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Kontakt/Contact

ZBW – Leibniz-Informationszentrum Wirtschaft/Leibniz Information Centre for Economics
Düsternbrooker Weg 120
24105 Kiel (Germany)
E-Mail: [rights\[at\]zbw.eu](mailto:rights[at]zbw.eu)
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CIGI Papers No. 144 – September 2017

Toward a Trade and Indigenous Peoples' Chapter in a Modernized NAFTA

Risa Schwartz



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Centre for International Governance Innovation

67 Erb Street West
Waterloo, ON, Canada N2L 6C2
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About the Author

Risa Schwartz is a senior research fellow with CIGI's International Law Research Program. In this role, Risa is examining the international and domestic laws that support increasing Indigenous peoples' participation in international law and treaty making. Prior to joining CIGI, Risa held positions as counsel to the Ministry of Aboriginal Affairs in Ontario, and the Ministry of the Environment and Climate Change, and worked as a legal officer at the World Trade Organization.

About the International Law Research Program

The International Law Research Program (ILRP) at CIGI is an integrated multidisciplinary research program that provides leading academics, government and private sector legal experts, as well as students from Canada and abroad, with the opportunity to contribute to advancements in international law.

The ILRP strives to be the world's leading international law research program, with recognized impact on how international law is brought to bear on significant global issues. The program's mission is to connect knowledge, policy and practice to build the international law framework — the globalized rule of law — to support international governance of the future. Its founding belief is that better international governance, including a strengthened international law framework, can improve the lives of people everywhere, increase prosperity, ensure global sustainability, address inequality, safeguard human rights and promote a more secure world.

The ILRP focuses on the areas of international law that are most important to global innovation, prosperity and sustainability: international economic law, international intellectual property law and international environmental law. In its research, the ILRP is attentive to the emerging interactions among international and transnational law, Indigenous law and constitutional law.

Acronyms and Abbreviations

ADRIP	American Declaration on the Rights of Indigenous Peoples
CCFIPPA	Canada-China Foreign Investment Promotion and Protection Agreement
CCFTA	Canada-Chile Free Trade Agreement
CETA	Comprehensive Economic and Trade Agreement
FCA	Federal Court of Appeal
FIPA	foreign investment promotion and protection agreement
FPIC	free, prior and informed consent
FTA	free trade agreement
IITIO	International Inter-tribal Trade and Investment Organization
ISDS	investor-state dispute settlement
NAFTA	North American Free Trade Agreement
OAS	Organization of American States
SCC	Supreme Court of Canada
TPP	Trans-Pacific Partnership

Executive Summary

The renegotiation of the North American Free Trade Agreement (NAFTA) offers a unique opportunity to better align international trade and investment with international Indigenous and human rights law. The announcement that Canada is seeking the inclusion of an Indigenous peoples' chapter in NAFTA as a priority is a bold step to protect Indigenous rights, while enhancing Indigenous peoples' increased participation in international trade. Not only does Canada's prioritization of a progressive trade agenda, which includes the promotion of an Indigenous peoples' chapter, help to realize economic equity, it is also consistent with Canada's stated commitment to Indigenous rights and renewed nation-to-nation and Inuit-to-Crown relationships. In order for Canada to take the lead globally in progressive and inclusive trade, the government must develop a process for broader-based collaboration in a spirit of cooperative decision making in accordance with international law.

The adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration) in 2007 and the more recent reaffirmation of Indigenous rights in the American Declaration on the Rights of Indigenous Peoples (ADRIP), lend credence to the claim that participation of Indigenous peoples in the negotiation of international trade and investment agreements, which have the potential to impact their rights, is consistent with international law. Canada should continue to push for a chapter on Indigenous peoples and trade in NAFTA, for both principled and pragmatic reasons: creating opportunities that enhance Indigenous cross-border trade and obtaining the consent of Indigenous peoples for NAFTA negotiations would provide increased economic certainty, which is attractive to international investors.

Introduction

A few days before the renegotiation of NAFTA began,¹ Canada's Minister of Foreign Affairs Chrystia Freeland announced Canada's negotiating priorities, which included the addition of an Indigenous chapter to a modernized NAFTA.² This announcement follows years of increasing interest from Indigenous peoples to become involved in shaping Canada's international trade and investment policy. Last year, representatives from the Assembly of First Nations and Métis Nation appeared before the Standing Committee on International Trade to provide their views on the Trans-Pacific Partnership (TPP)³, including a request for meaningful consultation and involvement of First Nations in the negotiations.⁴ A new organization, the International Inter-tribal Trade and Investment Organization (IITIO), was established in 2015 to encourage trade among North American Indigenous nations.⁵ One First Nation demonstrated its belief that the participation of Indigenous peoples in international negotiations was required under Canadian law as they attempted a legal challenge over the lack of consultation for the ratification of an international investment agreement.⁶ For those

1 *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, 32 ILM 296 (entered into force 1 January 1994) [NAFTA].

2 Chrystia Freeland, "Address by Foreign Affairs Minister on the modernization of the North American Free Trade Agreement (NAFTA)" (Speech delivered at a public forum, University of Ottawa, 14 August 2017), online: Global Affairs Canada <https://www.canada.ca/en/global-affairs/news/2017/08/address_by_foreignaffairsministeronthemodernizationofthenorthame.html>.

3 *Trans-Pacific Partnership Agreement*, 4 February 2016 (not yet entered into force), online: Consolidated TPP Text – Table of Contents <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ppp-ptp/text-texte/toc-tdm.aspx?lang=eng>.

4 House of Commons, Standing Committee on International Trade, 42nd Parl, 1st Sess, No 26 (14 June 2016) (National Chief Perry Bellegarde), online: CIIT Committee Meeting <www.ourcommons.ca/DocumentViewer/en/42-1/CIIT/meeting-26/evidence>.

5 A partnership between individuals from First Nations and Native American tribes, with support from international trade and investment experts from Canada and the United States, IITIO aims to "develop over time the tools, mechanisms and analysis necessary to assist in the global flow and exchange of Indigenous goods, services and investments." "Terms of Reference – IITIO" (28 November 2016), online: <iitio.org/terms-reference-iitio-2/>.

6 See *Hupacasath First Nation v Canada (Minister of Foreign Affairs)*, 2013 FC 900 at para 51, [2014] 4 FCR 836, online: <<https://www.canlii.org/en/ca/fct/doc/2013/2013fc900/2013fc900.html>>.

who have been following this debate, Freeland's speech was an acknowledgement of these efforts.

All three NAFTA partners have significant Indigenous populations.⁷ When NAFTA was first conceived, Indigenous peoples were not involved in the negotiations,⁸ and this lack of agency has been cited as a factor in the uprising in the Mexican state of Chiapas due to fears from Indigenous farmers that corn imports from the United States would disrupt small-scale and subsistence farming, leading to food insecurity and impacts on Indigenous culture.⁹ In Canada, the response to NAFTA was much more muted, although the Assembly of First Nations issued a resolution in 1993 noting its concerns about the lack of First Nations input in the development of NAFTA and asserting that the agreement would adversely affect, either directly or indirectly, their jurisdiction over natural resources in traditional territories.¹⁰

Canada's domestic policy still needs to be developed to allow for greater Indigenous participation in the negotiation of international agreements. The renegotiation of NAFTA in 2017, as well as the exploration of a free trade agreement with China,¹¹ offers unique opportunities to better align international trade and investment with international Indigenous and human rights law. The adoption of the

UN Declaration¹² in 2007 and the more recent reaffirmation of Indigenous rights in ADRIP¹³ lends credence to the claim that participation of Indigenous peoples in the negotiation of international trade agreements, which have the potential to impact their rights, is consistent with international law requirements, as well as in line with current international and Canadian domestic policy for Indigenous rights.

An Overview of Canadian and International Law as it Pertains to Indigenous Peoples' Participation in Decision Making

The right for Indigenous peoples to participate in decision making is found in various articles of the UN Declaration and it is an established principle of international human rights law,¹⁴ deriving primarily from the right to self-determination as set out in article 3 of the declaration. The language of article 3 is mirrored in broader international human rights law at articles 1(1) in both the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights, except that the language in the UN Declaration clarifies that Indigenous peoples have the same right to self-determination as all people. Participation in decision making is to be based on

7 According to the United Nations, 15 percent of Mexico's population identifies as Indigenous, although this may be a low estimate. See United Nations Human Rights Office of the Commissioner, "Advancing Indigenous Peoples' Rights in Mexico" (7 July 2011), online: <www.ohchr.org/EN/NewsEvents/Pages/IndigenousPeoplesRightsInMexico.aspx>.

In the United States, two percent of the population is Native American, and this number is growing. See Tina Norris, Paula L Vines & Elizabeth M Hoeffel, "The American Indian and Alaska Native Population: 2010" *2010 Census Briefs* (January 2012), online: <www.census.gov/history/pdf/c2010br-10.pdf>. In Canada, Indigenous peoples (First Nations, Métis and Inuit) make up more than four percent of the population, but like Indigenous peoples in the United States, the population is young and growing. See Statistics Canada, "Aboriginal Peoples in Canada: First Nations People, Métis and Inuit" (15 September 2016), online: <www12.statcan.gc.ca/nhs-enm/2011/as-sa/99-011-x/99-011-x2011001-eng.cfm>.

8 Brenda Gunn, "Impacts of the North American Free Trade Agreement on Indigenous Peoples and Their Interest" (2006) 9 *Balayi: Culture, Law and Colonialism* 5, online: SSRN <papers.ssrn.com/sol3/papers.cfm?abstract_id=1586163>.

9 *Ibid.*

10 Assembly of First Nations, *Resolution on the North American Free Trade Agreement*, AFN Res 7/93 as cited in *ibid.*

11 Global Affairs Canada, "Exploratory discussions on a possible Canada-China free trade agreement" (4 August 2017), online: <international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/china-chine/fta-ale/background-contexte.aspx?lang=eng>.

12 *United Nations Declaration on the Rights of Indigenous Peoples*, 13 September 2007, 61st Sess, Annex, Agenda Item 68, UN Doc A/RES/61/295 (2007), online: <www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf> [UN Declaration].

13 Organization of American States, General Assembly, 46th Sess, *American Declaration on the Rights of Indigenous Peoples*, OR OEA/Ser.P/AG/doc.5537/16 (2016), online <www.narf.org/wordpress/wp-content/uploads/2015/09/2016oas-declaration-indigenous-people.pdf> [ADRIP].

14 *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976), online: <www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>; *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976), online: <www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>.

free, prior and informed consent (FPIC), which is written in six articles of the UN Declaration.¹⁵

This paper will specifically focus on articles 19 and 41 of the UN Declaration, which set out the rights of participation in domestic and international decision making.¹⁶ Article 19 requires that states “consult and cooperate in good faith with the indigenous peoples through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them,” while article 41 contains the requirement that “[t]he organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration.... Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.” The ADRI, adopted by consensus by the Organization of American States (OAS) General Assembly in 2016, reaffirms the language of article 19 of the UN Declaration in article XXIII(2). Indigenous peoples who live on the continent now known as North America (Turtle Island) are supported by two international declarations that affirm their Indigenous rights and related state obligations.¹⁷

In Canadian law, there is no clear legal requirement to consult on legislation or administrative decisions, which would include the negotiation and ratification of international treaties. In fact, recent case law in Canada seems to be moving away from an earlier Supreme Court of Canada (SCC) decision, which held that consultation is required for certain “strategic high level decisions.”¹⁸ Decisions from the Federal Court of

Appeal (FCA) regarding consultation for higher level administrative decisions do not follow the spirit of the government-stated objective of “a renewed, nation-to-nation relationship with Indigenous Peoples, based on recognition of rights, respect, co-operation, and partnership,”¹⁹ nor are they in line with last year’s promise to implement the UN Declaration in accordance with Canada’s Constitution,²⁰ as well as the recently announced “Principles respecting the Government of Canada’s relationship with Indigenous peoples.”²¹

The FCA’s decisions in *Hupacasath First Nation v Canada (Minister of Foreign Affairs)*²² and in *Canada (Governor General in Council) v Courtoreille*²³ found against First Nation appellants seeking consultation prior to the ratification of a bilateral investment treaty with China (*Hupacasath*) or prior to the introduction of omnibus environmental legislation to Parliament (*Courtoreille*). Neither decision discusses article 19 of the UN Declaration,²⁴ despite Canada’s endorsement of its requirements in 2010²⁵ and the promise made in 2016 to implement

15 UN Declaration, *supra* note 12 at arts 10, 11(2), 19, 28, 29, 32.

16 *Ibid* at arts 18, 19, 41.

17 It should be noted that Canada included the following footnote to the adoption of ADRI: “Canada reiterates its commitment to a renewed relationship with its Indigenous peoples, based on recognition of rights, respect, co-operation and partnership. Canada is now fully engaged in full partnership with Indigenous peoples in Canada, to move forward with the implementation of the UN Declaration on the Rights of Indigenous Peoples in accordance with Canada’s Constitution. As Canada has not participated substantively in recent years in negotiations on the American Declaration on the Rights of Indigenous Peoples, it is not able at this time to take a position on the proposed text of this Declaration. Canada is committed to continue working with our partners in the OAS on advancing Indigenous issues across the Americas.” See ADRI, *supra* note 13.

18 *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 44, [2010] 2 SCR 650 [*Rio Tinto*], online: <<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7885/index.do>>.

19 “Minister of Foreign Affairs Mandate Letter”, online: <<http://pm.gc.ca/eng/minister-foreign-affairs-mandate-letter>>.

20 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, online: <www.canlii.org/en/ca/laws/stat/schedule-b-to-the-canada-act-1982-uk-1982-c-11/latest/schedule-b-to-the-canada-act-1982-uk-1982-c-11.html> [*Constitution Act, 1982*].

21 Department of Justice, “Principles respecting the Government of Canada’s relationship with Indigenous peoples” (19 July 2017), online: <www.justice.gc.ca/eng/csj-sjc/principles-principes.html>.

22 2015 FCA 4, 379 DLR (4th) 737 [*Hupacasath*].

23 2016 FCA 311, 405 DLR (4th) 721 [*Courtoreille*].

24 The lower court *Hupacasath* decision briefly mentions the UN Declaration, but does not consider the declaration to affect the duty to consult analysis: “Although HFN also briefly stated in its Application that Canada’s duty to consult also arises from the Crown’s fiduciary obligations towards First Nations Peoples and the *United Nations Declaration on the Rights of Indigenous Peoples*, Resolution 61/295, 13 September 2007, I agree with the Respondents that the question of whether the alleged duty to consult is owed to HFN must be determined solely by application of the test set forth immediately above [Duty to consult test]. I would add in passing that HFN did not pursue these assertions in either written or oral argument, and that, in a press release issued by Aboriginal Affairs and Northern Development Canada, entitled *Canada’s Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples*, that Declaration is described as ‘an aspirational document’ and as ‘a non-legally binding document that does not reflect customary international law nor change Canadian laws.’ HFN did not make submissions or lead evidence to the contrary.” See 2013 FC 900 at para 51, [2014] 4 FCR 836, online: <www.canlii.org/en/ca/ctf/doc/2013/2013fc900/2013fc900.html> [*Hupacasath FC*].

25 Indigenous and Northern Affairs Canada, “ARCHIVED – Canada’s Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples” (12 November 2010), online: <www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142>.

the declaration.²⁶ The *Hupacasath* decision was argued before the current government was elected, but the decision in *Courtoreille* cannot be blamed on previous governmental policies. Although the former Conservative government enacted the omnibus bills that were the subject of the appeal, the appeal itself was not heard until 2016. Therefore, it is surprising that lawyers for Canada insisted on focusing on Canadian law, discounting the relevance of article 19 of the UN Declaration just days after Minister of Indigenous and Northern Affairs Carolyn Bennett announced at the United Nations that the declaration would be supported in Canada “without qualification.”²⁷

The FCA in *Courtoreille* and *Hupacasath* both comment on the overwhelming procedural requirements to consult many or all Aboriginal peoples in Canada on negotiations of international agreements or legislation that may adversely impact their rights. The impracticability of the consultation for administrative and legislative decisions was noted in both decisions. In *Hupacasath*, the court stated, “Taken to its extreme, the appellant’s position would require the Minister of Finance — before the annual budget speech in the House of Commons, on every measure in it that might possibly affect the investment and development climate — to consult with every First Nation, large or small, whose claimed lands might conceivably or imaginatively be affected, no matter how remotely, no matter how insignificantly.”²⁸

The minority opinion in *Courtoreille* also relied on this troubling idea that if consultation is unworkable for the government, it should not be required. In his concurring reasons as to why consultation on the omnibus bills are not required, J. A. Pelletier seems to create a new test that laws of general application cannot attract a duty to consult: “The duty to consult cannot be conceived in such a way as to render effective government impossible. Imposing a duty to consult with all Aboriginal peoples over legislation of general

application would severely hamper the ability of government to act in the interests of all Canadians, both Aboriginal and non-Aboriginal. Consultation takes time and the more groups there are to be consulted, the more complex and time-consuming the consultations. At some point the ability to govern in the public interest can be overwhelmed by the need to take into account special interests.”²⁹

Unfortunately, there are serious flaws in reasoning for excluding consultation requirements on the development of legislation of general application or any other measure, such as international agreements, which have the potential to broadly impact Aboriginal rights. The development of the test for consultation was created by the courts themselves, through an interpretation of section 35 of Canada’s Constitution Act, 1982. The language, “duty to consult and accommodate,” is not directly found in section 35, which recognizes existing Aboriginal and treaty rights of Aboriginal peoples.³⁰ In order to determine whether Aboriginal and treaty rights are adversely impacted by a government action to the point of infringement and therefore not justifiable, the SCC developed a procedural duty of consultation as a means of ensuring justification for infringement of the right,³¹ while acknowledging the importance of consultation as a means of achieving reconciliation.³²

It is therefore clearly open to the court to amend, expand or refine these requirements for administrative or legislative decisions that adversely impact Aboriginal rights, but Canada should not wait for legal challenges, as proactive engagement with Indigenous peoples is a more responsive and effective approach. The requirements for “strategic, higher level decisions” do not have to follow the same procedural requirements as, for example, the consultation requirements for the approval to develop a mine on a nation’s traditional territory, but can be tailored to meet the challenges of a broader consultation. The courts can look to the language of article 19

26 The Honourable Carolyn Bennett, minister of Indigenous and Northern Affairs, “Announcement of Canada’s Support for the United Nations Declaration on the Rights of Indigenous Peoples” (Speaking notes delivered at the United Nations Permanent Forum on Indigenous Issues, New York City, 10 May 2016) [“Canada’s Support for the UN Declaration”], online: <www.metisnation.ca/wp-content/uploads/2016/05/Speech-Minister-Bennett-UNPFII-NEW-YORK-MAY-10-FINAL.pdf>.

27 *Ibid.*

28 *Hupacasath*, *supra* note 22 at para 120.

29 *Courtoreille*, *supra* note 23 at para 92.

30 *Constitution Act, 1982*, *supra* note 20 at s 35(1) states: “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”

31 See *R v Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 [*Haida Nation*]; and *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550 [*Taku River*].

32 *Taku River*, *supra* note 31 at para 25.

of the UN Declaration, which speaks to free, prior and informed consent with “indigenous peoples through their own representative institutions” and develop a test that requires collaboration with Indigenous peoples’ nominated institutions, rather than consultation with individual communities or larger collectives such as a nation. For some higher level decisions that are national in scope, it may be predetermined that Indigenous-nominated institutions are the appropriate partner for decision making with the government, consistent with article 19. For other decisions, the impacts may be more regional and involve specific nations. Consistent with the common-law duty to consult, the depth of participation for article 19 FPIC requirements can be increased or decreased based on the potential for adverse impacts on rights.³³ The “impracticability of the consultation” rationale that has crept into the FCA’s decisions denies the creative and consensually created techniques that will maintain the honour of the Crown and affirm both domestic and international commitments to Indigenous peoples.

There are inherent risks if consultation is not undertaken for proposed legislation or for international agreements. If it is later determined that a measure contained in legislation or an international agreement infringes on a right, this action may not be justified if there was no prior consultation. The court in *Courtoreille* recognized that risk: “To the extent that the impugned decisions directly derive from the policy choices embedded in a statute, the validity of such a statute may be called into question and consultation prior to the adoption of that statute will be a key factor in determining whether the infringement of an Aboriginal or treaty right is justified.”³⁴ British Columbia’s provincial court illustrated this risk

33 Claire Charters sets out a “contextual-participation approach” with consent at the high end and formal avenues of input at the lower end of the scale, consistent with the Canadian duty to consult law, the Committee on the Elimination of Racial Discrimination (CERD) and recommendations from James Anaya, the former special rapporteur for the rights of Indigenous peoples. See Claire Charters, “A Self-Determination Approach to Justifying Indigenous Peoples’ Participation in International Law and Policy” (2010) 17 *Intl J on Minority and Group Rights* 215 at 222–223, online: SSRN <ssrn.com/abstract=2887693>, citing Human Rights Council, *Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, UNGAOR, 12th Sess, Agenda Item 3, UN Doc A/HRC/12/34 (2009); *Haida Nation*, *supra* note 31; CERD, *Decision 1(66) New Zealand Foreshore and Seabed Act 2004*, CERD, 66th Sess, CERD/C/66/NZL/Dec.1 (2005) at para 1, online: <www2.ohchr.org/english/bodies/cerd/docs/CERD.C.66.NZL.Dec.1.pdf>.

34 *Courtoreille*, *supra* note 23 at para 63.

in a 2017 decision about cross-border hunting by a member of the Sinixt Nation. The provincial court found that provisions in the Wildlife Act³⁵ that restricted non-residents from hunting game in British Columbia infringed on the Aboriginal rights of a member of the Sinixt Nation and therefore could not be justified, due to the lack of consultation with the Sinixt and because the provision, which did not take into consideration the Aboriginal rights to hunt for food, social and ceremonial rights were therefore contrary to the honour of the Crown. According to Provincial Court judge Lisa Mrozinski, “The Crown’s refusal to consult is understandable given its position in this trial that no Sinixt aboriginal rights exist in Canada today. Still, consultation is a requirement in the justification analysis. Without it, the Crown can never hope to meet its onus to prove a justification of the infringement in this case.”³⁶

There are consultation requirements for international treaty making in many of Canada’s more modern treaties with First Nations, mostly in treaties made with nations that reside in British Columbia or the Yukon. These provisions already require consultation before Canada consents to be bound by a new international treaty that would give rise to new international legal obligations that may adversely affect a First Nation’s right.³⁷ This requirement is reciprocal, as some modern treaties also include articles that could require a First Nation having to remedy “the law or other exercise of power to the extent necessary to enable Canada to perform the International Legal Obligation,” which is defined as obligation binding on Canada under international law.³⁸

Hupacasath First Nation’s traditional territory is unceded, and the homepage of their official website asserts title, as well as stating that they will never negotiate a modern treaty.³⁹ If a First Nation party to a modern treaty brought a similar

35 *Wildlife Act*, RSBC 1996, c 488, ss 11, 47, online: <www.bclaws.ca/civix/document/id/consol24/consol24/00_96488_01>.

36 *R v DeSautel*, 2017 BCPC 84 at para 179, BCWLD 2514 [DeSautel]. The province of British Columbia has appealed this decision to the BC Supreme Court. Bill Metcalfe, “Province appeals Sinixt hunting case”, *Nelson Star* [1 May 2017], online: <www.nelsonstar.com/news/sinixt-hunting-trial-goes-to-appeal/>.

37 See e.g. *Tla’amin Final Agreement* (11 April 2014), art 24, online: <www.aadnc-aandc.gc.ca/eng/1397152724601/1397152939293>.

38 *Ibid* at art 26.

39 Hupacasath First Nation, “Ownership: Statement of Aboriginal Rights and Title”, online: <hupacasath.ca/ownership/>.

claim requiring consultation for an international agreement, would the court deem its case to be “speculative”? Consultation for international agreements can be a treaty right, and at least one modern treaty does not mention adverse effects, but instead includes language similar to the UN Declaration and requires that Canada undertake consultation if the international treaty “may affect a right” of a First Nation.⁴⁰ The lower court in *Hupacasath* noted that Canada’s position that the Canada-China Foreign Investment Promotion and Protection Agreement (CCFIPPA) could never attract a duty to consult was “inconsistent with provisions that are included in a number of final agreements that Canada has entered into with First Nations, which requires it to consult with those First Nations prior to consenting to be bound by a new international treaty which would give rise to new international legal obligations that may adversely affect a right of the First Nations.”⁴¹

The FCA in *Hupacasath* determined that treaty making was an appropriately reviewable government prerogative that left the door open to the possibility of future consultation requirements, but the court in *Courtoreille* found that there was no duty to consult on legislation due to parliamentary privilege. The SCC has agreed to hear the appeal for *Courtoreille*, which will allow the highest court to provide for much-needed guidance on this matter. Whether the SCC will be open to considering how the role of international law should guide consultation for legislation, specifically article 19 of the UN Declaration, it will no doubt be debated in oral argument.

Even without the benefit of further guidance from the SCC on which high-level strategic policy decisions trigger the duty to consult, Canada should fill this policy gap for consultation on international agreements that may impact Aboriginal rights for both principled and pragmatic reasons. In light of the government’s commitment to the UN Declaration and a renewed nation-to-nation, Inuit-to-Crown relationship, the government could develop a process for broader-based collaboration with Indigenous-nominated representative institutions in a spirit of

cooperative decision making, in accordance with the language in article 19 of the UN Declaration. As well, obtaining the consent of Indigenous peoples for international trade and investment agreements would provide the economic certainty attractive to international investors.

Maybe Not So Speculative after All?

Both the Federal Court and the FCA held that no consultation was required with *Hupacasath* First Nation for the ratification of the CCFIPPA⁴² as any impacts on their Aboriginal rights were “non-appreciable and entirely speculative in nature.”⁴³ As well, both levels of court found that the First Nation had not established a causal link between potential adverse impacts to their rights and the international investment treaty. Lawyers for Canada argued before the Federal Court that consultation was not required since any adverse impacts were speculative, based on the fact that there have been claims that threatened Aboriginal interests under NAFTA Chapter 11: “[T]here hasn’t even been a claim filed with respect to an aboriginal measure or a measure taken to accommodate an aboriginal interest in Canada throughout the NAFTA experience...So that is the experience that Canada monitors and looks to, and because of that Canada is satisfied that there have not been problems with respect to protecting aboriginal interests and accommodating them where required.”⁴⁴

The declaration of Aboriginal title lands in Canada is a significant change to Canadian Aboriginal law, which may render past experiences with NAFTA Chapter 11 claims less relevant. Aboriginal title was first recognized in Canadian common

40 See *Land Claims and Self-Government Agreement among the Tlicho and the Government of the Northwest Territories and the Government of Canada*, [25 August 2003] art 7.13.2, online: <www.aadnc-aandc.gc.ca/eng/1292948193972/1292948598544>.

41 *Hupacasath FC*, *supra* note 24 at para 69.

42 *Agreement Between the Government of Canada and the Government of the People’s Republic of China for the Promotion and Reciprocal Protection of Investments*, (8 September 2012), Can TS 2014/26 (entered into force 1 October 2014), online: <international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/china-chine/fipa-apie/> [CCFIPPA].

43 *Hupacasath*, *supra* note 22 at para 22, citing *Hupacasath FC*, *supra* note 24 at 3, 147–148.

44 *Hupacasath FC*, *supra* note 24 (Oral Argument, Respondents Volume 2, 6 June 2013).

law by the Privy Council in *St. Catherine's Milling*⁴⁵ and expounded upon in *Calder v Attorney General of British Columbia*,⁴⁶ *Guerin v The Queen*⁴⁷ and *Delgamuukw v British Columbia*.⁴⁸ This series of decisions set out the reasons why Aboriginal title is understood as *sui generis* interest:⁴⁹

- Aboriginal title is derived from historic occupation and possession of the lands.⁵⁰
- Aboriginal title is inalienable and cannot be transferred, sold or surrendered to anyone other than the Crown.⁵¹
- Aboriginal title encompasses the right to exclusive use and occupation of the land.⁵²
- Aboriginal title is held communally and, although the use of the land is not restricted to traditional uses, "The land has an inherent and unique value in itself, which is enjoyed by the community with aboriginal title to it. The community cannot put the land to uses which would destroy that value."⁵³

The test for establishing Aboriginal title was set out in *Delgamuukw*,⁵⁴ but it took two more decades for the SCC to make the first declaration of Aboriginal

title in *Tsilhqot'in Nation v British Columbia*.⁵⁵ *Tsilhqot'in Nation* was decided upon while *Hupacasath* was under reserve at the FCA. The FCA asked for additional submissions from the parties to consider whether the decision in *Tsilhqot'in Nation* had modified when the duty to consult was triggered. After hearing from the parties, the FCA was satisfied that *Rio Tinto*, as well as the other leading duty-to-consult decisions, *Mikisew Cree First Nation v Canada*⁵⁶ and *Haida Nation*,⁵⁷ were still the relevant legal precedents for consultation.⁵⁸

While the trigger for consultation may not have been changed by *Tsilhqot'in Nation*, the nature and consequences of consultation have arguably been significantly altered. It is now questionable whether an investor can rely on the previous consultation undertaken by the Crown on lands where Aboriginal title is established. Instead of consulting an Aboriginal community and perhaps accommodating the impacted Aboriginal right, the SCC recommends that the Crown seek consent from the relevant Aboriginal group on Aboriginal title land for the proposed land use:

Once title is established, it may be necessary for the Crown to reassess prior conduct in light of the new reality in order to faithfully discharge its fiduciary duty to the title-holding group going forward. For example, if the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing. Similarly, if legislation was validly enacted before title was established, such legislation may be rendered inapplicable going forward to the extent that it unjustifiably infringes Aboriginal title.⁵⁹

This prudent advice indicates that declaration of Aboriginal title may create new risks and uncertainties to international investors in Canada. There is potential for a dispute if title is declared by a court *after* an investment was made by a

45 *St Catherine's Milling & Lumber Co v The Queen* (1888), [1889] LR 14 App Cas 46, 6 LT 197 (JCPC) [*St. Catherine's Milling*], online: <<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/3769/index.do>>. The decision of the Privy Council is much criticized as evidence of Aboriginal law in Canada being built on assumed sovereignty based on the Doctrine of Discovery. Aboriginal or "Indian Title" is described in the decision as "a personal and usufructuary right, dependent upon the good will of the Sovereign" and "a mere burden."

46 *Calder et al. v Attorney-General of British Columbia* [1973] SCR 313, 34 DLR (3rd) 145 [*Calder*], online: <<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/5113/index.do>>.

47 *Guerin v The Queen*, [1984] 2 SCR 335, 12 DLR (4th) 321 [*Guerin*], online: <<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2495/index.do>>.

48 *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193 [*Delgamuukw*], online: <<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1569/index.do>>.

49 *Guerin*, *supra* note 47 at 382.

50 "Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries." *Calder*, *supra* note 46 at 328.

51 *Delgamuukw*, *supra* note 48 at para 113.

52 *Ibid* at para 115.

53 *Ibid* at para 129.

54 *Ibid*.

55 *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, 2 SCR 257 [*Tsilhqot'in Nation*], online: <<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14246/index.do>>.

56 *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, 3 SCR 388, online: <<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2251/index.do>>.

57 *Haida Nation*, *supra* note 31.

58 *Hupacasath*, *supra* note 23 at para 80.

59 *Tsilhqot'in Nation*, *supra* note 55 at para 92.

foreign investor pursuant to a foreign investment promotion and protection agreement (FIPA) as prior approvals may prove to be inapplicable, leading to a claim of indirect expropriation or an allegation that the investor was not treated in accordance with international standards of treatment. Pamela Palmater noted the reality of Aboriginal title for international investors when providing evidence before the Standing Committee on International Trade: “We know from the *Tsilhqot’in* case what aboriginal title land means. It means the exclusive jurisdiction to determine what happens with the lands and resources and benefits in that territory. Exclusive means exclusive. Nothing in the TPP [Trans-Pacific Partnership] can happen on any aboriginal title lands in this country without the consent of First Nations.”⁶⁰

Aboriginal title also changes the beneficial ownership interests of the resources on title lands. Chief Justice Beverley McLachlin explained in *Tsilhqot’in Nation* that “the title holders have the right to the benefits associated with the land — to use it, enjoy it and profit from its economic development. As such, the Crown does not retain a beneficial interest in Aboriginal title land.”⁶¹ She further explained the benefits of Aboriginal title for the *Tsilhqot’in Nation*: “This gives them the right to determine, subject to the inherent limits of group title held for future generations, the uses to which the land is put and to enjoy its economic fruits. As we have seen, this is not merely a right of first refusal with respect to Crown land management or usage plans. Rather, it is the right to proactively use and manage the land.”⁶² What a declaration of Aboriginal title lands means for trade in resources from unceded lands is a matter that should be the subject of consultations with the nations who have, or assert, Aboriginal title.

In addition to significant legal changes to Canadian law relating to a declaration of Aboriginal title, a recent dispute in British Columbia between a Canadian-based exploration company with foreign investment, China Minerals Mining Corp. (China Minerals) and the provincial government

illustrates why Canada may be found to be in non-compliance with Chapter 11 by a panel of international arbitrators due to an Indigenous land claim settlement. It is unclear why China Minerals brought the dispute before the British Columbia Supreme Court rather than under the CCFIPPA. Some have speculated that launching a judicial review was chosen as a means of keeping the dispute lower profile, so as not to interfere with the exploration of a Canada-China free trade agreement.⁶³ However, as there is no requirement to exhaust local remedies in the CCFIPPA,⁶⁴ this claim could easily have become the first case to trigger the dispute mechanism under the CCFIPPA. And, China Minerals could have launched a claim under the CCFIPPA investor-state dispute settlement (ISDS) mechanism if the dispute before the British Columbia courts ultimately proved unsuccessful.

China Minerals’ judicial review petition requested a declaration that the company’s right to procedural fairness was violated as they were not consulted prior to a land claim agreement being signed pursuant to the British Columbia treaty negotiation process with the Kaska Dene Council (a collective representing several First Nations communities).⁶⁵ China Minerals requested orders that would quash a proposed land transfer, which was part of the land claim agreement. The company acquired subsurface rights in a parcel that was to be transferred as part of the land claim settlement. China Minerals had already invested in exploration and drilling on this land. According to its petition, the change from Crown land to fee simple would change the underlying regulatory process and impact the company’s ability to develop its mining interests.⁶⁶ As well, Kaska Dene was planning a run of the river’s hydroelectricity project on the land, which China Minerals claimed was not compatible with their future mining plans.

In January 2017, the BC court declined to hear the judicial review, as the matter had become moot since Kaska Dene’s plans for the hydro project changed and they no longer wanted the disputed lands. China Minerals’ chairman was

60 House of Commons, Standing Committee on International Trade, 42nd Parl, 1st Sess, No 26 (14 June 2016) (Pamela Palmater), online: <www.ourcommons.ca/DocumentViewer/en/42-1/CIIIT/meeting-26/evidence>.

61 *Tsilhqot’in Nation*, *supra* note 55 at para 70. The Crown can encroach on Aboriginal title, but that encroachment would be subject to justification. See para 71.

62 *Ibid* at para 94.

63 Will Horter, “Canada’s first Chinese FIPA case in the making?”, *Dogwood* (15 February 2016), online: <dogwoodbc.ca/first-chinese-fipa-case/>.

64 CCFIPPA, *supra* note 42 at art 21.

65 *China Minerals Mining Corp v British Columbia (Minister of Forests et al.)*, 6 June 2016, Vancouver Registry No S-160923 (BCSC) (amended petition).

66 *Ibid* at para 20.

unhappy with the turn of events as the company “believe[d] this was an excellent opportunity for the Court to provide meaningful guidance to the government and others on the protection of 3rd party rights when the government enters into treaties....China Minerals supports reconciliation between the province of BC and Aboriginal groups — provided existing 3rd party rights are protected or properly compensated....The government transferred the lands to Kaska Dena without any consultation with the Company....We are hopeful that the government will learn from our case and rectify its policies and procedures.”⁶⁷

Canada took the position in *Hupacasath* that there was no need for broad reservations, excluding section 35 of the Constitution Act, 1982, from the international investment provisions for expropriation/regulatory takings, or from the provisions requiring the minimum standard of treatment. According to Canada’s lawyers, “there’s no need for a reservation here, and that’s why we said before that there’s no conflict between the treaty’s provisions — between both — between the FIPPA’s position and between the obligations that Canada owes to aboriginal peoples.”⁶⁸

However, the China Minerals dispute provides some examples of the potential conflicts. It was the company’s position that they were owed consultation for the change in status of the ownership of the surface right from Crown to private land as it impacted their third-party rights. This is ironic, as it is the Aboriginal collective that makes up Kaska Dene, not China Minerals, who may have been denied consultation for the granting of mineral rights on proposed treaty settlement lands.⁶⁹ The company has no rights to procedural fairness under British Columbia law for the disposition of the Crown land to fee simple as the

subsurface rights were not impacted.⁷⁰ The company tried to invalidate an incremental treaty, an agreement that would be constitutionally protected once finalized.⁷¹ China Minerals’ statement after the dispute was resolved (reproduced above) can be characterized as an attempt at regulatory chill to try to convince the government to subordinate Aboriginal rights in favour of investor protections.⁷² Arthur Manuel and Nicole Schabus characterized international investment agreements as placing “Indigenous Peoples in direct competition with multinational corporations for control over their lands. While multinational firms can sue even for expropriation of future profits, Indigenous Peoples still have not been able to secure the implementation of their ancestral land rights.”⁷³

As this dispute was only resolved when Kaska Dene determined they no longer wanted the specific parcel of land, it remains to be seen whether Canada will successfully protect Aboriginal rights in a dispute with a foreign investor. Canada and the provinces may be able to lessen the risk of an international investment dispute by notifying investors on asserted title lands about the *Tsilhqot’in Nation* decision and recommending that FPIC be obtained from the First Nation prior to completing the investment. Comprehensive carve-outs could be negotiated by Canada in a renegotiated NAFTA, which would alleviate the fear that international arbitrators may, in the future, have to decide on an investment dispute concerning a land claim settlement, or some other matter involving treaty rights or Aboriginal title. One precedent that is more protective of treaty rights was included by New Zealand in article 29 of the Trans-Pacific Partnership Agreement:

Article 29.6: Treaty of Waitangi

1. Provided that such measures are not used as a means of arbitrary or

67 “China Minerals Reports Court Decision”, *Accesswire* (18 January 2017), online: <www.accesswire.com/453042/China-Minerals-Reports-Court-Decision>.

68 *Hupacasath FC*, *supra* note 24.

69 Gavin Smith, “Alternate Realities: Flipping the Frame on Mining Corporations’ Claim of Unfair Land Transfers to First Nations” (22 March 2016), *Environmental Law Alert Blog*, online: West Coast Environmental Law <www.wcel.org/blog/alternate-realities-flipping-frame-mining-corporations-claim-unfair-land-transfers-first>. In this commentary, Gavin Smith of West Coast Environmental Law noted that British Columbia’s “free entry” system of allowing mineral staking without any consultation of First Nations may be contrary to Aboriginal rights, including Aboriginal title.

70 *China Minerals Mining Corp v British Columbia (Minister of Forests et al.)*, 13 April 2016, Vancouver Registry No. S-160923 (BCSC) (Response to the Petition).

71 *Constitution Act, 1982*, *supra* note 20 at s 35.

72 Victoria Tauli-Corpuz, *Report of the Special Rapporteur on the rights of indigenous people*, OHCHR, 33rd Sess, Agenda Item 3, UN Doc A/HRC/33/42] (2016) at para 5, online: OHCHR <www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session33/Pages/ListReports.aspx>.

73 Arthur Manuel & Nicole Schabus, “Indigenous Peoples at the Margin of the Global Economy: A Violation of International Human Rights and International Trade Law”, (2005) 8:229 *Chapman L Rev* 222 at 235, online: <<http://digitalcommons.chapman.edu/chapman-law-review/vol8/iss1/10/>>.

unjustified discrimination against persons of the other Parties or as a disguised restriction on trade in goods, trade in services and investment, nothing in this Agreement shall preclude the adoption by New Zealand of measures it deems necessary to accord more favourable treatment to Maori in respect of matters covered by this Agreement, including in fulfilment of its obligations under the Treaty of Waitangi.

2. The Parties agree that the interpretation of the Treaty of Waitangi, including as to the nature of the rights and obligations arising under it, shall not be subject to the dispute settlement provisions of this Agreement. Chapter 28 (Dispute Settlement) shall otherwise apply to this Article. A panel established under Article 28.7 (Establishment of a Panel) may be requested to determine only whether any measure referred to in paragraph 1 is inconsistent with a Party's rights under this Agreement.⁷⁴

A revised NAFTA could include similar wording in which the references to the Treaty of Waitangi would be replaced by a reference to section 35 of Canada's Constitution Act, 1982, the common-law duty to consult and accommodate, and recognition of Aboriginal title. Of course, it is open to Canada to negotiate a broader exemption in a future international investment treaty — one that completely excludes section 35 and related common-law duty to consult and accommodate from ISDS. It is interesting to note that Canada seems to have recognized that measures taken to protect Indigenous rights may be vulnerable to investment claims. In July 2017, Canada, its provinces and territories entered into an internal free trade agreement, which also includes investment provisions and person-to-government dispute resolution, and has a broad exception that protects Indigenous rights and the fulfillment of those rights from the provisions of the agreement. Article 800 of the Canadian Free Trade Agreement sets out that:

⁷⁴ *Trans-Pacific Partnership Agreement*, 4 February 2016 (not yet entered into force). See "Consolidated TPP Text - Table of Contents", online: <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpa-tpptp/text-texte/toc-tom.aspx?lang=eng>.

→ This Agreement does not apply to any measure adopted or maintained by a Party with respect to Aboriginal peoples. It does not affect existing aboriginal or treaty rights of any of the Aboriginal peoples of Canada under section 35 of the Constitution Act, 1982.

→ For greater certainty, nothing in this Agreement shall prevent a Party from fulfilling its obligations under its treaties with Aboriginal peoples, including land claims agreements.⁷⁵

Exception provisions in a modernized NAFTA should be negotiated to effectively protect Aboriginal rights, treaty rights and Aboriginal title interests in land, making reference not only to section 35 of Canada's Constitution, but also to internationally recognized Indigenous rights in the UN Declaration.

What Has Changed since *Hupacasath*: Canada's Promise of a Nation-to-Nation Relationship

Hupacasath was decided by the FCA in 2015, and over the past two years, the federal landscape for Indigenous relations has shifted. The first signs of change were heralded by the release of the *Truth and Reconciliation Commission of Canada: Calls to Action*,⁷⁶ a report developed over many years, based on accounts from survivors and others impacted by Canada's residential school system. Implementing all 94 calls to action was promised under the Liberal Party's platform, and many of the recommendations referenced the implementation of the UN

⁷⁵ *Canadian Free Trade Agreement*, Canada, Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, British Columbia, Prince Edward Island, Saskatchewan, Alberta, Newfoundland and Labrador, the Northwest Territories, Yukon and Nunavut, 6 April 2017, (entered into force 1 July 2017), [*Canadian Free Trade Agreement*] online: <www.cfta-alec.ca/wp-content/uploads/2017/06/CFTA-Consolidated-Text-Final-Print-Text-English.pdf>.

⁷⁶ *Truth and Reconciliation Commission of Canada, Honouring the Truth, Reconciling for the Future, Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Ottawa: Truth and Reconciliation Commission of Canada, 2015), online: <www.trc.ca/websites/trcinstitution/File/2015/Findings/Exec_Summary_2015_05_31_web_o.pdf>.

Declaration in Canadian law as a “framework for reconciliation.”⁷⁷ Six months later, at the 2016 United Nations Permanent Forum for Indigenous Issues, Canada announced that it was supporting the UN Declaration, without qualification, and the declaration would be implemented in accordance with Canada’s Constitution as “through section 35 of its Constitution, Canada has a robust framework for the protection of Indigenous rights.”⁷⁸ Other notable policy changes include a renewal of the nation-to-nation relationships through memoranda of understanding with Indigenous political organizations such as the Assembly of First Nations,⁷⁹ Métis Nation⁸⁰ and Inuit-to-Crown relationship with Inuit Tapiriit Kanatami.⁸¹ A working group of ministers was created to assess which statutory changes and new policies are needed to best meet Canada’s constitutional obligations and international commitments, including the UN Declaration.⁸² The review of laws and policies is to be guided by 10 “Principles respecting the Government of Canada’s relationship with Indigenous peoples”, a policy document announced by Minister of Justice Jody Wilson-Raybould on July 14, 2017.⁸³ Principle 6 acknowledges meaningful engagement “that builds on and goes beyond the legal duty to consult. In delivering on this commitment, the Government *recognizes the right of Indigenous peoples to participate in decision-making in matters that affect their rights through their own representative institutions and the need to consult and cooperate in good faith with the aim of securing their free, prior, and informed consent.*”⁸⁴

This development is notable as it repeats the language of article 19 of the UN Declaration, and the explanatory notes state that obtaining consent is not restricted to undertakings on Aboriginal title lands. As these principles were released one month prior to the earliest possible date that NAFTA negotiations could be initiated, there may be increased expectations from Indigenous leadership that the “opportunities to build processes and approaches aimed at securing consent, as well as creative and innovative mechanisms that will help build deeper collaboration, consensus, and new ways of working together” will include opportunities for Indigenous participation in decision making for international trade and investment negotiations.

Canada has also received recommendations about increasing the participation of Indigenous peoples in decision making from expert panels recommending enhancements to the National Energy Board⁸⁵ and to the Canadian Environmental Assessment Act.⁸⁶ In April 2017, Canada returned to the United Nations Permanent Forum for Indigenous Issues to support a new status at the United Nations General Assembly for Indigenous peoples to participate in decision making that affected them, as non-governmental consultative status was not meeting the needs of

77 *Ibid* at 325.

78 See Canada’s support for UN Declaration, *supra* note 24.

79 See *Assembly of First Nations – Canada Memorandum of Understanding on Joint Priorities* (12 June 2017), online: <www.afn.ca/uploads/files/canada-afn-mou-final-eng.pdf>.

80 See *Canada-Métis Nation Accord* (13 April 2017), online: <www.metisnation.ca/wp-content/uploads/2017/04/Canada-Métis-Nation-AccordEn.pdf>.

81 See the *Inuit Nunangat Declaration on Inuit-Crown Partnership* (9 February 2017), online: <www.itk.ca/wp-content/uploads/2017/02/English-Inuit-Nunangat-Declaration.pdf>.

82 “Prime Minister announces Working Group of Ministers on the Review of Laws and Policies Related to Indigenous Peoples” (22 February 2017), online: <pm.gc.ca/eng/news/2017/02/22/prime-minister-announces-working-group-ministers-review-laws-and-policies-related>.

83 Canada, Department of Justice, “Principles respecting the Government of Canada’s relationship with Indigenous peoples” (14 July 2017), online: <www.justice.gc.ca/eng/csj-sjc/principles-principes.html>.

84 *Ibid* at principle 6 [emphasis added].

85 “Canadians told us that they expect to see their energy regulator fully realize nation to nation relationships with Indigenous peoples. We agree. Our recommendations call for the equal recognition of traditional knowledge in hearings, acknowledgment of Indigenous worldviews in decision-making, a new Indigenous Major Projects Office to support true Consultation and accommodation, and several other measures to ensure that Indigenous rights, aboriginal and treaty rights, and title are fully taken into account by the regulator.” See Natural Resources Canada, *Forward, Together – Enabling Canada’s Clean, Safe and Secure Energy Future, Report of the Expert Panel on the Modernization of the National Energy Board* (15 May 2017), online: <www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/pdf/NEB-Modernization-Report-EN-WebReady.pdf>.

86 “UN Declaration is clear that all decision-making processes that impact the rights of Indigenous Peoples must be in accordance with the distinctive governance institutions, laws and customs of the relevant Indigenous Peoples. Accordingly, Indigenous Peoples must have the ability to select their own representatives to participate on their behalf within IA [impact assessment] processes, and maintain and develop internal decision-making institutions and distinctive customs.” See *Building Common Ground: A New Vision for Impact Assessment in Canada, The Final Report of the Expert Panel for the Review of Environmental Assessment Processes*, online: <www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes/building-common-ground.html>.

Indigenous peoples' representatives.⁸⁷ Canada's statement provided "unequivocal support [for] the representation of Indigenous self-governing nations at the United Nations General Assembly."⁸⁸ This initiative to enhance Indigenous representation at the United Nations is facing obstacles, but Canada's support remains strong. If Canada is holding itself out as a champion for Indigenous peoples' participation at the United Nations in relation to article 41 of the UN Declaration, this position should be supported by a complementary domestic policy that allows for an effective consultation process for international agreements with Indigenous peoples' representative institutions consistent with article 19 of the UN Declaration.

Indigenous Peoples Are Already Included in Trade Agreements – As a “Carve-Out”

Canada has 11 free trade agreements (FTAs) in force and four signed agreements, including the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union, the TPP and a modernized Canada-

Chile Free Trade Agreement (CCFTA).⁸⁹ Seven agreements are currently under negotiation, and Canada is engaged in exploratory discussions with four other countries, including China.⁹⁰

An examination of the FTAs, either signed or in force, reveals that there are a number of exceptions, reservations or “carve-outs” included in the agreements specifically for Aboriginal peoples. These carve-outs allow Canada to preserve rights and trade preferences that benefit Aboriginal peoples in Canada. An exception to an FTA applies to all parties to the agreement and is contained in the treaty's text. Reservations are specific to the country making the reservation and are usually found in an annex to the agreement.⁹¹ In the General Agreement on Tariffs and Trade (GATT) rules and the World Trade Organization (WTO) agreements, there are no formal reservation processes, but countries have provided notes or notification of non-conforming programs. Examples include providing notice of programs that benefit Aboriginal businesses or agriculture from GATT requirements, as well as programs that may be considered subsidies,⁹² or allowing for government procurement policies that favour Aboriginal businesses and service providers over foreign competitors.⁹³ Under the WTO's Technical Barriers to Trade Agreement, Canada's duty to consult guidance has been flagged as a measure to other parties as a possible trade barrier, so that

87 Paragraph 3 of the draft preamble for the resolution references the UN Declaration and specifically notes which of its articles affirm the right to participation in decision making: “Reaffirming the solemn commitment to respect, promote and advance and in no way diminish the rights of Indigenous Peoples and to uphold the principles of the Declaration, including the rights to self-determination and participation in UN decision-making that affects them, in accordance with articles 3, 5, 18, 19, 20, 32, 33, 37, 39, 41 and 42 of the Declaration.” See *Draft Resolution by the General Assembly on Enabling the Participation of Indigenous Peoples' Representative Institutions in Meetings of Relevant United Nations Bodies on Issues Affecting Them*, UNGAOR, REV 2, (2017), online: <www.un.org/pga/71/wp-content/uploads/sites/40/2015/08/Indigenous-peoples-6-June-2017.pdf>.

88 Carolyn Bennett, “Speech for the Honourable Carolyn Bennett, Minister of Indigenous and Northern Affairs at the United Nations Permanent Forum on Indigenous Issues 16th Session: Opening Ceremony” (Speech delivered at the United Nations Headquarters, General Assembly Hall, New York, 24 April 2017), online: <www.canada.ca/en/indigenous-northern-affairs/news/2017/04/united_nations_permanentforumonindigenousissues16thsessionopenin.html>.

89 The TPP has been in limbo since January 23, 2017, when US President Donald Trump issued a presidential memorandum directing the United States Trade Representative to withdraw the United States as a signatory to the TPP, as well as permanently withdraw the United States from TPP negotiations. See “Presidential Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement”, online: <www.whitehouse.gov/the-press-office/2017/01/23/presidential-memorandum-regarding-withdrawal-united-states-trans-pacific>.

90 Global Affairs Canada, “Trade and investment agreements”, online: <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/index.aspx?lang=eng&menu_id=137>.

91 For more detailed reading on reservations in trade and investment treaties, see Barry Appleton, “Legal Opinion on National Reservations to the Multilateral Agreement on Investment” (14 November 1997), online: Appleton & Associates International Lawyers <www.appletonlaw.com/MAI/reservations.html>.

92 See notification for WTO – Agriculture: New or Modified Domestic Support Measures; WTO – Subsidies and Countervailing Measures. See *General Agreement on Tariffs and Trade*, 30 October 1947, 58 UNTS 187 (entered into force 1 January 1948) at art XVI:1; *Agreement on Subsidies and Countervailing Measures*, 15 April 1994, 1869 UNTS 14 (entered into force 1 January 1995) at art 25.

93 *Agreement on Government Procurement*, 15 April 1994, 1869 UNTS 508 (entered into force 1 January 1996), at Annex 7, online: <www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm>.

Canada's trading partners have been provided notice of this constitutional requirement.⁹⁴

In NAFTA specifically, there is a sectoral reservation for Aboriginal peoples for future cross-border services and investment in which "Canada reserves the right to adopt or maintain any measure denying investors of another party and their investments, or service providers of another party, any rights or preferences provided to Aboriginal peoples." This reservation applies to enumerated articles in the investment chapter and the services chapter.⁹⁵ Although this reservation is meant to be protective of Aboriginal and treaty rights, as discussed in more detail in the next section of this paper, the reservations taken by Canada in international investment treaties, or chapters in NAFTA and CETA, do not include expropriation (article 1110 of NAFTA) or the minimum standard of treatment (article 1105). As Gus van Harten noted in his expert evidence for *Hupacasath*, "these are the two obligations relied on most frequently by arbitrators to find a treaty violation and award compensation to a foreign investor."⁹⁶ Therefore, this carve-out for Indigenous peoples in NAFTA is incomplete.

The United States and Mexico have also taken future cross-border services and investment reservations in NAFTA for "socially or economically disadvantaged minorities," but their carve-outs do not mention Indigenous peoples specifically.⁹⁷ Each NAFTA partner also lists an existing measure that is excepted from the enumerated cross-border services and investment provisions. In Canada, the existing measure is the Constitution Act, 1982, in which section 35 recognizes and affirms existing Aboriginal and treaty rights, including modern land claim agreements. In the United

States, the existing measure is the Alaska Native Claims Settlement Act⁹⁸ and is therefore a much more limited reservation as it only applies to one law, rather than the broader constitutional rights in Canada. The existing measure for Mexico also applies to its constitution, *Constitución Política de los Estados Unidos Mexicanos*, artículo 4. Brenda Gunn explains that article 4 of the Mexican Constitution was amended in 1992 to include protections for Indigenous peoples' customs, languages and culture, and specific forms of social organization, so this reference to article 4 would provide some protection for Indigenous peoples in Mexico.⁹⁹

NAFTA exceptions and reservations for preferences provided to Aboriginal peoples were enhanced under CETA. This agreement will be provisionally applied in both Europe and Canada on September 21, 2017, even though it is not yet ratified by all European member states.¹⁰⁰ The reservations for investment and cross-border services are the same as in NAFTA. CETA also has a complete carve-out from the procurement chapter in Annex 19-7 for "any measure adopted or maintained with respect to Aboriginal peoples, nor to set asides for aboriginal businesses; existing aboriginal or treaty rights of any of the Aboriginal peoples of Canada protected by section 35 of the Constitution Act, 1982."¹⁰¹ This reservation would allow Canada to continue to award procurement contracts to Aboriginal businesses in a preferential manner, without having to apply CETA requirements. As well, CETA includes an exception for Aboriginal affairs in article 12.2.2 of its domestic regulation chapter, which is somewhat notable as this carve-out is located in the actual text of the agreement, rather than in an annex. The purpose of Chapter 12 is to encourage transparency and non-arbitrary criteria for licensing and approval requirements. The purpose of this exception would be to continue any practices or preferences that benefit Aboriginal service providers in Canadian regulations.

94 Canada's 2007 "Cabinet Directive on Streamlining Regulation" has been notified under the technical barriers to trade implementation notification pursuant to article 15.2. Page 4 of the Cabinet directive explains Canada's section 35 constitutional requirements. See online: <<http://publications.gc.ca/collections/Collection/BT22-110-2007E.pdf>>.

95 This reservation applies to the following articles: national treatment (articles 1102, 1202), most favoured nation (articles 1103, 1203), local presence (article 1205), performance requirements (article 1106), and senior management and boards of directors (article 1107). NAFTA, *supra* note 1 at Annex II, Schedule of Canada at II-C-1.

96 Letter from Gus van Harten to Mark Underhill, counsel to Hupacasath First Nation (13 February 2013) Re: Canada-China FIPPA-Request for Expert Opinion, Exhibit "C" to the Affidavit of Gus van Harten.

97 Mexico and the United States have not taken a reservation for most favoured nation (articles 1103, 1203), and Mexico's reservation also does not apply to performance requirements (article 1106), and senior management and boards of directors (article 1107).

98 *Alaska Native Claims Settlement Act*, 43 USC § 1601 (1971).

99 Gunn, *supra* note 8.

100 Amanda Connolly, "CETA to be provisionally applied in September", *iPolitics* (8 July 2017), online: <ipolitics.ca/2017/07/08/ceta-to-be-provisionally-applied-in-september/>.

101 *Comprehensive Economic and Trade Agreement*, 30 October 2016 (not yet entered into force), online: <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-ttexte/toc-tdm.aspx?lang=eng>; Annex 19-7, online: <international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-ttexte/19-A.aspx?lang=eng#a7>.

As noted previously, the most comprehensive trade and investment protection for Indigenous peoples in Canada is not found in an international trade agreement, but in an internal agreement. Article 800 of the Canadian Free Trade Agreement is a complete exemption for measures taken with respect to Aboriginal peoples, and the language of the exemption is clear that Aboriginal or treaty rights are not impacted by the agreement, including the fulfillment of land claims.¹⁰²

While the preferential treatment for Aboriginal peoples in WTO rules, NAFTA and CETA is welcomed and encouraged,¹⁰³ it is notable that when Canada was making decisions that concerned Indigenous peoples without engagement, Canada was: deciding which programs to exempt from international trade agreements; notifying its trade partners about section 35 consultation requirements; and protecting certain measures that benefit Aboriginal businesses and services from ISDS without a process to meaningfully consult Aboriginal peoples about the purposes of any of these reservations. Canada and the European Union released a “Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada & the European Union and its Member States” in November 2016, extolling the virtues of CETA: “[It is] a modern and progressive trade agreement which will help boost trade and economic activity, while also promoting and protecting our shared values and perspectives on the role of government in society.”¹⁰⁴ The joint statement also noted that “Canada is committed to active engagement with Indigenous partners to ensure the ongoing implementation of CETA continues to reflect their interests,” but did not explain that there was no formal consultation about these interests during the seven years when CETA was under negotiation.¹⁰⁵

102 *Canadian Free Trade Agreement*, *supra* note 75.

103 House of Commons, Standing Committee on International Trade, 42nd Parl, 1st Sess, No 26 (14 June 2016) (John Weinstein), online: CIIT Committee Meeting <www.ourcommons.ca/DocumentViewer/en/42-1/CIIT/meeting-26/evidence>.

104 Global Affairs Canada, “Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement (CETA) between Canada & the European Union and its Member States”, online: <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/jii-iiic.aspx?lang=eng>.

105 Gus Van Harten, “The EU-Canada Joint Interpretive Declaration/Instrument on the CETA, Updated Comments” (8 October 2016), Osgoode Legal Studies Research Paper No 6, Vol 13 Issue 2, online: SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2850281>.

Indigenous Peoples Are Ready to Collaborate with Canada on International Trade and Investment

The *Hupacasath* decision aptly demonstrated Indigenous peoples’ interest to engage in the development or renewal of international trade and investment agreements. Although the narrative throughout the *Hupacasath* decision focused on one small community on Vancouver Island, this band was supported by other First Nations in British Columbia and Ontario, including Serpent River First Nation and the Tsawwassen First Nation, along with the Union of British Columbia Indian Chiefs and the Chiefs of Ontario.¹⁰⁶ And interest in Indigenous peoples’ participation in international trade and investment agreements has only grown, both in Canada and internationally.

Even before *Hupacasath* First Nation brought a judicial review application to challenge the lack of consultation on the CCFIPPA, a collective of First Nations used international trade rules as a means of bringing global attention to violations of their rights. The Interior Alliance of Indigenous Nations submitted an *amicus curiae* brief in 2002 before a panel at the WTO, looking at whether Canada was subsidizing its softwood lumber, a never-ending trade dispute between Canada and the United States. The Interior Alliance argued that Canada’s failure to recognize Aboriginal title and failure to pay proper remuneration for timber harvested on traditional lands subject to title claims constituted a subsidy that was not in accordance with WTO rules.¹⁰⁷ As noted by Arthur Manuel, one of the main proponents of the Interior Alliance, “Becoming an active party to a WTO trade dispute offers us a chance to seek these more effective, ‘harder’ sanctions and mechanisms that can more certainly protect Aboriginal and treaty rights for us

106 Union of British Columbia Indian Chiefs, News Release, “Hupacasath Brings Canada-China Foreign Investment Promotion and Protection Agreement to the Federal Court” (5 June 2013), online: <www.ubcic.bc.ca/News_Releases/UBCICNews06051301.html#axzz4eM6UXvgM>.

107 Manuel & Schabus, *supra* note 73 at 247–248.

and other indigenous nations around the globe.”¹⁰⁸ The arguments in the *amicus curiae* brief may have more resonance post *Tsilhqot’in Nation*, now that Aboriginal title has been declared for a nation.

International investment agreements and ISDS have been characterized as a threat to Indigenous rights by Victoria Tauli-Corpuz, UN special rapporteur on the rights of indigenous peoples. She found that non-discrimination and expropriation clauses in international investment agreements have “significant potential to undermine the protection of indigenous peoples’ land rights and the strongly associated cultural rights.”¹⁰⁹ She further noted that these clauses may erode protections for Indigenous lands and may be a significant barrier to Indigenous land claims. Her follow-up report in August 2016 explored in greater depth the impacts that international investment may have on Indigenous rights, including an overview of some international investment arbitrations that relate to Indigenous lands.¹¹⁰ The special rapporteur met with international investment experts and Indigenous peoples during a series of regional and global consultations to conduct research for this report.

Tauli-Corpuz concluded that there are overarching issues regarding the impacts of investment agreements on Indigenous rights, which include: the failure to adequately address human rights in the preambles and substantive provisions of such agreements; the actual or perceived threat of enforcement of investor protections under ISDS, leading to regulatory chill; and the exclusion of Indigenous peoples from the drafting, negotiation and approval processes of agreements and from the settlement of disputes.¹¹¹

The special rapporteur frames the lack of consultation with Indigenous peoples, and their loss of agency before international investment arbitrators, as a willingness of many states to

prioritize economic interests over the human rights of their most vulnerable citizens. She quotes her predecessor Rodolfo Stavenhagen in the report when he stressed, “The idea of prior right being granted to a mining or other business company rather than to a community that has held and cared for the land over generations must be stopped, as it brings the whole system of protection of human rights of indigenous peoples into disrepute.”¹¹² These words seem prescient in light of threats of foreign investors as demonstrated by the China Minerals dispute in British Columbia.

A Trade and Indigenous Peoples’ Chapter as a Template for Future Trade and Investment Agreements

Minister Freeland’s announcement that Canada would seek to add an Indigenous chapter to NAFTA is in line with inclusion of a trade and gender rights chapter in the CCFTA, which is Canada’s most recent innovation in international trade agreements. This chapter acknowledges the importance of applying gender perspective to economic and trade issues to ensure that economic growth benefits everyone, confirms the intention of both parties to enforce their respective international agreements on gender from a rights perspective, and provides a framework for Canada and Chile to cooperate on issues related to trade and gender, including “the creation of a trade and gender committee that will oversee cooperation and share experiences in designing

108 Arthur Manuel, “Indigenous Brief to WTO: How the Denial of Aboriginal Title Serves as an Illegal Export Subsidy” in Jerry Mander & Victoria Tauli-Corpuz, eds, *Paradigm Wars: Indigenous Peoples’ Resistance to Globalization* (Berkeley, CA: Sierra Club Books, 2006), online: <www.couchichinginstitute.ca/assets/readings/WTO.pdf>.

109 Victoria Tauli-Corpuz, *Report of the Special Rapporteur of the Human Rights Council on the rights of indigenous peoples on the impact of international investment and free trade on the human rights of indigenous peoples*, UNGAOR, 70th Sess, UN Doc A/70/301 (2015), online: <www.un.org/en/ga/search/view_doc.asp?symbol=A/70/301>.

110 Tauli-Corpuz, *supra* note 72.

111 *Ibid* at para 31.

112 *Ibid* at para 36 citing Commission on Human Rights, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, submitted in accordance with Commission on Human Rights Resolution 2002/65**, UNESCOR, 59th Sess, UN Doc E/CN.4/2003/90/Add.3 (2003) at para 67(e).

programs to encourage women's participation in national and international economies."¹¹³

The trade and gender chapter helps to realize Canada's progressive trade agenda, which aims to ensure that "all segments of society, both in Canada and abroad, can take advantage of the economic opportunities flowing from trade and investment."¹¹⁴ Progressive trade has a particular focus on women, Indigenous peoples, youth, and small and medium-sized businesses.¹¹⁵ Last year, Minister Freeland and Minister Bennett met with Indigenous leaders to discuss international trade agreements, especially CETA and the TPP, pursuant to Canada's progressive trade agenda.¹¹⁶ This session was conducted after CETA and the TPP were negotiated, and therefore would not be seen by Indigenous peoples as meaningful consultation or an example of their participation in international decision making. In June 2017, Canada hosted another engagement session on international trade, which covered initiatives related to NAFTA and the proposed trade agreement with China. Representatives from the Assembly of First Nations, Métis National Council, Inuit Tapiriit Kanatami and the Congress of Aboriginal Peoples attended. The NAFTA brief was led by Steve Verheul, Canada's chief negotiator for NAFTA.

According to the Canadian government, Indigenous peoples are also slated to benefit from the progressive trade agenda, making it worth considering how elements of a trade and gender chapter could be applicable to a trade and

Indigenous peoples' chapter.¹¹⁷ The CCFTA includes cooperative language to bring a gender perspective to international trade with the aim of ensuring that economic growth benefits everyone. Indigenous peoples in all three NAFTA jurisdictions would benefit from the model of the gender chapter and could incorporate the idea of cooperation activities, which could be designed to improve the conditions for Indigenous peoples to engage successfully in cross-border trade. Similar to the establishment of a trade and gender committee, which oversees cooperation and shares experiences in designing programs to encourage women's participation in national and international economies, Canada could propose an Indigenous peoples' committee. Indigenous representation in this committee (nominated by Indigenous representative organizations) from all three NAFTA partners would be crucial for success. This committee could assist in the development of programs that encourage and promote Indigenous peoples' participation in national and international economies.

There are important intersectional considerations for the NAFTA parties to consider between a trade and gender, and a trade and Indigenous peoples' chapter. Promoting the inclusion of Indigenous women in domestic and international economies should be emphasized in both chapters. Improving economic opportunities for Indigenous women should be a particular focus for the Canadian government, especially as the NAFTA modernization negotiations are taking place while the National Inquiry into Missing and Murdered Indigenous Women and Girls is meeting with Indigenous communities across the nation, examining "systemic causes of all forms of violence against Indigenous women and girls in Canada by looking at patterns and underlying factors."¹¹⁸ The role of poverty in increased violence against Indigenous women

113 Global Affairs Canada, News Release, "Canada breaks new ground as it signs modernized free trade agreement with Chile focusing on trade and gender" (5 June 2017), online: <www.canada.ca/en/global-affairs/news/2017/06/canada_breaks_newgroundasit signsmodernizedfreetradeagreementwith.html>.

114 *Ibid.*

115 Minister of International Trade François-Philippe Champagne, "Roundtable on 'Leveraging Opportunities and Addressing Challenges to Intra-Commonwealth Trade and Investment'" (Speech delivered at the Inaugural Commonwealth Trade Ministers Meeting, London, 10 March 2017), online: Global Affairs Canada <www.canada.ca/en/global-affairs/news/2017/03/address_by_ministerchampagneattheinauguralcommonwealthtrademinis.html>.

116 Global Affairs Canada, News Release, "Government of Canada discusses trade with Indigenous leaders and organizations" (9 September 2016), online: <www.canada.ca/en/global-affairs/news/2016/09/government-canada-discusses-trade-indigenous-leaders-organizations.html>.

117 The IIITIO made a submission to Global Affairs Canada recommending the inclusion of a trade and indigenous peoples' chapter in a modernized NAFTA. The IIITIO's submission includes ideas presented by the author in a presentation entitled "Increasing Indigenous Peoples' Participation in International Trade and Investment," made at the 3rd International Inter-Tribal Trade Mission and Conference in Oklahoma on June 5–6, 2017, which is a precursor to this paper. See *Submission by the International Inter-Tribal Trade and Investment Organization to the Government of Canada for the Renegotiation and Modernization of the North American Free Trade Agreement* (14 July 2017), online: <<http://iiitio.org/nafta/>>.

118 National Inquiry into Missing and Murdered Indigenous Women and Girls, "Mandate", online: Indigenous and Northern Affairs Canada <www.aadnc-aandc.gc.ca/eng/1470140972428/1470141043933>.

will certainly be a key consideration for the commissioners of the national inquiry.¹¹⁹

The intersection between Indigenous women and the importance of improving economic outcomes is specifically referenced in the UN Declaration, as it notes obligations of states to “take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.”¹²⁰ The American declaration promotes gender equality throughout its obligations. As the trade and Indigenous peoples’ chapter should be consistent with international human rights, direct reference to the UN Declaration and ADRIP should be incorporated, as these declarations are applicable to all three NAFTA parties. Besides the relationship among Indigenous rights, gender and human rights, linkages among other chapters of NAFTA and the Indigenous peoples’ chapter will require discussions among the NAFTA parties. Proposed requirements in the environment, intellectual property, investment and labour chapters will all need to be shared between tables for consistency and respect for Indigenous rights throughout the modernized agreement.

A trade and Indigenous peoples’ chapter should include all carve-outs previously negotiated to preserve any preferences currently provided to Indigenous peoples in NAFTA. However, Canadian negotiators for a revised NAFTA should consider stronger reservations that are more proactive in effectively protecting Aboriginal rights, treaty rights and Aboriginal title interests in land, including more comprehensive protections from ISDS. The exception language in the Canadian Free Trade Agreement for Aboriginal peoples could serve as a starting point for discussion with NAFTA partners, but may be too comprehensive for a tripartite agreement.

A trade and Indigenous peoples’ chapter could consider provisions that allow for freer movement of Indigenous peoples and goods traded by Indigenous peoples across the Canada-US border. The international border has caused hardship to

nations that reside close to, or straddle, the border as some communities have been divided by the border physically, or have suffered economically, as noted by the Mohawks of Akwesasne and the Grand Council of the Haudenosaunee (Six Nations Confederacy).¹²¹ Crossing into the United States by certain First Nations members who have the appropriate documentation has been facilitated by the Treaty of Amity, Commerce and Navigation of 1794,¹²² also known as the Jay Treaty, and corresponding US law.¹²³ But the same rights have not been reciprocated by Canada as the Jay Treaty, being a treaty between Great Britain and the United States, was not implemented in Canadian law;¹²⁴ nor have cross-border Aboriginal rights, such as the right to bring goods across the border for the purposes of trade,¹²⁵ been recognized by Canadian courts.

A court in British Columbia has recognized that the descendants of the Sinixt people, who now reside in Washington State, have an Aboriginal right¹²⁶ to hunt in their traditional territory, located in British Columbia. This decision, which is currently under appeal, will necessitate the movement of the Sinixt people across the border to hunt (and presumably they may wish to return to their homes with the animals that have gifted themselves to those hunters).¹²⁷ Although *R v DeSautel* did not recognize cross-border mobility

119 National Inquiry into Missing and Murdered Indigenous Women and Girls, *Fact Sheet: What is the National Inquiry?* (27 June 2017), online: <www.mmiwg-ffada.ca/files/fact-sheet-what-is-the-national-inquiry.pdf>.

120 UN Declaration, *supra* note 12 at art 21.

121 Senate, Standing Committee on Aboriginal Peoples, *Border Crossing Issues and the Jay Treaty (June 2016)* (Chair: Honourable Lillian Eva Dyck), online: <sencanada.ca/content/sen/committee/421/APPA/Reports/APPA-JayTreatyReport_e.pdf>. See also Haudenosaunee Documentation Committee, online: <www.haudenosauneeconfederacy.com/hdc.html>.

122 *Treaty of Amity, Commerce, and Navigation, Great Britain and United States*, 19 November 1794 (proclaimed 29 February 1796) [Jay Treaty], online: <www.loc.gov/law/help/us-treaties/bevans/b-gb-ust000012-0013.pdf>.

123 Such as “Title 8 CFR Part 289 - AMERICAN INDIANS BORN IN CANADA 8 U.S. Code § 1359 - Application to American Indians born in Canada. Nothing in this subchapter shall be construed to affect the right of American Indians born in Canada to pass the borders of the United States, but such right shall extend only to persons who possess at least 50 per centum of blood of the American Indian race.” See 8 USC § 1359 (1952), online: <www.law.cornell.edu/uscode/text/8/1359>.

124 *Francis v The Queen*, [1956] SCR 618, online: <scc-csc.lexum.com/scc-csc/scc-csc/en/item/6944/index.do>.

125 *Mitchell v MNR*, 2001 SCC 33, 1 SCR 911, online: <<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1869/index.do>>.

126 *DeSautel*, *supra* note 36.

127 Adrian Nieoczym, “Court decision may open border to First Nation hunters from U.S.,” CBC News (29 March 2017), online: <www.cbc.ca/news/canada/british-columbia/court-decision-may-open-border-to-first-nation-hunters-from-u-s-1.4046543>.

rights, the provincial court may have opened the door to allow other Indigenous peoples residing in the United States, but whose traditional territories are in Canada, to exercise Aboriginal rights in Canada. According to the provincial court, “I find that to read s. 35(1) as intending to apply only to aboriginal peoples holding Canadian citizenship would work an unintended hardship on those other non-citizen aboriginal peoples like the Lakes Tribe who also had unextinguished aboriginal rights in 1982. There is nothing in s. 35(1) to indicate that Parliament intended to make such a distinction when it promised to reconcile the existence of aboriginal peoples on the land when the Europeans arrived with Crown sovereignty.”¹²⁸

Allowing for freer movement of Indigenous peoples across the Canada-US border would be consistent with article 36 of the UN Declaration.¹²⁹ NAFTA mobility provisions are very limited, but have eased some restrictions, especially for certain professionals who wish to work in another NAFTA country.¹³⁰ Provisions that enhance the movement of Indigenous peoples would be a welcome addition to NAFTA negotiations and provide an opportunity to seek solutions to some of the mobility difficulties experienced by Indigenous peoples.¹³¹

Indigenous rights and intellectual property experts in Canada have also argued the protection of Indigenous traditional knowledge, traditional cultural expression and genetic resources should be addressed in the renegotiation of NAFTA.¹³² Since NAFTA was brought into force in 1994, there has been a proliferation of protections

for Indigenous traditional knowledge and related genetic resources in trade agreements to be consistent with requirements of articles 8(j) and 15 of the Convention for Biological Diversity¹³³ and the Nagoya Protocol. NAFTA does not include any references to protecting traditional knowledge or benefit sharing with Indigenous peoples who hold the knowledge. In his comprehensive survey of trade agreements, Jean-Frédéric Morin has identified a significant number that provide protections for Indigenous traditional knowledge. According to his research,

[A] total of 41 agreements mention traditional knowledge, most often enjoining states to put into place domestic measures to ensure its protection. For instance, the agreement between Nicaragua and Taiwan calls for a protection of ‘the collective intellectual property rights and the traditional knowledge of indigenous peoples and local and ethnic communities in which any of their creations...are used commercially.’ In addition, 17 agreements ensure that access to this knowledge is subject to the prior informed consent of indigenous communities (for example, Colombia-Costa Rica, 2013), and 29 agreements encourage the sharing of benefits derived from the use of this knowledge (for example, Caribbean Community-European Community, 2008).¹³⁴

As well, the adjourned TPP includes an article on cooperation that recognizes “the relevance of intellectual property systems and traditional knowledge associated with genetic resources,” but only when the traditional knowledge is related to the domestic intellectual property

128 DeSautel, *supra* note 34 at para 165.

129 UN Declaration, *supra* note 12 at art 36:

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.
2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

130 See NAFTA, *supra* note 1 at Chapter 16.

131 For other potential solutions, see *Border Crossing Issues and the Jay Treaty*, *supra* note 121.

132 See testimony of Palmater before the Standing Committee on International Trade, *supra* note 58, and the series *NAFTA and the Knowledge Economy* by the Centre for International Governance Innovations (CIGI); specifically the work of Oluwatobiloba (Tobi) Moody, “Indigenous Knowledge Has Key Place in NAFTA Negotiations” (22 August 2017), Centre for International Governance Innovation Opinion, online: <<https://www.cigionline.org/articles/indigenous-knowledge-has-key-place-nafta-renegotiations>>.

133 *Convention on Biological Diversity*, 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993). Article 8(j) states: “Each contracting Party shall, as far as possible and as appropriate: Subject to national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge innovations and practices.”

134 Jean-Frédéric Morin & Mathilde Gauquelin, “Trade Agreements as Vectors for the Nagoya Protocol’s Implementation” CIGI, CIGI Papers No 115 November 2016 at 2-3, online: <www.cigionline.org/sites/default/files/documents/Paper%20no.115.pdf>.

system.¹³⁵ A modernized NAFTA should include provisions to provide protection for Indigenous traditional knowledge, cultural expression and genetic resources.¹³⁶

Proposing a trade and Indigenous peoples' chapter to the United States in the current political climate may not be well received. However, it is also open to Canada and Mexico to enter into a side agreement, similar to arrangements under the TPP, that would bind the two NAFTA parties. An example of a side agreement under the TPP is the arrangement between Australia and New Zealand that stipulates their investors will have no recourse to dispute settlement with the other party.¹³⁷ While a side agreement between Canada and Mexico would be not as comprehensive as an Indigenous chapter in NAFTA, a binding arrangement could create a binational Indigenous peoples' committee that would serve as a valuable precedent for other trading partners and for future Canadian FTAs. As well, the political situation in the United States may change, allowing for bilateral discussion on Indigenous peoples' trade-related matters to become trilateral.

To negotiate an effective trade and Indigenous peoples' chapter in accordance with Indigenous peoples' rights to participate in decision making, Canada's negotiation team would need to include Indigenous negotiators, nominated by each of the three Aboriginal peoples recognized in section 35(2) of Canada's Constitution Act, 1982. This would provide Indigenous peoples with a seat at the negotiation tables. Not only would the inclusion of Indigenous negotiators from all three NAFTA parties meet the obligations of the UN Declaration and ADRIP, it would allow for Indigenous worldviews to influence the negotiation of a modernized NAFTA. Although each nation has unique creation beliefs, laws and customs that impact their worldview, a common element is their relationship to the land. As Arthur Manuel

wrote in *Unsettling Canada: A National Wake-Up Call*: “[W]e are interested in building true Indigenous economies that begin and end with our unique relationship to the land. This is essential so we can be true not only to ourselves, but also to a future we share with all of the peoples of the world. Our Indigenous view—which includes air, water, land, animals, and people in a continually sustaining circle—is increasingly seen by both scientists and citizens as the only way to a sustainable future.”¹³⁸

Conclusion

The business-as-usual approach of protecting Aboriginal rights and treaty rights through carve-outs in international trade and investment agreements, without meaningful consultation, does not sufficiently meet international law obligations for the participation of Indigenous peoples in decision making for matters that impact their rights, and falls short of Canada's nation-to-nation promises. For the renegotiation of NAFTA, Canada has taken a bold step to protect Indigenous rights, while enhancing Indigenous peoples' increased participation in international trade, a true win-win. The promotion of a trade and Indigenous peoples' chapter by Minister of Foreign Affairs Chrystia Freeland, as part of a modernized NAFTA, allows Canada to take the lead globally in progressive and inclusive trade.

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135 Oluwatobiloba (Tobi) Moody, “Indigenous Knowledge Has Key Place in NAFTA Negotiations” CIGI, 22 August 2017, online: <www.cigionline.org/articles/indigenous-knowledge-has-key-place-nafta-renegotiations>.

136 *Ibid.*

137 New Zealand Ministry of Foreign Affairs & Trade, “New Zealand-Australia Side Letter Relationship between TPP and Other Agreements”, online: <<http://tpp.mfat.govt.nz/assets/docs/side-letters/New%20Zealand-Australia%20Side%20Letter%20Relationship%20between%20TPP%20and%20Other%20Agreements.pdf>> or Australia Department of Foreign Affairs & Trade, online: <<http://dfat.gov.au/trade/agreements/tpp/official-documents/Documents/australia-new-zealand-investor-state-dispute-settlement-trade-remedies-and-transport-services.PDF>>.

138 Arthur Manuel & Grand Chief Ronald M. Derrickson, *Unsettling Canada: A National Wake-Up Call* (Toronto: Between the Lines Press, 2015) at chapter 1.

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**Centre for International
Governance Innovation**

67 Erb Street West
Waterloo, ON, Canada N2L 6C2
www.cigionline.org

