

Submission by the International Inter-Tribal Trade and Investment Organization to the Government of Canada for the Renegotiation and Modernization of the North American Free Trade Agreement

No relationship is more important to Canada than the relationship with Indigenous Peoples. Our Government is working together with Indigenous Peoples to build a nation-to-nation, Inuit-Crown, government-to-government relationship -- one based on respect, partnership, and recognition of rights. --Prime Minister Justin Trudeau, June 21, 2017

*The Government of Canada is seeking the views of Canadians on the scope of the renegotiation and modernization of the existing North American Free Trade Agreement (NAFTA) with the United States and Mexico. The Government is seeking views on key areas in NAFTA that could be clarified or updated, and on any new areas that should form part of a modernized agreement. This notice is part of the Government of Canada's ongoing domestic consultation process with stakeholders, including provinces and territories, businesses, civil society organizations, labour unions, academia, **Canada's Indigenous peoples**, and individual Canadians. --Global Affairs Canada, June 2107*

This submission¹ is filed² by the International Inter-Tribal Trade and Investment Organization (IITIO),³ a Canada-U.S. collaborative effort of legal experts from private practice and academia, and representatives from First Nations in Canada and Native Americans from the United States. IITIO has been in existence since 2015.

1 IITIO acknowledges the excellent contributions of our fellow executive member, Michael Woods, who has provided valuable international law insight from his many years of practice in the field of International law in both the public sector and the private sector. Further international law reading from to Mr. Woods can be found at: <http://www.wl-tradelaw.com/>

2 IITIO would like to thank Risa Schwartz, Senior Research Fellow of the Centre for International Governance Innovation, for her presentation, "Increasing Indigenous Peoples' Participation in International Trade and Investment," at the 3rd International Inter-Tribal Trade Mission and Conference in Oklahoma on June 5-6, 2017. Ms. Schwartz' presentation forms the background to this submission. Further reading related to this submission can be found at https://www.cigionline.org/sites/default/files/documents/cigi_paper_no.109_1.pdf

3 IITIO is a non-profit NGO with a Canadian head office in Ottawa, Canada. IITIO symposiums run every six months and alternate between the U.S and Canada. IITIO's inaugural inter-tribal conference took place at the University of Oklahoma College of Law in April 2016. Subsequent conferences have been held at Thompson Rivers University (November 2016) and at the University of Oklahoma (June 2017). For IITIO's full Terms of Reference visit <http://iitio.org/terms-reference-iitio-2/>

The IITIO Terms of Reference⁴ includes the following Mission:

...to support and enhance the implementation of the global flow and exchange of Indigenous goods, services and investments.

IITIO's focus has been the examination of the convergence of the law on international trade and investment with Indigenous Peoples' own long-standing laws and customs relating to nation-to-nation trade and commerce. We also examine domestic and international law, as it is developing, on the nation-to-nation relationship.

With the help and support of the law faculties of both Thompson Rivers University in Kamloops, BC, and the University of Oklahoma in Norman, Oklahoma, and leading practitioners and scholars from North America, IITIO has engaged with representatives of individual Indigenous Nations who have participated in the three conferences organized by IITIO since April 2016.

IITIO's Terms of Reference include other core aspects relevant to this submission:

...to apply the group's combined international expertise, passion and experience in addressing tangible issues that can assist in the global flow and exchange of Indigenous goods, services and investments...

...to facilitate productive discussion, objective research, and effective education with respect to international inter-tribal trade and investment, through seminars, conferences and scholarly papers...

⁴ IITIO Terms of Reference <http://iitio.org/terms-reference-iitio-2/>

...and to recommend measures, activities and policy/regulatory/legislative proposals (initiatives) that can further the global flow and exchange of indigenous goods and services while respecting its principles...⁵

One of the most important messages coming out of our country's collective reflections on the 150th anniversary of Confederation is that with respect to the place of our Indigenous Peoples, "we have a lot of work to do in the future, together."⁶ Prime Minister Trudeau's response to the Indigenous perspective on our shared history reflects modern Canada's growing realization of the country's "abject failure to respect rights, the spirit and intent of the original treaties with First Nations, Métis Nations, and Inuit Peoples. We have to transform that relationship."⁷

The challenge of "transforming the relationship" has been acknowledged. There will be a great deal of discussion, negotiation, and exchange of ideas. We submit that the modernization/renegotiation of the North American Free Trade Agreement provides an early opportunity to test the Government of Canada's resolve to address its 150 years of "abject failure" and start the work of righting ancient wrongs on a Nation to Nation, Government to Government basis.

A modern free trade agreement by its very nature involves the expression and exercise of sovereignty. Some would argue that by granting rights to trade and

5 IITIO's full Terms of Reference <http://iitio.org/terms-reference-iitio-2/>

6 Coyle, Jim. Author post July 1, 2017: "Indigenous Discontent Gives 150th Anniversary a Defining Theme." *The Toronto Star*. <https://www.thestar.com/news/canada/2017/07/01/indigenous-discontent-gives-150th-anniversary-a-defining-theme.html>

7 Wells, Paul. Author post July 1, 2017: "An Interview with Justin Trudeau." *McLean's Magazine* <http://www.macleans.ca/>

investment in its territory, a state is also ceding some of its sovereignty in the greater interest of opening markets and liberalizing trade on a reciprocal basis. At the same time and at its very core, the matter that divides Indigenous Peoples from the Canada of Confederation is the question of sovereignty. It is hard to accept the idea that those whom the Governor General has acknowledged to be “the original people of this land”⁸ are left out of the process of what we submit is the Government of Canada’s largest expression of sovereignty.

The territory we call Canada is made up of land originally occupied by its First Peoples, who have treaty rights or claims over vast portions of that land. It is submitted that the Government of Canada does not have the right to act unilaterally on behalf of Indigenous Peoples. It has that right neither in law nor based on the history of the Crown’s neglect and failure to provide even rudimentary consultation aligning with the standards set out by the Supreme Court of Canada.

A modern trade and investment treaty touches the most basic elements of sovereignty. In the context of both broad and specific effects of a free trade agreement in relation to the life of any nation, its peoples, and its principal sovereign rights, the matter of the effect on Indigenous Peoples is one that is both appreciable and non-speculative.

8 Pedwell, Terry. Author post June 19, 2017: “Governor-General David Johnston Apologizes for Referring to Indigenous People as Immigrants.” *The Globe and Mail*. <https://www.theglobeandmail.com/news/national/david-johnston-apologizes-for-referring-to-indigenous-people-as-immigrants/article35360297/>

If the Government of Canada's commitment to a Nation to Nation relationship is to be considered credible, any future international trade negotiations must include a place at the table for Indigenous Peoples as partner. This is a practical and workable step – the Canadian provinces and territories were included in the Comprehensive Economic and Trade Agreement (CETA) negotiations with the EU in recognition of their interests and part in Canada's development.

More importantly, this is the right way to proceed. The United Nations Declaration on the Rights of Indigenous Peoples is listed as the first of the Truth and Reconciliation Commission's ten principles of reconciliation. "Rights, and the preventive steps to ensure that the abrogation of rights do not occur, are the foundation upon which this country can transform itself."⁹

The renegotiation of NAFTA offers a unique opportunity to better align international trade and investment with international Indigenous and human rights law. The adoption of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) in 2007 and the more recent reaffirmation of Indigenous rights by the adoption of the *American Declaration on the Rights of Indigenous Peoples* (ADRIP) in 2016 lends international support for participation of Indigenous peoples in the negotiation of international agreements that impact their rights. This is consistent with both international law and current Canadian domestic policy for Indigenous rights.

9 Ry Moran. "Rights and Reconciliation"; *Canada's History*, Vol 97:3 June-July 2017, p. 40.

The right of Indigenous peoples to participate in decision making is found in various articles of UNDRIP, and it is an established principle of international human rights law. While at this point there is not yet a crystal clear general legal requirement in Canadian law to consult with Indigenous peoples on the negotiation and ratification of international treaties, a number of ‘modern’ treaties, called comprehensive land claims settlements, include explicit obligations on Canada to consult with the Indigenous party in advance of new international treaties that might affect rights under these agreements.

As recently as July 7, 2017 the Government of Canada, through Minister of Justice Jody Wilson-Raybould, published a Statement of Principles guiding the Government’s efforts to hasten the process of decolonization through Canadian law and policy, entitled *Principles Respecting the Government of Canada’s Relationship with Indigenous Peoples*.¹⁰ While the entire Statement of Principles is worthy of reference, certain passages in the preamble are of pertinence:

...Indigenous perspectives and rights must be incorporated in all aspects of this relationship.

These Principles are to be read holistically and with their supporting commentary.

These Principles are a necessary starting point for the Crown to engage in partnership...

¹⁰ Justice Minister Jody Wilson-Raybould. *Principles Respecting the Government of Canada’s Relationship with Indigenous Peoples*. July 7, 2017. Government of Canada Department of Justice, “Canada’s System of Justice.” <http://www.justice.gc.ca/eng/csj-sjc/principles-principes.html>

The work of shifting to, and implementing, recognition-based relationships is a process that will take dynamic and innovative action by the federal government and Indigenous peoples. These Principles are a step to building meaning into a renewed relationship.

The Supreme Court of Canada, in *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, has furthermore provided guidance as to whether the duty to consult extends beyond individual projects that impact Aboriginal territory. According to the SCC, “government action is not confined to decisions or conduct which have an immediate impact on lands and resources. A potential for adverse impact suffices. Thus, the duty to consult extends to ‘strategic, higher level decisions’ that may have an impact on Aboriginal claims and rights.”¹¹

In *Hupacasath First Nation v. Minister of Foreign Affairs Canada*,¹² the Federal Court of Appeal found against one First Nation appellant seeking consultation prior to the ratification of a bilateral investment treaty with China.

The Court, however, did not discuss international legal obligations for the participation of Indigenous peoples in decisions that impact their rights as set out in UNDRIP, despite Canada’s endorsement of its requirements in 2010 and the promise to implement the Declaration made in 2016. The Federal Court of Appeal determined that treaty making was an appropriately reviewable government prerogative that could impact international treaty negotiation. This has left the door

11 *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, [2010] 2 SCR 650 at para 44.

12 *Hupacasath First Nation v Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4 at para 58, 379 DLR (4th) 737.

open to the possibility of future consultation requirements. The Court's decision was not appealed to the Supreme Court of Canada.

Canada has acknowledged, in its duty-to-consult guidelines, that the duty may be triggered by international agreements.¹³ As noted above, there are provisions in numerous modern treaties that require consultation before Canada consents to be bound by a new international treaty, giving rise to new international legal obligations, that may adversely affect a right of the Indigenous signatory parties.¹⁴

Principles 6 (six) and 8 (eight) of the Department of Justice statement of *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples*¹⁵ are instructive:

6. The Government of Canada recognizes that meaningful engagement with Indigenous peoples aims to secure their free, prior, and informed consent when Canada proposes to take actions which impact them and their rights, including their lands, territories and resources.

8. The Government of Canada recognizes that reconciliation and self-government require a renewed fiscal relationship, developed in collaboration with Indigenous

¹³ "Officials should assess whether provisions in land claim agreements or self-government agreements require that consultation take place in relation to legally binding international instruments. Second, officials must determine whether legislation requires Canada to consult on international instruments. Officials should seek legal advice, which will support the broader departmental or agency assessments and decision-making processes." Canada, Minister of the Department of Aboriginal Affairs and Northern Development Canada, *Aboriginal Consultation and Accommodation - Updated Guidelines for Federal Officials to Fulfill the Duty to Consult*, (Ottawa: Public Works and Government Services Canada, 2011) at 23, online: Indigenous and Northern Affairs Canada.

¹⁴ For example, see art 24 of Tla'amin Final Agreement, Spring 2014, online: Indigenous and Northern Affairs Canada www.aadncaandc.gc.ca/eng/1397152724601/1397152939293

¹⁵ Justice Minister Jody Wilson-Raybould. *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples*. July 7, 2017. Government of Canada Department of Justice, "Canada's System of Justice." <http://www.justice.gc.ca/eng/csj-sjc/principles-principes.html>

nations, that promotes a mutually supportive climate for economic partnership and resource development.

Principle 6 (six) of the Statement¹⁶ is supported by explanatory notes, which are again very informative in providing guidance for implementation:

This Principle acknowledges the Government of Canada's commitment to new nation-to-nation, government-to-government, and Inuit-Crown relationships that builds on and goes beyond the legal duty to consult. In delivering on this commitment, the Government recognizes the right of Indigenous peoples to participate in decision-making in matters that affect their rights through their own representative institutions and the need to consult and cooperate in good faith with the aim of securing their free, prior, and informed consent.

The importance of free, prior, and informed consent, as identified in the UN Declaration, extends beyond title lands. To this end, the Government of Canada will look for opportunities to build processes and approaches aimed at securing consent, as well as creative and innovative mechanisms that will help build deeper collaboration, consensus, and new ways of working together. It will ensure that Indigenous peoples and their governments have a role in public decision-making as part of Canada's constitutional framework and ensure that Indigenous rights, interests, and aspirations are recognized in decision-making.

(emphasis added)

As well, the mandate letters of both the Minister of Foreign Affairs and the Minister of International Trade have the following instruction, made by Prime Minister Justin Trudeau: "No relationship is more important to me and to Canada than the one with Indigenous peoples. It is time for a renewed, nation-to-nation

¹⁶ *Principles respecting the Government of Canada's relationship with Indigenous peoples* <http://www.justice.gc.ca/eng/csj-sjc/principles-principes.html>

relationship with Indigenous peoples, based on recognition of rights, respect, co-operation, and partnership.”¹⁷

The Aboriginal right to trade is still very much open to judicial recognition regardless of the finding in *R. v Mitchell* where the Supreme Court of Canada found that the claimed Aboriginal right (to cross-border trade) never came into existence. It is also acknowledged that Justice Minister Jody Wilson-Raybould stated, on behalf of the Government of Canada at the Assembly of First Nations Annual General Meeting in Niagara Falls in July 2016, that the Liberal Government policy is to anticipate how Aboriginal and Treaty Rights will eventually be articulated by the Supreme Court of Canada so as to act accordingly, by establishing policies that “fill the section 35 rights box” in advance of slow and expensive Indigenous rights decisions from the Supreme Court of Canada. We submit that the Indigenous economic right is one of those anticipatory rights to go into the section 35 box. Accordingly, at minimum, Indigenous people need to be consulted, but above all need to be involved, in the NAFTA trade negotiations.

Without benefit of the Supreme Court of Canada’s guidance, at this point, on whether trade negotiations trigger consultation requirements, we submit that Canada should fill this policy gap and develop a framework for meaningful participation and increased involvement for Indigenous Peoples in NAFTA re-negotiations.

17 Mandate Letter, The Right Honourable Justin Trudeau to Foreign Affairs Minister Chrystia Freeland: <http://pm.gc.ca/eng/minister-foreign-affairs-mandate-letter>

In addition to our general comments we submit these specific recommendations:

- a. Development in NAFTA of a Chapter for Indigenous Peoples that promotes and enhances co-operation in trade and investment among all three NAFTA partners. There are some useful precedents from other international treaties that can be utilized in this context, such as the new Gender Chapter in the Canada-China Free Trade Agreement. Fostering co-operation activities designed to improve the capacity and conditions for Indigenous Peoples in North America to engage successfully in cross-border trade are essential additions to a revised NAFTA. The establishment of an Indigenous Peoples' committee with Indigenous representation (nominated by Indigenous organizations) from all three NAFTA partners is crucial.
- b. We recommend that the NAFTA Indigenous Peoples' Chapter should retain all the exceptions currently in NAFTA to preserve any preferences provided to Indigenous peoples. A revised NAFTA should contain stronger exceptions (reservations) that are more proactive in effectively protecting Aboriginal rights, treaty rights and Aboriginal title interests in land. Language included by New Zealand in Article 29 of the Trans-Pacific Partnership provides an excellent precedent stating:

Article 29.6: Treaty of Waitangi

1. Provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Parties or as a disguised restriction on trade in goods, trade in services and investment, nothing in this Agreement shall preclude the adoption by New Zealand of

measures it deems necessary to accord more favourable treatment to Maori in respect of matters covered by this Agreement, including in fulfilment of its obligations under the Treaty of Waitangi.

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

- c. Inclusion of a NAFTA Indigenous Peoples' Chapter that would work along the lines of these sections of the Trans-Pacific Partnership, but that would replace mention of the Treaty of Waitangi with reference to s. 35 of Canada's *Constitution Act*, 1982, the mandated Supreme Court of Canada duty to consult and accommodate Indigenous concerns, and to recognize Aboriginal Title as part of the common law as it stands in Canada.
- d. Incorporation, in the NAFTA Indigenous Peoples' Chapter, of human rights obligations from the relevant international Indigenous and human rights instruments, such as UNDRIP, ADRIP, the International Convention on the Elimination of All Forms of Racial Discrimination, and the International Covenant on Civil and Political Rights.
- e. Inclusion of provisions that allow for the freer movement across the Canada/US border of Indigenous Peoples, and of goods traded by Indigenous Peoples, consistent with the Treaty of Amity, Commerce, and Navigation, also known as the Jay Treaty, entered into by the United

States and Great Britain on November 19, 1794. Article III of the Jay Treaty stated that the Parties would allow First Nations people to live on either side of the newly established border and to freely cross the border:

“It is agreed that at all Times be free to His Majesty’s Subjects, and to the Citizens of the United States, and also to the Indians dwelling on either side of said Boundary Line freely to pass and re-pass by Land, or Inland Navigation, into the respective Territories and Countries of the Two Parties on the Continent of America (the Country within the Limits of the Hudson’s Bay Company only excepted) and to navigate all the Lakes, Rivers and waters thereof, and freely to carry on trade and commerce with each other [...] ...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 Import or Duty whatever. But Goods in Bales, or other large Packages unusual among the Indians shall not be considered as Goods belonging bona fide to Indians.

- f. Inclusion of provisions in the NAFTA Indigenous Peoples’ Chapter for greater protection to Indigenous cultural property and traditional knowledge. Implement obligations from the Convention for Biological Diversity and the Nagoya Protocol, consistent with other, modern trade agreements. Professor Jean-Frédéric Morin has produced a publication, for the Centre for International Governance Innovation, reviewing all trade agreements that provide protections of Indigenous traditional knowledge. According to his research, “a total of 41 agreements mention traditional knowledge, most often enjoining states to put into place domestic measures to ensure its protection. For instance, the agreement between Nicaragua and Taiwan calls for a protection of ‘the collective intellectual property rights and the traditional knowledge of Indigenous peoples and local and ethnic communities in which any of their

creations...are used commercially'. In addition, 17 agreements ensure that access to this knowledge is subject to the prior informed consent of indigenous communities (for example, Colombia-Costa Rica, 2013), and 29 agreements encourage the sharing of benefits derived from the use of this knowledge (for example, Caribbean Community-European Community, 2008)¹⁸

- g. Inclusion of Indigenous negotiators. In order to negotiate an effective Indigenous Peoples' Chapter in accordance with Indigenous peoples' right to participate in decision making for administrative decisions that impact their rights, Canada's negotiation teams must include Indigenous negotiators nominated by each of the three Aboriginal peoples recognized in s. 35 of Canada's *Constitution Act, 1982*.¹⁹
- h. Application of the principle of large and liberal interpretation. In accordance with the accepted case law in both Canada and the United States, conflicting interpretations of provisions within treaties between national governments and Indigenous peoples shall be approached by providing a large and liberal interpretation in favour of the Indigenous party to the treaty. This principle should be applied in the interpretation of provisions within a revised NAFTA when determining the rights and obligations of the parties thereunder.

18 Jean-Frédéric Morin and Mathilde Gauquelin, *Trade Agreements as Vectors for the Nagoya Protocol's Implementation*, CIGI Papers No.115 — November 2016 at pages 2-3. <https://www.cigionline.org/sites/default/files/documents/Paper%20no.115.pdf>

19 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982*, c 11.

The *Hupacasath* decision aptly demonstrated the interest of Indigenous peoples to engage on the development, or a renewal of international trade and investment agreements. Hupacasath First Nation was furthermore supported by other First Nations in British Columbia and Ontario, including Serpent River First Nation and the Tsawwassen First Nation, along with the Union of BC Indian Chiefs and the Chiefs of Ontario.²⁰ Interest in Indigenous peoples' participation in international trade and investment agreements has only grown, both in Canada and internationally, through creation of organizations examining how to increase cross-border trade and investment among Indigenous communities.

As well, both the Assembly of First Nations and Métis Nation have made submissions to the Standing Committee on International Trade to request meaningful consultation, to note their concerns about investment treaties, and to seek out provisions that would ensure preferential treatment for Indigenous peoples.

Given that the Government of Canada has committed to the implementation of UNDRIP, which requires the participation of Indigenous peoples in decision making for matters that impact their rights, and given that future international trade negotiations must include a place at the table for Indigenous peoples as partner, we conclude with a Summary of Recommendations:

20 "Hupacasath Brings Canada-China Foreign Investment Promotion and Protection Agreement to the Federal Court" News Release (Coast Salish Territory/Vancouver, B.C. – June 5, 2013)
http://www.ubcic.bc.ca/News_Releases/UBCICNews06051301.html#axzz4eM6UXvgM

Summary of Recommendations:

- Support for participation of Indigenous Peoples in the negotiation of international agreements that impact their rights
- Recognition of the right of Indigenous Peoples to participate in decision making in the NAFTA renegotiation process
- Development of a framework for meaningful and increased participation by Indigenous Peoples in NAFTA negotiations
- Development of a NAFTA Indigenous Peoples Chapter
- Inclusion in NAFTA of a reference to s. 35 of Canada's *Constitution Act*, 1982 with wording similar to that of the Treaty of Waitangi
- Incorporation of UNDRIP, ADRIP, the International Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights into a revised NAFTA
- Revision of NAFTA to include provisions consistent with the *Jay Treaty*
- Protection of Indigenous cultural property and traditional knowledge aligned with the Convention for Biological Diversity, and implementation of the obligations assumed under the Nagoya Protocol
- Inclusion of Indigenous negotiators on the NAFTA re-negotiation team
- Large and liberal interpretation in favour of the Indigenous parties to NAFTA

All of Which is Respectfully Submitted

This 14th day of July 2017



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