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The Modernization of the Columbia River Treaty: Interim Arrangements to Implement the Agreement-in-Principle

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Matters Commented On: (1) Canada/US Exchange of Notes re Columbia River Treaty Assured Operating Plan for 2024-25, (September 18 and 20, 2024) and re Entity Agreement on the Interim Period Determination of Downstream Power Benefits (September 13, 16 and 17 September, 2024), (2) Canada/US Exchange of Notes Regarding Interim Pre-Planned Flood Risk Management Arrangements (November 18 and 22, 2024), and (3) Entity Agreement regarding Pre-Planned Flood Risk Management Arrangements (November 14 & 15, 2024).

This post deals with the interim measures that the United States and Canada (the Parties) have adopted to address the temporal gap (the "Interim Period" between the Agreement-in-Principle (AiP) on a "modernized" Columbia River Treaty (CRT or Treaty) (1961)) adopted in mid-2024 and the conclusion and ratification of final modernized treaty text at some future time. In practice, the Parties and their operating Entities (see discussion of the term "Entities" below) are using the operational capability offered by the Treaty (and especially Article XIV(4)) to selectively implement some of the terms of the non-binding AiP. The Parties and their Entities have chosen to prioritize the early implementation of the changed flood control and power provisions of the AiP but have not extended that same priority to other elements of the AiP, including ecosystem considerations, and the creation of the Joint Ecosystem and Indigenous and Tribal Cultural Values Body (JEB). Neither do the interim arrangements address two groups of provisions in the AiP that were clearly intended to confer an advantage on Canada; first an additional annual compensation payment to Canada for "additional benefits" brought about by coordinated operations, and second, certain flexibility rules designed to allow Canada (British Columbia) to "undertake Treaty operations for domestic priorities, such as environmental, Indigenous cultural values and socioeconomic purposes."

The post first explains why the Parties might think that interim measures would be necessary. It then provides a brief description of the rules and practice pertaining to an exchange of diplomatic notes and Entity Agreements. It then turns to examine first the interim arrangements on flood control or flood risk management, and then the power operation and the downstream power benefits. In each case, the analysis begins with a summary of the applicable Treaty provisions, then the relevant AiP provisions, and then the interim measures that the Parties and their operating entities have adopted to deal with each main subject (flood and power).

The Agreement-in-Principle and the need for Interim Measures

On July 8, 2024 Canada and the United States announced that they had reached an Agreement-in-Principle on a "modernized" Columbia River Treaty. I posted on that important development here

and here. The Parties have not released the actual text of the AiP but have instead released a "public document" summarizing the AiP. This is problematic in the present context since at least some of the documents that are the subject of this post expressly refer to AiP text.

The Parties continued to negotiate following the AiP but have yet to agree on the text of the required amendments – amendments which would then be subject to the domestic processes of ratification in each state before the Modernized Treaty could enter into force. For many treaties this would not be problematic; the existing treaty would simply continue in force until the new arrangements could be finalized. And in most circumstances, one might expect this to occur reasonably expeditiously. But neither seems likely to work right now for the Columbia River Treaty for two reasons; one reason is internal to the Treaty, the other is external.

The problem internal to the CRT is that while the CRT as a whole has no particular end date (indeed it can only be terminated – and then only in part – on ten years notice, Article XIX(2)) the Treaty's flood control regime changed automatically on midnight of September 15, 2024, the eve of the sixtieth anniversary of the entry into force of the Treaty. More specifically, the Treaty's flood control regime changed from the assured operation contemplated by Article IV(2) of the treaty to what is known as the "called-upon" operation specified in Article IV(3) and qualified by the terms of the 1964 Protocol to the Treaty. Assured flood control was operationalized through the terms of paragraph 5 of Annex A (Principles of Operation) of the Treaty and Flood Control Operation Plans (FCOP). The current FCOP adopted in May 2003 is effectively superceded by the expiration of Article IV(2) of the Treaty.

But there are considerable uncertainties as to how to operationalize "called-upon", and this has been perhaps the most significant driver behind the AiP negotiations. The loss to the US of an assured flood control operation afforded Canada one of its most significant negotiating levers since it allowed Canada to seek concessions in return for acceding to US efforts to secure greater certainty through a more planned flood control operation. The AiP addressed this concern, but the AiP does not create legal obligations for either Party and is not self-implementing

The external challenge results from the US elections in November 2024 and the resulting presidential transition in January 2025. Despite optimistic statements from Secretary Blinken and Minister Jolie in November 2024, it never seemed likely that the Parties would be able to develop and gain approval for final treaty text prior to the presidential transition, and this too therefore called out for transitional arrangements to address not only flood control but also power operations and downstream power benefits. That said, the case for interim arrangements for downstream power benefits is (legally) much weaker than the case for planned flood control. This is simply because the Treaty itself does not envisage any change in the power operation on the Treaty's sixtieth anniversary. Nevertheless, there was clearly pressure from US interests to implement the changes contemplated by the AiP sooner rather than later. But perhaps the principal issue for both Parties now, but most especially Canada, is how long we can expect this interim period to last. In the scenario of a continued Democratic presidency, it might have been reasonable to anticipate a reasonably short interim period (depending upon US domestic measures for implementing any treaty amendments), but under a Trump presidency it seems naïve to anticipate either the speedy or predictable finalization of treaty text, or the speedy conclusion of domestic ratification procedures. Of course, we shouldn't be too one-sided about all of this. Given the current

prorogation of parliament and a likely federal election sometime this year, perhaps sooner rather than later, it will also be difficult for Canada (if not British Columbia) to finalize text and proceed to ratification – which in Canada's case will involve, at a minimum, tabling proposed treaty amendments in the House of Commons (see Policy on Tabling Treaties in Parliament and Bankes and Cosens, *The Future of the Columbia River Treaty*, 2012) . But at least the path to certainty on this side of the border seems more predictable and achievable within a shorter timeframe than what we see to the south.

In summary, the US and Canada have reached an agreement-in-principle on how to amend the Treaty but have been unable to finalize text and comply with domestic ratification procedures to meet the internal deadline imposed by the flood control provisions of the Treaty, or the external deadline imposed by the transfer of executive power in the United States. Given that, the two states have fallen back on a series of *ad hoc* measures to implement now some, but only some, of the agreed (in principle) changes, pending finalization and domestic ratification of formal treaty text. The Parties have chosen to do this through a combination of diplomatic notes and agreements between the operating Entities. The next step therefore is to examine how the CRT deals with such instruments.

Diplomatic Notes and Entity Agreements

States frequently record agreements between them in the form of an exchange of diplomatic notes. Such agreements typically take the form of a letter from a senior official or diplomat (e.g. an ambassador) expressing State A's understanding of the agreement that has been reached with State B. A person of similar rank in State B responds with a letter couched in parallel terms acknowledging that same understanding. Unlike an agreement-in-principle, an exchange of diplomatic notes is a treaty for the purposes of international law in the sense that it is "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation": Vienna Convention on the Law of Treaties (1969), Article 2(1)(a). (And for confirmation that Canadian practice recognizes that an exchange of notes may constitute a treaty see Policy on Tabling Treaties in Parliament, s 5.1). The CRT itself expressly contemplates that the Parties may use an exchange of notes to confirm or vary the application of the treaty in a number of ways. Here are some relevant examples from the Treaty text:

- Article IV(1) requires an exchange of notes to confirm the adoption of the first operating plan for Canadian storage and again "if in the view of either Canada or the United States of America [a new operating plan] departs substantially from the immediately preceding operating plan [the new plan] must, in order to be effective, be confirmed by an exchange of notes …".
- Article VIII(1) provides that with the approval of both Parties, evidenced by an exchange of notes, "portions of the downstream power benefits to which Canada is entitled may be disposed of within the United States of America …".
- Article XV(4) requires the Permanent Engineering Board, the Treaty's supervisory body, to "comply with directions, relating to its administration and procedures, agreed upon by Canada and the United States of America as evidenced by an exchange of notes."

- Article XIV(4) – most importantly for present purposes – provides that "Canada and the United States of America may by an exchange of notes empower or charge the entities with any other matter coming within the scope of the Treaty."

And this last example brings us to the question of "the Entities" and agreements between the Entities. The CRT pragmatically recognizes that while the Treaty itself is between the two governments, the responsibility for the construction, operation and coordination of storage, generation and related transmission facilities and general treaty implementation must necessarily fall to others – the designated Entities as prescribed by Article XIV(1) of the Treaty. The designated Entities for the operational purposes of the CRT are BC Hydro for Canada and the Northwestern Division, US Army Corps of Engineers (USACE) and the Bonneville Power Administration for the United States. Entity Agreements are not treaties and are not governed by international law. It should also be noted that each Party may change its designation of an Entity from time to time.

The Interim Flood Control/Flood Risk Management Arrangements

Before examining the Interim Flood Control/Flood Risk Management Arrangements that the Parties have adopted it is useful to recall the Treaty provisions on flood control as well as what the Parties have publicly said about their AiP on this topic.

The Treaty and Flood Control

Flood control was one of the two main objectives of the Treaty (the other being power) when the Treaty was first negotiated. In order to achieve these objectives, Canada agreed to build the three treaty dams Keenleyside (Arrow), Duncan and Mica and to devote 15.5 million acre feet (MAF) of that storage for "flow improvement" (CRT, Article II). As it happens, Canada, built additional storage (especially behind Mica) giving rise to what is known as non-treaty storage. On the flood control side of things, Canada agreed to dedicate 8.45 MAF of the treaty storage to flood control (CRT, Article IV(2) and Annex A at para 5). Most of this (7.1 MAF) was originally allocated to Arrow, but a series of agreements between the Entities (concluding in 1995) has redistributed the flood control obligation as follows: Arrow, 3.6 MAF, Mica, 4.08 MAF and Duncan, 1.27 MAF (no change) for a total 8.95 MAF (BC Hydro agreed to increase total flood control space by 0.5 MAF) in return moving the flood control space from Arrow upstream to Mica). (All as detailed in the current (2003), Flood Control Operating Plan (FCOP) at 14, 24 - 26.) This storage was subject to the assured flood control operation discussed in the introduction until 2024. In return for the commitments associated with construction and operation, Canada received a one-time payment totalling US$64.4 million (Article VI(1)) as and when flood control became available at the three treaty dams.

Paragraph 4 and 5 of Article IV stipulate how Canada will be paid when it provides post-2024 called-upon flood control operations: the US is to pay Canada "(a) the operating cost incurred by Canada in providing the flood control, and (b) compensation for the economic loss to Canada arising directly from Canada foregoing alternative uses of the storage used to provide the flood control." The called-upon operation requires Canada to operate available storage (treaty and non-

treaty) "to meet flood control needs for the duration of the flood period for which the call is made". (CRT Article (IV(3) and the Protocol, Article I(2) & (3)).

What did the AiP say about Flood Risk Management?

The AiP frames the flood provisions in the more modern language of flood risk management (FRM) rather than flood control. The August 2024 "Public Document" is rather brief. It begins by acknowledging the automatic change in the flood control rules of the Treaty which took effect in September 2024 and then goes on to provide that:

> Canada and the United States plan to update the pre-planned (also known as "assured") flood risk management operations with Canada, providing the U.S. with 3.6 MAF of pre-planned FRM for the Arrow Reservoir through to Operating Year 2044.
>
> Implementation of the pre-planned 3.6 MAF operation at Arrow would be accomplished by the Entities in the same manner as the current storage:
>
> - this volume would be evacuated according to an agreed Storage Reservation Diagram (SRD);
> - coordinated refill of Canadian projects for U.S. FRM purposes would continue in the same manner as today, with proportional refill to manage downstream flows. The U.S. Entity is expected to submit an updated Flood Control Operating Plan corresponding to the 3.6 MAF FRM. In coordinating the operation of all Treaty storage for all purposes, every effort would be made to minimize flood damage in the United States and Canada.

It will be observed that while the AiP relieves Mica and Duncan from assured flood control operations, Arrow will continue to be subject to the same 3.6 MAF that it has assumed since 1995. The Public Document does not define the term "proportional refill" and this requires clarification.

As for compensation for the pre-planned FRM, the Public Document states that:

> The United States is expected to compensate Canada for preplanned FRM by providing US$ 37.6 million per year, indexed to inflation (based on the U.S. Consumer Price Index or equivalent). Such compensation is expected to begin the first year in which Canada provides the pre-planned FRM, which can be as early as this operating year. Such compensation is expected to end after Operating Year 2044. Delivery of the pre-planned FRM operation will end when compensation ends.

The Public Document also acknowledges that the assured FRM operation will be in addition to, rather than in substitution for, the post 2024 called-upon flood control operation described in Article IV(3) of the Treaty and paragraphs 1 and 2 of the Protocol. This appears from the Parties' commitment to "develop a process to enhance the understanding of each other's positions regarding Called-Upon flood control." I examined the position of the Parties on this issue, particularly with respect to the trigger for a Called-Upon operation more than a decade ago here:

Nigel Bankes, "The Flood Control Regime of the Columbia River Treaty: Before and after 2024" (2012) 2:1 Wash J Envtl L & Pol'y at 1 and the Parties themselves through their respective Entities have articulated their preliminary positions on these issues in two important documents. For the US see the USACE White Paper, (2011)and for Canada see BC Hydro's "Preliminary View of Columbia River Treaty Post-2024 Called Upon Procedures" (2013).

Finally, the Public Document also refers to a mutual interest in managing the flood risk on Kootenay Lake which implicates the operation of the Libby Dam (and perhaps also Duncan) as well as a "levels" order for Kootenay Lake established by the International Joint Commission (and referenced in Article XII(6) of the CRT).

We can now turn to the question of how the Parties have operationalized (or not) these provisions of the AiP within the interim arrangements for flood risk management (FRM).

How do the Interim FRM Arrangements Implement the AiP?

To address the interim FRM arrangement, there are both (in chronological order) an Entity Agreement on pre-planned FRM (November 14 and 15, 2024) and an exchange of notes (November 18 and 22) between the Parties. While that may be the chronological order it is important to stress that insofar as a continuing pre-planned operation is inconsistent with the terms of the existing Treaty, we must locate the source of the authority to vary these terms. This requires a hierarchical rather than a chronological analysis since the Entities themselves clearly lack the authority to vary the terms of the Treaty. This suggests that our inquiry should begin with the exchange of notes, but in practice it is easier to examine the two documents (Entity Agreement and exchange of notes) in parallel.

Treaty Authority for the Interim FRM Arrangements

The Entity Agreement claims that the arrangements between the Parties and the Entities are based on Article XIV(2)(k) of the Treaty. This is the paragraph that allows the Entities to prepare and implement detailed operating plans that may produce operations that are more advantageous to both countries than the operations that would be required under the terms of Annexes A and B of the Treaty. By contrast, the exchange of notes regards the arrangements as effective under the broader terms of Article XIV(4) quoted above. In my view, this is a more convincing explanation of the authority for the arrangements. Indeed it is notable how the exchange of notes adopts the precise language of Article XIV(4) when the Parties recite that "the scope of the Treaty, which remains in force, includes 'cooperative measures for hydroelectric power and flood control' [taken from the Preamble of the Treaty] and so encompasses the Interim FRM Period Entity Agreement …"; later the parties adopt the language of "empower or charge" and expressly reference Article XIV(4).

Duration

Both the Entity Agreement and the exchange of notes contemplate that the interim arrangements will run from this operating year (August 2024 – July 31, 2025) until July 31, 2027 (i.e. a three-

year term) unless earlier superceded "on the first July 31st after the entry into force of the Modernized Treaty". However, the Entity Agreement adds a coda to the effect that:

> If it appears to the Entities that the Modernized Treaty will not enter into force before July 1, 2027, the Entities will make good faith efforts to negotiate a new agreement between them in relation to pre-planned FRM operations that continues to reflect the July 8, 2024 agreement in principle. (Entity Agreement, s 1)

This commitment is not carried through into the exchange of notes, but its inclusion in the Entity agreements suggests that the Entities themselves are none too sanguine about the early completion of formal Treaty Modernization.

Pre-Planned or an Option in Favour of the United States?

Both the Entity Agreement and the exchange of notes refer to the arrangements as pre-planned, but the assurance of these pre-planned operations only runs in favour of the United States; there is no mutuality to the assurance. Instead, both arrangements offer the United States the *option* to require Canada to evacuate storage as required by the terms of the agreements; and it is only if and when the United States exercises that option that the US is required to make the payment of US$37.6 million for the benefits conferred by the pre-planned or assured operation in the operating year to follow. While this might offer the US the opportunity to game the election (and thus its liability) based on available information of snowpack etc, this seems unlikely in the ordinary course since the Entity Agreement requires that the US make its election by September 30 of the preceding year. It is only in this first year (2024 – 25) that the US was allowed to delay making an election until December 31, 2024. That said, this is not a firm rule since it allows the Entities to agree upon a different date. The election is made by the US Entity making the prescribed payment. I have no information as to whether or not the payment was made for this year.

Both the Entity Agreement (s 4) and the exchange of notes remain faithful to the idea that nothing in these arrangements with respect to pre-planned FRM prejudices the US entitlement to a called-upon operation. The exchange of notes puts it this way:

> The Government of the United States of America shares the understanding expressed by the Government of Canada in its note that the provision of and compensation for pre-planned FRM operations under the Interim FRM Period Entity Agreement would be distinct from and in no way related to the provision of and compensation for called-upon FRM operations under Article IV(3) of the Treaty.

A New Flood Risk Operating Plan

As noted above, the existing Flood Control Operating Plan (FCOP) (2003) effectively expired with the expiration of the assured operation required by Article 4(2) of the Treaty. The full implementation of the pre-planned FRM therefore requires a new Flood Risk Operating Plan (FROP). The Entity Agreement (confirmed in this regard by the exchange of notes) contemplates that the Parties will follow current FCOP practice such that the FROP will be developed in the first instance by the US Army Corps of Engineers (USACE). The Entity Agreement also confirms that

the FROP (including any updates) "will not be applicable in relation to the operation of Canadian. Treaty storage unless it has been accepted by the Canadian Entity." (Entity Agreement, s 2)

The Entity Agreement anticipates that the new FROP will be in place by March 31, 2025. Failing that, the Agreement stipulates that the Entities will apply current operating rules (i.e. the rules in effect under the FCOP for 2023-2024) with appropriate adjustments to reflect FRM storage of 3.6 MAF at Arrow (as contemplated by the AiP) during the "flood control refill period" defined in the FCOP as the "Reservoir regulation period that begins 20 days prior to the date the unregulated mean daily discharge is forecast to exceed 450,000 cfs at The Dalles, Oregon. The end of the Flood Control Refill Period will be when no further flood potential exists at any of the damage areas in Canada and the United States …". (FCOP 2003, Appendix B, Glossary, and for the FCOP's treatment of damage areas in Canada see FCOP, 2003 at 16 and 17).

It appears that in the future the terms of the FROP will be reflected in the successive assured operating plans (AOPs) or detailed operating plans (DOPs) adopted by the Entities on an annual basis. But what happens in any year where the US fails to make its payment and exercise its option for pre-planned FRM? The Entity Agreement suggests that in such a case "none" of the FRM provisions reflected in such AOPs or DOPs "will be applicable" (Entity Agreement, s 2). That sounds simple, but I suspect that it will be difficult to disentangle FRM operations in any particular case without the risk of disagreement.

Without Prejudice

In addition to confirming their understanding that pre-planned FRM is supplemental to, and not in substitution for, the called-upon provisions of the Treaty (see above), the Parties also emphasise in their exchange of notes "that the empowerment and charge provided through this exchange of notes does not waive any options that may be available to either Party to resolve any difference arising under the Treaty, as provided in its Article XVI, and is without prejudice to the rights and obligations of the Parties under the Treaty." The reference to Article XVI is a reference to the "settlement of differences" provision of the Treaty. This is significant insofar as the called-upon provisions do pose significant interpretive challenges which may ultimately require authoritative settlement by a third party. See above for the position papers of each Entity.

Other Flood Risk Management Issues in the AiP

There is nothing in the interim flood risk management arrangements to address other flood-related issues referenced in the AiP including the operation of Libby and flood issues on Kootenay Lake, or the need for clarity about the rules for the called-upon operation, including the triggers for such an operation. Furthermore, while FCOP (2003) references Libby and the duty of coordination of Libby operations under Article XII (5) and (6), there is no reference to Libby in either the Entity Agreement or the exchange of notes, and the existing Libby Coordination Agreement also expired in September 2024 along with the assured flood control provisions. The emphasis on Arrow in these documents suggests that we can expect the FROP to be silent on the coordinated operation of Libby. That said, I acknowledge that the Entity Agreement provides that "The scope of the FROP necessarily includes re-fill operations by the Canadian Entity, but may include other pre-planned operations in Canada or the United States of America." (at 3)

Finally, it is worth noting that the current FCOP also addresses the possible need for flood operations during the fall and winter where a combination of rain and low-elevation snowmelt can cause flood flows in the lower Columbia (FCOP, 2003 at 9). The FCOP requires both Arrow and Mica to operate within the range of natural flows "insofar as possible" (at 26, 28) to address this risk. It is not clear whether these requirements (which might for example reduce energy otherwise available from Mica and Revelstoke) will be brought forward into the FROP.

Power Arrangements and the Downstream Power Benefit

It will be recalled that the CRT required Canada to construct 15.5 MAF of treaty storage that could be used for power purposes when not dedicated to flood control. This storage provided Canada with generation potential at Mica and subsequently at Revelstoke (a non-treaty run of the river dam immediately downstream of Mica) as well as a small amount of generation installed at Arrow/Keenleyside (185 MW). There is no generation at Duncan. In addition, and most importantly from a Treaty perspective, agreed operation of this Canadian storage in accordance with assured and detailed plans of operations (AOPs & DOPs) permitted US mainstream dams to make more efficient use of the flow of the river. Accordingly, it was agreed that Canada would be entitled to 50% of the incremental capacity and energy benefits at those mainstem facilities. This is known as the downstream power benefit and the calculation of the benefit is prescribed by Articles III – V and Annexes A and B of the Treaty. The mode of assessing the benefit and the size of the benefit became increasingly contested over time (for more discussion see Bankes, *The Columbia Basin and the Columbia River Treaty: Canadian Perspectives in the 1990s* (1996)), and therefore, while there was no automatic sunsetting or change in the power provisions of the Treaty in 2024 as there was (as we have seen) for flood control, the scale of the downstream power benefit became an important part of the mix in the negotiations to modernize the CRT.

What did the AiP say about the Power Operation and the Downstream Power Benefits?

The "Public Document" describing the AiP contains two groups of provisions addressing the power side of the operation of Canada's Treaty dams. The first group of provisions (in the order in which they appear in the document) seeks to provide Canada additional flexibility in the operation of Treaty dams in order to address domestic priorities such as "environmental, Indigenous cultural values and socioeconomic purposes." (at 3) However, the AiP itself makes it clear that these rules only become operational *after* entry into force of the modernized Treaty. Accordingly, it is hardly surprising (albeit likely disappointing to some) that the interim arrangements do not integrate these flexibility provisions into Treaty operations during the interim period.

The second group of provisions deals with the downstream power benefits and simply prescribes a declining schedule of capacity and energy benefits without any supporting rationale or argumentation. The changes in the AiP cover the period commencing August 1, 2024 (the new operating year) through to July 31st, 2044. While the AiP does not expressly provide that this will be addressed in any interim arrangements, the Parties have chosen to do so by means of another exchange of notes and two Entity Agreements (although one of these Agreements is the adoption

of an assured operating plan (AOP) for the current operating year, which, as I have already noted, is relevant for both the flood control and power operations under the Treaty).

Authority for the Downstream Power Benefit Changes

In my opinion, any change to the manner in which the downstream power benefits to Canada are determined is a significant amendment to one of the most fundamental elements of the Treaty. Indeed, the entirety of Annex B of the Treaty is concerned with the "Determination of the Downstream Power Benefits". How then did the Parties finesse this issue in the interim arrangements? Once again, the key document is the exchange of diplomatic notes; the Entities don't get to amend the treaty by way of an Entity Agreement. And once again, Article XIV(4) is central to the argumentation. Here's that text again:

> 4. Canada and the United States of America may by an exchange of notes empower or charge the entities with any other matter coming within the scope of the Treaty.

But the chain of reasoning in the exchange of notes is extremely thin. The notes again recognize that the scope of Treaty includes cooperative measures for hydroelectric power generation and then concludes that this extends to the Entity Agreement on the Interim Period Determination of Downstream Power Benefits (DDPB). There are at least two problems with this approach. First, the notes do not explain how a general treaty provision like Article XIV(4) can possibly override a whole series of specific provisions in the CRT dealing with the determination of downstream benefits. The first rule of treaty interpretation, much like the first rule of statutory interpretation, is the duty to read specific provisions in the context of the entire instrument. Article 31(1) of the Vienna Convention on the Law of Treaties puts it this way:

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
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> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

But of course, in the case of a bilateral treaty, the Parties can agree on pretty much any interpretation of the treaty that suits their interests (see the extended discussion of US/Canada treaty practice in Bankes and Cosens, *Protocols for Adaptive Water Governance: The Future of the Columbia River Treaty* (2014)). At least they can freely do so unless there is a person with standing (and a motivating interest) in a domestic court to make the argument that Article XIV(4) broad as it is, cannot be used to allow an Entity Agreement to significantly amend one of the

foundational concepts of the Treaty. And in this case, the persons most affected (the owners of mainstem dams in the US and their ratepayers), will have zero interest in contesting any reduction in the Canadian entitlement to downstream power benefits. (That said, the owners of those mainstem dams are questioning whether the US Entities have been too generous to Canada in determining ongoing downstream power benefits see press filings here and here.) And neither can we expect the Treaty's supervisory body, the Permanent Engineering Board (PEB) established by Article XV of the Treaty to take any issue with this "amendment"; after all Article XV(4) instructs that the PEB:

> … shall comply with directions, relating to its administration and procedures, agreed upon by Canada and the United States of America as evidenced by an exchange of notes

The second problem however is that the Entity Agreement, while couched (through its title) as an agreement relating to the Interim Period, reproduces the *entirety* of the schedule from the AiP of Canada's declining benefits from this operating year through to 2044. And the exchange of notes appears to endorse this approach.

There is a second source of authority recited in the diplomatic notes for the Entity AOP arrangements, but to me this is secondary and not specifically relevant to the reduction in the downstream power benefits. I refer to the references to Article IV(1) of the Treaty (quoted above) which requires an exchange of notes whenever a new AOP departs substantially from its predecessor.

Finally, much like the FRM arrangements both the exchange of notes and the Entity Agreement on the downstream power contain broadly drafted without prejudice clauses confirming the applicability of the dispute settlement provisions of the Treaty.

Conclusion: When is an Agreement-in-Principle not an Agreement-in-Principle?

The answer to the above riddle must be that an agreement-in-principle is no longer a mere agreement-in-principle when the parties to the AiP have agreed to binding implementation of the AiP – or at least selected parts of that AiP. And while the AiP itself seems like a balanced agreement between the Parties, I think that there at least two ways in which these interim arrangements are somewhat one-sided.

The first way in which the interim arrangements are one-sided is that the US gets what it wanted most out of the Treaty Modernization process *now*. It doesn't have to wait until the entry into force of a Modernized Treaty in order to get both pre-planned flood risk management operations and the immediate reduction of downstream power benefits. By contrast, Canada has to wait for both the "additional benefits" compensation and the flexibility to operate for values other than power and flood control. Neither do I see much assurance in these arrangements for Canada as to the future (and interim) coordinated operation of Libby, although that may become clearer when we see the new FROP.

The second way in which the interim arrangements are one-sided is that they clearly prioritize the traditional Treaty values of power and flood control and the traditional Treaty players – the

Entities. And so, while much has been made by all concerned, including the Parties, of the elevation of ecological values and the involvement of Indigenous peoples, all of that is pushed to one side by these interim arrangements. As Charles Wilkinson might have observed, the "Lords of Yesterday" are still with us today. The Parties could have offered some further endorsements of these new directions for a Modernized Treaty. For example, they might have announced new or additional Entity designations, or appointments to the PEB, that would reflect the importance of ecosystem function in future operations under the Treaty. See, for example the recommendations of the Universities Consortium on Columbia River Governance (November 21, 2024).

Perhaps no real damage will be done if these prove to be short-lived interim arrangements. But I think that there is at least some risk that the political instability south of the border, combined with the anti-Canada rhetoric and tariff talk emerging from the White House, along with anticipated changes in the federal government in Canada will lead to these interim arrangements taking on a life of their own. And if that happens, it will become increasingly difficult to raise up the other values highlighted in the AiP, as well as the enhanced involvement of Indigenous peoples and civil society. I hope that I am wrong.

And finally, there is one other aspect of these interim arrangements that I find troubling and that is that they do little to address the democratic deficit associated with the executive act of treaty making. I think I have demonstrated above that these interim arrangements are actually Treaty amendments dressed up as "empowerment" of the Entities. And yet these amendments have not been subject to the public scrutiny and debate typically devoted to significant treaty amendments. They have simply been adopted by diplomatic notes and Entity Agreements. It is of course true that there was *some* public debate on the AiP from mid-July 2024 onwards, but I don't recall anybody telling us, for example, that the Parties and Entities had already signed off on the exchange of notes authorizing a changed Assured Operating Plan and the Interim Period Entity Agreement on the Determination of Downstream Power Benefits as early as mid-September 2024. Furthermore, if these arrangements (and I refer here to the exchanges of notes) are in reality Treaty amendments, there is the question (at least on this side of the border) of why they were not tabled in parliament (I can find no record that they were) as required by the Federal Policy on the Tabling of Treaties in Parliament (see above), a policy that was adopted to address the democratic deficit associated with treaty making by the executive branch.

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