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Foreign Investment and Indigenous Peoples: Options for Promoting Equilibrium between Economic Development and Indigenous Rights

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FOREIGN INVESTMENT AND INDIGENOUS PEOPLES: OPTIONS FOR PROMOTING EQUILIBRIUM BETWEEN ECONOMIC DEVELOPMENT AND INDIGENOUS RIGHTS

*George K. Foster**

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INTRODUCTION

By the spring of 1875, tales of Black Hills gold had brought hundreds of miners up the Missouri River . . . Alarmed by the white men's gold craze and the Army's failure to protect their territory, Red Cloud and Spotted Tail made strong protests to Washington officials. The [President's] response was to send out a commission "to treat with the Sioux Indians for the relinquishment of the Black Hills." In other words, the time had come to take away one more piece of territory that had been assigned to the Indians in perpetuity.

—Dee Brown, *Bury My Heart at Wounded Knee*¹

At least 20 people died and 50 were injured on Friday in clashes between Peruvian police and Amazon tribes opposed to foreign companies pursuing oil and mining projects in the rainforest. Indigenous leaders accused police of shooting at hundreds of protesters from helicopters to end a road block on a remote jungle highway . . . Thousands of Amazon natives . . . have blocked roads and waterways in the area in a bid to force the government to revoke a series of investment laws passed last year and to revise concessions granted to foreign energy companies.

—*Oil Daily*, June 8, 2009²

The quotations above refer to distinct conflicts that are widely separated by time and geography but remarkably similar in other respects. The first describes events leading to the Black Hills War of 1876, in which the U.S. Army forced the Lakota Sioux and Northern Cheyenne onto reservations to

1. DEE BROWN, *BURY MY HEART AT WOUNDED KNEE* 177, 278–79 (2000).

2. *20 Killed in Peru Clashes*, OIL DAILY (Energy Intelligence Grp., New York, N.Y.), June 8, 2009.

make way for gold mining by non-Indians.³ The second describes a violent episode in a conflict between native groups and the Peruvian government, which began in 2009 when the government took steps to expand mining and oil operations by multinational enterprises (MNEs) in the Peruvian Amazon.⁴ In both cases, outside commercial interests discovered valuable natural resources on native lands and sought to exploit them despite opposition from local indigenous peoples. And in both cases, a national government sided with commercial interests and used military force to quash the opposition and secure access to the resources. It is tempting to conclude, therefore, that the history of the Old West is repeating itself in the rainforests of South America.

Yet it is too simplistic to view these events in Peru—or other recent encroachments onto the lands of indigenous peoples elsewhere⁵—as a throwback to any particular time or place. The factors these conflicts have in common have manifested countless times over the centuries, all over the world.⁶ They are therefore best seen as forming part of a broad, global pattern of encroachment of private commercial interests onto the lands of indigenous peoples,⁷ facilitated by national governments, which began long ago and has never stopped. From Peru to Papua New Guinea, from Siberia

3. ENCYCLOPEDIA OF NATIVE AMERICAN WARS AND WARFARE 48–49 (William B. Kessel & Robert Wooster eds., 2005).

4. For more on the June 2009 incident and more recent clashes in Peru, see Special Rapporteur on the Situation of Human Rights & Fundamental Freedoms of Indigenous People, *Observations on the Situation of the Indigenous Peoples of the Amazon Region and the Events of 5 June and the Following Days in Bagua and Utcubamba Provinces, Peru*, Human Rights Council, U.N. Doc. A/HRC/12/34/Add.8 (Aug. 18, 2009) (by S. James Anaya); Renzo Pipoli, *Peru Natives Once Again Resort to River Barricades to Protest*, INDIAN COUNTRY TODAY, Jan. 2, 2011, <http://indiancountrytodaymedianetwork.com/ictarchives/2011/01/02/peru-natives-once-again-resort-to-river-barricades-to-protest-81936>.

5. See Brant McGee, *The Community Referendum: Participatory Democracy and the Right to Free, Prior and Informed Consent to Development*, 27 BERKELEY J. INT'L L. 570, 573–74 (2009) (describing a number of recent development projects on indigenous lands in Latin America and elsewhere undertaken without local consent, and discussing acts of violence against their indigenous opponents); discussion *infra* Part I.B.

6. See *infra* Part I.

7. There is no universally accepted definition of the term “indigenous peoples,” but the term is used herein with the meaning given by an oft-cited U.N. report:

[Indigenous peoples] are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.

Special Rapporteur of the Sub-Comm'n on Prevention of Discrimination & Prot. of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations*, ¶¶ 379–82, U.N. Doc. E/CN.4/Sub.2/1986/7 & Add. 1–4 (1987) (by Jose R. Martínez Cobo).

to Sudan, indigenous peoples have suffered, and continue to suffer, the loss of their lands, the erosion of their cultures, and even the decimation of their populations as a result of this pattern.⁸

Although today outsiders seeking to exploit resources on indigenous lands often do not plan to remain any longer than necessary to complete a specific development project,⁹ even brief intrusions can have devastating and long-term consequences. As a result of these projects, indigenous peoples can suffer harms including exposure to infectious diseases;¹⁰ chemical contamination of drinking water and fisheries;¹¹ erosion of cultural traditions and identity;¹² destruction of the terrain and forests upon which they depend for hunting and subsistence agriculture;¹³ and displacement from their ancestral lands.¹⁴ When viewed in this light, it is not difficult to understand the concerns of indigenous peoples in Peru about the government's decision to expand mining and oil production on their lands.

8. See *infra* Part I.

9. The term "development project" is used herein as defined in a 2003 U.N. report:

[A] process of investment of public and/or private, national or international capital for the purpose of building or improving the physical infrastructure of a specified region, the transformation over the long run of productive activities involving changes in the use of and property rights to land, the large-scale exploitation of natural resources including subsoil resources, the building of urban centres, manufacturing and/or mining, power, extraction and refining plants, tourist developments, port facilities, military bases and similar undertakings.

Special Rapporteur on the Situation of Human Rights & Fundamental Freedoms of Indigenous People, *Indigenous Issues: Human Rights and Indigenous Issues*, ¶ 6, Comm'n on Human Rights, U.N. Doc. E/CN.4/2003/90 (Jan. 21, 2003) (by Rodolfo Stavenhagen) [hereinafter *Indigenous Issues*].

10. *Id.* ¶ 27 ("Major development projects often entail serious health hazards for indigenous peoples. . . . When relatively isolated indigenous communities enter into contact with the expanding national society and monetary economy . . . indigenous peoples also risk contracting contagious diseases, such as smallpox, AIDS and venereal diseases, as well as psychological disorders.").

11. *Id.* ("Environmental degradation, toxic chemical and mineral wastes, the destruction of self-sustaining ecosystems and the application of chemical fertilizers and pesticides are but some of the factors that seriously threaten the health of indigenous peoples in so-called 'development zones.'").

12. McGee, *supra* note 5, at 572. In some cases

[v]illagers are subjected to forced eviction from lands they have known for generations; roads and extraction sites destroy the habitat from which peoples derived their sustenance and bring crime and corruption; previous cultural norms disintegrate and the new cash economy brings divisiveness and promotes previously unknown self-centered conduct; land and water become polluted and destroy game and fish populations that were crucial to subsistence; and traditional tribal and family authority is replaced by indifferent corporate and governmental entities.

Id.

13. *Id.*

14. *Id.*

At one time, the commercial interests seeking access to indigenous resources generally originated in jurisdictions claiming sovereignty over the territory in question. Today these actors often hail from countries that make no such claims, and their activities represent a form of foreign direct investment (FDI).¹⁵ Investments of this nature pose unique threats.¹⁶ Many of the indigenous peoples that have managed to retain their distinct identity into the twenty-first century have done so in large part because they inhabit remote and challenging terrain, the resources of which domestic outsiders lack the means to exploit.¹⁷ MNEs, by contrast, frequently *do* have those means and, due to increasing global resource scarcity, are being drawn to ever more remote areas in search of resources.¹⁸ Moreover, FDI can lead to scale effects (that is, cumulative environmental or social impacts from the increasing scale of industrial activity), even if domestic actors are involved in similar activities.¹⁹

None of this is intended to suggest, however, that FDI is an inherently destructive phenomenon. To the contrary, many FDI activities are essential

15. The term “foreign direct investment” (FDI) refers to investments made by a person or company (the foreign investor) located in one country (the home state) in a company or productive assets located in another country (the host state), under circumstances in which the foreign investor has control over the local company or assets. *See* EDWARD M. GRAHAM & PAUL R. KRUGMAN, *FOREIGN DIRECT INVESTMENT IN THE UNITED STATES* 7–8 (3d ed. 1995).

16. Indigenous peoples certainly face pressures from domestic forces as well, but many development projects would be impossible without foreign technology or financing. *See, e.g.*, TOBIAS HALLER ET AL., *FOSSIL FUELS, OIL COMPANIES, AND INDIGENOUS PEOPLES* 259 (2007) (noting that in the 1990s Venezuela lacked the capital needed to develop its oil reserves and thus had to court foreign investment); NIGEL SIZER & DOMINIEK PLOUVIER, *INCREASED INVESTMENT AND TRADE BY TRANSNATIONAL LOGGING COMPANIES IN AFRICA, THE CARIBBEAN AND THE PACIFIC: IMPLICATIONS FOR THE SUSTAINABLE MANAGEMENT AND CONSERVATION OF TROPICAL FORESTS* 89 (2000) (“Although they vary in size and structure, [multinational enterprises (MNEs)] tend to be larger than local businesses and have greater opportunities for vertical integration, global linkages, and even an influence on international investment patterns.”).

17. Janeth Warden-Fernandez, *Indigenous Communities’ Rights and Mineral Development*, 23 *J. ENERGY & NAT. RESOURCES* L. 395, 396 (2005).

18. *See Indigenous Issues, supra* note 9, ¶ 7; Warden-Fernandez, *supra* note 17, at 396–97.

19. NICOLA BORREGAARD & ANNIE DUFÉY, *ENVIRONMENTAL EFFECTS OF FOREIGN INVESTMENT VERSUS DOMESTIC INVESTMENT IN THE MINING SECTOR IN LATIN AMERICA* 9–10 (paper presented at the Organization for Economic Co-operation and Development [OECD] Conference on Foreign Direct Investment and the Environment, “Lessons Learned from the Mining Sector” (Feb. 7–8, 2002)), available at <http://www.oecd.org/env/1819617.pdf> (noting that certain industrial activities, such as mining, inevitably have adverse environmental impacts, and so increased investment implies more environmental effects as a result of the expansion of production); Chris Wold, *Evaluating NAFTA and the Commission for Environmental Cooperation: Lessons for Integrating Trade and Environment in Free Trade Agreements*, 28 *ST. LOUIS U. PUB. L. REV.* 201, 224–25 (2008) (discussing scale effects in Mexico and other countries resulting from expanded international trade, including “increased production, resource exploitation, transportation and energy needs”).

to sustaining the global economy and our modern way of living.²⁰ Moreover, FDI can promote economic development in countries and communities that embrace development goals,²¹ and indigenous groups sometimes support and benefit from development projects.²² In addition, some MNEs employ more environmentally sustainable business practices and technology than their domestic counterparts, so there can be advantages to having a project carried out by a foreign company rather than a domestic one.²³

FDI thus presents both threats and opportunities to indigenous peoples. Unfortunately, the former all too often predominate over the latter because governments tend to prioritize economic development over indigenous rights,²⁴ and existing domestic and international legal frameworks are incapable of appropriately balancing the two. This Article identifies the specific deficiencies in those frameworks and outlines options for promoting equilibrium.

The discussion proceeds as follows. Part I explores how commercially motivated activities of MNEs or their historical analogs have affected indigenous peoples over time. Part II identifies a number of recent legal developments that have some potential to protect indigenous peoples from threats associated with FDI, including the adoption of the U.N. Declaration

20. See SALEEM H. ALI, *MINING, THE ENVIRONMENT, AND INDIGENOUS DEVELOPMENT CONFLICTS* xix (2003) (“Modern society relies fundamentally on mining as a primary source of raw material and fuel for production at all levels of industry.”).

21. See OECD, *FOREIGN DIRECT INVESTMENT FOR DEVELOPMENT: MAXIMISING BENEFITS, MINIMISING COSTS* 5 (2002), available at <http://www.oecd.org/dataoecd/47/51/1959815.pdf> (“Developing countries, emerging economies and countries in transition have come increasingly to see FDI as a source of economic development and modernisation, income growth and employment.”).

22. See, e.g., ALI, *supra* note 20, at 21 (“[M]ineral activity evokes a strong sense of ambivalence among [U.S. Indian] tribes, as it does among society in general. Nevertheless, tribes are eager to at least explore options with mineral resources. The requests for mineral assessments to the Bureau of Indian Affairs’ . . . mineral resources department are staggering.”); PAUL KAUFFMAN, WIK, *MINING AND ABORIGINES* 3 (1998) (“[R]esource developers have often recognised that native title parties are not anti-development. With the incentive of returns from commercial activity on land where native title may be established, indigenous people have often been pro-development.”).

23. See, e.g., Nicola Borregaard et al., *Foreigners in the Forests: Saviors or Invaders?*, in *RETHINKING FOREIGN INVESTMENT FOR SUSTAINABLE DEVELOPMENT: LESSONS FROM LATIN AMERICA* 147, 147 (Kevin P. Gallagher & Daniel Chudnovsky eds., 2010) (noting that foreign firms may “help to improve environmental performance in developing countries by transferring both cleaner technology and management expertise in controlling environmental impacts”).

24. Factors that may prompt states to give precedence to economic development over indigenous rights are discussed *infra* Part II.A.1. For more on this theme, see Vassilis P. Tzevelekos, *In Search of Alternative Solutions: Can the State of Origin Be Held Internationally Responsible for Investors’ Human Rights Abuses that Are Not Attributable to It?*, 35 *BROOK. J. INT’L L.* 155, 207 (2010) (“[H]ost states are often developing countries; even if authorities in such states are sensitive to human rights, either their protective efforts are ineffective or they are prone to prioritizing the economic benefits that corporate activities create and disregarding human rights abuses.” (footnote omitted)).

on the Rights of Indigenous Peoples (UNDRIP)²⁵ and its recent endorsement by President Obama.²⁶ This Part continues, however, to argue that these developments fall short of what is needed, principally because they are either too narrow in scope or rely on domestic enforcement mechanisms, which are frequently unreliable. Part III considers what steps could be taken to address this problem, concluding that key next steps should include (i) making relevant provisions of UNDRIP binding on foreign investors and other private actors; and (ii) giving indigenous peoples access to a neutral forum, independent of any national judicial system, to pursue claims against MNEs for violations of UNDRIP. Such a private right of action would be analogous to those that investment treaties already afford to many foreign investors, which those investors can exercise when they believe their rights under international law have been violated.²⁷ Part IV acknowledges that any efforts to implement UNDRIP in this manner would likely draw substantial opposition and explains how potential objections could be addressed.

I. THE IMPACTS OF FDI AND ITS HISTORICAL ANALOGS ON INDIGENOUS PEOPLES OVER TIME

In order to contextualize the threats posed by many FDI activities to indigenous peoples today, it is useful to compare contemporary conflicts between MNEs and indigenous peoples to historical precedents. As will be seen, troubling parallels can be drawn between contemporary development projects implemented by MNEs and encroachments by outsiders during the eras of exploration and colonialism.

A. *Conflicts in the Exploration and Colonialism Eras*

1. Spanish Conquests in the Americas

Although it is commonly assumed that Spanish expeditions of exploration and conquest in the Americas were conducted by military forces assembled by the Spanish Crown, in fact most were accomplished by private actors in search of commercial opportunities.²⁸ When Columbus set off

25. United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) [hereinafter UNDRIP].

26. Caren Bohan, *Obama Backs U.N. Indigenous Rights Declaration*, REUTERS, Dec. 16, 2010, available at <http://www.reuters.com/article/2010/12/16/us-obama-tribes-idUSTRE6BF4QJ20101216>.

27. The arbitration mechanism for enforcing investor rights that is typically provided in investment treaties is discussed *infra* Part III.A.

28. KIM MACQUARRIE, *THE LAST DAYS OF THE INCAS* 25 (2007) ("Although the popular myth is that conquistadors were professional soldiers sent out and financed by the Spanish king in order to extend the emerging Spanish Empire, nothing could have been further from the truth. . . . None received a payment or wage for participating, but all expected to share in the profits . . . according to what they themselves had invested. . . . The leaders of most conquest expeditions . . . actually formed a company that was normally drawn up as a

with his three small ships in 1492, for example, his aims were largely commercial—to find a new trade route to Asia and to acquire marketable spices.²⁹ Similarly, Cortès's foray into Mexico was originally intended as a mere trading mission to establish commercial relations with coastal tribes, was privately financed, and was staffed by men who served Cortès in exchange for a promised "liberal share of the anticipated profits."³⁰ And although the expedition ultimately went much further, the shift in focus was prompted by tales of gold deposits in the interior and the prospect of profits to be earned by the expedition members—not by any orders from Spanish authorities.³¹

Stories of gold likewise enticed Pizarro and his coadventurers to attempt an assault on the Inca Empire a few years later.³² These entrepreneurs openly acknowledged their endeavor as a commercial one, forming a company (which they dubbed the "the Company of the Levant") and agreeing to jointly finance it and divide any profits.³³

When such expeditions confirmed deposits of precious metals, other entrepreneurs were drawn to the area of discovery to exploit the resources.³⁴ They brought with them diseases to which the native peoples had no resistance, decimating local populations.³⁵ Many who survived the epidemics were impressed into slavery in the mines and other commercial ventures, while even those not so enslaved were forced to adopt the Spaniards' ways and religion or pushed to remote areas not immediately attractive to the newcomers.³⁶

contract and was duly notarized. The participants thus became partners in the company and were the equivalent of shareholders.").

29. See WILLIAM D. PHILLIPS, JR. & CARLA RAHN PHILLIPS, *THE WORLDS OF CHRISTOPHER COLUMBUS* 157–58 (1992).

30. WILLIAM H. PRESCOTT, *HISTORY OF THE CONQUEST OF MEXICO* 180–82 (Modern Library 2001) (1843) (describing the financing and staffing of the endeavor and noting that "the great object of the expedition was barter with the natives"); see PAUL D. ARON, *MYSTERIES IN HISTORY: FROM PREHISTORY TO THE PRESENT* 160 (2006).

31. See ARON, *supra* note 30, at 160–61; see also PRESCOTT, *supra* note 30, at 209, 216, 237–38 (explaining that Cortès and his companions identified items of gold among the coastal peoples, learned that the precious metal came from the interior—where it could be found in "abundance"—and thereafter decided to exceed their orders and invade Mexico in pursuit of "incalculable riches").

32. MACQUARRIE, *supra* note 28, at 27–28.

33. *Id.* at 24–27.

34. See Laurie Sargent, *The Indigenous Peoples of Bolivia's Amazon Basin Region and ILO Convention No. 169: Real Rights or Rhetoric?*, 29 U. MIAMI INTER-AM. L. REV. 451, 458 (1988); see, e.g., MACQUARRIE, *supra* note 28, at 22–23; PHILLIPS & PHILLIPS, *supra* note 29, at 213–15.

35. See, e.g., ARON, *supra* note 30, at 164; PHILLIPS & PHILLIPS, *supra* note 29, at 247–48; Rhona K.M. Smith, *The International Impact of Creative Problem Solving: Resolving the Plight of Indigenous Peoples*, 34 CAL. W. L. REV. 411, 413 (1998).

36. See KAREN ENGLE, *THE ELUSIVE PROMISE OF INDIGENOUS DEVELOPMENT: RIGHTS, CULTURE, STRATEGY* 21 (2010); see also Tania Sordo Ruz, *A Surrealist Country*, 15 LAW & BUS. REV. AM. 443, 446 (2009).

2. Anglo-American Colonialism and Expansionism

The pursuit of commercial opportunities by private actors similarly drove much of British colonialism and U.S. expansionism. In North America, for example, the Virginia Company founded Jamestown to pursue various “profitable undertakings—some of them commercial, some agricultural, and some industrial.”³⁷ Similarly, the Hudson’s Bay Company was formed to exploit fur pelts and precious metal deposits in the areas around Hudson Bay.³⁸ In time, it sent explorers and traders into even the remotest parts of North America in search of such resources, establishing a vast trade network that stretched from the Atlantic to the Pacific Northwest.³⁹ Other fur companies eventually established competing trade networks elsewhere in North America.⁴⁰ Collectively these enterprises opened the way to broad-based white settlement across the continent—in part because of the geographical information they gained through exploration, and in part because their traders and trappers introduced fatal diseases to the native peoples, dramatically reducing their populations.⁴¹

Another British trading company, the East India Company, established its own private army and came to control much of India.⁴² As Nick Robins has observed regarding one of the East India Company’s early territorial acquisitions:

The violence of the Company’s takeover of Bengal—and the use of the Company’s own private army to carry out the transaction—has meant that [the takeover has] generally been seen as a simple example of colonial conquest. This view is given strength by the Company’s subsequent evolution into an agent of the British state, administering its Indian territories in return for a secure profit for its

37. WESLEY FRANK CRAVEN, *THE VIRGINIA COMPANY OF LONDON, 1606–1624*, at 12–13, 16–17 (1957) (noting that the Virginia Company took the form of a joint-stock fund involving capital contributions from private investors).

38. See PETER C. NEWMAN, *EMPIRE OF THE BAY: THE COMPANY OF ADVENTURERS THAT SEIZED A CONTINENT* 71–72 (2000).

39. *Id.* at 39–40, 223–39.

40. 2 *ENCYCLOPEDIA OF AMERICAN INDIAN HISTORY* 394 (Bruce E. Johansen & Barry M. Pritzker eds., 2008) (describing competition that the Hudson’s Bay Company faced in the North American fur trade, and noting that representatives of the Company and competing fur companies “moved aggressively throughout the interior of North America”).

41. *Id.* (noting that white traders and trappers “introduced alcohol and diseases to Native Americans” and that “the resultant decline in Indian populations further opened the door for white settlement”); see also NEWMAN, *supra* note 38, at 39–40 (noting that Hudson’s Bay Company traders and trappers explored vast amounts of new territory in search of beaver pelts).

42. NICK ROBINS, *THE CORPORATION THAT CHANGED THE WORLD: HOW THE EAST INDIA COMPANY SHAPED THE MODERN MULTINATIONAL* 60–61 (2006).

shareholders. But . . . this event is best understood as a business deal, as an extreme form of corporate takeover.⁴³

The East India Company had ample commercial motivation to undertake such land seizures, as these allowed the company to secure local trade monopolies and establish large agricultural plantations for the benefit of its shareholders.⁴⁴

Much of British colonization of Africa was similarly stimulated by the activities of chartered trading companies, including the British South Africa Company. The British South Africa Company was founded by Cecil Rhodes, a Briton drawn to the area presently known as Tanzania and Zimbabwe by rumors of gold deposits.⁴⁵ It seized control of the area with the help of a small, private security force and proceeded to exploit the deposits.⁴⁶ This led to an influx of white settlers, resulting in the stratification of local society into what one settler described as “a white aristocracy with a class of highly paid white workingmen, who in their turn are employers of the real proletariat, the natives.”⁴⁷ In what came to be known as Rhodesia, native Africans in the cities were largely relegated to employment as “servants, mechanics, drivers, and [in] every kind of semi-skilled and unskilled labor,” while many of those in rural areas had their lands and cattle appropriated by white settlers or by the Company itself.⁴⁸

Private commercial ventures were also a driving force in the territorial expansion of the United States. Many nineteenth-century seizures of Indian lands by U.S. forces were immediately preceded by mineral discoveries, which prompted would-be miners and land speculators to pressure the federal government to remove native peoples from the area.⁴⁹ In each case, the federal government did not resist this pressure for long. This pattern played out in the following instances, among many others:

43. *Id.*

44. *Id.* at 144 (explaining how the East India Company’s conquest of Malabar in southwestern India allowed it to acquire monopolies over the production and sale of salt, tobacco, and timber in the region and to establish a 1,000-acre spice plantation).

45. H. Marshall Hole, *Pioneer Days in Southern Rhodesia*, 35 J. ROYAL AFR. SOC’Y 37, 37–39 (1936); Ethel Tawse-Jollie, *Southern Rhodesia: A White Man’s Country in the Tropics*, 17 GEOGRAPHICAL REV. 89, 89–91 (1927).

46. Tawse-Jollie, *supra* note 45, at 89–91.

47. *Id.* at 89–91, 94; *see also* ARTHUR KEPPEL-JONES, RHODES AND RHODESIA: THE WHITE CONQUEST OF ZIMBABWE 1884–1902, at 376 (1983) (describing Rhodesia as a society “in which white and black became interdependent economically—parts of a single economy—while the whites maintained a rigid social barrier against the blacks and excluded them from both the white society and from the citadel of power”).

48. Tawse-Jollie, *supra* note 45, at 94; *see also* KEPPEL-JONES, *supra* note 47, at 390–98 (describing the process of white settlement in the Matabele region of Rhodesia and the resulting appropriations of land and cattle from the native inhabitants).

49. *See infra* notes 50–52 and accompanying text.

- The 1838 removal of the Cherokee from their ancestral lands in Appalachia to Oklahoma on the Trail of Tears, which was precipitated by the discovery of gold on their lands;⁵⁰
- The coercion of the Nez Perce into ceding a large portion of their lands in 1863 following the discovery of gold in the area and a resulting influx of miners;⁵¹ and
- The seizure of the Black Hills from the Lakota and Northern Cheyenne in 1876–77 following the discovery of gold, despite an 1868 treaty guaranteeing those tribes' perpetual entitlement to those lands.⁵²

B. *FDI on Indigenous Lands in the Modern Era*

By the twentieth century, commercial interests could no longer carry out discovery and conquest expeditions to access new resource-rich lands, as most of the planet had already been divided up by European powers or republics founded by European-settler populations. The only option left was to engage in FDI: that is, to establish foreign investments under the actors' own control.⁵³ FDI has flourished ever since and has in fact increased dramatically in both volume and geographical scope in recent decades.⁵⁴ Much of this investment has occurred on lands occupied or claimed by indigenous peoples. The Subsections that follow provide several examples, although these are by no means exhaustive.

1. Investments in Latin America

Latin America is rich in cultural diversity, as numerous distinct indigenous groups have avoided assimilating to the dominant cultures imported by

50. See generally DAVID WILLIAMS, *THE GEORGIA GOLD RUSH: TWENTY-NINERS, CHEROKEES, AND GOLD FEVER* (1993).

51. Julia E. Sullivan, *Legal Analysis of the Treaty Violations that Resulted in the Nez Perce War of 1877*, 40 IDAHO L. REV. 657, 658 (2004) ("In 1855, wishing to preserve peace between themselves and the Americans, the Nez Perce made a solemn treaty with the U.S. government reserving millions of acres to themselves and ceding millions more to the fledgling republic. In 1860, gold was discovered on the land they had reserved to themselves. Soon their reservation was overrun by fortune hunters. Under extreme pressure from the whites, a portion of the tribe agreed to a new treaty in 1863, relinquishing all of the gold-bearing regions and more.").

52. BROWN, *supra* note 1; Robert M. Utley, *Origins of the Great Sioux War: The Brown-Anderson Controversy Revisited*, MONT. MAG. W. HIST., Autumn 1992, at 48, 48–49 ("The gold rush into the Black Hills . . . violated the Treaty of 1868 but . . . could not be prevented without unacceptable political cost.").

53. See generally Paul Sabin, *Home and Abroad: The Two "Wests" of Twentieth-Century United States History*, 66 PAC. HIST. REV. 305 (1997) (discussing U.S. international capitalist expansion in the twentieth century).

54. See NEIL PATTERSON ET AL., INT'L MONETARY FUND, *FOREIGN DIRECT INVESTMENT: TRENDS, DATA AVAILABILITY, CONCEPTS, AND RECORDING PRACTICES* 5–6 (2004).

European powers.⁵⁵ The region is also rich in natural resources and thus has attracted considerable FDI, much of it on indigenous lands.⁵⁶ Although there are examples of this phenomenon from one end of the region to the other, FDI in oil and gas in Peru provides a telling illustration of how FDI has affected indigenous peoples in Latin America.

Much of the oil and gas FDI in Peru has been concentrated in a strip along the Peru-Ecuador border in the Amazon rainforest that is home to several native peoples, including the Achuar, who still largely depend on hunting, fishing, and subsistence agriculture.⁵⁷

The Peruvian government granted the first concession for oil and gas operations on Achuar territory in 1971 to U.S.-based Occidental Petroleum Corporation.⁵⁸ Occidental began operations the next year and produced oil in its assigned areas, or “blocks,” for several decades, until it transferred its rights in stages to a French company, Pluspetrol Corporation S.A., between 1996 and 2001.⁵⁹

The effects of oil operations on the Achuar have been described as follows:

The Achuar report increasing mortality which they attribute to acute cases of poisoning, cancer and other unfamiliar illnesses. . . . Other environmental impacts are also reported in the area: there are innumerable testimonies of illegal logging, illegal trafficking in protected animal species, and hunting and commercialization of bushmeat, all undertaken by petroleum company workers and sub-contracted companies . . . to the detriment of indigenous peoples' subsistence resources. Thus petroleum operations have had direct and indirect impacts on Achuar health, both through exposure to

55. See James W. Zion & Robert Yazzie, *Indigenous Law in North America in the Wake of Conquest*, 20 B.C. INT'L & COMP. L. REV. 55, 56 (1997) (“Most Indian nations of the Americas refuse to assimilate, and many Indian peoples are still largely autonomous.”). See generally John A. Mills, Note, *Legal Constructions of Cultural Identity in Latin America: An Argument Against Defining “Indigenous Peoples,”* 8 TEX. HISP. J.L. & POL'Y 49 (2002) (discussing the distinctness and diversity of indigenous cultures in Latin America despite historical efforts by national governments to assimilate them).

56. See Sukanya Pillay, *Absence of Justice: Lessons from the Bhopal Union Carbide Disaster for Latin America*, 14 MICH. ST. J. INT'L L. 479, 510 (2006) (discussing recent growth in FDI in Latin America and its impacts on local indigenous peoples).

57. See Allison M. Dussias, *Indians and Indios: Echoes of the Bhopal Disaster in the Achuar People of Peru's Struggle Against the Toxic Legacy of Occidental Petroleum*, 42 NEW ENG. L. REV. 809, 819–20 (2008); Martí Orta Martínez et al., *Impacts of Petroleum Activities for the Achuar People of the Peruvian Amazon: Summary of Existing Evidence and Research Gaps*, ENVTL. RES. LETTERS, Oct.–Dec. 2007, at 1, 2, available at <http://iopscience.iop.org/1748-9326/2/4/045006>.

58. Martínez et al., *supra* note 57, at 2.

59. See *id.* at 2–3.

toxic substances or as a result of malnutrition associated with the reduction in animal populations available to hunt and fish⁶⁰

The Peruvian government has acknowledged some of these effects, including “[h]igh concentrations of hydrocarbons, barium, lead and chlorides . . . in samples of surface water from tributary streams”⁶¹ and excessive levels of lead and cadmium in blood samples from local indigenous communities.⁶² The nongovernmental organization (NGO) EarthRights International recently undertook an investigation and concluded that the causes of this contamination include the use of “out-of-date practices and methods that were long outlawed in the United States and in violation of Peruvian law” and a mix of “accidental spills and routine dumping of toxic byproducts.”⁶³ Another study claims to have identified “poor procedures for elimination of spills, including burning them . . . and burying them without adequate sealing measures.”⁶⁴ Other effects of oil operations on Achuar communities include increased rates of alcohol abuse, prostitution, and violence, allegedly resulting from contact with Peruvian settlers who have arrived on roads built by the foreign oil companies in search of employment and land.⁶⁵

The Achuar and other native groups have frequently protested MNE activities and have at times sought to block roads or rivers to hinder them.⁶⁶ As noted in the Introduction, however, the Peruvian government has in some cases sent troops in to suppress such resistance, and MNE operations have recently expanded in the region.⁶⁷

The situation of the Achuar in Peru may improve to some extent in light of the 2011 election to the presidency of Ollanta Humala, who has pledged to take a more conciliatory approach toward indigenous peoples.⁶⁸ Indeed,

60. *Id.* at 4.

61. *Id.* at 5.

62. *Id.* at 6; *see also* Dussias, *supra* note 57, at 817–18 (“[A] Peruvian Health Ministry study published in May 2006 [confirmed] the finding of cadmium and lead above acceptable limits in local residents’ bloodstreams.”).

63. Dussias, *supra* note 57, at 823 (summarizing EarthRights’s key findings).

64. Martínez, *supra* note 57, at 7.

65. HALLER ET AL., *supra* note 16, at 394–95; *see also* Martínez, *supra* note 57, at 8.

66. *See* Pipoli, *supra* note 4.

67. AMAZON WATCH, *THE ACHUAR AND TALISMAN ENERGY: INDIGENOUS RIGHTS, JUSTICE, AND CORPORATE ACCOUNTABILITY IN THE PERUVIAN AMAZON* (2011), available at http://www.amazonwatch.org/documents/talisman_issue_brief_2010.pdf (noting that Canadian company Talisman recently acquired a stake in a new block on Achuar lands but is facing local opposition); Pipoli, *supra* note 4 (“In the most recent river barricade, [n]atives were holding as of Dec. 28[, 2010,] a blockade of the Corrientes River in the Peruvian Amazon that had lasted the previous eight days. Natives threatened to continue that barricade indefinitely in an action aimed at getting oil producer Pluspetrol to pay for alleged environmental damages.”). *See also supra* Introduction.

68. Diego Moya Ocampos, *Peruvian President Signs Consultation Law for Indigenous Groups*, GLOBAL INSIGHT (Info. Handling Servs., Englewood, Colo.), Sept. 8, 2011 (noting

with Humala's support, the Peruvian legislature recently enacted a law requiring that indigenous peoples be consulted prior to any new development project on their land.⁶⁹ Yet it remains to be seen precisely what impact this new law and attitude will have on the ground. Reports indicate that the new law allows the state to go forward with a project even if consent is *not* obtained, and the Humala administration has made it clear that it views further hydrocarbon and mining development to be a major priority.⁷⁰ It has also been reported that the top indigenous-rights official in the Humala administration was fired when she attempted to block a gas project on lands occupied by an uncontacted indigenous people.⁷¹

2. Investments in the Asia-Pacific Region: FDI in the Philippines

Like Latin America, the Asia-Pacific Region has attracted a tremendous volume of FDI, often in remote areas occupied by indigenous peoples. FDI in the Philippines provides one example.

a. Logging Projects

Large-scale logging by foreign lumber companies in the Philippines began as early as 1904⁷² but underwent particular acceleration after World War II.⁷³ By 1992, only about a quarter of the country's land was still forested—down from more than seventy-five percent when large-scale logging began.⁷⁴ At that point, the national government imposed certain restrictions

that President Humala was elected with the support of Peru's indigenous peoples in June 2011 "on a promise to pay greater attention to the needs of Amerindian communities").

69. *Id.*

70. *Id.* (asserting that the new consultation law "does not make the results of the consultation process binding" and that Humala has announced a plan "to generate up to USD20 billion in new hydrocarbon and mining investments in the next five years"); see also *Peru's President Signs Consultation Law*, CNN WIRE (Sept. 7, 2011, 7:08 AM), <http://www.cnn.com/2011/WORLD/americas/09/07/peru.consultation.law/index.html> ("The law does not give communities the right to veto projects.").

71. *Peru Fires Top Indigenous Rights Official After She Blocks Gas Project*, SURVIVAL INT'L (Oct. 27, 2011), <http://www.survivalinternational.org/news/7834>.

72. SE. ASIA SUSTAINABLE FOREST MGMT. NETWORK, UPLAND PHILIPPINE COMMUNITIES: GUARDIANS OF THE FINAL FOREST FRONTIERS 6 (Mark Poffenberger & Betsy McGean eds., Research Network Report No. 4, 1993) [hereinafter UPLAND PHILIPPINE COMMUNITIES], available at http://pdf.usaid.gov/pdf_docs/PNABR681.pdf.

73. *Id.* at 7–8 ("[T]he Philippines experienced a phenomenal expansion of timber extraction from the end of World War II to the mid-1970s. . . . Between 1952 and 1977, the country lost 61 percent of its forests."); SIZER & PLOUVIER, *supra* note 16, at 26 ("North American timber companies had extensive concessions and logging operations in the Philippines in the 1960s and 1970s . . .").

74. UPLAND PHILIPPINE COMMUNITIES, *supra* note 72, at 1 ("By 1987, less than 22 percent of the country's land area supported forest vegetation, while undisturbed old growth forest represented less than 3 percent."); Karen E. Bravo, *Balancing Indigenous Rights to Land and the Demands of Economic Development: Lessons from the United States and Australia*, 30 COLUM. J.L. & SOC. PROBS. 529, 558–59 (1997) ("In the 1950s, three-quarters of

on commercial logging,⁷⁵ but it remained legal until September 2010, when the government announced a complete ban.⁷⁶

As laudable as the recent ban is, it has come too late for the country's indigenous peoples. The Philippines has many distinct indigenous groups, including "Negritos" descended from the archipelago's first inhabitants and non-Negrito groups that still maintain a traditional way of life, such as the Lumads of Mindanao and the Igorots of Luzon.⁷⁷ The logging ventures deprived these peoples of much of the forest on which they depend for hunting, gathering, and subsistence agriculture.⁷⁸ Moreover, the roads built by the logging companies made indigenous areas accessible to domestic outsiders, who migrated to them in large numbers, establishing plantation-style farms on the newly cleared terrain and driving indigenous groups further into the dwindling forests.⁷⁹

b. Mining Projects

As the forests disappeared, the Philippine government found that it could no longer rely on timber exports to generate the revenues required to service the country's foreign debt. Looking increasingly to mining as a source of revenue, in 1995 the government enacted a revised Mining Act to make it easier for foreign investors to obtain mining permits.⁸⁰ The government's efforts to

the land area in the archipelago nation supported virgin rain forest. Today, the figure hovers around twenty-five percent. Between 1980 and 1990, 300,000 hectares of forest area were destroyed annually.").

75. See Bravo, *supra* note 74, at 558 (noting that the government "phased out timber licensing agreements").

76. Madonna T. Virola, *Philippines President Orders Log Ban*, ASIA CALLING (Feb. 19, 2011, 11:11 AM), <http://www.asiacalling.kbr68h.com/en/archives/1866-philippines-president-orders-log-ban>.

77. For descriptions of the Philippines' various indigenous peoples, see Jose Mencio Molintas, *The Philippine Indigenous Peoples' Struggle for Land and Life: Challenging Legal Texts*, 21 ARIZ. J. INT'L & COMP. L. 269, 273-75 (2004).

78. See UPLAND PHILIPPINE COMMUNITIES, *supra* note 72, at 30-36 (describing the traditional subsistence activities of indigenous peoples in the Philippines and the adverse impacts of logging on those activities); see also Bravo, *supra* note 74, at 558 (asserting that much of the logging that occurred in the Philippines during the twentieth century occurred on the lands of the country's indigenous peoples).

79. UPLAND PHILIPPINE COMMUNITIES, *supra* note 72, at 20 ("As Ilocano and Tagalog migrants moved into the area, they took control and converted the riverine lands to rice fields. Dumagats moved further up the river, pushed by the migrants . . . [T]he movements of more politically empowered lowland migrants have resulted in major settlement shifts in a series of retreats by the acquiescent Dumagats."); see also *id.* at 48 ("The Lumads' movements progressively deeper into the forest in an attempt to escape domination by Visayan migrants and logging companies continue today.").

80. See Bravo, *supra* note 74, at 559 & nn. 183-84 ("In an attempt to give new life to its sagging mining sector, the Philippine government passed the Philippine Mining Act in 1995. This law was designed to attract foreign companies to the Philippines."); Alan Khee-Jin Tan, *All That Glitters: Foreign Investment in Mining Trumps the Environment in the Philippines*, 23 PACE ENVTL. L. REV. 183, 186-88 (2005) (asserting that the government's

attract FDI have been successful, and much of the resulting investment has occurred in the remote areas to which the country's surviving indigenous peoples had retreated.⁸¹

Some of the resulting consequences have been troubling. According to Joji Cariño, a Philippine indigenous-rights advocate, a review of mining company practices reveals “a pattern of abuse and misrepresentation that covers virtually all projects and involves both small and large firms.”⁸² Among the abuses she describes are (i) calling meetings for “consultation” about prospective projects with indigenous communities at inconvenient locations and without adequate notice so as to minimize community participation,⁸³ (ii) failing to provide adequate disclosure about projects and concealing the existence of community opposition,⁸⁴ and (iii) obtaining “consent” for projects through gifts, bribery, and coercion.⁸⁵

In addition, foreign-operated mines have allegedly caused major environmental destruction and pollution in areas occupied by indigenous peoples. For example, in 2010, Philippine environmental groups gathered to protest mining in Zambales province because of their concern that it “destroys the remaining forest cover in Zambales and threatens the Negrito ancestral domains in the area aside from affecting agricultural and fisheries activities.”⁸⁶ In addition, the government of the island province of Marinduque has alleged that Canada-based mining company Placer Dome “caused two cataclysmic environmental disasters, poisoned the islanders by contaminating their food and water sources, and then left the province without cleaning up the mess.”⁸⁷ Such accounts have prompted the Catholic Bish-

decision to promote FDI in mining was in response to pressure from the International Monetary Fund and World Bank to generate the revenues necessary to service the country's debts).

81. Joji Cariño, *Indigenous Peoples' Right to Free, Prior, Informed Consent: Reflections on Concepts and Practice*, 22 ARIZ. J. INT'L & COMP. L. 19, 29 (2005) (observing that the new Mining Act “was hugely successful in attracting foreign investment, and the companies drawn in ranged from small speculative ventures with little or no experience of actual mining to some of the major international mining companies, including Rio Tinto, BHP (Australia), Placer Dome (Canada), and Newmont (USA)”; Jeffrey O. Valisno, *Philippine Mining Act to Go Under the Microscope*, BUSINESSWORLD, July 27, 2010, at B/6 (noting the government's assertion that “the local mining industry has indeed been revived with the influx of on-stream investments from abroad” and that “foreign investments to the local mining sector reached \$2.8 billion . . . between 2004 to 2009 as a result of the revitalization program for the Philippine mining industry”).

82. Cariño, *supra* note 81, at 29.

83. *Id.* at 32.

84. *Id.* at 35–37.

85. *Id.* at 37–39.

86. Marvyn N. Benaning, *Green Groups Seek End to Mining in Zambales, Claim Extractive Industries Destroys Farming, Fishing Activities*, MANILA BULL. (May 5, 2010), <http://www.mb.com.ph/articles/256089/green-groups-seek-end-mining-zambales>.

87. *Provincial Gov't of Marinduque v. Placer Dome, Inc.*, 582 F.3d 1083, 1085 (9th Cir. 2009).

ops' Conference of the Philippines⁸⁸ to call for a repeal of the revised Mining Act, arguing that "[t]he adverse social impact on the affected communities, [e]specially on our indigenous brothers and sisters, far outweigh[s] the gains promised by large-scale mining corporations. Our people living in the mountains and along the affected shorelines can no longer avail of the bounty of nature."⁸⁹

c. Hydroelectric Projects

In recent years, the Philippine government has also promoted hydroelectric projects in areas occupied by indigenous peoples and brought in foreign investors to accomplish them.

For example, the San Roque Multipurpose Project in Luzon features a dam completed in 2003 by a joint Japanese-U.S. consortium over the opposition of local indigenous communities.⁹⁰ Although the Project now generates electricity and provides irrigation for large-scale commercial rice farming, it also required the mandatory resettlement of several indigenous villages and resulted in flooding of their ancestral lands.⁹¹ Moreover, the project's "watershed management plan" seeks to shift indigenous communities from traditional subsistence agriculture to cultivating cash crops and raising livestock for the market, both of which require clearing vegetation and cause soil erosion.⁹²

Another pending hydroelectric project, known as Pulangi V, will involve constructing a dam on the Pulangi River on Mindanao.⁹³ Many members of local Lumad communities and NGOs oppose Pulangi V because it will submerge the communities' ancestral lands and require the resettlement of several villages.⁹⁴ Opponents contend, moreover, that

88. The Catholic Bishops' Conference of the Philippines is a prominent and influential organization in the country. See Kathleen A. Martin & Agence France Presse, *Detained Health Workers to Be Transferred to Crame*, BUSINESSWORLD, Apr. 9, 2010, at S1/12 (noting that the organization "wields considerable influence in the Catholic Philippines and its statements often shape public opinion").

89. Valisno, *supra* note 81.

90. *Philippines: Local People Against the San Roque Dam*, WRM BULLETIN (World Rainforest Movement, Montevideo, Uru.), Jan. 2001, available at <http://www.wrm.org.uy/bulletin/42/Philippines.html>.

91. *Indigenous Issues*, *supra* note 9, ¶¶ 53–56.

92. *Id.* ¶ 57.

93. See Nicole J. Managbanag, *Hydropower Plant Project Kicks Off*, PULANGI V HYDRO POWER PROJECT—NEWS (June 6, 2010, 9:18 PM), <http://pulangivhydro.blogspot.com/2010/06/hydropower-plant-project-kicks-off.html>.

94. See Duyog Mindanao, *Lumads and Bangsamoro Communities Bear the Costs of Development Projects that are Imposed Against Their Will*, INDIGENOUS PEOPLES ISSUES & RESOURCES (Apr. 24, 2010, 1:24 PM), http://indigenouspeoplesissues.com/index.php?option=com_content&view=article&id=4920:lumads-and-bangsamoro-communities-bear-the-costs-of-development-projects-that-are-imposed-against-their-will&catid=62:southeast-asia-indigenous-peoples&Itemid=84.

developers failed to fulfill their promise to compensate Lumad communities displaced by a previously built dam on the same river, Pulangi IV.⁹⁵

The proponents of Pulangi V assert that the only villagers who were denied compensation for Pulangi IV were those who lacked “Property Documents proving their ownership.”⁹⁶ This would seem to include Lumads whose interest in the land inundated by Pulangi IV was communal in nature and not formally titled—a status common to indigenous peoples in the Philippines.⁹⁷ Proponents of Pulangi V also say that it will provide renewable and clean energy that is preferable to other energy sources like coal-fired power plants.⁹⁸ They acknowledge that approximately one thousand households will be displaced but insist that the affected persons “shall enjoy full compensation and relocation assistance,”⁹⁹ despite the complaints about compensation following Pulangi IV.

Proponents of Pulangi V also contend that displaced communities will have ample means to support themselves after the move, promising that they will not only receive new land but also “free seedlings of rubber, coffee, abaca and bamboo to help them establish soonest their agro-forestry farms in their alternative farms.”¹⁰⁰ In other words, the project organizers openly acknowledge that the affected Lumad communities will be steered away from traditional subsistence activities and toward growing cash crops.

It is not yet clear who will finance the project and carry out the construction work, if and when it goes forward. The project organizers are Philippine entities, but they have indicated that the project’s viability depends on their securing investment partners, at least some of whom are likely to be foreign.¹⁰¹

95. See, e.g., Legal Rights & Natural Res. Ctr./Kasama sa Kalikasan, *Friends of the Earth Slams FIBECO Pulangi V Project, Citing Massive IP Displacement and Cultural Annihilation*, PHILIPPINE INDIGENOUS PEOPLES LINKS (Oct. 21, 2009), <http://www.piplinks.org/4000-signatures-opposition-biggest-hydro-dam-mindanao-filed-doe-today>.

96. Pulangi 5 Hydro Project, *Pulangi V Hydro Electric Project: The Facts*, FACEBOOK (Nov. 4, 2009, 12:10 AM), http://www.facebook.com/note.php?note_id=192520391718 [hereinafter *Pulangi V Hydro Electric Project*].

97. See Mencio Molintas, *supra* note 77, at 275–76, 292 (noting that many indigenous peoples in the Philippines hold their lands communally and without formal legal title recognized by the government, in part because the process of land titling is cumbersome and expensive, and “many indigenous peoples are not aware that there is such a thing as land titling”).

98. See Ren Consul, *Pulangi 5 Exec Hits Back vs. Critics, Opposition*, PULANGI V HYDRO POWER PROJECT - NEWS (Sept. 18, 2010, 8:58 AM), <http://pulangi5hydro.blogspot.com/2010/09/pulangi-5-exec-hits-back-vs-critics.html>.

99. *Id.*

100. *Pulangi V Hydro Electric Project*, *supra* note 96.

101. *Clean and Cheap Solution to Mindanao Power Crises Pulangi V Hydro Project on Track*, PULANGI V POWER PROJECT - NEWS (Aug. 3, 2010, 5:36 AM), <http://pulangi5hydro.blogspot.com/2010/08/clean-and-cheap-solution-to-mindanao.html> (quoting a representative of one of the developers as asserting that “with the pre-development phase going smoothly, many foreign and local investors have signified their interest in the project”); Mike U. Crismundo, *\$27-Million Hydropower Plant Set To Be Completed in Bukidnon*,

3. Investments in Developed Countries

FDI on indigenous lands is by no means restricted to the developing world; much of it takes place in developed countries as well. For example, oil and gas development in Siberia has expanded significantly since Russia opened to FDI in the 1990s.¹⁰² This development has greatly affected local indigenous groups that relied mainly on reindeer breeding, fishing, and hunting until oil production and the resulting environmental destruction made those activities largely untenable.¹⁰³ FDI has also significantly affected indigenous peoples in such developed countries as Australia, the United States, and Canada.

a. Mining Projects in Australia

For many years, mining and other resource extraction projects in Australia were carried out as though Australian Aboriginals held no rights over lands they had traditionally owned and occupied.¹⁰⁴ In the 1990s, however, there was a major transformation of the legal framework governing the rights of Aboriginals that greatly buttressed their position.

Specifically, in the 1992 *Mabo v. Queensland* case,¹⁰⁵ the High Court of Australia held that Aboriginal groups have certain “native title” interests to areas they have traditionally occupied.¹⁰⁶ The government then implemented the *Mabo* decision by enacting the Native Title Act,¹⁰⁷ which established

MANILA BULL. (June 2, 2010, 4:53 PM), <http://www.mb.com.ph/node/260265/27m> (describing plans to construct Pulangi V and identifying “the Zhe Jiang Corp. of China and Applied Engineering Services based in the United States” as investors in the project). *But see* Michael D. Banos, *Regional Council Endorses Pulangi Project*, BUSINESSWORLD, June 24, 2011, at S1/6 (asserting that the project will be “financed by still unidentified partners”).

102. See BERNARD A. GELB, CONG. RESEARCH SERV., RL 33212, RUSSIAN OIL AND GAS CHALLENGES 1–3, 12 (2006), available at <http://fpc.state.gov/documents/organization/58988.pdf> (asserting that Russian oil and gas production has increased since the fall of the Soviet Union due in part to foreign investment and the introduction of more advanced Western technology, but that the sector will require further foreign investment to reach its full potential).

103. See HALLER ET AL., *supra* note 16, at 139, 164–65, 167; Gail Osherenko, *Indigenous Rights in Russia: Is Title to Land Essential for Cultural Survival?*, 13 GEO. INT’L ENVTL. L. REV. 695, 706 (2001) (“Throughout northwestern Siberia, oil and gas development has disturbed pastureland and undermined the ability of indigenous peoples to continue hunting, fishing, trapping, and herding activities.”).

104. See RICHARD HOWITT, RETHINKING RESOURCE MANAGEMENT: JUSTICE, SUSTAINABILITY AND INDIGENOUS PEOPLES 203–04 (2001) (“Before 1992, Australian governments operated land and resource management systems as if Aboriginal and Torres Strait Islander peoples had not existed or held any rights prior to British settlement.”).

105. *Mabo v. Queensland (No. 2)* (1992) 175 CLR 1, 2 (Austl.).

106. *Id.* at 2, 15. For discussions of the background, holding, and significance of the *Mabo* decision, see, e.g., HOWITT, *supra* note 104, at 205–08; Marcia Langton & Odette Mazel, *Poverty in the Midst of Plenty: Aboriginal People, the ‘Resource Curse’ and Australia’s Mining Boom*, 26 J. ENERGY & NAT. RESOURCES L. 31, 39–41 (2008).

107. *Native Title Act 1993* (Cth) (Austl.).

procedures for making and adjudicating Aboriginal land claims and provided that traditional owners must be notified and consulted about proposed extraction projects on their lands.¹⁰⁸ The Native Title Act does not recognize Aboriginal peoples as having ownership over subsurface minerals or the right to “veto” mining projects, but does establish a framework for consultation.¹⁰⁹

Mining companies now increasingly feel compelled to obtain the written consent of traditional land owners and to share financial benefits with them.¹¹⁰ Conditions set forth in such Indigenous Land Use Agreements (ILUAs) often include not only financial benefits, but also measures “aimed at delivering long-term outcomes for indigenous communities through creation of employment and training opportunities, business development and promotion of social well-being.”¹¹¹

One company that has signed ILUAs in Australia in recent years is Rio Tinto, a U.K.-based MNE that had difficult relations with Aboriginal communities in the past and has been accused of violating indigenous rights in connection with investments in other countries.¹¹² The ILUA concluded in connection with the company’s Argyle Diamond Mine illustrates the cooperative approach that the company has followed in Australia post-*Mabo*. According to Rio Tinto, this ILUA includes the following features, among others:

- “[A] suite of legally binding management plans dealing with the day-to-day interactions between the mine and traditional owners,” covering such issues as “Aboriginal site protection and heritage clearance work, training and employment programmes . . . [and] business development opportunities”;
- Provisions guaranteeing “secure Aboriginal sacred site protection” and giving traditional owners a veto “over any new development that will damage significant Aboriginal sites”; and

108. Langton & Mazel, *supra* note 106, at 40.

109. KAUFFMANN, *supra* note 22, at 6–8; David Brereton & Joni Parmenter, *Indigenous Employment in the Australian Mining Industry*, 26 J. ENERGY & NAT. RESOURCES L. 66, 68 (2008).

110. See Langton & Mazel, *supra* note 106, at 42.

111. Brereton & Parmenter, *supra* note 109, at 69.

112. For a discussion of the improvement of Rio Tinto’s relationships with Aboriginal communities in Australia following the *Mabo* decision, see HOWITT, *supra* note 104, at 261–64. For allegations levied against Rio Tinto in connection with investments elsewhere, see *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1123–24 (C.D. Cal. 2002) (discussing allegations relating to Rio Tinto’s Panguna copper mine on the island of Bougainville in Papua New Guinea), and see also *Rio Tinto: A Shameful History of Human and Labour Rights Abuses and Environmental Degradation Around the Globe*, LONDON MINING NETWORK (Apr. 20, 2010, 12:08 PM), <http://londonminingnetwork.org/2010/04/rio-tinto-a-shameful-history-of-human-and-labour-rights-abuses-and-environmental-degradation-around-the-globe/> (accusing Rio Tinto of human rights abuses in connection with investments in Papua New Guinea, Indonesia, and other countries).

- Provisions ensuring that the traditional owners will receive certain minimum or “floor” financial benefits but providing for the possibility of increased payments based on “a formula that includes a percentage of EBITDA (earnings before interest, tax, depreciation and amortization) component.”¹¹³

Professor Ciaran O’Faircheallaigh asserts that in the years since the above ILUA was concluded, the traditional owners have used financial benefits from the mine to establish “projects in areas including kidney health, health education, sports, law, culture and youth suicide prevention.”¹¹⁴ In addition, the mine has provided employment to a large number of Aboriginal individuals, who now account for over twenty percent of the mine’s workforce.¹¹⁵

b. Mining and Oil Projects in the United States

The United States has likewise seen a multitude of development projects on lands owned by native tribes or adjacent to them, often involving mining or oil. The affected tribes have opposed some of these projects and supported others.

Uranium mining has drawn both support and opposition from Native Americans at different times. Uranium has been mined extensively on tribal lands in the Four Corners region for decades.¹¹⁶ The tribes initially supported the mining in light of royalties they received and employment opportunities the mines provided.¹¹⁷ Over time, however, tribe members began to experience unusually high rates of cancer and other ailments, which some fear is due to uranium exposure.¹¹⁸ Consequently, several tribes

113. Bruce Harvey & Simon Nish, *Rio Tinto and Indigenous Community Agreement Making in Australia*, 23 J. ENERGY & NAT. RESOURCES L. 499, 506–08 (2005).

114. Ciaran O’Faircheallaigh, *Understanding Corporate-Aboriginal Agreements on Mineral Development: A Conceptual Framework*, in EARTH MATTERS: INDIGENOUS PEOPLES, THE EXTRACTIVE INDUSTRIES & CORPORATE SOCIAL RESPONSIBILITY 67, 76 (Ciaran O’Faircheallaigh & Saleem Ali eds., 2008).

115. *Id.* at 77.

116. See Charles K. Johnson, *A Sovereignty of Convenience: Native American Sovereignty and the United States Government’s Plan for Radioactive Waste on Indian Land*, 9 ST. JOHN’S J. LEGAL COMMENT. 589, 592–93 (1994) (describing the history of uranium mining in the Four Corners area of Arizona, Colorado, New Mexico, and Utah). See generally Rebecca Tsosie, *Indigenous People and Environmental Justice: The Impact of Climate Change*, 78 U. COLO. L. REV. 1625, 1630–31 (2007).

117. See, e.g., Winona La Duke, *Red Land and Uranium Mining: How the Search for Energy is Endangering Indian Tribes*, in THE ENERGY READER 105, 105–06 (Laura Nader ed., 2010) (discussing uranium mining contracts between a mining company and the Laguna Pueblo that guaranteed royalties and jobs for the tribe).

118. See Tsosie, *supra* note 116, at 1630; see also Johnson, *supra* note 116, at 593 (asserting that “[u]ranium mining has polluted the surface and ground water of the four corners area . . . where Pueblos, Hopis and Dine dwell, perhaps irreparably, due to the inattention of mining companies to the stabilization of their tailings piles,” and that, in one mining facility

now oppose continued mining. For example, in July 2010, the Havasupai tribe announced a protest against the reopening of Canyon Mine, a uranium mine in Arizona, by Canadian company Denison Mines because of fears of toxic contamination.¹¹⁹ Similarly, the Hualapai tribe has rejected overtures by Canadian company Pacific Bay Minerals Ltd. to build a new uranium mine on its lands in Arizona.¹²⁰ The Navajo tribe has likewise voiced opposition to plans by Texas-based Hydro Resources, Inc. and Japan-based Itochu Corporation to establish a new mine near a Navajo community.¹²¹

The Pebble Project in Alaska has similarly attracted controversy. The proposed project is a copper and gold mine that a consortium of foreign companies seeks to build in the headwaters of Bristol Bay.¹²² Pebble would involve constructing an open-pit mine up to two miles wide and 1,700 feet deep and a subterranean mine of similar scale, plus a pipeline, roads, and a port.¹²³ Although Pebble would be constructed on land owned by the state of Alaska,¹²⁴ it could significantly affect native peoples in the region. Environmental groups and several local tribes have voiced opposition to the project because of concerns that toxic discharges from the mine would devastate the Bay's vast salmon populations, on which many Native Americans depend for their livelihood.¹²⁵ Yet some native organizations have either endorsed Pebble or indicated a willingness to wait for environmental-impact studies before expressing a view, recognizing Pebble's potential to generate

in New Mexico, 134 of 150 Dine miners "experienced respiratory ailments and cancers related to uranium mining, thirty eight dying from it").

119. *Havasupai Announce Gathering to Protect Resumption of Uranium Mining at Grand Canyon Sacred Site*, NATIVE RTS. NEWS (July 21, 2009, 2:07 PM), <http://native-rights-news.blogspot.com/2009/07/havasupai-announce-gathering-to-protest.html>.

120. Press Release, Pac. Bay Minerals Ltd., Efforts to Negotiate with the Hualapai Tribe Thwarted by Uranium Mining Ban (Dec. 1, 2008), *available at* <http://www.pacificbayminerals.com/investors/press-releases/20081201-1.html> ("[The company] has learned that, in a reversal of previous indications, the Hualapai Tribal Council has voted to ban uranium mining on its Tribal lands which are located near the Grand Canyon in Arizona.").

121. *Navajo Challenge Uranium Mining Permit on Tribal Lands*, ENV'T NEWS SERV., April 19, 2008, *available at* <http://www.ens-newswire.com/ens/apr2008/2008-04-19-02.asp>.

122. Edwin Dobb, *Alaska's Choice: Salmon or Gold*, NAT'L GEOGRAPHIC, Dec. 2010, at 101, 107-12.

123. *Id.* at 107, 120.

124. *See Pebble Project*, ALASKA DEP'T OF NAT. RESOURCES, MINING, LAND & WATER, <http://dnr.alaska.gov/mlw/mining/largemine/pebble/> (last visited July 13, 2012).

125. Dobb, *supra* note 122, at 107, 112-13; Mary Pemberton, *Bristol Bay Alaska: Washington Senator Maria Cantwell Asks EPA to Protect Salmon from Proposed Mine*, HUFFINGTON POST (Sept. 12, 2011, 6:40 PM), http://www.huffingtonpost.com/2011/09/14/bristol-bay-maria-cantwell-epa_n_962599.html ("The Bristol Bay Native Corp. and nine federally recognized Bristol Bay Alaska native tribes have asked the EPA to use its authority under the Clean Water Act to stop the mine from being developed.").

income from taxes and royalties and provide employment and business opportunities to local tribes.¹²⁶

Other development projects in the United States enjoy wider support among the affected tribes. For example, several tribes have affirmatively endorsed oil drilling or coal mining on their lands in exchange for royalties and taxes, even when particular projects have been actively opposed by environmental groups.¹²⁷

c. Mining and Oil Projects in Canada

Canada has similarly witnessed many development projects on lands owned or claimed by native groups, which are known in that country as Inuit and First Nations, or, collectively, as Aboriginals.¹²⁸ As in Australia, it has become increasingly common for companies exploiting natural resources to seek the consent of affected Canadian Aboriginal communities and to negotiate agreements with them, known as Impact and Benefits Agreements.¹²⁹

For example, the Impact and Benefits Agreements for the Voisey's Bay Project, a nickel-copper-cobalt mine located on lands of an Inuit community and the Innu First Nation in Newfoundland and Labrador, provide for extensive environmental reviews and controls, as well as for substantial financial and employment benefits for the affected communities.¹³⁰ The company that operates the mine says that it awarded a total of \$515 million in contracts to

126. Dobb, *supra* note 122, at 120 (summarizing the position of some natives in the region); see also *Resolutions*, THE PEBBLE PARTNERSHIP, <http://www.pebblepartnership.com/community/resolutions.php> (last visited July 13, 2012) (listing tribal organizations that have resolved to await the outcome of further reports and studies).

127. See Judy Keen, *For Tribes, Economic Need Is Colliding with Tradition*, USA TODAY, Mar. 4, 2009, at 1A (noting that in 2006 the Northern Cheyenne voted to support coal mining on their reservation, that "[t]he nearby Crow tribe signed a contract [in 2008] with an Australian company to build a coal-to-liquid plant" in exchange for "taxes, royalties and a share of profits," and that "[i]n New Mexico, the Navajo Nation plans a coal-fired power plant that could create up to 3,000 construction jobs and bring \$54 million in revenue to the tribe, according to the company that will build it"); see also HOWITT, *supra* note 104, at 271 ("[Coal mining leases] have not only provided the Navajo Nation with a substantial and secure revenue base, and high levels of employment in a range of fields, but . . . this revenue has in turn enabled the nation to support a wider range of lifestyle choices for Diné on the reservation than would otherwise have been possible."); Tsosie, *supra* note 116, at 1630–33 (describing tensions between Indian tribes and environmental groups over coal mining and other development projects on tribal lands).

128. NATIVE AMERICAN HISTORY 24 (J.E. Luebering ed., 2011).

129. See Stefan Matiation, *Impact Benefits Agreements Between Mining Companies and Aboriginal Communities in Canada: A Model for Natural Resource Developments Affecting Indigenous Groups in Latin America?*, 7 GREAT PLAINS NAT. RESOURCES J. 204, 204 (2002).

130. CAN. ENVTL. ASSESSMENT AGENCY, VOISEY'S BAY MINE AND MILL ENVIRONMENTAL ASSESSMENT PANEL REPORT ch. 4 (2010), available at <http://www.ceaa.gc.ca/default.asp?lang=En&n=0a571a1a-1&xml=0a571a1a-84cd-496b-969e-7cf9cbea16ae&toc=show>.

Inuit and Innu companies during the construction, currently employs numerous community members, and gives funding to local schools.¹³¹

Although the Voisey's Bay Project provides an example of corporate-tribal cooperation, extractive operations in the Oil Sands (also known as the Tar Sands) reportedly lack the consent of affected Aboriginal communities and adequate environmental, social, and cultural controls. The Oil Sands are a type of petroleum deposit located primarily in Alberta under boreal forest and peat bog within the watersheds of the Athabasca and Peace Rivers,¹³² on the ancestral lands of several First Nation groups including Cree, Chipewyan, and Métis.¹³³ The relevant First Nations ceded their ownership of most of these lands to the government under a treaty signed in 1899 but reserved their perpetual rights to hunt, fish, and trap on the lands.¹³⁴ In fact, many members of these groups still depend on such traditional pursuits for their livelihoods, even if they are becoming increasingly infeasible due to environmental impacts of Oil Sands development.¹³⁵

Commercial exploitation of the Oil Sands began in 1967 when a subsidiary of U.S.-based Sun Oil established the first bitumen mine.¹³⁶ In 1978, a consortium of domestic and foreign investors known as Syncrude established a second mine.¹³⁷ Interest remained limited, though, until rising oil prices and increasing scarcity of conventional deposits led to a flood of new

131. NATURAL RES. CAN., PARTNERSHIP AGREEMENTS: VALE INCO—NEWFOUNDLAND AND LABRADOR (Aboriginal Participation in Mining Info. Bulletin, 2008), available at <http://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/minerals-metals/files/pdf/mms-smm/abor-auto/pdf/vale-08-eng.pdf>.

132. MARC HUMPHRIES, CONG. RESEARCH SERV., RL 34258, NORTH AMERICAN OIL SANDS: HISTORY OF DEVELOPMENT, PROSPECTS FOR THE FUTURE 3–5 (2008), available at <http://www.fas.org/sgp/crs/misc/RL34258.pdf> (noting that oil sands are unconventional petroleum deposits consisting of a mix of bitumen [a semisolid, highly viscous form of crude oil], silica sand, clay minerals, and water); Conor Duffy, Casenote, *Sisseton Wahpeton Oyate v. U.S. Department of State: Refusing to Drink of the NHPA's Implied Right of Action*, 14 SUSTAINABLE DEV. L.J. 63, 63 (2011) (“The Canadian oil sands are huge deposits of oily sand, beneath a layer of peat bog, topped by vast tracts of boreal forest.”).

133. See FMA HERITAGE RES. CONSULTANTS INC., TRADITIONAL ECOLOGICAL KNOWLEDGE AND LAND USE REPORT: DEER CREEK ENERGY LTD., JOSLYN NORTH MINE PROJECT 16 (2006).

134. See generally DENNIS F.K. MADILL, INDIAN & N. AFFAIRS CAN., TREATY RESEARCH REPORT: TREATY EIGHT (1986), available at <http://www.aadnc-aandc.gc.ca/eng/1100100028809> (discussing the negotiation, drafting, and conclusion of Treaty Eight in 1899).

135. See, e.g., AMNESTY INT’L, FROM HOMELAND TO OIL SANDS: THE IMPACT OF OIL AND GAS DEVELOPMENT ON THE LUBICON CREE OF CANADA 2–4 (AI Index AMR 20/002/2010, 2010), available at <http://www.amnesty.org/en/library/asset/AMR20/002/2010/en/9c1af4f4-6b1b-4327-a17b-77065b3cca2a/amr200022010en.pdf> (“The land is crucial to the Lubicon culture and economy. Before large-scale oil and gas development began, the Lubicon Cree were largely self-sufficient, relying on hunting, trapping, fishing and other traditional land uses to meet most of their needs.”).

136. HUMPHRIES, *supra* note 132, at 8.

137. *Id.* at 8–9.

investment.¹³⁸ A consortium of foreign oil companies (Shell, Chevron, and Marathon) opened a third bitumen mine in 2003,¹³⁹ and since then most of the world's major energy companies have invested in the Oil Sands.¹⁴⁰

Extractive operations in the Oil Sands have significant impacts on the environment. As Canadian journalist Andrew Nikiforuk has explained:

To coax just one barrel of bitumen from the Athabasca sand pudding, companies must mow down hundreds of trees, roll up acres of soil, drain wetlands, dig up four tons of earth to secure two tons of bituminous sand, and then give those two tons a hot wash.¹⁴¹

After the bitumen is separated, the companies dispose of the waste by dumping it in open-air tailings ponds, which, some allege, allow toxic chemicals to leach into groundwater and river systems.¹⁴²

According to critics, Oil Sands development is not only wreaking havoc on the environment but also on local First Nations communities. Among the asserted effects are the following:

- Fort Chipewyan, a town on the Athabasca River predominantly populated by Cree, Chipewyan, and Métis, exhibits startlingly high rates of several forms of cancer.¹⁴³
- “[T]he Lubicon Cree [another First Nation group living on the Peace River Oil Sands] have reported pervasive health and social

138. See Patrick J. Keenan, *Financial Globalization and Human Rights*, 46 COLUM. J. TRANSNAT'L L. 509, 521 (2008) (“[A]s oil and gas prices have climbed, it now makes economic sense to develop more costly oil projects. For example, this makes the relatively expensive oil found in the sands of Alberta more attractive than ever before.”).

139. *Oil Sands Canada*, OILFIELD DIRECTORY (Dec. 22, 2009), <http://www.oilfielddirectory.com/articles/view/oil-sands-canada.html>.

140. HUMPHRIES, *supra* note 132, at 2 (“Major U.S. oil companies (Sunoco, Exxon/Mobil, Conoco Philips, and Chevron) continue to make significant financial commitments to develop Canada’s oil sand resources.”); ANDREW NIKIFORUK, *TAR SANDS: DIRTY OIL AND THE FUTURE OF A CONTINENT* 188 (2010) (“[A]lmost every major multinational and state-owned oil company has put up a shingle in [the Oil Sands].”).

141. NIKIFORUK, *supra* note 140, at 14.

142. See, e.g., Erin N. Kelly et al., *Oil Sands Development Contributes Elements Toxic at Low Concentrations to the Athabasca River and Its Tributaries*, 107 PROC. NAT'L ACAD. SCI. U.S. 16178, 16178 (2010) (presenting the findings of a scientific study to the effect that “the oil sands industry releases the 13 elements considered priority pollutants . . . under the US Environmental Protection Agency’s Clean Water Act, via air and water, to the Athabasca River and its watershed”); see also HUMPHRIES, *supra* note 132, at 22 (“Wastewater tailings . . . are disposed in large ponds until the residue is used to fill mined-out pits. Seepage from the disposal ponds can result from erosion, breaching, and foundation creep. The principal environmental threat is the migration of tails to a groundwater system and leaks that might contaminate the soil and surface water.”).

143. NIKIFORUK, *supra* note 140, at 100 (discussing a 2009 government study that found that Fort Chipewyan “had a 30 per cent higher cancer rate than models would predict and a ‘higher than expected’ rate of cases of cancers of the blood, lymphatic system, and soft tissue,” as well as increases in the number of leukemia, lymphoma, and biliary tract cancers, and asserting a connection between Oil Sands development and these cancers).

problems . . . [including] disproportionate numbers of miscarriages, stillbirths and other maternal health concerns . . .”¹⁴⁴

- Waste from facilities that refine the oil “has feminized male snapping turtles in the St. Clair River, turned 45 per cent of the whitefish in Lake St. Clair ‘intersexual,’ and exposed two thousand members of the Aamjiwnaang First Nation to a daily cocktail of 105 carcinogens and gender-benders. Newborn girls outnumber boys by two to one on the reserve. Two-thirds of the children have asthma, and 40 per cent of pregnant women experience miscarriages.”¹⁴⁵
- Fish and game in many areas can no longer be safely consumed, because their flesh is contaminated and often deformed due to exposure to pollutants.¹⁴⁶

Despite such serious alleged impacts, several local Aboriginal groups say they have never been consulted about Oil Sands projects,¹⁴⁷ and developers often decline to conclude Impact and Benefits Agreements with impacted communities.¹⁴⁸ A few companies have announced agreements with particular groups,¹⁴⁹ but others have balked because of concerns that

144. AMNESTY INT’L, *supra* note 135, at 4.

145. NIKIFORUK, *supra* note 140, at 125.

146. *See id.* at 95–96 (asserting that leakage from toxic tailings causes fish deformities); *The Lubicon Cree Nation Fights Genocide*, TAR SANDS WATCH (Mar. 4, 2008), <http://www.tarsandswatch.org/lubicon-cree-nation-fights-genocide> (quoting Peter Cyprien, cochair of Keepers of the Athabasca River, as asserting that “water from the [Athabasca] river can no longer be drunk; fish caught in the river often have tumors and the moose are sick and can’t be eaten”).

147. *See, e.g., Indigenous Nations Governments Challenging Tar Sands*, DAILY OIL BULL. (June Warren-Nickle’s Energy Gp., Alberta, Can.), 2007, available at <http://oilsandstruth.org/indigenous-nations-governments-challenging-tar-sands> (quoting a Woodland Cree press release, which states that “[a]lthough the project has the potential to cause very significant adverse impacts to [the Woodland Cree First Nation]’s Treaty 8 and Aboriginal rights, to the environment and to present and future generations of WCFN members, neither Canada nor Alberta has bothered to consult with the WCFN about the project”).

148. MICHELLE DE CORDOVA & JAMIE BONHAM, NW. & ETHICAL INVS. L.P., *LINES IN THE SANDS: OIL SANDS SECTOR BENCHMARKING 4* (2009), available at http://www.neinvestments.com/neifiles/PDFs/5.4%20Research/lines_in_the_sands.pdf (“All oil sands companies in our survey operate in areas overlapping Aboriginal traditional territories. . . . Over a third of operators did not disclose the existence of even basic agreements with any impacted communities.”); GINGER GIBSON & CIARAN O’FAIRCHEALLAIGH, WALTER & DUNCAN GORDON FOUND., *IBA COMMUNITY TOOLKIT: NEGOTIATION AND IMPLEMENTATION OF IMPACT AND BENEFIT AGREEMENTS 35* (2010), available at http://www.ibacommunitytoolkit.ca/pdf/IBA_toolkit_March_2010_high_resolution.pdf (“[I]n Alberta, no [Impact and Benefit Agreements] have been negotiated, despite massive industrial development of the tar sands. This is likely a result of the political climate in Alberta, which is strongly supportive of resource development and antagonistic to Aboriginal rights.”).

149. *See, e.g., CSR CASE STUDY: SYNCRUDE CANADA LTD. 6* (2004), available at http://commdev.org/files/1077_file_syncrude_e.pdf (discussing an agreement between Syncrude and five First Nations groups); Claudio Cattaneo, *Deal Between Métis Community,*

extending benefits to one group could “raise expectations among other [A]boriginal communities” and lead to a “domino effect that could be costly and unpredictable.”¹⁵⁰ Meanwhile, the development of the Oil Sands proceeds apace.

II. RECENT PROGRESS TOWARD PROTECTING INDIGENOUS RIGHTS, AND HOW IT FALLS SHORT OF WHAT IS NEEDED

Part I demonstrated that indigenous peoples historically suffered grievous harms from encroachments by outside commercial interests, and that foreign investors continue to access indigenous resources with regularity even today, sometimes causing similar harms. It also showed, however, that some investments are now undertaken in a more cooperative manner and with better protections in place for impacted indigenous peoples.

A number of legal reforms help explain the shift in approach reflected in some more recent projects. These are attributable in part to an indigenous-rights movement that has developed with increasing vigor since the 1970s.¹⁵¹ In the words of Ecuadorian indigenous-rights advocate Carlos Zorrilla,

[I]ndigenous people are saying, enough is enough. Enough of having to pay the cost of projects that ruin their culture, contaminate their air, water, land, impact their health, and to having their human rights trampled, all to benefit the elite of their countries and the coffers of transnational enterprises.¹⁵²

As detailed more fully below, this movement has drawn support from the United Nations and human rights bodies, NGOs, and scholars, and its achievements are impressive.¹⁵³ Nevertheless, as also discussed below, the

Oilsands Firm a Turning Point, STARPHOENIX (Mar. 28, 2011), <http://www2.canada.com/saskatoonstarphoenix/news/national/story.html?id=5552b28a-d9d2-49b9-812b-4a2a0ac44037> (describing an agreement between a Métis community in Alberta and Cenovus Energy, which is expected to provide the former with forty to sixty million dollars over forty years); *Shell and Fort McKay Sign Innovative Land Agreement*, RIGZONE (Apr. 19, 2006), http://www.rigzone.com/news/article.asp?a_id=31374 (discussing an agreement between Shell and the Fort McKay First Nation).

150. Cattaneo, *supra* note 149.

151. For overviews of the modern indigenous-rights movement, see S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 56–58 (2d ed. 2004); ENGLE, *supra* note 36, at 46–137; Marina Hadjiannou, *The International Human Right to Culture: Reclamation of the Cultural Identities of Indigenous Peoples Under International Law*, 8 *CHAP. L. REV.* 201, 220–25 (2005).

152. Carlos Zorrilla, *The Role of the World Bank in Promoting Sustainable Development in Latin America*, 14 *MICH. ST. J. INT’L L.* 541, 553 (2006).

153. Examples of such support and achievements are detailed in the Sections that follow. For further discussion of these issues, see Ronald Niezen, *Indigeneity and the State: Comparative Critiques: The Indigenous Claim for Recognition in the International Public Sphere*, 17 *FLA. J. INT’L L.* 583, 592 (2005) (“The past several decades included the establishment of several thousand new NGOs concerned with the promotion of indigenous rights.”); Hari M. Osofsky, *Environmental Human Rights Under the Alien Tort Statute:*

reforms achieved to date are subject to major limitations, so development projects undertaken with adequate regard for indigenous rights will likely remain the exception rather than the norm until further reform occurs.

A. Progress at the Domestic Level

Among the positive developments that have occurred at the domestic level are (i) the adoption of constitutional provisions or legislation recognizing or expanding indigenous rights, and (ii) jurisprudence in the United States interpreting the Alien Tort Statute (ATS)¹⁵⁴ in a manner that opens U.S. courts to claims based on certain types of human rights violations.

1. Domestic Indigenous-Rights Protections

In recent years, many countries have added indigenous-rights protections to their constitutions or have enacted special indigenous-rights laws. A good example is the Native Title Act in Australia,¹⁵⁵ but similar protections have been established in Peru, the Philippines, Canada, and many other countries.¹⁵⁶ The terms of the adopted protections vary, but many require, *inter alia*, that indigenous groups be consulted prior to any extractive project on their lands, that they receive a share of revenues, that they receive compensation for land taken from them, and that projects be carried out with certain safeguards for the environment and human health.¹⁵⁷

Redress for Indigenous Victims of Multinational Corporations, 20 SUFFOLK TRANSNAT'L L. REV. 335, 390 (1997) (arguing that there exists "substantial scholarly support for indigenous rights with respect to the environment"); Kirsten M. Hetzel, Comment, *Reaching Regional Consensus: Examining United States Native American Property Rights in Light of Recent International Developments*, 10 TUL. J. INT'L & COMP. L. 307, 307–08 (2002) (describing progress achieved by indigenous peoples in recent decades with support from international bodies, including the promulgation of international instruments detailing the rights of indigenous peoples and the incorporation of such rights into national constitutions and domestic legislation).

154. 28 U.S.C. § 1350 (2011).

155. See *Native Title Act 1993* (Cth) (Austl.). See also *supra* note 107 and accompanying text.

156. See, e.g., DWIGHT G. NEWMAN, *THE DUTY TO CONSULT: NEW RELATIONSHIPS WITH ABORIGINAL PEOPLES* 9–45 (2009) (discussing a provision of the Canadian Constitution adopted in 1982 that recognizes and affirms existing Aboriginal and treaty rights and a series of subsequent court cases that established a "duty to consult" with Aboriginal groups under some circumstances when their rights are implicated by contemplated governmental action); Bravo, *supra* note 74, at 559 (describing protections for indigenous peoples set forth in the Philippine Constitution); Cariño, *supra* note 81, at 26–29 (discussing the Philippines' Indigenous Peoples Rights Act); Dussias, *supra* note 57, at 812–19 (providing a general overview of indigenous rights in Peru); Warden-Fernandez, *supra* note 17, at 420–24 (identifying several Latin American countries that have enacted special indigenous protections and summarizing them); Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Perspective*, 12 HARV. HUM. RTS. J. 57, 60–92 (1999) (offering a country-by-country summary of indigenous protections in national law).

157. See, e.g., Leonardo A. Crippa, *Cross-Cutting Issues in the Application of the Guatemalan "NEPA": Environmental Impact Assessment and the Rights of Indigenous Peoples*,

Such protections may seem impressive on their face, but all too often governments turn a blind eye to MNEs' violations of these laws¹⁵⁸ or even affirmatively cooperate with MNEs to suppress indigenous opposition to their activities.¹⁵⁹ After all, several of the more troubling investments described in Part I.B have taken place in countries that have such laws on their books. It seems, therefore, that many countries are quite good at enacting indigenous-rights laws but rather poor at enforcing them.

Any number of factors may lead a host state to be lax in enforcing its laws against MNEs. The state may lack the necessary institutional capacity to enforce its laws effectively.¹⁶⁰ It may have a financial stake in the project, making it reluctant to take any action that would diminish its profitability.¹⁶¹ (The state's reticence in this regard is typically all the greater if it has incurred substantial foreign debt and depends on revenues from indigenous

24 AM. U. INT'L L. REV. 103, 116–17, 121–22, 128–29 (2008) (describing Guatemalan indigenous-rights legislation); Dussias, *supra* note 57, at 813–15 (describing Peruvian indigenous-rights legislation).

158. See NIKIFORUK, *supra* note 140, at 180–81 (“Although Alberta has many strong environmental rules, it rarely implements them. . . . A recent analysis of Alberta Environment’s quarterly reports revealed that most tar sands projects, despite leaks, spills, and upsets, faced only a single fine between 2006 and 2007.”); Bravo, *supra* note 74, at 569–71 (“The apparently solid constitutional protections granted to Brazil’s indigenous peoples have proven to be empty promises.”); Dussias, *supra* note 57, at 815 (“Peruvian law thus purports to provide some recognition and protection of the rights of indigenous peoples. The experiences of the Achuar . . . raise serious questions, however, as to the legal significance and effectiveness of this purported recognition and protection.”).

159. See, e.g., Adenike Esan, *Preventing Violent Conflicts Caused by Infringements of Indigenous Peoples’ Rights: The Case of the Ecuadorian Amazon*, 23 J. ENERGY & NAT. RESOURCES L. 529, 531–32 (2005) (“[V]iolence and conflict associated with [multinational oil companies’] operations are usually from the use of force by government security forces or privately engaged security personnel against local protesters or indigenous communities who oppose exploration and production activities”); John W. Head, *Protecting and Supporting Indigenous Peoples in Latin America: Evaluating the Recent World Bank and IDB Initiatives*, 14 MICH. ST. J. INT’L L. 383, 411 (2006) (“Despite some protection having been promised in a 1993 law passed in Chile, the Mapuche people have allegedly received no benefit from the law because of lax enforcement; instead, they have reportedly been forced off their lands to make way for hydroelectric development and have suffered injury to their lands by forestry companies.”).

160. See, e.g., SIZER & PLOUVIER, *supra* note 16, at 30 (noting that recent growth in FDI in the logging sector has occurred mainly in countries that “have weak forest services, poor monitoring capacity, inefficient tax collection and auditing capacity”); Evaristus Oshionebo, *World Bank and Sustainable Development of Natural Resources in Developing Countries*, 27 J. ENERGY & NAT. RESOURCES L. 193, 219–20 (2009) (“[R]egulatory agencies in developing countries are, for the most part, poorly financed and lack requisite regulatory expertise.”).

161. See, e.g., NIKIFORUK, *supra* note 140, at 29 (arguing that Alberta’s regulatory agency “has become a captive regulator, largely funded by industry and mostly directed by lawyers and engineers with ties to the oil patch,” and that, as a consequence, its decisions are nearly always favorable to industry); Dussias, *supra* note 57, at 837 (arguing that the Peruvian government has failed to protect Achuar communities against legal violations by foreign oil companies because it does not wish to lose oil-related revenues).

resources to service it.¹⁶²) The officials charged with enforcement may have prejudices against the impacted peoples or consider them too poor and politically marginalized to require their attention.¹⁶³ And even if officials are genuinely concerned about the impacted peoples and the environment, they may assign them a lower priority than development goals.¹⁶⁴ Finally, those charged with holding MNEs accountable may be corrupt and susceptible to bribes.¹⁶⁵ Even judges are not always immune from corruption or political pressure.¹⁶⁶

162. HALLER ET AL., *supra* note 16, at 130–31 (arguing that the laxity of the Papua New Guinea government in enforcing social and environmental protections is attributable to its “huge foreign debt” and the fact that it is “so greatly dependent on revenue from resource exploitation”); Carmen G. Gonzalez, *Beyond Eco-Imperialism: An Environmental Justice Critique of Free Trade*, 78 DENV. U. L. REV. 979, 995 (2001) (“A significant factor promoting over-exploitation of forests in the South is debt. The World Bank and the International Monetary Fund have accelerated deforestation in the South by promoting export-led structural adjustment policies designed to ensure loan repayment.”).

163. See EARTHWORKS & OXFAM AMERICA, DIRTY METALS: MINING, COMMUNITIES & THE ENVIRONMENT 22 (2004), available at http://www.nodirtygold.org/dirty_metals_report.cfm (“Many indigenous peoples live in remote areas. . . . [a]nd their relative isolation from mainstream society often leaves them without basic legal and political safeguards—a condition that lends itself to abuse.”); Rodolfo Stavenhagen, *Making the Declaration on the Rights of Indigenous Peoples Work: The Challenge Ahead*, in REFLECTIONS ON THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 147, 158–59 (Stephen Allen & Alexandra Xanthaki eds., 2011) (describing pervasive racial and cultural discrimination against indigenous peoples).

164. Susan A. Crate & Natalia Yakovleva, *Indigenous People and Mineral Resource Extraction in Russia: The Case of Diamonds*, in EARTH MATTERS: INDIGENOUS PEOPLES, THE EXTRACTIVE INDUSTRIES AND CORPORATE SOCIAL RESPONSIBILITY, *supra* note 114, at 222, 239 (“[W]ith President Putin’s and now President Medvedev’s emphasis on natural resource development as Russia’s primary source of economic recovery and with much of that resource wealth found in indigenous areas, it appears that environmental issues will have a low priority. . . .”); Prasenjit Bhattacharya, *Vedanta, Avatar and the Tribal Activists*, WALL ST. J. (Feb. 9, 2010), <http://blogs.wsj.com/source/2010/02/09/vedanta-avatar-and-the-tribal-activists/> (“It’s clear to everybody that mining and metals production in India can’t take place without displacing local tribes and damaging local ecosystems. The land which is minerals rich in eastern and central India is heavily forested and home to several indigenous tribes with unique languages and cultures, besides being rich in biodiversity. But India needs steel and aluminum and copper and coal, if it is to keep growing at its current pace. . . .”).

165. SIZER & PLOUVIER, *supra* note 16, at 30 (asserting that widespread bribery and corruption inhibit regulation of logging by MNEs in many developing countries); Oshionebo, *supra* note 160, at 220 (discussing endemic corruption among regulatory agencies in developing countries).

166. See Dussias, *supra* note 57, at 830, 838 (discussing a contention by Achuar plaintiffs in a U.S. lawsuit that Peruvian courts would not provide an adequate forum for their claims against Occidental because the judicial system is corrupt, and noting the conviction for corruption of a Peruvian Supreme Court justice); see also Tan, *supra* note 80, at 199–200 (asserting that after the Philippine Supreme Court ruled in favor of an indigenous people who sought to block a mining project, the Executive Branch and industry pressured the Court to reverse itself, which it did).

Accordingly, even if a country has enacted indigenous-rights protections, its indigenous peoples often cannot count on domestic mechanisms to enforce those rights on the ground.

2. Alien Tort Statute Jurisprudence

The ATS was enacted by the First Congress in 1789 and provides, quite simply, that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”¹⁶⁷ The statute was almost never invoked for the first 190 years of its existence but has been dusted off and employed as a basis for jurisdiction in several lawsuits in recent years by alien plaintiffs, some of them indigenous.¹⁶⁸

In deciding these recent cases, U.S. courts have interpreted the ATS as making actionable only claims based on international wrongs that are precisely defined and universally condemned.¹⁶⁹ Wrongs that have been found to meet this standard include piracy, slave trading, genocide, war crimes, crimes against humanity, and torture.¹⁷⁰ By contrast, courts have rejected claims based on “mere” environmental degradation or even loss of life or health due to industrial pollution.¹⁷¹

Among the cases filed, several have been brought by non-U.S. indigenous plaintiffs against MNEs arising from development projects. These include lawsuits against Texaco by indigenous Ecuadorians,¹⁷² against Unocal by members of the Karen people of Burma,¹⁷³ against Rio Tinto by indigenous Papua New Guineans,¹⁷⁴ against Shell by members of the Ogoni

167. 28 U.S.C. § 1350 (2011).

168. See Shelli Stewart, *A Limited Future: The Alien Tort Claims Act Impacting Environmental Rights: Reconciling Past Possibilities with Future Limitations*, 31 AM. INDIAN L. REV. 743, 743–44 (2006).

169. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725–26, 732 (2004).

170. See Steven R. Swanson, *Terrorism, Piracy, and the Alien Tort Statute*, 40 RUTGERS L.J. 159, 178–79, (2008) (listing crimes that have been deemed actionable under the Alien Tort Statute [ATS] since the Supreme Court decision in *Sosa v. Alvarez-Machain*).

171. See Stewart, *supra* note 168, at 743–44; see also Mark W. Wilson, Comment, *Why Private Remedies for Environmental Torts Under the Alien Tort Statute Should Not Be Constrained by the Judicially Created Doctrines of Jus Cogens and Exhaustion*, 35 ENVTL. L. 451, 453–54 (2009) (explaining that attempts to apply the ATS to environmental torts have been unsuccessful to date).

172. *Jota v. Texaco, Inc.*, 157 F.3d 153, 155 (2d Cir. 1998).

173. *Doe v. Unocal, Inc.*, 248 F.3d 915 (9th Cir. 2001); see also BARBARA A. WEIGHTMAN, *DRAGONS AND TIGERS: A GEOGRAPHY OF SOUTH, EAST, AND SOUTHEAST ASIA* 420 (3d ed. 2011) (noting that the plaintiffs in the lawsuit were members of the Karen people and summarizing the alleged human rights abuses against them).

174. *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116 (C.D. Cal. 2002).

people of Nigeria,¹⁷⁵ and against Talisman by Nuer tribesmen of South Sudan.¹⁷⁶

Each of these cases has alleged that the defendant MNE either committed actionable human rights violations directly or aided and abetted violations by the host state. Yet none so far has resulted in a judgment on the merits in favor of the plaintiffs. The case against Unocal and some of the cases against Shell resulted in settlements,¹⁷⁷ and the case against Rio Tinto remains pending (despite the passage of a decade since its filing).¹⁷⁸ The rest of the cases have been dismissed.

Specifically, the case against Texaco was dismissed under *forum non conveniens*.¹⁷⁹ The Second Circuit dismissed the case against Talisman based on its conclusion that the plaintiffs failed to establish that the Canadian oil company aided and abetted the human rights abuses allegedly committed by the Sudanese military.¹⁸⁰ Most recently, in *Kiobel*, one of the cases against Shell, a divided panel of the Second Circuit came to the surprising conclusion that a corporation (as opposed to a natural person or a government) may not be held liable for a violation of customary international law.¹⁸¹ The decision of the majority in *Kiobel* contrasted with prior cases holding precisely the opposite,¹⁸² has been subsequently rejected by other federal circuit courts of appeal,¹⁸³ and has been criticized by some

175. *Kiobel v. Royal Dutch Petroleum Co.*, No. 02 Civ. 7618 (KMW) (HBP), 2004 U.S. Dist. LEXIS 28813 (S.D.N.Y. Mar. 11, 2004); *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 Civ. 8386 (KMW) (HBP), 1998 U.S. Dist. LEXIS 23065 (S.D.N.Y. Mar. 31, 1998).

176. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009).

177. See Jad Mouawad, *Shell Agrees to Settle Abuse Case for Millions*, N.Y. TIMES, June 9, 2009, at B1.

178. See *Sarei v. Rio Tinto PLC*, 671 F.3d 736 (9th Cir. 2011), *petition for cert. filed*, 2011 WL 5909911 (U.S. Nov. 23, 2011) (No. 11-649) (holding plaintiffs' allegations of genocide and war crimes justiciable under the ATS, but not their claims of food and medical blockade or racial discrimination); *Case Profile: Rio Tinto Lawsuit (re Papua New Guinea)*, BUS. & HUMAN RTS. RESOURCES CENTRE, <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/RioTintolawsuitrePapuaNewGuinea> (last updated July 13, 2012).

179. *Jota v. Texaco, Inc.*, 157 F.3d 153, 155 (2d Cir. 1998).

180. *Talisman*, 582 F.3d at 247-48.

181. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), *en banc rehearing denied in Kiobel v. Royal Dutch Petroleum Co.*, 2011 U.S. App. LEXIS 2200 (2d Cir. Feb. 4, 2011).

182. See, e.g., *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1263 (11th Cir. 2009) (“[W]e have . . . recognized corporate defendants are subject to liability under the ATS and may be liable for violations of the law of nations.”).

183. See *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 41 (D.C. Cir. 2011); *Flomo v. Firestone Nat'l Rubber Co.*, 643 F.3d 1013, 1021 (7th Cir. 2011); *Sarei v. Rio Tinto*, 671 F.3d 736, 747 (9th Cir. 2011).

commentators.¹⁸⁴ Nevertheless, the possibility exists that the decision will be upheld by the U.S. Supreme Court, which has granted a writ of certiorari in the case.¹⁸⁵ Indeed, at the recent oral argument on the matter, several members of the Supreme Court expressed skepticism about the applicability of the ATS in the case.¹⁸⁶ However, the Justices seemed more concerned with an issue left undiscussed in the Second Circuit opinion: the appropriateness of applying the ATS to conduct occurring outside the United States.¹⁸⁷ Were the Supreme Court to uphold the dismissal of the complaint in *Kiobel* on either ground (that is, the Second Circuit's conclusion that a corporation may not be held liable for a violation of international law, or the newly raised extraterritoriality issue), then indigenous peoples in foreign countries would be effectively precluded from using the ATS as a basis to pursue redress against MNEs whose activities cause them harm.

In sum, ATS claims against MNEs face a multitude of hurdles at present and may soon be foreclosed altogether. Accordingly, indigenous peoples certainly cannot count on the statute as an effective avenue of redress against MNEs who commit misconduct on their lands.

184. See, e.g., David Scheffer & Caroline Kaeb, *The Five Levels of CSR Compliance: The Resiliency of Corporate Liability Under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory*, 29 BERKELEY J. INT'L L. 334, 362–69 (2011).

185. *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-491, 2011 U.S. LEXIS 7522, (U.S. Oct. 17, 2011).

186. See Transcript of Oral Argument at 7–8, 11–12, *Kiobel v. Royal Dutch Petroleum*, No. 10-491 (U.S. Oct. 17, 2011), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1491.pdf; see also Mike Sacks, *Corporate Immunity Looks Likely: Supreme Court Seems Ready to Side with Shell in Human Rights Suit*, HUFFINGTON POST (Feb. 28, 2012, 12:19 PM), http://www.huffingtonpost.com/2012/02/28/corporate-immunity-supreme-court-shell-kiobel-human-rights_n_1306825.html (describing the Justices' comments during oral argument, and concluding that the attorney for Shell, Kathleen Sullivan, "appeared to have the Court's five-justice majority of Republican appointees on her side").

187. After the oral argument, the Supreme Court requested further briefing on this issue. *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-491, 2012 U.S. LEXIS 1998, at *1 (U.S. Mar. 5, 2012) ("Parties are directed to file supplemental briefs addressing . . . '[w]hether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.'"); see also John Bellinger, *Stop Press: Supreme Court Orders *Kiobel* Reargued to Address Extraterritoriality*, LAWFARE (Mar. 5, 2012, 7:03 PM), <http://www.lawfareblog.com/2012/03/stop-press-supreme-court-orders-kiobel-reargued-to-address-extraterritoriality/>. Bellinger observes that

[t]he Court's order [for further briefing on extraterritoriality] may reflect that a majority or plurality of the justices would like to decide the case on the larger issue of whether the Alien Tort Statute even applies to torts committed in other countries, rather than on the narrower issue of corporate liability

Id.

B. Progress at the International Level

Substantial progress toward protecting indigenous rights has also been made at the international level in recent years, but this progress is manifestly incomplete.

1. The Inter-American Human Rights System

One key development is the conclusion of various human rights instruments and a series of rulings from the Inter-American Commission on Human Rights and the Inter-American Court on Human Rights. These bodies were created under the auspices of the Organization of American States to interpret and apply its human rights instruments known as the American Declaration of the Rights and Duties of Man¹⁸⁸ and the American Convention on Human Rights.¹⁸⁹

Although neither of those instruments specifically mentions indigenous peoples, the Inter-American Commission and Court have interpreted them (and other sources of international law) as conferring a number of rights on such peoples.¹⁹⁰ Moreover, many members of the Organization of American States are party to a separate international agreement known as International Labor Organization Convention No. 169, which deals with indigenous rights in detail.¹⁹¹

The Inter-American Commission and Court have applied all of these instruments in a number of instances to uphold the rights of indigenous peoples faced with encroachments by outsiders onto their land. By way of example, in *Awas Tingni v. Nicaragua*, the Inter-American Court ruled that Nicaragua violated rights of the indigenous Awas Tingni tribe as enshrined in the American Convention and other instruments by authorizing a foreign company to carry out logging on the tribe's land and failing to recognize and respect the tribe's communal title to their traditional lands.¹⁹² The Court

188. American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX (1948), available at <http://www.cidh.oas.org/Basicos/English/Basic2.American%20Declaration.htm>.

189. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention].

190. See ANAYA, *supra* note 151, at 258–71.

191. International Labor Organization, Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169), June 27, 1989, 1650 U.N.T.S. 383, reprinted in 3 INT'L LABOUR ORG., INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS, 1977–1995, at 324–36 (1996); see Inter-American Commission on Human Rights, *Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, 35 AM. INDIAN L. REV. 263, 272–73 (2011) (discussing International Labor Organization Convention No. 169 and ways in which it has been applied by the bodies of the Inter-American human rights system).

192. *Mayagna Awas Tingni Cmty. v. Nicaragua*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001); see S. James Anaya & Claudio Grossman, *The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples*, 19 ARIZ. J. INT'L & COMP. L. 1, 1–2 (2002); Nigel Bankes, *International Human Rights Law and Natural Re-*

ordered the Nicaraguan government to pay the tribe damages and to formally demarcate the tribe's traditional territories.¹⁹³

Unfortunately, however, in most cases obtaining redress under the Inter-American human rights system is not a viable prospect for an indigenous people adversely impacted by a development project. One reason for this is that claims may not be asserted directly against a private actor.¹⁹⁴ In addition, only the Inter-American Court has the power to issue binding decisions, and only a relatively small number of countries (all located in Latin America or the Caribbean) have submitted to the jurisdiction of the Court.¹⁹⁵ Finally, no effective mechanism currently exists for ensuring compliance with decisions of the Court, and implementation of its decisions is often problematic.¹⁹⁶ Similar obstacles stand in the way of obtaining relief from MNEs before other human rights bodies as well.¹⁹⁷

2. Guidelines, Standards & Model Contractual Provisions

Another positive development from the perspective of indigenous peoples is the proliferation in recent years of guidelines, standards, and model contractual provisions designed to encourage MNE respect for human rights.

sources Projects Within the Traditional Territories of Indigenous Peoples, 47 ALTA. L. REV. 457, 481–84 (2010).

193. *Mayagna Awas Tingni Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶¶ 3–4; Anaya & Grossman, *supra* note 192, at 13.

194. Cristina Baez et al., *Multinational Enterprises and Human Rights*, 8 U. MIAMI INT'L & COMP. L. REV. 183, 186 (2000).

195. See, e.g., Beth Stephens, *Conceptualizing Violence Under International Law: Do Tort Remedies Fit the Crime?*, 60 ALB. L. REV. 579, 592 (1997) (“The Inter-American Commission on Human Rights issues decisions which are only recommendations, and although the Inter-American Court is authorized to issue binding judgments, several countries—including the United States—have refused to accept its jurisdiction . . .”); Sarah H. Cleveland, International Decisions, *Legal Status and Rights of Undocumented Workers*, *Advisory Opinion OC-18/03*, 99 AM. J. INT'L L. 460, 464 n.37 (2005) (listing the countries that had accepted the Inter-American Court's contentious jurisdiction as of 2005).

196. See DAVID C. BALUARTE & CHRISTIAN M. DE VOS, OPEN SOC'Y JUSTICE INITIATIVE, FROM JUDGMENT TO JUSTICE: IMPLEMENTING INTERNATIONAL AND REGIONAL HUMAN RIGHTS DECISIONS 65–74 (Nov. 2010), available at <http://www.soros.org/sites/default/files/from-judgment-to-justice-20101122.pdf> (discussing a recent study concerning the rate of implementation of the Court's decisions which found “a 29 percent rate of total implementation with the different types of remedies ordered, a 12 percent rate of partial implementation, and a 59 percent rate of non-implementation”); see also David Fautsch, Note, *An Analysis of Article 28 of the United Nations Declaration on the Rights of Indigenous Peoples, and Proposals for Reform*, 31 MICH. J. INT'L L. 449, 465–67 (2010) (quoting one of the Awas Tingni's lawyers as asserting that the implementation of the Court's decision was “plagued with unacceptable delays, dilatory practices by the government, and an overall lack of political will to recognize the full extent of the Awas Tingni's territorial claim”).

197. Baez et al., *supra* note 194, at 184–86 (noting that the U.N. Human Rights Committee and the European Court of Human Rights likewise lack jurisdiction over MNEs). See generally BALUARTE & DE VOS, *supra* note 196 (discussing problems associated with implementation of decisions by a number of different human rights bodies).

The Organization for Economic Cooperation and Development (OECD), for example, has promulgated the OECD Guidelines for Multinational Enterprises.¹⁹⁸ These encourage MNEs to respect human rights and abide by certain standards relating to labor and employment, protection of the environment, and avoidance of corruption, among other matters.¹⁹⁹ The effectiveness of these Guidelines is necessarily limited, however, because they are expressly nonbinding.²⁰⁰ And although the OECD has created a system of National Contact Points to investigate allegations of MNE noncompliance with the Guidelines, National Contact Points can do nothing more than make “recommendations” to MNEs; they cannot issue binding orders or awards.²⁰¹

U.N. Special Rapporteur John Ruggie promulgated another set of guidelines, the Guiding Principles on Business and Human Rights, in March 2011.²⁰² The U.N. Secretary-General appointed Ruggie in 2005 to investigate standards of MNE responsibility with regard to human rights and the role of states in regulating MNEs, as well as to develop appropriate human rights guidelines for MNEs.²⁰³ The result was the Guiding Principles, which confirm that MNEs “should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.”²⁰⁴ The Guiding Principles also identify a number of specific policy, operational, and due-diligence measures that MNEs should adopt with a view toward ensuring compliance with human rights.²⁰⁵ Once again, however, these guidelines are entirely nonbinding.²⁰⁶

198. OECD, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2011), available at <http://www.oecd.org/dataoecd/43/29/48004323.pdf>.

199. *Id.*

200. *Id.* at 17 (“Observance of the Guidelines by enterprises is voluntary and not legally enforceable.”).

201. See Anna Triponel, *Business & Human Rights Law: Diverging Trends in the United States and France*, 23 AM. U. INT’L L. REV. 855, 911 (2008) (describing the function of National Contact Points and noting that they may issue only “statements and recommendations”); see also JERNEJ LETNAR ČERNIČ, HUMAN RIGHTS LAW AND BUSINESS: CORPORATE RESPONSIBILITY FOR FUNDAMENTAL HUMAN RIGHTS 201 (2010) (noting that there are “problems with the National Contact Points system, particularly the inability of National Contact Points to make binding decisions on corporations under the OECD Guidelines.”).

202. Special Representative of the Secretary-General on the Issue of Human Rights & Transnational Corps. & Other Bus. Enters., *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, Human Rights Council, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie) [hereinafter *Guiding Principles*].

203. Press Release, Secretary-General, Secretary-General Appoints John Ruggie of United States Special Representative on Issue of Human Rights, Transnational Corporations, Other Business Enterprises, U.N. Press Release SG/A/934 (July 28, 2005).

204. *Guiding Principles*, *supra* note 202, at 13.

205. *Id.* at 6–27.

206. *Id.* at 6.

The World Bank Group (WBG) has also adopted certain standards to guide its lending decisions. Within the WBG, the World Bank provides financial and technical assistance to governments of developing countries,²⁰⁷ the International Finance Corporation finances private-sector projects taking place in the developing world,²⁰⁸ and the Multilateral Investment Guarantee Agency provides political-risk insurance to foreign investors.²⁰⁹ Some of the projects funded or insured by these bodies involve resource extraction on lands owned or occupied by indigenous peoples, and the WBG has come to recognize that such projects pose serious risks to local communities.²¹⁰ The WBG has therefore promulgated standards that require a recipient of funding or insurance to employ certain environmental and social controls, some of which are specifically designed to protect indigenous peoples.²¹¹ The WBG has also established an Inspection Panel and Compliance Advisor Ombudsman to monitor compliance.²¹²

Unfortunately, however, the impact of these standards has been limited to date. This is in part because WBG bodies sometimes fail to apply their own standards²¹³ and in part because these bodies do not always enforce them once applied.²¹⁴ As one commentator has asserted:

[T]he WBG has yet to achieve appreciable results in its drive towards sustainable development of natural resources. The WBG safeguard policies are frequently violated by project owners. Thus, today, many extractive projects supported by the WBG continue to pose serious environmental and social risks to host communities.²¹⁵

207. See *About Us*, WORLD BANK, <http://go.worldbank.org/3QT2P1GNH0> (last updated Apr. 2, 2012).

208. See *About IFC*, INT'L FIN. CORP., <http://www.ifc.org/about> (last visited July 13, 2012).

209. See *About MIGA*, MULTILATERAL INV. GUARANTEE AGENCY, http://www.miga.org/about/index_sv.cfm?stid=1736 (last visited July 13, 2012).

210. McGee, *supra* note 5, at 594–96 (discussing concerns investigated by the World Bank Group [WBG] regarding the impact of WBG-funded extractive-industry investments on indigenous peoples); Oshionebo, *supra* note 160, at 193–94 (“The World Bank Group . . . is actively engaged in the financing of extractive projects in many developing countries.”).

211. Natasha Affolder, *Cachet Not Cash: Another Sort of World Bank Group Borrowing*, 14 MICH. ST. J. INT'L L. 141, 141–42 (2006); McGee, *supra* note 5, at 600–02; Oshionebo, *supra* note 160, at 194–95.

212. Oshionebo, *supra* note 160, at 195.

213. Galit A. Sarfaty, Note, *The World Bank and the Internalization of Indigenous Rights Norms*, 114 YALE L.J. 1791, 1802 (2005) (noting that the World Bank’s “institutional practices regarding indigenous peoples diverge from its written policy” and discussing a report finding that the World Bank applied its indigenous peoples standards to only fifty-five of eighty-nine projects that could have affected indigenous peoples).

214. Oshionebo, *supra* note 160, at 213 (“[A] large gap exists between the WBG’s commitments embedded in its sustainability policies and the on-site implementation of these policies.”).

215. *Id.* at 203.

Another recent initiative designed in part to mitigate risks associated with FDI is a Model Mining Development Agreement (MMDA) drafted by a committee of the International Bar Association.²¹⁶ The MMDA features a menu of model contractual provisions that are designed to incorporate environmental and social controls into agreements between mining companies and governments.²¹⁷ The drafters expressly intended that the MMDA would be used not only by governments and mining companies, but also by other stakeholders, including “civil society organizations, Indigenous Peoples communities, parliamentarians and others who may engage in the [mine development] process.”²¹⁸ As useful as the MMDA may be, however, MNEs and governments have no obligation to incorporate its provisions into their agreements.

Accordingly, these guidelines, standards, and the MMDA are welcome developments but cannot be counted on to protect indigenous peoples consistently from threats associated with FDI.

3. U.N. Declaration on the Rights of Indigenous Peoples

Of all the recent developments at the international level, perhaps the most significant is UNDRIP.²¹⁹ The U.N. General Assembly adopted UNDRIP on September 13, 2007 to recognize a number of indigenous peoples’ individual and collective rights and states’ obligations in relation to such peoples.²²⁰ Among the rights of indigenous peoples articulated in UNDRIP are the rights to:

- Self-determination,²²¹
- Nonremoval from their lands or territories without their “free, prior and informed consent”,²²²
- Restitution or compensation “for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occu-

216. More information on the Model Mining Development Agreement and a copy of the document itself are available at MODEL MINING DEV. AGREEMENT PROJECT, <http://www.mmdaproject.org/> (last updated Apr. 4, 2011).

217. Int’l Inst. for Sustainable Dev., *The IBA’s Model Mining Development Agreement: A New Paradigm for Natural Resource Projects*, INVEST. TREATY NEWS, Sept. 2010, at 7, available at http://www.iisd.org/itn/wp-content/uploads/2010/09/IISD_ITN_newsletter_SEPT_WEB.pdf.

218. *Id.*

219. UNDRIP, *supra* note 25.

220. See *United Nations Adopts Declaration on Rights of Indigenous Peoples*, UN NEWS CENTRE, Sept. 13, 2007 [hereinafter *United Nations Adopts Declaration*], available at <http://www.un.org/apps/news/story.asp?NewsID=23794>.

221. UNDRIP, *supra* note 25, art. 3.

222. *Id.* art. 10.

pied, used or damaged without their free, prior and informed consent”,²²³

- Maintenance and protection of archaeological sites and other cultural manifestations;²²⁴
- Compliance with domestic and international labor laws;²²⁵
- Security in the enjoyment of their own means of subsistence and development, and free engagement in traditional economic activities;²²⁶
- Conservation of their “vital medicinal plants, animals and minerals”²²⁷ and of their local environment and the productive capacity of their lands or territories and resources;²²⁸ and
- Determination and development of their own “priorities and strategies for the development or use of their lands or territories and other resources.”²²⁹

Among the obligations of states specified in the Declaration are the duties to establish effective legal mechanisms to enforce indigenous rights;²³⁰ to ensure that “no storage or disposal of hazardous materials takes place in the lands or territories of indigenous peoples without their free, prior and informed consent”,²³¹ and to consult and cooperate in good faith with indigenous peoples in order to obtain their free and informed consent prior to (i) adopting “legislative or administrative measures that may affect them,”²³² or (ii) approving “any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.”²³³

Although UNDRIP is not legally binding in the sense of being a formal treaty that is open to ratification and independent monitoring,²³⁴ any country that endorses UNDRIP recognizes and affirms the rights articulated therein

223. *Id.* art. 28.

224. *Id.* art. 11.

225. *Id.* art. 17.

226. *Id.* art. 20.

227. *Id.* art. 24.

228. *Id.* art. 29.

229. *Id.* art. 32.

230. *Id.* arts. 8(2), 40.

231. *Id.* art. 29(2).

232. *Id.* art. 19.

233. *Id.* art. 32(2).

234. Julian Burger, *The UN Declaration on the Rights of Indigenous Peoples: From Advocacy to Implementation*, in REFLECTIONS ON THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, *supra* note 163, at 41, 55 (“It is certain that the Declaration is not binding on States, as it is not an international human rights treaty and is not open to ratification and independent monitoring.”).

and pledges to work toward their realization.²³⁵ Indeed, Article 38 provides that “States, in consultation and cooperation with indigenous peoples, *shall* take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.”²³⁶ Article 42 adds that “States *shall* promote respect for and full application of the provisions of this Declaration and *follow up the effectiveness of this Declaration.*”²³⁷

This remarkable instrument was adopted via an elaborate process that spanned several decades. It began in 1971 with the United Nations’ commission of a study on discrimination against indigenous populations, which was undertaken by U.N. Special Rapporteur José Martínez Cobo.²³⁸ While that study was in progress, Native American activists prepared a draft declaration on indigenous rights, which they presented at a U.N. meeting in 1977.²³⁹ Subsequently, Martínez Cobo issued his report in stages between 1981 and 1983, cataloguing a number of threats faced by indigenous peoples and endorsing the idea of a U.N. indigenous-rights declaration.²⁴⁰ Thereafter, a U.N. Working Group prepared a draft declaration between 1985 and 1993.²⁴¹ The U.N. Commission on Human Rights then undertook the task of revising the draft, ultimately sending its revision to the U.N. Human Rights Council, which promptly approved it.²⁴² The relevant U.N. bodies received extensive input throughout from indigenous groups, governments, scholars, and members of the public.²⁴³ Finally, in 2007, the

235. See UNDRIP, *supra* note 25, pmb1. (describing it as “as a standard of achievement to be pursued in a spirit of partnership and mutual respect” (emphasis added)). The head of the Working Group that prepared the initial draft of UNDRIP, Erica-Irene Daes, has observed that this paragraph “calls on States to play a pivotal role in promoting and protecting—that is operationalising—the rights contained in the Declaration.” See, e.g., Erica-Irene A. Daes, *The UN Declaration on the Rights of Indigenous Peoples: Background and Appraisal*, in REFLECTIONS ON THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, *supra* note 163, at 11, 39.

236. UNDRIP, *supra* note 25, art. 38 (emphasis added).

237. *Id.* art. 42 (emphasis added).

238. See Patrick Macklem, *Indigenous Recognition in International Law: Theoretical Observations*, 30 MICH. J. INT’L L. 177, 198–99 (2008).

239. Robert T. Coulter, *The U.N. Declaration on the Rights of Indigenous Peoples: A Historic Change in International Law*, 45 IDAHO L. REV. 539, 544–45 (2009).

240. See Special Rapporteur of the Sub-Comm’n on Prevention of Discrimination & Prot. of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations*, ch. XXII, ¶ 312, Human Rights Commission, U.N. Doc. E/CN.4/Sub.2/1983/21/Add.8 (Sept. 30, 1983) (by José Martínez Cobo) [hereinafter *Problem of Discrimination*]; Aliza Gail Organick, *Listening to Indigenous Voices: What the UN Declaration on the Rights of Indigenous Peoples Means for U.S. Tribes*, 16 U.C. DAVIS J. INT’L L. & POL’Y 171, 178 (2009).

241. Organick, *supra* note 240, at 179–80; see also Macklem, *supra* note 238, at 200.

242. Organick, *supra* note 240, at 183; see also Macklem, *supra* note 238, at 200.

243. See, e.g., Daes, *supra* note 235, at 38 (“The members of the [Working Group] and I made every effort to incorporate primary indigenous peoples’ aspirations, and also took into account several substantive comments and amendments proposed by various States.”); Organick, *supra* note 240, at 180–86 (describing the consultation and comment process).

General Assembly debated the final version before adopting it by a vote of 143 countries in favor, 4 against, and 11 abstentions.²⁴⁴

The four countries that voted against UNDRIP were the United States, Canada, Australia, and New Zealand.²⁴⁵ One of their principal objections was that the Declaration's reference to a right of "self-determination" could be construed as contemplating a right on the part of indigenous peoples to *secede* from the states in which they reside.²⁴⁶ These countries objected in this regard despite language elsewhere in UNDRIP and indications in the instrument's drafting history that make clear that "self-determination" in this context connotes merely *self-government* or other forms of autonomy *within* the state, not secession.²⁴⁷

UNDRIP's opponents also objected to the language concerning a right on the part of indigenous peoples to redress for displacement from traditional lands—a concern that is not surprising given that these countries' entire territories once belonged to indigenous peoples.²⁴⁸

These countries also objected to the language providing that states must consult and cooperate in good faith with indigenous peoples to obtain their free and informed consent prior to adopting legislative or administrative measures or approving extractive projects affecting them.²⁴⁹ They asserted

244. Press Release, General Assembly, General Assembly Adopts Declaration on Rights of Indigenous Peoples; 'Major Step Forward' Towards Human Rights for All, Says President, U.N. Press Release GA/10612 (Sept. 13, 2007) [hereinafter General Assembly Adopts Declaration], available at <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>.

245. Organick, *supra* note 240, at 189; General Assembly Adopts Declaration, *supra* note 244.

246. See, e.g., Organick, *supra* note 240, at 189 (summarizing the objections of Australia, New Zealand, the United States, and Canada); Sarah M. Stevenson, Comment, *Indigenous Land Rights and the Declaration on the Rights of Indigenous Peoples: Implications for Maori Land Claims in New Zealand*, 32 *FORDHAM INT'L L.J.* 298, 315 (2008) ("[T]he States voting against the Declaration were concerned that the inclusion of a right of self-determination implied a right to secession."); Press Release, U.S. Mission to the United Nations, Observations of the United States with Respect to the Declaration on the Rights of Indigenous Peoples, USUN Press Release No. 204(07) (Sept. 13, 2007), available at http://www.archive.usun.state.gov/press_releases/20070913_204.html.

247. See UNDRIP, *supra* note 25, art. 46(1) ("Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act . . . which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States."); see also Burger, *supra* note 234, at 45 ("As pointed out on many occasions by indigenous and governmental delegations, there is no right to political independence, but there were a growing number of experiences in which indigenous peoples enjoyed differing degrees and kinds of self-governing, autonomous or self-managing arrangements, thus giving practical application to the principle of self-determination.").

248. Organick, *supra* note 240, at 189; Stevenson, *supra* note 246, at 314 ("New Zealand objected to Articles 26 and 28 because, theoretically, the entire country would fall under the provisions of recognition and redress . . .").

249. Sian Elias, *First Peoples and Human Rights, A South Seas Perspective*, 39 *N.M. L. REV.* 299, 307–08 (2009); Stevenson, *supra* note 246, at 313. The relevant provisions are found at UNDRIP, *supra* note 25, arts. 19, 32(2).

that this would allow an indigenous group to “veto” legislation or projects approved by a national government and that giving a select group within society such a veto would be inconsistent with a democratic system of government.²⁵⁰ In so remarking, these countries overlooked the fact that the language in question refers to a state’s *obligations* (for example, to approve legislation impacting indigenous peoples or projects on indigenous lands only under certain conditions), not to an *indigenous people’s right* in relation to legislation or extractive projects. In other words, the relevant provisions do not purport to give indigenous peoples a special power that they can lord over other groups within society; rather, they call on states to use restraint and good faith in their dealings with indigenous peoples, in light of the acute losses states have inflicted on such peoples in the past and the unique risks that extractive projects pose to them.

Despite the foregoing objections, each of the countries that voted against UNDRIP in 2007 has subsequently endorsed it.²⁵¹ In so doing, Canada and the United States highlighted the nonbinding nature of the instrument and signaled that they will interpret it in a way consistent with their own constitutions.²⁵² The fact remains, however, that these and more than 140 other countries have now expressly recognized the rights articulated in UNDRIP²⁵³ and have pledged to pursue their realization—at least to the extent they do not conflict with fundamental national law. This is significant, because if UNDRIP were implemented faithfully, it could substantially mitigate the threats described in the Introduction and Part I, above, by ensuring that development projects are undertaken only with free, prior, and informed consent and with extensive controls in place.

Nevertheless, one should not expect UNDRIP to have a major effect on the lives of indigenous peoples in the short term. Simply put, it is one thing for UNDRIP to be adopted, and another for it to be implemented. As noted by Julian Burger, head of the U.N. Indigenous Peoples’ Programme, “like

250. Elias, *supra* note 249, at 308 (“Australia could not accept a right that allowed a particular sub-group of the population to be able to veto legitimate decisions of a democratic and representative Government.”); Stevenson, *supra* note 246, at 314 (“Articles 19 and 32(2) caused concern due to the perceived implication of a veto right for the indigenous population . . .”).

251. See Valerie Richardson, *Obama Adopts U.N. Manifesto on Rights of Indigenous Peoples*, WASH. TIMES (Dec. 16, 2010), [http://www.washingtontimes.com/news/2010/dec/16/obama-adopts-un-manifesto-on-rights-of-indigenous-1/](http://www.washingtontimes.com/news/2010/dec/16/obama-adopts-un-manifesto-on-rights-of-indigenous/).

252. *Id.* (“Before signing, Canada hedged its support by adding that the declaration would be endorsed ‘in a manner fully consistent with Canada’s Constitution and laws,’ a caveat that was included over the objection of that country’s tribal leaders.”); see also Press Release, U.S. State Dep’t, Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples PRN 2010/1829 (Dec. 16, 2010), available at <http://www.state.gov/r/pa/prs/ps/2010/12/153027.htm> (stating that the United States supports the Declaration but asserting that it is not legally binding).

253. *United Nations Adopts Declaration*, *supra* note 220.

other human rights instruments that invoke respect by States, there is a yawning gap between the words on paper and their application.²⁵⁴

A country could take any number of steps to implement UNDRIP, including adopting laws and regulations consistent with its terms and making the budgetary allocations required to enforce them.²⁵⁵ It has become apparent, however, that some countries have assigned implementation a higher priority than others,²⁵⁶ and it is questionable whether some intend to take any concrete steps *at all* in response to their endorsement of UNDRIP.²⁵⁷ Moreover, even if a country enacts new laws or regulations to implement UNDRIP, there is no reason to expect that the enforcement of those new laws or regulations will be any more effective or consistent than that of preexisting indigenous-rights laws—which, as noted above in Part II.A.1, has often been problematic.

It seems likely, therefore, that implementation of UNDRIP will be uneven and inadequate so long as it is left to individual countries to decide what, if anything, to do in order to conform with its terms, and so long as national courts remain the sole avenue available to indigenous peoples in most cases for enforcing their rights.

III. PROPOSED NEXT STEPS

As discussed above in Part II.B.3, of all the developments that have occurred to date, UNDRIP has the greatest potential to promote equilibrium between development and indigenous rights, if only it were implemented effectively. The question arises what, if anything, can be done to promote effective implementation. This Part explores options that could be pursued

254. Burger, *supra* note 234, at 41.

255. *Id.* at 56–58.

256. For example, Bolivia incorporated UNDRIP *verbatim* into domestic law on November 7, 2007. Clive Baldwin & Cynthia Morel, *Using the United Nations Declaration on the Rights of Indigenous Peoples in Litigation*, in REFLECTIONS ON THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, *supra* note 163, at 121, 124. In addition, the National Diet of Japan voted unanimously in June 2008 to recognize the Ainu as an indigenous people and called on the government to implement UNDRIP by taking comprehensive steps to protect the Ainu. See Stavenhagen, *supra* note 163, at 154.

257. Notably, the Modoc Nation has accused the United States of implicitly taking the position that its laws and practices *already* conform with UNDRIP, and thus that no specific action is required to implement UNDRIP. See Press Release, Modoc Nation, State Department White Paper Contradicts Obama's Statements at Tribal Nations Conference—Shows U.S. Endorsement of UNDRIP Really Means Politics and Business as Usual (Dec. 30, 2010), available at <http://modoc-nation.blogspot.com/2010/12/press-release-from-modoc-nation-re.html> (“[W]hen one reads the fine print of the [State Department] release that accompanied President Obama’s endorsement, one] finds that the United States government’s application and implementation of UNDRIP will be limited largely to *already existing federally recognized tribes and be carried out within the framework of existing US and state law*. In other words, even though the United States is ‘endorsing’ UNDRIP, it sees no need to alter any of its laws or policies pertaining to the indigenous peoples within its national boundaries and jurisdiction.” (emphasis added)).

toward that end, beginning with the possibility of converting UNDRIP into an international convention binding on contracting states, then turning to narrower measures targeted at the private sector.

A. *The Possibility of Converting UNDRIP Wholesale into a Binding Convention*

A number of scholars and indigenous-rights advocates have proposed that UNDRIP be followed by the enactment of an international convention that would make its principles binding on contracting states. Martínez Cobo himself viewed UNDRIP as but an interim step toward the adoption of such a convention.²⁵⁸ Likewise, certain members of the Working Group that drafted UNDRIP, and indigenous representatives who were consulted during the drafting process, advocated the eventual adoption of a binding convention.²⁵⁹ Others have similarly referred to the adoption of such an instrument as a logical and necessary next step after UNDRIP.²⁶⁰

There is no question that such a convention would be desirable from the perspective of indigenous peoples, because it would presumably spell out precisely what contracting states must do in order to implement UNDRIP and establish a mechanism for monitoring compliance. This would make it more likely that states would enact conforming legislation and put some pressure on them to enforce the same.

It must be acknowledged, however, that there are major practical obstacles in the way of such a convention, and that it is unlikely it could be accomplished any time soon. After all, it took more than thirty years to

258. Martínez Cobo called for a U.N. Working Group to “formulate a body of basic principles . . . in the text of a draft declaration, and propose *in due course a draft convention on the subject for the competent bodies of the United Nations.*” *Problem of Discrimination*, *supra* note 240, ¶ 312 (emphasis added).

259. See, e.g., Special Rapporteur on Prevention of Discrimination & Prot. of Minorities, *Report of the Working Group on Indigenous Populations on its Twelfth Session*, ¶ 117, Comm’n on Human Rights, U.N. Doc. E/CN.4/Sub.2/1994/30 (Aug. 17, 1994) (“Several indigenous representatives mentioned that the Working Group should start developing a convention on the rights of indigenous peoples, based on the draft declaration”); Daes, *supra* note 235, at 22 (“There was more or less general agreement on all sides that the [Working Group] should in the first instance produce a declaration. . . . The possibility of a convention was also mentioned, but there seemed to be general agreement that *this kind of instrument would emerge further down the road*, possibly inspired by the declaration.” (emphasis added)).

260. See, e.g., Nehla Basawaiya, *Status of Indigenous Rights in Fiji*, 10 ST. THOMAS L. REV. 197, 209 (1997) (“In order for indigenous rights [expressed in the then-draft UNDRIP] to have legal binding force, an international convention or treaty, or a consensus of particularly affected States is required to ensure the implementation of the principles and standards contained in it.”); Stavenhagen, *supra* note 163, at 151 (“[T]here is the opportunity, indeed the need, to begin working on a future convention on the rights of indigenous peoples.”); Brent D. Hessel, *United Nations Update*, 15 HUM. RTS. BRIEF 53, 53 (2007) (“The Declaration is currently non-binding, although many indigenous rights activists expect that the international community will move to adopt it as a convention within the next few years, adding it to the canon of binding international law.”).

adopt a *nonbinding* expression of indigenous rights, and several countries endorsed it only reluctantly, while emphasizing its nonbinding nature.²⁶¹ Moreover, some countries, including the United States, have a practice of avoiding human rights instruments that impose enforceable obligations on them.²⁶²

Furthermore, even if a group of countries did join together to convert UNDRIP into a binding convention, effective implementation would not be guaranteed. International conventions typically leave it to contracting states to enact implementing legislation and to domestic authorities to enforce that legislation. If that approach were followed here, enforcement might not be any more thorough and consistent in some countries than is the enforcement of existing indigenous-rights laws, despite any attempts to monitor enforcement. It is not uncommon for a country to be deficient in enforcing legislation enacted pursuant to international commitments.²⁶³

A potential solution would be to give indigenous peoples a private right of action to enforce contracting states' obligations under this hypothetical convention, analogous to that enjoyed by many investors under investment treaties. Investors have long possessed various rights under international law,²⁶⁴ but, before investment treaties, they had limited options for enforcing them. If the investor could not convince its home state to come to its aid,²⁶⁵

261. See *supra* Part II.B.3.

262. See Tsosie, *supra* note 116, at 1652 (“Many skeptics argue that international human rights law is virtually irrelevant in the United States, because the United States rarely signs on to international conventions and, when it does, almost never binds itself to them in any enforceable manner.”).

263. See, e.g., Marcos J. Basso & Adriana C.K. Vianna, *Intellectual Property Rights and the Digital Era: Argentina and Brazil*, 34 U. MIAMI INTER-AM. L. REV. 277, 313 (2003) (“Argentina and Brazil do not provide adequate enforcement of domestic and international regulations and, consequently . . . are very deficient in their protection of [intellectual property rights.]”); Srinivasan, *Regulating the Belching Dragon: Rule of Law, Politics of Enforcement, and Pollution Prevention in Post-Mao Industrial China*, 18 COLO. J. INT’L ENVTL. L. & POL’Y 267, 315 (2007) (“While China has continued to strengthen its environmental policies through . . . agreement to and attempted compliance with international environmental treaties, significant gaps persist in the enforcement of international laws.”); Daniel Patrick Ashe, Comment, *The Lengthening Anti-Bribery Lasso of the United States: The Recent Extraterritorial Application of the U.S. Foreign Corrupt Practices Act*, 73 FORDHAM L. REV. 2897, 2940 (2005) (arguing that several countries “have thus far failed to vigorously enforce anti-bribery legislation adopted pursuant to international agreement”).

264. Moshe Hirsch, *Investment Tribunals and Human Rights: Divergent Paths*, in HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION 97, 98 (P.M. Dupuy et al. eds., 2009) (describing the common origins of, and similarities between, international human rights law and investment law).

265. See RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 211–12 (2008) (discussing diplomatic protection, a mechanism whereby “[a] state . . . espouses the claim of its national against another state and pursues it in its own name”) (citation omitted); cf. Christopher J. Borgen, *Transnational Tribunals and the Transmutation of Norms: The Hegemony of Process*, 39 GEO. WASH. INT’L L. REV. 685, 694 (2007) (observing that diplomatic protection is unreliable and often not available).

it was generally limited to filing a lawsuit in host-state courts.²⁶⁶ That option was frequently unsatisfactory because of the risk that local courts would treat the host state as immune from jurisdiction, be biased against the investor, or otherwise deny the investors justice.²⁶⁷ In recent decades, countries have addressed this situation by signing a multitude of investment treaties with a view toward promoting FDI and mitigating the risks to investors associated with it.²⁶⁸ These treaties provide covered investors with a private right of action, authorizing them to bring claims before an international arbitral tribunal when they believe their rights under international law have been violated.²⁶⁹ Large numbers of investors have turned to this mechanism.²⁷⁰

Governments have not yet taken any comparable action for the benefit of indigenous peoples, but such peoples, too, would benefit from a private right of action to uphold their rights under UNDRIP and any implementing convention.²⁷¹ Such a right of action could be readily supplied by including language in the convention by which the contracting states would submit themselves to the jurisdiction of international tribunals, just as they have done in investment treaties.

It is unlikely, however, that states would agree to such a mechanism. Many are already chafing under their adherence to investment treaties, for the very reason that the treaties subject them to the jurisdiction of interna-

266. See DOLZER & SCHREUER, *supra* note 265, at 214–15.

267. *Id.*

268. *Id.* at 1–2 (describing the recent profusion of investment treaties); *id.* at 22 (“[T]he purpose of investment treaties is to address the typical risks of a long-term investment project, and thereby to provide for stability and predictability in the sense of an investment-friendly climate.”).

269. See *id.* at 124–28 (observing that provisions in investment treaties may incorporate preexisting principles of customary international law or establish independent standards); *id.* at 220–21 (explaining that investment treaties usually provide an arbitration mechanism for enforcing their provisions); Pamela B. Gann, *The U.S. Bilateral Investment Treaty Program*, 21 *STAN. J. INT’L L.* 373, 390 (1985) (noting that while investors are protected by certain rules and principles of international law even in the absence of an applicable investment treaty, incorporating them into an investment treaty “may give those rules and principles greater effectiveness . . . through the dispute settlement provisions”).

270. See Borgen, *supra* note 265, at 697–99 (explaining how investment treaties have improved investors’ prospects for recovery when disputes arise with host states, and describing the recent explosion in the volume of investor-state arbitration under investment treaties).

271. See Francesco Francioni, *Access to Justice, Denial of Justice, and International Investment Law*, in *HUMAN RIGHTS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION*, *supra* note 264, at 63, 71 (asking whether “the principle of access to justice, as successfully developed for the benefit of investors through the provision of binding arbitration, ought to be matched by a corresponding right to remedial process for individuals and groups adversely affected by the investment”); Valentina S. Vadi, *When Cultures Collide: Foreign Direct Investment, Natural Resources, and Indigenous Heritage in International Investment Law*, 42 *COLUM. HUM. RTS. L. REV.* 797, 833 (2011) (“While multinational corporations . . . have been afforded procedural rights, the procedural rights of the investment-affected communities, including indigenous peoples, have remained almost unchanged.”).

tional tribunals,²⁷² and it is hard to see countries authorizing an additional category of potential claims against them. Indeed, states arguably have substantially less incentive to adopt a convention exposing themselves to UNDRIP-related claims than to adopt investment treaties. The latter at least hold out the prospect of helping the country attract FDI, but no comparable economic benefits would flow from a convention implementing UNDRIP.

B. Measures Targeted at the Private Sector

Although states are unlikely to adopt a convention in the near term making UNDRIP binding on themselves—let alone one giving indigenous peoples a private right of action thereunder—narrower measures targeted at the private sector may be feasible. The Subsections below first explain the basis for applying UNDRIP to the private sector, then explore options for making UNDRIP binding on private actors and securing indigenous peoples' access to a reliable mechanism for pursuing redress for violations (to which I will refer as the Private-Sector Measures).

1. The Basis for Applying UNDRIP to the Private Sector

At first blush, the idea of implementing UNDRIP vis-à-vis the private sector may seem curious, considering that UNDRIP was adopted by *states*, not private actors, and that many of its provisions are expressly directed at *states*, not private actors. In fact, however, there are compelling reasons for applying UNDRIP to the private sector.

Notably, several provisions of UNDRIP explicitly anticipate violations of indigenous rights by private actors. For example, Article 40 provides that “[i]ndigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights.”²⁷³ Moreover, many of the rights mentioned in UNDRIP can be violated by private actors just as readily as by states. These include the rights to maintenance and protection of cultural sites, compliance with international and domestic labor laws, maintenance of the means of subsistence and free engagement in traditional economic activities, and conservation of traditional medicines and the environment.²⁷⁴ In addition, the U.N. Permanent Forum on Indigenous Issues—which is responsible for

272. See George K. Foster, *Striking a Balance Between Investor Protections and National Sovereignty: The Relevance of Local Remedies in Investment Treaty Arbitration*, 49 COLUM. J. TRANSNAT'L L. 201, 207–08 (2011).

273. UNDRIP, *supra* note 25, art. 40 (emphasis added).

274. See *supra* notes 221–233 and accompanying text. An argument can be made that Article 28(1) also applies in part to private actors. See UNDRIP, *supra* note 25, art. 28(1) (“Indigenous peoples have the right to redress . . . for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been . . . used or damaged without their free, prior and informed consent.”). This provision is not on its face limited to states.

promoting implementation of the Declaration—has explicitly called on the private sector to comply with UNDRIP.²⁷⁵

In fact, not only does UNDRIP contemplate compliance by the private sector, but states are obliged to ensure such compliance. One of Special Rapporteur Ruggie's principal findings was that states have an obligation under customary international law to ensure that enterprises organized under their law, or operating within their territory, respect human rights.²⁷⁶ Because indigenous rights are a species of human rights,²⁷⁷ this obligation extends to protecting the rights of indigenous peoples.

2. Ways to Make UNDRIP Binding on Private Actors and Give Indigenous Peoples an Effective Private Right of Action

If a state intended to make good on its obligation to ensure private-sector compliance with UNDRIP, there are various ways it could do so.

One possibility would be to join together with other states to adopt an international convention that would incorporate the principles of UNDRIP relevant to the private sector and require contracting states to enact legislation making those principles binding on private actors subject to their jurisdiction. Such an instrument might face less opposition than one converting UNDRIP wholesale into a binding convention, for two reasons.

First, it would make the relevant principles binding only on the private sector, not on contracting states themselves.

Second, the principles of UNDRIP that are relevant to the private sector are relatively noncontroversial. As noted previously, these include, at a min-

275. See, e.g., United Nations Permanent Forum on Indigenous Issues [UNPFII], *Implementation of the Recommendations of the Six Mandated Areas of the Permanent Forum and on the Millennium Development Goals*, ¶ (a)2, U.N. Doc. E/C.19/2008/L.4 (Apr. 28, 2008) (“The Permanent Forum urges that the private sector and its regulators incorporate the rights of indigenous peoples, recognized in the United Nations Declaration on the Rights of Indigenous Peoples, into their plans for economic development in indigenous territories.”); UNPFII, International Expert Group Meeting, New York, N.Y., Jan. 14–16, 2009, *Background Paper, Mandate of the United Nations Permanent Forum on Indigenous Issues Under Article 42 of the UN Declaration on the Rights of Indigenous Peoples*, at 8, U.N. Doc. PFII/2009/EGM1/2 (“How can UNPFII encourage States to require private sector actors to also comply with the provisions of the UN Declaration?”).

276. See *Guiding Principles*, *supra* note 202, at 6, foundational princ. I.A.1 (“States must protect against human rights abuse within their territory and/or jurisdiction by *third parties, including business enterprises*. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.” (emphasis added)); *id.* at 7, foundational princ. I.A.2 (“States should set out clearly the expectation that *all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations*.” (emphasis added)).

277. See S. James Anaya, *International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State*, 21 ARIZ. J. INT’L & COMP. L. 13, 14–16 (2004) (asserting that “[n]umerous processes within the international system have focused on the common set of ongoing problems that are central to the demands of indigenous groups,” and that these “now reveal a contemporary body of international human rights law on the subject,” including the then-draft UNDRIP).

imum, the rights of indigenous peoples to maintenance and protection of their cultural sites, compliance with international and domestic labor laws, maintenance of their means of subsistence and free engagement in traditional economic activities, and the conservation of their traditional medicines and environment.²⁷⁸ Significantly, none of these rights featured among the objections to the Declaration raised by the countries that voted against it in the General Assembly in 2007.²⁷⁹ As discussed above in Part II.B.3, those objections related principally to the language about self-determination, redress for traditional lands, and the need for *states* to obtain free, prior, and informed consent from indigenous peoples before enacting legislation affecting them or approving extractive projects on their lands. None of that controversial language is applicable to the private sector.

Yet even if the political will were lacking to enact an international convention targeted at the private sector, individual states would be free to adopt domestic legislation to the same effect. Indigenous peoples, indigenous-rights advocates, the U.N. Permanent Forum on Indigenous Issues, and others interested in seeing UNDRIP implemented effectively should make it a high priority to encourage states to do so.

It is important to recognize, however, that it would not be enough for states to make the relevant provisions of UNDRIP binding on private actors, whether through an international convention or through domestic legislation. They would also need to establish effective mechanisms of redress for any violations, as contemplated by Article 40 of UNDRIP. And merely giving indigenous peoples access to national courts is unlikely to be effective in many cases, particularly when the defendant is a large and powerful MNE whose activities provide substantial revenues for the government. It would be much better from the perspective of indigenous peoples if they could bring claims in a forum outside of any national judicial system, preferably of an international nature.²⁸⁰ Such a forum might consist, for example, of an international arbitral tribunal or human rights body.

278. See *supra* notes 273–274 and accompanying text.

279. See Organick, *supra* note 240, at 189 (summarizing the objections of Australia, New Zealand, the United States, and Canada). See also the discussion of those countries' objections *supra* Part II.B.3.

280. Some scholars have advocated, in general terms, giving victims of human rights abuses access to some sort of alternative—and preferably international—forum for bringing claims against MNEs and other violators. See, e.g., Avnita Lakhani, *The Role of Citizens and the Future of International Law: A Paradigm for a Changing World*, 8 CARDOZO J. CONFLICT RESOL. 159, 173–74 (2006) (arguing that nonstate actors such as victims of human rights abuses should have the ability to pursue claims against violators and that “ADR mechanisms, in the form of mediation, arbitration, and advanced international negotiation” could be part of the solution); Lillian Aponte Miranda, *The Hybrid State-Corporate Enterprise and Violations of Indigenous Land Rights: Theorizing Corporate Responsibility and Accountability Under International Law*, 11 LEWIS & CLARK L. REV. 135, 176–79 (2007) (arguing that MNEs should “bear direct human rights responsibilities to the indigenous peoples affected by” their projects, and “bear direct legal accountability at the international level for breaches” thereof); Todd Weiler, *Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order*, 27 B.C. INT’L & COMP. L. REV. 429, 437–38 (2004)

In some cases indigenous peoples may be able to secure *for themselves* access to such a forum. In particular, if an indigenous people is approached by an MNE about signing an Impact and Benefits Agreement, ILUA, or similar agreement, it could insist that the contract incorporate the relevant provisions of UNDRIP and refer to international arbitration any disputes that may arise in connection with the agreement. Agreement by the MNE to arbitrate would be required for an arbitral forum to be available, because arbitration is a creature of contract and normally requires the consent of all parties to the proceeding.²⁸¹

As discussed in Part I.B, however, companies operating on indigenous lands often fail to consult with the impacted peoples, let alone seek their permission for their activities. In such cases, some sort of outside intervention would be necessary to induce investors to consent to arbitrate.

One possibility in this regard would be for governments to enact legislation requiring that companies engaged in development projects on indigenous lands (whether locally or abroad) give their consent to arbitrate with impacted peoples as a condition to obtaining any governmental licenses or permits or to trading their securities publicly. Host states sometimes require companies seeking access to oil reserves to accept *other* obligations designed to protect the environment or indigenous peoples, which are typically incorporated into the contract by which the investor receives its authorization to exploit the reserves.²⁸² Such obligations may include, for example, commitments to take specified measures to minimize adverse environmental, social, or cultural impacts of the project.²⁸³ In addition, governments sometimes impose restrictions on companies whose securities are publicly traded in their territories, including in connection with their overseas operations.²⁸⁴ A commitment to arbitrate with impacted indigenous

(discussing the possibility of drafting individual investment treaties to provide individuals impacted by an investment with access to an “impartial, independent adjudicatory mechanism” to hear claims for alleged human rights violations).

281. See, e.g., *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1774 (2010) (“[A]n arbitrator derives his or her powers from the parties’ agreement to forgo the legal process and submit their disputes to private dispute resolution.”); MARGARET L. MOSES, *THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 18 (2008) (“Arbitration is a creature of consent, and that consent should be freely, knowingly, and competently given.”).

282. See ERNEST E. SMITH ET AL., *INTERNATIONAL PETROLEUM TRANSACTIONS* 673–77 (2d ed. 2000) (describing this practice, and quoting, as an example, provisions from a license contract accepted by a subsidiary of Shell relating to a block in the Peruvian Amazon).

283. See *id.* at 676–77 (quoting provisions from a license contract accepted by a subsidiary of Shell providing that it “commits itself to comply with” certain environmental standards laid down in a Peruvian governmental decree and to “make the necessary efforts in order to avoid to the extent possible affecting the native or peasant communities”).

284. U.S. law imposes a number of requirements on publicly traded companies that can apply to their overseas operations. One of these is the Foreign Corrupt Practices Act’s prohibition on offering or giving anything of value to foreign officials to obtain or retain business. Foreign Corrupt Practices Act, 15 U.S.C. § 78(dd) (2011); see Duane Windsor & Kathleen A. Getz, *Multilateral Cooperation to Combat Corruption: Normative Regimes Despite Mixed*

peoples could be made a further condition to accessing indigenous resources, obtaining governmental benefits, or engaging in the public trading of securities.

By the same token, international financial institutions like the entities of the WBG could insist that companies undertaking a development project on indigenous lands consent to arbitrate disputes with those peoples as a condition to obtaining financing or insurance. The International Finance Corporation and the Multilateral Investment Guarantee Agency already sometimes require governments or MNEs to comply with the indigenous-rights standards discussed in Part II.B.2, above, and incorporate those standards into their agreements.²⁸⁵ They could also require the MNEs with whom they contract to agree to arbitrate directly with indigenous peoples any disputes that may arise relating to rights enshrined in UNDRIP.

There is precedent for mandating arbitration with a third party in such a manner. For example, a quasi-regulatory organization in the United States known as the Financial Industry Regulatory Authority requires that any securities firm seeking to register with it (known as a “Member”) commit to arbitrate any disputes relating to the Member’s business that may arise between the Member and the Member’s customers (investors who retain the Member as a securities broker).²⁸⁶ This ensures that customers have an opportunity to arbitrate disputes with Members if they so choose²⁸⁷—which may be beneficial in some instances, particularly in small cases in which the costs of pursuing a claim in litigation would be prohibitive.²⁸⁸ Governments

Motives and Diverse Values, 33 CORNELL INT’L L.J. 731, 742–48 (2000). Another is a provision of the Dodd-Frank Act that requires publicly traded oil, natural gas, and mining companies to disclose information related to payments made to foreign governments in connection with their operations. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1504–05 (2010).

285. Sarfaty, *supra* note 213, at 1799 (“[T]he [World] Bank often incorporates provisions from its policies into its loan and credit agreements. For instance, as part of its loan agreement, a borrower country may be required to adopt and implement a resettlement action plan designed in accordance with the Bank’s operational policy on voluntary resettlement.”).

286. This requirement is imposed by the Financial Industry Regulatory Agency Code of Arbitration Procedure for Customer Disputes, R. 12200 (2011) [hereinafter FINRA Code], available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4106; see Cory Alpert, *Financial Services in the United States and United Kingdom: Comparative Approaches to Securities Regulation and Dispute Resolution*, 5 BYU INT’L L. & MGMT. REV. 75, 83–84 (2008).

287. Customers have choice in this regard if they have not signed a predispute arbitration agreement with the Member obliging the customer to arbitrate disputes. See Alpert, *supra* note 286, at 84 (explaining that under the FINRA Code “[b]rokerage customers are only compelled to arbitrate claims against their financial service providers if they are subject to a pre-dispute arbitration clause,” whereas “members of FINRA are always bound to arbitration if their customer so chooses”).

288. Jill I. Gross, *The End of Mandatory Securities Arbitration?*, 30 PACE L. REV. 1174, 1192 (2010) (“[Without the arbitration requirement imposed by the FINRA Code, and in the absence of a binding arbitration agreement between the parties,] industry players would have good reason to decline a customer’s post-dispute request for arbitration, especially for smaller cases. Because litigation costs would be prohibitive for low dollar-value disputes, and

and international financial institutions could similarly provide such an opportunity to indigenous peoples impacted by development projects by mandating that the MNEs undertaking those projects agree to arbitrate with those peoples, if and when they elect to enforce their rights in an arbitral forum.

If an MNE could be induced to arbitrate disputes relating to rights enshrined in UNDRIP, various forms of arbitration could be designated, including several employed for investment treaty disputes. These include arbitration under the rules of the United Nations Commission on International Trade Law (UNCITRAL),²⁸⁹ the Stockholm Chamber of Commerce,²⁹⁰ or the London Court of International Arbitration.²⁹¹ Each of these has been enlisted by investment treaties to adjudicate claims arising thereunder²⁹² and could be similarly employed to hear UNDRIP-related claims.

Arbitral tribunals would be attractive fora for such disputes in a number of ways. They would be neutral in nature²⁹³ and could award both monetary and injunctive relief.²⁹⁴ In addition, so long as the arbitration involved an MNE or otherwise had an international component,²⁹⁵ any resulting award

willing practitioners would be scarce, customers would likely decide not to pursue the claims.”).

289. United Nations Comm’n on Int’l Trade Law [UNCITRAL] Arbitration Rules, G.A. Res. 65/22, U.N. Doc. A/RES/65/22 (Jun. 25, 2010) [hereinafter UNCITRAL Arbitration Rules], available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf>.

290. STOCKHOLM CHAMBER OF COMMERCE, ARBITRATION RULES OF THE ARBITRATION INSTITUTE OF THE STOCKHOLM CHAMBER OF COMMERCE (2010), available at <http://www.sccinstitute.com/skiljedomsregler-4.aspx>.

291. LONDON COURT OF INT’L ARBITRATION, LCIA ARBITRATION RULES (1998), available at <http://www.lcia.org/>.

292. See, e.g., Barnali Choudhury, *Democratic Implications Arising from the Intersection of Investment Arbitration and Human Rights*, 46 ALTA. L. REV. 983, 987 (2009) (noting that many investment treaty disputes are adjudicated under the UNCITRAL rules). For examples of investment treaty arbitrations adjudicated under the Stockholm Chamber of Commerce Rules and the London Court of International Arbitration Rules, respectively, see LLC Amto v. Ukraine, SCC Arb. No. 080/2005 (2008), <http://www.asil.org/files/amto.pdf>; EnCana Corp. v. Ecuador, LCIA Case No. UN3481 (2006), <http://ita.law.uvic.ca/documents/EncanaAwardEnglish.pdf>.

293. See MOSES, *supra* note 281, at 2 (noting that “[a]rbitrators are private citizens” who “do not belong to any government hierarchy” and are “all expected to be independent and impartial”).

294. See NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 534 (5th ed. 2009) (“There is no objection in principle to an arbitral tribunal granting relief by way of injunction, if requested to do so, either on an interim basis or as final relief.”); see also *Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr, S.A.*, 533 F.3d 1349 (11th Cir. 2008) (affirming a district court decision recognizing and enforcing under the New York Convention an injunction issued by an international arbitral tribunal against a Venezuelan corporation).

295. The New York Convention applies only to awards rendered in a foreign country or “not considered domestic” under the law of the country where they were made. Convention

should be capable of recognition and enforcement in any country that adheres to the New York Convention, subject to the (relatively narrow) exceptions set forth in Article V of that Convention.²⁹⁶ This would allow for possible enforcement in any of the more than 140 countries that currently adhere to the New York Convention.²⁹⁷

Some might be concerned that such tribunals would be insufficiently protective of human rights in light of the tribunals' compositions. In arbitrations under the UNCITRAL Rules, for example, each party typically selects one arbitrator, and the third—who serves as the presiding arbitrator—is selected by the two party-appointed arbitrators (if they are able to agree on a choice), or by an independent appointing authority (if they are not).²⁹⁸ While indigenous claimants in such cases might be inclined to appoint a human rights expert, the respondent would likely appoint a lawyer or scholar from a business background, and it would be anyone's guess whom would be chosen as the presiding arbitrator. If that person, too, came from a business background, then a majority of the tribunal may tend to view matters from

on the Recognition and Enforcement of Foreign Arbitral Awards art. 1(1), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention], *reprinted in* 9 U.S.C. § 201 (historical and statutory notes). In the United States, the latter phrase has been interpreted to refer to awards rendered locally but that involve at least one foreign party or arise from a contract with a substantial foreign nexus. *See, e.g., Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1441 (11th Cir. 1998); *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 932 (2d Cir. 1983). It bears noting that some countries, including the United States, made reservations when acceding to the New York Convention to the effect that they will apply it only to awards that (i) were rendered in other New York Convention signatories, and (ii) arise out of "commercial" legal relationships. *See* George K. Foster, *Collecting from Sovereigns: The Current Legal Framework for Enforcing Arbitral Awards and Court Judgments Against States and Their Instrumentalities, and Some Proposals for Its Reform*, 25 ARIZ. J. INT'L & COMP. L. 665, 691 (2008). The former reservation would not be a problem so long as the relevant arbitration agreement called for arbitration in a New York Convention signatory. The latter should not be a problem either, because in arbitrations between indigenous peoples and MNEs involving alleged breaches of UNDRIP, the conduct at issue (typically resource extraction) would plainly be commercial in nature. In further support of this point see Ian H. Eliasoph, *Missing Link: International Arbitration and the Ability of Private Actors to Enforce Human Rights Norms*, 10 NEW ENG. J. INT'L & COMP. L. 83, 114 (2004) (noting that "[m]ost countries have declined to adopt the commercial reservation and thus, in those countries it provides no barrier at all" and arguing that "most countries that have adopted the reservation have construed it very broadly," such that "[a]lmost any contract [containing an arbitration clause] that has a significant nexus to a commercial enterprise will likely" fall under the New York Convention).

296. New York Convention, *supra* note 295, art. V. These grounds are designed to confirm that the dispute was covered by a valid arbitration agreement, as well as to ensure the procedural integrity of the arbitration proceeding and the award's consistency with local public policy, without inviting a court to substitute its own judgment for that of the tribunal on the merits of the dispute. *See* BLACKABY ET AL., *supra* note 294, at 638–42.

297. *Status of Treaties: Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, UNITED NATIONS TREATY COLLECTION, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&lang=en (last visited July 13, 2012).

298. UNCITRAL Arbitration Rules, *supra* note 289, art. 9.

the perspective of MNEs, and to lack familiarity with, or even to be skeptical of, indigenous rights. Critics of investment treaty arbitration have accused tribunals of having such a proinvestor bias or lack of familiarity with human rights norms, and the same charge could be levied here.²⁹⁹

Governments, international financial institutions, and indigenous peoples could seek to deal with this concern by insisting that the relevant arbitration agreements impose eligibility criteria on arbitrators designed to ensure their familiarity with, and commitment to, human rights and indigenous rights specifically.³⁰⁰ Yet this would significantly limit the pool of available arbitrators and might undermine the legitimacy of this adjudicative mechanism from the perspective of investors, governments, and the general public. After all, tribunals empanelled to hear disputes for violations of UNDRIP would be required to delicately balance a variety of interests—not only those of indigenous peoples, but also those of investors, governments, and the general public.³⁰¹ For this reason, the diverse compositions of international arbitral tribunals should not be seen as a drawback. To the contrary, this feature could enhance tribunals' legitimacy and may make it more likely that this form of dispute resolution would be made available to indigenous peoples in the first place.

299. See, e.g., LUKE ERIC PETERSON & KEVIN R. GRAY, INT'L INST. FOR SUSTAINABLE DEV., INTERNATIONAL HUMAN RIGHTS IN BILATERAL INVESTMENT TREATIES AND IN INVESTMENT TREATY ARBITRATION 34 (Apr. 2003), available at http://www.iisd.org/pdf/2003/investment_int_human_rights_bits.pdf (“[I]nvestment treaties and the common arbitral rules are virtually bereft of guidelines for the selection of arbitrators. A party may elect to choose an arbitrator with human rights expertise, but there are, at present, no assurances that those selected to preside over disputes will display knowledge and sensitivity to human rights concerns.”). But see James D. Fry, *International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity*, 18 DUKE J. COMP. & INT'L L. 77, 119–20 (2007) (“Some commentators see international arbitration as inherently skewed in favor of investors because arbitrators usually lack the expertise to fully take into consideration issues of public interest. However . . . arbitrators have shown a surprising willingness and ability to take into consideration decisions from human rights tribunals. Ultimately, this perceived bias, therefore, is likely not as strong as these commentators suggest.”).

300. The parties to an arbitration agreement generally may specify in advance eligibility criteria for arbitrators who may serve in connection with future disputes. See GARY B. BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING 70 (2d ed. 2006) (“Arbitration agreements can either directly specify or indirectly influence the qualifications and characteristics of the arbitrators.”). Moreover, requiring human rights expertise for cases involving human rights would not be unprecedented. Notably, Article 52(1) of the American Convention provides that, in order to be eligible to serve on the Inter-American Court, a prospective judge must be “of the highest moral authority and of recognized competence in the field of human rights . . .” American Convention, *supra* note 189, art. 52(1) (emphasis added).

301. See Nienke Grossman, *Legitimacy and International Adjudicative Bodies*, 41 GEO. WASH. INT'L L. REV. 107, 121, 139–40 (2009) (arguing that a key component of the legitimacy of an international adjudicative body is “the perception that the tribunal is fair and unbiased,” and that “some kind of overall representativeness is important to states agreeing to adjudication in an international tribunal”).

As an alternative to arbitral tribunals, states could make human rights courts available to hear claims by indigenous peoples against MNEs within their jurisdiction. Yet this would require an amendment to the instruments from which those courts derive their power,³⁰² and such a radical transformation of their mandates would be exceptionally difficult to achieve. For that reason, reliance on arbitral tribunals would be more practical.

IV. POTENTIAL OBJECTIONS AND HOW THEY CAN BE ADDRESSED

Any effort to adopt the Private-Sector Measures outlined in Part III.B would no doubt encounter substantial opposition, particularly from the MNEs that would be most directly affected. Moreover, even those interested in protecting and promoting indigenous rights may be skeptical of the feasibility of these measures. The Sections below identify and respond to a number of potential objections and concerns in this regard.

A. *The Proposed Measures Are Feasible*

It is worth asking, as a preliminary matter, whether the Private-Sector Measures have any realistic prospects for adoption. After all, they would have to be adopted by states in which indigenous peoples reside or in which the companies investing on indigenous lands are based, and many of those countries have been accused of violating (or allowing MNEs to violate) indigenous rights in connection with development projects. Why should anyone expect those same states to aid indigenous peoples by making aspects of UNDRIP binding on companies within their jurisdiction and incentivizing those companies to arbitrate with indigenous peoples? There is no question that convincing many states to take either step would be an uphill battle, but it is by no means out of the question.

As noted previously, many countries with significant indigenous populations have proven generally amenable to *enacting* indigenous-rights protections; it is the *enforcement* of those protections that is the problem.³⁰³ A strength of the proposed Private-Sector Measures is that governments would be required to do very little beyond the initial step of enacting them,

302. This is due to the fact that human rights courts currently have jurisdiction only over states, not private actors. See Stephen G. Wood & Brett G. Scharffs, *Applicability of Human Rights Standards to Private Corporations: An American Perspective*, 50 AM. J. COMP. L. 531, 545 n.72 (2002) ("Currently, international bodies with enforcement capabilities, such as the U.N. Human Rights Committee, the European Court of Human Rights, and the Inter-American Court of Human Rights, have enforcement capacity over states but not non-state actors."); see also Baez et al., *supra* note 194, at 186 ("It would take a major amendment to the instruments on which [human rights courts'] powers rest to give them jurisdiction over MNEs.").

303. See *supra* Part II.A.

because the dispute-resolution mechanism they contemplate would operate outside of the national judicial system.³⁰⁴

The possibility exists, of course, that MNEs and other interest groups would oppose the Private-Sector Measures more vigorously than they opposed existing indigenous-rights protections. MNEs have lobbied strenuously—and successfully—against other attempts to regulate their conduct. At the international level, such attempts have included the movements to adopt the U.N. Code of Conduct of Transnational Corporations (TNC Code)³⁰⁵ in the 1980s and the Norms on the Responsibilities of Transnational Corporations (Norms) in the 2000s.³⁰⁶ Yet the Private-Sector Measures are distinguishable from those prior unsuccessful initiatives.

One key distinction is that the Private-Sector Measures would be much narrower than the TNC Code or the Norms. The TNC Code and the Norms would have applied to *all* MNEs and would have imposed restrictions in such diverse areas as human rights, corruption, relations between MNEs and host states, consumer protection, workers' rights, and protection of the environment.³⁰⁷ The Private-Sector Measures, by contrast, would apply only to companies engaged in investment activity on indigenous lands and would implicate only those companies' interactions with, and impacts on, the indigenous peoples in question.

304. While indigenous claimants that prevailed in an arbitration against an MNE might need to petition a national court to recognize and enforce the award (if the MNE did not comply voluntarily), the grounds for refusing recognition of an international arbitral award are generally quite limited. *See supra* note 296 and accompanying text. Moreover, even if national courts were not inclined to recognize the award, the fact that a neutral international tribunal had upheld the claim would have some value in and of itself. This would help legitimize the indigenous claimants' position and assist them in a broader effort to publicize their plight and place pressure on the relevant MNE and government to respect their rights. *See* Kevin Banks, *Trade, Labor and International Governance: An Inquiry into the Potential Effectiveness of the New International Labor Law*, 32 BERKELEY J. EMP. & LAB. L. 45, 125 (2011) ("The main contribution of international tribunals . . . has been to validate the claims of social movements that have already achieved considerable political purchase, and to provide a justification or cover that allows political authorities to make concessions in the face of already mounting pressure.").

305. U.N. CTR. ON TRANSNATIONAL CORPS., THE UNITED NATIONS CODE OF CONDUCT ON TRANSNATIONAL CORPORATIONS, U.N. Doc. ST/CTC/SER.A/4, U.N. Sales No. E.86.II.A.15 (1986).

306. *See* U.N. Comm'n on Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/38/Rev.2 (Aug. 26, 2003).

307. U.N. CTR. ON TRANSNATIONAL CORPS., *supra* note 305, at 28–45; U.N. Comm'n on Human Rights, *supra* note 306; John H. Knox, *Horizontal Human Rights Law*, 102 AM. J. INT'L L. 1, 38 (2008) ("[I]f adopted as a binding instrument, the Norms could be read to require every business in the world to comply with every human right."). For the U.N. Code of Conduct of Transnational Corporations' putative scope of application, see U.N. CTR. ON TRANSNATIONAL CORPS., *supra* note 305, at 8 (defining "transnational corporation" and explaining that the definition "is designed to cover all enterprises that operate across national boundaries and in any field of activity, through affiliates or entities in two or more countries").

Another distinction is that the TNC Code and the Norms would have required adoption by the international community and other concerted international action.³⁰⁸ The Private-Sector Measures *could* be implemented through an international convention but would not *have* to be.

It is also notable that while the efforts to adopt the TNC Code and the Norms failed, initiatives to impose narrower restrictions on the private sector have repeatedly borne fruit, even at the international level. Achievements in this regard include the OECD Anti-Bribery Convention,³⁰⁹ the U.N. Convention Against Corruption,³¹⁰ the Basel Convention on the Control of Transboundary Movements of Hazardous Waste,³¹¹ the Convention on Civil Liability for Oil Pollution Damage,³¹² the Council of Europe Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment,³¹³ and the International Convention for the Regulation of Whaling.³¹⁴ In fact, in light of the number and variety of international instruments regulating private-sector conduct, the failure to regulate investment on indigenous lands is conspicuous.

*B. Effective Implementation of UNDRIP Would Not Unduly
Inhibit the Exploitation of Natural Resources
or Impede Development*

Opponents of the Private-Sector Measures may argue that effectively implementing UNDRIP vis-à-vis the private sector would unduly inhibit the exploitation of key natural resources and impede economic development. For the reasons explained below, any such contention would be unfounded.

308. See U.N. CTR. ON TRANSNATIONAL CORPS., *supra* note 305, at 24 (noting that the U.N. Code of Conduct of Transnational Corporations would have “emphasize[d] the importance of intergovernmental co-operation in accomplishing its objectives, and provide[d] a framework for such co-operation . . . as well as for implementation efforts at the national and international levels”); Knox, *supra* note 307, at 37–39 (observing that the Norms “set out sweeping human rights duties for corporations that would apply directly, as a matter of international law,” but that “to become part of international law, they would have to be adopted through some type of intergovernmental process”).

309. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. TREATY DOC. NO. 105-43 (1998), 37 I.L.M. 1 [hereinafter OECD Anti-Bribery Convention].

310. United Nations Convention Against Corruption arts. 15, 26, *opened for signature* Dec. 9, 2003, S. TREATY DOC. NO. 109-6 (2005), 2349 U.N.T.S. 41 (entered into force Dec. 14, 2005).

311. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal arts. 2(14), 4(3), 9(5), *adopted* Mar. 22, 1989, 1673 U.N.T.S. 57.

312. International Convention on Civil Liability for Oil Pollution Damage art. 1(2), Nov. 29, 1969, 26 U.S.T. 765, 973 U.N.T.S. 3; Protocol to Amend the International Convention on Civil Liability for Oil Pollution Damage, *adopted* Nov. 27, 1992, 1956 U.N.T.S. 255.

313. Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment art. 2(6), June 21, 1993, E.T.S. No. 150.

314. International Convention for the Regulation of Whaling art. I(2), Dec. 2, 1946, T.I.A.S. No. 1849, 161 U.N.T.S. 72.

1. Most Projects Would Remain Viable

Governments reasonably desire to ensure continued access to natural resources, including those located on indigenous lands, for the simple reason that hydrocarbons, precious metals, timber, and other natural resources sustain the global economy and the lifestyles to which those of us in the developed world have become accustomed. Many resources are becoming increasingly scarce, and some of the best remaining reserves are located on lands owned, occupied, or having spiritual significance to indigenous peoples.³¹⁵ It is no coincidence that all or most of the countries that declined to endorse UNDRIP in 2007 have economies that are dependent to some degree on resources located on indigenous lands.³¹⁶

For example, the U.S. government has long viewed the Oil Sands as an opportunity to reduce the country's dependence on Middle Eastern oil supplies and has promoted their development with particular urgency since the 9/11 attacks.³¹⁷ The Oil Sands have been developed so rapidly, in fact, that Canada has become the largest foreign supplier of oil to the United States.³¹⁸ And yet Canada is by no means the only oil exporter on which the United States and other Western powers rely that has reserves located largely on indigenous lands. The same is true of Peru, Venezuela, Nigeria, Russia, and Papua New Guinea, to name a few.³¹⁹ Consequently, were indigenous lands

315. See, e.g., EARTHWORKS & OXFAM AMERICA, *supra* note 163, at 22 ("Around half of all the gold mined from 1995 to 2015 is likely to come from native lands—the traditional territories of indigenous peoples."); NIKIFORUK, *supra* note 140, at 188 ("More than 50 [percent] of the world's oil comes from massive oil fields, the so-called supergiants, all of which are declining. Peak oil explains why almost every major multinational and state-owned oil company has put up a shingle in Canada's Great Reserve. The tar sands [of Alberta] are the last place in the world where oil companies can make an investment and grow production."); Gonzalez, *supra* note 162, at 995 (observing that as forests in Southeast Asia are becoming increasingly depleted, companies are having to look to countries such as Brazil, Guyana, Papua New Guinea, and Suriname to maintain production volumes).

316. As noted previously, the countries that voted against UNDRIP in the General Assembly in 2007 were the United States, Canada, Australia, and New Zealand—each of which has a large indigenous population. See *supra* note 245 and accompanying text. Among the eleven countries that *abstained* from the vote were several whose economies depend considerably on oil produced on indigenous lands, including Nigeria, Russia, and Colombia. See Siegfried Wiessner, *United Nations Declaration on the Rights of Indigenous Peoples*, AUDIOVISUAL LIBR. INT'L L. 1, 3 (2009), http://untreaty.un.org/cod/avl/pdf/ha/ga_61-295/ga_61-295_e.pdf (listing the countries that abstained from the vote); see also HALLER ET AL., *supra* note 16, at 42–132, 156–67, 417–37 (discussing economic development and oil production on indigenous lands in Nigeria, Russia, and Colombia).

317. See, e.g., NIKIFORUK, *supra* note 140, at 32.

318. HUMPHRIES, *supra* note 132, at 1; NIKIFORUK, *supra* note 140, at 31.

319. See generally HALLER ET AL., *supra* note 16 (reviewing oil production in countries including Nigeria, Papua New Guinea, Russia, Venezuela, and Peru).

suddenly to become off-limits to development, the West could find itself reliant on such oil exporters as Iran, Iraq, Libya, Saudi Arabia, and China.³²⁰

That having been said, there is no reason to expect that the Private-Sector Measures would significantly affect global oil production or investment flows. They would simply induce investors to undertake investments in a more conscientious manner, with appropriate environmental, social, and cultural controls. Indeed, even if UNDRIP were implemented *in its entirety*, including the provision obliging states to refrain from approving extractive projects without free, prior, and informed consent of affected indigenous peoples, the mere fact that such peoples would be free to withhold consent does not mean they would do so with significant frequency. As discussed above in Part I.B, indigenous peoples are often amenable to development projects when they are duly consulted and compensated and appropriate measures are taken to minimize the project's adverse consequences. This is in part because it may no longer be feasible for an indigenous people to rely exclusively on traditional means of subsistence,³²¹ and in part because some indigenous peoples desire to expand their economic opportunities and adopt new ways of living, so long as they can control the pace and content of development.³²²

Certainly some projects would become more expensive and less profitable if the investor complied with UNDRIP, but this does not mean that a large percentage of projects would become unviable altogether. Common sense and past experience suggest that many projects would still go forward—just as mining has continued to thrive in Australia notwithstanding enhanced protections granted to Aboriginals post-*Mabo*.³²³

320. See U.S. Cent. Intelligence Agency, *Country Comparison: Oil Exports*, WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2176rank.html> (last visited July 13, 2012) (listing the world's top oil exporters).

321. See ENGLE, *supra* note 36, at 196 (“[T]raditional modes of production and subsistence might no longer be feasible options for many of the world's indigenous peoples. This problem is particularly acute for indigenous peoples who have been displaced from their lands or territories. Even if they succeed in reclaiming such lands or are given new territory, it is often difficult—if not impossible—for them to sustain a community around development projects connected to traditional uses.”)

322. Alison Brysk, *Turning Weakness into Strength: The Internationalization of Indian Rights*, LATIN AM. PERSP., Spring 1996, at 38, 41 (asserting that “the preservation of precontact, low-technology indigenous cultures is neither viable nor desired by most groups,” that “Indian cultures are not static or primordial but evolve like all others,” and that most Indian groups do not seek to maintain “cultural autarky” but simply “to manag[e] the pace and content of development” for themselves).

323. Esther Thomas, *Aussie Mining Industry Likely to Enjoy Boom for Years to Come*, INT'L BUS. TIMES NEWS (Oct. 4, 2011), <http://au.ibtimes.com/articles/224329/20111004/aussie-mining-industry-likely-to-enjoy-boom-for-years-to-come.htm> (“One of the most significant sectoral trends experienced by Australia's economy has been the growth of the mining sector, including petroleum, in the past decade. It grew from around 4.5% in 1993–94, to almost 8% in 2006–07 in terms of contribution to GDP.”); *Australian Market for Power Generation in Mining Industry*, BUS. WIRE, Feb. 13, 2012, available at <http://www.businesswire.com/news/home/20120213005617/>

2. Whatever Projects Would Be Precluded Are Not Worth Pursuing

Even if certain investments would become logistically, economically, or legally unviable as a result of implementing UNDRIP, this would not necessarily be cause for regret.

To begin with, countries (or areas within countries) often end up faring worse rather than better when they rely heavily on natural-resource extraction. A rich interdisciplinary literature has identified what is known as the “resource curse,” a phenomenon whereby “many countries rich in natural resources have had poor economic growth, conflict and declining standards of democracy.”³²⁴ It has been observed, for example, that there is a “statistically significant, inverse, and robust association between natural resource intensity and [economic] growth” over recent decades.³²⁵

Revenues from extractive industries can also stimulate rent-seeking behavior by government officials and interest groups, leading to a “general weakening of state institutions, with less emphasis on accountable and transparent systems of governance.”³²⁶ Moreover, individual officials and particular ethnic groups can use revenues from extractive industries to gain power within the country and retain it.³²⁷ Other groups naturally resent this dynamic, which can fuel interethnic conflict, as has occurred in Nigeria and Sudan, among other countries.³²⁸

Scholars have also documented a pattern known as the “Gillette Syndrome” (named after a ranching community in Wyoming that experienced a

en/Research-Markets-Australian-Market-Power-Generation-Mining (“The mining industry in Australia, a significant contributor to the nation’s economy, has been growing at an unprecedented rate in the past three to five years.”).

324. Langton & Mazel, *supra* note 106, at 31–32.

325. Jeffrey D. Sachs & Andrew M. Warner, *Natural Resource Abundance and Economic Growth* 21 (Nat’l Bureau of Econ. Research, Working Paper No. 5398, 1995), available at <http://www.nber.org/papers/w5398.pdf>.

326. Chris Ballard & Glenn Banks, *Resource Wars: The Anthropology of Mining*, 32 ANN. REV. ANTHROPOLOGY 287, 295 (2003).

327. HALLER ET AL., *supra* note 16, at 458 (noting that in the 1970s, revenues generated by developing countries from oil production “often ended up in the hands of corrupt governments (e.g., Marcos in the Philippines, Somoza in Nicaragua) who spent the money on themselves or on the military” and that “[t]he money was not invested in a way that would have assured stable, long-term development”); Robert Dufresne, *The Opacity of Oil: Oil Corporations, Internal Violence, and International Law*, 36 N.Y.U. J. INT’L L. & POL. 331, 358 (2004) (“Whoever can take power in [a resource-rich] country by whatever means can maintain his rule, even against widespread popular opposition, by buying the arms and soldiers he needs with revenues from the export of natural resources. . . . This fact in turn provides a strong incentive toward the undemocratic acquisition and unresponsive exercise of political power in these countries.” (quoting Thomas Pogge, *Priorities of Global Justice*, 32 METAPHIL. 6, 21 (2001))).

328. Ballard & Banks, *supra* note 326, at 295 (“[M]ining can become a source of conflict over the control of resources and resource territories, the right to participate in decision making and benefit sharing, social and environmental impacts, and the means used to secure access to resources” (citation omitted)); Dufresne, *supra* note 327, at 338–44 (discussing interethnic conflicts fueled by oil in several countries).

sudden infusion of oil income during the 1970s), which refers to an increase in social ills that typically occurs during resource booms.³²⁹ Such social ills include substance abuse, spousal abuse, divorce, crime, and a loss of affordable housing.³³⁰ All of these have spiked in Alberta since the boom in the Oil Sands began, for example.³³¹

Another reason why governments should think twice before pursuing any given development project on indigenous lands is that such projects can result in harms to local indigenous peoples even if they consent to, and receive material benefits from, the project. The NGO Survival International has pointed out that when indigenous peoples maintain traditional lifestyles on their ancestral lands, unaffected by a development project, “they typically have many of the characteristics that have been found to raise happiness, including strong social relationships, stable political systems, high levels of trust and support, and religious or spiritual beliefs, which give their lives meaning.”³³² By contrast, after experiencing increased contact with outsiders and the sudden affluence associated with a development project, indigenous peoples can face a loss of culture and identity, a breakdown in familial bonds, increased substance abuse, and greater economic dependence.³³³

In addition, when indigenous peoples adopt new ways of living, they inevitably lose some of their traditional communal knowledge, which can be a precious resource for humanity.³³⁴ The value of such knowledge is nowhere more evident than in the fields of agriculture³³⁵ and medicine:

329. NIKIFORUK, *supra* note 140, at 44–46.

330. *Id.*

331. *Id.* at 44–46, 57–59.

332. SURVIVAL INT’L, PROGRESS CAN KILL: HOW IMPOSED DEVELOPMENT DESTROYS THE HEALTH OF TRIBAL PEOPLES 1 (2007), available at http://assets.survivalinternational.org/static/files/news/PPM_informe_completo.pdf.

333. EARTHWORKS & OXFAM AMERICA, *supra* note 163, at 18–21 (asserting that mining operations typically bring a short-term boost in economic activity and material benefits to local communities but also result in economic dependence and a host of social ills); HALLER ET AL., *supra* note 16, at 215–19; Marcos A. Orellana, *Indigenous Peoples, Energy and Environmental Justice: The Panguel/Ralco Hydroelectric Project in Chile’s Alto BíoBío*, 23 J. ENERGY & NAT. RESOURCES L. 511, 519 (2005) (asserting that certain Chilean indigenous groups are “physically integrated with the natural environment, in material and spiritual ways that define their cultural and corporal identity,” and that “any usurpation or physical destruction of their territories represents an attack on their cultural foundation and existence”).

334. The value of indigenous knowledge to humanity is acknowledged in several international instruments. See, e.g., Convention on Biological Diversity art. 8(j), June 5, 1992, 1760 U.N.T.S. 143; United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3–14, 1992, *Rio Declaration on Environment and Development*, princ. 22, U.N. Doc. A/CONF.151/26 (Vol. I) (Aug. 12, 1992).

335. See generally Charles Siebert, *Food Ark*, NAT. GEOGRAPHIC, July 2011, at 108, available at <http://ngm.nationalgeographic.com/2011/07/food-ark/siebert-text> (asserting that the crop and animal varieties and agricultural techniques employed by traditional farmers in areas like Ethiopia and the Andes could be critical to the long-term survival and prosperity of humanity).

In the Amazon, which is believed to contain half of all plant species in the world, indigenous peoples know ten times more plants than the plants currently known to have Latin names. Based on this knowledge, today almost 5000 medicines worldwide are derived from plants grown in indigenous areas.³³⁶

By the same token, indigenous peoples' noted ability to sustain themselves with limited resources and minimal impact on the environment and their experience with survival in challenging environmental conditions could prove vital as humanity seeks to adjust to the demands of a changing climate and declining natural resources.³³⁷ Not only would preserving indigenous knowledge contribute to the adoption of more sustainable practices by the broader population, but maintaining the integrity of indigenous lands would reduce the pressure on the global environment in the first place. Many of the world's remaining indigenous peoples reside in tropical and boreal forests, which serve vital ecological functions. Among other things, these forests contain critical stores of freshwater, serve as refuges for threatened wildlife, maintain freshwater flow that is key to maintaining arctic sea ice, and absorb and retain enormous amounts of greenhouse gases believed to contribute to global warming.³³⁸ Yet when such forests come under industrial exploitation, their ability to perform these functions is inevitably undermined.³³⁹

336. HALLER ET AL., *supra* note 16, at 15.

337. See Jacob Kronik & Dorte Verner, *The Role of Indigenous Knowledge in Crafting Adaptation and Mitigation Strategies for Climate Change in Latin America*, in SOCIAL DIMENSIONS OF CLIMATE CHANGE: EQUITY AND VULNERABILITY IN A WARMING WORLD 145, 146–47, 160 (Robin Mearns & Andrew Norton eds., 2010) (asserting that indigenous peoples “play unique roles in climate change adaptation and mitigation because of their knowledge systems and rights” and that “it will be difficult to achieve climate change adaptation and mitigation without taking action to strengthen the necessary conditions for continued use and development of indigenous knowledge”); Jo M. Pasqualucci, *International Indigenous Land Rights: A Critique of the Jurisprudence of the Inter-American Court of Human Rights in Light of the United Nations Declaration on the Rights of Indigenous Peoples*, 27 WIS. INT’L L.J. 51, 76–77 (2009) (stating that indigenous peoples “have become noted internationally for the conservation and protection of their land and natural resources” and that “[t]heir guardianship over those resources contributes to the international community’s efforts to practice sustainable development”).

338. See, e.g., HALLER ET AL., *supra* note 16, at 16 (asserting that “[t]he conservation of the ancestral territories of indigenous peoples would . . . increase the chances of containing the impending climate change” in light of the ability of tropical rainforest and northern boreal forest to absorb and bind carbon dioxide); PEW ENV’T GRP., A FOREST OF BLUE: CANADA’S BOREAL 6 (2011), available at <http://www.pewenvironment.org/newsroom/reports/a-forest-of-blue-canadas-boreal-328843> (detailing numerous ways in which Canada’s boreal forest provides “irreplaceable ecosystem services at local, provincial, national and international levels”); Tsosie, *supra* note 116, at 1633–34 (defining “climate change” and citing evidence that it “is caused in large part by ‘greenhouse gases’ such as carbon dioxide, methane, and nitrous dioxide, which are the byproducts of industrialization”).

339. For a detailed discussion of the impacts of resource extraction and hydropower development on Canada’s boreal forest, see generally PEW ENV’T GRP., *supra* note 338.

In sum, countries should not expect any extreme restrictions on investment and development to result from inducing private-sector compliance with UNDRIP. They should, however, welcome whatever limited restrictions might arise and respect the prerogatives of indigenous peoples that disfavor particular forms of development.

C. Investors from Implementing Countries Would Not Be Placed at an Undue Competitive Disadvantage

Opponents might also argue that if some countries implement UNDRIP effectively while others do not, it would place companies in the implementing countries' jurisdictions at an undue competitive disadvantage. Any such argument would be misguided.

First, an obligation to comply with UNDRIP could actually provide a competitive *advantage* to an investor in some cases, not a disadvantage. Compliance with indigenous rights would tend to build positive relations with local communities and avoid the insecurity and bad publicity that can result from conflict.³⁴⁰ As one commentator has observed:

[C]ompanies are increasingly finding that they need to earn and maintain a social licence to operate [They] face an ongoing danger that when their behaviour does not meet community expectations they will eventually be the subject of public censure, manifested in a number of possible direct ways, or via government and court actions. Community resistance to a project can be tacit in nature, such as intransigence during land-access negotiations, or it can be more palpable, such as public protest and physical occupation of a company operation, or even sabotage.³⁴¹

340. For example, Shell and other oil companies in Nigeria have experienced violence and repeated disruptions of their operations due to indigenous opposition to their activities. Victoria E. Kalu, *State Monopoly and Indigenous Participation Rights in Nigeria*, 26 J. ENERGY & NAT. RESOURCES L. 418, 422–23 (2008) (“What began as non-violent protests over large-scale environmental degradation, general neglect and impoverishment of indigenous oil-producing communities . . . metamorphosed into violent armed conflict to drive home demands for emancipation, self-determination and resource control,” resulting in “security-related drops in oil production . . . escalating violence, daylight street abductions and kidnappings of expatriate oil workers . . .”). Moreover, the situation in Nigeria has been a public-relations disaster for Shell. Doreen McBarnet, *Human Rights, Corporate Responsibility and the New Accountability*, in HUMAN RIGHTS AND THE MORAL RESPONSIBILITIES OF CORPORATE AND PUBLIC SECTOR ORGANISATIONS 63, 66 (Tom Campbell & Seumas Miller eds., 2004) (“The company’s operation in a state run by a military dictatorship accused of major human rights abuses, the impact of oil extraction on the Ogoni people and the Delta environment, . . . the campaigns of human rights organisations pointing the finger not just at the Nigerian dictatorship but at Shell, amounted to a PR disaster . . .”).

341. Katherine Trebeck, *Corporate Social Responsibility and Democratization: Opportunities and Obstacles*, in EARTH MATTERS: INDIGENOUS PEOPLES, THE EXTRACTIVE INDUSTRIES & CORPORATE SOCIAL RESPONSIBILITY, *supra* note 114, at 8, 12–13.

And although a company might be able to obtain such a “social license to operate” through *voluntary* compliance with indigenous rights, it would never be chosen for a project to begin with if local communities had input in the selection process and the company failed to win their confidence. Common sense suggests that when evaluating bidders, a community would be more likely to favor one that is legally obliged to comply with indigenous rights and could be held accountable for violations in a reliable neutral forum versus one whose compliance would be voluntary.

Second, even if applying UNDRIP to the private sector would create a competitive disadvantage in some cases, countries routinely impose such disadvantages on their nationals in order to achieve noneconomic goals to which they assign a high priority. For example, the United States and other OECD countries prohibit companies within their jurisdiction from offering or giving anything of value to foreign officials to obtain or retain business³⁴²—a restriction that can significantly disadvantage their companies vis-à-vis competitors from countries that have no such prohibitions.³⁴³ Furthermore, the United States and other countries sometimes impose economic sanctions against countries accused of human rights abuses, even though such sanctions deprive their own nationals of trade and investment opportunities.³⁴⁴ The threats to indigenous peoples from development projects undertaken without consent or adequate safeguards are arguably just as important to address as other human rights abuses or corruption in international business.

342. OECD Anti-Bribery Convention, *supra* note 309; *see also* Windsor & Getz, *supra* note 284, at 733, 739, 765–69.

343. *See* Jennifer Dawn Taylor, Comment, *Ambiguities in the Foreign Corrupt Practices Act: Unnecessary Costs of Fighting Corruption?*, 61 LA. L. REV. 861, 868–69 (2001) (asserting that, as a result of the Foreign Corrupt Practices Act, “United States companies are extremely disadvantaged when competing against foreign companies that pay bribes for international capital projects”). The Foreign Corrupt Practices Act is an example of national legislation consistent with the requirements of the OECD Anti-Bribery Convention. *See* Windsor & Getz, *supra* note 284, at 764 (observing that the OECD Anti-Bribery Convention “commits signatories to adopt FCPA-like national legislation”); *see also* FRITZ HEIMANN & GILLIAN DELL, TRANSPARENCY INT’L, PROGRESS REPORT 2009: ENFORCEMENT OF THE OECD CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS 56–60 (2009), available at http://www.transparency.org/news_room/in_focus/2009/oecd_pr_2009 (noting that Russia, India, and China are not parties to the OECD Anti-Bribery Convention and have not criminalized the act of bribing a foreign public official).

344. *See, e.g.*, Andreas F. Lowenfeld, *Reconciling Political Sanctions with Globalization and Free Trade: Trade Controls for Political Ends: Four Perspectives*, 4 CHI. J. INT’L L. 355, 369 (2003) (“States imposing sanctions—most often the United States, but other states as well—decide to forgo economic gains for themselves and for the system as a whole in order to promote other goals. Export controls deprive the exporting country and its firms of export earnings; restraints on investment deprive investors of economic opportunities and the home country and its citizens of dividends A government that undertakes such measures is asking its firms and its citizens to make sacrifices, on the ground that there are issues more important than economic advantage—aggressive war, *systematic violation of human rights* . . . and so on.” (emphasis added)).

CONCLUSION

This Article demonstrates that private commercial interests have sought out and exploited natural resources on indigenous lands since the Age of Discovery, often with the aid of national governments, in a pattern that remains unbroken to the present day, even if the context has changed. This Article also shows that whatever the context of the encroachment, the adverse effects on indigenous communities are often similar. To be sure, the consequences are not always negative, but all too often the harms to indigenous peoples from extracting resources on their lands outweigh the benefits. This Article also demonstrates that the existing domestic and international legal frameworks are inadequate to appropriately balance economic development and indigenous rights and that further action is needed to achieve that goal. At a minimum, countries should make relevant aspects of UNDRIP binding on foreign investors and other private actors and take steps to secure indigenous peoples' access to a neutral forum for adjudicating claims against those actors for any violations.

If historical patterns are not reversed, indigenous peoples will not be the only losers. All of humanity will pay a terrible price, as it will be deprived of a precious and irreplaceable repository of traditional skills and knowledge and will place further pressure on the already-threatened global environment. Yet seizing the chance to enact this proposal should have a relatively moderate impact on global investment and economic development, while going further than any current measure to protect indigenous rights.

The indigenous peoples of Peru and many other countries are standing up for their rights at this critical juncture, as did the Lakota and other tribes in centuries past. It remains to be seen whether the international community will stand up with them and give their struggles some prospect of success, or whether indigenous peoples will continue to suffer the same defeats and depredations as those who fought unwinnable fights, alone, before them. The international community has already offered an important show of support by adopting UNDRIP and recognizing key indigenous rights. Now it is time to give those rights the weight they deserve by making them binding on the private sector and establishing effective mechanisms for enforcing them. Only then will a fair and lasting equilibrium between development and indigenous rights be attainable.

