THE ESTEY CENTRE FOR LAW AND ECONOMICS IN INTERNATIONAL TRADE

SHADOWS OF A TALKING CIRCLE:

ABORIGINAL ADVOCACY BEFORE INTERNATIONAL INSTITUTIONS AND TRIBUNALS

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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.

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The author discloses that he represents the Meadow Lake Tribal Council and NorSask Forest Products Inc. in the *Softwood Lumber* dispute before the Department of Commerce, NAFTA Binational Panel, and as *Amicus Curiae* in the World Trade Organization proceedings.

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TABLE OF CONTENTS

INTRODUCTION: A CURSORY DISCUSSION OF THEMES OF FUNDAMENTAL IMPORTANCE.

It is somewhat surprising to be considering aboriginal rights/issues in the context of international trade. This is due to two reasons: firstly, Canadian aboriginal communities[2] – like most aboriginal communities in the world – are among the poorest and most marginalized in society.[3] The irony was not lost on one member of the West Bay First Nations in Northern Ontario, who commented that it is difficult to discuss aboriginal groups becoming involved in international trade when most have been denied meaningful participation in the Canadian economy. Notwithstanding this, some aboriginal groups have established a strong economic base (the Meadow Lake Tribal Council of Northern Saskatchewan being one example). It is also evident that Canadian aboriginal groups are beginning to engage in some degree of international trade.[4]

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2 Throughout the paper the word "aboriginal" is used. The author was instructed by Jason Knockwood, Vice-President, Aboriginal Peoples Congress that "First Nations" is not interchangeable with the word "aboriginal" because there are many aboriginal groups within Canada that do not have "First Nations" status, with many living off reserve. The author, who is responsible for any error in the use of terms, was and remains grateful for the instruction. A number of relevant definitions can be found at: http://www.ainc-inac.gc.ca/pr/info/info101_e.pdf

3 In most cases these communities are in isolated areas with little or no access to the kind of infrastructure that the non-aboriginal communities take for granted. All-weather roads are poor and in some cases non-existent. Natural gas for heating, safe drinking water, proper education facilities and access to commercial enterprises, are all commodities that are either rare or non-existent. Unemployment typically averages 90% on forest belt reserves and non-aboriginal teachers, nurses and police, hold the few employment opportunities in these communities. Social assistance is the mainstay of their economies and First Nations people experience high rates of suicide, criminal activity and social maladies. Statistics indicate that: most First Nations people are at or below the poverty line; in major cities in Western Canada, four times as many First Nations people as other citizens are below the poverty line; First Nations people have a life expectancy seven to eight years shorter than other Canadians; the suicide rates for Indian youths are eight times higher than the national rate for females and five times higher for males; infant mortality rates for First Nations people are twice that of the national rate (11% as opposed to 6 %); First Nations people are more likely than other Canadians to have hearing, sight and speech disabilities; 62% of First Nations people perceive alcohol abuse as a problem in their community; and incarceration rates for Aboriginal people are six times higher than the national average. These statistics were compiled by the Department of Indian and Northern Affairs Canada (www.ainc-inac.gc.ca/gs/soci_e.html)

4 It has been reported that nineteen percent of aboriginal enterprises engage in international trade, compared to the national standard of 4 percent: *Aboriginal Entrepreneurs in Canada, Progress and Prospects:* Micro-Economic Policy Analysis Branch and Aboriginal Business Canada http://strategis.ic.gc.ca/pics/ab/440_ref_rep001_e.pdf. Aboriginal products – especially cultural

Secondly, First Nations and other aboriginal groups within Canada – whether or not they might be recognized under the *Indian Act* – have been engaged in international trade since time immemorial. In a sense, trade between First Nations within Canada should be considered "international" by definition, unless the concept of a "First Nation" is another qualified concept within Canadian law and is not truly a "nation" at all.[5] This begs the question of the status of Canadian aboriginal groups in international law and it is dealt with in the first section of the paper. A corollary issue is 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 imposed on government, if any, to consider 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 free trade negotiations.

Until relatively recently, aboriginal issues appear to have been largely ignored in the negotiation of free trade agreements. A sea change does appear 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 among aboriginal groups themselves that international trade law dispute settlement mechanisms provide a new platform for aboriginal groups to raise issues that they believe are ignored on the domestic stage. The *Softwood Lumber* case and the appearance of aboriginal groups

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products – have significant appeal and "aboriginal tourism" represent potential growth areas, at 22, 34

5 Concepts within Canadian law are strangely qualified in a manner that smacks of Orwellian double speak. For instance, "fiduciary obligations" aren't "fiduciary obligations", at least as they are understood in the common law and the maximum damages that flow automatically from a breach of such obligations.

either directly or as *amicus curiae*[6] participants, provide an excellent example of this emerging trend.

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 rights but, at most, a modest one. It provides an opportunity to raise aboriginal issues, 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.

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[6] Amicus Curiae briefs are filed by non-parties to litigation, who are given permission to file briefs and to appear on issues that arise in the litigation that are of significance importance to them.

The purpose of this 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 bedevil[7] 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 the holistic viewpoint that is entirely consistent with the new economic and scientific approaches generally referred to under the rubric of "complexity theory." This new intellectual trend suggests that intangible qualities of a particular field of study can be lost when the issues contained therein are desegregated and analysed independently. As a result, this 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 to coordinate aboriginal initiatives before international institutions and tribunals.

After analysing the position of Canadian aboriginal peoples within international law, the paper considers the unique status of Canadian aboriginal groups 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 exportation of 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 by this legislation in a manner that cannot be justified on any principled ground. Complicating this 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 Complaints because of a denial of "national treatment". The possibility of commencing such an action is suggested,[8] as the basis for a complaint may arise as a

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

8 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.

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.

Next, the paper discusses the absence of aboriginal issues in existing trade agreements (including the WTO, NAFTA, *Canada-Chile Free Trade Agreement*, and *Canada-Costa Rica Free Trade Agreement*) but are beginning to be considered as part of the *Free Trade Agreement of the Americas'* initiative. 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 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.[9] 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

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[9] 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."

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."

Shadows are ephemeral and fleeting impressions that are the reflections of objects illuminated for an instant or longer. 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 the New York Symposium 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. Some of these central themes may include the following:

(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: S*trategies 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.

The purpose of this paper is to set forth a research agenda that should be undertaken with respect to aboriginal advocacy before international institutions and tribunals. It should be noted that the paper is intended to be a broad survey of issues and to raise the issues not resolve them. Further analysis may confirm or refute the treatment of any particular issue included herein.

A. IS THERE A FIDUCIARY DUTY TO CONSULT ABORIGINAL CANADIANS IN THE FORMATION OF INTERNATIONAL TRADE POLICY THAT MIGHT INFRINGE AN ABORIGINAL OR TREATY RIGHT?

The first question that arises is the status of aboriginal peoples within Canada according to international law. Professor Jean-Gabriel Castel[10] summarizes this status in the following manner:

> Canada is a party to a large number of agreements with indigenous people living in her territory referred to as 'Indian Treaties' in the *Indian Act*.[11] These agreements with First Nations are enforceable in Canadian law.[12] They are *sui generis* and are neither created nor terminated according to the rules of international law.[13] Therefore, although 'Great Britain and France felt that the Indian Nations had sufficient independence and played a large enough role in North America for it to be good policy to maintain relations with them very close to those maintained between sovereign nations,'[14] they have not been considered sovereign nations by Canada or the international community. 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.

While Canadian aboriginal peoples may lack international personality, aboriginal and treaty rights have been enshrined in Section 35(1) of the *Canada Constitution Act*. It recognizes *sui generis* aboriginal law as part of the Constitution of Canada and thus must be considered equal to the common law. It provides:

> (1). The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2). In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Metis peoples of Canada.

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10 Professor Emeritus, Osgoode Hall Law School, York University, Toronto

11 R.S.C. 1985, c.I-5, as am, s.88

12 See s. 35 of the *Constitution Act 1982*, s. 88 of the *Indian Act* and *R. v. Sioui*, [1990] 1 S.C.R.1025,1043.

13 *Simon v. The Queen,* [1985] 2 S.C.R. 387 ,404

14 *R. v. Sioui , op cit., supra* , note 12, per Lamer .J.

> (3). For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
>
> (4). Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are governed equally to male and female persons.[15]

The Supreme Court has determined that once aboriginal rights are established, "they must be interpreted according to the constitutional fiduciary duty of a Agenerous and liberal@ interpretation in favour of Aboriginal people, and in a way that allows aboriginal rights to develop over time: *sui generis* interpretative principles that build on the strength of aboriginal law knowledge, and perspectives."[16]

With this background, what happens if a trade agreement is found to be inconsistent with an aboriginal or treaty right? Assuming such is the case it is relatively clear that the trade agreement would be inconsistent with the constitutional obligations owed to aboriginal groups within Canada, unless the free trade provisions in question were found to constitute a "justifiable infringement" of the aboriginal or treaty right. The most recent pronouncement on the competence of provincial legislation to infringing an aboriginal or treaty right appears in *R. V. Marshall (No. 2),* at para 24:

> At para. 64, the majority judgment again referred to regulation permitted by the Badger test. The Court was thus most explicit in confirming the regulatory authority of the federal and provincial governments within their respective legislative fields to regulate the exercise of the treaty right subject to the constitutional requirement that restraints on the exercise of the treaty right have to be justified on the basis of conservation or other compelling and substantial public objectives…

Presumably, the public objective of international relations generally and promoting international trade in particular, would likely be found a "compelling" or a "substantial

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15 *Constitutional Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.) 1982.c.11,

16 Henderson, Benson & Findlay, *Aboriginal Tenure in the Constitution of Canada*, Carswell, 2000, at 342, citing at 1091

public objective."[17] Nevertheless, the determination would turn on the degree of interference with the aboriginal or treaty right in question and so it is quite possible that a particular provision within a trade agreement could be found constitutionally invalid. Canada's legal obligations under the trade agreement or treaty would remain unchanged, even though the treaty provision and any law implementing it would be invalid as a matter of domestic law. The fact that a trade agreement or treaty conflicts with the Canadian constitution is not in and of itself sufficient to invalidate it. The only provision of the *Vienna Convention on the Law of Treaties* even remotely applicable provides the following:

> *Article 46 Provisions of internal law regarding competence to conclude treaties*
>
> 1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
>
> 2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

Assuming that the violation of the constitution is not a "manifest" such that Canada may claim not to be bound by the treaty provision, the question arises as to the remedy available to aboriginal groups within Canada if a trade agreement or treaty is found to

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[17] Also see *R. v Sparrow*, that has been described in the following terms:

> In R. v. Sparrow, a member of a First Nation in British Columbia caught fish off-reserve in traditional waters. He was charged for using a net that was longer than permitted by federal Fisheries Regulations. His First Nation did not have a treaty. The Supreme Court of Canada held that the Aboriginal right to fish for food had not been extinguished. The court then held that a federal law could limit an Aboriginal right only if there were a very good reason for passing the law, and only if that law interferes with the Aboriginal right in the least intrusive way possible. If the law does not meet these tests, the law will be declared unconstitutional.
>
> The same principle applies to treaty rights. Courts have held that the test developed in *R. v. Sparrow* restricts the ability of the federal government to override rights contained in treaties.
>
> Shin Imai, *Aboriginal Law Handbook*, 2nd Edition, Carswell, 1999 at 32-3

have violated a treaty or aboriginal right in a manner that cannot be justified. The remedy would appear to sound in damages and it would not be possible to obtain a declaration that the particular trade agreement itself is invalid.

The question then arises whether there is a constitutional duty imposed on the Government of Canada to consult with Canadian aboriginal peoples if a particular legislative or regulatory initiative has the potential to impact upon aboriginal or treaty rights. It would appear to follow from the concept of a "fiduciary obligation" that such a duty would arise. The Supreme Court stated in *Delgamuukw v. British Columbia* in a case involving the question of aboriginal tenure:

> There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified, in the same way that the Crown's failure to consult an aboriginal group with respect to the terms by which reserve land is leased may breach its fiduciary duty at common law: *Guerin*. The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.[18]

The duty to consult aboriginal groups in Canada was more recently discussed by the Supreme Court in *R. v. Marshall (No 2)* in the following terms:

> Aboriginal people are entitled to be consulted about limitations on the exercise of treaty and aboriginal rights. The [Supreme Court of Canada] has emphasized the importance in the justification context of consultations with aboriginal peoples … The special trust relationship includes the right of the treaty beneficiaries to be consulted about restrictions on their rights, although, as stated in *Delgamuukw,* "the nature and scope of the duty of consultation will vary with the circumstances." This variation may reflect such factors as the seriousness and duration of the proposed restriction,

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[18] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, (SCC) at para 168

> and whether or not the Minster is required to act in response to unforeseen or urgent circumstances. As stated, if the consultation does not produce an agreement, the adequacy of the justification of the government's initiative will have to be litigated in the courts.[19]

The duty to consult with aboriginal peoples appears to be dependent on the degree to which the proposed legislation or regulation may interfere with an aboriginal or treaty right. Implicit in this duty is a requirement that government consider whether a particular trade agreement might impact upon aboriginal or treaty rights. The federal government has an obligation to consult with Canada's aboriginal peoples in a meaningful way, possibly allowing them a seat at the negotiating table depending on the degree of the interference with such rights. The failure to undertake meaningful consultation will be a contributing factor to any 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 these obligations, it appears to be somewhat surprising that aboriginal peoples have been all but ignored in the *Canada-United States Free Trade Agreement* (CUSFTA), the *North American Free Trade Agreement* (NAFTA),[20] the *Canada-Chile Free Trade Agreement* (CCFTA), or the *Canada-Costa Rica Free Trade Agreement* (CCRFTA). There are certain reservations included in Annex II of NAFTA relating to investment[21] and cross-border trade in services,[22] the Annex stating:

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19 R. v. Marshall, [1999] 3 S.C.R. 533, (motion for rehearing and stay) at 43.

20 Claude Carrier, comments at *Impact Of NAFTA On Aboriginal Business In North America*, Estey Centre Conference, May, 2001, Saskatoon, Sask

21 Chapter 11, which is the chapter on investment that introduced a unique arbitral dispute settlement provision. These exclusions are in relation to the provision of national treatment (that foreigners are treated in the same manner as Canadian citizens and corporations), according most-favoured-nation status (providing the same treatment that the citizens of the foreign country with whom the most preferential treatment has been given), and from the restrictions on imposing performance requirements on investments, and restrictions on the nationality and residency of senior management and boards of directors.

22 These exclusions relate to the provision of national treatment, most-favoured nation treatment.

> 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. [23]

The *General Agreement on Tariffs and Trade* ("GATT") and the *World Trade Organization Agreements* "*WTO Agreements*" also have not dealt with the question of aboriginal rights.[24] The extent to which aboriginal rights were not on the negotiating agenda at the time of the negotiation of the *WTO Agreements*, is reflected in the fact that financial support for aboriginal groups was not included in the "green light" subsidy category that established permissible subsidies that could be granted by government without the risk of the imposition of countervailing duties by foreign governments.[25] If government should choose to provide financial support for First Nations initiatives, such financial support might be actionable as a countervailable subsidy under the *World Trade Organization Agreement on Subsidies and Countervailing Measures* (A*SCM Agreement*@). A non-actionable or Agreen light@ exemption for regional development initiatives was included within the *SCM Agreement* but the provision has now lapsed.[26] It might be argued that it is unlikely that financial support to a First Nations' group could

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23 CCFTA Annex II provides specific exemptions and then a basket clause stating "Canada reserves the right to adopt or maintain any measure denying investors of Chile and their investments, or service providers of Chile, any rights or preferences provided to aboriginal peoples."

24 Article XX(f), provides exceptions to the general WTO obligations in respect of measures "imposed for the protection of national treasuries of artistic, historic or archaeological value."

25 At the Estey Centre Conference, May, 2001, Professor Russel Barsh of NYU Law School highlighted the state aids provision within the *Treaty of Rome*. The European Community has a positive obligation to provide support for disadvantaged regions and identifiable groups. At least one group in northern Europe was provided as an example of a disadvantaged group that was entitled to support even though they are not concentrated within a particular contiguous region. The suggestion implicit in the reference to the state aids program is that this approach might be used as a template for the inclusion within NAFTA/FTAA of First Nations rights and economic development issues.

26 Article 8.2 established eligibility criteria including that the region must have: either (a), income per capita or household income per capita, or GDP per capita, at least 15% below the average for the territory concerned; and (b), an unemployment rate, which must be at least 110% of the average for the territory concerned. The provision expired in 1999, but the United States had expressed support for continuing the provision prior to its expiry. See *Subsidies Enforcement, Annual Report to Congress,* Joint Report of the Office of the United States Trade Representative and the U.S. Department of Commerce. February 2000. Found online at www.ia.ita.doc.gov/esel/reports/seo2000/report2k.html

ever provide the basis for injury to a domestic industry within the United States, a necessary requirement for the imposition of countervailing duties. Currently, First Nations forestry operations are subject to the same countervailing duty tariffs that have been imposed by the United States after proceedings before the Department of Commerce (that found stumpage programs constituted subsidies) and the International Trade Commission (that found injury to the American softwood lumber industry). First Nations' forestry operations might have availed themselves of the provisions respecting "green light" subsidies, assuming that countervailing duties are confirmed by the NAFTA binational panel. Similar to the issues concerning endangered species reviewed above, it appears that aboriginal groups within Canada are more likely to be involved in the primary industries and they appear to be vulnerable to countervailing and antidumping actions.

The issues concerning the rights of aboriginal peoples appear to be finding more of a voice in the *Free Trade Agreement of the Americas* initiative. The final communiqué at the FTAA Summit in Quebec City in April 2001 specifically mentioned the importance of the issue. In 2001, Canada also chaired the discussion on aboriginal issues that are taking place under the umbrella of the FTAA.[27] These discussions have involved as many as fourteen of the constituent nations with aboriginal populations. This forum provides a unique opportunity to promote contact between aboriginal groups throughout the Americas and to provide a forum in which common problems can be identified. Finding the political will to deal meaningfully with aboriginal issues in the FTAA will be another matter. It is apparent that many nations will be reluctant to address the cross-border movement of peoples, of the need to protect their habitat and culture in a manner that enshrines new rights at the international level, thus encouraging scrutiny through international dispute settlement proceedings.

Notwithstanding the FTAA initiatives to include aboriginal issues, aboriginal peoples do not appear to participate directly in the consultative mechanisms designed to solicit input

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[27] Laurent Charette, DFAIT, West Bay First Nations Conference, June 22nd, 2001

on the international negotiations. As an example, there is no aboriginal "Sectoral Advisory Group on International Trade" otherwise known as "SAGIT". They were formed by DFAIT to provide advice in respect of international trade measures. "These groups have been established purely on a sectoral basis and, with one or two exceptions, as aboriginal businesses are not major players in any of the designated sectors, they do not have a seat at the table."[28] A separate aboriginal SAGIT might help to ensure that trade issues involving aboriginal rights are discussed at the policy formation stage. The members of a SAGIT might help the government discharge its fiduciary obligation to consider the manner in which proposed free trade agreement provisions might impact on aboriginal rights and issues. It would also help in facilitating the consultations that would have to occur in respect of any potential infringement of such rights and issues.

Apart from a SAGIT, one model by which aboriginal peoples might be included in the negotiation of trade agreements may be found in the aboriginal participation that took place when the *1916 Migratory Birds Convention*[29] was amended. Great Britain (on behalf of Canada) and the United States signed the Convention that imposed a March 10th to September 1st hunting season for migratory birds.[30] The Cree First Nations established an aboriginal right to the hunting of migratory birds that transcended subsistence harvesting due to the cultural aspects of the timing and symbolism of the hunt. The *James Bay and Northern Quebec Agreement* signed in 1975 provided in Section 24 "for the right of every Native person to hunt, fish and trap any species of wild fauna (including migratory birds) at all times of the year.[31] The Canadian government also undertook to amend the *Migratory Birds Convention* and this led to the negotiation of a protocol between Canada and the United States signed in 1979 "acknowledging the right of each party to dispense with the close season provided in the Convention as it applied to

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28 Letter from James Leach, Executive Director of the Estey Centre to the Honourable Pierre Pettigrew, Minister for International Trade, June 28th, 2001

29 Philip Awashish, *Amending the 1916 Migratory Birds Convention*, October 1, 2000, Unpublished Manuscript,

30 *Ibid.,* at 2

31 *Ibid.,* at 3

indigenous peoples."[32] The Protocol was not submitted to the United States Senate because of strong lobbying by interest groups.

It was not until 1994 that the initiative was revived with the Canadian Department of Foreign Affairs and United States Department of the Environment were once again mandated to negotiate amendments to the Convention. The U.S. team, which was limited to ten people, included "one or two Native persons from Alaska", while "Canada proposed to have three aboriginal members (one member from each of the aboriginal peoples – Indian, Inuit and Metis)"[33] They also had access to legal expertise, with Peter Hutchins, one of the leading counsel in the field of aboriginal and treaty rights, was present during the negotiations to provide legal advice. The participation of aboriginal representatives and their counsel appears to have had a significant impact on the drafting of the Parksville Protocol that was signed on April 27th, 1995.[34] The Federal Cabinet subsequently approved the Protocol in September 1995,[35] and it signed by the United States in December 1995. An exchange of the instruments of ratification took place in Ottawa on October 7th, 1999.[36]

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32 *Ibid.,* at 4

33 *Ibid.,* at 10

34 Ibid., at 15. The terms included:

> (i) Migratory birds and their eggs (regardless of classification as game, insectivorous and nongame birds) may be harvested throughout the year by Aboriginal peoples of Canada having aboriginal or treaty rights. (the closed season provisions are subject to the aboriginal and treaty rights of Aboriginal peoples of Canada.)
>
> (ii) Down and inedible by-products may be sold, but migratory birds and eggs shall e offered for barter, exchange or trade or sale only within or between Aboriginal communities as provided for, in the relevant treaties, land claims agreements, self government agreements or co-management agreements made with Aboriginal peoples of Canada.

35 It was amended before signature to "incorporate changes requested by the Untied States to proviision relating to the harvesting of migratory birds and their eggs by the indigenous inhabitants of the State of Alaska." *Ibid*., at 16

36 *Ibid.,* at 17

The direct participation of Canadian aboriginal peoples in the amendment of the *Migratory Birds Convention* provides a model for such involvement. It would appear that the federal government was legally required to provide a seat at the negotiating table, due to the importance of the aboriginal right and the degree of interference therewith (see *Delgamuukw*).

B. DO CANADIAN ABORIGINAL PEOPLES ENJOY A SPECIAL STATUS WITHIN NORTH AMERICA AS A JAY TREATY OR GENERALLY?

Canadian aboriginal peoples enjoy a special status within North America, and beyond that of aboriginal groups within the United States and Mexico. Canadian aboriginal peoples have a right to enter the United States and remain there, pursuant to Section 289 of the United States' *Immigration and Naturalization Act*[37] that provides:

> Nothing in this title 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 only extend to persons who possess at least (50%) per centum of blood of the American Indian race.

Documentation must be presented to establish the required blood percentage that is obviously a racial qualification. Aboriginal applicants should produce either an identification card from the Federal Ministry of Indian and Northern Affairs (DIAND), or a written statement from an "official" from the tribe of origin, substantiated by additional documentation.[38] The racial qualification[39] appears to be more inclusive than the

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37 8 U.S.C.§ 1359, see *Native Indians Born in Canada,* Consulate General of the United States of America, "U.S. Consulate". The U.S. Code of Federal Regulations provides the following for permanent residency for Canadian Indians:

> "[a]ny American Indian born in Canada who at the time of entry was entitled to the exemption provided … by … Section 289 of the Act, and has maintained residence in the United States since his entry, shall be regarded as having been lawfully admitted for permanent residence." 8 C.F.R.§ 289.2 (1999)

38 This evidence should include tribe records, civil long form birth certificates bearing names(s) of parent(s). The statement should be on the Tribe's official letterhead and "should explicitly state what percentage of American Indian blood that you, or your parent(s) possess, based on official documents/records. *Ibid.*

39 American case law has established that a "racial" and not a "political" definition governs. *Goodwin v. Karnuth*, 74 F.Supp, 660 (W.D.N.Y.1947)

recognition of aboriginal groups under the Federal *Indian Act,* assuming for the moment that there are registered Indians with less than 50% "blood of the American Indian race." Any Canadian aboriginal person can apply – including Metis – as long as the racial qualification is met.[40] This also raises the question whether a DIAND identification card is sufficient without further proof. If so, American immigration law would be deferring to Canadian law insofar as it might expand the racial qualification, to aboriginal Canadians with less than 50% native blood.[41]

Canadian aboriginal peoples that qualify are granted a "resident alien (1-151) 'green' card" by USINS,[42] but are still subject to deportation.[43] "Canadian-born Indians" are also exempt from all immigration restrictions imposed on aliens by the *Immigration and Nationality Act*."[44]

Aboriginal peoples in the United States or Mexico do not share the rights that Canadian aboriginal groups enjoy. It is unclear the extent to which United States Indians may immigrate to Canada. The Canadian courts have commented without finding that a U.S. Native American citizen could claim the aboriginal right of free passage, if she or he

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40 It has been suggested that when the border between Canada and the U.S. was initially being established, there was a discussion to allow a 150 mile strip between the two countries for the "Indians" that lived there. Instead, the border was established and established the Jay Treaty rights for those "Indians" that had half their people living on one side and the other on the other side. It has been suggested that the Jay treaty might not apply to either Inuit or Metis people. This would provide an interesting issue to research regarding to the history of the *Jay Treaty*.

41 This deference by American law has been suggested by Bryan Nickels, *Native American Free Passage Rights under the 1794 Jay Treaty: Survival under United States Statutory Law and Canadian Common Law*, Boston College International and Comparative Law Review, Vol 24, 313-40, http://www.bc.edu/bc_org/avp/law/lwsch/journals/bciclr/24_2/04_FMS.htm

42 "Recipients are entitled to all rights and privileges accorded legal immigrants of the United States – including, if they wish, eventual naturalization as American citizens, and the right to sponsor immediate family members into the United States. Resident aliens are entitled to file on behalf of a spouse and unmarried children if they are not also eligible to be admitted under Section 289 of the INA." U.S. Consulate, *op cit., supra*, note 37

43 Nickels, *op cit., supra,* note 41 at 5, citing *Matter of Yellowquill*, 16 I. & N. Dec. at 577

44 Nickels, *op cit., supra*, note 41 at 4, citing *Atkins v. Saxbe*, 380 F. Supp. 1210, at 1219 (D. Maine, 1974)

could establish a sufficient geographical "nexus" to Canada.[45] There is no similar provision allowing "American Indians born in Mexico" to enter the United States. However, the same rights have been provided in at least one instance to a Texas Band of Kickapoo Indians that was divided by the U.S.-Mexican border.[46]

It is generally believed that the special rights that Canadian aboriginal peoples enjoy stem from the *Jay Treaty* that was negotiated in 1794.[47] One remarkable aspect of this Treaty is that it "marked the beginning of modern international arbitration."[48] Article III of the said Treaty provides in part:

> No duty of entry shall ever be levied by either party on peltries brought by land or inland navigation into the said territories respectively, nor shall the Indians passing or re-passing with their own proper goods and effects of whatever nature, pay for the same any impost or duty whatever. But goods in bales, or other large packages, unusual among Indians, shall not be considered as goods belonging bona fide to Indians.

This Treaty has achieved almost mythical proportions in terms of the rights that Canadian aboriginal peoples have attributed to it. They claim rights of admission to the United States as well as the right to cross-border trade exempt from duties and taxes. It appears that the consensus of American and Canadian courts is that the *Jay Treaty* was abrogated by the War of 1812, although there is some difference of opinion within the United

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45 Nickels, *op cit., supra*, note 41 at 8, citing *Watt v. Liebelt,* 65 C.R.R.2d 191 (Fed. Ct.App.1998)

46 "Congress extended the benefits of Section 289 to the band [n]otwithstanding the Immigration and Nationality Act, all members of the Band shall be entitled to freely pass and re-pass the border of the United States and to live and working the United States. While the Texas Kickapoo are granted free passage rights, members of the Tohono O'odham tribe in Arizona are subject to the same admission and deportation requirements as Mexican nationals simply for travel across their own traditional lands." Nickels, *op cit., supra*, note 41 at 9. See Megan S. Austin, *A Culture Divided by the United States-Mexico Border: The Tohono O'Odham Claim for Border Crossing Rights*, 8 Ariz. J. of Int'l & Comp L. 97, 103 (1991)

47 Its formal title is "Treaty of Amity, Commerce and Navigation", John Leslie, *The Jay Treaty,* December 1979, Treaties and Historical Research Centre, Research Branch, Corporate Policy, Department of Indian and Northern Affairs Canada.

48 Jonathan I. Charney, *Third Party Dispute Settlement and International Law*, 36 Columbia Journal of Transational Law, 1997, 65 at 68

States.[49] The argument is that the Treaty of Ghent has not been enacted into Canadian legislation. The *Treaty Of Ghent*[50] did provide for the restoration of the rights of the "Indians" as they existed prior to the war.[51] It has been found that the provision was not self-executing and, therefore, had to be enacted through the appropriate legislation by both Canada and the United States.[52] The policy of the United States permitting Canadian aboriginal peoples to enter, traced to a broader principle of "fairness" that is not necessarily evident in Canadian immigration policy.[53]

It is quite clear that neither the United States nor Canada permit the importation of goods into either country, free of applicable border controls and duties. It appears that there is a consensus in the United States that the "courts have generally treated the passage of

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49 *Karnuth v. United States ex rel Albro* 279 U.S. 231, 237 (1929), *United States vs. Mrs. P.L. Garrow*. [1937,] *Garrow* determined that American Indians had to pay duty on goods brought into the United States from Canada. However, Nickels cites a case in which the Third Circuit held that the Jay Treaty was still in force, presumably at least with respect to the mobility right. Nickels, *op cit., supra,* note 41 at 3, citing *Diablo v. McCandless*, 18 F.2d 282 (E.D. Penn., 1927).

50 *Treaty of Peace and Amnity,* Dec 24, 1814, U.S.-U.K., T.S., No 109

51 Article 9 provides: "The United States of America engage … to restore to such tribes or nations, respectively, all the possessions, rights, and privileges, which they may have enjoyed or been entitled to in one thousand eight hundred and eleven, previous to such hostilities … And His Britannic majesty engages … to restore to such tribes or nations, respectively, all the possessions, rights and privileges, which they may have enjoyed or been entitled, to in one thousand eight hundred and eleven, previous to such hostilities.

52 Leslie*, op cit., supra,* note 47 at 8, and at 13, citing *United States vs. Mrs. P.L. Garrow*: "The Treaty of Ghent was also held not to have been a self-executing treaty but dependent on legislative enactment, and that failure of Congress properly to legislate in accordance with the provisions of the Treaty rendered the merchandise of Indians entering the United States dutiable."

53 Nickels, *op cit., supra,* note 41 at 3, quoting *Karnuth v. United States,Ex Rel. Albro,* 279 U.S., 242:

> It is true, as respondents assert, that citizens and subjects of the two countries continued after the War of 1812, as before, freely to pass and repass the international boundary line. And so they would have done if there never had been a treaty on the subjected. Until a very recent period, the policy of the United States, with certain definitely specified exemptions, had been to open its doors to all comers without regard to their allegiance. This policy sufficiently accounts for the acquiescence of the Government in the continued exercise of the crossing privilege upon the part of the inhabitants of Canada, with whom we have always been upon the most friendly terms …

goods section as abrogated."[54] In 1956, the Supreme Court of Canada held in *Francis vs. the Queen*,[55] that the *Jay Treaty* did not preserve the right to import goods into Canada, without deciding the issue whether the *Jay Treaty* was abrogated by the War of 1812. More recently, the issue of a right to trade freely across the border was left open if an "aboriginal right" could be established in respect thereof. In *Mitchell v. M.N.R.,* the Supreme Court of Canada rejected an aboriginal right characterized by Chief Justice McLachlin as "the right to bring goods across the Canada-United States boundary at the St. Lawrence River for purposes of trade."[56] McLachlin C.J., in writing for the unanimous court, held:

> The claimed right in the present case implicates an international boundary and, consequently, imports a geographical element into the inquiry. Instead of asking whether the right to trade - in the abstract - is integral to the Mohawk people, this Court must ask whether the right to trade across the St. Lawrence River is integral to the Mohawks. The evidence establishes that it is not. Even if the trial judge's generous interpretation of the evidence were accepted, it discloses negligible transportation and trade of goods by the Mohawks north of the St. Lawrence River prior to contact. If the Mohawks did transport trade goods across the St. Lawrence River for trade, such occasions were few and far between. Certainly it cannot be said that the Mohawk culture would have been "fundamentally altered" without this trade, in the language of *Van der Peet*, *supra,* at para. 59. It was not vital to the Mohawks' collective identity. It was not something that "truly made the society what it was" (*Van der Peet,* at para. 55 (emphasis in original)). Participation in northerly trade was therefore not a practice integral to the distinctive culture of the Mohawk people. It follows that no

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54 Nickels, *op cit., supra,* note 41, footnote 49, citing *Goodwinv. Karnuth* 74 F.Supp 660 (W.D.N.Y.1947) at 663, and United States ex. *Albro*, 279 U.S. 231, at 239 (1929)

55 *Francis v. The Queen*, [1956] S.C.R. 617, per Kerwin C.J. at 621:

> "The Jay Treaty was not a Treaty of Peace and it is clear that in Canada such rights and privileges as are here advanced of subjects of a contracting party to a treaty are enforceable by the Courts only where the treaty has been implemented or sanctioned by legislation … This is not a case where vested rights of property are concerned and it is unnecessary to consider the question whether the terms of the Jay Treaty were abrogated by the war of 1812."

56 *Ibid.,* at Paragraph 19

> aboriginal right to bring goods across the border for the purposes of trade has been established.[57]

The possibility of establishing such a right is left open should, in another case, if it can be established that cross-border trade was "integral to the distinctive culture" of the aboriginal group in question.

While there may be no right of cross-border trade by Canadian aboriginal groups, they may be able to take advantage of their unique status in another manner. It was suggested that Canadian aboriginal group members might qualify under the United States' *Minority Small Business and Capital Ownership Development Program*, to achieve assistance in establishing businesses within the United States. The Minority Small Business and Capital Ownership program is established pursuant to Section 8(a) of the *Small Business Act*.[58] A business that qualifies participates in the program for a period of nine years and is eligible to receive financial assistance, and procurement advantages among others.[59] It appears unlikely that Canadian aboriginals could qualify for the program, even if they obtain "resident alien" or "green card" status. Within the United States, it appears that Indian "tribes" are recognized, and individuals are identified in terms of their "band" membership, versus the recognition of each individual under Canadian law.[60]Indian tribes within the United States qualify for the program,[61] but there is no specific provision

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57 *Ibid.,* at Paragraph 60.

58 Other programs that have been identified include the "hubzone" program, which provide assistance for businesses locating in specified disadvantaged areas

59 13 CFR Ch. 1 § 124.2. Those eligible participate in a "developmental stage" that lasts for four years and a "transitional stage" that lasts for five years. During the "developmental stage", participants are entitled to "sole source and competitive contract support", financial assistance, transfer of technology or training. They can receive the same support during the "developmental stage," but can also receive assistance from procuring agencies in the form of joint ventures. 13 CFR Ch1 § 124.404.

60 Interviews with DIAND and DFAIT personnel, August 1st – 2nd, 2001.

61 The following definitions are included:

> *Indian Tribe* means any Indian tribe, band, nation or other organized group or community of Indians, including any ANC, which is recognized as eligible for the special programs and services provided by the United States to Indians

making individual American Indians eligible. Participation in the program requires American citizenship and there is no indication that resident aliens might qualify.[62]

The existence of the program suggests that Canadian aboriginal groups might consider entering into joint ventures with tribes in the United States that can take advantage of the program. The joint venture might take the form of a sales corporation within the United States to sell raw material, inputs or goods that have been sourced from the Canadian aboriginal groups.

Canadian aboriginal group members that hold "resident alien" status within the United States might qualify under various supplier diversity programs that have been established. Many of the "Fortune 500" corporations within the United States have established preferential procurement policies.[63] AT&T acquires in excess of $1 billion per year under its Supplier Diversity Program[64] and "Native Americans" qualify for participation in the program that includes supplier registration as well as various forms of assistance.[65]

> because of their status as Indians, or is recognized as such by the State in which the tribe, band, nation, group, or community resides.
>
> *Tribally owned concern* means any concern at least 51% owned by an Indian tribe as defined in this section.

62 13 CFR Ch. 1 § 124.101

> "Generally, a concern meets the basic requirements for admission to the 8(a) BD program if it is a small business which is unconditionally owned and controlled by one or more socially and economically disadvantaged individuals who are of good character and citizens of the United States, and which demonstrates potential for success."

63 Some of the Fortune 500 Companies that attended a Native American Business Alliance Conference in Hinkley Minnesota, August 12-14th, 2001, included American Express, IBM, Phillip Morris, Ford Motor Company, General Motors, Chrysler, General Mills, UPS, Nestle and Walt Disney.

64 AT&T's Mission Statement includes:

> "AT&T's corporate policy underscores the company's commitment to the Supplier Diversity program by stating that maximum opportunity will continually be afforded to minority, women, and service disabled veteran-owned enterprises (MWVBEs) to participate with us as suppliers, contractors, and subcontractors of goods and services."

65 AT&T's Supplier Diversity Program, www.alt.com/supplier_management/mwbe/index.html

C. WHAT TRADE ISSUES PERSIST NOTWITHSTANDING ANY SPECIAL STATUS?

Canadian aboriginals may have a special status within North America, but they still suffer from specific border problems related to trade. These appear to arise from the use of animal materials in their personal goods that they try to take with them into the United States, or in their crafts that they export into the United States. The problem arises as a result of the well-intentioned international conventions and domestic legislation within the United States designed to prevent the exploitation of endangered species. This includes the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* ("CITES"), negotiated in 1973. It lists species that are considered to be endangered by trade, including: species in respect of which trade is prohibited (Appendix I):[66] species in respect of which trade can occur but only with the requisite certificate (Appendix II);[67] and species in respect of which trade should be monitored (Appendix III).

One problem that may arise is the similarity in appearance between prohibited and non-prohibited items. U.S. Fish and Wildlife maintains a list of restricted raw materials and undertakes an inspection of goods crossing the border to ensure that raw materials that are similar in appearance, are, in fact, not prohibited. It has been reported that if a shipment contains one product that includes feathers, hide, buffalo horn or porcupine quills, the exporter may have to pay a fee of U.S.$55.00 to have the shipment inspected to confirm that no restricted materials were used. The charge increases to U.S.$95.00 if any shells have been used. The problem is that the shipment of crafts usually occurs in relatively small quantities and the profit is quickly lost if a fee of U.S.$55.00 must be paid on a shipment of U.S.$200.00 in products. Canadian craft exporters are reportedly taking steps to replace raw materials that are even similar in appearance so that no inspection is necessary, such as refraining from using any shell products at all. This may be a border control issue that imposes a hardship on Canadian aboriginal groups that is

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66 E.g., ex whopping cranes

67 E.g.,Lynx and Wolf fur.

not imposed on American tribes trading within the United States. Apparently, American tribes are able to certify that no restricted materials have been used and no inspection occurs. These issues are still under review at the time of writing.

American legislation in this area predates the CITES Convention and is more restrictive creating difficulty for Canadian aboriginal groups carrying spiritual objects or traditional belongings into the United States. Such legislation includes the *Endangered Species Act*, *Migratory Birds Treaty Act*, the *Marine Mammal Protection Act*, as well as legislation banning the importation of eagle feathers into the United States, enacted in 1940. Apparently, bald eagles are not endangered but the legislation persists due to the importance of the species as the national symbol of the United States. Exceptions to the statute exist, in respect of feathers that were taken prior to 1940, as well as those that are taken from dead eagles that have not been slaughtered for the purpose of harvesting their feathers. Although not a trade issue *per se*, the existence of this legislation has created problems for Canadian aboriginal peoples that are taking personal regalia, spiritual objects or traditional belongings into the United States that contain eagle feathers. In many cases, the eagle feathers that they have were obtained before 1940. Various Canadian aboriginal groups maintain "sacred bundles", that contain the history of the particular group. These bundles contain eagle feathers, among a wide variety of other objects. These bundles have been subject to inspection and removal at border points by U.S. customs officials who may not be aware of the importance and sacred nature of these bundles.

A solution to the problem faced by Canadian aborignal peoples carrying objects across the Canada-United States border might be found in the permits that have been issued to American Indian tribes allowing them to possess eagle feathers.[68] It has been suggested

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[68] The restriction in the permit program that they may only be issued to federally recognized Indian treaties, has been subject to review by the courts. In *Saen v. Department of Interior*, No 00-2166 (10th Cir. August 8/01), the Court ruled that eagle feathers should be returned to him even though he could not obtain a permit because his tribe – the Chiricahua Apache Tribe of New Mexico – was terminated in the 1800s. Non-natives have also been challenging the restriction. Also see, *U.S. v. Wilgus,* No 00-4015 (10th Cir. August 8, 2001), *U.S. v. Hardman* no 99-4210 (10th Cir. August 8, 2001).

that the Canadian government establish a similar system of permits that could be shown at the border. There appear to be two problems with this proposal, the first being the difference between the American practice of recognizing bands versus the Canadian practice of recognizing individuals. The second problem is that the permit system itself might cause problems. Sacred bundles and other objects that contain eagle feathers might be confiscated at the border if a permit was not obtained. A policy of self-declaration might be a good solution from the Canadian perspective but American officials are unlikely to adopt any solution that goes beyond the program extended to American Indian tribes.

The *Marine Mammal Protection Act ("MMPA")* also causes significant problems for Canadian aboriginal groups, particularly those located in Northern Canada. In 1972, the MMPA was passed in part to save the harp seals by preventing trade. Apparently, the European Community enacted similar legislation in or about 1983. The MMPA also called for international negotiations on an international convention and this initiative led to the negotiation of CITES. However, the MMPA is more restrictive than CITES and it has not been brought into conformity with the international convention. The MMPA bans trade in respect of a number of species, including the narwal, whales, polar bears and harp seals, but, not all on the list are in danger of extinction, the harp seals being chief among them. The MMPA prevents Canadian aboriginal peoples from exporting products containing sealskin into the United States. [69] The unfairness of this restriction is evident in the exemption given to American Indians and Eskimos for personal consumption, subsistence and traditional handicrafts. An American Indian or Eskimo living one mile west of the Alaskan/Yukon border can sell traditional handicrafts made from seal skin into the 'lower 48', while a Canadian aboriginal person or Inuit living one mile east of the same border, cannot do so. Further, Alaskan Inuit are also allowed to kill fifty

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[69] See *Marine Mammal Protection Amendments Act, 2002,* 107th Congress, 2nd Session, H.R., 4781, May 21st, 2002. Section 4 provides: "A marine mammal product may be exported from the United States if the product: (i) is legally possessed and exported as part of a cultural exchange, by an Indian, Aleut, or Eskimo residing in Alaska; or (ii) is owned by a Native inhabitant of Russia, Canada, or Greenland and is exported for noncommercial purposes:(I) in conjunction with, and upon the completion of, travel within the United States; or (II) as part of a cultural exchange with an Indian, Aleut, or Eskimo residing in Alaska..

bowhead whales a year, but Canadian Inuit are prevented from trading in whale products of any kind.[70] The Inuit of Canada's north are seeking changes to the MMPA but, unfortunately, the Inuit in Alaska do not support these amendments due to concern that they might lose what advantages they now have under the statute.[71]

The difference in treatment of Canadian versus American aboriginal peoples is reflected in the fact that Canada has been "cited" under a relatively recent amendment[72] to American fisheries legislation. Apparently, the citation was reportedly made on the basis that Canada was not keeping its aboriginal peoples "under control".[73] The fact that Canada has been cited is material, because Canada is not eligible for even the limited exemption that exists under the MMPA, in circumstances where non-depletion can be

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70 It has been reported that this provides as much as half the meat that the 10,000-member Inuit community eats each year. http:news.bbc.co.uk/go/em/-/hi/English/world/asia-pacific/newsid_2005000/2. It was reported that Japan intended to support a ban on all indigenous hunts in retaliation for restrictions on its own whaling, at the International Whaling Commission conference that was held in May, 2002.

71 *"Okalik to Push Marine Mammal Act Changes,"* WebPosted Sep 4 2002 09:10 AM CDT http://north.cbc.ca/template/servlet/View?filename=se04okammpa

> Nunavut Premier Paul Okalik says that has shut down the seal fur industry, and has had a devastating effect on the traditions and livelihood of Canadian Inuit.
>
> But the Alaskan Inuit, the Inupiat, fear changes could hurt their subsistence hunting rights, guaranteed in the Act.
>
> Inupiat leader Arnold Brower Jr. says they can hunt whales and other marine mammals in the area for food, and to make and sell crafts. He says efforts to get the American government to amend the act could change that.
>
> "We are skeptical about the issue," he says. "We're afraid of the conflict that it is going to raise if M.M.P.A. is changed just for that purpose. It will have other ramifications. There is no other autonomy for us to protect our rights."
>
> Nunavut's premier Paul Okalik says all Inuit need the opportunity to trade freely with the largest trader in the world. He says Canadian Inuit need the income from the sale of seal pelts to the U.S. to maintain their traditions and livelihood as well.

72 The "Pelly Amendment"

73 Discussions with DFAIT and DIAND, August 1st, 2001

demonstrated under management programs deemed acceptable. Apparently, such exemptions have been granted rarely, if at all. [74]

The MMPA has strong public support within the United States and it is impossible to expect that the legislation would be repealed or significantly amended. The political sensitivity of the legislation is reflected in the fact that the issue is not even raised in the Arctic Council (composed of countries located in the arctic regions), even during the period recently when Canada chaired the Council. Nevertheless, it has been Canada's position that the legislation is over-reaching in its outright ban on trade, especially when the Canadian and American governments appear to agree that sustainable management of resources is the correct policy imperative.

It is clear that Canada's aboriginal peoples have been sideswiped by environmental legislation intended to protect endangered species. It is equally apparent that Canadian and American groups are treated differently from the standpoint of the manner in which they are exempted from this type of well-meaning legislation. This difference in treatment interferes with – and in some cases prevents - the export of Canadian traditional crafts and other native goods, into the United States. It would appear to violate the "national treatment" provisions of the *WTO Agreements*.[75] The difference in treatment might provide the basis for a complaint under the general dispute settlement provisions of NAFTA or the WTO.

D. DOES THE SOFTWOOD LUMBER DISPUTE PROVIDE A FORUM IN WHICH TO RAISES ABORIGINAL ISSUES?

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[74] The limited exemption under the MMPA is extended annually. A restricted harvest may occur from certain populations and the products crafted from those animals may be imported into the United States. The IUCN (World Conversation Union) monitors requests for exemptions.

[75] *General Agreement on Trade and Tariffs,1947,* Article III provides:

> 2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set for in paragraph 1.

NAFTA and the WTO are currently being tested as a potential forum for aboriginal rights. The current iteration of the *Softwood Lumber dispute from Canada* dispute has seen the intervention of aboriginal groups on both sides of the issue before all tribunals that have considered the issue as to whether Canada is providing a "financial contribution" through "the provision of goods or services"[76] such that "a benefit is thereby conferred"[77] on Canadian softwood lumber producers. The first stage of the dispute was before two administrative tribunals in the United States, the Department of Commerce ((("DOC") deciding whether a countervailable subsidy has been bestowed) and the International Trade Commission (deciding whether injury to a domestic industry has occurred). On May 10th, 2001, the Interior Alliance of British Columbia and the Grand Council of the Cree filed a submission before the Department of Commerce that the Governments of Canada, British Columbia and Quebec have disregarded the rights of the First Nations people in the administration of their forestry programs.

> The submitters further allege that across Canada First Nations see their treaty and land rights violated so that timber companies may benefit. In 1975, the James Bay Cree of Quebec entered into a treaty with the government of the province of Quebec and the federal government of Canada. The James Bay and Northern Quebec Agreement is primarily a land and environmental treaty. It recognizes the Cree right to occupy territory through the traditional subsistence economy and to have a major role in other types of future economic development in the region. The agreement established an environmental protection regime to safeguard the resources necessary for a viable subsistence economy in the context of development. Neither Quebec nor Canada has honoured this treaty, giving yet another type of subsidy to timber companies who are allowed to clear cut Cree lands in violation of treaty obligations.
>
> Finally, the submitters allege that as in British Columbia no treaties were signed with indigenous peoples, the government of British Columbia confers a subsidy in allowing timber companies to log lands under land claims disputes ... While British Columbia fights First Nations land rights claims in the courts, the province allows destructive resource practices to continue such as wide-spread clear-cutting of native hunting

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76 *Tariff Act,* 19 U.S.C. § 1677(5)(D), *Agreement on Subsidies and Countervailing Measures*, Article 1.1(a)(i)

77 *Tariff Act*, 19 U.S.C. § 1677(5)(E), *Agreement on Subsidies and Countervaling Measures*, Article 1.1(b)

> and fishing grounds. Forest companies are the beneficiaries of these delay tactics. They can continue harvesting undervalued timber and in the case of a finding against the governments they would have to account for the difference in value. Forest companies are therefore receiving financial contribution both through revenue foregone and through the provision of services under market value.

The Cree highlighted the non-compliance with the requirement to establish social and environmental review panels that had to be established pursuant to Section 22 of the *James Bay and Northern Quebec Agreement*.

The forestry management practices evident in British Columbia and Quebec were alleged to impose a cost on First Nations= peoples who have been denied the right to participate in the forestry industry, or receive payment for the exploitation of timber on their traditional lands. The Cree/IA Submission states that this cost should be considered a subsidy. The Cree support the imposition of countervailing duties, stating:

> Thus the application of U.S. trade law will work directly to benefit the environment, promote sustainable development of the forests, and uphold the rights of Indigenous People while eliminating unfair competitive advantages for Quebec=s lumber industry.

The Interior Alliance states:

> The Indigenous peoples of the Interior are concerned about unsustainable logging practices, whose environmental cost is externalized and borne by indigenous land users. Indigenous peoples bear the double cost. Their lands are being destroyed at an increasing rate due to the selling of resources extracted from their traditional territories under market value in international markets, mainly because the collective proprietary interest of indigenous peoples is not taken into account and compensated in decisions and transactions regarding their traditional lands and extraction of natural resources, such as softwood lumber.

On May 18th, 2001, the Meadow Lake Tribal Council and NorSask Forest Products Inc. ("NorSask")[78] filed a submission with the DOC seeking an exemption from any

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[78] NorSask operates a sawmill at Meadow Lake, and it is owned by the MLTC=s constituent First Nations communities under a limited partnership arrangement. The NorSask sawmill is a high efficiency softwood stud mill that produces annually approximately 120 million board feet of

countervailing duties levied against softwood lumber from Canada, for the softwood lumber products exported by NorSask. Contrary to the position of the Cree and the Interior Alliance of British Columbia, NorSask and the MLTC adopted the position of the Canadian Government that the stumpage programs do not constitute countervailable subsidies. The request for an exemption was made on the basis that no subsidy may be found to exist with respect to timber harvested from MLTC's aboriginal lands over which they assert, by treaty and by custom, aboriginal proprietary rights.[79]

The MLTC submitted that the First Nations forestry operations are based on their aboriginal proprietary rights, which are constitutionally recognized within Canada. The Government of Canada owes fiduciary obligations to the First Nations people in Northern Saskatchewan. The existence of these rights places the MLTC and NorSask in a unique position that cannot be compared to other forestry operations within Canada. They are reflected in the exclusive license given to the MLTC and NorSask with respect to the right to harvest the timber from their traditional lands. NorSask does pay stumpage fees in respect of the timber cut on their traditional lands as a matter of Saskatchewan law. The MLTC and NorSask submitted that the DOC is required to acknowledge in its investigation of the Saskatchewan stumpage program that the First Nations people are exercising their aboriginal rights over their traditional lands. The submission stated that, in this respect, they might be compared to an owner taking timber off his own land.

The DOC rejected the submission of the Interior Alliance/Northern Cree in a separate memorandum shortly before the Preliminary Determination was released.[80] This memorandum provided in part:

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softwood lumber. NorSask has also established smaller satellite sawmills in some of the aboriginal communities to the north of Meadow Lake. A small mill is currently operating on the Buffalo River First Nation that provides employment for approximately fifty First Nations people both in the mill and in the woodlands.

79 Ninety percent of the softwood timber that is supplied to the NorSask sawmill comes from the traditional lands of its owners, the nine First Nations of the MLTC.

80 Preliminary Determination at 2:

> "On May 10, 2001, the Natural Resources Defense Council, the Defenders of Wildlife, the Northwest Ecosystem Alliance, along with the Grand Council for the

> We also note that the allegations that the Government of Canada and the Provinces of British Columbia and Quebec are violating treaties and land rights with the First Nations are also questions more properly addressed in Canada. However to the extent that Canadian lumber companies are being provided with stumpage from provincial governments, we are measuring that financial contribution in our preliminary determination based upon a market rate for stumpage.

The Department of Commerce rejected the Interior Alliance submission on the ground that they should be defined in Canada and because the methodology employed already includes any such purported subsidy because of the measurement mechanism: any excess of the fair market value of timber over the stumpage charge would therefore include the subsidy alleged by the Northern Cree/Interior Alliance.

The Interior Alliance next filed an *amicus curiae* brief before the World Trade Organization panel that was convened to review the preliminary determination by the DOC. There are no established guidelines for filing an *amicus curiae* brief and the Interior Alliance and their consultant, Nicole Schabus, a doctoral candidate at the University of Vienna, quite creatively persisted until the brief was accepted. Later, the Nishnawbe Aski nation in Ontario (Treaty #9) joined the Interior Alliance by filing a brief also supporting the imposition of duties.[81] The MLTC and NorSask followed suit, attempting to leverage the DOC's memo that rejected the issue of first nations' rights, by stating:

> This analysis is not applicable in the circumstances of NorSask and the MLTC. Their participation in the softwood lumber operations in Northern Saskatchewan results from the recognition of their treaties, as well as their ownership and land rights over their traditional lands. This question is not "more properly addressed in Canada." The

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> Cree and the Interior Alliance, submitted new subsidy allegations. Supplementary information on these allegations was filed on June 1, 2001, and on June 15, 2001, the Nishawabe Aski Nation submitted an additional subsidy allegation. Based upon the information on the record, we have decided not to initiate investigations of these allegations. See August 9, 2001, Memorandum to Melissa G. Skinner from Team on New Subsidy Allegations …"

[81] Interior Alliance press Release June 10th, 2002, *Native Leaders Join Together to Pursue Softwood Lumber Issue*.

> Department of Commerce has a positive obligation to determine whether the government is providing a "good or service" and whether "a benefit is thereby conferred."[82] The Canadian and Saskatchewan governments are not *"providing"* a good or service or *"conferring a benefit"* to the nine First Nations that constitute the MLTC to the extent that the timber is taken from their traditional lands over which they have aboriginal proprietary rights.

The Panel determination was released on September 27th, 2002 and while the filing of the Interior Alliance brief was noted, the arguments raised therein were not dealt with.[83] Nevertheless, the success in filing the brief indicates that the WTO panels in appropriate circumstances become another forum in which the issue of aboriginal rights may be raised.

Notwithstanding the fact that the aboriginal issues were not dealt with, the Panel determination indicates the importance of these issues within the context of the *Softwood Lumber* dispute. One ground of appeal advanced on behalf of Canada is that the stumpage duties should be viewed as paid in respect of a "right to exploit an *in situ* natural resource" and the right to harvest standing timber "is not a financial contribution." As such, "it is a form of a property right which cannot be equated to the provision of a good or a service by the government." The WTO Panel rejected this argument, holding that Canadian governments were providing a good or service because "the trees which grow on the publicly owned Crown land are government owned." The Panel stated in an accompanying footnote:

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82 *Agreement on Subsidies and Countervailing Measures*, World Trade Organization Final Agreements, Article 1.1

83 *United States Preliminary Determinations with Respect to Certain Softwood Lumber From Canada,* Report of the Panel, WT/DS236/R, September 27th, 2002, Para 7.2:

> As a preliminary matter, we note that in the course of these proceedings, we decided to accept for consideration one unsolicited *amicus curiae* brief from a Canadian non-governmental organization, the *Interior Alliance*. This brief was submitted to us prior to the first substantive meeting of the Panel with the parties and the parties and third parties were given an opportunity to comment on this *amicus curiae* brief. After this meeting, we received three additional unsolicited *amicus curiae* briefs. For reasons relating to the timing of these submissions, we decided not to accept any of these later briefs.

> Canada states that "the Canadian provinces have title to the majority of public property and exercise exclusive jurisdiction to legislate in relation to the development, conservation and management of" *inter alia* forestry resources. According to Canada, "In the various provincial systems, the provinces retain ownership of the land, typically employing tenure agreements or licenses that confer rights to exploit the resource." [84]

Presumably, the WTO Panel would have had to conclude that government was not providing a good or service if in fact the timber was owned by the First Nations that were harvesting the timber from their traditional lands. It would also appear to follow that the WTO would be compelled to find that there could be no subsidy if indeed the First Nations and government both share ownership of the timber. If the Department of Commerce was to make a finding that a subsidy still existed, one would expect that it would be reduced by the extent of their proprietarily interest.

The fact that First Nations have a claim to the timber harvested on their traditional lands provides one of the few exceptions by which duties might be substantially reduced or eliminated altogether, at least to the extent to which First Nations' companies are involved in the softwood industry.

The *Softwood Lumber* dispute continues with panels convened under NAFTA Chapter 19 and the WTO to consider the Final Determination of the United States Department of Commerce that (along with the International Trade Commission's confirmation of injury) imposed a 27.2% duty on Canadian exports of softwood lumber. The MLTC filed a complaint before the NAFTA Binational Panel and are appearing as a party before the tribunal. No response was received to the NorSask submission of May 18th, 2001, and the MLTC/NorSask have appealed the failure to respond, arguing that the DOC has a positive obligation to provide a reasoned analysis for its rejection of NorSask's aboriginal rights as a distinguishing characteristic. MLTC and NorSask have argued that American law recognizes that markets exist in which the presumption of market distortion does not apply, due to their unique characteristics. MLTC/NorSask argue further that their aboriginal and treaty rights are *sui generis* in nature and thus constitute a unique market

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[84] *United States Preliminary Determinations with Respect to Certain Softwood Lumber From Canada,* Report of the Panel, WT/DS236/R, September 27th, 2002, at 76, Footnote 43

characteristic such that: (a), the government cannot be said to be providing a "good or service" because the MLTC has rights in the land and in the timber that is harvested; (b), the MLTC has not received a "benefit" from government due to the rights that they enjoy.

The Interior Alliance/Northern Cree was unable to participate in the appeal to the Binational Panel, as they lack the standing to be heard. They were not an "Interested Person" as defined under the United States *Tariff Act* and were only able to make the submission to the DOC by partnering with the Natural Resources Defence Council, an environmental group located in the United States. In contrast, NorSask and the Meadow Lake Tribal Council were able to appear before the Department of Commerce and the Binational Panel because they were exporters of softwood to the United States each year. However, once again demonstrating their innovative approach to forcing the issue, the Interior Alliance filed a motion before the Binational Panel seeking *amicus curiae* status. The argument appears to be the same as that submitted to the Department of Commerce and the WTO, but indicates that they have gathered more support from other aboriginal groups within Canada for their position. To the best of the writer's knowledge that, if such status is granted, it will be the first time a non-party has been granted this kind of limited standing to file a brief before a NAFTA Chapter 19 panel. A practice of admitting *amicus curiae* briefs has developed under NAFTA Chapter 11, which is the investor-state dispute settlement mechanism that is used when foreign investors have alleged that they have been denied national-treatment (Article 1102) or most-favoured-nation treatment (Article 1103) of their investments, that their investments have not been accorded the minimum standard of treatment required by customary international law (Article 1105), or that their investment has been substantially nullified by conduct tantamount to expropriation (Article 1110).

Both the Interior Alliance and the MLTC are likely to attempt to file *amicus curiae* briefs before the WTO dispute settlement panel that has also now been convened to deal with the Final Determination of the Department of Commerce. The filing of *amicus curiae* briefs by the Interior Alliance/Cree and MLTC/NorSask highlights the fact that there are

no published rules for the submission of such briefs.[85] Further, non-governmental organizations filing *amicus curiae* briefs are not allowed to appear before the WTO panels and it would be helpful for the transparency of the process if rules were published and appearances are permitted before the panel.

E. ARE THE FEDERAL AND PROVINCIAL GOVERNMENTS PLACED IN A CONFLICT OF INTEREST WHEN REPRESENTING ENTRENCHED INTERESTS IN A TRADE DISPUTE THAT MAY INFRINGE UPON ABORIGINAL TENURE OR RIGHTS?

The federal and provincial governments appear to have been placed in a position of conflict of interest, once the Interior Alliance/Northern Cree appeared in the proceeding, at least with respect to the aboriginal issues. This conflict of interest arises from the tension between the fiduciary obligations that are owed to Canadian aboriginal peoples, and the vested lumber interests that have significant, if not determinative, influence over the Canadian position before the various tribunals. Although it has not been confirmed, it appears that the Canadian government advocated a position that is contrary to that of the Interior Alliance/Northern Cree. It can be expected that the Department of Commerce – and the WTO – would give significant weight to the Canadian government's position in respect of aboriginal rights within Canada, due in part to the existence of the fiduciary obligations. The question arises as to how the Canadian government can provide an opinion – or take a position – that is contrary to that of an aboriginal group in Canada before an international tribunal? The Canadian government immediately appears to assume the position of both advocate and judge and jury because, in effect, the Canadian government is rendering the decisive "opinion" on the position of Canadian law regarding aboriginal law within Canada. Such an opinion is rendered even through the issues are currently before the courts (e.g. *Joshua Bernard v. The Queen,* N.B.C.A.Court File No 113/01/CA). The problem is that this "opinion" is being rendered in a proceeding in which the Canadian government is desperately trying to defend key softwood lumber

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85 It was not clear even upon whom the briefs should be filed and the procedure and the fax numbers were only obtained by NorSask by helpful personnel within the Department of Foreign Affairs and International Trade.

interests that constitute an economic engine in certain provinces within Canada. In circumstances such as these, the Canadian government would do well to acknowledge the conflict of interest in which it is placed and to allow an "independent" voice to provide an opinion regarding the nature – and extent – of aboriginal rights within Canada. The authority to provide such an opinion does not flow from the nature of the fiduciary obligation, which instead gives rise to the conflict. The existence of such a conflict of interest is one of the central issues that need illumination, due to the importance of establishing who should speak for Canadian aboriginal groups before international institutions and tribunals.

F. ARE DOMESTIC AND INTERNATIONAL INTELLECTUAL PROPERTY CONVENTIONS SENSITIVE TO THE COLLECTIVE AND INTER-GENERATIONAL OWNERSHIP OF ABORIGINAL INTELLECTUAL PROPERTY?

The traditional knowledge of indigenous people has also become an issue in international forums. The *Convention on Biological Biodiversity* appears to be one of the first that deals directly with traditional or indigenous knowledge. The problem is that the *Convention* itself and the initiatives that have been taken thereunder do not appear to deal meaningfully with the ownership and protection of indigenous knowledge when it is being commercialised. Indigenous knowledge is under some pressure due to the growing interest in exploiting it for commercial gain.

> Indigenous peoples insist that scientific knowledge is an inalienable part of their cultures and territories. Developing countries want preferential access to all of the indigenous knowledge within their borders, hoping to stimulate the development of more exportable commodities. Industrialized countries want immediate access to indigenous peoples' knowledge under the least restrictive conditions – preferably conventional intellectual property mechanisms such as patents – so that they can develop new commodities to sell back to developing countries.[86]

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[86] The issue is squarely put by Russel Lawrence Barsh*, How do you Patent a Landscape? The Perils of Dichotomizing Cultural and Intellectual Property*, 8 International Journal of Cultural Property (1999) 14, at 15

The question becomes how indigenous knowledge can be protected under existing intellectual property regimes, when its paradigm of inter-generational shared knowledge conflicts with the time-limited rights in respect of the ingenuity of particular individuals as recognized under intellectual property regimes. In this section, Canada's implementation of the *Convention on Biological Biodiversity* is reviewed, the unique challenges that the protection of indigenous knowledge poses for traditional intellectual property regimes is discussed and then the *WTO Agreement on Trade-Related Aspects of Intellectual Property Rights* ("TRIPs Agreement") is introduced.[87]

The *Convention on Biological Biodiversity*[88] was negotiated in 1992 and came into force in early 1993. To its credit, Canada was the first developed nation[89] that ratified the *Convention*, the Secretariat of which is located in Montreal.[90] The *Convention* has been described as promoting conservation of threatened species in their original habitats and offers assistance to developing countries as an incentive to participate.[91] The objectives of the *Convention* include "the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those

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87 There are a significant number of initiatives that deal with indigenous knowledge and cultural property and reference should be had to Russell Lawrence Barsh, *How do you Patent a Landscape? The Perils of Dichotomizing Cultural and Intellectual Property*, 8 International Journal of Cultural Property, (1999), at 14-47

88 The *Convention on Biological Diversity*, 1992, 31 International Legal Materials 822 (1992). Howard Mann, *Indigenous Peoples and the Use of Intellectual Property rights in Canada: Case Studies elating to Intellectual Property Rights and the Protection of Biodiversity*, submitted to Intellectual Property Policy Directorate, Corporate Governance Branch, Industry Canada, 1997; Yianna Lambrou, *Benefit Sharing of Indigenous Knowledge*, unpublished on file with Author, September 28, 1996; Yianna Lambrou, *Control and Access to Indigenous Knowledge and Biological Resources*, Submitted to the Biodiversity Convention Office Environment Canada, October 31, 1997; Russell Lawrence Barsh, *How do you Patent a Landscape? The Perils of Dichotomizing Cultural and Intellectual Property*, 8 International Journal of Cultural Property, (1999), at 14-47;

89 Mann, *Indigenous Peoples and the use of Intellectual Property Rights in Canada, op cit., supra,* note 88 at 1, footnote 2

90 *Ibid.,* at 32

91 Barsh, *op cit., supra*, note 88, at 32

resources and to technologies, and by appropriate funding."[92] Aboriginal rights are dealt with in paragraph 12 of the preamble that recognizes:

> The close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of indigenous knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components.[93]

Article 8(j) of the *Convention* builds on the preamble stating that:

> 8. Each contracting Party shall, as far as possible and as appropriate: ….
>
> (j) Subject to its 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 benefits arising from the utilization of such knowledge, innovation and practices.[94]

The *Convention* sets forth certain objectives to be pursued by the parties but it does not provide specific mechanisms that they should include in domestic law to achieve them. The qualification "subject to national legislation," has been criticized as a limiting condition that undercuts the force of the objectives that have been set out.[95] A number of other sections in the *Convention* supplement this basic obligation. Article 10(c) directs states to "protect and encourage customary use of biological resources in accordance with

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92 *Convention,* Article 1, quoted in Howard Mann, *Indigenous Peoples and the Use of Intellectual Property Rights in Canada, op cit., supra,* note 88, at 1, footnote 1

93 Howard Mann, *Indigenous Knowledge and IPRs: A Canadian Perspective*, unpublished on file with author, at 2

94 Additional provisions within the *Convention* impact upon the protection of indigenous knowledge, including Article 15(1) and (5) that deal with the issue of "informed consent", and Article 18(4) that recognizes the importance of traditional technologies. *Ibid.,* at 5-6

95 *Ibid*., at 5

traditional cultural practices that are compatible with conservation or sustainable use requirements."[96] Professor Barsh comments that:

> While territorial security and local autonomy are not expressly mentioned, they are both necessary for the effective implementation of articles 8(j) and 10(c). Without the continued sustainable use of their territories, indigenous peoples cannot maintain and develop their local knowledge systems, and without the maintenance of local knowledge systems, local uses of land will not be sustainable.[97]

A Canadian Biodiversity Strategy was published in 1995, as a response to the *Convention on Biological Diversity*.[98] It includes as one of its guiding principles that "(t)he knowledge, innovations and practices of indigenous and local communities should be respected, and their use and maintenance carried out with the support and involvement of these communities."[99] A "strategic direction" is also included that provides that an attempt will be made to:

> [i]dentify mechanisms to use tradition knowledge, innovations and practices with the involvement of the holders of such knowledge, innovations and practices, and encourage the equitable sharing of benefits arising from the utilization of such knowledge, innovations and practices.[100]

In response to its commitments under the *Convention*, Canada formed a 'working group on Article 8(j) in March 1997 to participate at a workshop on traditional knowledge and biodiversity held in November 1997 in Madrid, Spain. Seven of the thirteen participants were aboriginal persons.[101] The Federal Government pointed to the inclusion of

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96 Barsh, *op cit., supra*, note 88 at 33

97 *Ibid.,* at 33

98 *Canadian Biodiversity Strategy, Canada's Response to the Convention on Biological Diversity*, 1995, Ministry of Supply and Services Canada,

99 *Ibid.,* at 17.

100 *Ibid.,* at 49

101 *Caring for Canada's Biodiversity, Canada's First National Report to the Conference of the Parties to the Convention on Biological Diversity,* 1998, Public Works and Government Services, Canada., at 16

aboriginal peoples in the environmental assessments and review panels,[102] as well as the importance of co-management arrangements in self-government agreements and land claim negotiations that underscore the "greater share of authority over the management and development of their traditional lands."[103] By 1998, Canada also reported a number of initiatives relating to the "promotion of the use of traditional knowledge," including establishing "Centres" for "Traditional Knowledge" and "Traditional Knowledge Partnerships" at the Canadian Museum of Nature as well as a documentation project of traditional knowledge in a Northern River Basins study.[104] Canada further reported two initiatives to enhance indigenous peoples involvement in biodiversity management, including the development of co-management guidelines in Saskatchewan and a Northern Great Plains Native Plant Committee, also in Saskatchewan.[105]

WIPO is also reported to have begun grappling with the issue of indigenous knowledge.[106]

The pattern of initiatives reflected above do not appear to address the more significant problems that exist in terms of the protection of indigenous knowledge. These relate to the ownership of the indigenous knowledge and the control of the commercial exploitation thereof. Canada's intellectual property regime has some difficulty dealing with certain unique aspects of indigenous knowledge. The problem is that the primary goal of aboriginal people is preservation of knowledge rather than the kind of innovation

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102 *Ibid.*

103 *Ibid.,* at 3

104 *Caring for Canada's Biodiversity, Annex to Canada's First National Report to the Conference of the Parties to the Convention on Biological Diversity, Inventory of Initiatives,* 1998, Public Works and Government Services, Canada., at 5-6

105 *Ibid.,* at 6-7

106 Interviews with DIAND and DFAIT personnel, August 1-2, 2001

that is the basis for granting protection under various forms of intellectual property.[107] Indigenous knowledge is often collective in nature, and passed from one generation to another and it is inconsistent with the grant of time-limited intellectual property rights. Copyright, for instance, does not appear well suited to the protection of an aboriginal legend or song because it does not allow them to be protected in perpetuity, but only for a period of 50 years. Further, they were created generations ago and transmitted orally, so that they are likely in the public domain and open for use by others without consent.[108]

By its very nature, a significant amount of indigenous knowledge is already generally known and, therefore, may no longer be capable of protection under existing intellectual property laws, even if the other problems associated with indigenous knowledge could be overcome. The design of a kayak, for example, has long been public knowledge. Enforcement may also represent a problem, as it is the obligation of the rights holder to commence action to protect the rights that have been granted and aboriginal groups may not have the resources to undertake the kind of costly litigation that would be necessary to protect property rights that have been granted.[109] One study undertaken on behalf of

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107 Simon Brascoupe and Karin Endemann, *Intellectual Property and Aboriginal People: A Working Paper, Fall 1999, Research and Analysis Directorate,* Department of Indian Affairs and Northern Development, at 2. Canada's intellectual property regime includes:

> "*Copyrights* protect original literary, artistic, dramatic or musical works and computer software when they are expressed or fixed in a material form;
>
> *Neighbouring rights* refer to the rights of performers and producers to be compensated when their performances and sound recordings are performed publicly or broadcast;
>
> *Industrial designs* protect the shape, pattern or ornamentation applied to a manufactured product;
>
> *Trade-marks* protect words, symbols or pictures used to distinguish goods or services of an individual or organization from those of others in the marketplace;
>
> *Patents* protect new technological products and processes;
>
> *Trade secrecy* law protects trade secrets and confidential information from public disclosure and unauthorized use." *Ibid*., at 8

108 *Ibid.,* at 14-5

109 *Ibid.,* at 10

the Intellectual Property Policy Directorate of Industry Canada and the Canadian Working Group on Article 8(j) concluded:

> There is little in the cases found to suggest that the IP system has adapted very much to the unique aspects of indigenous knowledge or heritage. Rather, indigenous peoples have been required to conform to the legislation that was designed for other contexts and purposes, namely western commercial practices and circumstances.
>
> At the same time, there is little evidence that these changes have been promoted within the system, i.e., from failed efforts to use it that have been challenged. Thus, the potential to make the system change may not yet have been fully tested. Still, it is apparent from the paucity of examples found for this study that there is little use of the IP system in Canada by indigenous interests and this itself should be a cause of concern.[110]

Copyright law is reported to be widely used by aboriginal artists and this appears to be the exception.[111] Aboriginal peoples appear not to use industrial design protection, with a search of the federal Industrial Design Office records undertaken in 1999 disclosing one exception. The West Baffin Eskimo Cooperative Ltd. "filed more than 50 industrial designs in the late 1960s" covering fabrics using traditional images of animals and Inuit people.[112] Trademarks are used by aboriginal people, most notably the Cowichan Band Council of B.C. which sells sweaters that are hand-knit from ancient designs with yarn that is hand dyed, using traditional colours. It has registered a certification mark *"Genuine Cowichan Approved"* to distinguish its products.[113] Aboriginal peoples do not appear to have been very successful at obtaining patent protection for their traditional technologies. One attempt to register a patent involved the *Igloolik Floe-Edge Boat*. It is

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110 Mann, *Indigenous Peoples and the Use of Intellectual Property Rights in Canada: Case Studies Relating to Intellectual Property Rights and the Protection of Biodiversity, op cit., supra,* note 88, at 43. Mann included the following case studies: the Igloolik Floe-Edge Boat; "*Icy Waters",* a fish farming company in Whitehorse that is the only significant fish farmer of arctic charr with most if not all of the certified brood stock for fish farming purposes; *white Indian flint flour corn* was an indigenous strain of corn that has been harvested in specific days from the point of first contact; *Protecting Inuit art and sculpture*; *Environmental assessment and indigenous knowledge*;

111 Brascoupe and Endemann, *op cit. supra*, note 107, at 14-5

112 *Ibid*., at 16-17

113 *Ibid.,* at 19-20

an adaptation of a traditional Inuit design to retrieve seals shot at the edge of the ice flow. In the late 1980s, the Igloolik Research Centre developed an undated design using fibreglass that permitted certain improvements on the traditional design to be implemented. The initial steps were undertaken to file a patent, but appear to have been abandoned after a search of existing patents on boats of the same general design.[114] Other examples of aboriginal groups attempting to gain intellectual property rights have been cited, with varying degrees of success.[115]

The question arises as to what changes are necessary to Canada's intellectual property regime, if any to deal with the unique challenges of protecting indigenous knowledge. Issues such as "informed consent", and the licensing of rights suggests that the programs that enable aboriginal groups to take advantage of the existing laws may also be necessary. An example of legislation designed to protect aboriginal peoples, is the *Scientists' Act of the Northwest Territories* that requires all scientists conducting research to obtain a license from the territorial government before commencing research.

> This Act sets a precedent both in Canada and internationally; it has helped to establish the principle of prior informed consent in Canada for researchers seeking access to the traditional knowledge of Canada's Aboriginal people. This principle is now being adopted in land claims agreements and land use plans in the NWT and the new territory of Nunavut.[116]

The problem of protecting indigenous knowledge is impacted upon by the initiative for global harmonization of intellectual property regimes through the negotiation and implementation of the *WTO TRIPs Agreement*. It has been suggested that "[t]he prize has been speedy access to the genetic diversity of farmers and forests in developing countries

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114 Mann*, op cit., supra*, note 88, at 17-20

115 *Ibid.,*

116 Brasoupe and Endemann, *op cit., supra*, note 107 at 6

and an ability to convert traditional knowledge into globally binding patents before developing countries themselves acquire the capacity for biotechnology of their own."[117]

The *TRIPs Agreement* establishes minimum standards for intellectual property protection and enforcement among the parties to the Agreement. It requires "national treatment" (domestic and foreign rights holders must be treated in the same way) and "most favoured nation" treatment (all residents of whatever nation must be accorded the same protection) to be extended in respect of intellectual property. One of its most important features is to implement a dispute settlement mechanism for the enforcement of these minimum standards.[118]

The question arises whether the *TRIPs Agreement* will limit the ability of the Canadian government to implement changes to its intellectual property regime to better enable aboriginal peoples to protect their traditional knowledge. It has been noted that there is no "necessary inconsistency between TRIPs and special measures for the protection of indigenous knowledge."[119] There may be at least two opportunities provided for national legislation to acknowledge the uniqueness of indigenous knowledge and the legal framework necessary to protect it.

> Under Article 27 of the *TRIPs Agreement*, states may deny patents to: inventions that must be controlled in order 'to protect human, animal or plant life or health or to avoid serious prejudice to the environment" (biosafety exemption); "diagnostic, therapeutic and surgical methods for the treatment of humans or animals (biomedicine exemption); and, plants and animals and "essentially biological processes for the production of plants or animals," provided that some alternative legal protection is given to plant varieties (species exemption).[120]

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117 Barsh, *op cit., supra,* note 88, at 34

118 Mann, *Indigenous Peoples and the Use of Intellectual Property Rights in Canada, op cit., supra,* note 88, at 9-10

119 *Ibid.,* citing Erica-Irene Daes, *Protection of the Heritage of Indigenous People: Supplemental Report*, U.N. Doc. E/CN.4/Sub.2/1996/22 (1996), at 11-12. Ms. Daes is the Chairperson of the United Nations Commission on Human Rights 'Working Group on Indigenous Populations."

120 *Ibid.,* at 35

Professor Barsh comments that a great deal of indigenous knowledge falls within these exemptions and that "[i]t is therefore within the sovereign authority of individual states to take these forms of local knowledge out of the patent system, and enact national legislation specially adapted to the concerns of indigenous peoples."[121]

Professor Barsh indicates that a second window may be found in the *TRIPs Agreement's* provision relating to trade secrets because specialized knowledge of medicinal plants and restricted-access ceremonies conducted by aboriginal groups might fall within this provision.[122] He points to "varieties of knowledge" that are taught "sparingly to carefully chosen or initiated persons, who are instructed not to divulge what they have learned."[123] Notwithstanding its existence, this window might be somewhat narrow as the degree of "protected knowledge" appears relatively small, when compared to the aboriginal tradition of communally held knowledge.

The Federal Government appears to have taken no step to amend existing intellectual property legislation to take advantage of either window, or to otherwise deal with the special challenges of protecting aboriginal knowledge. It has been suggested by Robert Patterson and Dennis Karjala that amending the intellectual property regime may not be either desirable or necessary and that other alternatives might exist that could deal

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121 *Ibid.*

122 Ibid., citing TRIPs Article 39-2 that provides:

> Natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, or acquired by, or used by others without their consent in a manner contrary to honest commercial practices as long as such information:
>
> (a) is secret in the sense that it is not, as a body or in the precise configuration of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
>
> (b) has commercial value because it is secret; and
>
> (c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

123 *Ibid.,* at 35

effectively with the unique challenges of protecting indigenous knowledge.[124] They conclude:

> Like most commentators, we have found that IPR rights seem to be an unsatisfactory foundation on which to build a viable culture heritage legal edifice. Rather than try to fit the justifiable claims of indigenous peoples into legal property-rights categories that were not designed to accommodate their essential characteristics, our proposal is to focus on those aspects of indigenous peoples' claims that can be addressed outside the IPR regimes of patent and copyright. We have found that traditional concepts of Western law from contract, privacy, trade secret, and trademark can take us a long way in the desired direction.[125]

While individual initiatives have been undertaken, it appears that there is no systematic study underway to consider how indigenous knowledge should be protected either through the Canadian intellectual property regime or alternatively through other initiatives that might be taken. The lack of a coordinated analysis may exacerbate the limited manner in which aboriginal groups within Canada appear to have been included in the public consultation mechanisms developed to facilitate the various free trade negotiations. The development of a "Working Group on Section 8(j)" with significant aboriginal participation highlights the absence of a SAGIT into which the Working Group might be integrated or with which it might consult. The need to undertake these analyses and develop consultative mechanisms is underscored by the commitments that Canada has made to its aboriginal peoples through its support for the *Convention on Biological Biodiversity*.

G. APART FROM INTERNATIONAL TRADE LAW, WHAT IS THE STATUS OF ABORIGINAL RIGHTS IN CONVENTIONAL OR CUSTOMARY INTERNATIONAL LAW?

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124 Robert Paterson and Dennis Karjala, *Looking Beyond Intellectual Property in Resolving Protection of the Intangible Cultural Heritage of Indigenous Peoples*, Draft as of May 1st, 2002, publication forthcoming 11 Cardozo Journal of International & Comparative Law ___ (2003). On file and used with the permission of the authors.

125 *Ibid.,* at 49.

Apart from trade agreements, aboriginal issues have been the subjects of study and policy development before international institutions. Most notably, this has been undertaken by the International Labour Organization, which first dealt with the issue in 1957 in its *Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries ("ILO Convention 107").*[126] Currently, nineteen countries have ratified the Convention but this list does not include Canada, the United States, or European countries (excluding Belgium).

The Convention provides in Article 7, that "[i]n defining the rights and duties of the populations concerned regard shall be had to their customary laws" and "these populations shall be allowed to retain their own customs and institutions where these are not incompatible with the national legal system or the objectives of integration programmes." With respect to land, Article 11 provides "[t]he right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy shall be recognised." [127] Employment and social conditions are dealt with in a number of sections, but the only reference that may impact on trade issues is Article 18 that provides:

> 1. Handicrafts and rural industries shall be encouraged as factors in the economic development of the populations concerned in a manner which

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126 *ILO Convention 107* came into effect on June 2nd, 1959. It has been ratified by 27 states, with 8 subsequently denouncing their instruments of ratification. In the Americas, the following countries ratified the convention: Argentina (denounced July 3rd, 2000); Bolivia (since denounced); Brazil; Columbia (since denounced); Costa Rica (since denounced); Cuba; Dominican Republic; Ecuador (since denounced); El Salvador; Haiti; Mexico (since denounced); Paraguay; (since denounced); Peru (since denounced).

127 Land rights are also dealt with in Article 12 (1) The populations concerned shall not be removed without their free consent from their habitual territories except in accordance with national laws and regulations for reasons relating to national security, or in the interest of national economic development or of the health of the said populations.

(2) When in such cases removal of these populations is necessary as an exceptional measure, they shall be provided with lands of quality at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. In cases where chances of alternative employment exist and where the populations concerned prefer to have compensation in money or in kind, they shall be so compensated under appropriate guarantees.

(3) Persons thus removed shall be fully compensated for any resulting loss or injury.

> will enable these populations to raise their standard of living and adjust themselves to modern methods of production and marketing.
>
> 2. Handicrafts and rural industries shall be developed in a manner that preserves the cultural heritage of these populations and improves their artistic values and particular modes of cultural expression.

This provision does not deal with international trade *per se* but the reference to 'handicrafts' and 'rural industries' can easily be interpreted in a manner supporting the position of Canadian aboriginal groups in respect of the MMPA. The provisions respecting land rights suggest support for the position of the Interior Alliance and the Grand Council of the Cree. At the same time, the land rights and 'rural industries' provision suggest support for the position of the MLTC and NorSask.

ILO Convention 107 has been criticized on the basis that the underlying principle is one of assimilation of indigenous peoples and that it was drafted without input from the aboriginal groups.[128] The Convention was modified in 1989 by the *Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169)* that came into force on September 5th, 1991. It is said to be a "marked departure in world community policy from the philosophy of integration or assimilation underlying the earlier convention."[129] The *Convention* places "affirmative duties on states to advance indigenous cultural integrity; uphold land and resource rights; and secure non-discrimination in social welfare spheres; and the convention generally enjoins states to respect indigenous peoples' aspirations in all decisions."[130] The *Convention* has been criticized for the number of caveats that it includes or its provisions that appear in the

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128 S. James Anaya, Richard Falk and Donat Pharand, *Canada's Fiduciary Obligation to Aboriginal Peoples in Quebec under International Law in General,* Canada's Fiduciary Obligation in the Context of Accession to Sovereignty by Quebec, International Dimensions, Volume I, Royal Commission on Aboriginal Peoples (1995), 9 at 16

129 *Ibid.,* at 20-1. The basic approach of the Convention is set out in its preamble, emphasizing that:

> the aspirations of [Indigenous peoples] to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live.

130 *Ibid.,* at 20-1

nature of recommendations.[131] The *Convention* provides that aboriginal peoples should be able to exercise control over their economic, social and cultural development in a manner that protects and preserves their environment,[132] with "due regard to their customs or customary laws."[133] There is no specific reference to international trade but handicrafts are again dealt with, but this time with a more positive obligation on governments to provide "appropriate technical and financial assistance."[134] Governments are directed to "respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship."[135] Aboriginal peoples are not to be "removed from the lands that they

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131 *Ibid.,* at 21, footnote 36: Article 8.1 In the application of "national laws and regulations to the peoples concerned, *due regard* shall be had to their customs or customary laws." Article 9.1 "*To the extent compatible with the national legal systems and internationally recognized human rights,* the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected."; Article 10.1: "In imposing penalties laid down y general law on members of these peoples account *shall be taken* of their economic, social and cultural characteristics." [Emphasis added]

132 Article 7 provides:

> 1. The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development that may affect them directly.
>
> 2. The improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and co-operation, shall be a matter of priority in plans for the overall economic development of areas they inhabit. Special projects for development of the areas in question shall also be so designed as to promote such improvement …
>
> 4. Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.

133 Article 8

134 Article 23(2) provides:

> Upon the request of the peoples concerned, appropriate technical and financial assistance shall be provided wherever possible, taking into account the traditional technologies and cultural characteristics of these peoples, as well as the importance of sustainable and equitable development.

occupy"[136] and "[w]here the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent."[137] Aboriginal rights of ownership and possession are to be recognized, including the right to use lands "to which they have traditionally had access for their subsistence and traditional activities."[138] Governments are to safeguard the "rights of the peoples concerned to the natural resources."[139] Article 15(2) provides:

> In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.

Fourteen countries have ratified the Convention but, once again, Canada and the United States are not among them.[140] Canada participated in the negotiation of the Convention and voted in favour of its adoption. It has failed to ratify the Convention due to its concerns regarding: (a), the ownership of lands traditionally occupied; (b), ownership of Indian reserve lands; (c), indigenous customs in penal matters; (d), indigenous educational institutions; and (e), the definition of "lands".[141] It has been argued that

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135 Article 13(1)

136 Article 16(1)

137 Article 16(2)

138 Article 14(1)

139 Article 15(1)

140 The Convention has been ratified by: Argentina, Bolivia, Columbia, Costa Rica, Denmark, Ecuador, FIJI, Guatemala, Honduras, Mexico, Netherlands, Norway, Paraguay, Peru.

141 *Ibid., Annex III,* 132-9. Canada's objection to the treatment of "ownership of lands traditionally occupied is instructive:

> The concern arises out of article 14, paragraph 1, which provides that "The rights of ownership and possession of the peoples concerned over lands which they traditionally occupy shall be recognized."

Canada could ratify the Convention by relying upon the "general override clause that provides that implementation measures must be determined "in a flexible manner, having regard to the conditions characteristic of each country."[142]

The ILO Conventions 107 and 169 provide relatively comprehensive codes that deal with a variety of important aboriginal rights/issues. The problem is that the codes have not been ratified by enough countries – particularly those with large aboriginal populations – to make them effective, notwithstanding the symbolic and moral importance they might have. Even assuming that a sufficient number of ratifications occurred within the Americas, the importance of the Conventions is undercut by the fact that the ILO does not have an effective dispute settlement mechanism. The ILO does convene "panels of experts" when grievances are filed with the ILO and these panels have reportedly taken a "progressive view of states' obligations in this regard."[143]

While the Conventions have not entered conventional law *per se*, it has been suggested that they, along with a number of other initiatives, contribute to a series of principles that

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> Canada points out that existing Aboriginal rights in land, protected by Canada's constitution," may encompass significant areas of Canada which are also subject to the rights of the Crown and of third parties." The federal government's policy on comprehensive claims permits the exchange of these Aboriginal rights in certain lands for Aboriginal ownership of smaller areas, but this policy is not based on a prior recognition of Aboriginal ownership. Consequently, "a requirement to recognize aboriginal ownership of all lands which are subject to aboriginal rights would … not appear to correspond to Canadian law and practice."

142 *Ibid.,* at 139

143 Russel Lawrence Barsh, *Is the Expropriation of Indigenous Peoples' Land GATT-able*?, May, 2001, unpublished manuscript on file with author, at 2 –3

> "The Committee has advised governments that they must act promptly to demarcate indigenous territories, and take effective action to prevent invasions by settlers. It has rejected arguments that indigenous communities lack protected interests in lands they occupy, or lands they have only recently occupied, merely because the state holds title under national laws. It has chastised India for failing to provide suitable lands for the resettlement of communities displaced by construction of a World Bank-financed hydroelectric dam, and Bangladesh for failing to compensate tribal peoples displaced by spontaneous (albeit state-protected) settlers. Indigenous peoples were nonetheless dissatisfied with the national development exception in the convention, and with its overall philosophical orientation towards their gradual socioeconomic integration into national society."

now constitute customary international law.[144] These may be summarized as including the principles of self-determination, cultural integrity, control of lands and resources, social welfare and development, and self-government.[145] The 'lands and resources' principle has been described in the following terms:

> In general, Indigenous peoples are acknowledged to be entitled to ownership of, or substantial control over and access to, the lands and natural resources that traditionally have supported their respective economies and cultural practices. Where Indigenous peoples have been disposed of their ancestral lands or lost access to natural resources through coercion or fraud, the norm is for governments to have procedures permitting the indigenous groups concerned to recover lands or access to resources needed for their subsistence and cultural practices and, in appropriate circumstances, to receive compensation.[146]

The "social welfare and development" principle suggests that it is generally accepted that special attention is due Indigenous peoples in regard to their health, housing, education and employment."[147] Both principles suggest support for the positions of the Interior Alliance/Northern Cree and the MLTC in the *Softwood Lumber* dispute.

The initiatives that give rise to these principles of customary international law are said to include: the Charter of the United Nations;[148] the International Covenant on Civil and Political Rights and participation in the United Nations Human Rights Committee charged with overseeing this Covenant; the International Covenant on Economic, Social

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144 Customary international law has been described in the following manner:

> Norms of customary law arise when a preponderance of states and other authoritative actors converges upon a common understanding of the norms' content and generally expecting future behaviour in conformity with the norms…. Compare Article 38(1)(a) of the statute of the International Court of Justice, describing "international custom, as evidence of a general practice accepted as law." Anaya*, op cit., supra*, note 128, footnote 43 at 148

145 Anaya, *op cit., supra*, note 128, at 31-33

146 *Ibid*., at 32-3

147 *Ibid.*

148 It incorporates the principle of "equal rights and self-determination of peoples" and it generally requires observance of all human rights and fundamental freedoms. *Ibid.,* at 34

and Cultural Rights (confirming in Article 1 that "all peoples have the right of self-determination"); and, the International Convention on the Elimination of All Forms of Racial Discrimination.[149] Canada has also participated in the United Nations Working Group on Indigenous Populations, and the Committee on the Elimination of Racial Discrimination.

Apart from these initiatives there are also the United Nations' Declaration on the Rights of Indigenous Peoples, as well as the Organization of American States' *Declaration on the Rights of Indigenous Peoples* "that follows the broad outlines of ILO Convention 169".[150] The latter is reported to go somewhat beyond the ILO, in that it includes:

> … respect for indigenous peoples' traditional laws and intellectual property rights. "[T]raditional collective systems for control and use" of indigenous peoples' territories must be maintained as "a necessary condition for their survival, social organization, development , and their individual and collective well-being (preamble, paragraph 5). Indigenous legal systems are therefore recognized as part of each state's legal system, both generally, and with specific reference to land ownership and use (articles 16 and 18). Indigenous peoples furthermore have a right to ownership and control of their intellectual property through: "trademarks, patents, copyright and other such procedures as established under domestic law; as well as special measures to ensure them legal status and institutional capacity to develop use, share, market and bequeath that heritage to future generations" (article 20). While acknowledging the crucial linkage between cultural survival, the ways people use their land, and their ecological knowledge, the draft emphasizes conventional time-limited, commoditized mechanisms such as patent law. It does not exclude other approaches however.[151]

A further international initiative occurred in May 2002, under the auspices of the United Nations, which convened the inaugural session of the Permanent Forum on Indigenous Issues.

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149 *Ibid.,* at 34-5

150 Barsh, *How do you Patent a Landscape? The perils of Dichotomizing Cultural and Intellectual Property, op cit., supra,* note 88, at 36

151 *Ibid.*

It is notable that the University of Tulsa College of Law is offering an LL.M. in American Indian & International Law. It is unknown whether any Canadian university provides an LL.M in aboriginal international law but there is certainly a need for the development of such a program.[152]

H. WHAT IS THE ROLE OF CUSTOMARY INTERNATIONAL LAW NAFTA CHAPTER 11?

The integration of aboriginal rights/issues into customary international law may be of some importance within NAFTA dispute settlement mechanisms. NAFTA Chapter 11 allows foreign investors to commence arbitration against the Canadian government in circumstances where governmental measures affect existing investments within Canada. "Investment" is broadly defined, including, *inter alia,* equity or debt security or a loan of an enterprise,[153] or an interest in an enterprise that entitles the investor to share in income or profits of the enterprise.

Part "A" to NAFTA Chapter 11 provides the obligations that each Party to NAFTA owes to foreign investors located within the free trade area. As indicated above, NAFTA Annex II permits Canada to deny an investor from another Party the rights or preferences offered to any aboriginal person in relation to the principles of "national treatment" or "most-favoured-nation" treatment. However, certain obligations are not excluded even with respect to investment involving aboriginal issues. This includes the "minimum standard of treatment" pursuant to 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.[154]

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[152] The University of Tulsa College of Law, LL.M. Information related to the program may be found at http://www.law.utulsa.edu/indianlaw/llm/

[153] Article 1139, the debt security must have an original maturity of at least thee years or whether the enterprise is an affiliate of the investor.

[154] There are other NAFTA Chapter 11 provisions that might be raised in claims involving aboriginal issues. There is no exclusion in Annex II from the requirement in NAFTA Article 1109(1) that financial transfers be permitted:

Part "B" to NAFTA Chapter 11 establishes the arbitration mechanism for the settlement of investment disputes. It is the first provision in international trade law of its kind, as it requires each Member government to consent to settle disputes with private parties by arbitration.[155]

It has been suggested that the "minimum treatment" standard has been the most difficult NAFTA Article to define and interpret by tribunals constituted under Chapter 11,[156] on the ground that it is an ill-defined standard. Some of the panels that have dealt with this provision have been criticized on the basis that they have added new elements into the standard of fair and equitable treatment. They are alleged to have missed the fundamental

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> Each Party shall permit all transfers relating to an investment of an investor of another Party in the territory of the Party to be made freely and without delay. Such transfers include:
>
> (a) profits, dividends, interest, capital gains, royalty payments, management fees, technical assistance and other fees, returns in kind and other amounts derived from the investment;
>
> (b) Proceeds from the sale of all or any part of the investment or from the partial or complete liquidation of the investment;
>
> (c) Payments made under a contract entered into by the investor, or its investment, including payments made pursuant to a loan agreement …

Further, there is no exclusion from the requirements in NAFTA Article 1110(1) relating to the obligation arising to pay compensation arising from conduct amounting to expropriation:

> No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except … (d) on payment of compensation in accordance with paragraphs 2 through 5.
>
> Subparagraph (2) is the only one of note. It requires that "compensation shall be equivalent to h the fair market value of the expropriated investment … Valuation criteria shall include going concern value …"

155 NAFTA Article 1122. Previous investment agreements existed, but these require the consent of the government on a case-by-case basis. Of course, one could argue that the United States-Iran Claims Tribunal would actually be the first such mechanism.

156 J. Anthony VanDuzer, *NAFTA Chapter 11 to Date: The Process of a Work in Progress*, March 31st, 2002 manuscript.

point that the Article adds no new principle or rule that requires any treatment mandated beyond the minimum standard required by customary international law.[157]

Canada's concern with the manner in which the NAFTA Chapter 11 tribunals were dealing with the enlargement of obligations under 'minimum treatment' standard, led to the issuance by the Free Trade Commission of an Interpretative Note that stated:

> Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
>
> The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

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157 Significant concern regarding this issue was raised by one case in particular, the *Metalclad* decision and it is briefly described below, due to the importance of this dispute in evaluating the Chapter 11 process and its legal standards. This case involved arbitration against Mexico commenced by an American company in respect of the denial of building permits for a hazardous waste disposal facility within the Municipality of Guadalcazar, in the sate of San Luis Potosi, Mexico. The panel issued an award on August 20th, 2000, awarding Metalclad damages in the amount of U.S.$16.3 million on the basis that Mexico did not meet the 1105 standard of treatment to Metalclad because Mexico failed to ensure a transparent and predictable framework for Metalclad's business planning and investment. *The United Mexican States vs. Metalclad Corporation*, (2001) BCSC 664, May 2nd, 2001, at 7. The decision of the Tribunal was set aside under Article 1105 on the basis that the Tribunal wrongly imposed a new obligation of transparency as part of the Article 1105(1) standard required to be accorded to international investors. Mr. Justice Tysoe stated:

> > … in order to qualify as a breach of Article 1105, the treatment in question must fail to accord to international law. Two potential examples are 'fair and equitable treatment' and 'full protection and security', but those phrases do not stand on their own. For instance, treatment may be perceived to be unfair or inequitable but it will not constitute a breach of Article 1105 unless it is treatment which is not in accordance with international law. In using the words 'international law', Article 1105 is referring to customary international law which is developed by common practices of countries. It is to be distinguished from conventional international law which is comprised in treaties entered into by countries (including provisions contained in the NAFTA other than Article 1105 and other provisions of Chapter 11). *Ibid.,* at 15
>
> His Honour stated that by imposing a new obligation of transparency – which is not part of Chapter 11 - the decision was made on the basis of a matter outside the scope of the submission to arbitration. *Ibid.,* at 15-6

> A determination that there has been a breach of another provision of the NATA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).[158]

Article 1131(2) provides that "an interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Article. As a result, the issue is what is the standard of treatment to be accorded by customary international law.

An aboriginal group from one NAFTA country investing in another could advance an argument that aboriginal rights/issues have entered into customary international law and has become part of the minimum international standard of treatment of a foreign investor. Research would be required to determine the possible merit of such an argument.

I. CAN INTERNATIONAL TRADE LAW EASILY ADAPT TO ABORIGINAL ISSUES?

Aboriginal law is unique in its concepts and principles and trade law will not easily accommodate it. These concepts have proved to be a significant challenge for the development of Canadian constitutional law that is in a process of (slow) evolution and (uneven) development. One question that arises is whether international trade law is well suited to dealing with the challenges posed by aboriginal law. Another question is whether aboriginal trade issues can be desegregated from aboriginal rights generally considered. If the objective is to advance aboriginal rights/issues in international law generally and trade law in particular, it is instructive to consider the competence of trade law to deal substantively – versus symbolically – with essential aboriginal concepts.

The inclusion of the spectrum of aboriginal rights within Section 35(1) of the *Constitution Act, 1982,*[159] has resulted in the Supreme Court of Canada recognizing

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[158] VanDuzer, *op cit., supra*, note 156, at 23

[159] Article 35 provides:

> (1). The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2). In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Metis peoples of Canada.

aboriginal tenure/rights as a *sui generis* (self-generating) legal system that does not look to the common law for its founding principles. The fiduciary obligation that is owed to Canada's aboriginal peoples is readily confirmed but the limit of the duty has not been established.[160] The existence of a constitutional remedy has not been adequately dealt with in existing case law and must evolve through precedent. The application of legal or equitable remedies to aboriginal tenure/rights is in its infancy and the degree to which aboriginal groups can use the breach of fiduciary duty to establish an action for damages, appears to be virgin territory.[161] A unique argument has been made by Henderson, Benson and Findlay[162] that Canadian courts must accord traditional aboriginal law equal respect to that of English common law. It is a radical argument that has profound implications for the development of a unique property law regime within Canada.

Aboriginal rights and traditional legal principles evidence a unique concern for collective, ecological responsibility. The rights of ownership are not confined within the lifetime of a sovereign individual, but extend on an inter-generational basis requiring the maintenance of the cultural and communal ecological factors of traditional wealth. Common law traditions appear not to adapt easily to the aboriginal concept of the collectivity. An example is provided by the intellectual property regimes reviewed above, which recognize recent patents, industrial designs and copyrights of the author for a relatively short period of time. Traditional knowledge involves collective knowledge that

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(3). For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4). Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are governed equally to male and female persons. *Constitutional Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.) 1982.c.11,

160 The complexities inherent in defining this fiduciary obligation is discussed in Renee Dupuis and Kent McNeil, *Canada's Fiduciary Obligation to Aboriginal Peoples in the Context of Accession to Sovereignty by Quebec, Volume 2, Domestic Dimensions*, August, 1995, Royal Commission on Aboriginal Peoples.

161 Henderson, Benson & Findlay, *Aboriginal Tenure in the Constitution of Canada*, Carswell, 2000. A discussion of the constitutional remedy is found at 372-295.

162 *Ibid.*

has existed for generations, usually cannot be attributed to a particular "owner"[163] and should be unlimited in terms of the duration of period of protection.

Aboriginal legal concepts also emphasize a "holistic" ethos that suggests it is inappropriate to attempt to desegregate the various aspects and interests implicit in a particular aboriginal issue. As an example, Professor Barsh states that aboriginal intellectual property cannot be separated from the landscape from which it emerged and in which the particular song, story or technology is embedded.[164] He perceives that "separating land ownership from knowledge ownership reflects a peculiarly Western reductionism."[165] Aboriginal groups themselves have advanced the proposition that trade issues cannot be separated from issues related to the broader panoply of their rights.[166] This position is reflective of a broader intellectual trend, challenging the atomism of western thought, in which fields of study are segregated and separated. This reductionism has been criticized on the basis that while the study of the particular area may become more mathematically exact; its "quality" is lost. This trend is generally known as "complexity theory" that attempts to take a more holistic view of a particular phenomenon – scientific, economic or otherwise.[167] Aboriginal law and concepts that take a holistic view, appear to exemplify this intellectual trend.

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163 It has been argued that this problem can and has been overcome by identifying a particular elder as applicant for the aboriginal group in question.

164 Barsh, *How Do You Patent a Landscape? The Perils of Dichotomizing Cultural and Intellectual Property, op cit., supra*, note 88

165 *Ibid.,* at 20. He gives three examples, one of which includes:

> Among the Mi'kmaw, hunting areas and coastal fisheries were allocated among clans in large tracts or estates known as umitki, which followed the boundaries of bays, river watersheds, lakes and marshes. The clan regarded all of the animals and plants living within its umitki as its kinfolk and its own role as that of a steward or guardian. To assert a claim to hunt or fish within a umitki, it was necessary to show some relationship with the custodial clan and thereby, implicitly, a kinship with the animals and plants found there.

166 Aboriginal Summit, April 2001

167 One of the foremost inter-disciplinary institutions promoting this viewpoint is the Santa Fe Institute founded in New Mexico in 1987. W. Brian Arthur, *Self-Reinforcing Mechanisms in Economics*, in Philip W. Anderson, Kenneth J. Arrow, David Pines (eds), *The Economy as an Evolving Complex System*, 1988, Santa Fe Institute Studies in the Science of Complexity, at 9-10

International trade law does not appear to be well suited to the unique aspects of aboriginal rights/issues. If domestic legal regimes are having difficulty recognizing aboriginal tenure/rights/traditional law, it is stretching credulity to assume that international trade law will accept the challenge more quickly. International trade law is static and is not subject to the kind of evolution that is possible in domestic legal systems. The rules regarding trade evolve very slowly through multilateral negotiating rounds in which concessions are extremely difficult to extract and sovereignty is jealously guarded. Antidumping "law" provides an example of this rigidity. There is no economic justification for the continuation of these principles and their existence is due to protectionist pressures, primarily within the United States. This is reflected in the grant of "fast track" negotiating authority to President Bush, in which one of the negotiating objectives is to maintain existing antidumping principles.[168]

While aboriginal rights/issues have established a basis in international customary law, they have not achieved much status in conventional law and no significant status in international trade law. It appears that it is inappropriate to consider trade issues from an aboriginal standpoint without considering the other facets of aboriginal rights. Much like the unique nature of aboriginal rights generally, a holistic approach to aboriginal rights/issues within the international sphere appears necessary. This underscores the importance of coordinating the advocacy of aboriginal issues before international institutions and tribunals.

J. IS THERE A NEED TO COORDINATE AD HOC ADVOCACY EFFORTS BEFORE INTERNATIONAL TRADE TRIBUNALS?

The need for the coordination of international advocacy of aboriginal rights is reflected in the *ad hoc* mechanisms that are developing to fill the void left by the absence of an institutional response. On May 17-19th, 2002, a symposium was held at New York University Law School regarding "Indigenous Peoples and Multilateral Trade Regimes:

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168 *Final Fast-Track Deal Weakens Dayton-Craig Trade Remedy Provisions*, Inside U.S. Trade, August 2, 2002

Navigating New Opportunities for Advocacy." The conference was organized by Professor Russel Barsh, of the New York University Law School.[169]

The symposium considered that it is important to recognize that there are different aspirations of First Nations groups throughout the western hemisphere. Some, such as the MLTC, want to participate fully in trade. Other aboriginal groups in Mexico and Peru may not wish to participate in trade but to be protected from it[170] in order to continue their cultural traditions. Expressed in this manner, the difference in aboriginal viewpoint is expressed as a north-south issue, but there are also differences in viewpoint towards participation in international trade within Canada itself. The difference between the MLTC and the Interior Alliance highlights this difference.

The problem when including aboriginal tenure/rights within free trade agreements is to do so in a manner assuring that aboriginal groups are given the choice about self-determination. The trade systems must identify those cultural factors that the trade system must either protect or respect. Non-interference was perceived to be a guiding principle in the design of the free trade agreements, in a manner that provides space for indigenous peoples. Basic conditions must be established so that First Nations can choose to participate or not participate. The need to recognize aboriginal rights within trade treaties

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169 The conference was funded in part by International Institute for Indigenous Resource Management that was represented at the conference by its President, Mervyn Tano. The participants at the conference included, among others, Chief Arthur Manuel and Nicole Schaus (Interior Alliance of British Columbia), Robert Patterson (Associate Dean of UBC), Bill Kerr (Estey Centre, University of Saskatchewan), June McCue, (Assistant Professor and Director of First Nations Legal Studies, UBC), Gavin Clarkson (Harvard Business School), Alfred A. Ilenre, (Secretary General, Ethnic Minority and Indigenous Rights Organization of Africa) as well as student groups from NYU, U of T and UBC law schools.

170 The example of the cultural importance of corn to aboriginal groups in Mexico, that were put at risk due to corn imports, as well as the patenting of certain strains such as "blue" corn, thus potentially denying its availability to the aboriginal groups that developed the strain over the millennia. A further example that was provided involved cooperative ownership structures in Mexico that had lasted for decades prior to the implementation of NAFTA, after which these communal structures were squeezed out, possibly by the Mexican government using the Agreement as a pretext. These anecdotes are included here as recorded without verification through independent research.

challenges them to evolve beyond static trade issues in favour of the social dimensions of trade.

The Symposium considered that one of the basic conditions to be established is to protect and respect the traditional aboriginal names, geographical identifications and the products of aboriginal groups. 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 to consumers and industries as to what is genuinely an aboriginal good or activity. One example is provided by "sweat lodge" experiences, which are not offered by aboriginal groups but entrepreneurs who offer this "genuine" experience at $5,000.00.[171]

The WTO regime creates opportunities and they are of two kinds: firstly, it provides an opportunity to become engaged in international trade as an exporter and importer; and secondly, it provides an opportunity to impose financial consequences on domestic regimes that do not respect certain basic aboriginal rights and tenure. The *Softwood Lumber* case and the submission by the Interior Alliance is identified as an example of the way in which the WTO procedure might be used to focus on the alleged failure of the Canadian government to respect aboriginal tenure in the interior of British Columbia.

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 their traditional lands. This may involve the application of traditional concepts such as trust or constructive trust doctrines. This must involve the utilization of private international law because the WTO does not permit such actions or remedies, but simply the imposition of duties on goods that have been improperly subsidized or dumped, or the removal of non-tariff barriers to trade. If one intends to control traditional knowledge, one has to use the private international law mechanisms as a result of specific conflicts over lands and resources.

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[171] Comment by Gavin Clarkson (Harvard Business School),

Apart from the WTO mechanisms, the Symposium considered that more 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 placement of resolutions on the agenda.

The meeting concluded with a list of specific projects that might be taken into consideration. They include firstly, the preparation of a *Draft Agreement on Aboriginal Issues* that could be included as a separate purilateral agreement under the umbrella of the WTO. 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. It should be noted that it might be an error to describe the draft as a "Side Agreement" similar in nature to the NAFTA Labour and Environmental Side Agreements. It was suggested that the side agreements have not been particularly effective and that they have a weaker enforcement mechanism. The concern was advanced that relegating aboriginal rights issues to side agreement status might be to denigrate them.

A second project identified on the Symposium's action plan was a *Pilot Project on Certification*. Aboriginal intellectual property requires protection from exploitation from groups capitalizing on the cachet of "aboriginal" and "traditional" experiences. The creation of a trademark or certification would facilitate consumer choice in respect of such aboriginal services or goods that are sourced on indigenous people's territory and with their consent. The pilot project might work with a few aboriginal groups in different areas of the world to ensure that their goods and services are distinctive and identifiable. It would also help overcome the problems associated with competing products made without their consent but which masquerade as aboriginal goods/services. Gavin Clarkson of Harvard Business School commented that any such pilot project might have to also include a marketing initiative to build brand awareness of any mark or certification that was created. It is only through a program to build awareness among suppliers and consumers that the objectives of the pilot project would be realized.

A third project involved the *Monitoring of the WTO Dispute Resolution Process*. The experience of the Interior Alliance and NorSask/MLTC is that it was difficult to determine what the rules are regarding the submission of *amicus curiae* briefs to the *Softwood Lumber* WTO panel. The need to publish guidelines for the filing of such briefs was discussed. In addition, the list of disputes before the WTO should be monitored to identify those disputes that might provide an opportunity for aboriginal rights issues to be advanced. Disputes filed before regional bodies such as NAFTA should also be monitored and an *amicus curiae* process in NAFTA Chapter 19 (antidumping/ countervailing duty mechanism) and NAFTA Chapter 20 (general dispute settlement mechanism), should be pursued.

A fourth project involved the development of a United States' *Department of Commerce Aboriginal Protocol*. Mervyn Tano (President, International Institute for Indigenous Resource Management) made the point that the United States Department of Commerce does not have an aboriginal policy. Mr. Tano indicated that the Departments of Defense and the Environment do have such policies that apparently recognize the fiduciary obligation that is owed to the Indian tribes within the United States and defines the way in which these departments intend to work with Indian tribes in this regard. These policies can be important as the EPA aboriginal policy was fundamental in preventing a project proceeding in Washington State that would have impacted on aboriginal lands. The *Softwood Lumber* dispute indicates that a significant proportion of the trade between the United States and Canada may impact on aboriginal rights. Any policy that is negotiated with the Department of Commerce may allow indigenous peoples to become directly engaged in the trade discussions between the United States and Canada.

A fifth project involved steps that might be taken to *Facilitate Aboriginal Participation* in various trade conferences and meetings. For instance, British Columbia has indicated that it wants to hold a softwood summit and First Nations' representatives should be given the opportunity to participate.

A sixth project related to the identification of *Private International Law Initiatives* that might be undertaken. It is necessary to develop the expertise to identify and prosecute test cases that will advance aboriginal law. The Symposium discussed the possibility of establishing a network of lawyers to bring actions across borders to "surgically punish bad behaviour". The cases will have to be carefully selected to ensure a good chance of success.

Finally, *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 should be created at the World Trade Organization or the Department of Foreign Affairs and International Trade. These internships might also have an equally important benefit of sensitizing trade officials within these institutions to aboriginal issues.

K. APART FROM TRADE TRIBUNALS, IS THERE A BROADER NEED TO COORDINATE THE ADVOCACY BEFORE INTERNATIONAL INSTITUTIONS AND TRIBUNALS?

The *Softwood Lumber* dispute provides an example of the newfound activism of Canadian aboriginal groups before international trade tribunals. The fact of a relatively effective (although not binding) dispute settlement mechanism makes the World Trade Organization a focal point for social activists, even though the *World Trade Organization Agreements* do not deal directly with the aboriginal rights. It appears that the issues raised by the Interior Alliance should be brought under the auspices of the International Labour Organization, but the fact that they have been unable to do so underscores the fact that the ILO Conventions 107 and 169 have not been ratified by Canada and it does not have an effective dispute settlement mechanism. In this sense, the issues raised in the Interior Alliance/Cree brief before the DOC and WTO have been diverted from a more appropriate forum.

The diversion of aboriginal issues 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. The "Battle in Seattle" at the

WTO meeting held in November 1999, represented an inflection point in anti-globalization sentiment, such that any meeting of a multilateral institution is anticipated to become a lightening rod for dissent. Much of the criticism surrounding the WTO results from the perception that the institution is little more than the pawn of socially irresponsible multinational corporations with sub par labour and environmental standards. The IMF and World Bank are increasingly perceived as captives of the United States Administration and Treasury Department in the imposition of market liberalization programs as part of austerity measures that are insensitive to the resulting hardships.

Fifty years after the 1944 Bretton Woods Conference that established the economic institutional structure to guide post-war reconstruction, it may be time for another conference or "summit" to focus attention on policy coordination between these institutions as well as the collection of institutions established under the auspices of the United Nations. The objective of such a conference would be to identify which institutions should be responsible for advancing certain objectives and establishing the manner in which those institutions that share responsibility will cooperate.

The need for policy coordination arises in part because the WTO is under pressure to transform itself from a trade body to one that attempts to promote social policy or, at least "fair trade". The engrafting of social policies onto trade issues may result in making progress on trade liberalization in the next round of WTO trade negotiations much more difficult. The developing world views the development of a "social conscience" to be veiled protectionism and a new way in which the developed world will exclude their products. The result is that the benefits of free trade will be lost. In the absence of market failure, a policy of free trade should increase economic efficiency and raise living standards through the utilization of comparative advantage.[172]

Policy coordination will be instrumental in any attempt by the IMF and the World Bank to regain the credibility that each lost as a result of their handling of the Asian financial

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[172] The case for free trade is eloquently put by Jagdish Bhagwati, *Free Trade Today,* Princeton University Press, 2002

crisis of 1997. Nobel Laureate Joseph Stiglitz[173] has strongly criticized the IMF for its "shock therapy," that requires rapid market liberalization and other market concessions including institutional reform, in return for temporary financial relief. Such reforms are alleged to have prolonged pressures of rescission and contributed to a deepening of the adjustment problems resulting from the failure of traditional enterprises and institutions such as domestic banks that lend to small and medium-sized enterprises. Stiglitz's analysis points to the importance of institutional maintenance and development within market liberalization programs that are staged and paced. Although the Laureate's analysis has been the subject of withering criticism, there is a general consensus on the need to pace market liberalization. The criticism of the IMF suggests that there needs to be greater coordination between it and the WTO. Assuming any credible austerity programs need to include market liberalization conditions, it would follow that the WTO's institutional expertise on trade matters be brought to bear on the design of such conditions.

In the second half of the twentieth century, the IMF, the World Bank and the WTO performed relatively well under their respective mandates. However, as globalization proceeds relentlessly and continues to chip away at national sovereignty, consideration must be given to the structure of the institutions that are needed to facilitate market liberalization in the first half of the twenty-first century. The various economic and social objectives should be allocated amongst the key institutions because, in default thereof, the WTO will be pressured to pursue various objectives that are not dealt with effectively by the institutions created to address them. It is unlikely that the WTO can be all things to all people and its main objective – promoting trade liberalization – will be frustrated.

The WTO might respond in part to the public criticism by introducing transparency into the dispute settlement process by developing rules for the submission of *amicus curiae* briefs and permitting non-governmental organizations to appear before dispute settlement

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[173] Joseph E. Stiglitz, *Globalization and Its Discontents*, W.W. Norton & Company, 2002

panels.[174] In addition, the ILO might be given status to intervene at the request of aboriginal groups, in WTO dispute settlement proceedings, and if not in all disputes, at least those involving parties that have ratified the ILO Conventions 107 or 169. The IMF or World Bank might also be required to consult with the ILO when developing programs in the developing world.

CONCLUSION: THE NEED FOR CONSTANT ILLUMINATION OF ISSUES OF FUNDAMENTAL IMPORTANCE

Aboriginal groups are among the most marginalized in Canadian society. Notwithstanding the inflexible nature of international trade law, they must attempt to assert a presence in multilateral and regional trade negotiations. The examples of the *MMPA* and *Softwood Lumber* confirm that aboriginal groups are particularly vulnerable to trade issues as they are engaged in traditional and primary industries that are often targeted by trade prohibitions or trade actions. Trade agreements also have the potential to interfere with support programs intended to promote participation in the primary industries, on the basis that they constitute actionable subsidies. Participation in trade negotiations should be entered into with limited expectations. The inflexible nature of trade law is such that objectives must be kept modest and must augment initiatives in other international forums such as the United Nations collection of institutions.

The model that this involvement could take is beyond the scope of this paper. However, it might include the development of an aboriginal SAGIT. One model that has been suggested is the participation of aboriginal representatives in the revision to the *Migratory Birds Act*. They had a seat at the negotiating table with direct access to the American representatives.

There is also a role for *ad hoc* advocacy before international tribunals. The growing activism of aboriginal groups in asserting their rights before international tribunals provides a new forum for their rights to be pursued. Aboriginal groups should insist that

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[174] The confidentiality of proprietary information might be protected by having NGOs that have filed *amicus curiae* briefs attend a separate hearing immediately after the traditional hearing attended by the parties.

Canada's objectives in the WTO, NAFTA and FTAA negotiations should include a transparent process for the filing of *amicus curiae* briefs as well as the status to appear before tribunals convened in trade disputes. Canada should also be pressured to support institutional changes to facilitate the advocacy of aboriginal issues before the international institutions and tribunals. There appears to be an inherent conflict of interest in the position of the Canadian and provincial governments in trade disputes in which aboriginal rights are asserted. It has been suggested that the Canadian government opposed the position of the Interior Alliance before the international tribunal. It would appear that a better institutional response would be to grant standing to the International Labour Organization, or some other institution such as a United Nations Committee or Working Group. This would provide an independent voice and a forum to advance aboriginal issues on the basis of the customary law that is suggested to be developing.

It is also apparent that capacity building is necessary to permit aboriginal groups to advocate their interests on this relatively new frontier. Internships are but one way in which this can occur. This capacity building also involves the training of aboriginal groups with respect to border and customs procedures as well as ways in which they might avail themselves of opportunities provided by the existing intellectual property regime.

More importantly, thought should be given to the manner in which aboriginal rights/issues might be coordinated on a broader basis if aboriginal groups are to take advantage of the opportunities provided by their newfound activism before international tribunals.

In conclusion, this paper is intended to be a broad survey of the aboriginal issues that arise in the context of international trade. It is intended to provide a research agenda to illuminate the issues in a manner permitting policy options to be developed. The agenda is provided in the schedule to this paper.

SCHEDULE:
ABORIGINAL TRADE ISSUES

Provided below is a list of issues that were identified during the research of this paper. They are in no particular order and they have not been ranked in terms of their importance. They may also 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. Central themes that form the core of a research agenda:

(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.

*(iv) The identification of other international institutions and tribunals and the ways in which aboriginal rights might be advanced before them in a coordinated fashion: S*trategies 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 purilateral 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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