Globalization, Law and Indigenous Transnational Activism: The Possibilities and Limitations of Indigenous Advocacy at the WTO

by

Jennifer M. Sankey
B.A., University of British Columbia, 1998
LL.B., University of British Columbia, 2002

A Thesis Submitted in Partial Fulfillment of the Requirements for the Degree of

MASTER OF LAWS

in the Faculty of Law

© Jennifer M. Sankey, 2006
University of Victoria

All rights reserved. This thesis may not be reproduced in whole or in part, by photocopy or other means, without the permission of the author
SUPERVISORY COMMITTEE

Globalization, Law and Indigenous Transnational Activism: The Possibilities and Limitations of Indigenous Advocacy at the WTO

by

Jennifer M. Sankey
B.A., University of British Columbia, 1998
LL.B., University of British Columbia, 2002

Supervisory Committee

Co-supervisor: Dr. John Borrows, Faculty of Law

Co-supervisor: Dr. Michael Webb, Department of Political Science

External Examiners: Professor Ruth Buchanan, Faculty of Law, University of British Columbia
ABSTRACT

This thesis argues that globalization is creating increased need and opportunities for Indigenous rights advocacy/participation within emerging institutions of global governance and analyzes the possibilities and limitations of Indigenous advocacy at the WTO, drawing on the experiences of First Nations from the Interior of British Columbia.

It begins by examining how governance is shifting in the context of globalization, pointing to the emergence of an integrated global economy, the rise of supranational regulatory regimes such as the WTO, and the increased power and significance of non-state actors within the global political-legal arena. It then analyzes how globalization is affecting Indigenous peoples and moreover, how Indigenous peoples have been responding to this through transnational advocacy efforts. The author argues that given the shifting nature of governance, and the growing significance of intergovernmental organizations (i.e. the WTO), it is prudent for Indigenous rights advocates to expand the parameters of their advocacy – to seek out non-traditional spaces at both local and global levels to assert Indigenous voices where they have traditionally been rendered absent.

Adopting Boaventura de Sousa Santos’ subaltern cosmopolitan legality perspective, the author then turns to examine how First Nations from the Interior of BC have used a multiplicity of legal techniques and strategies across a “plural legal landscape” to simultaneously assert their Indigenous rights over their forest resources and to challenge the dominant neoliberal conception of economy. The author examines the political and legal mobilization of BC Interior First Nations from local acts of resistance against BC government forest policies to global acts of resistance vis a vis the submission of amicus curiae briefs to the WTO in the Canada-United States Softwood Lumber Dispute. In analyzing this struggle the author illustrates how globalization has created the need and opportunity for BC First Nations to locate new directions of advocacy, and how they have reinvented law to fit their objectives and enable their access to traditionally “closed” political-legal arenas.
Upon conducting an examination of the BC Interior First Nations' experiences, the author then critically evaluates the possibilities and limitations of Indigenous advocacy at the WTO. The author finds that while amicus curiae submissions provide some possibility to strengthen Indigenous rights by raising awareness about the linkages between international trade and Indigenous rights within the international trade arena, there are significant limitations that must be considered in pursuing such advocacy. The author concludes with recommendations concerning how Indigenous rights advocacy may be approached in the context of shifting governance relations.
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Supervisory Committee</td>
<td>ii</td>
</tr>
<tr>
<td></td>
<td>Abstract</td>
<td>iii</td>
</tr>
<tr>
<td></td>
<td>Table of Contents</td>
<td>v</td>
</tr>
<tr>
<td></td>
<td><strong>CHAPTER ONE</strong></td>
<td></td>
</tr>
<tr>
<td>A.</td>
<td>Introduction</td>
<td>1</td>
</tr>
<tr>
<td>B.</td>
<td>Methodology</td>
<td>4</td>
</tr>
<tr>
<td>a)</td>
<td>Epistemological Underpinnings</td>
<td>5</td>
</tr>
<tr>
<td>i.</td>
<td>Sociology of Absences</td>
<td>7</td>
</tr>
<tr>
<td>ii.</td>
<td>Sociology of Emergence</td>
<td>10</td>
</tr>
<tr>
<td>b)</td>
<td>Adopting a “Subaltern Cosmopolitan Legality” Perspective</td>
<td>12</td>
</tr>
<tr>
<td>c)</td>
<td>Research Methodology</td>
<td>16</td>
</tr>
<tr>
<td>C.</td>
<td>Chapter Overview</td>
<td>18</td>
</tr>
<tr>
<td></td>
<td><strong>CHAPTER TWO</strong></td>
<td></td>
</tr>
<tr>
<td>A.</td>
<td>Globalization and Governance</td>
<td>20</td>
</tr>
<tr>
<td>a)</td>
<td>Defining Globalization?</td>
<td>20</td>
</tr>
<tr>
<td>b)</td>
<td>The Global Economy</td>
<td>23</td>
</tr>
<tr>
<td>c)</td>
<td>Intergovernmental Organizations and the World Trade Organization</td>
<td>27</td>
</tr>
<tr>
<td>d)</td>
<td>Conceptualizing Global Governance</td>
<td>33</td>
</tr>
<tr>
<td>e)</td>
<td>Globalization-from-above vs. Globalization-from-below</td>
<td>36</td>
</tr>
<tr>
<td>B.</td>
<td>Globalization and Indigenous Peoples</td>
<td>37</td>
</tr>
<tr>
<td>C.</td>
<td>Indigenous Transnational Advocacy</td>
<td>47</td>
</tr>
<tr>
<td>a)</td>
<td>The International Human Rights Arena</td>
<td>49</td>
</tr>
<tr>
<td>i.</td>
<td>Normative Development of International Indigenous Rights Law</td>
<td>49</td>
</tr>
<tr>
<td>ii.</td>
<td>Limitations</td>
<td>56</td>
</tr>
<tr>
<td>b)</td>
<td>Looking to the International Trade Arena</td>
<td>59</td>
</tr>
<tr>
<td>D.</td>
<td>Conclusion</td>
<td>61</td>
</tr>
<tr>
<td></td>
<td><strong>CHAPTER THREE</strong></td>
<td></td>
</tr>
<tr>
<td>A.</td>
<td>Introduction</td>
<td>64</td>
</tr>
<tr>
<td>B.</td>
<td>The Seewepemec First Nation and Indigenous Resistance to Colonization</td>
<td>66</td>
</tr>
<tr>
<td>C.</td>
<td>The Seewepemec Struggle for Forest Resources: A Case of Globalization-</td>
<td>77</td>
</tr>
<tr>
<td></td>
<td>from-below</td>
<td></td>
</tr>
<tr>
<td>a)</td>
<td>Logging Interior Forests</td>
<td>77</td>
</tr>
<tr>
<td>b)</td>
<td>Grassroots Mobilization</td>
<td>79</td>
</tr>
<tr>
<td>c)</td>
<td>National Legal Mobilization</td>
<td>82</td>
</tr>
<tr>
<td>d)</td>
<td>The Emergence of a Transnational Advocacy Network</td>
<td>84</td>
</tr>
<tr>
<td>e)</td>
<td>Intervention at the WTO</td>
<td>92</td>
</tr>
<tr>
<td>f)</td>
<td>“Reinventing” International Trade Law to Fit Indigenous Claims</td>
<td>95</td>
</tr>
<tr>
<td>g)</td>
<td>Indigenous Conceptions of Economy</td>
<td>100</td>
</tr>
<tr>
<td>h)</td>
<td>A Boomerang Effect?</td>
<td>103</td>
</tr>
<tr>
<td>i)</td>
<td>Conclusion</td>
<td>108</td>
</tr>
</tbody>
</table>
### CHAPTER FOUR

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Introduction</td>
<td>111</td>
</tr>
<tr>
<td>B. NGOs and Amicus Curiae Briefs at the WTO</td>
<td>112</td>
</tr>
<tr>
<td>C. The Possibilities of Indigenous Transnational Advocacy within the</td>
<td></td>
</tr>
<tr>
<td>International Trade Arena: Creating Space for Indigenous Voices at the</td>
<td></td>
</tr>
<tr>
<td>WTO?</td>
<td>118</td>
</tr>
<tr>
<td>a) An Indigenous Transnational Advocacy Network</td>
<td>118</td>
</tr>
<tr>
<td>b) Gaining Access to Global Governance</td>
<td>122</td>
</tr>
<tr>
<td>c) Strengthening Recognition of Indigenous Property Rights using the</td>
<td></td>
</tr>
<tr>
<td>Language of International Trade Law</td>
<td>126</td>
</tr>
<tr>
<td>d) Creating a Bridge for other International Law Norms</td>
<td>130</td>
</tr>
<tr>
<td>e) Promoting Indigenous Economic Laws and Legal Pluralism at the WTO</td>
<td>133</td>
</tr>
<tr>
<td>B. Friend or Foe? The Limitations of Indigenous Amicus Curiae Submissions at the WTO</td>
<td>135</td>
</tr>
<tr>
<td>a) Enhancing the Legitimacy of the WTO</td>
<td>136</td>
</tr>
<tr>
<td>i. Neoliberal Normative Structure</td>
<td>136</td>
</tr>
<tr>
<td>ii. State-centric Organization</td>
<td>139</td>
</tr>
<tr>
<td>iii. Deterritorialized Governance</td>
<td>143</td>
</tr>
<tr>
<td>b) Framing Indigenous Rights Using the Language of International Trade</td>
<td>147</td>
</tr>
<tr>
<td>c) Strategic Framing at the WTO</td>
<td>152</td>
</tr>
<tr>
<td>d) Who Speaks for Indigenous Peoples?</td>
<td>155</td>
</tr>
<tr>
<td>C. Conclusion</td>
<td>156</td>
</tr>
</tbody>
</table>

### CHAPTER FIVE

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Overview of Thesis Argument</td>
<td>158</td>
</tr>
<tr>
<td>B. Where Do We Go From Here?</td>
<td>162</td>
</tr>
<tr>
<td>C. Final Summary</td>
<td>166</td>
</tr>
<tr>
<td>i. Alternative Trails and Riverbeds: Multi-dimensional Advocacy and the</td>
<td></td>
</tr>
<tr>
<td>Sociology of Emergence</td>
<td>167</td>
</tr>
</tbody>
</table>

Bibliography                                                            | 171  |
CHAPTER ONE

A. Introduction

Over the past few decades, "globalization" has become an increasingly popular term, used somewhat loosely, to refer to the multiplicity of processes, practices, and relationships that are occurring throughout the world. Perhaps similar to those living in eras characterized by the rise of capitalism or the industrial revolution, there is a sense today that significant events are occurring across the globe; however, whether they represent a break from the past, and what they mean for the future, is difficult to determine and subject to much debate. Indeed, much scholarly literature has been devoted to better understanding globalization, with the task for many globalization scholars being to identify the specific events, processes, and/or changes that are occurring along various dimensions of society, and to examine the potential and/or implications of these changes for the world. Much of the literature focuses on the proliferation of global processes and institutions and the repercussions for the nation-state; however, relatively little attention has been placed on understanding how "sub-state" groups are affected.

My thesis is concerned with Indigenous rights and advocacy in the context of globalization. Its purpose is to consider how globalization is creating both need and opportunity for Indigenous rights advocacy/participation within emerging institutions of global governance, and to investigate what possibilities and limitations arise for
Indigenous peoples\(^1\) in pursuing transnational advocacy at the World Trade Organization (WTO). It is premised on the belief that globalization is not only placing pressures on Indigenous lands and resources at an accelerated rate, but moreover, that governance is shifting in the context of globalization, generating increased need for Indigenous groups to pioneer new modes of advocacy to assert and protect their rights. Furthermore, it is believed that increased global interconnectedness is facilitating greater communication and linkages between Indigenous peoples and other NGOs, fostering their ability to engage in transnational advocacy.

My thesis explores the relationship between globalization, law and transnational Indigenous advocacy. It demonstrates how the interconnectedness, or intertwining, of local and global political-legal spaces in the context of globalization is creating need and opportunities for Indigenous rights advocates to pursue transnational advocacy.\(^2\) It originated from a curiosity I have regarding how Indigenous legal struggles for autonomy and rights recognition within nation-states

---

\(^1\) There is no universal agreement regarding who are “Indigenous peoples.” For the purpose of this thesis, I will adopt the meaning that is asserted by James Anaya as follows: 
\ldots the term Indigenous refers broadly to the living descendants of preinvasion inhabitants of lands now dominated by others. Indigenous peoples, nations, or communities are culturally distinctive groups that find themselves engulfed by settler societies born of forces of empire and conquest.
See S. James Anaya, *Indigenous Peoples and International Law*, 2\(^{nd}\) Ed. (New York: Oxford University Press, 2004) at 3. Furthermore, throughout this thesis, I will refer to Indigenous peoples, Aboriginal peoples, and First Nations interchangeably. When referring to Indigenous peoples from Canada, I will tend to use First Nations or Aboriginal more often because these terms are consistent with the legal discourse. I use the term Indian when referring to quoted sources or Canadian federal legislation.

\(^2\) Indigenous peoples’ rights include the fundamental rights of all human beings, typically individualistic in nature, as well as collective rights such as rights to self-determination, cultural integrity and land and resources. The latter set of rights are what one typically understands as “Indigenous rights,” as these rights are of distinct concern for Indigenous peoples and are seen as necessary to safeguard the cultural preservation of Indigenous peoples.
are affected by myriad global processes that appear to be eroding the entity to which much Indigenous advocacy is directed. I was interested in understanding how globalization is impacting the unique circumstances of Indigenous peoples as “sub-state” groups, and moreover, how Indigenous peoples are responding to this through the use of legal strategies that may have the potential to challenge their historical exclusion from the global arena. I was also curious as to the limitations, or tensions, that arise for Indigenous peoples in engaging Western law as a tool to assert their voices and alternative conceptions of economy within global political-legal arenas.

My thesis centers on a case study involving a particular struggle by Canadian Indigenous groups to assert their rights over the forest within the international trade arena. In the early 2000s, Canadian Indigenous groups, namely the Interior Alliance (IA) and Indigenous Network on Economies and Trade (INET),\(^3\) intervened at the WTO by way of amicus curiae\(^4\) briefs in the Canada-United States Softwood Lumber Dispute (Softwood Lumber Dispute) using international subsidies law to assert their Indigenous proprietary rights to land and resources.\(^5\) I find this intervention

---

\(^3\) The IA is a political association of five First Nations from the Interior of British Columbia, namely the Secwepemc, Okanagan, St’at’imc, Nlaka’pamux, and Southern Carrier Nations. The INET is an umbrella organization that emerged from the IA’s initial transnational advocacy efforts. The IA, the Nishnawbe Aski Nation, and the Grand Council of Treaty 3 are members of the INET.

\(^4\) Black’s Law Dictionary Seventh Ed. defines amicus curiae as follows: [Latin “friend of the court”] A person who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter.

interesting not only because it an example of how Indigenous peoples are using innovative legal strategies to resist the pressures being exerted on their lands and resources, but also because it demonstrates how Indigenous peoples are responding to global shifts in governance that are increasingly challenging the authority of the nation-state. In light of my concern for how globalization, law and Indigenous rights advocacy intersect, I decided to delve deeper into this intervention, to learn about its origins, its motivating factors, the groups involved, the processes they undertook, and the outcome. Most importantly, I thought that a critical evaluation of this intervention would assist other Indigenous groups in better understanding the possibilities and limitations of pursuing transnational advocacy within the international trade arena.

In conducting my evaluation of the possibilities and limitations, I found that while amicus submissions to the WTO provide some potential to raise awareness concerning the linkages between international trade law and Indigenous rights to land and resources within the international trade arena, there are various limitations, or tensions, that arise for Indigenous peoples in pursuing such advocacy. These include the fact that by participating in the WTO as amici, Indigenous peoples run the risk of strengthening, or even legitimizing, the WTO’s neoliberal normative structure, state-centric organization and deterritorialized governance model. In addition, the fact that access to the WTO dispute settlement arena requires legal arguments be framed using the language of international trade law, raises questions regarding its capacity to

distort Indigenous conceptions of proprietary rights and subject them to a neoliberal individualistic paradigm that may be antithetical to the laws, values and interests of many Indigenous peoples. Finally, questions arise concerning the differing perspectives of Indigenous peoples with respect to their economies, and how an “Indigenous voice” becomes characterized within the international legal arena. Given these findings, I conclude that Indigenous transnational advocacy in the form of amicus curiae submissions to the WTO currently provides limited opportunity for Indigenous rights advocates.

While my evaluation of the IA and INET struggle finds that various limitations arise with respect to Indigenous transnational advocacy at the WTO, my thesis also clearly demonstrates that there is definite need for Indigenous advocacy/participation within institutions of global governance. Indeed, the gains made by Indigenous peoples over the past several decades in terms of recognition of their rights at the nation-state level are being challenged by the shifting nature of governance in the context of globalization. That being said, it is important to recognize the crucial role the state still occupies within the complex matrix of local, national and global rule systems. Thus, I recommend approaching Indigenous rights advocacy in a manner that recognizes the interconnectedness of the local, national and global political-legal levels, and seeks to assert and strengthen Indigenous voices in both traditional and non-traditional political-legal spaces across all levels.

Having outlined the trajectory of my thesis argument above, the remainder of this chapter will: 1) explain why I have chosen to study this topic and discuss some of
the themes that underpin my thesis project; 2) set out the methodological approach I use to analyze my case study; and 3) provide an overview of the chapters to follow.

B. **The Origin of My Thesis Project**

My decision to study Indigenous rights advocacy in the context of globalization and the international legal arena has involved a new academic journey for me personally. Up until recently, my studies have concentrated on Aboriginal issues in Canada. This thesis shifts the scope of my research to the international arena; however, it does not escape a distinct focus on Canadian Aboriginal peoples. I concentrate on Canada, and more specifically British Columbia (BC), because this is the environment I know. Having lived most of my life in BC, I am familiar with its geography and its dominant political and legal systems. Moreover, I am familiar with the territories and lands of many BC First Nations, having inevitably spent a great deal of time moving in and out of various First Nations territories, including the Interior First Nations that are a central focus of my thesis. And while today I recognize how my day-to-day life intersects with many Indigenous territories, lands and resources, this has not always been apparent to me. Other than the short unit I studied on “Indians” in fourth grade, I grew up with virtually no understanding of First Nations. Indeed, it was not until I began post-secondary education that this “absence of knowledge” became evident to me. I can recall being assigned to read a book titled, *In Celebration Our Survival: The First Nations of British Columbia*[^6], and being shocked at what it revealed. Prior to that, I had no awareness of residential

schools, or the *Indian Act*\(^7\). I did not really understand what Reserves were, and I had little idea about the tenuous position of the BC government with respect to ownership of provincial land. When I reflect on this it is troubling. How could I have grown up in BC and have had so little knowledge about the Indigenous peoples who live here? How and why did this “absence” occur?

I came to see that the answers lay in the fact that colonial assumptions of Western dominance pervade all facets of Canadian society. I started to recognize how I had grown up learning to think a certain way based on what I had seen, or had not seen, in the dominant institutions around me — by the “truths” that had been constructed by dominant discourses that function through processes of inclusion and exclusion.\(^8\) I came to recognize that colonial assumptions work like erasers, rubbing out that which does not neatly fit within Western conceptions of reality. What is left behind is an “absence,” a half-told narrative that solidifies and naturalizes over time, often making it difficult for those not familiar with the untold portion to even conceive of how it could fit within the lines of that which they are so familiar.

As a student of law, I am interested in how law is implicated in this complexity of discourses that creates spaces in which Indigenous voices can and cannot exist. In other words, the ways in which law establishes and reinforces spaces in which certain voices are heard, while others are disqualified. Indeed, I am interested in understanding how the exclusionary relationships, processes and

---

\(^7\) R.S. 1985, c. I-5.

principles embedded in law have the power to render certain voices nonexistent, or as Boaventura de Sousa Santos says, to produce “absence.”  

Indeed, through his conception of the “sociology of absences,” Santos asserts that “absences” do not simply occur, but rather are produced. He argues that “[n]onexistence is produced whenever a certain entity is disqualified and rendered invisible, unintelligible, or irreversibly discardable.”

I find Santos’ conception of absences useful because it has assisted me in better understanding the absences of knowledge that occurred in my life as I grew up, and moreover, it has provoked me to think more deeply about how law creates absences, and the consequences that result.

I have come to understand how, in the Canadian context, law has been able to determine how Aboriginal people can exist in certain spaces by establishing norms, principles and/or tests that determine what is, or is not, “Aboriginal.” For example, the legal test for Aboriginal rights – informed by a half-told narrative of mainly Western legal conceptions of what it means to be Aboriginal, and how Aboriginality can function within a dominant Western paradigm – has created both spaces for, and absences of, Aboriginal knowledge and participation.

With respect to my thesis project, I can recall that when I first read that Canadian Indigenous groups from the Interior of BC were intervening in the

---


10 Ibid.

11 For a deeper discussion on these ideas see John Borrows Recovering Canada: The Resurgence of Indigenous Law (Toronto: University of Toronto Press, 2002).

Softwood Lumber Dispute at the WTO, I found it somehow strange and/or unique that Indigenous peoples would be participating in the arena of international trade. I was intrigued to study this area more deeply because it seemed so “different.” As I have proceeded through the intellectual journey of writing this thesis, however, I have come to realize that my initial reaction was, in part, due to the “absences” that have been produced with respect to Indigenous peoples and the international legal arena. My reaction stemmed from the fact that Indigenous peoples have historically been excluded from international relations and, as such, their perspectives have been left out of international trade agreements such as the WTO. This exclusion has led to a disqualification, or rendering absent, of Indigenous knowledge and laws concerning international trade, and has had the effect of making Indigenous peoples somehow seem “out of place” within this arena. Indeed, as will be discussed in later chapters, Canada has taken the position in various international trade arenas that it is inappropriate to deal with Indigenous perspectives within these forums — that these issues are “domestic” issues that should be dealt with at the local level. The logic behind this is that Canada is capable of representing Indigenous peoples’ interests at the international level. In the Softwood Lumber Dispute, however, this was clearly not the case, given that Canada did not address the Indigenous concerns or perspectives in its arguments, and, indeed, actively sought to silence them. The Softwood Lumber Dispute, therefore, provides a useful context in which to question whether Canada is capable of adequately representing Indigenous interests at the international level, and furthermore, how operating under such a faulty assumption

13 Although one could try to argue that Indigenous perspectives have been subsumed by the nation-state, I would argue that this is probably unlikely.
serves to disqualify Indigenous peoples’ nationhood and distinct perspectives and concerns.

What is perhaps most ironic about the disqualification of Indigenous perspectives from the discourses of international trade is the long and rich history Indigenous peoples have in conducting international trade in North America. The First Nations from the Interior of BC were engaging in international trade before the arrival of European settlers, and upon European’s arrival, international trade was central to the Indigenous-settler relationship. Indeed, Annabel Cropped Eared Wolf describes the trading relations between Interior First Nations as follows:

The northern bands served as middlemen between the other Shuswap bands and the Chilcotin. “The northern bands bought products from both groups and sold them at a profit.” The Soda Creek Band traded with the Carrier, while the bands in the North Thompson Division had contact with the Plains, Cree, Stoney, Kootenay and Iroquois. (The Iroquois were paddlers from the fur trade who had settled in the Interior.) The bands in the Kamloops Division and the Shuswap Lake Division traded mainly with the Okanagan. The Stuctwesemc and the Pavilion bands did their trading with the Lillooet and the Thompson.14

The above observation demonstrates how the disqualification of certain perspectives for unjust reasons not only results in detrimental consequences for those disqualified, but also results in a less enriched understanding of the social world by those included. Indeed, Santos points out that the social production of absences results in the “waste of social experience.”15 Thus, Santos uses the concept of the “sociology of absences” to “identify and valorize social experiences available in the

14 Annabel Cropped Ear Wolf, Shuswap History: A Century of Change (Kamloops: Secwepemc Cultural Education Society 1996) at 7 (citing James Teit).

world, although declared nonexistent by hegemonic rationality and knowledge." \footnote{16} He explains that this the "sociology of absences" works in conjunction with the "sociology of emergence," which is concerned with "interpreting in an expansive way the initiatives, movements or organizations that resist neoliberal globalization and social exclusion, and offer alternatives to them." \footnote{17} Indeed, in their most recent book, \footnote{18} Santos and Cesar Rodriguez-Garavito compile essays concerning various experiences and struggles of subaltern groups which they indicate are "admittedly fragile." \footnote{19} They point out that the case studies found in the book are indicative of the "sociology of emergence"; in other words,

The traits of the struggles are amplified so as to render visible and credible the potential that lies implicit or remains embryonic in the experiences under examination. This symbolic blow-up seeks to expose and underscore the signals, clues, or traces of future possibilities embedded in nascent or marginalized legal practices or knowledge. \footnote{20}

My approach to this thesis project follows in this tradition. By engaging in an analysis of the struggles of Canadian Indigenous groups to assert their Indigenous rights to land and resources using innovative legal arguments and strategies to access the WTO, I am seeking to bring an emergent quality to this struggle – to expand its significance and to draw attention to the experiences of Indigenous peoples in the

\footnote{16} Ibid. at 24.

\footnote{17} Boaventura de Sousa Santos, Toward A New Legal Common Sense: Law, Globalization and Emancipation 2nd ed. (London: Butterworths, 2002) at 465.


\footnote{19} Ibid. at 17.

\footnote{20} Ibid.
context of globalization, as well as to their own economic laws and distinct perspectives concerning international trade.\textsuperscript{21}

C. Methodology

The central aim of my thesis project is to explore and evaluate the possibilities and limitations of Indigenous advocacy at the WTO. To this end, I conduct a case study of a particular struggle carried out by First Nations from the Interior of BC that involved the submission of amicus curiae briefs to the WTO in the context of the Softwood Lumber Dispute. I decided to ground my thesis project in an examination of this struggle because I think it provides a clear example of the increased need and opportunities being created for Indigenous rights advocacy and participation within emerging institutions of global governance. Furthermore, it serves as a tangible example through which one can evaluate the possibilities and limitations of Indigenous advocacy at the WTO, and shed light on issues that might be considered in pursuing such advocacy.

My case study begins by analyzing the local origins of the struggle in BC and tracing it through to various Canadian courts, the US trade arena, and eventually to the WTO. In conducting my case study, I rely on a variety of primary sources including: 1) Canadian case law dealing with the various proceedings which originated from the Interior First Nations' attempts to log in their territories;\textsuperscript{22} 2) the

\textsuperscript{21} I would like to acknowledge the significant advocacy work of Arthur Manuel and Nicole Schabus, the authors of the various amicus curiae briefs and the activists that led the Indigenous intervention at the WTO. Manuel and Schabus are highly active in advocating for Indigenous peoples’ rights in the international arena and have written and spoken extensively on the topic, particularly as it relates to the recognition of Indigenous economies. See generally supra note 5.

\textsuperscript{22} Various proceedings including injunction and costs applications have been initiated under the case name \textit{British Columbia (Minister of Forests) v. Okanagan Indian Band}. These proceedings involve
factum of the respondent Chief Ronnie Jules et al.\(^2\) submitted to the Supreme Court of Canada in *British Columbia (Minister of Forests) v. Okanagan Indian Band*;\(^3\) affidavits of various individuals filed in respect of the aforementioned proceedings;\(^4\) the joint petition filed to the US Department of Commerce (USDOC) by the Natural Resources Defense Council, Defenders of Wildlife, Northwest Ecosystem, Alliance, Grand Council of Cree (Eeyou Istchee), and the IA concerning the imposition of countervailing duties on Canadian softwood lumber ("Joint Petition");\(^5\) the amicus curiae brief filed by the IA to the WTO Panel on April 15, 2002 and the

two separate actions heard together. One action involves the Okanagan Indian Band (case name) and the other involves the Adams Lake, Spallumcheen, and Neskonlith Indian Bands, *British Columbia (Minister of Forests) v. Adams Lake Band.*

\(^2\) The full name of the respondent is Chief Ronnie Jules, in his personal capacity and as representative of the Adams Lake Indian Band, Chief Stuart Lee, in his personal capacity and as representative of the Spallumcheen Indian Band, Chief Arthur Manuel, in his personal capacity and as representative of the Neskonlith Indian Band, and David Anthony Nordquist, in his personal capacity and as representative of the Adams Lake Indian Band, the Spallumcheen Indian Band and the Neskonlith Indian Band, and all other persons engaged in the cutting, damaging or destroying of Crown Timber at Timber Sale Licence A38029, Block 2 [Adams Lake Band].

\(^3\) Factum of the Respondent, the Adams Lake Band, in *British Columbia (Minister of Forests) v. Okanagan Indian Band* [2003] 3 S.C.R. 371, 2003 SCC 71. This is registered at the Supreme Court of Canada and is also on file with the solicitors for the respondents.

\(^4\) These affidavits are filed in the Vernon Court Registry under action number 23914, *British Columbia (Minister of Forests) v. Adams Lake Band.* They include: the Affidavit of Joe Manuel, Elder of the Neskonlith Indian Band, filed October 27, 1999 (J. Manuel Affidavit); the Affidavit of Dr. Peter Alias, Anthropologist, filed October 27, 1999 (Alias Affidavit); the Affidavit of David Nordquist, Adams Lake Band Member and Natural Resource Manager, filed October 27, 1999 (Nordquist Affidavit); and Affidavit of Arthur Manuel, Chief of the Neskonlith Indian Band and Chair of the Shuswap Tribal Council, filed December 3, 1999 (A. Manuel Affidavit).

\(^5\) Petition for the Imposition of Countervailing Duties Pursuant to Section 701 of the Tariff Act of 1930, as Amended, Public Document on Behalf of Natural Resources Defense Council, Defenders of Wildlife, Northwest Ecosystem Alliance, Grand Council of Cree (Eeyou Istchee), and Interior Alliance (Nlaka'pamux Nation, Okanagan Nation, Secwepemc Nation, St’át’imc Nation, Southern Carrier Nation) dated May 10, 2001 filed with the International Trade Administration of the United States Department of Commerce (Joint Petition). This information may also be obtained by contacting the solicitors for the Natural Resources Defense Council.
letter of acceptance from the WTO;\(^{27}\) 6) the amicus curiae brief filed to the WTO Panel by the Indigenous Network of Economics and Trade (INET) on January 21, 2003 and the response letter of the WTO;\(^{28}\) 7) the amicus curiae brief filed by the INET to the WTO Appellate Body on October 20, 2003;\(^{29}\) and 8) various WTO Panel and Appellate Body Reports.

I rely on secondary source materials to contextualize my examination of the Interior First Nations’ struggle. This has involved reviewing published and unpublished literature written and presented by Arthur Manuel, former Chief of the Neskonlith Band/IA Chairperson/INET Spokesperson, and Nicole Schabus, IA/INET International Law Advisor, concerning the IA and INET intervention at the WTO. As authors of the amici, and as the lead activists involved in initiating and carrying out both the local and global legal mobilization, their work explains how the interventions were accomplished, what the motivations of the First Nations were, and what they see the results to be. I draw on their experiences to assist me to determine whether globalization is creating need and opportunity for Indigenous advocacy.


beyond state borders, and to inform my interpretation of what I see to be the current possibilities and limitations of Indigenous transnational advocacy at the WTO.

As context for this examination, I have conducted a multi-disciplinary literature review in the areas of globalization and governance, Indigenous resistance to globalization, Indigenous peoples’ rights within international law, and amicus curiae submissions to the WTO. Finally, because my analysis focuses on the Interior First Nations of BC, and more specifically the Secwepemc (Shuswap) Nation\textsuperscript{30}, I have consulted literature regarding the early history of the Secwepemc peoples and their stories and teachings.

In terms of the theoretical framework I use to conduct my study, I found Santos and Rodriguez-Garavito’s notions of “counter-hegemonic globalization” and “subaltern cosmopolitan legality” provided useful conceptual tools for understanding the trajectory of this struggle, and for illuminating the interrelationship between law, globalization and Indigenous transnational advocacy.\textsuperscript{31} Their concept of counter-hegemonic globalization fit well with my objective to focus on Indigenous peoples’ experiences of globalization and to counter the invisibility of Indigenous peoples that so often occurs in globalization studies. Indeed, Santos and Garavito-Rodriguez explain that investigating counter-hegemonic globalization involves shifting the analytical gaze away from the key actors of neoliberal hegemonic globalization (powerful nation states, multinational corporations, the Bretton Woods institutions and so on), and towards the “grassroots contestation” of such globalization. This is

\textsuperscript{30} \textit{Infra} note 166.

\textsuperscript{31} \textit{Supra} note 18.
done to de-center the hegemonic position of neoliberal global actors and institutions and to place the “local, national and transnational social groups, networks, initiatives, organizations and movements [which] have been active in confronting neoliberal globalization” as the central focus. Santos defines counter-hegemonic globalization, therefore, as the myriad networks, initiatives, organizations, and movements that resist the economic, social and political outcomes of hegemonic globalization, and propose alternative conceptions.  

Santos notion that globalization is better conceptualized in more than one form, hegemonic as well as counter-hegemonic, coincides with what Richard Falk identifies as “globalization-from-above” and “globalization from below.” Falk associates “globalization-from-above” with transnational market forces that legitimate ideas that are “in many respects located beyond the effective reach of the territorial authority” and have “enlisted most governments as tacit partners.”

“Globalization-from-below,” on the other hand, refers to the transnational linkages of knowledge and political action that have formed at a local or grassroots level for the purpose of resisting globalization-from-above. Similar to Santos, Falk recognizes that globalization should not be understood as simply a top-down process. Rather, attention must be paid to the experiences of those at the bottom who are challenging the effects of top-down globalization on their rights, and whose struggles are being

---

32 Supra note 17 at 458.


facilitated by increased technology that enables like-minded groups across borders to communicate with one another more efficiently and effectively.

My case study serves as an example of counter-hegemonic globalization, or "globalization-from-below," demonstrating how the global economy, the erosion of nation-state authority over trade in lumber, and the WTO are affecting Canadian Indigenous peoples' rights to land and resources. Moreover, my case study demonstrates how Canadian Indigenous peoples were able to respond to this by establishing a transnational advocacy network with other Indigenous groups and NGOs, which facilitated their ability to gain access to a broader range of international legal forums.

In conducting my analysis of this case, I was particularly interested in the ways in which Canadian indigenous groups were able to use law to assert their voices and alternative conceptions of economy within the international trade arena. I thus found Santos and Rodriguez-Garavito's concept of "subaltern cosmopolitan legality" (SCL) useful because it involves adopting a "bottom-up approach" to understanding the relationship between law and globalization.\(^{35}\) It focuses on the way in which grassroots organizations use law-centered strategies to contest and challenge the dominant exclusionary processes of neoliberal globalization in an effort to promote transformation and increase social inclusion. Indeed, adopting a SCL approach to analyze a particular struggle involves inquiring into the ways in which dominant conceptions of law may be re-crafted to advance the struggle, as well as the ways in

\(^{35}\) *Supra* note 18 at 15.
which different forms of legal knowledge may be mobilized to promote the transformation of dominant institutions along more democratic and pluralistic lines.

Santos and Garavito-Rodriguez indicate that a first step to engaging a SCL perspective involves “inquiring into the combination of legal and illegal (as well as non-legal) strategies through which transnational and local movements advance their causes.”\textsuperscript{36} Thus, my analysis begins with the purportedly “illegal” acts of members of the Secwepemc First Nation who chose to follow their own Indigenous laws, as opposed to the BC government’s laws, in logging trees in their traditional territories.\textsuperscript{37} My study continues by analyzing the legal mobilization of the Interior First Nations in national legal institutions (the BC courts and the Supreme Court of Canada), through to the International Trade Administration of the USDOC, and then to the WTO in the Canada-United States Softwood Lumber Dispute (the “Softwood Lumber Dispute”). Indeed, Santos and Garavito-Rodriguez indicate that an additional requirement of conducting a SCL inquiry involves looking at the way in which particular struggles operate “across scales.”\textsuperscript{38} In other words, it focuses on how groups seek to mobilize both nationally and transnationally to “exploit the opportunities offered by an increasingly plural legal landscape.”\textsuperscript{39} Finally, Santos

\textsuperscript{36} Supra note 18 at 15.

\textsuperscript{37} The term traditional territories is used widely to refer to the lands in which Indigenous peoples have historically claimed as their own in accordance with their own laws and which are today subject to aboriginal land claims. I dislike the term “traditional territories” because it seems to connote a past-oriented focus to Indigenous lands, negating the fact that these lands are still essential to Indigenous peoples and subject to contemporary Indigenous uses. To ensure clarity in my argument, I will use this term at certain points throughout my thesis; however, where possible, I will refer to “traditional territories” as simply territories.

\textsuperscript{38} Supra note 18 at 16.

\textsuperscript{39} Ibid.
and Garavito-Rodriguez point out that adopting an SCL perspective necessitates inquiring into the ways in which a struggle seeks “to expand the legal canon beyond individual rights.”

Santos suggests that a key imperative of “counter-hegemonic globalization” is “reinventing law to fit the normative claims of subaltern social groups and their movements and organizations struggling for alternatives to neoliberal globalization.”

Thus, my analysis focuses on the way in which the transnational advocacy network representing Canadian First Nations attempted to “reinvent” Western international subsidies law to create opportunities to assert Indigenous proprietary rights and furthermore, to create a space within the formal workings of the WTO where Indigenous knowledge and laws could be voiced.

Santos and Rodriguez-Garavito indicate that the main purpose of adopting a SCL perspective is “to expose the potential and limitations of law-centered strategies for the advancement of counter-hegemonic political struggles in the context of globalization.” However, they do not provide much theoretical guidance for analyzing the possibilities and limitations revealed by these struggles. They do this deliberately stating that:

... the plurality of efforts at counter-hegemonic globalization cannot be encompassed by an overarching theory. Rather, the scholarly task consists in providing analytical clarity and translation devices to make such efforts mutually intelligible. Further, the potential contribution of our approach lies in its distinctive bottom-up perspective ... rather than in a set of fixed substantive claims.

---

40 Ibid.

41 Supra note 17 at 446.

42 Supra note 18 at 4.

43 Ibid. at 13.
They explain that “theorists and practitioners of subaltern cosmopolitan legality [must] take it upon themselves to interpret these embryonic experiences [counter-hegemonic struggles] in a prospective spirit that can be called the sociology of emergence.”  Thus, the process of interpreting the possibilities and limitations of counter-hegemonic struggles is left undertheorized with one proviso—that the aim of SCL is to “assess the potential [of counter-hegemonic struggles] to subvert hegemonic institutions and ideologies, and learn from their capacity to offer alternatives to the latter.”

Where Santos and Rodriguez-Garavito’s approach is undertheorized, I found the work of Margaret Keck and Kathryn Sikkink on transnational advocacy networks (TANS) useful.  Indeed, in conducting my case study, I drew on their conception of the “boomerang effect” and engaged their five indicators for evaluating the success or failure of TANs to analyze the overall outcome of the IA and INET struggle at the WTO. Keck and Sikkink point out that the aim of many transnational advocates is to pursue transnational political opportunity structures that will result in policy changes at a local level. They call this a “boomerang effect.” A “boomerang effect” occurs when transnational advocates (or transnational advocacy networks) use the international arena to enlist support from powerful States which in turn pressure other States to embark on a certain course of action that is desired by the advocates.

While the claims of an advocacy group may be blocked by one government, they may

44 Ibid. at 17.

45 Ibid. at 15.


resonate with another, thus “international contacts can amplify the demands of
domestic groups, pry open space for new issues, and then echo back these demands
into the domestic arena.” Keck and Sikkink point to the “cases of the rubber tappers
trying to stop encroachment by cattle ranchers in Brazil’s Western Amazon, and of
tribal populations threatened by the damming of the Narmada River,” as examples.

A key tool of TANs is the strategic, or cognitive, framing of issues. This
occurs when advocates frame their concerns in accordance with issues that resonate
with powerful elites in an attempt to garner their support. Strategic frames align the
interests of a movement with the interests of the elites targeted by the movement, and
thereby enlist those elites in promoting change. According to Martha Finnemore
and Kathryn Sikkink, cognitive framing is an essential strategy for transnational
advocates “since, when they are successful, the new frames resonate with broader
public understandings and are adopted as new ways of talking about and
understanding issues.” I found the concept of strategic framing useful in
elaborating on Santos and Rodriguez-Garavito’s ideas concerning the use of law in
counter-hegemonic struggles. Indeed, I drew on the concept of strategic framing to
illuminate my discussion concerning the INET’s ability to “reinvent” international
trade law to fit their normative claims, and to analyze the possibilities and limitations
of doing so.

48 Ibid.
49 Ibid.
50 Ibid.

51 Martha Finnemore & Kathryn Sikkink, "International Norm Dynamics and Political Change" (1998)
52:4 International Organization 887 at 895.
D. Chapter Overview

Chapter Two provides context for my overall thesis argument. It begins by establishing why I believe governance is shifting in the context of globalization, pointing to such factors as the emergence of a global economy and the rise of supranational regulatory regimes such as the WTO. It examines why the WTO has become a significant player in the realm of global governance and discusses how I see global governance functioning within contemporary globalization. My analysis then shifts to how globalization is affecting Indigenous peoples and how Indigenous peoples have been responding to it through transnational advocacy efforts. I briefly discuss the normative development of international human rights law concerning Indigenous peoples’ rights and some of the limitations Indigenous peoples have faced while advocating within this arena. In light of this background, I argue that shifts in governance, and the growing strength of intergovernmental organizations (i.e. the WTO), suggest that it may be prudent to expand the parameters of transnational Indigenous rights advocacy – to seek out new directions of advocacy in non-traditional spaces at the global level. I indicate that Indigenous rights advocates have begun to target international trade arena, namely the WTO, which will be the substantive focus of my thesis project.

Chapter Three is grounded in an analysis of the struggles by BC Interior First Nations to assert their Indigenous rights over the forest resources in their territories. Drawing on the work of Santos and Rodriguez-Garavito, I analyze my case study as an example of counter-hegemonic globalization and adopt a “subaltern cosmopolitan legality” (SCL) perspective. I also rely on Keck and Sikkink’s work on transnational
advocacy networks. I demonstrate how the Interior First Nations have used a multiplicity of legal techniques and strategies across a "plural legal landscape"\textsuperscript{52} to simultaneously assert their Indigenous rights over their forest resources and to challenge the dominant neoliberal conception of economy. Indeed, I examine the political and legal mobilization of BC Interior First Nations from local acts of resistance against BC government forest policies to global acts of resistance vis a vis the submission of amicus curiae briefs to the WTO in the Canada-United States Softwood Lumber Dispute. In analyzing this struggle I illustrate how globalization is creating both need and opportunity for Indigenous rights advocacy/participation within emerging institutions of global governance.

Chapter Four examines the possibilities and limitations of Indigenous advocacy at the WTO revealed by the experiences of Canadian Indigenous groups. It begins with a review of the normative development of amicus submissions to the WTO, and then outlines the potential and limitations of this type of advocacy for Indigenous rights recognition. My analysis concludes that while amicus curiae submissions provide some possibility to strengthen Indigenous rights by raising awareness of the linkages between Indigenous rights and international trade, there are significant limitations that must be considered in pursuing such advocacy. Chapter Five concludes with recommendations concerning approaches to Indigenous rights advocacy in the context of shifting governance relations.

\textsuperscript{52} Supra note 18 at 16. They use the term "plural legal landscape" to refer to the multiple scales of potential legal advocacy, namely local, national, regional and global.
CHAPTER TWO

A. Globalization and Governance

a) Defining Globalization?

To understand the implications of globalization for Indigenous rights advocacy, it is first necessary to grapple with the concept of globalization. Due to its fluid nature, globalization is not an easily definable term and there is no universally accepted meaning. David Held et al. state that in the simplest sense, “globalization refers to the widening, deepening and speeding up of global interconnectedness.” Anthony Giddens describes it as “the intensification of worldwide social relations which link distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa.” What both these definitions connote is that globalization encompasses shifts that are occurring with respect to the way the world is organized. Indeed, Jan Art Scholte argues that contemporary globalization can be viewed as the “rise of supraterritoriality.” He sees globalization as altering the “prevailing framework of social space,” such that governance, economy, culture and so on, are increasingly becoming removed from distinct geographical places.

---


56 Ibid. at 3.
Globalization is understood by many as a set of processes that are challenging the traditional authority of the nation-state and reconfiguring the Westphalian legal order. There is, however, much debate regarding the extent to which this is in fact occurring. Some believe that globalization is a myth, or misnomer, arguing that “a more valid conceptualization of current trends is captured by the term ‘internationalization.’” Paul Hirst and Grahame Thompson, for example, argue that the current “highly internationalized economy” represents growing links between discrete national economies, and that the sovereign state still remains the principal unit of international political organization. Similarly, Linda Weiss argues that “the novelty, magnitude and patterning of change in the world economy are insufficient to support the idea of a ‘transnational’ tendency: that is to say, the creation of genuinely global markets in which locational and institutional—and therefore national—constraints no longer matter.” These skeptics (to adopt the label of Held and McGrew) argue that national governments are still the central loci of power, production and wealth and therefore, territory, borders and place are still primary.


58 Ibid. at 5 (citing Hirst and Thompson, 1999).


61 Supra note 57 at 5.
In addition, some skeptics argue that the processes labeled as globalization in the twenty-first century are no different from processes that were seen at the turn of the twentieth century and even later.

I take the position that globalization is not a myth – significant global changes are occurring which are restructuring the relationship between territory and political space and strengthening a deterritorialized global governance regime. Indeed, I see new global players, processes and practices emerging which are challenging the Westphalian primacy of territory and borders. These include, *inter alia*, the emergence of an increasingly integrated global economy and the rise of multiple supranational regulatory regimes, which are becoming necessary to govern a range of transnational economic, political and environmental concerns.

The following sections outline these reasons in more detail by discussing: 1) why the global economy has become more integrated over the past few decades; 2) how intergovernmental organizations (IGOs) such as the WTO are emerging as powerful institutions of global governance; and 3) how global governance can be seen to be functioning in the context of contemporary globalization. I then explain how these processes of “globalization-from-above” are being challenged and shaped by “globalization-from-below,” and discuss some of the efforts and results of Indigenous transnational advocacy in the international human rights arena. The sections in this chapter serve to provide a context and background for the central issues I explore later in my thesis.
b) The Global Economy

Over the past few decades it has become apparent that the global economy is becoming increasingly integrated. A key reason for this integration is the increase in international economic cooperation that has been occurring since World War II. Indeed, one can trace the origins of today's international economic cooperation back to 1944, when world leaders met in Bretton Woods to discuss ways to build the international economy in the aftermath of the war.\(^{62}\) Their main concerns were: first, to establish an international monetary system that would stabilize currencies and prevent the type of inflation and economic crisis that had characterized the interwar years; and second, to create international economic institutions that would administer the international monetary system, facilitate money lending for the rebuilding of Europe, and foster international trade by lowering import tariffs.\(^{63}\) To this end, Bretton Woods gave rise to the World Bank, the International Monetary Fund (IMF), and laid the foundation for what would later become the General Agreement on Tariffs and Trade (GATT) and eventually the WTO.\(^{64}\)

\(^{62}\) One could trace the principles upon which this cooperation is built even farther back to the theories espoused by Adam Smith's *Wealth of Nations* (1776) and by David Ricardo. Indeed, Smith's work provided a powerful intellectual basis for the free trade movement and Ricardo's work was important in developing the notion of comparative advantage.

\(^{63}\) The interwar years had been characterized by strong state protectionism, which was thought to have contributed to international economic instability and eventually world conflict. The aim of the new economic order was to break down state protectionism through strengthening the trading relationships between states. This was done alongside the establishment of the United Nations which was responsible for fostering human rights recognition and respect for state sovereignty. For a concise discussion on the emergence of the post-war economic order see Manfred B. Steger, *Globalization: A Very Short Introduction* (Oxford: Oxford University Press, 2003) at 37-55.

\(^{64}\) The GATT was established in 1947 to facilitate multilateral trade negotiations and agreements between nation-states. It later became entrenched within the World Trade Organization, which was created in 1995 following the Uruguay Round of negotiations.
Since 1944, the global economy has become increasingly strong and international trade has grown at an unprecedented rate. In 2004, world trade in merchandise exports and commercial services reached $8.9 trillion and $2.1 trillion respectively.\(^{65}\) An impetus behind this high degree of global economic activity has been the proliferation of international trade agreements over the past few decades that are aimed at promoting freer trade relations between nation-states. Indeed, in the 1980s, global superpowers, namely the United States and Britain, began shifting their national economic policies away from Keynesianism towards neoliberalism. These policy shifts became known as Reganite and Thatcherite politics, and together they began to promote a worldwide ideological shift towards neoliberalism. Whereas Keynesian economic policies favour the establishment of a welfare state to combat boom-bust economic cycles, neoliberal economic policies seek to scale back on state intervention. Neoliberal economic policies include, \textit{inter alia}, privatization of public enterprises, deregulation of the economy, and increased trade liberalization.\(^{66}\) Trade liberalization necessitates increased international cooperation as it involves international agreement on various measures such as the elimination of trade barriers and the establishment of a uniform set of rules to govern the international exchange of goods and services. Indeed, trade liberalization today is being achieved through the sundry multilateral trade agreements that have been negotiated between Member States under the GATT and WTO, and by the many regional trade agreements that


\(^{66}\) Steger, \textit{supra} note 63 at 40.
have become increasingly commonplace across the globe in the past few decades.\textsuperscript{67} International trade agreements, therefore, are playing a significant role in unifying states under a regime of neoliberalism and in strengthening the IGOs that regulate such regimes, i.e. the WTO.

The increased ease of conducting international trade in today’s global economy has resulted in a high degree of international economic integration and interdependence. Certain global actors, such as transnational corporations (TNCs), have been well situated to capitalize on this increased integration and have contributed to the growing global economic interconnectedness.\textsuperscript{68} According to Held and McGrew, “a quarter to a third of world trade is intrafirm trade between branches of multinationals [or transnationals].”\textsuperscript{69} The increasingly deregulated labour market has assisted TNCs in consolidating their global operations and “the availability of cheap labour, resources, and favourable production conditions in the global South has enhanced corporate mobility and profitability.”\textsuperscript{70} Furthermore, the ability of TNCs to direct massive cash flows across borders has increased their power and their ability to exert influence in the global economy, which has contributed to the displacement of nation-state power. Indeed, as Susan Strange points out, the power once held by the nation-state is being diffused throughout the global political economy, such that

\begin{itemize}
\item \textsuperscript{67} See for example the North America Free Trade Agreement (NAFTA), the ASEAN Free Trade Areas (ASEAN FTA), the European Union (EU) and European Free Trade Association (EFTA), the Southern Common Market (MERCOSUR), and the Common Market of Eastern and Southern Africa (COMESA).
\item \textsuperscript{69} Ibid.
\item \textsuperscript{70} Supra note 63 at 48.
\end{itemize}
“power over outcomes is exercised impersonally by markets and often unintentionally by those who buy and sell in the market.”\textsuperscript{71}

The effects of a strongly integrated global economy are far-reaching and, based on the reasons I have outlined above, it is apparent why globalization and the spread of neoliberalism are often seen as one in the same. Stephen Gill argues that as “the dominant discursive formation of our time, the neoliberal concept of ‘globalization’ suggests that privatization and transnationalization of capital are either inevitable or desirable from a broad social viewpoint.”\textsuperscript{72} Nation-states are pulled into this “inevitability” through various economic practices and processes that reinforce the unification of the global economy.

This brief discussion of global economic integration has served to demonstrate how the global economy is a central component of, or impetus behind, the deterritorializing forces of globalization. These processes are becoming entrenched within the regulatory regimes emerging from IGOs and, more increasingly, international non-governmental organizations (INGOs). The next section examines this in more detail, focusing specifically on the WTO.

c) Intergovernmental Organizations and the World Trade Organization

In recent decades there has been a proliferation of supranational regulatory regimes which are increasingly challenging the sovereign authority of the nation-

\textsuperscript{71} Susan Strange, \textit{The Retreat of the State} (Cambridge: Cambridge University Press, 1996) at 5.

state. Regional and global regulatory regimes have emerged to address a range of economic, social and environmental concerns that transcend any one nation-state, and thus require international cooperation to find an appropriate solution.\textsuperscript{73} Indeed, Held and McGrew indicate that:

\[ \ldots \text{the sovereign state now lies at the intersection of a vast array of international regimes and organizations that have been established to manage whole areas of transnational activity (trade, financial flows, crime and so on) and collective policy problems.}\textsuperscript{74} \]

To a large extent these regulatory regimes are entrenched within IGOs such as the Bretton Woods institutions, the WTO and the United Nations, as well as INGOs, such as OXFAM, Medicin Sans Frontiers and numerous others. The range and magnitude of IGOs and INGOs that exist today is vast. Indeed, Held and McGrew indicate that “[a]t the beginning of the twentieth century there were just 37 IGOs and 176 INGOs, whereas in 1996 there were 1,830 IGOs and 38,243 INGOs.\textsuperscript{75} The list of IGOs and INGOs looms large; however, because I am concerned with Indigenous advocacy efforts directed at the WTO, I am going to focus on it specifically, and discuss the reasons why it has become such a significant IGO in the field of global governance.

The WTO emerged from the GATT in 1995, and its governing capacity now reaches well beyond any previous multilateral trade regime, and perhaps any other IGO. Indeed, as of December 2005, 149 States are Members of the WTO. By signing on they have agreed that the WTO has the authority to consider new national trade rules, review national trade laws, and adjudicate disputes between Member

\textsuperscript{73} Supra note 68 at 6-7.

\textsuperscript{74} Ibid. at 6.

\textsuperscript{75} Ibid. at 7.
States. As a rule-based system, Member States agree to be bound by the WTO body of law which extends over three broad domains: trade in goods, trade in services and intellectual property rights. This expansive set of rules has become increasingly important in governing both domestic and global affairs. Indeed, as Samson points out:

The WTO rules now apply not only to the one-fifth of the world production that is trade but also to goods and services that may never enter into trade. These rules extend well beyond border measures and reach deep into domestic regulatory structures. Domestic regulations relating to patents, financial services, subsidies, and support measures for agriculture are all subject to WTO disciplines. Some WTO agreements raise ethical questions about the patenting of life forms, the role of precaution in the absence of scientific evidence, compulsory licensing to provide access to essential medicines, and the rewarding of Indigenous peoples for pharmaceutical discoveries.

In addition to its expansive scope, the WTO has adopted a dispute settlement mechanism (DSM) that is much more “legalized” than its precursor under the GATT, and which has given the WTO much greater power over nation-state policy-making. The Dispute Settlement Understanding (DSU), negotiated during the Uruguay Round, has changed the nature of dispute resolution “from a diplomatic to a legalized process and from a power-based to a rule-based procedure.” In terms of its origins,
Robert Read points out that prior to the commencement of the Uruguay Round, contracting State parties to the GATT recognized the need to improve the dispute settlement process such that disputes would be resolved more promptly and through a strengthened system of rules and procedures that included monitoring arrangements to facilitate compliance.\textsuperscript{81} States wished to enhance the power of the dispute settlement process and the enforceability of dispute settlement decisions as a means of ensuring overall State compliance with the trade-liberalizing commitments being agreed upon among States during the Uruguay Round. In other words, States needed to feel confident that any protective measures they were agreeing to give up during the Uruguay Round, were also being given up by other Member States, and moreover, that there was judicial recourse should a Member State choose to renege on its international trade commitments.

According to Read, the negotiation of the DSU has satisfied most of the concerns Member States had with respect to improving dispute settlement:

Unilateral action by the United States and other Members is restrained in several ways. Article XVI.4 of the Agreement Establishing the WTO requires that Members’ national laws comply with their obligations under the WTO. The DSU also requires that Members abide by its rules and procedures, further ensured by its including in the covered agreements listed in Appendix 1 of the DSU.\textsuperscript{82}

The result, however, has been that the WTO has gained an unprecedented ability to impact national policy-making. Jens Mortensen asserts that the legalization of the


\textsuperscript{82} Ibid.
DSM has led to a "hardening" of WTO governance, and Samson points out that the rules concerning compensation and the imposition of sanctions in instances of non-compliance with WTO rulings have "greatly increased the effectiveness of the process and made it very different from the compliance mechanisms of other international agreements."83 Indeed, pursuant to the DSU, a Member State can now submit a complaint alleging violation of WTO rules to the WTO Dispute Settlement Body and it will, in turn, establish a trade dispute Panel to make a binding determination with respect to the alleged violation (appealable only to the Appellate Body). The new rule of "automacity" provides that the decisions of the Panel and the Appellate Body are automatically adopted by the WTO unless rejected by a consensus of Member States.84

Violations are often alleged against Member States in response to domestic laws which are seen to result in discriminatory treatment of one State's goods or services by another, as was the case in the Softwood Lumber Dispute. The two non-discrimination principles that form the basis for the international trading system are the most-favoured-nation (MFN) and national treatment (NT) principles.85 The MFN principle requires that if a Member State extends an advantage to another Member State, that same advantage must be extended to all Members. The NT principle, on the other hand, requires that non-national goods be treated the same as national goods. Thus, if a complaint is alleged against a Member State, the Panels and the

83 Supra note 78.


Appellate Body have the power to review that Member States' laws and/or policies and to recommend sanctions if the domestic laws do not accord with WTO law. Sanctions include such measures as the levying of countervailing duties against imports which can seriously affect the ability of a nation, and its industries, to compete in the global economy.\textsuperscript{86}

This is controversial on many levels, most specifically because it calls into question the democratic authority and expertise of the WTO to make decisions that have far reaching impact on the domestic affairs of Member States. Indeed, Mortensen points out that “WTO enforcement frequently entails difficult choices between conflicting objectives and competing interpretations of imprecise rules.”\textsuperscript{87} Moreover, WTO governance is left up to international trade lawyers and experts who apply a specifically trade-focused logic to the resolution of disputes. Given the far-reaching effect of WTO decisions, it has received much criticism with respect to the fact that trade experts are not equipped to deal with the wide range of social, political and environmental concerns that are necessarily linked to trade issues. In the Shrimp Turtle\textsuperscript{88} case, for example, there was much public outcry when the WTO Panel ruled against a US import ban on shrimp that did not use a particular locating device to prevent the accidental death of sea turtles. The WTO ultimately found that the way in which the US had applied its endangered species legislation violated discriminatory treatment principles according to WTO law.

\textsuperscript{86} This has what as occurred in the Softwood Lumber Dispute.

\textsuperscript{87} Supra note 77 at 172.

Despite criticisms regarding its legitimacy, however, Member States have not shied away from using the WTO dispute resolution processes. Indeed, according to Mortensen, “WTO members increasingly resort to aggressive litigation rather than prudent diplomacy,” as was more common under the GATT.\(^9\) Today, 335 disputes have come before the WTO Panels, and as more Member States turn to the dispute resolution processes, the body of WTO jurisprudence will continue to grow, and its authority will likely become more pervasive.\(^9\)

The expanding scope of the WTO, its formalized dispute resolution process and the rate at which Member States are turning to the WTO to resolve disputes, demonstrate how the WTO has become a significant player in the realm of global governance. The next section discusses in more detail the concept of global governance and how it can be seen to be functioning in the context of globalization.

d) Conceptualizing Global Governance

The emergence of a strong global regulatory regime has led to a shift in discourse from “government” to “governance.” According to James Rosenau, “given the absence of a world government, the concept of global governance provides a language for describing the nexus of systems of rule-making, political coordination and problem-solving which transcend states and societies.”\(^9\)\(^1\) Held and McGrew state that the global governance analytical approach “rejects the conventional state-centric

---

\(^9\) Supra note 77 at 176.

\(^9\) This statement does not neglect the fact that at the same time the WTO’s authority is strengthening, it is subject to strong criticism that has the potential to weaken such authority.

conception of world politics and world order" and is concerned with "understanding and explaining the political significance of global, regional, and transnational authority structures." They quote Rosenau in stating:

By locating rule systems at the heart of our theoretical formulations, we can trace and assess the processes of governance wherever they may occur. That is, through focusing on rule systems we will not be confined to the world of states and will be empowered to explore issues and processes in terms of the way in which authority is created, dispersed, consolidated or otherwise employed to exercise control with respect to the numerous issues and processes that states are unable or unwilling to address.

Thus, the concept of global governance involves moving beyond the notion that political and legal authority are bounded to particular geographical places, and towards a more pluralistic, or multi-sited, conception of authority, which seeks to identify the specific locales from which rule systems emerge.

Scholte uses the term "polycentric" to describe how governance is functioning in the context of globalization. He sees that the acceleration of supraterritoriality is causing regulatory power to shift from a statist model to a polycentric model, which he describes as follows:

... governance in the more global world of the twenty-first century has become distinctly multi-layered and cross-cutting. Regulation occurs at -- and through interconnections among -- municipal, provincial, national, regional and global sites. No single 'level' reigns over the others, as occurred with the primacy of the state over suprastate and substate spheres in territorialist circumstances. Instead, governance tends to be diffuse, emanating from multiple locales at once, with points and lines of authority that are not always clear.

---

92 Supra note 68 at 9 (citing Boli, 1999 and Smouts, 2001).
93 Ibid. [my emphasis added].
94 Supra note 55.
95 Ibid. at 3-4 [my emphasis added].
Scholte argues, however, that the end of statism "in no way entails the end of the state itself;" the nation-state has been repositioned, but it still remains "a crucial node in polycentric governance."\textsuperscript{96} In other words, the state continues to wield power; however, its authority to govern in the Westphalian sense is undergoing significant transformation in accordance with the processes of globalization.

I believe Scholte's conception of polycentric governance provides a particularly useful way of understanding how political and legal authority function in today's globalized world. For the reasons I outlined above, namely the increased integration of the global economy, the emergence and strengthening of supranational regulatory regimes, and the increased power wielded by various non-state actors (TNCs, IGOs, and INGOs), I would argue that it is increasingly difficult to sustain the critics' arguments that nation-state authority, in the Westphalian sense, has remained unchanged. Indeed, while nation-states still hold significant power, that power is increasingly becoming intertwined within a set of global processes that exert pressure on, and ultimately influence, nation-state authority.

**e) Globalization-from-above vs. Globalization-from-below**

Thus far I have discussed how a set of processes, namely global economic integration and the emergence of supranational regulatory regimes, have been challenging the traditional authority of the sovereign state and contributing to the emergence of global governance. This has inevitably focused on what Richard Falk identifies as "globalization-from-above," and what Santos calls neoliberal hegemonic globalization. It has been necessary to discuss the processes of "globalization-from-above."

\textsuperscript{96} Ibid.
above,” i.e. the mode in which global governance is functioning vis a vis a polycentric rather than statist manner, in order to lay the foundation for my argument that globalization is creating need and opportunity for Indigenous rights advocacy within institutions of global governance. In other words, it has been necessary to outline how the processes of neoliberal globalization are operating in order to better understand how “globalization-from-below” responds to it.

As mentioned in Chapter One, this thesis project does not focus on one mode of globalization, but rather recognizes that resistances to the dominant conception of globalization are equally, if not more, deserving of scholarly attention. Indeed, as Santos indicates, an overwhelming amount of scholarly thought has been devoted to neoliberal hegemonic globalization and its key actors, while relatively less attention has been paid to groups that are involved in the “grassroots contestation” of such globalization and the multiple ways they are using law to contest it. Following in this vein, my thesis project now turns to examine how Indigenous rights are being affected by hegemonic globalization, and more importantly, the ways in which Indigenous peoples are responding to this through various legal strategies.

B. Globalization and Indigenous Peoples

The processes of globalization raise questions for Indigenous peoples not only with respect to how the reconfiguration of nation-state power will affect Indigenous rights, but also in terms of how Indigenous cultures can be sustained in the context of what Falk calls “predatory globalization” – the “cumulative adverse effects of . . .
[neoliberal policies] on human-well being.” Indeed, while proponents of neoliberalism argue that trade liberalization represents the most efficient way of distributing the world’s wealth to the greatest amount of people, critics argue that markets are not the best mechanisms for the distribution of resources, and that unrestricted free trade benefits the wealthy at the expense of the poor. Globalization may have improved the material standard of living of certain populations; however, it has also exacerbated inequalities and has served to further marginalize “already-marginalized” groups. Amy Chua points out, for example, that in the developing world, economic globalization has tended to reward small economically dominant groups at the expense of the overall population, which has led to increased ethnic hatred and violence. David Korten similarly points out that “whether intended or not, the policies so successfully advanced by the Bretton Woods institutions have inexorably empowered the super rich to lay claim to the world’s wealth at the expense of other people, other species, and the viability of the planet’s ecosystem.” In other words, far from raising the overall socio-economic standard of the world, today’s neoliberal economic order is impugned for causing, or enhancing, a range of social ills including environmental degradation, child and sweatshop labour, and increased poverty among the working classes in both the developed and developing world’s

97 Supra note 34.


populations. The negative fallout of neoliberal economic globalization has led to an extensive movement against globalization, at least with respect to its dominant neoliberal manifestation.\footnote{This has culminated in several large “anti-globalization” protests which took place most notably in Seattle, Genoa, and Montreal.}

Indigenous peoples have been among the groups resisting globalization. Given that they are the most economically, politically, and socially marginalized groups in the world, economic globalization presents significant challenges for them. It also raises a distinct set of concerns. These include: 1) the central role territory plays in Indigenous worldviews and understandings of identity; 2) the normative power of neoliberal economic discourses to disqualify Indigenous worldviews as impediments to “progress;” and 3) the threats globalization poses to the political and legal gains made by Indigenous peoples in terms of recognition of their rights at the nation-state level.

With respect to the first concern, many Indigenous peoples view their identity and cultural survival as being inextricably linked to their relationship with the land and resources of their traditional territories, and thus their worldviews tend to clash with the dominant neoliberal paradigm that informs the deterritorialized processes of hegemonic globalization.\footnote{For various examples of these “cultural clashes” see Jerry Mander & Victoria Tauli-Corpuz, supra note 99.} Many Indigenous peoples view the natural world not simply in terms of a space to be utilized for economic gain, but rather in terms of a reciprocal relationship, whereby each is sustained by the other. In the UN Study of
the Problem of Discrimination against Indigenous Populations, for example, Special Rapporteur Martinez Cobo points out that:

It is essential to know and understand the deeply spiritual special relationship between Indigenous peoples and their land as basic to their existence as such and to all their beliefs, customs, traditions and culture.

For such peoples, the land is not merely a possession and a means of production. The entire relationship between the spiritual life of Indigenous peoples and Mother Earth, and their land, has a great many deep-seated implications. Their land is not a commodity which can be acquired, but a material element to be enjoyed freely.\textsuperscript{102}

Victoria Tauli-Corpuz of Tebtebba (an Indigenous NGO arising from the Phillipines) explains the divergence between her Indigenous worldview and the neoliberal worldview as follows:

For Indigenous peoples, keeping our territorial or ancestral lands is the most important thing. This is what determines our identity. This is where our ancestors walked and where they learned everything they left to us. Our land is where we forge our relations with Mother Earth and create social bonds with each other. It is no wonder then, that rapidly increasing so-called “ethnic conflicts” in the world are really pitting Indigenous peoples, asserting our rights over our territories, against the global institutions that want to separate us from our land. Globalization policies and activities play a huge part in inflaming these conflicts by erasing borders and erasing identities that are inextricably linked to our rights as Indigenous peoples.\textsuperscript{103}

Indeed, many Indigenous peoples worldwide indicate that it is difficult to separate the concept of their relationship with their lands, territories and resources from that of their cultural differences and values because their “relationship with the land and all


living things is at the core of their societies.”\textsuperscript{104} As Robert Williams Jr. points out, “the spiritual and material foundations of their cultural identities are sustained by their unique relationships to their traditional territories.”\textsuperscript{105}

Indigenous peoples’ relationships with their lands and resources vary from culture to culture; however, there are certain aspects that tend to converge. Land use patterns, for example, frequently provide, or provided, subsistence and are/were linked to familial and social relations, religious practices, and the very existence of Indigenous communities as discrete social and cultural phenomena.\textsuperscript{106} Indigenous languages, knowledge and laws are often intimately linked to particular territories and the natural environment found within those territories.\textsuperscript{107} Furthermore, the values that inform Indigenous knowledge and laws are in many ways derived from their relationships with the natural and spiritual geography of their traditional territories.\textsuperscript{108} It is for all these reasons that Robert Williams Jr. and James Anaya indicate that land


\textsuperscript{107} Last spring I had the opportunity to hear Mr. Lucien Ukaliannuk, Elder-in-Residence, at the Akitsiraq Law School in Nunuvut present to the UVIC Faculty of Law on Inuit Law. It was very apparent from his explanations that Inuit Law is inextricably linked with the physical geography of the North.

and resources are "prerequisites for the physical and cultural survival of Indigenous communities."\textsuperscript{109}

The deterritorializing forces of globalization, therefore, pose unique challenges for Indigenous peoples' identities. John Tomlinson contends that globalization is engendering processes whereby "cultural experience is in various ways 'lifted out' of its traditional 'anchoring' in particular localities."\textsuperscript{110} Axford and Huggins suggest that globalization is redefining political space and the identity spaces of individuals and collective actors.\textsuperscript{111} They argue that:

Globalization has relativized the world and identities in it by penetrating or dissolving boundaries around previously closed (or partially closed) systems, often of a communal or ethnic variety, creating, or beginning to create, intersociety and even post-territorial discursive spaces and networks of relationships along time-space edges of existence. Along the way, various transformations are in train, including reconceptualisations of existing categories of social stratification and in key signifiers such as race, class, gender, sexual preference, and locality, along with key associations such as such as citizenship and nationality.\textsuperscript{112}

Processes of globalization which have the effect of eroding the tie between local or national identity and geographical place raise various questions for Indigenous peoples. On the one hand, given the strong affiliation many Indigenous peoples have with their territories, deterritorialization may pose a threat as Indigenous identities may not be translatable into global spaces. On the other hand, it may be such that

\textsuperscript{109} Supra note 106 at 53.


\textsuperscript{112} \textit{Ibid.} at 3.
different forms of Indigenous identities are forming, or will form, which could strengthen a global identity for Indigenous peoples.\textsuperscript{113} Indeed, Robert Niezen raises these questions by asking:

Under the conditions of not only rapid travel, communication and access to information but also of internationalized nationalism and the global advent of identical pressures of resource extraction on subsistence-based communities and peoples, how are cultural differences being defended? And how does that defense in itself influence the way cultures and identities are reformulated?\textsuperscript{114}

It is beyond the scope of this thesis to examine the possibilities of shifting Indigenous identities; however, it is worth raising the point that globalization raises these challenges for Indigenous peoples.

In terms of the second concern, given the fundamental tension between Indigenous peoples’ attachments to land and the deterritorializing processes of globalization, a key obstacle for Indigenous peoples is the normative power of globalization to render Indigenous worldviews as an impediment to “the progressive evolution of the world.” Indeed, the ideological dimension of neoliberal globalization has naturalized the notion that mass consumption, consumer choice, and technological advance equate to progress in a “modern” society.\textsuperscript{115} As Gill notes, the dominant discourses of neoliberalism propagate the notion “that privatization and transnationalization of capital are either inevitable or desirable from a broad social

\textsuperscript{113} Kinwa Bluesky, a graduate student at the University of Victoria Faculty of Law is currently examining the concept of an emerging global indigeneity.


\textsuperscript{115} For discussions on whether contemporary technological advance does in fact represent “modernity” see Jerry Mander, \textit{In the Absence of the Sacred} (San Francisco: Sierra Club, 1991).
viewpoint.”

Many Indigenous peoples, therefore, face the unique challenge of having to defend the right to be who they are in the context of a dominant world order that regards their values as antiquated, or "inferior," and indeed, as obstacles to the realization of progress.

Finally, with respect to the third concern, globalization poses a significant threat to the gains Indigenous peoples have made within nation-states in terms of having their rights to land and resources recognized. Over the past several decades, Indigenous rights advocates throughout the world have made significant political and legal gains within nation-states. The constitutions of various countries within North and South America, namely Canada, Bolivia, Brazil, Columbia, Ecuador, and Nicaragua, now contain provisions guaranteeing and protecting Indigenous peoples’ rights, which include rights to land and natural resources. In other states, such as Australia, Chile, Mexico and the United States, recognition of rights to land and resources is recognized within statutory law. And while in most cases the promise of such constitutional or statutory recognition has yet to be fully realized, Indigenous advocates have been making inroads in reversing some of the atrociously colonial doctrines such as terra nullius and the "doctrine of discovery."

---

116 Supra note 77 at 125 [my emphasis added].


118 For a more detailed discussion see supra note 106.

119 For a discussion on how American Federal Indian Law, rooted in the "doctrine of discovery", continues to perpetuate racism against American Indians, see Robert A. Williams Jr., Like A Loaded Weapon: The Renquist Court, Indian Rights, and the Legal History of Racism in America (Minneapolis: University of Minnesota Press, 2005).
The recognition of Indigenous rights to land and resources within nation-states, however, is constantly threatened by accelerated demands for land and resources that are needed to fuel the global economy. Whether it is oil, logging, mining, fish farm, nuclear power, or pulp and paper, corporate encroachment on Indigenous lands is commonplace throughout the world. And while it can be argued that the encroachment of Indigenous lands has been occurring for centuries, what is different today, aside from the accelerated pace at which resource extraction is occurring, is that constitutional protections of Indigenous rights, and the emerging jurisprudence that supports those rights, are enabling Indigenous peoples to fend off corporate encroachment through national legal avenues. This is assisting in strengthening indigenous autonomy within the nation-state. Indeed, now when national governments make economic development decisions that are inconsistent with the constitutionally-protected rights of Indigenous peoples, Indigenous peoples have judicial recourse through various legal arenas.

In Canada, for example, although Aboriginal rights and title were recognized within the Canadian Constitution in 1982\textsuperscript{120}, provincial and federal governments continued to take the position that they were not required to consult with Aboriginal peoples regarding economic development in Aboriginal territories until Aboriginal peoples had proven their rights and title through costly litigation or the settlement of a land claim agreement. The Supreme Court of Canada ruled otherwise in 2004, when the Haida peoples of British Columbia used constitutional arguments to argue that the government could not allow the logging company, Weyerhauser, to carry out logging

\textsuperscript{120} Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982 c. 11.
in Haida territories without consulting and accommodating the Haida. Similar situations have arisen in South America where Indigenous rights have been statutorily or constitutionally recognized, but governments have continued to permit economic development by corporate interests, which conflicts with Indigenous rights.

Indigenous peoples in South America have been able to turn to national courts and to the international arena, namely the Organization of American States (OAS) Inter-American Human Rights System, to bring claims against the nation-state. Today, national constitutional and statutory recognition provide Indigenous peoples with a lever to access the judiciary and to hold governments accountable to their legal obligations to recognize and protect Indigenous rights.

Globalization therefore presents distinct challenges for Indigenous peoples to the extent that nation-state power is being eroded through the emergence of global governance institutions. Critical questions arise with respect to how shifts in governance will impact the national constitutional guarantees of Indigenous peoples’ rights. Victor Menotti asserts that the strengthening of global institutions is having

---


123 By stating that these legal avenues now exist I do not wish to overemphasize their potential for just resolutions. Indeed, while there have been some significant gains, colonial assumptions underpinning the Western common law continue to pose challenges for Indigenous peoples. For further discussion see *supra* note 129. Furthermore, the cost of engaging in such litigation also poses serious barriers for many Indigenous peoples.
the effect of diminishing Indigenous autonomy in the same way it is diminishing state autonomy. He states:

While Indigenous peoples around the world have been gaining political ground in recent years by asserting their sovereignty within nation states, those same national governments have given away their own authority, including sovereignty over natural resources, to the World Trade Organization. Despite the fact that Indigenous peoples have been winning landmark domestic court decisions and capturing national elected offices, fundamental decisions as to who finally controls land, water, genes, and essential public services, are now effectively being moved under the authority of the WTO. The result is diminished powers for Indigenous peoples, in relation to other levels of government, and vis-à-vis global corporations whose rights are increasingly enforced by global trade bodies.

Indeed, this is the argument Arthur Manuel makes with respect to the INET’s decision to intervene in the Softwood Lumber Dispute; he states: “we felt that we had to get involved in the Canada-United States Softwood Lumber Dispute because the Canadian government has given up its sovereignty to the international trade tribunals like the World Trade Organization.”

The effect that shifts in state power may have in relation to the recognition and protection of Indigenous rights is an area that I believe merits exploration by Indigenous rights advocates. Indeed, I believe that it signals a need to explore and pursue new opportunities for advocacy beyond state borders – to continue the work done at the national level at various transnational locales such that Indigenous rights

---


125 Ibid.

achieve greater normative significance at the global level. The advocacy work of the INET at the WTO is one example of how this work is beginning to occur. The next section provides a brief background on transnational Indigenous advocacy generally.

C. Indigenous Transnational Advocacy

If the ultimate authority of nation-states is becoming more tenuous and, in accordance with Scholte’s polycentric model, governance can be seen as “emanating from multiple locales at once,” then it is prudent for Indigenous rights advocates to consider how they might respond to this by exploring potential opportunities for advocacy that may be opening up within the context of globalization – avenues that either did not exist before, or that may have been resistant to Indigenous transnational advocacy. Indeed, as Santos points out, the field of resistance is shifting:

Local or national struggles continue to be decisive, but we are in a new stage in which it is necessary to articulate these scales of struggle with the global scale. Movements cannot afford to concentrate themselves on a specific scale of struggles; they have to fight local, national and global struggles, because they are all intertwined.127

Thus, it is important to consider how local struggles are being affected by processes beyond nation-states and to develop transnational advocacy strategies accordingly. Indigenous transnational advocacy requires adopting a multidimensional and multilayered approach that mirrors, to a certain degree, the polycentric mode of governance that is emerging as a result of globalization.

Indigenous rights advocates today may be able to use law to locate new and innovative sites of resistance within emerging institutions of governance, and to

---

discover pressure points that will promote change at both local and global levels. Furthermore, the technological and communicative advances that have enabled hegemonic globalization have also facilitated the unification of Indigenous peoples across the globe, who share similar concerns and who wish to advance their positions through similar legal strategies. The processes of hegemonic globalization may continue to strengthen the international Indigenous rights movement and establish a foundation for counter-hegemonic globalization. Indeed, Victoria Tauli Corpuz states:

If we look at what has been happening to Indigenous peoples and their territories in the past three decades, it is clear that economic globalization is a key factor in bringing about the worsening of these conditions. It is also true, though, that we have not only been the victims of globalization. *We also have exercised our own version of globalization which is to network between ourselves, on a global scale, and bring our issues to the international multilateral bodies, like the United Nations.*

The international indigenous rights movement has, in fact, gained significant momentum over the past several decades, particularly with respect to advocacy within the international human rights arena. Indeed, Indigenous transnational advocates have had success in pursuing and creating political opportunities within the international human rights arena both at the United Nations (UN) and within regional human rights bodies, namely the OAS Inter-American Human Rights System. Because the international human rights arena has been the central target of Indigenous transnational advocacy, it is worth discussing some of the results and limitations of this advocacy to establish background and context for my overall thesis argument.

---

The next section briefly discusses the normative development of international human Indigenous rights law that has resulted from Indigenous transnational advocacy, as well as some of the obstacles faced by Indigenous peoples in engaging in such advocacy.

a) **Transnational Advocacy in the International Human Rights Arena**

i. **Normative Development of International Human Rights Law**

Over the past three decades, Indigenous transnational advocates have created a distinct space for Indigenous peoples within the international human rights arena and have begun to generate a normative framework that addresses human rights specific to Indigenous peoples. Indeed, since the early 1970s, two UN working groups have been established to address Indigenous issues,\(^{129}\) the UN General Assembly has announced two International Decades of the World’s Indigenous Peoples,\(^{130}\) and the Permanent Forum on Indigenous Issues\(^{131}\) has been created to act as an advisory board to the UN Economic and Social Council (ECOSOC). Furthermore, Indigenous peoples themselves are playing a much greater participatory role through consultative status with the ECOSOC, and through direct participation in the Working Group on Indigenous Populations (WGIP).\(^{132}\)

---

\(^{129}\) The WGIP was established in 1982 to draft the Draft Declaration on the Rights of Indigenous Peoples (DDRIP), which it adopted in 1994, and submitted to the Commission on Human Rights (CHR). In 1995, the CHR established another working group to consider the DDRIP; these discussions are still ongoing.

\(^{130}\) The UN General Assembly launched the first International Decade of the World’s Indigenous Peoples (1995 – 2004) to increase United Nations' Commitment to promoting and protecting the rights of Indigenous peoples. The second Decade was launched in 2005 to continue striving toward the objectives that were not met in the first Decade.

\(^{131}\) The Permanent Forum on Indigenous Issues was established in 2000.
A key result of Indigenous transnational advocacy has been the movement within the UN to develop a comprehensive declaration outlining the rights of Indigenous peoples, the *Draft Declaration on the Rights of Indigenous Peoples* (DDRIP).\(^{133}\) If adopted, the DDRIP will represent the most comprehensive statement on the rights of Indigenous peoples in international law. The current DDRIP, which has been adopted by the human rights experts of the WGIP and the Sub-Commission on the Promotion and Protection of Human Rights, goes beyond *International Labour Organization Convention No. 169 Concerning Indigenous And Tribal Peoples* (ILO Convention 169)\(^{134}\) in a number of areas, including recognition of the right to self-determination (Article 3) and rights to own and control land and resources (Article 21, 25-30). Furthermore, it recognizes the *collective rights* of Indigenous peoples to a much higher degree than any other international human rights doctrine, and recognizes that Indigenous people are “peoples” as a matter of international law. The “peoples” issue and the issue of Indigenous collective rights have been the subject of vigorous debate and disagreement among States at the UN; however, which is indicative of the UN’s liberal individualistic and state-centric origins which continue

---


to pose obstacles for Indigenous peoples’ participation and rights recognition. That said, scholars such as Anaya argue that although it has been “grudging and imperfect, falling short of Indigenous peoples’ aspirations,” international human rights law has moved away from its exclusively state-centered orientation and is continuing to develop to support Indigenous peoples’ demands.\(^{135}\)

Indeed, Anaya holds an optimistic view of the potential of international law to further the aims of Indigenous peoples.\(^{136}\) He argues that the normative development of international law concerning Indigenous peoples’ rights has not only been facilitated by greater participation by Indigenous people within the UN, but also by the use of various international law conventions within the UN and OAS human rights arenas, which are contributing to a growing jurisprudence concerning Indigenous peoples and international law.\(^{137}\) Indeed, he argues that the advocacy and lobbying of Indigenous peoples in the international human rights arena has resulted in the emergence of international norms and a consensus among authoritative international actors that is laying the foundation for the emergence of customary international law concerning the rights of Indigenous peoples.\(^{138}\)

---

\(^{135}\) *Supra* note 1 at 4.


\(^{138}\) *Supra* note 1.
Anaya identifies some specific international law norms that have been generated with respect to Indigenous peoples, namely “non-discrimination, cultural integrity, lands and resources, social welfare and development, and self-government.”\(^{139}\) He asserts that these norms arise from the foundational principle of “self-determination and related human rights precepts.”\(^{140}\) The norm of “cultural integrity” reflects the increased recognition of the right of Indigenous peoples “to maintain and freely develop their cultural identities in co-existence with other sectors of humanity.”\(^{141}\) In other words, there is growing recognition that Indigenous rights arise from the overall human right of peoples to determine who they are, and to exist according to this determination. And, Indigenous rights to lands and resources and are now being seen as necessary elements of the right to self-determination.

The norms outlined above are entrenched within international legal doctrine such as ILO Convention 169 and the DDRIP. They are also being generated through jurisprudence such as the Case of the Mayagna (Sumo) Awas Tingi Community v. Nicaragua (Awas Tingi).\(^{142}\) In Awas Tingi, the OAS Inter-American Commission chose to bring the complaint made by the Awas Tingi against the government of Nicaragua to the Inter-American Court on the Awas Tingi’s behalf. Relying on Article 21 (right to property) and Article 25 (the right to judicial protection) of the

\(^{139}\) Ibid. at 129.

\(^{140}\) Ibid.

\(^{141}\) Ibid. at 131.

American Convention on Human Rights (American Convention)\textsuperscript{143}, the Inter-American Court found that the Awas Tingi had collective rights, as a matter of international law, to the lands and natural resources that they traditionally used and occupied. In other words, the Court accepted that the right to property pursuant to Article 21 includes communal property ownership, as is consistent with Awas Tingi culture. This case set an international legal precedent as the first decision of an international court with binding authority to directly address the property rights of Indigenous peoples.

Rhiannon Morgan argues that the achievements of Indigenous rights advocates within the international human rights arena are linked to the ways in which they have strategically framed Indigenous rights concerns so as to “engender support for their aspirations within the international legal system.”\textsuperscript{144} Indeed, Morgan argues that by demonstrating how Indigenous rights intersect with other social concerns, and by framing them as such, Indigenous rights advocates have been able to enlist a broader base of support within the international human rights community.\textsuperscript{145} Strategic frames align the interests of a movement with the “concerns, values, and understandings” of the elites targeted by the movement, and thereby enlist those elites in promoting change.\textsuperscript{146} One can see how Indigenous advocates have been able to use strategic framing to target elites within the UN system, as it has been possible to


\textsuperscript{145} Ibid.

\textsuperscript{146} Ibid.
align Indigenous rights claims with interests that resonate within the UN, namely non-discrimination, cultural preservation, peace and security, and respect for the environment. In the subsequent chapters of this thesis, which examine Indigenous advocacy within the international trade arena, it will be important to consider to what extent frame alignment within institutions such as the WTO, is possible, or even desirable, given the overall desired objectives of Indigenous peoples.

ii. Limitations of Indigenous Transnational Advocacy in the International Human Rights Arena

Having delineated the successes of transnational advocacy within the international human rights arena, it is also prudent to discuss some of the limitations. Indeed, while it can be argued that there has been a significant development of norms concerning Indigenous peoples’ rights within the international human rights arena, this arena continues to present challenges for Indigenous peoples due to its liberal individualistic and state-centric foundations. In critiquing the approach taken by Anaya, Will Kymlicka questions whether development of Indigenous rights in conjunction with international human rights law is appropriate – “or whether it is a form of cultural imperialism to expect Indigenous communities to abide by ‘Eurocentric’ principles of individual civil and political rights”.148 As mentioned, the state-centric and individualistic tendencies of the UN are evident in the difficulties surrounding the recognition of collective rights in the DDRIP. Indeed, many States

147 Ibid., Morgan identifies three central frames, discrimination, peace and security, and the environment, as the strategic frames that Indigenous advocates have employed to further Indigenous interests.

148 Supra note 136 at 291.
have voiced reluctance to recognize Indigenous peoples’ collective rights, with states such as Japan and France arguing that collective rights have never existed in international law. Taiaiake Alfred and Jeff Corntassel argue that the delay surrounding the adoption of the DDRIP is indicative of States’ refusals to seriously consider Indigenous peoples’ rights, and the overall inability of the UN to affect practical change in the lives of Indigenous peoples. They therefore argue that Indigenous peoples must seek other forms of advocacy that involve building strength amongst Indigenous nations themselves.

Another significant limitation with respect to advocacy in the international human rights arena relates to enforcement. While it can be argued that transnational Indigenous rights advocacy has succeeded in generating a strong enough international normative consensus such that Indigenous rights can no longer be ignored at the international level, it does not necessarily ensure change at the national level. Indeed, recognition within the international human rights law does not guarantee that States will enable Indigenous self-determination through granting greater access and control over land and resources or otherwise. While traditional conceptions of state-sovereignty are beginning to shift, the principle of non-intervention and the concomitant lack of enforcement of international human rights law at the State level still have serious ramifications for its efficacy. Furthermore, the fact that once


adopted, the DDRIP will only exist as a declaration, and not a convention encompassing justiciable principles, compounds the problem of enforcement.

The challenge, then, is to find ways of advocating for Indigenous rights through avenues which can affect change, either because States respond more effectively to the decisions made within those arenas, or because they face greater repercussions should those decisions be ignored (for example the imposition of trade sanctions within the realm of international trade law). Indeed, the problems of enforceability of international human rights law have led some Indigenous advocates to consider alternative uses of international law to promote Indigenous rights. This has come with the concomitant realization that there is a need to question what Sundhya Pahuja claims is a “conceptual and canonical separation of international economic law . . . from human rights law.”¹⁵¹ In other words, the shifting nature of world politics is challenging transnational advocates to reconsider the arenas and boundaries that have been constructed to address social justice concerns, and to query whether this separation in and of itself is perpetuating a detrimental notion that trade and human welfare are mutually exclusive categories. Finally, it has become increasingly apparent that the international trade arena is having a powerful influence in governing world affairs; thus many who are concerned with the effects of neoliberal globalization, including Indigenous peoples, have begun to seek out ways to bring these issues to the international trade arena.

b) Looking to the International Trade Arena

Indigenous peoples are beginning to explore whether new opportunities for advocacy are opening up as a result of globalization. Indeed, in 2002, a symposium titled, “Indigenous Peoples and Multilateral Trade Regimes: Navigating Opportunities for Advocacy” (the “Symposium”) was held at the New York University School of Law, which brought together Indigenous leaders, activists, economists, lawyers, law faculty and students from across North America to discuss “broadening Indigenous advocacy from its narrow focus on human rights complaints against States, to a more proactive economic agenda.”\textsuperscript{152} In commenting on the objectives of the Symposium, Russel Barsh states:

Indigenous peoples have learned to make effective uses of national courts and the United Nations although these institutions were also created by nation-states to serve states’ interests. We were interested in discovering in what ways and to what extent can Indigenous peoples use MTOs [multi-lateral trade organizations] to combat discrimination and economic marginalization.\textsuperscript{153}

The Symposium resulted in an exchange of dialogue concerning innovative ways that Indigenous interests have been pursued, or may be pursued, within the domain of international trade. Some of these include: using dispute-resolution mechanisms as a forum to put pressure on States; using the TRIPS Agreement to identify, certify and promote consumer recognition and preference for products made by or with the consent of Indigenous communities; and negotiating with States to have certain


\textsuperscript{153} Ibid.
benefits provided to Indigenous groups, such as employment and procurement opportunities, considered “green-light” subsidies.  

Menotti indicates that Indigenous advocates are beginning to identify global economic institutions, such as the WTO, as potential arenas of resistance. He states that:

While battles against various colonial monarchies range back for centuries, today’s drive for natural resources is increasingly determined by a single set of global rules created by the WTO. In doing so, the WTO has indirectly imposed a single regime over Indigenous peoples everywhere. In response, native communities fighting for their sovereignty are recognizing this new arena of struggle and Indigenous organizations are unifying internationally to change those rules.  

Canadian Indigenous peoples have been leading the way in this regard having successfully gained access to the WTO in the context of the Softwood Lumber Dispute. Indigenous peoples from around the world, however, have identified the WTO has a potential target for their advocacy. During the WTO Ministerial Conferences held in Seattle (1999)\textsuperscript{156} and Cancun (2003)\textsuperscript{157}, Indigenous peoples

\textsuperscript{154} Ibid.

\textsuperscript{155} Supra note 124 at 47 (my emphasis added).

worldwide came together to hold parallel conferences. At both conferences declarations were written outlining how Indigenous peoples are affected by economic globalization and specifically calling on Member States to reform the policies of the WTO.

D. Conclusion

Indigenous rights advocates are beginning to pursue new and innovative ways of advocating for their rights across “an increasingly plural legal landscape.”158 Accelerated threats of resource exploitation in Indigenous territories, coupled with the emergence of new institutions of governance that are challenging the authority of the nation-state, are creating both need and opportunity for Indigenous advocates to look to alternative forms of resistance and advocacy across a multi-scale legal landscape—at local, national, regional and global levels. The shifting nature of governance in the context of globalization is an area I believe merits significant attention by Indigenous rights advocates. Moreover, I believe it is necessary to consider how Indigenous advocacy is responding to it. The next two chapters are devoted to analyzing how and why transnational advocacy efforts directed at the WTO were initiated by

---


158 Supra note 18 at 16.
Canadian Indigenous groups, and the possibilities and limitations that exist in engaging in this type of advocacy.
CHAPTER THREE

A. Introduction

Over the past decade, First Nations from the Interior of BC have initiated a particularly strong campaign to assert their rights over forest resources. Their campaign is interesting because of the myriad ways they have used both legal, and purportedly “illegal”, strategies across a plural legal landscape to promote the recognition of their rights on the ground. They have enlisted the support of other Indigenous groups and non-state actors across borders to simultaneously advocate for their Indigenous rights and to resist neoliberal hegemonic globalization in the form of what Keck and Sikkink would call a transnational advocacy network (TAN). Their struggle clearly illustrates the connection between globalization, law, and the transnational Indigenous rights movement. Moreover, it demonstrates how globalization is creating both need and the opportunity for Indigenous peoples to advocate/participate in emerging institutions of global governance.

I view the Interior First Nations struggle as an example of counter-hegemonic globalization, or “globalization-from-below,” and I approach my analysis of this struggle by adopting a “subaltern cosmopolitan legality” (SCL) perspective. Examining a struggle through a SCL lens involves “inquiring into the combination of

159 Supra note 18 at 7.

160 Supra note 18.
legal and illegal (as well as non-legal) strategies through which transnational and local movements advance their causes" across borders. My analysis, therefore, examines the purportedly "illegal" acts of members of the Secwepemc First Nation (a group of BC Interior First Nations communities) to assert their Indigenous rights over their forest resources and continues by analyzing the various political-legal strategies they utilized in national and then international institutions. In addition, an SCL perspective necessitates inquiring into the ways in which a struggle seeks "to expand the legal canon beyond individual rights." Indeed, Santos suggests that a key imperative of "counter-hegemonic globalization" is "reinventing law to fit the normative claims of subaltern social groups." Thus, my analysis focuses on the way in which the Interior Alliance and the INET "reinvented" neoliberal international subsidies law to strengthen recognition of Indigenous proprietary rights over the forest and to create a space within the formal workings of the WTO to assert Indigenous economic laws.

An SCL perspective aims to "empirically document experiences of resistance, assess their potential to subvert hegemonic institutions and ideologies, and to learn from their capacity to offer alternatives to the latter." Its central purpose is "to expose the potential and limitations of law-centered strategies for the advancement of counter-hegemonic political struggles in the context of globalization." I draw on

161 Ibid.
162 Ibid.
163 Supra note 17 at 446
164 Supra note 18 at 14-15.
165 Ibid. at 4.
the work of Keck and Sikkink to assess the outcome of the INET’s struggle, relying on their five indicators for evaluating the success or failure of a transnational advocacy network. I find their work helpful in elaborating on some of the undertheorized elements of SCL.

Chapter Three sets the stage for my examination in Chapter Four where I conduct a detailed evaluation of the possibilities and limitations of Indigenous advocacy at the WTO, as they have been exposed by my analysis of the IA and INET experiences. I begin this chapter with a discussion of the Secwepemc peoples’ relationship with the forest and key events in the colonial history of First Nations’ land claims in BC.

B. The Secwepemc First Nation and Indigenous Resistance to Colonization

The Secwepemc Nation, also referred to as the Shuswap Nation, is comprised of seventeen Bands located throughout the Interior, or south-central part, of BC.166 At the time of European contact, Secwepemc territory extended from the Columbia River Valley on the east slope of the Rocky Mountains to the Fraser River District on the west, and from the upper Fraser River in the north, to the Arrow Lakes in the south.167 The Secwepemc traditional territory spans approximately 180,000 square

166 The seventeen Bands are the: Adams Lake, Bonaparte, Canoe Creek, Esketemc, High Bar, Kamloops, Little Shuswap, Neskonlith, North Thompson, Soda Creek, Shuswap, Skeetchesn, Spallumcheen, Ts’kw’aylax, Whispering Pines/Clinton and Williams Lake.

kilometers, and today, the population of the Secwepemc Nation is approximately 8,500 people.

The Secwepemc Nation was traditionally a political alliance of communities that were separate and independent, but united by a common language, Sewepemcitsin, and by a similar culture and belief system. Secwepemcitsin is one of the Interior Salish languages of the large Salishan language family. According to the George Manuel Institute,

The language contains the mental, physical, and spiritual connectedness of the Secwepemc to the land. It protects and maintains all forms of Secwepemc knowledge. It keeps the people whole and connected to the Creator. It maintains the Secwepemc responsibility to the land. The language contains traditional ecological knowledge needed to protect biodiversity and it is used to transmit all forms of knowledge to future generations.

The Secwepemc were traditionally a semi-nomadic people who lived in semi-underground pit-houses, or kekuli, during the winter, and in portable mat lodges.

---

168 Wolf, *ibid.*

169 The Shuswap Nation Tribal Council online: “Who are the Secwepemc?” <http://www.shuswapnation.org/Who%20are%20the%20Secwepemc.htm>.


171 Secwemcitsin, *ibid.* According to The George Manuel Institute, *ibid.*:

As the Secwepemc were given the land; they were also given a language. Language was given to the Secwepemc by the Creator for communication to the people and to the natural world. This communication created a reciprocal and cooperative relationship between them and the natural world which allowed the Secwepemc to survive and flourish in harsh environments.

during the summer.\textsuperscript{173} Their economy was, and in many respects still is, based on fishing, hunting and trading.\textsuperscript{174} Elder Joe Manuel of the Nesklonlith Band states:

When I was young, my family got by because we stored food. We canned fish and deer meat, and picked berries, roots and plants. Even when I was young, my parents taught me that we had to feed people to make sure that everybody was taken care of. Sometimes, I remember that my mom would cook and cook and cook to feed all of the people. There were sometimes so many people that we would have to do different sittings for dinner, to wash the dishes after one group ate so that we had enough plates to feed the next group. When people were hungry they always knew to come to our house, and we would feed them.\textsuperscript{175}

Dr. Peter Elias, an anthropologist who conducted a Traditional Use Study\textsuperscript{176} with the Adams Lake and Neskonlith Bands (communities within the Secwepemc Nation), indicates that these communities have, throughout time, used the forest resources “for the purposes of construction of homes and furnishings, water craft, fishing paraphernalia, tools, containers, and for heating, cook and curing fuel.”\textsuperscript{177} Dr. Elias points out that Secwepemc territory is home to a vast variety of tree species and that historically, Secwepemc people would “travel throughout their traditional territory to secure the correct wood needed for a particular application.”\textsuperscript{178} He has concluded that “from the distant past to the present day Shuswap culture is based on the relations between the human population and forests in their contemporary use of territory.”\textsuperscript{179}

\textsuperscript{173} Wolf, \textit{supra} note 167 at 8.

\textsuperscript{174} Ibid. at 7.

\textsuperscript{175} J. Manuel Affidavit, \textit{supra} note 25.

\textsuperscript{176} A Traditional Use Study examines and records all of the places where a First Nation population makes historic and current use of lands and resources and the ways in which these lands and resources are used.

\textsuperscript{177} Elias Affidavit, \textit{supra} note 25.

\textsuperscript{178} Ibid.
The Shuswap story of “Coyote and Spider” told by Ike Willard supports this notion. This story speaks to the Secwepemc’s use of forest products describing how “Coyote’s fur was transformed into black tree moss to provide food for the coming peoples.”

The connection the Secwepemc people have with the natural resources of their territories is eloquently set out in the Memorial that the Chiefs of the Shuswap, Okanagan and Couteau Tribes presented to Sir Wilfred Laurier in Kamloops in 1910.

It states:

> When they [Europeans] first came among us there were only Indians here. They found the people of each tribe supreme in their own territory, and having tribal boundaries known and recognized by all. The country of each tribe was just the same as a very large farm or ranch (belonging to all the people of the tribe) from which they gathered their food and clothing, etc., fish which they got in plenty for food, grass and vegetation on which their horses grazed and the game lived, and much of which furnished materials for manufactures, etc., stone which furnished pipes, utensils, and tools, etc., trees which furnished firewood, materials for houses and utensils, plants, roots, seeds, nuts and berries which grew abundantly and were gathered in their season just the same as the crops on a ranch, and used for food; minerals, shells, etc., which were used for ornament and for plants, etc., water which was free to all. Thus, fire, water, food, clothing and all the necessaries of life were obtained in abundance from the lands of each tribe, and all the people had equal rights of access to everything they required. You will see the ranch of each tribe was the same as its life, and without it the people could not have lived.

In the Memorial, the Chiefs state that their relationship with the initial Europeans was based on respect for each others’ laws, and that the Europeans had acknowledged the

---


182 Memorial To Sir Wilfred Laurier, Premier of the Dominion of Canada From the Chiefs of the Shuswap, Okanagan and Couteau Tribes of British Columbia (25 August 1910), Victoria, Provincial Archives of British Columbia (NWp, 970.5, M533).
Tribes’ ownership of their lands. The Tribes’ relationships with subsequent Europeans and the Canadian governments, however, had deteriorated as settler societies gained more power. At the time of presenting the Memorial to Sir Wilfred Laurier, the Chiefs were deeply concerned about, *inter alia*, the imposition of European/Canadian laws upon their peoples, the expropriation of their lands, and the absence of treaties between the Tribes and the Canadian government.

Unlike in the majority of other provinces in Canada where treaties were entered into between First Nations and the British colonial and/or Canadian governments, very few of these treaties exist in BC. This is primarily a result of the racist perspectives and policies of the colonial government that existed in BC prior to its joining the Confederation of Canada in 1871. While some treaties were entered into between Governor Douglas and First Nations on Vancouver Island during the 1850s,\textsuperscript{183} treaty-making on the whole was not carried out in BC. When Governor Trutch succeeded Governor Douglas in 1864, all policies established by Douglas concerning First Nations land rights were put to an end, as Trutch explicitly asserted that “British Columbia Indians had never owned the land.”\textsuperscript{184} This was clearly contrary to the view that had been held by the British government at the time, and that had initially been followed by Governor Douglas. Nonetheless, this rationale took hold and established a legacy of not recognizing First Nations’ rights to land and resources in BC for over one hundred years.

\textsuperscript{183} Governor Douglas entered into fourteen agreements with First Nations on Vancouver Island during the 1850s; these agreements have come to be known as the Douglas Treaties.

Throughout this period of time, First Nations across BC continued to assert their rights to the land and its resources; however, their ability to bring forward legal claims was significantly affected by the enactment of prohibitions within the federal Indian Act, which made it illegal for any person to raise funds for the purpose of pursuing “Indian” claims without the permission of a representative of the Crown. This very dark chapter of Canadian history lasted from 1927 to 1951, when the prohibition was finally repealed.

Following the repeal of the legislation, First Nations began to mobilize both politically and legally to pursue their land claims against the Canadian governments. During this time, members from Interior First Nations played a very active role in Aboriginal politics and in establishing Aboriginal political organizations. In addition, the litigation initiated by various First Nations within BC began to significantly impact Canadian law concerning Indigenous rights over land. The first significant case was the Calder case in 1973, which resulted in a majority of the Supreme Court of Canada recognizing that Aboriginal title exists, a fact long denied by the BC government. Following this decision, the federal government agreed to enter into land claims negotiations with the Nisga’a (who had initiated the case);

---

185 Provisions prohibiting the Potlatch ceremony, the central political and economic institution of Northwest Coast Indigenous peoples, were also enacted within the Indian Act.

186 Supra note 184 at 125. Tennant notes that George Manuel of the Neskonlith Band was instrumental in reviving the North American Indian Brotherhood and in working towards establishing unity among BC First Nations.


188 In Calder 6 of 7 Supreme Court judges found that aboriginal title existed at common law and continued to exist until validly extinguished through clear and plain extinguishment. The Court, however, split 3-3 regarding whether the Nisga’a aboriginal title had been extinguished. Because the seventh judge dismissed the appeal on technical grounds, the Nisga’a lost the case.
however, the provincial government still clung to its colonial beliefs that Aboriginal title did not exist in BC.

In 1982, after significant lobbying by both Canadian Aboriginal and non-Aboriginal people, the recognition and affirmation of Aboriginal and treaty rights was incorporated into section 35(1) of the Canadian Constitution. While this event symbolized an important milestone for Canada in terms of beginning to reconcile the injustices of its colonial past, it was uncertain at the time what practical effects section 35 would have for First Nations people in terms of the tangible recognition of their rights. Furthermore, despite Constitutional recognition, the BC government still refused to acknowledge Aboriginal title in BC. As a result, in the mid-1980s, a series of blockades were set up by First Nations throughout BC to prevent resource companies from logging and/or developing in Indigenous traditional territories. These purportedly "illegal" acts of resistance proved to be successful in raising awareness about the problem of non-recognition of Aboriginal title, and in securing legal judgments that were the impetus behind much of the change that began to occur in BC during the 1990s.

In 1985, in *MacMillan Bloedel v. Mullin*, the BC Court of Appeal granted an injunction, requested by the Clayquot and Ahousaht Bands, to prevent MacMillan Bloedel from continuing to log on Meares Island on the northwest coast of Vancouver Island. In the majority decision, Justice Seaton made strong statements which

---

189 Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982 c. 11. Section 35(1) states: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

190 Supra note 184 at 222-226.

indicated that the judiciary was no longer prepared to ignore the problem that the BC
government had been refusing to address for so long. Justice Seaton stated:

There is a problem about tenure that has not been attended to in the past.
We are being asked to ignore the problem as others have ignored it. I am not
willing to do that.\footnote{Ibid. at para. 78.}

He found that the balance of convenience favoured the claims of the Clayquot and
Ahousaht Bands, stating that denying or postponing the right of Macmillan Bloedel to
log the land would not cause irreparable harm – if it were decided at trial that
MacMillan Bloedel had the right log, “the timber would still be there.”\footnote{Ibid. at para. 69.}
Following \textit{Mullin}, BC First Nations were successful in obtaining injunctions preventing logging
in their territories in various other cases.\footnote{Supra note 184 at 225. Paul Tennant states that “Logging was halted on Deere Island in Kwaguilth
territory. Railway expansion was prevented along the Thompson River. Logging preparation was
halted in the Giksan-Wet’suwet’en claim area. Resource development was stopped in the whole area
that he McLeod Lake band was seeking to have recognized as its reserve should its efforts to adhere to
Treaty No. 8 be successful.”} This put great pressure on the BC
government and, according to Paul Tennant, “prompted major resource development
corporations to begin considering whether their own interests would not be better
served by the province’s negotiating with the Indians.”\footnote{Ibid.}

In 1990, the BC government changed its long-held policy by entering into the
land claim negotiations that were ongoing between the Nisga’a and the federal
government, and by establishing the BC Treaty Process (the “Process”) to negotiate
outstanding land claims with First Nations throughout BC. At the time, the BC
Treaty Process promised to establish a new relationship between BC First Nations

\footnote{Supra note 184 at 225. Paul Tennant states that “Logging was halted on Deere Island in Kwaguilth
territory. Railway expansion was prevented along the Thompson River. Logging preparation was
halted in the Giksan-Wet’suwet’en claim area. Resource development was stopped in the whole area
that he McLeod Lake band was seeking to have recognized as its reserve should its efforts to adhere to
Treaty No. 8 be successful.”}
and the federal and BC governments; however, since its inception the Process has been the subject of much debate, disagreement, and disillusionment. There are major differences in perspectives between First Nations and the governments concerning what treaty-making entails, and many First Nations communities, such as those from the Interior of BC, have refused to submit their land claims to the Process.

The problems with the Process were compounded in 1997 when the Supreme Court of Canada handed down its major Aboriginal title decision in *Delgamuukw v. British Columbia*. In this landmark case, the Supreme Court of Canada recognized that governments must respect Aboriginal title, Aboriginal laws and Aboriginal oral history. The Court reiterated its finding in *Calder* that Aboriginal title arises from the pre-existence of Aboriginal societies prior to the Crown’s assertion of sovereignty. In outlining the nature of Aboriginal title, the Court indicated that there were three dimensions which made Aboriginal title "sui generis": 1) the fact that it is inalienable except to the Crown; 2) that its sources include both the common law and Aboriginal laws; and 3) the fact that it is held communally. The Court indicated that *sui generis* means that:

---


... its [Aboriginal Title’s] characteristics cannot be completely explained by reference either to the common law rules of real property or to the rules of property found in Aboriginal legal systems. As with other Aboriginal rights, it must be understood by reference to both common law and Aboriginal perspectives.200

Thus, the court recognized the important role Aboriginal laws have to play in determining the meaning of Aboriginal title.

The Court in Delgamuukw also found that the purpose of section 35 of the Constitution is to reconcile the pre-existence of Aboriginal societies with the Crown’s assertion of sovereignty,201 and it set out a test which governments were to follow should Aboriginal title be infringed by activities of the Crown.202 It is important to note that in setting out a test for infringement of Aboriginal title the Court acknowledged that Aboriginal title “encompasses the right to exclusive use and occupation of the land,” “the right to choose to what uses the land can be put,” and has an “inescapable economic component” to it.203

Following this judgment, it appeared clear that the governments would not only have to change the approach they were taking at the treaty tables, but also the way in which they managed and used “Crown” land.204 BC, however, took the position that First Nations must first prove their Aboriginal title through litigation or

200 Ibid. at para. 112.
201 Ibid. at para. 140.
202 Ibid. at paras. 160 – 169.
203 Ibid. at 166 [my emphasis added].
204 I place parentheses around Crown to indicate the unresolved issue of ownership concerning this land.
settled treaties before it was required to consult and/or accommodate Aboriginal rights when permitting resource extraction to occur on Aboriginal claimed lands.\textsuperscript{205}

The colonial political-legal history that I have briefly set out demonstrates how law is implicated in rendering “absent” First Nations legal traditions and knowledge in British Columbia. Provisions enacted within the \textit{Indian Act} prohibiting First Nations from, \textit{inter alia}, continuing to practice the Potlatch and collecting funds to bring forward land claims, are examples of how Western law has served as an eraser, “rubbing out” Indigenous knowledge and laws from the British Columbian political-legal landscape. The historic denial of Aboriginal title by the British Columbian government and its approach to interpreting section 35 of the Canadian Constitution, have continued to solidify this “absence.” In repeatedly taking the position that it has no obligation to consult or accommodate Aboriginal title and rights, the British Columbian government has sought to render absent the protective potential of section 35. Indeed, this has led authors such as Ardith Walkem and Halie Bruce to question whether section 35 represents a “box of treasures”, or simply an “empty box.”\textsuperscript{206}

What this brief re-telling of history also indicates is how BC First Nations have been able to successfully utilize the judiciary to further the recognition of their Aboriginal title and rights. Many of the breakthroughs with respect to Aboriginal rights have resulted from legal cases initiated by First Nations who have challenged

\begin{footnotes}
\item[\textsuperscript{205}] In \textit{Haida} and \textit{Taku}, supra note 130, the Supreme Court of Canada ruled that so long as there is a prima facie case for aboriginal rights or title, the Crown must consult First Nations when engaging in activities that might infringe aboriginal rights or title.

\item[\textsuperscript{206}] Ardith Walkem \& Halie Bruce Walkem, “Introduction” in Ardith Walkem \& Halie Bruce eds., \textit{Box of Treasures or Empty Box?: Twenty Years of Section 35} (Canada: Theytus Books, 2003) 10.
\end{footnotes}
the positions taken by Canadian governments. You will recall Justice Seaton’s statements in Mullin that the judiciary was no longer prepared “to ignore the problem that others have ignored.”\textsuperscript{207} Indeed, national courts have served as important arenas for furthering recognition of Aboriginal rights in Canada, and in keeping governments in check. Thus, questions arise with respect to how globalization will impact these national legal institutions, and what potential exists for Indigenous advocacy within global legal institutions to ensure similar protective measures are put in place. It is in light of this historical backdrop, and these questions, that I now turn to my analysis of the Secwepemc First Nations’ contemporary struggle to assert their rights over the forest resources of their territories using various different political-legal arenas. In addition to demonstrating how globalization is creating both need and opportunity for Indigenous peoples to seek out new directions of advocacy within institutions of global governance, I hope to bring an emergent quality to this struggle consistent with Santos notion of “the sociology of emergence.”\textsuperscript{208}

C. The Secwepemc Struggle for Forest Resources: A Case of Globalization-from-below\textsuperscript{209}

a) Logging Interior Forests

The logging and forest products industry has traditionally been, and still is, the dominant industry in BC. Forest products are the province’s “most important export

\textsuperscript{207} Supra note 191.

\textsuperscript{208} Supra note 18; supra note 9.

\textsuperscript{209} In my framework for examining the Secwepemc struggle I have drawn from the framework used to examine the U’wa’s struggle in Cesar A. Rodriguez-Garavito & Luis Carlos Arenas supra note 122.
commodity,” and accounted for more than $15 billion, or 52%, of the province’s total exports in 1999. Nearly all of the wood in BC is softwood, which is used to produce lumber, plywood, shakes, shingles, newsprint and pulp and paper products. About half of the softwood produced in Canada comes from BC and is traded with the United States, Canada’s largest international softwood lumber customer. Because roughly 95 percent of BC’s land base is considered public, or “Crown” land, more than 90 percent of the logging in the province occurs on government regulated land, most, if not all, of which is the subject of Aboriginal land claims. Logging takes place on “Crown” land through a system of land tenures -logging companies acquire leases, licenses and/or permits from the province which enable them to log the lands in accordance with government regulations. The provincial government generates revenue from the logging companies through a system of stumpage payments, the rates of which are determined “by combining variables such as the value of the timber, market conditions, and logging costs.”

Stumpage rates charged by the province have been the subject of much concern for environmental groups, First Nations, and US lumber producers (although the latter groups are motivated by different reasons than the former groups). In 2001, the Sierra Legal Defence Fund (Sierra) conducted a study comparing Coastal and Interior stumpage rates and found that at that time, the minimum rate of stumpage was legislated at only $0.25, a rate which should only be used for the lowest quality

---


logs.\textsuperscript{212} Sierra indicates that to understand the significance of this minimum stumpage rate, one must "consider that when the rate is applied to a fully loaded logging truck, the province receives only about $10."\textsuperscript{213} In comparing stumpage rates paid by Interior and Coastal logging companies, Sierra concluded that "more than 40\% of the wood logged in the Interior was sold by the BC government at the legal minimum rate."\textsuperscript{214}

The BC stumpage system has traditionally posed grave concerns for Interior First Nations for various reasons. First, the low value being charged for the logs increases the rate at which they are sold in the open market. Second, First Nations' values and laws have not been considered in the regulation of an industry that is occurring within their territories. Third, First Nations have not been able to participate in adequate revenue sharing with the province with respect to the revenue derived from their resources; and finally, the revenue the province is generating from the logging industry is far below what would be adequate to compensate First Nations with respect to infringement of their Aboriginal rights and title. Indeed, according the Manuel and Schabus, the failure of the BC government to recognize the Interior First Nations’ proprietary rights in the forest, coupled with the impoverished housing conditions of many Interior First Nations people,\textsuperscript{215} motivated several Interior First Nations communities’ to begin resisting the provincial government’s forestry regime

\textsuperscript{212} Ibid.
\textsuperscript{213} Ibid. at 10.
\textsuperscript{214} Ibid.
\textsuperscript{215} A. Manuel Affidavit \textit{supra} note 25.
by asserting their Indigenous rights over the forest in accordance with their own laws and values.216

b) Grassroots Mobilization

In 1999, members of the Neskonlith, Adams Lake, and Spallumcheen Bands, communities within the Secwepemc First Nation, began logging around Harper Lake in the Interior of BC.217 According to oral history and archeological records, the Harper Lake area has been used by the Secwepemc for generations and falls within the boundaries of Secwepemc traditional territory. Joe Manuel, Elder of the Neskonlith Indian Band states:

According to the oral history, passed down to me, the Harper Lake area, including the cutting permit areas, is within the territory of the Secwepemc Nation, and is an area which has been used by and sustained the Neskonlith people since long before settlers came here. I have heard no history that any other Indigenous Nation ever claimed this area.

My dad and uncle used to hunt in the Harper Lake area. Secwepemc elders, including my maternal grandparents, remembered when old people used to set up hunting and fishing camps to dry meat up in that area. The creek which runs between Harper Lake and the smaller lake used to be a preferred area for the Secwepemc people to catch trout.218

Prior to commencing logging, the Secwepemc members received a permit from the Shuswap Tribal Council, the political body of the Secwepemc people that is involved with natural resources management within the Secwepemc Nation

---


218 J. Manuel Affidavit, supra note 25.
territory.\textsuperscript{219} The members did not, however, receive authorization pursuant to the BC Forest Practices Code (the "Code")\textsuperscript{220}. In explaining the reasoning of the band members, Arthur Manuel, who was then the Chief of the Neskonlith Band states: "[l]ike our elders always directed us, we were refusing to go under provincial jurisdiction, because taking out a logging permit, is just like taking out a provincial government hunting or federal government fishing permit."\textsuperscript{221} In other words, the Band members were not prepared to be bound by Canadian laws and, instead, received permission to log from their own political organization, which contained logging conditions according to their own Indigenous laws.\textsuperscript{222}

The BC Minister of Forests responded to the logging by the Secwepemc by serving each of the three Bands with stop-work orders, seizing the cut timber, and when the Bands declined to stop logging, by commencing interlocutory injunction proceedings to enforce the orders pursuant to the Code.\textsuperscript{223} The Okanagan Band was involved in similar logging activities in the Brown’s Creek area in its territory and thus the multiple court proceedings that arose as a result of these acts of resistance involved the Okanagan, Neskonlith, Adams Lake, and Spallumcheen Bands, and came to be known as the British Columbia (Minister of Forests) v. Okanagan Indian Band case.

\textsuperscript{219} A. Manuel Affidavit and Nordquist Affidavit, \textit{supra} note 25.

\textsuperscript{220} R.S.B.C. 1996, c. 159.

\textsuperscript{221} Indigenous Network on Economies and Trade, “Memorandum on Softwood Lumber To the INET Members and Interested Parties” (6 June 2003) online: <www.indigenousnet.org>.

\textsuperscript{222} Arthur Manuel, “Aboriginal Rights on the Ground: Making Section 35 Meaningful” in Ardith Walkem & Halie Bruce eds., \textit{Box of Treasures or Empty Box?: Twenty Years of Section 35} (Canada: Theytus Books, 2003) 316 at 332 Walkem. See also Nordquist Affidavit \textit{supra} note 25.

\textsuperscript{223} \textit{Okanagan #1}, \textit{Supra} note 217.
The Bands’ main argument in response to the Crown’s injunction application was that they hold Aboriginal title to the lands in question and thus, are lawfully exercising their Aboriginal rights to log the lands.\textsuperscript{224} Manuel has explained the position of the Bands as follows:

\ldots you can’t seize anything if you don’t own it exclusively and the Supreme Court of Canada said that in British Columbia because we don’t have a treaty as the Secwepemc people or any of the other nations in British Columbia with the government with regard to surrender of our lands, we have Aboriginal title to those trees. You can’t charge anybody with trespass or charge anybody, seize anything from anybody, if you don’t own those trees exclusively.\textsuperscript{225}

They also argued, \textit{inter alia}, that the Province had failed to implement the \textit{Delgamuukw} decision and that the balance of convenience favoured the Bands who would incur greater economic loss than the Province because timber was desperately needed to ameliorate the inadequate housing available to their members on Reserves.\textsuperscript{226} The Interior First Nations sought to provide economic security for their people through contemporary use of the resources in their territory and through building their own economies based on their own laws and values.\textsuperscript{227} Both the Chambers Judge and the Court of Appeal, however, found in favour of the Province; they were both of the opinion that the issue of Aboriginal title could not be determined without a trial and that it was in the public interest to preserve the provincial statutory regime until the issue of Aboriginal title had been determined.\textsuperscript{228}

\textsuperscript{224} \textit{Ibid.}

\textsuperscript{225} \textit{Supra} note 126.

\textsuperscript{226} \textit{Supra} note 24 at para. 12 -14.

\textsuperscript{227} A. Manuel Affidavit \textit{supra} note 25.

\textsuperscript{228} \textit{Okanagan #2, supra} note 217.
c) National Legal Mobilization

After receiving stop-work orders, the Bands filed a Notice of Constitutional Question with the Court challenging the constitutionality of the provisions of the Code that had enabled the Province to halt the logging and seize the timber, on the basis that the Province failed to accommodate the Bands’ Aboriginal title to lands in question and their consequent right to log.\textsuperscript{229} The Province responded by applying to the Court to have the matter remitted to trial.\textsuperscript{230} This would prolong the matter and increase the cost of the litigation dramatically; thus, the Bands opposed the application. They argued that the matter could be decided summarily as a petition, and that the Court should dismiss the Province’s request because the Bands could not afford to proceed through to a trial. Alternatively, the Bands argued that if the matter was to go to trial the Province should be ordered to pay for the Bands’ legal costs.

The Bands asserted this argument pursuant to the Canadian Constitution and pursuant to the discretion afforded to the Court under Rule 57 of the \textit{BC Supreme Court Rules}\textsuperscript{231}.

The Chambers judge found that the matter should be remitted to trial and that the Bands were not entitled to have their legal costs paid for by the Province. The Court of Appeal, however, reversed the Chamber judge’s decision concerning costs, finding that it was within the Court’s discretion to award interim advanced costs in exceptional and unique circumstances. The Court of Appeal found that given the

\textsuperscript{229} \textit{Ibid.}

\textsuperscript{230} \textit{Ibid.}

\textsuperscript{231} B.C. Reg. 221/90.
“test case” nature of the proceedings, and that it was clearly in the public interest that the applicability of the Code to lands and activities claimed as Aboriginal be determined, the case merited an award of advanced interim costs.\textsuperscript{232} The Supreme Court of Canada later upheld the Court of Appeal’s ruling, finding that a trial judge’s inherent equitable jurisdiction to award costs included the discretion to award interim costs in advance of a trial to parties who cannot afford to pay, when it is in the public’s interest to have the case decided. Thus, what began as an effort to exercise an Aboriginal right to harvest timber, resulted in an important precedent-setting decision by the Supreme Court of Canada concerning access to justice for impecunious First Nations who are required to prove their Aboriginal rights and title through litigation.

While the Interior First Nations won their victory with respect to having their legal costs paid to carry out the Aboriginal title litigation, this did not address the fact that their forest resources were subject to third party exploitation in the interim. At that time, the \textit{Haida} case had not yet been determined, and the provincial government continued to minimize its duty to consult and accommodate Aboriginal rights and title when permitting resource extraction on Aboriginal claimed lands. Indeed, Schabus and Manuel point out that Aboriginal title cases take decades to litigate and that while this litigation drags on, governments continue to take a “business as usual” approach to Indigenous lands, “freely allocating resources” without regard to Indigenous interests.\textsuperscript{233} Thus, the Interior First Nations found it necessary to continue to explore

\footnotesize{\textsuperscript{232} Okanagan \#2, supra note 217.}

\footnotesize{\textsuperscript{233} Manuel and Schabus 2002 supra note 5 at 4.}
ways of raising awareness regarding their Aboriginal title and rights through other legal and political avenues.

**d) The Emergence of a Transnational Advocacy Network**

*As British Columbia (Minister of Forests) v. Okanagan Indian Band* was making its way through the various courts in Canada, the Interior First Nations\(^\text{234}\) began to mobilize politically to raise public awareness regarding their Aboriginal rights and title claims over the forest and the failure of the Canadian governments to adequately recognize those rights. Manuel states that in addition to the various court proceedings,

> ... the Interior Alliance, an organization of Interior British Columbia Indian tribes, put a paid advertisement in the Vancouver Sun notifying the general public and all forest investors that Indigenous Peoples have proprietary interests in BC forests. This Notice opened the door to make our Aboriginal Title and Rights an international issue in the context of the Canada/United States Softwood Lumber Dispute.\(^\text{235}\)

Indeed, while this political mobilization was occurring, the Softwood Lumber Agreement entered into in 1996 between Canada and the United States (the “Agreement”) was set to expire on April 1, 2001.\(^\text{236}\) Concerned that this would accelerate the rate at which Canadian lumber exports entered the United States, US lumber producers began petitioning the US Department of Commerce (USDOC) to

\(^\text{234}\) The Secwepemc, Okanagan, St’at’imc, Nlaka’pamux, and Southern Carrier Nations form a political body known as the Interior Alliance.

\(^\text{235}\) *Supra* note 222 at 334.

\(^\text{236}\) In 1996, in an attempt to resolve the ongoing softwood lumber dispute between the United States and Canada, the countries entered into an agreement which restricted Canadian lumber exports to the US for a period of five years beginning April 1, 1996. See Stephen Davadoss & Angel Aguiar Roman, “Recent Developments in the US-Canadian Softwood Lumber Dispute” The Estey Centre Journal of International Law and Trade Policy (2004) Vol. 5 No.2 168.
conduct an investigation concerning possible dumping and countervailable subsidies associated with Canadian softwood lumber.\textsuperscript{237} US lumber producers alleged unfair competition was occurring because Canada/BC was subsidizing its softwood lumber industry through its stumpage system, and that this would enable Canadian lumber producers to export lumber to the US below the cost of production.

US Environmental groups also had concerns with the Canadian lumber industry. Their concern, however, was that Canada’s lax enforcement of environmental standards was having the effect of subsidizing the Canadian forest industry. Manuel indicates that by placing their advertisement in the Vancouver Sun, the Interior Alliance (IA) attracted the attention of US Environmental groups, namely the Natural Resources Defense Council (NRDC), which saw Canadian Aboriginal groups as having a parallel concern regarding the Canadian softwood lumber industry.\textsuperscript{238} Indeed, Canada’s non-recognition, or non-compliance, with its environmental laws negatively affects Aboriginal rights to land and resources. Thus, Manuel indicates that he “traveled with a delegation of Indigenous Peoples to New York and Washington BC to follow up on the advertisement” and to meet with the NRDC.\textsuperscript{239}

The NRDC, along with two other US Environmental NGOs, the Defenders of Wildlife and the Northwest Ecosystem Alliance (the “Environmental NGOs”), were concerned that Canadian lumber companies were able to sell their lumber at below-market-value due to the Canadian government’s deliberate and systematic failure to

---

\textsuperscript{237} Ibid. at 169.

\textsuperscript{238} Supra note 222 at 334.

\textsuperscript{239} Ibid.
enforce Canada’s federal *Fisheries Act*\textsuperscript{240} habitat provisions in British Columbia\textsuperscript{241}.

They believed that Canada’s failure to enforce these provisions constituted a countervailable subsidy under U.S. law and thus, they were interested in joining forces with Canadian Aboriginal groups to petition the USDOC regarding an investigation into possible countervailable subsidies associated with Canada’s neglect of environmental standards. Following their meeting, the IA and the Grand Council of Cree (Eeyou Istchee) (GCC) from Quebec decided to join the Environmental NGOs in petitioning the USDOC to conduct an investigation.\textsuperscript{242} The IA had been working together with the GCC in Canada to raise awareness regarding Canada’s neglect of Aboriginal rights, and they had also been engaging in advocacy work at the UN Working Group on Indigenous Populations.

Together, the Environmental NGOs, the IA and the GCC submitted a petition before the International Trade Administration of the USDOC (the “Joint Petition”) outlining their arguments as to why countervailing duties should be applied to Canadian softwood lumber exports.\textsuperscript{243} The IA argued that the BC government’s policies of non-recognition of Aboriginal rights and title to the lumber it trades with the US constituted a countervailable subsidy pursuant to US law.\textsuperscript{244} Similarly, the GCC asserted that the Government of Quebec’s forest legislation and policy were in breach of the *James Bay and Northern Quebec Agreement*’s constitutionally protected

\textsuperscript{240} R.S., 1985, c. F-14.

\textsuperscript{241} *Supra* note 26.

\textsuperscript{242} *Supra* note 222 at 334.

\textsuperscript{243} *Supra* note 26.

\textsuperscript{244} Ibid. at 54 – 79.
Environmental and Social Protection Regime, and therefore violated guaranteed Cree Aboriginal and treaty rights.\textsuperscript{245} In other words, they argued that the failure of Canadian governments to recognize Aboriginal proprietary interests in the forests drove down the cost of timber production and resulted in an illegal export subsidy to the Canadian forest industry.

Under the US \textit{Tariff Act} 1930, consumers may submit "relevant information and argument" to the Department of Commerce concerning dumping or a countervailing subsidy.\textsuperscript{246} As consumer organizations, the Environmental NGOs had the statutory ability to submit information on possible countervailable subsidies associated with Canadian softwood lumber to the USDOS. Thus, by creating this advocacy network, the IA and GCC were able to gain access to a legal arena that would not have otherwise been available to them. The US Environmental Groups were provided with the added benefit of being able to strengthen their argument by expanding the basis of support for their position in Canada. Indeed, the Joint Petition states:

\begin{quote}
The groups submitting this additional information work together as a coalition reflecting our members’ belief that trade and the environment are inextricably linked. Specifically, our concern is that the softwood lumber entering the United States retail market from Canada has been produced with environmentally-damaging subsidies and in violation of the treaty and land rights of First Nations.\textsuperscript{247}
\end{quote}

It should also be noted that another Indigenous group from Canada also made submissions to the USDOS. The Meadow Lake Tribal Council (MLTC) from

\begin{flushright}
\footnotesize\textsuperscript{245} \textit{Ibid.} at 33 – 52. \\
\footnotesize\textsuperscript{246} \textit{Ibid.} at 6. \\
\footnotesize\textsuperscript{247} \textit{Ibid.} at 7.
\end{flushright}
Saskatchewan, in conjunction with its wholly owned sawmill operation, NorSask Forest Products Inc. (NorSask), had standing to make submissions to the USDOC due to its status as an exporter of softwood lumber to the US. MLTC/NorSask filed a submission to the USDOC "seeking an exemption from any countervailing duties levied against softwood lumber from Canada, for the softwood lumber products exported by NorSask." Adopting a contrary position to the IA and the GCC, MLTC/NorSask argued that the Canadian governments’ "stumpage programs do not constitute countervailable subsidies." In the alternative, they argued that an exemption be granted to their timber on the "basis that no subsidy may be found to exist with respect to timber harvested from MLTC’s Aboriginal lands over which they assert, by treaty and by custom, Aboriginal proprietary rights." They argued that because they have constitutionally recognized Aboriginal rights to carry out forestry operations, "they are in a unique position that cannot be compared to other forestry operations within Canada." In other words, their constitutionally-protected Aboriginal right to harvest timber puts them in a unique situation and out-of-reach of international trade rules. This argument clearly illustrates the concerns I discussed earlier regarding how global governance institutions have the capacity to erode nation-state authority and thereby impact the national constitutional recognition of


249 Ibid. at 33.

250 Ibid.

251 Ibid.

252 Ibid.
Aboriginal rights. This example also highlights an issue that I will discuss in greater detail in Chapter Four concerning the different perspectives of Indigenous peoples with respect to economy. Indeed, the IA’s argument and the MLTC/NorSask argument differ to the extent that the former is demanding that constitutional protection entitles Indigenous proprietary rights be acknowledged according to the rules of international trade, while the latter is arguing that constitutional protection entitles their proprietary rights be treated differently.

After extensive investigations and findings, the US International Trade Commission (USITC) of the USDOC concluded that Canada does subsidize its softwood lumber and it imposed a preliminary countervailing duty of 19.31 percent on Canadian lumber exports. The USITC also found evidence of dumping, i.e. the selling of lumber in the United States at below the cost of production, and thus imposed antidumping duties ranging from 5.94-19.34 percent on certain Canadian lumber products. The main reason for reaching this conclusion, however, was not because of environmental or Indigenous concerns, but related to the purported unfair competition caused to US lumber producers by Canadian stumpage. The USITC “rejected the IA’s submission on the ground that they [Indigenous proprietary interests] should be defined in Canada”. Furthermore, the USITC was of the opinion that its method of determining the rate of subsidization included any further subsidy alleged by the IA. It stated:

253 Stephen Davados & Angel Aguiar Roman, supra note 236 at 169.

254 Ibid.

255 Supra note 248 at 34.
We also note that the allegations that the Government of Canada and the Provinces in British Columbia and Quebec are violating treaties and land rights with the First Nations are also questions more properly addressed in Canada. However to 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 market rate for stumpage.\textsuperscript{256}

Despite the minimal response by the USDOC to their advocacy efforts, Manuel indicates that the “Interior Nations received a lot of support and interest from across Canada.” Indeed, following its submission to the USDOC, and its first submission to the WTO, the Interior Alliance “started working with the Grand Council of Treaty 3 and the Nishnawbe Aski Nation, whose territories cover more than two thirds of Ontario, under the umbrella of the Indigenous Network on Economies and Trade (INET).”\textsuperscript{257} Manuel states that the INET began looking for ways to engage in further transnational advocacy efforts before international trade tribunals, and that they “started working with US tribes in the Pacific Northwest who have participated in international fisheries negotiations.”\textsuperscript{258}

The emergence of this TAN is symptomatic of the shift in governance which is occurring in the context of globalization. The uniting of geographically distant groups, the US Environmental NGOs and the various different Canadian Indigenous groups, to pursue common interests within the global political-legal arena speaks to how globalization offers opportunities to strengthen advocacy efforts that emerge from below. Indeed, Santos points out that:

\textsuperscript{256} \textit{Ibid.} No mention was made of the MLTC/NorSask position.

\textsuperscript{257} \textit{Supra} note 222 at 335.

\textsuperscript{258} \textit{Ibid.}
[neoliberal globalization]—while propagating throughout the globe the same system of domination and exclusion—has created the conditions for the counter-hegemonic forces, organizations and movements located in the most disparate regions of the globe to visualize common interests across and beyond the many differences that separate them and to converge in counter-hegemonic struggles embodying separate but related emancipatory social projects.\textsuperscript{259}

The next section examines how the Indigenous transnational legal mobilization that began with the formation of this TAN, continued to seek out receptive legal venues within the arena of international trade to assert an Indigenous voice.

e) Intervention at the WTO

Following the findings of the USITC and the imposition of substantial countervailing duties on Canadian softwood lumber, Canada requested that the WTO establish a dispute settlement Panel to the review the findings.\textsuperscript{260} A series of hearings began at the WTO concerning different elements of the Softwood Lumber Dispute.\textsuperscript{261} This opened up transnational advocacy opportunities for Canadian Aboriginal peoples within the WTO’s dispute settlement arena. Between 2002 and 2003, the IA and the INET submitted three amicus curiae briefs (the “Briefs”) to WTO Panels and the Appellate Body hearing the Softwood Lumber Dispute.\textsuperscript{262} Similar to the submissions made to the USDOC, the Briefs argued that Canada was unfairly subsidizing

\begin{footnotes}
\textsuperscript{259} Supra note 17 at 446.

\textsuperscript{260} Submissions were also made to the NAFTA; however, this thesis project will only focus on the WTO.

\textsuperscript{261} The Softwood Lumber Dispute involved various hearings concerning countervailing duties, antidumping and material injury. The Indigenous interventions focused on the countervailing duties hearings.

\textsuperscript{262} Amicus #1 supra note 27; Amicus #2 supra note 28; and Amicus #3 supra note 29.
\end{footnotes}
Canadian lumber by providing timber to forest companies at artificially low prices that did not take into account the proprietary interests held by Canadian Aboriginal peoples. Manuel explains the motivations of the INET to intervene as follows:

That’s what they [the Canadian governments] want -- they want to control the power to make decisions regarding the land that we own. And so the only way that we could challenge this was that we felt that we had to get involved in the Canada/United States softwood lumber dispute because the Canadian government has given up its sovereignty to the international trade tribunals like the World Trade Organization and they’ve given up their international sovereignty to the NAFTA Agreement, the North America Trade Agreement. . . And they were talking about our trees; they weren’t talking about their trees, they were talking about our trees.²⁶³

In an uncharacteristic fashion, the Panels and Appellate Body accepted all of the Briefs submitted by the IA and the INET, representing the first time an Indigenous organization has been successful in having its perspective brought to the attention of the WTO in a trade dispute.²⁶⁴ MLTC/NorSask also attempted to submit an amicus curiae brief to the WTO; however, its brief was not accepted due to being filed too late.

The United States argument with respect to the subsidization of Canada’s softwood lumber industry can be summarized as follows:

. . . the Canadian government charges lumber companies at artificially low prices for harvesting lumber on Canadian public land, a practice which enables these companies to sell at below the cost of production in the U.S. market. The United States claims that almost 94 percent of Canadian timberlands are publicly owned . . . which makes it possible for companies to acquire timber at a low price. In contrast, only 42 percent of the timberlands in the United States are owned by the government, and since the timber is auctioned off in the open market, its harvest is not subsidized.²⁶⁵

²⁶³ Supra note 126 (my emphasis added).

²⁶⁴ Manuel and Schabus 2002, supra note 5 at 1.

²⁶⁵ Supra note 236 at 169.
A central issue in the dispute between the US and Canada, therefore, relates to the differences in the two countries with respect to private versus public land ownership. Canada’s response has been that it grants companies harvesting rights to standing timber in exchange for a volumetric stumpage charge, as well as “service and maintenance obligations (e.g. road-building, protection against fire, disease, and insects); [and] implementation of forestry management and conservation measures (including silviculture).”\textsuperscript{266} Canada claims that the US is not adequately taking the latter into account in formulating the price of Canadian softwood lumber. Furthermore Canada “claims that its vast endowment of forestland provides a natural competitive advantage, which helps to lower the timber price.”\textsuperscript{267}

The participation of Canadian Indigenous peoples within this dispute allows for a broader and more accurate consideration of the issues at bar. When Canada speaks of having a “natural competitive advantage” over the US with respect to its vast forest lands, an Indigenous perspective recognizes the error, or omission, in this statement. Indeed, Canada must be questioned on how it came to obtain that “natural” competitive advantage. Furthermore, given that the Supreme Court of Canada in \textit{Delgamuukw} found that there is an “inescapable economic component” to Aboriginal title; Canada must be questioned on how this is being factored into its purported “natural” competitive advantage. If the purpose of the free trade system is to maximize comparative advantage to promote the most efficient allocation of the world’s resources, then distortions caused by subsidies may act as artificial stimuli

\textsuperscript{266} \textit{Ibid.}

\textsuperscript{267} \textit{Ibid.}
leading to resource misallocation. As demonstrated by the arguments put forth by the IA and INET, it is from the Indigenous vantage point that these important issues become apparent. This clearly illustrates Santos’ notion of the sociology of absence resulting in a “waste of social experience” – when Indigenous voices are excluded, or rendered absent, significant issues are overlooked, or purposely omitted. The breadth of discussion and potential for a just resolution are therefore diminished.

f) "Reinventing" International Trade Law to Fit Indigenous Claims

By gaining access to the WTO Panels and Appellate Body, the IA and INET were able to raise an alternative perspective that was not being presented by the other parties to the dispute.\(^{268}\) Indeed, they used international trade law to argue that Canada’s violation of its own laws concerning Aboriginal title, i.e. the Delgamuukw decision, constitutes a subsidy according to international trade law principles.

The concern of international trade law with subsidies is rooted in the idea that free trade requires that the goods and services of all Member nations be treated equally, without discrimination. As indicated above, two non-discrimination principles that form the basis for the international trading system are the principles of most-favoured-nation (MFN) and national treatment (NT). The NT principle is

\(^{268}\) There is little precedent to determine why the Panels and Appellate Body choose to accept some amicus curiae and not others; what is known is that accepting amicus curiae is a rare practice for the WTO. If national practice serves as any indication, however, it is likely the briefs were accepted because they raised issues that were relevant to the arguments being made, but which were not being addressed by the immediate parties. This is the test for whether intervenor status will be granted to interested parties at the Supreme Court of Canada. The authority to accept amicus curiae is derived from Article 13 of the WTO Dispute Settlement Understanding that allow the Panels/Appellate Body to seek information from outside parties if they believe outside expertise is required to determine the issues addressed in the dispute; See Shrimp Turtle, supra note 88.
particularly powerful because it uses the language of subsidies and gives the WTO the power to make decisions about states’ laws and/or policies that are alleged to be subsidizing its goods. Pahuja explains:

Offensively, they [subsidies] operate to make a product destined for export cheaper than it ‘should’ be because a portion or cost of production is born by the government (through taxpayers) of the state from which the product originates. Defensively, they may operate to make a product designed for domestic consumption artificially cheaper than the imported version. Either way, such subsidies are said to be a ‘distortion’ of the free market.  \(^{269}\)

According to international trade law, a subsidy is comprised of two discrete elements: 1) a financial contribution; and 2) the conferral of a benefit. Article 1 of the *Agreement on Subsidies and Countervailing Measures* \(^{270}\) defines a subsidy as “a financial contribution by a government or public body where there is a direct transfer of funds, government revenue is foregone, goods or services other than general infrastructure is provided, or goods are purchased by government. In any of these instances, a benefit must be conferred for there to be a subsidy.” \(^{271}\)

The INET briefs state:

The provinces provide a financial contribution in the form of a good by making lumber from Crown and Aboriginal Title lands available to forest companies. Also revenue that is due is foregone by not collecting compensation for the collective proprietary interests of Indigenous peoples, which the federal government is under an obligation to protect and take into account. A clear benefit is conferred upon companies who do not have to take Aboriginal Title into account and do not even have to compensate for it. \(^{272}\)

\(^{269}\) *Supra* note 151 at 49.


\(^{271}\) *Ibid.*

\(^{272}\) Amicus #2 *supra* note 28 at 18; and Amicus #3 *supra* note 29 at 11.
The Briefs argue that BC’s current forestry laws and tenure system, by inadequately recognizing Aboriginal title in the land and forest resources, are distorting free market trade in lumber. Indeed, the Supreme Court of Canada in *Delgamuwkw* acknowledged a central aspect of Aboriginal title is that it has an “inescapable economic component” to it.273 The Briefs argue that Canada’s neglect of this “economic component” is causing Canadian forest companies to acquire an unfair advantage. The INET Briefs state:

The failure to include the economic dimension of Aboriginal Title in the price of wood products makes the remuneration inadequate as Aboriginal peoples as the traditional owners of the forests and resources extracted from them do not get paid. According to the Canadian legal system, Aboriginal Title has to be taken into account implying the determination of new market prices that will adequately remunerate Indigenous peoples. Any other pricing regimes confer illegal benefits upon Canadian forest companies.274

The IA Brief states:

The failure to provide for adequate schemes obligating forest companies whose activities clearly constitute infringements on Aboriginal Title to compensate Indigenous peoples for their proprietary interest constitutes a financial contribution and provides them with an unfair economic advantage. As outlined above damages are being claimed from the governments and damages for past infringements are expected to be awarded. This would further illustrate the nature of the financial contribution of the governments to companies: instead of following their constitutional obligation to set up adequate compensation schemes for Aboriginal Title, the governments make themselves liable to damage claims by Indigenous groups, that will likely result in high damage payments that will not be recuperated from the companies who would have to pay for the proprietary interests of Indigenous peoples in the first place. A clear benefit is conferred upon forest companies by government action.275

---

273 *Supra* note 198.

274 Amicus #2 *supra* note 28 at 21; and Amicus #3 *supra* note 29 at 13.

275 Amicus #1 *supra* note 27 at 23. Amicus #2 contains similar wording at 36.
With the expiry of the 1996 Softwood Lumber Agreement (that had placed a quota on Canadian lumber exports to the US) the issue of accelerated lumber exports to the US became a significant issue for Interior First Nations concerned with protecting their Aboriginal right to the forest resources. The INET recognized how decisions being made within the international trade arena with respect to softwood lumber could directly impact Aboriginal people and their rights on the ground. Indeed, as the issue of trade in softwood lumber gets pushed into global institutions where there is no Aboriginal voice, national laws concerning Aboriginal rights and title are neglected and the protective potential of national laws is therefore eroded. As the Briefs illustrate, Aboriginal rights and title, and the possibility of compensation for those rights, become “lost somewhere” in the global transaction process.\textsuperscript{276}

In an attempt to address this absence, the IA and INET used international subsidies law to gain access to the international trade arena. Moreover, they attempted to re-craft international subsidies law to encourage Canadian governments to adopt a new approach to addressing Aboriginal rights and title. As indicated earlier, one of the aims of subaltern cosmopolitan legality is to “seek to articulate new notions of rights that go beyond the liberal ideal of individual autonomy, and incorporate solidaristic understandings of entitlements grounded in alternative forms of legal knowledge.”\textsuperscript{277} This may involve “reinventing law to fit the normative claims of subaltern social groups and their movements and organizations struggling

\textsuperscript{276} Amicus #2 \textit{supra} note 28 at 18.

\textsuperscript{277} \textit{Supra} note 17 at 16.
for alternatives to neoliberal globalization." In this case, the IA and INET attempted to use Western liberal-individualistic based law as a tool to facilitate the recognition of their collective rights to land and resources. In other words, they attempted to "reinvent" Western international trade law in an effort to further the recognition of Indigenous collective rights.

International trade law has developed to coordinate and facilitate trade liberalization, a central aspect of neoliberal economic globalization. As Claire Cutler points out, law has emerged to enhance and protect deterritorialized capital flows and "dephysicalized" or intangible forms of property rights that are emerging to assist capital accumulation (i.e. various types of financial interests and intellectual property rights). International subsidies law seeks to ensure that equality of treatment is afforded to foreign and domestic goods and services (i.e. property rights) such that the world's resources are distributed most efficiently according to a market model. The emergence of these novel forms of property rights, coupled with an increasingly strong global regime to protect and enhance these rights, suggests that opportunities may lie within the processes of economic globalization for the recognition of Indigenous property interests (so long as they can be understood in economic terms). Indeed, Cutler points out that implicit within these deterritorialized laws created to strengthen and protect liberal conceptions of property for the benefit of

---

278 Supra note 18 at 446.


280 Ibid.

281 The limitations of this will be discussed in Chapter Four.
capital, is the potential to strengthen the property rights of other parties.\textsuperscript{282} She states that:

\ldots the corporate-state monopoly of protective and enforcement measures is nowhere preordained nor inevitable. Indeed, these areas provide important and potentially fertile sites of contestation for consumers, investors, purchasers, and inventors to organize efforts to re-democratize the processes through which property rights and their underlying theories of entitlement are constructed and protected. This is evident in the field of intellectual property where novel claims by Indigenous peoples to ownership of cultural property are challenging corporate/statist monopoly of intellectual property and effecting a fundamental reconsideration of the nature of property rights protected by intellectual property laws.\textsuperscript{283}

The IA and INET reinvention of international subsidies law to promote the recognition of their Indigenous proprietary rights is indicative of the potential that may lie within the laws that facilitate economic globalization.

g) **Indigenous Conceptions of Economy**

In addition to raising arguments concerning subsidization of Canadian lumber through the non-recognition of Indigenous proprietary interests, the Briefs also sought to raise awareness concerning alternative conceptions of economy. The Briefs point out that the INET is "a representative platform for Indigenous peoples across Canada who works together towards the protection of Indigenous proprietary interests and their own economies, which have to be given value in the mainstream economic system."\textsuperscript{284} Informed by their own Indigenous laws concerning economy and management of forest resources, the Briefs indicate that "Aboriginal and treaty rights

\textsuperscript{282} Supra note 279 at 250.

\textsuperscript{283} Ibid.

\textsuperscript{284} Amicus #2 supra note 28 at 3; Amicus #3 supra note 29 at 1 (my emphasis added).
are of relevance to international trade and if respected could be the basis for more sustainable development, [and] in the present case especially more sustainable logging practices."^{285} In asserting the need for trade Panels to consider Indigenous laws, the brief submitted to the Appellate Body point to some of the laws and values of the BC Interior First Nations:

Aboriginal people hold traditional knowledge regarding their lands and resources, grounded-truthed over generations and generations and therefore constituting the densest and most long-term data available. This database is a necessary starting point for planning and management decision making needed for more sustainable land and resource management which in turn is an important precondition for fair and sustainable flow of international trade. Unsustainable logging practices impact other industries and economies, for example, by destroying salmon habitat and spawning grounds. Salmon in turn is an important staple food for Aboriginal peoples in British Columbia and its loss has direct economic and health implications for Indigenous communities and families. In its present submissions Canada fails to take into account the role and needs of Aboriginal peoples.^{286}

In addition, the brief submitted to the Panel on January 21, 2003, includes a statement by the Grand Council of Treaty #3 which indicates their concern over "proponents (corporations, developers, etc) who carry out business activities that may result in the destruction to the environment or interference with the traditional activities of individual and collective members of the Anishinaabe Nation in Treaty #3."^{287} The Grand Council of Treaty 3 indicates that it is prepared to hold discussions with proponents that wish to carry out activities within Treaty #3 Territory and that there is Anishnaabe Law that can guide consultations that the proponents are required by the

---

^{285} Amicus #3, supra note 29 at 1.

^{286} Ibid. at 4.

^{287} Amicus #2, supra note 28 at 29.
Canadian Constitution to engage in with the Anishnaabe. The Grand Council
describes this law as "Manito Aki Inakonigagaawin or the Great Earth Law."²⁸⁸

Both the laws of the Interior First Nations and the Anishnaabe require
adopting a more holistic approach to economy. Indeed, the preamble to the Manito
Aki Inakonigagaawin specifies that "Saagima Manito gave to the Anishnaabe duties
and responsibilities for their traditional lands," and that by entering into treaty with
Her Majesty, the Anishnaabe share these duties and responsibilities.²⁸⁹ The duties
and responsibilities that the Anishnaabe have over their traditional lands require that
economic development be approached and carried out accordance with certain
principles. Indeed, sub-sections 12 and 13 of the Manito Aki Inakonigagaawin
indicate that authorization for development is subject to such conditions as
"promoting good governance, conserving the environment within Treaty #3 territory
and protecting the rights of the Anishnaabe."²⁹⁰

Indigenous conceptions of economy require expanding the scope of
considerations when engaging in trade and other economic activities. Thus, they
challenge the dominant Western model, which is based on an atomistic approach that
segregates and separates different disciplines or fields of study.²⁹¹ Charles Castle
points out that Aboriginal peoples "have advanced the proposition that trade issues

²⁸⁸ Amicus #2, supra note 28 at 29. It explains how the Great Earth Law was enacted as follows: The Elders gathering in Kay-Nah-Chi-Wah-Nung at Manito Oochi-waan on April 23, 1997 and on July 31, 1997 approved this law and respectfully petitioned the National Assembly to adopt it as a temporal law of the Nation. The Nation, with approval of the Elders and validation in traditional ceremony, and with ratification by the National Assembly, proclaimed this law on the 3rd day of October 1997

²⁸⁹ The Anishnaabe Nation in Treaty #3, Manito Aki Inakonigagaawin, Unofficial Consolidation at 1.

²⁹⁰ Ibid. at 4.

²⁹¹ Supra note 248 at 62.
cannot be separated from issues related to the broader panoply of their rights.”

Gastle states:

Aboriginal legal concepts also emphasize a “holistic” ethos that suggests it is inappropriate to attempt to desegregate the various aspects and interests implicit in a particular Aboriginal issue. As an example, Professor Barsh states that Aboriginal intellectual property cannot be separated from the landscape from which it emerged and in which the particular song, story or technology is embedded. He perceives that “separating land ownership from knowledge ownership reflects a peculiarly Western reductionism.”

Manuel sees that Indigenous conceptions of economy have a unique contribution to make to the world in terms of providing a model for sustainability because it is Indigenous peoples “who have a direct connection and link to the land.” Indeed, his conception of economy challenges the notion that trade operates in a vacuum and pays attention to the interrelationship that exists between the exchange of goods and services, the human beings who produce them, and the environment from which they are derived.

h) A Boomerang Effect?

Having outlined how this struggle unfolded, the question to ask now is what effect, if any, did the IA and INET transnational advocacy efforts have? In other words, in what ways has the IA and INET’s transnational advocacy been successful in creating a “boomerang effect”? Keck and Sikkink point to the following five factors as indictors of whether a TAN has been effective:

---

292 Ibid.

293 Ibid.

294 Supra note 126; supra note 222.
(1) by framing debates and getting issues onto the agenda; (2) by encouraging
discursive commitments from states and other policy actors; (3) by causing
procedural change at the international and domestic level; (4) by affecting
policy; and (5) by influencing the behaviour changes in target actors. 295

I have already illustrated how the IA and INET were successful in framing
their issues according to, or “reinventing” international subsidies law in order to “get
the issues on the agenda.” In terms of the Keck and Sikkink’s second indicator, it is
difficult to know from the statements made by the Panel in its report, what degree of
consideration was given to the IA brief by the Panels. The report merely stated:

As a preliminary matter, we note that in the course of these proceedings, we
decided to accept for consideration one unsolicited 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. 296

The lack of written reasons concerning this brief suggests it was not given much
consideration by the WTO Panel. Furthermore, the second Panel decided that it
would “consider any arguments raised by amici curiae only to the extent that these
arguments are taken up in the written submissions and/or oral statements of any party
or third party.” 297 And, the Appellate Body stated that it “did not find it necessary to

---

295 Supra note 46 at 201.

296 WTO, Report of the Panel on United States-Preliminary Determinations With Respect to Certain
Softwood Lumber From Canada, WTO Doc. WT/DS236/R (2002), online: WTO
<http://www.wto.org/english/tratop_e/dispu_e/find_dispu_cases_e.htm#results>.

297 Facsimilie from Clarisse Morgan, Secretary to the WTO Panel, to INET (24 January 2003), online:
States-Final Countervailing Duty Determination With Respect to Certain Softwood Lumber From
Canada WT/DS257.
take the two amicus curiae briefs into account in rendering its decision.\footnote{298} The various Panels’ responses in this case suggest that the WTO still remains predominantly closed to non-State Party interests.

Manuel and Schabus point out, however, that the INET’s briefs represent a starting point in that they began an important dialogue between State parties within the international trade arena concerning the linkages between international trade and Indigenous proprietary rights.\footnote{299} Following the first amicus submission, the Panel circulated the IA’s brief to all Parties and invited them to provide comments on the brief. A meeting was then held with all Parties and the Panel to discuss the issues in the brief. Thus, one effect that can be seen from these transnational advocacy efforts is the development of a relationship between the INET and the USDOC.\footnote{300} Indeed, the United States did make mention of the INET’s brief in its submissions to one of the WTO Panels.\footnote{301} Furthermore, the communications between the INET and the USDOC later resulted in reference being made to Indigenous land ownership in a USDOC discussion paper regarding changes that may be made to the Canadian forest


\footnote{299}{Manuel & Schabus 2005, supra note 5 at 16.

\footnote{300}{\em Ibid.}

\footnote{301}{See Answers of the United States of America to the Panel’s 26 April 2002 Questions (8 May 2002) United States—Preliminary Determinations with Respect to Certain Softwood Lumber From Canada WT/DS236 at para. 13, online: Indigenous Network on Economies and Trade <www.indigenousnet.org>. The United States referred to the IA’s brief to dispute Canada’s claim that stumpage is a tax, pointing out that Canada has always claimed exclusive jurisdiction over the public lands as Indigenous peoples well know. Stumpage, therefore, constitutes payment for a good.
industry to transform it into a “market-based system.” In making recommendations to Canada, the USDOC stated:

Alternatively, if the province were to expand significantly the percentage of harvest in private hands or in the hands of Indigenous peoples, sales from private lands or by Indigenous peoples could also suffice as an adequate basis for assessing the province’s timber sales program.

This is significant, yet also problematic, as many Canadian Aboriginal peoples regard increased private land ownership as posing a threat to Aboriginal rights and title, and may be reluctant to engage in any sort of advocacy that could result in these ends. Manuel responded to this statement by commenting that “if land is to be made private the Aboriginal title needs to be dealt with according to law as prescribed by SCC decisions of Haida and Delgamuukw cases.”

In terms of its relationship with the USDOC, the INET was also given the opportunity to present its position on the USDOC’s “Proposed Policy Regarding the Conduct of Changed Circumstances Review Under the Countervailing Duty Order on Softwood Lumber from Canada (C 122 839).” This was a policy bulletin put forth by the USDOC as a way of resolving the Softwood Lumber Dispute. In these submissions the INET proposed alternatives to the current long-term tenures that are granted to large integrated wood processing companies. This included the

---


303 Ibid.

304 Manuel comments to Ibid. online: Indigenous Network on Economics and Trade <www.indigenousnet.org>

“reallocation of tenure to Indigenous peoples” which would “not only ensure diversification of tenure, but also more sustainable forest management and pricing mechanisms to ensure that the full price is paid” for Indigenous forest resources.  

In terms of Keck and Sikkink’s third indicator, causing procedural changes at international and domestic levels, Manuel and Schabus point out that the IA and INET intervention represent the first time an Indigenous submission has been accepted by the WTO. They see this as setting a precedent for future amicus curiae submissions, not only for Indigenous peoples, but also for other NGOs. There is little evidence as of yet to determine whether a precedent has been set; however, time will tell whether this does indeed prove to be the case.

Finally, with respect to the fourth and fifth indicators, affecting policy and influencing the behaviour changes in target actors, it is difficult to determine to what extent the IA and INET’s advocacy led to changes in BC forest policy. There have indeed been significant changes made since the Interior First Nations first engaged in logging in their territories; however, it is difficult to pinpoint exactly what led to these changes. Under the new Forest and Range Practice Act308, the BC government has adopted a purportedly “more generous” policy concerning First Nations participation in the forest industry.  


307 Manuel & Schabus 2005, supra note 6 at 16.

308 S.B.C. 2002, c. 69 (FRPA).

309 Under FRPA the BC government will enter into Forest and Range Agreement (FRAs) with First Nations. FRAs are interim agreements between the Ministry of Forests and eligible First Nations
allowable cut to be held by eligible First Nations pre-treaty. In exchange, however, the First Nation must agree not to engage in any litigation with respect to the adequacy of accommodation in the forest industry. Various BC First Nations have been entering into FRAs with the province; however, they are viewed as highly problematic by some.\(^{310}\)

One reason why it is difficult to make a clear determination with respect to how the IA and INET’s advocacy has influenced BC forest policy is that at the same time the Interior First Nations were mobilizing internationally, other BC First Nations, i.e. the Haida and Taku River Tlingit, were pursuing legal cases with respect to their Aboriginal rights at the BC Court of Appeal and the Supreme Court of Canada.\(^{311}\) As mentioned earlier, these efforts resulted in significant decisions being rendered with respect to Canadian government’s duties to consult and accommodate First Nations when permitting resource extraction in Aboriginal-claimed territories.

Pinpointing the causes of policy change is a difficult task. Indeed, as Rodriguez-Garavito and Arenas point out, “assessing the results of cross-border mobilization is not simple, as there is no single indicator of success or failure, and

---

\(^{310}\) For a discussion on the limitations of FRAs see Title and Rights Alliance, “Title and Rights Alliance Background Paper: Forest and Range Agreements” (May 2004) online: <http://www.titleandrightsalliance.org/Documents/FRABackgrounderFINAL.pdf>. See also Huu-Aht First Nation v. British Columbia (Minister of Forests) [2005] 3 C.N.L.R. 74, 2005 BCSC 697.

\(^{311}\) Supra note 121.
perceptions of results may vary among local and international actors.”

Furthermore, they assert that "legal mobilization for social movements cannot be evaluated simply by examining the immediate outcome of mobilization. Indirect and mediate effects (e.g. consolidation of activist coalitions through collaborative work on legal cases) must also be considered." Thus, further to the results outlined above, one can see that an additional outcome of the INET struggle has been the unification and mobilization of Indigenous groups from across Canada in accordance with a common concern over how international trade affects Aboriginal peoples and their rights. Indeed, the power of TANs to generate solidarity and strength among the activists/advocates themselves is an indicator of success that should not be overlooked.

i) Conclusion

In this Chapter I have examined how the struggle by BC Interior First Nations for their land and natural resource rights has unfolded over time, and particularly, how globalization has been impacting it. In conducting my examination, I adopted a “subaltern cosmopolitan legality” perspective—I have approached the analysis from the experiences of the Interior First Nations who are experimenting with various political and legal strategies across a multi-scale legal landscape to assert their Indigenous rights in the context of globalization. And, I drew on Keck and Sikkink’s theories of TANs to evaluate the outcome of this struggle. My analysis has attempted to bring an emergent quality to the Interior First Nations’ struggle. Indeed, it has

312 Supra note 124 at 260.

313 Ibid.
sought to provide an expansive understanding of these resistance efforts into order to “expose and underscore the signals, clues, or traces of future possibilities” that are entrenched within these marginalized practices and knowledges.\textsuperscript{314}

Santos and Garavito-Rodriguez explain that “the perspective of subaltern cosmopolitan studies of globalization aims to empirically document experiences of resistance, assess their potential to subvert hegemonic institutions and ideologies, and learn from their capacity to offer alternatives to the latter.”\textsuperscript{315} They point out that the purpose driving this type of analysis “is to expose the potential and the limitations of law-centered strategies for the advancement of counter-hegemonic political struggles in the context of globalization.”\textsuperscript{316} Thus, in light of this examination, in the following chapter I analyze the possibilities, implications and tensions faced by Indigenous groups in engaging in advocacy at the WTO, drawing on the Interior Alliance and INET’s\textsuperscript{317} experiences.

\textsuperscript{314} Supra note 18 at 17.

\textsuperscript{315} Ibid. at 15.

\textsuperscript{316} Ibid. at 4.

\textsuperscript{317} For simplicity sake, herein I will refer to the INET’s experiences and amicus curiae submissions as encompassing that of the Interior Alliance because, as I will describe, the INET emerged from the efforts of the IA, and the INET’s amicus briefs incorporated many of the same arguments made by the IA.
CHAPTER FOUR

A. Introduction

My thesis thus far has suggested that the shifting nature of the world’s political organization, i.e. the emergence of a strong global trade regime which is playing a more significant role in governing the international exchange of “Canadian” timber, has created increased need, opportunities, and possibilities for First Nations to direct their advocacy beyond state borders. Furthermore, the increased juridification of the WTO through a more formalized dispute settlement process has opened up space within this international trade arena where Indigenous peoples may begin to play a more substantive participatory role. Indeed, transnational advocacy efforts of NGOs and Indigenous peoples at the WTO may have the potential to strengthen existing international norms as well as generate new norms that may assist in restructuring world politics along more democratic and pluralistic lines. This could begin to improve the legitimacy of the WTO and lead to the emergence of a normative framework within the international trade arena which recognizes and accounts for the intersection between trade and other important social issues such as Indigenous collective rights to land, environmental sustainability, and so on. There are limitations to this type of advocacy, however, and these limitations must be explored as there may be implications for Indigenous peoples in enhancing the legitimacy of an organization that is fundamentally inconsistent with their core values and laws.318 Furthermore, there are certain tensions that arise for Indigenous peoples
when engaging in transnational advocacy in the international trade arena, which occurs as a result of its deterritorialized, state-centric and liberal-individualistic foundations.

In this chapter I will begin by briefly reviewing the key issues raised in the academic literature regarding NGO participation and amicus curiae submissions at the WTO. I do this to establish a context for my pending analysis as I believe some background on amicus submissions at the WTO is necessary to understand the potential and limitations of using such strategies to further Indigenous claims. Next, I analyze the opportunities and possibilities of Indigenous transnational advocacy and amicus curiae submissions at the WTO, as they have been revealed by INET’s experiences. The final part of this chapter examines some of the limitations and/or implications that I see presented for Indigenous cosmopolitan struggles within the international trade arena.

B. NGOs and Amicus Curiae Briefs at the WTO

Over the past several years much scholarly work has been devoted to the subject of NGO participation at the WTO via amicus curiae submissions. This has

318 For examples of Indigenous perspectives on international trade and on values concerning relationship with territory see: the Indigenous Peoples’ Seattle Declaration on the occasion of the Third Ministerial Meeting of the World Trade Organization November 30 – December 3, 1999 and supra note 115.

occurred for various reasons: first, because the acceptance of amicus curiae by the WTO is a relatively new phenomena and has generated significant controversy among the WTO Membership;\textsuperscript{320} second, because the WTO has been highly criticized for its lack of transparency and legitimacy;\textsuperscript{321} and third, because the submission of amicus provides potential for NGOs to participate in the WTO to a much greater degree than has thus far been permitted.\textsuperscript{322} Indeed, at present, there are few opportunities for NGO participation within the formal operations of the WTO.\textsuperscript{323} NGOs are granted accreditation to observe certain aspects of Ministerial Conferences; however, according to Robert Howse, this provides them with the "dubious privilege of attending several 'plenary sessions' where delegations read set speeches, repeating generalities about their negotiating positions that could less tediously be gleaned from a regular reading of the Financial Times."\textsuperscript{324} They are invited to participate in symposia held between the WTO and NGOs each year; however, Howse points out that this has not "brought civil society any closer to routine, systematic participation

\textsuperscript{320} Howse (2003) \textit{Ibid.}

\textsuperscript{321} \textit{Supra} note 319.

\textsuperscript{322} Howse (2003), \textit{supra} note 319.

\textsuperscript{323} Esty, Charnovitz (2000-2001), Howse (2003), \textit{supra} note 319.

\textsuperscript{324} Howse 2003, \textit{supra} note 5 at 319.
in the real workings of the WTO."\(^{325}\) Thus, amicus curiae briefs, which allow NGOs to make submissions to trade Panels during the process of dispute resolution, currently represent the only true *participatory* role NGOs have in the formal workings of the WTO.\(^{326}\)

A key reason why NGO participation at the WTO is so limited relates to the fact that the WTO has remained a guardedly state-centric institution. Keohane and Nye assert that the WTO's closed-door nature is a result of international trade organizations traditionally operating under what they call a "Club Model."\(^{327}\) Historically, international trade negotiations functioned like private clubs whereby government officials from a small number of relatively rich counties would negotiate in secret and then report back to their respective national governments with the agreements they had devised.\(^{328}\) Howse concludes that this parochial "Club" mentality continues to pervade the mindset of the WTO, particularly its executive branch (the Secretariat and the Members).\(^{329}\)

The "Club" mentality of the WTO has led to much criticism by civil society, international trade scholars and others, who argue that the lack of NGO participation is reflective of its democratic deficit. Critics point out that the increased judicialization of the WTO has strengthened its power and enabled it to make

\(^{325}\) Ibid.

\(^{326}\) Ibid.


\(^{328}\) Ibid. at 3.

\(^{329}\) Howse (2003), supra note 319.
decisions which affect a wide range of people in all pockets of the globe; however, the majority of these people have very little say in how its decisions are made.\textsuperscript{330} They argue that the WTO could improve its legitimacy by providing a role for global civil society through the participation of NGOs.\textsuperscript{331} The WTO, however, has remained committed to the belief that it is a democratic organization because Member States, representing their constituents, have an equal participatory role in the decision-making process. This belief was recently affirmed by Pascal Lamy at the Hong Kong Ministerial Conference where he emphatically stated:

\textit{In sum, and in spite of all criticism, the WTO decision-making process is democratic. If it were different, if it were not as democratic as it is, then, I can tell you, the negotiations probably would be easier, but they wouldn't be as legitimate...} \textsuperscript{332}

In response to this problem, WTO critics argue that in an increasingly globalized world, where States are no longer seen as the sole players in the global arena, (a view that is long overdue from an Indigenous perspective), it is necessary to account for non-State actors who are impacted by the decisions of these powerful institutions of global governance. Due to the breath and complexity of the issues now facing WTO trade Panels, it can be argued that they would be better served to hear a variety of perspectives concerning how to approach and deal with these issues. Furthermore, by denying access to civil society, the WTO adversely affects the ability of various groups to participate in defining how global trade should operate. And,

\textsuperscript{330} Esty, supra note 319.

\textsuperscript{331} Ibid.

\textsuperscript{332} These statements were made by WTO Director General at the WTO 5th Ministerial Conference held in Hong Kong (Dec. 13 – 18) on December 13 at the Inaugral Session. A live webcast is available at http://www.wtoms6.gov.hk/eng/webcasting/webcasting_archive.html#archive_2.
given that it is simply impossible for Member States to adequately represent the various views of all their constituents at the international level, and that powerful corporate interests have an advantage due to their enhanced ability to access State power, the WTO could improve its democratic structure by allowing NGOs, who represent a wider range of views (including those of the poor and disadvantaged sectors of the global population), a space to assert their voice.

Those who support amicus curiae submissions view them as a way in which NGOs can participate within the WTO to help it strengthen its legitimacy. As so-called “friends of the court,” amicus curiae can serve the purpose of expressing the legal, social, and public concerns not articulated by the parties to a dispute. They enable non-WTO Members to gain access to trade disputes to present information that a State party either cannot, or is resistant, to bring before a trade tribunal. According to Ernesto Hernandez-Lopez:

States are often unwilling to present sensitive issues of environmental, social and labour concerns before a court. These issues may not be in the State’s interest in resolving the dispute. Often presenting one of these issues before an international tribunal may contradict foreign policy objectives. The reasoning behind these issues may contradict the State’s legal theory. The issues may complicate the litigation strategy of the State. Similarly, a State may be unwilling to bring a dispute before a tribunal, because the expected economic return of the dispute may be wealth reducing... With this discretion many issues fail to be considered by Panels, because they have no voice.

Based on Hernandez-Lopez assertions, it can be argued that not only may amici provide an opportunity to strengthen the relationship between the WTO and global civil society, but they may also provide the WTO with a more comprehensive range

---

333 E. Hernandez-Lopez, supra note 319 at 486.

334 Ibid.
of issues and remedial possibilities which could result in more informed decisions. Indeed, various scholars have indicated that amicus curiae submissions provide both an opportunity for the WTO to improve its legitimacy by developing connections with global civil society, as well as deal with the "linkage issue" -- the fact that issues raised in trade disputes are almost always linked to other significant issues such as the environment, labour, Indigenous rights to land and resources, and so on.

While I have outlined the possibilities for amicus curiae submissions to assist in improving the legitimacy of the WTO, at least with respect its judicial arm, it must be recognized that current amici practice has, to date, proven to be quite limited. The WTO sees the role of NGOs as more appropriate at the State level. Thus, as Jeffrey Dunhoff points out, in cases where amicus curiae briefs have been accepted, it is rare they are given serious consideration unless adopted as the argument of a State-party to the trade dispute.\textsuperscript{335} Dunhoff indicates that the typical practice of the Panels and the Appellate Body is to declare the briefs admissible, "but then find them unhelpful in the resolution of the dispute."\textsuperscript{336} He states, therefore, that while there has been "an apparently significant doctrinal advance with respect to civil society participation in the WTO dispute resolution,"

Surprisingly ... this apparent doctrinal advance has produced a practice that may actually be detrimental to the interests of NGOs and other nonstate actors. In practice, briefs submitted by nonstate actors are only considered when adopted by a party to the dispute. Under this practice, civil society participates in WTO dispute resolution at the sufferance of the parties to the dispute. This effectively transforms NGOs and other civil society actors from independent entities with

\textsuperscript{335} Dunhoff, supra note 319. In the Shrimp Turtle case, the United States attached three briefs to its brief and all were accepted by the Appellate Body; see WTO, Report of the Appellate Body on United States-Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R 3.129 (Oct. 12, 1998).

\textsuperscript{336} Ibid. at 964.
independent perspectives into entitles that simply echo government arguments, thereby destroying much of the potential advantages of civil society participation.\footnote{337}

Thus while international trade scholars such as Charnovitz, Esty and Howse argue that there is much potential for NGO participation through amicus submissions, current amicus practice indicates that that potential has yet to be realized.

Having briefly set the context concerning how NGO participation and amicus curiae briefs have been dealt with by the academic literature, I will now turn to my examination of the possibilities revealed by the INET’s transnational advocacy efforts, focusing primarily on the possibilities of Indigenous interventions in trade disputes at the WTO.

C. The Possibilities of Indigenous Transnational Advocacy within the International Trade Arena: Creating Space for Indigenous Voices at the WTO?

a) An Indigenous Transnational Advocacy Network

As I discussed in Chapter 2, transnational advocacy networks (TANs) are becoming an increasingly popular way in which non-state actors are organizing to pursue their political/legal objectives across state borders. The preceding chapter demonstrated how the IA was able to strengthen its transnational advocacy efforts within the international trade arena\footnote{338} by developing a TAN with the GCC and with

\footnote{337} Ibid. at 965.

\footnote{338} It should be noted that the Interior Alliance was already involved in international advocacy work within the United Nations Working Group on Indigenous Populations and the Convention on Biodiversity.
the Environmental NGOs. This network of non-state actors shared similar concerns with respect to the subsidization by Canadian softwood lumber, and wished to make their concerns known to the USDOC which was considering the imposition of countervailing duties against Canadian lumber. The joining of forces between the US environmental NGOs and the two Canadian Indigenous groups enabled all the parties to strengthen their claims against the Canadian government by appearing as a united front. By unifying their efforts, the parties were able to point to various ways in which the Canadian government was breaching international subsidies law, basing their arguments on their joint expertise and experiences.

As outlined in Chapter Three, because the US environmental groups had standing under US law to make formal submissions to the USDOC, by acting collectively with these groups, the IA and the GCC were able to submit arguments through a formalized legal process that they would not have otherwise been able to access. The US environmental groups benefited from Canadian Indigenous participation because it enabled them to establish a wider range of concerns in their arguments. Furthermore, the submission of this Joint Petition led other Canadian First Nations to become interested in these activities. Soon after, the Nishnawbe Aski Nation (NAN) filed a letter supporting the Joint Petition alleging similar illegal subsidization was occurring in its province of Ontario.339

Keck and Sikkink point out that “[b]y building new links among actors in civil societies, states, and international organizations, they [TANs] multiply the channels

of access to the international system."³⁴⁰ This was clearly the case with respect to the Joint Petition submitted to the USDOD. And while the result of this advocacy at the USDOD did not prove to be overly successful – the US ultimately decided not to initiate investigations concerning the allegations put forth in the Joint Petition³⁴¹-- these efforts did instigate the formation of the Indigenous Network on Economics and Trade, a "network open to Indigenous peoples and organizations from around the globe who want to defend their inherent rights to their territories and Indigenous communities."³⁴² The INET, to which the Interior Alliance, the NAN, and the Grand Council of Treaty #3 belong, continued to take advantage of "transnational political opportunity structures"³⁴³ – raising awareness of the links between trade and Indigenous proprietary rights through amicus curiae submissions to both the WTO and the NAFTA in the Softwood Lumber Dispute.³⁴⁴ The INET was able to adjust and modify the arguments it initially submitted to the USDOD to fit the particular international institution it was targeting. And, by establishing a network of various First Nations across Canada, the IA was able to strengthen its position by

³⁴⁰ Supra note 46 at 1.

³⁴¹ Amicus #2, supra note 28 at 15.

³⁴² See the INET website at www.indigenosnet.org.

³⁴³ Sanjeev Khagram, James V. Riker & Kathryn Sikkink, "From Santiago to Seattle: Transnational Advocacy Groups Restructuring Politics" in Sanjeev Khagram, James V. Riker & Kathryn Sikkink eds., Restructuring World Politics: Transnational Social Movements, Networks and Norms (Minneapolis: University of Minnesota Press, 2002) 3 at 17. Sanjeev Khagram et al. identify potential opportunities for advocacy as "political opportunity structures," and define them as the "consistent dimensions of the political environment that provide incentives for, or constraints on, people undertaking collective action."³⁴³ They indicate that "political opportunities often provide resources for leverage and spaces for access," and are both taken advantage of by social movements, as well as created by them.³⁴³

³⁴⁴ While submissions were made to the NAFTA, this thesis will only focus on the WTO.
demonstrating how Canadian governments’ policies were impacting a range of Indigenous peoples and their proprietary interests (including treaty rights). Since these amici submissions, the Spokesperson for the INET, Arthur Manuel, has continued to travel throughout the world speaking to, educating, and garnering support from, a multiplicity of non-state actors with respect to the INET’s transnational advocacy work.\textsuperscript{345}

TANs often assist groups that are marginalized in their domestic political systems achieve greater power and influence both nationally and internationally. The acceptance of the INET’s amicus briefs by the WTO and the NAFTA, despite the fact that the Canadian government continued to argue that Indigenous peoples have no standing to make submissions to international economic institutions,\textsuperscript{346} suggests that this advocacy network enabled the INET to gain a certain amount of power by directing its efforts transnationally. Indeed, the relationship it was able to develop with United States trade representatives was facilitated by the advocacy link it created through submissions to the USDOC and within the WTO. This link was mediated through amicus curiae briefs and the use of law contained within. Thus, in this instance, it can be seen that law played a significant orientating role in this TANs activities.

The point of this section has been to analyze the possibilities of TANs for Indigenous peoples, and to suggest that in this regard, globalization can be seen as

\textsuperscript{345} The long list of activities the INET engaged in since the submission of amicus briefs is available on its website at http://www.Indigenousnet.org/content/view/20/54/1/1/.

\textsuperscript{346} See Amicus #1, \textit{supra} note 27; Amicus #2, \textit{supra} note 28; Amicus #3, \textit{supra} note 29. See also Grand Council of Cree, “Summary: Canada Tries to Shut Out Citizens from Trade Dispute” online: Grand Council of Cree <at www.gcc.ca/archive/article.php?id=46>.
strengthening Indigenous advocacy efforts. Indeed, globalization can be viewed as the impetus behind the creation of TANs by increasing global interconnectedness and the intensification of global social relations such that Indigenous groups, and other like-minded non-state actors, are able to work collectively together. In the INET’s case, the network created was relatively small and much of its support came from Canadian First Nations. Thus, it was transnational in terms of uniting various Canadian Indigenous nations; however, less so in terms of Indigenous peoples from other countries—although, some consultation did occur with US Indian tribes.347 A key possibility demonstrated by the INET’s efforts is how this form of advocacy can strengthen ties between geographically distinct Indigenous peoples and serve to educate and mobilize various Indigenous groups with respect to their common interests regarding the impact of international trade on Indigenous rights to land and resources.

b) Gaining Access to Global Governance

The INET gained access to the WTO through the submission of amicus curiae briefs. By submitting briefs to the trade Panels hearing the Softwood Lumber Dispute, Indigenous peoples were able to assert an Indigenous perspective on the issues and put forth arguments concerning Indigenous proprietary rights to land and resources that would not have otherwise been considered. As mentioned in previous chapters, Indigenous peoples around the world are beginning to recognize that the governing capacity of the WTO now reaches well beyond any previous multilateral

347 For information gathered in those consultations see supra note 305.
trade regime, and that international trade rules are becoming increasingly important in governing both global and local affairs. They are recognizing that while Indigenous peoples have been gaining political and legal ground by asserting their Indigenous rights and sovereignty within nation states, “those same national governments have given away their own authority, including sovereignty over natural resources, to the World Trade Organization.”\textsuperscript{348} In other words, the increased power of the WTO, which is placing constraints on national autonomy, can have the effect of diminishing Indigenous rights and/or sovereignty. Because of this, Victor Menotti points out that

\textellipsis some leaders of national Indigenous movements now understand that to truly resolve these issues, [i.e. Indigenous self-determination including rights to land and resources] they must also address global forces beyond the borders of the nation-states in which they live. While battles against various colonial monarchies range back for centuries, today’s drive for natural resources is increasingly determined by a single set of global rules created by the WTO. In doing so, the WTO has indirectly imposed a single regime over Indigenous peoples everywhere.\textsuperscript{349}

These reasons motivated the INET to intervene in the Softwood Lumber Dispute. Indeed, as Arthur Manuel explains:

\textellipsis we felt that we had to get involved in the Canada-United States Softwood Lumber Dispute because the Canadian government has given up its sovereignty to the international trade tribunals like the World Trade Organization. And they’ve given up their international sovereignty to the NAFTA Agreement, the North American Free Trade Agreement, and Canadians . . . \textsuperscript{350}

The INET recognized that the decisions the WTO was making concerning softwood lumber could have a direct impact on the recognition and protection of their

\textsuperscript{348} Supra note 124 at 47.

\textsuperscript{349} Ibid.

\textsuperscript{350} Supra note 126.
Indigenous land and resource rights at the national and local level. For example, if the WTO accepted Canada’s arguments concerning stumpage, it would be endorsing the accelerated rate at which Canada is able to trade lumber that is subject to Aboriginal proprietary claims.\(^{351}\) It would be implicitly authorizing Canada to continue with its “business as usual approach” of neglecting Aboriginal land and resource rights.\(^{352}\) Furthermore, according to arguments made in the amicus briefs, the INET realized, that if found to be true, the argument Canada was making at the WTO could have serious implications for First Nations in terms of their struggles for revenue-sharing agreements between First Nations and the provinces at the local level. Canada was arguing that it could not be found to be subsidizing its softwood lumber because by entering into long-term forest tenures with logging companies the provinces were not providing them with a good, but rather a “right to exploit an in situ natural resource.”\(^{353}\) Canada argued that stumpage, therefore, was a tax on the right to use the land, and did not represent the monetary value of the timber.\(^{354}\) This argument was ultimately rejected by the WTO; however, as the INET briefs point out, if it had been upheld, “the provinces could in the future continue to keep Indigenous peoples out of all remuneration schemes, as they do not have any tax authority.”\(^{355}\) In other words, if challenged, the provinces could later argue that First Nations were not entitled to share in stumpage revenue because stumpage was confined to the

\(^{351}\) Manuel & Schabus 2005, supra note 5 at 15.

\(^{352}\) Ibid.

\(^{353}\) Supra note 248 at 35.

\(^{354}\) Ibid.

\(^{355}\) Amicus #2, supra note 28 at 18; Amicus #3, supra note 29 at 11.
province's taxation powers. The INET recognized that the Softwood Lumber Dispute
gave the WTO the authority to make decisions that could impact and/or erode the
protective potential of their Aboriginal rights and title at the local level; it was
important, therefore, that they adopt a strategy to gain access to this legal forum to
voice their perspective. Thus, it can be said, that amicus briefs provide the possibility
of gaining access to the WTO; however, in this case access did not result in the
substantive consideration of the arguments raised by the INET by the WTO Trade
Panels.

c) Strengthening Recognition of Indigenous Property Rights using the
Language of International Trade Law

It taken seriously, amicus curiae submissions to the WTO could provide the
possibility of strengthening international recognition of Indigenous property rights.
Indeed, because WTO laws have emerged from the desire to promote the flow of
capital and moreover, to protect property interests, there may lay opportunities within
such laws to strengthen Indigenous property rights. Indeed, as Cutler points out, legal
regimes created to strengthen and protect liberal conceptions of property for the
benefit of capital also contain the potential to strengthen the property rights of other
parties.\textsuperscript{356} This is what the INET sought to do through its amicus curiae submissions.
Manuel points out,

When the WTO accepted the Indigenous submission in this case, it opened the
door and set a precedent to also recognize future submissions in similar cases,
thus potentially helping Indigenous peoples everywhere strengthen our hold
on our property rights, as recognized by international law and most

\textsuperscript{356} Supra note 279 at 250.
constitutions in the Americas. If so, we will be able to use the rules of an otherwise dangerous bureaucracy against its own sponsors.\textsuperscript{357} Sidney Tarrow points out that “international institutions are created by states to satisfy states interests, but once created, become focal points for contention.”\textsuperscript{358} He further argues that these international institutions “create complex rules, and from this complexity come unanticipated consequences that can provide openings that nonstate actors and members states can exploit.”\textsuperscript{359} Indeed, this is what occurred in the INET’s situation. By framing Indigenous rights in terms of an illegal export subsidy, the INET was able to use international trade law in a unique and unexpected way (albeit the overall effect of the INET’s argument proved to be quite limited, as it did not receive substantial consideration by the Panels).

While having limited affect on the Trade Panels, by framing Indigenous rights in this manner, the INET was able to raise some awareness among the State Parties to the dispute with respect to linkages between international trade law and Indigenous rights to land and resources. Arthur Manuel asserts, the submissions of amicus curiae “opened the door for an international debate on Indigenous proprietary interests.”\textsuperscript{360} Manuel and Schabus summarize the results of their advocacy efforts as follows:

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

\textsuperscript{357} Manuel, 2005\textit{ supra} note 5 at 174. Further amici submissions will be helpful in determining whether, indeed, as precedent has been set.

\textsuperscript{358} Sidney Tarrow, \textit{The New Transnational Activism} (New York: Cambridge, 2005) at 26 (citing Martin and Simmon).

\textsuperscript{359} \textit{Ibid}.

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.\textsuperscript{361}

Moreover, they point out:

\begin{quote}
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.\textsuperscript{362}
\end{quote}

Thus the INET's amicus submissions, by framing the legal issues in a manner consistent with the dominant discourses of international trade law, presented an opportunity to force the State Parties to conceptualize Indigenous property rights in terms of trade issues.

The conceptualization of Canada's neglect of Aboriginal land and resource rights as an illegal export subsidy required construing the issues strictly in economic terms because international trade law principles deem that a subsidy necessarily includes two discrete elements 1) a financial contribution; and 2) the conferral of a benefit. As I will discuss in detail later, there are definite limitations to interpreting the issues in this way; however, one must not overlook the fact that by framing the issues in this manner, the INET was able to make its case relevant to the issues raised in the Softwood Lumber Dispute, and arguably, this is what led the Panels to accept the Briefs. Moreover, framing the issues using the language of international trade attracted the attention of United States trade representatives who became interested in

\textsuperscript{361} Manuel & Schabus, supra note 5 at 16 [my emphasis added].

\textsuperscript{362} Ibid. [my emphasis added].
the INET case to the extent that the INET’s arguments coincided with their arguments. Indeed, the United States trade representatives were willing to enter into dialogue with the INET concerning its position, and later made reference to the INET’s brief in asserting its arguments to the WTO trade Panels.\(^{363}\) In highlighting some aspects of the discussions, the INET had with United States trade representatives, Manuel states as follows:

\[
\ldots \text{they were talking to us about what their situation was and what our situation was and I explained our situation and they’d always ask, “What? Did the Canadian people pay you Indians for those trees?” They asked that three times during that meeting. And we kept on saying no, they haven’t paid us one cent... it’s important to realize that people out there in the bigger picture, in the bigger world, are listening to what we have to say.}^{364}\]

The support the INET was able to receive from the United States is important because as Keck and Sikkink point out, for transnational advocates, garnering the support of an influential State in the international arena is a critical step towards attaining what they call the “boomerang effect.” In this case, the US applied some pressure to Canada by asserting in its recommendations that increased ownership “in the hands of Indigenous peoples” would be a way for Canada to move its lumber industry towards a market model.\(^{365}\)

In sum, while the Briefs submitted in this case did not receive substantial consideration by the Panels, they did provide the opportunity to raise issues concerning their Indigenous property rights with United States trade representatives and thus, raise awareness concerning Indigenous rights within the parameters of the

\(^{363}\) Ibid. at 16.

\(^{364}\) Supra note 126.

\(^{365}\) Supra note 302.
international trade community, an arena in which Indigenous voices have, until now, been absent. In this case, by using international trade law as a language in which to negotiate, the INET was able to make its case relevant enough for the trade Panels to accept the Briefs, and begin a dialogue with the United States.

d) Creating a Bridge for other International Law Norms

As outlined in Chapter Two, over the past several decades a body of international legal norms has begun to develop in the international human rights arena which recognizes Indigenous collective rights to land and resources. According to Anaya, the emergence of such international law norms is laying the foundation for customary international law concerning Indigenous property rights.\(^{366}\) Thus, it can be argued, that amicus curiae provide an opportunity to strengthen these emerging norms by bringing attention to them in different international legal forums. Amicus submissions provide the possibility of creating a bridge between other international legal arenas and the WTO. In doing so, they present the opportunity of challenging what Sundhya Pahuja acknowledges as a “conceptual and canonical separation of international economic law . . . from human rights law.”\(^{367}\) Indeed, authors of amicus curiae briefs may begin to challenge the status quo exclusion of environmental, social and cultural issues from the trade agenda by specifically drawing the links between trade and these important issues, and by placing them before trade Panels to consider.

The INET’s amicus submissions spoke to the fact that norms are being generated in other international legal arenas concerning Indigenous rights. For

\(^{366}\) Supra note 1.

\(^{367}\) Supra note 151 at 39.
example, the INET’s briefs outlined how “... other international institutions such as
the United Nations (UN) and the Convention on Biological Diversity (CBD) have
recognized the special standing and rights of Indigenous peoples.”368 They described
how, over the past several decades, the United Nations has recognized the unique
status of Indigenous peoples in the international arena and that various arenas have
opened up for Indigenous participation including the UN Working Group on
Indigenous Populations and the Permanent Forum on Indigenous Issues.369 They also
outlined how “[t]he Parties of the Convention on Biological Diversity have
recognized the central role of Indigenous peoples in the conservation of biological
diversity and have created an Ad Hoc, Open Ended, Inter Sessional Working Group
on Article 8j in the COP Decision III where Indigenous peoples discuss and work
alongside nation state representatives.”370 The Briefs further made reference to the
fact that Article 8(j) of the Convention on Biological Diversity specifically recognizes
the obligation of States to protect the traditional knowledge of Indigenous peoples
and to seek the approval and involvement of Indigenous peoples when engaging in
natural resource exploitation that affect them.371

In pointing to Article 8(j) of the Convention on Biological Diversity, the
INET illustrated how it is becoming increasingly recognized that a significant
component of economic development requires that Indigenous peoples must be
consulted and accommodated. While their submissions did not have an effect on the

368 Amicus #2 supra note 28 at 3; Amicus #3 supra note 29 at 1.
369 Ibid.
370 Ibid.
371 Ibid.
substantive decisions made by the WTO Panels, it may be one indication of why the Panels and the Appellate Body chose to accept the Indigenous briefs. In this case there is little evidence to suggest that an actual bridge was created between international norms; however, the fact that Indigenous peoples were able to raise these issues at all is significant and is indicative of a starting point. Indeed, while there may be little evidence as of yet to suggest that trade Panels are open to considering arguments that deviate from their narrowly-held trade focus, Howse points out that,

... it is far from clear that a submission that is not ‘considered’ will simply go in the waste-paper basket of the law clerks. There is nothing that prevents the judges from reading any such submissions they choose to read, if only to decide whether or not to ‘consider’ them. If a compelling or moving argument is made in an amicus submission, can a judge really erase that argument from his or her mind, if for whatever good reason, the judge decides that the brief does not need to be considered to decide the appeal. ... More generally, even scanning eventually ‘rejected’ material, if there is enough of it and it is good enough, will broaden the perspective of the judges. Such broadened perspective may be more significant to the way cases implicating competing human values are decided, than any specific legal argument in any one brief. 372

B. Friend or Foe? The Limitations of Indigenous Amicus Curiae Submissions at the WTO

Having analyzed the possibilities presented by the INET’s transnational advocacy at the WTO, I now wish to examine the limitations of such advocacy. It is important to consider the limitations because while it may seem axiomatic that working towards a more pluralistic and democratic WTO is beneficial for Indigenous peoples, there are implications in seeking to participate in a global institution that may be overwhelmingly resistant to change and, moreover, fundamentally

372 Howse 2003, supra note 319 at 510.
incompatible with Indigenous values and interests. Furthermore, there are certain tensions that arise for Indigenous peoples in engaging in transnational advocacy within the international trade arena that are not necessarily present for other groups within global civil society. Indeed, for each possibility outlined above, a distinct set of questions and/or challenges arises. For example, does participating in the WTO as amicus curiae, rather than as a recognized Member State, strengthen and perpetuate the State-centric international legal order that excludes Indigenous forms of political organization? Does strengthening the legitimacy of a deterritorialized governance regime have implications for Indigenous peoples whose governance models tend to emphasize community and territoriality? Can framing Indigenous rights to land and resources in terms of Western international subsidy law ever lead to a desired result? And, who is capable of representing an “Indigenous perspective”?

a) Enhancing the Legitimacy of the WTO

i. Neoliberal Normative Structure

Ruth Buchanan argues that the advocacy efforts of social justice-oriented NGOs which focus on reforming the WTO along procedural lines could, in fact, be counterproductive to the overall aims of these NGOs to the extent they foster legitimacy within the WTO without altering its underlying normative structure. She points out that “[t]he implicit assumption made by both activists and policymakers is that there is a linkage between transparency, legitimacy, and accountability

---

of multilateral institutions, and the structure of the global economy.”\textsuperscript{374} In other words, current campaigns directed at making the WTO a more democratic and pluralistic institution by increasing NGO participation through procedural means, may not have any effect on what is at the root of the problem – that is, the inequalities created by neoliberal global capitalism. She states:

Not only might they [the advocacy efforts of NGOs] fail to lead to the types of substantive changes that are the stated goal of many justice-oriented non-governmental organizations (NGOs), but, if successful, current campaigns centered largely on proceduralist reforms could well transform the WTO into an even more powerful institution of global economic governance without significantly affecting the current system of global economic inequality over which it presides.\textsuperscript{375}

In light of this, she offers a specific warning: “we need to become more attentive to the particular ways in which the ideal of cosmopolitan legality that remains at the heart of most cosmopolitanisms, even subaltern, decentred and democratic ones, functions to subvert and undermine efforts to promote global justice.”\textsuperscript{376} In other words, when embarking on various routes of advocacy, we must continue to evaluate to what extent the generation of procedural norms has the ability to promote substantive, transformative change.

This clearly raises concerns for Indigenous advocacy efforts directed at the WTO. If Indigenous participation within the WTO is only capable of creating an illusion that the WTO is a democratic and pluralistic institution when, in fact, it is not, then this may be an undesirable avenue of Indigenous transnational advocacy. If

\textsuperscript{374} Ibid. at 675
\textsuperscript{375} Ibid. at 675.
\textsuperscript{376} Ibid. at 698.
participation has the effect of masking, rather than transforming, the WTO’s neoliberal normative framework, then participation at the WTO may be antithetical to the overall values and interests of Indigenous peoples. This is particularly so because, as outlined in Chapter 2, the values and interests of many Indigenous peoples often conflict with the neoliberal normative values entrenched within the WTO and its Agreements. Indeed, the values reflected in the laws of the Interior First Nations and Grand Council of Treaty #3 are, in many ways, inconsistent with the values underpinning WTO law.

There is a fundamental tension between the deterritorialized neoliberal economic approach that seeks to maximize wealth accumulation according to capitalist ideals of comparative advantage seeing the entire globe as its marketplace, and the approach reflected in the INET’s laws, which focuses on Indigenous relationships and obligations to land, resources and territory. Indeed, the Manito Aki Inakonigagaawin starts with the principle that the Anishnaabe were given land by Saagima Manito and have responsibilities and duties to it. This conception of obligation to the land is referenced by Manuel in his reflections of listening to Terri Lynn Williams-Davidson, a Haida lawyer, speak to the Supreme Court of Canada in the Haida case:

The other day I had a real good opportunity to sit in at the Haida case when it was being heard in front of the Supreme Court of Canada . . . The first day it was with the government and Weyerhaeuser and they were talking about what those Red Cedar meant to them – they meant jurisdiction, they meant profits, they meant logging and operations, and they spelled that out pretty clearly. But the second day it was opened up with Terri-Lynn Williams-Davidson . . . who is a Haida . . . lawyer . . . representing her people . . . She had a big picture of a Haida village and she pointed . . . out the significance of the cedar . . . and she said “most importantly what I am trying say is that the Red Cedar are the six to eight hundred year old sisters of the Haida people”, and that was entirely opposite to what the
Weyerhaeuser lawyer was saying cedar meant to them . . . But they [the Haida] where the only people in Canada standing up and saying that . . . with a tremendous sense of commitment and resolve to protect the six hundred year old sister.\textsuperscript{377}

This demonstrates the tension between the dominant economic approach that seeks to commodify the natural world, and the INET's Indigenous economic approaches, which seek to maintain an organic relationship between human beings and the environment. The \textit{Seattle Declaration} further reflects this tension stating:

We believe that the whole philosophy underlying the WTO Agreements and the principles and policies that it promotes contradict our core values, spirituality and worldviews, as well as our concepts and practices of development, trade, and environmental protection. Therefore we challenge the WTO to redefine its principles and practices towards a "sustainable communities" paradigm, and to recognize and allow for the continuation of other worldviews and models of development.\textsuperscript{378}

In this case, the WTO demonstrated little resolve to substantively consider the economic arguments put forth by the INET. And, while the US did demonstrate interest, the fact that the US responded by advocating for greater land and resources in the hands of Canadian private owners or Indigenous peoples as a means of moving toward a "market model," presents problems because a market model facilitates the commodification of the forests. Indeed, if one of the aims of SCL is to assess the potential of counter-hegemonic struggles "to subvert hegemonic institutions and ideologies," the outcome of this case suggests that amicus curiae submissions provide limited potential to do so.\textsuperscript{379} Taking heed of Buchanan's warning, then, in any given struggle it will be important to critically assess whether Indigenous participation

\textsuperscript{377} Supra note 126.

\textsuperscript{378} Supra note 156.

\textsuperscript{379} Supra note 18 at 15.
within the WTO serves the ultimate purpose of grating against the neoliberal values that inform it or, rather, whether participation runs the risk of legitimizing those values. As Santos points out, the central challenge of subaltern cosmopolitan legality is to locate ways to “reinvent law beyond liberal and demosocialist model without falling into the conservative agenda – and indeed, to do it so as to combat the latter more efficiently.”

ii. State-centric Organization

Another distinct challenge and/or limitation for Indigenous peoples, is the state-centric organization of the WTO. The INET experience demonstrates how Indigenous peoples are currently only able to participate in WTO trade disputes as amicus curiae, and even then, participation is highly discretionary and limited. Thus, while amicus curiae submissions represent a way in which Indigenous peoples may assert a voice at the WTO, it can be argued that participating in a manner that affords few participatory rights as compared to Member States, reinforces the marginalization of Indigenous people. By participating in a peripheral way, Indigenous peoples run the risk of legitimating their marginalization in the international legal order and perpetuating colonial conceptions of Indigenous political organization.

The state-centric foundations of Western international law have always posed obstacles for Indigenous peoples seeking to participate in international legal arenas.

---

380 Supra note 17 at 443.

381 Strongly rooted in a Western world view, the state-centered international law system developed to facilitate colonial patterns promoted by European states. When European colonial powers settled in, and gradually overtook Indigenous peoples’ lands, the colonial powers became recognized in international law as the sovereign authorities over these territories. Indigenous peoples were excluded from participating in international law because they were considered to have no international legal
In recent decades, however, the international human rights arena has begun to address and repudiate some of its distinctly colonial underpinnings, becoming more open to both Indigenous participation and the recognition of Indigenous rights (including Indigenous collective rights\textsuperscript{382}). The WTO, by contrast, has remained guardedly state-centric and relatively closed to non-State participation. Article VI of the WTO’s \textit{Guidelines for Arrangements on relations with Non-Governmental Organizations}\textsuperscript{383} illustrates this state-centricism indicating as follows:

\begin{quote}
status or capacity. In many cases, European colonialists viewed Indigenous peoples as “primitive” and therefore incapable of holding sovereign authority over the territory they occupied. In some cases, treaties were entered into between the colonial powers and Indigenous peoples; however, over time, colonial views of Indigenous peoples being “inferior” took root, causing serious abrogation of the rights of Indigenous peoples recognized in the treaties. In most cases, without conquest or consent, colonial powers simply asserted sovereignty over Indigenous peoples’ lands. Because international law only recognized the state-individual dichotomy, Indigenous peoples, as collective entities existing within states, could not be accounted for within its framework. For a more detailed discussion see Jennifer Sankey “Fitting Indigenous Rights to Land and Resources into International Human Rights Law” (2005) 6/7 Cultural Reflections Journal of the Graduate Students of Anthropology 69. See also Anna Meijknecht, \textit{Towards International personality: The Position of Minorities and Indigenous Peoples in International Law} (Antwerp: Intersentia, 2001); \textit{supra} note 1; and

\textsuperscript{382} The liberal individualist framework of international human rights law has been a key challenge for Indigenous peoples because their claims for rights to land, resources, and self-determination, among others, are collective in nature. Debates about the recognition of Indigenous peoples’ collective rights in international law were heightened during the United Nations (UN) Working Group on Indigenous Populations’ (WGIP) discussion concerning the drafting of the \textit{Draft Declaration on the Rights of Indigenous Peoples (DDRIP)}. Many states voiced reluctance to recognize Indigenous peoples’ collective rights, with states such as Japan and France arguing that collective rights have never existed in international law; see Patrick, Thornberry, \textit{Indigenous Peoples and Human Rights} (United States: Manchester University Press, 2002) at 378-9. This is rooted in the origins of liberal-democratic thought, which developed according to an individual-state dichotomy. Liberal rights theory recognizes that individuals have certain inalienable rights and that governments derive their just power from the consent of the governed individuals; See Vernon Van Dyke. “The Individual, the State, and Ethnic Communities in Political Theory” in Will Kymlicka, ed. \textit{The Rights of Minority Cultures} (New York: Oxford University Press, 1995) at 32. The clear thrust of most international human rights doctrine, therefore, is in accordance with a liberal individualistic paradigm, requiring states to promote human rights without distinction as to race, sex, language, or religion. Traditional liberalism views collective and individual rights as being antagonistic. Up until recently, international human rights law has generally protected individual rights and precluded the granting of legal status and rights to groups as collective entities whenever they are identified by characteristics such as race, language or religion.

Members have pointed to the special character of the WTO, which is both a legally binding intergovernmental treaty of rights and obligations among its Members and a forum for negotiations. As a result of extensive discussions, there is currently a broadly held view that it would not be possible for NGOs to be directly involved in the work of the WTO or its meetings. Closer consultation and cooperation with NGOs can also be met constructively through appropriate processes at the national level where lies primary responsibility for taking into account the different elements of public interest which are brought to bear on trade policy-making.\textsuperscript{384}

Unlike other international institutions, the WTO sees the role of non-State actors as existing at the State level. For Indigenous peoples, this is particularly problematic because it has the effect of denying recognition of Indigenous autonomy. The result is that Indigenous peoples’ ability to contribute to the normative development of international trade law is seriously weakened, if not denied – Indigenous peoples’ voices are relegated to the national level to be dealt with as a “domestic issues” falling into a large basket of many other social concerns. Examples of this are illustrated in this case by Canada’s consistent arguments that the USDOC and WTO should not accept submissions on behalf Indigenous peoples, and by the USDOC’s findings that questions involving treaties and land rights with the First Nations are “questions more properly addressed in Canada.”\textsuperscript{385}

The inability of Indigenous peoples to exercise their autonomy within the WTO compounds the power asymmetries that exist between Indigenous peoples and States in the international arena. The state-centric structure of the WTO serves to reproduce relationships at the supranational level that are characterized by power imbalances that impede true participation of Indigenous peoples from ever occurring.

\textsuperscript{384} Ibid.

\textsuperscript{385} Supra note 27 at 34 (my emphasis added).
For Indigenous rights advocates struggling in this direction, then, it is important to consider how structural inequalities might distort the type of democratic participation achievable at a global level. In accordance with the aim of the SCL perspective to assess the potential to subvert hegemonic practices by dominant institutions such as the WTO, the INET’s experience highlights the necessity to explore different forms of Indigenous advocacy within the WTO that may more effectively address the power asymmetries caused by state-centricism. These might involve lobbying for greater participatory rights at Ministerial Conference and other workings arenas of the WTO (not simply dispute resolution), as well as establishing a consultative process with Indigenous peoples within the WTO.

Having illustrated how the state-centric organization of the WTO creates tensions and presents limitations for Indigenous advocates, I do not wish to suggest that advocacy in this arena must be abandoned outright. I do believe, however, that it is important to be aware of these tensions such that creative resistance techniques can be made more effective and result in more desirable outcomes. While Indigenous advocacy directed at the WTO through peripheral avenues could reinforce its state-centric nature, lack of advocacy will do little to improve this. Thus, in some ways, it makes sense to pursue the possibilities of immediate political gains without worrying about the broader philosophical consequences. Indeed, Aboriginal advocacy has made significant gains for Aboriginal peoples in Canada by using Canadian courts and thus legitimizing (as well as developing) Canadian laws. As Russel Barsh points out, “Indigenous peoples have learned to make effective uses of national courts and
the United Nations . . . although these institutions were also created by nation-states to serve states’ interests.”

iii. Deterritorialized Governance

Above I have asserted that Indigenous transnational advocacy directed at emerging institutions of global governance, such as the WTO, may provide the possibility for Indigenous peoples to access the central decision-makers in an increasingly globalized world. A tension arises, however, to the extent this may serve to strengthen a deterritorialized governance regime that is ultimately inconsistent with Indigenous conceptions of governance, and moreover, destructive to Indigenous autonomy and identity. In Chapter 2, I explained how globalization can be conceptualized as deterritorialization – a process by which various social processes, practices and relationships (economy, governance, culture, and so on) are lifted out of distinct territorial places and resituated in more distant spaces. I also demonstrated how this poses challenges for many Indigenous peoples who view their identity and cultural survival as being inextricably linked to their relationship with the land and resources of their traditional territories. This is true for the various Indigenous groups that form the INET, as is illustrated through their approaches to economic law.

Indeed, Manuel states:

Aboriginal knowledge cannot be treated simply as a pure academic collection of information because the learning and teaching of Aboriginal knowledge is directly linked to the land. Aboriginal values, uses and activities depend on our Elders and Peoples having access to our traditional land and control over

---

386 Supra note 152.
development in those areas in order to protect and teach our traditional knowledge.\textsuperscript{387}

Indigenous peoples worldwide indicate that it is difficult to separate the concept of their relationship with their lands, territories and resources from that of their cultural differences and values, because their "relationship with the land and all living things is at the core of their societies."\textsuperscript{388} Indeed, James Anaya points to the rich diversity of Indigenous peoples throughout the world and concludes that “[t]hey are Indigenous because their ancestral roots are embedded in the lands in which they live, or would like to live, much more deeply than the roots of more powerful sectors of society living on the same lands or in close proximity.”\textsuperscript{389}

According to Anaya, therefore, Indigenous identities are distinguishable from other cultural identities, to a certain degree, based on their connections with land. This notion is conveyed well by Douglas Harris’s use of the term “Indigenous territoriality.”\textsuperscript{390} Harris defines “territoriality” as “the communication or assignment of meaning to particular boundaries in order to assert control over a defined space,”\textsuperscript{391} and describes “Indigenous territoriality” as “Indigenous People’s sense of belonging to, owning, and being part of a particular territory.”\textsuperscript{392} The central role that territory

\textsuperscript{387} Manuel 2003, supra note 5 at 324.

\textsuperscript{388} Supra note 1 at 115.

\textsuperscript{389} Ibid. at 3. Anaya lists the following peoples as Indigenous: “Indian communities and nations of the Western Hemisphere, the Inuit and Aleut of the Arctic, the Aboriginal people of Australia, the Maori of Aotearoa (New Zealand), Native Hawaiians and other Pacific Islanders, the Saami of the European far North, and many of the minority and nondominant tribal peoples of Africa and Asia . . .”

\textsuperscript{390} Douglas Harris, “Indigenous Territoriality in Canadian Courts” in A. Walkem and H. Bruce (eds.) Box of Treasures or Empty Box: Twenty Years of Section 35 (Canada: Theytus Books, 2003) at 176.

\textsuperscript{391} Ibid.

\textsuperscript{392} Ibid.
plays in the construction of Indigenous identities suggests that the deterritorialized governance regime which global institutions such as the WTO encompass, may be inconsistent with Indigenous territoriality and thus, Indigenous conceptions of governance. It is thus worthwhile for Indigenous advocates to question the extent to which participation at the WTO could serve to undermine Indigenous identities and Indigenous governance models by promoting the dislocation of governance from Indigenous communities. Besides being undesirable, Indigenous governance may not be easily translatable into global spaces that are divorced from firm geographical places. For most Aboriginal peoples in Canada, for example, self-determination struggles have focused on the relinquishment of power by the federal government over Aboriginal communities such that Aboriginal peoples may exercise their inherent self-governing powers without interference from the colonial State. The prospect of a global governance regime, then, may appear as simply another Western political/legal forum in which Indigenous self-determination is less easy to control and more open to co-optation.

It is also important to consider the extent to which Indigenous territoriality has enabled many Indigenous peoples to maintain their distinct identities, despite colonial incursions. As has been illustrated throughout this thesis, systematic attacks on Indigenous cultures by colonial powers have occurred over a long period of time; however, by engaging in various practices, strategies and resistances, Indigenous peoples have managed to preserve their cultural identities, albeit certain aspects have been diminished. One can argue that a key reason why Indigenous cultures have been able to withstand colonial pressures is Indigenous peoples’ continued assertion of
their right to self-determination including the right to maintain their relationship with their traditional territories. In other words, Indigenous peoples’ commitments to territoriality have served as a basis to contest colonialism.

Arthur Manuel sees Indigenous relationships with territory as being a means, or as providing a model, to contest neoliberal globalization.\footnote{393} He sees this model not only as being important for Indigenous peoples, but also, for all people of the world, because it provides an alternative to the unsustainable model that is currently being used.\footnote{394} Manuel indicates that the direct relationship Indigenous peoples have continued to assert over their resources is a model for sustainability, and that this model needs to be pursued at the global level in order to preserve the earth and future generations of human beings – his “great-great-grandchildren.”\footnote{395}

In pursuing legal struggles within institutions such as the WTO, then, it is prudent to consider the extent to which deterritorialized forms of governance may have the ability to distort the governance models that have sustained the identities of Indigenous peoples. I again do not wish to imply that all global advocacy efforts should be rejected; however, I do wish to suggest that these are important tensions to consider when engaging in transnational advocacy. It may be such that a deterritorialized global governance regime, is indeed, compatible with Indigenous conceptions of governance. Moreover, it may be possible to adopt strategies of

\footnote{393} Supra note 126.\
\footnote{394} Ibid. The Seattle Declaration also makes this point, supra note 156.\
\footnote{395} Supra note 126.
resistance that strengthen global governance regulation and Indigenous local autonomy concomitantly.\textsuperscript{396}

\textbf{b) Framing Indigenous Rights Using the Language of International Trade}

Above I discussed how, by “reinventing,” or framing Indigenous proprietary rights in terms of, Western international subsides law, the INET was able to demonstrate the linkages between Indigenous proprietary rights and international trade. Above I quoted Arthur Manuel who has stated that the acceptance of Indigenous amicus curiae briefs by the WTO set a precedent that may allow Indigenous peoples to “use the rules of an otherwise dangerous bureaucracy against its own sponsors.”\textsuperscript{397} A concern that immediately arises from this statement, however, is the extent to which international trade law can in fact be used as a tool to foster Indigenous property rights, or whether it, in fact, it forces Indigenous conceptions of property into a dangerous paradigm. In other words, is it possible to use Western international subsidies law, necessarily liberal, individualistic and capitalist, to promote the recognition of Indigenous rights to land and resources – rights that are most often characterized as collective in nature? To borrow from

\textsuperscript{396} It is beyond the scope of this paper to provide a detailed analysis concerning models of global democracy; however, it is worth pointing out that some scholars argue that greater global regulation does not have to come at the expense of local and regional autonomy. David Held argues that “governance should normally be local” and that a “principle of subsidiarity ought to guide the relationships between local, regional, state and global governance; see I.M. Young, Inclusion and Democracy (New York: Oxford University Press, 2000) at 267. Iris Marion Young also envisions “a global system of regulatory regimes to which locales and regions relate in a federated system” at 267.

\textsuperscript{397} Manuel 2005, \textit{supra} note 5.
Audrey Lorde, then, can the Master’s tools be used to dismantle, or at least reorganize, the Master’s house?398

By framing Canada’s policy of neglecting Aboriginal proprietary rights as an illegal export subsidy, the INET was forced to construe Aboriginal rights to the timber in strictly economic terms. As outlined in Chapter Three, the INET argument relied heavily on the principle found in the Delgamuukw decision, that there is an “inescapable economic component” to Aboriginal title. Indeed, the INET Briefs state:

The failure to include the proprietary interests of indigenous peoples and the economic dimension of Aboriginal Title in the price of wood products makes the remuneration inadequate as Aboriginal peoples as the traditional owners of the forests and resources extracted from them do not get paid.399

By engaging international trade law to frame their argument the INET was forced to conceive of Indigenous proprietary rights and ownership in accordance with Western economic principles. By conceptualizing the issues in this way, the risk is that Indigenous rights to land and resources become equated with, or reduced to, Western forms of private property ownership, and for many Indigenous peoples this is inimical to their values and beliefs. As Sakej Henderson explains, “to speak of modern legal notions of ‘ownership’ and ‘property’ rights in the context of Aboriginal languages or worldview is difficult, if not impossible,” because Indigenous peoples’ “visions of land and entitlements were unlike the European notion of ‘property.’”400 He states


399 Amicus 2 #, supra note 28 at 21; Amicus #3, supra note 29 at 13. Similar language is used in Amicus #1, supra note 27 at 21.
that "the Aboriginal vision of property was ecological space that creates our consciousness, not an ideological construct or fungible resource."

Furthermore, conceiving of Indigenous rights to land and resources in terms of Western international trade law runs the risk of transforming these rights along liberal individualistic lines. Indeed, at play here is the power of Western legal discourse to construe property rights such that they are only recognizable according to a single paradigm, thereby rendering absent Indigenous conceptions of property. Not only may Indigenous rights become the subjects of an individualistic ideology, but furthermore, they run the risk of being reduced to an intangible monetary value. Under a trade law paradigm, Indigenous rights may simply become questions of financial compensation, neglecting the more important issues of securing recognition of Indigenous rights over land and resources, essential elements for Indigenous cultural preservation. This is facilitated by the positivistic paradigm under which international trade law and the WTO dispute resolution process operates. In other words, issues become abstracted, stripped of context, and subjected to a technical form of legal reasoning that is rooted in a neoliberal economic rationality. The issues are inevitably absorbed, integrated, and perhaps even distorted, into purely economic questions.

This is exemplified, to a certain degree, by the INET’s case. For example, if the INET had been successful in their argument that the Canadian government was subsidizing its lumber by its non-recognition of Aboriginal proprietary interests, the


\[401\] Ibid.
next task would be to numerically quantify the subsidy so as to incorporate it into the
countervailing duties being levied against Canada by the United States. This
reduction to monetary terms is reflected in the meeting the INET held with US trade
representatives who, according to Manuel, repeatedly asked, “What? Did the
Canadian people pay you Indians for those trees?” The underlying assumption is that
if the government had paid “market value” for the trees, there would be no subsidies
argument to make.

Given the relationship that many Indigenous peoples have with their territories
and the land and resources within, how would one engage in quantifying this in terms
of simply an economic value? For many Indigenous peoples, a solution does not lie
in receiving payment in return for outside exploitation of their territories.402 Indeed,
many Indigenous peoples are fighting against just that – they are arguing that their
cultural survival supercedes any corporate interest intent on maximizing wealth in
their traditional territories and that they should be able to decide how the land and
resources are managed. Thus, a tension arises to the extent that the means of alerting
the international trade arena to Indigenous rights issues, vis a vis framing them in
terms of subsidies, could result in undesirable ends.403

402 It must be noted, however, that some Indigenous people support this compensation model viewing it
as a means to become more independent as Indigenous nations. For examples of the different ways in
which BC Aboriginal groups are participating in the Canadian economy, see the seven part series

403 It is interesting to reflect on this in light of the history outlined in A. Wolf, Shuswap History: A
Century of Change (Kamloops: Secwepemc Cultural Education Society, 1996). Annabel Cropped
Eared Wolf discusses the political changes that the Shuswap people experienced after European
contact from 1800 – 1858, indicating that the tribe’s relationships with each were negatively impacted
by the fur trade economy. She states:
In 1822, Chief Trader John McLeod, upon arriving in Kamloops, found himself in the midst
of a war between two of the Interior Indian nations. Chief Factor Donald McLean,
complained that in 1859 trade at Kamloops was affected as the Indians were trapping very
Santos points out that cosmopolitan legality “may find itself in a position of being most effective when defending the legal status quo, the effective enforcement of laws as they exist in the books” and, therefore, “the dilemma for cosmopolitanism lies in having to struggle both for deep social transformation and for the status quo.”

For Indigenous peoples, this observation is particularly pertinent – it is often the case that Indigenous aims can be furthered by effectively strengthening the Western conceptions of the rule of law, despite the fact that the latter are implicated in colonial ideals and the historical social and political exclusion of Indigenous peoples. Indeed, in this case the INET faced the dilemma of being able to use international subsidies law to advocate for greater recognition of Aboriginal proprietary rights, albeit the mode of property rights recognized by such law has traditionally not fit well with indigenous conceptions of property. It may, however, be worthwhile to pursue the immediate possibility of recognition and work from that point forward towards more substantive, transformative change. Indeed, in many cases it may be necessary to use Western law, despite its limitations, to achieve interim solutions that have the potential to lead to greater substantive change across a longer time horizon.

c) Strategic Framing at the WTO

My discussion above concerning the limitations of framing Indigenous rights in terms of international subsidies law leads to a broader limitation regarding
cognitive or strategic framing at the WTO. As I discussed in Chapter 2, Indigenous transnational advocacy within the international human rights arena has been successful, to a large degree, as the result of framing Indigenous rights to land and resources in terms of human rights concerns that resonate with the international human rights community. Indeed, the ability to articulate Indigenous rights issues in terms of human rights has, according to Morgan, engendered “support for their aspirations within the international legal system.”

This is not to say there have not been challenges; the extent to which international human rights law is normatively grounded in liberal individualism, recognizing individual rights over collective rights, has made the recognition of Indigenous rights difficult. Nevertheless, the ability to frame Indigenous rights to self-determination, land, resources and so on, in terms of Indigenous cultural preservation, has assisted the United Nations and the OAS Inter-American Human Rights System in understanding why these rights must be accommodated within their legal frameworks. According to Martha Finnemore and Kathryn Sikkink, cognitive framing is an essential strategy for transnational advocates “since, when they are successful, the new frames resonate with broader public understandings and are adopted as new ways of talking about and understanding issues.”

Indeed, the ability of Indigenous rights advocates to align their interests with the overall interests of the international human rights community

---

405 Supra note 144 at 1.

406 Supra note 51 at 895.
has led to the emergence of a body of international law that recognizes Indigenous rights to land and resources as the human rights of Indigenous peoples.\footnote{For a discussion concerning the development of this body of law in the United Nations and within the OAS Inter-American System of Human Rights see \textit{supra} note 1. See also \textit{supra} note 106.}

The problem that arises for Indigenous advocates within the international trade arena is that there are few opportunities where frame alignment is possible, and even if it is possible, it may not be desirable. As I outlined above, the neoliberal normative values that underpin the WTO and its Agreements are often viewed as conflicting with Indigenous values and interests. In the INET’s case, for example, frame alignment, or “interest convergence,”\footnote{For a more detailed discussion see \textit{supra} note 119 (citing Derrick Bell).} occurred between it and the United States. Indeed, the opportunity to intervene arose as a result of the US conflict with Canada, and the INET framed its interests in accordance with international subsidies law which aligned it, to a certain degree, with the US. While the INET points out in its brief that it was not its intent to support either party to the dispute, the issues raised by the INET converged with those raised by the US, and arguably, the discussions that ensued between them were a direct result of the perceived convergence by the US. The INET briefs demonstrate that it was clearly in opposition to the position being argued by Canada – Indeed, the INET indicated the USDOC should have “initiated a detailed investigation to determine the extent to which stumpage rates would raise if the proprietary interests of Indigenous peoples were taken into account. This would have shown that Canadian lumber subsidies are even larger.”\footnote{Amicus \#2, \textit{supra} note 28 at 22; Amicus \#3, \textit{supra} note 29 at 14.}
One must question to what extent the salutary effects of such an alignment outweigh the deleterious effects. For example, the United States’ argument concerning Canada’s subsidization of timber logically leads to a restructuring of provincial tenure policy favoring greater private ownership of “Crown” land, an idea that many Aboriginal peoples are opposed to. In addition, there may be ramifications for the recognition of Indigenous rights at the local level to the extent that a perceived alignment with the United States generates negative public perception of these rights. Indigenous advocates may also wish to consider to what extent aligning with a State that is at the center of much criticism, both nationally and internationally, is detrimental to their overall aims and values. Indeed, many view the Softwood Lumber Dispute between Canada and the United States as an example of US hegemony and protectionism.

In sum, Indigenous advocates find a place to assert their voice within the international human rights arena because Indigenous rights are more easily aligned with human rights concerns. The participants within this arena are well versed in issues concerning cultural preservation, racial discrimination, human dignity, and peace—issues that more easily accord with Indigenous rights concerns. At the WTO, on the other hand, participants are well versed in neoliberal economic theories and the technical rules of international trade law. Indigenous advocacy becomes much more difficult and complex due to the challenges of framing Indigenous issues such that they resonate with the proponents of international trade.

In his comments on this term, Manuel indicates that any increase in private land ownership must recognize Aboriginal rights and title in accordance with Delgamuukw and Haida.
d) **Who Speaks for Indigenous Peoples?**

Throughout this thesis I have referred to Indigenous rights advocacy noting that Indigenous peoples will not always share the same perspectives. As with nation-states' populations, there will inevitably be different views among Indigenous populations concerning how to approach Indigenous economies and development. I have outlined the concerns of Indigenous peoples as I have seen them asserted by the INET in its briefs, statements made by Indigenous organizations and activists, case law, United Nations reports, academic literature, my personal interactions with Indigenous peoples, and so on. It would be incorrect to assume, however, that there is one universal Indigenous point of view on Indigenous economies and international trade. Indeed, as outlined in Chapter Three, submissions to the USDOC and WTO were also made by MLTC/Norsask supporting the position argued by Canada, that provincial stumpage does not constitute a countervailable subsidy. It argued that the First Nations of Northern Saskatchewan cannot be said to benefit from the countervailable subsidy that the US alleges benefits Canadian lumber producers because Aboriginal rights over their traditional lands and their treaty rights are "sui generis," and constitute a "unique market characteristic." In other words, they asserted that Aboriginal proprietary interests must be viewed differently than Western property rights and Western forms of ownership. The INET, by contrast, argued that Aboriginal proprietary rights must be treated as equals to Western property rights.

This intervention clearly illustrates how there can be differences in opinions between Indigenous peoples depending on their various perspectives and interests. The trouble, or limitation, with transnational Indigenous advocacy is the tendency it
has to universalize the “Indigenous perspective” at the global level. The danger of universalizing the Indigenous perspective is the power it has to construct and inscribe a purported “true Indigenous identity” within international law. The result is that when one Indigenous group’s perspective deviates from this constructed identity, the group is viewed as less “authentic,” or as pursuing “non-Indigenous” aims. My main point in raising this issue is to highlight some of the difficulties and/or limitations involved in determining how an “Indigenous voice” becomes incorporated into global governance regimes.

C. Conclusion

This Chapter has provided a detailed analysis of the possibilities, opportunities, tensions, limitations and implications of Indigenous transnational advocacy in the international trade arena, specifically the WTO. It has illustrated that currently, the potential for Indigenous transnational advocacy in the realm of international trade lies in its ability to raise awareness regarding the relationship between globalization, international trade law and Indigenous rights, and its ability to promote legal mobilization among Indigenous peoples with respect to these issues. In terms of amicus curiae submissions to the WTO, while they may provide some potential to strengthen the recognition of Indigenous rights by raising awareness, through dialogue, of the linkages between international trade and Indigenous rights to lands and resources, there are significant limitations. These limitations include the fact that by participating in the WTO as amici, Indigenous peoples run the risk of strengthening the WTO’s neoliberal normative structure, state-centric organization and deterritorialized governance model. In addition, the fact that Indigenous legal
arguments must be framed using the language of international trade law has the capacity to distort Indigenous proprietary rights and subject them to a neoliberal individualistic paradigm that may be antithetical to the laws, values and interests of many Indigenous peoples. Finally, questions arise concerning the differing perspectives of Indigenous peoples with respect to their economies, and how an “Indigenous voice” becomes characterized within the international legal arena.
CHAPTER FIVE

A. Overview of Thesis Argument

Throughout this thesis I have argued that globalization is creating increased need and opportunities for Indigenous rights advocacy/participation within emerging institutions of global governance and, drawing on the experiences of Canadian indigenous groups, I have analyzed the possibilities and limitations of Indigenous advocacy at the WTO. I have demonstrated that need and opportunities for Indigenous participation within institutions of global governance is increasing because governance is shifting in the context of globalization. Indeed, drawing on the work of Scholte, I asserted that governance in the context of globalization can be seen as functioning in accordance with a polycentric model; it can be characterized as being:

...distinctly multi-layered and cross-cutting. Regulation occurs at—and through interconnections among—municipal, provincial, national, regional and global sites. No single ‘level’ reigns over the others, as occurred with the primacy of the state over suprastate and substate spheres in territorialist circumstances. Instead, governance tends to be diffuse, emanating from multiple locales at once, with points and lines of authority that are not always clear.\(^{411}\)

I have argued that these shifts in governance raise significant questions for Indigenous rights advocacy, particularly with respect to how national recognition of Aboriginal rights will be impacted. Indeed, I pointed out that as supranational regulatory regimes exert more influence over the nation-state, there is potential for

\(^{411}\) Supra note 55 at 3-4 [my emphasis added].
Aboriginal rights to become neglected and/or eroded if global decision-makers lack an understanding of the importance and nature of Aboriginal rights, and/or fail to adopt effective protective measures to recognize and accommodate these rights, as has been the aim of many national Constitutions. Furthermore, have I argued that if the governing power of the WTO is to continue to increase, those subject to its authority, including Indigenous peoples, must have a say in the rules by which they are governed, if the WTO is ever to become a legitimate institution. Thus, I see that it is prudent for Indigenous rights advocates to examine how their advocacy efforts might respond to these shifts in governance, in an effort to promote Indigenous rights recognition within the global arena.

To illustrate my argument, I conducted a case study of the BC Interior First Nations’ struggle to assert their Aboriginal rights to the forest resources, which I see as an excellent example of how Indigenous groups are beginning to explore new opportunities for advocacy within non-traditional global spaces. In conducting this analysis, I adopted what Santos calls a “subaltern cosmopolitan legality” (SCL) perspective – I examined the law-centered strategies used by BC Interior First Nations across a multi-scale legal landscape. I looked at their direct assertion of their own Indigenous economic laws and rights to log at the local level and analyzed the trajectory of their struggle through to the submission of amicus curiae briefs at the WTO. Indeed, in documenting their experiences, I laid the foundation to evaluate the potential and limitations of their advocacy in terms of advancing a “counter-hegemonic” political struggle in the context of globalization. My analysis then

---

focused on the possibilities and limitations of Indigenous cosmopolitan legality to challenge the exclusionary nature of the international trade arena.

My evaluation has revealed that the potential for Indigenous transnational advocacy in the realm of international trade currently lies in its ability to raise awareness about the relationship between globalization, international trade and the recognition of Indigenous rights, and to promote legal mobilization among Indigenous peoples in this regard. The submission of amicus curiae briefs using international trade law to promote Indigenous rights provides the possibility of: 1) attracting the attention of key players in the international trade arena; and 2) beginning a dialogue which could lead to pressure being placed on non-conforming nation-states. This occurred, to some degree, in the context of the Softwood Lumber Dispute in that the USDOC suggested to Canada that greater control over land and forest resources by Indigenous peoples could assist in moving Canada towards a “market model” for trade in lumber. And, indeed, BC has adopted a new forest policy that seeks to place greater control in the hands of Indigenous peoples (although it may be argued that legal decisions rendered by the BC Court of Appeal and the Supreme Court of Canada in the Haida case were significant contributors to this shift in policy).

I have found, however, that while some potential for Indigenous transnational advocacy within the international trade arena is evident, there are various limitations, implications and/or tensions that arise in pursuing advocacy at the WTO. These limitations include the fact that participation runs the risk of strengthening the WTO’s neoliberal normative structure, state-centric organization and deterritorialized
governance model, which may be inconsistent with Indigenous peoples overall aims. In addition, framing Indigenous legal arguments using the language of international trade law to gain access to the WTO has the capacity to distort Indigenous proprietary rights and subject them to a neoliberal individualistic paradigm that may be antithetical to the laws, values and interests of many Indigenous peoples. Furthermore, as is a concern with respect to Indigenous advocacy in the international arena generally, questions arise concerning how the different perspectives of Indigenous peoples may be represented and accommodated within a global governance regime. Indeed, the concept of an “Indigenous voice” is problematic to the extent that it universalizes a single perspective for Indigenous peoples and thus renders absent their rich diversity.

In reflecting on these limitations, one may be left feeling somewhat discouraged, or frustrated, concerning how to approach Indigenous transnational advocacy. Indeed, the shifting nature of governance demonstrates the need to pursue powerful global institutions such as the WTO, and yet these institutions are most inimical to Indigenous interests. Furthermore, while it would appear that the UN is a more hospitable environment for Indigenous rights advocacy, serious questions arise concerning enforcement of decisions in this realm. As we enter into the UN’s second decade on Indigenous Peoples, and reflect on the fact that the UN Draft Declaration on the Right of Indigenous Peoples still remains a draft, it seems apparent that the UN has little potential for concrete influence on nation-states. Thus, we are left to question where does Indigenous transnational advocacy go from here?
B. Where Do We Go From Here?

I am led to conclude that the best approach for Indigenous rights advocacy is one that reflects the shifting nature of governance in the context of globalization. Indeed, bearing in mind Scholte’s contention that governance today tends to be “diffuse, emanating from multiple locales at once, with points and lines of authority that are not always clear”, and Rosenau’s conclusion that

... through focusing on rule systems we will not be confined to the world of states and will be empowered to explore issues and processes in terms of the way in which authority is created, dispersed, consolidated or otherwise employed to exercise control with respect to the numerous issues and processes that states are unable or unwilling to address,

I believe Indigenous transnational advocacy may be most effective if it seeks to continually explore and create opportunities for Indigenous participation within traditional and non-traditional political-legal spaces at both local and global levels. This approach is consistent with Santos’s conception of subaltern cosmopolitan legality, and with the approach adopted by the Interior First Nations in their struggle to assert their rights to the forest. Indeed, what is illustrated by their struggle is that no one form of advocacy enabled them to meet their aims entirely; however, combinations of different political and legal efforts across scales resulted in something more significant.

Local Locales

The reliance of Band members on Secwepemc laws to determine how logging should be carried out in Secwepemc territory had an emergent effect on Secwepemc legal

---

413 Supra note 55 at 3-4 [my emphasis added].

414 Supra note 91 at 9.
traditions. Indeed, the importance of local and national advocacy must not be underemphasized. I see the Secwepemc’s decision to assert their right to build their economies through direct action based on their own laws, knowledge and values as an important form of local advocacy, particularly in terms of building strength and generating the will to mobilize within Indigenous communities.

National Locales

In addition, the assertion of Aboriginal rights to defend against the BC government’s imposition of its forestry laws, and the consequent recognition by the Supreme Court of Canada in Okanagan Indian Band, that if BC requires Aboriginal rights to be proven vis a vis Canadian legal institutions, it must compensate First Nations in terms of legal fees, is indicative of the crucial role national legal institutions still play. Indeed, in accordance with Scholte’s model, I believe the state is still a crucial node of governance; however, its potential must be understood while reflecting on the global processes that exert pressure on it. I am thus led to believe that there may be additional opportunities to negotiate within the state in efforts to strengthen Indigenous voices and participation within the arena of international trade.

For example, Manuel and Schabus point out that the ruling in Haida that governments must accommodate Aboriginal interests to land and resources leads to an inference that “indigenous rights must also be accounted for on both the national and international level.”\(^{415}\) Thus, I believe it might be prudent for Indigenous rights advocates to consider lobbying the federal government to establish a process whereby Canadian Indigenous peoples are consulted and accommodated with respect to

\(^{415}\) Manuel and Schabus 2005, supra note 6 at 12.
international trade policy that may result in infringements to Aboriginal and/or treaty rights. This might provide an additional means of getting Indigenous issues “on the international trade agenda” at the WTO. Furthermore, given the cost involved in pursuing advocacy at the WTO (both travel and legal resources), and the limited potential it currently offers, the development of a consultative process within Canada may provide an important alternative. It could have the additional advantage of strengthening national legal norms concerning the rights of Indigenous peoples to their own economies, and thereby assist Canadian courts in seeing how Aboriginal and treaty rights encompass the ability of Aboriginal peoples to engage in contemporary economic uses of land and resources.\textsuperscript{416}

\textit{Global Locales}

In terms of advocacy directed at the WTO, given the current limitations presented with respect to participating within the realm of dispute resolution, it may be useful to explore how Indigenous peoples could participate in the WTO in other ways. This could involve lobbying for a participatory role at Ministerial Conferences and establishing a process whereby Indigenous Peoples are consulted and accommodated in the development of multilateral trade agreements. Participation in this manner will still fall prey to some of the limitations I outlined above; however, it may be more conducive to promoting transformative change. Furthermore, while Indigenous advocacy may currently be limited by the ideological underpinnings of

\textsuperscript{416} See for example the cases of \textit{R. v. Marshall, R. v. Bernard} [2005] 2 S.C.R. 220, 2005 SCC 43 where the Supreme Court of Canada held that Mi’kmaq in Nova Scotia and New Brunswick do not have a treaty right to log on Crown lands for commercial purposes. It found that the treaties of 1760-61 did not confer on modern Mi’kmaq a right to log contrary to provincial regulation because the truckhouse clause of the treaties was a trade clause which only granted the Mi’kmaq the right to continue to trade in items traditionally traded in 1760-61.
the WTO, this does not mean advocacy efforts aimed at increased Indigenous
coloration should altogether be abandoned. Indeed, the WTO is a reality of today's
global governance regime and must be dealt with despite its hostility.

On a similar note, despite limitations with respect to enforcement, pursuing
advocacy at the UN and other intergovernmental organizations is still an important
avenue of advocacy. This is particularly so because advocacy within this arena has
the capacity to generate international legal norms concerning Indigenous human
rights. At the very least, these norms make it such that Indigenous issues cannot
simply be ignored within international legal contexts. The strengthening of these
norms, particularly recognition of Indigenous rights to economic self-determination,
may provide a context for commencing a dialogue within the international trade
arena, should that one day occur. Indeed, strengthening norms in other international
arenas may be an important first step, given that increased attention is being paid to
the fact that the WTO operates within a framework of global agreements and that
"greater coherence is needed between the WTO and other international
institutions/agreements to ensure that trade does not nullify other legitimate
international policy objectives."\footnote{417}

Finally, in light of the importance of generating a normative foundation for
Indigenous participation and rights recognition within the global arena, I believe it is
necessary for various international bodies, legal as well as "non-legal", to take a
proactive approach to accommodating Indigenous peoples and their interests within
their governing frameworks. Many international bodies, while not necessarily

\footnote{417} The UK Trade Network, "For Whose Benefit? Making Trade Work for People and the Planet" (February 2001) [unpublished].
recognized as legal or political institutions, can be seen as locales from which rules and norms emerge. They thus provide spaces in which Indigenous voices may be exercised. In the spirit of legal pluralism and subaltern cosmopolitan legality we must look for ways in which law is expressed, and may be expressed, in non-traditional spaces. Indeed, as advocates we are presented with the challenge of expanding the “plural legal landscape.”

C. Final Summary

I began this thesis with a discussion concerning Santos’ notions of the “sociology of absence” and the “sociology of emergence”, and I indicated how the themes of absence and emergence underpin my thesis project. Indeed, my thesis has sought to bring an emergent quality to the Secwepemc struggle and to demonstrate how the exclusion, or rendering absent, of Indigenous perspectives from the international trade arena has resulted in a “waste of social experience.”\(^418\) In engaging in this intellectual journey, I have become interested in the various ways Western forms of knowledge and practices of knowing subjugate Indigenous knowledge and practices of knowing. I believe it is important as a non-Indigenous scholar to recognize this fact and to challenge oneself, to the extent possible, to engage in alternative forms of knowing and understanding. Thus, under the encouragement of Professor Borrows, and having been influenced by his work,\(^419\) I have decided to end my thesis by summarizing it as a story which draws on processes found in the natural world where I am from. Recognizing that there will always be

\(^{418}\) Supra note 9 at 17.

\(^{419}\) My story has been inspired by the work of John Borrows, see supra note 10.
limitations in my ability to adopt an Indigenous methodology, this is, nonetheless, my attempt.

i. Hidden Trails and Emerging Riverbeds: A Multi-dimensional Approach to Indigenous Advocacy

North Vancouver is a place of dense rainforests, a distinct mountain range and a complex system of rivers, creeks, and streams. On any given day, one can take advantage of the beauty of these surroundings by setting out on any of the multiple trails and hiking routes that exist throughout the area. Indeed, this is where I have found myself on numerous occasions having spent most of my life living in this area. One particular day, however, I set out along a well-traveled forest path and found myself being pulled in an alternative direction. The path I was on meandered north towards the mountains, and south towards the ocean. While walking on this path, I noticed that off to the side the land began to slope. I only needed to branch off the trail a meter or so before I saw that the land gradually sloped downward, forming a distinct gully. The gully was scattered with smooth, circular-shaped stones that spread both across it horizontally and lengthwise up into the mountains. It was the subtle remnants of a waterway – a stream, a creek, or a river, that used to flow through it. It was hard to tell that a waterway used to exist there, but by closely examining the circularity and smoothness of the stones left in the gully, it was clear that water must have rushed over top of and between these stones for many years. Today, however, there was no water – just stones and empty spaces between the stones – absences had been produced.
I became curious – what had happened to the water? I decided to branch off the path a little further and begin to follow the gully up the mountain. I did not really know where I was heading and when people walking along the trail saw what I was doing, they shouted out at me to “Come back! There is nothing up there!” they said. Yet I was compelled to continue on.

As I made my way up the mountain, I began to see that some of the stones in the gully started to appear wet. It became clear that water was emerging from somewhere. As I continued up the mountain, I saw that more signs of water were emerging in the gully. I finally reached a slight leveling out of the land and as I did, it was revealed to me why there was so little water in the dried up gully – the gully was blocked by a large incline of boulders, rocks, mud, dirt, and other debris. Long ago, a logging company had built a mud dam here, creating a lake where the loggers could boom their felled logs. Logging in the area had ceased long ago; however, the dam was left behind. At that time, little regard was paid to what the dam would do to the environment, the water, and the creeks and streambeds below.

At the bottom of this mud dam I could make out a group of campers. They were busy at work trying to dislodge the barrier, and it looked like they had been working there for some time. I sat down to watch them and I saw that some were collectively trying to dislodge a large boulder from the mud. Others were working individually on the smaller stones and dirt. It was time consuming work, but all of the efforts were necessary.

Occasionally, I noticed the campers become frustrated – they would pull out one stone and another would fall into its place. When this would happen the campers
would huddle together and talk. They would devise new strategies on how to
approach the problem using various types of tools. Sometimes they used tools that I
recognized; however, oftentimes they would take those tools and then craft them into
new tools that I had never seen before.

I became increasingly interested. I made my way over to the campers to ask if
I could help, and they agreed. I joined the group that was chipping away at the mud
trying to dislodge a stone from its firm grasp. It was only once I got up quite close
that I could start to really understand the challenges of the mud dam. I started to see
that the mud represented colonialism and the stones and boulders lodged within it
were such things as the *Indian Act*, residential schools, and Reserves. The mud was
difficult to manage – it was messy and it seemed to cover everything. Tackling the
mud required constant thought, discussions, and the development of different
strategies and approaches. It required incremental work – there was no one solution
that would wash the mud and the dam away in one fell swoop.

Though time consuming, and often frustrating, every so often a chunk of stone
or debris was heaved out of the mud wall and water began to trickle out of the hole
that remained. When this happened, all the campers would cheer and watch as the
water began to make its way down the mountainside, weaving over top and between
the stones in the gully. As more stones, boulders, and chips of dirt were removed
from the mud wall, more trickles of water began to emerge. Eventually there was
enough water fill in the absent spaces between the stones that lined the dried up gully
– enough water to fill in the absences that had been produced by the dam many years
ago.
Overtime, enough water emerged to form a river that extended all the way from the top of the mountain to the ocean. As the water came back to the gully, new life began to emerge within the river – algae grew out of the relationship between the water and the stones... and, eventually, new, unexpected forms of life appeared to feed on the algae.
Bibliography

LEGISLATION: CANADIAN

BC Supreme Court Rules, B.C. Reg. 221/90.

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982 c. 11.

Fisheries Act, R.S., 1985, c. F-14.


Indian Act, R.S. 1985, c. I-5.

LEGISLATION: OTHER


*International Cancun Declaration of Indigenous Peoples (Cancun Declaration)* 5th WTO Ministerial Conference – Cancun, Quintana Roo, Mexico, 12, September 2003 online: http://www.tebtebba.org/tebtebba_files/finance/cancunipdec.rtf”.


*Manito Aki Inakonigagaawin*. The Elders gathering in Kay-Nah-Chi-Wah-Nung at Manito Oochi-waan on April 23, 1997 and on July 31, 1997 approved this law and respectfully petitioned the National Assembly to adopt it as a temporal law of the Nation. The Nation, with approval of the Elders and validation in traditional ceremony, and with ratification by the National Assembly, proclaimed this law on the 3rd day of October 1997.


**JURISPRUDENCE: CANADIAN**


JURISPRUDENCE: OTHER

Maya Communities and their Members against Belize, (2000), Inter-Am C.H.R. No. 12.053.

The Case of the Mayagna (Sumo) Awas Tingi Community vs. Nicaragua (2000), Inter-Am. Ct. H.R. No. 11.577.


SECONDARY MATERIAL: ARTICLES


Harris, Douglas. “Indigenous Territoriality in Canadian Courts” in Ardhit Walkem & Halie Bruce eds. Box of Treasures or Empty Box?: Twenty Years of Section 35 (Canada: Theytus Books, 2003) 176.


Khagram, Sanjeev, Riker, James. V. & Sikkink, Kathryn, “From Santiago to Seattle: Transnational Advocacy Groups Restructuring Politics” in Khagram, Sanjeev, Riker,


Manuel, Arthur. “Aboriginal Rights on the Ground: Making Section 35 Meaningful” in Ardith Walkem & Halie Bruce eds., *Box of Treasures or Empty Box?: Twenty Years of Section 35* (Canada: Thetys Books, 2003) 316.


Walkem, Ardith & Bruce, Halie. “Introduction” in Ardith Walkem and Halie Bruce eds., Box of Treasures or Empty Box?: Twenty Years of Section 35 (Canada: Theyts Books, 2003) 10.


SECONDARY MATERIAL: BOOKS


Secwepemc Cultural Education Society. *Coyote as the Sun and Other Stories* (Kamloops: Secwepemc Cultural Education, 1993).


SECONDARY MATERIAL: PUBLICATIONS BY INTERNATIONAL BODIES


SECONDARY MATERIAL: OTHER


nations/SpeakerSeries_Transcripts/5_FNSP_Land_Claims_and_Governance_05022.pdf>.


Scholte, Jan Aart. “Globalization and Governance: From Statism to Polycentrism” (2004) [unpublished, archived at Centre for the Study of Globalisation and Regionalisation, University of Warwick].


Sierra Legal Defence Fund, Interior Stumpage Report (Vancouver, Sierra Legal Defence, 2001).

The UK Trade Network, “For Whose Benefit? Making Trade Work for People and the Planet” (February 2001) [unpublished].


OTHER MATERIALS


Answers of the United States of America to the Panel’s 26 April 2002 Questions (8 May 2002) United States—Preliminary Determinations with Respect to Certain Softwood Lumber From Canada
Factum of the Respondent, Chief Ronnie Jules, in his personal capacity and as representative of the Adams Lake Indian Band, Chief Stuart Lee, in his personal capacity and as representative of the Spallumcheen Indian Band, Chief Arthur Manuel, in his personal capacity and as representative of the Neskonlith Indian Band, and David Anthony Nordquist, in his personal capacity and as representative of the Adams Lake Indian Band, the Spallumcheen Indian Band and the Neskonlith Indian Band, and all other persons engaged in the cutting, damaging or destroying of Crown Timber at Timber Sale Licence A38029, Block 2, British Columbia (Minister of Forests) v. Okanagan Indian Band [2003] 3 S.C.R. 371, 2003 SCC 71.


Memorial To Sir Wilfred Laurier, Premier of the Dominion of Canada From the Chiefs of the Shuswap, Okanagan and Couteau Tribes of British Columbia (25 August 1910), Victoria, Provincial Archives of British Columbia (NWp, 970.5, M533).
