



ROOTS OF RESISTENCE: RIGHTS OF INDIGENOUS COMMUNITIES IN THE GLOBAL TRADE

THEME: ENVIRONMENT LAW AND CLIMATE JUSTICE

SUB-THEME: ADDRESSING BIODIVERSITY LOSS THROUGH INTERNATIONAL LAW

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ABSTRACT

Indigenous communities are not just the artistic subjects with a head-gear of any documentary or exotic painted faces of a cultural display. They are modern citizens with rights and voices existing in the border of the shared society. The rights of indigenous people in an international set-up have been centred around environmental protection or as a human right regime, but with the fast-paced world of rapid development, it becomes necessary to give a different perspective to the existing issues. The international framework measures development with the global trade. Indigenous communities are underrepresented and marginalized in global trade discussions and are encountered with substantial challenges to their political, economic, and cultural rights due to international trade agreements. This paper attempts to analyse the complex relation of indigenous rights with the emerging global trade, with a focus on issues such as economic exploitation, cultural marginalization, and controlled participation in decision-making processes. The paper also analyses the frameworks like WTO and TRIPS, which essentially perpetuate inequalities such as biopiracy and resource exploitation by prioritizing economic gains over indigenous values. The paper uses the concepts of self-determination, collective rights and contextual participation as the criteria to assess the participation of indigenous communities at international decision-making process. The paper further presents a case study of Softwood Lumber Dispute, as an illustration of gradual and significant integration of indigenous perspectives into trade disputes and also as an attempt to highlight the flaws in the present mechanism. The paper concludes by advocating a more inclusive and equitable approach to international legal framework for a more efficient representation and protection of indigenous communities in global trade dynamics.

INTRODUCTION

Indigenous communities are not just a painted-face and feather-geared head entities nor just an artistic, cultural ornament of any documentary. They are modern people, with their own set of rights and voices, having an existence at the limits of a shared society. The rights of indigenous people in an international set-up have been centred around environmental protection or as a human right regime, but with the fast-paced world of rapid development, it becomes necessary to give a different perspective to the existing issues. The international framework measures development with the global trade. Indigenous communities are underrepresented and marginalized in global trade discussions and are encountered with substantial challenges to their political, economic, and cultural rights due to international trade agreements.

Trade has a close relationship with the crucial quality of development on a global scale. In addition to just stealing their land, international trade agreements such as WTO and TRIPS, also cause harm to indigenous people by turning their culture into a commodity for commerce and financial exploitation. They are mostly left without recourse since they are disconnected from the world and its functioning, and they are not even aware of their rights when it comes to battling these multinational businesses. By encouraging actions like resource extraction that negatively impact their way of life, trade regulators such as the WTO directly threaten the acknowledged rights of indigenous groups. As trade becomes more popular, international policy and decision-making must consider the rights of indigenous communities.

PARTICIPATION OF INDIGENOUS COMMUNITIES IN INTERNATIONAL FRAMEWORK

Concept of Self Determination

Self Determination is a recognized and affirmed principle in the UN Charter. It also finds its meaning as “right of all people” in the international human rights covenants. In common parlance, the idea of self-determination has always been associated with statehood, implying a right to have an independent existence as a state.¹ In an international set-up, indigenous people’s participation is that of non-state actors, therefore, their participation is highly variable in quality and degree.

The main problem with the current definition of "self-determination" is that it is a very state-centric concept that reflects the belief that indigenous people are separate but yet a part of the state.² The second challenge pertains to the idea of "intra-indigenous," which maintains that because of their political, cultural, and economic differences, some indigenous people have greater access to international forums than other communities.

Indigenous people do not benefit from this understanding of state both normatively and descriptively. For them, self-determination doesn’t lie in independent statehood rather in a set up where there is context-based consensual

¹ Anaya, S.J. (1998) ‘Indigenous Peoples and International Law Issues’, *Proceedings of the Annual Meeting (American Society of International Law)*, 92, pp. 96–98. Available at: <https://www.jstor.org/stable/25659200> (Accessed: 26 January 2025).

² Charters, C. (2010) ‘A Self-Determination Approach to Justifying Indigenous Peoples’ Participation in International Law and Policy Making’, *International Journal on Minority and Group Rights*, 17(2), pp. 215–240. Available at: <https://www.jstor.org/stable/24675786> (Accessed: 26 January 2025).

participation, they have autonomy relevant to their cultural pattern and rights to participate in the political processes relating to territorial boundaries of the state they live.³

The strength of participation of indigenous people in international law-making is hinged upon two key factors: firstly, the degree of interest of the indigenous people in the matter being discussed, particularly its prospective impact on their self-determination and other rights; and, secondly, whether they agreed in line with free, prior and informed consent to be represented by a relevant state capable of accurately representing their perspective.⁴ In light of this, a different model is required for the acute representation of indigenous people.

Adopting a "contextual-participation" approach to the legislative process can help address these issues. This approach contends that if the issue being discussed for international negotiation is significant to the indigenous people, the level of their participation should be confirmed, provided that they have not consented to state representation. This approach suggests a range of engagement, from full participation, like that of governments where indigenous people agree, to more limited forms of involvement, including providing formal channels for opinion.⁵ Such a plan for their engagement affirms their claims to remedial measures to acknowledge their sovereignty while striking a balance between their rights to full participation and self-determination.

Individual Rights v Collective Rights

The most distinctive defining feature of the indigenous people is their existence as a community and the concept of individual identity within the community is a foreign concept. They demand participation in international decision-making process as a collective right. In the international legal framework, the idea of collective or group right does not fit well due to its very state-centric and individualistic approach.

Under such a preference for collective set of rights, the issue regarding the rights of individual members within the group arises. Indigenous people being a unique community, the question of individual right to be tested against collective right is irrelevant as their individual and collective rights are generally “mutually interactive rather than in competition”, implying the idea of kinship or social networks.⁶ In the case of indigenous communities, collective rights supplement the individual rights.

As the collective rights are intrinsic to indigenous communities, the international legal framework needs to establish an effective instrument for the protection of these rights. In Western idea of rights, they have been framed in terms of an individual's claim to participation, equality, freedom, and economic or physical security

³ Kingsbury, B. (1998) “‘Indigenous Peoples’ in International Law: A Constructivist Approach to the Asian Controversy”, *The American Journal of International Law*, 92(3), pp. 414–457. Available at: <http://www.jstor.com/stable/2997916>

⁴ Davis M, (2005) ‘INTERNATIONAL TRADE LAW AND INDIGENOUS PEOPLES A NEW DIRECTION IN HUMAN RIGHTS ADVOCACY?’, *Australian Indigenous Law Reporter*, 9(16) pp. 426-440. Available at: <https://www.jstor.org/stable/10.2307/26479574> (Accessed: 26 January 2025)

⁵ Charters, C. (2010) ‘A Self-Determination Approach to Justifying Indigenous Peoples’ Participation in International Law and Policy Making’, *International Journal on Minority and Group Rights*, 17(2), pp. 215–240. Available at: <https://www.jstor.org/stable/24675786> (Accessed: 26 January 2025).

⁶ Anaya, S.J. (1998) ‘Indigenous Peoples and International Law Issues’, *Proceedings of the Annual Meeting (American Society of International Law)*, 92, pp. 96–98. Available at: <https://www.jstor.org/stable/25659200> (Accessed: 26 January 2025).

in relation to the state, or as the sovereign prerogatives of the state himself.⁷ On the other hand, the indigenous people have asserted rights of group autonomy or collective control over their resources.

Protecting the Indigenous way of life requires acknowledging group rights because indigenous societies are communal. The nascent discourse on human rights has recognised this imperative and formulated these collective rights in the framework of international human rights regimes.

Treatment in Trade Law System

The facilitative body for any international trade legal framework is the World Trade Organization. Certain terms of the WTO agreement, particularly related to trade in goods, services and intellectual property dealing in the produce of the indigenous communities, have significant implications for indigenous people's rights and well-being.⁸ To acknowledge these growing concerns caused by extractive industries and provide due recognition and economic welfare to these communities, the WTO has made active efforts in recognizing such persistent issues while interpreting the WTO legal agreements.

While this is a positive step, further action is required to safeguard the interest and rights of indigenous people and creating an environment of more active participation in decision-making processes when the issue directly concerns. These initiatives are also necessary to safeguard their economic interest and self-determination.⁹ This may include direct advocacy for their interests during negotiations; this, however remains a challenge as the WTO is a strictly state-member organization and indigenous communities are non-state actors. The alternative may be including them as observers at the negotiations, whose interests can be represented through a legally formed and recognised advisory body.

INDIGENOUS COMMUNITIES AND GLOBAL TRADE: ROOTS OF RESISTANCE

The establishment of the GATT (General Agreement on Tariffs and Trade) in 1947, accompanied by the rapid evolution of modern multilateral trade law system, has resulted in an impactful rise in global trade and substantial economic growth. However, this expansion in worldwide trade has exacerbated issues like poverty, economic inequality and environmental degradation. The downside of such growth has been severely suffered by the indigenous people as their resources and livelihood are the prime victim of such extractive industries.

The cornerstone of world trade law is the World Trade Organization which does not expressly address the indigenous people. Nonetheless, over the past decades and increased acknowledgement of environmental degradation due to industrialization has pushed the policymakers to explore the relationship between trade and sustainable development.

⁷ Mazel, O. (2009) 'THE EVOLUTION OF RIGHTS: INDIGENOUS PEOPLES AND INTERNATIONAL LAW', *Australian Indigenous Law Review*, 13(1), pp. 140–158. Available at: <https://www.jstor.org/stable/10.2307/26423121>

⁸ Pritchard, S. and Sarah PriHeindow-Dolman, C. (1998) 'INDIGENOUS PEOPLES AND INTERNATIONAL LAW: A CRITICAL OVERVIEW', *Australian Indigenous Law Reporter*, 3(4), pp. 473–509. Available at: <https://www.jstor.org/stable/45239456> (Accessed: 26 January 2025).

⁹ Davis M, (2005) 'INTERNATIONAL TRADE LAW AND INDIGENOUS PEOPLES A NEW DIRECTION IN HUMAN RIGHTS ADVOCACY?', *Australian Indigenous Law Reporter*, 9(16) pp. 426-440. Available at: <https://www.jstor.org/stable/10.2307/26479574> (Accessed: 26 January 2025)

Impact of Trade

The aim here is to assess the potential impacts that trade agreements, especially WTO Agreements cause to the rights and interest of the Indigenous people. The analysis is structured in two key categories: (i) economic impacts which assesses the issue of resource dispossessions by extractive industries; and (ii) political impacts which hinges upon the political participation and sources of disempowerment.

- **Economic Effect**

The economic impacts of international trade agreements on the indigenous communities are exclusive and distinct having dual consequences of exacerbation of continuing economic inequalities and a source of threat to their well-being and livelihood. The genesis of there effects lies in the rapid process of economic liberalization engraved and fermented in these international trade agreements.¹⁰ Such degree of liberalization and resultant surge of global commerce presents difficulties for indigenous communities to stay in market and effectively compete as there is an inherent lack of necessary resources like capital, technologies or supply chain networks as opposed to big and better equipped industries.¹¹ This form of advancement results into the phenomenon of “reverse discrimination” which occurs when the attempt to make a market more fair results into degradation of products by indigenous people as lower tier.¹²

Another impact of the global trade agreements is that it legitimizes liberalization in all economic sectors including natural resource.¹³ Indigenous communities are a home to vast natural resources linked to their cultural identity they're made to suffer the consequences. Extractive industries have rampantly exploited the lands of indigenous people without any equitable compensation or appropriate recognition of their contributions. Therefore, the impact of such global trade law agreements is not limited to environment but possesses an existential threat to the cultural survival of indigenous people.

- **Political Effect**

The ability of indigenous people to participate in international policy-making process, particularly in trade discussions, is severely limited. Despite having acknowledged the rights to participate in public affairs, their voice is frequently observed as insignificant or immaterial due to insufficient representation and that the decision-making processes being circumvented to favour the demands of the mainstream.¹⁴ They are further denied any appropriate opportunity to present their concerns in a technical negotiation concerning their rights due to significantly restricted availability of expert

¹⁰ Goldtooth, T.B.K. (2004) 'Stolen Resources: Continuing threats to Indigenous people's sovereignty and survival', *Race, Poverty & the Environment*, 11(1), pp. 9–12. Available at: <https://www.jstor.org/stable/41554413> (Accessed: 2025).

¹¹ Puig, S. and Shepherd, A. (2024) 'Indigenous peoples and International Trade Law', *Arizona Legal Studies*, 24(22). doi:10.2139/ssrn.4899663.

¹² Davis, M. (2005) 'INTERNATIONAL TRADE LAW AND INDIGENOUS PEOPLES A NEW DIRECTION IN HUMAN RIGHTS ADVOCACY?', *Australian Indigenous Law Reporter*, 9(2), pp. 16–22. Available at: <https://www.jstor.org/stable/10.2307/26479574> (Accessed: 2025).

¹³ Puig, S. and Shepherd, A. (2024) 'Indigenous peoples and International Trade Law', *Arizona Legal Studies*, 24(22). doi:10.2139/ssrn.4899663.

¹⁴ Charters, C. (2010) 'A Self-Determination Approach to Justifying Indigenous Peoples' Participation in International Law and Policy Making', *International Journal on Minority and Group Rights*, 17(2), pp. 215–240. Available at: <https://www.jstor.org/stable/24675786> (Accessed: 26 January 2025).

assistance and guidance. These obstacles weaken their negotiation position in addition to restricting their capacity to engage.

Furthermore, certain trade agreements may even make social and economic inequality by directing government focus away from initiative that should be given utmost priority in such areas, like poverty eradication, and towards market efficiency.¹⁵ The inclination of policies to prioritise trade and economic goals over social empowerment and fairness implies that indigenous people would be subjected to increased poverty and social exclusion.

Trade Barriers Encountered by Indigenous Peoples

Given the growth of international trade patterns, it is essential to comprehend how indigenous people fit into these trends because they unintentionally affect their ability to survive. Below is a citation to one of such instances:

The subject of whether indigenous people may be granted intellectual property rights, which have emerged in practically every aspect of society, should be vehemently disputed because they lack the necessary resources to exercise any of these rights.¹⁶ Their biological resources, which are grown on their land, and their traditional knowledge of their cultural legacy, which is being economically exploited without giving them the credit they deserve, cannot be protected in any way.¹⁷ There is no effort to pay them for using their biological expertise, even when their resources are used to make pharmaceutical items.

Despite the fact that the TRIPS agreement indirectly promotes traditional knowledge in some ways, this concept is seriously problematic because it puts financial gain ahead of cultural legacy. Economic and commercial gains are the main factors considered under TRIPS, with any benefits to indigenous people coming in secondary.¹⁸ This strategy, which is tainted with economic objectives rather than being concerned with the preservation of indigenous communities' identities and values, puts cultural heritage and traditional knowledge at greater risk.¹⁹ These marginalised communities are further pushed into poverty by the absence of any system to fairly recompense them.

The goal of the TRIPS agreement is to preserve indigenous ethnobiological knowledge against "biopiracy," which is the practice of industrialised nations using biological or genetic resources from indigenous people's

¹⁵ Davis M, (2005) 'INTERNATIONAL TRADE LAW AND INDIGENOUS PEOPLES A NEW DIRECTION IN HUMAN RIGHTS ADVOCACY?', *Australian Indigenous Law Reporter*, 9(16) pp. 426-440. Available at: <https://www.jstor.org/stable/10.2307/26479574> (Accessed: 26 January 2025)

¹⁶ Pritchard, S. and Sarah PriHeindow-Dolman, C. (1998) 'INDIGENOUS PEOPLES AND INTERNATIONAL LAW: A CRITICAL OVERVIEW', *Australian Indigenous Law Reporter*, 3(4), pp. 473–509. Available at: <https://www.jstor.org/stable/45239456> (Accessed: 26 January 2025)

¹⁷ Puig, S. and Shepherd, A. (2024) 'Indigenous peoples and International Trade Law', *Arizona Legal Studies*, 24(22). doi:10.2139/ssrn.4899663.

¹⁸ Pritchard, S. and Sarah PriHeindow-Dolman, C. (1998) 'INDIGENOUS PEOPLES AND INTERNATIONAL LAW: A CRITICAL OVERVIEW', *Australian Indigenous Law Reporter*, 3(4), pp. 473–509. Available at: <https://www.jstor.org/stable/45239456> (Accessed: 26 January 2025)

¹⁹ Puig, S. and Shepherd, A. (2024) 'Indigenous peoples and International Trade Law', *Arizona Legal Studies*, 24(22). doi:10.2139/ssrn.4899663.

territory to create and sell goods.²⁰ TRIPS requires that indigenous people receive the acknowledgement they deserve and receive fair compensation. However, these industrialised nations market these products internationally and earn greatly from the protections offered by TRIPS and GATT, while the traditional proprietors of the raw ingredients and ethnobiological knowledge receive nothing.

The indigenous people's skills are exploited by the developed nations, and they are unable to defend their rights because they are unaware of them and lack the means to do so if they discover that their rights are being infringed. Such actions fall under the category of indigenous resource exploitation.

SOFTWOOD LUMBER DISPUTE: A TALE OF PARTICIPATION

This case study identifies a new dimension in international legal framework of trade laws as it dwells into the affirmation and acknowledgement of indigenous rights, which gives indigenous populations greater autonomy in advocating for their needs internationally. Owing to the concerns related to state sovereignty and the narrow approach to human rights framework, the international bodies like the UN and the International Labour Organisation have constantly had difficulty implementing indigenous rights effectively. Nonetheless, a new avenue is made possible by the expanding platform like that of WTO affords for the defence of indigenous rights.

The case of the Indigenous Alliance, a group of indigenous nations based in British Columbia, represents a significant milestone. The Alliance defended the first indigenous people's rights acting as amicus curiae at WTO during the hearing of Canada-US Softwood Lumber Dispute, claiming their concerns regarding the subsidies provided by Canada to Canadian softwood lumber businesses, stating that Canada had disregarded the rights of indigenous peoples to their territories.²¹ This submission is significant as it incorporated indigenous rights within the competitive and economic framework of international trade law in addition to presenting indigenous claims to their territories.²²

Regardless of whether the WTO panel failed to act upon the legal arguments made in the amicus curiae brief, its approval was a significant step towards trade forums becoming more amenable to taking into consideration the indigenous people's rights concerns into account.²³ This shift expands advocacy activities beyond organisations that focus on human rights to include commercial and economic institutions, enabling indigenous peoples to contest governmental actions and their rights in a potent new international framework.²⁴ This

²⁰ Pritchard, S. and Sarah PriHeindow-Dolman, C. (1998) 'INDIGENOUS PEOPLES AND INTERNATIONAL LAW: A CRITICAL OVERVIEW', *Australian Indigenous Law Reporter*, 3(4), pp. 473–509. Available at: <https://www.jstor.org/stable/45239456> (Accessed: 26 January 2025)

²¹ Davis M, (2005) 'INTERNATIONAL TRADE LAW AND INDIGENOUS PEOPLES A NEW DIRECTION IN HUMAN RIGHTS ADVOCACY?', *Australian Indigenous Law Reporter*, 9(16) pp. 426-440. Available at: <https://www.jstor.org/stable/10.2307/26479574> (Accessed: 26 January 2025)

²² Arthur Manuel & Nicole Schabus, (2005) 'Indigenous Peoples at the Margin of the Global Economy: A Violation of International Human Rights and International Trade Law' *Chap L Rev* 8 (229) pp. 324-348. Available at: <https://www.jstor.org/stable/10.2307/26479574> (Accessed: 26 January 2025)

²³ Davis M, (2005) 'INTERNATIONAL TRADE LAW AND INDIGENOUS PEOPLES A NEW DIRECTION IN HUMAN RIGHTS ADVOCACY?', *Australian Indigenous Law Reporter*, 9(16) pp. 426-440. Available at: <https://www.jstor.org/stable/10.2307/26479574> (Accessed: 26 January 2025)

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tendency will become significant because it was only through improvements in this field that indigenous people's rights were likely to be a part of mainstream and genuinely influential sectors of international law and politics.

CONCLUSION

The rights of indigenous peoples have been recognised and included in international law, despite the fact that these rights were more obvious in the areas of environmental protection and human rights. The expansion of these rights has never been simple or linear; rather, it was divisive due to a variety of national and international governance factors. However, each small initiative towards acknowledging indigenous people and their rights inside the framework of international law is a significant advance. With a growing departure from the conventional state-centred framework to accommodate the interests and rights of people and marginalised groups, this tendency signifies a more significant paradigm shift in international law.

Although this represents a significant step in the right direction, there is still a problem with the application of indigenous peoples' rights and their upholding in all areas of international law, including but not limited to trade and economic systems. The rights of indigenous people around the world will only be successfully embraced by international law through inclusion and persistent efforts.

