

## Introduction

*John Borrows and Risa Schwartz*

The creation of rules by governments in international trade and investment agreements is heavily swayed by the interests of “elite” economic actors such as “multinational corporations, industry associations, banks, hedge funds, and billionaires who can effectively influence the negotiating position of the most powerful governments.”<sup>1</sup> These alliances often generate business practices and policy preferences which disadvantage Indigenous and other economically marginalized people.<sup>2</sup> International investment and its investor–state dispute settlement (ISDS) mechanism have had a “differentiated and disproportional negative impact . . . on women as well as on Indigenous peoples, particularly in relation to resource extraction in or near Indigenous peoples’ territories.”<sup>3</sup> The inequity of which groups benefit from international trade and the asymmetrical relationship in international investment agreements between Indigenous peoples and international investors are the focus of those who wish to reform the system—but reform comes with its own challenges. International law’s state-centric nature seriously impedes Indigenous peoples’ ability to effectively address these inequities in international economic law. This has led to a rejection of international economic law by some Indigenous peoples even as others have sought to reform the system to advance their rights and interests in this field. This book contains views which straddle these ambiguities.

<sup>1</sup> Sergio Puig, “International Indigenous Economic Law,” (2019) 52 *U.C. Davis Review* 1243 at 1260.

<sup>2</sup> Department of Economic and Social Affairs Division for Social Policy and Development Secretariat of the Permanent Forum on Indigenous Issues, *State of the World’s Indigenous Peoples*, ST/ESA 38 (New York, UN: Department of Economic and Social Affairs, 2009) at 13–38.

<sup>3</sup> UN Human Rights Council, Mandates of the Working Group on the issue of human rights and transnational corporations and other business enterprises; the Special Rapporteur on the right to development; the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment; the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights; the Special Rapporteur on the rights of indigenous peoples; the Independent Expert on the promotion of a democratic and equitable international order; and the Special Rapporteur on the human rights to safe drinking water and sanitation, OL ARM 1/2019, 7 March 2019, [www.ohchr.org/Documents/Issues/Development/IEDebt/OL\\_ARM\\_07.03.19\\_1.2019.pdf](http://www.ohchr.org/Documents/Issues/Development/IEDebt/OL_ARM_07.03.19_1.2019.pdf).

The search for nuance in a field which clearly marginalizes Indigenous peoples is a risky endeavor. There are many reasons for Indigenous peoples to resist engagement in international investment and trade. At the same time, change may also be in the wind. On August 14, 2017, Minister Chrystia Freeland, Canada's Minister of Foreign Affairs, announced that Canada was prioritizing a new chapter in the renegotiation of the North American Free Trade Agreement (NAFTA), which she called a "Trade and Indigenous Peoples Chapter." The Canadian proposal, drafted with the assistance of representatives from national Indigenous organizations in Canada, as well as experts on Indigenous peoples' economic development, was introduced to the negotiations in November 2017. Although New Zealand had already negotiated a cooperative chapter for Indigenous peoples in a trade agreement with Taiwan, the Canadian proposal was the first attempt to recognize Indigenous rights, including the United Nations Declaration on the Rights of Indigenous Peoples in a trade or investment agreement.

These nascent developments are important because international trade and investment agreements have traditionally excluded Indigenous thought and practices and physically restricted any representations by Indigenous peoples. The dichotomy is that the success of international trade is often built upon the colonization of Indigenous territory, resources and labour. As well, restrictions have been placed on Indigenous peoples who have tried to reclaim trading practices with nations and tribes separated by international borders. The result is that trade and investment are not viewed neutrally by Indigenous peoples; rather, they are seen alternatively as either a promise or a threat, and therefore treated as problematic. As international trade and investment agreements are legal arrangements that facilitate the ongoing dispossession and oppression of Indigenous peoples, there is great skepticism about introducing provisions to integrate Indigenous peoples in a fundamentally flawed economic system.

The United Nations Declaration on the Rights of Indigenous Peoples is mainly seen as an international human rights instrument. However, the Declaration also encompasses cultural, social and economic rights. Taken in the context of international trade and investment, the UN Declaration is a valuable tool to support the economic self-determination of Indigenous peoples. This book explores the emergence of Indigenous peoples' participation in international trade and investment and how it is shaping legal instruments: in environment and trade, intellectual property and traditional knowledge. One theme that is explored is agency: from amicus interventions at the World Trade Organization, to developing a future precedent for a "Trade and Indigenous Peoples Chapter," to applying Indigenous laws and ways of being; Indigenous peoples are asserting their right to participate in decision-making.

The potential adverse effects of international investor agreements on Indigenous rights have been explored in reports, most recently by the Special Rapporteur on the rights of Indigenous peoples, as well as by academics in settler states, mainly

Canada, Australia and New Zealand. However, the potential benefits of Indigenous participation in the development of international economic agreements have not been widely considered. The time to examine this matter is overdue given the protection of Indigenous rights in major regional free trade agreements such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the recently engaged, but perhaps never to be married, United States–Mexico–Canada Agreement (USMCA) as well as in current international trade negotiations with Latin American trading blocs Pacific Alliance and Mercosur. More analysis is needed on how to protect Indigenous rights to lands and resources in the face of encroaching economic development, while promoting and enhancing access to Indigenous goods and services. The emphasis on inter-nation Indigenous trade leads to interesting questions: How will the inclusion of trade and Indigenous peoples chapters in international trade agreements intersect with other social economic equity chapters such as environment and gender? How will Indigenous peoples' own laws, norms and processes be considered by Indigenous peoples when debating their role in international agreements and when renewing their own trade ties? What is the role of the United Nations Declaration on the Rights of Indigenous Peoples in international trade and investment? Should trade agreements even address protection of the traditional knowledge of Indigenous peoples in intellectual property chapters, or will this inclusion just allow more avenues for piracy of Indigenous values, culture and knowledge?

The authors in this edited collection take on these questions and more. Many of the authors are Indigenous scholars of world renown. They are at the cutting edge of the resurgence of Indigenous laws and turning their attention to international trade and investment agreements. Joining them are non-Indigenous scholars and lawyers who are both established and emerging experts in international trade and investment and human rights. This collection is a conversation about building international trade and investment agreements that include Indigenous peoples and their values in the existing debates involving trade, investment and labour, human rights and environmental rights.

As noted, the following chapters raise significant objections to international economic law's underlying assumptions and operations even as they identify significant opportunities for positive reform. As editors, we invited contributors who would write with nuance to address complexities in this field. The authors have carefully chronicled structural and other impediments to reform while simultaneously searching for frameworks to enhance Indigenous economic agency and well-being. Rejecting dichotomies is a hoped-for characteristic feature of this work. Thus, no article entirely and unequivocally rejects or champions international trade involving Indigenous peoples, while international investment and its associated ISDS mechanism are treated with greater skepticism. Each author is open to possibilities for reforming the field despite the overwhelming challenges they identify in their work. Thus, notwithstanding their concerns, each contributor seeks to

identify areas where international economic law would benefit from understanding and applying Indigenous laws, rights, insights, ideas, powers, jurisdictions and aspirations in the field.

Part I of the collection opens with an overview by **John Borrows** which notes how Indigenous peoples are increasingly turning to their own processes and principles to evaluate international investment and trade opportunities. He argues in Chapter 1 that the resurgence of Indigenous peoples' law means that agreements are being evaluated against criteria which are not just formed by nation states or international instruments. The emergence of Indigenous normativity as an aspect of international investment and trade thus challenges communities and investors who must negotiate this new terrain. In making these points, Professor Borrows examines the role of Indigenous peoples' law in implementing international investment and trade, including the impact of domestic law in recognizing and affirming Indigenous constitutional and statutory protections.

Chapter 2 is an exploration by **Angelique EagleWoman (Wambdi A. Was'teWinyan)** of some historical trade relationships and the vast networks connecting Indigenous commerce in the Americas. Her chapter sets forth the values and worldviews that traditionally undergirded the commercial framework as well as providing an overview of the inter-nation trade in goods and services that has developed over hundreds of years. The chapter closes with insight into the potential for revitalizing and reconnecting traditional trade alliances to rebuild Indigenous economies.

In Chapter 3, **James Hopkins** cautions that modern trade agreements benefit an elite few and that the agreements are reliant upon overly ambitious macroeconomic theories. There is a growing awareness that international trade's net effect is widening the gap between economic winners and losers, much to the detriment of Indigenous peoples. In his chapter, Professor Hopkins examines the impacts of international trade on the Indigenous peoples of Mexico and provides some hope that the USMCA, if ratified, may be an improvement to the NAFTA, which has contributed to a dire human rights situation which threatens the lives and livelihoods of Indigenous peoples.

Chapter 4 looks at how Latin America has experienced the negative effects of the international investment law system and tensions when trying to protect Indigenous peoples' rights while simultaneously trying to attract foreign investment. **Enrique Prieto-Ríos** and **Daniel Rivas-Ramírez** present some prominent investment arbitration cases involving Latin American countries and the rights of Indigenous peoples. They conclude that Indigenous peoples in Latin America are invisible to investment arbitration tribunals because international investment arbitration is a self-contained system that does not look beyond international economic law to Indigenous rights or, more generally, human rights. Current negotiations among Canada, New Zealand and the Pacific Alliance offer an opportunity to consider including a chapter for Indigenous people. The addition of New Zealand and Canada as

associate members means that they will have to address the rights of Indigenous peoples in some manner for domestic political reasons.

To conclude Part I of the collection, Chapter 5 brings the reader to the far north to examine the importance of self-determination for Inuit in trading disputes on seals and seal products. **Michael Fakhri** and **Madeleine Redfern** focus on how the Appellate Body of the World Trade Organization used trade law to construct an Indigenous exemption including a European-imposed determination of Indigenous identity for the purpose of trade in a manner that limits Inuit political and economic options and works against their rights. This chapter emphasizes the importance of Indigenous people continuing to assert their sovereign power and claims for self-determination not just through international law but, more specifically, through international trade law.

Part II of this book looks at specific chapters in modern free trade agreements (FTAs) and provides for new ways for Indigenous people to rethink trade and its potential benefits and harms to their lives and territories. Each chapter discusses legal and policy options for negotiating parties to consider so that they can begin to broaden the social and economic benefits of these arrangements for Indigenous peoples. In Chapter 6, **William David** looks at the inter-linkages between trade and environment in various FTAs and provides a thorough examination of new provisions in the environment chapters of regional trade agreements and how they may impact Indigenous peoples. Particular emphasis is placed on an exploration of the North American Agreement on Environmental Cooperation (NAAEC), a side agreement of the NAFTA, as well as the CPTPP and the intersection between Indigenous rights, environmental law and ISDS under the NAFTA.

Environmental measures in the international trade context can be tools for greater recognition and implementation of Indigenous rights just as easily as they can serve as discriminatory instruments which undermine the rights of Indigenous peoples. The current challenge faced by states and Indigenous peoples is how to devise an international legal order in which states can accomplish their own objectives on trade and environmental issues, while respecting their obligations to Indigenous peoples.

In Chapter 7 on trade-related aspects of traditional knowledge protection, **Oluwatobiloba Moody** looks at the proliferation of provisions related to traditional knowledge and genetic resources in trade agreements. He questions whether trade agreements are the correct instrument to protect traditional knowledge particularly from biopiracy and other abuses. Although he argues that trade agreements could play an important role in addressing key aspects of traditional knowledge protection, he suggests that such protection should not occur in a vacuum. These provisions should rather complement and/or reinforce the international commitments and/or domestic frameworks of negotiating parties. The misappropriation and commodification of traditional knowledge through trade agreements must be pursued with caution, by parties to international trade agreements and by Indigenous peoples.

Protection of traditional knowledge must involve consultation with Indigenous groups to ensure that these new provisions in trade agreements do not abrogate their established rights.

In Chapter 8, **Brenda Gunn** looks to Canada as an example when she provides an analysis of how states have obligations to ensure the protection and promotion of Indigenous peoples' rights in international investment agreements. Professor Gunn's chapter begins by discussing some of the rights of Indigenous peoples that are potentially threatened by investment agreements, with a focus on land rights and the right to participate in decision-making on the basis of free, prior and informed consent. She concludes with a discussion of what measures need to be taken in investment agreements to ensure that Indigenous peoples' rights are properly protected during the negotiation and implementation of investment agreements. This includes reference to the obligations of states and business enterprises to ensure that investment agreements protect Indigenous peoples' rights while at the same time promoting foreign direct investment.

**Maria Panezi** explains in Chapter 9 that Indigenous peoples are frequently included in social procurement programs as part of government efforts to correct past injustices and offer assistance toward a better economic future. Both the empowering and the redistributive outcomes of government procurement are equally important for Indigenous peoples and should be immediate priorities of governments to advance economic equity. There have been efforts to create a robust procurement regime for Indigenous peoples in various national contexts, especially in Canada, the United States, Australia and New Zealand. These programs are works in progress and need to be both supported and evaluated continuously to allow for adaptation. This chapter serves as necessary background for the re-evaluation of transnational (local, provincial, regional, federal and cross-border) procurement policies for Indigenous businesses and service providers.

In Chapter 10, **Risa Schwartz** discusses the development of a trade and Indigenous peoples chapter, looking at the development of provisions that provide for set-asides and carve-outs in earlier FTAs to more modern provisions that recognize Indigenous rights. The chapter traces how advocacy of Indigenous peoples in international trade and investment laid the groundwork for both Canada and New Zealand to substantively address Indigenous rights. Although we have yet to see the establishment of a new chapter specifically for trade and Indigenous peoples, the USMCA, which is undergoing ratification, is the first agreement to include a General Exception that protects the rights of Indigenous peoples for all signatories. These new preferences and protections for Indigenous peoples in Canada, Mexico and the United States signal a new relationship between Indigenous peoples and international trade.

**Amokura Kawharu's** Chapter 11 discusses the "Treaty of Waitangi" exception that is now included in each of New Zealand's FTAs. The exception is intended to enable the New Zealand government to enact measures in order to give effect to its

obligations to Māori under the Treaty of Waitangi, even if the measures are inconsistent with obligations assumed by New Zealand under the FTAs. It has also served as a precedent for other states looking to include a General Exception to protect Indigenous rights. Professor Kawharu examines the circumstances surrounding the adoption and continued use of the exception in New Zealand's FTA practice. She also examines the adequacy of the exception in the context of the increasing depth and scale of New Zealand's participation in FTAs (and, in particular, New Zealand's expanding commitments with respect to the protection of foreign investment) and proposes options for Māori to consider as means for addressing the issues.

Finally, in Chapter 12, **Caroline Dommen** concludes our discussion by addressing how human rights impact assessments can contribute to ensuring that Indigenous rights are upheld in international trade agreements. She considers how explicit reference to the rights of Indigenous peoples, including the UN Declaration on the Rights of Indigenous Peoples, may improve human rights impact assessments as well as trade agreements, from both legal and policy perspectives. There is now a substantial body of impact assessments of actual or likely impacts of trade and investment agreements on human rights, including on the rights of Indigenous peoples. Her chapter describes the role and the objectives of impact assessment, explaining the particular advantages of human rights-based impact assessment. It draws on recommendations of UN human rights mechanisms and analysis of completed impact assessments of trade agreements to present some of the main principles of human rights law that are relevant in the trade policy context, and how these impose legal obligations on states to carry out human rights impact assessments prior to adopting new trade agreements.

This collection considers innovative and creative ideas to reorient international trade and investment agreements and thus improve global and local governance. Of course, ideas alone are necessary but not sufficient to produce such a reorientation. However, without these new perspectives, such a redirection would not be possible. The following chapters illustrate that international trade's key challenges cannot be solved inside the current economic thought. The impacts of climate change and environmental degradation are serious and unless we fundamentally change these systems, the next generations will suffer greatly. Perhaps a different way of building wealth, based on Indigenous knowledge, is what is needed. The aim of this edited collection is to connect knowledge, policy and practice for a more equitable and inclusive international rule of law with better tools to address our uncertain future.