

# The Vulnerability of Indigenous Rights In The Era of Global Extractivism: The Case of The Gateway Pacific Terminal

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**ABSTRACT:** Indigenous lands host 80% of the world's biodiversity. However, their environmental stewardship—driven by their high awareness of nature and confirmed by the UN Declaration on the Rights of Indigenous Peoples (UNDRIP)—is often viewed as an obstacle for industrial projects and global market access. While the conflict between sovereignty and globalization is well-documented, a significant gap remains in understanding how Investor-State Dispute Settlement (ISDS) mechanisms use data manipulation to bypass treaty-protected rights. This paper argues that, within ISDS arbitrations, private corporations use non-objective information, failing to meet standards of Free, Prior, and Informed Consent (FPIC) and violating Indigenous sovereignty. By analyzing the 1855 Treaty of Point Elliott, the USMCA, UNDRIP, the technical reports, and Joint Aquatic Resources Permit Applications (JARPA), this research examines the 2011–2016 conflict over the Gateway Pacific Terminal at Cherry Point (Xwe'chi'eXen). The findings suggest that corporations provide reconstructed data and non-objective environmental projections to subvert Indigenous opposition in favor of market access. This dysregulation is empowered by the ISDS mechanism, which allows foreign investors to sue Indigenous autonomies and host states in private tribunals if any protections interfere with expected profits. Ultimately, this paper demonstrates the vulnerability of Indigenous rights within modern trade regimes.

**KEYWORDS:** Human Rights, UNDRIP, ISDS, Lummi Nation, the Gateway Pacific Terminal.

## ■ Introduction

Only 6% of the world's population is Indigenous. All Indigenous peoples—ranging from the Inuit (North America) to the Māori (New Zealand)—occupy approximately 20% of the Earth's landmass, yet their territories preserve an estimated 80% of the world's remaining biodiversity.<sup>1</sup> This careful relationship with nature is inherent in Indigenous culture and lifestyle; formally, the ecological stewardship of Indigenous peoples is officially recognized and protected by international frameworks, such as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). UNDRIP protects individual and collective rights to self-determination, culture, identity, and land of Indigenous peoples. Moreover, introduced by UNDRIP, Free, Prior, and Informed Consent (FPIC) ensures that Indigenous communities have the right to give or withhold approval for projects on their lands, so that no work on their reservations can be started without the awareness and consent of Indigenous peoples. However, as global markets expand, Indigenous ancestral lands are not recognized as sovereign territories; instead, they are framed as obstacles to economic growth. International companies and private corporations, which aim to use Indigenous territories for their projects, operate through Investor-State Dispute Settlement (ISDS). This legal mechanism has threatened vulnerable Indigenous sovereignty, clashing environmental protection and Indigenous rights with corporate interests. Within the ISDS arbitration processes, investors present non-objective, reconstructed data that, in this case, was implemented to subvert Indigenous governance. In fact, ISDS lacks objective information in the context of Indigenous consent, allowing investors to

disregard the standards of UNDRIP and FPIC. This demonstrates that FPIC and UNDRIP are “soft law” that fail to advocate for and protect Indigenous peoples.

A primary example of this struggle is found in the Salish Sea, an international waterway managed by over 65 Tribes and the home of First Nations—Coast Salish Sea People. Between 2011 and 2016, this region became the site of a critical jurisdictional dispute when project developer Pacific International Terminals (a subsidiary of SSA Marine) proposed the Gateway Pacific Terminal (GPT)—the largest coal export facility in North America—to be built on the Lummi Nation's sacred site, Cherry Point (Xwe'chi'eXen).

While the Lummi Nation's rights to withhold consent were promised by FPIC, SSA Marine pushed their project further with reconstructed environmental data and economic benefits, thus bypassing legal standards and Indigenous rights. This research argues that the eventual defeat of the GPT proposal was not achieved through the “soft law” of UNDRIP or FPIC, but rather through the domestic enforcement of the 1855 Treaty of Point Elliott. This “hard law” treaty provided a legal shield that resisted information manipulation within ISDS and preserved Lummi's land. Eventually, this dispute highlights a jurisdictional asymmetry, suggesting that Indigenous sovereignty remains in a globally vulnerable position unless substantive protections are integrated into the international trade regime itself.

In the first section, I present the work of modern scholars on the key concepts and legal frameworks central to this study. In the second section, I provide the synthesized methods used to demonstrate the violation of Indigenous rights within mod-

ern trade agreements. In the third section, I introduce the case study, establishing the historical, ecological, and cultural background of the Lummi Nation as well as the legal basis of their rights. Moreover, this third section analyzes the Gateway Pacific Terminal project, including its scale, environmental impact assessments, and the non-objective data provided by the developer. Finally, by examining the intervention of the high-level organization, I highlight the vulnerability and dependence of Indigenous rights within modern trade agreements.

## ■ Literature Review

### *Trade agreements and ISDS:*

To cover the conflict between the Lummi Nation and the Gateway Pacific Terminal, it is first necessary to examine the evolution of the regional trade framework under which the dispute happened. The dispute over the terminal originally manifested under the 1994 North American Free Trade Agreement (NAFTA), which was subsequently replaced by the United States–Mexico–Canada Agreement (USMCA) on July 1, 2020. The USMCA was designed to transform the regional economy, aiming to be “a mutually beneficial win for North American workers, farmers, ranchers, and businesses.”<sup>2</sup> The new agreement promised to create “more balanced, reciprocal trade supporting high-paying jobs for Americans and grow the North American economy.”<sup>2</sup> While it boosted the North American trade economy, it also narrowed the “regulatory policy space” for governments to fulfill environmental and Indigenous treaty obligations.<sup>3</sup> To assess the broader legal framework underlying these disputes, it is necessary to examine the architecture of international arbitration. The structural mechanism driving these narrow regulation policies is the investor-State dispute settlement system (ISDS).

### *ISDS Criticism and Regulatory Chill:*

The following section reviews existing scholarship on the structural biases of the ISDS framework and the phenomenon of “regulatory chill.” Legal scholars, such as Barnali Choudhury, José E. Alvarez, Sergio Puig, and Anton Strezhnev, have long been criticizing the ISDS system, arguing that it is controversial and biased.<sup>4–6</sup> During the ISDS arbitrations, investors can bring claims against government actions, even in domestic policy areas such as environmental protection and public health.<sup>7</sup> As Perrone notes, protections provided by the ISDS system are extended specifically to private corporations.<sup>8</sup> A primary consequence of the ISDS framework is the “regulatory chill”—a phenomenon in which governments refrain from enacting public interest policies due to the threat of costly arbitration or substantial compensation to foreign investors.<sup>9</sup> The consequences of ISDS within independent, specifically developing, states have already been meticulously studied. Specifically, case studies in the Global South—including environmental litigation in African countries, challenges against public health regulations in Latin America, and mining disputes in Central Asian countries—demonstrate that ISDS favors capital-exporting states.<sup>10–13</sup> However, little research has been conducted on how the ISDS mechanism impacts vulnerable Indigenous autonomies that operate under different legal protections than

those of independent states. Moreover, there is a conceptual gap in studying methods used by investors, such as the utilization of reconstructed data and the violation of domestic law, to bypass Indigenous sovereignty and reframe their treaty-based status as right-holders to economic stakeholders. While scholars like Wang, Ning, and Zhang have begun studying how investors bypass local law, they have not yet applied it to tribal treaty rights in developed nations like the U.S.<sup>14</sup>

By ignoring Indigenous treaty rights, human rights, and environmental threats, the conflict within ISDS becomes “two-dimensional.” This systematic limitation of disputes within ISDS is demonstrated by Lorenzo Cotula; in his work, he compares case studies of indigenous and agrarian groups, demonstrating that their human rights have been appropriated by social actors who reclaim their land, resources, and territories.<sup>15</sup> As Lorenzo Cotula demonstrates, ISDS excludes local communities, framing the disagreement as a binary struggle between a Host State and an Investor over a financial asset.<sup>16</sup> This challenge of exclusion is further analyzed by Gus Van Harten.<sup>17</sup> Van Harten’s work supports the claim of one-sided wins, exploring how the public law system of ISDS allows corporations to challenge sovereign acts, like environmental protections and, in this case, treaty rights, in a private forum. As the environmental consequences and minority rights are often neglected within the ISDS arbitrations and placed in a private, commercial arbitration setting, host states tend to be “chilled” on regulatory policy and environmental protections.<sup>17</sup> The primary consequence of this dysregulation is the “regulatory chill.” As Soloway observes, in international investment law, the phenomenon of the “regulatory chill” occurs when a government refrains from enacting or enforcing public interest policies, such as environmental protections, due to potential disputes with foreign investors.<sup>18</sup> Consequently, policymakers, such as the U.S. government, prioritize avoiding disputes and costly claims “over the development of efficient regulation in the public interest.”<sup>19</sup> This asymmetry in regulation policies directly undermines Indigenous rights and challenges their environmental stewardship.

### *International protections for Indigenous rights:*

The counterweight to the corporate pressure toward Indigenous communities is the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). UNDRIP is more contemporary and global than the domestic 1855 Treaty, which will be mentioned and analyzed in the following sections. However, it does not introduce new or ‘extra’ rights to Indigenous peoples. In reality, its purpose is to guarantee Indigenous communities the same protections and access to justice as any other group.<sup>20</sup> To meet this goal, the UNDRIP has introduced Free, Prior, and Informed Consent (FPIC), providing the progressive right of self-determination for Indigenous Peoples.<sup>20,21</sup> It is important to acknowledge that the FPIC mechanism was introduced “exclusively for Indigenous and other ‘traditional peoples’, such as quilombolas in Brazil and tribal peoples in Africa”, becoming a foundation for Indigenous peoples and local communities to shape the direction and consequences of resource interventions.<sup>21,22</sup> Specifically,

the goal of FPIC is to ensure that, giving or withholding their permission, Indigenous Peoples are consulted and cooperate in good faith with States before the implementation of any legislative or administrative measures that may affect their lands.<sup>23</sup> Article 32 highlights that “Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.” In order to obtain Indigenous approval of any projects affecting their territories and resources, states shall consult with indigenous peoples through their own representative institutions. As stated in Article 32, Indigenous consent is highly required in projects connected to the development, utilization, or exploitation of mineral, water, or other resources.<sup>24</sup> Finally, Article 32 ensures states are responsible for the consequences of any projects developed on Indigenous land, affirming that “States shall provide effective mechanisms...for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.”

#### ***UNDRIP Limitations:***

While UNDRIP has to protect Indigenous rights and advocate for their self-determination, it functions primarily as a non-binding moral framework. The limitations of the UNDRIP standards to protect Indigenous sovereignty are studied by Stavenhagen, who notes that Indigenous rights violations keep occurring, and the consequences of resource extraction on sovereign Indigenous lands remain a major problem for Indigenous peoples.<sup>25</sup> Further substantive work on the UNDRIP limitations has been done by Maro Barelli. Barelli argues that, while UNDRIP is a significant legal document, it remains “soft law.”<sup>26</sup> Because it is a Declaration and not a formal Treaty, it does not create legally binding obligations for states in the same way a trade or investment agreement does. Moreover, with the rise of economic globalization, the responsibility to meet FPIC standards has moved from states to private corporations.<sup>27</sup> This created a significant implementation gap in the FPIC duties, reducing equal negotiations between Indigenous peoples and investors to a bureaucratic formality. The next phenomenon of the “governance gap” was mentioned, defining the failure of states’ obligation to protect Indigenous rights.<sup>21</sup> This negligence is explained by a lack of “mechanisms to verify compliance with human rights responsibilities” and the absence of “legal instruments at the international level to enforce companies to comply.”<sup>21</sup> This demonstrates a systematic failure in the implementation of human rights within Indigenous territories. Both private investors and states view UNDRIP standards as aspirational rather than mandatory, thus frequently circumventing critical responsibilities such as the FPIC process.

The further violation of Indigenous rights, UNDRIP, and FPIC within the ISDS system includes systematic data asymmetry. Corporate information manipulation has been thoroughly documented in traditional market contexts; specifically, Healy and Palepu analyze how firms maintain a technical monopoly by distorting financial statements and management disclosures.<sup>28</sup> However, little research has explored how the

same information distortions within ISDS are applied to ecological data. In the context of the Gateway Pacific Terminal dispute, this asymmetry shifted from the financial to the environmental field. The project investors did not merely misrepresent the economic projections of their proposal; crucially, they presented reconstructed environmental risk assessments designed to minimize apparent impacts on local ecosystems, thus subverting the requirements of FPIC.

#### **■ Methods**

Through a single-case study of the conflict between the Lummi Nation and Pacific Terminals (PIT) over the proposed Gateway Pacific Terminal (GPT) at Cherry Point, this research aims to demonstrate the broad concept of Indigenous rights within modern trade agreements. The dispute over the GPT serves as a perfect critical case study as it intersects sovereign domestic Indigenous treaties, international trade agreements, globally recognized “soft law” frameworks, and corporate environmental reporting. Ultimately, this paper examines micro-mechanisms of corporate behavior and legal navigation within modern trade regimes toward vulnerable communities that may be missed in a broad multi-case study.

This study is built on three primary legal frameworks to determine the extent to which the territorial and human rights of Indigenous peoples are protected and respected within contemporary trade regimes. First, the study examines the power of the Treaty of Point Elliott (1855) with a specific focus on Article 5 regarding “Usual and Accustomed” fishing grounds, thus demonstrating how Lummi’s territories and resources define tribal sovereignty and fishing rights within the Salish Sea. Besides, the paper analyzes the international “soft law” protections outlined in the UNDRIP and its core mechanism, FPIC. After legal sovereign protections, the research evaluates the specific environmental and logistical information submitted by the project developer within their official report of Joint Aquatic Resources Permit Application (JARPA). Subsequently, the study synthesizes official public interest letters from environmental advocacy groups like Salish Land Policy Solutions and the U.S. Army Corps of Engineers (USACE).

The analytical process was conducted in two stages. First, the legal basis for veto power under domestic treaty law was determined and compared with the consultation standards required by FPIC. Second, a cross-analysis of the data was conducted to identify information asymmetry. This was accomplished by comparing technical indicators provided by the developer (such as vessel traffic frequency and local pile driving zones) with biological and geographic impacts documented by independent federal and tribal agencies. By measuring the gap between corporate projections and empirical reality, the methodology allows us to identify “data reconstruction” strategies used to circumvent Indigenous sovereignty. To observe how these data strategies manifest in an actual regulatory dispute, this methodology must be attached to a specific geographic and ecological area. Consequently, the following section introduces the primary case site of this research, detailing how corporate industrial ambitions directly collided with the ancestral waters of the Lummi Nation.

## ■ Case study

### *The Lummi Nation and The 1855 Treaty:*

The Salish Sea is a complex international inland sea known for its rich and diverse marine life and ecosystem that contains 37 mammal species, 172 bird species, 261 fish species, and over 3,000 invertebrate species.<sup>29</sup> Being located in the Canadian province of British Columbia and the U.S. state of Washington, its waters are managed not only by the U.S. and Canadian governments but also by over 65 Tribes.<sup>30</sup> These tribes are considered to be the First Nations of the Salish Sea—Coast Salish peoples. In 1855, Coast Salish peoples signed with Washington Governor Issac Stevens the Treaty of Point Elliot.<sup>31</sup> In exchange for millions of acres of land, the U.S. government recognized and established independent reservations, including the Lummi Nation. The contemporary Lummi's estimated population is 5,000 tribal members, and its self-governing community manages around 13,000 acres of tidelands, including Bellingham Bay, the Strait of Juan de Fuca, parts of the Georgia Strait, and Cherry Point.<sup>32</sup> As "People of the Sea", the Lummi Nation relies on its waters: Lummi are famous for their reef-netting system, and their primary source of survival is salmon.<sup>33</sup> Cherry Point serves as a site of profound cultural and spiritual significance to the Lummi Nation, as this territory has been the ancestral homeland of their people for over 3,000 years.<sup>34</sup> As a result of the Point of Elliot Treaty—specifically Article 5 that guarantees all the Salish Sea tribes the right to fish at their "usual and accustomed grounds" (U&A), providing access to traditional food resources, tribal sovereignty, and resource management—Lummi Nation obtained perpetual rights to access and control their lands and resources. The 1855 Treaty of Point Elliot has been a legal shield for Coast Salish sovereignty for more than 160 years; however, in 2011, Indigenous rights protected by the treaty were challenged by private corporations and their multibillion-dollar proposal. In 2011, the project developer, Pacific International Terminals (a subsidiary of SSA Marine), proposed to construct the Gateway Pacific Terminal on the Lummi Nation's sacred site—Cherry Point (Xwe'chi'eXen).

### *The GPT proposal and Environmental Impact:*

Before introducing the Gateway Pacific Terminal proposal, it must be acknowledged that, based on the employment report of Hodges, H., & Beyers, B., Cherry Point had already been used in heavy industry—specifically for large-scale fossil fuel refining, propane export, and aluminum smelting—for national and international markets.<sup>35,36</sup> Hosting major facilities like the BP refinery, Phillips 66 refinery, and former Alcoa plant, Cherry Point has experienced a severe decline in fisheries over the past half-century, with some populations facing total collapse.<sup>37</sup> Consequently, Cherry Point's vulnerable ecological position would have been threatened further by the construction of the massive coal terminal, and the proposed volume of extraction that will be mentioned in the following passage.

The Gateway Pacific Terminal (GPT) would have become the largest North American coal export facility. According to Pacific International Terminals, the project was designed to export up to 54 million metric tonnes of dry bulk to Asian

markets annually, with coal accounting for 48 million tonnes of that total.<sup>36</sup> As the University of Washington Environmental Law and Regulation Practicum reports, the terminal construction would have excavated an estimated 3.4 million cubic yards of material—equivalent to over 680,000 dump truck loads—to grade the site for rail service, resulting in high levels of earth disturbance and increased soil vulnerability.<sup>38,39</sup> The Earth disturbance to construct the proposed project would have negatively impacted the rare biodiversity, local economy, and traditional life of the Salish Sea region. According to the JAR-PA filed by SSA, over 50 species of fish and larger organisms would have likely been affected. The proposed project encompasses 560 acres, 255 acres of which would have been directly disturbed. While some of the wetlands lost would have been attempted to be recreated on site, 140.6 acres were planned to be mitigated through means that had not been determined.<sup>38</sup> This severe disruption extends into the marine environment. Initial technical metrics framed the proposed 3,000-foot multi-berth wharf as standard marine infrastructure; however, independent empirical assessments revealed that driving hundreds of large-diameter steel piles into the coastal soil would permanently destroy herring spawning habitats, which are critical to the Salish Sea ecosystem (Table 1). Furthermore, data from BNSF Railway indicates that loaded railcars can lose up to 3% of their total mass as fugitive dust during transit.<sup>40</sup> Applied to the Gateway Pacific Terminal's maximum proposed volume of 48 million annual tons of Powder River Basin coal, a constant 3% transit loss would yield a projected atmospheric and terrestrial emission of approximately 1.44 million tons of fugitive coal dust per fiscal year.<sup>38</sup>

### *Data Asymmetry and Informational Gatekeeping:*

In addition to the hazardous scale of the project, a further concern of this proposal was a lack of administrative transparency and rigorous data verification. According to Ehrlichman and Dykes, policy consultants have raised concerns regarding the "lack of good information and analysis available to the public" during the early stages of the GPT review process.<sup>41</sup> Specifically, Ehrlichman and Dykes' work indicated that SSA Marine's "factual premises about key planning numbers" were not supported by any documented evidence and lacked critical baseline information necessary to commence SEPA review. The lack of transparency effectively concealed the associated cross-border environmental risks inherent in the project's logistics. Specifically, the Washington State Department of Ecology's climate projections warned of intensifying precipitation and winter storm events; however, the project developer failed to account for the cumulative impact of stormwater leaching. The operation of 18 daily trains, each consisting of 125 coal cars, represents a significant, uncontrolled, non-point source of hazardous material discharge. Because active public rail lines border the Salish Sea coastline for extensive stretches and cross dozens of critical river and stream tributaries, this uncontrolled leaching of toxic substances threatens widespread water pollution—a vulnerability that national regulators have not addressed under standard Clean Water Act protocols.<sup>41</sup> Furthermore, the core operational parameters submitted by

the developer lacked any mandatory regulatory or voluntary limits. Although Pacific International Terminals claimed that the terminal's maximum capacity would be strictly limited to 18 trains per day and 48 million tons of exports per year, Erlichman and Dykes revealed that no such restrictive conditions or legal commitments were included in the JARPA applications or official project plans.<sup>41</sup> This structural omission allowed for potential, unregulated expansion driven by future improvements in the technological efficiency of the loading terminal. Finally, the applicant's projections relied on an unsubstantiated net-traffic assumption: that Canadian coal rail shipments would completely cease upon the GPT's completion, resulting in a net-zero increase in regional rail traffic. The developer did not provide any empirical data on current daily rail traffic volumes to Canada, thus failing to establish a verifiable historical baseline. The resulting lack of data has led independent policy advocates to demand that the Environmental Impact Assessment (EIA) report consider the proposed 18 daily trains not as a replacement, but as a massive, additional environmental burden on the regional ecosystem.<sup>41</sup>

Ergo, SSA Marine practiced informational gatekeeping, avoiding Indigenous concerns and ensuring that the regulatory process began on terms favorable to the investor. This regulatory deficit illustrates the specific patterns of corporate behavior examined by Van Harten.<sup>17</sup> This strategy forced the Lummi Nation into a reactive position, as tribes had to use their own limited resources to challenge and correct the initially reshaped data. Furthermore, this control over the initial data narrative represents a severe violation of FPIC. For consent to be "informed," the information provided must be transparent, objective, and accessible. However, the 2014 Vessel Traffic and Risk Assessment Study, conducted by The Glosten Associates for SSA Marine (Pacific International Terminals), contravenes the FPIC standards, containing further data reconstruction.<sup>42</sup> For instance, SSA Marine vice president Bob Watters argued that the study showed the terminal would have a "less than 1 percent impact" on treaty fishing. However, the same report contained data indicating that intense shipping would actually increase disruptions to Lummi fishing by 76%.<sup>42-44</sup> This finding shows the statistical erasure that was practiced by SSA Marine. By making the legal violation of Indigenous rights and environmental standards appear "de minimis," or too small in a court of law, SSA Marine pushed their project proposal forward. This broader strategy of statistical erasure is demonstrated in Table 1, which contrasts the developer's self-reported metrics against the empirical findings verified by independent tribal and federal agencies.

Subsequently, the lack of data integrity was maintained through the exclusion of Indigenous peoples from important negotiations. As Lummi's land was at the center of the dispute, the Lummi Nation, according to FPIC standards, had to be informed first about any project developments. However, based on the Salish Land Policy Solution report, the Office of Regulatory Assistance (ORA) MAP Team process excluded avenues for factual input from affected cities and counties along the transit line.<sup>41</sup> Specifically, Faith Lumsden, Director at ORA, had denied impacted jurisdictions, Bellingham,

Skagit County, Burlington, and others, a seat at the ORA table. Excluding affected Indigenous communities made it impossible to track regional environmental damage and verify data presented by the project developer. Without this shared and transparent data, true informed consent could not happen.

**Table 1 Legend:** Comparing corporate projections with empirical environmental data. The data reveal a pattern of information asymmetry—specifically through cumulative omissions, baseline deficits, frequency truncation, and proxy distortions—utilized to minimize the projected ecological impacts on Indigenous lands and marine habitats.

| Environmental Impact/ Feature                     | JARPA Technical Metric (SSA Marine Projections)                                                                                                                                  | Empirical Impact Assessment (USACE, Tribal & Salish Sea Policy Findings)                                                                                                                 | Mechanism of Information Asymmetry                                                                                                                                                                                    |
|---------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Vessel Traffic &amp; Terminal Frequency</b>    | The projected Capesize bulk carrier volume is 487 vessels per year; the project is framed as an incremental, low-impact addition to existing regional maritime transport routes. | A minimum of 974 transits (one-way movements) would pass directly through treaty-protected <i>Usual &amp; Accustomed</i> (U&A) fishing grounds, creating severe physical gear conflicts. | The omission of cumulative impacts. By modifying models to isolate terminal vessel traffic from regional congestion, SSA Marine hid the true cumulative risk of local vessel collisions.                              |
| <b>Wharf &amp; Structural Footprint Impact</b>    | A trestle and multiple berth structure, which extends approximately 3,000 feet into the water, is classified as standard deepwater infrastructure.                               | The construction requires driving hundreds of large-diameter steel piles into the coastal soil, which will permanently destroy vital herring spawning areas.                             | Baseline Data Deficit. By using global regional averages to calculate local mortality of benthic organisms (seafloor), the project developer masked the destruction of the unique herring population at Cherry Point. |
| <b>Acoustic &amp; Biophysical Disturbance</b>     | The industrial acoustic impact zone is localized directly on the industrial coastline and is maintained within standard regulatory threshold values.                             | Intense underwater acoustic propagation, covering long distances in narrow straits, will disrupt the echolocation of southern populations of killer whales.                              | Frequency Truncation: By utilizing atmospheric noise propagation models instead of marine hydroacoustic vectors, the project developer significantly underestimated the sound intensity underwater.                   |
| <b>Overwater Shading &amp; Primary Production</b> | The shading area above the water surface is minimal, and the deck design minimizes continuous light blockage above the marine environment.                                       | Continuous overwater shading across multiple acres of sensitive nearshore habitat will block sunlight and halt the primary production of eelgrass beds.                                  | Proxy Metric Distortion. Replacing local light penetration patterns with macro-scale vegetation data obscures localized marine food web collapse.                                                                     |

### *Economic Benefits over Environmental Risks:*

However, minimizing environmental impact and excluding locals was not enough to win in arbitrations. The greater strategy to obtain permission for construction, especially within the ISDS system, is to demonstrate economic benefits and projected profits. The construction of the GPT promised to stabilize the economy of Whatcom County and Washington State by

creating 430 permanent jobs and by generating approximately \$11 million in annual state and local tax revenues.<sup>36</sup> Being prioritized over environmental risks, economic projections served as a primary instrument for SSA Marine to push their project further through the U.S. domestic permitting process, directly challenging the U.S. federal government's legal obligation to uphold Lummi treaty protections. These numbers were provided to minimize and replace the potential hazards to human health and the environment. In this case, the emphasis on job creation serves as a distraction technique, attempting to justify the permanent ecological destruction of Cherry Point through temporary economic incentives. While jobs and tax revenues are subject to market fluctuations and have a limited trend, the destruction of the Pacific herring and Chinook salmon populations at Cherry Point is irreversible.

### *The conflict resolution and its factors:*

The massive scale of this environmental damage and physical disturbance shows why the final legal decision was based on protecting treaty rights rather than taking economic promises into account. The conflict was resolved on May 9, 2016, by the United States Army Corps of Engineers (USACE) following the final and successful objection by the Lummi Nation. In cooperation with Pacific International Holdings, LLC, Lummi provided vast information regarding fishing practices, potential impacts, and mitigation to support their objective claims. After careful consideration of all the information available, including environmental assessment, the U.S. Army Corps of Engineers (2016) reported that it could not permit the terminal because the project's impacts on Lummi Nation treaty rights were found to be "greater than de minimis," and violated the Lummi Nation's U&A rights. According to the U.S. Army Corps of Engineers, "The district's evaluation of effects of the proposal on the Lummi's U&A fishing rights is undertaken to fulfill the federal government's responsibility to protect treaty rights."<sup>45</sup>

The Corps may not permit a project that abrogates treaty rights." While the five-year conflict over the GPT proposal ended in favor of the Lummi Nation, this fair and legal outcome was not guaranteed by the UNDRIP. As the case of the Belo Monte dam in Brazil—a large hydroelectric facility built without obtaining FPIC—shows, the "soft law" of the UNDRIP can be easily ignored by the government.<sup>46</sup> The mining activities of AngloGold Ashanti in the Canamomo Lomapi-eta Indigenous Reserve, which were completed without the consent of the Indigenous communities, further demonstrate the lack of authority of the UNDRIP standards.<sup>47</sup> In the case of the Lummi Nation, the important factors of its success were the USACE intervention and the 1855 treaty. Firstly, the Lummi's inherent rights were effectively used by a federal agency that held the final power of interpretation. The Corps has chosen to honor its federal trust responsibility, thus prohibiting the project. However, had the USACE adopted a different definition of what constitutes a "de minimis" impact, or had political priorities shifted within the administration, the Lummi would have had a limited opportunity to stop the project. Secondly, the 1855 Treaty of Point Elliott is recognized under the U.S. Constitution as the "supreme law of the land".<sup>48</sup> It cre-

ated a mandatory legal obligation for the federal government that could not be as easily bypassed as UNDRIP standards. The 1855 treaty has proven that Indigenous protection is most effective when it is grounded in domestic "hard law" that is non-negotiable to corporate expansion. Because of this chilled environment and systematic exclusion, the Lummi Nation had been fighting for its inherited rights and opposing the GPT for five years while its sovereignty was being silenced. By design, ISDS does not recognize the Lummi as a third sovereign state with an interest and rights in the land. Instead, the process treats the tribe's ancestral territory as part of state property or an investment site that the U.S. government is managing. This not only violates the legal protections, such as the 1855 treaty and the UNDRIP, but also ignores the sufferings and sacrifices, including the cession of 5 million acres of land, that Indigenous peoples have experienced to become independent.

### ■ Conclusion

Is the sovereignty of Indigenous peoples protected within modern trade agreements, and is this protection enough? While internationally recognized mechanisms are established, they fail to prevent human rights violations against Indigenous peoples.

As this research showed, the Lummi Nation's victory over corporate interests was achieved because of the exclusive "hard law" of the 1855 Treaty. The Treaty of Point Elliott could not be easily bypassed, as FPIC standards were. Additionally, the treaty found recognition and support among the U.S. Army Corps of Engineers. This big intervention is the second important factor of the Lummi's victory; it reveals the vulnerability of Indigenous rights, as not international organizations, but a high-level federal agency, was able to end this dispute. Nevertheless, the GPT conflict serves as a critical case study of how procedural formalism can be used to challenge tribal resources and defer sovereign justice to meet investor expectations. Future research should examine whether these findings hold in other global contexts, such as the Global South, where Indigenous communities may lack the "hard law" protections of historical treaties and must rely on "soft law" international frameworks. Furthermore, investigating how these legal vulnerabilities extend beyond land disputes to issues of cultural and intellectual property will be essential. Consequently, this case demonstrates that without robust domestic enforcement, the power of Indigenous sovereignty remains globally threatened; the GPT resolution may serve as a precedent for similar jurisdictional disputes across North American resource zones. Therefore, this paper highlights that until structural reforms are made to the international trade system, Indigenous sovereignty will remain dependent on the inconsistent protection of domestic courts.

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