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## Bringing Indigenous Goals and Concerns into the Progressive Trade Agenda

*Apporter des objectifs des peuples autochtones dans le programme commercial progressiste*

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# Bringing Indigenous Goals and Concerns into the Progressive Trade Agenda

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## 01. Introduction

- 1 Trade has been top of the political agenda for several years now, due to the election of Donald Trump in the United States, NAFTA renegotiation, and British efforts to leave the European Union, among other developments. These developments have helped to (re)ignite controversies about how best to mobilize free trade agreements to produce inclusive and equitable outcomes. Central to this conversation in Canada are Indigenous peoples, who are directly affected by free trade agreements but have rarely participated in their negotiation. A significant part of the conversation about Indigenous reconciliation is inclusion in the economy. Trade negotiations – a fundamental activity in a trading nation like Canada – is a gateway to this aspect of reconciliation.
- 2 Soon after the Trudeau government assumed office in 2015, it indicated that it would pursue a ‘progressive trade agenda’ (PTA).<sup>1</sup> The objective of the PTA is to ensure that the benefits and opportunities of trade are distributed more equitably and that trade is not only free but fair and inclusive. While there has not been widespread opposition to trade agreements in Canada, the Trudeau government’s adoption of the PTA strategy recognizes that such dissatisfaction is not impossible. A backlash against trade in Canada would be a concern given the Canadian economy’s reliance on trade. For example, in 2015, total exports of goods and services accounted for 31.5 percent of

Canada's GDP (Cross 2016, 4). Almost 17 percent of jobs in Canada are linked to exports (Statistics Canada 2016).

- 3 The Trudeau government saw and understood the various manifestations of anti-trade sentiment expressed in places like the United States and Europe in recent years. The PTA is at least partially a response to this backlash. In the United States, Donald Trump repeatedly claimed during his Presidential election cycle that trade agreements had been unfair to American workers and had also exacerbated the US trade deficit. He has received considerable support for this position. Shortly after assuming office, he vowed to pull out of the Trans-Pacific Partnership (TPP) and to renegotiate the North American Free Trade Agreement (NAFTA). He did both. The United States-Mexico-Canada Agreement (USMCA) was signed in November 2018 and passed by US Congress in early 2020.
- 4 In Europe, hundreds of thousands of people poured into the streets in Vienna, Berlin, and elsewhere through 2015 to protest the now-stalled United States-European Union (EU) Transatlantic Trade and Investment Partnership (TTIP). Europeans expressed concern about the challenge posed by some TTIP provisions to sovereign governments' ability to regulate in the public interest. They also worried that TTIP would invite opposition to European food safety practices, viewed unfavorably by US interests seeking to compete in the EU market (De Ville and Siles-Brügge 2015). While Europeans mostly feared the consequences of the agreement with the US, they soon recognized that some of the provisions that concerned them in TTIP could also be found in the Canada-EU Comprehensive Economic and Trade Agreement (CETA). Protests also started to target CETA.
- 5 In October 2016, opposition in some quarters seemed so strong that some worried that CETA would not pass through the various EU legislative hurdles. In particular, the Belgian region of Wallonia threatened to scuttle the deal until it received assurances that CETA's worst provisions could be attenuated in some way (Bollen, De Ville and Gheyle 2020). CETA has been provisionally applied pending ratification by EU member state governments, some of which still express skepticism about the agreement. For example, in July 2019, France ratified CETA, but only after a contentious debate and by a close vote of 266-213. These various developments have made leaders across the world more attentive to the benefits and the costs of trade.
- 6 The specifics of the progressive trade agenda were vague at first, but have come into focus. As former Minister of International Trade, François-Philippe Champagne, described it, "progressive trade means helping ensure that all segments of society can take advantage of the opportunities that flow from trade and investment – with a particular focus on women, Indigenous peoples, youth, and small and medium-sized businesses....Progressive trade also means being open and transparent and maintaining an ongoing dialogue with civil society and a broad range of stakeholders. It also means ensuring that trade agreements include strong provisions in important areas such as workers' rights, gender equality, and environmental protection, and reinforce the continued right of governments to regulate in the public interest. In short, it's about efforts that help ensure international trade works for businesses and citizens alike. That it works for people" (Champagne 2017).
- 7 During eleventh-hour efforts to promote passage of CETA, former Minister of International Trade, Chrystia Freeland, used the term to capture revisions to the agreement's investor-state dispute settlement (ISDS) mechanism, a key irritant for

CETA opposition in Europe. Donald Trump's election and his expression of dissatisfaction with NAFTA provided a further opportunity for the Trudeau government to clarify the PTA. Two days before NAFTA renegotiations were set to launch, Freeland, then Minister of Foreign Affairs, laid out her negotiating objectives in a speech at the University of Ottawa. She said, "we can make NAFTA more progressive first by bringing strong labor safeguards into the core of the agreement; second by integrating enhanced environmental provisions to ensure no NAFTA country weakens environmental protection to attract investment, for example, and that fully supports efforts to address climate change; third by adding a new chapter on gender rights, in keeping with our commitment to gender equality; fourth, in line with our commitment to improving our relationship with Indigenous peoples, by adding an Indigenous chapter; and finally by reforming the Investor-State Dispute Settlement process, to ensure that governments have an unassailable right to regulate in the public interest"(Freeland 2017).

- 8 More recently, former Minister of International Trade Diversification, Jim Carr, echoed some of these sentiments noting, for example, that, "Canada strongly believes that inclusive trade is key to the prosperity and growth of our country."<sup>2</sup> Minister Carr also participated in meetings of the Inclusive Trade Action Group (ITAG), made up of Canada, New Zealand, and Chile.
- 9 In all of these Ministers' official statements, there is a direct reference to Indigenous concerns as a key component of the PTA. Indigenous issues received particular prominence in NAFTA renegotiations following Minister Freeland's call to include an Indigenous chapter in the trilateral agreement with the US and Mexico (Freeland 2017; Schwartz 2020). She also created an advisory body, the NAFTA Council, appointing Assembly of First Nations National Chief, Perry Bellegarde, alongside a dozen other prominent Canadians representing key constituencies and stakeholders in the NAFTA renegotiation.
- 10 Indigenous concerns were on Freeland's radar well before her August 2017 speech in Ottawa. In September 2016, as Canada's then-Minister of International Trade, she and then-Minister of Indigenous and Northern Affairs, Carolyn Bennett, met with national Indigenous leaders in Toronto. Freeland called the meeting, "the beginning of a really important dialogue between the government of Canada and First Nations, Métis and Inuit people about international trade." She continued, "it's a discussion that is long overdue" (Nahwegahbow 2016, 1). More recently, former Minister Carr shone a light on Indigenous peoples' relationship to trade, saying that, "Indigenous businesses are growing at a faster rate than other businesses in Canada and are more than twice as likely as all small businesses to export. By providing new tools and resources for Indigenous entrepreneurs to compete and succeed internationally, our trade diversification strategy aims to reinforce this trend over the coming years."<sup>3</sup> Under Carr's leadership, the Government of Canada sponsored an Indigenous trade mission to New Zealand in 2018 and to Texas and Oklahoma in 2019, among other such initiatives.
- 11 The inclusion of Indigenous peoples fits not only with the goal of fairer trade outcomes. It also aligns with the Trudeau government's purported commitment to Indigenous reconciliation, including full implementation of the Truth and Reconciliation Commission's 94 calls to action (Trudeau 2015). Indeed, the observation that Canada is a trading nation grappling with Indigenous reconciliation captures two fundamental aspects of contemporary Canadian reality that we can – and often do – consider

separately from one another. However, they intersect when we consider Indigenous goals and concerns as they relate to the progressive trade agenda. The myriad ways that Indigenous peoples are implicated in the promotion of Canadian prosperity through trade necessitates an integration of Indigenous perspectives across the trade policy-making process as a critical component of reconciliation.

- 12 Indigenous peoples participate in international trade as market actors to enjoy the benefits of trade. At the same time, trade rules can negatively affect Indigenous interests related to the land and cultural practices, among other things. Decisions at the World Trade Organization (WTO) and in free trade agreement negotiations can have an impact on their livelihood and treaty rights in significant ways, though rarely with their consent. In some instances, Indigenous peoples have what trade scholars call ‘defensive interests’ (VanGrasstek 2013). Trade agreements threaten to impinge upon cultural practices or legal rights, just to name two possibilities. The focus is on preventing or mitigating any potential damage and working to safeguard treaty rights and ways of life against encroachment by trading activity. In other instances, Indigenous peoples pursue ‘offensive interests,’ seeking the economic benefits and opportunities that can derive from trade agreements (see, for example, Bélanger Baur 2019). Simultaneously achieving these various objectives can be challenging and there is no strong consensus on trade priorities and preferences across Indigenous communities (UN General Assembly 2015).
- 13 Indigenous peoples have engaged in the debate about trade in various ways in the past, however, they have not been directly involved in trade agreement negotiations (Schwartz 2020). For example, they have commented on talks between the Canadian and American governments over softwood lumber. The Canadian government has recently been engaged with its American counterpart, another installment in a series of disputes and bilateral negotiations that have been ongoing for decades. US lumber producers have long accused their Canadian competitors of an unfair advantage since they typically lease their lands from (provincial) governments at rates more favorable than those offered by private American landholders. Initiatives within NAFTA and the WTO dispute systems have failed to resolve this disagreement.
- 14 Canadian Indigenous groups have been active in the debate, pointing out that many forested locations are not Crown lands, but territories subject to Aboriginal title (Kukucha 2005; Robertson 2015). In 2002, an alliance of five Indigenous nations from British Columbia submitted an *amicus curiae* brief to the WTO, arguing that the Canadian lumber management system did indeed create an unfair advantage, not due to low stumpage fees, as the American trading partner claimed, but because proceeds owed to Indigenous peoples were not being paid out (Manuel and Schabus 2005).
- 15 Indigenous peoples expressed concerns about the original NAFTA agreement (Gunn 2006) and were central to the WTO dispute on seal products. In 2009, Canada filed a case against the European Union, protesting the EU prohibition on imports of seal products. A distinction was eventually drawn between the commercial seal hunt and traditional Indigenous hunts tied to subsistence and cultural practices (Fakhri and Redfern 2020; Hossain 2011; Shaffer and Pabian 2015).
- 16 Despite these select examples of previous Indigenous efforts to influence trade policy, the Trudeau government’s declaration of a progressive trade agenda and its stated commitment to making the case for an Indigenous chapter in USMCA gave Indigenous goals and concerns a new prominence and, arguably, created a critical opportunity. As

Schwartz (2017) points out, "participation of Indigenous peoples in negotiations of international trade agreements, which have the potential to impact their rights, is consistent with international law requirements" (2017, 2). Current developments may also have finally created a permissive *political* environment to enact these legal rights, though recent outcomes have been uneven.

- 17 The USMCA contains a specific Indigenous provision, though no dedicated chapter. Article 32.5 provides a general exception for Indigenous Peoples Rights. It is much more sweeping than any contained in agreements concluded by the US or Canada. It reads, "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, services, and investment, this Agreement does not preclude a Party from adopting or maintaining a measure it deems necessary to fulfill its legal obligations to indigenous peoples." The article is accompanied by a footnote, which says, "For greater certainty, for Canada, the legal obligations include those recognized and affirmed by section 35 of the Constitution Act 1982 or those set out in self-government agreements between a central or regional level of government and indigenous peoples." Chief Bellegarde called this provision "pivotal" (Bellegarde 2018) because it should ensure that trade agreement commitments cannot override the Canadian government's legal and treaty commitments to Indigenous peoples. He went on to call USMCA "ground-breaking for Indigenous peoples and their rights" (Bellegarde 2018).
- 18 Several other provisions in the North American agreement are also noteworthy. For example, in the Preamble to USMCA, the Parties resolve to, "RECOGNIZE the importance of increased engagement by indigenous peoples in trade and investment." Chapter 24 on the Environment acknowledges in multiple ways the important relationship between Indigenous peoples and various aspects of the natural world.<sup>4</sup> Some have noted that these provisions are in the main agreement text, rather than in a side agreement, as was the case with NAFTA. Besides, Article 25.2(b) indicates that each Party shall, "strengthen its collaboration with the other Parties on activities to promote SMEs owned by under-represented groups, including women, indigenous peoples, youth and minorities, as well as start-ups, agricultural and rural SMEs, and promote partnership among these SMEs and their participation in international trade."
- 19 CETA contains no special provision or general exception for Indigenous rights. However, Article 12.2.2 of CETA indicates that Chapter 12 on Domestic Regulation does not apply to several sectors and activities, including aboriginal affairs. Schwartz draws attention to this provision since it is included in the actual text of the agreement. It allows the Government of Canada to retain or introduce domestic regulations that benefit Indigenous service providers (Schwartz 2017, 13). Article 1(2)(a) of Annex 19-7 is part of the chapter on Government Procurement. It states that the chapter does not apply to "any measure adopted or maintained concerning Aboriginal peoples, nor to set-asides for aboriginal businesses; existing aboriginal or treaty rights of any of the Aboriginal peoples of Canada protected by section 35 of the Constitution Act, 1982 are not affected by this Chapter." This CETA provision allows the Government of Canada to award preferential contracts to Indigenous businesses.
- 20 While Prime Minister Stephen Harper's government negotiated most of CETA's text, the Joint Interpretative Instrument, which emerged after Wallonia's late efforts to influence CETA, was a product of the Trudeau government. It includes a reference to

Indigenous peoples. Article 14 Preferences for Canada's Aboriginal Peoples states that "In CETA Canada has included exceptions and carve-outs to ensure its ability to adopt measures that preserve rights and preferences for Aboriginal peoples. Canada is committed to active engagement with Indigenous partners to ensure the ongoing implementation of CETA continues to reflect their interests."

- 21 The Comprehensive and Progressive Trans-Pacific Partnership (CPTPP), which was salvaged by the eleven remaining signatories to TPP after Donald Trump withdrew from the United States, contains some provisions relevant to Indigenous peoples. Chapter 20 on the Environment contains the same exclusion in the definition of "environmental law" that we find in other FTAs to which Canada is a party, namely that it does not include "any statute or regulation, or provision thereof, the primary purpose of which is managing the subsistence or aboriginal harvesting of natural resources." This provision shields Indigenous practices that might conflict with other environmental objectives.
- 22 In the chapter on Government Procurement, Annex 15-A, Schedule of Canada, Section G Article 3(b) states that Canada's obligations under Chapter 15 shall not apply to "any measure adopted or maintained for Aboriginal peoples, not to set-asides for aboriginal businesses, existing aboriginal or treaty rights of any of the Aboriginal peoples of Canada protected by section 35 of the Constitution Act, 1982 are not affected by Chapter 15 (Government Procurement)." This is a substantial provision (Panezi 2020). Furthermore, the Preamble contains language that flags Indigenous rights.
- 23 These developments, combined with a review of the academic literature, think tank briefs, NGO materials, and testimony to Parliament by representatives of Indigenous groups, among other resources, suggest at least five key issues that need our attention to bring Indigenous goals and concerns into the progressive trade agenda in Canada.

## 02. The Duty to Consult

- 24 A key issue that emerges frequently in discussions of Indigenous goals and concerns about trade is the importance of consulting Indigenous peoples and obtaining their free, prior, and informed consent before any trade negotiations ensue. The duty to consult is grounded both in international law and in the moral and political commitments that the Canadian government has made to reconciliation.
- 25 There are three places where one might locate the duty to consult in law. First, the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) contains provisions that establish the right of Indigenous peoples to participate in decision-making that affects them (Schwartz 2017, 2). Several articles in the Declaration make relevant references (Schwartz 2017, 3). Second, in Canadian law, a "procedural" duty to consult has emerged from case law (Schwartz 2017, 4). Some point to Section 35 of the Constitution to find the duty to consult, however, no clear duty is found there. Richardson (2017) argues that "the duty to consult Indigenous peoples and, where appropriate, the duty to accommodate their interests, is a Crown obligation... This duty stems from the honor of the Crown, requiring it to act honorably in all dealings with Indigenous peoples" (Richardson 2017, 3). There is debate about when, exactly, the duty is triggered, as well as what counts as suitable accommodation when it is (Richardson 2017).

- 26 To date, there has been no specific challenge regarding Indigenous consultation in trade negotiations in Canada. However, closely related is the *Hupacasath First Nation v. Canada* case, which pertains to the bilateral investment treaty signed between the Government of Canada and China. Schwartz (2017, 4) points out that the *Hupacasath* ruling on Indigenous participation turns on the practical and logistical challenges of consultation rather than on any moral or legal obligation. Richardson suggests that “the speculative nature of claims about the future consequences of FTAs [free trade agreements],” as well as practical obstacles, may make extensive consultation of Indigenous peoples challenging in trade agreements (Richardson 2017, 6).
- 27 The third-place where one might locate a legal duty to consult is in modern treaties between Indigenous peoples and the Crown (Schwartz 2017; Richardson 2017). These treaties would not extend to all Indigenous peoples, but rather to some First Nations peoples who have negotiated agreements with the Canadian government.
- 28 None of the three legal sources establishes a clear and binding duty to consult Indigenous peoples where trade negotiations are concerned (Richardson 2017). While a legal obligation would be important and powerful, it is not the only consideration. One can also argue that there are moral and political reasons to consult Indigenous peoples given the commitment by the current government to reconciliation. Indeed, in NAFTA renegotiations, culminating in USMCA, the Trudeau government seemed to have taken this to heart, establishing a new body. In early August 2017, the Government announced the creation of the NAFTA Council, a bi-partisan advisory body composed of thirteen prominent Canadians from across the political and economic spectrum in Canada. Notable for our purposes was the appointment of Perry Bellegarde, National Chief of the Assembly of First Nations. Bellegarde commented that “throughout the negotiations, First Nations have had a significant influence on the outcome of the deal, and I had an opportunity to provide advice to Foreign Minister Chrystia Freeland, too” (Bellegarde 2018).
- 29 While this is a step in the right direction, there are still questions as to whether it constituted adequate and meaningful consultation in USMCA. First, Bellegarde is the National Chief of the Assembly of First Nations. Therefore, while he may be well-intentioned, he does not speak for the Métis or Inuit peoples of Canada. Second, the extent to which Bellegarde received input from the broader First Nations leadership or membership is unclear. Furthermore, it is worth noting that no similar body was constituted for other recent trade agreement negotiations, though we can assume that the Government of Canada is consulting with Indigenous peoples through other means, including advisory working groups.
- 30 In Canada, processes exist for stakeholders to register their support or concern for trade agreements. The Standing Committee on International Trade is one example. However, these opportunities have their limits. Typically, interested groups must get to the consultation venue. Interventions are five-minute presentations to Committee, followed by time-limited questions. A written submission can accompany these interventions, but both modes can be insufficient to communicate the range and depth of Indigenous concerns. Besides, as the Canadian Council on Aboriginal Business notes in its testimony, “it’s a very complicated technical subject to provide input on” (CCAB 2017). This affects both preparation and presentation of an intervention or submission.
- 31 The pace of USMCA negotiating rounds also made meaningful consultation very difficult. Eight rounds of talks were held, each lasting roughly five to ten days each. In

the early rounds, less than three weeks, and sometimes considerably less, elapsed between rounds.<sup>5</sup> The time between rounds lengthened toward the end of negotiations, but it was still a matter of weeks. As the IITIO representative put it in testimony before the Parliamentary committee, the tight timelines do not allow for "full, frank, fair and meaningful consultation with rights holders" (IITIO 2017b).

- 32 Furthermore, it is the nature of trade negotiations that a range of stakeholders communicate their goals and desires to the government. Then, negotiators enter a room where they must bargain with their counterparts, standing firm on some non-negotiable items and conceding on others. Indigenous perspectives may be at odds with those of other domestic stakeholders or they may not align with broader goals as expressed by negotiating partners. For this reason, some Indigenous groups have asked for a seat at the negotiating table (IITIO 2017a). IITIO also distinguishes "stakeholders" and "rights holders" (IITIO 2017b). In this formulation, sectors, and industries, for example, are stakeholders in trade agreements, while Indigenous peoples are rights holders. As such, a higher level of consultation for the latter group would be warranted.
- 33 Ultimately, there must be a determination of what constitutes adequate consultation or meaningful engagement where trade agreements are concerned. This will affect the legitimacy of trade agreements, as well as the broader reconciliation process, for Indigenous peoples in Canada.

### 03. Traditional Knowledge

- 34 Protections for Traditional Knowledge (TK) in trade agreements are generally inadequate. TK can be defined as "the summation of all knowledge, information, and traditional perspectives relating to the skills, understandings, expertise, facts, familiarities, justified beliefs, revelations, and observations that are owned, controlled, created, preserved, and disseminated by a particular Indigenous nation" (AFN n.d.,4). Article 31 of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) establishes that "Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge, and traditional cultural expressions, as well as the manifestations of their sciences, technologies, and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literature, designs, sports, and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions" (UNDRIP 2007).
- 35 Unlicensed use and misappropriation of TK have led not only to commercial losses for Indigenous peoples, but also to spiritual losses as sacred beliefs, practices, traditions, songs, and other aspects of cultural heritage intimately linked to Indigenous identity are used without respect for or permission of the steward community. However, finding adequate TK protections is elusive (Oguamanam 2004; Davis 2006; Dagne 2014; Graber, Kuprecht and Lai 2012). Efforts to protect TK exist in domestic policy around the world. In the last twenty years, international initiatives have been taken to protect TK.
- 36 One prominent example is the World Intellectual Property Organization (WIPO). Established in 1970, WIPO's core tasks include "assisting governments and

organizations to develop the policies, structures, and skills needed to harness the potential of IP for economic development; working with the Member States to develop international intellectual property (IP) law; administering treaties; running global registration systems for trademarks, industrial designs and appellations of origin and a filing system for patents; delivering dispute resolution services; and providing a forum for informed debate and the exchange of expertise" (WIPO: An Overview). In the late 1990s, WIPO turned its attention to the protection of traditional knowledge and traditional cultural expression (TCE), and benefit-sharing for genetic resources. An ad hoc committee was struck to study how the IP system might accommodate TK, TCE, and genetic resources, and the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) was born. The IGC was convened in 2001 for the first time and it has met, on average, twice-yearly since then. Its activities have been accompanied by much data-gathering and analysis on the part of the WIPO Secretariat, including scores of fact-finding missions to indigenous and traditional communities around the world. Its efforts continue. The 41<sup>st</sup> Session took place in early 2020 and its mandate has been renewed through 2021.

- 37 Several scholars have illuminated the differences between Western IP law and Indigenous TK as distinct knowledge systems (Anderson 2009; Bowrey 2009, 2011; Coombe and Aylwin 2014; Dutfield 2004; Munzer and Raustiala 2009; Zografos 2010). TK protection is often broached as part of the IP conversation, as is the case at WIPO. However, IP frameworks are founded on different philosophical and cosmological commitments. Early WIPO fact-finding missions showed that "while many forms of TK are or could be protected as IP, existing IP mechanisms are not able to fully protect all forms of TK. This is because existing IP mechanisms cannot fully respond to the characteristics of certain forms of traditional knowledge, namely, their holistic nature, collective origination, and oral transmission and preservation" (WIPO 2001, 2016). Similarly, Drahos (2011) describes distinctive features of Indigenous innovation systems, including the development of "systems to maintain ecological systems" (Drahos 2011, 4) as opposed to mainstream notions of innovation "often conceptualized in terms of firms developing new products and processes" (Drahos 2011, 3). As a result, TK has not been adequately protected by international IP law.
- 38 WIPO acknowledges that the current IP system was created during the early period of industrialization to reward and incentivize invention (WIPO 2016a, 1). That is not to say that the current system is irrelevant to Indigenous groups who, in some instances, choose to avail themselves of a patent or trademark law, industrial design, or neighboring-rights IP protections (Dagne 2014b, 45). Yet the narrowly commercial notion of IP enshrined in the international regime is not wholly compatible with Indigenous interests (Drahos and Frankel 2012; Frankel 2015a; 2015b). TK holders often seek protections for indefinite rather than limited periods; for knowledge that may not be classed as 'original' by IP standards; and for rights that are collectively rather than individually held. For these reasons, Geographical Indications (GI) may be the IP category that most resembles TK. "GIs mainly designate products originating from places, towns, regions or countries, instead of from specific private individuals" (Dagne 2014, 142). The relation to place and collectively-held rights creates synergies between GIs and TK, but GIs like feta cheese are ultimately still commercial products. Thus, there are limits to the protections that GIs can offer to Indigenous knowledge (Dagne 2014a, 2014b, 2015; Gervais 2009, 2010; Frankel 2011a; Singhal 2008; van Caenegem 2015), making IP and TK an uneasy fit. For these reasons, the tendency to fold TK into

the intellectual property chapter of trade agreements is inadequate to accommodate the distinctive features of Indigenous knowledge (Drahos and Frankel 2012; Frankel 2015a; 2015b; Moody 2020).

- 39 In a very interesting recent development, provisions intended directly to protect traditional knowledge and genetic resources as such (not necessarily as IP) have started to appear in free trade agreements, with a marked increase after 2009 (Covarrubia 2011; Valdés and McCann 2014, 27; Morin and Gauquelin 2016). Some provisions are more extensive than others. Nonetheless, this trend is noteworthy for two reasons. First, it signals disappointment with multilateral processes at the WTO and WIPO and a potentially fruitful new strategy to protect Indigenous interests (WIPO 2016). Second, FTAs have repeatedly been portrayed as vehicles for developed countries to lock in higher IP standards that would advantage corporate investors (Drahos 2003). TK and GR provisions in free trade agreements turn this assumption on its head, although some Indigenous groups remain skeptical that they will serve their interests. At a minimum, FTAs have emerged as an alternative forum where Indigenous objectives can be pursued, if indeed Indigenous interests are driving the appearance of TK provisions in free trade agreements. Further research is required to determine the motivations and consequences of this phenomenon.

## 04. Investor-State Dispute Settlement

- 40 Investor-state dispute settlement (ISDS) or investor-state arbitration (ISA) is a form of dispute settlement that gives standing to companies or private investors to bring suit against sovereign governments. Investors seek redress from governments when they can show that their assets have been expropriated as a result of government action. ISDS mandates a separate tribunal, outside regular courts, typically composed of three appointed arbitrators.
- 41 ISDS first appeared in the late 1950s at a time when governments were trying to signal to foreign investors that their money would be safe in their country. These investors were reticent for a variety of reasons – they had seen the same governments nationalize foreign assets or they worried that courts in the host country would not give a fair hearing should a conflict arise between the investor and the government. In many instances, governments struck special bilateral investment treaties (BITs) that established ISDS to allay these fears. (In the Canadian context, these are often referred to as Foreign Investment Protection and Promotion Agreements (FIPPA)). The prospect of neutral tribunals would ostensibly mitigate risk for foreign investors and increase the likelihood that they would invest.
- 42 ISDS is controversial for many reasons (Van Harten 2008; Van Harten, Kelsey and Schneiderman 2018). Provisions give rights to foreign investors that domestic investors do not enjoy. There has been a notable increase in ISDS cases in recent years, causing concern that the mechanism is being overused and, perhaps, abused (UNCTAD, 2014). There is a worry that ISDS unnecessarily sidesteps legitimate courts. Arbitrators who serve on tribunals have often represented the very companies bringing suit against governments. Arbitrators are also typically paid by the hour, creating an incentive for arbitration to take longer than the merits of a case might require. In many instances, ISDS decisions cannot be appealed. ISDS cases can be very expensive to defend. Some worry that governments faced with the threat of an ISDS suit may opt not to implement

the offending regulation, even if it is in the public interest to do so, creating a prospective “regulatory chill.” It is in answer to this concern that the Trudeau government’s progressive trade agenda commits to the government’s “right to regulate.”

- 43 Indigenous peoples have specific concerns about ISDS. They were perhaps most eloquently expressed in a 2015 report by the UN Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz. "The Special Rapporteur's research reveals an alarming number of cases in the mining, oil and gas, hydroelectric and agribusiness sectors whereby foreign investment projects have resulted in serious violations of indigenous peoples' land, self-governance and cultural rights" (Tauli-Corpuz 2016, 7). She continues, "Inadequate respect and protections for indigenous peoples' land and free, prior and informed consent rights when granting rights to investors over their territories are the root causes for subsequent and broader violations of indigenous peoples' rights" (Tauli-Corpuz 2016, 8).
- 44 While governments continue to negotiate BITs, ISDS provisions have also been common in trade agreements. The North American Free Trade Agreement (1994) was one of the first to contain such a provision. NAFTA's Chapter 11 spawned several prominent and controversial cases. Subsequent FTAs, including the recent Comprehensive and Progressive Trans-Pacific Partnership (CPTPP) and Canada-EU Comprehensive Economic and Trade Agreement (CETA), contain ISDS provisions, though this trend may be slowing, at least in Europe. Indigenous peoples are not the only ones to express concern about ISDS. CETA negotiations were stalled over this issue. Wallonia's eleventh-hour opposition to Belgium's participation in CETA was at least partly inspired by concern over ISDS. Both the EU and the Canadian government were moved in this instance to shift focus to the possibility of creating an international investment court, which includes proposals for greater transparency, appellate proceedings, and the appointment of independent and impartial arbitrators to allay the concerns of opponents to ISDS. (Diependaele, De Ville, and Sterckx 2019).
- 45 This impulse to move ISDS out of European trade agreements was reinforced by a recent decision by the Court of Justice of the European Union, which considered the EU's trade agreement with Singapore. It ruled that ISDS is not within the EU's exclusive competence, even though the Lisbon Treaty sought to transfer jurisdiction over trade negotiations to the EU level (on EU trade, see Bollen, De Ville and Gheyle 2020; Garcia 2020). As a result, commentators have predicted that future European trade agreements will not include ISDS provisions.
- 46 ISDS has also recently been controversial in the American context. USMCA will limit ISDS between Canada and the United States. Despite these strides, it may be too early to speak of the phenomenon of ISDS provisions in trade agreements in the past tense. The investment court system that the EU and Canada support is still unfolding. Furthermore, ISDS provisions still exist in other trade agreements, like CPTPP. In their testimony to Parliament on the Trans-Pacific Partnership, the Union of British Columbia Indian Chiefs expressed their concerns about it, saying that, "ISDS provides a loophole to ignore Indigenous rights and title" (UBCIC 2017). Therefore, as the conversation about the future of ISDS continues, it will be important to include Indigenous peoples' specific concerns.

## 05. Inter-Indigenous Trade

- 47 A key component of the trade discussion for Indigenous peoples is the possibility of conducting trade between and among Indigenous groups across North America and the world (EagleWoman 2020). Historically, before colonization, Indigenous groups traded extensively with one another. For example, Jobin’s (2013) study of the Plains Cree shows highly developed trading relations, as well as a sophisticated network of trails and trading routes to support them. Jobin argues that Cree trading practices were a critical manifestation of their status as a self-determining people (Jobin 2013, 603). “If, as the research evidence proves, international trade occurred, then it stands to reason that Indigenous rights in Canada should include the redeployment of international alliances including Indigenous international trade agreements” (Jobin 2013, 635).
- 48 The National Aboriginal Economic Development Board asserts something similar in their testimony before the Standing Committee on International Trade. “Traditionally, our people had free and open borders. Trade between nations that today fall on both sides of the US and Canadian borders was unencumbered...” The NAEDB noted in their testimony that opportunities for inter-tribal trade across the Canada-US border “depends on the border crossing.” It is easier in some locations than others. Much of this discussion relates to the acknowledgment of the Jay Treaty. Officially known as the Treaty of Amity, Commerce, and Navigation, signed by the United States and Great Britain in 1794, the Jay Treaty seems to establish border-crossing rights for Indigenous peoples in Article III by specifically calling for “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.” However, a Standing Committee of the Canadian Senate argued that “for two reasons, the Jay Treaty has no practical application in Canada today” (Senate 2016, 8). The Report continues: “First, the Jay Treaty was abrogated by the War of 1812 between Great Britain and the United States. Second, the Treaty has not been implemented or sanctioned by legislation in Canada” (Senate 2016, 8).
- 49 While IITIO representatives acknowledge that the Jay Treaty “has no force or effect in Canada,” the spirit of the Treaty can be upheld and legislation passed to give it effect (IITIO 2017b). Doing so would greatly ease cross-border relations for Indigenous peoples living near the US-Canada border. Canadian Indigenous groups, therefore, have called for a process to allow free movement of goods and people to facilitate inter-Indigenous trade, a process that will likely not find its clearest manifestation in trade agreements. Nonetheless, discussions of cross-border trade in the context of trade agreement negotiations have shed new light on this important issue.

## 06. The Limits of Trade Agreements

- 50 Trade policy and trade agreement negotiations should comprise one component of a larger policy strategy to promote Indigenous economic development. Integrating Indigenous goals and concerns into the progressive trade agenda must include a discussion of the opportunities that exist across the range of trade agreements that Canada may negotiate with various partners. There should also be a focus on the broader aspects of trade policy beyond trade agreement negotiations, as well as

complementary domestic policies, which might include Indigenous export promotion assistance and reforms to regulations governing business practices on and off reserve.

- 51 We have seen some recent successes in the North American context about Indigenous issues and trade, notably the general exception for Indigenous Rights in USMCA. Nonetheless, many questions remain. First, how will Indigenous perspectives fit into trade negotiations with other partners? The Government of Canada has indicated that it is exploring possible agreements with China, the Association of Southeast Asian Nations (ASEAN), and the Pacific Alliance (Chile, Columbia, Mexico, and Peru), among others. Wolfe (2017) suggests that China would be unreceptive to the progressive trade agenda. “That’s because this agreement could well be a template for its negotiations with other OECD countries – meaning that what China agrees to with Canada, may become its default negotiating position expected by other countries” (Wolfe 2017, 2). Will the Trudeau government remain committed to a progressive trade agenda that includes Indigenous perspectives in these prospective agreements? Will a subsequent Canadian government preserve this commitment? Does the identity of the trading partner affect possible outcomes for Indigenous peoples in trade negotiations?
- 52 Second, how can trade agreements best reflect or incorporate Indigenous interests? Previous Canadian trade agreements have included carve-outs (Schwartz 2017, 12). The CETA agreement is one instance of this given the government procurement provisions that privilege Indigenous interests. The NAFTA renegotiation considered an Indigenous chapter. What do such strategies achieve or exclude? What would an Indigenous chapter contain (Schwartz 2020)? For example, a chapter can include language that reaffirms the Canadian government’s commitment as a signatory of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). Is this desirable? Would indigenous concerns be confined to such a chapter? Presumably, Indigenous peoples have concerns that cut across other chapters. How would that be handled? Which approach is best-suited to Indigenous goals as they pertain to trade?
- 53 Third, which other aspects of trade policy, in addition to trade agreement negotiations, should draw our attention? On their own, trade agreement provisions are not enough to provide the support for economic development that Indigenous peoples in Canada seek. Domestic flanking policies are also required, including reform to the Indian Act, programs to promote Indigenous economic development, and incentives for Indigenous businesses to avail themselves of government export promotion services. How can this best be encouraged and through what means?

## 07. Conclusion

- 54 The election of Donald Trump and the renegotiation of the North American Free Trade Agreement (NAFTA) brought trade to the top of the political agenda and ignited controversies about how best to mobilize free trade agreements to produce inclusive and equitable outcomes. Central to this conversation in Canada are Indigenous peoples, who are directly affected by FTAs but have rarely participated in their negotiation. This paper flags key issues in this conversation to deepen our understanding of how to integrate Indigenous concerns into the progressive trade agenda. In particular, attention to the duty to consult Indigenous peoples before and during trade agreement negotiations, to the special protections that are required to safeguard Traditional Knowledge, to the significant threat posed to Indigenous rights and practices by

investor-state dispute settlement, and to the prospects for inter-Indigenous trade is essential. A critical part of the conversation about Indigenous reconciliation is full inclusion in the economy. Trade negotiations – a fundamental activity in a trading nation like Canada – is a gateway to this dimension of reconciliation.

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## NOTES

1. We have more recently seen a terminological shift toward "inclusive trade," but there are many conceptual overlaps. I retain PTA for this special issue.
2. <https://www.canada.ca/en/global-affairs/news/2019/06/minister-carr-to-attend-g20-ministerial-meeting-on-trade-and-digital-economy-in-japan.html>
3. <https://www.canada.ca/en/global-affairs/news/2019/05/minister-carr-highlights-new-export-opportunities-for-indigenous-businesses-at-ottawas-the-panel-event.html>
4. For example, in addition to provisions on marine wildlife and forest management that reference Indigenous peoples, Article 24.2(4) says that "The Parties recognize that the environment plays an important role in the economic, social, and cultural well-being of indigenous peoples and local communities, and acknowledge the importance of engaging with these groups in the long-term conservation of the environment." Article 24.15(3), which deals with Trade and Biodiversity, says, "The Parties recognize the importance of respecting, preserving, and maintaining knowledge and practices of indigenous peoples and local

communities embodying traditional lifestyles that contribute to the conservation and sustainable use of biological diversity."

5. Round 1 Aug 16-20, 2017 (Washington); Round 2 Sept 1-5, 2017 (Mexico City); Round 3 Sept 23-27, 2017 (Ottawa); Round 4 Oct 11-17, 2017 (Washington).

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## ABSTRACTS

A key element of the progressive trade agenda is attention to the concerns of Indigenous peoples. To ensure that Indigenous peoples' interests are addressed in free trade agreement negotiations and as part of trade policy more generally, at least four aspects must be priorities. These are the duty to consult, the distinct features of traditional knowledge, investor-state dispute settlement, and inter-Indigenous trade. Successfully integrating these topics into the trade agenda would constitute a serious first step toward exploring the intersection of reconciliation and economic development in Canada and toward achieving the promise of the progressive trade agenda.

L'attention portée aux préoccupations des peuples autochtones est un élément clé du programme commercial progressiste canadien. Mais pour que leurs intérêts soient réellement pris en compte dans les négociations commerciales et, plus généralement, dans le cadre de la politique commerciale, au moins quatre éléments doivent figurer dans les priorités : 1) l'obligation de consulter les peuples autochtones ; 2) la reconnaissance des savoirs traditionnels et de leurs caractéristiques distinctes ; 3) le règlement des différends investisseur-État ; et 4) le commerce entre des peuples autochtones. L'intégration réussie de ces éléments dans le programme commercial constituerait une première étape cruciale si l'on veut avancer réconciliation et développement économique et réaliser ainsi la promesse d'un programme commercial progressiste au Canada.

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