



INTERNATIONAL TRADE AND INVESTMENT LAW & INDIGENOUS PEOPLES' RIGHTS IN MINING PROJECTS

WHAT ARE THE INTERACTIONS?

Professor Erick Duchesne, University Laval, Québec
3rd MinErAL Meeting, 12-14 June 2019, Cairns

Presentation plan

- Roots of the project
- Objective of the project
- Methodology
- Preliminary results



2nd Annual Meeting MinErAL Network

29-30 May 2018
Shaputuan, Uashat, Québec



<http://www.eti.ulaval.ca/canada-united-states-agricultural-trade-under-the-shadow-of-nafta-liberalization-conflicts-and-challenges%E2%80%93nouvelle-publication-d%27erick-duchesne>



Victoria Tauli-Corpuz, SRRIP

<https://www.culturalsurvival.org/news/victoria-tauli-corpuz-talks-cultural-survival-wake-terrorism-charge-philippine-government>



Kenneth Deer

<https://www.cbc.ca/news/indigenous/usmca-trade-deal-indigenous-rights-1.4846073>



<https://www.chevron-texaco-business-customers-begin-conversion-wex-platform>



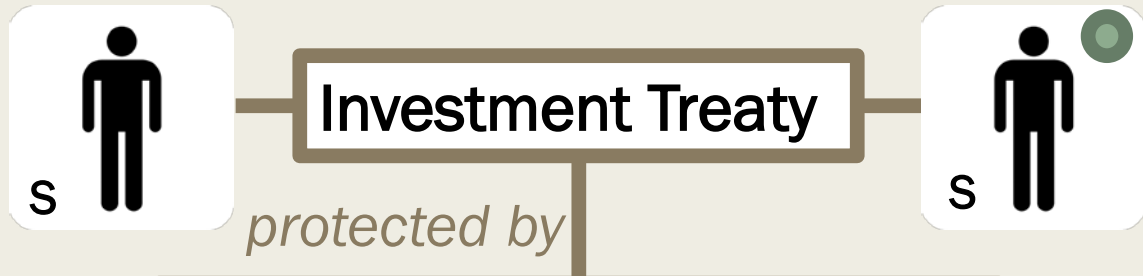
<https://www.cartalk.com/content/you-shouldnt-trust-your-car-men-who-wore-star>



<https://www.ttnews.com/articles/nafta-replacement-usmca-signed-awaits-ratification-congress>



<https://www.eluniverso.com/noticias/2017/06/19/nota/6239155/victoria-chevron-caso-contaminacion-ecuador-concede-corte-suprema>



<https://www.armsreliability.com/page/resources/case-studies/how-an-iron-ore-mine-reduces-costs-on-a-sustainable-basis>

= « INTERNATIONAL INVESTMENT »

~~INDIGENOUS PEOPLES~~

= « NATIONAL »



= State Responsibility

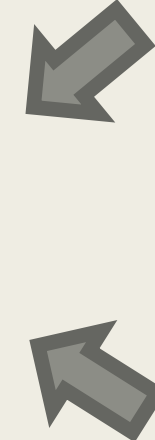
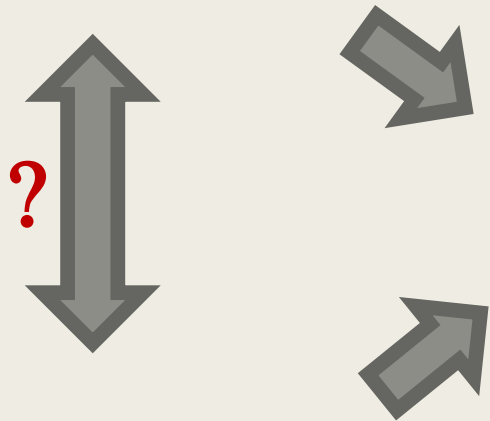


Why this project?

INTERNATIONAL INVESTMENT and TRADE LAW

- International corporation = international investment

↳ BIT/MIT protect corporations' interests



- Mining projects taking place on **Indigenous peoples' lands**
→ trigger IP' rights

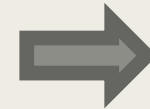


INDIGENOUS PEOPLES' RIGHTS

What are the objectives of the project?

- **1-** Interactions between ITIL and IPR in mining projects
--> **survey** of what currently exists :

*a. What are the **references to IP rights** in International Trade and Investment Instruments?*



Positive Law

*b. What is the state of the **literature** on that topic?*



What analysis exist and what avenues of improvements identified?

- **2-** Formulation of **hypothesis** regarding the impacts of Trade and Investment Law on IP rights in mining projects

What methodology are we using?

- **1-** Systematic literature review

- a. Positive law: key words in English, French, (Spanish, Russian, Portuguese)

- b. Secondary and grey literature: key words in English and French

Some preliminary results (positive law, Eng/Fr, 1-a)

Numbers of references (treaties, arbitral awards, procedural documents, articles...)

- 3 references to « Autochtones » (exception provisions)
- 174 - Aboriginal(s)
- 313 - « Indigenous » (various)
- 76 - « Sami(s) » / « Saami(s) »
- 22 - « Maori »
- 12 - « Inuit »

- 1 - « Eskimos »
- 116 - « M(é)ti(s) »
- 135 - « Tribal(s) »
- 386 - « Tribu(s) »

- No reference/ irrelevant references with: « Indig(è)ne(s) » / « Aborig(è)ne(s) » / « Indien(s) » / « Indian(s) » / « Premi(è)re(s) Nation(s) » / « First People(s) / « First Nation(s) »

***Some preliminary reflections** (literature, 1-b)*

- Investment Law only, mainly under NAFTA, based on literature review made in July 2018

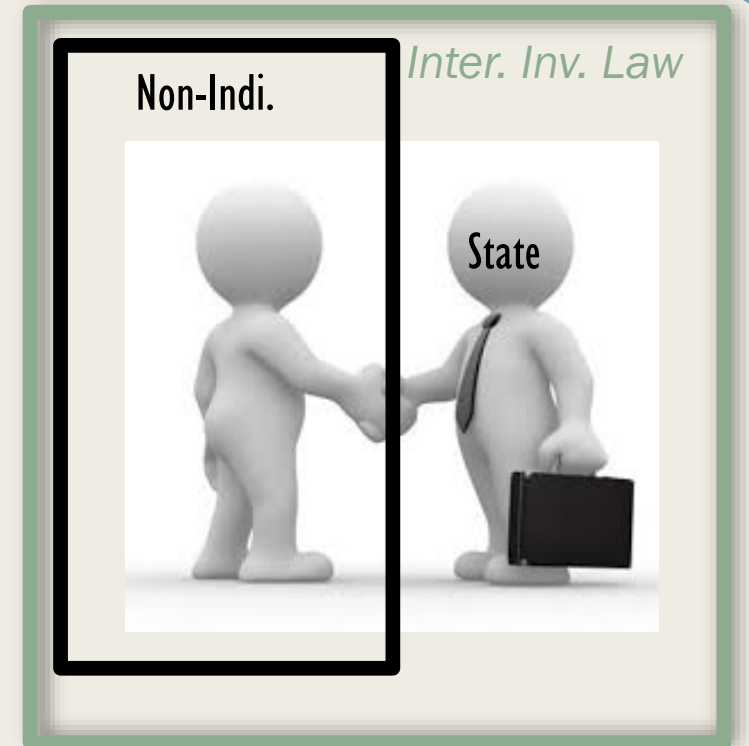
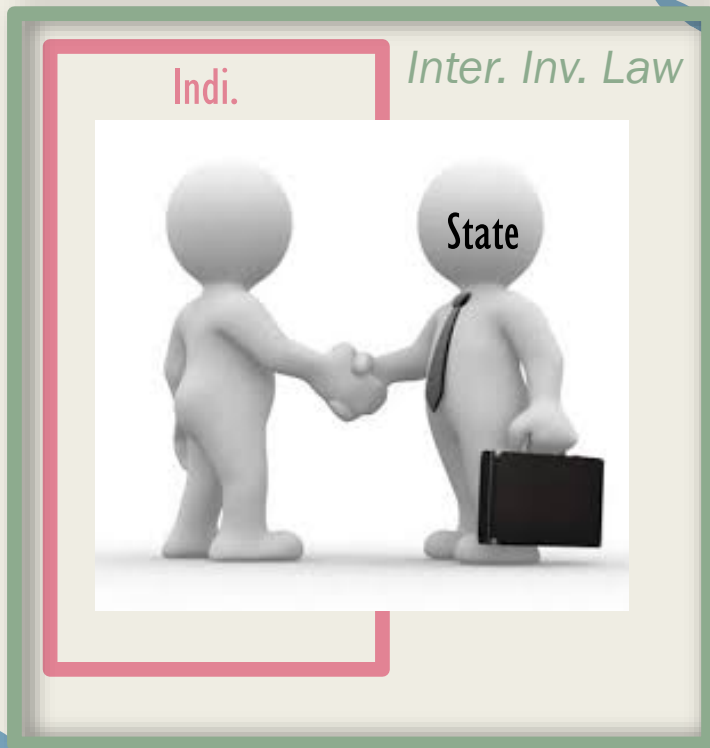
- 2 scenarios
 - *Investor = Indigenous*
 - *Investor = non-Indigenous*

- 2 times
 - *BIT / MIT*
 - *Arbitration*

ITIL & IPR from a legal perspective – 2 potential scenarios

Scenario 2

Scenario 1



Scenario 1 – The investor is Indigenous

- Does he/she enjoy specific treatment?
 - *No? Grand River v. United States of America Enterprises Six Nations, Ltd., Et Al. v. United States of America, ICSID Case No ARB/10/5, Award, 12 January 2011.*

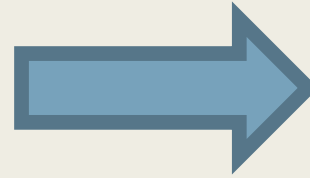
Scenario 2 – Indigenous Peoples are affected by mining corporations' activities

Time 1:

- Consultation of IP during negotiation of BIT/MIT?
 - Canada: no, *Hupacasath First Nation v. Canada* (FCA) (2015)

- Could they enjoy specific rights under international investment law?
 - *Applicable law*
 - *Exception provision*

Example of the USMC Agreement – General Exception



That « measure » is an « **expropriation** » according to the BIT signed between you and my country. You owned me compensation »

Time 2:

■ How can the arbitrators take into account IP rights?

- *Applicable law (international customary law)*
- *Principle of systemic integration*
- *Investor's legitimate expectation*

■ How can they participate in the arbitral procedure?

- *Glamis Gold , Ltd. v. United States, Award, 8 June 2009.*

Next steps

Objective 1 – Literature Review

- Analysing of positive law
- Updating literature review and integrating International Trade Law component

THANK YOU!

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