

Estey Centre for Law and Economics in International Trade

Proceedings of a Conference

entitled

**Impact of NAFTA on Aboriginal Business in
North America**

held in Saskatoon, Canada

2001

(electronic version)

Impact of NAFTA on Aboriginal Business in North America

Papers, presentations and proceedings of the Conference

**Saskatoon, SK
May 28-29, 2001**

Introduction

The Estey Centre for Law and Economics in International Trade hosted a conference on the Impact of NAFTA on Aboriginal Business in North America, in Saskatoon, SK, May 28-29, 2001. The conference attracted 75 participants, including representatives of seven federal government departments, the Alberta and Saskatchewan governments, aboriginal organizations, law professors and students, practicing attorneys, and the private sector.

As only one of the speakers, Professor Valerie Phillips of Washington State University, had prepared a paper for presentation, a court reporter was engaged to record the proceedings of the conference. The report which follows was distilled from several hundred pages of transcript, and includes the full text of Professor Phillips' paper. The Estey Centre regrets that all of the presentations, and certainly not all of the comments, questions and responses, could be included. The valuable contributions of all of the speakers, panelists and participants were, needless to say, greatly appreciated.

Although some might argue that the entire transcript of the proceedings should be published, to ensure that all of the points raised are recorded and to provide the full flavour of the discussion, in our view, such a document would be unwieldy and, with all due respect to the speakers, largely unreadable. Every effort has been made to retain as much as possible the presentational style of the speakers. Although a conversational style may be agreeable to listen to, it is not necessarily the most readable. The Estey Centre accepts full responsibility for any errors and omissions in the text, resulting from the editing process, but it should be noted that the presentations and comments reflect the views of the speakers, and not necessarily the view of the Estey Centre.

Finally, the Estey Centre gratefully acknowledges the financial support of the sponsors of the conference: CanWest Global Foundation, Law Foundation of Saskatchewan, Department of Foreign Affairs and International Trade, Saskatchewan Intergovernmental and Aboriginal Affairs, Alberta Law Foundation, Law Foundation of Ontario, Indian and Northern Affairs Canada, and the Policy Research Secretariat. Without their generous support, the conference would not have been viable, and the Centre would not have been able to begin a program of post-conference research.

Saskatoon, SK
August 2001

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Opening Remarks by Program Chair

MR. MOLLOY:

Thank you, and welcome to the conference. My job as the chair will be to try and keep us on schedule so that all of the speakers get an opportunity to make presentations and also to try and ensure that there is as much opportunity for you to be able to participate in the discussion as possible, because I think it's important that there be a flow of information, both from the table here as well as from those of you who are sitting on the other side of us.

I think this conference is very timely, that it's taking place at a time when there is talk about expanding free trade. It's also taking place at a time when First Nations peoples of Canada are more and more on the world stage, whether it be by partnerships in other countries, in the business world or in the world stage seeking support for their causes in Canada through the boycotting of Canadian products. And, also, it's timely in that the Mitchell case, a decision of the Supreme Court of Canada, was handed down last week, and I'm sure that that will be something that will be covered during our discussions today.

Session 1: An overview of how NAFTA does, or does not, accommodate the business interests of indigenous North Americans, the current policy framework.

CLAUDE CARRIERE:

Thank you, Mr. Chairman. I would first like to thank Mr. Leach and Mr. Robinson for organizing the conference, and for getting me to Saskatoon for the second time in my life. I am pleased to be here and to learn. When Wayne first mentioned the subject of the conference to me last year, I was somewhat sceptical that there would be very much interest in it. I'm glad to see that I was wrong.

The subject matter for a trade negotiator like me is a bit challenging, as the NAFTA does not specifically mention indigenous peoples or aboriginals, but as the NAFTA does, in my view, accommodate the business interests of business people in Canada, the United States and Mexico, and to the extent that aboriginal peoples in Canada are business people, I would think that their interest would be accommodated.

I thought I should set the stage by telling you what the NAFTA is, and what it is not, and talk a bit about the context in which it was negotiated over ten years ago, and also about Canada's continued interest in the hemisphere.

The paternity of the NAFTA is the Canada- U.S. Free Trade Agreement, which was negotiated in the mid-1980s. Negotiations started over 15 years ago, and that agreement entered into force on the first of January, 1989. Some of you will recall there was a great debate in Canada in 1988 about whether Canada should actually approve agreement. The NAFTA came afterwards. As soon as Canada and the U.S. had concluded their negotiations, the Mexican government decided to look outward and begin negotiating a similar bilateral agreement with the United States, and bilateral negotiations were announced in the spring of 1990. It only became a trilateral negotiation when Canada decided to elbow its way to the table. Mexico and the United States did not want us at the table, as both felt that could be a spoiler in the negotiations. Mexico felt that we might ally with the United States against Mexican interests, and the United States felt that we could be reopening some very sensitive issues that we had negotiated in the FTA. A deal was struck between Jaime Serra Puche, Carla Hills and John Crosbie, who was our minister at the time, that Canada would be allowed at the table, but if we could not stand the heat we would leave graciously and allow the United States and Mexico to continue negotiations. NAFTA was in fact negotiated in two years, and Canada contributed quite significantly to it. It did not enter into force until two additional agreements were negotiated at the request of the United States - an environmental and a labour cooperation agreement - and the three entered into force at the same time in January of 1995. Canada-U.S. trade is now free of tariffs; we implemented the last tariff cut last year, and duties will be removed on goods traded between Canada and Mexico in January, 2003. There are exceptions to that, and a few products in all three countries will remain subject to tariffs, but for the most part, 99.999 per cent of goods crossing the border will be duty-free.

The NAFTA also contains new provisions on cross-border services trade, and protection of investment and intellectual property. Although the NAFTA is the sole reason, should not take all the credit for what happened, it is still a contributing factor to the enormous increase in trade among the NAFTA partners. The numbers are quite astonishing. As you all know, 85 per cent or more of Canadian exports go to the United States. Some of that goes on to Mexico, but is lost in the statistical calculations. But we have today more than one and a half billion dollars in trade crossing the border every single day. The other success is that we have an enormous surplus with the United States, which, to our great pleasure, they have not noticed. They still think Japan is their largest trading partner and we want to make sure that they keep thinking that, so that they don't notice that we have a 90 billion dollar surplus. For the most part, trade has gone up sharply to our benefit, and we've turned around in some sectors. We used to have a very significant deficit in trade with the United States in agri-food; now we have a 2-to-1 surplus in agri-food.

Investment has also gone up sharply, starting with a turnaround in the late 1980's while we were negotiating the NAFTA. Up to that point a lot of investment was leaving Canada. The negotiation of the agreement led to a surge of investments not only from the United States, but also from Europe and elsewhere to take advantage of and participate in the integration of the North American continent.

We have to recognize that in the early 1990's there was a recession, and to some degree the impact of the recession was aggravated by the agreement and the adjustments to the

production patterns brought about by the agreement, but that was short-lived, and since then there has been quite a significant integration of production and markets in North America.

Let me mention something that some of you might have forgotten. When we started the NAFTA negotiations, we had just terminated the Softwood Lumber Agreement that had been negotiated in 1986, and I think at the time we got into Countervail II. Countervail I was in 1983. So, the current situation in which we find ourselves, with the countervailing duty and anti-dumping investigation is not something which is new. We fought them before and we won before; hopefully we'll win again. But one of the key features of the NAFTA for us, and one of the most difficult chapters of the agreement to be negotiated, in fact, it was negotiated at the highest levels in Canada and the United States, is what is called Chapter 19, which provides for a special dispute settlement mechanism and allows Canadians to determine whether or not U.S. law is applied consistently and fairly.

Chapter 19 was designed to give us security, that when the countervailing duty and anti-dumping laws would be applied to exports from Canada, we could be assured that the process was fair, and seen to be fair. My former ambassador, Derek Burney, used to say that this was the crown jewel of the agreement. Today, Chapter 19 isn't as important to many people in Canada, because of the Uruguay Round. The Uruguay Round resulted in the creation of the World Trade Organization, which strengthened and improved dispute settlement.

While we still have access to Chapter 19, that has its limitations. It determines whether or not U.S. law is applied fairly and it doesn't determine whether U.S. law is fair. The WTO allows us to test whether or not countervailing duty or anti-dumping law is consistent with internationally negotiated agreements in Geneva, the Subsidies and Countervailing Duties Agreement and the Anti-Dumping Duties Agreement. In fact, we recently did challenge one portion of U.S. law, whether or not export restrictions were countervailable subsidies, and the panel found that they were not. So now we have not only the NAFTA in this file, but also the WTO as a potential help.

I said earlier that there were no specific provisions in the NAFTA regarding aboriginal business, and that's true, but there are provisions which allow governments to take domestic policy decisions in certain areas to promote certain businesses or groups of businesses. For example, in the area of government procurement, we negotiated a reservation to our obligation that would allow the government to maintain certain preference programs to favour small business and minority businesses, similar to those in the United States, which has allowed the government to introduce preferences in government procurement for aboriginal businesses, while meeting its obligations under NAFTA. So while the agreement may not have a specific provision in one area, the idea is to maximize the freedom of the government to continue to legislate or regulate in areas that it considers important. For example, there are chapters that deal with standards and regulations, such as sanitary regulations, and we have been careful to ensure that governments continue to have the right to take regulatory action to meet legitimate objectives of the protection of health and safety, of the environment, of consumer information, and similar objectives. These freedoms are constrained by certain obligations, by the process of ensuring that the measures are not discriminatory and that they are not excessive or disproportionate, but

the capacity to take regulatory action to promote specific objectives remains and is protected, and has not been challenged.

Since the NAFTA was negotiated, other activities have been taking place in the hemisphere. Some of you may be aware of the Summit of the Americas in Miami in December 1994. The Summit of the Americas launched the FTAA negotiations and gave the trade ministers the task of trying to negotiate an agreement by 2005. That objective was reaffirmed by leaders at Quebec City a month ago. But let me just say that the Summit of the Americas process is much broader than just a trade agreement; it is aimed at increasing cooperation among countries in the hemisphere in a wide range of areas. The theme in Quebec City was democracy, and the protection and promotion of democracy, and leaders agreed to a democracy clause that enforces democracy and hopefully will ensure that we have no backsliding in this area. This clause applies to the Summit of the Americas process of all of the 18 or 20 different activities, only one of which is trade. Prime Minister Chrétien is quite adamant that the democracy clause, that was agreed to in Quebec City, will apply to all aspects of the Summit of the Americas process. Thank you very much.

Session 2: Identifying National & International Legal Vacuums Potentially Impacting NAFTA & Indigenous Peoples

VALERIE J. PHILLIPS:

Note: The following is the full text of Professor Phillips' paper, rather than her presentation of the paper at the conference.

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% of its population categorized as Amerindian and 60% as mestizo (Amerindian-Spanish),ⁱ 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,ⁱⁱ 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 20th 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 anti-statist, individualistic and classically liberal.ⁱⁱⁱ Appleton asserts that the pre-adoption debate over NAFTA largely reflected the tension between these two views, with the anti-statist, 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.^{iv}

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 impacted; and (3) It openly, albeit weakly, acknowledges the link between trade and environment while ignoring other links in the area 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 because each has inserted specific language or "non-conforming measures" within NAFTA that exempt specific sectors from operation of the treaty.^v 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 U.S. 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 only 10% of its minority population can arguably be termed non-indigenous since at least 30% of the population is "Amerindian" and 60% is termed an "Amerindian-Spanish" mixture. In contrast, Mexico's white population is only 9% of the total population while the white populations in Canada and the United States are much larger, at 66% and 83.5%, 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.

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 non-commercial 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.^{vi} 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. 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.^{vii}

The above assumptions are attitudes to which nation-states tenaciously cling whenever *any* discussion on the rights of indigenous peoples surfaces. These attitudes therefore color the entire discourse on NAFTA and indigenous peoples within the United States, Canada, and Mexico, not just any discussions surrounding treaty rights, and 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, although by no means the exclusive, 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 licenses 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 anti-statist, 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 favor of business interests. Appleton asserts that it is an attempt to "lock-in one perspective of governmental role for all successive North American governments."^{viii} 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. The fact that NAFTA would enshrine and attempt to lock-in future governments to an unprecedented mechanism that allows investors to challenge governments in international tribunals while simultaneously doing everything possible to prevent indigenous peoples from challenging nation-states internationally speaks volumes.

THE FTAA LINK

In all three nation-states, whites and their value system 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, 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 a lá NAFTA and that an FTAA investment agreement would apply to the Guatemalan peace accords without any exceptions.^{ix} 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 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 violated national treatment since "affirmative action to make up for historical discrimination suffered by indigenous women entails contemporary discrimination against foreign investors" and/or 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.^x

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

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.^{xi} 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 spit-run magazines, and renegotiation of an airport privatization contract.^{xii}

POSSIBLE REMEDIES

The overarching investor-state mechanism and the current record of investor challenges under NAFTA are already ominous. When that is coupled with the persistent refusal of nation-states, particularly the United States, to untangle the mess that it has 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*.^{xiii} 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 U.S. 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 U.S. 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 U.S., 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 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 re-double their efforts with respect to health, education and welfare of Indian people.^{xiv}

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 along the rest of the Western Hemisphere, can realistically be expected to restore Indian nationhood in a meaningful way given the prevailing attitudes and multi-layered, 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, insanity 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.^{xv} 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>

¹ Two percent and 0.8%, 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.

¹ Appleton, Barry. (1994) Navigating NAFTA: A Concise User's Guide to the North American Free Trade Agreement, p. 207.

¹ Ibid at 14.

¹ 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>.

¹ Makin, Kirk (May 24, 2001). *Native import rights restricted*, Globe & Mail.

¹ 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.

¹ Appleton at 207.

¹ Van Harten, Gus. (2000). Yale Human Rights and Development Law Journal, Vol 3:113, 145.

¹ Ibid at pp. 148-153. Van Harten points out that this list is not exhaustive.

¹ Ibid at 141.

¹ Ibid at 143.

¹ 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.

¹ Ibid, pp. 205-209.

¹ 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 website.

LENOR SCHEFFLER:

My name is Lenor Scheffler, and I am a Mdewakanton Dakota from Southern Minnesota. I have had occasion to visit Canada a number of times in the last two years, and what started it for me was our Minnesota American Indian Chamber of Commerce. Incidentally, we call ourselves Indian, American Indian, or native American in the United States, whereas I know here in Canada you refer to First Nations or aboriginal people. We have 100 members in the Minnesota American Indian Chamber of Commerce, from a number of reservations in Minnesota and other parts of the United States, and they represent a wide variety of different businesses and occupations. After the Chamber had begun talking with First Nations business people in Thunder Bay and Winnipeg, they came to me because the Indian Chamber is a pro bono client of the firm, in fact a pro bono client of mine, and they they told me that they wanted to trade, to do business across the border, and what about that Jay Treaty, and can't we just move goods across?

And so I have had to learn and try to answer some of those questions, and subsequently our Minnesota American Indian Chamber of Commerce signed an MOU with the Winnipeg First Nations Chamber of Commerce, agreeing to re-establish our trade routes, not establish, but re-establish those routes and trading relationships that we had before the Europeans arrived. The border did not exist for our peoples. Today, for example, the Tohono O'odham tribe in southern Arizona is split between Mexico and the United States at that border. The Tohono O'odham in Arizona are working on an economic development program to be able to take some of their tribal money and share that with their relatives across the border in Mexico, and they have been asking questions about how to do that or what have other tribes that are along the borders done? I didn't have the answers, but it made me realize that these are issues for our people that we need to start talking about, and that our governments - Canada, the United States and Mexico - need to know that their aboriginal citizens must deal with them every day.

There are other examples. We have people in northern Minnesota, the Red Lake Ojibwe, who are split between Minnesota and the Canadian side. The Grand Portage Band of Ojibwe in the northeast corner of Minnesota live in Grand Portage, on the Minnesota side, and also in Thunder Bay. Some of our Dakota people, whose ancestors went into exile in the 1800s in Manitoba, come down to our Dakota communities in Prairie Island and in Shakopee, to work in our casinos, or to work as language teachers, because our Dakota communities in southern Minnesota are so small, many no longer speak our language, and so we rely on our relatives from Manitoba to come and teach us, and there have been immigration issues. Even though they are just travelling from the reserve in Manitoba directly to the reservation in Minnesota to work on the reservation, there were immigration problems, which, fortunately, were cleared up.

My second observation is that this wanting to reach across the border to reconnect with friends and relatives comes from individuals as opposed to elected tribal officials, with the exception of the NCAI, our National Congress American Indians, which is a national

organization of tribes in the United States, which did come to see the AFN. There was a major conference last year, I think, or the year before, which was extraordinary because it brought together for the first time all the U.S. tribes belonging to the NCAI, and all the Canadian First Nations belonging to the AFN.

Also, casino gaming has brought our people together at the tribal government level, to communicate, teach and share with each other. But mostly I observe that it is the individual business people who want to do business across the border. Canadian First Nations see market and investment opportunities with our American tribes, who in turn see market and investment opportunities with the First Nations in Canada

RUSSEL BARSH:

Two kinds of objectives have already been raised here as objectives for aboriginal or indigenous peoples in the trade area: one is trade promotion, getting more trade being included in trade rather than excluded from the growth of regional and international trade; the other is concern about assuring freedom to protect and develop indigenous peoples' own cultures and ways of life and institutions. Now these can be mutually reinforcing in some cases, where trade expansion produces the resources for cultural development, but that depends on the freedom and security of the indigenous peoples' concern, and their ability to really get involved in and benefit fully from trade. There is a possibility that these two objectives can be in conflict, depending on national circumstances, where trade promotion, in fact, comes at the price of efforts by the state and by communities themselves to maintain, renew and develop their own cultures and ways of life in their own ways.

It seems to me that one of the interesting points that is raised by Valerie Phillips' talk is the extent to which laws, programs and resources aimed at supporting the cultural development and the autonomy of indigenous peoples may come in conflict with trade law. I think that to some extent it has been unnecessarily downplayed by governments, and perhaps unnecessarily raised as a fear by some indigenous peoples who suspect the worst of the governments that negotiated NAFTA and the Uruguay Round; but I think there are some serious technical problems that need to be clarified in NAFTA, in a FTAA super NAFTA or expanded NAFTA and, indeed, need to be raised in the next WTO trade round when we take a second look at the Subsidies and Countervailing Measures Agreement.

At best, Annex II of NAFTA provides some shielding for government rules and regulations that set different standards for business owned or operated by or located within the community of an indigenous nation. It does not seem to apply to the actual transfer of resources between the state and indigenous peoples. I think there is a difference in the way it was worded and intended, between standards and actual transfers of resources. There is a reason for that, because any transfer of resources from the state to an indigenous community, if it has an effect on trade, could be a GATTable subsidy, could come into conflict with the Subsidies and Countervailing Measures Agreement, which is an international agreement, and to which the three NAFTA parties are also parties. And also, as Valerie pointed out, one of the concerns would be that while there is some policy shielding for existing state legislation, there is no affirmative duty

on the state to do anything to support either the cultural development or the trade promotion sought by indigenous peoples. You may also have heard about the cultural industries provision in NAFTA. It is quite interesting because you would think that indigenous peoples would be interested in something having to do with the expansion of culture, but the cultural industries provision in Article 2106 is about broadcasting and publishing, and the other industries in the broadest sense at the national level, that involve arts, culture, language and information, rather than the protection of cultures within states.

So I would suggest that we do need to think carefully about the extent to which the kinds of support programs that indigenous peoples in Canada and the U.S., at least, have come to rely upon as essential to maintaining some momentum in the direction of human development and basic community integrity, and whether they might come afoul of prohibitions against subsidies. Now, of course, it is going to depend upon how it's done and whether it has an effect on trade. One argument that could be made is simply that the effect on trade of the kinds of benefits and resources transferred to indigenous peoples in North America, at least, are simply too small, that their impact on the trade of these countries amongst themselves or with third parties would simply be too small, to become actionable under the SCM, the Subsidies and Countervailing Measures Agreement, or to be worth anyone's time trying to grieve under NAFTA. However, I think that even if this is a remote possibility, it is certainly one that needs to be put to rest to provide a certain sense of security for indigenous nations and peoples, that they do have at least the freedom to continue to receive special support, and perhaps even to argue for more support, to catch up in the development and trade areas without fear of trade law repercussions. We note in this regard that while there is only a transitory provision for aid to disadvantaged regions in the Subsidies and Countervailing Measures Agreement, there is a permanent regional equalization provision in the Treaty of Rome creating the European Economic Community. It is a very important provision that is being used more and more as an aspect of international economic activity within Europe, and is one of the reasons the European community will be very interested in the fate of the SCM as we look at it further, whether there will be increasing tensions between the economic structure of the European community and the global economic structure contemplated by the GATT instruments.

One of the most interesting recent developments I've seen is the use by the Sami, the indigenous peoples of northern Europe, of the regional equity clause in the Treaty of Rome, to get the Sami in four countries of Europe defined as a disadvantaged region, that has a position, therefore, under the European Regional Trade Agreement, to receive special economic support in the human development sector, education, training, social security, in order to catch up. So there is actually an affirmative duty in the Treaty of Rome to support disadvantaged regions. Regions can be defined in ways that do not respect state borders within the European Community. They can be, as the Sami region is, an international region. They were really targeted in that case as groups rather than regions in the conventional territorial sense, and not only are transfers of resources shielded from trade action within the community, but they are also required as part of the integrity of the European Community as a free and fair trade area. Now, of course, you can say, "Well, that's the European Community, and this is way beyond anything that we're contemplating in North America or throughout the Americas. That's really an emergent state

rather than just a trade area or customs union, and is something that goes beyond anything that anyone is contemplating here."

Be that as it may, I think that it may be worth taking another look at the thinking behind the European social charter and the regional equity provision of the Treaty of Rome, because we are in a hemisphere with some extraordinarily disadvantaged, as Valerie pointed out correctly, repressed and often violently victimized communities, and the notion that we can have free and fair trade without providing some boost, some protection and resources for those peoples and communities to engage in the open trading system that's been constructed, to suspect that nothing needs to be done other than perhaps just allowing them to participate, just a freedom of opportunity clause, I think is really completely unrealistic. Looking from the United States or Canada outwards, it may be easier to suppose that we could get away with trade promotion of a very modest level, and no major investments in indigenous people's basic human development for indigenous communities, not only to enjoy the benefits of a broader stronger trading system, but to actually survive. But I think, as we move around the Americas generally, we see that this is a very serious flaw in the region as a whole, and in many parts of the region very particularly, and the same reasoning that applied in the construction of the regional provisions in the Treaty of Rome, vast regional inequalities, vast inequalities among peoples, apply with equal force to the creation of fundamental equity in a regional agreement to the Americas. Another way of looking at it is that there is another trade agreement, although admittedly one that is a bit deeper and more integrated, that has addressed this issue directly, and recognized that it is fundamental to having an equitable trade agreement that peoples or communities that have historically been excluded, and don't have the assets, have direct financial support, not just freedom of access and preferential standards, but resources.

PAGE HALL:

I will try to give you a historical perspective on trade and free trade agreements. In the United States, when we had a revolution and broke away from England, one thing that was considered absolutely necessary, as a matter of fact it was the second law enacted by the United States Congress, was the law establishing essentially a customs union, creating a common external tariff with the 13 colonies. Prior to then, a good might be exported from Massachusetts to Virginia and imported into Virginia, and a tariff or a tax would be applied to that good. That's what free trade is all about, and Canada is, as someone already said, the United States' number one trading partner by far, and NAFTA has a big piece in that. U.S. trade with Mexico is also increasing. Basically what NAFTA does is create duty-free trade for most goods among the three countries. There are still many goods that are not free between Mexico and the United States right now. Most everything is between Canada and the United States. Anti-dumping and countervailing duties are still applied, though, to some goods between Canada and the United States, so there are still duties involved, but basically NAFTA deals with, and what I deal with in my law practice, is trade in goods, and the primary book that is available from the United States government, and you can download it from the U.S. Custom Services' website is *NAFTA, A Guide to Customs Procedures*. It tells you about how goods are classified under the harmonized tariff schedules. Goods are valued according to an international valuation agreement, and then rules of origin are the key for duty-free trade under NAFTA. The FTAA will be an expansion of

NAFTA throughout the hemisphere, and what I would also like to see throughout the hemisphere, or at least in North America, is a customs union so that we would have totally free trade amongst all the nations, and we would have a common external tariff for goods from Asia, from Europe, from Africa, from other parts of the world. That would be a goal that I would like to see happen in the future, at least with respect to North America.

As a number of people have said this morning, there are no special rules under NAFTA for trade by indigenous people. The same rules apply to indigenous people as apply to non-indigenous people. If you fill out the NAFTA Certificate of Origin and ship goods to the United States from Canada, you will probably get duty-free trade if the rules of origin, classification, valuation, all work in your favour, the same for as any other commercial enterprise. In the United States, of course, we treat native Americans specially with respect to national rules, but as far as trade goes, you are treated the same as a corporation. A native corporation is treated the same as Toyota or Nabisco.

The Jay Treaty has been mentioned, too. In 1794, the Jay Treaty, basically in Article III, allowed indigenous peoples of the United States and Canada to cross back and forth across the border with personal articles, without interference and without duties, but unfortunately, the Jay Treaty, in its 18th century language, basically said "but no commercial goods". So if I manufactured pelts or something like that, I couldn't ship thousands of pelts from Canada to the United States and have them enter duty-free, even under Article III of the Jay Treaty. But then in 1977 in the United States there was a case called *Aikens vs. The United States* that made it up to what was then the Court of Customs and Patent Appeals, which is now called the Court of Appeals for the Federal Circuit. In that case they said, "Well, the Jay Treaty Article III, which enabled indigenous peoples to bring goods across the border duty-free, was abrogated by the War of 1812." It took them until 1977 to figure this out, which is odd in itself. In the *Mitchell* case, the Canadians are basically saying the same thing that the Americans said back in 1977, and that is no special deal for personal articles.

So my question is whether there should be special treatment to recognize the importance of the indigenous people in North America and in this hemisphere? I'm throwing that out for you. And should it only cover personal effects, like the intent of the Jay Treaty? I think you should go for whole enchilada, for commercial goods, too. There is also a bigger question whether trade agreements should be used for social policy at all? Are they just trade agreements? Are they just trade for economic purposes or should we use them for environmental protection? Should we use them for human rights or labour?

RUSSEL BARSH:

One very brief comment is that a large number of the countries, of the states, that would presumably be included in an FTAA have ratified the International Labour Organization's Convention #169, which does commit those states to opening their borders to contact, cooperation and trade amongst indigenous people. So in a sense there is a precedent already established in a dozen of the American states. That doesn't mean that they have opened their borders, but they are committed to a policy of providing truly open borders to indigenous peoples

and that might be the starting point for a discussion of the kind of preferential freedom of trade that you were raising.

PETER HUTCHINS:

You'll be hearing from me later on *Mitchell*, but I just wanted to follow up on the point about First Nations people participating in international agreements. It's an interesting idea and I wanted to raise one example in which I was involved. Basically it dealt with trade matters, among other things, and is the 1916 Migratory Birds Convention Act signed between the United States and Britain, of course, and now Canada in the mid-1990s as a result of treaty undertakings by the federal government. Canada approached the United States and said we have to amend this treaty to bring it into line with the now constitutionally protected and recognized rights in Canada, and the United States agreed. By the way, these were commitments put into modern treaties, such as the Jay agreement or Quebec agreement. It was agreed and Canada then took the further step of asking aboriginal peoples to be parties to, and members of the delegation that negotiated, the amendments to the Migratory Birds Convention, in Parksville, British Columbia in the mid '90s, and I was legal advisor for the aboriginal people of the delegation. I thought it was an excellent example and model of governments working together with aboriginal peoples in an international forum, and being full partners in the negotiations.

GARY LIPINSKI:

My name is Gary Lipinski, and I'm chairman of the Métis Nation of Ontario. For the benefit of those who aren't from Canada, the Canadian Constitution has defined its aboriginal peoples as Métis people, First Nations people and Inuit people. I just wanted to say that I appreciated the comments of Valerie Phillips, and I support her idea that we have to start recognizing aboriginal nations as nations and not subjugate them to some lower level. Should we treat aboriginal people with some sort of special interest as we move to amend the NAFTA? I think not. I think we need to treat aboriginal nations as equal nations or equal participants. Aboriginal peoples need to have equal access to the resources, to the lands and to the opportunities.

Session 3: The Economic Argument for Regional Coordination of Land Rights Protection

RUSSEL BARSH

The situation we are facing in the expansion of NAFTA into a free trade area of the Americas, is expanding the NAFTA concept into a region where there is a much larger proportion of indigenous peoples than in North America, including Mexico, and where the rate of dispossession of indigenous peoples from their ancestral lands is not only high and continuing,

but where it has increased in the last ten years. As a result of investment liberalization policies adopted by Latin American governments in the last decade, particularly in the Andes, there has been a significant increase of foreign direct investment in those countries, particularly in countries which have very large indigenous populations, indeed indigenous majorities in some cases. The immediate effect has been to place investment in indigenous territories where people's rights to the lands that they have continued to use and occupy are not secure. That's the starting point for my talk, which really is about land rights and about the question of the kinds of things that we might want to write into the democracy clause of FTAA that are not obviously there already. I'd like to suggest that trade promotion measures, such as FTAA, have to be linked with some clear provisions for the basic security of land tenure of indigenous peoples, or the entire system will be fundamentally flawed as a matter of market economics. After all, in the theory of classical economics that we are pursuing in removing trade barriers and facilitating the movements of goods, services and investment, the foundation of a free market is property and contract. We know who owns things, their tenure over their productive assets is clear and secure and enforceable, and they not only have freedom to dispose of the things that they own through trade, but they have security of contract. When they dispose of things, when they make agreements to sell their things, their contracts are enforceable. There are clear rules about how you dispose of things and what the consequences are, and your deals are enforceable as you intend them. So freedom of contract, in the sense of a clear enforceable system of contract on a foundation of secure property rights is a structural condition of free markets.

There are lots of subsidiary aspects of that, such as freedom of information, people knowing what everyone else owns so that they know whom they want to do business with; basic legal security, freedom from crime, from violence, from war. There are other aspects, but the foundations, ever since free market theory was developed centuries ago, are security of property and freedom of contract. I would like to suggest that we begin thinking along the following lines, that those two conditions are not met in countries where a substantial part of the population, that is to say, indigenous peoples, don't have secure land tenure or any way of securely and freely sharing or using their land as part of business development. I'm not going to exempt North America from that, except to say that we're dealing with situations elsewhere in the Americas which are truly desperate, where a large part of the countryside and a large part, indeed a majority, of the population, suffers from the effect of no security of tenure, and generally no freedom of contract or enforceable contracts.

The existing trade agreements that we have, not only in the Americas, but the original trade agreements negotiated, many years ago, and now through many modifications, the GATT, the international trade agreements last modified in 1994 by the Uruguay Round trade talks, these regional and international agreements actually don't deal with fundamental structural conditions. They deal with a secondary condition, which is mobility across borders, that you not only own things and you can dispose of them, but when you dispose of them across international borders, there are no additional restrictions, limitations, conditions or taxes to impede the free movement of commerce across state borders. But there is a sense, a hidden assumption, not only in NAFTA, but in the GATT, the underlying structural conditions of free market exist within the countries that are parties to the international agreement; otherwise, simply the mobility of capital does not assure that a free market in a classic theoretical sense exists at all, nor does it assure a

fair market, which is efficient in terms of rewarding effort and creativity, and which sends resources to their best users, rather than to the most aggressive thieves, for example.

There is some language in NAFTA limiting the power of states to expropriate property and, of course, the GATT now includes the TRIPS agreement, which has to do specifically with security of intellectual property, but not real property. I don't think the expropriation provision in NAFTA is particularly useful as a way of addressing the kind of massive structural inequality that we see in countries that don't respect indigenous people's land rights, because it puts the burden on the individual or enterprise that has lost resources to challenge the loss and get the resources back. So it's not a condition in the sense of a condition of membership, membership in good standing in the trade area that governments must take action to provide security of land tenure, in other words, a proactive approach where states must show that they're doing something to create the conditions for free markets. Rather, it's a remedy for individuals to complain about individual expropriations, meaning that every campesino would have to go and bring a grievance to be able to get back the piece of land that was not protected from invasion by settlers in the Andes or the oriente in Latin America. That doesn't make much sense. If it is a widespread problem that is systemic in the nature of legal structures of many or all of the American states, it would make more sense that we address it as a structural condition, as a threshold condition of good standing within a trade system rather than simply create a remedy which the victims of this problem probably will not have the resources to exercise.

There are systemic weaknesses that affect the entire economy of a country, such as weak court systems that don't really enforce the laws, or extraordinarily burdensome paperwork to document transactions, or extensive taxes, internal taxes, which make every transaction very expensive and complicated and frustrating and uncertain, but it affects every transaction in the society. There are obviously differences between the quality and efficiency, fairness, certainty of national legal and macroeconomic systems, and we can compare countries in that regard to some extent: "This country has a very strong, simple, straightforward and clear legal system; if you have property and somebody interferes with it, you can get a remedy, and it doesn't cost you a lot. If you make a contract it's going to be enforced, everybody knows what it means, and the government is not going to interfere with it"; compare that with a country in which every business deal is a headache. In a case like that, where it's a systemic weakness and the entire economy is affected by that weakness, it applies to everybody. The prediction would be that the entire country suffers a disadvantage in international trade because nobody wants to go there, it's a headache and it costs money. The only thing that is going to attract investors in that country is some very valuable asset, like diamonds or new petroleum reserves, that are cheaply accessible and are worth the headache of putting up with all the complications and taxes and interference and uncertainty in order to get at that asset; but it takes a very strong incentive to draw investors into a place where there is systemic uncertainty and legal weakness. So it disadvantages everybody in the country.

However, there is another kind of weakness in legal systems that has a very different effect, and I think this is the one that we need to be looking at with respect to aboriginal peoples, First Nations and the development of First Nations through trade, and that is discrimination

between different parts of the national population in terms of the conditions under which they trade, where, for example, one part of the population has secured land tenure and another part of the population doesn't; one part of the population has effective legal remedies and the other part of the population does not; one part of the population operates with limited moderate government regulation, bureaucracy, another part of the population suffers under excessive government regulation and bureaucracy, like Indian Affairs. Where the economy is segmented, it's split between a relatively secure sector and an insecure sector. What happens? One thing is that it doesn't necessarily disadvantage the whole country. It clearly puts at a tremendous economic disadvantage the group of people in that country whose rights are not secure, whose property is not secure, whose business is subject to excessive or immoderate regulations, but it also creates what I would like to describe as an extractive frontier. It creates a zone of contact in that country where it is very profitable to take advantage of the ability to convert insecure tenure into secure tenure, to invade the lands of people whose tenure is not secure and then take the land which has been stolen and put it under the secure property system. It rewards theft. It's a structural condition that rewards theft. And it attracts investment because it makes getting land very cheap, and once you get it you can convert it into a secure system, you can keep it. Zones of contact between weak legal protection and strong legal protection, I would argue, always attract investment, promote theft, and actually favour flows of resources into a country that maintains that discrimination. So if we have a trading area where a number of the parties, a number of the countries involved, maintain discrimination between the indigenous people who live in the country, and who don't have secure land tenure, and other people in the country who do, and who can secure their rights and enforce them, then the net effect is going to be to give the country an advantage, an unfair advantage, I would argue, in international trade to attract investment to get rights from the people who can't enforce their rights. It will energize the economy, but at the expense of the people who will be moved off their land, and it will create a false economy. It looks sufficient because there's a lot of economic activity, but it just redistributes it, it's just stealing, taking out of one pocket and putting it into another pocket. That, to me, is not the kind of thing that we want to promote, it's not the kind of thing that makes for more wealth or more development, it makes for more poverty for those who are the losers along the frontier.

The problem that we have is that to the extent that this is what we would call a market defect in economics, it's a flaw in the structure of the way business is done under law that creates undesirable results. It is something we can and should address. Should we address it through a trade system, or a trade convention? It seems to me that there are all sorts of arguments why we must in this particular case, some of which are purely economic and others are broader political concerns. Indeed, there are also legal reasons. Very much at the base of it is that the countries of the Americas have all signed and ratified international conventions, which clearly require that indigenous peoples be given at least as good security or tenure as everyone else in the country. These are international covenants of civil and political rights, and non-discrimination, such as in paragraph 2, article 2, of the Convention on the Elimination of Racial Discrimination. The enforcement body is the U.N. committee on the elimination of racial discrimination, which has authoritatively read in an opinion, issued in 1998, requiring the demarcation and security of land tenure of indigenous peoples, in the Inter-American Convention on Human Rights, which is the regional human rights convention of the Inter-American system, which specifically refers to non-discrimination and the right to own property, and Convention 169, the ILO Convention I referred

to earlier, which has been ratified by a dozen of the American states, although sadly, and this puts us at a great disadvantage in talking about it at the OAS, not by Canada or by the U.S.

So the countries involved in the potential FTAA have all ratified international conventions which oblige them to eliminate any discrimination and security of land tenure between indigenous people and citizens of the state as a whole. There's already a legal obligation, but is it something that ought to be an obligation of participating in a trade system? There are economic arguments, as I suggested, and one is that it's a structural flaw which tends to create a false economy, where there is investment in theft rather than investment in greater production, that what attracts investment is the possibility of getting something for nothing rather than the possibility of making more with what you've got, which is what, in principle, free markets are supposed to encourage. We know from experience that when there is a lot of stealing, it causes a lot of conflict and violence, and in the longer run, not the horizon of the next ten years, but of the next generation or so, countries that attract investment by preventing indigenous peoples from securing and defending their lands are going to be countries where there will be violence, and where businesses will be blown up and burned down, and there will be very bad business conditions in the future. It's a very short-sighted economy, or a false economy of short-sightedness, to create these frontier situations as a way of attracting foreign investment and to pretend that it's good for trade.

I would also like to suggest that, in economic terms, the effects of this are large. There is some reason to believe that the possible subsidy effects of programs to promote indigenous people's development in North America, are likely to be so small in international trade that they're not worth grieving through international trade mechanisms. On the other hand the subsidy effects of insecure land rights, I would argue, are enormous and they have very big effects on global trade, and they would have extremely large and distressing effects in an FTAA trade system. We're talking about up to half of the total land area of many countries, a sizeable proportion of the minerals and timber in the Americas being on land, the ownership of which is either unsettled or insecure, and where indigenous peoples have substantial, if not already legally recognized, claims to the possession and control of that real estate. From my work, I would put a rough estimate on it of 25 per cent of the natural resources, the commodities in trade amongst the FTAA countries, would come from disputed territory. That's a big trade effect, considering the threshold for actionability in the Subsidies and Countervailing Measures Agreement of the WTO is 5 per cent, 5 per cent distortion, and we could be looking at perhaps a 25 per cent distortion in commodity prices between countries. That's big enough to be a very serious concern.

It seems to me that this situation is exactly the kind of situation in which we should be saying that to be a member of the club you have to play fair, and to play fair is not just some broad conception of being a democratic country, being nice people, respecting human rights, but rather meeting the fundamental conditions of a free market, meaning securing the assets of people in the territory, not discriminating, not practicing racism or discrimination between different groups of people in terms of their right to own and control the assets that they live from, and guaranteeing effective legal remedies for any invasion, theft or interference with the rights of all people in the territory, not just a favoured elite or privileged few. If you don't meet those basic conditions, then you are competing unfairly with everyone else because you're attracting

investment by basically inviting people to steal the lands of some of your citizens. Could it be done? It would be very interesting. It would seem quite simple to simply introduce into the FTAA negotiation context the idea that the existing obligations of the American states under regional and international treaties, such as the Inter-American Convention of Human Rights, will be respected by all of the members, and if the non-respect of any of those undertakings results in a measurable distortion of trade, it's actionable. The biggest problem I have with it, however, is that almost every country in the Americas would be a potential target of trade actions, by all the others, and if they're all guilty, then does anyone win in a trade action, or do you just get claims and counterclaims and everyone pointing a finger at everyone else, and everyone is right, because everybody is breaking the law. The only answer I can give to that is that maybe this is one of the ways of creating an incentive for some countries to rise above the average, and to try to do a better job of securing indigenous peoples' rights to their fundamental assets, to their lands and territories and resources, because by doing that you lift yourself out of vulnerability to attacks by other countries that you are competing unfairly with them by giving away indigenous peoples' resources. I don't know if there is, anywhere else in the international system, an effective remedy for the violation of the existing treaty obligations of the American states in this regard. The United Nations chides them, non-governmental organizations accuse them, newspapers deride them, but in the end they still make money. If you can't take the money out of the theft, you're not really going to reform the thief, and it seems to me that these matters should be tied to trade and made central to the notion of a democracy clause. Let's deal with the things that actually are a part of trade, and land rights is a part of trade economics; it's a human rights issue which also happens to be a major factor in the way the trade system works economically.

So let's start with the things that actually have to do with trade. We can tie them to, it seems to me, a broader concern about having a democratic, law-bound, human rights respecting, western hemisphere, but that's a very tall order and is going to take a very long time, and would require huge political transformations in states. I would like to see indigenous peoples within the Inter-American system at least have the basic security of their natural resources and the ability to use those natural resources to gain real economic power in their respective countries, to participate in a democratic society effectively, and help build the democratic country that all of us in the western hemisphere have idealistically agreed to be. That's a very broad statement of a very complex proposal that I have my doubts about myself all the time, but I would like to pursue further with you, privately and in discussions here in this room, the extent to which this may be one of the issues that should be on the table that is fundamental to determining whether indigenous peoples in the Americas are beneficiaries or victims of a more open trading system.

DR. JAMES (SAKEJ) HENDERSON:

I want to talk a bit about the land reform in Canada and United States and Mexico, but from a different position than Russel discussed. The important part that you have to grasp is that all of this is being done without any parliamentary action. It is being done by executive action, and in both the United States and Canada, one of the fundamental constitutional constructs of the nation includes constitutional rights of aboriginal people. They're mentioned both in the Canadian Constitution as reserving aboriginal and treaty rights, and it's also mentioned in the

U.S. Constitution when it talks about trade between foreign nations, Indian tribes and states, and even with that powerful constitutional tool, our negotiators will mute our voice and pretend they can speak for us instead of empowering us to be part of the negotiations, as Peter Hutchins mentioned. That's a crucial constitutional mistake, and it's a crucial confusion of colonization with a post-colonial constitutional realm. And now in the creation of the Mexican Constitution, we're arguing very hard, as much as we can from Canada, for the recognition of aboriginal rights, to make it harmonious under NAFTA, and to harmonize the constitutional provisions of Canada and the United States. But Russel mentioned that the two important things about our free trade area, are freedom of property and freedom of contract. In the international arena it changes significantly. In the Canadian context, it's clear that the Supreme Court of Canada has recognized aboriginal tenure where there are no existing treaties, and they've said that aboriginal tenure exists, whether it was ever ratified or recognized by any foreign power, and that's our constitutional clause for right of property, even without any treaties. When you look at the treaties, we have more vested rights, except in Canada or Upper Canada, with the Robinson and Huron treaties, where the Crown purchased the land. All the other land in Canada has a lien on it to perform all the treaties. Treaties are just the Imperial reflection of the power and the right of contract between nations, and to the extent the negotiators ignore our constitutional voice as indigenous peoples, in both the United States and in Canada and to the extent of Mexico, they become violators of their own constitutional structure. This creates some problems with NAFTA that we'll have to resolve, but no one is going to resolve this without our participation and without the participation of the lawyers for the indigenous peoples. The only other treaties that bump into the international multilateral treaties are Indian treaties, and there are over 300 in Canada. The United States is in the same situation with about 400 Indian treaties. One of the most successful ways to maintain myths and lies is always doing second things always first, instead of doing first things first. The first treaties that created the hemispheric North America are with aboriginal peoples, and these aren't being complied with.

There are international treaties between European nations, starting with the Treaty of Utrecht in 1713, that say that Indians can reside wherever they want and they can trade wherever they want. This is still effective, as a matter of fact it was reinforced by the Treaty of Paris in 1763, when the French finally capitulated in North America, at least British North America. These governments have a fiduciary obligation to the aboriginal peoples separate from any citizenship. They cannot keep avoiding it by creating the international structure of trade, because they're working in part as our fiduciaries, but they have not received any beneficiary's instructions on how they should negotiate these agreements.

We have the same process going on in the former Soviet Union. How did the new independent nations of the former Soviet Bloc redistribute the property, after it had been assumed to be owned by the state? We have a similar problem, as Russel explained, in North America and in South America. The colonial governments assumed that they owned all the land and had no obligations, even if you had written treaties and even if you had aboriginal rights. We now have a whole new regime of how do you redistribute property to create wealth? The leading exponent of that is Professor de Soto, from Peru, who talks about that in terms of "dead capital", that Indians and indigenous people have settlement, they have houses, they have property interests, they have shanty towns, and just like the Indians on the reserve, they can't use

any of that for investment, and so finding out how to animate this dead capital into loans and infrastructure in order to do business is our task as aboriginal people.

But let me go back to a defining statement this morning about NAFTA being really about investors' actions against governments. From both the treaty and aboriginal perspective in Canada and the U.S., it's a very small leap to say that the federal government has a fiduciary duty to aboriginal people, in that we were the first investors in the nation state of North America by entering into treaty, sharing land, sharing trade, sharing goods. We are the only the constitutional fiduciaries and that should put us into an investor's category. In fact, we're starting to move on softwood lumber, we're going to start acting to protect things that come from our origin and make sure that no one else can trade in them, and we're going to protect our intellectual knowledge, our cultural knowledge, and our biological knowledge. What's missing so far in NAFTA, is any respect for aboriginal law. And as you move into our territories, it's not European, Canadian, U.S., or Mexican law that's going to apply; you're going to have to deal with the fundamental conflict of laws question: is this appropriate in aboriginal law?

Session 4: Softwood Lumber IV: The Potential Impact on First Nations

DR. CHARLES GASTLE:

I would like to give an introduction, if you will, to the softwood lumber dispute, in order to set up a discussion of the way in which the aboriginal rights issues are being raised in that dispute.

This dispute started when Ronald Reagan was president, and the New York Islanders and the Vancouver Canucks were playing for the Stanley Cup, so you can see how much things have changed. It started in 1982 and it's still going today, in fact, it's the most durable trade dispute in Canadian-American bilateral trade. What's at stake is about 10 billion dollars in Canadian trade into the United States. What's the risk? Some are talking about imposing duties of up to 60 per cent, which represents the wildest dreams that the Coalition for Fair Lumber Imports in the United States. If past history is any guide, we may be looking at something up to 15 per cent or 20 per cent. Why this dispute has arisen is because after Canada won the dispute in 1982, there was a preliminary determination in 1986 that there was a countervailing duty, and Canada negotiated a 15 per cent export tax and applied it. This dispute was one of the primary reasons why the Canada-U.S. free trade agreement was negotiated. In 1992 it arose again, and Canada won the dispute. In 1996, we negotiated a Softwood Lumber Agreement, which basically put in a quota system, and we were limited to about 15 billion board feet, or between 32 and 34 per cent of the American market. Anything beyond that attracted a duty. That expired on March 31, 2001 and on April 2nd the complaint was filed with the U.S. Department of Congress and the International Trade Commission.

Let's talk about the impact on Saskatchewan for a moment. Saskatchewan was not part of the SLA, the Softwood Lumber Agreement. Saskatchewan could export any amount of lumber into the States that it wanted to. Now it is part of this investigation and the risks are high. To give you an idea, the basic allegation is that the way stumpage rates are set in Canada, which is basically a government charge for cutting down timber, provides a subsidy or a benefit to the wood producers. The stumpage rate, and this comes straight from the complaint, is approximately \$3 Canadian, per cubic metre of timber. The American Coalition is saying, "How do you measure the benefit?" Let's take a look at what is happening in Montana, because there they have a market base system where the rates are auctioned off. There the amount that is paid is \$44.89, so the specific subsidy which is alleged for Saskatchewan timber is \$41.88 per cubic metre. The total subsidy for one year: \$70,384,356! The purpose of countervailing duties is to offset the injury. So potentially if Christmas arrived early for the Coalition and everything went their way every step along the way, duties could be that high.

What is Canada's main defence? Canada is arguing that there is no injury because in order to put in countervailing duties there have to be two factors, a subsidy, and injury to the American industry. The argument is an interesting one from Canada's standpoint, because what they say is how can there possibly be any injury? You negotiated a Softwood Lumber Agreement in 1996 which he has allocated 32 to 34 per cent of the American market; that's what our import penetration could be, and if we have that, there is no injury. If it's in that range there's no injury. And in order to put this agreement in place, the U.S. industry and the Coalition itself had to sign off, and send letters to the United States Trade Representative, confirming that at these levels there's no injury. So Canada is saying, "Well, let's take a look at what the market shares were between 1988 and 2001. In 1998, Canada had 34.5 per cent of the market, in 1999, 33.56 per cent of the market, in 2000, 34.11 per cent of the market, and in January, 2001, 32.13 per cent of the market. So how can there possibly be injury?" The Coalition responds, "That was all illegal fiction, and you should ignore the fact that we signed off and said there was no injury at those levels. Certainly there is injury now." Canada also says there is no injury because the decline in volumes and the decline in prices that was evident in 2000, which is what the American Coalition is relying on, is really due to a cyclical downturn in the U.S. economy. The fact of the matter is that when housing starts go down, interest rates go up, and the softwood lumber industry turns down. This is an industry in which it's been recognized that when the peak of the cycle is reached, investment goes into building capacity, and in the late '90s capacity increased by 9.5 billion board feet. The Coalition argued that all of this was in Canada. The Canadian government responded that 60 per cent was in the U.S. and only 39 per cent in Canada. So, again, where is the harm? Canada also says that if you look at the latest trends in terms of pricing, the price is beginning to increase again, so where is the harm?

So then the question becomes in this dispute, if we won this so many times, and if there's such a paucity of evidence of injury, what's the problem, and why worry? Pierre Pettigrew said, "I find it annoying time and time again to reinvent the wheel, especially since we win every time, when will they learn?" He said that while he was in the United States, which, in my view, was not a good thing to do. The situation is that there's a real reason to worry about Canada's position, and there is a significant threat of duties, for the following reasons. American countervailing duty law and anti-dumping law has biases in it that favour the imposition of duties

on a preliminary basis; it's almost a reverse onus of proof, that we have to establish that there's absolutely no evidence of any injury, and there can never be any evidence of any injury, otherwise duties can be imposed. Given the fact that they were imposed in 1986, and given that they were imposed in 1992, the expectation is they're going to be imposed again. What this means is that for at least a period of three years there will be preliminary duties, and if there are preliminary duties imposed, those preliminary duties will be collected on bonds that will be posted; or, if there is a settlement and we have to impose some kind of an export tax, obviously that revenue will go to the provincial governments.

But let's talk about NAFTA and about "we won before, why is it a problem now?" This is quite interesting, because if you look at the last binational panel decision, once the Department of Commerce and the International Trade Commission make a final affirmative determination that anti-dumping and countervailing duties should be imposed, then Canada has an election to make. They can send it through the usual form of administrative review in the United States, which takes it to the Court of International Trade, which is a domestic appellant process, with one judge, or they can elect to take it through NAFTA, which is a binational panel made up of Canadians and Americans who are trade experts and not necessarily judges. In all likelihood they will be lawyers. We're pervasive! And it will be that panel that will exercise the role of judicial review. The interesting thing here is that those panels must apply American law, and the American standard to judicial review, which has a lot of deference to the American tribunals. As a matter of law, the court has to abide by and respect that exercise of deference. In 1992-1993 there were two panels which heard this case, and the leading panel was comprised of three Canadians and two Americans. The three Canadians voted to overturn it, and the two Americans said they should defer to the Department of Commerce. It then went to the Extraordinary Challenge Committee, and there were two Canadians and one American on the Extraordinary Challenge Committee, which is the appellant level over the binational panel. The two Canadians voted to overturn the Department of Commerce's finding, and the one American said the exercise of discretion should be respected. All hell broke out in the United States. There were congressional reports which claimed that system doesn't work. There were changes made to the underlying legislation, which made it harder for Canada to win the next time around, that have never been overturned, simply because the mechanism to do so in NAFTA is somewhat weak. The bottom line is, "how much are you willing to bet that we're going to have a Canadian majority the next time around on both panels?"

So there is reason for Canada to be concerned in this dispute. There is reason for Canada to consider negotiating a solution, and the last word is that B.C. and Quebec have called a meeting in Ottawa of industry representatives to try and obtain a mandate to settle the case. Brock Folkersen, who is here today, will be attending that meeting on behalf of the Saskatchewan lumber interests. You may see movement and negotiation on this, even though Pierre Pettigrew finds it annoying time and time again to reinvent the wheel, especially since Canada wins every time.

RAY AHENAKEW:

I want to thank Chuck for making a lot of the comments that I've been thinking about since this morning. It takes me back to 1994 here in Saskatoon, when we brought together a group of First Nations people from across North America to look at what the impact was and how it was going to be felt by First Nations people and what benefits we would have and how we would fit into it. But as you can see, what we're dealing with today is basically the same questions that we were dealing with in 1994, and I think the time has come when First Nations people have got to take an aggressive step forward and look at how we believe that we should be dealt with and how we should be respected when we look at the NAFTA agreement. I'm not talking about the FTAA, which is the subject of all the talk from Quebec City, but I wanted instead to tell you a bit about who we are and who I represent, and why I have an understanding of what we're talking about with respect to countervailing duties. We were pretty cheeky, I think, in '92 and '96, when the majority on the panels were Canadians and we seemed to come out on top, but I also think that was the right thing. We were on the outside, however, because it didn't apply to Saskatchewan corporations, but you'll see how it's going to apply to us, and you've got to keep in mind that we are still the poorest people in this country today as aboriginal people.

Who is Meadow Lake Tribal Council? We're nine First Nations. We are in the northwest part of this province. We are made up of approximately 10,000 people, Dene and Cree, I would think the split would be fairly close, maybe 6,000 and 4,000 in favour of the Cree, but our growth rate is 4 times the provincial average. With a province of a million people and you start figuring that out, it doesn't take very long to look at what the economy is going to be like in our part of the woods 20 years down the road. With young, aggressive leaders within our communities up north, we have a vision of where we want to go in the future, and I think we're achieving that as a tribal council.

We started dealing with the inherent right to self government in 1982, and as a result of that, we have been in serious negotiations with Saskatchewan and Canada now for about 11 years, looking at what we believe is the inherent right of First Nations people. In fact, that's when I really got to know our chairman today, and believe it or not, on an airplane, even though we're from the same city. We seemed to meet in the Toronto, Saskatoon or Ottawa airports, looking at different paths that we were both following at the same time.

Our organization is set up to look at programs and services, and to protect the treaty rights and implement and broaden the exposure of what our rights are as First Nations people. We're also looking at building an economy to really make a self government package sustainable, because without the foundation of a good government structure, and a good economic structure, we will not have self government. Also we know that we cannot rely on government to hand out contribution agreements for years to come.

Our treaties within that area are numbers 6, 8 and 10, and I think that we are all quite pleased with some of the advances that we have been making. We have also been looking at opportunities elsewhere in North America, and in South and Central America and Mexico over the last seven years. We do have a aid program in Nicaragua for the next three years, looking at social development, health, water, education and, of course, economic opportunities. But getting

back to what brought me here today, we own a sawmill in northwest Saskatchewan. We have about 120 million board feet a year, we export 99 per cent of it to the United States. Given the rate of exchange, it doesn't take long to figure out why we're selling in the American market. We manage 3.3 million hectares, and I think we were the first aboriginal organization in Canada to be awarded an FMA for management of the forest. We've always said that we're probably the best managers of the forest throughout Canada, as that's the way we've been brought up. We harvest timber from our traditional lands and we believe that we have rights to harvest on traditional lands. Keep that in mind when we're thinking in terms of the Free Trade Agreement. I'm glad to see some of the people in the audience today, such as MLA's from this province, and a number of the provincial government officials, that we work very closely with.

As I mentioned earlier, Saskatchewan has been exempt from the agreement so far. I think it's been pretty well covered that the U.S. contends that Canada subsidizes its timber harvesting with low stumpage rates, but we believe that we have a right to these lands and these trees. In fact, we've taken the position over the last month, that I think shocked some of the provincial people and probably some of the federal people, that when we entered into the whole idea of the inherent right to govern ourselves, we said that nothing will sidetrack us from the developments that we are undertaking, until the agreements are signed. Traditional lands, of course, is a big issue for us in northwest Saskatchewan, because there is forestry, mining, mineral rights and all of that. Our belief, our strong belief historically, is that the Cree and the Dene moved between Manitoba and the Territories, that we had a right to traditional lands. So we don't feel that we're doing anything wrong by harvesting trees from within traditional First Nations land.

What would be the impact of new duties applied to the softwood industry, if it does so happen, and how would it impact our sawmill. Well, it would have a big impact. We started looking at the idea of forming a partnership with First Nation people in the United States. Then there was the idea of a conference to look at the NAFTA agreement and also the Jay Treaty.

We also believe that we have a right to free trade with our communities because we did trade freely historically. The Dene had traded with the Navajo, for example, in Arizona, the dialect of their language was not identical, but it was similar and they could make out what everybody was talking about or get very close to it, so it showed that there was a pattern of trade. I think that one of the things that a lot of people have really got to get out of their minds is the idea that all we want to trade are jewelry and trinkets. When we talk about free trade and about investment, we're talking about major industries. We're talking about natural gas, oil, forestry and a number of other areas.

I look around here and I listen to a lot of the speakers, and I'm telling you, there is so much knowledge sitting in here, with a legal and an economic and trade background, I hope I don't come back here in another seven years and see the same people doing the same thing, looking at how we should address some of the problems that we're facing today. You know, the hard thing for people like myself and the people that I represent, is that we, the poorest people in this land, and we, Meadow Lake Tribal Council, are subsidizing government programs for education, health and housing. What we're looking at now, and I'll be going to Duluth,

Minnesota next month to talk about the forestry sector, is how we form a partnership, to sell our product, and eliminate the Chicago market, directly to a First Nations partner in the United States, who could be a distributor from there. Does this agreement give me that right? I don't know, and I hope to come out of here with some understanding of whether there are opportunities and possibilities.

RUSSEL BARSH:

I would like to see if I can make a connection between what has been said by the previous two speakers. Where does it all come together? Well, firstly, it is important to look at what was the nature of the original softwood lumber dispute, and how some First Nations in Quebec and B.C. have raised a new issue. The original issue basically was that the stumpage rates set by the provinces were below fair market value, that they were artificially low and didn't reflect either the true cost of raising the trees, or the cost of reproducing the forest, that is, the fair market value. One of the problems we need to come back to, is the problem of comparability, because a very large proportion of the forest land in commercial production in the United States is privately owned, so it is auctioned through the market by private land owners. Publicly-owned land is mostly under an auction system. In Canada, most forest land is Crown land and is under set fees or set stumpage rates. So the two markets work differently, and it's very hard to calculate what the fair market value or free price of lumber would be in a province like B.C., if the land were owned by private parties and they sold it on the open market to whoever wanted to cut the trees down and turn them into a commercial product. To some extent, this is all in the realm of attempting through theory to forecast what people would have done had conditions been different, and see if that's comparable in terms of the price which actually is being charged by the province to its forest-product companies. Now the main focus really was on the idea that this was an export-directed subsidy, that the stumpage rate was being kept low by the provinces in order to encourage the exports. The environmental groups got involved by arguing that it was kept low in a way that also did not provide the provinces with adequate resources in terms of revenue returned to the province through stumpage to manage the forest, to keep the forests alive biologically. What has now been injected, and which is very interesting, because it changes the whole percentage in my opinion, is having two coalitions of First Nations in Canada go in and say, "Yes, the stumpage rate to a large extent in most parts of Canada is artificially low and below fair market value because it's really our land and the provinces are selling our trees without our consent." This is a prima facie case, that the land owner is not making the decision about the price, the price is being made by government, and the land owner is saying, "We wouldn't sell at that price if we were given the legal authority to dispose of our own trees in our own way." Now, of course, the first question is, is that a plausible argument in terms of who the real land owner is? Obviously, an awful lot of the forest land in B.C. is currently under claim or negotiation, and more importantly from an international legal perspective, a large part of the land that's in dispute in B.C., that's also in commercial production, is actually occupied or used by First Nations.

In other words, it's not land occupied by non-native people, but land which native people have continued to use, but onto which forestry companies have come under provincial licenses.

So there is a real direct conflict of use. That is quite important, because in the international conventions which we now can draw on as a source of land rights law, the ones I mentioned earlier, the Convention on the Elimination of Racial Discrimination and the ILO Convention 169, it's very clear that indigenous peoples are deemed to be the owners of the lands they occupy or use. So if there is use, there is ownership, and if there is ownership, then government is required by those international obligations to demarcate and secure, put a boundary around it, register it and protect it. Now that, in principle, is what the processes, like the B.C. treaty process, are supposed to be doing, to demarcate and secure, but the whole argument in B.C. is that government is dragging out the process and while it's dithering over exactly where the boundaries are going to go, exactly what kind of arrangements are going to be made for securing First Nations' rights. They're selling off the trees and the trees are going into international commerce at a discount, which distorts trade, and at the same time involves an injury to the true land owner.

Of course, the problem that is going to come up in real practical litigation terms is the same problem that the United States faced in the Softwood Lumber I and Softwood Lumber II, proving to a high level of certainty the size of the subsidy benefit and the size of the injury to the U.S. industry. It's easy to establish the basic legal and historical facts to create a presumption that B.C., for example, is able to and likely does transfer resources to the forest products industry in B.C. at a discount financed by the lack of compensation or consent by First Nations, but how big is that effect? How high would the stumpage rate be if First Nations did have the decision-making power and they set their own rate, because that would be the measure of the discount, the subsidy, and what's the real effect, as Chuck is saying, on the U.S. industry? This is very hard to calculate, and this is why trade actions become so expensive, because economists rack their brains generating statistical tables to try to establish what things would be if the world was different than it is. However, there is some reason to suspect that there is a subsidy, in effect. If you apply this whole line of thinking and then think through the corollary, it distinguishes those cases in which First Nations themselves are the land owner and operator and are setting the price themselves, because there is no subsidy effect there, they're setting their own price. So from the point of view of an argument over a land rights driven subsidy problem, the law breakers are industry's enterprises, enterprises which are benefitting from provincial stumpage rates, but that concern does not extend to First Nations land owners or, indeed, other private land owners who are setting their own rates on the market. So it's very specific to a particular sector of the Canadian forest products industry. It is not every Canadian enterprise, but those enterprises which are presumed to benefit from discounted provincial stumpage rates in those parts of Canada where land rights have been recognized, but not settled.

Now given the politics, as Chuck described, and I agree with his cynical view of the politics of trade disputes, a lot of this is about power. It's what you can get away with, what you can afford, a reason why it's sometimes better to maneuver around, make arguments and then try to negotiate, than to go through a full scale dispute with some hope of being able to prevail, particularly if it's a dispute with a very powerful economy. And I would say that for First Nations it's probably not possible to stop the U.S. from countervailing, at least as a preliminary matter, pending further proceedings, which will have a very big effect on Canada, and it's also probably not possible to prevail in the long run on these arguments about another subsidy effect,

not because these are not legitimate legal arguments, but because the problems of proof are substantial, and it would take an awful lot of work to come close to being persuasive in terms of putting dollar values on the effects that we might suppose are there. However, even if that were true, even if there were very little likelihood in this case that the thing will come out in a reasoned and principled and let's say mutually satisfactory manner, it will again be disappointing to many of the parties and disappointing to the industry. Even if that were the case, I would argue that it's very important for First Nations to be involved and, in fact, to be involved on both sides of the dispute. Firstly, it is very important that First Nations recognize that their interests are at stake in trade disputes within the NAFTA system and to establish precedence of standing to be there to present their side of the story. This is a case where it is absolutely fundamental that First Nations in B.C., that have problems with the B.C. stumpage system, and First Nations here, or example, in Saskatchewan, that are independent entrepreneurial timber processors, be there to say "Pay attention to our specific circumstances, we're not necessarily the same as everyone else, listen to us." I think this is an extremely good opportunity to make that point and establish that precedent. And, secondly, I think the broader principle, as I suggested earlier today, is very important, that if there is a reasonable suspicion that a government is disguising an export subsidy in some form, disguising it behind a land rights issue, and that what we're seeing is that tampering with indigenous people's ownership and occupation and use of their ancestral territories, is being used as a way of making other people rich, I think we should establish a precedent that it is a trade problem and it's appropriate for trade bodies in a dispute to raise that issue and to accept evidence on it. This is a case that we can't stop, but we might be able to win some points in terms of new parties and new issues that should be in trade for future.

CHARLES GASTLE:

I would like just to comment on what Russel had to say about standing. Today NorSask and the Meadow Lake Tribal Council have put in an appearance before the U.S. Department of Commerce and, therefore, do have standing. The Cree in Northern Quebec are in a different situation. Because they are neither a producer nor exporter, they actually do not have direct standing in this dispute, but had to partner with the Natural Resources Defence Council.

Also, it raises the potential to appear in front of a binational panel and to participate directly. What this means is that for the first time you have First Nations' issues being raised in an international dispute settlement forum. There is a possibility that this dispute will go to the World Trade Organization. Neither NorSask nor the Meadow Lake Tribal Council will have direct standing there, however, as Russel has pointed out in another article, recently the WTO has indicated that a WTO panel has the discretion to accept submissions from NGOs, non-governmental organizations, and the fact of the matter is that there would be the potential for NorSask to do that. I'm not saying that NorSask is going to take any of these steps, of course; I'm just raising the issue, and the opportunity to raise these issues in an international forum where they have to be dealt with.

Session 5: Cross-border movement of people and the Jay Treaty

PETER HUTCHINS:

Thank you very much, and thanks to the organizers, the Estey Centre, Jim Leach and Wayne Robinson, for kindly inviting me to speak. Of course, my invitation arrived long before the Supreme Court judgment in *Mitchell*, and I'm not quite sure whether I would have been invited had the judgment been out. So here I am, and as I've had less than a week to reflect upon the judgment, I would like to spend some time reflecting with you. I know the topic is supposed to be mobility, movement of people and the Jay Treaty, but given the obvious interest in *Mitchell*, as I've heard throughout the day, I think it is appropriate, and I hope you agree, that you have the unique opportunity to hear from the losing counsel. I actually got the judgment, while on the run on Thursday, and I had to go out to Calgary, and I was sort of cherishing the idea coming to Saskatoon to get away from it all. So I arrived in Saskatoon with a spring in my step, and when I checked into the hotel, I found a letter from Jim Leach, welcoming me to Saskatoon and saying that he and Wayne Robinson were delighted that I was able to join you for this conference, that they were looking forward to my participation, and that it promised to be a very relevant and timely conference, particularly in light of the *Mitchell* decision. So obviously there is no escape!

This conference is addressing issues of state sovereignty, but the concentration has been on the aspect of state sovereignty, which permits a state to fetter its sovereignty through treaty making, essentially, a self-fettering of that sovereignty. But there is another aspect which we have to bear in mind, of course, which Chief Mitchell has brought before the courts, and that is the external fettering of state sovereignty, a fettering brought about from a number of directions, certainly the international instruments and the international norms that are being developed, that we have heard about in the earlier panels, which although Canada is involved in, Canada doesn't have total control over that process. And, of course, in Canada, since 1982, we've had a constitutionally entrenched recognition of aboriginal treaty rights in this country, somewhat different from the situation in the United States. These rights are not subject to the whim of parliament or the executive branch, and they are indeed protected through the Constitution. The problem, of course, has always been, "Well, what exactly are they?" and defining them, is where the courts come into play.

Mr. Justice Binnie, incidentally, in his dissent in *Mitchell* does raise that issue of the difference between an aboriginal right and a treaty right. The aboriginal right is something that presumably, or according to the court, is imposed upon the sovereign, imposed upon on the government, and takes its source externally from legislation, from executive action. The treaty right, of course, Crown aboriginal treaties, still result from a decision by the Crown to conclude those treaties.

Now I don't know how far I'll get in terms of describing the case, but I'll just keep going until the chairman gives me the hook. Before I get into some of the details of the case, what does it represent generally? I have to say that I've practiced in this area of law for 27 years, and I've practiced in the Supreme Court on a number of cases. I'm not saying that to adduce myself, but simply to indicate that I'm someone who has watched the court over the years and quite frankly has been an advocate not only before the court, but for the court and of the court. In my view the Supreme Court of Canada in the last 10 or 15 years has done extraordinary things in recognizing aboriginal treaty rights, bringing them to the fore, creating tests, and really placing burdens on the Crown. So there's no question about it that the law in the last 27 years has evolved, and has evolved in the right direction. Now that said, it won't come as any surprise to learn that I was disappointed in the way the court handled this case and, of course, so was Chief Mitchell and his community. It's not important how counsel feels, but the impact on clients, the impact on the First Nation, is very important. Obviously I have spoken to Chief Mitchell since, and he is accepting it with his usual grace, and I can tell you that he has not given up and he is determined to continue to work for the understanding and the recognition of his people's rights and First Nations' peoples' rights across the country.

The Supreme Court of Canada has decided, in its wisdom, that the Canadian legal system cannot at the moment countenance the kind of right that was put before it. The political system may not be able to. That, in my respectful opinion, doesn't mean that the right does not exist; it means that Canada is, through its political institutions and judicial institutions, are not capable yet of acknowledging it and dealing with it. But, as I said, there has been amazing evolution in the law over the last number of years. Twenty years ago one would not have been talking about treaty rights being protected in court, believe it or not; aboriginal rights and aboriginal titles were not even considered legal concepts when the Supreme Court of Canada came down with *Calder* in 1973. So we've come a long way, the court has come a long way, and there will be another day.

What does *Mitchell* represent in this continuum? It's the first aboriginal case heard after the famous *Marshall* decision and the *Marshall II* decision, and I'm sorry that some of you may not be aware of the legal context in Canada. Unfortunately time just won't permit. I'd love to be able to stand here for hours and give you a course on all this, but I can't. But *Marshall* was a decision from the Supreme Court on fishing on the east coast, which caused absolute chaos. There was great public reaction to the suggestion that Mi'kmaq had treaty rights in this area. The Court had a rehearing and drew back somewhat from its original position, and I think *Mitchell* represents a continuing retreat by the Court on these matters. It confirms the trend to deny or render almost impossible aboriginal economic rights and claims, and this is a trend that we've already seen cases that say, "Look, we can't allow an entrenched right to trade in the commercial mainstream; this would be an unfair advantage for aboriginal peoples." I can tell you right now that Chief Mitchell was not arguing that kind of a right. As a matter of fact, he had seriously restricted the scope of a trading right that he was putting before the courts, but that didn't seem to have any effect. This case does not conclude the line of cases promoting negotiation rather than

litigation. Our Supreme Court has stressed over and over again that negotiation is the way. By the way, Chief Mitchell went to court only after many, many years of attempting to negotiate arrangements with the Government of Canada, cooperative arrangements, and only when he was told that if he thought he had rights, he better go to court. That was evidence before the trial judge, which, except for a bit of a nod by Justice Binnie, wasn't taken up by the Court. The Supreme Court could, I think, have suggested that negotiations would be appropriate. It's a case that tightens the test for establishing aboriginal rights in the country, and if I have time I'll explain. It contradicts long-standing authority concerning deference to the trial judge on findings of fact, particularly when upheld by the Court of Appeal. I gather, from discussions I've had today, that some of you don't realize that Chief Mitchell won at trial, a 35-day trial, and he had a wonderful judgment from the trial judge on the aboriginal right, not on the treaty right, which was upheld by the Federal Court of Appeal. So, as Chief Mitchell says, "I won two out of three."

The treatment of evidentiary issues is somewhat problematic, but one of the big problems here is that the court suggests in this case that aboriginal litigants are not free to frame their own case and their relief. And for those of you who have read the judgment, you'll see that Chief Mitchell tried very hard to narrow the scope of the relief sought. He excluded a number of issues, a number of items from the trade; guns, alcohol, and drugs were all excluded. He excluded mobility, and it was very clear, very clearly argued that this was not a mobility case. He tried to get the courts to focus on the main issue, which was payment of duties and taxes toward certain items, but the Court could not avoid considering all the aboriginal activities, and reframing the right to reflect those activities. So the Court characterized this right as a right to trade, whereas Chief Mitchell had argued both at trial and all the way through, that he was arguing a right to bring personal goods across the border, a right to bring community goods across the border, including the notion of goods for trade with other First Nations in Canada. And that was the relief that he was seeking.

The other thing the case does, especially in the context of what we're talking about, is that it flies in the face of the trend towards dismantling of borders. We've heard today about moving towards no more customs duties, and no more tariffs, and Chief Mitchell was saying, "Well, that has been a situation in the Mohawk nation and Mohawk territory for centuries. It was promised to us by the British through the various treaties, and what's so difficult about this?"

The case was originally brought as both an aboriginal rights case and a treaty rights case, two independent sources of the right to bring goods across the border duty-free. The treaty right aspect of it involved a number of treaties, and I've actually provided, at the back, copies of the documents that were raised. But just to give you an idea, Article 15 of the Treaty of Utrecht was pleaded. Article III of the Jay Treaty was pleaded, Article 9 of the Treaty of Ghent was pleaded, and five councils were pleaded; five councils -- very interesting when you look at the record. The British came to the First Nations around the time of the signing of the Jay Treaty, before and after, and also after the war of 1812, saying essentially, "The line that we have drawn across your territories with the Americans has no effect on you, it is between the British Crown and the Americans." And there were a number of those representations. Now did that itself represent a treaty right? The court said no. Can it be used as context to perhaps explain what the Jay Treaty was all about, and perhaps even to explain or to demonstrate that there was a pre-existing right,

which we refer to as an aboriginal right. Well, one would think so. The treaty right actually did not prevail in the Trial Court or the Court of Appeal, and I'll explain very quickly why, and why we decided not to take that aspect of the case to the Supreme Court of Canada. So the issue of the Jay Treaty and other treaty rights was not before the Supreme Court of Canada in this case, and we'll await another case, another day, perhaps another counsel. The aboriginal right, of course, went up.

The reason for the courts having difficulty with the treaty right, by the way, because it goes to what we're talking about here, was some considerable difficulty whether international treaties, treaties between the British Crown and the Americans, can confer rights on Indian nations not party to the agreement. We argued a right, a stipulation for third parties, which one sees in the Vienna Convention on the law of treaties, for example, and one sees in private law. This was a stipulation on the part of the state parties towards First Nations. Incidentally, it's accepted by them through these conferences, but the courts are not ready to acknowledge that these international instruments can confer rights on the treaty rights, Section 35 treaty rights on First Nations, and that's something that we have to look at in the context of NAFTA and all the rest that's going on. There were technical evidentiary issues, like who was there and who the British were actually speaking about, and to which First Nations were they speaking at these conferences. But the treaty right, I think, raises interesting issues and is still very much alive. In terms of the aboriginal right, it went to the court and Chief Mitchell was suggesting and arguing that he had a right to bring these goods across the border duty-free. As I said, he seriously limited it, and tried to focus the relief, but the Court was not prepared to accept it. We have a test in Canada for establishing aboriginal rights, which is essentially that a right has to be integral to a distinctive culture of the First Nations, and this is not always easy to do, obviously, when you're dealing with pre-contact activities. The evidence in this case showed that the Mohawks were traders and that trade was integral to the Mohawk society. It was an essential aspect of the society, but the court took it further and said, "That's not good enough, you have to prove that northerly trade is essential to Mohawk culture, integral to Mohawk culture, because, in fairness, you're dealing with a border and the right involves a border." Justice Binnie also added, by the way, that the fact that there was a border perhaps induced the Mohawks to bring this claim forward, because the border made it profitable for Mohawks to plead special treatment vis-a-vis others with respect to border crossing and bringing goods across the border. One good piece of news was that the Crown argued in this case a new test, as far as I'm concerned, a test of consistency with Crown sovereignty. The Crown went very hard in the Court of Appeal and the Supreme Court that the kind of right that Chief Mitchell was pleading was essentially inconsistent and abhorrent to Crown sovereignty and, therefore, could never crystallize as a right. The majority did not accept that argument and has left it for another day. The minority, Mr. Justice Binnie and Mr. Justice Major, actually did accept that argument. So it's there, but is not part of the majority decision in the court. And, quite frankly, that's very good news.

I know we're all talking about treaties and the treaty issues, and I think something this conference should dwell on is the issue of treaty formation, which was very much a part of the proceedings in the lower courts. We have to bear in mind that the historical record is that aboriginal peoples, First Nations, were considered to be allies and not subjects of the Crown at the time of the Jay Treaty and before, and that there was a geopolitical, a military situation,

whereby the Crown was not out of largesse concluding treaties with these people. Out of necessity, the Crown was concluding treaties of alliance, military alliance and trade alliance, with the First Nations at this time.

The courts so far have been very generous on the matter of treaty formation. They've found treaties of peace and friendship not dealing with land were enforceable against the Crown, and that you don't have to be dealing with traditional territory to have a valid treaty. They found treaties not signed to be valid treaties. They found treaties not found, not even found, to be valid treaties and treaty rights flowed. They found treaty promises and treaty rights from oral promises, not written. They have found treaty rights in favour of people not party to various treaties, and they have dealt with this notion of stipulation in favour of third parties. I'm counting what the case law is, and we would have hoped that some of those principles would have been applied in this context.

The Jay Treaty itself, I have to say, has not fared well in the courts. In 1956, the Supreme Court found against Louis Francis, who was pleading Article III of the Jay Treaty. Mike Mitchell came back, and one of the reasons why this case was brought, was to test whether the state of the law had really changed since 1982, certainly since 1956.

There is another judgment of the Ontario Court of Appeal you should be aware of, *R. v. Vincent* in 1993, which again dealt with the Jay Treaty and found that there was no right enforceable in Canada. The problem with the Jay Treaty and these other international treaties is always that if Parliament doesn't enact legislation to implement the treaty into Canadian law, it is not part of Canadian law. One of our arguments, and I would hope that it would continue in other instances, is that Section 35 can be said to incorporate some of these treaty promises into Canadian law without explicit legislation. The Supreme Court of Canada in *Sparrow* said that Section 35 of the Constitution was a promise to the aboriginal peoples of Canada. We still have to discover what the content of that promise was, and how binding it might be.

In terms of where we go, and how we deal with all this, I think it was Oliver Wendell Holmes who said something about dissents announcing the law of future. There is some interesting material in Justice Binnie's reasons. He refers, for example, to the international instruments, and I think that that's important, because there has been some difficulty getting courts to refer to and give a nod to international instruments, and Justice Binnie, at paragraphs 81, 82 and 83 of the reasons, refers to the draft United Nations Declaration on the Rights of Indigenous Peoples. He refers to Convention #169 concerning indigenous and tribal peoples, and he refers to the draft of the Inter-American Declaration of the Rights of Indigenous Peoples in terms of how the international community is dealing with the impact of borders on indigenous peoples and how this should be dealt with. So it has become part of the jurisprudence of the court now, and I think we should work on that aspect. Justice Binnie also refers to the Royal Commission on aboriginal peoples. A huge report by that Royal Commission came up with many very important recommendations. The government has essentially ignored all of it, and Justice Binnie, and the Supreme Court, through the minority, is recognizing the Royal Commission's report and some of the ideas in the report, among them the notion of merged or shared sovereignty. And there's some discussion in the dissent about this not being about aboriginal sovereignty being swallowed up, but about aboriginal sovereignty and Crown

sovereignty coming together and merging. We'll just have to sort out what that means in practice.

I thought I might just give you a sense of the test for what it takes to establish an aboriginal right, because one reads in the paper, "The Court has dismissed Chief Mitchell's claims on aboriginal right." One has to consider what aboriginal litigants are up against in terms of establishing these rights, and just to give you some inkling of it, in paragraph 12 of the reasons, the Chief Justice, speaking for the majority, writes: "Stripped to essentials, an aboriginal claimant must prove in modern practice, tradition or custom that has a reasonable degree of continuity with the practices, traditions or customs that existed prior to contact. The practice, customs and traditions must have been 'integral to the distinctive culture' of the aboriginal peoples, in the sense that it distinguished or characterized their traditional culture and lay at the core of the peoples' identity. It must be a 'defining feature' of the aboriginal society, such that the culture would be 'fundamentally altered' without it. It must be a feature of 'central significance' to the peoples' culture, one that truly made the society what it was." That is part of the test developed originally in the Van der Peet case by the Supreme Court of Canada. One gets a sense of the evidentiary difficulties involved in proving this, and I come back to the point, interestingly, that the Court, actually all three courts, found that Mohawks were essentially traders, that trade was integral to the society, that it made them what they were generally, but that in this case the requirement was to prove northerly trading and meet that test. I think we have to bear these things in mind when you consider the results in cases such as this. My point is, with all due respect, that there was really no floodgates issue here, there really wasn't any threat to Canadian sovereignty, the way Chief Mitchell framed the case, which was to bring these goods across the border, excluding all goods that were controversial, and to trade only with other First Nations. After the Federal Court of Appeal, it was with only First Nations in Quebec and Ontario. The obligation, by the way, to stop and report at the border and to clear the goods, was part of what Chief Mitchell was prepared to see as his right. Given all that, one wonders whether sovereignty in this country would have been shaken to the core had Chief Mitchell's plea been accepted.

Where do we go and what's happening? In my opinion, and this is based on four days, and lawyers' opinions can change, this doesn't close the door on the legal proposition that was before the courts in this case, that is, that First Nations had homelands prior to the coming of the Europeans, that the Europeans drew a line across this country artificially, that the Europeans told the First Nations at the time that it had nothing to do with them, and that perhaps our law can come to grips with that and make some sense of it. If one can find encouragement, it is the fact that this case was found on a lack of evidence, so the legal argument is still alive. The door is not closed on the treaty right argument. No Supreme Court modern judgment since *Francis* has closed the door on that particular aspect, and I think it has to be pursued, whether in court or through negotiation. I say that this makes it incumbent on Canada to work with First Nations to undo what the government initially created in the first place. Chief Mitchell had to go to court because Canada denies the Jay Treaty is effective in this country and has refused to implement it through legislation, and it's very simple to do that. Again, I believe that it's incumbent on the government and the Crown to comply with external directions being received through international fora, through the international instruments. Is it entirely discretionary on

government or on the Crown to decide what it will do, what it won't do, what it will accept, what it won't accept?

We've heard a great deal today about how this discretion is being fettered, that there is an international community that will not accept certain practices. I'm not suggesting that this problem of border crossing in Canada is equivalent to what's happening in other countries of the world, but the fact of the matter is there are international standards being imposed upon governments, and one of them, through these international instruments, as Justice Binnie himself acknowledges, is the impact of borders on aboriginal peoples and their traditional territories. Now if the court feels hamstrung and cannot deal with it, certainly governments can. I say that one of the conclusions is that Canada should honour the promise that it made through Section 35 of the Constitution Act, so much touted by Canada in international fora as an example of how Canada is dealing with its indigenous peoples. Chief Justice Lamer in *Delgamuukw*, the large land claim case, ended it by saying, "Let's face it, we're all here to stay", in the context of the way to deal with these things is through negotiation.

So I leave you with that, in terms of where we go from here; we're all here to stay. Chief Mitchell will continue to work for recognition and vindication. I know First Nations across the country will, and I hope, and have confidence, that the legal community, the bar and the judiciary, will be up to the task of considering this in the light of the 21st century standards that are developed. Thank you very much.

JAMES (SAKEJ) HENDERSON:

It seems to me that the *Mitchell* case shows the tremendous problems we have with an education system that's based on forgetting that there were aboriginal people. It's a tonic for writing all the materials from first grade through college as if Europeans discovered an empty land. We fought against that and created a constitutional reminder that aboriginal peoples exist, and they have aboriginal and treaty rights. We're now finding out before the court that this is a very tenuous remembering, that while they acknowledge that the constitutional command in Canada is that they have to respect and acknowledge aboriginal law, aboriginal tenure to the land, aboriginal uses of the land, and the treaties, they want us to recreate a world that they were never a part of, in English, to explain to them what we did and why it was important to us. Now this is the tonic stupidity. The issue isn't what we did. The issue is what were our aboriginal laws of trade. The court totally avoids this.

Our aboriginal law of trade would definitely control goods across the river because the *Mitchell* case is not a decision about the border. You can't have aboriginal rights pre-contact when there was no border created by another treaty between the United Kingdom and the United States. So the real issue, as the court said, was can you bring goods across the river to trade? And even they admitted it was very small, non-commercial. But they had so much difficulty with this, because they didn't know how to limit this to the trade partners, which is outlandish in this age of free trade.

Now I've seen maps from the Aztecs and the Mayans that completely describe North America. Even the Aztecs and Mayans knew there was a St. Lawrence River, and they knew where Labrador was. How did they know this? It was because of the huge trade routes that developed during the Ice Age when they were all forced down to the equator from both sides. As the ice cap came back, they came back to their aboriginal territories. All of our stories and creation myths, and everything we talk about with the ice giants and other people, all tell about the Ice Age coming and moving down and having to take all the seeds, and returning centuries later having to reseed our land. That's why the trading empire is exclusive. Take the Crees, for example. We can find Cree language reserves all the way to Mexico, but they're called Kickapoo in Mexico and they're called Kickapoo in Kansas, but they're all Cree, just labelled differently.

So how do you explain there being Cree reserves all the way down to Mexico if we didn't trade that far? Well, it's all part of the great remembrance, that we're savages, we're uncivilized, we never had any trade, we never had any law, the whole list can go on endlessly, but it's all a myth. But how do you produce that evidence to a court that's dedicated to the proposition from all its opinions that Indians can't have a commercial interest as Indians. It's the worst kind of discrimination that we're talking about today. The whole issue of remembering what aboriginal rights are, is about remembering what aboriginal law is, and we have to be more forthright on that. The only issue with which I really agree with the Supreme Court is that the border is a construction of newcomers. How that construction can limit our aboriginal rights is the great mystery, because the newcomers weren't there. We didn't have what you would call the constructed treaty border or the medicine line; that was an imposition. Did we respond to the imposition? We did. Peter Hutchins has already talked about the treaties, such as the Treaty of Utrecht. They created these borders that didn't apply to us, because this was a family agreement between the European nations about where they were going to be, and it didn't affect our trade. We don't even have to use Section 35 in the Canadian Constitution, because those rights were enshrined in the original constitution of Canada which says, in Section 132, that the federal government of Canada has all the power to implement all the treaties with an Imperial Crown and foreign countries, such as United States. This is basic simple constitutional law. If we weren't Indians, and if we weren't in a category of disrepute, we wouldn't have this problem, but I guess I take the most umbrage at the idea that the world is finished already, that we have nothing to do in the world except unfold the colonial dramas, that nothing is complete and nothing is finished, no law is finished, no constitution is finished, no NAFTA is finished. We create these artificial rules; they're not written in stone, and we have to change them. That's our role.

This is the first generation of aboriginal lawyers. We were excluded from this profession just a few years ago. In the 25 years that we've been in existence in both the United States and Canada and now Mexico, we bring to the law certain deep spirituality, and a deep experience with oppression and being excluded from things, and that creates within us a sense of justice. When we look at the global trading networks, it was anticipated by our elders that this whole oppression phase of dividing up the country into Canada and British North America, U.S. and Mexico, would all fade, because it's artificial and it's not ecologically sustainable. We don't have an aboriginal word for free trade; the only word we have is responsible conduct. That's what trade was to us. We went to the resources, and we didn't try and build the resources. We didn't

get into farming and say, "We'll grow everything in our little territory." We enjoyed the hospitality of going where the berries were being raised, where the fish were being brought upstream, and negotiating with those people who live there and who were the stewards of that natural resource. That's the history of aboriginal consciousness. We had no borders, we had no duties, we had no wrong economic theories about how tariffs were going to help everything that's now disputed. You're coming back to where we were when you came as newcomers and we just have to work out the new order. That's the key to aboriginal participation. I don't care really if the U.S. Congress is plenary over us in the United States in our domestic capacity; they're not sovereign over us in our foreign capacity or in our treaties that exist with their executives. And, the same way, in Canada, this is about treaty power, not any legislative power. There is a distinction between that, that Congress can't overrule our treaties without giving us compensation, either in Canada or the United States, that all the power of the people who are elected and all the so-called democratic clauses were set up to not implement our treaties and to create another way of life.

The whole issue of fair trade, or what we call responsible conduct, is the dominant issue that is going to take over the continent. It's a brand new transborder legal realm where we have a lot to do to make it better, and our governments are struggling in their own ways to make it better. But that's the future. But the Supreme Court, because of the way it constructed how it's going to deal with aboriginal rights is in another time and another place, that they didn't even exist, and they have to try to imagine what it was like to be in North America before they came and their ancestors came, and they're just absolutely terrible at remembering or imagining aboriginal life. As lawyers, we're getting better at trying to explain to them why all of their evidence codes and all of their civil codes are all based on English law or French law. In some cases, they've been imported, and that's the inconsistency. It's the inconsistency between the hard line treaties we negotiated as aboriginal people with those nations, and how they were implemented in other international treaties and colonization. Once the colonists were given the power to legislate, the only theory at their disposal was parliamentary sovereignty and our clone in the United States called plenary power of Congress. These are still constitutionally distinct from the treaty powers. Where aboriginal people live is the treaty power. The colonization experience in America, either Canada or the United States, and what's ongoing in Mexico, is a colonization process which created colonized organization for aboriginal people, only to derail us from our treaty rights. We have them in Canada called the Indian Act Bands and we have them in the United States called Indian Reorganization Act. All of these are organized not through the treaty power, but through legislative power, and all of those have traditionally excluded us from travelling, from leaving the reserves they forced us on to, and to have any kind of relationships with the people that are just a treaty line away, that we never consented to, and they told us would never apply to us.

The court has a tremendous job to do in understanding aboriginal rights, and in the *Mitchell* case it failed, but its failure is so clear and obvious to all of the aboriginal experts. They were trapped in their own delusion, they were trapped in treaty law when they should have been in aboriginal law, and if you're in aboriginal law, there was no border, it's a figment created by treaties without our consent, and aboriginally it was never there. They did real good for at least 15 paragraphs and then they lost their perspective and started applying a different legal method

to an aboriginal right, and they called that the evidence code. Well, the evidence codes, my friends, in Canada and in the United States are merely legislation, ordinary legislation drafted mostly by the courts, but they're not constitutional. Our rights are supposed to be constitutional. We made that choice, and the Canadian people made that choice in 1982 when they included Section 35 into the Constitution. The constitutional rights should not be held to be consistent with the common law evidence code, which isn't constitutionalized; it's not part of the Constitution. It may be the legal consciousness of the court, but it's the wrong consciousness to apply to aboriginal rights, and the court has developed another test. They just don't know how to develop it, and that's called *sui generis* analysis of aboriginal rights property. But if they won't allow us to phrase our issue, with that becoming the most important issue that's going to destabilize sovereignty every time you bring something across the border, then we're dealing with not only a tenuous memory, but a very fragile state that's struggling to survive if it has that low self concept that it can't take Indians trading across its border. Those are the inconsistencies we have to explain, and it's a great process, because we get into the dialogue by their mistakes. And if they make a mistake, then our fiduciaries, the Crown, the federal government, has got to solve it, and that's another dialogue we get into.

So we're in a new era, and the international era is brand new and fresh and trembling with anticipation of great profits and great relationships that come from trade. But these were the same ones that, of course, brought the newcomers to North America, and no matter what script we write as lawyers, whatever judicial cases we have as judges, whatever a legislature has put down, and whatever bureaucrats create in regulations, the human spirit for justice, the human spirit for human betterment always overwhelms the existing script, and that's what NAFTA means to me. What people really want, the so-called real democracy, what business people and other people really want, is more freedom to trade and make deals and less bureaucracy. We haven't got there, but it's a good vision, and it's the vision that starts to talk about trade as a form of justice between peoples and against the state. The states have agreed that the investors can challenge them on the regulations. This is a new human empowerment script that's going to flow from the North American experience, and we're going to be sure, as aboriginal lawyers, and as the first generation of aboriginal lawyers, that justice is going to be part of this. I couldn't tell you how we got the Section 35 into the Constitution against all odds, but I think it was because we were right. The time had come for this idea in Canada, and the time is coming in Mexico, and the time is right throughout the entire poverty and profession of Latin America.

PETER HUTCHINS:

Further to the *Mitchell* case, initially at trial, the relief was not to bring goods in to trade at large, but to bring goods in to trade with other First Nations, and there was some explanation at trial as to how that would work. The Federal Court of Appeal narrowed that, in accordance with, in fairness, the evidence that was led in terms of Mohawk historical trading patterns, limited to trading with First Nations in Quebec and Ontario, but the idea was still a nation to nation, a reserve to reserve trading, which both courts, the Federal Court Trial Division and the Federal Court of Appeal, appeared comfortable with. When we get to the Supreme Court, one of the disturbing points in the judgment was that the Court brings up this matter of enforcement and says, "Well, how do we know that even if the goods do go initially to another First Nation, they

won't go from there, spread across the land?" In other words, very interestingly, suddenly the aboriginal litigant or claimant is not only required to go through the hoops that I described in terms of the test to establish the right, but now has to guarantee perfect compliance and enforcement, and has to explain how there could be no possible abuse. As one of my colleagues said, answering a journalist the other day, let's not forget that the Federal Court of Appeal judgment, trial judgment, has been in force now for a number of years, and the last time I had checked there had been no chaos and no abuse, and perhaps that's the best test of what happens, but this was another disturbing aspect of the case. Do you find this in division of powers, cases between the Crown, between the federal government and province, or in the United States is the jurisdiction claiming jurisdiction in a given case required to establish beyond a doubt that there will be no abuse, no going beyond the bounds of that particular head of jurisdiction? Come on! That's what constitutional law is all about and that's what keeps constitutional lawyers busy. There is a troubling issue here as to whether First Nations are actually being faced with a greater burden not only establishing the right, but ensuring compliance with the right.

RAPPORTEUR'S REPORT

DR. CHARLES GASTLE and ROBIN LEE CAFFREY:

The conference dealt with five issues:

- (a) Should aboriginal rights be identified and dealt with separately within trade agreements?
- (b) If yes, how should they be dealt with?
- (c) What are the trade aspects of aboriginal rights over traditional lands?
- (d) Does *Softwood Lumber IV* provide a case study of the issue of aboriginal rights over traditional lands?
- (e) What are the implications of the Mitchell case on border rights and the sovereignty of First Nations?

Attached to this report is a point form summary of the Softwood Lumber dispute.

A. SHOULD ABORIGINAL RIGHTS BE IDENTIFIED AND DEALT WITH SEPARATELY WITHIN TRADE AGREEMENTS?

Claude Carrière stated that although aboriginal issues were not separately identified or dealt with as part of the *Canada-United States Free Trade Agreement* ("CUSFTA") or the *North*

American Free Trade Agreement (“NAFTA”), this does not mean that these interests are not accommodated within NAFTA. For example, the general provisions in the agreement relating to government procurement allow Canada to provide special preferences for aboriginal small businesses. *Francisco Lopez Barcenas* indicated that the native population within Mexico had simply been characterized as small farmers, and thus had not been dealt with separately. *Michael Speck* opined that, from the U.S. perspective, native rights were accommodated within the Agreement through its general provisions, by permitting specific initiatives to promote them. The Department of Commerce has established minorities business promotion agencies and, in particular, he referred to a minority, rural and native team which has been established to help develop new business opportunities.

Professor Valerie Phillips indicated that the treatment of native issues in NAFTA is almost non-existent. There are certain reservations that are included in Annex II of the investor state provisions. Canada does mention aboriginal rights, while the United States and Mexico deal with them indirectly, by utilizing the term “minority affairs”, a term which tends to minimize their importance, especially within the United States, where the law governing non-indigenous and indigenous minorities differs substantially. The reference to these rights in Annex II places no positive obligation on the governments to actively support aboriginal issues. At most, these references protect the right of governments to promote aboriginal rights and business interests, without rendering them vulnerable to investor-state challenges through the arbitration provisions contained in NAFTA Chapter 11. In this context, the inclusion of these rights does not appear to protect aboriginal rights at all, but is merely intended to insulate governments from collateral attack.

The non-recognition of aboriginal rights within NAFTA is symptomatic of a pervasive failure of governments to deal directly and openly with native issues. This failure extends not only to the issue of land claims, but also to issues of economic development. By not treating the rights of indigenous people separately and identifiably, their interests are subordinated within the trade agreements to those of the nation states. It reinforces the perception that the entitlement of aboriginals is limited to that which they can obtain through the good graces of the nation state.

Lenor Scheffler highlighted the need for the separate recognition of aboriginal rights. In her experience, aboriginal groups are trying to re-establish traditional contact across the “medicine lines”. These cross-border initiatives to re-establish traditional trade routes may be found along the Canada-U.S. border and the United States-Mexico border. *Sakej Henderson* referred to Aztec maps that show the St Lawrence River, and the fact that Cree Nation peoples may be found in Canada, the United States and Mexico. They may be referred to by different names (such as the Kickapoo in the southern U.S. and Mexico), but they are still Cree and share the Cree culture. These facts provide demonstrable evidence that the traditional trade routes of aboriginals throughout the Americas, and helps to illustrate that Euro-centric borders are constructions of newcomers.

It appeared from the general discussion which followed that it is time to recognize the rights of aboriginals directly within NAFTA or in any further regional or multilateral trade

initiative. In particular, this should occur within the Free Trade Agreement of the Americas initiative ("FTAA") or, failing the granting of fast track authority within the United States this Fall, any initiative to expand NAFTA to include Chile. The "C4" Free Trade Agreement negotiations also provides a possible opportunity to raise these issues.¹ This conclusion is based in part on the growing prominence of aboriginal issues within the Americas. In Canada, aboriginal rights have been considered in certain seminal Supreme Court Decisions, the most recent of which was *Mitchell vs. M.N.R.* In Mexico, the Zapatista movement timed certain guerrilla activities to coincide with the signing of the NAFTA.

Aboriginal rights should also be separately identified within the FTAA, particularly if it is to become an agreement "beyond trade." The fact that the FTAA may have a democracy clause - as a threshold requirement of entry - requires that the agreement not just deal with traditional trade issues, but it must also consider the institutions that are necessary to support fledgling democracies.

B. HOW SHOULD NATIVE RIGHTS BE DEALT WITH ?

Page Hall asked two questions: Firstly, should there be special treatment for the personal or commercial goods of indigenous people? Secondly, should trade agreements be used for social policy at all, such as environmental, human rights, or aboriginal issues?

¹ The C4 nations include: El Salvador, Honduras, Nicaragua, Guatemala. These negotiations commenced earlier this year and it is expected that the Canada-Costa Rican Free Trade Agreement will form the template for the Agreement.

Valerie Philips noted the absence of linkage between NAFTA and human rights or social policy, even though there was some linkage to environmental and labour issues in the NAFTA Side Agreements. *Claude Carrière's* identification of the democracy clause to be included in the FTAA initiative, again suggests that the FTAA will have to provide support for the institutions that are necessary to support democracy. Does this provide an opening for consideration of such broader policy issues as aboriginal rights? If such an opportunity does exist, how can the direct inclusion of aboriginal rights be achieved?

Russel Barsh stated that it is unrealistic to suggest that government assistance is unnecessary to achieve meaningful aboriginal participation in the business opportunities that may result from the creation of a regional free trade area. While NAFTA Annex II provides some shielding for government initiatives, there is no obligation for Canada, the United States or Mexico to provide any financial or other support for the cultural protection or economic development of aboriginal people. If a government should choose to provide financial support for aboriginal initiatives, this funding may come into conflict with NAFTA/WTO provisions other than those contained in NAFTA Chapter 11, which deals with investment issues. Such financial support might be actionable as a countervailable subsidy under the *World Trade Organization Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"). A non-actionable or "green light" exemption for regional development initiatives was included within the SCM Agreement but the provision has now lapsed.² A case can be made for the implementation of an aboriginal exemption should the provision dealing with "green light" subsidies be revived.

² Article 8.2 established eligibility criteria including that the region must have: either (a), income per capita or household income per capita, or GDP per capita, at least 15% below the average for the territory concerned; and (b), an unemployment rate, which must be at least 110% of the average for the territory concerned. The provision expired in 1999, but the United States had expressed support for continuing the provision prior to its expiry. See *Subsidies Enforcement, Annual Report to Congress*, Joint Report of the Office of the United States Trade Representative and the U.S. Department of Commerce. February 2000. Found online at www.ia.ita.doc.gov/esel/reports/seo2000/report2k.html

Russel Barsh suggested that aboriginal rights could be recognized in NAFTA by building on existing precedents. He highlighted the provision in the *Treaty of Rome*, under which the European Community has an obligation to provide support for disadvantaged regions and identifiable groups, and provided an example of disadvantaged groups that were entitled to support even though they were not concentrated within a particular contiguous region. The suggestion implicit in the reference to the state aids program is that this approach might be used as a template for the inclusion within NAFTA/FTAA of aboriginal rights and economic development issues.

He then highlighted the fact that a number of states within the Americas have ratified the *Convention on Indigenous and Tribal Peoples 1989 (No. 169)* ("ILO 169"), which came into force in 1991. Among other obligations, this Convention requires signatories to permit cross-border cooperation, contact and trade amongst native groups. He suggested that it should be a condition of participation in a free trade agreement that these international agreements be respected. The effectiveness of such an approach is highlighted by the practice of WTO dispute settlement panels and appellate bodies, to refer to other international agreements when evaluating trade disputes.³ There is also precedent for the incorporation by reference within NAFTA of agreements dealing with collateral issues. It should be possible to incorporate the ILO 169 to support aboriginal peoples, if agreements have been incorporated that deal with endangered species, depletion of the ozone layer, and the trans-boundary movements of hazardous waste.⁴ The inclusion of such agreements by reference would require parties to ratify

³ An example is provided by the reference of the WTO Panel to the *OECD Arrangement on Guidelines for Officially Supported Export Credits*, in its decision that Canada had adequately amended the conditions for Canada Account financing of Bombardier aircraft sales. See Paragraph 104, Canada - Measures Affecting the Export of Civilian Aircraft, WTO Panel Decision, May 9, 2000, WT/DS70/RW.

⁴ NAFTA Article 104(1) provides:

Article 104 Relation to Environmental and Conservation Agreements

In the event of any inconsistency between this Agreement and the specific trade obligations set out in:

- (a) the Convention on International Trade in Endangered Species of Wild Fauna and Flora, done at Washington, March 3, 1973 as amended June 22, 1979;
- (b) the Montreal Protocol on Substances that Deplete the Ozone Layer, done at Montreal September 16, 1987, as amended June 29, 1990,
- (c) the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, done at Basel, March 22, 1989, on

ILO 169 as a condition of entry and thus possibly provide a mechanism for enforcing the Convention.

The effectiveness of this approach may have been underscored by *Francisco Lopez* in his comments. He referred to an agreement that was signed in 1992 by Mexico but which had not been enacted into Mexican law or adopted by the Mexican constitution.

C. WHAT ARE THE TRADE ASPECTS OF ABORIGINAL RIGHTS OVER TRADITIONAL LANDS?

Russel Barsh discussed the manner in which aboriginal rights over their traditional lands should be approached within the general context of trade agreements and the dispute settlement process. Secure property rights are a fundamental component of an effective free market. A mis-allocation of resources and a sacrifice of economic efficiency occurs in states that do not provide security of property and freedom of contract. An example is provided by those states that do not provide these basic rights to aboriginal people. These states provide an incentive for investments that exploit aboriginal traditional lands and realize the economic rents associated with placing those lands into the possession of economic interests that have access to a secure property regime and the enforcement thereof. The subsequent exploitation of these lands is prone to undervalue the natural resources exploited from them in a manner that distorts trade and transfers a countervailable benefit to the producers, assuming that the requisite degree of injury can be proved in any resulting CVD proceeding. The magnitude of trade distortion occurring as a result of a the failure to provide secure property rights to First Nations people, would far surpass the degree of trade distortion, if any, that might result from providing direct, financial support to aboriginal development projects.

its entry into force for Canada, Mexico and the United States, or the agreements set out in Annex 104.1

Such obligations shall prevail to the extent of the inconsistency, provided that the Party has a choice among equally effective and reasonably available means of complying with such obligations the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement.

It should be a condition that if a state aspires to be a member of a free trade agreement, that state has to “play fair” and provide the basic security of property and freedom of contract necessary in a fully functioning democracy and free market. This highlights the fact that if the FTAA is to include a democracy clause, consideration must be given to the institutions necessary to support incipient democracies. The importance of imposing such a condition is underscored by the fact that basic security of property and freedom of contract cannot be addressed fully by the creation of a multilateral dispute settlement remedy.⁵ An institutional bias exists against disadvantaged groups which are required to discharge the burden of proof governing the tribunal. This is unsuitable for indigenous people who may lack the resources and legal expertise to pursue their rights for the duration of the proceeding.

Francisco Lopez’ description of the situation in Mexico underscored the potential effectiveness of a standing, structural condition of entry. As indicated above, Mexico signed an agreement in 1992, that has not been adopted into Mexican law. In addition, long-standing land claims have not been addressed. Natives were removed from their traditional lands in the 1960s to permit the construction in Mexico of certain hydroelectric plants. These claims are still before the courts. When NAFTA was signed, traditional lands were exploited for natural resources without adequate compensation. He also highlighted the manner in which traditional aboriginal knowledge is being commercialized by third parties without adequate compensation. Licenses are provided by Mexican authorities to distribute cultural and traditional property in a manner highlighting the absence of legal protection of native rights.

⁵ An example of such a remedy is the *WTO Agreement on Trade-Related Aspects of Intellectual Property Rights* that is designed to protect intellectual property rights and to provide a forum in which disputes may be settled.

D. SOFTWOOD LUMBER AND THE RIGHTS OF FIRST NATIONS TO PARTICIPATE IN FORESTRY OPERATIONS ON TRADITIONAL LANDS

Softwood Lumber IV provides a good case study of the trade aspects of aboriginal rights over traditional lands. A point form summary of the Softwood Lumber dispute is attached as Appendix “A”. The importance of the dispute is that it is the first time that native rights issues have been raised in a countervailing duty investigation by the United States Department of Commerce (“DOC”). It provides the opportunity to raise these issues before any bi-national panel established to review the final determination scheduled to be issued by the DOC November 1st, 2001 in its countervailing duty investigation and January 17th, 2002, in the antidumping investigation. It also provides the possibility of raising these issues before any WTO Dispute Settlement Panel that is established, assuming that the panel exercises its discretion and accepts the submission from a “non-governmental organization”.

D.I CREE/INTERIOR ALLIANCE SUBMISSION

On May 10th, the issue of aboriginal rights was placed squarely before the DOC by the Grand Council of the Cree and the Interior Alliance. The argument is advanced that the Governments of Canada, British Columbia and Quebec have disregarded the rights of the First Nations people in the administration of their forestry programs.

The submitters further allege that across Canada First Nations see their treaty and land rights violated so that timber companies may benefit. In 1975, the James Bay Cree of Quebec entered into a treaty with the government of the province of Quebec and the federal government of Canada. The James Bay and Northern Quebec Agreement is primarily a land and environmental treaty. It recognizes the Cree right to occupy territory through the traditional subsistence economy and to have a major role in other types of future economic development in the region. The agreement established an environmental protection regime to safeguard the resources necessary for a viable subsistence economy in the context of development. Neither Quebec nor Canada has honoured this treaty, giving yet another type of subsidy to timber companies who are allowed to clear cut Cree lands in violation of treaty obligations.

Finally, the submitters allege that as in British Columbia no treaties were signed with indigenous peoples, the government of British Columbia confers a subsidy in allowing timber companies to log lands under land claims disputes... While British Columbia fights First Nations land rights claims in the courts, the province allows destructive resource practices to continue such as wide-spread clear-cutting of native hunting and fishing grounds. Forest companies are the beneficiaries of these delay tactics. They can continue harvesting undervalued timber and in the case of a finding against the governments they would have to account for the difference in value. Forest companies are therefore receiving financial

contribution both through revenue foregone and through the provision of services under market value.

The Cree highlight the non-compliance with the requirement to establish social and environmental review panels that had to be established pursuant to Section 22 of the *James Bay and Northern Quebec Agreement*.

The forestry management practices evident in British Columbia and Quebec are alleged to impose a cost on First Nations' peoples who have been denied the right to participate in the forestry industry, or receive payment for the exploitation of timber on their traditional lands. The Cree/IA Submission states that this cost should be considered a subsidy. The Cree have commenced action in Quebec Superior Court asserting that this costs amounts to \$500 million (*Mario Lord et al v. the Attorney General of Quebec*). They support the imposition of countervailing duties, stating:

Thus the application of U.S. trade law will work directly to benefit the environment, promote sustainable development of the forests, and uphold the rights of Indigenous People while eliminating unfair competitive advantages for Quebec's lumber industry.

The Interior Alliance states:

The Indigenous peoples of the Interior are concerned about unsustainable logging practices, whose environmental cost is externalized and borne by indigenous land users. Indigenous peoples bear the double cost. Their lands are being destroyed at an increasing rate due to the selling of resources extracted from their traditional territories under market value in international markets, mainly because the collective proprietary interest of indigenous peoples is not taken into account and compensated in decisions and transactions regarding their traditional lands and extraction of natural resources, such as softwood lumber.

D.II NORSASK SUBMISSION

On May 18th, the Meadow Lake Tribal Council and NorSask filed a submission with the DOC seeking an exemption for the softwood lumber products exported by NorSask. The request is made on the basis that no subsidy may be found to exist with respect to timber harvested from MLTC'S aboriginal lands over which they assert, by treaty and by custom, aboriginal proprietary rights. Ninety percent of the softwood timber which is supplied to the NorSask sawmill comes from the traditional lands of its owners, the nine First Nations of the MLTC. The existence of these rights has been recognized by the Supreme Court of Canada and by the Governments of Canada and Saskatchewan.

NorSask operates a sawmill at Meadow Lake, and it is owned by the MLTC's constituent First Nations communities under a limited partnership arrangement. The NorSask sawmill is a high efficiency softwood stud mill which produces annually approximately 120 million board

feet of softwood lumber. NorSask has also established smaller satellite sawmills in some of the aboriginal communities to the north of Meadow Lake. A small mill is currently operating on the Buffalo River First Nation which provides employment for approximately fifty First Nations people both in the mill and in the woodlands.

Access to the U.S. market is crucial to maintaining the viability of these sawmills located in the aboriginal communities of Saskatchewan. Over 90% of NorSask's production is exported to the United States. The imposition of duties will threaten an important source of funding for community programs, as the proceeds realized by the MLTC are invested back into the First Nations communities.

The First Nations forestry operations are based on their aboriginal proprietary rights, which are constitutionally recognized within Canada. The Government of Canada owes fiduciary obligations to the First Nations people in Northern Saskatchewan. The existence of these rights places the MLTC and NorSask in a unique position that cannot be compared to other forestry operations within Canada. They are reflected in the exclusive license given to the MLTC and NorSask with respect to the right to harvest the timber from their traditional lands. The unique nature of these rights is further reflected in the fact that they continue even after the grant of the timber license. Notwithstanding its status as a First Nations forestry operation, NorSask is required to engage in a process of consultation with the First Nations people. This is a matter of law and every forest management plan must show how, and to what degree, the First Nations people affected by the forest operations have been consulted and the manner in which they will share in the economic benefits from the forestry operation. To facilitate the consultation process, the communities within the traditional land areas have formed "co-management boards" that review and approve forest plans. These boards also provide input into the choice of the contractors engaged to carry out the harvesting, timber hauling or silviculture operations. This ensures that the First Nations people of the MLTC are directly involved in the forestry operations and that a cluster of aboriginal companies in all aspects of forestry management are nurtured on the northern reserves. Before NorSask's forestry company builds any roads, harvests any timber or engages in any forest management activities, the people on the land are consulted through the co-management process. Their input affects every forest management activity on the land base.

NorSask does pay stumpage fees in respect of the timber cut on their traditional lands as a matter of Saskatchewan law. NorSask and the MLTC adopt the position of the Canadian Government that the stumpage programs do not constitute countervailable subsidies. In addition to the arguments set forth in the briefs filed on behalf of the Canadian Government, the MLTC and NorSask submit that Commerce is required to recognize and acknowledge in its investigation of the Saskatchewan stumpage program that the First Nations people are exercising their aboriginal rights over their traditional lands. In this respect, they may be compared to an owner taking timber off his own land.

D.III IRRECONCILABLE POSITIONS OR A COMMON THEME?

The Interior Alliance and Cree support the imposition of duties and the MLTC and NorSask resist it. Their positions can be reconciled by the fact the First Nations' people in Northern Saskatchewan participate meaningfully in the forestry industry in a manner that is denied to either the Cree or the Interior Alliance.

A further difference in the positions is that the MLTC and NorSask have standing before the DOC while the Cree/Interior Alliance do not. Any "Interested Party" may have standing before the DOC and this term includes:

"a foreign manufacturer, producer, or exporter, or the United States importer of subject merchandise or a trade or business association a majority of the members of which are producers, exporters, or importers of such merchandise."

The Cree/Interior Alliance are not "Interested Parties" within the statutory provision and were only able to make their submission by incorporating it into the submission of the Natural Resources Defense Council.

E WHAT ARE THE IMPLICATIONS OF THE *MITCHELL* CASE ON BORDER RIGHTS AND THE SOVEREIGNTY OF FIRST NATIONS?

Peter Hutchins commented on the *Mitchell v. Canada*⁶ case, released on May 24th. He remarked that this conference addresses issue of State sovereignty. Given that the conference is studying the impact of NAFTA, it is essentially concerned with that aspect of State sovereignty which permits the State to fetter its own sovereignty through treaty-making, a form of self-fettering. He mentioned that, of course, there is another means of fettering State sovereignty, that being through external forces such as international law standards and duties. In addition, in Canada, with the enactment of section 35 of the *Constitution Act, 1982*, constitutionally entrenched aboriginal and treaty rights now constitute fetters on Canadian State sovereignty. He mentioned that this entrenchment distinguished the situation in Canada from that in the U.S., where the rights of Indian tribes are subject to the pleasure of Congress. He also referred to the fact that Justice Binnie, writing for the minority in the *Mitchell* decision, raised this distinction between voluntary State fettering through treaty-making, in this instance through Crown Aboriginal treaties, and the imposition of norms or duties upon Canada arising out of entrenched aboriginal rights. He indicated that the rights of First Nations' people have come a long way over the past two decades in a variety of decisions by the Supreme Court of Canada. Unfortunately, in this, the first opinion after the *Marshall* decision, the Court is not prepared to recognize the Mohawk right to bring personal goods and community goods across the border, or the right to bring goods across the border to trade with other First Nations communities. He noted that the majority of the court had not accepted the argument by the Crown that First

⁶ 2001 S.C.R. 33

Nations' rights are circumscribed when they are inconsistent with crown sovereignty. He also reviewed the Court's evidentiary treatment of the First Nations' oral tradition and the challenges in meeting the traditional, civil burden of proof when First Nations are required to adduce evidence which is four hundred years old.

Generally the *Mitchell* decision represents the following:

- it was the first aboriginal rights case heard by the Supreme Court after the *Marshall* decision, and represents a continuation of the retreat by the Court which commenced with *Marshall 2*;
- it confirms the trend to deny or render next to impossible aboriginal economic rights or claims, a trend seen in the cases dealing with competition in the "economic mainstream";
- it does not continue the line of cases promoting negotiations rather than litigation (*Delgamuukw, Montana*);
- it tightens the tests for establishing aboriginal rights (*Van der Peet* test);
- it contradicts longstanding authority on deference to the trial judge's findings of fact, particularly when upheld by a Court of Appeal, as in the *Mitchell* case;
- it purports to clarify earlier case law on the assessment of evidence in aboriginal rights claims, requiring persuasive evidence demonstrating validity on the balance of probabilities. The aboriginal perspective is to be given equal and due consideration no more;
- it suggests that aboriginal litigants are not free to frame their own case and relief sought. Apparently they must seek recognition and declaration of rights reflecting the entire range of historical aboriginal activities;
- it suggests that aboriginal litigants also have the burden of establishing reliable enforcement of their rights, and any restrictions to their rights;
- it flies in the face of trends towards dismantling borders, globalization, and internationalism. In this respect, it is a judgement of the nineteenth rather than the twenty-first century.

Peter Hutchins commented on the *Jay Treaty* and the manner in which it has not fared well in Canadian courts. It was first rejected by the Supreme Court of Canada in 1956, and was brought back in the *Mitchell* case to determine whether the state of the law had been altered by the passage of the *Constitution Act, 1982* and the inclusion of Section 35 that gave constitutional protection to the rights of First Nations. Canadian law provides that a treaty does not come into force unless legislation is passed enacting it into Canadian law. The argument was advanced that the inclusion of Section 35 in and of itself fulfilled this requirement. In addition, reference was made to the *Vienna Convention* for the interpretation of treaties, to address the issue that third party rights cannot accrue to third parties from a treaty negotiated by sovereign states. The argument was further supported by a series of treaties, starting with the *Treaty of Utrecht* in 1713, as well as a series of conventions in which the First Nations' people were

assured that the border was not meant to limit their movement. These arguments were rejected by the trial judge and at the Court of Appeal. They were not appealed to the Supreme Court.

Peter Hutchins suggested that notwithstanding the *Mitchell* decision, the issue of border rights will not go away and that there will be other opportunities for the limits on First Nations mobility and trade rights to be challenged. He stated that it is important that the Canadian government respond to its international obligations under various treaties and accords, including the *Jay Treaty*. In *Sparrow*, the Supreme Court had commented that Section 35 was a promise to the First Nations people in Canada. It is apparent that we still have to learn the extent of that promise.

He noted one initiative that indicated the manner in which Canada could give effect to its constitutional obligations to First Nations' people. The *Migratory Birds Convention* was renegotiated with the United States in 1995 to bring it into compliance with the constitutional protection of First Nations' rights. First Nations' people were directly involved as commissioners during the negotiations and thus were given direct and meaningful participation

Lenor Scheffler compared and contrasted the situation in the United States. She noted the right of Congress to terminate the recognition of tribes or to pass laws contrary to the aboriginal rights of the tribes. Notwithstanding this, she indicated that Congress would encounter more difficulty in passing such legislation than in the past.

Sakej Henderson commented that First Nations people have constitutional rights in both Canada and the United States. Aboriginal tenure has been recognized in Canada and the federal government owes fiduciary obligations to the First Nations people. Unlike the situation in Upper Canada where the First Nations' lands were sold to the Crown pursuant to the terms of the governing treaties, no such sale occurred in Saskatchewan. Here, there is a lien on the traditional lands in a manner requiring the Canadian government to discharge its fiduciary duties to the First Nations People.

With respect to the *Mitchell* case, he noted that the issue isn't what the evidence suggested took place 400 years ago. The requirement to consider such evidence places the Supreme Court of Canada in an artificial situation that misdirects the analysis. "They were trapped in their own delusion and treaty law." The emphasis should be placed on the nature of aboriginal trade law and how it would govern the rights at issue in the case. Aboriginal trade law would certainly govern the question as to whether goods could be taken across the St Lawrence River, and it should be determinative of the issue.

If evidence regarding trade routes is necessary, it can be found in abundance. The Aztec maps of the Americas long before first contact and the existence of the Cree Nation from Canada to Mexico, provides the requisite evidence.

APPENDIX "A"

CERTAIN SOFTWOOD LUMBER PRODUCTS FROM CANADA SOFTWOOD LUMBER IV MAY 29TH, 2001

A. INTRODUCTION:

3. The Softwood Lumber dispute is a good case study for the assertion of aboriginal rights in the NAFTA context. Two submissions have now been made to the Department of Commerce regarding the relevance of aboriginal rights over traditional lands to the determination as to whether a countervailable subsidy exists.

B. BACKGROUND TO THE DISPUTE

4. What's at stake: \$10 billion per year in Canadian exports to the United States;

1. Coalition for Fair Lumber Imports seeking duties of up to 60%;

2. Past Experience: duties of 7% to 15% have been imposed;

(1) 1982: Dismissed the proceeding;

(2) 1986: Positive Preliminary determination: MOU

15%;

(3) 1991: Canada terminated the MOU, duties of 6.51%;

(1) 1994: Canada won before binational panel,

(4) March 1996: Under threat of new investigation, Softwood Lumber Agreement negotiated;

(1) 14.7 billion board feet;

(2) \$50 and \$100 duty paid beyond that level;

5. Softwood Lumber Agreement expired on March 31st, 2001;
 1. It only dealt with imports from British Columbia, Alberta, Ontario and Quebec;
 2. Imports from Saskatchewan, were not covered under the dispute and freely imported into the United States;

6. U.S. Coalition for Fair Lumber Imports filed a CVD and antidumping petition April 2nd 2001, with the Department of Commerce and International Trade Commission:

1. CVD: Alleges that a financial benefit has been provided to timber companies by setting stumpage rates below fair market value.
2. Dumping: selling lumber in the United States at less than fair value;
3. In both cases, must be a finding of injury or a threat of material injury;

7. *First Factor*: Subsidy/below fair value: Stumpage programs

SASKATCHEWAN:

Stumpage:	\$ 3.01 C\$/m ³
Competitive	\$44.89 ⁷
Per unit benefit	\$41.88
Total softwood harvested utilized by	
Sawmills:	1,680,649
Total Subsidy:	\$70,384,356.00
Alleged rates:	

8. *Second Factor*: Injury;
 1. Lower costs have allowed Canadian exporters to reduce the SPF benchmark price. Thus, price suppression is occurring in the U.S. Market;

⁷ Stumpage price paid for softwood sawlumber harvested from USFS and state lands in Montana in the second and third quarters of 2000.

2. Elimination of SLA will result in a “wall of wood” sent to the U.S. markets by Canada;

9. Canada’s key defence is that there is no injury:

1. SLA: Intended to provide Canada with 33-34% market share;

1998:	34.5%;
1999:	33.56%
2000	34.11%
Jan 2001:	32.13%

2. American industry certified that there was no injury at the 33-34% level;

3. Unique nature of softwood lumber market makes stumpage irrelevant;

(1) Close to a perfectly competitive market in which Canadian exporters are price takers and do not set the market price.

(2) Stumpage fees are irrelevant, because exporters sell at the market price set by market factors beyond their control.

4. Any injury to U.S. industry in 2000, is caused by cyclical downturn;

(1) 2000, slowdown in housing starts and increase in mortgage rates;

(2) There was an increase in productive capacity during the late 1990s:

(9.5 Billion board feet), 60% of which occurred in the United States.

10. STATUS OF INVESTIGATIONS:

1. International Trade Commission decides injury;
 1. ITC May 16th: “Reasonable indication of threat of injury;
 2. Note: no finding of current injury, SLA argument may be working?
2. Department of Commerce decides subsidization/ dumping:
 1. Preliminary Findings:

June 26 th ,	DOC Subsidization;
Sept 10 th ,	DOC Dumping
3. Imposition of duties:
 1. Duties could be imposed by June 26th;
 2. Could be applied retroactively by 90 days if “critical circumstances”⁸, but not before date of Notice in Federal Register, therefore, April 30th;

11. FINAL DETERMINATIONS

	CVD	Dumping
DOC	Sept 10 th	Nov 26 th
ITC	Oct 25 th	Jan 10 th ,
DOC orders	Nov 1, Jan 17 th ,	2002

⁸

Critical Circumstances if:

- (A)(i) there is a history of dumping and material injury by reason of dumped imports;
- (ii) the person knew or should have known that the exporter was selling the subject merchandise at less than its fair value;
- (iii) there have been massive imports of the subject merchandise over a relatively short period. This is defined as an increase of 15%.

12. WHAT IS LIKELY TO HAPPEN:

1. In March, Pierre Pettigrew,

“I find it annoying time and time again to reinvent the wheel, especially since we win every time. When will they learn?”

2. B.C. and Quebec have called a meeting in Ottawa of industry representatives to try to obtain a mandate to settle the case. Brock Folkerson of NorSask will be attending as a representative of the Saskatchewan forest industry. This represents a sea change as prior to this, there had been no consensus on negotiations.

3. Why would they negotiate when:

1. Defence on issue of injury;
2. In the past Canada has won?

4. POINT:

1. Everyone expects both Commerce and ITC to impose duties;

- (1) almost a reverse onus of proof at the preliminary duty phase;

2. Can only appeal final determinations;

- (1) Even if win on a NAFTA panel, may take three years before get rid of duties:

- (2) Duties paid to U.S. treasury, recoverable if overturned;

- (3) If MOU, Canada collects the duty and goes into provincial coffers;

3. Not clear that Canada will win before the binational panels;

- (1) Good chance that duties could be indefinite;

13. NAFTA BINATIONAL PANELS;

1. Softwood Lumber a critical factor in the negotiation of Canada-United States Free Trade Agreement:

1. 1986 MOU: 15% duty;
2. Canada's objective: to eliminate CVD and Antidumping

duties;

3. CVD proved to be the stumbling block and a last minute compromise was the solution;

2. The compromise was that the process of judicial review would be undertaken by binational panels and not the U.S. Court of International Trade;

1. Instead of Court of International Trade;
2. Five member panel, Canadian and American trade experts;
3. Intended to apply U.S. standard of judicial review;
4. Significant deference to the DOC/ITC;

3. Softwood Lumber III:

1. Canada won, but panels split along national lines;
2. Issue of deference;
3. Fairly strong reason to believe that Canada won because of a majority on both panels;
 - (1) Binational Panel;
 - (2) ECC;
4. Unclear that will have a majority on both panels in *Softwood Lumber IV*;

The way ahead. Do we need a consultative mechanism in NAFTA?

Open discussion.

JAMES LEACH:

What we would like to do today is discuss and, if possible, try and decide on what is, in fact, doable. Too many conferences and seminars and symposia and summits conclude with a very ambitious program of resolutions and decisions, but then nothing ever happens because there's no structure, no organization, and no resources for follow-up. So Wayne Robinson and I will be listening very carefully to see what role we, as the Estey Centre, can play.

One of the elements of the Estey Centre's international trade initiative for western Canada, is a program which focuses on trade policy issues of particular concern to aboriginal peoples, and we have already developed some ideas for post-conference research, such as projects dealing with international intellectual property rights, the implication of Softwood Lumber IV, eagle feathers and U.S. endangered species legislation, can Jay Treaty rights be incorporated into NAFTA, that sort of thing. We fully intend to proceed with a program of research, and we would also like to think in terms of organizing another conference next year,

dealing with some other topic or topics related to aboriginal trade policy issues. But we would like to look at what is doable, from our perspective.

JAMES (SAKEJ) HENDERSON:

I also want to think about what we can do from my perspective and that of everyone else here. So I would like to start off by saying that it doesn't matter whether it's at the Estey Centre or at the Native Law Centre or some other place, but we need a clearing house for information, because there is just too much non-information out there. DFAIT and Industry and Commerce should be really thinking about how they are going to get the information out to the aboriginal peoples. Portal is one way, but there are other ways, too. We really need more than just research, although research is good, too. But I think we need a clearing house to start, a sustainable clearing house that's not only going to set up the information, but also, as the years progress, take on perspectives and opinions concerning the NAFTA implementation and the FTAA. Any indigenous business person should know how to fill out the NAFTA forms. Those are two practical doables that I think should come out of the conference, that is, structuring information, allowing people to get the information, and then structuring the art of crafting NAFTA, and also how to deal with the NAFTA paperwork

RUSSEL BARSH:

I think it is very important that there be a point of information and support for working on standing access to trade negotiations and ultimately to the trade dispute settlement process. At this stage it could be simply another aspect of coordinating information, a clearing house, but with a specific aim of informing people about how everybody was working in their separate ways to open doors for participation, and to specifically support initiatives at the national level, initially with Ottawa and Washington, D.C., to get national government support for participation in trade delegations.

PAGE HALL:

We also need to give ourselves some goals that are achievable in the relatively short future, so that we can then measure our progress. We have here today people from the capitals - Ottawa, Washington, D.C., and Mexico City – as well as from many parts of the U.S. and Canada, and we can do these things if we work together as a team. I guess the one other thing I would add is the importance of communications. All of our e-mail addresses are available and we need to keep in touch, keep communicating.

CHARLES GASTLE:

I have a very specific suggestion and it comes out of some of the brainstorming sessions that I've had with Jim Leach and Wayne Robinson, and that is that we have talked about the possibility of having an intern at Foreign Affairs and International Trade to work with some of the people who are negotiating the various trade agreements, whether the FTAA initiative, or the C4 trade negotiations that are going on right now with respect to Honduras, Nicaragua, El Salvador, Guatemala, and my understanding is that some senior officials are receptive to the

idea. However, why not consider putting in someone from the aboriginal bar to get some first-hand exposure to the trade negotiation process?

RUSSEL BARSH:

One thing that might respond to a few comments that were made here about the potential competitive role and great power of large business corporations and their influence on trade policy. I have been involved in the last few years in the development of initiative in the States through American Indian Organizations to begin a process of corporate engagement with selected large corporations, major corporations, that have some interest in social policy and are working in sectors where they end up elbow-to-elbow with aboriginal people in the States and elsewhere in the world. Part of the strategy is not only to engage executives and companies that have an impact and are interested in talking about the social consequences of their business practices and their investment practices, but also to bring in key investors that are interested in this as well, such as ethical investors and mutual funds and pension funds that socially screen their investments or engage in shareholder advocacy. Right now we're working primarily with four mutual funds which collectively have six billion dollars U.S. in managed assets and that talks very loudly to companies when they find that they are in the portfolios of these funds, that their owners are interested in getting them to the table to talk about both working on a business level with indigenous peoples, but also being much more cautious about the potential adverse impacts of their activities on indigenous peoples. So one dimension of what could be promoted, in fact initially facilitated by an organization like the Estey Centre and then taken over by a group of aboriginal organizations or institutions, is a process of engagement with key Canadian corporations that may be critical in trade policy formulation and which also are potential good business partners that are interested in being friends rather than enemies. Of course, there are always strategic risks because you're dealing with a potential competitor in such cases, but that's what businesses do to themselves, is engage with a potential competitor that they feel the greatest degree of trust and common interest with, build strategic alliances, promote common agendas. It's a way of sharing some of that power and at the same time getting a second opinion on what's happening on trade policy. There's a possibility of getting directly into the DFAIT structure, into the trade negotiations themselves, but also of working through some key companies and industry groups that have their own advocacy efforts at both the level of DFAIT and to some extent, directly through trade negotiations where there are business councils or subcommittees that advise in negotiations themselves. That might be a parallel strategy. We talk about essentially engaging in some kind of advocacy to government and getting into trade negotiations through the government avenue, and I would suggest that there is a complementary strategy of working through the corporate avenue that involves both creating the possibility of amplifying the voice of aboriginal business people and indigenous peoples generally, but also of creating some more business opportunities, getting to know these folks and finding out that maybe you are on the same side on some issues, or at least you're on the same side with some companies that are willing to look more broadly at things like social returns of investment and doing good business practices.

LENOR SCHEFFLER:

I was just thinking about the idea of doing another conference, which I think is a good idea in that it wouldn't hurt for us to come back together, because we'll have had another year of experience, and hopefully some success and some challenges. There would be value in this process, because I think this is only the beginning of a very extended experience. I don't know exactly how long it will take and what it's going to take for us to make a difference, and not only at the practical level, getting the paperwork and doing the practical business of selling your goods or services across the border, but getting that recognition of a sovereign status of aboriginal people. So coming together again is a good idea, and having aboriginal business people more involved, makes a lot of sense. They are on the line that we lawyers are not; they're on a line that we academics are not. But also, when I talked to clients back at home, they weren't really sure, after I showed them the agenda, how or where they would fit. But they have things to say, and because I wasn't sure what we were going to be doing, I couldn't assure them that it really made sense. Because they're also business people, they wanted to know that if they came, it would be worthwhile.

JAMES LEACH:

I would like to pick up on a couple of points, one that Chuck Gastle had made about the possibility of an internship, and the other about the need to have somebody at a more senior level. I should give you a little more background of what we had envisaged. We didn't call them internships, but rather fellowships, and the idea sprang from Mr. Justice Estey, whose name is attached to our Centre. He has for quite a number of years lamented the fact that there is a woeful shortage in Canada of lawyers who are knowledgeable about international trade law and international trade agreements, and he has on occasion recounted stories of being on NAFTA panels where the room was filled with lawyers representing both the U.S. firms and the Canadian firms, and they were all American lawyers. We subscribe to a publication called *Inside U.S. Trade*, and on a regular basis there is a note that such and such a person has joined USTR from some law firm in the United States, and it seems to be an established practice in the United States for lawyers to move from private practice into the government, into the U.S. Trade Representative's office and then back into private practice. But that's not common in Canada at all, and so the idea that Wayne and I had discussed and, in fact, had discussed with Foreign Affairs, was to establish an Estey fellowship at Foreign Affairs whereby a lawyer, not necessarily a new graduate or an intern, but somebody who has been trained to some degree in international trade law, and has a genuine interest in international trade law, could spend six months or a year, no more, with Foreign Affairs, either working hands-on in international trade negotiations in one of the economic bureaus or doing dispute resolution work in the legal section. That's what we had originally had in mind. Chuck had mentioned the idea of having an aboriginal lawyer doing something like that; that's an idea that might be worth considering.

The second point I wanted to make was that Sakej had initially raised the matter of some training or education in handling the NAFTA paperwork, and Lee Caffrey had also mentioned the need for such courses, in either the commerce or the law faculty. Something else that we are proposing is what we have described as a Certificate in Global Management, which would provide an overview of the knowledge and skills necessary to operate in the international

marketplace. The global economy affects directly and indirectly virtually every aboriginal business in western Canada, and as the economy becomes increasingly dependent on international business success, aboriginal managers have to learn new skills to compete successfully in the global markets. So we're thinking in terms of something beyond the paperwork.

JAMES (SAKEJ) HENDERSON:

I would also suggest you look at the possibility of a fellowship at the WTO itself, because that's where a lot of the new problems with trade will be resolved.

PAGE HALL:

NAFTA is probably the most modern free trade agreement in the world. There are lots of free trade agreements. Some are bilateral and others tri-national, like NAFTA; some are multi-lateral and encompass a number of nations, like some of the Uruguay Round agreements or the Information Technology Agreement. These free trade agreements generally deal with duties on goods, and they create a national identity, because you're treating the goods within the group, whether within national or multi-national boundaries, all the same, but you treat everybody outside differently. And, secondly, they collect revenue. NAFTA treats textiles completely differently from the way it treats automobiles, or the way it treats computers. There are some groups of people that are treated specially, such as truckers crossing borders, and there is some controversy now about truckers from Mexico being treated differently than truckers from Canada coming into the United States. There is no reason why you couldn't insert into NAFTA an exception, if you will, for all goods that might be traded, perhaps with some exceptions, among the indigenous peoples of North America.

CHARLES GASTLE:

Another aspect of the NAFTA free trade agreement is that NAFTA represents the first time you have both developing and fully developed nations participating in a free trade agreement. The interesting thing about CUSFTA, which is the Canada-U.S. Free Trade Agreement, is that it had a very weak institutional structure, almost non-existent. Secretariats for the CUSFTA parties were extremely small. I don't think they're that much bigger under NAFTA. Once you start expanding southward and taking in fledgling democracies, the question is going to be, how does that agreement begin to go beyond a trade agreement and start looking at some of the other issues? The fact that the Free Trade Agreement of the Americas is going to have a democracy clause starts opening the door to other issues. One of the things that Canada is going to have to do in terms of its negotiations with C4 and others, is they have to concentrate more upon building an institutional infrastructure that can support trade. Once you start getting into those other issues, there should be an interest in having aboriginal people there to raise the profile, and try to participate in these agreements.

WAYNE ROBINSON:

I don't think it's necessarily a problem of NAFTA not working. We were having a discussion yesterday and again last night about two problem areas, which aboriginal people face on a regular basis, eagle feathers and marine animal carvings. It's not because of NAFTA, but because of endangered species legislation and marine animal protection legislation. In the United States, it's my understanding that Indian people have managed to secure an exemption, and they can get a certificate from a certain authority that says these feathers were taken from dead eagles, and these bones were taken from beached whales. Well, we have that right, too. Under NAFTA, there's a clause, I believe it's 19, that says that we should get national treatment. In other words, we should get the same treatment, but somebody has to go to the NAFTA authorities, and to the people who deal with marine animal protection and endangered species, and show them the certification process that we are putting in place or have put in place, for them to be able to say, "Okay, that's good enough, we'll accept that certificate." But I don't know that anybody has done that. I think that in many cases it's not that NAFTA doesn't work, but there are other pieces of legislation, and other implications. So somebody has got to make an inventory of these problems, and sit down with DFAIT and perhaps with INAC and discuss how they might be solved, and if not, we might need to look at having a side bar in NAFTA or some kind of consulting mechanism.

RUSSEL BARSH:

If the question is only whether NAFTA does, in fact, create greater business opportunities for native entrepreneurs as it stands, there's no doubt that the answer is yes. If the question is whether it creates a greater opportunity for native entrepreneurs than for other enterprises, then the answer is no, but it's not because of NAFTA, it's because of other structural factors which we can choose to address through trade agreements, or through other mechanisms. My concern has been that we are structuring trade agreements which limit the ability of individual governments to engage in those other mechanisms of equalizing opportunity, and unless we look very carefully at things, like the construction of the language of the anti-subsidy, anti-dumping provisions of trade agreements, we may cut off some of the possibilities for boosting the capacity of indigenous people's own enterprises to take as much advantage of open borders as other enterprises are able to do with the head start that they have. NAFTA is a nightmare of exceptions, of all sorts of annexes and schedules about exactly how different things are treated. One of the exceptions that hasn't come up yet is the infamous corn and beans exception, which was requested by the Mexican state to protect Mexican subsistence agriculture. It superficially was sold as a provision to provide a certain degree of safety for indigenous subsistence level farmers to continue to be able to make enough money from their small patches of corn and beans to stay in business. It's a family farm provision. Does it work? No, because it favours the entire Mexican corn and bean exporting industry, and most farmers do not export beans to Texas. The agri-businesses in northern Mexico export beans to Texas, so without indigenous peoples being explicitly part of the structure of that, the impact of that provision, which was again deliberately inserted to protect indigenous peoples, is that it protects Mexican agri-business at the expense of indigenous peoples.

PETER HUTCHINS:

Should there be special provisions in NAFTA? Yes. And I think the second important question is who should participate in developing those special provisions. I would like to take it further and say that it's very important for the indigenous peoples, and I'll talk about Canada, the aboriginal peoples of Canada, to be full partners in the development and the negotiation of these treaty arrangements and norms with Canada's treaty partners. I mentioned the example yesterday of the 1916 Migratory Birds Convention Act amendments. I think it's a model that really should be looked at because three things happened: the Government of Canada undertook to go back to its American partners in the migratory birds regime and try to renegotiate that treaty to bring it in line with the treaty rights that they were negotiating with aboriginal peoples in Canada. They then, after approaching the Americans, decided to put aboriginal representatives on the Canadian delegation as full members of the delegation, not just as advisors. The Americans came to that process and said, "Wait a minute, Canada is asking us to make this regime consistent with the aboriginal treaty rights in Canada. What are they? We don't know what they are, or what are you talking about when you say aboriginal rights in Canada." The Canadian head of delegation turned to the aboriginal members of the delegation and said, "Will you please explain to our American friends what we're talking about?" So the explanation of what Canada was trying to get at in terms of these so-called special provisions came from the aboriginal delegates. Now there's no substitute for being there and being able to participate and, of course, there was a lot of dynamic behind the scene between the various members of the delegation. I'm suggesting that that is a very interesting model that very few people know about, and it was, as far as I am concerned, a great success, a model for working together, government and indigenous peoples, on common problems, on international problems. I hope that this knowledge goes out from here, because it's a shame that these successes get buried while the less successful initiatives are given high profile.

There seems to be a suggestion that the NAFTA can create the negotiation of trade arrangements, new conditions and new opportunities for indigenous peoples. Well, that may be true beyond their historical homelands, but I think the first thing to do is to acknowledge that what the state parties are doing through these treaties is really acknowledging or rediscovering what the situation was for indigenous peoples whose territories were traversed and separated by the borders, so this is nothing new. In terms of the Mohawks, for example, and the Mohawk homeland, NAFTA will not do anything new in granting Mohawks special rights to trade into New York State. It would be acknowledging that this was the homeland and restating that position. Quite frankly, favours aren't being done to indigenous peoples; justice is being done in terms of acknowledging what was once there.

JAMES LEACH:

We have heard a lot of good ideas this morning, some doable, others not, but no discussion about who is going to do anything. I think, however, that we, Wayne and myself, have some ideas, as a result of the discussion over the past day-and-a-half, that we would like to explore, not with a large group, but with some of you individually over a period of time. We will try to develop an Estey Centre aboriginal trade development or trade policy program which will incorporate some of the ideas that have been presented today. There are limitations, of course,

and not the least of which is the question of resources. That will be one of our challenges, namely to find the resources to undertake certain projects. I know that you, Sakej, said that there has to be more than just research, but for us that's a starting point, and maybe some of these projects, such as preparing an inventory of trade policy issues and irritants that specifically affect aboriginal trade, can lead to something else.
