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Nous recevons les documents présentés sous forme d'articles de fond, de commentaires d'arrêts, de notes de pratique, de nouvelles sur les traités, de développements juridiques et de critiques de livres.

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EDITOR'S NOTE

Noemi Gal-Or

With this issue, as with the previous one, there is good news to share with you, dear *CIL* reader. The Editorial Board is very content that a long awaited contract between the CBA and HeinOnline, an Internet database service specializing in legal materials, has now been concluded. As a result, a whole new world opens up to *CIL*. Initially reserved exclusively to CBA members, then for the first time since last year, offered via open access, *CIL* is now globally available. The implications for *CIL* are exciting and I am looking forward to reporting on the impact as it evolves.

This note is being written while the Comprehensive Economic and Trade Agreement (CETA) remains shaky and the US elections are less than a week away. Understandably, some of the pertinent articles have been written in less uncertain times; nevertheless, the themes they engage with remain relevant and important as before — for instance, the Trans-Pacific Partnership (TPP), anti-corruption, or softwood lumber — and therefore merit reader's attention.

Vol. 11(2) brings as feature article a study on "Trade in Illegally Logged Timber: Analysing the Effectiveness of Canadian Legislation in Comparison with US, EU and Australian Laws" written by Sara Hipson, Liat Podolsky and Hugh S. Wilkins. The paper focuses on the regime created in Canada's Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act (WAPPRIITA) and the disadvantages to Canada arising from the law's unsatisfactory implementation.

In the Legal Developments section, Geoffrey C. Kubrick and Jennifer L. Hill give "A Tip of the Hat to the TPP: Market Access, Flow of Goods, and Environmental Protection". While emphasizing the full half of the glass, namely that the TPP may point the way to the wider benefits of global free trade they also identify the areas risky to Canada. In "International Norms as the Standard of Care in Negligence Claims against Canadian Companies Operating Overseas", John Kloosterman contemplates the extent to which 'soft law' influences the interpretation (and creation) of 'hard law'. The article discusses the likelihood of Canada becoming a favoured locus for the progressive application of international law — this following claims filed in Canadian courts by foreign residents seeking to use 'soft law' as a standard of care for their negligence claims.

The Practice Note "The Re-Opening of Iran to Canadian Business: Practical Strategies for Pursuing Opportunity While Managing Risk" written by Jennifer Radford and Vincent DeRose serves as a cautionary note that although once again open for Canadian business, risk management strategies are worthwhile devising when entertaining commercial re-engagement with Iran.

2016 may go down in history as an 'environmental landmark' year thanks to the global signing of the Paris Climate Change Convention. In "Paris Agreement on Climate Change on a Sustainable Development Pathway", Marie-Claire Cordonier Segger elucidates for the reader the essence of the commitment — now shared by 197 States — to the principle of intended Nationally Determined Contributions ((i)NDCs) which is designed to ensure sustainable use of natural resources by all signatories based on their differentiated responsibilities. Noemi Gal-Or expounds on the strengths and weaknesses of, yet another, international attempt at curbing corruption in "A Forgotten Chapter? Trans-Pacific Partnership Chapter 26 Transparency and Anti-Corruption". Even if it fails to materialise, the TPP drafting experience will surely contribute to improving future international anti-corruption instruments.

Throughout 2015 to the fall of 2016, the CBA's National Section on International Law was busy bringing together an outstanding program towards a conference entitled "Religion and International Law. Is there State Discretion in Public International Law for the Application of Religious Law?" Although cancelled (due to low registration), *CIL* has undertaken to share with its readers some of the prospective highlights. With "Questions of Divine and International Law" by Yvon Pichette and Jon Derrick Marshall, *CIL*s section From a Legal Point of View provides a first taste of what would have been offered at the conference, here — on the challenges of reconciling religion and international law as seen from the perspective of two chaplains of the Canadian Armed Forces.

Finally, in the Book Review section you will find a critique by Aaron Ogletree of *International Law Chiefly as Interpreted and Applied in Canada* (8th Edition). Forthright, concise, and eloquent, it offers reliable accounts of several areas of international law of interest to every Canadian lawyer.

I wish you a gratifying and stimulating reading.

NOTE DE LA RÉDACTION

Noemi Gal-Or

Cher lecteur, chère lectrice, à l'instar du numéro précédent, le présent numéro de la *Revue* s'accompagne d'une bonne nouvelle : le comité de rédaction est très heureux d'annoncer la conclusion d'un contrat tant attendu entre l'ABC et HeinOnline, une banque de données en ligne spécialisée dans les documents juridiques. C'est un tout nouveau monde qui s'ouvre à notre publication. D'abord réservée aux membres de l'ABC, puis offerte en libre accès depuis l'an dernier, la *Revue canadienne de droit international* est désormais accessible mondialement. Cette nouvelle entraînera pour la revue de formidables retombées, dont je me ferai un plaisir de vous faire part régulièrement.

Au moment où j'écris la présente note, l'Accord économique et commercial global (AECG) demeure chancelant et nous sommes à moins d'une semaine des élections américaines. Certes, quelques articles pertinents du présent numéro ont été écrits en des temps moins incertains, mais les thèmes qu'ils explorent – comme le Partenariat transpacifique (PTP), la lutte contre la corruption et le bois d'œuvre – demeurent tout aussi actuels et importants. Ils méritent donc l'attention des lecteurs.

Le deuxième numéro du volume 11 propose comme article vedette une étude intitulée *Commerce de bois d'œuvre coupé illégalement : une comparaison de l'efficacité des lois canadiennes et des lois américaines, européennes et australiennes*, produite par Sara Hipson, Liat Podolsky et Hugh S. Wilkins. L'article aborde le régime que crée la *Loi sur la protection d'espèces animales ou végétales sauvages et la réglementation de leur commerce international et interprovincial* du Canada et les préjudices que le Canada subit du fait de l'application insuffisante de cette loi.

Dans la section *Les développements juridiques*, Geoffrey C. Kubrick et Jennifer L. Hill décernent *Un coup de chapeau pour le PTP : accès aux marchés, circulation des biens et protection de l'environnement*. Bien que les auteurs mettent l'accent sur le côté positif de l'entente, à savoir que celle-ci pourrait mettre en lumière les plus grands avantages du libre-échange mondial, ils en font aussi ressortir les aspects qui présentent un risque pour le Canada. De son côté, John Kloosterman se demande à quel degré le « droit souple » influe sur l'interprétation (et la création) des règles impératives dans son article intitulé *Les normes internationales comme norme de diligence dans les allégations de négligence contre les*

entreprises canadiennes à l'étranger. L'article se penche sur les probabilités que le Canada devienne un lieu privilégié pour l'application progressive du droit international, étant donné que des résidents étrangers se sont adressés aux tribunaux canadiens en vue de faire appliquer le droit souple comme norme de diligence à l'appui de leurs allégations de négligence.

Dans l'article *La réouverture de l'Iran aux entreprises canadiennes : des stratégies pratiques pour saisir des occasions tout en gérant les risques,* de la section *La pratique en bref*, les auteurs Jennifer Radford et Vincent DeRose lancent une mise en garde : même si l'Iran est de nouveau ouvert aux affaires avec le Canada, l'élaboration de stratégies de gestion des risques est de mise pour les entreprises qui envisagent un réengagement commercial avec ce pays.

L'année 2016 pourrait bien passer à l'histoire comme une année charnière en matière d'environnement, grâce à la signature d'un accord international à l'issue de la Conférence de Paris sur le climat. Dans l'article *Accord de Paris sur le changement climatique : une évolution vers le développement durable*, Marie-Claire Cordonier Segger élucide la nature de l'adhésion des États – dont le nombre se chiffre désormais à 197 – au principe des contributions prévues déterminées au niveau national, principe articulé de telle sorte que tous les signataires puissent faire un usage durable de leurs ressources naturelles en fonction de leurs responsabilités distinctes. Pour sa part, Noemi Gal-Or expose les forces et les faiblesses d'une énième tentative internationale de juguler la corruption, dans *Un chapitre oublié? Transparence et lutte contre la corruption : le chapitre 26 de l'Accord du Partenariat transpacifique*. Que cet accord se concrétise ou non, l'expérience de sa rédaction aura sans doute contribué à l'amélioration des futurs instruments internationaux de lutte contre la corruption.

En 2015 et jusqu'à l'automne 2016, la Section nationale du droit international de l'ABC s'est affairée à monter un programme exceptionnel en vue d'une conférence intitulée *La religion et le droit international : les États ont-ils un pouvoir discrétionnaire en droit public international quant à l'application du droit religieux?* Malgré l'annulation de l'événement (par manque d'inscriptions), la *Revue* a décidé de donner à ses lecteurs un aperçu de ce qui en aurait été les points saillants. Ainsi, dans l'article *Questions de droit divin et de droit international* de la section *D'un point de vue juridique*, Yvon Pichette et Jon Derrick Marshall examinent,

depuis leur point de vue d'aumôniers des Forces armées canadiennes, les difficultés que pose la conciliation de la religion et du droit international.

Enfin, dans la section *Critique de livre*, vous trouverez une recension, par Aaron Ogletree, du livre *International Law : Chiefly as Interpreted and Applied in Canada* (8e édition). Direct, concis et clair, cet ouvrage offre un tour d'horizon sérieux de plusieurs domaines du droit international qui devraient intéresser chaque juriste canadien.

Que votre lecture soit à la fois enrichissante et stimulante!

ARTICLES

TRADE IN ILLEGALLY LOGGED TIMBER: ANALYSING THE EFFECTIVENESS OF CANADIAN LEGISLATION IN COMPARISON WITH US, EU AND AUSTRALIAN LAWS

Sara Hipson, Liat Podolsky and Hugh S. Wilkins[1]

Illegally logged timber constitutes a significant share of all timber traded globally resulting in serious impacts on government revenue, economic stability, and international trade. Due to the importation of illegally logged timber and wood products, Canada is placed in a disadvantaged position as cheap illegal imports are able to compete with properly sourced Canadian forestry products. Canada's Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act *(WAPPRIITA) provides tools for regulating trade in illegally harvested plant and animal species. This paper analyzes WAPPRIITA's implementation and compares the* Act *to similar legislation in the United States, European Union and Australia. It finds that while WAPPRIITA provides the foundation for an effective regime to address the import of illegally logged timber and wood products, its implementation demonstrates that it does not match efforts in other developed countries.*

Le bois d'œuvre coupé illégalement représente une part considérable du bois d'œuvre en circulation dans le monde, ce qui a de graves conséquences sur les recettes publiques, la stabilité économique et le commerce international. L'importation de bois d'œuvre et de produits du bois coupés illégalement désavantage le Canada : les produits d'importation illégaux bon marché font en effet concurrence aux produits forestiers canadiens obtenus licitement. Néanmoins, la Loi sur la protection d'espèces animales ou végétales sauvages et la réglementation de leur commerce international et interprovincial *du Canada offre des moyens de réglementer le commerce d'espèces végétales et animales récoltées ou capturées illégalement. Cet article analyse l'application de la* Loi *et la compare à des lois semblables des États-Unis, de l'Union européenne et de l'Australie. Les auteurs concluent que, bien que la* Loi *jette les bases d'une stratégie efficace de lutte contre l'importation de bois d'œuvre et de produits du bois coupés illégalement, son application montre qu'elle n'arrive pas à la hauteur des efforts déployés dans d'autres pays développés.*

I. Introduction

Illegal logging has emerged as a significant problem over the past two decades with adverse consequences on host country forests, international trade and the forest sectors in importing countries. Some experts estimate that it accounts for up to 30 percent of all timber traded globally.[2] Unregulated and untaxed, it has serious impacts on government revenue, economic stability, the environment, public health and international trade.[3] The importation of illegally sourced timber and wood products is an ongoing problem in many countries, including Canada.[4]

Canada's *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act* (WAPPRIITA)[5] provides tools for regulating trade in illegally harvested plant and animal species, aiming to protect species through the implementation of the Convention on International Trade in Endangered Species (CITES).[6] This paper analyzes WAPPRIITA's implementation and whether it effectively addresses trade in illegally logged timber and wood products. It compares WAPPRIITA to legislation in the United States, European Union and Australia.

II. The Illegal Logging Problem

Illegal logging is the harvesting, transporting, processing, buying or selling of timber in violation of a State's laws.[7] It includes the use of corrupt means to gain access to forests, the cutting of protected species, logging in protected areas, extraction in excess of agreed limits, illegal processing and export, fraudulent declarations to customs, and the avoidance of taxes and other charges. Without government control or planning, illegal logging can have devastating impacts on the environment, social development and the economic prosperity of host countries, as well as a corroding effect on the rule of law and good governance.[8] Despite these adverse impacts, most actions to combat the problem have been lacklustre. The World Bank states:

> Despite compelling data and evidence showing that illegal logging is a worldwide epidemic, most forest crimes go undetected, unreported, or are ignored. All too often, investigations – in the rare event that they do take place – are amateurish and inconclusive, and the few cases taken to court tend to be of trivial significance, prosecuting people whose involvement in crime is due to poverty and exploitation. Even fewer cases result in significant or serious penalties, and the public treasury virtually never recovers the economic value of stolen or destroyed forest

> assets. Considering that billions of dollars are reaped in illicit gains from forestry-related abuses every year, it is not surprising that the relatively light penalties that are exacted for these crimes form no deterrent at all.[9]

The lack of regulatory measures addressing illegal logging also results in unfair competition in international trade. Law abiding companies must compete with producers of cheap illegally sourced timber and wood products[10] and incur enormous lost revenues as a result, creating unfair advantages for those who are not demonstrating stewardship or abiding by the law. INTERPOL reiterates that tackling the problem will "benefit the law-abiding members of the timber industry by allowing them to obtain appropriate market prices for their timber."[11]

Although estimates vary considerably, UNEP and INTERPOL stated in 2012 that the economic value of global illegal logging, including processing, could be as high as US$100 billion, at the cost to governments of as much as US$30 billion per year.[12] A study done for the American Forest and Paper Association stated that illegal logging suppresses global timber prices from 7 to 16 per cent.[13]

Suppressed prices have serious consequences for timber exporting countries with properly regulated practices, such as Canada, as higher production costs result in more expensive product. In the United States, the American Forest and Paper Association estimates that US timber producers lose about US$1 billion annually due to global illegal logging.[14] It is estimated that illegal logging was a significant factor in the loss of approximately 200,000 forest sector jobs between 2001 and 2006 in the United States.[15]

Canada, which prides itself as having little or no illegal logging domestically, is placed in a disadvantaged trade position by illegally logged timber as cheap illegal imports may compete with legally sourced and regulated Canadian forest products.[16] The Forest Products Association of Canada states that "Canadian firms would benefit from the levelling of the playing field, since illegally cut lumber is cheaper and puts major Canadian firms at a disadvantage."[17] The Association states that "the extent of the problem and potential impact on world trade poses a threat to the legitimate forest products industry and represents an economic disincentive to sustainable forest management."[18] With Canada exporting several billion dollars worth of wood and wood products annually,[19] a price increase of 7 to 16 percent (based on the American Forest and

Paper Association's figures) in these exports would likely benefit the Canadian forestry sector significantly.

III. International and State Actions to Address the Illegal Timber Trade

There has been a sustained effort by the G8 to address illegal logging. In 1998, G8 Foreign Ministers initiated an Action Programme on Forests, which prioritizes the elimination of illegal logging and trade in illegally harvested timber.[20] In 2002, the Group committed to continue addressing forest issues on domestic and international agendas and to take further effort to specifically combat illegal logging and trade. In 2005, its Environment and Development Ministers committed to combating the problem through cooperation with partner countries.[21] In 2008, leaders again recognized the impacts of illegal logging[22] and pledged to "make all possible efforts by ensuring close coordination among various fora and initiatives with a view to promoting effective forest law enforcement and governance and sustainable forest management worldwide."[23] In 2013, they further agreed to take action by focusing on the illegal trafficking of protected or endangered species.[24]

Several trade agreements also address the issue. In Canada's recently concluded free trade agreement with the EU, it undertakes to exchange information, and if appropriate, cooperate on initiatives to promote efforts designed to combat illegal logging and related trade and to promote the effective use of CITES with regard to timber species considered at risk.[25] The Trans-Pacific Partnership also includes provisions affirming the importance of combatting the illegal trade in wild flora and fauna and requires parties to adopt, maintain and implement measures to fulfil their obligations under CITES.[26] The text states that parties must take measures to combat, and cooperate to prevent, such trade through sanctions, penalties, or other effective measures.[27] These provisions, if they are approved, may require changes in Canadian law to ensure their fulfilment.

Following the G8's lead, the United States, European Union and Australia have taken significant actions to address the problem.[28] They have each enacted legislation setting up regimes that exact strict penalties for the trade of timber and wood products where the timber has been, or there is too great a risk that it has been, illegally harvested. Each regime has strengths and weaknesses in design and implementation. This section reviews those regimes.

A. United States

The US Lacey Act, originally enacted in 1900 to control the trafficking of fish and wildlife, was amended in 2008 to include rules on the import of illegally harvested or traded plants, including timber. Under the amended Lacey Act, it is unlawful to import, export, transport, sell, receive, acquire, possess (with some limited exceptions), or purchase in interstate or foreign commerce any plant, taken or traded in violation of the laws of the United States, a U.S. State or a foreign country.[29] To ensure a wide range of protection, the Act extends to include any plant, or part, product, egg, or offspring, dead or alive.[30] For most timber and many wood product imports,[31] importers must declare the scientific name of any species used in the import, its origin, the amount being imported, and its value.[32] More items to be placed with these requirements are to be phased-in over time.[33]

The Lacey Act focuses on the trading of wood that was illegally obtained[34] and makes timber traders responsible for ensuring the legality of their traded items.[35] However, in a prosecution, the burden of proof of illegality remains on the government. The Act applies directly to domestic importing companies in addition to the exporting companies in foreign countries.[36] It does not discriminate against imports from specific countries.[37]

Traders do not need to have certification of legality to trade timber and wood products, but must declare listed items when they are imported and exercise "due care".[38] Penalties for Lacey Act violations are assessed based on the intent and degree to which the defendant exercised such due care. The criminal penalties under the Act are divided into felony and misdemeanour offences distinguished by a defendant's knowledge of the illegal activity.[39] Felony charges are applied when it can be proved that the defendant knowingly engaged in conduct with the full intent to profit from the items (with a value of more than US$350).[40] A person who intentionally falsifies documents and labelling may also be charged with a felony offence. If convicted, the defendant could face up to five years in prison and a fine of up to US$20,000 for each count and may also be required to pay restitution.[41] The Act also allows for liability for corporate officers and directors. Misdemeanour offences require that the defendant in the exercise of due care should have known that the object(s) were "taken, possessed, transported, or sold in contravention of

any law." Misdemeanour offences apply to the trade in items with a value of up to US$350 and can result in fines of up to US$10,000.[42]

The first enforcement action under the amended Lacey Act consisted of charges levied against the Gibson Guitar Corporation for allegedly importing illegally sourced decorative woods, including ebony, to be used in the assembly of its musical instruments. The case settled in 2012 with the US Justice Department agreeing to defer prosecution provided that the company pay in full the following fines and comply fully with agreed corrective actions: payment of US$300,000 plus a US$50,000 community service payment to the US Fish and Wildlife Foundation to help promote the safeguarding of protected trees; forfeiture of the right to use over US$260,000 in seized ebony and other woods seized during the investigations; a written statement that, among other things, it had imported ebony despite knowing that it was illegal to cut in Madagascar; and the undertaking of specific steps to redesign its supply system to avoid receiving illegal wood in the future.[43]

As a second major action, U.S. federal authorities, in September 2013, raided Lumber Liquidators, a specialty-flooring retailer for wood illegally imported through China and then Canada to the United States.[44] The case concluded with a felony plea in October 2015 whereby the company was required to pay more than US$13 million in fines and penalties to the U.S. government and was placed on probation for five years while it implements an environmental compliance plan.[45]

Also, in August 2015, proceedings were brought against J&L Tonewoods, a wood buyer and lumber mill. It was indicted for purchasing illegally harvested protected wood species in Washington State.[46]

B. European Union

In 2003, the European Union adopted the EU Forest Law Enforcement, Governance and Trade (FLEGT) Action Plan.[47] The FLEGT Action Plan includes measures to address both supply and demand pressures for the import of illegally sourced timber and wood products into the EU. Savaresi provides an overview of the FLEGT Action Plan. She states:

> The FLEGT Action Plan encompasses a series of tools, including support for timber-producing countries, efforts to develop multilateral collaboration to combat the trade in illegally harvested timber, voluntary measures to support governments wanting to ensure that illegally harvested timber from their territory is not admitted to the EU market, public procurement

policy, private sector initiatives and measures to avoid investments in activities that encourage illegal logging and conflict timber.[48]

The EU FLEGT Action Plan has four key elements:[49]

- negotiation of voluntary partnership agreements (VPAs) with timber-producing countries: the VPAs include a licensing system, which provides for the identification of legal products and their licensing for import to the EU. Applicable products that are not licensed from the partnering timber-producing country are denied entry to the EU market. The VPAs are based on a multi-stakeholder approach and include provisions for capacity building for partner countries to assist them in setting up the licensing system, strengthen enforcement and undertake law reform, if needed.

- government procurement: EU Member States are encouraged to adopt timber procurement policies aimed to sourcing legal and sustainable timber.

- financial due diligence: financial institutions are encouraged to scrutinize financing to the forestry industry.

- consideration of additional legislative options: these are to more broadly prohibit the import to the EU of illegal timber with a focus on products from non-VPA participating countries. The EU's Timber Regulation ("EUTR") is the end result of this.[50]

Among the tools under the FLEGT Action Plan, the EUTR is the most like the Lacey Act in its application and of most relevance when comparing the EU regime to Canadian legislation. As a supplement to the VPAs (which are the heart of the FLEGT Action Plan), the EUTR prohibits the placing of illegally harvested timber and timber products on the EU market. Licensed imports from VPA countries and imports with CITES permits are viewed as legal and therefore pass the EUTR's requirements.[51]

With the exception of printed paper, musical instruments and recycled timber products, the EUTR applies to most timber and timber products.[52] It focuses on timber that was "illegally harvested", which is defined as "harvested in contravention of the applicable legislation in the country of harvest."[53] The EUTR addresses both timber imported from outside the EU and timber produced in the EU.[54]

Under the EUTR, "operators" are those who first place applicable

timber and products on the EU market and "traders" are those who buy or sell applicable items that have already been placed on the European market.[55] Under the EUTR, operators are prohibited from placing illegally harvested timber on the EU market. Operators must exercise "due diligence",[56] necessitating that they have access to documentation regarding their timber and wood products (when they are placed on the EU market for the first time).[57] This differs from the Lacey Act under which all actors in the supply chain are subject to the offence of handling illegal timber and leaves it to them to take steps to avoid committing the offence. Traders do not have this obligation.[58] However, the EUTR requires both operators and traders to be able to identify and keep information on the operators or traders who have supplied them with timber or timber products and, where applicable, the buyers to whom they have supplied those items.[59]

Operators must have a due diligence system in place and use an adequate risk assessment scheme, which minimizes the risk that illegal timber will be introduced to EU markets.[60] The EUTR requires that operators approach due diligence as a three-step process. The operators must (1) have access to detailed information about the timber or timber product,[61] (2) assess their supply chain for the risk of illegally sourced timber or timber products,[62] and (3) have risk mitigation measures and procedures in place with the purpose of making the operator ensure that the risk of illegality is not greater than negligible.[63] The mitigation component is often viewed as the most important, but also the most overlooked part.

Operators can use approved third-party monitoring organizations to help them set up functional due diligence systems or they can prepare their own due diligence system.[64] An approved monitoring organization maintains and regularly evaluates an operator's due diligence system. It grants the operator the right to use it and verifies its proper use, but it does not undertake investigations of illegal supply itself.[65] This is the operator's responsibility. Article 10 of the EUTR requires competent authorities in the Member States to undertake risk-based checks to ensure that operators are meeting their obligations and may, among other measures, order immediate interim measures if they are not.[66]

Under the EUTR, each EU Member State is required to develop penalties that will reflect the magnitude of an infraction. The EUTR requires that penalties be "effective, proportionate and dissuasive" and may

include fines with incremental increases for repeat offenders,[67] seizure of the timber and timber products concerned,[68] and/or immediate suspension of all trading rights.[69] As noted above, immediate interim measures may also be ordered by competent authorities on the basis of the outcome of their checks. These interim measures include the seizure of timber and timber products and the prohibition of the marketing of timber and timber products.[70]

Implementation of the EUTR has encountered mixed success.[71] The European Commission reported in February 2016 that implementation and enforcement have been slow and uneven[72] and that not all EU Member States have fully implemented the EUTR. It adds that compliance by the private sector has been "uneven and insufficient".[73]

C. Australia

Australia's Illegal Logging Prohibition Act 2012 prohibits the import of timber products containing illegally logged timber and the processing of domestically grown raw logs that have been illegally harvested. It requires importers and processors to undertake due diligence to mitigate the risk of products containing illegally logged timber and requires comprehensive monitoring, investigation and enforcement to ensure compliance.[74]

The Act's due diligence requirements apply to a defined list of "regulated timber products" under the Act's regulation.[75] The list includes most timber and wood-based products such as sawn timber, veneer, mouldings, wood panels, plywood, pulp, paper and wooden furniture.[76] Importers of regulated timber products must provide declarations, at the time of import, on the due diligence that they have undertaken.[77] The due diligence requirements for importation mandate the gathering of information for assessing the risk that the imports include illegally logged timber or wood products, and details on the kind, origin and manner of harvest of the timber. The name and business addresses of suppliers, evidence of compliance with the laws of the country in which timber was harvested, and data on the completeness, accuracy and reliability of the information gathered must be provided.[78] Importers must provide information relating to the product and its area of harvest, including any legality frameworks that apply (such as a FLEGT licence), a copy of the harvesting license, and evidence that any necessary payments or taxes have been made at the point of harvest.[79] The Act's requirements also include the undertaking of measures to mitigate the risk of importing

illegally logged timber and wood products and the provision of statements and reports on compliance, audits, and remedial action.[80]

Under the Act, there are both criminal and civil (financial) penalties. Criminal penalties may apply if it is proven that the accused knowingly, intentionally or recklessly imported or processed illegally logged timber. The maximum criminal penalties are five years of imprisonment and/or fines of AUD$85,000 for an individual or AUD$425,000 for a corporation.[81] In proceedings for a civil penalty order, strict liability applies. It is not necessary to prove the person's intention, knowledge, recklessness, negligence, or any other state of mind.[82] Civil penalties under the Act are assessed based on the intent and degree to which the defendant exercised due diligence when undertaking the activities in question. Section 60 of the Act gives the Court discretion to determine the amount of the civil penalty. When assessing the civil penalty, the court will consider the nature and extent of the contravention, the nature and extent of any loss or damage suffered because of the contravention, the circumstances in which the contravention took place; and any past similar conduct.[83]

The Act permits inspectors to exercise monitoring, investigation and enforcement powers. These powers allow inspectors to search premises, observe operations, and sample items to determine whether information given in compliance with the Act is correct. They may also to search and secure evidence and to obtain search warrants.[84]

The provisions of the Act came into effect at the end of November 2014, but the Australian Department of Agriculture and Water Resources instituted an initial "soft-start" compliance period during which the Department has not issued penalties. The government has also commissioned an independent review to assess the Act's impacts on small businesses and is considering amendments to reduce such impacts.[85]

IV. Canadian Legislation

Canada's legislative efforts to address trade in illegally logged timber and wood products are primarily reflected in WAPPRIITA. One of the aims of the Act is to apply CITES.[86] CITES is a multilateral environmental agreement created to protect species from the threat of extinction by requiring the enactment and implementation of laws that regulate the trade of animals and plants. Its goal is to ensure the continuation of species, especially those that are commercially harvested, by taking trade

control measures. The Convention provides a framework for parties to use when creating their own national legislation.

By itself, CITES does not protect all forests, wildlife and forest communities from the effects of illegal logging. It only provides trade restrictions for enumerated "at risk" species that are commodities in international trade. Not all illegally logged timber and wood products come from "at risk" species, thus illegally logged timber and wood products often will not be covered under CITES.

Although WAPPRIITA's main focus is on CITES, it also extends to a broader range of plants and animals. WAPPRIITA's section 6(1) applies to both CITES-listed species and non-CITES species if the imported plant or animal was illegally sourced or shipped. Section 6(1) of the Act states:

> 6. (1) No person shall import into Canada any animal or plant that was taken, or any animal or plant, or any part or derivative of an animal or plant, that was possessed, distributed or transported in contravention of any law of any foreign state.[87]

Important for applying section 6(1) in the context of trade in illegally logged timber is the applicable definition of "plant". The Act's Wild Animal and Plant Trade Regulations (WAPTR) provide a definition of "plant" specifically for the application of s. 6(1) of the Act.[88] Section 4(b) of WAPTR states:

> 4. For the purposes of subsection 6(1) of the Act,
>
> […]
>
> (b) "plant" means any specimen, whether living or dead, of any wild species of the plant kingdom (kingdom Plantae), and includes any seed, spore, pollen or tissue culture of any such plant.[89]

Applying this definition to the section 6(1) prohibition arguably exposes importers of all types of illegally sourced timber to prosecution.[90] This is reflected in Canada Border Services Agency's memorandum on interpreting WAPPRIITA and CITES. It states:

> 5. Under subsection 6(1) of WAPPRIITA, the importation into Canada of any animal or plant that was taken, or any animal or plant, or any part or derivative of an animal or plant, that was possessed, distributed or transported in contravention of any law of any foreign state is prohibited.

> Importers are expected to be aware of and abide by foreign laws concerning exportation of wild animals and plants from foreign states. Timber, flooring, pulp and paper, and other wood products obtained from sources associated with illegal logging are examples of commodities that may be subject to WAPPRIITA import prohibitions. Border services officers may detain shipments suspected to be in violation of foreign laws and refer them to Environment Canada.[91]

WAPPRIITA requires plant importers to keep documentation regarding the import[92] and prohibits a person from knowingly furnishing false or misleading information or making misrepresentations with respect to any matter under the Act.[93] Importers may be required to also make a declaration regarding the origins and legality of imported items that are exempt from requiring a CITES permit. This declaration requirement does not however apply to non-CITES-listed items.[94]

Almost all offences under the Act are strict liability offences.[95] For a strict liability offence in Canada, the prosecution must only demonstrate the elements of *actus reus* beyond a reasonable doubt. Proving the mental element of *mens rea* is not required. If the *actus reus* is proven, the accused may then avoid conviction by proving that he or she exercised due diligence on a balance of probabilities.[96] Unlike the EU and Australian regimes, traders in Canada do not need to show due diligence efforts when trading an item, but rather they have due diligence as a defence that can be raised if they are charged with violating the Act (like the due care defence under the Lacey Act).[97]

WAPPRIITA provides designated officers and customs officials with the powers to search, inspect, apply for a warrant, detain, seize and take into custody suspicious imports.[98] It also allows courts to require goods to be forfeited.[99]

Depending on the gravity of the act, those who contravene WAPPRIITA may be subject to summary or indictable offences. Penalties under the Act include fines of up to CAD$50,000 and six months imprisonment for summary conviction offences[100] and fines of up to CAD$300,000 for a corporation and CAD$150,000 for a person and imprisonment for up to 5 years for indictable offences.[101] Where a corporation commits an offence under the Act, any officer, director or agent of the corporation who directed, authorized, assented to or acquiesced or participated in the commission of the offence is a party to and guilty of the offence.[102] The federal Minister of the Environment is to maintain a public registry

providing information on all convictions of corporations for offences under the Act.[103] It is also to annually produce a report to Parliament on the implementation of the Act.[104]

Where a court finds that a person who has been convicted of an offence under WAPPRIITA obtained monetary benefits as a result of the commission of the offence, the court may order the person to pay, notwithstanding the maximum amount of any fine that may otherwise be imposed, an additional fine in an amount equal to the court's estimation of the amount of those monetary benefits.[105] It may also prohibit a convicted person under the Act from doing any act or engaging in any activity that could result in the continuation or repetition of the offence. The court may also direct the person to take any action the court considers appropriate to remedy or avoid any harm to any plant to which the Act applies.[106] Courts may also order persons convicted under the Act to compensate the Crown and order preventive or remedial actions. It may further order any action that the court considers appropriate for securing the person's good conduct and for preventing the person from repeating the offence or committing other offences under the Act.[107] WAPPRIITA also allows for private prosecutions where the applicable Attorney General does not intervene.[108]

There is little caselaw on the application of s. 6(1) of WAPPRIITA, but the caselaw that does exist identifies enforcement challenges. For instance, in *Druyan v Canada (Attorney General)*, 2014 FC 705 (FCTD) at paragraphs 50-52, the Federal Court stated that expert testimony is needed in a s. 6(1) prosecution to present evidence that a foreign law has been violated. This may be a difficult and costly task if illegally logged timber is sourced from countries under poor governance, where accessing the appropriate experts and information is difficult, or where the evidence is otherwise unreliable.[109]

Another challenge is that much of the timber that is imported into Canada is in the form of finished wood products, which may lead to enforcement problems as the origin of wood in finished products is often hard to trace accurately through the supply chain.

Application of the Act outside of the context of CITES has been lacklustre. There are no reports of compliance actions taken regarding the import of illegally harvested timber or wood products (CITES-listed or not) over the past five years in Environment Canada's annual reports on WAPPRIITA implementation.[110]

WAPPRIITA and WAPTR have important components for regulating illegally sourced timber and wood products. They provide a clear definition of what constitutes illegally harvested timber or wood products, a prohibition of the import and possession of illegally harvested timber or wood products, and strong penalties for violators to deter their further participation in such activities. Their weakness, however, is in their application: the WAPPRIITA and WAPTR declaratory requirements are neither mandatory nor widely applied[111] and when enforcement actions are taken, the burden is on the prosecution to show that a foreign law has been violated, which, as noted above, can be difficult or expensive to undertake.

A. The Declaration Requirement

The US and Australian regimes apply whenever listed plants are imported into those countries. Customs officials do not use their discretion to determine when to require a declaration on the imported timber or wood products.[112] They require declarations for all listed imports. Section 3372(f)(1) of the amended Lacey Act states:

> … it shall be unlawful for any person to import any plant unless the person files upon importation a declaration that contains
>
> (A) the scientific name of any plant (including the genus and species of the plant) contained in the importation;
>
> (B) a description of
> (i) the value of the importation; and
> (ii) the quantity, including the unit of measure, of the plant; and
>
> (C) the name of the country from which the plant was taken.

Section 13 of the Australian Illegal Logging Prohibition Act, 2012 similarly requires importers of regulated timber products to make declarations on the timber and wood products they import. This applies to most timber and wood-based products that are imported into Australia.[113]

WAPPRIITA does not include a declaration requirement in the Act itself. Such a requirement does however appear in WAPTR. Section 19(1) of WAPTR states:

> 19. (1) Any individual who imports into Canada or exports from Canada an animal or plant, or a part or derivative of one, and who is exempt from holding a permit under these Regulations shall, on the request of

> an officer or a customs officer under subsection (2), make a declaration at the time of import or export on a form provided for that purpose by the Minister.

The Canadian declaration requirement only applies to individuals who are "exempt from holding a permit", i.e., those holding a CITES permit issued by the country of origin. Non-CITES products are not subject to the declaration requirement. Moreover, importers who are subject to the requirement do not necessarily need to make a declaration. Whether to require a declaration is left to the discretion of the designated officer or customs officer, except when the Minister orders otherwise.[114] This limited application and granting of discretion is significantly different from the mandatory declarations found in the US and Australian regimes.

Section 21 of WAPPRIITA provides the federal government with the power to make regulations for carrying out the purposes of the Act.[115] A regulatory change to WAPTR by Cabinet could replace the discretion afforded to officers and customs officers with a requirement making the submission of declarations mandatory for all imports of enumerated species in a manner similar to the Lacey Act or the Australian legislation. Provided the revised regulation applies to both imports and domestic processing and does not place imports by fact of the regulation at a competitive disadvantage in accessing Canadian buyers, World Trade Organization rules would not likely be violated on the premise that it is a non-discriminatory trade measure.

The Canadian Council of Forest Ministers recommends a "multifaceted approach to address the direct and underlying causes of illegal logging", including specific actions, such as exploring "a range of policy options which Canada could take to halt the importation and trade of illegal forest products, taking into consideration the initiatives and experiences of other countries" and "… to explore ways to tighten border controls to combat illegal logging and the illegal trade of timber."[116] Requiring mandatory declarations for enumerated timber imports would be a step in this direction.

B. Declarations should require Proof of Legality

As noted above, the courts have found that expert testimony is needed to demonstrate that a foreign law has been violated under s. 6(1). This *actus reus* component may be extremely difficult to prove where

accessing the appropriate experts and evidence from foreign countries is required.[117] Demonstrating that a piece of timber was illegally harvested may be straightforward if it is of a protected species, but extremely difficult if it is from a traded species, but was cut illegally without a permit or in a protected area. Requiring the importer to provide proof when importing timber and forest products that the imports were sourced legally would reduce these often insurmountable challenges faced by the prosecution and facilitate enforcement efforts. Such a requirement in WAPTR would align with the declaration requirements in the Illegal Logging Prohibition Act 2012.

Such amendments require the political will to prioritize the combating of illegal logging and the allocation of the necessary resources to make the amendments happen. Such changes would have value. Tackling illegal logging is an effective policy measure due to its multi-pronged nature of addressing: domestic economic issues to benefit the Canadian forestry sector; environmental issues through better environmental stewardship and sustainable development in host countries; and international development in terms of strengthening good governance, economic development and political and social stability and the strengthening of the rule of law where illegal logging takes place.

V. Conclusions

In 2013, Natural Resources Canada stated:

> Many governments around the world are determined to combat illegal logging and the illegal timber trade. Several developed economies, for instance, have adopted laws and regulatory measures to halt illegal timber imports at their borders. They have also taken steps to ban the illegal trade within their borders. To date, these economies include the United States, the European Union and Australia.
>
> […]
>
> The Government of Canada supports initiatives to combat illegal logging and the illegal timber trade. In collaboration with its provincial, territorial and forest industry partners, it is actively engaged in international discussions and multilateral initiatives on these two issues. It also closely monitors new legislative measures to minimize any potential market issues for Canadian forest products in those markets. For example, Canadian exporters may be asked to document the legality of the wood in their products to customers in the United States, the European Union

> and Australia. This may increase administrative burdens and costs associated with exporting their products into these markets.
>
> Canada is a global leader in sustainable forest management and a major exporter of forest products. To provide Canadian forest products with a competitive advantage in the marketplace, the federal government will continue to work at having Canada recognized as a supplier of legal and sustainable forest products.[118]

This statement recognizes the problem and the actions that other developed countries are taking to address it, but avoids providing any indication that Canada will follow the lead of the US, EU or Australia and take stronger measures to address illegal imports. In fact, it suggests that Canadian exporters may be encumbered by international efforts to combat the trade in illegally logged timber and wood products. Also, the Canadian government's handling of endangered species and CITES-related issues have recently been criticized with allegations that these issues have been, at least until recently, low on the government's priority list.[119]

Illegal logging has serious impacts on government revenue, economic and social stability, and international trade. Canada, which prides itself as having little or no illegal logging, is placed in a disadvantaged position as cheap illegal imports are able to compete with properly sourced Canadian forest products. The Canadian Forest Products Association, the Canadian Council of Forest Ministers, the World Bank, INTERPOL and G8 leaders have all called for stronger measures to address illegal logging. The Canada-EU Comprehensive Economic and Trade Agreement and the Trans-Pacific Partnership, if they are approved, will each also call for efforts to address the issue. Also, with the recognition of EU FLEGT licences to assist importers to meet the Australian Act's due diligence requirements and commitments to combat illegal logging appearing in international trade agreements, the seeds of an international system to address illegal logging may be emerging.[120]

Canada has the foundation of an effective regime to address the import of illegally logged timber and wood products. However, the implementation histories of s. 6(1) of WAPPRIITA and s. 19 of WAPTR indicate that the Canadian regime has not been fully applied. Canada has not matched efforts in the US, EU or Australia to tackle the trade in illegally logged timber and wood products. Other G20 States are taking action. Japan is strengthening its approach to the issue with illegal logging legislation

currently before its Diet and China is taking steps to address illegal logging as well.[121] Canadian news reports indicate, and the Lumber Liquidators case (in which illegal timber was imported into the US through Canada) demonstrates, that the importation of illegal timber and wood products is a continuing problem in Canada.[122] Amendments to WAPTR in regard to declaratory requirements could strengthen the Canadian regime.

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Endnotes

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[2] See UNEP & INTERPOL, *Green Carbon, Black Trade: Illegal Logging, Tax*

Fraud an Laundering in the World's Tropical Forests (Norway: Birkeland Trykkeri AS, 2012) at 5 and 13, online: UNEP <http://www.unep.org/pdf/RRAlogging_english_scr.pdf>; INTERPOL, *Chainsaw Project: An INTERPOL perspective on law enforcement in illegal logging* (INTERPOL/World Bank, 2009), at 4-6, online: Illegal Logging Portal <http://www.illegal-logging.info/content/chainsaw-project-interpol-perspective-law-enforcement-illegal-logging>. See also and Marilyne Pereira Goncalves et al., *Justice for Forests: Improving Criminal Justice Efforts to Combat Illegal Logging* (Washington DC: World Bank, 2012), online: <http://siteresources.worldbank.org/EXTFINANCIALSECTOR/Resources/Illegal_Logging.pdf>. According to INTERPOL, as much as 90 percent of exported timber from some countries is illegally logged timber. See INTERPOL, "Combating illegal logging key to saving our forests and preventing climate change" (21 March 2013), online: INTERPOL: <http://www.interpol.int/News-and-media/News/2013/N20130321>. The Royal Institute of International Affairs ("Chatham House") estimates that illegal harvesting represents over 50% of logging in Brazil, 65% in Cameroon, 70% in Ghana, 60% in Indonesia, 35% in Malaysia and 90% in the Democratic Republic of Congo. See also Alison Hoare, *Tackling Illegal Logging and the Related Trade: What Progress and Where Next?* (London: Chatham House, 2010), at 61-62, online: <https://www.chathamhouse.org/sites/files/chathamhouse/publications/research/20150715IllegalLoggingHoareFinal.pdf>; Sam Lawson and Larry MacFaul, *Illegal Logging and related Trade: Indicators of the Global Response* (Chatham House, 2010), online: Illegal Logging Portal <http://www.illegal-logging.info/sites/default/files/uploads/CHillegalloggingpaperwebready1.pdf>.

[3] See Forest Products Association of Canada, "Canadian Forestry Leader Urges Ambitious Global Action to End Deforestation" (20 October 2009), online: <http://www.fpac.ca/index.php/en/press-releases-full/canadian-forestry-leader-urges-ambitious-global-action-to-end-deforestation>.

[4] See Global News, "16x9: An investigation into illegal lumber" (4 October 2014), online: <http://globalnews.ca/news/1598958/16x9-an-investigation-into-illegal-lumber>.

[5] *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*, SC 1992, c 52 (WAPPRIITA).

[6] *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, 993 U.N.T.S. 243 (Washington D.C.: 3 June 1973) ("CITES").

[7] *Lacey Act*, *2008*, 16 U.S.C. §§ 3371–3378.

[8] Marilyne Pereira Goncalves et al, *supra* note 2, at 1-2. For centuries, the exploitation of natural resources, including logging, has caused, increased or sustained armed conflict. See United Nations Environment Program, *The Role of Natural Resources in Disarmament, Demobilization and Reintegration: Addressing Risks and Seizing Opportunities* (New York: UNDP/UNEP, 2013) at 5 and 19, online: UNEP <http://postconflict.unep.ch/publications/UNEP_UNDP_NRM_DDR.pdf>. Armed disputes relating to natural resources

have included conflicts in Afghanistan (1978-present), Angola (1995-2002), Burundi (1993-2005), Cambodia (1978-1997), Colombia (1984-present), DRC (1990-present), Cote d'Ivoire, Indonesia, and Liberia. *Ibid* at 24. As noted by UNDP, it "can have a multiplier effect on other causes and drivers, including underlying social divisions, governance deficits, fragile institutions and more."

[9] Marilyne Pereira Goncalves, et al, *ibid* at 1.

[10] Yulia Levashova, "How effective in the new EU Timber Regulation in the fight against illegal logging" (2011), 20:3 *RECIEL* 290 at 291.

[11] INTERPOL, *supra* note 2 at 1.

[12] UNEP/INTERPOL, *supra* note 2 at 6 and 13. See generally, Arnoldo Contreras-Hermosilla, Richard Doornbosch and Michael Lodge, *OECD Round Table on Sustainable Development: The Economics of Illegal Logging and Associated Trade* (SG/SD/RT (2007)1/REV, 9 January 2007), online: OECD <http://www.oecd.org/sd-roundtable/papersandpublications/39348796.pdf>. These numbers are estimates.

[13] Seneca Creek Associates, *Illegal Logging and Global Wood Markets: The Competitive Impacts on the U.S. Wood Products Industry* (Poolesville: American Forest and Paper Association, 2004) at 17, online: Illegal Logging Portal <http://www.illegal-logging.info/sites/default/files/uploads/1_AF_and_PA_summary.pdf>.

[14] See American Forest and Paper Association, "Illegal Logging", online: AFPA <http://www.afandpa.org/issues/illegal-logging>. See also Environmental Investigation Agency, *No Questions Asked: The Impacts of US Market Demand for Illegal Timber – And the Potential for Change* (Washington, DC: Environment Investigation Agency, undated) at 21, online: Illegal Logging Portal <http://www.illegal-logging.info/sites/default/files/uploads/eia_no_questions_asked.pdf>.

[15] See Environmental Investigation Agency, *ibid* at 21.

[16] Corruption indices support the findings by organizations in Canada's export markets that Canadian wood products are of negligible risk with respect to illegality. See Canadian Council of Forest Ministers, "Canada's Legal Forest Products" (undated), online: CCFM <http://www.sfmcanada.org/en/forest-products/legal-forest-products>.

[17] Peter O'Neil, "EU's illegal-logging crackdown pleases Canada's forest industry", *Vancouver Sun* (21 January 2009).

[18] Forest Products Association of Canada, *Canada: A Reliable Source of Legal Forest Products* (Forest Products Association of Canada, undated), online: FPAC <http://www.fpac.ca/publications/Illegal_logging_EN_Dec2011.pdf>.

[19] See Industry Canada, *Product Categories IX and X*, online: <http://www.ic.gc.ca/sc_mrkti/tdst/tdo/tdo.php#tag>.

[20] See Annalisa Savaresi, "EU External Action on Forests: FLEGT and the Development of International Law", in E. Morgera (ed.), *The External Environmental Policy of the European Union: EU and International Law Perspectives* (Cambridge: Cambridge University Press, 2012), 149 at 154.

[21] Japan Ministry of Foreign Affairs, *The G8 Forest Experts' Report on*

Illegal Logging (May 2008) at 1-2, online: <http://www.mofa.go.jp/policy/environment/forest/report0805.pdf>.

[22] *The Gleneagles Communiqué* (8 July 2005) at paras 36-38, online: University of Toronto <http://www.g8.utoronto.ca/summit/2005gleneagles/communique.pdf>. See also Duncan Brack, "Controlling illegal logging and the trade in illegally harvested timber: The EU's Forest Law Enforcement, Governance and Trade Initiative" (2005), 14:1 *RECIEL* 28.

[23] *G8 Hokkaido Toyako Summit Leaders Declaration* (8 July 2008) at para 36, online: MOFA <http://www.mofa.go.jp/policy/economy/summit/2008/doc/doc080714__en.html>.

[24] See *Lough Erne G8 Leaders Communiqué* (18 June 2013) at para. 70, online: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/207771/Lough_Erne_2013_G8_Leaders_Communique.pdf>.

[25] See *Comprehensive Economic and Trade Agreement between Canada and the European Union* (not yet approved), art. 24.10 (2)(b) and (c), online: EC <http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf>. See also art. 25.3 (1)(e) under which the parties agree to carry out bilateral dialogue on "perspectives on multilateral and plurilateral organisations and processes in which they participate, which seek to promote sustainable forest management or combat illegal logging."

[26] See *Trans-Pacific Partnership* (not yet approved), art 20.17 (1), (2), (3) and (7), online: <https://www.mfat.govt.nz/assets/_securedfiles/Trans-Pacific-Partnership/Text/20.-Environment-Chapter.pdf>. The parties also agree to exchange information and experiences, undertake, where appropriate, joint activities on conservation issues of mutual interest, and enhance law enforcement cooperation and information sharing among the parties to combat illegal trade in wild flora and fauna.

[27] See *ibid*, art 20.17 (5) and (6), which state:

> 5. In a further effort to address the illegal take of, and illegal trade in, wild fauna and flora, including parts and products thereof, each Party shall take measures to combat, and cooperate to prevent, the trade of wild fauna and flora that, based on credible evidence, were taken or traded in violation of that Party's law or another applicable law, the primary purpose of which is to conserve, protect, or manage wild fauna or flora. Such measures shall include sanctions, penalties, or other effective measures, including administrative measures, that can act as a deterrent to such trade. In addition, each Party shall endeavour to take measures to combat the trade of wild fauna and flora transshipped through its territory that, based on credible evidence, were illegally taken or traded.
>
> 6. The Parties recognise that each Party retains the right to exercise administrative, investigatory and enforcement discretion in its implementation of paragraph 5, including by taking into account in relation to each situation the strength of the available evidence and the seriousness of the suspected violation. In addition, the Parties recognise that in

implementing paragraph 5, each Party retains the right to make decisions regarding the allocation of administrative, investigatory and enforcement resources.

[28] Japan presently has proposed legislation before the Diet. See "Cracking down on illegal logging", The Japan Times (1 May 2016), online: <http://www.japantimes.co.jp/opinion/2016/05/01/editorials/cracking-illegal-logging>. Japan was the first G8 state to take action; however, its approach emphasizes voluntary measures rather than binding requirements. See Mari Momii, *Trade in Illegal Timber: The Response in Japan* (London: Chatham House, 2014), online: <http://www.chathamhouse.org/publication/trade-illegal-timber-response-japan#>. Several States, including Japan, France, New Zealand, Netherlands, Germany and Denmark, have adopted timber procurement policies, which tackle illegal imports. In this regard, the European Commission's policy on green procurement states that legality should be a minimum requirement for wood-based products. See European Commission, *Public Procurement for a Better Environment* COM(2008) 400/2, 2008.

[29] *The Lacey Act*, *supra* note 7 § 3372 (a)(2)(B) and (a)(3)(B). See generally, Kate Dooley and Saskia Ozinga, "Building on Forest Governance Reforms through FLEGT: The best way of controlling forests' contribution to climate change?" (2011), 20:2 RECIEL 163 at 165-66.

[30] *The Lacey Act*, *ibid* § 3371 (f). It excludes food crops, certain common cultivars and scientific specimens.

[31] This currently applies only to a subset of all products covered by the general prohibition contained in the Act.

[32] *The Lacey Act*, *supra* note 7 § 3372 (f)(1) and (2). The products to which this applies are listed on the Animal and Plant Health Inspection Service (APHIS) website. See APHIS, *Schedule of Enforcement of the Plant and Plant Product Declaration Requirement* (APHIS, 29 October 2013), online: <http://www.aphis.usda.gov/plant_health/lacey_act/downloads/ImplementationSchedule.pdf>.

[33] The list is intended to increase as it becomes clear that such declarations are technically practical and feasible. See *Revised Lacey Act Provisions; Implementation* (undated), online <http://www.regulations.gov/#!docketDetail;D=APHIS-2008-0119>.

[34] Kate Dooley and Saskia Ozinga, *supra* note 29 at 165.

[35] Olga Malets, "The Lacey Act: Bringing Public Governance Back In", in Leonhard Dobusch, Phil Mader and Sigrid Quack (eds), *Governance Across Borders: Transnational Fields and Transversal Themes* (epubli, 2013), 96 at 97.

[36] See Duncan Brack, *Controlling Illegal Logging: Consumer Country Measures* (London: Chatham House, 2011) at 7, online: <http://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Energy%2C%20Environment%20and%20Development/bp0110brack.pdf>.

[37] See Olga Malets, *supra* note 35 at 98. See also Duncan Brack, Alexander C. Chandra, and Herjuno Kinasih, *The Australian Government's Illegal Logging*

Prohibition Bill: World Trade Implications (London: Chatham House, 2012), online: <http://www.iisd.org/tkn>.

[38] "Due care" is the level of care a similarly situated person would be expected to exercise. Due care requires those being regulated to make efforts to avoid harm and is based in the degree of judgment, care, prudence, determination, and activity that a reasonable person would take under the particular circumstances. See Duncan Brack, "Controlling Illegal Logging: Consumer Country Measures", Briefing Paper (London: Chatham House, 2010) at 7-8, online: <http://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Energy%2C%20Environment%20and%20Development/bp0110brack.pdf>.

[39] *Lacey Act, supra* note 7 § 3373.

[40] *Ibid* § 3373(d).

[41] See *United States v Bengis*, 2013 WL 2922292 (SDNY, June 14, 2013) (memorandum), online: <http://www.justice.gov/usao/nys/pressreleases/June13/BengisArnoldetalRestitutionPR/U.S.%20v.%20Arnold%20Bengis%20et%20al.%20Opinion.pdf>. See also Samuel Witten and Jeremy Peterson, "The *Bengis* Case: New York Court Orders Substantial Restitution from U.S. Defendants to the Republic of South Africa in Environmental Crime Case", *Criminal Law Reporter* (25 September 2013), online: <http://www.arnoldporter.com/resources/documents/The%20Bengis%20Case_Witten%20Peterson%20BNA%20Article%2009.25.2013.pdf>.

[42] *Lacey Act, supra* note 7 § 3373 (a).

[43] See US Department of Justice, press release "Gibson Guitar Corp. Agrees to Resolve Investigation into Lacey Act Violations" (6 August 2012), online: <http://www.justice.gov/opa/pr/gibson-guitar-corp-agrees-resolve-investigation-lacey-act-violations>; and Pete Kasperowicz, "Gibson Guitar Agrees to Pay $300,000 Penalty to Settle Lacey Act Violations", *The Hill* (6 August 2012), online: <http://thehill.com/blogs/floor-action/house/242357-gibson-guitar-agrees-to-pay-300000-to-settle-lacey-act-violations>.

[44] See Andrew Dowell, "Here's the Report that May Have Prompted the Lumber Liquidators Raid", *The Wall Street Journal* (9 October 2013), online: <http://blogs.wsj.com/corporate-intelligence/2013/10/09/heres-the-report-that-may-have-prompted-the-lumber-liquidators-raid/>. See also Environmental Investigation Agency, *Liquidating the Forests: Hardwood Flooring, Organized Crime, and the World's Last Siberian Tigers* (Environmental Investigation Agency, 2013), online: <http://eia-global.org/images/uploads/EIA_Liquidating_Report__Edits_1.pdf>.

[45] See Environmental Investigation Agency, "Lumber Liquidators Plea Deal" (7 October 2015), online: <http://eia-global.org/campaigns/forests-campaign/u.s.-lacey-act/lumber-liquidators-info/>. Notably, a Canadian investigative news programme found that material from the same Chinese supplier was available in Canadian stores. See Global News, *supra* note 4.

[46] See Emily Kaldjian, "Northwest Lumber Mill First to Be Indicted on US Domestic Lacey Act Charges", *World Resources Institute* (19 August

2015), online <http://www.wri.org/blog/2015/08/northwest-lumber-mill-first-be-indicted-us-domestic-lacey-act-charges>; and see US Attorneys Office – Western District of Washington, press release, "Tree Thieves and Mill Owner Indicted for Theft of Big Leaf Maples from National Forest: Men Allegedly Illegally Cut "Figured" Maple for Sale as Valuable Music Wood" (6 August 2015), online: <http://www.justice.gov/usao-wdwa/pr/tree-thieves-and-mill-owner-indicted-theft-big-leaf-maples-national-forest>.

[47] European Commission, "Communication – Forest Law Enforcement, Governance and Trade (FLEGT): proposal for an Action Plan", COM (2003) 251 (21 May 2003).

[48] See Annalisa Savaresi, *supra* note 18 at 155.

[49] See Duncan Brack, *supra* note 19 at 2-3. See also Kate Dooley and Saskia Ozinga, *supra* note 27 at 166-7.

[50] The Action Plan also include elements aimed to increase development assistance and encourage private sector action.

[51] Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market, [2010] OJ L 295/23 (12 November 2010) (EUTR). EUTR, Article 3 states that "Timber embedded in timber products listed in Annexes II and III to Regulation (EC) No 2173/2005 which originate in partner countries listed in Annex I to that Regulation and which comply with that Regulation and its implementing provisions shall be considered to have been legally harvested for the purposes of this Regulation."

[52] Jon Buckrell and Alison Hoare, *Controlling Illegal Logging: Implementation of the EU Timber Regulation* (London: Chatham House, 2011) at 3, online: <http://www.chathamhouse.org/sites/files/chathamhouse/0611buckrell_hoare.pdf>. A list of products covered by the EUTR is found in the Annex to the EUTR.

[53] See EUTR, *ibid* at art 2(g) and (h). "Applicable legislation" is defined as "the legislation in force in the country of harvest covering the following matters: rights to harvest timber within legally gazetted boundaries; payments for harvest rights and timber including duties related to timber harvesting; timber harvesting, including environmental and forest legislation including forest management and biodiversity conservation, where directly related to timber harvesting; third parties' legal rights concerning use and tenure that are affected by timber harvesting; and trade and customs, in so far as the forest sector is concerned". Legality is defined in relation to the country of harvest's existing legislation. See Donald Brack, *supra* note 36 at 10.

[54] *Ibid*.

[55] Jon Buckrell and Alison Hoare, *supra* note 52 at 2. EUTR, *supra* note 51 art. 2 defines "placing on the market" as "the supply by any means, irrespective of the selling technique used, of timber or timber products for the first time on the internal market for distribution or use in the course of a commercial activity, whether in return for payment or free of charge […]." It adds that "[t]he supply on the internal market of timber products derived from timber or

timber products already placed on the internal market shall not constitute 'placing on the market'". "Operator" is defined as "any natural or legal person that places timber or timber products on the market" and "trader" is defined as "any natural or legal person who, in the course of a commercial activity, sells or buys on the internal market timber or timber products already placed on the internal market".

[56] EUTR, *ibid*, art 4.

[57] See Donald Brack, *supra* note 36, at 11.

[58] See European Commission - Environment, *Timber Regulation* (undated), online: <http://ec.europa.eu/environment/forests/timber_regulation.htm>. See also Yulia Levashova, *supra* note 10.

[59] EUTR, *supra* note 51 at art 5. The European Commission states that due diligence requires operators to "undertake a risk management exercise so as to minimise the risk of placing illegally harvested timber, or timber products containing illegally harvested timber, on the EU market." This requires the operator to: have access to relevant information on the imports; assess the risk of illegal timber in its supply chain; and mitigate that risk by requiring additional information and verification from the supplier. See European Commission, *Timber Regulation* (undated), online: <http://ec.europa.eu/environment/forests/timber_regulation.htm#diligence>.

[60] Donald Brack, "Controlling Illegal Logging: Consumer Country Measures", Briefing Paper (London: Chatham House, 2010) at 9, online: <http://www.chathamhouse.org/sites/files/chathamhouse/public/Research/Energy%2C%20Environment%20and%20Development/bp0110brack.pdf>, citing European Commission (2008), *Questions and Answers on the Proposed Regulation laying down the obligations of operators who place timber and timber products on the EU market* (October 2008), question 18. Note that this differs from the *U.S. Lacey Act*, which has a wider scope making it unlawful to import, export, sell, receive, require or purchase timber or related products in violation of U.S. laws or relevant foreign laws at any time.

[61] EUTR, *supra* note 51, art 6.1(a). As noted by Buckrell and Hoare, "the information required includes: type of product, common name of the tree species, country of harvest, quantity, name and address of the supplier, name and address of the trader to whom the timber and timber products have been supplied and documents or other information indicating compliance of those timber and timber products with the applicable legislation." See Jon Buckrell and Alison Hoare, *supra* note 48 at 6.

[62] EUTR, *ibid,* art 6.1(b). The operator must have procedures for the analysis and evaluation of the risk of illegally harvested timber or products being placed in the EU market.

[63] *Ibid*, art 6.1(c). The operator must have a set of measures and procedures in place that are "adequate and proportionate" to minimize any identified risks. Negligible risks are not included. The measures may include that additional information or documents be produced or third party verification be required. See Jon Buckrell and Alison Hoare, *supra* note 48 at 3 and 6.

[64] See Yulia Levashova, *supra* note 10 at 293. The monitoring organizations are approved by the European Commission.
[65] EUTR, *supra* note 51 at art 7. See Jon Buckrell and Alison Hoare, *supra* note 52.
[66] EUTR, *ibid,* art 10. Competent authorities are designated under EUTR Article 7.3. The competent authority may issue an order of remedial actions to be taken and require that interim measures to remedy any deficiencies identified during the checks. These interim measures include seizure of timber and timber products and prohibition of marketing of timber and timber products. See EUTR, *ibid*, art 10.5(a) and (b).
[67] *Ibid*, art 19.2(a) states that fines should be "proportionate to the environmental damage, the value of the timber or timber products concerned and the tax losses and economic detriment resulting from the infringement, calculating the level of such fines in such way as to make sure that they effectively deprive those responsible of the economic benefits derived from their serious infringements, without prejudice to the legitimate right to exercise a profession, and gradually increasing the level of such fines for repeated serious infringements."
[68] *Ibid*, art 19.2(b).
[69] *Ibid*, art 19.2 (c).
[70] *Ibid*, art 10.5(a) and (b). See generally Jon Buckrell and Alison Hoare, *supra* note 52 at 7-10.
[71] Danielle van Oijeb, "Tackling Illegal Logging Should Not be a Yearly Event", *Greenpeace* (2014), online: <http://www.greenpeace.org/international/en/news/Blogs/makingwaves/tackling-illegal-logging-should-not-be-a-year/blog/48362/>. For an analysis of possible EUTR deficiencies, see Yulia Levashova, *supra* note 10 at 298. Levashova argues that the EUTR's prohibition requirements do not extend far enough, the EUTR's scope is too narrow, and the EUTR allows Member States too much freedom over how to implement their own sanctions regimes. See also Kate Dooley and Saskia Ozinga, *supra* note 29 at 167.
[72] See Report from the Commission to the European Parliament and the Council: Regulation EU/995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market (the EU Timber Regulation), COM(2016) 74 final (18 February 2016), online: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0074&from=EN>; and see European Commission, "State of Implementation of EU Timber Regulation in 28 EU States" (undated), online: <http://ec.europa.eu/environment/forests/pdf/EUTR%20implementation%20scoreboard.pdf>.
[73] See Report from the Commission to the European Parliament and the Council, *ibid* at 9 and 11. See also A. Hoare, *supra* note 1 at 42-44. See also WWF, "European Countries Failing to Halt the Timber Trade" (6 August 2014), online: <http://www.wwf.eu/?226851/EU-countries-failing-to-halt-illegal-timber-trade>; Greenpeace, "Commission scorecard shows Europe is

still a market for illegal timber", *Greenpeace* (31 July 2014), online: <http://www.greenpeace.org/eu-unit/en/News/2014/Commission-scorecard-shows-Europe-is-still-a-market-for-illegal-timber/>. There have recently been some enforcement proceedings commenced. See Forest Trends, *Meeting Summary: Timber Regulation Enforcement Exchange* (Forest Trends, 2016), online: <http://www.forest-trends.org/documents/files/doc_5241.pdf>.

[74] See *Illegal Logging: Frequently Asked Questions* (Australian Department of Agriculture, undated), online: <http://www.agriculture.gov.au/forestry/policies/illegal-logging/faqs>. There are some exceptions. Goods are exempted from due diligence requirements if they have a combined customs value of less than AUD$1,000 and are made of recycled material.

[75] Illegal Logging Prohibition Amendment Regulation 2013 (No. 1), Schedule 1, s 1, online: <http://www.comlaw.gov.au/Details/F2013L00883>. Pursuant to section 2, the regulation came into effect on 30 November 2014.

[76] See *Illegal Logging: Frequently Asked Questions, supra* note 74.

[77] *Illegal Logging Prohibition Act, 2012* (No. 166, 2012), s 6.

[78] The Act's regulations require due diligence by compliance with specified laws, rules or processes, including laws, or processes under laws, in force in a State or Territory or another country; rules or processes established or accredited by an industry or certifying body; and established operational processes. See *ibid*, s 14(5) and s 18(5).

[79] *Ibid*, s 13, 14(3), and 18(3). See also *Illegal Logging Prohibition Amendment Regulation 2013 (No. 1)*, Schedule 1, Parts 2 and 3.

[80] *Illegal Logging Prohibition Act, 2012*, *supra* note 77 s 14(3) and 18(3).

[81] *Ibid*, s 8, 9 and 15. See also *Illegal Logging: Frequently Asked Questions, supra* note 74.

[82] *Illegal Logging Prohibition Act*, 2012, *supra* note 77 s 74. Note however that the mistake of fact is a defence to civil penalty orders under the Act. A person is not liable to have a civil penalty order made against him or her if at or before the time of the conduct constituting the contravention, the person considered whether or not facts existed and was under a mistaken but reasonable belief about those facts and had those facts existed, the conduct would not have constituted a contravention of the civil penalty provision. *Ibid*, s 73(1).

[83] *Ibid*, s 60.

[84] *Ibid*, s 21, 23, 25-26, 28, 30-34 and 42.

[85] See Australian Department of Agriculture and Water Resources, *Extension of the illegal logging 'soft-start' compliance period* (30 May 2016), online: <http://www.agriculture.gov.au/forestry/policies/illegal-logging/compliance/can/2016/1-2016>; Australian Department of Agriculture and Water Resources, *Small Business Impacts Review: Independent review of the impact of the illegal logging regulations on small business* (undated), online: <http://www.agriculture.gov.au/forestry/policies/illegal-logging/small-business-impacts-review>; KPMG, *Independent review of the impact of the illegal logging regulations on small business* (28 March 2015), online: <http://www.agriculture.gov.au/SiteCollectionDocuments/forestry/australias-forest-policies/

illegal-logging/independent-review-impact-illegal-logging-regulations.pdf>; Australian Department of Agriculture and Water Resources, *Government Response to the 'Independent Review of the Impact of the Illegal Logging Regulations on Small Business'* (undated), online: <http://www.agriculture.gov.au/SiteCollectionDocuments/forestry/australias-forest-policies/illegal-logging/government-response-independent-review-impact-illegal-logging-regulations.pdf>.

[86] The focus of WAPPRIITA is on CITES-listed species, which is reflected in Environment Canada's annual reports on implementation of the Act and the caselaw. See, e.g., Environment Canada, *WAPPRIITA Annual Report for 2012* (Environment Canada, undated), online: <http://www.ec.gc.ca/CITES/default.asp?lang=En&n=0B61EB03-1&offset=1&toc=show>.

[87] WAPPRIITA, *supra* note 5, s 6(1).

[88] *Wild Animal and Plant Trade Regulation*, SOR/96-263 ("WAPTR"). Note that s 2 of the WAPPRIITA excludes timber species from protection if they are not listed under CITES.

[89] *Ibid*, s 4(b).

[90] These prohibitions are consistent with Environment Canada's insistence that WAPPRIITA's purpose is to provide protection for domestic and foreign species of plants and animals "that may be at risk of overexploitation because of unsustainable or illegal trade", and to guard Canadian ecosystems from invasive species. See Environment Canada, *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act Annual Report for 2009* (Environment Canada, 2010).

[91] See Interpretation of the *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act* (WAPPRIITA) and the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES), Memorandum D19-7-1 (4 October 2013), paragraph 5, online: <http://www.cbsa-asfc.gc.ca/publications/dm-md/d19/d19-7-1-eng.html>.

[92] WAPPRIITA, *supra* note 5, s 9. Note however that WAPTR does not yet set a time period for which this documentation must be kept. This provision therefore may be difficult to enforce.

[93] *Ibid*, s 11.

[94] See WAPTR, *supra* note 87, s 19.

[95] The exception are found in s 8, 11 and 12(4).

[96] See *R v Sault Ste Marie (City)*, [1978] 2 SCR 1299, at 1325-1326; and *Lévis (City) v Tétreault*, [2006] 1 SCR 420 at paras 15-19.

[97] In *R v Alsager*, [2011] SKPC 184 (Sask Prov Ct) at para 50, aff'd [2012] SKQB 516 (Sask QB), and [2013] SKCA 129 (Sask CA), the court addressed the defence of due diligence in the context of WAPPRIITA. It observed that the defence of due diligence allows a defendant to argue that he or she acted based on an officially-induced error or used reasonable care by taking all reasonable steps to avoid the commission of the offence. See also *R v Marsland*, [2011] SKQB 207 (Sask QB) at paras. 41-56, aff'd [2012] SKCA 47 (Sask CA); *R v Nordstrom*, [2011] SKPC 166 (Sask Prov Ct), aff'd *R v Nordstrom*, [2014] SKQB

26 (Sask QB). The requirements for successfully applying the defence of due diligence in Canada are set out in *Merchant v Law Society of Saskatchewan*, [2009] 5 WWR 478 (Sask CA), at para 47.
[98] WAPPRIITA, *supra* note 4, s 13, 14, 15 and 16.
[99] *Ibid*, s 19.
[100] For a discussion on penalties under the Act, see *R v Deslisle*, 2003 BCCA 196, 2003 Carswell BC 661. The maximum fines for individuals is C$25,000 and C$50,000 for corporation for summary offences. WAPPRIITA, *ibid*, s 22(1)(a).
[101] WAPPRIITA, *ibid*, s 22(1)(b).
[102] *Ibid*, s 24.
[103] *Ibid*, s 27.1(1).
[104] *Ibid*, s 28.
[105] *Ibid*, s 22(5).
[106] *Ibid*, s 22(6)(a) and (b).
[107] *Ibid*, s 22(6)(d) and (h).
[108] *Ibid*, s 22(11).
[109] For other examples, see *R v Thomson*, [2015] ABPC 63 (Alta. Prov. Ct.) and *R v Prince*, [2014] ABPC 272 (Alta Prov Ct) where the Courts found there was insufficient proof of the violation of a foreign law. Similar challenges have also been encountered regarding enforcement of the Lacey Act. See Donald Brack and Jon Buckrell, *supra* note 36, at 8.
[110] See Environment Canada annual reports on the implementation of WAPPRIITA, online: <http://www.ec.gc.ca/nature/default.asp?lang=En&n=132ADBFC-1&parent=CDBEC7E7-0ACF-452E-B8E0-7AE620D8AD50>.
[111] It is noted that Section 4(b) of WAPTR defines "plant" as "any specimen, whether living or dead, of any wild species of the plant kingdom". Although this appears to be a fairly wide definition, it is unclear what constitutes a "wild species". If it excludes non-wild specimens grown, for example, in plantations, then this definition is in fact quite narrow. Note that illegally sourced or imported timber and timber products are in essence "contraband". Whether the imports come from wild or domestically grown plants should not be a factor.
[112] The EUTR does not have a declaration requirement.
[113] See *Illegal Logging: Frequently Asked Questions, supra* note 74.
[114] For CITES-listed products, WAPTR, *supra* note 88, s 19(2) stipulates that a declaration is mandatory "where the Minister requires it in order to obtain information relating to the implementation" of CITES.
[115] WAPPRIITA, *supra* note 5, s 21(1).
[116] Canadian Council of Forest Ministers, *Position on Illegal Logging* (Canadian Council of Forest Ministers, undated), online: <http://www.sfmcanada.org/images/Publications/EN/Illegal_Logging_EN.pdf>.
[117] Similar challenges have also been encountered regarding enforcement of the Lacey Act. See Donald Brack and Jon Buckrell, *supra* note 36 at 8.

[118] Canadian Forest Service – Natural Resources Canada, *Spotlight: Illegal Logging and the Illegal Timber Trade: Why They Matter to Canada* (Natural Resources Canada, March 2013) at 1, online: <http://cfs.nrcan.gc.ca/pubwarehouse/pdfs/34390.pdf>.

[119] See Bob Weber, "Canada Won't Block International Trade in 76 Endangered Species", *The Toronto Star* (11 December 2014), online: <http://www.thestar.com/news/canada/2014/12/10/canada_wont_block_international_trade_in_76_endangered_species.html>. There is a long list of amendments that are not in force, which would make the law more rigorous; however, these do not focus on penalties for wildlife trafficking. It should also be noted that in 2013, Canada withdrew from the International Tropical Timber Agreement, 2006 (Geneva, 27 January 2006). One of the aims of the Agreement is to "promote the expansion and diversification of international trade in tropical timber from sustainably managed and legally harvested forests …".

[120] Also, private sector initiatives, such as efforts to address illegal logging through forestry certification processes are also emerging. See, for example, Sustainable Forestry Initiative, *Addressing Illegal Logging through SFI Certification* (Sustainable Forestry Initiative, undated), online: <http://www.sfiprogram.org/markets/prevent-illegal-logging/>.

[121] See "Cracking down on illegal logging", supra note 28; and see Laura Wellesley, *Trade in Illegal Timber: The Response in China*, Research Paper (London: Chatham House, 2014), online: <http://www.illegal-logging.info/sites/files/chlogging/CHHJ2361_China_Logging_Research_Paper_FINAL.pdf>. See also Mari Momii, *supra* note 28.

[122] See Global News, *supra* note 4. As noted above, this is evidenced by the recent Lumber Liquidators felony plea in the United States, which related to timber purchased in Canada that had been illegally sourced elsewhere, but imported through Canada into the United States.

LEGAL DEVELOPMENTS

INTERNATIONAL NORMS AS THE STANDARD OF CARE IN NEGLIGENCE CLAIMS AGAINST CANADIAN COMPANIES OPERATING OVERSEAS

John Kloosterman

In the last several years, a number of foreign residents who assert they were injured by the practices of Canadian companies operating in their home countries have filed claims in Canadian courts seeking to use 'soft law' international norms as a standard of care for their negligence claims. They also argue that the claims should be heard in Canada rather than in the country where the conduct actually occurred. The increasing frequency of these claims indicate a growing effort to use Canada as a forum for addressing human rights violations committed overseas, whether or not a company has expressly adopted these norms. The courts have recognized that a duty of care based on international soft law norms is novel and not currently the law, but are divided on whether courts or legislatures should resolve the issue.

These claims also form part of a global movement to transform 'soft law' international norms – especially, the UN Guiding Principles on Business and Human Rights *– into binding 'hard law'.*

Au cours des dernières années, un certain nombre de résidents étrangers qui affirment avoir subi des préjudices à cause des pratiques d'entreprises canadiennes présentes dans leur pays se sont adressés aux tribunaux canadiens en vue de faire appliquer les normes internationales de « droit souple » comme norme de diligence à l'appui de leurs allégations de négligence. Ils soutiennent aussi que leurs allégations devraient être entendues au Canada plutôt que dans le pays où est survenu l'incident. La fréquence croissante de ces allégations dénote une volonté de plus en plus forte de recourir au Canada comme instance où sanctionner les violations des droits de la personne commises à l'étranger, qu'une entreprise ait adopté formellement ces normes ou non. Les tribunaux ont reconnu qu'un devoir de diligence fondé sur des normes internationales de droit souple est inhabituel et n'est pas prévu par la loi pour le moment, mais sont divisés quant à savoir si cette question relève des tribunaux ou des organes législatifs.

Ces allégations s'inscrivent aussi dans un mouvement mondial pour la transformation des normes internationales de droit souple – surtout les

Principes directeurs relatifs aux entreprises et aux droits de l'homme *de l'ONU – en règles impératives.*

I. Novel Duties of Care

Currently, Canadian parent companies do not have a legal duty, under legislation or common law, to ensure that the operations of their foreign subsidiaries are conducted so as to protect local residents. Plaintiffs in recent cases have asserted that if a duty of care could be established, a Canadian parent and its foreign subsidiary could be found jointly and severally liable for negligence if each company's direct actions resulted in damage to local residents. An unrecognized duty of care is referred to as a "novel" duty of care.[1]

Canadian courts recognize that a plaintiff can plead a *prima facie* novel duty of care provided they can establish two elements: 1) foreseeability of harm, and 2) proximity between the foreign plaintiffs and the defendant. If these two elements are established, then the court will analyze whether there are any policy considerations present that should restrict or negate the duty.[2]

II. The Ontario Superior Court Recognizes that International Norms May Lead to a Duty of Care

In 2013, members of an indigenous Mayan community in Guatemala brought three suits in Toronto against the Canadian company Hudbay Minerals and its local Guatemalan subsidiary, Campania Guatemalteca de Niquel S.A. (CGN), for alleged human rights abuses committed by security personnel at a nickel mining project in Guatemala.[3] The project mine was owned and operated by CGN, which was owned and controlled by Hudbay. The claims pled causes of action for negligence against Hudbay.

The plaintiffs asserted that Hudbay owed them a duty of care to prevent these harms and breached its duty to them by failing to prevent the harms. The alleged duty of care arose from, among other things, international norms, including the International Finance Corporation Performance Standards and the Voluntary Principles on Security and Human Rights, which the company had publicly committed to follow. Amnesty International, as an intervenor, filed a submission arguing that these international norms, as well as the UN Guiding Principles on

Business and Human Rights[4] (UN Guiding Principles) and the OECD Guidelines for Multinational Enterprises[5], form the applicable duty of care.

Hudbay moved to strike the claim, asserting that the claim did not state a reasonable cause of action because it owed no duty of care to the plaintiffs. Accordingly, it could not have been negligent in its actions.

The court recognized that the negligence claim was novel and applied the *Odhavji* criteria. It denied the motion to strike, finding that, among other things, the plaintiffs had properly established the duty of care. It noted that the company had made public statements that it had adopted the international norms at issue and, therefore, there was proximity between the plaintiffs and the company. As the court stated, "these public statements alleged to have been made by the parent company are one factor to be considered … [that] are indicative of a relationship of proximity", which creates the company's obligation to be mindful of the plaintiffs' legitimate interests.[6]

In analyzing whether public policy weighed against recognizing such a novel duty of care, the court reviewed several factors asserted by the defendants: 1) that Parliament had rejected a bill that would have required mining companies to meet environmental and human rights standards; 2) that Parliament had also rejected a bill that would have allowed foreign plaintiffs to sue in Canada based on violations of international law that Canada is party to; and 3) that the federal government had been working with the mining industry on implementing corporate social responsibility principles. It also analyzed the plaintiffs' assertion that tort law should evolve to accord with globalization.[7]

The court held that the competing factors alone indicated that the novel duty could not be restricted or negated, and that the parties should have created a full evidentiary record so the court could have properly analyzed the strengths and weaknesses of the policy considerations.

III. The British Columbia Supreme Court Decides Otherwise

Similar to *Hudbay*, in June 2014, seven Guatemalan residents filed suit in the Supreme Court of British Columbia against Tahoe Resources Ltd., asserting that the company was negligent in failing to prevent security personnel at one of the company's Guatemalan mines from using excessive force against them.[8] The mine in question was owned and operated

by a Guatemalan company called Minera San Rafael S.A., which was owned by Tahoe. Tahoe itself was registered in British Columbia but headquartered in Nevada; it had no officers or employees in British Columbia.

The plaintiffs asserted that Tahoe owed them a duty of care based on international norms and other standards adopted by the company including the UN Guiding Principles and the Voluntary Principles on Security and Human Rights[9], to which the company had publicly committed.

Tahoe moved for an order declining jurisdiction based on f*orum non conveniens*, arguing that the more appropriate forum was Guatemala. The court granted Tahoe's motion.[10]

In reaching its decision, the court made two important holdings that were at odds with *Hudbay*. First, the court held that the applicable law was that of Guatemala, not British Columbia. In reaching this holding, the court did not analyze *Hudbay* (although it did so elsewhere in its decision). Instead, it held that that the law applicable to tort claims was the law of the place where the activity occurred.[11] Here, that was Guatemala or Nevada, not British Columbia.

Second, the court analyzed the traditional *forum non conveniens* factor of the interests of justice (specifically, the interests of the fair and efficient working of the Canadian legal system). In its analysis, although looking at *Hudbay*, the court found it "far from clear" that the plaintiffs would prevail on their novel duty of care argument.[12] Furthermore, it cited another Ontario case that had held, prior, and in contrast to, *Hudbay*, that extending liability in cases involving torts that occurred in another country was a policy consideration to be left "for legislatures and not the courts."[13]

IV. Recently, Plaintiffs Have Been Emboldened to Argue Negligence Based on International Norms Not Expressly Adopted by Defendant-Companies

In at least two other cases, foreign nationals have appeared to be taking a more aggressive stance by arguing that international norms apply even when a company has not expressly adopted international norms.

For example, in November 2014, three Eritrean refugees filed suit in the Supreme Court of British Columbia alleging that the Canadian company Nevsun Resources "aided, abetted, contributed to and became

an accomplice to the use of forced labour, crimes against humanity and other human rights abuses" at an Eritrean mine.[14] The plaintiffs alleged that the company was negligent because it violated the International Finance Corporation's Environmental and Social Performance Standards[15], which the company had publicly committed to follow. However, these foreign plaintiffs also asserted that a duty of care arose from customary international law, which prohibits forced labour. In other words, the plaintiffs appeared to claim that the duty of care draws from *not only* publicly stated commitments by the company to certain international norms, but also from international law in general.

Most recently, in April 2015, survivors and family members of workers who died in a collapse of the building of a textile factory in Bangladesh filed suit in Toronto against a large Canadian retailer, seeking nearly $2 billion in damages.[16] The plaintiffs claimed that the company was negligent because it was aware of a "significant and specific risk" to factory workers making garments for the company's clothing line, yet failed to conduct inspections and audits - not only in accordance with its own standards, but also with international standards set forth in the UN Guiding Principles, the OECD Guidelines for Multinational Enterprises and the ISO 26000 Guidance on Social Responsibility promulgated by the International Organisation for Standardization.[17] By alleging violations of "soft laws", the plaintiffs have been arguing that a source of the company's duty of care may be found in international norms beyond those to which the company had publicly committed.

V. Could Canada Become the Next Preferred Forum for Testing International Negligence Liabilities?

To date, only in *Hudbay* did the court squarely address the propriety of a novel duty of care based on international norms publicly committed to by a company; and it did so only as part of a preliminary motion to strike.[18] Nonetheless, there may be an emerging trend in which plaintiffs view Canadian courts as more hospitable to tort claims than other jurisdictions.

For many years, the United States was considered the most hospitable forum for tort claims by non-resident plaintiffs complaining about alleged human rights violations in their home countries. The Alien Tort Claims Act (ATCA), adopted in 1789, grants the federal courts "original jurisdiction of any civil action by an alien for a tort, only committed in violation of the law of nations or a treaty of the United States".[19] Since the

1980s, foreign plaintiffs have sought redress in United States courts for breaches of international law, including against multinational corporations for allegedly engaging in and condoning human rights violations committed by foreign governments or private companies in foreign jurisdictions. Recently, however, the U.S. Supreme Court unanimously limited the jurisdictional scope of ATCA, holding that it might not be used to bring claims in the United States against multinational companies for alleged human rights practices in foreign jurisdictions.[20]

Given the decision in *Kiobel*, plaintiffs with extra-territorial claims against multinational companies may be more inclined to focus their efforts in Canadian courts as opposed to United States courts.[21] Arguably, the plaintiffs in *Tahoe* could have brought suit in Nevada since the company was headquartered there and some of the conduct at issue had occurred there; however, they chose to bring suit in British Columbia instead based on the company's *locus* of registration.

VI. Global Developments Indicate a Move to Make International Norms Binding Law

The developments in Canada reviewed herein are set against a background where global attention has been focusing on the accountability of multinational enterprises across their supply chains. A movement to transform into binding law certain international norms relied on by the plaintiffs in the above cases is emerging. On July 6, 2015, the UN Human Rights Council's Open-Ended Intergovernmental Working Group (OEIWG) has begun negotiations on a multi-lateral treaty to codify the UN Guiding Principles.[22] Further, an ever-increasing number of states have been adopting "national action plans" to implement the UN Guiding Principles, which include introducing and adopting legislation that bind their national companies to some of those UN Guiding Principles.[23] For example, in August 2015, Sweden published its national action plan to implement these principles, which *inter alia*, explores how the Swedish state should carry out its "obligation to provide effective remedies when a company has committed human rights abuses."[24] Plaintiffs will likely point to these global developments to transform "soft law" into "hard law" in support of their efforts to concretize international norms such as the UN Guiding Principles as the standard of care for multinationals operating overseas.

VII. Conclusion

The cases reviewed make clear that multinational companies with a tie to Canada may find it increasingly difficult to avoid litigation in Canada over issues that arise in other countries. They may also be held accountable for violating voluntary international norms, whether or not they had adopted them. Finally, Canada may be supplanting the United States as one of the more hospitable jurisdictions in which to litigate tort claims based on international human rights issues. These developments emphasize the fact that multinational companies need to closely watch their global human rights impacts.

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[1] See, eg, *Kamloops (City) v Nielson,* [1984] 2 SCR 2.
[2] *Odhavji Estate v Woodhouse*, [2003] 3 SCR 263.
[3] *Choc v Hudbay Minerals, Inc*, 2013 ONSC 1414 (Order).
[4] United Nations, *UN Guiding Principles on Business and Human Rights* (undated), online: UN <http://business-humanrights.org/en/un-guiding-principles>.
[5] OECD, OECD Guidelines for Multinational Enterprises (Paris: OECD Publishing, 2011), online: OECD <http://mneguidelines.oecd.org/text/>.
[6] *Choc v Hudbay Minerals, Inc*, *supra* note 3 at para 68.
[7] In contrast, as discussed below, the U.S. Supreme Court has recently limited the jurisdictional scope of U.S. tort law that had been used by foreign plaintiffs to assert claims against companies in the U.S. based on foreign human rights issues. See *Kiobel v Royal Dutch Petroleum Co.* 133 S Ct 1659 (2013).

[8] See *Garcia v Tahoe Resources, Inc*, 2015 BCSC 2045 (Notice of Claim S 144746).
[9] Secretariat for the Voluntary Principles on Security and Human Rights, *Voluntary Principles on Security and Human Rights* (undated), online: Voluntary Principles on Security and Human Rights <http://www.voluntaryprinciples.org>.
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[17] International Standards Organization, I*SO 26000 - Social responsibility* (2010), online: International Standards Organization <http://www.iso.org/iso/home/standards/iso26000.htm>.
[18] While the *Tahoe* court looked at the duty of care question, it reviewed *Hudbay* and based its conclusion on the *Hudbay* court's analysis and refrained from offering its own analysis.
[19] 28 U.S.C. § 1350.
[20] *Kiobel, supra* note 7.
[21] Nevertheless, plaintiffs have been bringing similar claims in the courts in California – but under that state's unfair competition legislation, asserting that a violation of international norms constituted unfair competition and deceptive advertising. See, *Wirth v Mars, Inc*, No 15-cv-1470 (C D Cal 2015); *Sud v CP Food Products, Inc*, No 15-cv-03783 (ND Cal 2015); B*arber v Nestle USA, Inc*, No. 15-cv-1364 (CD Cal 2015); *Hodsdon v Mars, Inc*, No 15-cv-04450 (ND Cal 2015); *Dana v The Hershey Co*, No 15-cv-04453 (ND Cal 2015); *McCoy v Nestle USA, Inc*, No 15-cv-04451 (ND Cal 2015).
[22] United Nations General Assembly, Human Rights Council, Thirty-second session, *Report of the Open-ended inter-governmental working group on transnational corporations and other business enterprises with respect to human rights* (July 10, 2015), online: OHCHR <http://www.ohchr.org>.
[23] A full list of states that have adopted or are working on adopting national action plans, along with a copy of the plan, is available online. See Business & Human Rights Resource Centre, *Government Action Plan Platform*, online: <http://business-humanrights.org/en/government-action-platform>. As of May 2016, national action plans have been adopted by Colombia, Denmark, Finland, Lithuania, the Netherlands, Norway, Sweden and the United Kingdom.

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A TIP OF THE HAT TO THE TPP: MARKET ACCESS, FLOW OF GOODS, AND ENVIRONMENTAL PROTECTION

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The Trans-Pacific Partnership (TPP) is a trade liberalization agreement signed by twelve countries. The signatories are: Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Vietnam.

The TPP focuses on free trade in goods and services, with a particular emphasis on removal of tariff barriers and facilitating trade in services. The agreement also contemplates rules for the development of technical regulations, standards and conformity assessment procedures as well as rules for the development, adoption, and implementation of sanitary and phytosanitary measures. The negotiators also agreed on a dispute resolution procedure, apparently modeled on arrangements under the North America Free Trade Agreement (NAFTA), but it is unclear as to the extent of the scope of panel jurisdiction under the TPP.

TPP negotiations started in 2008 when the United States opened discussions with Brunei, Chile, New Zealand and Singapore. Canada joined the negotiations in October 2012.[1] *Negotiations concluded in October 2015, and the full text was released in November 2015. The agreement was signed on February 2016.*[2] *Current estimates suggest that TPP will enter into force by late 2017. Although Canada signed the TPP in February, extensive consultations on the agreement have been initiated by the new Liberal government.*[3] *Whether Canada will ratify the TPP remains unanswered. The most likely scenario is that Canada will await American ratification before proceeding. American adoption of the TPP would mean a significant change in automotive rules of origin, and failure to be on the same trading terms as TPP countries would be devastating to the competitiveness of the Canadian automotive industry in the U.S. market.*

Le Partenariat transpacifique (PTP) est un accord de libéralisation du commerce signé par 12 pays : l'Australie, Brunéi Darussalam, le Canada, le Chili, les États-Unis, le Japon, la Malaisie, le Mexique, la Nouvelle-Zélande, le Pérou, Singapour et le Vietnam.

Le PTP est centré sur le libre-échange des biens et des services, et vise particulièrement à éliminer les obstacles tarifaires et à faciliter le commerce des services. Il prévoit aussi des règles en vue de l'élaboration de règlements

techniques, de normes et de mécanismes d'évaluation de la conformité, et en vue de la création, de l'adoption et de l'application de mesures sanitaires et phytosanitaires. Par ailleurs, les négociateurs se sont entendus sur une procédure de règlement des différends qui semble s'inspirer des arrangements prévus dans l'Accord de libre-échange nord-américain (ALENA); toutefois, le champ de compétence des groupes spéciaux institués en vertu du PTP demeure incertain.

Les négociations du PTP ont débuté en 2008, lorsque les États-Unis ont entamé des discussions avec Brunéi Darussalam, le Chili, la Nouvelle-Zélande et Singapour. Le Canada, quant à lui, s'est engagé dans les négociations en octobre 2012. Celles-ci se sont conclues en octobre 2015, et le texte intégral a été publié en novembre 2015. Enfin, l'accord a été signé en février 2016, et les prévisions actuelles portent à croire qu'il entrera en vigueur d'ici la fin de 2017. Or, malgré la signature du Canada en février, le nouveau gouvernement libéral a entrepris de vastes consultations à ce sujet. On ne sait donc toujours pas si Ottawa ratifiera l'accord; en fait, tout indique que le Canada attendra la ratification américaine avant d'agir. L'adoption de l'accord du PTP par les États-Unis changerait considérablement les règles d'origine dans le secteur automobile, et si le Canada ne parvenait pas à obtenir les mêmes conditions d'échange que les autres pays signataires, la compétitivité de son industrie automobile sur le marché américain en souffrirait énormément.

I. Improved Market Access: Lower Tariffs and New Rules of Origin

A primary element of the TPP agreement is a commitment by signatories to make substantial tariff cuts. Unless agreed otherwise, each country shall progressively eliminate its customs duties on originating goods in accordance with its Schedule to Annex 2-D (Tariff Commitments).[4]

The TPP does seem to contemplate an asymmetrical reduction in tariffs, depending on political sensitivities in each country. The timeline for duty removal varies by country and by product. Some tariffs will be removed immediately, but others are to be phased out over periods ranging up to twenty-five years. Canada's tariff reductions fall into the former category, with the vast majority of reductions occurring upon the TPP's entry into force or within a short phase-out period. For Canadian domestic industries this means a relatively short adjustment period. However, for many Canadian export markets, a period of volatility is

likely to remain in place as competition from duty-free imports increases and the markets find their new equilibrium.

Also included in the Agreement are rules of origin and origin procedures for defining whether a particular good is 'originating' and therefore eligible to receive TPP preferential tariffs.[5] Goods which are wholly obtained or produced entirely in the territory of one or more TPP Parties,[6] as well as goods that are entirely in the territory of one or more Parties, exclusively from originating materials, have TPP origin.[7] Given the integration of production and supply chains within North America, these rules and procedures reflect Canadian production realities.[8]

A. Industrial Exports

Reduced tariffs are likely to benefit Canadian exporters, since Canada has traditionally had lower tariffs on imports (other than in the dairy and poultry sectors) compared to many of the potential free trade partners. This means that tariff barriers in certain TPP countries that are much higher than those in Canada will eventually be removed on all industrial goods, improving market access and creating significant export opportunities. Most tariff elimination in industrial goods will be implemented immediately upon entry into force of the TPP. The remaining tariffs will be eliminated within 10 or 20 years, as agreed by the TPP parties.[9]

In terms of gains from tariff reductions, improved market access in Japan, Malaysia and Vietnam are the most significant for Canadian exporters of industrial and consumer products. These countries have historically posted high tariffs on metals, minerals, chemical products as well as iron and steel. The TPP marks the first time Canada will have preferential access to these markets.[10] The aluminum industry in Quebec and B.C. may be one of the bigger winners with large tariff reductions in Japan (rates of up to 7.5%), Australia (rates of up to 5%), Vietnam (rates of up to 27%) and Malaysia (rates of up to 30%).[11]

B. Automotive

The Canadian automotive sector also expressed reservations about the TPP. A prime concern has been competition from Japanese automobiles and the removal of Canada's 6.1% tariff rate over five years. The tariff will be phased out through five annual cuts of to 5.5%, 5%, 2.5%, 2%, and then zero.[12] The staggered implementation will provide Canadian retailers with more protection during the first two years compared to either of

Canada's tariff outcomes under the Canada-Korea Free Trade Agreement or the Comprehensive Economic Trade Agreement (CETA), however, the five year-period is significantly shorter than the 25 years negotiated by the U.S.[13] Tariff reductions in the growing markets of Malaysian and Vietnamese markets could benefit Canadian automotive exports. Both countries have agreed to eliminate their tariffs on vehicle parts within 12 years, 35% and 74%, respectively.[14]

At the same time, "within-TPP" content required for preferential tariff treatment under the agreement would be set between 40-45% for finished vehicles and higher-end auto parts.[15] In other words, only 45% of the content for vehicles and key Canadian-produced vehicle parts would have to be from a TPP country to enjoy the new tariff treatment. This compares with the 62.5% content requirement under NAFTA. The 45% rule will reportedly replace the current 62.5% rule for NAFTA on ratification of the TPP.[16] The comparability of these numbers is unclear since the special-accounting method for TPP content has not yet been disclosed.

The concern, particularly amongst Canadian auto parts producers, that this change would allow for more imported parts in Canadian-built vehicles, may be somewhat short-sighted. If Canada were the only NAFTA party not to join the TPP, its inputs into American and Mexican automobiles would not count as TPP-qualified content on exports of vehicles from those two countries. This means that Canadian assembly plants and parts manufacturers would be at a competitive disadvantage compared with its NAFTA partners, making Canada a less attractive location for both production and investment to countries such as Japan.[17]

A $1 billion ten-year top-up to the existing Automotive Innovation Fund was a Conservative election promise to assist the Canadian automotive sector.[18] Whether the liberal government will follow through with a similar commitment is uncertain. Budget 2016 announced the extension of the Automotive Innovation Fund through to the end of 2020-21, but specific financial commitments were not included.[19]

C. Agriculture

The Canadian Government considers agri-food business in Canada to be a major beneficiary of the agreement as a result of significant tariff reductions from Japan, Malaysia and Vietnam, particularly for pulses, grains, beef, and pork products.[20] Currently agricultural tariffs on Canadian imports in these countries average 17.3 percent in Japan, 17 percent

in Vietnam and 10.9 percent in Malaysia.[21] Increased access to Australia and New Zealand markets may also occur, with both countries eliminating tariffs on almost 99% of their agriculture and agri-food tariff lines upon entry into force of the Agreement.

However, Canada's supply-managed agricultural sector was a controversial subject throughout the agreement's negotiations. One of Canada's more significant concessions was to allow increased market access to the dairy and poultry markets. The supply-managed poultry and dairy industries will continue to maintain their ability to control supply (and pricing) in the Canadian market subject only to small increases in permissible duty free import quotas. While the method of quota allocation is not specified, TPP agricultural exporters will be allowed duty free exports up to 3.25% of the Canadian dairy market (including milk, cream, butter, powdered forms of the previous, yogurt and cheese)[22] and duty free access for poultry ranging between 1.5% and 2.3% of the Canadian market depending on the nature of the product (2.1% of Canada's current production chicken market, 2.3% of Canada's current production of eggs, 2% of Canada's current production of turkey and 1.5% of Canada's current production of broiler hatched eggs).[23]

Increased import competition may cause a shift in agriculture production away from dairy and poultry into other products, or possibly away from agriculture all together. To recognize the potentially harmful effect that trade liberalization may have on Canadian farmers, the Canadian Government promised $4.3B in transition assistance subsidies over 15 years, as income support to offset the "loss" of market share in Canada. However, the subsidy package is currently under review as part of the Liberal government's promise to consult with Canadians on the TPP. Neither Budget 2016 nor spending estimates of the Liberal government reference the compensation pledge.[24]

II. Improved Flow of Goods Across Borders

A cross-cutting theme of the TPP is regulatory cooperation and coherence. The agreement contemplates rules for the development of technical regulations, standards and conformity assessment procedures as well as rules for the development, adoption, and implementation of sanitary and phytosanitary measures. These non-tariff measures minimize the impact of technical barriers and reduce costs for highly-integrated global supply chains. This maximizes market access for Canadian exports, and

is a major assist for small-and mid-sized exporters looking to compete globally.

For example, Chapter 5 - Customs Administration and Trade Facilitation promotes cooperation between customs officials by establishing procedures for the efficient release of goods, advance rulings and review of decisions. Similarly, Chapter 7 - Sanitary and Phytosanitary Measures imposes obligations on the reasonableness of import checks and audits. These measures provide greater certainty and predictability for Canadian companies operating in TPP markets; they also cut the cost, time and complexity of selling to foreign markets.[25] Streamlining the procedures governing flow of goods across borders will strengthen the functioning of regional supply chains that make up the bulk of North American manufacturing.[26]

In many respects, the TPP has more limited coverage than other Canadian trade arrangements such as the NAFTA. In particular, the provisions for administrative cooperation to standardize rules applicable to mutual recognition of standards and resolving technical barriers to trade seem to be less comprehensive.

Although the TPP as a whole is lacking in terms of concrete obligations to ensure improved regulatory cooperation, the TPP does contemplate various mechanisms, for instance, the Committee on Regulatory Coherence, which aims to foster regulatory synergies amongst the parties. Whether these voluntary mechanisms will suffice to promote substantial change remains to be seen. There is currently no timeline or implementation procedure in place for these measures.

III. Increased Environmental Protection

Included in the TPP is also a chapter relating to trade and the environment. This is not the first time that environmental protection has been ascribed as a goal of a bilateral or multilateral trade agreement. The TPP is different, however, in that it incorporates an enforcement mechanism that shows more teeth compared with previous trade agreements.

Multilateral agreements have traditionally favored trade over environmental concerns. The General Agreement on Tariffs and Trade (GATT) did allow countries to undertake certain environmental measures as long as they did not result in unjustifiable trade discrimination or act

as disguised restrictions on international trade. Article XX of the GATT accepts that legitimate measures may be undertaken when necessary to protect human, animal or plant life or health; or to conserve exhaustible natural resources. Similar measures were adopted in the General Agreement on Trade in Services (GATS). The World Trade Organisation (WTO) Agreement on the Application of Sanitary and Phytosanitary Measures expanded the scope for health-related environmental controls, but once again, subject to the limiting rules set out in Article XX of the GATT.

NAFTA appended an environmental side agreement, the North American Agreement on Environmental Cooperation (NAAEC), aiming at ensuring that lax enforcement of existing environmental laws are not used by parties to obtain trade advantages. The NAAEC did allow for consultations, which if failed, lead to an arbitral panel to recommend the means of resolution or impose monetary penalties for failure of the parties to settle. To date, no arbitral panel under the NAAEC has ever been convened.

The TPP goes further than previous trade agreements in establishing a range of positive environmental obligations on member countries, and for the enforcement of these obligations through consultation and arbitral panels.

In addition to the usual bromides about public awareness, accountability and transparency, the TPP specifies obligations related to:

- combating illegal fishing, logging and wild life trade; and
- affirming commitments to multilateral environment agreements that have been ratified by the member states.

IV. Conclusion

The TPP is unusual in several important respects. Rather than reflecting the tendency of countries to enter into bilateral trade arrangements, it engages a group of 12 countries in varying degrees of economic development and across pre-existing trading blocks in a plurilateral trade agreement.

The TPP is also progressive in its recognition of integrated supply chains and environmental concerns that may transcend trading issues. While the full benefits of the TPP may take some time to be fully realized,

a successful outcome for all countries concerned might very well prove to be a trigger for the achievement of a broader multilateral free trade arrangement under the World Trade Organization.

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PRACTICE NOTES

THE RE-OPENING OF IRAN TO CANADIAN BUSINESS: PRACTICAL STRATEGIES FOR PURSUING OPPORTUNITY WHILE MANAGING RISK

Jennifer Radford and Vincent DeRose

With confirmation that Iran met the requirements of the Joint Comprehensive Plan of Action ("JCPOA") and the subsequent massive Canadian claw-back of sanctions against Iran that followed, markets in Iran are again open for business with Canada.[1] *The previous sanctions regime had effectively prohibited commercial dealings between Canada and Iran. Opportunity now abounds, with access by Canadians to a consumer population in excess of 80 million people and a diverse economy that is the 18th largest in the world. Business opportunities exist across an expanse of industry sectors, ranging from oil and gas to financial services to civil aviation. These opportunities are significant ones. For example, there are recent reports that Iran's Qeshm free zone wishes to create a new airline and equip it with Bombardier airlines, which may allow the company to avoid having to seek financial assistance from the Canadian Federal Government to maintain its operations given the lucrative nature of the transaction.*[2]

While the liberalizing of the Iranian sanctions regime is substantial, some restrictions do remain. As Canadians seek out opportunities in Iranian markets, they must be aware of these restrictions to avoid running afoul of the current sanctions. It behooves Canadians seeking to engage or re-engage in Iranian markets to consider implementing mitigation strategies to manage the risk that continues to exist in doing business with Iran.

Vu la conformité de l'Iran aux exigences du Plan d'action global commun et la levée massive des sanctions canadiennes qui en a découlé, les marchés iraniens sont de nouveau ouverts aux affaires avec le Canada. Le régime de sanctions auparavant en vigueur interdisait tout échange commercial entre les deux pays. Maintenant, les occasions abondent : les Canadiens ont en effet accès à plus de 80 millions de consommateurs et à une économie diversifiée qui occupe le 18e rang mondial. L'Iran offre des débouchés dans un large éventail de secteurs, du pétrole et du gaz aux services financiers en passant par l'aviation civile. Il s'agit là d'occasions importantes. On a récemment rapporté, par exemple, que la zone franche iranienne de Qeshm souhaitait créer une nouvelle compagnie aérienne et l'équiper d'avions Bombardier, une transaction lucrative qui pourrait éviter à l'entreprise de

demander de l'aide financière du gouvernement fédéral pour poursuivre ses activités.

Or, malgré l'assouplissement substantiel du régime de sanctions contre l'Iran, certaines restrictions demeurent, et les Canadiens et Canadiennes qui cherchent des occasions sur les marchés iraniens doivent en être conscients pour ne pas enfreindre les sanctions toujours en place. Il incombe donc à ceux et celles qui souhaitent entrer sur ces marchés, ou y revenir, d'envisager des stratégies d'atténuation des risques associés à la conduite des affaires avec ce pays.

January 16, 2016 was "Implementation Day" under the Joint Comprehensive Plan of Action ("JCPOA") agreed to by Iran, the United States, the European Union, and several other countries.[3] On Implementation Day, in exchange for Iran having met its initial commitments under the JCPOA, the United Nations, the United States, the European Union and other JCPOA parties eased sanctions on Iran.

Canada followed suit shortly after. On February 5, 2016, Canada announced the formal coming into force of amendments to the *Special Economic Measures (Iran) Regulations* (the *SEMA Regulations*), along with updates to regulations made under the *United Nations Act* (the *UN Act*) in order to conform with the obligatory changes to the United Nations sanctions regime.[4]

The economic sanctions imposed under the *SEMA Regulations* were much more intrusive on Canadian-Iran trade than those imposed under the *United Nations Act*.[5] In effect, Canada's prior economic sanctions imposed under the *SEMA Regulations*[6] prohibited anyone in Canada, and any Canadians outside of Canada, from entering into, or facilitating, directly or indirectly, the exporting, selling, supplying or shipping of goods to Iran. These prohibitions extended to the provision of almost all services, including insurance and banking. While there were some discrete exceptions, the prior *SEMA Regulations* essentially prohibited commercial activity between Canada and Iran.

While there was an obligation on Canada as a member of the United Nations to rescind or amend the regulations it had in place under the *UN Act* following Implementation Day, there was no obligation on Canada to amend or revoke the comprehensive sanctions that it had additionally imposed on Iran under the *SEMA Regulations*. With the February 5, 2016

amendments to its *SEMA Regulations* against Iran, Canada fell in step with its allies.

The revisions to the *SEMA Regulations* represent a significant overhaul of the previously broad-reaching autonomous sanctions against Iran, with the intention of allowing for a controlled economic re-engagement in transactions with Iran. The amendments have removed the broad prohibitions on imports/exports and financial services between Canada and Iran.

However, discrete restrictions remain in effect. The export to Iran of any goods listed in Schedule 2 of the *SEMA Regulations* (and the provision to Iran of technical data related to those goods) is prohibited. Schedule 2 goods are generally "dual use" products that are capable of being used in nuclear, chemical, and biological weaponry. Furthermore, any dealings with individuals or entities listed on Schedule 1 of the *SEMA Regulations* are also prohibited. The Schedule 1 list has been significantly scaled down. The "prohibited entities" have been reduced from 530 to 161 and the "prohibited individuals" have been reduced from 83 to 41. While some of the prohibited entities are obviously military in nature (for instance, the Islamic Revolutionary Guard Corps or the Iranian Army), other prohibited entities are not (for instance, the Baghyatollah Medical Sciences University). In light of the fact that Canadians are prohibited from entering into any transactions, directly or indirectly, with people or entities on this list, the importance of screening all transactions against the prohibited lists cannot be understated.

Given this updated legal landscape, Canadian businesses considering pursuing opportunities in Iran should consider employing strategies to mitigate risk.

I. Confirm Prospective Iranian Counter-parts Are Not Subject to Remaining Sanctions

Canadian businesses must be equipped to undertake due diligence on any prospective business partners, customers, suppliers, or agents domiciled in Iran or affiliated with Iran. Under the Regulations Implementing the United Nations Resolutions on Iran ("Iran UN Regulations"), specified activities involving certain persons and products relating to Iran's nuclear proliferation and arms programs are prohibited. For example, it is prohibited for any person in Canada or Canadian citizen abroad to deal in any property in Canada that is owned or controlled by

a "designated person" or by an agent acting on their behalf. Moreover, the *SEMA Regulations* currently in place prohibit dealings with 161 prohibited entities and 41 prohibited individuals set out in "Schedule 1." Specifically, the SEMA Regulations prohibit persons in Canada and Canadians abroad from:

- Dealing in any property held by or on behalf of a designated person or entity, or facilitating or providing financial or other related services in respect of such a dealing;
- Making any goods available to a designated person or entity;
- Providing any financial or related services to or for the benefit of a designated person or entity; and
- "Causing, assisting, or promoting" these prohibited activities is also not permitted.

II. Confirm Goods/Services Not Subject to Remaining Sanctions

The overhaul to the *SEMA Regulations* included a lifting of broad financial services prohibitions and prohibitions on investments in Iranian entities. The amendments also removed the general ban on imports and exports involving Iran, including the transfer or provision of related technical data and services. The only *SEMA Regulations*-based restrictions that remain in place are set out in Schedule 2. Those restrictions prohibit the export, sale, supply, or shipment of specific goods listed in Schedule 2, or related technical data, to Iran. The goods and services currently prohibited by the *SEMA Regulations* are generally items that are used or have the potential to be used in nuclear, biological, and chemical warfare and related delivery systems. The items that have the potential to be used for these purposes, commonly referred to as "dual use" goods, are often at a glance innocuous. For example, paint ball guns are prohibited. Thus, it is absolutely necessary to screen any contemplated exports against those items set out in Schedule 2 to ensure the transaction at issue will not offend the sanctions.

III. If Sanctions are Applicable - Consider Application for Exemption Permit

The *Special Economic Measures Act* authorizes the Minister of Foreign Affairs to issue to any person in Canada or any Canadian outside Canada

a permit to carry out a specified activity or transaction that is otherwise restricted or prohibited *vis-a-vis* Iran through the issuance of a Special Economic Measures (Iran) Permit Authorization Order.[7] Under the prior comprehensive sanctions regime against Iran, in our experience, it was very difficult to obtain such a permit. It remains to be seen whether the climate for granting such permits will improve under the new *SEMA Regulations* and new Federal Government.

IV. Beware of Foreign Sanctions Laws

Consideration must be paid as to whether or not the transaction at issue triggers the application of any foreign sanctions laws. For example, circumstances exist where Canadians may be subject to U.S. sanctions laws.[8] This includes the re-export of U.S. origin goods and technology to Iran. Also of note, U.S. banks are still not permitted to participate in "U-turn transactions". These are transactions between foreign companies in which U.S. funds are routed through a U.S. bank to convert them to dollars. Such transactions are integral to any international commerce conducted in U.S. dollars. In effect, business with Iran will likely not be conducted in U.S. currency.

V. Beware of Political Volatility

The easing of sanctions against Iran remains in its infancy phase. All countries that have eased sanctions, including Canada, are monitoring developments in Iran closely. The current landscape of sanctions in place could be quickly revised in the face of negative political developments. This is a very real going concern. For example, recently there were reports that Iran's Revolutionary Guard test-fired two ballistic missiles, one of them with the phrase "Israel should be wiped off the Earth" written on it in Hebrew.[9] The testing of ballistic missiles with nuclear warhead capability is strictly prohibited by the JCPOA. The U.S. State Department is reviewing the reported tests and intends to raise them in the United Nations Security Council to seek an "appropriate response" if they are confirmed. In short, the broad sanctions against Iran could be snapped back into place in short order in the face of a breach by Iran of its commitments to non-proliferation.

It is worth noting the challenge for Canada in this context. On September 7, 2012, Canada designated Iran as a state supporter of terrorism. Pursuant to the *Justice for Victims of Terrorism Act*,[10] and related amendments to the *State Immunity Act*[11], Canada has revoked

Iran's state immunity in relation to any actions brought against Iran in connection with its support of terrorism. Since that time, diplomatic relations between Canada and Iran have been suspended. The current Canadian Government must determine how it can repair these diplomatic relations.

VI. Beware of Canada's Export Control List

Beyond sanctions, dealings with Iran are also subject to export controls.

The Canadian *Export and Import Permit Act*[12] allows the Minister of International Trade to issue an export permit to authorize the export of items specified on an Export Control List. Without an export permit, items listed on the Export Control List are prohibited exports.

Many of the goods and technology listed in the Export Control List are obvious military products and technologies. For this reason, there is no surprise that such items cannot be exported without an export permit. That said, other goods and technologies that have a variety of lawful commercial applications are also subject to export controls.

The goods and technology subject to the *Export and Import Permit Act*, and the related Export Control List, are very broad in scope. Dual use goods and technology (those that can be used for both military and non-military commercial purposes) represent a large variety of products regularly exported out of Canada. Examples include certain types of:

- Alloyed materials;
- Banking equipment;
- Cellular communications equipment;
- Compressors;
- Computers;
- Cutting and milling machines;
- Digital video recorders and photographic equipment;
- Freeze-drying equipment;
- Machinery and tools; and
- Software containing encryption.

Canada has also regulated the export of certain types of goods to protect vulnerable industries. Export controls apply to items such as:

- Forest products;
- Peanut butter;

- Products that contain sugar;
- Refined sugar; and
- Textiles and clothing.

This sampling is small. The Export Control List contains over a thousand items that may require an export permit. Like sanctions infringements, the potential consequences for exporting without a permit are serious, including hefty fines and imprisonment.

Notably, in conjunction with the amendments to the *SEMA Regulations*, Canada also issued a "Notice to Exporters No. 196" on February 5, 2016.[13] It indicated that applications under the *Export and Import Permits Act* for permits to export items on Canada's Export Control List to Iran will be reviewed on a case-by-case basis, and applications for permits to export the most sensitive items on the Export Control List will typically be denied. While this strongly suggests that export permits will be difficult to obtain, it nevertheless opens up the possibility of selling goods or technology listed on Canada's Export Control List to Iran.

In sum, Canadian business is now poised to pursue vast new economic opportunities with Iran. In doing so, it is prudent to understand and be mindful of the sanctions web that remains in place for Iran, and ensure due diligence is paid to compliance.

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TREATIES

PARIS AGREEMENT ON CLIMATE CHANGE ON A SUSTAINABLE DEVELOPMENT PATHWAY

Marie-Claire Cordonier Segger[1]

In December 2015 197 countries adopted the Paris Agreement. The Agreement is set to enter into force in November 2016. While establishing a legal framework for global greenhouse gas emissions, the Paris Agreement in its substantive text and adoption decision also concretely put into action international sustainable development principles in the implementation of its goals. This paper provides a brief overview of the sustainable development pathway in the Paris Agreement.

En décembre 2015, 197 pays ont ratifié l'Accord de Paris, qui entrera en vigueur en novembre 2016. Tout en établissant un cadre juridique relatif aux émissions mondiales de gaz à effet de serre, cet accord, tant dans son libellé que dans sa décision d'adoption, a appliqué concrètement les principes internationaux de développement durable à la réalisation de ses objectifs. Cet article résume ainsi l'évolution vers le développement durable prévu dans l'Accord de Paris.

I. Introduction

Climate change is one of the most important challenges for sustainable development. Impacts of climate change threaten to undermine decades of progress, severely constraining efforts to protect the environment and to realise a wide range of human rights, including rights to health, water, food, shelter and life itself.[2]

After nearly seventeen years of deadlock, 197 countries adopted[3] the Paris Agreement on 12 December 2015,[4] in the 21st Conference of the Parties to the UN Framework Convention on Climate Change (UNFCCC).[5] The accord enters into force upon ratification by 55 countries or more, representing 55% of the world's emissions. That threshold was met in October, 2016, with the Agreement set to enter into force in November 2016. In order to develop the initial 'rulebook' for the implementation of the Paris Agreement, an Ad Hoc Working Group on the Paris Agreement (APA) was established at the 44th UNFCCC Subsidiary Bodies meeting in Bonn, Germany in May 2016. This article

highlights certain sustainable development dimensions of the new treaty of importance for implementation.

II. The Paris Agreement on Climate Change

Through the new treaty,[6] States aim to achieve climate mitigation, adaptation and finance in a series of cooperative frameworks and mechanisms, each of which establishes different legal rights and obligations for Parties. They seek to strengthen the global response to the threat of climate change in the context of sustainable development and efforts to eradicate poverty, providing a 'high ambition' framework to hold increases in global temperatures well below 2°C, pursue efforts toward a 1.5°C limit; increasing adaptation to climate impacts and foster resilience; and re-directing finance flows towards low-greenhouse gas (GHG) emissions and climate-resilient development. The accord is backed by measures for inter-governmental cooperation on loss and damage, forests and land management, technology development and transfer, education and capacity building, with a fit-to-purpose framework of transparency, peer review, stock-taking and compliance support. Adopting a 'bottom up' approach, it builds on submissions of climate action plans to the UNFCCC by 187 countries as intended Nationally Determined Contributions ((i)NDCs) and signals a growing need for legal preparedness for climate change. Indeed, out of 187 countries with UNFCCC registered (i)NDCs, 156 countries explicitly prioritize future legal and institutional reforms.[7] Further, 120 countries are calling for support from the international community in their (i)NDCs, with 51 stressing the need for capacity building.[8]

III. Sustainable Development Principles in the Paris Agreement

The Paris Agreement and the CoP21 Decision evince acceptance of the commitment to sustainable development. The 2002 *New Delhi ILA Declaration on Principles of International Law relating to Sustainable Development,* adopted as a Resolution of the 70th Conference of the International Law Association,[9] drew on years of global policy discussions[10] to derive sustainable development principles. In the Declaration, seven principles of international law are highlighted, which are increasingly made operational in binding international treaties,[11] and have been reflected in the decisions of international courts and tribunals on sustainable development issues.[12] Together they form part of international law

and policy in the field sustainable development. All these principles are now assembled and reflected in the Paris Agreement in different ways.

For instance, with regards the *duty of States to ensure sustainable use of natural resources*, the Paris Agreement frames atmospheric and carbon resources as key resources to be managed in a sustainable manner, one which avoids dangerous climate change, and prominently noted both in the treaty preamble and the substantive sections on mitigation. Parties recognize, at Article 2, that limiting the temperature increase to 1.5°C above pre-industrial levels "would significantly reduce the risks and impacts of climate change" and also aim to make finance flows consistent with pathways for low-greenhouse gas (GHG) emissions and climate-resilient development.[13] Further, as emphasized in Article 5, Parties are encouraged to take action on sustainable management of forests as key natural resources and carbon sinks,[14] including through Reducing Emissions from Deforestation and Forest Degradation in Developing Countries (REDD+) and alternative policy frameworks such as joint mitigation and adaptation approaches for the integral and sustainable management of forests.

As a second example, the *principle of equity and the eradication of poverty* arises frequently in the Paris Agreement.[15] The Preamble of the treaty emphasize State commitments to equity and intergenerational equity-, the principle being also recognized in the Preamble of the Adoption Decision. In the operational provisions of the Paris Agreement, it is noted that Parties should protect the climate on the basis of equity.[16]

As a third example, the Paris Agreement will be implemented to respect the p*rinciple of common but differentiated responsibilities* (CBDR) and respective capabilities, in light of different national circumstances.[17] Each Party's successive NDC will represent a progression beyond their earlier one, with its highest possible ambition, reflecting its CBDRs.[18] Each Party will also strive to formulate and communicate long-term low Green House Gas development strategies, mindful of CBDR,[19] and as recognized also in the Preamble.[20]

In addition, with regards to the *principle of public participation and access to information and justice*, as noted in the Adoption Decision[21] and in the Paris Agreement Preamble,[22] public participation and access to information are crucial for global responses to climate change- and for the success of the new framework established by the Paris Agreement itself. The importance of public participation is emphasized throughout the treaty.[23] In essence, the treaty depends on public engagement,

informed by the communications that are made available through the national communications that are submitted to international registries, the global stock-take, peer review, and other measures, to assist Parties to progressively intensify their contributions to mitigation, adaptation, finance and other aspects of the global response to climate change.[24]

IV. Commitment to Sustainable Development in the CoP21 Treaty Adoption Decision

In the CoP21 Decision, States welcome the UNGA Resolution A/RES/70/1 which sets global Sustainable Development Goals up to 2030. Particularly striking is Goal 13 on Climate Change,[25] acknowledging that climate change is a common concern to humankind. Important sustainable development principles are also reflected in the Decision's Preamble. States recognize the need to respect, promote and consider their human rights obligations, including *inter-alia* the rights of indigenous peoples, children and others in vulnerable situations and inter-generational equity when making climate change relevant decisions, and highlight the need to promote universal access to sustainable energy and deployment of renewables in developing countries.

Furthermore, in the Decision, States operationalize many aspects of the Paris Agreement which relate to sustainable development. For instance, the UNFCCC Subsidiary Body for Scientific and Technological Advice is mandated to develop a programme on non-market approaches to sustainable development;[26] and UN agencies and financial institutions are invited to provide information on how their development assistance and climate finance programmes incorporate climate-proofing and resilience measures.[27] States also recognize links between adequate and predictable financial resources and sustainable management of forests,[28] the co-benefits of voluntary mitigation actions for adaptation, health and sustainable development,[29] the importance of taking national sustainable development priorities into account in the existing technical examination process on mitigation,[30] and encourage Parties to make effective use of the Climate Technology Centre and Network to obtain assistance to develop economically, environmentally and socially viable project proposals in the high mitigation potential areas identified in the process.[31]

V. Conclusion

To secure effective responses to climate change under international law, inter-actional forms of international law-making under framework

treaties are proving essential. Many countries plan to reform their laws and institutions across diverse economic, environmental and social sectors in order to respond to the challenges of climate mitigation, resilience, technology, finance and accountability.[32] As countries seek to implement the Paris Agreement, including through the presentation of new and more ambitious NDCs and (i)NDCs , and the adoption of domestic laws designing their transition to a low-carbon economy, a profound comprehension of the principle of sustainable development and its different parameters will be essential. As recognised in the Agreement itself, new legal research, education, awareness, capacity building and technical assistance will be essential to ensure the success of the commitments undertaken in Paris, the avoidance of climate change's most dangerous consequences, and the transformation of the world's economies, societies and ecosystems towards sustainability. Canada is not an exception in this regard. In Canada this will mean a large role remains with civil society groups and stakeholders, including leading universities to further the knowledge and innovate to achieve prosperity in a carbon constrained environment, as well as to independently review and improve government targets. Additionally, with emission targets having been set, new opportunities for green finance and investment within Canada's growing renewable energy market, forestry sector, and mining will also produce further opportunities for Canadian business to implement the sustainable development agenda. For Canadian lawyers, assisting clients in this matters, advising government or working in civil society or government an in-depth knowledge of Paris Agreement and its principles will be required to harness the benefits of the international agreement, while ensuring its successful implementation.

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[28] *Ibid,* art 55.
[29] *Ibid*, art 109.
[30] *Ibid* at para 110a.
[31] *Ibid* at para 110d.
[32] See eg Robert Kibugi, "Mainstreaming Climate Change into Public Policy Functions: Legal Options to Reinforce Sustainable Development of Kenya" *Florida A & M University Law Review* 8:2 (2013) 205; Jose Ramon T Villarin, Ma Antonia Y Loyzaga & Antonio GM La Viña, "'In the Eye of the Perfect Storm: What the Philippines Should do about Climate Change" *Electronics, Computer and Communications Engineering Department, Ateneo de Manila University, SCJ Professorial Lecture, Working Paper* (8 July 2008) online: <http://ohm.ecce.admu.edu.ph/wiki/pub/Main/EandEMaterials/SCJ_doc.pdf> accessed 14 June 2016.

A FORGOTTEN CHAPTER? TRANS-PACIFIC PARTNERSHIP CHAPTER 26 TRANSPARENCY AND ANTI-CORRUPTION

Noemi Gal-Or

Although the diverse composition of the TPP membership would warrant public and the legal profession's attention to TPP Chapter 26 Transparency and Anti-Corruption, little notice has been taken of it. Chapter 26 introduces some innovative anti-corruption provisions and has the potential to spearhead the anti-corruption regime provided TPP parties refrain from availing themselves of its fairly narrow compliance and enforcement framework.

Bien que la diversité des membres du PTP mérite que le public et les juristes s'attardent au chapitre 26 de l'Accord, Transparence et lutte contre la corruption, celui-ci est plutôt passé inaperçu. Il contient pourtant certaines dispositions inédites et pourrait servir de tremplin vers un régime de lutte contre la corruption, à condition que les parties au PTP s'abstiennent de recourir à son cadre d'observation et d'application de la loi plutôt restrictif.

One of the lesser known chapters of the Trans-Pacific Partnership (TPP) is Chapter 26, Transparency and Anti-Corruption.[1] Cognisant of the impressive cost to business attributed to bribes said to amount up to 17 percent of a country's gross domestic product,[2] the twelve TPP signatories were no doubt compelled to react. So long as the playing field isn't leveled in matters corruption, a "barrier to trade"[3] will survive the free trade agreement. Companies registered in States that provide for strong anti-corruption legislation will keep finding themselves on the disadvantaged side when pursuing trade and investment in anti-corruption lax jurisdictions. Thus, against the backdrop of various corruption scandals – many of them yet to be unearthed, for example, following the Panama Papers leak[4] – and as Canada is being called upon to assume leadership in establishing an International Anti-Corruption Court (IACC),[5] it's about time to draw attention to Chapter 26. An important innovation because it is the first of its kind in a multilateral trade and investment treaty, the following question arises: Will it become the hoped for powerful tool in the almost non-existent anti-corruption arsenal in trade and investment treaties? The sparse opinions assessing Chapter 26 are divided on the matter.

I. Chapter 26: Review and Interesting Aspects

Chapter 26 is divided into three sections and has two appendices.[6] The innovation comes right at the beginning. In addition to the standard definition of "foreign public official", Article 26.1 Definitions introduces the broader term of "public official" to mean:

> (a) any person holding a legislative, executive, administrative or judicial office of a Party, whether appointed or elected, *whether permanent or temporary, whether paid or unpaid*, irrespective of that person's seniority;
>
> (b) any other person who performs a public function for a Party, including for a public agency or public enterprise, or provides a public service, as defined under the Party's law and as applied in the pertinent area of that Party's law; or
>
> (c) any other person defined as a public official under a Party's law.[7]

Although "public function" is left undefined, the Article establishes a category encompassing persons beyond those provided in Canada's Corruption of Foreign Public Officials Act (CFPOA), the United States (US) Foreign Corrupt Practices Act (FCPA) (both States are TPP signatories), and the United Kingdom's (UK) United Kingdom Bribery Act 2010 (UKBA).[8] While one commentator suggests that "public function" appears not to apply to employees of State-owned or State-controlled entities,[9] note that TPP Chapter 17, State Owned Enterprises and Designated Monopolies, might nevertheless prove relevant, suggesting the test lies with future interpretations of both Chapters 17 and 26 and other TPP provisions.

The seven Articles 26.6-12 in Section C: Anti-Corruption set the TPP's anti-corruption standards. The preamble sub-section of Article 26.6 Scope (Article 26.6.1) states the signatories' determination to eliminate "bribery and corruption" leaving open whether there is a difference between the two terms, and delineates the scope of their intent to apply strictly to trade and investment.[10] Both public and private sectors are recognised as having "each […] complementary responsibilities" in the matter, reflecting the respective Asia-Pacific Economic Cooperation (APEC) soft law initiatives[11] in which all TPP signatories participate.

Article 26.6.3 recognised the primacy of domestic anti-corruption law regarding offenses, defences, principles, and prosecution applicable to

Section C. While this approach, which runs throughout the text suggests that the Section does not purport to harmonise the twelve signatories' legislations[12] into one uniform anti-corruption regime, Article 26.6.4 requires – as a measure of standardisation – that the parties accede to, and ratify, the United Nations Convention Against Corruption (UNCAC).[13]

Article 26.7 Measures to Combat Corruption lists the actions to be maintained or legislated as criminal offenses in the domestic law of the signatories "when committed intentionally by any person subject to its jurisdiction." Unlike the CFPA but as with the CPFOA, Chapter 26 does not specify "corrupt motive";[14] and unlike other domestic legislations, there is no mention of "facilitation payments". Arguably, this is covered by the Article's qualification of "undue advantage" (discussed below). While Chapter 26 does not require accession or ratification by the parties to the Organisation of Economic Cooperation and Development (OECD) 1977 Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions,[15] Article 26.7.1 (a)-(c) replicates the OECD Convention's elements of bribery. It instructs (in footnote 4) TPP parties that are not parties to the OECD Convention to establish these provisions in their domestic law as criminal offenses when "in the exercise of his or her official duties" – language stronger than the standard reference to official's "performance". Importantly, the list addresses both supply and demand aspects of the bribery transaction – the offer or promise, the solicitation or acceptance of an offer or promise – whether directly or indirectly and whether for the advantage of the official or someone else (natural or legal person). The transaction is intended to create an "undue advantage" – a term associated with the Council of Europe Criminal Law Convention on Corruption,[16] which is broader than the language common to bilateral trade agreements (BTAs) and incorporates the US and UK, but not the Canadian, provisions.[17] "Undue advantage" may include pecuniary and non-pecuniary advantages, the latter theoretically as small as making an introduction between persons.[18] Footnote 5 seems, however, to contradict this provision. Confusingly, on the one hand, it advises that "[f]or greater certainty, a Party may provide *in its law that it is not an offence* if the advantage was permitted or required by the written laws or regulations of a foreign public official's country, including case law", while on the other hand, immediately following this sentence, it requires "[the] Parties [to] confirm that they are not endorsing those written laws or regulations". [Emphasis added] Article 26.7.1(d) prohibits aiding and abetting, and conspiracy (*asociacíon ilícita*) in bribery.

Acknowledgement that the corporate entity – not merely the natural person – is a critical component to the corrupt transaction is reflected in Article 26.7.3 urging parties to ensure "[i]n particular […] that legal persons held liable for offences described in paragraph 1 or 5 are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, which include monetary sanctions". While the Canadian Criminal Code recognises that corporations, characterized as "organizations",[19] can be parties to an offence based on 'fault', without need for a 'directing mind' of the corporation;[20] the UKBA criminalises the corporate offense of failing to prevent bribery;[21] and the US maintains the broadest terms of all – not every TPP signatory provides in its domestic law for corporate criminal liability, "at least for covered bribery offenses",[22] not Japan, not even Mexico which is a North American Free Trade Agreement (NAFTA) party.[23]

Article 26.7.4 prohibits the deduction of tax expenses connected to the offense, and Article 26.7.5 orders the standard (UNCAC's and OECD's and some signatories' domestic laws') anti-corruption requirement to maintain books and record and lists certain respective prohibited acts. Article 26.7.6 recommends, but doesn't require, the adoption or maintenance of whistleblower protection. The provision is further weakened by the Chapter's failure to include a corporate offense of failure to prevent bribery.[24]

Corruption would not be possible without, at least, public acquiescence in one way or another, active or passive. This explains the inclusion of Article 26.8: Promoting Integrity Among Public Officials, which lists promotional measures for adoption by the parties to ensure the ethical quality of their public officials and their conduct as well as maintaining of procedures to address alleged offenses. It reiterates the whistleblower protection twice – in sub-paragraph 1(e), and in sub-paragraph 4 where it requires the parties to "prevent opportunities for corruption" including those comprising also of members of the judiciary.

The enforcement provisions are the Achilles Heel of Section C. The problem is double. First is the challenge of distinguishing trade and investment from domestic commerce. How to qualify a case where a public procurement contract was awarded to a domestic corporation instead of a foreign investor as a result of bribery of a public official?[25] Would such practice be interpreted as "affecting trade or investment"?[26] However, more important is the other problem created in the self-invalidating

provision in Article 26.9: Application and Enforcement of Anti-Corruption Laws. The Article sets out enforcement and compliance provisions that appear stricter than in other treaties, for instance, the prohibition in Article 26.9.1 of a party's failure to enforce its laws and failure to comply with the Chapter's anti-corruption measures through "a sustained or recurring course of action or inaction." But footnote 8[27] points at what is to follow namely, a significant exemption. Accordingly, paragraph 3 in Article 26.12: Dispute Settlement excludes the very Article's application, as well as that of Chapter 28: Dispute Settlement, in regards to "any matter arising under Article 26.9 (Application and Enforcement of Anti-Corruption Laws)". Consequently, paragraph 5 of Article 28.9: Composition of Panels, which compels the parties to ensure a stricter degree of expertise of the tribunal when the latter is seized by a Chapter 26 breach, and requires that also "panelists other than the chair shall have expertise or experience in anti-corruption law or practice" (sub-paragraph (c)) appears to be for naught.[28] Interestingly, Article 9.3: Relations to other Chapters (Chapter 9: Investment) instructs that in such event the other chapter will prevail.

Other possible complications regarding compliance and enforcement include, for instance, failure to define "effective" enforcement – "no Party shall fail to effectively enforce its laws" (Article 26.9.1) – although the provisions of Chapter 28 may compensate for this deficit. Exempting the enforcement provisions from the TPP dispute settlement mechanism raises questions also a party's (in)consistency in its compliance with Chapter 26 obligations. Would failure to adopt an "administrative ruling of general application" (Article 26.1) or to join the UNCAC be considered as a (self) enforcement measure for the purpose of invoking Article 26.12 and Chapter 28?

To be sure, the explicit exclusion of Article 26.9 from the dispute settlement mechanism "should not be underestimated";[29] after all, the test of legislation is in compliance, and in the absence thereof, enforcement is the only available remedy. And where a party has "a vested interest in lax anti-corruption enforcement",[30] Article 26.9 will not offer the wronged parties any recourse in the face of countries with a poor anti-corruption record such as Malaysia or Vietnam or future acceding states.[31]

Article 26.10: Participation of Private Sector and Society may constitute a power tool in the anti-corruption struggle. Sub-paragraph 3 repeats the whistleblower protection recommendations already specified

in Articles 26.7.6 and 26.8.1(e). However, reliance on this tool offer little if anything in exchange of a self-curtailing compliance law and absence of judicial recourse.

Concerns of corruption in the pharmaceutical and medical sectors must have been sufficiently weighty[32] to warrant the addition of Annex 26-A Transparency and Procedural Fairness for Pharmaceutical Products and Medical Devices.[33] Practitioners are advised to read this Annex conjointly with Annex 8-C Pharmaceuticals and Annex 8-E Medical Devices of Chapter 8 Technical Barriers to Trade. Article 8.2: Objective instructs in sub-paragraph 1 that the Chapter's objectives include "enhancing transparency, and promoting greater regulatory cooperation and good regulatory practice", and Article 8.13: Annexes declares that the scope of these Annexes differs from that set out in Article 8.3 (Scope). Notably, the scope of Annex 26-A excludes government procurement of pharmaceutical products and medical devices (Article 3: Procedural Fairness, footnote 11) and post-market subsidisation of these products and devices under certain conditions relating to public health care entities (Article 3, footnote 12). And while requiring "truthful and not misleading information" (Article 4: Dissemination of Information to Health Professionals and Consumers), similar to Section C, it bars access to Chapter 28 Dispute settlement hence weakens enforcement here as well (Article 6: Non-Application of Dispute Settlement).

II. Should the TPP Come into Force, then…

The previous section highlighted both the innovative and problematic aspects of the anti-corruption part of Chapter 26. It showed that the effectiveness test of the TPP anti-corruption law hinges on a combination of factors. Assessing its contribution to the international legal anti-corruption regime should be measured not only by each provision individually nor solely by their collective coherence; the test consists also in the Chapter's place within the TPP and overall internal consistency of the entire treaty.

Overall, commentators agree that the TPP approach to the challenge of corruption represents a welcome contribution. In some, not-insignificant respects, Chapter 26 reaches beyond the current bilateral and international legal anti-corruption regimes. Said to employ the strongest language so far;[34] representing one of the "most striking features"[35] in the TPP; and "marking a major step forward"[36] in the anti-corruption struggle, it is expected to serve as a model set to bolster future efforts

in countering corruption. According to TI, even prior to being signed, Chapter 26 has already inspired the European Commission to pledge to become more motivated concerning anti-corruption provisions in its future bilateral trade negotiation, including the Transatlantic Trade and Investment Partnership (TTIP) with the US.[37]

To be sure, the significance of Chapter 26 is to be attributed not only to the novel provisions in Chapter 26 but derives also from the sheer size of the TPP, a treaty which covers 40 percent of the world's GDP[38] and which provides for an unprecedented substantive scale of trade and investment sectors to which the terms of Chapter 26 apply. Importantly, the TPP anti-corruption standards have been designed with an eye to levelling the playing field for developed and developing economies alike all the while seeking the highest ethical standards and contributing to building more corruption resilient governance institutions. On its face, this should increase the risk for those tempted to engage in corrupt activity.

Nevertheless, although companies value (for various business related reasons) the stability and certainty of non-corrupt economies and markets, getting there might involve a price to pay. Accordingly, a realistic evaluation of the contribution of Chapter 26 to the anti-corruption campaign must consider not only the public common good perspective. Seen from that angle, anti-corruption provisions in bilateral and multilateral treaties have two objectives: Focusing on State anti-corruption measures and penalising corrupt transactions.[39] The first requires governments to incorporate the international standards in their domestic legislation and especially, ensure the transparency and resilience of government procurement procedures. The second objective mandates governments to deprive corrupt transactions from the trade and investment protections provided in the treaty.[40] Another inevitable consideration, however, comprises of what is economically good for business and companies. While in the long run, both interests – public and private – will converge, in the short- and medium-term, should the TPP come into force, Chapter 26 is expected to levy a significant increase in compliance costs. These will be borne by companies as they navigate the complexity added to the web of the international trade and investment anti-corruption regime.[41]

Further efforts are required to encourage compliance with Chapter 26 in order to achieve the long term goal of satisfying both the public and private good. Given Chapter 26 enforcement deficit, commentators have

identified the need, and contemplated the means available, to incentivise investors and governments alike to bring claims forward against parties reneging on their anti-corruption obligations.[42] One route sees committed parties' incentivising other parties – for instance, by offering financial support, litigation support[43] – that extends beyond reliance on civil society pressure,[44] which, to be sure, has been very instrumental in advancing the global corruption campaign to its current stage. Also entertained is the possibility that individual civil suits concerning inadequate enforcement could be brought forward domestically although it is uncertain how they could be reconciled with a party's Chapter 26 terms.[45] And then, due to the similarity of Chapter 26 and the OECD Convention, both may combine to exert enhanced pressure bolstering the anti-corruption struggle.[46] Should all this materialise, and with Chapter 26 stimulating inclusion of anti-corruption provisions in European Union BTAs, and albeit a contentious proposition – also enlisting the World Trade Organisation[47] to join the anti-corruption campaign – Chapter 26 might prove a crucial part of an anti-corruption 'incentive formula'. It is however possible that exactly the opposite happens, namely that the OECD Convention monitoring system might be side-lined in favour of Chapter 26. The next stage in the anti-corruption struggle will thus revert to private sector and civil society initiatives.

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Endnotes

[1] New Zealand Foreign Affairs and Trade, Text of the Trans-Pacific Partnership, online: <https://www.mfat.govt.nz/en/about-us/who-we-are/treaty-making-process/trans-pacific-partnership-tpp/text-of-the-trans-pacific-partnership/>, [hereafter: TPP].

[2] Joanne E. Donoghue, "The Corruption Trump in Investment Arbitration", (2015) ICSID Review, 1, online: <http://icsidreview.oxfordjournals.org>; "4. What are the costs of corruption?", Transparency International, online:

<http://www.transparency.org/whoweare/organisation/faqs_on_corruption#costsOfCorruption>.

[3] Mickey Kantor, then U.S. Trade Representative, qualified it as such, in Colette van der Ven, "Should the WTO Outlaw Transnational Bribery?" (18 July 2014) GAB The Global Anticorruption Blog, online: <http://globalanticorruptionblog.com/>.

[4] Frederik Obermaier, Bastian Obermayer, Vanessa Warmer and Wolfgang Jaschensky, "About the Panama Papers", Suedeutsche Zeitung (n/d), online: *Suedeutsche Zeitung*, <http://panamapapers.sueddeutsche.de/articles/56febff0a1bb8d3c3495adf4>.

[5] Robert Rotberg, "It's Time for Canada to Back an International Anti-Corruption Court", The Globe and Mail (25 April 2016), online: The Globe and Mail, <http://www.theglobeandmail.com/opinion/why-canada-should-back-an-international-anti-corruption-court/article29725219/>.

[6] Section B: Transparency consists of Articles 26.3-5. Since transparency provisions have been common in many bilateral free trade and investment agreements, they will not be addressed here.

[7] Section C: Anti-Corruption, in TPP [hereafter: Section C, emphasis added].

[8] William Robinson and Georgia Dawson, "Trans-Pacific Partnership: Transparency and Anti-Corruption" (November 2015), Freshfields Bruckhaus Deringer, online: <http://www.freshfields.com/en/global/TPP/Protections_against_Bribery_and_Corruption/>.

[9] Wendy Wysong, "Time to Up Your Game: The TPP's Enhanced Anti-Corruption Provisions", (November 2015) Clifford Chance Briefing Note, online: <http://www.cliffordchance.com/briefings/2015/11/time_to_up_your_gamethetppsenhance.html>.

[10] This is reinforced in Article 26.6.2. Article 15.18. Ensuring Integrity in Procurement Practices (TPP Chapter 15 Government Procurement) expressly requires each party to provide for "criminal or administrative measures […] to address corruption in its government procurement", reiterating a similar provision in the Trans-Pacific Strategic Economic Partnership (TPSEP). Article 16.6: Consumer Protection (TPP Chapter 16 Competition Policy) also refers to corrupt practices – akin to Transparency International's (TI) characterisation of corruption - addressing "fraudulent and deceptive commercial activities […] that cause actual harm to consumers, or that pose an imminent threat of such harm if not prevented" and requiring parties to "adopt or maintain consumer protection laws […]".

[11] See Asia-Pacific Economic Cooperation, Anti-Corruption and Transparency Experts' Working Group, online: <http://www.apec.org/Groups/SOM-Steering-Committee-on-Economic-and-Technical-Cooperation/Working-Groups/Anti-Corruption-and-Transparency>.

[12] Robinson and Dawson, *supra* note 8.

[13] Japan's and New Zealand's ratifications are still pending, and future acceding States – most likely next are Korea, the Philippines and Taiwan – will have to comply. See "What to Make of the TPP's Anticorruption

Chapter?" (8 November 2015) The Mexico Monitor (blog), online: <https://themexicomonitor.com/2015/11/08/what-to-make-of-the-tpps-anticorruption-chapter/> [hereafter: Mexico Monitor].

[14] Robinson and Dawson, *supra* note 8.

[15] Organisation for Economic Co-operation and Development, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents*, Paris 17 December 1997, <http://www.oecd.org/corruption/oecdantibriberyconvention.htm> [hereafter: OECD Convention].

[16] Council of Europe, *Criminal Law Convention on Corruption*, CETS No.173, Strasbourg 27 January 1999, online: <http://conventions.coe.int/treaty/en/treaties/html/173.htm>.

[17] For the US and UK see Lawrence A. Schneider, Claire E. Reade, Michael T. Shor and Andrew Treaster, "The Trans-Pacific Partnership Agreement Would Affect Diverse Sectors of the Global Economy" (18 November 2015), Arnold Porter LLP Advisory, online: <http://www.arnoldporter.com/ resources/ documents/ ADV18Nov2015TheTppAgreementWouldAffectDiverseSectors OfTheGlobalEconomy.pdf> [hereafter: Schneider et al]. The Canada CFPOA stipulates:

> **Bribing a foreign public official**
>
> **3 (1)** Every person commits an offence who, in order to obtain or retain an advantage in the course of business, directly or indirectly gives, offers or agrees to give or offer a loan, reward, advantage or benefit of any kind to a foreign public official or to any person for the benefit of a foreign public official…

Corruption of Foreign Public Officials Act, SC 1998, c 34, online: <http://laws.justice.gc.ca/eng/acts/C-45.2/page-1.html>.

[18] Wysong, *supra* note 9.

[19] *Criminal Code*, RSC, 1985, c C-46, s 22.1 and 22.

[20] *Ibid.*

[21] Wysong, *supra* note 9.

[22] Kaitlin Beach, "A Trade-Anticorruption Breakthrough? The Trans-Pacific Partnership's Transparency and Anticorruption Chapter", (Nov 23, 2015) GAB The Global Anticorruption Blog, online: <http://globalanticorruptionblog.com/2015/11/23/the-trans-pacific-partnerships-transparency-and-anticorruption-chapter/>.

[23] Mexico Monitor, *supra* note 13.

[24] Wysong, *supra* note 9.

[25] Beach, *supra* note 22.

[26] *Ibid*.

[27] "For greater certainty […] individual cases or specific discretionary decisions related to the enforcement […] are subject to each Party's own domestic laws […]".

[28] Commentators have noted that even developed countries such as Japan and Australia show unsatisfactory records in anti-corruption; indeed, together

with Mexico, the three have pressed for the inclusion of the disclaimer. Mexico Monitor, *supra* note 13.
[29] Robinson and Dawson, *supra* note 8.
[30] *Ibid*.
[31] *Ibid*.
[32] Unlike FTAs concluded by the US, which require independent review of government reimbursement decisions, the TPP contents with either an independent or internal review process. Industry's request for the imposition of a specific decision-making time frame for reimbursement determinations was not granted. Note that several related TPP provisions, especially concerning Vietnam, Australia, Japan, and Peru refer also to pharmaceutical issues. Schneider *et al*, *supra* note 16. For details on the issue and the problem of TPP intra-consistency see also Ronald Labonté, Ashley Schram, and Arne Ruckert, "The Trans-Pacific Partnership: Is It Everything We Feared for Health?" (17 April 2016) 5.X, International Journal of Health Policy and Management 1, online: <http://ijhpm.com>.
[33] It is followed by an Appendix to Annex 26-A Party Specific Definitions.
[34] Wysong, *supra* note 9.
[35] Beach, *supra* note 22.
[36] Robinson and Dawson, *supra* note 8.
[37] Transparency International, Press Release, "EU Trade Deals to Include 'Ambitious' Anti-Corruption Proposals" (14 October 2015), online: TI, <http://www.transparencyinternational.eu/2015/10/press-release-eu-trade-deals-to-include>. The US has been responsible in large measure for the Chapter 26 progressive achievements.
[38] Schneider *et al*, *supra* note 17.
[39] Wysong, *supra* note 9.
[40] *Ibid*.
[41] Robinson and Dawson, *supra* note 8.
[42] Beach, *supra* note 22.
[43] Nathan Sandals in blog comments in Beach *ibid*.
[44] Beach *ibid*.
[45] *Ibid*. While the possible implications of the Kenyan World Duty Free case — a complex and challenging example – are relevant here, such analysis is beyond the scope of this article.
[46] *Ibid*.
[47] *Ibid*.

FROM A LEGAL POINT OF VIEW

QUESTIONS OF DIVINE AND INTERNATIONAL LAW

Yvon Pichette and Jon Derrick Marshall

In regards to international law and matters of religion we attempt to identify, in a succinct manner, not so much answers as the right questions to be asked. More precisely, this article seeks to address questions regarding religion and governance.

Dans les affaires de religion et de droit international, nous ne tentons pas tant de trouver des réponses que de définir de manière succincte les questions à poser. Cet article traite plus précisément des questions de religion et de gouvernance.

In many countries in the Western world, especially in Canada, matters regarding religion have, for the most part, been relegated to the private sphere. Among the consequences of this reality, when Canada projects its own national interests around the world (economic, military, social, and cultural),[1] we no longer know how to act comprehensively[2] within a foreign context where religion is a major part of the public sphere.

Obviously Canadians, and some Western countries, tend to bring this worldview (*i.e.* a private-sphere approach to religious belief and expression) with them. For this reason, various Canadian Armed Forces operations over the past 15 years (*e.g.* Canadian missions in East Timor, Afghanistan and Libya) were detrimentally affected by this implicit approach to religious privatization.

Finally, realizing its weakness in dealing with religion in a public context, the Canadian Armed Forces established Religious Leader Engagement (RLE) and Religious Area Analysis (RAA) as formal parts of its doctrine regarding operations.[3]

The conflicts of late have involved coalition partners against either a country or an organization (*e.g.* ISIS). While the gap of the capacities between the coalition and the country or organization, militarily speaking, was obvious and victory was predictable, not in all cases did this result in *post bellum* (i.e. post-military intervention) peace and justice. Where this is the case, one must conclude that the way that coalitions fight must change, because the end game is to instill peace and establish

justice. This necessitates the support of the local population of the country or organization being militarily defeated. To be more circumspect coalitions must, therefore, review the manner in which conflict is conducted In other words, targets can be legally recognized as a legitimate target and destroyed, but this may not be an effective strategy in the long-term if it negatively impacts relationships with the local populace. Without the support of the local population, including the support of local religious leaders, the coalition's agenda cannot be fulfilled. The Second Iraq War is a point in case: the coalition used traditional strategy to win the war, however, even where military success was assured, the cost economically and in terms of human capital was high, and peace and justice still remain unrealized.

Pax Romana tends to impose its worldview, including regarding matters of religion, and the past several UN and NATO interventions in international conflicts have been no exception. This raises an important question regarding governance, and whether or not it is becoming more inclusive or totalitarian in nature.

It could, perhaps, be agreed that separation of Religion and State is a healthy aspect of political liberal societies. This is also the case in a society of rights. Most Western States have decided intentionally to move away from a "society of the good" towards a "society of the just". Within religious communities, however, there is still a tension between the values of the just and the good.

In societies where religion is a major part of the public sphere this tension does not exist, because they tend to favour the good (according to their own religious tradition) over the just. When coalitions impose their ethical value systems and their visions of the just over the good tension boils over within the religious component of countries or religious organizations outside the coalition, because for them the good of collectivity is more important than individual rights. To facilitate the prevention of such tension, we as academics and chaplains within the Canadian Armed Forces have been asked to participate in an inclusive manner in the public sphere, to serve everyone, regardless of religious or spiritual outlook. Can we now expect such inclusivity from public secular institutions, or is inclusivity only unidirectional? In other words, is creative strategic cooperation possible in the public sphere during and after the military operation, such that secular and religious interests are both 'inclusive' of one another in their collective efforts?

What does separation of Religion and State in a politically liberal society, based on rights, really look like? From both a legal and ethical viewpoint, can societies re-negotiate or renew their vision so that no single religion can dominate, yet so that religion can play a healthy and contributive role in the public sphere? Although dysfunctional, religion can be detrimental in public life, healthy religion — if both reasonable and rational — can be a powerful asset in contributing to a collective consensus where religious and secular values can flourish together.

We recognize that religion is a complex and difficult reality to navigate in the public sphere, and building a peaceful consensus is not easy. We acknowledge that answers cannot be offered in a short essay such as this. Yet, knowing that religious leaders are well aware of deep-rooted conflict in the world at large, in their local communities, and also within their own institutions, creative solutions are hampered when they are not consulted or involved in problem-solving, locally, nationally or internationally. This requires a better understanding on the part of politicians and lawyers of the role of religion and its concomitant cultures worldwide.

Conclusion

As academics with global military operational experience, we feel that perhaps the right question to be asked (and then answered) is this: What are we seeking, a world-wide hegemonic system or world-wide and lasting peace?

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Endnotes

[1] This includes religious interests. The Harper Government created the Office of Religious Affairs, as a sub-department of DFAIT.

[2] Canadian Armed Forces works in terms of interoperability and the Whole of Government approach to operations, and this should also include working with local religious leaders and faith communities.

[3] Definition of Religious Leader Engagement (RLE): "RLE is a command authorized, chaplain conducted activity focused on establishing or facilitating trust and building relationships with or among indigenous religious leaders." Land Force Doctrine Note 1-13, page 2.

BOOK REVIEW

INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED IN CANADA

Hugh M. Kindred, Phillip M. Saunders, Robert J. Currie, Jutta Brunnée, Ted L. McDorman, Ikechi Mgbeoji, Karin T. Mickelson, René Provost, Linda C. Reif, Chris Waters

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Reviewed by Aaron Ogletree

International Law Chiefly as Interpreted and Applied in Canada, 8th Edition critically explores the practice of international law largely from a Canadian perspective. It is intended for "law students who are studying international law for the first time" and to provide "a reference of first resort for anyone in need of international legal sources." (p. 2). In doing so, it examines the foundational principles, sources, concepts, and institutions of international law. The volume has an accompanying Documentary Supplement that provides the text of nine major multilateral treaties.

The eighth edition of this volume is distinct from other editions, providing extensive revisions to the organizational structure and presentation in an attempt to streamline delivery of the sources and principles of international law. The stated purpose for these changes is to better adapt to the working habits of the audience. Some of the modernizations are more successful than others. For example, this edition includes a companion website that provides a searchable index to the volume. While this edition expands its scope by including the subject of international humanitarian law, it excludes any meaningful discussion of the role played by non-state actors, persons and non-governmental organizations that are important in expanding and enforcing international law.

The volume comprises of eleven chapters and is divided into two parts with impressive cohesion. Part one presents the fundamentals of the international legal system and part two focuses on six areas of international law. Each chapter has commentaries, questions, and notes examining the law attached; the volume has a good index and detailed footnotes.

Chapters one to five present the principles, institutions, and processes

of international law by critically examining the sources, the legal actors and the Canadian reception of international law. Chapters six to eleven examine international criminal law, the law of the sea, international environmental law, international humanitarian law, international human rights law, and the law limiting the use of force. These chapters attempt to show a connection to Canada using Canadian examples in each of these areas of international law. The Documentary Supplement goes beyond the volume, which presents in each chapter only the applicable articles of multilateral treaties, by providing the whole text of the Charter of the United Nations; Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations; Statute of the International Court of Justice; Rome Statute of the International Criminal Court; Vienna Convention on the Law of Treaties; Universal Declaration of Human Rights; International Covenant on Economic, Social and Cultural Rights; International Covenant on Civil and Political Rights; and United Nations Convention on the Law of the Sea.

Chapter four, State jurisdiction, explores the concept of jurisdiction and its application to a selection of subject matters ranging from nationals to outer space. The chapter outlines the legal issues pertaining to Newfoundland's joining of Canada, the relationship with part of Baffin Island, and areas adjacent to the now northern boundaries of Manitoba and Saskatchewan. It also raises issues concerning the unsettled maritime boundaries of Canada along the Machias Seal Island and the possibility of altering boundaries with a hypothetical independent Quebec.

Chapter seven, international humanitarian law, was included because of the "raised concern and attention for the subject amid the violence of contemporary international society." (p. iii) The chapter explores "how can law protect in the midst of the barbarism that is war?" (p. 523). It attempts to answer the question by outlining the origins, fundamental principles, and the treaty and customary sources of international humanitarian law. A discussion of Phillip Alston's (Office of the United Nations High Commissioner for Human Rights) Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions provides a decent summary of concerns regarding the use of drones to kill in violation of international humanitarian law and the potential for the development of a "playstation mentality" to killing.

Chapter eight, international human rights law, examines an area of law

that is a "significant agent of change in the creation of international legal norms" and "permeated nearly all areas of international law." (p.575) The chapter evaluates human rights standards, non-Canadian case law, compliance, and enforcement mechanisms. There is a compelling discussion of reservations, non-ratifications, and limitations to human rights conventions as well as derogation from human rights obligations that States, including Canada, use to avoid accountability for failing to protect certain of human rights. For example, Canada has refused to ratify the American Convention on Human Rights.

Chapter eleven, limitation on the use of force, documents how the law on the use of force has evolved, its fundamental concepts, and challenges that this area of law stands to face in the future. The chapter's subsection on humanitarian intervention would more appropriately fit in chapter seven. The subsection discusses purported examples of State humanitarian intervention which includes "1827 intervention by Austria, Great Britain, France, Prussia, and Russia in aid of Greek insurgents" and "the French action and occupation of Syria to prevent the massacre of Maronite Christians." (p. 827). Rather than being a selfless humanitarian intervention, States had ulterior motives that motivated them to intervene using humanitarian intervention as an effective propaganda to mask these motives.

The volume frequently veers off topic by covering cases and other matters that have no direct relationship to Canada. For example, there is discussion of the Independent International Fact-Finding Report on the Conflict in Georgia, regional norms in Africa, construction of a wall in the Palestinian Territory, and a case concerning oil platforms (Islamic Republic of Iran v. United States of America). While covering these types of matters provides a fine context for the discussion of international law in general — by examining well-known matters and bringing light to others, it nevertheless neglects to provide insight into how international law is interpreted or applied in Canada.

There is little discussion on two major issues affecting Canada — climate change and Indigenous rights as both are disposed of in only ten pages each. This is regrettable especially since climate change is one of the two most important issues currently confronting humanity.

International Law Chiefly as Interpreted and Applied in Canada, 8th Edition is well-written, straightforward, concise, and offers reliable accounts of several areas of international law. The revisions made in this

volume show a willingness on the part of the editors to engage readers in a more insightful and accessible manner compared to previous editions of the volume and other publications, and builds upon that international law scholarship in different and challenging ways. This volume will engage anyone interested in learning about international law in general.

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