

THE CURSE AND THEFT OF NATURAL RICHES: ENVIRONMENTAL CRIMES AND VIOLATIONS OF INDIGENOUS RIGHTS THROUGHOUT HISTORY FACILITATED BY LEGAL AND FINANCIAL SYSTEMS

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Worldwide Patterns of Dispossession and Exploitation

“Sharing” the Wealth? Minerals, oil, timber, medicines and now genetic wealth-all play a major role in development and all are the source of conflict, dispute and violations of centuries-old rights of indigenous people’. The world was recently alerted once more to this crisis in 2014 when a tribe that had never before had any contact with the “civilized” world sought help in a remote area of Amazonia in Brazil against invading and murderous loggers, prospectors and drug traffickers on the Peruvian side of the border.² The driving force behind the relentless conflict

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² <http://www.theguardian.com/world/video/2014/aug/01/amazon-tribe-first-contact-video>

between indigenous peoples and the waves of outsiders making forceful contact with them is the search for resources — wherever resources, deemed to be valuable, happen to be at the time. This is not a new phenomenon. It has permeated human history worldwide. Various empires throughout the world and the millennia were established by groups looking for riches and resources well beyond their original areas and obtaining them through conquest, domination and exploitation. The Aztec, Inca, Roman, Mongol, Sumer, Babylonian, Assyrian, Seleucid (based on the conquests of Alexander the Great), Arab and Ottoman empires and the colonial empires of many European countries are only a few well-known examples of such domination and exploitation throughout time.

Development was also part of it. The Romans, for example, are well known for the vast and intricate system of roads and bridges, some of them still working today, that they built throughout Europe, North Africa, and parts of the Middle East. Many of today's major European cities, from London to Istanbul, were established or expanded by the Romans. In all cases, the exploitation of conquered lands took different forms, from the enslavement and forced labor of the inhabitants to prospecting and mining for precious metals to harsh and exploitative systems of tribute and forced labor.

The Historic Role of the Private Sector in the Quest for Riches

The quest for resources and riches, at times of mythical proportions, did motivate exploration and conquest throughout the centuries. At times these were official expeditions taking place with the approval and under the mandate of the authorities, like the voyage of Columbus to the Western Hemisphere with the support of the Spanish crown. Very frequently, though, contrary to popular belief, these expeditions were undertaken by private individuals or companies looking to establish lucrative trade routes and relationships and to find and exploit the New World's "incalculable riches".³ For example, what eventually became the conquest of

³ This also explains why certain colonies, especially at the beginning of colonization, did not succeed and at times disappeared without a trace. Some participants in the early expeditions were mostly from the nobility, upper classes and merchants who used their status and influence to be among the first to get to sail to the New World for what was expected to be an easy and exotic adventure with vast rewards in gold and valuables. Thus, they had no survival skills and were not prepared when they had to fend for themselves upon arrival, especially when faced with hostile natives. See, for example, *The Lost Colony*

Mexico by Hernán Cortés began as a trading mission to start a commercial relationship with tribes living on the eastern coast of Mexico. The men who accompanied Cortés were partners in the venture, expecting a sizeable share of the projected profits.⁴ The decision to go further into the country that led to the toppling of the Aztecs was made only after learning from the intended coastal trading partners of the existence of gold mines in the interior and wanting to find and exploit them.⁵

The same happened with the expeditions of Francisco Pizarro to conquer the Inca Empire. News of Cortés's success in Mexico and tales of the riches of the Incas motivated him to organize expeditions against them. The first two in 1524 and 1526 failed because of the hostility of the indigenous populations, inclement weather, and lack of supplies. The third one in 1530 finally succeeded. The members of Pizarro's expeditions jointly financed them and expected a considerable return.

Many of these expeditions were not even authorized by the Spanish authorities in the New World.⁶ Once the riches of the Aztecs and particularly of the Incas were known, other entrepreneurs followed, looking for their fortune. They brought with them diseases against which the native populations had not defense, thus decimating them; often abused and mistreated the indigenous people they encountered, forcing able bodied men to work as slaves in the mines and other ventures and women into sexual servitude and forced domestic work; and displaced local populations to less desirable or less promising areas.⁷

The same happened with British explorers. For example, the Virginia Company was a joint stock company chartered by James I in 1606 to establish settlements along the coast of North America, from today's state of Maine to today's Virginia border with North Carolina. As a corporation it was given the unusual and valuable power to govern itself, a status that it passed on to its successor colony, Virginia. A self-governing colony was certainly a novelty in 1624. The seeds for democracy in North

of Roanoke Island (North Carolina), <http://www.serc.si.edu/education/resources/watershed/stories/roanoke.aspx>

⁴ William H. Prescott, *History of the Conquest of Mexico* 180-82 (Modern Library 2001) (1843).

⁵ See Prescott, *supra* note 2, at 209, 216, 237-38.

⁶ Kim MacQuarrie, *The Last Days of the Incas* 27-28 (Simon & Schuster 2007).

⁷ See Karen Engle, *The Elusive Promise of Indigenous Development: Rights, Culture, Strategy* 21 (Duke University Press 2010) and *La Esquiva Promesa de Desarrollo Para las Comunidades Afrodescendientes: El Futuro de la Ley 70*, *Revista de Derecho Público*, No. 26, Universidad de los Andes, Bogotá, Colombia (2011).

America were thus unwittingly planted. The objective of the Virginia Company was to pursue different “profitable undertakings, some commercial, some agricultural, and some industrial.”⁸ When no precious metals were found, the investors were quite disappointed. However trade eventually flourished, especially when sweeter varieties of tobacco were brought to Virginia from the Caribbean to supplant the native harsh tasting one.⁹

Farther north, in today’s Canada, the Hudson’s Bay Company was established to commercialize pelts and precious metals to be found there. The company was incorporated by English royal charter in 1670 as The Governor and Company of Adventurers of England Trading into Hudson’s Bay. It acted as the *de facto* government in large sections of North America before Great Britain and France and later the United States asserted their claim to some of those lands. Eventually the Company sent explorers and traders to the most remote areas of North America looking for those goods. In the end they created a vast network of trade posts that went from the Pacific Northwest to the Atlantic and provided the base and justification for possession by the British.¹⁰

Both companies no doubt opened the path for inland penetration and the establishment of settlements by Europeans in North America, thanks to the geographical knowledge and mapping gained through exploration and trading and also to diseases brought in by traders and trappers that decimated the indigenous populations, thus facilitating the invasion, military superiority, survival and successful settling in of the Europeans.¹¹

Another major example is the East India Company, originally chartered in 1600 by Queen Elizabeth as the Governor and Company of Merchants of London trading into the East Indies.¹² It was established to develop trade with the East Indies but actually dealt mostly with the Indian subcontinent, China under the Qing Dynasty, the North-West Frontier Province and Baluchistan. At one point, the company accounted

⁸ Wesley Frank Craven, *The Virginia Company of London, 1606-1624*, 12-13, 16-17 (Williamsburg VA 1957).

⁹ George K Foster, *Foreign Investment and Indigenous Peoples: Options for Promoting Equilibrium Between Economic Development and Indigenous Rights*, Michigan Journal of International Law, 33, 4, 627 (07/2012).

¹⁰ Bruce E. Johansen & Barry M. Pritzker eds., *2 Encyclopedia of American Indian History* 394 (ABC-CLIO 2008).

¹¹ See Peter C. Newman, *Empire of the Bay: The Company of Adventurers that Seized a Continent* 71-72 (Penguin Books 2000).

¹² Gardner, Brian, *The East India Company: a History* (McCall Publishing Company 1972).

for half of the world's trade, particularly in basic commodities (cotton, silk, indigo dye, salt, saltpeter, tea and opium). Importantly, the company laid the foundation of the British Empire in India. Rich merchants and nobles controlled the Company's shares. The Government owned no shares. Eventually, the company received from London the right to autonomous territorial acquisitions, to mint money, to build and staff fortresses and maintain private armies, to create alliances, to make war and peace, and to have both civil and criminal jurisdiction over the areas it controlled. It monopolized commerce, established factories and large plantations, all for profit and for the benefit of the shareholders. From 1700s onwards and for the next 158 years, the East India Company recruited and organized its own army. Each of the three administrative regions of India — the Presidencies of Bombay, Madras and Bengal — had its own army with its own commander-in-chief. The Bengal commander was considered the most senior officer. These armies and their salaries were entirely paid for with revenues of the Company. Together, these armies were larger than the British army itself. In times of need, the British Crown lent units of its own army to the East India Company. The main function of these troops was to protect the properties and assets of the Company.¹³ 700 Company rule effectively began in 1757 and lasted some 100 years until 1858 when the British Crown assumed direct control of India. Thus, the Company conducted a colonial conquest on a large scale and at times with considerable violence, especially in the takeover of Bengal. It became an agent of the British government, administering India, collecting taxes, and appointing the Governor General, while earning in return large and secure profits for the shareholders. Many of its actions can be seen as business transactions, and at times as extreme examples of what we would call today hostile corporate takeovers.¹⁴ The Dutch East India Company originated and functioned along the same line. It can be correctly considered the first true multinational corporation. For practically two centuries, 1602-1798, it set the standard for maritime trade in the East Indies and it played a key role in fueling and supporting the Dutch Golden Age, a time when Dutch military, trade, technology, art, and painting were the most advanced and the best in the

¹³ <http://www.royalmunsterfusiliers.org/d3eicmil.htm>

¹⁴ Nick Robins, *The Corporation that Changed the World: How the East India Company Shaped the Modern Multinational*, *Asian Affairs*, 43, 1 12-26 (March 2012); Bernstein, William J., *A Splendid Exchange: How Trade Shaped the World*, 238 (Atlantic Monthly Press 2008).

world.¹⁵ The Dutch East India Company established commercial routes in India, China, and Japan while conquering vast territories that eventually became Dutch colonies, like today's Indonesia.¹⁶

Similarly to the British counterpart, the Charter of the Dutch East India Company represented a novel and revolutionary bestowing outright or by acquiescence sovereign rights and granting of support to a state chartered company.¹⁷ Chartered trading companies also spearheaded the British colonization of Africa. For example, Cecil Rhodes established the British South Africa Company in 1889 to operate especially in what are today Zambia and Zimbabwe, based on speculation that there were there sizable gold deposits there. The gold was expected to finance the exploitation of the mineral and timber wealth of other parts of Africa, especially in Katanga. The Company gained the control of the area using a private security force. The gold did not materialize but the British South Africa Company retained the power to administer Northern (now Zambia) and Southern (now Zimbabwe) Rhodesia, form private armies, exercise police functions, retain landholding rights until 1924 and mineral rights until 1964, and own the railways until 1947. This activity attracted numerous white settlers,¹⁸ creating a heavily stratified society with native Africans dispossessed of their land and cattle by white settlers or by the Company and, in the cities, forced to take the most menial and lowest paying jobs, thus creating a permanent under-class. Also in the case of the United States, private ventures for profit were often the driving force for the westward expansion of the country. Major movement of European immigrants often took place after the news of the discovery of mineral deposits, especially gold. Miners and land speculators would forcefully demand that the Federal government remove indigenous tribes so that they would have free access to the land. The doctrine of "Manifest Destiny"¹⁹ provided

¹⁵ Kerry Ward, *Networks of Empire: Forced Migration in the Dutch East India Company* (New York: Cambridge U.P. 2009) 5.

¹⁶ Daniel Gerstell, *Administrative Adaptability: The Dutch East India Company and its Rise to Power* <http://history.emory.edu/home/assets/documents/endeavors/volume3/DanielGerstell.pdf>

¹⁷ Om Prakash, *Bullion for Goods: European and Indian Merchants in the Indian Ocean 1500-1800* (New Delhi: Manohar Publishers, 2004), 17.

¹⁸ 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).

¹⁹ Shawn W. Schwaller, *The doctrine of Whiteness: National supremacy and Manifest Destiny* (Thesis (M.A.) – State University of New York at Buffalo, 2005). Available through UMI ProQuest Digital).

the needed philosophical and almost theological cover for this disregard of the Native people's interests and claims²⁰. This became a well-established and refined pattern of behavior that continues even today in many parts of the world.

One of the saddest and infamous instances of this ethnic cleansing so that land could be opened up to European mining for gold and settlement is the so-called "Trail of Tears".²¹ It refers to the forced relocation of Native American nations from southeastern parts of the United States, following the narrow adoption of the Indian Removal Act of 1830 by the U.S. Congress. President Andrew Jackson strongly supported the removal²². He had won re-election in 1832 by a landslide, partly thanks to his popularity for advocating the removal of the Indian Nations²³. The removal included many members of the Cherokee, Muscogee (Creek), Seminole, Chickasaw, and Choctaw nations, among others, from their homelands in the southeast of the U.S. to Indian Territory in eastern parts of the present-day state of Oklahoma. The name often given to this ethnic cleansing, the "Trail of Tears"²⁴, stems from an account of the removal of the Choctaw Nation in 1831. Thousands of Native Americans died during the forced relocation for lack of food and water, exhaustion, lack of sanitation and hygiene, rampant infectious diseases, mistreatment, exposure to extremes of the weather, too hot or too cold, and more²⁵.

What makes the injustice of this cleansing even more noteworthy is that these Native American nations lived in well planned villages, had a well established system of law and tribal government, a strong cultural heritage, were mostly farmers and lived peacefully with their immigrant neighbors. Especially the Choctaws and the Cherokees had adopted and

²⁰ Robert J. Miller, *American Indians, the Doctrine of Discovery, and Manifest Destiny*, Wyoming Law Rev. 11, 2, 329 (2011).

²¹ David Williams, *The Georgia Gold Rush: Twenty-Niners, Cherokees, and Gold Fever* (University of South Carolina Press 1995).

²² Andrew Jackson is best known as the President who created "Jacksonian democracy", with its focus on manifest destiny and laissez-faire economics.

²³ Robert Vincent Remini, *Andrew Jackson and His Indian Wars* (New York: Palgrave Macmillan, 2008).

²⁴ John P. Bowes, *The Trail of Tears: Removal in the South* (New York: Chelsea House, 2007); Ann Byers, *The Trail of Tears: a primary source history of the forced relocation of the Cherokee Nation* (New York: Rosen Pub. 2004).

²⁵ Daniel F. Littlefield, Jr. and James W. Parins (editors), *Encyclopedia of American Indian Removal* (Santa Barbara, Calif.: Greenwood, 2011); Kathleen A. Tobin, *Five Civilized Tribes in Indian Territory: The Cherokee, Chickasaw, Choctaw, Creek, and Seminole Nations* (Greenwood Press, 2004).

integrated into their lives many practices of European-American culture and way of life. For this reason at the time they were patronizingly called the “Five Civilized Tribes” but even this did not save them from the greed for land and resources of the Anglo-European settlers supported by the state.²⁶ It must also be noted that soon enough these Native nations faced the same pressure and depredations in their new “home”, regardless of the promise by treaty by the U.S. Government that this would not happen. Settlers invaded Indian land without repercussions. Finally in 1893 large portions of this Native American nations’ territory were opened to white settlement during the so-called “Oklahoma Land Rush.”²⁷

There are several other examples of this pattern taking place in the United States like that of the Nez Perce people in the Northwestern region of the U.S. In 1800 they lived in over 100 villages and were the largest Indian group on the Columbia River plateau. The arrival of settlers during the XIX century brought considerable calamity to the Nez Perce. From 12,000 tribe members in mid-1800, their number was down to 1,900 in early 1900, because of epidemics, loss of habitat, conflicts with settlers and with the U.S. Army, displacement and more. In 1863 they were forced to relinquish a large portion of their land because of the discovery of gold and because of pressure by settlers to eject them from their fertile land in today’s Oregon and Washington states.²⁸ The majority of them agreed to be removed to a less desirable area. However, about 3,000 of them did not and tried to flee to “Grandmother’s (Queen Victoria) land”, Canada. Under the guide of Chief Joseph, these 3,000 Nez Perce remarkably traveled 1,900 km on foot through all sorts of terrain, including major mountain ranges, while 2,000 American soldiers and cavalry were pursuing them.²⁹ Eight hundred Nez Perce warriors fought a rear

²⁶ C.L. Thomas, *Five civilized tribes and the Osage Nation* (Buffalo, N.Y.: W.S. Hein, 2006).

²⁷ Bruce Kauffmann, *The Oklahoma Land Rush* (Longview News – Journal, 04/23/2008); Houston Chronicle, *Oklahoma land rush recreated* (ISSN 1074-7109, 04/23/1989, p. 3) At noon on April 22, 1889, more than 40,000 settlers raced from the borders of the 2 million-acre Unassigned Lands – present-day central Oklahoma, then Indian territory – to claim 160-acre tracts or town lots. President Benjamin Harrison had opened the land to white settlement.

²⁸ 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).

²⁹ Kent Nerbum, *Chief Joseph & the flight of the Nez Perce: the untold story of an American tragedy* (New York: Harper, 2005).

guard action against the U.S. forces, protecting the rest. Unfortunately for them, only 64 km from Canada, the survivors of the journey (about 1,000 died on the way) were surrounded and forced to surrender. Those who had earlier accepted to go to the reservation did not fare much better. No sooner had they settled in their new territory that President Grover Cleveland opened it in 1895 to white settlers, just as he did in 1893 against the Oklahoma tribes.

Another cogent example is that of the ejection of the Lakota and Northern Cheyenne tribes following the discovery of gold in their ancestral land, the Black Hills, an isolated mountain range in today's South Dakota, considered sacred by the Lakota. When gold was discovered, thousands of miners arrived.³⁰ The Lakota objected to their mining.³¹ Only four years earlier, the United States had signed the Fort Laramie Treaty of 1868, excluding the Black Hills from all white settlement "forever". The Lakota attacked settlers and miners encroaching on their territory with predictable consequences: the U.S. Army responded militarily.³² The Black Hills war exploded.³³ One of the strategies of the U.S. Army was to kill as many bison as they could to deprive the Lakota of their major source of food, clothing and shelter materials and of trade income, an action that today would be decried worldwide as an ecological disaster and crime. The war ended in the defeat and forced removal of the Lakota.³⁴

Fast forward to today: Development & Indigenous Rights

If we fast-forward this analysis to the XX-XXI century, we will find many similar episodes where interests in mining, ranching, farming, timber, hydroelectric power generation and more have clashed with indigenous interests and often prevailed, frequently with the support of

³⁰ *THE BLACK HILLS COUNTRY: CONSULTATION BETWEEN THE PRESIDENT, SECRETARIES OF WAR AND THE INTERIOR ON THE INVASION BY MINERS* (New York Times (1857-1922), ISSN 0362-4331, 03/17/1875, p. 1).

³¹ *Ho! For the Black Hills: Captain Jack Crawford Reports the Black Hills Gold Rush and Great Sioux War*, Wild West, ISSN 1046-4638, 12/2012, Volume 25, Issue 4, p. 71.

³² The U.S. Army actually facilitated the arrival of the miners. See for example, *HOW TO REACH THE BLACK HILLS: A WAR DEPARTMENT CIRCULAR CONTAINING THE BEST ROUTES FROM THE MISSOURI RIVER TO DEADWOOD AND CUSTER CITIES*. New York Times (1857-1922), ISSN 0362-4331, 04/06/1877, p. 2.

³³ *Lakota War for the Black Hills (1876-1877)*. Term Paper Resource Guide to American Indian History, 2009, ISBN 9780313352713 (Greenwood, 2009).

³⁴ Robert M. Utley, *Origins of the Great Sioux War: The Brown-Anderson Controversy Revisited*, Mont. Mag. W. Hist., Autumn 1992, 48, 48-49.

the national state within whose boundaries such contrasting interests played out. With the nationalization of many extractive and energy industries, quite frequently it was the very state that clashed with its own indigenous population.³⁵

In a more general sense, as a consequence of “development” and increasing wealth worldwide, governments worldwide but especially in Africa, Asia and throughout the Americas, continue to plan and construct motorways, super highways, oil pipelines, hydroelectric dams and open-pit mines, both within and close to indigenous territories, without obtaining the communities’ free, prior and informed consent. Among the most glaring and contemporary examples are the conflict over the decision of the government of Ecuador to permit drilling for oil in one of the world’s most ecologically complex and fragile places, Yasuni National Park, an area that is also home to several indigenous tribes. One of them, the Taromenane, has had almost no contact with outsiders. Oil extraction in Ecuador has become a national issue. Indigenous and non-indigenous struggles continue and grow as oil wells move deeper into the Amazon where the destruction of priceless habitat and contamination are increasing. This struggle is the latest episode in a long history of conflict between indigenous groups and the state over land rights and with oil companies over extraction and contamination.³⁶ It must be noted that indigenous territories in the Amazon have been officially recognized since 1992, giving indigenous groups more negotiating power and national legitimacy. However, at the same time, land titles can be revoked legally if communities impede or block oil or mining work, which obviously annuls any real control of their land on their part. Either they agree to what the state and oil companies, in growing numbers Asian, decide or they can be shunted aside “legally”.³⁷

In neighboring Bolivia, rich in natural gas, the Bolivians of Indian ethnicity, who make up roughly 60 percent of the population, particularly the Guarani, who inhabit Bolivia’s southeastern provinces rich in natural

³⁵ *Extractive industries and indigenous peoples. Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya.* Report to the U.N. Human Rights Council A/HRC/24/41, 2013. See also previous reports: A/HRC/18/35, paras. 22-89, and A/HRC/21/47, paras. 34-76 and 79-87.

³⁶ Harry Sanabria, *Resistance and the arts of domination: Miners and the Bolivian state, Latin American Perspectives*, 27(1): 56–81 (2000).

³⁷ J. Kimerling, *Rights, Responsibilities and Realities: Environmental Protection Laws in Ecuador’s Amazon oil fields.* *Southwestern Journal of Law and Trade in the Americas* 2, 293-384 (1995).

gas, feel marginalized and have recently blocked several key energy projects over not being consulted, demanding compensation for anticipated environmental damage. This alienation and dissatisfaction threatens to weaken the very power base of the current government that came to power using the partial state takeover of the energy sector as the cornerstone of its political and economic philosophy, arguing that Bolivia's natural resources have been plundered for centuries by foreign interests. The new energy strategy was presented to Bolivians as a way for the country to keep more for itself — a message that appealed to a population that has little to begin with but that is now starting to lose its appeal and credibility, especially among the indigenous people directly affected by the extraction of gas.³⁸

The same is happening in Peru where the government recently approved the expansion of prospecting for and extracting gas by an international consortium led by Pluspetrol.³⁹ It is called the Camisea River project. It is Peru's largest energy development and plays a key role in Peru's economy. When Shell surveyed and explored that area in the 1980s, the company opened paths into the forest. Naturally, loggers took advantage of the paths to penetrate the region. As a result, nearly half of the Nahua tribe died because of diseases brought in by loggers they had no defense or medical assistance against.⁴⁰ According to indigenous and environmental organizations, the Camisea project violates the intangibility of the Kugapakori-Nahua-Nanti Reserve and the fundamental rights of the indigenous peoples living there.⁴¹ The reserve was created in the Amazon for indigenous peoples living in "initial contact" and "voluntary isolation." Almost 75% of this gas concession created in 2000 and called Lot 88, overlaps the reserve, which was established 10 years earlier. In 2003, the reserve was granted greater legal protection by a Presidential

³⁸ Monte Reel, *Bolivia's Irresistible Reserves*, Washington Post Foreign Service, Sunday, February 10, 2008.

<http://www.washingtonpost.com/wp-dyn/content/article/2008/02/09/AR2008020901326.html>

³⁹ *Peru Approves the Expansion of the Camisea Gas Project into Indigenous People's Reserves*, 30 January 2014, Redd Monitor.org; <http://www.redd-monitor.org/2014/01/30/peru-approves-the-expansion-of-the-camisea-gas-project-into-indigenous-peoples-reserve>.

⁴⁰ Dora A. Napolitano and Aliya S.S. Ryan, *The Dilemma of Contact: Voluntary Isolation and the Impacts of Gas Exploitation on Health and Rights in the Kugapakori Nahua Reserve, Peruvian Amazon*, Environ. Research Letter 2 (2007) 0455005.

⁴¹ Conrad Feather, *Violating Rights and Threatening Lives: The Camisea Gas Project and Indigenous People in Voluntary Isolation*. London: Forest People Programme, January 2014.

Supreme Decree “guaranteeing [its] territorial integrity”, banning “human settlements” different from those of the reserve’s inhabitants, prohibiting the “granting of new rights involving the exploitation of natural resources”, and ensuring that “existing rights to exploit natural resources must be carried out with the maximum considerations to guarantee that the rights of the reserve’s inhabitants are not affected”. Regardless, operations have continued and two major phases of expansion have been approved.⁴²

Yet another major example is the Usina de Belo Monte project in the state of Pará in Brazil. An army of 25 thousand workers in Pará is building the third largest dam in the world, a controversial project because of the anticipated low output by the plant and its impact on the environment and indigenous populations of a large area and on the riparian inhabitants of Altamira and the surrounding region.⁴³ The negative aspects of the construction is that an entire area of thousands of hectares is being stripped of its forests to make way for the plant; 14 million liters of water a second will be diverted from the river Xingu with a potentially devastating impact on river navigation, fish migration and fishing and the livelihood of indigenous people and those living on and off the river;⁴⁴ more than 6,000 families are being removed from the area and relocated; more than 400 bird species and 250 mammal species will lose their natural habitat; Belo Monte’s 668 square kilometers (258 sq. mi) of lake-reservoir will flood 400 square kilometers (150 sq. mi) of Amazonian forest;

⁴² David Hill, *Two lawsuits to stop Peru’s biggest gas project in indigenous reserve*, The Guardian Feb 25, 2014 <http://www.theguardian.com/environment/andes-to-the-amazon/2014/feb/25/peru-biggest-gas-project-indigenous-reserve-two-lawsuits>; Ryan Bergstrom, *Illegal Clearings in ‘Isolated Indigenous Peoples’ Reserve-Peru*, October 23, 2013, geography.blog.gustavus.edu/2013/10/23/Illegal-Clearings... “Yet the indigenous peoples in ‘voluntary isolation’ in the KNNR have neither given their consent to, nor been consulted about, Pluspetrol’s expansion plans. Indeed, not only is it impossible to secure their informed consent for such projects but any attempt to contact them in order to seek such consent could kill many of them via epidemics because of their lack of immunological defenses.” In addition, “Pluspetrol admits in this EIA that contact with the indigenous peoples in ‘voluntary isolation’ is ‘probable’ during its operations, that such people in general are highly vulnerable to contact and ‘massive deaths’ can occur as a result, and that the impacts of its expansion on them will be, or could be, considerable for a wide variety of reasons.”

⁴³ *A Batalha de Belo Monte*, a major report by the newspaper Folha de Sao Paulo containing 24 videos, 55 photographs, 8 infographics and even a videogame (December 16, 2013) <http://arte.folha.uol.com.br/especiais/2013/12/16/belo-monte/>

⁴⁴ Survival International, *The Dark Side of Brazil; The Ghosts of the World Cup* <http://www.survivalinternational.org/worldcup>

indigenous people have their territories invaded by construction, housing, and roads needed to accommodate the thousands of workers attracted to the area by the employment prospects; the city of Altamira and the surrounding area are experiencing major problems in traffic, sanitation, potable water, sewer, medical facilities, schools, and housing by growing in 4 years from 100,000 to 150,000 inhabitants. Indigenous tribes of the region have vigorously opposed the project; dozens of lawsuits have been filed; international opposition has been expressed; yet, the project continues and likely will be completed.

There are many more examples of “development” that appear to disregard the interests, rights, and needs, at times supposedly officially protected by the state, in order to allow major projects, especially in extractive industries and dam construction.

When it comes to Australia, for example, there have been some clearly unequal conflicts between mining companies and indigenous groups. For example in 1957 in Cape York, the Aboriginal community of Mapoon was closed by force and the inhabitants removed so that bauxite mining could proceed in 1963. Among other examples are Noonkanbah and the Argyle diamond mine in the Kimberley region and the iron ore mining in the Pilbara region of Western Australia.⁴⁵

In a seminal study, two economists, Cousins and Nieuwenhuysen,⁴⁶ showed how the indigenous populations benefited little from substantial mining activities on their land. Most importantly, they showed how the Australian state, both at the federal and state levels, without exception, sided with the mining industry. Throughout the history of Australia, the mining industry has strongly fought against land rights and native title, basically considering it just another regulatory obstacle in its race for the exploitation of minerals, ideally without any encumbrances or limitations. When the movement for land rights began to acquire traction in Australia, the mining sector lobbied strenuously for the dilution of their commercial value and of the native title that could benefit native populations.

Illustrative examples of this conflicts are the Ranger Uranium mine which began operations in 1980 in the area of Kakadu National Park, a place of high historical and environmental significance and also a UNESCO

⁴⁵ Ronald Libby, *Hawke's Law: The Politics of Mining and Aboriginal Land Rights in Australia*. Perth: University of Western Australia Press (1989).

⁴⁶ David Cousins and John Nieuwenhuysen, *Aboriginals and the Mining Industry: Case Studies of the Australian Experience*. Sydney: George Allen and Unwin (1984).

World Heritage site and the Century mine, Australia's largest open zinc, lead and silver mine in North West Queensland, started in 1997.

Another instance that illustrates well the connection between the state, multinational corporations and international financial institutions and their impact, normally detrimental, on indigenous populations, is that of an aluminum mine and refinery project in the Kalahandi district of Orissa, India owned by Vedanta Resources, based in London, with overall revenues in excess of \$14 billion from operations in Namibia, Zambia, Ireland, Liberia, South Africa and Australia, apart from India. The Vedanta project involved building a refinery capable of processing one million ton of aluminum and a large power plant. The mines for this project are in the Niyamgiri mountain range, next to the refinery and in a large forested region. The objective was to extract and process three million tons per year of bauxite. Fifty percent of the output was meant for export. As recounted in the press⁴⁷, Vedanta decided to move with "speed and aggression" and built its infrastructure even before receiving the clearances required to mine Niyamgiri. Much of the land Vedanta Aluminum Ltd (VAL) — the associate company set up for the project — required was forestland, and hence required clearances.⁴⁸ The people affected by the project are the Kondhs, especially the Dongaria Kondhs who number less than 6000 and lived in villages in the mountain range. The Kondhs are among the most underdeveloped native tribes in Orissa state and depend completely on agriculture for their survival. The Vedanta project has resulted in their forced dislocation and in the complete disruption of their lives. Initially, there was an attempt to persuade the Kondhs to move away from their ancestral villages to a camp far away from the mountain range. They were promised a nice home built of concrete, electricity, running water, sanitation facilities, television and more. When there was resistance, the state utilized brute physical force and goons were hired to instill deep fear among the native tribes. People were beaten up, and their property confiscated with violence. They were forced to go to a "colony" a few kilometers away where they were practically imprisoned by Vedanta's private security force. The state and the police not only acquiesced but helped drive the Kondhs away, forcing them to

⁴⁷ *Vedanta's Rs 50,000-cr Odisha investment: How not to go about executing a mega project in India*, India Times, Economic Times, Metals and Mining Section, May 8, 2014; http://articles.economicstimes.indiatimes.com/2013-08-18/news/41421071_1_vedanta-aluminium-ltd-anil-agarwal-bauxite-supplies.

⁴⁸ *Supra*, note 27.

move to substandard housing with almost none of the promised utilities and amenities.⁴⁹ Promises of fulltime employment were made but not kept. The refinery generated mostly technical jobs for which the Kondhs, who only know farming, were not qualified. Almost all jobs, even the most unskilled ones, were given to outsiders. For a people deriving their food and livelihood from agriculture and depending on the forest as well for food, shelter, medicine and other needs, this situation has been disastrous. Moreover, the available water in the region has been requisitioned for the operation of the refinery.

Eventually in 2005 the Kondhs started a protest movement.⁵⁰ The usual tools were used to break it up: physical force and intimidation, money, promise of jobs and better housing and more. The objective was to break up the solidarity, unity, and mutual trust among the Kondhs. Political leaders, some of them Kondhs, have been reportedly bribed and enlisted to speak out in support of Vedanta and to minimize the impact of the mine and of the plant. When all of this did not work, force was used to create a reign of terror on the native population. The resistance movement has scored some victories recently. The environment ministry denied forest clearance for the mining project in 2010. In response, the Odisha Mining Corporation (OMC) — with which Vedanta had signed an agreement for bauxite supply — challenged the decision in the Supreme Court of India. The Supreme Court decided that, before any mining could take place, the tribal leaders or panchayats would have to give their consent in a session chaired by a district judge. All of them voted against mining in the mountain range. Thus, presently the Niyamgiri project, its smelter, refinery and power plant, look like a lost cause. However, this is scarce consolation for those Kondhs whose land has been bulldozed and deforested, who have lost their villages, land, farms, way of life, and who have been dislocated and impoverished. Moreover, the battle is not finished. Local politicians have already declared that the ruling party in Orissa is “committed” to provide Vedanta with bauxite, regardless of these setbacks.⁵¹

Similar events are taking place in the Omo River, one of Africa’s and the world’s last, great undiscovered places, home to the so-called

⁴⁹ Rakesh Kalshian, *Sterlite Brings Darkness to India’s Indigenous Peoples*. *India Resource Center* (16 June, 2004).

⁵⁰ Prafulla Samantara, *Niyamgiri Waiting for Justice*. Lokshakti Abhiyan (Orissa Unit), Hillpatna, Behrampur (2006).

⁵¹ *Supra*, note 27.

“vanishing” tribes of Ethiopia. The massive Gilgel Gibe III Dam is scheduled to begin operations several hundred miles upriver. While the controversial project will more than double electrical output in Ethiopia, it will destroy a fragile environment and displace as many as 200,000 indigenous people who rely on the Omo’s natural flood cycles to produce their crops, and whose land may now go dry. It is another example of a “top down” development project. Local tribes were not consulted, approached or considered worthy as legitimate “stakeholders” with legal rights and definite opinions. Not only the tribes were not consulted. Some locals are reportedly even unaware that these changes are coming.⁵² The dam will have catastrophic consequences for the eight different tribes of the Omo River who already live a marginal life in this dry, unpredictable and very challenging area. That the end is near in a region once inhabited by some of our earliest ancestors (*Australopithecus* walked these very river banks) is not only sad but points out the violent displacement and life-threatening insecurity that “development” engenders. As in all examples of forced development given here, for the Gibe III dam there is a legitimizing discourse that justifies seeing the dam to completion,⁵³ thus opening the whole area to outsiders to introduce massive commercial agriculture, while destroying local livelihoods and group social structures. According to reputable sources,⁵⁴ in 2011 the Ethiopian government began to lease out large swaths of fertile land in the Lower Omo region to Malaysian, Italian, Indian and Korean companies to grow biofuels and cash crops such as oil palm, jatropha, cotton and maize. At the same time it has been expelling Bodi, Kwegu, and Mursi tribes from their territory into camps to free land for the large, state-run Kuraz Sugar Project, which could potentially cover 250,000 hectares.⁵⁵

The Suri who live west of the Omo are also being forcibly moved in order to open land for the Koka oil palm plantation. Reportedly, communities’ grain stores and their valuable land for grazing cattle have been

⁵² Jan Abbink, *Dam Controversies: Contested Governance and Developmental Discourse*. *Social Anthropology*, 20, 2, p. 125-144 (2012).

⁵³ *Ethiopia Pursues Controversial Dam Project*, Al Jazeera (12 March 2012) <http://www.aljazeera.com/video/africa/2012/03/20123128485291626.html>

⁵⁴ Survival International, *The Omo Valley Tribes*, <http://www.survivalinternational.org/tribes/omovalley/gibedam>.

⁵⁵ Very pro-project statements, quite patronizing about the indigenous tribes, the “pastoralists”, are, for example: <http://aigaforum.com/articles/The-Omo-Kraz-Sugar-development-Project-English.pdf> and <http://www.slideshare.net/meresaf/the-omokuraz-sugar-development-project>.

destroyed or taken over. Opponents of this land grab are beaten and jailed. There have been frequent reports of sexual assaults of women and even killings of tribal people by the military, patrolling the area to guard the construction and plantation workers. The Bodi, Mursi and Suri tribes have been told that they must leave behind their herds of cattle, a central part of their livelihood, status and culture, and will be allowed to only keep a few cows in the camps. This will force them to depend on the government aid to survive, a form of controlling and subduing them used all over the world against removed native populations.⁵⁶ After the dam construction is completed, hundreds of kilometers of canals will be built to irrigate commercial plantations, thus effectively depriving the indigenous tribes of their millennia-old way of living and dramatically altering their habitat.

The same is true with farmers forced out of their land in various parts of China; with fishing communities losing their livelihood because of devastating pollution impacting marine life in the Great Barrier Reef area of Australia, due to massive mining and shipping of minerals and the

⁵⁶ Some Native American tribes confined to reservations, often located on less hospitable land, and deprived of sources of income, are now able to climb out of destitute poverty and dependence on the Federal government thanks to gambling establishments located on their lands. The income from the casinos also allows them to more effectively defend their rights in Federal courts and score some important legal victories. As in other countries, for example, the Federal Government since the XIX century acted as the intermediary or “protector” of Native Americans, leasing or selling oil, mineral and timber rights and collecting the income on their behalf. A class action suit was filed in 1996 accusing the Federal government of mismanaging the funds and owing billions of dollars to the rightful owners of exploited land. The lawsuit spanned three presidencies and engendered seven trials covering 192 trial days, generated 22 published judicial opinions, and went before a Federal appeals court 10 times. It was finally settled in 2009 for \$3.4 billions owed to First Nations people. See for example, http://www.nytimes.com/2009/12/09/us/09tribes.html?pagewanted=all&_r=0 Funds generated through gambling establishments also help more Native Americans pursue a higher education, including law, and this has empowered them to protect their interests more firmly and effectively. Not all tribes are however included in these positive developments since not all can or are allowed to have casinos. Some are geographically isolated. Others have been denied permits that were given to neighboring tribes and have alleged at times disparate treatment due to political influence, corruption, and rewards for political campaigns contributions. See Micah Morrison, *Did Clinton Cronies Cash in on Indian Gambling?* Wall Street Journal, July 18, 2001; also *Jack Abramoff Indian Lobbying Scandal*, http://en.wikipedia.org/wiki/Jack_Abramoff_Indian_lobbying_scandal; U.S. Senate Governmental Affairs Committee’s Report, *Investigation on Illegal or Improper Activities in Connection With The 1996 Federal Election Campaigns (Indian Casino Decision)*, executive summary published in The Washington Post (March 5, 1998), www.washingtonpost.com/wp-srv/politics/special/campfin/stories/execsumm030698.htm.

concomitant port construction or expansion and ship traffic; with other indigenous people losing their land and way of life to powerful and well connected “entrepreneurs” expanding their land holdings in the “Triple Frontier” region between Brazil, Paraguay and Argentina to raise cattle to satisfy the growing world demand for meat in an area until recently considered “impenetrable” or to practice open air mining there. Some twenty indigenous groups in the area, including a totally isolated one in Paraguay believed to never have had contacts with “modern” people, have been abused, forcibly displaced, and reduced to a life of homelessness, poverty, begging, alcoholism and resorting to prostitution and petty crime for survival. The Mapuche in southern Chile and the descendants of the Maya in Chiapas, Mexico have faced and are still confronted with similar depredations, displacement, and insecurity, often with the open support of the state and the weight of the law certainly not written to protect their title, needs, and interests.

Who Owns Natural Resources: Development as Legalized Theft?

Driven by an increasing realization that the Earth’s riches are limited and at the same time spurred by the fierce competition that globalization has unleashed, and using increasingly sophisticated technology, both for discovery and exploitation, states and corporations have been motivated and able to go, literally, where no outsider has gone before.

The natural resources located in some of the Earth’s most remote or inhospitable locations became especially available for exploitation when a number of new states sprung up in the post-World War II, postcolonial period. Elites and dominant groups, empowered to maintain security and promote trade, “developed” natural resources often igniting conflicts with indigenous nations. Frequently, these clashes led to the growth of the military and to arm races, which in turn led to debt and — full circle now — the need to appropriate more saleable resources to pay off the debts.

This various cycle of resource appropriation, conflict, and weapons purchased has fed not only the developing world’s debt but also conflict over the very issue of who owns the resources — a question that has been central to the rise of nationalism and the assertion of “ethnic” identity throughout the world. Nation peoples realize that without their resource base, they have no future. They also believe that modern states, some of them relatively young, cannot legitimately claim resources that First

Nation peoples have utilized and maintained for centuries. The manner in which this is done is also the subject of fierce disputes (e.g. damage or destruction of ancestral lands, food and water sources, way of life).

States have traditionally received considerable help from other states and international organizations in appropriating the resources of indigenous people.

Ironically, the improving economic conditions worldwide and the growing wealth of many in emerging economies have made this hunt and exploitation of natural resources even more urgent and seemingly legitimize it, given the increasing demand for consumer goods and technological items. This experience is the rule, not the exception.

Worldwide, development industries help states to seize resources and put them up for sale on the world market — through “obvious” projects such as mining, oil exploration, and hydroelectric development, and more “subtle” projects such as colonization (which takes land), transportation (which eventually takes land, timber, minerals, and/or other resources), and credit (which finances the appropriation and/or processing of saleable resources).

One issue is never, or at best rarely, addressed when development projects are launched: Who owns the resources to begin with? Whose agreement is needed before proceeding? What is an equitable formula for sharing the earnings and mitigate displacement and environmental pollution and destruction? Which accountability systems should be in place to make sure those agreements and contracts are honored and fulfilled?

Laws introduced in the past few decades by ruling groups deny First Nations’ claims to their resources. Such laws, many indigenous groups argue, should not and do not take precedence over their prior claims to resources. The issue of who has rights to resources is being fought out on a case-by-case basis in the streets, in the forests, on the high seas, and in the courts. At stake are not only the issue of ownerships, but also the value of the resources and who has the right to manage, extract and consume them.

International institutions, including the United Nations and the World Bank, and some multinational companies (MNCs) have voiced concern over the adverse impact of resource extraction activities on the livelihood of indigenous communities but they can be also be seen as continuing to fund them. The scale and scope of problems confronting indigenous peoples caused by mineral extraction projects endorsed by governments,

international agencies and multinational companies are monumental and growing.⁵⁷

This raises a paradox: Despite the burgeoning number of international charters and national laws asserting the rights of indigenous peoples, they still find themselves subjected to discrimination, dispossession and racism.⁵⁸

The fact is that indigenous people, often shunted away to places thought to be barren and unproductive, are actually often inhabiting areas with vast natural resources that are much in demand today and coveted by the extractive industry. However, as in years and centuries past, native groups are rarely consulted in deciding whether and how to go about mining or building dams or harvesting lumber from the forests. They are also normally not offered or trained for employment in the projects that take advantage and profit from their lands. There is ample evidence of this from the few worldwide examples provided here and also thanks to the protest and advocacy movements of the native people in various parts of the world. They are drawing attention to the strain and the disconnect between the development discourse in the developed world and the deep-seated aspirations of indigenous groups who often have century-old and deep links with their land.⁵⁹

First Nation People: Identity and Their Link to the Land

Indigenous people does not see the land just as a source of riches to be exploited (and to be left behind at times totally destroyed like through open pit mining) but also as an ancestral cradle, a sacred place, a spiritual base, and a source of inspiration, values, and identity.⁶⁰ It is most important to

⁵⁷ Edmund Terence Gomez and Suzana Sawyer, *State, Capital, Multinational Institutions, and Indigenous Peoples*. Pp. 33-45 in Edmund Terence Gomez and Suzana Sawyer, *The Politics of Resource Extraction: Indigenous People, Multinational Corporations and the State* (Palgrave MacMillan 2012).

⁵⁸ See U.N. Special Reports: A/HRC/18/35, paras. 22-89, and A/HRC/21/47, paras. 34-76 and 79-87.

⁵⁹ See, for example, International Work Group for Indigenous Affairs, "*Indigenous peoples, transnational corporations and other business enterprises*", briefing note (January 2012), p. 1. Available from www.iwgia.org/iwgia_files_publications_files/0566_BRIEFING_2.pdf

⁶⁰ United Nations (2001) *Prevention of Discrimination and Protection of Indigenous Peoples*. Report of the Working Group on Indigenous Populations on its nineteenth session. Sub-Commission on the Promotion and Protection of Human Rights. Fifty-third session, Agenda item 5(b). UN Doc. E/CN.4/Sub.2/2001/17, 9 August.

<http://daccessddsny.un.org/doc/UNDOC/GEN/G01/149/79/PDF/G0114979.pdf?>

keep in mind that the link between native people and their land is also deeply connected with their identity. Thus, issues of identity are essential to grasp and comprehend how and why indigenous people relate to and respond to the approach and vision of neoliberal capitalism.⁶¹

Many perceive globalization as a mechanism that requires and imposes homogeneity in most aspects of life, what we might call “the Holiday Inn approach” reflecting a marketing campaign a few years ago by that hotel chain stressing that its rooms were so identical all over the world that a business person, once she stayed at a Holiday Inn, did not need to turn on the lights upon arrival, regardless of where she found herself in the world, to know where things were in the room and what to do. Complete sameness is guaranteed, worldwide.

Development, Dispossession and Denial of Identity

Globalization, because of its intrinsic dynamics and needs, is perceived by native people as undermining the sustainability of the ecosystems on which they have depended for millennia and the endurance of their unique native identity.⁶² There are those among them who see economic development, often presented as the panacea for all ills and problems facing a particular society or group, as an instrument, almost a Trojan horse, to justify and impose assimilation, as evidenced by countless examples, old and current, in the history of the relations between the “developed” world and indigenous populations with the interpretation of reality, of what is and what should be, done by the representatives of the settler establishment, without any possibly useful input from the natives.⁶³ Basically, “development” has been defined and presented worldwide, in subtle and no so subtle ways, as equivalent to becoming, acting, and living like Westerners. It is seen as the same as attaining the level and status of Western civilization.⁶⁴ One could say that, regardless of much talk about human rights and democracy, we have not progressed much

⁶¹ Makere Stewart-Harawira, 2005, 152-55. *The New Imperial Order: Indigenous Responses to Globalization*, 152-55 (London: Zed Books, 2005).

⁶² Michael Löwy and Charlotte C. Stanley, *Toward an international resistance against capitalist globalization*, *Latin American Perspectives*, 29(6): 127-31 (2002).

⁶³ The literature supporting and praising development in the Omo river valley in Ethiopia (supra, note 34) clearly reflects these patronizing attitudes, values and approach.

See Verónica Potes, *The duty to accommodate Aboriginal peoples rights: Substantive consultation?* *Journal of Environmental Law and Practice*, 17(1): 27-45 (2006).

⁶⁴ See supra note 35.

from the time of the “encounter” of Europeans explorers and entrepreneurs with indigenous populations in different parts of the world. The Medieval and Renaissance Europeans instinctively assumed that they were “the” model of what a human being should be and act and that the indigenous people were by definition inferior, backward, uncivilized and therefore fair game for being subjugated and exploited, often under the pretense of “protecting” them. The best hope of the native populations was to eventually become “civilized”, that is the same as the Europeans.⁶⁵ Until then, the natives were fair game for exploitation, enslavement, and mistreatment, their way of life considered a waste, not worth living, and definitely needing to be drastically “improved”, and their riches to be plundered at will and with the backing of the state. Since the very start of European exploration and expansion in various parts of the world, it was common practice to capture individuals or families or groups of natives, considered to be “exotic”, and take them to Europe. This was done for various purposes: to function as interpreters and help with communications and the preparation of dictionaries; to provide information and intelligence for the drawing maps, charts, invasion or battle plans for government officials, sailors, and colonial businesspeople; to be properly instructed in the Christian faith and be converted and then sent back to set an example and aid the missionaries; and for servitude.

However, it is important to note that at times they were simply taken to Europe to illustrate their “otherness”⁶⁶ and, by visibly demonstrating their “backwardness”, reaffirm European superiority and supremacy and legitimize its exploitative colonial conquests.⁶⁷ They were exhibited in “ceremonies of possession”⁶⁸, in circuses, at fairs or in “human zoos” as a curiosity, not differently from the Romans’ practice of exhibiting the leaders of conquered nations in a triumphal parade, celebrating the

⁶⁵ Guido Abbattista, *European Encounters in the Age of Expansion*. European History Online (2011).

<http://ieg-ego.eu/en/threads/backgrounds/european-encounters/guido-abbattista-european-encounters-in-the-age-of-expansion>

⁶⁶ Larry Catá Backer, *From Hatuey to Che: Indigenous Cuba without Indians and the U.N. Declaration on the Rights of Indigenous Peoples*, American Indian Law Review, ISSN 0094-002X, 01/2008, Volume 33, Issue 1, pp. 201-238.

⁶⁷ Suzana Sawyer and Edmund Terence Gomez, *On Indigenous Identity and a Language of Rights*. P. 9 in Suzana Sawyer and Edmund Terence Gomez, *The Politics of Research Extraction: Indigenous People, Multinational Corporations and the State* (Palgrave MacMillan 2012).

⁶⁸ Patricia Seed, *Ceremonies of Possession in Europe’s Conquest of the New World, 1492-1640* (Cambridge University Press 1995).

victorious troops and their commanders returning to Rome. This practices continued well into the 19th and even early 20th century, at times under the pretension of anthropological studies and research.

This perception of “otherness” and lack of full human status even permeated medical research and practice. For example, the reputed “father of (American) gynecology,” J. Marion Sims (1813-1884), reportedly conducted much of his research on bought female African slaves, on whom he performed his experimental surgeries without anesthesia.⁶⁹ His position on this was clearly influenced by race and class. According to him, lower class women, especially African slaves and also Irish women immigrants he treated in New York, did not need and were not entitled to anesthesia. Instead, Anglo-European women of the upper classes were, because they could not tolerate surgery or childbirth pain on account of their more civilized and delicate nature.⁷⁰

There was actually considerable discussion among theologians and philosophers if indigenous populations, not being like Europeans, could actually be considered fully humans. The word “savage,” noble or ignoble, was used until not long ago in the literature to describe native populations in contrast to the “civilized” Europeans and their colonial successors. As Edmund Burke,⁷¹ an 18th century Irish statesman who served for many years in the House of Commons, wrote to an American colleague in 1777: “Now the Great Map of Mankind is unrolled at once; and there is no state or Gradation of barbarism, and no mode of refinement which we have not at the same instant under our View. The very different Civility of Europe and of China; the barbarism of Persia and Abyssinia; the erratic manners of Tartary, and of Arabia; the Savage state of North America, and of New Zealand.”

⁶⁹ Diana E. Axelson, *Women as Victims of Medical Experimentation: J. Marion Sims' Surgeries on Slave Women, 1845-1850*, <http://www.aasd.umd.edu/chateauvert/axelson.htm>; J. Marion Sims, *The Story of My Life* (New York: Appleton, 1884, 1885, 1888); Seale Harris, *Woman's Surgeon* (New York: Macmillan, 1950), 374, 392. To provide some perspective, it must be noted that anesthesia by ether did become widely used in the U.S. only after the Civil War (1861-1865), even though known since the early 1840s. Similarly, despite the benefits and proven safety of anesthesia, studies in the early 1990s found that most male newborn circumcisions in North America still did not involve anesthetics and this was as much as 64–96% in some regions.

⁷⁰ Jeffrey S. Sartin, *J. Marion Sims, the Father of Gynecology: Hero or Villain?* *South Med J.* 97(5) (2004). http://www.medscape.com/viewarticle/479892_3

⁷¹ Edmund Burke to William Robertson, 9 June 1777, in: Robertson, *Works* 1819; see also in: Burke, *Correspondence* 3.351 (1958).

For this reasons, colonial administrations and national governments like Australia, Canada, the United States and others, often took away children of indigenous people, by force if necessary, to “educate” them in far away Western-style residential schools where they would be treated as inferior beings, forbidden to speak their language and follow their religious beliefs, and straightjacketed into a Western model of thinking, feeling and acting. In reality, they received little education and were mostly trained to be farm hands or house servants. And the practice reportedly continues, regardless of our supposed advances in human rights and official recognition of past abuses. According to Native sources, in Australia, as of June 2013, nearly 14,000 Aboriginal children were “removed” from their parents, siblings and relatives. While Aboriginal children account for a mere 3 percent of the Australian population, they presently make up a third of all children in state custody. They are placed in institutions or with foster families where they are often physically, emotionally, and sexually abused and receive little or no education. The swift termination of parental rights, with Aboriginal parents unable to assert their rights because of large distances from the courthouse with no means of transportation and no funds to hire legal help, often leaves these children adrift and defenseless for the rest of their lives. Mixed race children have been and are most often a special target of this state intervention and forceful removal to “breed out the color” as one chief “protector” of Aborigines reportedly described it.⁷²

At the same time, the Europeans and their successors, the Australians, Canadians, Americans and others, felt completely entitled to plunder any type of resource they could encounter in the territories of the native peoples because the natives were deemed to be too lazy or ignorant or incapable of properly managing and exploiting them and therefore stood in the way

⁷² Read more at <http://indiancountrytodaymedianetwork.com/2014/03/26/australia-perpetuates-cultural-genocide-through-forced-removal-aboriginal-youth-154181>. See also Ian Lloyd Neubauer, *Australian Child Protection Accused of Repeating Sins of ‘Stolen Generation’*, Time Magazine (March 11, 2014); <http://time.com/19431/australian-child-protection-accused-of-repeating-sins-of-stolen-generations/> The plight and suffering of the Lost Generation was movingly portrayed in the 2002 film *Rabbit-Proof Fence* based on the book *Follow the Rabbit-Proof Fence* by Doris Pilkington Garimara based on the true story of her mother, as well as two other mixed-race Aboriginal girls, who ran away from the Moore River institution, north of Perth, Western Australia, to return to their Aboriginal families, after having been forcefully placed there in 1931. The film recreates the Aboriginal girls’ walk for nine weeks along 1,500 miles (2,400 km) of the Australian rabbit-proof fence to return to their community at Jigalong, while being hunted by a white government man and an Aboriginal tracker.

of “progress.” Not much has changed since time immemorial, in the wake of invasion, conquest and subjugation.

On the bright side, the reoccupation and effort to resist the homogenizing dynamics of globalization is actually giving fruit by forcing the introduction of an alternative vision that accommodates both economic development and group identity for native populations by underlining that ‘[t]here is an intriguing symmetry between the modernity of the desire for global business competence and competitiveness, and the insistence upon the distinctive importance of cultural heritage in developing new enterprises.’⁷³ This can actually be seen through the apparent paradox in today’s commercial transactions, where producers of goods on the one hand want to conquer global markets while on the other they fiercely defend, to the point of appearing parochial, the denomination of origin of their products, often tied to a very specific and even obscure geographical place. The issue of Appellation or Denomination of Origin, and of Geographical Indicators is growing in importance, warnings, threats, and litigation in international trade.⁷⁴ The list of categories is growing. Now we also have Protected Designation of Origin, Protected Geographical Indicator, and Traditional Specialty Guaranteed and, of course, Organic. The European Union is quite involved and active in this area on behalf of Member States.⁷⁵

Foreign Direct Investments and Multinational Corporations: The New Wave of Conquests and Exploitation

Historically, with the passage of time, it became increasingly difficult for trade and commercial interests to mount and execute expeditions for

⁷³ Kevin Hindle, Robert B. Anderson, Robert J. Giberson, and Bob Kayseas, *Relating practice to theory in indigenous entrepreneurship: A pilot investigation of the Kitsaki Partnership Portfolio*, *American Indian Quarterly*, 29(1/2) Winter/Spring: 1–23 (2005).

⁷⁴ Ekaterine Egutia, *Marketing and Protecting Geographical Indication of Georgia Abroad*, www.sakpetenti.org.ge (2013).

⁷⁵ http://ec.europa.eu/agriculture/quality/index_en.htm. See also *EU and US: Opposing Views of Geographic Indications of Origin*, 03/05/2010, <http://www.fr.com/TrademarkThoughtsFall2008/> and also, *Geographical Indications: systems, registration, use and protection in China and Europe*, <http://www.ipr2.org/gi>. For the complications and possible contradictions of promoting free trade while enforcing all these origin and geographical limitations, see: Danielle B. Shalov, *Will the European Union Prove to Be Lactose Intolerant? The European Union’s Attempt to Strike a Delicate Balance between Protecting Appellation of Origin for Cheese and the Promotion of Free Movement of Goods Between Member States*, 11 *Cardozo J. Int’l & Comp. L.* 1099 (Spring 2004).

discovery and conquest in new areas reputed to have abundant resources. Basically by the 20th century, the earth had been divided up among powerful European countries or their successors states founded by European settlers, including the United States that claimed the entire Western Hemisphere to itself with the Monroe Doctrine.⁷⁶ Thus, the only remaining choice for the private sector was to engage in Foreign Direct Investment which is defined as “an investment made by a company or entity based in one country, into a company or entity based in another country... Entities making direct investments typically have a significant degree of influence and control over the company into which the investment is made.”⁷⁷

Foreign direct investments have grown substantially in the last 25 years in both volume and geographical reach. It must be kept in mind that foreign direct investment is a measure of foreign ownership of productive assets, like factories, mines, agricultural land, forested land. The increase of foreign investment is often considered an indication of growing economic globalization. The biggest influx of foreign direct investments is mostly among developed countries and open economies in general. However, given the economic crisis that many developed countries have experienced since 2008, while some developing and emergent countries have instead prospered through a substantial increase of their international trade, a much bigger flow of capital was generated recently toward developing and emerging countries than before.

Since most of this growing trade originating in emerging countries consists of raw materials, minerals, agricultural products, meat and lumber, most of the foreign direct investment has focused on and has impacted lands either occupied or claimed by native groups.

Foreign direct investment has also provided a major platform, role and influence to multinational corporations. These companies operate in more than one country through subsidiaries. They establish themselves in other

⁷⁶ The Monroe Doctrine was an overall statement of U.S. foreign policy regarding Latin American countries in the early 19th century. It stated that additional efforts by European countries, especially Spain, to colonize land or intervene with states in North or South America would be viewed as acts of aggression, triggering U.S. intervention. The United States effectively reserved to itself economic, political and military interventions in Central and South America and the Caribbean. This doctrine came to be widely resented in the Americas because it was perceived as justifying U.S. interventionism and even imperialism in the region and limiting the ability of countries in the region to be fully independent and autonomous actors in international trade, politics and alliances.

⁷⁷ Investopedia, *Foreign Direct Investment-FDI*, <http://www.investopedia.com/terms/f/fdi.asp>

countries with the aim of engaging in the exploitation of raw materials; more easily access and dominate markets; benefit by cheaper labor and the consequent reduction in costs; and take advantage of benefits provided by more permissive legislation and in favor of their interests in various areas: environmental, labor, tax exemptions, incentives and the offer at no cost by the state and/or locality of expensive infrastructure needed to operate, like access roads, road or rail connections, electricity, water and more. This does not only happen in developing countries. Given the very strong competition, even developed countries, like the United States and European countries, offer incentives and tax breaks to attract factories, sorting and packing centers, malls and mega-supermarkets like Walmart, Carrefour and others.

Multinational corporations have a lot of weight and influence in the process of globalization and in a national economy because many of them are stronger and have more capital than most countries, especially small or developing ones.

Multinationals, Elections and Undue Influence

One major point of entry into the policy-making and legislative process of a country for a multinational is the elections process. Today, elections are increasingly expensive. As an example, according to an estimate by the non-partisan Center for Responsive Politics, the re-election of President Obama in the United States in 2012 reportedly cost around \$6 billion,⁷⁸ \$700 million more than the previous “most expensive election” in history — 2008. While not all elections will cost that much, everywhere elections have become much more sophisticated and complicated affairs, requiring highly skilled advisers, planners, and executing staffers and the use of very expensive media. Political parties and politicians everywhere welcome donations and rely to a great extent on monies provided by major corporate leaders and businesses. And corporations are happy to oblige. In the United States there has been considerable controversy over recent Supreme Court decisions that first struck down limits on independent campaign spending by corporations and unions⁷⁹ and now

⁷⁸ <http://www.thewire.com/politics/2012/11/most-expensive-election-history-numbers/58745/>

⁷⁹ *Citizens United v. Federal Election Commission*, 558 US ___(2010); decided on January 21, 2010.

eliminated a decades-old cap on the total amount any individual can contribute to federal candidates in a two-year election cycle.⁸⁰ The Court decided that overall limits of \$48,600 by individuals every two years for contributions to all federal candidates violated the First Amendment, as did separate aggregate limits on contributions to political party committees, currently \$74,600. The dissenting judges pointed out that, under this decision, a single individual could contribute millions to a political party or to a candidate's campaign. It must be noted that the previous U.S. Supreme Court decision regulating donations to political campaigns in 1976 limited contributions to political campaigns specifically in order to prevent corruption.⁸¹ Commonsensically, most people worry that a politician who wins an election thanks to ample funds to run his or her campaign may be in fact indebted to those who "invested" in him or her by contributing large amounts of money.⁸² Thus, political contributions are at times made to one candidate versus another on the basis of calculating the return that can be expected favoring the company's interests thanks to the special relations thus acquired with the winning candidate. At times, big individual and corporate donors donate to candidates of both parties competing in an election to ensure that, regardless of the result, access and influence to high-level politicians and decision makers will be guaranteed. Moreover, in another twist, it is also possible that big individual and corporate donors may decide from the start which candidate they are going to put forward and support through substantial contributions to make sure that their interests will be protected and advanced. There is no doubt that in many countries the higher levels of government are at times completely controlled or at least strongly influenced by those who did contribute and can continue to donate large amounts of monies to a political party that they themselves may have helped come to power

⁸⁰ *McCutcheon et Al. v. Federal Election Commission*, 572 US ____ (2014); decided on April 2, 2014.

⁸¹ *Buckley v. Valeo*, 75 ____ 436; decided on January 30, 1976 ("The contribution provisions, along with those covering disclosure, are appropriate legislative weapons against the reality or appearance of improper influence stemming from the dependence of candidates on large campaign contributions, and the ceilings imposed accordingly serve the basic governmental interest in safeguarding the integrity of the electoral process", p. 23).

⁸² It has been said, for example, that the Obama's administration strong support for gays in the military and for gay marriage has been in acknowledgment of the substantial fundraising for his election and re-election campaigns conducted by the gay (LGBT) community, especially in California.

in the first place. Thus corporations can gain significant influence on policy making in any given country. Foreign corporations and interests can do so rather easily in developing countries where big interests are at stake and financial tycoons are still a rare species. Access by foreign corporations to large amounts of monies, and moreover in hard currency, gives them a sizeable opening to “buy” influence with the government. Ironically, this has been made easier by policies of restructuring the financial sector and the modernization and liberalization of financial operations and markets demanded by international financial institutions as a condition for grants or loans for development. The most important elements of this, which are very helpful to multinationals, are the free entry of foreign capital or foreign direct investment; the elimination of restrictions on currency speculation or conversion; the guarantee of repatriation of profits; and the right of foreign investors to attain, purchase or keep a majority equity stake in domestic companies. This allows them to become major inside players in the economic policy making decisions in that particular country; to have access; and to be obtain concrete results. Multinational corporations this way will find it quite easy to get at and exploit natural resources; invest and move large amounts of money in and out of the country; and set up local companies in crucial areas of the economy that have access to a large amount of capital and therefore can drive genuine local companies out of business so as to monopolize access to resources and therefore dictate policies, salaries, prices and quantities on the basis of the company’s interests. As it was already said, jurisdictions often compete to attract investments and foreign companies that might bring jobs, revenues, and development. Laws are at times changed to create a favorable climate for businesses involved in trade, mining, commercial farming, manufacturing and assembling products so that they may be enticed to come and establish themselves in such a “business friendly country.” This often means that labor laws, environmental laws and laws that are aimed at protecting indigenous populations and their lands are not even considered or, if existing, are weakened or even abolished, or assurances are given to native people and environmentalists with a wink and a nod to the investors that they will not be a problem, that they will not be enforced.

To illustrate the point, at a forum organized by the London Mining Network at Amnesty International in London in April 2014, a succession of trade union and community representatives from across the world told how mining giant Rio Tinto is practicing a 21st century form of colonialism.

They explained how the company makes offers to national governments that they cannot refuse. This then leads in some cases to governments almost becoming an arm of Rio Tinto's operations. According to them, the company operates in this way across many countries, practicing a divide-and-rule policy toward governments, workers and citizens or indigenous groups. For example, according to press accounts,⁸³ a delegate from Madagascar stated that, "Before they came to Madagascar Rio Tinto bought out the political powers. If Madagascans don't agree with their activities, the authorities act to protect Rio Tinto." Another favorite tactic when there is joint ownership is for the multinational, in this case Rio Tinto, to let the other partner(s), most often the state government, negotiate compensation for displaced people for example. Thus, if there are protests about it, the company can say that they have no control over it. It is the government's fault. The same happened with complaints of unsafe mining operations at the Grasberg gold mine in Indonesia that resulted in the death of 33 miners. Rio Tinto conveniently explained that the mine was managed by another company and thus not its responsibility. Native Papuan people protesting against the Grasberg mine, which has also been at the center of alleged environmental abuses, were joined by others complaining about alleged human right and environmental abuses in Madagascar, Australia, Namibia and the United States. In Madagascar, reportedly, the fight-back has gained strength over the last four years, with indigenous people organizing barricades, around the mining operations. These activities began in October 2010 with just a few people but now around 8,000 are taking part. And, in this vein, we all witnessed with horror the killing by police of 34 miners demonstrating at the Marikana platinum mine in South Africa owned by the Lonmin Company for better wages and for the recognition of a new union. The killing of the 34 was the most deadly police action since South Africa became a democracy in 1994. And yet, while the whole world saw the police kill those 34 striking miners, 27 of their fellow demonstrators, including some who were wounded by the police, have been arrested and accused of the 34 killings. No police officer has been arrested or prosecuted.⁸⁴ Like Chile against the Mapuche, South Africa is using a penal law doctrine

⁸³ For an account of the meetings in London in April 2014 airing complaints about Rio Tinto's management of mines in various continents, see <http://www.minesandcommunities.org/article.php?a=12619>

⁸⁴ <http://www.bbc.com/news/world-africa-19424484>; <http://www.bbc.com/news/business-19316846>

that was enacted and used by the apartheid regime to prosecute and even ask the death penalty for large numbers of demonstrators. At the time of apartheid, the African National Congress (ANC), the former liberation movement now in power, campaigned against the doctrine. Now, its critics accuse it of behaving just like the apartheid regime and turning victims into perpetrators.⁸⁵ This is apparently the power of cozy arrangements and profit sharing between multinationals and state governments! Other companies like Anglo American Platinum and Impala Platinum have also been affected. The violence too continues with a number of workers at the Lonmin mine killed, often hacked to death with machetes, in various circumstances.⁸⁶

The Ease of Doing Business Standards and the Resource Curse

At times, international financial institutions themselves at least appear to facilitate this process to the detriment of environmental, human rights and indigenous concerns. This is done for example by ranking countries on the ease of doing business there and therefore on how attractive, secure, and profitable they are for foreign direct investment without pesky legal restrictions or considerations of social justice. The “Ease of Doing Business” rankings by the World Bank have been quite controversial in this respect as advancing “savage capitalism” as the ideal business environment and are apparently being reviewed.⁸⁷

Moreover, a number of respectable studies have shown how damaging and dangerous it is for a country to depend only on the extractive industry, without many limitations and actually as a race to extract as much as possible as fast as possible. The repercussions are wide and deleterious. This has been called, “the resource curse.” It means that countries rich in natural resources where the standard of living should be high for everyone to enjoy it, instead have high levels of poverty,⁸⁸ homelessness,

⁸⁵ <http://www.bbc.com/news/world-africa-19424484>; <http://www.bbc.com/news/business-19316846>

⁸⁶ <http://online.wsj.com/articles/four-killed-in-violence-amid-1399897818>; <http://www.theguardian.com/business/marketforceslive/2014/may/12/lonmin-strike-miners-killed-profits-fall> (both dated May 12, 2014).

⁸⁷ <http://www.doingbusiness.org/~media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB13-full-report.pdf>

⁸⁸ 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).

poor health and health care, if any at all, alcohol and drug abuse, domestic violence, high rates of crime and violence, and often are governed by authoritarian or dictatorial governments. It has actually been established that there is a statistically significant, inverse relationship between abundance of natural resources and economic growth.⁸⁹ Focusing specifically on income from minerals, gas or oil extraction to accelerate the development of a country that may face deep seated problems, can lead to policies that ignore the foundational measures that ensure a solid, long lasting and effective development⁹⁰ in favor instead of highly visible and mediatic but superficial improvements. Also, the hydra of corruption, lavish spending on government officials, and pet projects to satisfy politicians' vanity and the demands of their constituents for immediate gratification; increased spending on arms and the military to protect the nation's riches and ensuring governmental controls; and neglect of other vital sectors of the economy are also part of the distortion brought about by stressing the extractive industry as a universal panacea.⁹¹ Recent wide demonstrations in Brazil questioning the large investments in stadiums and sports venues in preparation for the World Football Cup of 2014 and the Summer Olympics of 2016 while there are so many unattended needs in the general infrastructure, educational and health system, and housing stock of the country illustrate this point.

The Revolving Door Effect

Finally, another dynamic that facilitates the corrupting and damaging influence of the business world and of multinationals on the government is the so-called "revolving door" that allows key and influential people to constantly circulate and be recycled among government, business, international financial institutions and multinationals. These persons operate often like a Trojan horse that infiltrates the halls of government and influences policy making in favor of corporate and investment firms'

⁸⁹ Jeffrey D. Sachs & Andrew M. Warner, *Natural Resource Abundance and Economic Growth*, November 1997 (Nat'l Bureau of Econ. Research, Working Paper No. 5398, 1997).

⁹⁰ Jeffrey D. Sachs & Andrew M. Warner, *Fundamental Sources of Long-Run Growth*, *American Economic Review*, 87, 2, 184-88 (May 1997); http://www.iser.uaa.alaska.edu/people/colt/personal/shared_papers/sachs_warner_growth_aer_may1997.pdf

⁹¹ George K. Foster, *Foreign Investment and Indigenous Peoples: Options for Promoting Equilibrium Between Economic Development and Indigenous Rights*, *Michigan Journal of International Law*, ISSN 1052-2867, 07/2012, Volume 33, Issue 4, p. 627.

interests and plans. This permits big corporations to facilitate and expedite policies, financial decisions, and projects that benefit them and to defeat attempts for more transparency, consumer protection, and regulation. The goal, especially in smaller and weaker countries, is to gain control of the government and thereby of valuable and rare resources and firm up the multinational's place and control in the developing economy. The vital importance of this revolving door process is clearly demonstrated when captains of industry, investment bankers, and Wall Street wizards leave highly paid jobs with bonuses in the millions for modestly paid governmental jobs. It is clear that the payoff is not the salary and that the person is doing it on behalf of a whole industry that will "remember" and handsomely reward him or her when he will return to whatever field of work he left to go on this assignment. This is also a way to spread a certain vision of reality, of the economy, of what is good for a country, of what will revive the economy, of what will generate prosperity, power and influence. It is an effort at social construction to make sure that a certain definition of what is good and right economically for a country, according to the interests of a particular business sector, is accepted and becomes part of everyone's understanding, lexicon, and assessment of reality. For example, one the most widespread mantra that justifies major environmental damage or the risk of it; paying low wages while reaping ample profits thanks also to generous tax exemptions; and trampling upon human and indigenous rights is "job creation." This has become the most widespread, almost generic, benchmark of success, universally accepted, good enough to silence criticism, strong enough to quell complaints, without any further inquiry or discussion as to the quality of those jobs, the wages that will be paid; how secure and stable they are; and if an employee can conceivably live at a decent level on the basis of that job and more. "Creating jobs" is the secular dogma that indeed explains away anything and everything and secures a green light for any project, regardless of the havoc and damage it may visit upon a country or a society or a particular group.

Investments create those jobs that the financial sector, industrialists and politicians always trumpet as the best a society wants and expects, as a dogma of faith that justifies negative consequences for the environment; the pollution of water sources, rivers and air; and that rarely leads to wealth for the common people, especially indigenous ones, an outcome often presented as the natural outcome of the investment and the consequent development. Those becoming wealthier are quite few and

often live far away from the area impacted or even in other parts of the world. For example, we recently learned of many protests in China, of course usually “illegal”, by local people who oppose the confiscation of their land in the name of development, resulting in their eviction, displacement and subsequent impoverishment and serious damage to the quality of air and water in their cities.

The power of big corporations and the overt or covert support they receive from various levels of governments and of international financial institutions are clearly visible in many parts of the world where the territories of indigenous groups are used for various projects — mining, hydroelectric plants, highways, vast plantations, fracking, tourism and sports without their consent, input, compensation, any plan to offer them worthy opportunities for training and employment and viable relocation, housing, and education.

Technological and Genetic Advances and Negative Impacts

The sad story that has marked colonialism, especially in Africa, and the expansion of large countries such as the United States, Brazil, Canada, Australia, Argentina, South Africa and others, is repeated again today in vulnerable parts of the world, especially those with native populations, facilitated by the “progress” furnished by science and technology that allows us to reach areas where we could not go before or exploit the land in ways previously impossible or very difficult and expensive. Examples are fracking, processing of oil shale, digging oil wells in deep ocean waters several kilometers below the sea level, and oil extraction and mines in inaccessible areas now reachable with helicopters and drones.

Genetic advances now allow the introduction of plants, cereals, vegetables, and soy, for example, that can better adapt to their surrounding conditions, and even survive in very dry conditions, high temperatures, and poor quality land where before agriculture or livestock were impossible or fruitless. For example, until recently, thousands of acres at the borders of Argentina, Paraguay and Brazil, the so-called “Triple Frontier” region, very dry and hot in the summer, have been called since colonial times, the “Impenetrable”, an expanse of rugged terrain covered with low and thorny vegetation forbidding and impassable. Indigenous peoples, such as the Guaraníes, the Guaycurúes and Kairos, did adapt to survive in such a harsh and unforgiving environment. Today, after the removal of the native vegetation, thousands of these acres have been turned into vast fields of

soybeans and other crops, owned by large multinational agribusinesses. Indigenous peoples have been displaced against their will, often threatened by the barrel of guns, with no alternative plans for them. They are now living in extreme poverty, sometimes in makeshift shelters at the edge of the roads in the region, without any services, schools, food, drinking water, sanitation and sources of income. Their demands to stop the stripping of their territory have not borne any fruit; on the contrary, they have been repressed by the police, especially in the Argentine provinces of Chaco and Formosa, with even several casualties.

The same happened in the south of Chile, where the native Mapuche have been struggling for years for the return of their lands and for a stop to forestry practices that are destroying the native forests in favor of non-native trees that quickly produce wood for export abroad. Japanese and Swiss interests and two major forest companies in Chile have planted hundreds of thousands of acres with non-native species such as Monterey pine, Douglas fir and eucalyptus trees. Chile exports more than \$600 million of wood to the United States, almost all of which comes from this region of the south, and is increasing. For example, Home Depot, the most important “do it yourself” home and construction company in the United States reportedly buys its wood from Chile. Some Mapuche leaders want stronger protections for the forests. Even worse, in recent years, protests by Mapuche activists have been prosecuted under Chilean anti-terrorism legislation, originally enacted by the military dictatorship of Augusto Pinochet to control political dissidents. The law allows prosecutors to withhold evidence from the defense for up to six months and to conceal the identity of their witnesses, who can provide evidence in court from behind screens. Recently, the Mapuche have launched a series of hunger strikes asking that the use of this harsh anti-terrorism legislation be discontinued. It is indeed very ironic and sad that laws rooted in the previous dictatorship be used by the successor democratic government to stamp out the indigenous people’s defense of their land. And these are just two examples of activities of multinational and local companies accused of violating human rights and of harming the environment in indigenous areas in cooperation with state and local authorities.

The Role and Function of International Financial Institutions

One can certainly argue that in the last 30 years, an increasing number of developing countries have been supervised and even ruled in an extensive

way by transnational organizations, like, for example, international financial institutions and multinational corporations that work in close cooperation and coordination with each other and with developed countries. The International Monetary Fund and the World Bank and their abbreviations, IMF and WB, are the best known international financial institutions and mentioning them elicits at times strong reactions in favor or against on the part of the “street”, worldwide. Argentina’s repayment in 2005 of her entire \$9.8 billion debt to the IMF, severing at the same time her 22-year-old ties with a lender that it blamed for its financial woes, strongly echoed around the world, especially among the developing and emerging countries.

This situation of transnational financial organizations controlling developing countries reflects the increasingly strong and complex ties between states, international financial institutions and multinationals.⁹² These power linkages especially impact decisions on extractive investments that affect local, and especially indigenous, communities. These bonds have existed in different forms and strength since a long time as illustrated through previous historical examples in this paper. These days, however, they have become deeper, firmer, systematic, embedded, and part of institutional manners of operation.⁹³

It was about 20 years ago or so that the United Nations and influential leaders started to propose and promote the advantages of public-private partnerships that would make development plans and projects possible, feasible, and more likely to succeed. In 2006 the U.N. General Assembly adopted the resolution “Toward Global Partnerships” which calls for stronger partnerships with the private sector.⁹⁴ The idea was to advance the public good, especially in desperately poor countries, by organizing shared business ventures that would provide profits for everyone.⁹⁵ Also in 2006

⁹² Korinna Horta, *The State, International Institutions, and Indigenous Peoples in Chad and Cameroon*, in *The Politics of Resource Extraction: Indigenous People, Multinational Corporations and the State* 204 (Terence Gomez & Suzana Sawyer eds. Palgrave MacMillan 2012).

⁹³ International Work Group for Indigenous Affairs, “*Indigenous peoples, transnational corporations and other business enterprises*”, Briefing note (January 2012), p. 1. Available from www.iwgia.org/iwgia_files_publications_files/0566_BRIEFING_2.pdf.

⁹⁴ United Nations General Assembly Resolution A/RES/60/215.

⁹⁵ Simon Zadek, *The Logic of Collaborative Governance: Corporate Responsibility, Accountability, and the Social Contract*. Corporate Social Responsibility Initiative Working Paper No. 17. Cambridge, MA: John F. Kennedy School of Government, Harvard University (2006).

the report of the Secretary General High-level Panel on U.N. System-wide Coherence stressed public-private partnerships as a dynamic way to realize sustainable development goals within the context of U.N. reform.⁹⁶

High on the list of objectives pursued by these public and private partnerships are the obliteration of poverty, the introduction and support of economic development in its most sustainable forms, and environmental protection. However, there has been considerable concern about how these ties between governments, international financial institutions, and multinational corporations may grow into patterns of action that will actually undercut the very objectives that they purportedly want to reach. The impact that this web of connections and powerful interests has on indigenous people and their interests is a particularly sensitive area.⁹⁷ As some experts have pointed out,⁹⁸ regardless of their claims of being neutral, international financial institutions depend and are under the strong influence, of course, of their most prominent member and donor countries, which normally are developed countries. As a consequence, the financial aid distributed by the international financial organizations and the conditions that accompany it strongly reflect the political and economic agenda of the member states that provide the bulk of the funding.⁹⁹ Differently from the United Nations and some other international organizations where each member, regardless of size or population has one vote to cast, the international financial organizations make decisions using a weighted system of voting.¹⁰⁰ How many votes a member country has depends of

⁹⁶ *Delivering as One*, Report of the U.N. Secretary General's High-level Panel 2006, paragraph 74; <http://www.un.org/en/ga/deliveringasone/>

⁹⁷ Sanae Fujita, *The World Bank, Asian Development Bank And Human Rights: Developing Standards Of Transparency, Participation And Accountability*, Cheltenham: Edward Elgar (2013).

⁹⁸ Korinna Horta, *The State, International Institutions, and Indigenous Peoples in Chad and Cameroon*, 204 in Edmund Terence Gomez and Suzana Sawyer, *The Politics of Resource Extraction: Indigenous People, Multinational Corporations and the State*. Palgrave MacMillan (2012).

⁹⁹ Axel Dreher and Nathan Jensen. *Independent Actor or Agent? An Empirical Analysis of the Impact of US Interests on IMF Conditions*. Leitner Working Paper 2003–04 (2004).

¹⁰⁰ T. Y. Wang, *U.S. Foreign Aid and UN Voting: An Analysis of Important Issues*, 43(1) Intl. Stud. Q., 199–210 (1999); Christopher Kilby, *The Political Economy of Conditionality: An Empirical Analysis of World Bank Loan Disbursements*, 89 J. Dev. Econ. 51–61 (2009); Ilyana Kuziemko & Eric Werker, *How Much is a Seat on the Security Council Worth? Foreign Aid and Bribery at the United Nations*, 114(5) J. Political Economy 905–30 (2006); Charles W. Kegley & Steven W. Hook, *U.S. Foreign Aid and UN Voting: Did Reagan's Linkage Strategy Buy Deference or Defiance?* 35(3) Intl. Stud. Q.

a formula that takes into account a number of variables, the most important one of which is how much money the country contributes to the resources of the international financial institution. For this reason, the largest share of voting power at the World Bank is held by the United States (15.85%), Japan (6.84%), China (4.42%), Germany (4.00%), and the United Kingdom (3.75%). In 2010 the voting power allocation formula was modified to increase the voice of developing countries like China. However, it must be noted that the United States percentage of voting power was not reduced. According to Dreher and Sturm,¹⁰¹ the power of the United States over important international financial institutions is revealed by the fact that developing countries that are close allies of the United States and vote with it most of the time at the United Nations and other international forums, receive International Monetary Fund's loans more easily and with more favorable terms.¹⁰² It is also key to note that the member states providing the largest amount of funds sit as such, under their name, on the executive boards of the World Bank and of the International Monetary Fund. Other member states are grouped into constituencies and are collectively represented by region. Thus, these latter member states have a very reduced decision-making power. On this basis, one can argue that this system of decision-making at these international financial institutions is skewed in favor of developed countries to the detriment of developing countries.¹⁰³

295–312 (1991); Axel Dreher, Peter Nunnenkamp, & Rainer Thiele, *Does U.S. Aid Buy UN General Assembly Votes? A Disaggregated Analysis*, 136 *Pub. Choice* 139–64 (2008); Paul Nelson, *Whose Civil Society? Whose Governance? Decision-Making and Practice in the New Agenda at the Inter-American Development Bank and the World Bank*, 6(4) *Global Governance* 405–31, at 421 (October–December 2000). See also Robert K. Fleck & Christopher, *How Do Political Changes Influence U.S. Bilateral Aid Allocations? Evidence from Panel Data*, 10(2) *Rev. Dev. Economics* 210–23 (2006). This is not limited to the World Bank and IMF. For the influence of the United States and Japan on the Asian Development Bank's decisions, see Christopher Kilby, *Donor Influence in Multilateral Development Banks: The Case of the Asian Development Bank*, 1(2) *Rev. Intl. Organizations*. 173–95 (2006).

Lewis G. Irwin, *Dancing the Foreign Aid Appropriations Dance: Recurring Themes in the Modern Congresses*, 20(2) *Pub. Budgeting & Fin.* 30–48.

¹⁰¹ Axel Dreher and Jan-Egbert Sturm, *Do IMF and World Bank Influence Voting in the UN General Assembly?* Swiss Federal Institute of Technology and KOF, December (2005).

¹⁰² Paul Nelson, *Whose civil society? Whose governance? Decision-making and practice in the new agenda at the Inter-American Development Bank and the World Bank*. *Global Governance*, 6(4): October-December 2000, 405–31 at 421 (2001).

¹⁰³ Ngaire Woods, *Order, justice, the IMF and the World Bank*. In Rosemary Foot, John Lewis Gaddis and Andrew Hurrell (eds), *Order and Justice in International Relations*. Oxford: Oxford University Press, 83 (2003).

The strong connecting web of mutual interests between the international financial institutions and developed and developing countries results in a potent and well-entrenched complex of control and submission founded on financial considerations.¹⁰⁴ This is why the international financial institutions are often perceived as oblique conduits for the more powerful developed member states to protect and advance their economic clout, objectives and interests in the developing world. As a matter of fact, by means of technical assistance loans, the International Monetary Fund and the World Bank and the related banks and organizations, have played a key role in setting up energy sections in the national economic system of several countries and in substantially amplifying extraction activities of minerals and hydrocarbons.

The absence of accountability (except to the leading members states that may be the ones instigating certain policies to protect their own status and interests and provide for their own needs to start with) and of transparency of international financial institutions has also made it easier for malfeasance and corruption to take roots. This is because the development projects and the institutions themselves are not directly answerable to any supervisory outside organ. This could at times embolden certain states to impose their will and pressure the international financial institutions to go against their own policies and benchmarks.¹⁰⁵

It is also relevant to stress that international financial institutions are not monolithic. At times there are strong divergent opinions within them over promoting or approving or carrying out extractive projects. For example, the World Bank and the Asian Development Bank strongly influenced the Philippine government to adopt the Indigenous People's Rights Act of 1997.¹⁰⁶ However both organizations had earlier advocated the introduction and the approval by The Philippines of the Mining Act

¹⁰⁴ Will Hout, *The Politics of Aid Selectivity: Good Governance Criteria in World Bank, US and Dutch Development Assistance* (Routledge 2007), and Axel Dreher & Nathan Jensen. *Independent Actor or Agent? An Empirical Analysis of the Impact of US Interests on IMF Conditions*, Leitner Working Paper, 2003–04, (2004).

¹⁰⁵ Edmund Terence Gomez and Suzana Sawyer, State, Capital, Multinational Institutions, and Indigenous Peoples, pp. 1-9 in *The Politics of Resource Extraction: Indigenous People, Multinational Corporations and the State* (Palgrave MacMillan 2012).

¹⁰⁶ A recent evaluation of the implementation of the Indigenous People's Rights Act (IPRA) states that: "The indigenous people of The Philippines continue to figure in social discrimination, economic marginalization, and political disempowerment, albeit the presence of IPRA and the existence of the National Commission for the Indigenous People. Subject to socio-economic and political exclusion, they have remained the most disadvantaged people, representing the poorest of the poor and the most vulnerable sector". IAG

of 1995 that very much runs counter the provisions of the Indigenous People's Rights Act.¹⁰⁷

It has also been said that, for example, the Inter American Development Bank on the one hand supported the Camisea River project in Peru (already mentioned previously in this paper) and on the other wavered over actually funding the project. It was also supporting the establishment of public agencies to supervise the carrying out of the project.¹⁰⁸ It has also been said that, when a major Cameroon-Chad oil pipeline project was proposed and approved, there were serious disagreement over the project within the World Bank about the actual implementation.¹⁰⁹ Reportedly, the disagreeing voices were eventually silenced.¹¹⁰ These incongruities can be explained, for example, by the fact that these international financial institutions may not consider their policies affecting native groups as being incompatible with their position on increased extraction of oil or mineral riches because the latter supposedly may eventually assist in reducing poverty by bringing in foreign capital and channel it into the national and local economy. If one accepts the "trickle down theory"¹¹¹ of wealth sharing,¹¹² then this is a sensible approach. However, the theory has been roundly criticized and even ridiculed by many economists and officials. Pope Francis has on many occasions strongly criticized growing

Policy Brief: *The Struggle Continues: Uphold the Rights of Indigenous People*, 2 (April 2011).

¹⁰⁷ Raymundo D. Rovillos and Victoria Tauli-Corpus, *Development, Power, and Identity Politics in the Philippines*. Pp. 129 in Edmund Terence Gomez and Suzana Sawyer, *The Politics of Resource Extraction: Indigenous People, Multinational Corporations and the State* (Palgrave MacMillan 2012).

¹⁰⁸ Patricia Urteaga-Crovetto, The Broker State and the 'Inevitability' of Progress: The Camisea Project and Indigenous Peoples in Peru. Pp. 103 in Edmund Terence Gomez and Suzana Sawyer, *The Politics of Resource Extraction: Indigenous People, Multinational Corporations and the State*. (Palgrave MacMillan 2012).

¹⁰⁹ Genoveva Hernandez Uriz, *To Lend or Not to Lend: Oil, Human Rights and the World Bank's Internal Contradictions*, 14 Harv. Hum. Rts. J. 197 (Spring 2001); Dustin D. Sharp, Requiem for a Pipedream: Oil, The World Bank and the Need for Human Rights Assessment 25 Emory Int'l L. Rev. 379 (2011).

¹¹⁰ Kathleen Grimes, *Environmental Justice Case Study: The Chad-Cameroon Oil and Pipeline Project*, 2000 <http://www.umich.edu/~snre492/Jones/pipe.htm>

¹¹¹ The phrase has often been used derisively to describe a popular version of conservative economic philosophy that argues that allowing the wealthy to run their businesses unencumbered by regulation or taxation bears economic benefits that lead to more jobs and income for the rest of society. Various economists and officials have rejected the theory, saying it is contradicted by economic evidence.

¹¹² Philippe Aghion and Patrick Bolton, *A Theory of Trickle-down Growth and Development*, *The Review of Economic Studies* 64 (2): 151-172 (1997).

inequality and unfettered economic markets. On the “trickle down” theory he recently wrote: “Some people continue to defend trickle-down theories which assume that economic growth, encouraged by a free market, will inevitably succeed in bringing about greater justice and inclusiveness in the world. This opinion, which has never been confirmed by the facts, expresses a crude and naive trust in the goodness of those wielding economic power and in the workings of the prevailing economic system. Meanwhile, the excluded are still waiting.”¹¹³ On the occasion of a meeting with the U.N. Secretary General Ban Ki-moon and the heads of major U.N. agencies on May 9, 2014, Pope Francis called for governments to redistribute wealth to the poor in a new spirit of generosity to help curb the “economy of exclusion” that is taking hold today. He pointed out that a more equal form of economic progress could be had through “the legitimate redistribution of economic benefits by the state, as well as indispensable cooperation between the private sector and civil society.” Pope Francis urged the U.N. to promote development goals that attack the root causes of poverty and hunger protect the environment and ensure dignified labor for all. He voiced a similar message to the World Economic Forum in January.¹¹⁴

International Financial Institutions & Extractive Industries

A number of studies and evaluations, some of them already cited above, have shown that, as one would expect, international financial institutions have exercised a major role in assessing and establishing the conditions and the granting of resource extraction contracts. However, they have at the same time neglected or even declined to restrain or correct and penalize governments or multinationals for contravening the conditions of the agreements.¹¹⁵ There are instances when international financial institutions have failed to discipline recipients of funds for sabotaging the public agencies that were funded by these international

¹¹³ Zachary A. Goldfarb and Michelle Boorstein, *10Francis denounces ‘trickle-down’ economic theories in critique of inequality*, Washington Post, November 26, 2013.

¹¹⁴ <http://www.nydailynews.com/news/world/pope-francis-urges-legitimate-redistribution-wealth-article-1.1785861#ixzz31Ve1Yi4F>

¹¹⁵ For an in-depth analysis of the interaction of the various actors on this project, see Ben Naanenm, *The Nigerian State, Multinational Oil Corporations, and the Indigenous Communities of the Niger Delta*. Pp. 153-179 in Edmund Terence Gomez and Suzana Sawyer, *The Politics of Resource Extraction: Indigenous People, Multinational Corporations and the State* (Palgrave MacMillan 2012).

institutions to supervise and check on the extraction of underground riches.¹¹⁶ As it is often said, regulatory agencies, through the “revolving door” phenomenon, maintain very cozy relationships with the industries that they supposedly regulate and often are in a substantial way regulated by those that they are meant to oversee. Thus, this absence of supervision by these international institutions may signify that a principal function of theirs is actually to promote the undisturbed progress and earnings by multinational corporations.¹¹⁷ It is important to underline that nothing said above is meant to state that Foreign Direct Investments are per se and by their very nature harmful and pernicious. That is not always so. There are Foreign Direct Investments that are indeed crucial to supporting the global economy and our current lifestyle.¹¹⁸ Additionally, Foreign Direct Investments can advance economic development in states and communities that accept and adopt development goals.¹¹⁹ Native groups at times endorse and are behind development programs that ultimately benefit them. It is also true that some multinationals engage in business practices and use work methodologies that favor environmental sustainability more than domestic firms. Thus, having a multinational deliver a project may be less injurious to native populations and the environment.¹²⁰ Thus, Foreign Direct Investment offers both dangers and possibilities to First Nations. However, deplorably, dangers and risks are often more frequent and operative than opportunities.¹²¹ As it was already stated previously herein, governmental entities, especially in developing countries are either too weak to effectively protect human and indigenous

¹¹⁶ Patricia Urteaga-Crovetto, *The Broker State and the ‘Inevitability’ of Progress: The Camisea Project and Indigenous Peoples in Peru*. Pp. 103 in Edmund Terence Gomez and Suzana Sawyer, *The Politics of Resource Extraction: Indigenous People, Multinational Corporations and the State* (Palgrave MacMillan 2012).

¹¹⁷ Edmund Terence Gomez and Suzana Sawyer, *State, Capital, Multinational Institutions, and Indigenous Peoples*. P. 35 in *The Politics of Resource Extraction: Indigenous People, Multinational Corporations and the State* (Palgrave MacMillan 2012).

¹¹⁸ See Saleem H. Ali, *Mining, the Environment, and Indigenous Development Conflicts*, University of Arizona Press (2003).

¹¹⁹ See OECD, *Foreign Direct Investment for Development: Maximising Benefits, Minimising Costs* 5 (2002) <http://www.oecd.org.proxyau.wrlc.org/dataoecd/47/51/1959815.pdf>

¹²⁰ See Nicola Borregaard et al., *Foreigners in the Forests: Saviors or Invaders?* in Kevin P. Gallagher & Daniel Chudnovsky eds., *Rethinking Foreign Investment for Sustainable Development: Lessons from Latin America* 147, 147 (2010).

¹²¹ Fergus MacKay, *Indigenous People and International Financial Institutions* in D. Bradlow and D. Hunter (eds.), *International Financial Institutions and International Law* (Kluwer Press, 2010).

rights, even if sympathetic to them or, when it comes to prioritizing, favor economic gains over the respect for native populations' rights and title.¹²²

Rebalancing the Scale: Various Approaches & Possible Solutions

Some progress is being made internationally to protect the rights of indigenous people.¹²³ It must be stressed from the outset that much remains to be done.

1. *The Inter-American Human Rights System*

In the Americas there are remarkable human rights conventions and also jurisprudence that can be applied to redress the violations of the rights of the First Nations in the Western Hemisphere. The American Declaration of the Rights and Duties of Man (1948)¹²⁴ and the American Convention on Human Rights (1978)¹²⁵ do not particularly refer to indigenous groups. However, the bodies created to interpret and enforce the Convention, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have understood them to allocate and bestow a certain number of rights on these groups. Additionally, many states members of the Organization of American States are party to other international conventions like the often-cited International Labor Organization Convention no. 169 that addresses indigenous rights in detail.¹²⁶

¹²² 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).

¹²³ George K. Foster, *Foreign Investment and Indigenous Peoples: Options for Promoting Equilibrium Between Economic Development and Indigenous Rights*, *Michigan Journal of International Law*, ISSN 1052-2867, 07/2012, Volume 33, Issue 4, p. 627.

¹²⁴ *American Declaration of the Rights and Duties of Man*, 1948 <http://www.cidh.oas.org/Basicos/English/Basic2.American%20Declaration.htm>

¹²⁵ 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.

¹²⁶ The International Labor Organization (ILO) deserves to be recognized as the first international institution that paid attention to indigenous issues, its efforts beginning in 1957 with the adoption of ILO Convention 107 for the protection of indigenous, tribal, and semi-tribal populations. Following the prevalent mentality at the time, ILO Convention 107 adopted an 'integrationist' approach with the goal of assimilating indigenous peoples into the dominant culture, most often Western, and into the national society, an agenda that was seriously criticized and discarded, at least officially, afterward. In 1989, this convention was revised and amended, becoming ILO Convention 169 concerning

One key development in the Americas has been the accession and ratification of these human rights instruments¹²⁷ 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, the American Declaration and the American Convention on Human Rights.¹²⁸

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. Moreover, many members of the Organization of American States are party to a separate international agreement known as International Labor Organization Convention No. 169,¹²⁹ which deals with indigenous rights in detail. Both the Inter-American Commission and the Court have utilized these instruments in a number of cases to assert and reinforce the rights of Native people confronted with encroachments on their territory by strangers to carry out extractive industries activities. Among the most notable recent decisions by the Inter-American Court of Human Rights (IACHR) is the 2012 ruling in the case *Sarayaku v. Ecuador*¹³⁰ in favor of the

Indigenous and Tribal Peoples in Independent Countries. Presently, ILO Convention 169 is the only binding instrument that specifically covers the need to protect the rights of indigenous peoples. It is noteworthy for our purposes here that only 22, out of the 192 U.N. member states, have ratified this document. With the exception of Fiji and Nepal, they are all in Central and South America and Europe.

¹²⁷ The United States and Canada have not signed or ratified the American Convention on Human Rights and do not accept the jurisdiction of the Inter-American Court of Human Rights. However, the jurisprudence of the Court holds that the American Declaration of Human Rights and Duties of Man is a source of binding international obligations for the member states of the Organization of American States. Thus, the terms of the Declaration can be enforced even on those states that have not ratified the Convention, like the United States, Canada and Cuba. Venezuela renounced its ratification of the American Convention effective on September 9, 2013. See Diego Germán Mejía-Lemos, *Venezuela's Denunciation of the American Convention on Human Rights*, Insights, 17, 1 (January 2013) <http://www.asil.org/insights/volume/17/issue/1/venezuelas-denunciation-american-convention-human-rights>

¹²⁸ George K Foster, *Foreign Investment and Indigenous Peoples: Options for Promoting Equilibrium Between Economic Development and Indigenous Rights*, Michigan Journal of International Law, 33, 4, 627 (07/2012).

¹²⁹ International Labor Organization, *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (ILO No. 169), June 27, 1989, 1650 U.N.T.S. 383.

¹³⁰ *Case of the Kiwcha Indigenous People of Sarayaku versus Ecuador*. Judgment of 27 June 2012 (Merits and Reparations). Case 167/03, Report No. 62/04, Inter-Am. C.H.R., OEA/Ser.L/V/II.122 Doc. 5 rev.

Ecuadorian Amazon's Sarayaku community. This represents a key victory for indigenous peoples.

In the early 2000s, Petroecuador, the state oil firm, signed a prospecting deal with a consortium led by Argentina's Compañía General de Combustibles (CGC). Ecuadorian authorities allowed CGC to invade the Sarayaku's traditional lands without the community's consent, starting what would be a decade-long legal battle.

The IACHR found that the Ecuadorian state violated the community's right to be consulted and that it neglected the Sarayaku's property rights and cultural identity. The ruling also named Ecuador responsible for putting the life and physical integrity of the Sarayaku at serious risk when the oil company stored more than 1,400 kg of high-grade explosives on the community's territory.

This court decision makes it very clear that states have the responsibility to carry out special consultation processes¹³¹ before engaging in development projects that impact indigenous peoples and their rights.¹³²

The ruling establishes in detail how a consultation should be undertaken: in good faith and through culturally appropriate procedures that are aimed at reaching consent.¹³³ The Court underlined that exploration or extraction of natural resources cannot be done at the expense of an indigenous community's means of physical or cultural survival on their own land.

However, unfortunately the Inter-American human rights system does not offer an effective and viable remedy to indigenous groups impacted by outsiders.¹³⁴ The main reasons are that claims cannot be lodged directly against a private party, like a multinational company. They can be lodged only against member states. Moreover, the Commission can only refer cases deemed to be worthy and valid to the Court, which is the only body that can deliver a binding decision. Presently, as in the case of

¹³¹ Dwight G. Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (Purich Publ., 2007/2011).

¹³² *A Ruling on an oil gas project reasserts the indigenous' right to consultation*, The Economist, July 28 2012; www.economist.com/node/21559653

¹³³ For a in depth discussion of what the IACHR's jurisprudence in this area to protect indigenous rights see: Carla Garcia Zendejas, *The Inter American Human Rights System and the Rights of Indigenous People to Land, Territory and Natural Resources*, Due Process of Law Foundation, Washington DC (2012)

¹³⁴ For example, the limitations of the *Sarayaku v. Ecuador* case are discussed in Thomas M. Antkowiak, *Rights, Resources and Rethoric: Indigenous People and the Inter-American Court* (Journal of International Law, vol. 35, issue 1, art. 3) 113.

most international tribunals, there is no machinery that ensures the enforcement of the verdict.¹³⁵ Additionally, not all countries in the Americas have accepted the jurisdiction of the Court. Among them are the United States and Canada, both countries with large extractive industries, both at home and abroad. Even though little known, Canadian mining companies are actually the largest and most active in the world.¹³⁶ For example, five of the ten largest gold mining companies in the world are Canadian. Seventy-five percent of mining companies in the world are headquartered in Canada and for a good reason: Canada offers the best protection from accountability and redress.¹³⁷ For example, while American mining companies can be prosecuted for environmental and social policies abroad under the U.S. Alien Tort Statute, Canada does not have any such legal mechanisms to hold companies accountable.¹³⁸ Somewhat facetiously, only two Canadian laws apply internationally to mining practices: one is against having sex with children and the other is against bribery and corruption, both difficult and complicated to enforce.

The situation is basically the same with other international organisms that have been instituted to protect human rights. Thus, multinationals do not have much to fear from the Inter-American system.¹³⁹ The same applies to the U.N. Human Rights system for the same reasons.

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

The United Nations General Assembly on September 13, 2007 adopted the U.N. Declaration on the Rights of Indigenous People (UNDRIP).¹⁴⁰

¹³⁵ Fergus MacKay, *From 'Sacred Commitments' to Justiciable Norms: Indigenous Peoples' Rights and the Inter American Human Rights System* in M. Salomon, A. Tostens and W. Vandenhole (editors), *Casting the Net Wider: Human Rights and Development in the 21st Century* (Antwerp: Intersentia, 2007).

¹³⁶ <http://www.mining.ca/resources/mining-facts>

¹³⁷ http://en.wikipedia.org/wiki/Largest_gold_companies. For criticism of the record of Canadian mining companies worldwide and for current struggles by Native people with this sector, see www.polarisinstitute.org or miningwatch.ca. See also <http://globaljournalist.org/2013/10/when-canadian-mining-companies-take-over-the-world/>

¹³⁸ Kelly Patterson, *Open veins: Bloody conflicts are erupting around the world over Canadian mining projects*, Ottawa Citizen, B1 (October 1, 2005) <http://www.lexisnexis.com.proxyau.wrlc.org/hottopics/Inacademic/?verb=sr&csi=143838>.

¹³⁹ Cristina Baez et al., *Multinational Enterprises and Human Rights*, 8 U. Miami Int'l & Comp. L. Rev. 183, 186 (2000).

¹⁴⁰ http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

It recognizes that there exist several individual and collective rights of indigenous people and that states have the duty to recognize them. Especially significant are the right to self-determination; of non-removal from their lands or territories without their “free, prior and informed consent; restitution and compensation for land and resources that they traditionally owned, or occupied or used that were confiscated without their free, prior and informed consent; compliance with domestic and international labor laws; security in the enjoyment of their own means of subsistence and development, and free engagement in traditional economic activities; conservation of their medicinal plants, animals and minerals and of their environment and of the productivity of their lands or territories and resources; maintenance and protection of archaeological sites and other cultural manifestations; and the ability to determine their own priorities for the development or use of their lands and resources. States are under the duties to establish effective legal mechanisms to enforce indigenous rights; to ensure that there is no storage or disposal of hazardous materials on indigenous land without their free, prior and informed consent; and to consult and cooperate in good faith with indigenous peoples in order to obtain their free and informed consent prior to adopting laws or administrative rules that may affect them, or approving “any project affecting their lands and other resources, especially if connected with the development, utilization or exploitation of mineral, water or other resources.”¹⁴¹ It must be stressed that UNDRIP is a declaration, not a treaty, and therefore it is not legally binding. However if a country agrees to the Declaration that way acknowledges and recognizes the rights spelled out in the Declaration and commits to work for their respect and implementation. The Declaration represents the culmination of a long process that began in 1971.¹⁴²

Four countries voted against UNDRIP: Australia, Canada, New Zealand and the United States. They especially objected to the “right to self-determination” that might induce Native people to consider seceding from the country they live in. In reality UNDRIP contains language that limits self-determination to self-government or some form of autonomy but no secession. The recognition in UNDRIP of the right to redress from

¹⁴¹ Akilah Jenga Kinnison, *Indigenous consent: rethinking U.S. consultation policies in light of the U.N. Declaration on the Rights of Indigenous Peoples*, *Arizona Law Review*, ISSN 0004-153X, 12/2011, Volume 53, Issue 4, p. 1301.

¹⁴² 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).

displacement from ancestral lands was also objected to and for obvious reasons since the territory of the objecting countries was once the possession of First Nations.¹⁴³

The four countries also did not accept the provision that states must consult and cooperate in good faith with indigenous peoples in order to get their free and informed consent before enacting legislative or administrative measures or approving extractive projects that will impact them. They asserted that this would give an indigenous group the power to “veto” legislation or projects approved by a national government. Giving a specific group within society such a veto would go against a democratic system of government. The four countries did not properly take into account that the article stresses the state’s obligations when preparing or voting on laws that affect indigenous groups; not the native people’s right to control laws related to them or to the extractive industries projects.¹⁴⁴ The article basically reminds states to act with restraint and good faith when dealing with indigenous peoples, especially taking into account the major losses that these people incurred at the hand of the state in past years and also the considerable risks that the extractive industry presents to them.¹⁴⁵ It must be noted that the four countries later on endorsed UNDRIP stressing its non-binding nature and reserving the right to interpret it in accordance with their own constitution. Will UNDRIP make an important and quick difference on the lives of Native people? Not really. As it applies to any law or treaty, it is one thing to adopt or endorse a Declaration; it is another to implement it.¹⁴⁶ As for

¹⁴³ 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).

¹⁴⁴ George K Foster, *Foreign Investment and Indigenous Peoples: Options for Promoting Equilibrium Between Economic Development and Indigenous Rights*, Michigan Journal of International Law, 33, 4, 627 (07/2012).

¹⁴⁵ A month after President Obama announced in December 2010 that the United States would support UNDRIP, the U.S. State Department clarified that by stating: “the United States understands [the importance of a] call for a process of meaningful consultation with tribal leaders, but not necessarily the agreement of those leaders, before the actions addressed in those consultations are taken.” See the following note for details.

See more at: <http://www.culturalsurvival.org/news/united-states/victory-us-endorses-un-declaration-rights-indigenous-peoples#sthash.06NvUV9w.dpuf>

¹⁴⁶ Shortly after President Obama declared that the United States would lend its support to UNDRIP, the commitment of the U.S. to UNDRIP and to genuine consultation and taking indigenous people’s interests into account is being tested by the proposed Trans-Canada Keystone XL Pipeline. If constructed, the Keystone XL pipeline would transport hundreds of thousands of barrels of crude oil from Alberta to Nebraska, crossing six states

most human rights instruments, there is a big chasm between the words written on paper and their application in real life.¹⁴⁷ History will tell if countries that adopted UNDRIP did then give priority to adopting the necessary laws and budget the funds needed to make it a reality.¹⁴⁸ No doubt, some countries will take UNDRIP more seriously to heart than others.¹⁴⁹ Even if a country adopts corresponding laws, the process is not finished yet. They have to be enforced. Will they be enforced more seriously and forcefully than other pre-existing indigenous rights laws or even treaties? That is not a given, especially in light of all the broken treaties and agreements between modern States and Native people as already addressed earlier in this paper. Thus, the actual carrying out of UNDRIP will likely be unbalanced, erratic and insufficient as long as individual states decide what to do in order to comply with its terms and

and thousands of square miles of indigenous lands. Since the proposed pipeline must cross an international border, the project must obtain a Presidential Permit from the State Department before it can be built. In September 2011, Native leaders delivered to the President “The Mother Earth Accord”, a rejection of the pipeline grounded on “the principles of traditional indigenous knowledge, spiritual values, and respectful use of the land.” It is a clear invocation of the right to Free, Prior, and Informed Consent (FPIC) as provided by the UNDRIP, and the president’s first major chance to demonstrate his administration’s acceptance of the Declaration by honoring the tribes’ decision. The position of the Native leaders is that, without the right to decide what happens on their lands, indigenous people are left with no control of their assets, and therefore no say in their future. TransCanada, responsible for the construction and operation of the pipeline, reportedly has stated that it has “no legal obligation to work with the tribes,” adding, “We do it because we have a policy. We believe it’s a good, neighborly thing to do.” Tribal leaders also complain that the U.S. State Department is not living up to UNDRIP’s consultation requirement, raising questions about the Obama administration’s commitment to indigenous rights. One of the obstacles is the Native leaders’ insistence that negotiations be conducted on nation-to-nation basis. Pressure to allow the pipeline is enormous. The push-back is also strong. No decision has been announced as of May 2014. For the source of quotations included in this note, see: *Decision Time for Keystone XL – Was Obama’s UNDRIP Endorsement an Empty Promise?* First Peoples Worldwide Newsletter (June 4, 2013), <http://firstpeoples.org/wp/decision-time-for-keystone-xl-was-obamas-undrip-endorsement-an-empty-promise/>

¹⁴⁷ Julian Burger, *The UN Declaration on the Rights of Indigenous Peoples: From Advocacy to Implementation*, in Stephen Allen & Alexandra Xanthaki eds., *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (2011).

¹⁴⁸ Rodolfo Stavenhagen, *Making the Declaration on the Rights of Indigenous Peoples Work: The Challenge Ahead*, in Stephen Allen & Alexandra Xanthaki eds., *Reflections on the UN Declaration on the Rights of Indigenous Peoples* 147, 158-59 (2011).

¹⁴⁹ For example, Bolivia incorporated UNDRIP verbatim into domestic law on November 7, 2007.

their courts will be the venue for interpretation and enforcement with probably contrasting decisions.¹⁵⁰

3. Rules, Standards, and Model Contracts

In the last few years a number of standards, model contracts and other documents have been produced to facilitate agreements between multinationals and their counterparts, including indigenous ones.

The **Guidelines for Multinational Enterprises**¹⁵¹ of the **Organization for Economic Cooperation and Development (OECD)** are the most comprehensive set of government-backed recommendations on responsible business conduct in existence today. The governments adhering to the Guidelines aim to encourage and maximize the positive impact MNEs can make to sustainable development and enduring social progress. They are non-binding and therefore their efficacy is limited. The OECD has set up a network of National Contact Points to investigate accusations of non-compliance by multinational corporations. However the National Contact Points can only make recommendations to the multinationals.¹⁵² They cannot promulgate orders that must be followed. This greatly diminishes their usefulness and efficacy.

Another document that can be useful are **The United Nations Guiding Principles on Business and Human Rights (UNGPs)**,¹⁵³ a global standard for preventing and addressing the risk of adverse impacts on human rights caused by business activity. On June 16, 2011, the United Nations Human Rights Council unanimously endorsed the Guiding Principles for Business and Human Right.¹⁵⁴ This made them the first attempt to address corporate human rights responsibility to be endorsed by the United

¹⁵⁰ Yousef T. Jabareen, *Redefining minority rights: successes and shortcomings of the U.N. Declaration on the Rights of Indigenous Peoples*, *Journal of International Law & Policy*, ISSN 1080-6687, 09/2011, Volume 18, Issue 1, p. 119.

¹⁵¹ <http://mneguidelines.oecd.org>

¹⁵² 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); see also Jernej Letnar Cernic, *Human Rights Law and Business: Corporate Responsibility for Fundamental Human Rights*, Groningen: Europa Law Publishing (2010).

¹⁵³ *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).

¹⁵⁴ John R. Crook, *United States endorses Ruggie principles on responsibility of businesses and transnational corporations to respect human rights*, *American Journal of International Law*, ISSN 0002-9300, 10/2011, Volume 105, Issue 4, p. 792.

Nations. Three pillars form the Principles and profile how states and businesses should act:

- The state duty to protect human rights
- The corporate responsibility to respect human rights
- Access to remedy for victims of business-related abuses.

The UNGPs have been well received by states, civil society organizations, and the private sector.¹⁵⁵ The UNGPs are also called the “**Ruggie Principles**” or the “Ruggie Framework” because they were the brainchild of John Ruggie, appointed in 2005 as the Special Representative of the U.N. Secretary General on business and human rights. A major objective that the Principles establish for multinationals is that they “should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.”¹⁵⁶

Again, while this is a good attempt to regulate multinationals and ensure that they respect human rights, they are completely non-binding and therefore limited¹⁵⁷ in their impact.¹⁵⁸ It must also be noted that in 2007, after more than 20 years of protracted negotiations, drafts and revisions between indigenous groups and member states, the United Nations overwhelmingly adopted the Declaration on the Rights of Indigenous Peoples. With this adoption, the United Nations acknowledged the right of indigenous peoples “to promote, develop and maintain their ... distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.” The Declaration also recognizes land rights for indigenous people.¹⁵⁹

¹⁵⁵ George K Foster, *Foreign Investment and Indigenous Peoples: Options for Promoting Equilibrium Between Economic Development and Indigenous Rights*, Michigan Journal of International Law, 33, 4, 627 (07/2012).

¹⁵⁶ See supra, note 106 at 13.

¹⁵⁷ Steven Bittle and Lauren Snider, *Examining the Ruggie Report: Can Voluntary Guidelines Tame Global Capitalism?* Critical Criminology, ISSN 1205-8629, 05/2013, Volume 21, Issue 2, pp. 177-192.

¹⁵⁸ Michael D. Goldhaber, *Human rights on hold: the ABA endorsed the Ruggie principles, but few law firms have followed*, Corporate Counsel, ISSN 1524-7597, 03/2013, Volume 20, Issue 3, p. 25.

¹⁵⁹ http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf. For a critical examination of the Declaration, see Robin Perry, *Balancing Rights or Building Rights? Reconciling the Right to Use Customary Systems of Law with Competing Human Rights in Pursuit of Indigenous Sovereignty*, 24 Harv. Hum. Rts. J. 71 (Summer 2011).

The **World Bank Group** (WBG) has also developed and ratified a number of standards to manage and shepherd its lending decisions.¹⁶⁰ Within the Group, the World Bank offers financial and technical assistance to the governments of developing countries. The task of the International Finance Corporation is to finance projects by the private sector unfolding in the developing world. The Multilateral Investment Guarantee Agency instead furnishes political risk insurance to foreign investors. At times the projects that are funded or insured entail the extraction of natural resources on lands owned or occupied by First Nations. The World Bank Group is aware that projects of this type present a major risk to the indigenous people.¹⁶¹

To prevent, minimize or ameliorate this, the Group has created a set of social and environmental standards to provide guidance to staff within the World Bank Group. They were not developed to provide worldwide rules for businesses on social and environmental issues. They evolved as policy documents created to provide guidance to the WBG staff. Initially not publicly available, they are emerging as an influential source of *de facto* global rules. They are increasingly being adopted by corporations, by private and public financial institutions, government and export credit agencies.¹⁶² Some of them have been especially formulated to shield Native people. An Inspection Panel and a Compliance Advisor Ombudsman have been created to oversee compliance.

There is a legislative void internationally when it comes to developing standards of acceptable environmental and social behavior. For those who feel the pressure to adopt some international standards, also to feel secure, safe and protected, the World Bank ones serve the purpose well. Most of all, they provide a safe refuge for multinationals and regulators alike. Corporate and governmental officers can protect themselves by outwardly accepting and professing the social and environmental standards of the World Bank that give them the armor and cachet of social and environmental respectability.¹⁶³

¹⁶⁰ See World Bank, “*The World Bank Group in extractive industries: 2011 annual review*” (2011), pp. 8-14. Available from http://siteresources.worldbank.org/INTOGMC/Resources/WBG_EI_Annual_Report_FY11_Final.pdf

¹⁶¹ Evaristus Oshionebo, *World Bank and Sustainable Development of Natural Resources in Developing Countries*, 27 J. Energy & Nat. Resources L. 193, 219-20 (2009).

¹⁶² Natasha Affolder, *Cachet Not Cash: Another Sort of World Bank Group Borrowing*, 14 Mich. St. J. Int’l L. 141 (2006).

¹⁶³ See supra, note 106 at 147.

Even if there are shortcomings or they are deficiently implemented, they are seen as the minimum floor on which any project that is socially and environmentally sound and acceptable should stand.

This is compatible and coherent with the work of Neil Gunningham, Robert Kagan, and Dorothy Thornton¹⁶⁴ who expounded on the concept of a “social license to operate” in the extractive industries world. Attempting to explain the variation in compliance with environmental standards by 14 pulp manufacturing plants in United States, Canada, Australia, and New Zealand, they found that it is not necessarily due to the differences in regulation in each country. Rather, what accounts for the variation is the complex interaction between tightening regulations and what they call a social license to operate (especially pressures from community and environmental activists), economic constraints, and differences in corporate environmental management style.

This social license to operate is much wider than a legal license.¹⁶⁵ It is not enough any more to comply only with a regulatory license. There is a felt need, a strong expectation to observe also a social license¹⁶⁶ which is very much connected with the world of social media and reputation as one of the most valuable assets of an individual or corporation.¹⁶⁷ Activists in our times of “regulation by information” use a variety of tools. While the technology behind them is very new, the dynamic is often very old. Think for example of shaming, an ancient approach to keep people in line. Anne Marie Slaughter puts it rather well: “The World Bank provides guidance, saves transaction costs, and offers the luxury of security. The value of such guidance rises concomitantly with both uncertainty and complexity, circumstances likely to arise more and more frequently in a world of complex rules and technical regulations.”¹⁶⁸ However, when it comes to the impact of the WBG standards, according

¹⁶⁴ Neil Gunningham, Robert Kagan, and Dorothy Thornton, *Shades of Green: Business, Regulation, and Environment*. Stanford University Press, 2003.

¹⁶⁵ Melanie Lain Dare, Jacki Schirmer and Frank Vanclay, *Community engagement and social licence to operate*, Impact Assessment and Project Appraisal, ISSN 1461-5517, 09/2014, Volume 32, Issue 3, p. 188.

¹⁶⁶ John R. Owen and Deanna Kemp, *Social Licence and Mining: A Critical Perspective*, Resources Policy, ISSN 0301-4207, 03/2013, Volume 38, Issue 1, pp. 29-35.

¹⁶⁷ Jaquelina Jimena, *Social License: A Profitable Issue*, Canadian Mining Journal, ISSN 0008-4492, 09/2011, Volume 132, Issue 7, p. 8.

¹⁶⁸ Anne-Marie Slaughter, *Sovereignty and Power in a Networked World Order*, 40 Stan. J. Int'l L. 283, 300 (2004).

to some,¹⁶⁹ it has been unsatisfactory and only partial to date. The reason given is that the WBG components at times do not implement their own standards or they do not enforce them when they use them.¹⁷⁰ As one critic has said: “[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.”¹⁷¹ The International Bar Association with its Model Mining Development Agreement made still another effort.¹⁷² It offers a menu of model contracts that are meant to include environmental and social restrictions into the agreements between the governments and the mining companies. The members of the drafting committee clearly wanted that the Model Agreement be utilized not just by governments and the extractive companies, but by other stakeholders as well like non-governmental organizations, Native people groups, members of parliaments and others involved in extractive business. The Model Mining Development Agreement has the same inherent shortcoming of the other ones: multinationals and governments are under no obligation to insert its prescriptions into their contracts.

In summary, all these guidelines, standards, rules, and model agreements certainly represent important efforts, creativity, and advances. However, they cannot yet be relied upon to offer the needed protection to indigenous people and to the environment from the challenges and perils posed by Foreign Direct Investments, especially when it comes to extractive industries.¹⁷³

¹⁶⁹ George K. Foster, *Foreign Investment and Indigenous Peoples: Options for Promoting Equilibrium between Economic Development and Indigenous Rights*, Michigan Journal of International Law 33.4, 627-691 at 643 (Summer 2012).

¹⁷⁰ Dana Clark, *Boundaries in the Field of Human Rights: The World Bank and Human Rights: The Need for Greater Accountability*, 15 Harv. Hum. Rts.J. 205 (Spring 2002).

¹⁷¹ See supra note 106 at 203.

¹⁷² Maître François Serres, *The Model Mining Development Agreement*, http://www.afllsf.org/downloads/capacity_building/05.F.SERRES-The%20IBA's%20Model%20Mining%20Agreement.pdf

¹⁷³ 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).

Conclusion

More and more since the 1980s international financial institutions and other development banks have supported, facilitated and funded the liberalization of the mining, oil and lumber business areas in the world. They have also embraced the advantages of public-private collaboration as a way to anchor them on a more solid base and to raise the awareness of the corporations involved to the challenges that come along most extraction ventures. Today, it is generally believed that public-private partnerships among governments, multinational corporations, and international financial institutions are a very positive tool to increase society's welfare through the elimination of poverty, the advancement of sustainable models of economic development, and the protection of the environment. Not everyone agrees. The historic record, from the "Encounter" days to today as analyzed in this chapter, is not so positive. Not everything is consistently so rosy. Several international organizations, among them the United Nations and development banks, have expressed their alarm over the negative consequences that minerals, oil and timber extraction operations are having on the subsistence and way of life of Native populations. They have been joined by a few multinational corporations involved in extractive activities who have begun espousing principles of Corporate Social Responsibility.¹⁷⁴ They all agree about the urgency and the obligation, especially by the respective states, to provide indigenous people with ways to take part in making choices that will impact their lifestyle and their future, for example, through inclusive consultative approaches.¹⁷⁵ In reply to these unease and preoccupation, some international organizations and governments have developed and approved charters, guidelines,

¹⁷⁴ A definition of Corporate Social Responsibility is: "Corporate initiative to assess and take responsibility for the company's effects on the environment and impact on social welfare. The term generally applies to company efforts that go beyond what may be required by regulators or environmental protection groups. Corporate social responsibility may also be referred to as "corporate citizenship" and can involve incurring short-term costs that do not provide an immediate financial benefit to the company, but instead promote positive social and environmental change." <http://www.investopedia.com/terms/c/corp-social-responsibility.asp>

For an analysis of this concept and its applications to management, see Adam Lindgreen and Valérie Swaen (Guest Editors), Special Issue: *Corporate Social Responsibility*, International Journal of Management Reviews, Volume 10, Issue 1 (March 2010).

¹⁷⁵ This obligation is grounded for all Member States in the Charter of the United Nations, articles 1, 2 and 56, among others, and is a general principle of international law. It applies in respect of those human rights found in treaties to which States subscribe and in other sources of international law.

rules and laws to shield the rights and the welfare of First Nations. Ideally, these new tools provide indigenous parties the power to request changes, reformulate, endorse, or even reject projects put forward by governments, multinational corporations, international organizations or all three depending on a number of variables, including the impact on their way of life. In reality, the size and the breadth of the challenges confronting Native people connected with extractive industry projects, approved and financed by governments or multinationals or international financial institutions, are very large, complex, and bewildering. The unequal balance of power in negotiations between multinationals, the state, international financial organizations on one side and indigenous groups on the other can be very large.¹⁷⁶ What is disappointing and a source of grave concern is that despite the increasing number of international declarations, amendments of some state constitutions, and favorable national legislation that purport to support and protect the rights of First Nations, most native peoples, especially those affected by extractive industries projects, actually end up facing more discrimination, exploitation, loss of territory and livelihood, poverty and racism. Sample examples of this were provided in this work. International legal mechanisms that admit and accept the rights of indigenous peoples are increasing, but so is the marginalization of most Native peoples. This is due not only to the discontinuity between the law on the books and its application in the real world or between the *de jure* and *de facto* acceptance of indigenous rights. It is much more than that. It is at the intersection of powerful worldwide economic, trade; consumer demand; international financing; multinationals interests and even greed and rapacity; pressure of the international markets; and global competition between big countries for power, influence, and dominance. No doubt we need to fathom and analyze the structures and dynamics of power at play that were unleashed by neoliberal financial reforms and by the frenetically increased extraction activities that require large capital. The effort to find a space in this equation of oversize, titanic variables for human rights, indigenous rights to their land, their way of life, their identity, a reasonable say-so on proposed projects and an equitable compensation for the taking or use of their

¹⁷⁶ For an analysis of the interaction of these variables to the detriment of indigenous communities, see Jon Altman, *Indigenous Rights, Mining Corporations, and the Australian State*. Pp. 46-74 in Edmund Terence Gomez and Suzana Sawyer, *The Politics of Resource Extraction: Indigenous People, Multinational Corporations and the State* (Palgrave MacMillan 2012).

lands, their resources, their medicines and more will be monumental, complex, fraught with difficulties and errors, as it has been to date.¹⁷⁷ Various actors, some very powerful and with ample access to funds and assets, from international financial institutions to non-governmental organizations to governments, at times venal and corrupt, to international organizations like the U.N. and others, to indigenous groups hardly skilled and poorly prepared, for the most part, to enter this match, will compete to define the reality of the situation, fashion the rules, establish the guideposts, and institute the suitable governance apparatus that will oversee this extraction of resources worldwide.

A global debate on defining and applying indigenous rights will need to take place, hopefully before it is too late. These are fundamental questions that are facing us today with increased urgency because of globalization, instant communications, and the hyper awareness that we constantly have of what is happening around us and in the farthest corners of the world. It even has deep religious dimensions for some. The exploitative relation of humans to nature, its riches, its animals, its forests and its fruits is at times and by some justified and upheld with biblical truths and godly injunctions. As this work historically traces, it is a challenge and a struggle that operate since millennia but that have become stronger and with more at stake, ironically because of our technological and scientific advances that allow us to find riches and to go where before we, as humans, could not. Committing to find a solution is imperative for our common good and to fulfill our joint responsibility of improving our lives extracting from the earth what we need, while protecting the environment for our sake; that of those who have lived there for millennia and are very vulnerable and unequipped for our increasingly penetrating invasions and depredations of their lands and waters on a massive scale; and that of those who will follow us.

SUMMARY

“Sharing” the Wealth? Minerals, oil, timber, medicines and now genetic wealth, all play a major role in development and all are the source of conflict, dispute and violations of indigenous peoples’ centuries-old rights. The driving force

¹⁷⁷ For an analysis of the interplay of these factors, see Megan Davis, *Identity, Power, and Rights: The State, International Institutions, and Indigenous Peoples in Canada*. Pp. 230-252 in Edmund Terence Gomez and Suzana Sawyer, *The Politics of Resource Extraction: Indigenous People, Multinational Corporations and the State* (Palgrave MacMillan 2012).

behind the relentless conflict between indigenous peoples and the waves of outsiders making forceful contact with them is the search for resources. Driven by an increasing realization that the Earth's riches are limited and at the same time by the fierce competition that globalization and economic policies have unleashed, and using increasingly sophisticated technology, both for discovery and exploitation, states and multinationals have been motivated and able to go, literally, where no outsider has gone before.

The natural resources located in some of the Earth's most remote or inhospitable locations became especially available for exploitation when a number of new states sprung up in the post-World War II, postcolonial period. Elites and dominant groups, empowered to maintain security and promote trade, spurred by multinationals' offers that they could not refuse and by international financial institutions loans and grants "developed" natural resources, often igniting conflicts with indigenous nations. Frequently, these clashes led to the growth of the military, to arm races to ensure the monopoly on "development", to authoritarian and corrupt regimes, and to the opposite of what was expected, increased poverty and inequality.

The conflict is over the very issue of who owns the resources — a question that has been central to the rise of nationalism and the assertion of "ethnic" identity throughout the world. First Nation peoples realize that without their resource base, they have no future. They also believe that modern states, some of them relatively young, cannot legitimately claim resources that nation peoples have utilized and maintained for centuries. The manner in which this is done is also the subject of fierce disputes (e.g. damage or destruction of ancestral lands, food and water sources, way of life, income).

States have traditionally received considerable help from other states and international organizations in appropriating the resources of indigenous peoples. Ironically, the improving economic conditions worldwide and the growing wealth of many in emerging economies have made this hunt and exploitation of natural resources even more urgent and seemingly legitimize it, given the increasing demand for consumer goods and technological items.

Worldwide, multinational development industries help states to seize resources and put them up for sale on the world market — especially through "obvious" projects such as mining, oil exploration, and hydroelectric development.

One issue is never, or at best rarely, addressed: Who owns the resources to begin with? Whose agreement is needed before proceeding? What is an equitable formula for sharing the earnings and mitigate displacement and environmental pollution and destruction? Laws introduced in the past few decades by ruling groups often deny first nations' claims to their resources. Such laws, many indigenous groups argue, do not take precedence over their prior claims to resources. At stake are not only the issue of ownerships, but also the value of resources and who has the right to manage, extract and consume them. It is also a question of survival and identity.

This work of critical criminology reviews the historical record of "exploration" and exploitation of resources showing that it is not a new phenomenon but rather a chronic situation that indigenous peoples have endured throughout the centuries. It examines the role that the state, the multinationals and the international

financial institutions play in this clash over resources when indigenous peoples' rights are often ignored, stepped upon and disregarded. It critically examines current efforts, treaties and policies meant to recognize and respect Native peoples' rights. It shows that current measures are not truly addressing the key issues and that a concerted effort must be undertaken to change the equation and dynamics of power, dominion and use of the earth's riches.

Development must be redefined, crafted and targeted in the right way taking into account and respecting all legitimate claims to the earth's wealth, especially those of the "First Nations" that have suffered throughout the centuries the impact of colonialism, racism, and wholesale theft of their riches on the part of the "developed" world.

RÉSUMÉ

« Partager » la richesse ? Minéraux, pétrole, le bois, les médicaments et la richesse génétique aujourd'hui jouent tous un rôle majeur dans le développement et tous sont la source de conflit, crimes et violations des droits centenaires des peuples autochtones. La force motrice derrière le conflit incessant entre les peuples autochtones et les vagues d'étrangers qui entrent en contact avec eux par la force est la recherche de ressources. Poussé par une prise de conscience croissante que les richesses de la Terre sont limitées et en même temps par la concurrence féroce que la mondialisation et les politiques économiques ont déclenché, et en utilisant la technologie de plus en plus sophistiquée, à la fois pour la découverte et l'exploitation, les Etats et les multinationales ont été motivés et capables d'aller, littéralement, où aucun étranger n'est allé avant.

Les ressources naturelles situées dans certains des endroits les plus reculées ou inhospitalières de la planète sont devenues particulièrement disponibles pour l'exploitation quand un certain nombre de nouveaux Etats surgit dans la période postcoloniale post-Seconde Guerre mondiale. Les élites et les groupes dominants, habilités à maintenir la sécurité et promouvoir le commerce, stimulés par les offres des multinationales qu'ils ne pouvaient pas refuser et par les institutions financières des prêts et des subventions internationales « développent » les ressources naturelles, enflammant souvent des conflits avec les nations autochtones. Souvent, ces affrontements ont conduit à la croissance de l'armée, pour assurer le monopole du « développement » à des régimes autoritaires et corrompus. A l'opposé de ce qui était attendu, ce développement augmente la pauvreté et l'inégalité.

Le conflit est sur la question même de qui possède les ressources — une question qui a été au centre de la montée du nationalisme et de l'affirmation de l'identité « ethnique » dans le monde entier. Les peuples des Premières nations se rendent compte que, sans leur base de ressources, ils n'ont aucun avenir. Ils croient également que les États modernes, certains d'entre eux relativement jeunes, ne peuvent prétendre légitimement les ressources que les peuples de la nation ont utilisés et entretenus depuis des siècles. La façon dont cela est fait est également l'objet de litiges féroces (par exemple sur les dommages ou la destruction de leurs terres ancestrales, sources de nourriture et d'eau, mode de vie, et revenu).

Les États ont traditionnellement reçu une aide considérable de la part d'autres Etats et organisations internationales à s'approprier les ressources des peuples

autochtones. Ironiquement, l'amélioration des conditions économiques à travers le monde et la richesse croissante de beaucoup dans les économies émergentes ont fait cette chasse et exploitation des ressources naturelles encore plus urgentes et l'ont apparemment légitimé, compte tenu de la demande croissante de biens de consommation et d'objets technologiques.

Dans le monde entier, les industries multinationales de développement aident les États à saisir des ressources et à les mettre en vente sur le marché mondial — en particulier à travers des projets « évidentes » comme l'exploitation minière, l'exploration pétrolière, et le développement hydroélectrique.

Une question qui n'est jamais, ou rarement, au mieux, adressée est : Qui possède les ressources pour commencer ? L'accord de quelle personne ou autorité est nécessaire avant de procéder ? Quelle est une formule équitable pour partager les recettes et atténuer le déplacement et la pollution de l'environnement et sa destruction ? Lois introduites au cours des dernières décennies par des groupes dirigeants refusent souvent de reconnaître ou entretenir les revendications des Premières nations à leurs ressources. Ces lois, de nombreux groupes autochtones soutiennent, ne prévalent pas sur leurs revendications antérieures sur les ressources. L'enjeu est non seulement la question de copropriétés, mais aussi la valeur des ressources et qui a le droit de les gérer, extraire et les consommer. C'est aussi une question de survie et de l'identité.

Ce travail de la criminologie critique examine l'histoire des « explorations » et exploitation des ressources, montrant que ce n'est pas un phénomène nouveau mais plutôt une situation chronique que les peuples autochtones ont subi à travers les siècles. Il examine le rôle que l'État, les multinationales et les institutions financières internationales jouent dans ce conflit sur les ressources, lorsque les droits des peuples autochtones sont souvent ignorés, méprisés et méconnus. Il examine de façon critique les efforts actuels, les traités et les politiques destinées à reconnaître et respecter les droits des peuples autochtones. Il montre que les mesures actuelles ne abordent pas vraiment les questions clés et qu'un effort concerté doit être entrepris pour changer l'équation et de la dynamique du pouvoir, la domination et l'utilisation des richesses de la terre.

Le développement doit être redéfini, conçu et ciblée dans le droit chemin en prenant en compte et en respectant toutes les demandes légitimes de la richesse de la terre, en particulier ceux des « Premières Nations » qui ont souffert tout au long des siècles l'impact du colonialisme, du racisme, et du vol de leurs richesses par la partie du monde « développé ».

RESUMEN

“Compartir” la riqueza? Minerales, petróleo, madera, medicamentos y ahora también la riqueza genética, todos juegan un papel importante en el desarrollo y todos son una mayor fuente de conflicto, controversia y violaciones de los derechos de siglos de antigüedad de los pueblos indígenas. La fuerza impulsora detrás del conflicto incesante entre los pueblos indígenas y las olas de los extranjeros que entran en contacto con ellos de manera contundente es la búsqueda de recursos. Impulsados por una creciente toma de conciencia de que la riqueza de la Tierra es limitada y, al mismo tiempo, por la competencia feroz que la globalización y las

políticas económicas han desatado, y el uso de tecnología cada vez más sofisticada, tanto para el descubrimiento que para la explotación, los estados y las multinacionales han sido motivados y capaces de ir, literalmente, donde ningún extraño ha ido antes.

Los recursos naturales ubicados en algunos de los lugares más remotos o inhóspitos de la Tierra se hicieron especialmente disponible para la explotación, cuando una serie de nuevos estados establecidos en el período postcolonial posterior a la Segunda Guerra Mundial. Las élites y grupos dominantes, con el poder para mantener la seguridad y promover el comercio, espoleados por las ofertas de las multinacionales que no podían rechazar y por las instituciones financieras de préstamos y donaciones internacionales “desarrollaron” los recursos naturales a menudo encendiendo conflictos con las naciones indígenas. Con frecuencia, estos enfrentamientos provocaron el crecimiento de las fuerzas armadas, carreras para armamentos para asegurar el monopolio de “desarrollo” a regímenes autoritarios y corruptos, y al contrario de lo que se esperaba, el aumento de la pobreza y la desigualdad.

Una pregunta básica raramente contestada justamente es sobre quién posee los recursos — algo que ha sido fundamental para el auge del nacionalismo y la afirmación de la identidad “étnica” en todo el mundo. Los pueblos de las Primeras Naciones se han dado cuenta de que sin su base de recursos, no tienen futuro. También creen que los estados modernos, algunos de ellos relativamente jóvenes, no pueden legítimamente reclamar los recursos que ellos, los pueblos originarios, han utilizados y mantenidos durante siglos. La forma en que esto se hace es también el tema de conflictos violentos (por ejemplo, daño o destrucción de las tierras ancestrales, de las fuentes de alimentos y agua, forma de vida, ingresos).

Tradicionalmente, los Estados han recibido una considerable ayuda de otros Estados y organizaciones internacionales en la apropiación de los recursos de los pueblos indígenas. Irónicamente, las condiciones económicas en todo el mundo, la mejora económica y la creciente riqueza de muchas de las economías emergentes han hecho esta caza y la explotación de los recursos naturales aún más urgente y aparentemente la legitiman, dada la creciente demanda de bienes de consumo y de artículos tecnológicos.

A nivel mundial, las industrias multinacionales de desarrollo ayudan a los Estados a aprovechar de los recursos y ponerlos a la venta en el mercado mundial — especialmente a través de proyectos “obvios”, como la minería, la explotación petrolera y el desarrollo hidroeléctrico.

Una cuestión no es nunca, o al mejor raramente abordada: ¿Quién posee los recursos para empezar? Se necesita cuyo acuerdo antes de proceder? ¿Cuál es una fórmula equitativa para compartir los ingresos y mitigar el desplazamiento y la contaminación ambiental y la destrucción? Las leyes introducidas en las últimas décadas por grupos dominantes suelen negar reclamaciones de las primeras naciones a sus recursos. Tales leyes, muchos grupos indígenas argumentan, no tienen prioridad sobre sus reclamaciones previas a los recursos. Están en juego no sólo la cuestión de titularidades, sino también el valor de los recursos y de quien tiene el derecho de administrarlos, extraerlos y consumirlos. También es una cuestión de supervivencia y de identidad.

Esta obra de la criminología crítica examina los antecedentes históricos de “exploración” y explotación de los recursos que demuestran que no es un fenómeno nuevo, sino más bien una situación crónica que los pueblos indígenas han perdurado a lo largo de los siglos. Examina el papel que el Estado, las multinacionales y las instituciones financieras internacionales desempeñan en este choque sobre los recursos cuando los derechos de los pueblos indígenas son a menudo ignorados, pisados y desatendidos. En este trabajo se examinan críticamente los esfuerzos actuales, los tratados y las políticas destinadas a reconocer y respetar los derechos de los pueblos nativos. Esto demuestra que las medidas actuales no se ocupan realmente de las cuestiones fundamentales y que un esfuerzo concertado debe llevarse a cabo para cambiar la ecuación y la dinámica de poder, dominio y uso de las riquezas de la tierra.

El desarrollo debe ser redefinido, recreado y dirigido de manera correcta, teniendo en cuenta y respetando todas las demandas legítimas de la riqueza de la tierra, sobre todo los de las “primeras naciones” que han sufrido a lo largo de los siglos el impacto del colonialismo, del racismo y del robo al por mayor de sus riquezas por parte de el mundo “desarrollado”.