

SHADOWS OF A TALKING CIRCLE:

**ABORIGINAL ADVOCACY BEFORE INTERNATIONAL
INSTITUTIONS AND TRIBUNALS**

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EXECUTIVE SUMMARY

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Shadows are ephemeral and fleeting impressions of objects illuminated for an instant or more prolonged period of time. The issues presented herein are shadows of a “talking circle” that took place at the conclusion of the Estey Centre Conference regarding the *Impact of NAFTA on Aboriginal Business in North America* that occurred in Saskatoon in May 2001. These issues were illuminated once again at a Symposium at New York University School of Law dealing with *Indigenous Peoples and Multilateral Trade Regimes: Navigating New Opportunities for Advocacy* that took place in May, 2002. They are shadows because they are a cursory discussion of themes of fundamental importance that require substantive analysis in a rigorous fashion well beyond the scope of this paper. It is only through a process of continuous illumination that the central themes may be clearly identified in a manner permitting policy options to be developed.

Until relatively recently, aboriginal issues were largely ignored in free trade negotiations. A sea change appears to be occurring, involving a rising awareness of aboriginal issues within the context of international trade. By no means does this suggest that the international trade community is prepared to recognize aboriginal rights. However, there appears to be an increasing awareness by aboriginal peoples themselves that international trade law dispute settlement mechanisms provide a new platform for aboriginal groups to raise issues that often are ignored on the domestic stage.

The fact that aboriginal groups are looking to the World Trade Organization, underscores the failure of the International Labour Organization (ILO) or the United Nations’

collection of institutions to effectively deal with aboriginal issues. The ILO, for instance, has dealt with aboriginal issues such as cross-border rights, but the ILO Conventions have not been ratified by Canada – or by a number of other nations – and there is no effective ILO dispute settlement system. The WTO is currently under pressure to include a number of “social” issues on its negotiating agenda that will fundamentally transform the organization. In the past, trade interests within the United States wished to add labour and environmental standards in an attempt to address “fair trade” concerns. The inclusion of such social issues would transform the WTO, taking it well beyond its orientation to promote liberalization of trade and the pressure for this transformation is a result of the failure of the international institutions charged with addressing these social issues to carry out their mandates. Developing nations viewed the addition of such issues as veiled protectionism, giving a new excuse to exclude products that take advantage of the fundamental comparative advantage that they have – cheap labour. However, the Republican domination of Congress makes the inclusion of such issues unlikely. Republican “fair trade” appears to involve enhanced antidumping and countervailing duty mechanisms that the developing world also views as veiled trade barriers designed to keep their products out of the markets of the developed world.

International trade law represents an opportunity to advance First Nations issues but, at most, a modest one. It provides an opportunity to raise the issue of aboriginal rights, but it is an inflexible form of law that rarely is allowed to evolve according to logical dictates. International dispute settlement mechanisms are limited. Nations jealously guard their sovereignty and the recognition of aboriginal groups appears to be anathema, due to the implications that such recognition would entail.

The purpose of the paper is to discuss aboriginal issues as they arise in the context of international trade. Initially, the Estey Centre for Economics and Law in International Trade requested that the paper focus on purely trade issues as distinct from the broader human rights issues that bedevilⁱⁱ the participation of aboriginal groups in international negotiations. The research in support of this paper has suggested that desegregating trade from broader aboriginal issues is not possible and, indeed, counterproductive. Aboriginal

law draws part of its uniqueness from its holistic viewpoint, which suggests that its intangible qualities may be lost if the issues are desegregated and analysed independently. As a result, the paper does not attempt to segregate the various issues, but instead tries to consider trade issues in the broader context of aboriginal rights/issues, to inform a discussion of the need for coordination of aboriginal initiatives before international institutions and tribunals.

The paper begins with the question of the status of Canadian aboriginal groups in international law. Not being subjects of international law and therefore devoid of international personality, First Nations are part of Canada and are bound by the provisions of NAFTA. As a result, if a trade agreement or treaty is inconsistent with aboriginal or treaty rights as protected by Section 35(1) of the *Canada Constitution Act*,ⁱⁱⁱ it is not void^{iv} and will not be struck out. The remedy afforded to aboriginal groups appears to be one of monetary damages.

Prior to the implementation of free trade agreements, there exists a duty on government to consult with aboriginal peoples if any provision may infringe an aboriginal or treaty right. The duty to consult appears dependent on the degree to which the provision might impact upon aboriginal or treaty rights. The greater the impact the more onerous the requirement will be to undertake meaningful consultations, possibly requiring government to allow aboriginal groups a seat at the negotiating table. The failure to undertake meaningful consultation will be a factor in finding that the provision of the trade agreement in question is invalid as an unjustifiable infringement of an aboriginal or treaty right.

In the light of the obligation to undertake consultations, it is somewhat surprising that aboriginal peoples appear to have little if any involvement in the consultation in the negotiation of existing trade agreements (including the WTO, NAFTA, *Canada-Chile Free Trade Agreement*, and *Canada-Costa Rica Free Trade Agreement*). Aboriginal issues appear to be raised in the context of the *Free Trade Agreement of the Americas*' negotiations. The process by which the *1916 Migratory Birds Convention* was amended

is a model for aboriginal participation, as they were given a seat at the table in an international treaty that clearly infringed an aboriginal right.

While Canadian aboriginal peoples lack international personality, they do have a unique international status within North America, due to the *Jay Treaty* that gives them special rights of access to the United States. Notwithstanding this special status, trade issues persist in the context of exporting aboriginal goods to the United States, due largely to the tension between traditional industries that are essential to maintaining aboriginal culture and well-intentioned legislation intended to protect “endangered” species. Canadian aboriginal groups are sideswiped in a manner that cannot be justified on any principled ground. Complicating the vulnerability of Canadian aboriginal groups is a possible lack of political will on the part of the Department of Foreign Affairs and International Trade to commence WTO or NAFTA trade actions because of a denial of “national treatment” principles. The possibility of commencing such an action is suggested,^v as it may arise as a result of the unjustifiable difference in treatment between Canadian and American aboriginal groups with respect to the ability to sell traditional goods within the United States.

The newfound activism of aboriginal groups in the *Softwood Lumber* dispute is also reviewed, along with the special case of the protection of aboriginal knowledge in international agreements such as the *Convention on Biological Diversity*. These provide case studies of specific initiatives intended to advance aboriginal interests.

The paper then turns to a discussion of the issue of aboriginal rights/ issues in international trade law, to place the more specific trade initiatives in their proper context. International Labour Conventions 107 and 169 are reviewed, along with the drafting of Declaration of Rights before both the United Nations and Organization of American States. This discussion highlights the manner in which aboriginal rights do not appear to have penetrated conventional international law, but may be becoming recognized as part of international customary law. This is of more than passing interest because foreign investors may commence arbitration against Canada if they have not been accorded the

“minimum standard of treatment” according to customary international law.^{vi} The unique character of aboriginal rights is then contrasted with the inflexible nature of international trade law, and the difficulties are highlighted in attempting to pursue unique and independent legal principles in an area of law that tends to defy evolutionary pressures.

The paper concludes with an analysis of the emerging need for coordination of aboriginal initiatives before international institutions and tribunals. The federal and provincial governments appear to be placed in a conflict of interest with respect to the advocacy of aboriginal rights and trade issues. Apart from the need to grant standing to aboriginal groups themselves, one possible institutional response is to grant standing to the International Labour Organization, or some other similar international institution, to independently advance aboriginal issues in more transparent WTO and NAFTA dispute settlement proceedings. The paper also highlights the *ad hoc* arrangements that are occurring to coordinate these activities, in the light of the lack of an institutional response. An example of such an *ad hoc* arrangement is provided, being a symposium that was held at New York University Law School in May 2002, regarding “Indigenous Peoples and Multilateral Trade Regimes: Navigating New Opportunities for Advocacy.”

The list of issues identified in the analysis is presented in the Appendix annexed hereto.

APPENDIX

The issues provided below have not been ranked in terms of their importance. They may be somewhat repetitive, as this list is intended to act as an index of issues discussed in the various subsection of the paper.

Introduction:

1. The proposed research agenda is based on the following central themes:
 - (i) *The status of Canadian aboriginal peoples within the context of aboriginal law and the implications thereof:* These issues include: the status of international trade agreements and treaties generally, if they are found to be inconsistent with aboriginal and treaty rights that are constitutionally protected pursuant to Section 35(1) of the *Canada Constitution Act*. Further, what obligation is there, if any, arising from the fiduciary obligations owed to Canadian aboriginal peoples to consider from their standpoint the manner in which a particular trade agreement might negatively affect aboriginal or treaty rights. The question arises in such circumstances whether the federal government is under an obligation to consult with them in a meaningful way during the process of negotiations.
 - (ii) *The institutional competence of trade institutions and tribunals to deal with aboriginal rights/interests:* To what extent can aboriginal issues be included within trade agreements? A strategy intending to introduce the full panoply of aboriginal rights/issues into trade agreements is almost certain to fail. It is necessary to identify those issues that may be addressed in trade agreements.
 - (iii) *The identification of other international institutions and tribunals and the ways in which aboriginal rights might be advanced before them in a coordinated fashion:* Strategies might be developed to pursue those rights/issues that may not be ready for inclusion in trade agreements, before other international institutions or tribunals.
 - (iv) *The investigation of the degree to which aboriginal rights/issues have been integrated into customary international law:* This would be important not only to Canadian aboriginal peoples, but also aboriginal peoples in other countries. It would provide a benchmark for nations to determine whether they have accorded their aboriginal groups even the minimum standard of treatment required by international law. It would also explain the manner by which NAFTA Chapter 11 might be utilized by aboriginal groups whose investments are seriously impacted by other NAFTA parties.
 - (v) *Does a conflict of interest arise when the Federal and Provincial governments deal with aboriginal rights/issues before international institutions and tribunals?* A conflict arises between the fiduciary obligations owed to aboriginal peoples and the

responsibility that DFAIT has to advance entrenched trade and other economic interests that may be hostile to the aboriginal position. This is especially the case when dealing with trade disputes dealing with primary industries.

(vi) *The identification of model by which aboriginal peoples might participate directly in trade negotiations and be represented before international tribunals.* This may include institutional changes such as identifying other international institutions – such as the International Labour Organization - to intervene on behalf of aboriginal groups in more transparent dispute settlement mechanisms.

(vii) *An analysis of particular trade issues confronting Canadian aboriginal peoples.* One such issue is the lack of national treatment accorded Canadian aboriginal peoples in the export of traditional goods to the United States.

A. The Special Status of Canadian Aboriginal Groups Within North America

2. Can Canadian aboriginal groups through their special status within North America, participate in minority supplier diversity programs within the United States?
3. From a historical standpoint, the issue arises whether the *Jay Treaty* was intended to apply to Inuit and Metis people. In all likelihood the Treaty was intended to apply to both. It has been suggested that the *Jay Treaty* dealt with those “Indian” groups that straddle the border. The inference has been suggested that the *Jay Treaty* was only intended to apply only to aboriginal peoples living along the border.

B. A Special Status But Trade Issues Persist

4. There is a problem with United States Fish and Wildlife license fees on traditional crafts exported to the United States by Canadian Aboriginal groups. These fees (\$50 to \$75.00 per shipment) have the effect of eliminating any profit on small shipments. Two trade issues arise:
 - (a), do these license fees constitute a denial of national treatment on the basis that American Indian groups do not pay the fees; and
 - (b), due to the fact that these fees were introduced in 1997, is it possible to launch a NAFTA Chapter 11 challenge against the fees? Even if such a cause of action arises, has the three-year limitation period expired?
5. Canadian aboriginal peoples periodically have problems traveling into the United States with eagle feathers. While not a trade issue *per se*, it is a cross-border problem that must be dealt with. The question is whether a system of permits should be established, taking into account the difference by which Canada and the United States recognizes their aboriginal peoples (Canada recognizes the individual and the United States recognizes separate tribes).

6. There are special challenges posed by the *Marine Mammal Protection Act*. It is unjustified in its scope, unjustifiably harmful to aboriginal interests and their traditional way of life. It also gives rise to inconsistencies in the manner it treats Canadian and American aboriginal peoples. Canadian aboriginal peoples are unable to export traditional products into the United States, while American aboriginal peoples can sell traditional handicrafts incorporating some of the prohibited materials (e.g. seal skin). Once again, the question arises whether ‘national treatment’ issues arise.

C. Aboriginal Issues In NAFTA, FTAA, WTO & Newfound Activism In The Softwood Lumber Dispute

7. There has been an absence of aboriginal involvement in the negotiation in trade agreements, including the lack of an aboriginal *Special Advisory Group on International Trade*. The manner in which aboriginal issues appear to be discussed as part of the FTAA initiative suggests a possible model and should be investigated further to determine ways in which it might be augmented. The question arises how this precedent might be extended to the Doha WTO Round of multilateral negotiations.
8. The need for Canada to support the introduction of an aboriginal “green light” subsidy in the Doha Round of multilateral trade negotiations and also in the FTAA negotiations.
9. There is an opportunity to advance aboriginal issues within the context of trade disputes involving primary industries for activism by aboriginal peoples before international trade tribunals, including the Department of Commerce, NAFTA Binational Panels and the World Trade Organization.
10. There is a lack of established guidelines for the filing of *amicus curiae* briefs before the World Trade Organization dispute settlement mechanism. The inability of non-governmental organizations to appear before the WTO panels.

D. The International Aspects Of The Protection Of Indigenous Knowledge

11. Although a domestic issue, there is a need to consider changes to Canada’s intellectual property regime to allow the registration of collective, inter-generational property rights in a manner consistent with the unique nature of aboriginal ownership practices. The possibility of addressing aboriginal rights/issues through mechanisms other than Canada’s intellectual property regimes also arises.
12. There are projects that might be undertaken to build the capacity of aboriginal groups to take advantage of the existing intellectual property regime.
13. There is a need to promote the significant involvement of First Nations peoples in the negotiation of matters pertaining to intellectual property issues, pursuant to the *Convention on Biological Diversity*, the Doha negotiations relating to any proposed

amendment to the *TRIPs Agreement* as well as any proceedings before WIPO. It is to Canada's credit that the *Working Group on Section 8(j)* has included such direct involvement.

E. Aboriginal Rights In The International Arena Generally

14. There is a need to consider independent advocates for aboriginal rights within the context of international trade disputes before the WTO and NAFTA. One alternative would be to empower the ILO to act as an advocate of aboriginal rights issues due in part to the importance of ILO Conventions 107 and 169 as sources of international customary law

F. Can International Trade Law Easily Adapt To Aboriginal Issues?

15. The question arises whether aboriginal trade issues can be desegregated from the broader concept of aboriginal rights.

G. The Need To Coordinate Ad Hoc And Opportunistic Advocacy Efforts Before International Tribunals

16. The issues that arise from the May 2002 symposium held at New York University Law School regarding "Indigenous Peoples and Multilateral Trade Regimes: Navigating New Opportunities for Advocacy," included:
 - i. The recognition that trade is multi-faceted and that some aboriginal groups may want to participate in international trade, while others do not. Expressed in this manner, the difference in the aboriginal viewpoint is expressed as a north-south issue.
 - ii. Pro-active registration and certification of aboriginal marks is one project that should be undertaken. Aboriginal groups should identify what is under their control, to alert consumers and industries as to what is genuinely an aboriginal good or activity.
 - iii. Private international commercial law may provide an opportunity to advance aboriginal tenure/rights in circumstances in which the consent of aboriginal groups has not been obtained. It may be possible to trace assets and goods that have been improperly removed from traditional lands. This may involve the application of traditional concepts such as trust or constructive trust doctrines.
 - iv. Use must be made of financial market tools to discipline industries, to establish codes of conduct, and to promote socially responsible investment organizations. The development of strategies might be considered to take advantage of corporate governance provisions, allowing questions to be raised at shareholders meetings and the advancement of corporate resolutions that are sensitive to aboriginal issues.

- v. The preparation of a *Draft Agreement on Aboriginal Issues* that could be included as a separate plurilateral agreement in the WTO list of agreements. This would create a list of concepts that hopefully would spark debate on the issues included as well as proposals for new concepts to be added or deleted.
- vi. The development of a United States' *Department of Commerce Aboriginal Protocol*. The Department of Defence and the Department of the Environment do have such protocols that apparently recognize the fiduciary obligation that is owed to the Indian tribes within the United States and defines the way in which the departments intend to work with Indian tribes in this regard.
- vii. *WTO/DFAIT/DOC Internships* were discussed as a way for advocates of aboriginal rights/issues to gain experience in trade issues. If possible, an internship position for aboriginal law students might be created at the World Trade Organization and/or the Department of Foreign Affairs and International Trade.

H. Coordination Of Aboriginal Advocacy Part Of A Broader Need To Coordinate International Institutions Generally

- 17. The diversion of aboriginal issues from the ILO to the WTO is emblematic of a more widespread phenomenon, which is the diversion of many issues to the WTO that might be more appropriately dealt with by another international institution.
- 18. There is a need to coordinate policy issues among the WTO, IMF and World Bank and consideration should be given as to the manner by which aboriginal groups might be considered as part of the coordination.
- 19. A question also arises whether there is sufficient coordination between INAC, Industry Canada, DFAIT and the CCRA, among others, with respect to aboriginal rights/trade issues.

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ⁱⁱ The word "bedevil" is the author's characterization and not that of the Estey Centre.

ⁱⁱⁱ R.S.C. 1985, c.I-5, as am, s.88

^{iv} *Vienna Convention on the Law of Treaties*, Article 46

^v The substantive research and analysis to provide an opinion on the possibility of success of such a trade action is beyond the scope of this paper.

^{vi} NAFTA Article 1105(1), that states: "Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."