

## Chapman Law Review

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Volume 8 | Issue 1

Article 10

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2005

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### Recommended Citation

Arthur Manuel & Nicole Schabus, *Indigenous Peoples at the Margin of the Global Economy: A Violation of International Human Rights and International Trade Law*, 8 *CHAP. L. REV.* 229 (2005).

Available at: <http://digitalcommons.chapman.edu/chapman-law-review/vol8/iss1/10>

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## INDIGENOUS PEOPLES AT THE MARGIN OF THE GLOBAL ECONOMY: A VIOLATION OF INTERNATIONAL HUMAN RIGHTS AND INTERNATIONAL TRADE LAW

*Arthur Manuel\**  
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In the 1999 *Human Development Report*, which uses data from 1996 and 1997, Canada was ranked first among the 174 countries included in the report, and had the highest over all Human Development Index [HDI] score. Calculating HDI scores for Registered Indians, including those living on and off reserve, reveals a substantially lower HDI score for the Registered Indian population, which would be ranked about forty-eighth among the countries in the report.<sup>1</sup>

### I. INTRODUCTION: A WIDE RANGE OF INDIGENOUS RIGHTS

Over the last three decades, Indigenous Peoples around the world have won important constitutional recognition of their inherent rights and jurisdiction. Yet, despite these gains, the socio-economic status of Indigenous Peoples has not improved and they continue to be the poorest populations of those countries

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<sup>1</sup> Dan Beavon & Martin Cooke, *An Application of the United Nations Human Development Index to Registered Indians in Canada, 1996*, in *ABORIGINAL CONDITIONS: RESEARCH AS A FOUNDATION FOR PUBLIC POLICY* 207 (Jerry P. White et al. eds., 2003). In the past decade, the United Nations Development Program (UNDP) Human Development Index (HDI) has become one of the most commonly cited and used indices of well-being. Canada has consistently scored at or near the top of the United Nations' ranking of countries based on the HDI scores. *Id.*

in which they live. This socio-economic status is perpetuated partly because, despite certain gains, many governments still refuse to implement constitutional provisions recognizing the rights of Indigenous Peoples. In addition, the 1990s saw an unprecedented consolidation of international trade law with the creation of the World Trade Organization (WTO) in 1995 and the signing of important global and international trade agreements. This consolidation undermines the rights of Indigenous Peoples around the globe by increasing corporate access to both land and resources held by Indigenous Peoples and it serves to perpetuate an already tenuous socio-economic status.

This article is a case study into the historic and ongoing efforts of Aboriginal Peoples from the Interior of British Columbia to secure the recognition and implementation of their land rights. It will be argued that the real property interest of Indigenous Peoples should be valued over the alleged quasi-proprietary interests of corporations. Unlike so many state governments, Indigenous Peoples have never ceded their sovereignty through accession to free trade agreements. Because Indigenous Peoples still maintain legally recognizable property rights, this article argues that Indigenous Peoples are in a unique position to challenge corporate control over their land and resources under the current international law regime.

## II. BACKGROUND ON THE SOCIO-ECONOMIC MARGINALIZATION OF THE INDIGENOUS PEOPLES OF CANADA

### A. Indian Reserves: The “Fourth World” Inside the “First World”

The United Nations Development Program first published its Human Development Index in 1990.<sup>2</sup> Since then Canada has always been ranked on or near the top.<sup>3</sup> This high ranking indicates that Canada would be one of the best countries in the world in which to live.<sup>4</sup> However, if you are an indigenous person born in Canada, statistics show that you would likely not be living at Canada’s much touted high level of development.<sup>5</sup> Instead, you would be living at a much lower level of development.<sup>6</sup> This is especially true among registered Indians living on reserves in Canada whose living conditions, on average,

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

are below living conditions found in developing countries.<sup>7</sup> Living conditions on Canadian Indian reserves are ranked at the same level as a country with a rank of seventy-eight on the Human Development Index.<sup>8</sup>

The situation in the United States is similar. A recent study conducted by the Harvard Project on American Indian Economic Development found that “reservation Indians perennially have been the poorest identifiable group in the United States. American Indian/Alaska Native families on and off reservation are two-and-a-half times more likely than the average American family to live in poverty, and the situation is worse for families on reservations.”<sup>9</sup> Yet the Harvard Study also found that “the era of self-determination has brought progress, [given that] Indian nations have had a long way to go in terms of their economic development.”<sup>10</sup>

Addressing tribal sovereignty, the study went on to state:

Supported by every U.S. President since the 1960s and bolstered, for a time, by a combination of federal court rulings and congressional policies, tribal self-rule – *sovereignty* – has proven to be the only policy that has shown concrete success in breaking debilitating economic dependence on federal spending programs and replenishing the social and cultural fabric that can support vibrant and healthy communities and families.<sup>11</sup>

The study further notes that tribal sovereignty is increasingly under attack by the courts and congressional bills that want to abolish the tribes’ economic and legal independence.<sup>12</sup> When Indigenous Peoples first started organizing at the international level during the 1970s, they vowed to work together to overcome their socio-economic marginalization through recognition of their inherent rights. They called themselves the “Fourth World Movement,” in reference to the fact that Indigenous Peoples are the poorest peoples in the world.<sup>13</sup>

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 208.

<sup>9</sup> Joseph P. Kalt & Joseph William Singer, *Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule*, Joint Occasional Papers on Native Affairs No. 2004-03, at 35 (2004), available at [http://www.jopna.net/pubs/JOPNA06\\_MythsandRealities.pdf](http://www.jopna.net/pubs/JOPNA06_MythsandRealities.pdf).

<sup>10</sup> *Id.* (footnote omitted).

<sup>11</sup> *Id.* at 1.

<sup>12</sup> *Id.* at 7.

<sup>13</sup> See GEORGE MANUEL & MICHAEL POSLUNS, *THE FOURTH WORLD: AN INDIAN REALITY* (1974).

B. The Underlying Problem: Constitutional Breaches in Canada and the United States

Tribal sovereignty and the right to control tribal lands was first recognized in a series of cases known as the Marshall trilogy.<sup>14</sup> The first case, *Johnson v. McIntosh*, decided in 1823, found that Indian title to land was compatible with U.S. property law and could only be extinguished by the federal government.<sup>15</sup> One decade later, in *Cherokee Nation v. Georgia*, the state of Georgia attempted to oust the Cherokee from their traditional territories within the state despite a treaty with the federal government of the United States.<sup>16</sup> The Cherokee took their case directly to the U.S. Supreme Court, who found them to be “domestic dependent nations.”<sup>17</sup> Just one year later, in *Worcester v. Georgia*, the Court found that the Cherokee had not surrendered their right to self-government through contact with the colonial powers, and still had the power to remain in and govern their territory.<sup>18</sup>

President Andrew Jackson did not agree with the *Worcester* decision and is said to have stated: “John Marshall made his decision; let him enforce it now if he can.”<sup>19</sup> President Jackson ordered the removal of the Cherokee in an act of unconstitutional defiance against the Supreme Court ruling.<sup>20</sup> Known as the Trail of Tears, the forced march of nearly 17,000 Cherokee from northern Georgia to present-day Oklahoma resulted in the deaths of over 4,000 Cherokee.<sup>21</sup>

The U.S. policy of removal was followed by equally cruel and destructive policies including the making and subsequent breaching of treaties with Indian populations until 1871, the practice of assimilation and allotment until 1928, reorganization until 1942; and termination until 1968.<sup>22</sup> All of these policies were aimed at destroying and undermining the very fabric of Native American Tribes and their control over their tribal lands.

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<sup>14</sup> The Marshall trilogy consists of the following three cases, decided by Chief Justice John Marshall in the early 1800s: *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823), *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

<sup>15</sup> 21 U.S. (8 Wheat.) at 592-93.

<sup>16</sup> 30 U.S. (5 Pet.) at 3.

<sup>17</sup> *Id.* at 17.

<sup>18</sup> 31 U.S. (6 Pet.) at 560-61.

<sup>19</sup> JOHN EHLE, *TRAIL OF TEARS: THE RISE AND FALL OF THE CHEROKEE NATION* 255 (1988).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 391.

<sup>22</sup> For more information on these different U.S. policies see United States Environmental Protection Agency Tribal Training Resource Guide 29-38 (2004), available at <http://www.epa.gov/indian/resource/modules/entire.pdf>.

Still, Native Americans organized themselves in opposition to these policies. In 1953, tribal leaders in the northwest formed the Affiliated Tribes of Northwest Indians (Affiliated Tribes), an organization dedicated to tribal sovereignty and self-determination.<sup>23</sup> The Affiliated Tribes finally secured the recognition and implementation of their tribal sovereignty in the late 1960s, with their own authorities taking control over the administration of tribal affairs and the extraction of resources from tribal lands.<sup>24</sup>

In their paper *Myths and Realities of Tribal Sovereignty: The Law and Economics of Indian Self-Rule*, Joseph Kalt and Joseph Singer detail how important strengthening tribal sovereignty is:

[S]overeignty holds the prospect of being a win-win strategy for all contending parties. Obviously, tribes are winners *by their own standards* – as they demonstrate daily by pushing unerringly for self-rule. But states and the federal government stand to gain as well, as tribes make economic and social progress, contribute to their local and regional economies, and take pressure off of state and federal budgets otherwise needed to fight problems of poverty and social disarray.<sup>25</sup>

While the policy in the United States leaves some room for Native American tribes to slowly close the gap and overcome poverty amongst their peoples, the policy in Canada remains the extinguishment of Aboriginal Title.<sup>26</sup> This policy of extinguishments, similar to the earlier US policy of termination, contributes to the inability of the Indigenous Peoples to regain their economic independence.<sup>27</sup> In many ways, Canada is now facing in the twentieth century the same choice the United States faced in the 1830s. Canada must choose to either recognize the judicially prescribed and constitutionally supported proprietary interests of Aboriginal Peoples, or it can continue its unconstitutional policy of extinguishing Aboriginal land rights.

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<sup>23</sup> See Affiliated Tribes of Northwest Indians, available at <http://www.atntribes.org/about.html>.

<sup>24</sup> See Ed Goodman, *Protecting Habitat For Off-Reservation Tribal Hunting and Fishing Rights: Tribal Comanagement as a Reserved Right*, 30 ENVTL. L. 279 (2000)

<sup>25</sup> Kalt & Singer, *supra* note 9, at 41.

<sup>26</sup> See Indian and Northern Affairs Canada, *Comprehensive Claims Policy and Status of Claims (2003)*, available at [http://www.ainc-inac.gc.ca/ps/clm/brief\\_e.html](http://www.ainc-inac.gc.ca/ps/clm/brief_e.html).

<sup>27</sup> Beavon & Cooke, *supra* note 1. Canada has created an elaborate system of federal spending and funding programs for numerous Indian bands and tribal organizations. These programs not only contribute to the economic dependence of Indigenous People, but they help to perpetuate poverty on Indian reserves. For example, in 1996 the GDP per capita for an average Canadian amounted to \$ 22,480. *Id.* at 208. In contrast, the GDP per capita for a registered Indian living on reserve amounted to \$8,720, almost one third the national average. *Id.* For more information on the Canadian spending and funding programs see Royal Commission on Aboriginal Peoples, *5 Report of the Royal Commission on Aboriginal Peoples* § 2 (1996), available at [http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm\\_e.html](http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm_e.html).

In the 1997 decision, *Delgamuukw v. British Columbia*, the Supreme Court of Canada recognized Aboriginal Title as the collective proprietary interests of Aboriginal Peoples in their traditional territories.<sup>28</sup> The decision applies to all territories where no treaties between the Crown and the Indigenous Peoples had been entered into, with British Columbia being the largest area effected.<sup>29</sup> In most provinces east of the Rockies historic treaties were signed, but the debate about their implementation continues. Many Indigenous Peoples argue that the “spirit and intent” of the treaties also ensures indigenous control over their traditional territories. Aboriginal nations and organizations are now pressuring Canadian provincial governments to recognize the Aboriginal sovereignty enshrined in these treaties and to right past breaches of these historic documents.<sup>30</sup>

In British Columbia on the other hand, a number of Aboriginal nations in the Interior refuse to enter into any type of agreement that would extinguish their inherent land rights and/or limit their sovereignty.<sup>31</sup> Instead, these nations continue to fight for the recognition of their land rights and their right to control traditional territories.<sup>32</sup> These rights were recognized in *Delgamuukw* in which the Court called for the Canadian government to enter into negotiations based on the recognition of Aboriginal Title:

Moreover, the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith. Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Vander Peet*, to be a basic purpose of s. 35(1) – “the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.” Let us face it, we are all here to stay.<sup>33</sup>

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<sup>28</sup> [1997] 3 S.C.R. 1010, 1014 (Can.) (stating “aboriginal title is held communally.”).

<sup>29</sup> *Id.* at 1014-15.

<sup>30</sup> *Id.* at 37-43.

<sup>31</sup> See Bernard Schulmann, *Getting Treaty Talks Off Square One*, POLICY OPTIONS, Oct. 2000, at 60, available at <http://www.irpp.org/po/archive/oct00/schulman.pdf>.

<sup>32</sup> See e.g. *Haida Nation v. British Columbia*, [2004] 3 S.C.R. 511 (Can.).

<sup>33</sup> *Delgamuukw*, [1997] 3 S.C.R. at 1123-24 (citation omitted). Chief Justice Lamer references Section 35 of the Canadian Constitution as the basis for the coexistence of Aboriginal sovereignty and the sovereignty of the Crown. *Id.* Section 35 is part of the new Canadian Constitution that came into force in 1982. See CAN. CONST. § 35 (1982). Prior to that, Canada’s Constitution was enshrined in a treaty with the United Kingdom entitled the 1867 British North America Act. CAN CONST. (Constitution Act, 1867), § 30 & 31 Victoria, c. 3.

In the early 1980s, Prime Minister Trudeau wanted to “patriate” the Constitution, making it a solely Canadian Act and leaving its amendment to federal parliament and the provinces. He also wanted to introduce the Charter of Rights and Freedoms, enshrining individual civil rights in the Constitution. At the same time, he attempted to remove any reference to Indigenous Peoples and their collective rights from the Constitution. It was because of this that Aboriginal nations from across Canada were opposed to the patriation of the Constitution. Led by Indigenous Peoples from British Columbia who rented a train

The first and most important paragraph of Section 35 of the 1982 Canadian Constitution reads “[t]he existing aboriginal and treaty rights of the Aboriginal Peoples of Canada are hereby recognized and affirmed.”<sup>34</sup> This provision constitutes the unconditional recognition of Aboriginal rights and extends constitutional protection to them. Many Indigenous Peoples also consider Section 35 the source for Aboriginal jurisdiction, placing it on equal footing with federal and provincial jurisdiction. However, since its enactment in 1982, the Canadian government has refused to implement Section 35 so that it has arguably become nothing more than an “empty box.”<sup>35</sup>

In conjunction with its reductionist reading of Section 35, the federal government has also refused to revoke its land rights policy entitled the Comprehensive Claims Policy. Taking advantage of the Supreme Court of Canada’s divisive position on Aboriginal Title in the 1973 case *Calder v. British Columbia*,<sup>36</sup> the federal government devised the Comprehensive Claims Policy in order to accomplish the “blanket extinguishment” of Aboriginal Title.<sup>37</sup> Following the recognition of Aboriginal rights in the Constitution of 1982, this policy of extinguishment should have been revoked or reformed. It was not. Today, Aboriginal Peoples from across British Columbia continue to reject this federal policy. For example, in 2000, all major provincial Indian organizations in British Columbia signed the following Consensus Statement:

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that became known as the Constitution Express, they travelled to Ottawa to protest. A year later, in 1981, they sent a delegation of indigenous leaders to England to stop the patriation. As a result, Canada had to add Section 35 to the 1982 Canadian Constitution. See generally George Egerton, *Trudeau, God, and The Canadian Constitution: Religion, Human Rights, and Government Authority in the Making of the 1982 Constitution*, in *RETHINKING CHURCH, STATE, AND MODERNITY: CANADA BETWEEN EUROPE AND AMERICA* (David Lyon and Marguerite Van Die eds., 2000); James Ross Hurley, *The Canadian Constitutional Debate: From the Death of the Meech Lake Accord of 1997 to the 1992 Referendum*, Dec. 16, 1992, available at <http://www.pco-bcp.gc.ca/aia/default.asp?Language=E&Page=consfile&Sub=TheConstitutionalDebate>; Union of British Columbia Indian Chiefs, *Constitutional Express*, available at <http://www.ubcic.bc.ca/conxprss.htm> (last modified Feb. 23, 2005).

<sup>34</sup> CAN. CONST. (Constitution Act, 1982), Schedule B, c. 11, § 35.

<sup>35</sup> For more information on this ongoing debate, see ARDITH EALKEM, *BOX OF TREASURES OR EMPTY BOX?: 20 YEARS OF SECTION 35* (2003).

<sup>36</sup> *Calder v. British Columbia*, [1973] S.C.R. 313 (Can.). In *Calder*, three judges held that the inherent land rights of Aboriginal Peoples had not been extinguished, three judges found they had been, and the last judge dismissed the matter on a technicality. *Id.*

<sup>37</sup> See Indian and Northern Affairs Canada, *supra* note 26. Only a very limited number of Aboriginal Nations from across Canada entered into negotiations with the federal government. The only resulting agreements were the James Bay and Northern Quebec Agreement of 1975 and the Northeastern Quebec Agreement of 1978. See Indian and Northern Affairs Canada, *The James Bay and Northern Quebec Agreement and Northeastern Quebec Agreement*, available at [http://www.ainc-inac.gc.ca/pr/info/info14\\_e.html](http://www.ainc-inac.gc.ca/pr/info/info14_e.html).



The Assembly of First Nations, the Union of B.C. Indian Chiefs, the Interior Alliance and the First Nations Summit, hereby join together publicly to affirm the Aboriginal [T]itle and rights of all First Nations of British Columbia and Canada. Canada's Comprehensive Claims Policy is predicated on the denial of our rights and title. We categorically reject this policy and Canada's implementation of this policy. We call upon Canada to assert the honour of the Crown and to adopt a new policy of recognition, affirmation and implementation of Aboriginal [T]itle.<sup>38</sup>

Due to the failure of the federal and provincial governments to take the necessary steps to implement Aboriginal rights, the Supreme Court of Canada in a number of decisions throughout the 1990s, began to give meaning to Section 35 and itself defined the fiduciary obligation of the federal government with Aboriginal Peoples.<sup>39</sup> In 1997, in a unanimous judgment written by Chief Justice Lamer in the *Delgamuukw* case, the Supreme Court of Canada not only recognized Aboriginal Title, but also held Aboriginal Title was protected by Section 35 of the Canadian Constitution.<sup>40</sup> Although Aboriginal Title is recognized under Canadian law, the Court went further to define it as a *sui generis* right, controlled by the indigenous laws of the respective nation.<sup>41</sup>

This decision by the Supreme Court of Canada clearly rendered the Comprehensive Claims Policy of 1986 unconstitutional. Yet, despite repeated calls by indigenous leadership to adopt a new policy of recognition, affirmation and implementation of Aboriginal Title, the federal government has made it very clear that it has no intention of changing its policy or its laws.<sup>42</sup> This categorical refusal to honor Supreme Court decisions defining constitutional rights amounts to the same type of constitutional crisis sparked by President Andrew Jackson in the 1830s. The Canadian federal government's refusal to abide by the constitutional rulings of the Supreme Court is also a blow in the face of Aboriginal Peoples who have historically attempted to work with the federal government to find a solution.

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<sup>38</sup> BUSINESS COUNCIL OF BRITISH COLUMBIA, *THE BRITISH COLUMBIA TREATY PROCESS: A ROAD MAP FOR FURTHER PROGRESS* (2004), available at [http://www.bcbc.com/archive/FinalTreatyPaper\\_may2004.pdf](http://www.bcbc.com/archive/FinalTreatyPaper_may2004.pdf).

<sup>39</sup> Amongst the most important decisions on Aboriginal rights in the 1990's were *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (Can.); *R. v. Van der Peet*, [1996] 2 S.C.R. 507 (Can.); *R. v. Gladstone*, [1996] 2 S.C.R. 723 (Can.).

<sup>40</sup> *Delgamuukw*, [1997] 3 S.C.R. at 1010.

<sup>41</sup> *Id.* at 1014.

<sup>42</sup> Janice G.A.E. Switlo, *In a Perfect World*, at 10, at [http://www.ualberta.ca/NATIVESTUDIES/LegalPDF/In a perfect world.pdf](http://www.ualberta.ca/NATIVESTUDIES/LegalPDF/In%20a%20perfect%20world.pdf) (stating that a letter from Hon. Robert Nault, Minister of Indian And Northern Affairs, to Phil Fontaine, National First Nations Chief, that "Canada was not prepared to change the Comprehensive Land Claims policy" in response to First Nation's pressure.).

For example, the Royal Commission on Aboriginal Peoples had the monumental task of shedding light on the history of dispossession of Aboriginal Peoples in Canada and making recommendations to the federal government on how past wrongs could be resolved.<sup>43</sup> The commissioners concluded that current levels of poverty and underdevelopment are directly linked to the dispossession of Indigenous Peoples from their lands and the delegitimization of their institutions of society and governance.<sup>44</sup> The commissioners also concluded that land and governance questions needed to be resolved in a meaningful way.<sup>45</sup> The entire last volume of the Royal Commission's five-volume report to the federal government was dedicated to the Commission's recommendations for possible resolution.<sup>46</sup> In addition to its comprehensive recommendations, the Royal Commission highlighted the urgency and volatility of the situation and emphasized the need for timely and fundamental changes.<sup>47</sup>

The federal government's response to the Commission's efforts exemplifies the federal government's unwillingness to recognize Aboriginal Title and Rights. In "Gathering Strength," which speaks of "a renewed partnership with Aboriginal People and governments,"<sup>48</sup> and its response in "Agenda for Action with First Nations,"<sup>49</sup> the government claimed its willingness to develop a partnership with Indigenous Peoples. Yet, the way the government envisioned the "partnership," Indigenous Peoples would have had to recognize the existing land tenure system and abide by the very policies that the Royal Commission so emphatically discredited in its study.<sup>50</sup> This "partnership" was therefore nothing more than the government's endorsement of the status quo. Despite the efforts of the Royal Commission and its subsequent findings, the federal government chose to continue on as before and endorsed policies like the 1973 and 1986

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<sup>43</sup> See generally Royal Commission on Aboriginal Peoples, *supra* note 27.

<sup>44</sup> See Royal Commission on Aboriginal Peoples, 1 Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* §§ 11.2-11.4 (1996), available at [http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm\\_e.html](http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm_e.html).

<sup>45</sup> See Royal Commission on Aboriginal Peoples, 2 *Report of the Royal Commission on Aboriginal Peoples* §§ 4-6 (1996), available at [http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm\\_e.html](http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm_e.html).

<sup>46</sup> See Royal Commission on Aboriginal Peoples, 5 *Report of the Royal Commission on Aboriginal Peoples* (1996), available at [http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm\\_e.html](http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm_e.html).

<sup>47</sup> See *id.* § 2.

<sup>48</sup> Minister of Indian and Northern Affairs Canada, *Gathering Strength: Canada's Aboriginal Action Plan* (1997), available at [http://www.ainc-inac.gc.ca/gs/chg\\_e.html](http://www.ainc-inac.gc.ca/gs/chg_e.html).

<sup>49</sup> Minister of Indian and Northern Affairs Canada, *Agenda for Action with First Nations* (1998), available at [http://www.ainc-inac.gc.ca/gs/agn\\_e.html](http://www.ainc-inac.gc.ca/gs/agn_e.html).

<sup>50</sup> See generally ABORIGINAL RIGHTS COALITION, *BLIND SPOTS: AN EXAMINATION OF THE FEDERAL GOVERNMENT'S RESPONSE TO THE REPORT OF THE ROYAL COMMISSION ON ABORIGINAL PEOPLES* (Patricia Sherlock ed., 2001).

Comprehensive Claims Policies that subject its Indigenous populations to subjugation and suffering.

### C. Continuing Violations of International Human Rights

The growing gap between the findings of the Royal Commission and the rulings of the Supreme Court of Canada on the one hand, and the actions of the federal government on the other, drew the attention of numerous international human rights bodies. In December of 1998, the United Nations Committee on Economic, Social and Cultural Rights presented its concluding observations on the reports submitted by the government of Canada pursuant to Articles 16 and 17 of the Covenant on Economic, Social and Cultural Rights.<sup>51</sup> In its report, the Committee made reference to the disparity between the living conditions for non-indigenous and indigenous Canadians:

3. The Committee notes that, for the past five years, Canada has been ranked at the top of the United Nations Development Programme's Human Development Index (HDI). . . .

. . . .

17. The Committee is greatly concerned at the gross disparity between Aboriginal [P]eople and the majority of Canadians with respect to the enjoyment of Covenant rights. There has been little or no progress in the alleviation of social and economic deprivation among Aboriginal [P]eople. . . .

18. The Committee views with concern the direct connection between Aboriginal economic marginalization and the ongoing dispossession of Aboriginal [P]eople from their lands, as recognized by RCAP, and endorses the recommendations of RCAP that policies which violate Aboriginal treaty obligations and the extinguishment, conversion or giving up of Aboriginal rights and title should on no account be pursued by the State Party. . . .<sup>52</sup>

The Committee, concerned about the poor standard of living among Aboriginal Peoples, the inadequate food and housing, the inadequate legal protection, and the mass unemployment, found Canada to be in violation of the Covenant on Economic, Social and Cultural Rights.<sup>53</sup> The following year, the United Nations Human Rights Committee reviewed the fourth periodic report submitted by Canada and came to similar conclusions:

The Committee notes that, as the State party acknowledged, the situation of the [A]boriginal [P]eoples remains 'the most pressing

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<sup>51</sup> See generally U.N. ESCOR, 19th Sess., 57th mtg. U.N. Doc. E/C.12/1/Add.31 (1998).

<sup>52</sup> *Id.* at 2, 4.

<sup>53</sup> *Id.* at 4.

human rights issue facing Canadians'. In this connection, the Committee is particularly concerned that the State party has not yet implemented the recommendations of the Royal Commission on Aboriginal Peoples (RCAP). With reference to the conclusion by RCAP that without a greater share of lands and resources institutions of aboriginal self-government will fail, the Committee emphasizes that the right to self-determination requires, *inter alia*, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence . . . .<sup>54</sup>

Since then, the United Nations Committee on the Elimination of Racial Discrimination (CERD) has noted similar concerns with regard to Canada's policies on land rights and self-government.<sup>55</sup> Despite repeated findings of human rights violations regarding Indigenous Peoples in Canada, the Canadian government has done nothing to act in accordance with the recommendations of the various United Nations human rights bodies.

#### D. Exploring Alternative Avenues

A growing number of Indigenous Nations from Canada are attempting to draw the international community's attention to the federal government's violations of international law. Although international human rights bodies, such as the United Nations, have repeatedly found Canada to be in violation of international law, these bodies lack the power enforcing their decisions at the international level.<sup>56</sup> Thus, Indigenous Peoples in Canada are now faced with the challenge of remedying the constitutional crisis facing them and are attempting on their own to right the wrongs recognized by international human rights organizations.

One avenue considered by Indigenous Peoples and organizations is a return to the Canadian courts for judicial remedies. There are some Aboriginal Title and rights cases currently underway before Canadian courts.<sup>57</sup> However, it takes over ten years and substantial funds for an Aboriginal Title case to wind its way through the Canadian judicial system.

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<sup>54</sup> *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee*, U.N. Human Rights Committee, 65th Sess., at ¶ 8, U.N. Doc. CCPR/C/79/Add.105 (1999).

<sup>55</sup> *Report of the Committee on the Elimination of Racial Discrimination*, U.N. GAOR, 57th Sess., at 58, U.N. Doc. A/57/18 (2002).

<sup>56</sup> See, e.g., U. N. ESCOR, *supra* note 51, at 2, 4.

<sup>57</sup> See, e.g., Brian Thom, *Rising to the Test: Meeting Lamer's Tests for Aboriginal Rights and Title After Delgamuukw*, Meeting of the Canadian Anthropology Society, at <http://home.istar.ca/~bthom/tests.htm> (May 1999) (discussing several recent cases regarding Aboriginal Title).

Hampered by an inability to pay the necessary fees to successfully win a judgment and the need for quicker resolution, most Aboriginal Nations are unable to utilize the Canadian court option.

A number of Indigenous Peoples, unable to wait ten years for a resolution of their rights, have taken alternative actions to assert and protect their Aboriginal Title. For example, many Indigenous Peoples have actively tried to stop the exploitation of natural resources on their lands by blocking access to mining and logging sites.<sup>58</sup> In response, affected corporations seek injunctions, those are interim remedied in which the courts weigh the economic loss of the corporations against the interests of Indigenous Peoples.<sup>59</sup> Based on a minimal showing of hardship and often without a hearing, the injunctions are granted. Once these injunctions are granted, Indigenous Nations are then faced with a decision: obey the order or be found in contempt of court.<sup>60</sup> Unable to get the federal and provincial governments to recognize their rights, Indigenous Peoples across Canada now face criminal prosecution for exercising what the Supreme Court of Canada has already deemed a constitutional right.

Another avenue for Indigenous Peoples is to enlist the international community. By lobbying for the international recognition of indigenous rights, pointing to Canadian violations of international human rights laws, and calling for the enforcement of the financial and social responsibilities of international corporations that are active on Indigenous lands, the Indigenous Peoples of Canada strive to win recognition of their Aboriginal Title and rights from the international community.

### III. CHALLENGING THE STATUS QUO: ASSERTING INDIGENOUS PROPERTY RIGHTS ON AN INTERNATIONAL LEVEL

As alluded to above, Indigenous Peoples adapt to changing realities and use different avenues to maintain their inherent rights. Indigenous rights, especially property rights, are *sui generis*, defined by respective Indigenous laws, which maintain a strong connection to traditional territories.<sup>61</sup> Indigenous rights are extremely multifaceted, containing social, cultural, environmental and economic dimensions. Per their customs,

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<sup>58</sup> See Julia E. Lawn, *The John Doe Injunction in Mass Protest Cases*, 56 U. TORONTO FAC. L. REV. 101 (1998).

<sup>59</sup> See *id.* at 104.

<sup>60</sup> See *id.*

<sup>61</sup> *Delgamuukw*, [1997] 3 S.C.R. at 1014.

Indigenous Peoples see and assert their rights in a holistic manner. However, because of ever-changing political and legal climates, Indigenous Peoples have been forced to venture into the unchartered territory of international law to assert their proprietary interests and win recognition of their inherent rights.

A. How International Trade Agreements Threaten to Undermine Indigenous Rights

The 1990s was an important decade in terms of recognition of Indigenous rights, both in Canada and across the Americas. Today, many new Latin American constitutions not only recognize, but also protect Indigenous rights and jurisdictions.<sup>62</sup> The 1990s also saw an increased strengthening of international trade law regimes. One of the most significant was the creation of the WTO and the passage of its new Dispute Settlement Understanding, which strengthens sanctions and enforcement mechanisms for international trade law.<sup>63</sup>

Yet, despite these gains, there were losses in the international arena. In North America, the North American Free Trade Agreement (NAFTA) entered into force on January 1, 1994 and proved to be a setback for the recognition of Indigenous rights.<sup>64</sup> The same day of its enactment, Indigenous Peoples in the Southern Highlands of Mexico staged the Zapatista uprising in protest.<sup>65</sup> The reason for the protest lied in Mexico's elimination of all constitutional protections for collective Indigenous land rights in order to comport with the membership requirements of NAFTA.<sup>66</sup> NAFTA secures increased corporate access to natural resources and threatens to freeze environmental, social, and human rights standards.

Chapter 11 of NAFTA, the Investor State Chapter, allows international corporations to sue states for expropriation or loss of their investments.<sup>67</sup> If a regulation deprives a company of the

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<sup>62</sup> See Theodore McDonald, *Indigenous Rights: Configuring Citizenships*, REVISTA: HARVARD REVIEW OF LATIN AMERICA (2003), available at [http://drclas.fas.harvard.edu/revista/tcontents\\_issue.php?issue=15&article=291](http://drclas.fas.harvard.edu/revista/tcontents_issue.php?issue=15&article=291); North American Free Trade Agreement, Jan. 1, 1994, U.S.-Can.-Mex., art. 1110, 32 I.L.M. 289.

<sup>63</sup> For more information on the WTO's Dispute Settlement Understanding, please visit [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm).

<sup>64</sup> See WILLIAM J. DAVEY, PINE & SWINE: CANADA-UNITED STATES TRADE DISPUTE SETTLEMENT: THE FTA EXPERIENCE AND NAFTA PROSPECTS 2 (1996).

<sup>65</sup> See Amelia M. DeAngelis, Note, *Coffee, Mexico's Other Bean: An Examination of the Globalization of the Coffee Industry, its Impact on Mexican Villages, and the Possibility of Surviving the Grind*, 3 WASH. U. GLOBAL STUD. L. REV. 887 (2004). See also [http://www.abstractdynamics.org/archives/2004/01/02/zapatista\\_nafta.html](http://www.abstractdynamics.org/archives/2004/01/02/zapatista_nafta.html).

<sup>66</sup> *Id.*

<sup>67</sup> North American Free Trade Agreement, Jan. 1, 1994, U.S.-Can.-Mex., art. 1110, 32 I.L.M. 289.

right to profit from its investment, or even invest in the first place, the foreign corporation is entitled to fair market value compensation for the “expropriation” of its profits.<sup>68</sup> NAFTA provisions on investment and the rights of investors contained in Chapter 11 not only grant preferential treatment to foreign investors but also guarantees them the right to invest despite domestic laws and regulations. Moreover, in the case of a change in public policy (i.e. environmental protection) corporations can claim expropriation for the mere loss of opportunities.<sup>69</sup> Thus, foreign investors now have the ability to sue countries where they have lost profits, or have been prohibited from investing in the first place, even where domestic companies could not do the same.<sup>70</sup>

As a result of international trade agreements like NAFTA, Indigenous Peoples are in direct competition with multinational corporations for control over their lands. While multinational firms can sue even for the expropriation of future profits, Indigenous Peoples still have not been able to secure the implementation of their ancestral land rights. Indigenous Peoples are still fighting to stop the expropriation and third party alienation of their lands and resources. Unfortunately, Indigenous Peoples are fighting this fight without much in the way of ammunition. With no remuneration rights and with few efficient remedies available to enforce recognized rights, Indigenous Peoples are fighting an uphill battle against the illegal expropriation of their lands by multinational companies.

#### IV. THE SOFTWOOD LUMBER DISPUTE: DEALING WITH INDIGENOUS PROPERTY RIGHTS

##### A. The Perspective of the Indigenous Peoples of British Columbia

The Indigenous Peoples of the South Central Interior of British Columbia have never given up their land rights. Even as far back as 1910, the Indian tribes of the Interior of British Columbia gathered to call upon the then Prime Minister of Canada, Sir Wilfrid Laurier, to recognize their proprietary interests:

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<sup>68</sup> *Id.*

<sup>69</sup> For example, on August 25, 2000, a NAFTA Chapter 11 tribunal ordered the government of Mexico to pay an American company, Metalclad, almost seventeen million U.S. dollars because a Mexican community refused to allow the company to operate a waste disposal site on ecologically sensitive land. Stephen L. Kass & Jean McCarroll, *The 'Metalclad' Decision Under NAFTA's Chapter 11*, N.Y.L.J., October 27, 2000, at 3.

<sup>70</sup> North American Free Trade Agreement, *supra* note 67, arts. 1115-38.

The whites made a government in Victoria . . . . At this time they did not deny the Indian tribes owned the whole country and everything in it. . . . We trusted the whites and waited patiently for their chiefs to declare their intentions toward us and our lands. . . . They told us to have no fear, the queen's laws would prevail in this country, and everything would be well for the Indians here. . . . They let us think this would be done soon . . . .<sup>71</sup>

They also made it very clear that they did not accept reservations as a replacement for their rights to the land:

This was their proposal not ours, and we never accepted these reservations as settlement for anything, nor did we sign any papers or make any treaties about same. They thought we would be satisfied with this, but we never have been satisfied and never will be until we get our rights.<sup>72</sup>

When the Supreme Court of Canada finally recognized Aboriginal Title in 1997,<sup>73</sup> Indigenous Peoples in the Interior of British Columbia celebrated. Expectations were that the Canadian government would act promptly to implement the Supreme Court decision, just as the government of Australia had done by passing the Native Title Act one year after its High Court recognized inherent Indigenous land rights.<sup>74</sup> The Interior Alliance, an organization consisting of Interior Tribes of British Columbia, called on the federal and provincial governments to recognize and implement Aboriginal Title.<sup>75</sup> As discussed previously, that recognition and implementation never came. So in 1999, the leaders of the Interior Tribes decided that it was time to take action.

#### B. Attacking the Lumber Industry: The Fight in British Columbia

The dominant industry in the Interior of British Columbia is forestry,<sup>76</sup> and, for the past 50 years, the majority of land tenure has been allocated to large integrated wood-processing corporations holding long-term renewable licenses.<sup>77</sup> The

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<sup>71</sup> Memorial from the Chiefs of the Shuswap, Okanagan and Couteau Tribes of British Columbia, to Sir Wilfrid Laurier 3 (August 25, 1910), *available at* <http://www.secwepemc.org/memorial.htm>.

<sup>72</sup> *Id.* at 4.

<sup>73</sup> *Delgamuukw*, [1997] 3 S.C.R. at 1014.

<sup>74</sup> See *Mabo v. Queensland* [No 2] (1992) 175 CLR 1.

<sup>75</sup> See Richard Cowan, *Environmentalists, Tribes Seek Duties on Canada Lumber*, Canada Forest Conservation News & Information, *available at* <http://forests.org/archive/canada/entrseek.htm> (May 11, 2001).

<sup>76</sup> British Columbia Ministry of Management Services, *British Columbia Manufacturing Shipments 1997-2004*, *available at* <http://www.bcstats.gov.bc.ca/data/dd/handout/mannaics.pdf> (showing that wood and paper make up over 50% of British Columbia's manufacturing shipments).

<sup>77</sup> Roland Stiven, *Social Involvement in Forestry: Eight Cases Studies from British*



recognition of Aboriginal Title would therefore require a major reallocation of land tenure away from these corporations. To win recognition of proprietary rights in the lumber industry would not only equate recognition of Aboriginal Title but would also serve to protect the natural resources Indigenous Peoples have relied on for so long.

In their efforts to assert Aboriginal Title via the lumber industry, some Indian Nations issued logging permits pursuant to their jurisdiction under Section 35 of the Canadian Constitution.<sup>78</sup> These permits allowed the permit holder to log on a small cut block according to the highest environmental standards. No provincial permits were acquired. In September 1999, a number of Indian bands, including the Adams Lake, Neskonlith and Spallumcheen Indian bands, went logging with the authorization and in the name of their Secwepemc Nation.<sup>79</sup> Similarly the Okanagan Indian Band went logging in the name of the Okanagan Nation. The province of British Columbia charged them with stealing the timber.<sup>80</sup> In return, the Indian bands brought a defense, arguing that they had property rights in the timber and asserted Aboriginal Title as their defense.<sup>81</sup>

The case regarding the property rights of Interior Tribes over timber will be heard in the British Columbia Supreme Court in 2006. While the final outcome is years away, the Aboriginal Peoples have already won one major battle in *British Columbia v. Okanagan Indian Band*.<sup>82</sup> Due to the socio-economic status of many of the tribes involved, the Indian bands argued that they were not in a financial position to properly fight a case of substantial national importance.<sup>83</sup> The British Columbia Court of Appeal agreed.<sup>84</sup> The Court held that the provincial government would have to pay for the Indian plaintiffs' legal costs.<sup>85</sup> The Supreme Court of Canada, finding the case to be of national importance, upheld the cost decision.<sup>86</sup>

Yet, with no final ruling in sight and an initial trial set to

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*Columbia and Quebec*, The Caledonia Centre for Social Development, at <http://www.caledonia.org.uk/socialand/canada.htm> (Aug. 2000).

<sup>78</sup> Section 35 of the Canadian Constitution guarantees Aboriginal rights. See Richard Spaulding, *Peoples as National Minorities: A Review of Will Kymlicka's Arguments for Aboriginal Rights from a Self-Determination Perspective*, 47 U. TORONTO L.J. 35 (1997).

<sup>79</sup> *British Columbia v. Jules*, [2001] 92 C.R.R. 2d 319.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> [2003] 3 S.C.R. 371.

<sup>83</sup> *Id.* at 373.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

start seven years after the logging took place, the issue of who controls the forests of British Columbia might be sidelined in the Canadian courts for decades. During this time, the integrated wood processing corporations, with government support, may continue to exploit and potentially exhaust the forestry resources in the respective Indigenous territories. Therefore, while Indigenous Peoples continue to seek recognition of their Aboriginal Title and rights in the Canadian Courts, they continue to look for other avenues through which they can assert and protect their property rights.

### C. Beyond British Columbia: The Fight Against the Lumber Industry and the United States

The Interior Alliance, deciding to take its struggle to the international level, turned to the United States. The U.S. is the main export market for timber and lumber from Canada, with a major share originating from the Interior of British Columbia.<sup>87</sup> The year 2000, when representatives of the Interior Tribes first headed to the United States, was just the right year to start discussing forestry imports from Canada and the associated violations of Indigenous rights. The Softwood Lumber Agreement imposing export quotas on Canadian lumber producers, entered into force on April 1, 1996, was set to expire on March 31, 2001.<sup>88</sup>

In 2000, it was already clear that both countries wanted the quota system to end and that the Softwood Lumber Agreement would not be extended. Canadian producers were pushing for free trade in lumber and unlimited access to the U.S. market.<sup>89</sup> The U.S. lumber industry, claiming injury from cheap Canadian lumber imports, pushed Senators from the most affected U.S. states for a stronger stand on Canadian lumber imports and fundamental changes in the land tenure and wood allocation system.<sup>90</sup> Environmental groups that opposed clear-cutting and

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<sup>87</sup> The Interior of British Columbia is not only a stronghold of Aboriginal Title, but it is also the heartland of softwood lumber exploitation. Canadian softwood lumber exports to the United States amount to over six billion dollars annually, making it the single-largest trade good between the two countries. See International Trade Canada, *Softwood Lumber*, at <http://www.dfait-maeci.gc.ca/eicb/softwood/intro-en.asp> (last modified March 26, 2004). More than 40% of the exports come from British Columbia, and the majority of that lumber originates from the traditional territories of Indigenous Peoples in the Interior. See British Columbia Ministry of Management Services, *supra* note 76. See also Greg Mastel, *Stopping the Giveaway of Canada's Forests: Establishing True Free Trade in Softwood Lumber* (Oct. 2000), at [http://www.newamerica.net/Download\\_Docs/pdfs/Pub\\_File\\_628\\_1.pdf](http://www.newamerica.net/Download_Docs/pdfs/Pub_File_628_1.pdf).

<sup>88</sup> See Greg Mastel, *supra* note 87, at 8.

<sup>89</sup> *Id.*

<sup>90</sup> Sign on Letter from United State Senate to US Department Of Commerce and

forestry practices in Canada supported this position.<sup>91</sup>

Groups from Canada and the United States submitted their concerns in response to a call for positions regarding the Softwood Lumber Agreement issued by the U.S. Trade Representative.<sup>92</sup> For the first time in the history of international trade disputes, Indigenous Nations from Canada also submitted their positions.<sup>93</sup> The Interior Alliance made a submission based on Aboriginal Title to their traditional territories, detailing the refusal of the Canadian government to let them share in the management of the land and its resources.<sup>94</sup>

At the same time, the Interior Alliance also lobbied the U.S. Congress, which was more understanding of the threats to Indigenous rights than the Canadian government had ever been. The co-chairs of the Human Rights Caucus of the House of Representatives circulated a special sign-on letter entitled "Canadian Logging Threatens First Nations Habitats: Support Native Peoples' Right for Self-Determination in Canada."<sup>95</sup> This letter stated "[i]t appears that while (Native) rights are being defined in the court system that Canadian logging companies are trampling them by clear-cutting these forest areas for profit, at the same time eviscerating valuable wildlife habitat and medicinal plants that are used by these people."<sup>96</sup>

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United States Trade Representative, (July 17, 2000) (on file with author).

<sup>91</sup> See, e.g., Letter from Northwest Ecosystem Alliance, et al., to The Hon. Marc Racicot, Special Ambassador, U.S./Canada Softwood Lumber (February 13, 2002), available at <http://albertawilderness.ca/News/NR2002/NR020213/LET020213NKNB/LET020213NKNB.htm>.

<sup>92</sup> Request for Public Comment Regarding Softwood Lumber Practices in Canada and Softwood Lumber Trade Between the United States and Canada, Office of the United States Trade Representative, 65 Fed. Reg. 11363 (2000).

<sup>93</sup> It was important for Indigenous Peoples to be involved in the U.S.-Canada Softwood Lumber Dispute because it touched the core of their livelihood and deeply impacted their Aboriginal Title and rights. Canadian softwood lumber imports also impact Native American tribes in the United States: through self-determination and self-rule many tribes, especially those in the Pacific Northwest, have gained control over forestry on their lands. Those tribes have developed sustainable forest management practices that make it impossible for them to compete with cheap Canadian lumber imports that neither take into account Indigenous rights nor environmental standards when harvested. See, e.g., Ernie Atencio, *After a Heavy Harvest and a Death, Navajo Forestry Realigns with Culture*, HIGH COUNTRY NEWS, available at <http://www.hcn.org/servlets/hcn.URLRemapper/1994/oct31/dir/wr4.html> (stating that BIA's interest in Indian self-determination has led to the Navajo Indians saving the rest of their forests).

<sup>94</sup> See *Canadian First Nations Join Together in Washington, DC to Present Views on Softwood Lumber Agreement*, KAHTOU NEWS, May 2000, available at <http://www.kahtou.com/images/lumber.html>.

<sup>95</sup> Sign-on Letter from Tom Lantos et al., entitled *Canadian Logging Threatens First Nations Habitats: Support Native Peoples' Right for Self-Determination in Canada* (2000) (on file with author).

<sup>96</sup> *Id.*

## D. The Softwood Lumber Dispute: United States v. Canada

The U.S.-Canada Softwood Lumber Dispute has been one of the most contentious trade issues between these two neighboring countries in the past few decades.<sup>97</sup> In the early 1980s, the U.S. lumber industry organized under the Coalition for Fair Lumber Imports (CFLI).<sup>98</sup> CFLI argued that the Canadian government was, through non-competitive allocation, subsidizing the timber production of Canadian producers.<sup>99</sup> At issue was “whether fees charged by provincial authorities to lumber firms to harvest trees on public land (stumpage rights) [were] artificially low and constitute[d] countervailable subsidies.”<sup>100</sup> In response to CFLI’s contentions, the U.S. Department of Commerce investigated and found that the actions of the provincial governments might be inflicting material injury on U.S. industry.<sup>101</sup> In what is known as *Softwood Lumber I*, the Department of Commerce found that stumpage was a good but was unable to conclude that the Canadian government significantly subsidized its industry.<sup>102</sup>

The U.S. lumber industry was undeterred, however, and brought another complaint in 1986: *Softwood Lumber II*.<sup>103</sup> Due to changes in its interpretation of U.S. countervailing duties law, the Department of Commerce departed from its decision three years earlier and found “Canada’s timber pricing and allocation policies [did] constitute a countervailable subsidy.”<sup>104</sup> Facing a preliminary decision to impose a provincial duty of fifteen percent or more, the Canadian government entered a last minute agreement in December 1986 which imposed a fifteen percent

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<sup>97</sup> Debates of the Senate (Hansard), 1st Session, 38th Parliament, Volume 142, Issue 11, November 2, 2004, available at [http://www.parl.gc.ca/38/1/parlbus/chambus/senate/deb-e/011db\\_2004-11-02-E.htm?Language=E&Parl=38&Ses=1](http://www.parl.gc.ca/38/1/parlbus/chambus/senate/deb-e/011db_2004-11-02-E.htm?Language=E&Parl=38&Ses=1) (statement from Hon. Jack Austin stating that “[g]iven the dependence of the British Columbia economy on the United States market, the long dispute with the lumber industry in the United States over their trade protectionism and claims of harm to their industry goes on and on and continues to damage B.C. interests and Canada-United States trade relations.”).

<sup>98</sup> GEORGE HOBERG & PAUL HOWE, LAW, KNOWLEDGE AND NATIONAL INTERESTS IN TRADE DISPUTES: THE SOFTWOOD LUMBER CASE 4 (Univ. of British Columbia, Inst. of Int’l Relations, Working Paper No. 29, 1999), available at <http://www.iir.ubc.ca/pdffiles/webwp29.pdf>.

<sup>99</sup> See Letter from Coalition for Fair Lumber Imports to Undersecretary of Commerce Grant Aldonas and Deputy U.S. Trade Representative Peter Allgeler (June 16, 2003), available at <http://www.ftlc.org/index.cfm?Section=2&DownloadID=79> (discussing need for negotiations on subsidized and dumped Canadian lumber).

<sup>100</sup> Gilbert Gagne, *The NAFTA and the Softwood Lumber Dispute: What Kind of Canada-U.S. Partnership?* 3 (November 2002), at [http://www.unites.uqam.ca/gric/pdf/Cahier\\_Gagne.pdf](http://www.unites.uqam.ca/gric/pdf/Cahier_Gagne.pdf).

<sup>101</sup> *Id.* at 12.

<sup>102</sup> Final Negative Countervailing Duty Determinations on Certain Softwood Lumber Products from Canada, 48 Fed. Reg. 24,159 (1983).

<sup>103</sup> Gilbert Gagne, *supra* note 100, at 7.

<sup>104</sup> *Id.* at 8.

export tax on all softwood lumber exported to the U.S.<sup>105</sup> After this agreement expired in 1991, another countervailing duty investigation was launched. In 1992, following the conclusion of its investigation, the Department of Commerce imposed a six and a half percent duty on Canadian imports.<sup>106</sup>

Canada launched three appeals against the duty determination, including one under the terms of the General Agreement on Tariffs and Trade (GATT),<sup>107</sup> but no decision was ever adopted or publicized. This was primarily due to the weak dispute settlement procedures that were then in place. At that time, two bi-national panels had been set up under the Canada-U.S. Free Trade Agreement (CUSFTA) – one to look at the question of injury, another to look at the question of subsidies.<sup>108</sup> Due to a lack of evidence, neither panel agreed with the decisions of the U.S. authorities and sent the cases back for further consideration.<sup>109</sup>

The Department of Commerce maintained its decision to impose a duty on Canadian imports.<sup>110</sup> After the bi-national panel rejected it once more, the Department of Commerce resorted to a procedure provided for in the CUSFTA, which allowed it to bring its case before an Extraordinary Challenge Committee.<sup>111</sup> Voting along national lines, the Committee rejected the U.S. appeal in 1994.<sup>112</sup> The United States had to rescind its countervailing duties and frustrations with the partisan dispute settlement process were great.<sup>113</sup>

In 1994, when Canadian exports to the U.S. hit a record 16.4 billion board feet, the U.S. industry proclaimed its readiness to launch another countervailing duty investigation.<sup>114</sup> Instead, bi-national discussions between the U.S. and Canada were launched in 1995 and an agreement, now known as the Softwood Lumber Agreement, was reached. This agreement imposed a quota system that allowed British Columbia, Alberta, Ontario, and Quebec to export 14.7 billion board feet of lumber to the U.S.

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<sup>105</sup> *Id.*

<sup>106</sup> Final Affirmative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada, 57 Fed. Reg. 22,570 (1992).

<sup>107</sup> *Gagne, supra* note 100, at 9-11.

<sup>108</sup> *Id.* at 11.

<sup>109</sup> *See id.* at 12.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 13.

<sup>112</sup> *See DAVEY, supra* note 64, at 232.

<sup>113</sup> *Gagne, supra* note 100, at 13-14.

<sup>114</sup> *U.S.-Canada Trade Agreement Timeline, 1982-Present* (Random Lengths Publications, Inc.), March 29, 2005, at 7, available at [http://www.randomlengths.com/base.asp?s1=In\\_Depth&s2=U.S.-Canada\\_Trade\\_Dispute&s3=U.S.-Canada\\_Trade\\_Agreement\\_Timeline\\_1995-present](http://www.randomlengths.com/base.asp?s1=In_Depth&s2=U.S.-Canada_Trade_Dispute&s3=U.S.-Canada_Trade_Agreement_Timeline_1995-present).

annually without penalty.<sup>115</sup> The Softwood Lumber Agreement went into effect on April 1, 1996 and expired on March 31, 2001.<sup>116</sup> The following day, on April 1, 2001, the U.S. softwood lumber industry, represented by CFLI, brought its petition alleging that,

[t]he Government of Canada and Canadian provincial governments are providing countervailable subsidies with respect to the export, manufacture and production of softwood lumber (the “Subject Merchandise”), within the meaning of Section 701 and 702(b) of the Tariff Act of 1930 (the “Tariff Act”), 19 U.S.C. §§ 1671 and 1671a(b).<sup>117</sup>

#### 1. First Indigenous Submissions to International Trade Tribunals

In May 2001, the U.S. Department of Commerce once again began an investigation into softwood lumber imports from Canada (*Softwood Lumber III*).<sup>118</sup> This was the first investigation into the subsidization of Canadian lumber since the recognition of Aboriginal rights to land and resources in the *Delgamuukw* Decision. Understanding the pressure that free trade in natural resources was putting on Aboriginal lands and economies, the Aboriginal Peoples of the Interior decided to involve themselves in the dispute. They filed substantive submissions with the U.S. Department of Commerce, alleging that the non-recognition of Aboriginal Title constituted a subsidy under international trade law.<sup>119</sup>

The investigative authorities, although interested in this novel issue, lacked both the expertise and the time to investigate these additional subsidy claims in detail. Instead, the Department of Commerce found that the potential subsidies for the non-recognition of Aboriginal Title and non-implementation of treaties and environmental provisions would be included in the overall market value: “[T]o the extent that Canadian lumber companies are being provided with stumpage from provincial governments, we are measuring that financial contribution in our preliminary determination based upon a market rate for

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<sup>115</sup> *Id.* at 8.

<sup>116</sup> *Id.*

<sup>117</sup> Petition for the Imposition of Antidumping Duties Pursuant to Section 731 of the Tariff Act of 1930 as Amended, at 1, In Matter of Certain Softwood Lumber Products from Canada, USITC Inv. No. A-122-838 (April 2, 2001), available at <http://www.dbtrade.com/casework/softwood/Common%20Volume.pdf>.

<sup>118</sup> See Gagne, *supra* note 100, at 20.

<sup>119</sup> Charles M. Gastle, *Shadows of a Talking Circle: Aboriginal Advocacy Before International Institutions and Tribunals*, at 31 (Dec. 2002), at [http://www.esteycentre.ca/ShadowsOfATalkingCircle\\_final.pdf](http://www.esteycentre.ca/ShadowsOfATalkingCircle_final.pdf).

stumpage.”<sup>120</sup> The U.S. Department of Commerce then went on to deliver its preliminary decision in the *Softwood Lumber III* and imposed countervailing duties of 19.31 percent on all Softwood Lumber Imports from Canada.<sup>121</sup>

Throughout *Softwood Lumber III*, Canada openly opposed submissions by Indigenous Peoples, arguing that questions of land rights had to be first dealt with in Canadian courts.<sup>122</sup> Knowing that Aboriginal Title cases take decades to litigate, the federal government was attempting to perpetuate its “business as usual” approach: ignore the already constitutionally recognized Aboriginal rights within the territories at issue and encourage the exploitation of the natural resources by Canadian companies. Aboriginal Peoples understood that they had to continue to assert their rights in venues outside Canada in order to stop the third party alienation and exploitation of their lands and resources. Despite Canada’s attempt to block indigenous participation in the Softwood Labor Dispute, organizations like the Interior Alliance pressed on to ensure that their voices were heard.

## 2. Rejection of the “Business as Usual” Approach: Strengthening the Indigenous Position in the Softwood Labor Dispute

Interior Alliance’s position that it had a right to continue participating in the Softwood Lumber Dispute despite Canada’s opposition was strengthened by rulings of Canadian courts rejecting Canada’s “business as usual” approach.” One such decision, *Haida Nation v. British Columbia*, rendered on February 27, 2002 by the Court of Appeal for British Columbia, further defined Canada’s legal obligations towards Indigenous Peoples.<sup>123</sup> In its holding that indigenous interests have to be accommodated and taken into account on a provincial level, the Court inferred that indigenous rights must also be accounted for on both the national and international level.<sup>124</sup>

The decision was especially relevant to the Softwood Lumber

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<sup>120</sup> *Id.* at 34.

<sup>121</sup> Notice of Preliminary Affirmative Countervailing Duty Determination, Preliminary Affirmative Political Circumstances Determination, and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination: Certain Softwood Lumber Products from Canada, 66 Fed. Reg. 43,186 (2001).

<sup>122</sup> For more information on Canada’s opposition, see Arthur Manuel and Nicole Schabus, *Aboriginal Peoples v. Companies and Governments: Who are the Real Stewards of the Land and Forests?* 4 (2002), available at <http://www.iiirm.org/publications/Articles%20Reports%20Papers/NYU%20Trade%20Conference/Schabus-Manuel%20Forestry%20Paper.pdf>.

<sup>123</sup> [2002] B.C.A.C. Lexis 130 ¶¶ 58, 60.

<sup>124</sup> *Id.* ¶ 58.

Dispute and is deserving of brief discussion here. The case dealt with the replacement of tree farm licenses and subsequent transfer of lands to large forestry firms on Haida Gwaii.<sup>125</sup> Haida Gwaii is an island claimed in its totality by the Indigenous Haida people who have lived there for many generations.<sup>126</sup> The Haida, claiming Aboriginal Title over the area, had always opposed any grant of right over their land. For a number of years leading up to the case, the Haida had consistently expressed their objections to the Crown about the rate at which the old-growth forests of Haida Gwaii were being logged, the methods of logging being used, and the environmental effects of the logging on the land, watersheds, fish, and wildlife.<sup>127</sup>

Yet, true to its “business as usual” policy, the Crown and Weyerhaeuser Company Ltd., a named co-defendant in the *Haida Nation* case, failed to recognize the proprietary interests of the Haida. In its opinion, the Court of Appeal for British Columbia condemned this “business as usual” approach:

[T]he Crown Provincial and Weyerhaeuser were in breach of an enforceable, legal and equitable duty to consult with the Haida people and to seek an accommodation with them at the time when the processes were under way for a replacement of T.F.L. 39 and Block 6 and for a transfer of T.F.L. 39 from MacMillan Bloedel to Weyerhaeuser in the year 2000. That enforceable legal and equitable duty has continued from then until the present time and will continue until the Haida title and rights are determined by treaty or by a Court of competent jurisdiction. . . .

. . . .

However, I would grant a declaration to the petitioners that the Crown Provincial and Weyerhaeuser have now, and had in 1999 and 2000, and earlier, a legally enforceable duty to the Haida people to consult with them in good faith and to endeavour to seek workable accommodations between the aboriginal interests of the Haida people, on the one hand, and the short term and long term objectives of the Crown and Weyerhaeuser to manage T.F.L. 39 and Block 6 in accordance with the public interest, both aboriginal and non-aboriginal, on the other hand.<sup>128</sup>

In a unanimous decision, the Supreme Court of Canada affirmed the lower court’s ruling on a duty to consult with regard to the Crown:

The government’s duty to consult with Aboriginal [P]eoples and accommodate their interests is grounded in the honour of the Crown.

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<sup>125</sup> *Id.* ¶¶ 20-23

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Haida*, [2002] B.C.A.C. Lexis 130, ¶¶ 58 & 60.



....

The jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution.<sup>129</sup>

The Supreme Court also held that the “honour of the Crown” could not be delegated and the legal responsibility for consultation and accommodation rested with the Crown.<sup>130</sup> This does not mean, however, that third parties can never be liable to Aboriginal Peoples. The court found that “[t]he fact that third parties are under no duty to consult or accommodate Aboriginal concerns does not mean that they can never be liable to Aboriginal [P]eoples.”<sup>131</sup>

The importance of this ruling to the Interior Nation’s position with regard to the Softwood Lumber Dispute is clear. In finding a duty to consult and accommodate Aboriginal Peoples, the Supreme Court supported the argument that the Canadian government’s refusal to recognize Aboriginal Title serves as a subsidy for Canadian lumber companies. In other words, the “honour of the Crown,” clearly mandates that the Canadian government recognize the proprietary interests of Indigenous Peoples. By failing to do so, the Canadian government is subsidizing corporations, allowing them to bypass their obligation of negotiation and remuneration. In other words, by refusing to acknowledge Aboriginal Title, the Canadian government is subsidizing an entire industry and making it easier for Canadian companies to exploit the lands of Indigenous Peoples.

## V. THE WTO: SETTING PRECEDENT ON SUBSIDIZATION

Since the preliminary determination of the U.S. Department of Commerce in the Softwood Lumber Dispute, Canada has brought the Softwood Lumber dispute before the international trade tribunals.<sup>132</sup> Dispute settlement panels have been set up under both the WTO and NAFTA to address Canada’s

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<sup>129</sup> *Haida Nation v. British Columbia*, [2004] 3 S.C.R. 511, 522, 528.

<sup>130</sup> *Id.* at 521.

<sup>131</sup> *Id.* at 539.

<sup>132</sup> In April 2002, the U.S. Department of Commerce released its final determination on subsidies and on dumping Canadian softwood lumber imports to the United States. The Department imposed a countervailing duty of 19.34% and antidumping margins ranging between 2.26 and 15.83. See Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances: Certain Softwood Lumber Products from Canada, 67 Fed. Reg. 15,545 (2002); Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products from Canada, 67 Fed. Reg. 15,539 (2002). For more information on WTO disputes please visit the WTO Dispute Settlement site at [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_status\\_e.htm#2002](http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm#2002).

complaints.<sup>133</sup> The first panel set up under the WTO addressed the U.S. Department of Commerce's preliminary determination imposing countervailing duties on certain softwood lumber from Canada. A second panel addressing the final countervailing duty determination soon followed.

#### A. Canada Arguing for Corporate Rights

The cases brought before the WTO by Canada disputing subsidization of softwood lumber have created important precedent as they were the first cases involving natural resource exploitation brought under the WTO's new Dispute Settlement Understanding. In its complaints, the government of Canada argued that the integrated wood-processing companies from Canada had quasi-proprietary interests in the timber growing on public lands in Aboriginal Title territories.<sup>134</sup>

Attempting to move the entire natural resource exploitation sector outside the scope of countervailing duty investigations, Canada argued in favor of timber harvesters:

Timber harvesters have the right to harvest timber from Crown lands by virtue of their tenures or licenses; they do not pay stumpage charges as remuneration to acquire this right. Rather, a "stumpage charge" is a levy on the exercise of an existing right to harvest timber. Stumpage charges are properly viewed as a form of revenue collection that is the economic equivalent of a tax.<sup>135</sup>

Canada argued that there should not be remuneration for the acquisition of the right to harvest timber.<sup>136</sup> Instead of remuneration for the provision of public timber, it contended that it was merely collecting part of an economic rent, like a tax.<sup>137</sup> Thus, companies that harvested the lumber could acquire limited ownership through the general licensing agreement long before they met all statutory requirements, including the payment of stumpage.<sup>138</sup> In other words, Canada tried to resurrect its already rejected contention that stumpage could not be subject to a countervailing duty because it was not a good.<sup>139</sup> In doing so,

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<sup>133</sup> See *DSB Establishes Panel to Examine Softwood Lumber Dispute*, WTO NEWS, Dec. 5, 2001, at [http://www.wto.org/english/news\\_e/news01\\_e/dsb\\_5dec01\\_e.htm](http://www.wto.org/english/news_e/news01_e/dsb_5dec01_e.htm); Status Report of Panel Proceedings: Active NAFTA Panel Reviews, at [http://www.nafta-sec-alena.org/DefaultSite/index\\_e.aspx?ArticleID=616](http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?ArticleID=616) (last modified July 25, 2003).

<sup>134</sup> See *Report of the Dispute Settlement Panel: United States - Preliminary Determinations With Respect To Certain Softwood Lumber From Canada*, World Trade Organization, Doc. No. WT/DS236/R (2002), ¶¶ 1.1-1.3 [hereinafter *WTO Panel Report*], available at <http://docsonline.wto.org>.

<sup>135</sup> *Id.* ¶ 4.117.

<sup>136</sup> *Id.* ¶¶ 4.116-4.122.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> To reiterate, international trade tribunals have consistently found that stumpage

the Canadian government was attempting to outmaneuver the imposition of a countervailing duty and the application of the WTO Subsidies and Countervailing Measures Agreement.<sup>140</sup>

#### B. Indigenous Peoples Make Their Case

In opposition to Canada's arguments that integrated wood processing companies had quasi-proprietary interests in the timber on Aboriginal Title lands, the Interior Alliance argued in its amicus curiae brief that there could be no transfer of ownership until they had given their consent and received fair remuneration.<sup>141</sup> Again, the Indigenous Peoples of Canada were forced to make their claim for Aboriginal Title and rights, despite the fact that the Canadian Constitution and Supreme Court had already recognized these rights. One of the reasons why the Interior Alliance chose to once again make its case was the pending reality that, if Canada's arguments were accepted by the WTO, it would have opened the way for free corporate access to natural resources within the traditional territories of Indigenous Peoples.<sup>142</sup> Therefore, the Interior Alliance felt it needed to submit its argument that the Canadian government's refusal to recognize Aboriginal Title constituted a subsidy.

Canada has always argued for a restrictive interpretation of terms like "direct subsidies," arguing that they could not be payments in kind because they were not a financial

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is a good. In three prior countervailing duty investigations covering softwood lumber products from Canada, the U.S. Department of Commerce determined that stumpage programs involve the provision of a good. See Final Negative Countervailing Duty Determinations: Certain Softwood Lumber Products from Canada, 48 Fed. Reg. 24,159, 24,167 (May 31, 1983); Preliminary Affirmative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada, 51 Fed. Reg. 37,453, 37,457 (Oct. 22, 1986); Final Affirmative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada, 57 Fed. Reg. 22,570, (May 28, 1992). In 1992, a GATT panel rejected Canada's contention that stumpage cannot be countervailing because it is not a good. See United States – Measures Affecting Imports of Softwood Lumber from Canada, GATT B.I.S.D., 40th Supp., (1993), at 358, ¶ 346-47 (Feb. 19, 1993), available at <http://www.sice.oas.org/dispute/gatt/91lumber.asp>.

<sup>140</sup> For more information on the WTO Subsidies and Countervailing Measures Agreement see [http://www.wto.org/english/tratop\\_e/scm\\_e/scm\\_e.htm](http://www.wto.org/english/tratop_e/scm_e/scm_e.htm).

<sup>141</sup> See Brief of Amici Curiae Interior Alliance Indigenous Nations, WTO Panel on US – Preliminary Determinations with Respect to Certain Softwood Lumber from Canada (No. DS-236) (2002) (on file with author) [hereinafter *Interior Alliance Amicus Brief*].

<sup>142</sup> If Canada's arguments had been accepted by the WTO, Aboriginal proprietary interests would have gotten lost somewhere in the process of resource distribution and would not form part of any economic equation or remuneration scheme. Under the guise that they were simply collecting economic rent, the provinces could, in the future, have continued to keep Indigenous Peoples out of all remuneration schemes. At present, Aboriginal Peoples are not remunerated for their ownership and have not passed on their ownership in the timber to the governments or companies. Therefore, those entities have not acquired full ownership at any point in the licensing, harvesting and marketing processes.

contribution.<sup>143</sup> Other countries, like the United States, have argued the opposite: payments in kind can be the basis for a direct subsidy.<sup>144</sup> The WTO appellate body, in previous cases, has also spoken on the issue, ruling against Canada and its restrictive interpretation that payments must be in the form of money: “[w]e, therefore, agree with the Panel that the ordinary meaning of the word ‘payments’ in Article 9.1(c) encompasses ‘payments’ made in forms other than money, including revenue foregone.”<sup>145</sup> Accordingly, it is not necessary that the cost for the reduced price of an input be born by the government.<sup>146</sup> It is deemed sufficient that such a transfer of resources takes place “by virtue of governmental action.”<sup>147</sup>

The past position of the WTO applied perfectly to the issue of an Aboriginal Title subsidy. The argument of the Indigenous Peoples of Canada was that the federal government’s Comprehensive Claims Policy was a subsidy.<sup>148</sup> That policy, along with its “business as usual” approach, constituted government actions that allowed corporations to exploit natural resources in the traditional territories of Indigenous Peoples without remuneration.<sup>149</sup> In other words, the policy of the Canadian government conferred a benefit on Canadian integrated wood processing corporations, amounting to what many consider a subsidy.<sup>150</sup>

### C. Indigenous Peoples’ Precedent: Amicus Brief Accepted

The Interior Alliance’s submission to the WTO presented the first ever substantive, rights-based Indigenous submission to an international trade tribunal. In making its finding, the WTO panel at the outset commented on its receipt of the amicus brief:

As a preliminary matter, we note that in the course of these proceedings, we decided to accept for consideration one unsolicited

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<sup>143</sup> See *WTO Panel Report*, *supra* note 134, ¶¶ 4.26-4.29.

<sup>144</sup> See *id.* ¶¶ 4.93-4.96.

<sup>145</sup> *Report of the Appellate Body: Canada - Measures Affecting The Importation Of Milk And The Exportation Of Dairy Products*, World Trade Organization, Doc. No. WT/DS103/AB/R (1999), ¶ 112, available at <http://docsonline.wto.org>.

<sup>146</sup> *Id.* ¶ 115.

<sup>147</sup> *Id.* ¶ 116.

<sup>148</sup> *Interior Alliance Amicus Brief*, *supra* note 141.

<sup>149</sup> *Id.*

<sup>150</sup> Further supporting the argument for the finding of a subsidy was the reality that a sale of lumber resources by the province of British Columbia without accounting for the revenue due to Indigenous Peoples directly contributed to the artificial undervaluing of the resource. *Interior Alliance Amicus Brief*, *supra* note 141. The amicus curiae brief also noted that the province of British Columbia had repeatedly refused to discuss revenue sharing with the Interior Alliance and the federal government had refused to change its Comprehensive Claims Policy that provides the Aboriginal Title subsidy to corporations. *Id.*

*amicus curiae* brief from a Canadian non-governmental organization, the Interior Alliance. This brief was submitted to us prior to the first substantive meeting of the Panel with the parties and the parties and third parties were given an opportunity to comment on this *amicus curiae* brief. After this meeting, we received three additional unsolicited *amicus curiae* briefs. For reasons relating to the timing of these submissions, we decided not to accept any of these later briefs.<sup>151</sup>

The official acceptance of the first ever substantive submission made by Indigenous Peoples to a WTO panel set an important procedural precedent. Prior to its acceptance, the WTO had rejected a number of *amicus curiae* briefs. The acceptance of the *amicus curiae* brief was hailed as a great breakthrough by non-governmental actors. While the ability to provide additional legal and substantive information on behalf of the Indigenous populations of Canada was important in and of itself, perhaps one of the most important results was a procedural one. In accepting the *amicus* brief, the WTO officially circulated the brief to all parties and third parties for their comments. By inviting comment on the brief, the WTO has taken a step towards opening the dialogue between nations and Indigenous Peoples, forcing countries who are parties to a WTO action to acknowledge and respond to the Indigenous position.<sup>152</sup>

Of the five parties in the case, only two countries objected to the acceptance of the brief. India objected on the grounds that the acceptance of *amicus curiae* submissions in WTO panel proceedings could open the door to industry. Its fear was that corporations, who often have more resources than governments of developing countries, could use the *amicus curiae* process to undermine the arguments and position of sovereign nations.<sup>153</sup> Not surprisingly, Canada also opposed the filing of the *amicus curiae* brief, contradicting its earlier position that *amicus curiae* briefs, usually filed in support of the government's position, should be considered. In the end, only the United States, unopposed to the submission of the *amicus curiae* brief, actually

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<sup>151</sup> *WTO Panel Report*, *supra* note 134, ¶ 7.2.

<sup>152</sup> Another procedural element determined by the WTO's acceptance of the brief was the timeline for third party involvement. Following the resolution of this dispute, Indigenous populations now know that, in WTO proceedings, third parties are only actively involved until the end of the first hearing by the panel or upon the panel's specific request. Any briefs received after the first panel hearing (such as the three additional briefs submitted in this case) will not be accepted.

<sup>153</sup> Aboriginal Peoples involved in proceedings before the WTO have since made it clear that they would not bring industry arguments, and that even if such arguments were brought by an Indigenous group arguing commercial-industrial interests over Aboriginal interests, they should be rejected. This was the case in the Softwood Lumber Dispute where the Meadow Lake Tribal Council filed a submission relying on industry arguments and the submission was rejected.

acknowledged the substantive argument posed in the brief in its second written submission to the panel.<sup>154</sup>

The acceptance of the amicus curiae brief did not end the involvement of the Aboriginal Peoples in the WTO proceedings. Unfortunately, the often-criticized lack of transparency of the WTO, hurt Aboriginal participation and involvement in the proceedings. For example, notification of the acceptance of their brief was only sent to the State parties, not the Aboriginal submitters. In addition, throughout the proceedings, Aboriginal Peoples were forced to rely heavily on discussions and information being passed on by other parties, especially third parties.<sup>155</sup> Despite some difficulty, the involvement of Aboriginal Peoples in the WTO proceedings was historic in and of itself. Almost more important was the ensuing communications that resulted between Aboriginal Peoples and state parties. For the first time, state parties had to conceptualize Aboriginal rights on an international level, contributing to an important learning process and a growing international awareness of Indigenous proprietary interests.

The general outcome of the WTO's investigation was also encouraging for Aboriginal Peoples. In general, Aboriginal Peoples support the finding of the WTO panel:

In sum, and in the context of Article 1.1(a)(1)(iii) SCM Agreement, we are of the view that where a government allows the exercise of harvesting rights, it is providing standing timber to the harvesting companies. From the perspective of the harvesting company the situation is clear: most forest land is Crown land, and if the company wants to cut the trees for processing or sale, it will need to enter into a stumpage contract with the provincial government, under which it will have to take on a number of obligations in addition to paying a stumpage fee for the trees actually harvested.<sup>156</sup>

In other words, the WTO found that Canada was providing a good through its present stumpage system. In so finding, the WTO also found that Canada's providing of this was a potential subsidy against which countervailing duties could be levied in measure of the benefit incurred by the industry.<sup>157</sup>

## VI. CONCLUSION

It must be recognized, in light of the WTO's holding, that Indigenous Peoples believe they hold collective proprietary

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<sup>154</sup> *WTO Panel Report*, *supra* note 134, ¶ 4.252-4.297.

<sup>155</sup> Even states that usually support high transparency, such as the member states of the European Union, often feel restricted by the rules and procedures of the WTO.

<sup>156</sup> *WTO Panel Report*, *supra* note 134, ¶ 7.18.

<sup>157</sup> *Id.* ¶¶ 7.20-7.30.

interests in their traditional territories. In other words, it is the position of the Indigenous Peoples of Canada that Aboriginal Title coexists with, and is not subsumed by, the Title of the Crown. Aboriginal Peoples should therefore be part of the decision making process over their land and resources, and companies should also be required to remunerate Indigenous Peoples' proprietary interests.

Canada's arguments against the recognition of Aboriginal Title before the WTO and its own Courts illustrates just how many provinces try to undermine the proprietary interests of Aboriginal Peoples by strengthening commercial and industrial interests. The provinces provide a benefit to companies in the form of a good by facilitating the taking of title from Aboriginal lands without requiring the consent of and remuneration to Indigenous Peoples. In other words, the federal government provides a subsidy through government action enshrined in its policy of the non-recognition of Aboriginal Title, exonerating companies from having to remunerate Indigenous proprietary interests.

The first submissions by Aboriginal Nations from the Interior of British Columbia to international trade tribunals, along with the acceptance of their amicus curiae brief by the WTO panel on the subsidization of softwood lumber, were important first steps in recognizing Aboriginal Title and resource rights. These first substantive Indigenous submissions have opened the door for the debate of Indigenous rights at the international level and for future Indigenous interventions in trade disputes that impact their rights.

Since the WTO investigation, the Interior Alliance nations were joined by a number of Aboriginal Nations from across Canada. The platform for Indigenous rights has expanded to both a national and international level and is now known as the Indigenous Network on Economies and Trade (INET).<sup>158</sup> INET is open to Indigenous nations that want to assert and protect their rights to their lands and resources. As a platform that focuses on the macro-economic dimension of Indigenous rights, INET is working towards the fair and equitable recognition of Indigenous proprietary interests in the global economy. Indigenous Peoples must continue to assert their rights both within their respective countries and on an international level in order to counter current trends calling for increased corporate control. By involving themselves on an international front, Indigenous

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<sup>158</sup> For more information please visit <http://www.indigenousnet.org/> or contact INET at [inet@earthlink.net](mailto:inet@earthlink.net).

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*Indigenous Peoples at the Margin*

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Peoples are hoping to not only win recognition of their proprietary rights, but also be active participants in trade negotiations impacting their lands and resources.