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## **Identifying National and International Vacuums Potentially Impacting NAFTA and Indigenous Peoples**

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The North American Free Trade Agreement (NAFTA) was made among three nation-states, Canada, the United States, and Mexico. Each of these nation-states has indigenous populations within its borders. Each has chosen different legal mechanisms for interacting with indigenous peoples. For example, the United States has an extensive web of treaties with the tribes within its borders while Canada, in contrast, has relatively few. All three nation-states have grappled with armed conflicts with indigenous peoples well into the 20th century. Indigenous peoples within each have long social, cultural, economic, and political histories which cross the borders of these countries.

Within the provisions of NAFTA, each nation-state reserved the right to deny investors rights or preferences provided to “aboriginal peoples”, “socially or economically disadvantaged minorities”, or “socially or economically disadvantaged groups” in from two to five designated areas. All three approaches nevertheless leave substantial national and international legal vacuums that necessarily impact the implementation of NAFTA as well as the economic interests of indigenous peoples. This paper identifies some of those vacuums, considers their potential impacts and their relationship to negotiations on a Free Trade of the Americas (FTAA) agreement, and discusses possible remedies.

Keywords: FTAA, indigenous, investor, NAFTA, nation-state

Since it came into force on January 1, 1994, little attention has been paid to the ramifications of the North American Free Trade Agreement (NAFTA) on indigenous peoples and their business interests. This lack of attention to the interests of indigenous peoples is reflected in all areas of potential concern, including the economic sphere. Nevertheless, the three signatories to the NAFTA, Canada, Mexico, and the United States, all have indigenous populations within their respective borders. Mexico, with approximately 30 percent of its population categorized as Amerindian and 60 percent as mestizo (Amerindian-Spanish),<sup>1</sup> has by far the largest numbers of indigenous peoples residing within its borders. Of the three nation-states, Mexico has also experienced the most violent and sustained indigenous protest surrounding the implementation of NAFTA. Nevertheless, in spite of the much smaller numbers of indigenous peoples within their respective borders,<sup>2</sup> Canada and the United States have long histories of violence against and suppression of indigenous peoples across all areas of their existence. All three nation-states have grappled with armed conflicts with indigenous peoples within their respective borders well into the 20<sup>th</sup> century.

### Important Features of the Pre-adoption NAFTA Debate

Each of the three nation-states undoubtedly has differing histories and political climates. Nevertheless, Lipset posits that Canada and Mexico have had somewhat similar political cultures in that they have both been more statist and communitarian while the dominant tradition of the United States has been antistatist, individualistic and classically liberal.<sup>3</sup> Appleton asserts that the pre-adoption debate over NAFTA largely reflected the tension between these two views, with the antistatist, individualistic and classical liberal view of the United States ultimately prevailing. In spite of the claimed similarity between Canadian and Mexican political culture, it was Mexico's lack of national laws in the areas of intellectual property, civil remedies, etc., that necessitated the most negotiation over large sections of NAFTA's provisions.<sup>4</sup>

NAFTA's provisions themselves take a very broad approach in their coverage by designating limited sectors *that are not covered* by its provisions rather than listing individual areas that are. The breadth and depth of NAFTA's sectoral approach represents a milestone for an international trade agreement. According to Appleton, other landmark developments include the following: (1) It is the first trade agreement of its kind between developed and developing countries. (2) It gives individual investors the ability to challenge governments in international tribunals if a NAFTA investment has been affected. (3) It openly, albeit weakly, acknowledges the link between trade and environment while ignoring other links in the areas of human rights and social policy.

## Exemptions under NAFTA

More recent and pivotal developments arising out of NAFTA's sweeping provisions are the discussions surrounding using NAFTA as a model for a Free Trade Area of the Americas (FTAA) agreement. Discussions on a FTAA agreement commenced in December of 1994 when thirty-four countries, including Canada, Mexico, and the United States, began negotiations at the first Summit of the Americas. Indigenous peoples were not present at these negotiations nor those surrounding NAFTA. Nevertheless, ostensibly, the United States, Canada, and Mexico did not entirely forget the indigenous peoples within their respective borders during NAFTA negotiations, since each has inserted specific language or "non-conforming measures" within NAFTA that ostensibly exempt specific sectors from operation of the treaty.<sup>5</sup> Canada, Mexico, and the United States undoubtedly prefer to argue that they will similarly not forget indigenous peoples in the current discussions surrounding a FTAA agreement. It is therefore worth examining how these three actually did remember indigenous peoples in NAFTA.

Canada inserted what appears to be the strongest language into NAFTA under Annex II dealing with reservations or exemptions from NAFTA. One of its exempted sectors is labeled "Aboriginal Affairs". Under that section, Canada reserves the right to deny investors or "another Party" the rights or preferences provided to "aboriginal peoples" in five areas: national treatment, Most-Favored-Nation treatment, local presence, performance requirements, and senior management and boards of directors.

In contrast, the exempted sector of the United States is entitled "Minority Affairs", effectively lumping indigenous interests within its borders with non-indigenous minorities in the United States and thus minimizing within NAFTA the vital legal distinctions that already exist between indigenous peoples and non-indigenous minorities within the United States. The U.S. reserves the right to adopt or maintain rights or preferences to what are termed "socially or economically disadvantaged minorities", again lumping indigenous peoples with non-indigenous minorities and minimizing the important legal differences at the national level between the two groups. The U.S. reserves these rights in the same areas as Canada with the significant exception of Most-Favored-Nation treatment.

Mexico also entitled its exempted sector "Minority Affairs", obscuring the fact that arguably only 10 percent of its population can be termed non-indigenous since at least 30 percent of the population is "Amerindian" and 60 percent is termed an "Amerindian-Spanish" mixture. Mexico's white population is only 9 percent of the total population while the white populations in Canada and the United States are much larger, at 66 percent and 83.5 percent, respectively. Mexico, with the largest numbers of indigenous peoples within its borders of the three nation-states, reserved these rights in only the two areas of national treatment and local presence. All three nation-states remembered indigenous peoples, but only long enough to put them in their place.

## The Heart of the Matter

In spite of the differences among the three nation-states in history, culture, politics, economics, and social relations, each one chose to enshrine its then-current national policies towards indigenous peoples in NAFTA's provisions. Canada's use of the language "aboriginal affairs" and "Most-Favored-Nation treatment" would seem to be cause for celebration among indigenous peoples residing within Canadian borders. However, the recent decision by the Supreme Court of Canada that a Mohawk band does not have an aboriginal right to bring even noncommercial goods into Canada from the United States duty-free gives one reason to pause. The case involved a grand total of \$142.88 in claimed duties on blankets, bibles, food, clothing, a washing machine, and motor oil, all of which were intended to be gifts to a neighboring Mohawk band, with the exception of the motor oil, which was intended for resale.<sup>6</sup> This case highlights how meaningless language such as "Most-Favored-Nation" in a document like NAFTA potentially can be when the Canadian judicial system has ultimate say over indigenous noncommercial as well as even the most minute of commercial interests.

Even with a Permanent Forum within the United Nations, as it is presently being discussed, indigenous peoples will not have the same voice or legal presence that nation-states enjoy within that body.<sup>7</sup> The driving force behind the provisions in Annex II of NAFTA and the practical realities of nation-state dealings with indigenous peoples may really be found in the assumptions that Miguel Alfonso Martinez, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, identified as dominating the academic and legal discourse on indigenous peoples and their treaty rights. Either it is held that:

1. Indigenous peoples are not peoples according to the meaning of the term in international law; or
2. Treaties involving indigenous peoples are not treaties in the present conventional sense of the term, that is, instruments concluded between sovereign States (hence the established position of the United States and Canadian judiciary, by virtue of which treaties involving indigenous peoples are considered to be instruments *sui generis*); or
3. Those legal instruments have simply been superseded by the realities of life as reflected in the domestic legislation of States.<sup>8</sup>

The above assumptions are attitudes to which nation-states tenaciously cling whenever *any* discussion on the rights of indigenous peoples surfaces. These attitudes therefore colour the entire discourse on NAFTA and indigenous peoples within the United States, Canada, and Mexico as well as any discussions surrounding treaty rights. They are reflected in the national policies to which the three nation-states adhere. It is therefore necessary

to examine some of the more salient features of the still-current national policies of Canada, Mexico, and the United States towards indigenous peoples to understand completely how NAFTA's provisions in Annex II affect indigenous peoples from a legal standpoint. A summary of those features follows, along with an indication in parentheses of which of the three countries seem to be the leading proponents. They are taken from the Final Report of Special Rapporteur Martinez.

1. Law as an instrument of colonialism where *ex post facto* reasoning is used to project into the past the current "domesticated" status of indigenous peoples, a condition of subjugation that evolved from events taking place mainly in the second half of the nineteenth century. Such *ex post facto* reasoning is used to rationalize continuing to not afford indigenous peoples within these countries either justice or fair treatment today. (Canada, the United States, Mexico)
2. Since public wholesale slaughter of indigenous peoples is no longer socially acceptable within at least the United States and Canada, resort to alternative forms of duress, such as the deliberate fragmentation of indigenous entities, as in the creation of new bands, or in the case of the United States, "reorganization", to facilitate "settlement" and opening of indigenous lands to white ownership and exploitation. (Canada, the United States)
3. Continued judicial, legislative, administrative, and sometimes even military, pressures from nation-states to undermine and destroy whatever is left of traditional economic activities. Examples of such pressures include, but are not limited to, direct threats of forced eviction, obligations to obtain licences and permits or other authorization from non-indigenous administrative authorities to be able to engage in traditional economic activities, restrictive quotas that do not cover indigenous needs, effects of modern technology on traditional habitats, etc. (Canada, Mexico, the United States)
4. An overriding refusal to discuss these issues with indigenous peoples openly and in national and international forums. (Canada, Mexico, the United States)

The language quoted from Annex II of NAFTA is simply a by-product of the above four factors. According to Appleton, the antistatist, individualistic, and classical liberal view of the United States ultimately prevailed in NAFTA's provisions. NAFTA in general thus represents an extreme example of restraining the role of government in favour of business interests. Appleton asserts that it is an attempt to "lock in one perspective of governmental role for all successive North American governments".<sup>9</sup> With respect to indigenous peoples, the provisions in Annex II, which ostensibly reserve a stronger role for government at least in relation to minorities and aboriginal peoples, really only serve to lock in the continued subjugation of the interests of indigenous peoples to those of nation-states. It goes without saying that all three nation-states have had and continue to exhibit substantial, almost incredible deference to the business interests within their borders. NAFTA enshrines and

attempts to lock in future governments to an unprecedented mechanism that allows investors to challenge governments in international tribunals. Simultaneously, the same governments do everything possible to prevent indigenous peoples from challenging nation-states internationally. This alone speaks volumes.

### The FTAA Link

In all three nation-states, whites and their value systems dominate business interests. The same may be said of the other nation-states in the rest of the Western Hemisphere. The rise of closely affiliated, occasionally nonwhite, elites within the Western Hemisphere, such as those identified by Van Harten,<sup>10</sup> does not alter this fact. Indeed, Van Harten points out that since the 1960s, national governments, particularly the United States, have been negotiating bilateral investment treaties (BITs) that have broadened the definition of what is an investment and accorded increasing protections to investors. The emphasis on broadening the investment definition and investor protection is one of the most salient features of the discussions surrounding a FTAA agreement.

In his analysis of the potential impact of a FTAA on the recent Guatemalan Peace Accords, Van Harten rightly assumes that a FTAA agreement is also heading towards an investor right of establishment, a prohibition on performance requirements, broad notions of expropriation and compensation, and an investor-to-state mechanism à la NAFTA and that a FTAA investment agreement would apply to the Guatemalan peace accords without any exceptions.<sup>11</sup> Van Harten posits that such an agreement will sacrifice the important and hard-won provisions of the peace accords as a direct result of probable investor efforts at “protecting investments” in Guatemala. Such efforts at investment protection would include, but not be limited to:

1. Attacking a governmental policy to recognize communal land ownership as flowing disproportionately or exclusively to Guatemalans, primarily Mayan communities, as discrimination against foreign investors, and a violation of national treatment.
2. Attacking any possible governmental restrictions on private individual entitlement to own common and municipal land as a violation of the right of establishment, claiming lost profits on such land.
3. Attacking any governmental recognition of “special” rights of access to traditional lands as a potential violation of national treatment and discrimination against foreign investors.
4. Attacking any governmental grant of “special” indigenous rights of access to sacred sites within portions of an investor’s land as “tantamount to expropriation” of the land.

5. Attacking any governmental grant of any degree of indigenous authority over local natural resources, including possible restrictions of participation in resource development projects to community members, as discriminatory or perhaps a lost business opportunity that requires compensation from either the government, or even the indigenous authority itself as a “recognized” governmental entity.
6. Attack government commitments to eliminate discrimination against indigenous women seeking access to land as an affirmative action program that violates national treatment since “affirmative action to make up for historical discrimination suffered by indigenous women entails contemporary discrimination against foreign investors” and/or is a prohibited performance requirement.
7. Attacking governmental attempts to settle indigenous claims to communal land either through restoration or payment for the land as a loss of profits/assets and/or an impediment to carrying out a planned resource development project.<sup>12</sup>

Van Harten points out that the mere threat of such a challenge from investors is sufficient to cause governments like Guatemala’s to think twice before pursuing their commitments under the peace accords to promote indigenous linguistic, cultural, civil, political, social, and economic rights. Investor trump cards are claims challenging, as a violation of national treatment, the “preferential” treatment and “discrimination” that are inherent in recognizing and protecting indigenous rights.

Admittedly, Van Harten’s analysis is speculation on what might be in a FTAA agreement, and its effect on indigenous peoples in Guatemala. Nevertheless, he points to several concrete instances in which NAFTA’s investor-to-state mechanism allowed investors to avoid domestic courts and governments entirely under Chapter 11 of NAFTA without normally attendant sovereign immunity issues coming into play. International arbitration panels made up of finance, international commerce, industry, and legal experts decide such challenges under Chapter 11 without the benefit of judicial review in domestic courts.

Van Harten reports that at least thirteen NAFTA lawsuits have been initiated challenging Mexican, Canadian, and U.S. policies in several revealing areas: a phase-out of a gasoline additive that had previously been found to be a threat to human health and the environment, a ban on exports of PCBs, the creation of an ecological preserve, a jury damages award, a bilateral agreement on softwood lumber exports, a mall deal gone bad, a banana gasoline additive, and a moratorium on water exports.<sup>13</sup> He also reports several cases in which the mere threat of a lawsuit allegedly caused governments to reconsider proposals in the area of public auto insurance, mandatory plain cigarette packaging, restrictions on advertising in split-run magazines, and renegotiation of an airport privatization contract.<sup>14</sup>

## Possible Remedies

The overarching investor-state mechanism and the current record of investor challenges under NAFTA are already ominous. When they are combined with the persistent refusal of nation-states, particularly the United States, to untangle the mess they have created with respect to indigenous peoples, the prospects for a fair and inclusive FTAA agreement as well as respect for the economic interests of indigenous peoples under NAFTA are poor. Nevertheless, all is not lost. In addition to recommendations already made by Special Rapporteurs like Martinez, Erica Irene-Daes and others, and the voluminous documents arising out of the Indigenous Summit of the Americas, Bothwell has recently published a pivotal law review article entitled, *We Live on Their Land: Implications of Long-Ago Takings of Native American Indian Property*.<sup>15</sup> While in no way suggesting that recommendations of indigenous peoples themselves or of the Special Rapporteurs and others too numerous to mention should be ignored, the remainder of this paper will focus on Bothwell's article, since it goes to the heart of nation-state attitudes, previously identified, that constitute a major impediment to the serious consideration of any business-related recommendations regarding indigenous peoples. Bothwell also provides a useful, overarching framework within which all recommendations concerning indigenous peoples in the Western Hemisphere should be considered.

Bothwell remarks that the European taking of America involved "the most extensive land fraud and the largest holocaust in world history". He argues persuasively that, within the United States, the Supreme Court distorted international "laws" or doctrines regarding conquest and discovery to "rationalize white supremacist usurpation of Indian nation sovereignty, even while conceding that the great injustice may have violated international law principles". Bothwell goes even further than the mere analysis of then-existing international laws to assert that the taking of America violated binding treaties, the law of nations as recognized in the U.S. Constitution, as well as the Supremacy, Commerce, Takings, Contracts, and Fifth Amendment Due Process Clauses of the U.S. Constitution.

Bothwell's legal arguments are solid and compelling. He eschews the circular reasoning prevalent in most legal discourse within the United States on indigenous peoples. Nor does he allow subsequent rationalizations by generations of U.S. court decisions, executive orders, acts of Congress, army expeditions and mob action to cloud the fact that the United States violated its own as well as international laws to get where it is today. His article is not a mere diatribe. It contains practical suggestions for the United States, and by extension other nation-states in the Western Hemisphere, to untangle the mess that they have created with respect to indigenous peoples. Bothwell represents the kind of clarity of thinking that must inform the dialogue over NAFTA as well as a proposed FTAA agreement. The general recommendations, summarized below, that Bothwell makes for the United

States to restore the rights of American Indians serve as a framework upon which NAFTA should have been based and a FTAA agreement can be based:

1. Indian nationhood<sup>16</sup> can and should be restored. The fact that Indian nations are small and numerous should not be an insurmountable obstacle. As Bothwell points out, this did not prevent Saint Kitts and Nevis (139 square miles, 54,755 people), Liechtenstein (62 square miles, 27,074 people), San Marino (23 square miles, 22,791 people) and others from being admitted to United Nations membership. In addition, the survivors of the Jewish Holocaust, in which six million perished, a figure much smaller than what occurred in the American Holocaust, were allowed to return to their homeland two thousand years after their dispersal, declare their independence and be admitted to the U.N. under the constitutive theory of statehood, a theory that can be applied to Indians throughout the Americas.
2. The U.S. should support the rights of indigenous peoples in such international legal instruments as the 1977 Geneva Draft Declaration of Principles for the Defense of the Indigenous Nations and Peoples of the Western Hemisphere ("Indigenous peoples shall be accorded recognition as nations ...." Art. 1); the 1984 Panama Declaration of Principles of Indigenous Rights ("Indigenous nations and peoples are entitled to the permanent control and enjoyment of their aboriginal ancestral-historical territories." Art. 4); the 1991 Geneva Convention Concerning Indigenous and Tribal Peoples in Independent Countries ("The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized." Art. 14, para. 1); and the 1995 Draft of the Inter-American Declaration on the rights of Indigenous peoples ("... in many indigenous cultures, traditional collective systems for control and use of land and territory ... are a necessary condition for their survival ... and collective well-being." Preamble, para. 6).
3. The President of the United States should appoint a high-level and broad-based commission to conduct a serious public study of the feasibility of restoring Indian nationhood within practical boundaries with which the United States and indigenous peoples can both live. The State Department should simultaneously be conducting a review of U.S. obligations to Native Americans under international human rights law while other responsible agencies redouble their efforts with respect to health, education and welfare of Indian people.<sup>17</sup>

This author believes that Bothwell's first suggestion, the restoration of Indian nationhood, is the most vital one of the three that he put forth, from the standpoint of indigenous business and economic interests, although the importance of the other two cannot be overemphasized. The only question remaining is whether the United States, let alone the rest of the Western Hemisphere, can realistically be expected to restore Indian nationhood in a meaningful way given the prevailing attitudes and multilayered, legalized subterfuge previously identified. This author believes that the American experience with slavery is

instructive since that “peculiar institution”, next to U.S. treatment of American Indians, represents the height of America’s contradictory stance towards nonwhite peoples and required a multifaceted approach to eliminate.

Slavery was enshrined in the U.S. Constitution and deeply embedded in America’s social, economic, legal, and political fabric for years before it was finally abolished. For years, the United States wasted time, energy, and intellectual resources on rationalizing the existence of slavery. During those years, even the idea of abolishing slavery within the United States seemed impossible, insane even, from the perspective of white society. Yet slavery no longer exists in the United States. Rather, today, the U.S. is simultaneously confronted with the interrelated legacies of brutal but unacknowledged colonialism, genocide, and serious, worldwide environmental degradation. It is Indian tribes that are leading the way in attempts to create a viable system of trade and development that respects human rights and is environmentally sustainable.<sup>18</sup> Restoration of Indian nationhood can be a vital first step in finally eliminating the three scourges of brutal colonialism, genocide, and environmental degradation from the Western Hemisphere while creating a FTAA that is beneficial to all.

## Endnotes

1. CIA. The World Factbook 2000. Mexico. <http://www.odci.gov/cia/publications/factbook/geos/mx.html>
2. Two percent and 0.8 percent, respectively, of the total populations according to World Factbook 2000 figures for Canada and the United States. The accuracy of these numbers may be in dispute but will suffice for purposes of this article.
3. Appleton, Barry. (1994) *Navigating NAFTA: A Concise User’s Guide to the North American Free Trade Agreement* at 207, [citing S.M. Lipset, *Consensus and Conflict: Essays in Political Sociology* (New Brunswick, 1985) as cited by Rod MacDonald, “Tears are not Enough” in John D. Whyte and Ian Peach eds., *Re-Forming Canada? The Meaning of the Meech Lake Accord and the Free Trade Agreement for the Canadian State*. (Kingston: Institute of Intergovernmental Relations, Queen’s University, 1989, at 10)].
4. Ibid. at 14.
5. The full text of each of the reservations herein discussed are: “Canada reserves the right to adopt or maintain any measure denying investors of another Party and their investments, or service providers of another Party, any rights or preferences provided to aboriginal peoples,” Annex II at <http://sice.oas.org/trade/nafta/anx2cda.asp>; “The United States reserves the right to adopt or maintain any measure according rights or preferences to socially or economically disadvantaged minorities, including corporations organized under the laws of the State of Alaska in accordance with the Alaska Native Claims Settlement Act,” Annex II at <http://www.sice.oas.org/trade/nafta/anx2usa.asp>; “Mexico reserves the right to adopt or maintain any measure according rights or preferences to socially or economically

- disadvantaged groups,” Annex II at <http://www.sice.oas.org/trade/nafta/anx2mex.asp>. All of these exemptions simply continue the ongoing nation-state subordination and marginalization of indigenous peoples.
6. Makin, Kirk. (May 24, 2001). *Native import rights restricted*, Globe & Mail.
  7. Lam, Maivan Clech. (2000). *At the Edge of the State: Indigenous Peoples and Self-Determination (Innovation in International Law)*. Lam details the history of the Working Group on Indigenous Populations in this area and proposes thought-provoking alternatives for fuller recognition of indigenous rights to self-determination.
  8. Martinez, Miguel Alfonso, Special Rapporteur. (22 June 1999). Final Report on Human Rights of Indigenous Peoples: Study on treaties, agreements and other constructive arrangements between States and indigenous populations, E/CN.4/Sub.2/1999/20 at paragraph 115.
  9. Appleton at 207.
  10. Van Harten, Gus. (2000). *Yale Human Rights and Development Law Journal*, Vol 3:113, 118.
  11. Ibid. at 145.
  12. Ibid. at 148-153. Van Harten points out that this list is not exhaustive.
  13. Ibid. at 141.
  14. Ibid. at 143.
  15. Bothwell, Anthony P.X., *We Live on Their land: Implications of Long-Ago Takings of Native American Indian Property*, Golden Gate University Annual Survey of International & Comparative Law, Vol 6:1, 175 et seq, Spring 2000.
  16. See Lam for a discussion of important nuances in conceptualization of “nationhood” and self-determination with respect to indigenous peoples. This paper leaves the precise definition of “Indian nationhood” open as indigenous peoples themselves become more involved in the process.
  17. Ibid., pp. 205-209.
  18. More details on their efforts as well as informative documents that should help form the basis of future discussion may be found at the March 28-31, 2001 Indigenous Peoples Summit of the Americas, [http://www.afn.ca/Summit/indigenous\\_summit\\_of\\_the\\_america.htm](http://www.afn.ca/Summit/indigenous_summit_of_the_america.htm)

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