INDIGENOUS PEOPLES AND INTERNATIONAL TRADE

The United Nations Declaration on the Rights of Indigenous Peoples is seen primarily as an international human rights instrument. However, the UN 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 economic self-determination of Indigenous peoples. This volume explores the emergence of Indigenous peoples' participation in international trade and investment, as well as 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, Indigenous peoples are asserting their right to participate in decision-making. The authors, who include both Indigenous and non-Indigenous experts on trade and investment, provide needed ideas and recommendations for governments, academia and policy thinkers to achieve economic reconciliation.

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Indigenous Peoples and International Trade

BUILDING EQUITABLE AND INCLUSIVE INTERNATIONAL TRADE AND INVESTMENT AGREEMENTS

Edited by

JOHN BORROWS

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Foreword

In this timely and significant book, this first generation of Indigenous scholars and friends have generated some original rethinking about decolonizing international trade and investment agreements. Their ideas are impressive and at the cutting edge of Indigenous knowledge and law. Their work is changing the constitutions of their countries and the international law of human rights. They are an authentic voice of Indigenous renaissance that is gradually decolonizing international law. The International Labour Organization's Indigenous and Tribal Peoples Convention Number 169[1] and the UN Declaration on the Rights of Indigenous Peoples[2] bear witness to this decolonization movement. It is also evident in the developing exceptions, set-asides, carve-outs and procurement provisions in international trade and investment agreements, which are designed to protect, fulfil and advance Indigenous peoples' self-determination and rights, as well as developing human rights impact assessments. One needs to read these agreements as complementary.

As analyzed and discussed in the book, the Indigenous issues surrounding international trade may establish the jurisdictions of the future. They extend the concept of 'law from below' talking back to the 'law from above' as developed by Boaventura de Sousa Santos and César A. Rodriguez-Garavito's book *Law and Globalization from Below: Towards a Cosmopolitan Legality*.[3] From 'Indigenous law from below', the authors introduce prismatic insights and ideas. These ideas have programmatic implications for reformulating familiar predicaments and for challenging the international trading system and the concept of corporate globalization. This new (old) way of thinking creates challenges for nation-states, communities and investors negotiating and implementing agreements as it normalizes responsibilities to the

[1] International Labour Organization, Indigenous and Tribal Peoples Convention, 27 June 1989, No. 169, 1650 UNTS 383 [hereinafter Indigenous and Tribal Peoples Convention], www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169.

[2] United Nations, GA Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (13 September 2007) [hereinafter UN Declaration], https://undocs.org/A/RES/61/295.

[3] Boaventura de Sousa Santos and César A. Rodriguez-Garavito, eds., *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge: Cambridge University Press, 2005).

land and to each other. These future jurisdictions depend on deepening the idea of human rights in reimagining and reorganizing international trade.

Similar to most human civilizations, Indigenous civilizations have valued trade as part of their knowledge systems and laws. Trade has always been the aspirational desire of most human civilizations. It has generated international trade law through many different historical cycles of international laws of nations, both Indigenous and European. Its inter-temporal law interprets the enduring meaning of the treaties, agreements and laws within each period. Indigenous nations made trade laws a central feature of their treaties with other Indigenous nations and with European nations. They did this through ceremonies and in writing. They also developed many different trade protocols to bridge the language gaps they encountered.

The history of trade law involves an endless list of emperors, rulers, merchants, pirates, imperialists, protagonists, visionaries, governments, protectionists, free traders, artificial transnational corporations, judges and global visionaries. These diverse experiences and perspectives have carved out the legal space of various empires. These empires were full of corridors and enclaves of imperial control, which are marked by unruly gaps and imperfect geographies of irregular and sometimes undefined borders. This raises the issue of peoples who have been discouraged or excluded. And, more importantly, it highlights whose identities have been produced, encouraged, sanctioned and imposed. In the process, trading systems may either stimulate or inhibit new legal spaces within commercial empires that exist beyond territorial jurisdictions. This book's authors bring these questions to life again.

Since the Treaty of Westphalia[4] restored territorial boundaries to the law of nations, it has become difficult to imagine a world organized in any other way. Law has constructed national territories that appear to be natural. Yet these boundaries generate a legal paradox because they arbitrarily designate regions that are considered beyond a nation's territory. Two distinct treaty orders were necessary for European sovereigns to acquire authority or jurisdiction over foreign territory legitimately. First, European monarchs or nations had to acknowledge and affirm international jurisdictions in foreign territories, which they did through European treaties. Second, European sovereigns had to enter into treaties with the Indigenous nations in specific regions in overseas territories to confirm the so-called jurisdiction acquired by the European treaties.

Article 15 of the Treaty of Peace and Friendship[5] at Utrecht established and affirmed the integral role of trade with the Indigenous nations among the European nations in the law of nations in North America:

[4] Treaty of Westphalia, Holy Roman Emp.–Fr., 24 October 1648, https://avalon.law.yale.edu/17th_century/westphal.asp.

[5] Peace and Friendship Treaty of Utrecht between France and Great Britain, Fr. –Gr. Brit., 11 April 1713 [hereinafter Treaty of Peace and Friendship].

> The Subject of France Inhabiting Canada and others, shall hereafter give no Hindrance or Molestation to the Five Nations or Cantons of Indians, Subject to the Dominion of Great Britain; nor to the other Natives of America, who are Friends to the same. In like manner, the Subjects of Great Britain shall behave themselves Peaceably toward the Americas, who are Subjects or Friends to France; and on both Sides, they shall enjoy full Liberty of going and coming on Account of Trade. As also the Natives of those Countries shall, with the same Liberty, Resort, as they please, to the British and French Colonies, for Promoting Trade on one Side, and the other without any Molestation or Hindrance, either on the Part of the British Subjects or of the French.[6]

Article 18 provided for the enforcement of these free liberties under the 'Rules and Directions of the Law of Nations'.[7] Moreover, France and Great Britain established a special international commission to determine the territorial scope of authority over Acadia and to determine the status of the Indigenous nations.

Subsequently, the north-eastern Indigenous confederacies, nations and tribes ratified these free liberties in separate treaties with Great Britain and France. Article 37 of the United Nations Declaration on the Rights of Indigenous Peoples affirmed these treaties.[8] Subsequent treaties that divided the jurisdictions in North America between Great Britain and France including the Treaty of Paris confirmed these Indigenous free liberties.[9] Similar provisions were included in the division of jurisdiction between Great Britain and the United States in Article 3 of the Jay Treaty of Amity, Commerce and Navigation[10] and Article 9 of the Treaty of Peace and Amity at Ghent that restores the possessions, rights and privileges of the nations and tribes.[11] Article 36 of the United Nations Declaration on the Rights of Indigenous Peoples also confirmed these fundamental free liberties of trade for Indigenous peoples divided by international borders.[12] Both the United States and Great Britain entered into hundreds of treaties with the Western Indigenous nations, many of these concerned with trade.

The international protection of Indigenous trade in these treaties has embodied the deepest desires, tensions and conflicts inherent in generating a system of ordered, rational and utilitarian exchange. European colonialism worked to generate wealth for colonizing economies and to extract wealth from Indigenous economies. This uneven exchange has haunted the historical development of trade law. We are still living with the consequences of the territorial jurisdictions created during public

6 Treaty of Peace and Friendship, *supra* note 5, art. 15.
7 Treaty of Peace and Friendship, *supra* note 5, art. 18.
8 UN Declaration, *supra* note 2, art. 37.
9 Treaty of Paris 1763, Fr.–Gr. Brit., 10 February 1763, https://avalon.law.yale.edu/18th_century/paris763.asp.
10 Treaty of Amity, Commerce and Navigation, Gr. Brit.–USA, 19 November 1794, art. 3, https://avalon.law.yale.edu/18th_century/jay.asp.
11 Treaty of Ghent, UK–USA, 24 December 1814, art. 9, https://avalon.law.yale.edu/19th_century/ghent.asp.
12 UN Declaration, *supra* note 2, art. 36.

international law's dark era of colonization. Through this long and destructive era, Indigenous nations have been oppressed and their treaties have been made invisible in international and national legal systems.

The injustice that Indigenous peoples encounter must end. Under international customary law and Articles 26 and 30(4b) of the Vienna Convention on the Law of Treaties, pre-existing treaty obligations have always bound the nation-states.[13] Indigenous treaties must be treated as pre-existing obligations under this convention. Nation-states must identify potential inconsistencies between existing Indigenous treaties and present and future trade or investment agreements. This is necessary to help nation-states avoid subsequent incompatible provisions or inconsistent obligations. Unfortunately, Indigenous 'free liberties' and treaty rights have not been identified or harmonized in either international law or the 3,600 treaties regulating trade or investment.

The post–World War II decolonization movement in international law contains key lessons for addressing the international law–sanctioned injustice faced by Indigenous peoples today. At the height of the decolonization movement, Eurocentric international lawyers and state leaders were given the task of decolonizing international law to recognize the rights of oppressed peoples. State officials sought to remedy 'the international law of colonization' by recognizing self-determination and inherent human rights. They sought to reformulate international law to promote a just distribution of sovereign power in a new public international order. In the process, international human rights law was designed to move from public international law to national law through state ratification of these decolonizing principles. Decolonization was meant to establish new territorial jurisdiction for Indigenous and other peoples that would coincide with the resurgence of Indigenous self-determination. Recognition of Indigenous territorial jurisdictions was to become an inevitable precondition in international law and the foundation of nation-states' new political and social identities.

Unfortunately, decolonization did not go as planned. International trade law continues to concentrate wealth in artificial corporations that exist without territorial borders. This is deliberately encouraged by nation-states. International trade law and especially the arbitral systems that enforce international investment agreements have created a commercial empire that operates similar to colonialism and imperialism. The colonial premises of international trade law have remained resilient, taking their sources and authorities from the colonial archive. This commercial empire promulgates a lie: that humanity reaps the benefits of a more meaningful life when nations specialize in developing natural resources and labour within their territory, based on comparative advantages, through a combination of national politics and private enterprise.

[13] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331.

While small sections of the globe have benefitted from international law's continued colonial structures, Indigenous peoples and the global south have not reaped trade's promised benefits. The past thirty years have continually revealed the vast power of corporations' transnational commercial empire. This is supported by international trade law and it must be decolonized, just as surely as the world insisted that European territorial empires had to be decolonized in earlier eras. Those working to decolonize are challenging corporate colonization. They are reimagining ways to create better relationships among corporations, nation-states, natural resources and peoples. They are working on processes that will repair relations with the environment. In the process Indigenous diplomacy is incrementally decolonizing parts of the contemporary international trade law by exposing its premises and its shifting history and uncovering what it fails to acknowledge. Indigenous diplomacy has stressed that international trade law is often built on colonized Indigenous territory, resources and labour. It highlights how Indigenous peoples have been normatively excluded from co-creating our global trading systems, treaties and laws. Indigenous voices cannot be silenced, as demonstrated through their resilient resistance to corporate takeovers of Indigenous territory. Indigenous peoples continue to push to clean up the pollution from these activities that threatens their ways of life. Corporate wealth flourishes through the implicit subsidies that are granted by nation-states and taken from Indigenous peoples' resources.

In the process, Indigenous peoples are highlighting international law's role in promoting, shaping and legitimating economic inequality in trade. Indigenous peoples' work to decolonize international investment and trade law exposes Eurocentric platitudes posing as humane attempts to remedy market economy and economic theory beyond territorial jurisdictions. Nation-states and transnational corporations continue to be disoriented by the jurisdictional transformations involved with international trade law's decolonization.

In addressing these issues, the authors of this book reveal that some of the central problems of international trade cannot be solved within current Eurocentric economic thought. The present paradigm gives far too little weight to the Indigenous capacities, knowledge and creativity that are integral to the global economy's innovation and sustainable growth. The authors suggest that international trading law is best enhanced by embracing opportunities for Indigenous peoples to contribute their perspectives, insights, visions and ideas. Decolonization in international trade law will not occur without their vision, ideas and perspectives. Without such redirection, Indigenous peoples will be condemned to playing a subordinate role in our international systems. This will also be devastating for our planet.

This book contains innovative and creative arguments for decolonizing international law in ways that improve not only trade but also global and local governance. These authors are focused on implementing human rights in international trade

(including international environmental law) to generate more holistic and sustainable treaties and agreements.

The voices in this book are academically engaged and they advance practical ideas for future action. They open fields for new policy debates and create space for renewed negotiations to help us decolonize the world's colonized trading empire. They use Indigenous knowledge, law, policy and practice to argue for a fairer international rule of law that will support a shift to a more equitable economic future.

James (Sa'kej) Youngblood Henderson

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About the Cover Art

"Conversation with The Great Mystery" is an evolution in my depictions of Nanabush. Standing rooted to Turtle Island; He is praying to the Creator – The Great Mystery – for guidance. The varied floral and angular designs behind him represent trade with the diverse races and nations of the world. We are at a crossroads in our history, with technology enabling us to engage with people around the world. It opens up many avenues of economic, cultural and social exchange. The question, as always, is about finding a balance. I believe that with a firm base of knowledge and experience in our own native cultures and spirituality, we will inherently possess the tools necessary to navigate the choices before us.

Adrian Nadjiwon

About the Artist

Adrian Nadjiwon is an artist from the Chippewas of Nawash Reserve on the Bruce Peninsula; an area carved out from the limestone bluffs of the Niagara Escarpment. Surrounded by the blue water of Georgian Bay, the land is well known for its natural beauty. So, it would appear that Adrian's talent is a product of his environment.

Adrian has drawn ever since he can remember, and with training and experience in the fine arts, classical animation, graphic design and, most recently, web design, Adrian has now mastered a wide variety of creative media.

Adrian is a student both of the visual arts and of his own native heritage. This curiosity was piqued at a young age by images painted in the Woodland style; a manner of painting developed by Cree and Anishinaabe artists such as Norval Morrisseau, Ahmoo Angeconeb and Roy Thomas. Inspired by those colourful images, Adrian began a journey to understand the roots of this art, his ancestry and spirituality – a journey that continues to this day.