

# 'PARADIGM WARS'<sup>†</sup> REVISITED: New Eyes On Indigenous Peoples' Resistance To Globalization



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<sup>†</sup> In 2006, the International Forum on Globalization ([www.ifg.org](http://www.ifg.org)) published a Monograph entitled, *Paradigm Wars: Indigenous Peoples' Resistance to Globalization* (Jerry Mander & Victoria Tauli-Corpuz eds.). More than ten years on now, I have set contemporary eyes on the challenges Indigenous Peoples face against the continued onslaught of globalized forces.

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## Table of Contents

|   |     |
|---|-----|
| INTRODUCTION .....                              | 44  |
| I. ECONOMIC HEGEMONY .....                      | 49  |
| II. BIO-PROSPECTING .....                       | 60  |
| III. NATURE CONSERVATION .....                  | 66  |
| IV. ADDITIONAL EXAMPLES .....                   | 78  |
| V. NEGOTIATION AND CONSULTATION .....           | 83  |
| VI. PROTOCOL .....                              | 92  |
| VII. THE IMPORTANCE OF INDIGENOUS CONTROL ..... | 96  |
| VIII. TECHNOLOGY AND INDIGENOUS RIGHTS .....    | 102 |
| IX. ANNEX I .....                               | 111 |
| POSTSCRIPT .....                                | 116 |

### Introduction

Globalization is really a painting of the earth whose rendering can never be truly fixed. Pigmented colors continually move and all the while suffer the patina of centuries. The word, “globalization,” itself, is spoken everywhere and is emblematic of the social dimensions of human interactions.<sup>3</sup> To some it means worldwide economic homogenization, or “integration,” as one of my more “economics-schooled” colleagues chooses to categorize it. To others it connotes prosperity under the guide of “free trade.”<sup>4</sup> Is globalization meant to imply the structure of an in-

<sup>3</sup> “Globalization” has become a ubiquitous term. The field of sociology, however, offers some useful starting points for grasping many of the fundamental connotations of this term. For earlier “key ideas” primers, see MALCOLM WATERS, *GLOBALIZATION* (1995); *GLOBALIZATION: THE READER* (John Beynon & David Dunkerley eds., 2000); BARRIE AXFORD, *THE GLOBAL SYSTEM: ECONOMICS, POLITICS, AND CULTURE* (1995); MARTIN ALBROW, *THE GLOBAL AGE: STATE AND SOCIETY BEYOND MODERNITY* (1996); JOHN TOMLINSON, *GLOBALIZATION AND CULTURE* (1999); *THE WORLD ECONOMY: TEXTBOOK IN INTERNATIONAL ECONOMICS* (John Williamson and Chris Miller eds., 1991). More contemporary writings include IMMANUEL WALLERSTEIN, *WORLD SYSTEMS ANALYSIS* (2004); *READINGS IN GLOBALIZATION: KEY CONCEPTS AND MAJOR DEBATES* (George Ritzer & Zeynep Atalay eds., 2009); ROBERT REICH, *SUPERCAPITALISM: THE TRANSFORMATION OF BUSINESS, DEMOCRACY, AND EVERYDAY LIFE* (2007); Herman Daly, *Relations Among Nations: How to Go Global Without Being Globalized*, 25 *ORION* 11 (2006); Moisés Naim, *Think Again: Globalization*, *FOREIGN POL’Y* (Sept. 30, 2009, 7:19 PM) [www.foreignpolicy.com/2009/09/30/think-again-globalization](http://www.foreignpolicy.com/2009/09/30/think-again-globalization); Jeffrey D. Sachs, *A User’s Guide to the Century*, *THE NAT’L INTEREST* (July 2, 2008), [www.nationalinterest.org/article/a-users-guide-to-the-century-2461](http://www.nationalinterest.org/article/a-users-guide-to-the-century-2461); Interview with Moises Naim, *PUB. BROAD. SERV.*, [www.pbs.org/wgbh/commandingheights/shared/pdf/int\\_moisesnaim.pdf](http://www.pbs.org/wgbh/commandingheights/shared/pdf/int_moisesnaim.pdf) (last visited Oct. 18, 2018); Bjarke Skaerlund Risager, *Neoliberalism Is a Political Project: An Interview with David Harvey*, *JACOBIN* (July 23, 2016), [www.jacobinmag.com/2016/07/david-harvey-neoliberalism-capitalism-labor-crisis-resistance](http://www.jacobinmag.com/2016/07/david-harvey-neoliberalism-capitalism-labor-crisis-resistance).

<sup>4</sup> *But see* JOSEPH E. STIGLITZ & ANDREW CHARLTON, *FAIR TRADE FOR ALL: HOW TRADE CAN PROMOTE DEVELOPMENT* (2006); Clive Crook, *Beyond Belief*, *ATLANTIC*, Oct. 2007, [www.theatlantic.com/magazine/archive/2007/10/beyond-belief/306172](http://www.theatlantic.com/magazine/archive/2007/10/beyond-belief/306172).

ternational corporate marketplace, the rise of religious evangelicalism around the globe,<sup>5</sup> a sanction of academic elites speaking professionally in English, transformations in culture that are promoted by western values, or all of the above? Is it the global standardization of economic accounting to measure and declare what is considered wealth, success, and growth? Is globalization a symbol of injustice, inequality, poverty, and unfair hegemonic trade rules?<sup>6</sup> A provocateur of hope, fear; a beacon of colonization, a lighthouse in warning, a naïve and robust fantasy, a giant ark lifting all dreams? Is it gradually becoming devoid of all meaning? The string of questions, ascriptions, labels and logos is endless.<sup>7</sup> And

<sup>5</sup> JOHN MICKLEWAIT & ADRIAN WOOLDRIDGE, *GOD IS BACK: HOW THE GLOBAL REVIVAL OF FAITH IS CHANGING THE WORLD* (2009). Does science make belief in God obsolete? *See Does Science Make Belief in God Obsolete? Thirteen Views on the Question*, JOHN TEMPLETON FOUND., <https://andrewjmonaco.files.wordpress.com/2012/10/templeton-science-religion.pdf> (last visited Oct. 18, 2018).

<sup>6</sup> *See* DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* (2005). Devised by David Ricardo in 1817, the principle of comparative advantage has been championed, until recently, as the most significant tool in the economist's toolbox. *See* Crook, *supra* note 4, at 44.

<sup>7</sup> Some eloquent souls have made valiant attempts to draw the contours of the doctrine, and I provide some of their titles here as referential. Adrian Campos, *Effects on Globalization in Culture Differentiation*, (Information Technology, Globalization and Social Development Manuel Castells UNRISD Discussion Paper No. 114, Sept. 1999), <http://www.studymode.com/essays/Effects-On-Globalization-In-Culture-Differentiation-397384.html>; David C. Korten, *The Failures of Bretton Woods, in THE CASE AGAINST THE GLOBAL ECONOMY AND FOR A TURN TOWARD THE LOCAL 20* (Jerry Mander & Edward Goldsmith eds., 1996) [hereinafter Mander]; Helena Norberg-Hodge, *The Pressure to Modernize and Globalize*, in Mander, at 33; Marten Khor, *Global Economy and the Third World*, in Mander, at 47; Maude Barlow & Heather-jane Robertson, *Homogenization of Education*, in Mander, at 60; Richard Barnett & John Cavanagh, *Homogenization of Global Culture*, in Mander, at 71; Edward Goldsmith, *Development as Colonialism*, in Mander, at 253; Peter Berger, *Four Faces of Global Culture*, 49 *THE NAT'L INTEREST* 23 (1997); Moises Naim, *The Five Wars of Globalization*, 134 *FOREIGN POL'Y* 28, 29 (2003); MISHA GLENNY, *McMAFIA: A JOURNEY THROUGH THE GLOBAL CRIMINAL UNDERWORLD* (2008); Philip Jenkins, *The Next Christianity*, ATLANTIC, Oct. 2002, <https://www.theatlantic.com/magazine/archive/2002/10/the-next-christianity/302591>; Somini Sengupta & Larry Rohter, *Where Faith Grows, Fired by Pentecostalism*, N.Y. TIMES, Oct. 14, 2004, at A1, A10; Amy Chua, *A World on the Edge*, 26 *WILSON Q.* 62, 62 (2002); Lawrence M. Friedman, *Erewhon: The Coming Global Legal Order*, 37 *STAN. J. INT'L L.* 347 (2001); Benjamin R. Barber, *The Uncertainty of Digital Politics*, 43 *HARV. INT'L REV.* 42 (2001); Amartya Sen, *Universal Truths: Human Rights and the Westernizing Illusion*, 20 *HARV. INT'L REV.* 40 (1998); Richard Falk, *World Prisms: The Future of Sovereign States and International Order*, 21 *HARV. INT'L REV.* 30 (1999); Stephen A. Marglin, *Development as Poison: Rethinking the Western Model of Modernity*, 25 *HARV. INT'L REV.* 70 (2003); Barbara Stark, *Women and Globalization: The Failure and Postmodern Possibilities of International Law*, 33 *VAND. J. TRANSNAT'L L.* 503 (2002); Edward Said, *The Clash of Ignorance*, 273 *THE NATION* 11 (2001); Tina Rosenberg, *The Free Trade Fix*, N.Y. TIMES MAG., Aug. 18, 2002, at 28; Steven A. Ramirez, *Market Fundamentalism's New Fiasco: Globalization As Exhibit B in the Case for a New Law and Economics*, 24 *MICH. J. INT'L L.* 831 (2003) (reviewing JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (2002)); John Ralston Saul, *The Collapse of Globalism*, HARPER'S MAG., Mar. 2004, at 33; *Bill Moyers Interviews Union Theological Seminary's Joseph Hough*, NOW WITH BILL MOYERS, <http://www>.

the answer to whether it, or what, is working depends on who is asked and whose dignity and socioeconomic opportunities are respected by the machinations of globalization. Many argue that economic globalization is still imperial hegemony by empires with only a change in name. Inhabiting a world of its own, to the side of geophysical reality,<sup>8</sup> the words “free trade” have taken on a moral undertone akin to “democracy” and “freedom.”<sup>9</sup> Yet the connections and consequences of the deregulated and unrestricted movements of goods, money, and services must be exposed to a light different from the glare of its faith-based credo.<sup>10</sup>

For over four decades, both as a litigator for Native Nations and as a professor of Indigenous Peoples law and policy, I have studied the genocide of Indigenous Peoples and have explored the long, historical polemic and legal sophistry of colonization. It is no wonder that globalization has particular urgency for the world’s Indigenous Peoples.<sup>11</sup>

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pbs.org/now/society/hough.html (broadcast Oct. 24, 2003). Recent adventuresome authors include: FAREED ZAKARIA, *THE POST-AMERICAN WORLD* (2008); PAUL COLLIER, *THE BOTTOM BILLION: WHY THE POOREST COUNTRIES ARE FAILING AND WHAT CAN BE DONE ABOUT IT* (2007); JAMES FALLOWS, *POSTCARDS FROM TOMORROW SQUARE: REPORTS FROM CHINA* (2009); Sergio Puig, *International Indigenous Economic Law*, 52 U.C. DAVIS L. REV. (forthcoming 2018), <http://www.law.uci.edu/academics/centers/glas/activities/reconceiving-trade-agreements-workshop/puig-abstract.html>. I venture that the term “globalization” must now be followed by any of a multitude of nouns, such as the “globalization of economics,” or the “globalization of the English language in scientific treatises.”

<sup>8</sup> See ROBERT ALAN HERSHEY, *GLOBALIZATION AND THE TRANSFORMATION OF CULTURE: A CURRICULUM AND TOOLKIT FOR THE EFFLORESCENCE OF ECOLOGICAL LITERACY IN LEGAL AND BUSINESS SCHOOL EDUCATION* (2010), [http://www.ecoliteratelaw.com/02\\_whyQuestion.cfm?sect=text&#\\_ftnref7](http://www.ecoliteratelaw.com/02_whyQuestion.cfm?sect=text&#_ftnref7).

<sup>9</sup> William Finnegan, *The Economics of Empire: Notes on the Washington Consensus*, HARPER’S MAG., May 2003, at 41.

<sup>10</sup> The aphorism “a rising tide lifts all boats” has become associated with the idea that general economic improvements will benefit everyone in the economy, and therefore governments should focus on free market policies that will improve the economy. The rapid economic growth in America during the 1960s seemed to support this view, but recently economists have questioned an uncompromising belief in this dogma. See, e.g., James R. Hines, Jr. et al., *Another Look at Whether a Rising Tide Lifts All Boats*, in *THE ROARING NINETIES: CAN FULL EMPLOYMENT BE SUSTAINED?* (Alan B. Krueger & Robert Solow eds., 2001), <http://gspp.berkeley.edu/assets/uploads/research/pdf/hhk-final.pdf>. Lately, another aphorism has flooded the waterways: “Global warming lifts all boats.”

<sup>11</sup> I have observed no settled definition of “Indigenous Peoples” in international law. States and Indigenous Peoples have argued for decades at the United Nations Working Group on Indigenous Populations, whether to demand definition or favor self-identification and flexibility. Even the United Nations Declaration on the Rights of Indigenous Peoples contains no hard and fast legal definition. Dean, then Professor, James Anaya, who was the United Nations Special Rapporteur on Indigenous Peoples, emphasizes a People’s relationship to land. He elaborates further characteristics of Indigenous Peoples:

Within international law and institutions, however, the term *indigenous*, or similar terms such as *native* or *aboriginal*, just as in the domestic legal regimes of many countries, has long been used to refer to a particular subset of humanity that represents a certain common set of experiences rooted in

Many Indigenous systems of collective economic production and distribution do not conform to capitalism's cultural emphasis on individual accumulation.<sup>12</sup> The two worldviews may indeed be antithetical.<sup>13</sup>

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historical subjugation by colonialism, or *something like colonialism*. Today, indigenous peoples are identified, and identify themselves as such, by reference to identities that predate historical encroachments by other groups and the ensuing histories that have wrought, and continue to bring, oppression against their cultural survival and self-determination as distinct peoples.

S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 5 (2d ed., 2004) (last emphasis added). For a comprehensive and thoughtful review of opinions on the question of definition, see Mohammad Moin Uddin, *Recognition of the Chittagong Hill Tribes of Bangladesh as Indigenous Peoples and/or Nations: A Conceptual, Normative and Structural Survey of Issues* (2016) (unpublished S.J.D. dissertation, Indigenous Peoples Law & Policy Program, James E. Rogers College of Law, University of Arizona) (on file with author). See also Suzana Sawyer & Terence Gomez, *Identity, Power, and Rights: Paradoxes of Neoliberalism in the Context of Resource Extraction*, (Programme on Identities, Conflict and Cohesion, Paper No.13, UNRISD, Geneva, 2008).

A formerly cited U.N. definition is:

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

U.N. Subcommission on the Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination against Indigenous Populations*, § 379, U.N. Doc. E/CN.4/Sub.2/1986/7/Add. 1-4 (Mar. 1986). See further Erica-Irene A. Daes, *Working Paper by the Chairperson-Rapporteur*, ¶ 69, U.N. Doc. E/CN.4/Sub.2/AC.4/1996/2 (June 10, 1996). Many definitions also require self-identification as an Indigenous person and/or Peoples. I use the terms "Indigenous Peoples," "communities," "societies," "Native Nations," and "groups" interchangeably, for ease of reference, but the same international legal rights would attach regardless of the term used in the context of this paper.

<sup>12</sup> This phenomenon is not new, although processes of globalization have increased the scale and frequency of such conflicts of perspective. The contradictions between Indigenous and capitalist modes of production, and the tensions generated by their intersection, have deep historical roots in the process of colonization. Anthropologist Eric Wolf's classic, *EUROPE AND THE PEOPLE WITHOUT HISTORY* (1982), is one of the most comprehensive works on this theme. See also ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* (1990).  
<sup>13</sup> Victoria Tauli-Corpuz, an Igorot activist from the Philippines, now the United Nations Special Rapporteur on the Rights of Indigenous Peoples, summarizes the difference when she writes that:

Industrialized culture regards our values as unscientific obstacles to modernization and thus worthy of ridicule, suppression, and denigration. The industrial world also views our political, social, and land-tenure traditions as dangerous: our collective identities; our communal ownership of forests, waters, and lands; our *usufruct* system of community sharing; and our consensus decision making are all antithetical to the capitalist hallmarks of individualism and private property.

Indigenous societies generally view resources in a very different way from that of global industry's commodity-centered calculus.<sup>14</sup> Around the world, a good number of Indigenous groups have over centuries or millennia successfully sustained economies in one particular place and ecosystem. Indigenous Peoples' coadaptation with other elements of their ecological systems has meant that the integrity and functioning of these systems has been sustainable even as their culture developed and changed historically. These economic arrangements should be seen not as separate from, but as one component of, entire cultural understandings that include sacred interactions with the world.<sup>15</sup> Indigenous economies can thus be seen to be sustainable to the extent that the holders of culture interact in their own culturally appropriate way with the world around them, including those elements of the world known to modern scientists as "natural resources."<sup>16</sup>

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Victoria Tauli-Corpuz, *Our Right to Remain Separate and Distinct*, in *PARADIGM WARS: INDIGENOUS PEOPLES' RESISTANCE TO GLOBALIZATION* 13, 15 (Jerry Mander & Victoria Tauli-Corpuz eds., 2006) [hereinafter *PARADIGM WARS*]. See also Jon Emont & Sergey Ponomarev, *Modern World Tugs at an Indonesian Tribe Clinging to Its Ancient Ways*, N.Y. TIMES (Dec. 2, 2016), <https://www.nytimes.com/2016/12/02/world/asia/modern-world-tugs-at-an-indonesian-tribe-clinging-to-its-ancient-ways.html>.

<sup>14</sup> A past leader of the Indigenous Network on Economies and Trade, Secwepemc author Arthur Manuel wrote:

Mainstream economists tend to value development strategies solely in terms of their wealth generation potential for industry and government. Resources are viewed strictly in monetary terms. But indigenous peoples consider the value of land and resources in far broader, more integrated terms, including cultural, social, spiritual and environmental values, as well as sustainability. Among indigenous peoples, decisions about caring for resources and the environment are usually made as part of a collective process, where the community takes into account a full spectrum of values and benefits beyond short-term economic gain.

*Indigenous Brief to WTO: How the Denial of Aboriginal Title Serves as an Illegal Export Subsidy*, in *PARADIGM WARS*, *supra* note 13, at 206. See also WHAT CAN TRIBES DO? STRATEGIES AND INSTITUTIONS IN AMERICAN INDIAN ECONOMIC DEVELOPMENT (Stephen Cornell & Joseph P. Kalt eds., 1992); Angelique A. EagleWoman, *Tribal Nation Economics: Rebuilding Commercial Prosperity in Spite of U.S. Trade Restraints—Recommendations for Economic Revitalization in Indian Country*, 44 TULSA L. REV. 383 (2008); Rebecca Adamson: *Indigenous Self-Determination & Principles Benefiting Both People & Business*, LIFT ECON., <https://soundcloud.com/lift-economy/rebecca-adamson-indigenous-self-determination-principles-for-benefit-of-financial-performance-all-life> (last visited Oct. 18, 2018).

<sup>15</sup> For an attempt to correlate levels of knowledge of an ecosystem with the number of generations that a people have been living in a particular place, and a description of the means by which knowledge of sustainable economic practices becomes incorporated into the sacred practices and beliefs of a community, see F. Berkes, C. Folke, & M. Gadgil, *Traditional Ecological Knowledge: Biodiversity, Resilience, and Sustainability*, in *BIODIVERSITY CONSERVATION* 281–89 (C.A. Perry ed., 1995). See also Benjamin R. Richardson & Donna Craig, *Indigenous Peoples, Law and the Environment*, in *ENVIRONMENTAL LAW FOR SUSTAINABILITY: A READER*, 195–226 (Benjamin J. Richardson & Stepan Wood eds., 2006).

<sup>16</sup> To use the westernized term "natural resources" is to often manage our unthoughtfulness. We wouldn't refer to our relatives as natural resources any more than some

In many areas Indigenous people have sustained communities from time immemorial, and their resilient ecological systems have maintained richness despite natural perturbations such as drought or fires. The ecosystems that have remained predominantly under control and care of Indigenous Peoples thus tend to be characterized by high biodiversity, abundant renewable resources, and relatively unexploited nonrenewable resources. One of the great ironies of globalization is that this very approach to sustaining their economies now makes Indigenous territories and knowledge valuable commodities in a targeted globalized economy. And due to their historical position in relation to Western/European/US economic powers, Indigenous people around the globe frequently do not benefit from having maintained sustainable economies or Indigenous knowledge. Rather, the commoditization and globalization of their processes might render their practices too expensive for them to continue.

Indigenous people have not passively acceded to the penetration of extractive capitalism into their communities. Thus the following account not only reviews how globalization impacts Indigenous people, but also describes how Indigenous communities resist and negotiate to defend their territories and cultural integrity.<sup>17</sup>

## I. Economic Hegemony

Economic policy, when set on a global scale, can undermine the political gains that Indigenous Peoples may have made within the legal systems of nation states.<sup>18</sup> Victor Menotti of the International Forum on Global-

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native people would refer to their relations—rocks, plants, mountains, animals, place names—solely by physical objects devoid of the qualities of spiritual dimensions and containers. It is a distinction of which we should all be aware. See KEITH H. BASSO, *WISDOM SITS IN PLACES* (1996). For a compilation of statements by Indigenous Peoples about land and meaning, see the references *supra* note 11; S. James Anaya, *Indigenous Peoples' Participatory Rights in Relation to Decisions About Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources*, 22 *ARIZ. J. INT'L & COMP. L.* 7 (2005).

<sup>17</sup> See generally MAKERE STEWART-HARAWIRA, *THE NEW IMPERIAL ORDER: INDIGENOUS RESPONSES TO GLOBALIZATION* (2005); Mary Christina Wood & Zachary Welcker, *Tribes As Trustees Again (Part I): The Emerging Tribal Role in the Conservation Trust Movement*, 32 *HARV. ENVTL. L. REV.* 373 (2008); Mary Christina Wood & Matthew O'Brien, *Tribes As Trustees Again (Part II): Evaluating Four Models of Tribal Participation in the Conservation Trust Movement*, 27 *STAN. ENVTL. L.J.* 477 (2008); Michael P. O'Connell, *Indian Tribes and Project Development Outside Indian Reservations*, 21 *NAT. RES. & ENV'T* 54 (2007).

<sup>18</sup> For a discussion of power in globalization, see MICHAEL MANN, *THE SOURCES OF SOCIAL POWER*, Vol. 1–4 (2d ed., 2012); MICHAEL MANN, *POWER IN THE 21ST CENTURY: CONVERSATIONS WITH JOHN HALL* (2011). Mann focuses on economic and other structural aspects of globalization and their impacts on Indigenous Peoples. His approach is different from strictly an analysis of the role of power in globalization. For example, Mann defines globalization as the “expansion of the sources of social power,” which includes ideological, economic, military, and political power. Indigenous Peoples have responded to the structural elements of globalization by critiquing its influence on local culture and livelihoods, establishing new spaces for dialogue and creating new, sometimes reactionary systems of social organization.

ization has written of how World Trade Organization (WTO) authority is diminishing the sovereignty of nation states over their land, water, genetic material, and public services.<sup>19</sup> The General Agreement on Trade in Services (GATS),<sup>20</sup> for example, favors the privatization of systems (such as those for water distribution) that serve the general public but without an equitable provision of services, which is often at odds with maximization of profits.<sup>21</sup> Structural adjustment programs (SAPs) imposed as a condition of loans from global finance agencies such as the World Bank also often mandate privatization.<sup>22</sup> The effects on Indigenous Peoples and other

<sup>19</sup> Victor Menotti, *How the World Trade Organization Diminishes Native Sovereignty*, in PARADIGM WARS, *supra* note 13, at 59–70. Undeniably, the legal and political systems of the nation state have also enabled the persecution of Indigenous Peoples; nevertheless, Menotti's point that some hard-fought gains on a national level are put at risk by WTO authority is well taken.

<sup>20</sup> GATS is a World Trade Organization (WTO) treaty effective as of January 1995. Much like the General Agreements on Tariffs and Trade (GATT) which provides a system for merchandise trade and ultimately became the WTO framework in 1994, GATS was created to extend the multilateral trading system to the service sector. See *General Agreement on Trade in Services*, <http://www.worldtradelaw.net/uragreements/gats.pdf> (last visited Oct. 18, 2018). See also GATT 1994: General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter GATT 1994]; *International Economic Law and Policy Blog*, WORLD TRADE LAW, <http://worldtradelaw.typepad.com/ielpblog>; *The General Agreement on Trades Services (GATS): Objectives, Coverage, and Discipline*, WTO, [www.wto.org/english/tratop\\_e/serv\\_w/gatsqa\\_e.htm](http://www.wto.org/english/tratop_e/serv_w/gatsqa_e.htm) (last visited Oct. 18, 2018).

<sup>21</sup> Investment in infrastructure to provide water to a small village, for example, may not make business sense if the number of users is too small or too poor to provide a return on the initial construction costs. A national or local government agency may choose to pursue such a project either out of social responsibility or in response to political pressure, but a private company is less likely to do so. Additionally, costs of basic services such as water often rise under privatization as companies seek to increase profits, a change that can result in a loss of access for poor people. See generally Ellen L. Lutz, *Indigenous Peoples and Water Rights* (Dec. 2005), <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/indigenous-peoples-and-water-rights>; John Vidal, *Water Privatisation: A Worldwide Failure?*, GUARDIAN (Jan. 30, 2015), <https://www.theguardian.com/global-development/2015/jan/30/water-privatisation-worldwide-failure-lagos-world-bank>; *The Truth About the World Bank's Water Privatization Plans*, CORP. ACCOUNTABILITY (Jan. 25, 2016), <https://www.corporateaccountability.org/blog/truth-world-banks-water-privatization-plans>; Anna Lappe, *World Bank Wants Water Privatized, Despite Risks*, AL JAZEERA (Apr. 17, 2014, 5:00 AM), <http://america.aljazeera.com/opinions/2014/4/water-management-privatization-worldbankgroupifc.html>; Jesse Bragg, *A Member of Congress Issued a Warning to the World Bank: 'Stop Privatizing Water'*, ALTERNET (Apr. 22, 2016, 5:35 AM) [www.alternet.org/print/water/member-congress-issued-warning-world-bank-stop-privatizing-water](http://www.alternet.org/print/water/member-congress-issued-warning-world-bank-stop-privatizing-water).

<sup>22</sup> These pre-agreement guidelines require the indebted country to be integrated into the global economy, deregulate and liberalize its economy, shift from an agriculture-based to a manufacturing and service industry-based economy, and liberalize its financial sector, in essence linking developing countries to the world economy quickly. Thus, by virtue of agreeing to the SAP, the local economy is opened to foreign investments and multinational corporations, while eliminating subsidies and protection to local industries.

poor people can be devastating. World Bank-mandated SAP privatization of coal mining in the Indian state of Orissa in the 1990s, for example, resulted in contamination of rivers, increased rates of fluoride poisoning, infections, and cancer, displacement of towns, and 500 percent increases to power rates.<sup>23</sup> The World Bank and IMF have also made water privatization a prior condition for granting loans and debt reductions.<sup>24</sup> Structural adjustment programs also weaken national-level environmental and labor laws that Indigenous communities may have relied on previously to maintain control over territory and resources.<sup>25</sup> Philosophically, these concepts

<sup>23</sup> Victoria Tauli-Corpuz, *World Bank and IMF Impacts on Indigenous Economies*, in *PARADIGM WARS*, *supra* note 13, at 49–58. See also Victoria Tauli-Corpuz, Director, Tebtebba Foundation (Indigenous Peoples' International Centre for Policy Research and Education), Speech at "The Human Face of Trade: Health and Environment" People's Tribunal: Impacts of WTO On The Environment, Cultures and Indigenous Peoples (Nov. 29, 1999). Tauli-Corpuz talks on some of the impacts of the WTO on the environment and Indigenous cultures based on the Tebtebba Foundation's documentation of the impacts of trade liberalization, the WTO Agreements and other regional trade agreements on Indigenous Peoples in general. She recognizes that "the whole philosophy underpinning the WTO Agreements and all regional agreements like NAFTA, MERCOSUR, etc. contradicts Indigenous peoples' worldviews, concepts and practices related to environment, trade, and development, the way we regard and use knowledge, and our core values and spirituality. The principles and policies they promote such as trade liberalization, export-oriented development, trade barriers, leveling the playing field, comparative advantage, most-favored nation and national treatment, and worst, the patenting of lifeforms are antithetical to most of our core-values and beliefs. . . ." She goes on from there to point out cases where this has created difficulties, at best, for the world's Indigenous people.

<sup>24</sup> Antonia Juhasz, *Global Water Wars*, in *PARADIGM WARS*, *supra* note 13, at 109–13.

<sup>25</sup> Tauli-Corpuz, *World Bank and IMF Impacts on Indigenous Economies*, *supra* note 23. For a specific overview of how a SAP resulted in an impoverishment of small-scale farmers as measured by household nutrition studies, see Wycliffe Chilowa, *The Impact of Agricultural Liberalization on Food Security in Malawi*, 23 *FOOD POLICY* 553–69 (1998). For an examination of how SAPs lead to environmental degradation as rural people are forced into vulnerable situations, see David Kaimowitz, Graham Thiele & Pablo Pacheco, *The Effects of Structural Adjustment on Deforestation and Forest Degradation in Lowland Bolivia*, 27 *WORLD DEV.* 505–20 (1999). See also The International Cancun Declaration of Indigenous Peoples, 5th WTO Ministerial Conference—Cancun, Quintana Roo, Mexico, Sept. 12, 2003, <http://www.ienearth.org/the-international-cancun-declaration-of-indigenous-peoples>, which reflects the experiences of Indigenous people and their efforts to speak out against the critical issues and negative impacts of the World Trade Organization (WTO) Trade Negotiations on their communities and nations. According to this declaration, "the creation of the [WTO] and [] the continuing imposition of the structural adjustment policies of the World Bank and International Monetary Fund" has turned the situation of Indigenous peoples "from bad to worse." Written in support of the concerns expressed by the Congreso Nacional Indígena Declaration of Cancun, this outlines the joining of their voices to the CNI Declaration, its conclusions and recommendations.

Raymond de Chavez, formerly a member of the research staff at Tebtebba Foundation, chronicles how Indigenous Peoples are suffering via the false hope of both traditional tourism and ecotourism. In their drive for profits, transnational corporations which dominate the international tourist industry have, with the complicity of governments (particularly those of the Third World), devastated the lives and lifestyles of Indigenous Peoples. Fueled by the International Monetary Fund's (IMF)

dovetail with a drive to privatize Indigenous lands, often with the claim that developing (and hence collateralizing) an Indigenous population's natural resources will eliminate poverty and lead to a more 'productive' way (capitalist system) of life.<sup>26</sup>

Other recent international trade rules also negatively impact Indigenous Peoples.<sup>27</sup> Article I of the General Agreement on Tariffs and Trade (GATT) makes it nearly impossible for national governments to restrict

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inclusion of tourism as part of its Structural Adjustment Programmes (SAPs), these preconditions for the approval of financial assistance, require the indebted country to be integrated into the global economy, deregulate and liberalize its economy, shift from an agriculture-based to a manufacturing and service industry-based economy, and liberalize its financial sector thereby quickly linking developing countries to the world economy. "The SAP opens up the local economy to foreign investments and multinational corporations, while eliminating subsidies and protection to local industries. Under IMF-World Bank prescriptions, tourism is classified as an export strategy. With its capacity to earn billions of dollars, tourism is being promoted by the IMF-WB as a means for [developing] countries to repay their debts to them." According to de Chavez, the process of globalization will only exacerbate the plight of the Indigenous people negatively affected already. Raymond de Chavez, *Globalisation and Tourism: Deadly Mix for Indigenous Peoples*, 103 THIRD WORLD RESURGENCE (Mar. 1999), <http://el.doccentre.info/eldoc/0503/globalisation-tourism.html>.

And, in *The General Agreement on Trade in Services (GATS) and Education for All (EFA): Conflict of Interests?*, 9 EDUCATE 7 (2009), Anita Trisnawati Abbott discusses the impact of GATS on the notion of equality of access to education. Recognizing that some might see GATS as improving the opportunity for Indigenous people to have greater access to better and higher quality education—if they can pay—Abbott examines just how helpful the commoditization of education actually is. Although GATS is thought to lead the "flourishing" of foreign education providers who will meet the *higher education* skills target outcomes and expectations, there are other processes in place to ensure quality education for people globally. Equal access to education is ensured by the United Nations Educational, Scientific, and Cultural Organization (UNESCO) through their goals of Education for All (EFA). The EFA goals include equality of access for *basic education* to the most vulnerable and disadvantaged—among them ethnic minorities, young people, women and girls, and adults. Abbott examines how GATS might hinder and promote the goals of EFA and the impact of GATS on basic and higher education.

<sup>26</sup> Jamie Way, *The Neoliberal Crusade For Resources on Indigenous Lands in the Peruvian Amazon*, UPSIDE DOWN WORLD (Oct. 19, 2009), <http://www.upsidedownworld.org/archives/peru-archives/the-neoliberal-crusade-for-resources-on-indigenous-lands-in-the-peruvian-amazon>. An academic/political theorist arguing for an expansive measure of privatization, couching his rhetoric to avoid focusing on "the 'backwards' culture of Indigenous groups," is Hernando de Soto. See HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (2000). See also Shiri Pasternak, *How Capitalism Will Save Colonialism: The Privatization of Reserve Lands in Canada*, 47 ANTIPODE 179 (2015) (surveying the First Nations Property Ownership Act); Naomi Schaefer Riley, *One Way to Help Native Americans: Property Rights*, ATLANTIC (July 30, 2016), <http://www.theatlantic.com/politics/archive/2016/07/native-americans-property-rights/492941>; George K. Foster, *Foreign Investment and Indigenous Peoples: Options for Promoting Equilibrium Between Economic Development and Indigenous Rights*, 33 MICH. J. INT'L L. 627 (2012).

<sup>27</sup> See generally Symposium, *Trade and Foreign Investment in the Americas: The Impact on Indigenous Peoples and the Environment*, 14 MICH. ST. J. INT'L L., ISSUES 2 & 3 (2006).

imports from other WTO countries with questionable human rights, labor, or environmental records and thus disallows a potential safeguard for the rights of Indigenous Peoples. For instance, Victor Menotti points out that under current GATT<sup>28</sup> rules it would have been impossible to boycott South African goods during international apartheid protests.<sup>29</sup>

Article III of GATT, together with its corollary Articles V and XI, requires governments to treat all imported goods “no less favorably” than locally produced goods and bans restrictions on imports. Menotti explains how this feature of GATT “prevent[s] any government from favoring or protecting its own local industries, or farmers or cultures that might otherwise be overwhelmed by globe-spanning corporations bringing vast amounts of cheap imports that make local or [I]ndigenous economies nonviable.”<sup>30</sup> Similar “free trade” policies under NAFTA have already been demonstrated to undercut the livelihoods of small-scale Mexican corn farmers, many of whom are Indigenous, who are unable to compete with cheap, mass-produced grain from the US.<sup>31</sup>

Another set of WTO rules, the Agreement on Agriculture, further weakens the ability of nations to set up barriers to imports and also prohibits the internal support of domestic producers through low-cost credit, price supports, and subsidized seeds and fertilizer. WTO agriculture rules, rather than safeguarding the rights of Indigenous producers and small-scale farmers, are specifically designed to favor the large-scale

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<sup>28</sup> GATT/WTO Research Guide, J. MICHAEL GOODSON L. LIBRARY DUKE UNIV. SCH. OF L., <https://law.duke.edu/lib/researchguides/gatt/>; *International Trade Law Research: WTO/GATT*, FLA. STATE UNIV. COLL. OF L. RESEARCH CTR., <http://guides.law.fsu.edu/trade/wto>.

<sup>29</sup> Menotti, *supra* note 19. See also SARAH JOSEPH, *BLAME IT ON THE WTO?: A HUMAN RIGHTS CRITIQUE* (2011).

<sup>30</sup> *Id.* at 60.

<sup>31</sup> See *NAFTA FROM BELOW: MAQUILADORAS WORKERS, FARMERS, AND INDIGENOUS COMMUNITIES SPEAK OUT ON THE IMPACT OF FREE TRADE IN MEXICO* (Martha A. Ojeda & Rosemary Hennessy eds., 2007); Peter Canby, *Retreat to Subsistence*, THE NATION (June 16, 2010), <http://www.thenation.com/article/retreat-subsistence>; *NAFTA, “A Death Sentence for the Indigenous People of Mexico*, <https://www.citizenstrade.org/ctc/wp-content/uploads/2011/05/NAFTA-A-Death-Sentence-for-the-Indigenous-People-of-Mexico.pdf> (last visited Oct. 18, 2018); Gonzalo Fanjul & Arabella Fraser, *Dumping Without Borders: How U.S. Agricultural Policies are Destroying the Livelihoods of Mexican Corn Farmers*, Oxfam Briefing Paper No. 50 (Aug. 2003). The Environmental Working Group calculates farm subsidies in the United States. See ENVTL. WORKING GRP., <http://www.ewg.org/farmsubsidies>. The newly minted United States-Mexico-Canada Agreement (USMCA) (supplanting the 1993 NAFTA *Accord*), it is claimed, offers the most inclusive international trade agreement favoring Indigenous Peoples rights. Parties are free to conclude business transactions while meeting their legal obligations to Indigenous Peoples without running afoul of trade or investment rules. The general exception clause covers the entire Agreement and specifically provides for duty-free treatment of Indigenous handicraft goods in the Textiles chapter. The USMCA recognizes Indigenous Peoples’ role in the conservation of the environment. See Jorge Barrera, *New Trade Agreement a ‘Step Up’ From NAFTA on Indigenous Rights*, CBC NEWS (Oct. 1, 2018), [www.cbc.ca/news/indigenous/usmca-trade-deal-indigenous-rights-1.4846073](http://www.cbc.ca/news/indigenous/usmca-trade-deal-indigenous-rights-1.4846073).

production of luxury exports, leading to monocultural production of cash crops and the associated environmental problems and ecological vulnerability that ensues.<sup>32</sup> It is argued that the Agreement on Sanitary and Phyto-Sanitary Measures (SPS) limits the ability of national governments to regulate or monitor imports of transgenic foods.<sup>33</sup> Former Mexican President Vicente Fox's ambitious Plan Puebla-Panama was a well-known example of how the transportation infrastructure to facilitate this export-based economy often appropriates Indigenous Peoples' lands without their consent.<sup>34</sup>

Many large-scale infrastructure projects, often funded through loans from the World Bank Group (WBG), regional multilateral banks (e.g., the Inter-American Development Bank and Asian Development Bank), and more recently by the U.S. Export-Import Bank and the Japan Bank for International Cooperation (JBIC), represent threats to Indigenous Peoples' autonomy and resources.<sup>35</sup> For example, The World

<sup>32</sup> *Agreement on Agriculture*, Uruguay Round Agreement, WORLD TRADE ORG., [http://www.wto.org/english/docs\\_e/legal\\_e/14-ag\\_01\\_e.htm](http://www.wto.org/english/docs_e/legal_e/14-ag_01_e.htm). William Robinson deals extensively with this topic of Nontraditional Agricultural Exports (NTAEs) in his magisterial work on how current trends represent a qualitative shift in the interaction of the global and local economies. *TRANSNATIONAL CONFLICTS: CENTRAL AMERICA, SOCIAL CHANGE, AND GLOBALIZATION* (2003). Menotti shares Robinson's perspective when he writes:

*WTO rules on farming are essentially designed to "open up" foreign markets for large-scale luxury export producers. The rules therefore offer great incentives for nations to emphasize expanding and supporting export-oriented industrial agricultural production at the expense of small, traditional, indigenous producers who grow food for local markets and communities. Discriminating in favor of this kind of massive monocultural production—especially of exotic commodities not usually produced in a locale, such as export beef, luxury vegetables, soy, or exotic flowers—brings enormous environmental problems to lands that have often been occupied by indigenous peoples for millennia. Aside from the pollution from industrial-intensive production, large new infrastructure systems are required to bring the products from distant locations to seaports and airports and then across oceans. Very often these new roads, canals, pipelines, and ports are built directly on indigenous lands, without prior approval, causing great conflict.*

Menotti, *supra* note 19, at 62 (emphasis added).

<sup>33</sup> Menotti, *supra* note 19, at 63.

<sup>34</sup> Briefing Reports, in *PARADIGM WARS*, *supra* note 13, at 164–65. Resistance to the Plan, which envisioned, among other things, ten dams on various rivers, appeared to be successful. Then, in 2008, the heads of affected countries met and agreed to rename it the Mesoamerica Project (*Proyecto Mesoamerica*, or PM). It reduced the 100 development projects to five megaprojects: "electricity, highways, telecommunications, cybernetic information and health." See Chiapas Support Committee, *The Plan Puebla-Panama is Changing Chiapas* (Mar. 25, 2014), <http://chiapas-support.org/2014/03/25/the-plan-puebla-panama-is-changing-chiapas>.

<sup>35</sup> Tauli-Corpuz, *supra* note 23. Free Trade Agreements (FTA), Bilateral Investment Treaties (BIT), and Foreign Direct Investment (FDI) all must be examined for their consequences to Indigenous Peoples. See generally, Andrew Gray, *Development Policy—Development Project: The World Bank, Indigenous Peoples, and NGOs*, in *THE STRUGGLE FOR ACCOUNTABILITY: THE WORLD BANK, NGO, AND GRASSROOTS MOVEMENTS*, 267, 268 (Jonathan A. Fox & David L. Brown eds., 1998); *INTER-AMERICAN*

Bank-funded Polonoeste highway project through Indigenous lands in the Amazon rain forest brought colonizers, deforestation, and disease epidemics to the region. Pipeline construction, damming of rivers, and toxic contamination from industrial development are other dangers for Indigenous Peoples of the Amazon.<sup>36</sup> In order to promise returns on the investment of the international lending institution, these projects are scaled too large to account for local needs, even if the desire to do so exists.<sup>37</sup>

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DEVELOPMENT BANK, OPERATIONAL GUIDELINES FOR THE INDIGENOUS PEOPLES POLICY, OPERATIONAL POLICY OF INVOLUNTARY RESETTLEMENT, OPERATIONAL POLICY ON INDIGENOUS PEOPLES AND STRATEGIES FOR INDIGENOUS DEVELOPMENT; INTERNATIONAL FINANCE CORPORATION, PERFORMANCE STANDARD 7: INDIGENOUS PEOPLES (Jan. 2012); ASIAN DEVELOPMENT BANK, THE BANK'S POLICY ON INDIGENOUS PEOPLES § 31 (1998); CARIBBEAN DEVELOPMENT BANK, GUIDELINES FOR THE SOCIAL ANALYSIS OF DEVELOPMENT PROJECTS § 3.08; AFRICAN DEVELOPMENT BANK, DEVELOPMENT AND INDIGENOUS PEOPLE IN AFRICA (2016); Puig, *supra* note 7; cf. GLOB. ENV'T FACILITY, *New User Guide on Indigenous Peoples and Project Financing* (May 12, 2016), <https://www.thegef.org/news/new-user-guide-indigenous-peoples-and-project-financing>.

<sup>36</sup> Janet Lloyd, Atossa Soltani, and Kevin Koenig of Amazon Watch provide specific case studies in their chapter, *Infrastructure Development in the South American Amazon*, in PARADIGM WARS, *supra* note 13, at 89–94. See also Barbara Rose Johnston, *Chixoy Dam Legacies: The Struggle to Secure Reparation and the Right to Remedy in Guatemala*, 3 WATER ALTERNATIVES 341 (2010) (World Bank funded dam flooded Mayan communities without finalized plans on compensation and resettlement. Hundreds of protesters were allegedly killed.); Jacob Kushner, Anthony Langat, Michael Hudson, & Sasha Chavkin, *World Bank—Backed Projects Threaten Indigenous Communities' Ways of Life*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Oct. 26, 2015), <http://www.icij.org/project/world-bank/world-bank-backed-projects-threaten-indigenous-communities-ways-life> (allegations that Kenya Forest Service used a World Bank-backed conservation loan to bankroll a “wave of evictions targeting the Sengwer, a hunter-gatherer tribe that (has lived) in the forest for centuries”).

<sup>37</sup> Regarding dams, Indigenous rights organizations have achieved partial progress. In the 1994 Manibeli Declaration more than 2000 civil society organizations called for comprehensive review of all World Bank-funded dam projects. Responding to consistent pressure, in 1998 the World Bank agreed to support the creation of the World Commission on Dams (WCD), with specific memberships reserved for Indigenous groups' representatives on both the commission council and a consultative forum. The WCD process has since been widely praised by Indigenous peoples both because of the required Indigenous membership and because the final WCD guidelines for sustainable dam development fully recognize Indigenous peoples' right to “free prior and informed consent” (FPIC) and establishes that FPIC is a process whereby each stage of a project cycle is subject to prior agreement by potentially affected Indigenous and tribal peoples. However, various Indigenous organizations have since accused the Bank of failing to act on WCD recommendations, as the Bank has only committed to using the reports produced by the Commission as a “valuable reference.” The Bank has not incorporated any of the WCD's major recommendations into its revised policy on Indigenous peoples or its other mandatory safeguard policies. Tom Griffiths provides a detailed account of this process in his excellent critical summary of World Bank actions to include participation of Indigenous peoples, and the shortcomings and failings of such actions. See especially INDIGENOUS PEOPLES AND THE WORLD BANK: EXPERIENCES WITH PARTICIPATION, FOREST PEOPLES PROGRAMME 8–10 (July 2005), <http://www.forestpeoples.org/sites/fpp/files/publication/2011/08/wbipsandparticipjul05eng.pdf>. See also *Statement on the Occasion of the Release of the World Commission Dams*

A major impact associated with large infrastructure developments such as highways and dams is the resettlement—indeed, the displacement—of Indigenous communities that have developed sacred knowledge of, and connections with, specific places.<sup>38</sup> Not only can the

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*Final Report*, James Bay Cree Nation & Pimicikamak Cree Nation, [http://www.dams.org/index.php?option=com\\_content&view=article&id=117&Itemid=65](http://www.dams.org/index.php?option=com_content&view=article&id=117&Itemid=65). Ede Ijjasz-Vasquez, senior director of the World Bank's Social, Urban, Rural, and Resilience Global Practice, claims that the World Bank works to center marginalized sections of society in the Bank's development agenda. *Partnering with Indigenous Peoples and Ethnic Minorities Through Community-Driven Development*, THE WORLD BANK (May 11, 2016), <http://www.worldbank.org/en/news/feature/2016/05/11/partnering-with-indigenous-peoples-and-ethnic-minorities-through-community-driven-development>. Nevertheless, many claim that the Bank is retreating on Indigenous Peoples Rights and that it rolled back essential environmental and social protections in communities worldwide. See *World Bank Undermines Decades of Progress on Building Protections for the Rights of Indigenous Peoples*, FOREST PEOPLES PROGRAMME (July 28, 2016), <http://www.forestpeoples.org/en/topics/world-bank/news/2016/07/world-bank-undermines-decades-progress-building-protections-rights-in>; Gretchen Gordon & Prabindra Shakya, *The World Bank's Retreat on Indigenous Rights*, INTERCONTINENTAL CRY (Aug. 27, 2016), <http://intercontinentalcry.org/world-banks-retreat-indigenous-rights>. The World Bank's Environmental and Social Framework was approved August 4, 2016, stating that countries could petition to “opt-out” of heightened protections for Indigenous Peoples if they are concerned that, in the application of the policy, ethnic tension will be exacerbated or that the policy is inconsistent with their national constitution. See *The World Bank Environmental and Social Framework*, WORLD BANK (2016), available at <http://documents.worldbank.org/curated/en/383011492423734099/pdf/114278-WP-REVISED-PUBLIC-Environmental-and-Social-Framework.pdf>. The Environmental and Social Framework went live and into effect for all World Bank operations as of October 1, 2018. Under certain circumstances detailed therein, the World Bank has concluded that “free, prior, and informed consent (FPIC)” of Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities (IP/SSAHUTLC) is required. See *id.* The Overview of the World Bank Environmental and Social Framework (for information only and not a part of the Framework), states that the Framework replaces OP/BP4.10, Indigenous Peoples. *Id.* at xi, ¶ 13. The exact nature of FPIC is articulated generally—there being no precise definition—in its Guidelines; however, the language of the document also connotes the conditions for workarounds. For a more lengthy discussion on the divergences between the World Bank's Operational Policy 4.10 and the Environmental and Social Framework's Environmental and Social Standard 7 (ESS7), see *infra* Part III. Lastly, see *Implementation of the World Bank's Indigenous Peoples Policy: A Learning Review (FY 2006–2008)* 22 (OPCS, Working Paper, Aug. 2011).

<sup>38</sup> See Sasha Chavkin & Michael Hudson, *New Investigation Reveals 3.4M Displaced by World Bank*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Apr. 13, 2015), <http://www.icij.org/blog/2015/04/new-investigation-reveals-34m-displaced-world-bank>; Sasha Chavkin & Dana Ullman, *World Bank Allows Tanzania to Sidestep Rule Protecting Indigenous Groups*, HUFFINGTON POST (June 20, 2016), [http://www.huffingtonpost.com/entry/world-bank-allows-tanzania-to-sidestep-rule-protecting-indigenous-groups\\_us\\_57607769e4b09c926cfd6b1c](http://www.huffingtonpost.com/entry/world-bank-allows-tanzania-to-sidestep-rule-protecting-indigenous-groups_us_57607769e4b09c926cfd6b1c) (locals displaced in path of agricultural development where the World Bank committed a \$70 million dollar loan to the Southern Agricultural Growth Corridor of Tanzania (SAGCOT) to encourage foreign investment and make way for a dam that is to provide irrigation to SAGCOT-backed rice and sugar farms. Tanzania was successful in its petition to the Bank to waive its policy that required potential borrowers to receive the support of the Indigenous groups affected); Damien Gayle, *Tanzania Orders 40,000 Maasai*

trauma of flight be compounded by the possible extinction of their culture, but the impacts on the areas receiving large numbers of displaced people can also be devastating. From 1976 to 1986, Indonesia's Suharto government used a \$630 million World Bank loan to resettle millions of people in order to relieve population pressure and to provide a labor force for export crops such as cacao, coffee, and palm oil. On the receiving island of Irian Jaya (West Papua), the influx of 300,000 Javanese has been a root cause of decades of ethnic conflict with Melanesians speaking 224 different languages, and the biodiversity of the island has come under threat from large mining operations and cash crop plantations.<sup>39</sup>

Whether for minerals,<sup>40</sup> agriculture, forest products,<sup>41</sup> or even genetic information and environmental knowledge,<sup>42</sup> resource extraction<sup>43</sup> can

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*Tribesmen to Leave Their Homeland After Going Back on Their Promise Not to Turn Their Land into a Hunting Ground for Dubai Royal Family*, DAILY MAIL (Nov. 17, 2014), <http://www.dailymail.co.uk/news/article-2837533/Tanzania-orders-40-000-Maasai-tribesmen-leave-homeland-going-promise-not-turn-land-hunting-ground-Dubai-royal-family.html>; *Plans to Evict the Maasai of Loliondo Continue*, VIEW FROM THE TERMITE MOUND BLOG (Mar. 3, 2017), <http://termitemoundview.blogspot.com/2017/03/plans-to-evict-maasai-of-loliondo.html>; Chris Arsenault, *Corporate Encroachment Reduces Indigenous Lands, Biodiversity*, REUTERS (Feb. 13, 2010), <http://www.reuters.com/article/food-un-indigenous-rights/corporate-encroachment-reduces-indigenous-lands-biodiversity-u-n-trfn-idUSL5NOVM5VZ20150213>.

<sup>39</sup> Tauli-Corpuz, *supra* note 23. See also Victoria Tauli-Corpuz & Parshuram Tamang, *Oil Palm and Other Commercial Tree Plantations, Monocropping: Impacts on Indigenous Peoples' Land Tenure and Resource Management Systems and Livelihoods*, United Nations Permanent Forum on Indigenous Issues, Sixth Session, E/C.19/2007/CRP.6 (May 7, 2007). Given such impacts, one wonders why the United States would continue to support large World Bank-funded infrastructure projects. Lawrence Summers, then Undersecretary of International Affairs at the Treasury Department, offered a partial explanation when he estimated in a 1995 Congressional hearing that for every \$1 that the U.S. contributes to World Bank, U.S. corporations get \$1.30 in procurement contracts. See also Ana Natsvlishvili, *The Impact of Globalization on Human Rights in the Developing World: Transnational Corporations and Human Rights—The Masterpieces of Globalization in the Era of Democratized Violence* (2007), <https://www.nottingham.ac.uk/gep/documents/conferences/2007/2007postgradconf/natsvlishvili-pgrconf07.pdf> (discussing toxic practices of the Freeport-McMoRan mining company in Indonesia); CARLOS YESCAS ANGELES TRUJANO, *INDIGENOUS ROUTES: A FRAMEWORK FOR UNDERSTANDING INDIGENOUS MIGRATION* (2008), [http://publications.iom.int/system/files/pdf/indigenous\\_routes.pdf](http://publications.iom.int/system/files/pdf/indigenous_routes.pdf).

<sup>40</sup> Mark Dowie, *Nuclear Caribou: On the Front Lines of the New Uranium Rush With the Inuit of Nunavut*, ORION, Jan./Feb. 2009, at 20.

<sup>41</sup> S. James Anaya & Claudio Grossman, *The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples*, 19 ARIZ. J. INT'L & COMP. L. 1 (2002).

<sup>42</sup> See discussion *infra* Part II.

<sup>43</sup> See REPORT A/HRC/24/41, *EXTRACTIVE INDUSTRIES AND INDIGENOUS PEOPLES. REPORT OF THE SPECIAL RAPPORTEUR ON THE RIGHTS OF INDIGENOUS PEOPLES* (July 2013), <http://unsr.jamesanaya.org/study/report-a-hrc-24-41-extractive-industries-and-indigenous-peoples-report-of-the-special-rapporteur-on-the-rights-of-indigenous-peoples>; THE POLITICS OF RESOURCE EXTRACTION: INDIGENOUS PEOPLES, MULTINATIONAL CORPORATIONS AND THE STATE (Suzana Sawyer & Edmund Terence Gomez eds., 2012); Mark Kernan, *The Economics of Exploitation: Indigenous Peoples and*

underlie many of the negative impacts of globalization on Indigenous Peoples.<sup>44</sup> The well-known example of Royal Dutch Shell's actions in the Niger Delta made infamous because of active resistance by local populations illustrates an oft-repeated pattern.<sup>45</sup> The corporation has been extracting oil from the region for half a century but few if any benefits from the extraction have come to Indigenous Peoples such as the Ogoni and Ijaw populations. In addition, associated infrastructure construction and pollution from processing operations has heavily contaminated the air, water, and soils of the Delta. In the 1960s, Nigeria was almost self-sufficient agriculturally, but in the 1970s the national economy became dependent on revenue from oil exports that brought great wealth to elite classes in the country. Because of government corruption, Nigeria began accumulating a then \$9 billion external debt. When oil prices dropped, the Nigerian government faced the prospect of defaulting, at which point the IMF offered a \$5 billion loan tied to an SAP designed to cut funding for social services, privatize government-owned agencies, and encourage further dependence on exportable oil and cash crops. By the early 1990s, Shell's own armed police forces together with the Nigerian military (who, in the words of one former military officer, were paid by Shell to "sanitize" the people in the area of Shell's five oil fields) put down Indigenous resistance by razing villages and executing opposition leaders.<sup>46</sup>

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*the Impact of Resource Extraction*, COUNTERPUNCH (Aug. 20, 2015), <https://www.counterpunch.org/2015/08/20/the-economics-of-exploitation-indigenous-peoples-and-the-impact-of-resource-extraction>; Luis Vittor, *Indigenous People and the Resistance to Mining Projects (English Version)*, REVISTA, <https://revista.drclas.harvard.edu/book/indigenous-people-and-resistance-mining-projects>; *The Double Life of International Law: Indigenous Peoples and Extraction Industries*, 129 HARV. L. REV. 1755 (2016); VALENTINA VADI, CULTURAL HERITAGE IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION (2014); Scott Wallace, *Illegal Loggers Wage War on Indigenous People in Brazil*, NAT'L GEOGRAPHIC (Jan. 21, 2016), <https://news.nationalgeographic.com/2016/01/160120-brazil-illegal-logging-indigenous-people-Amazon-Basin-Aw-ibama>. *But see Indigenous Peoples and Mining Good Practice Guide*, INT'L COUNCIL ON MINING AND METALS, <https://www.icmm.com/en-gb/publications/mining-and-communities/indigenous-peoples-and-mining-good-practice-guide>.

<sup>44</sup> See generally Sawyer & Gomez, *supra* note 11, at 5.

<sup>45</sup> The Niger Delta situation is well-known perhaps only because active resistance by local populations has drawn press coverage. A February 2006 N.Y. Times article, for example, focused on the abduction of foreign workers and several acts of pipeline sabotage by "Nigerian militants," noting only in one sentence at the end that "[m]ilitancy in the delta . . . is rooted in the extreme poverty of the majority who live there." *Nigerian Militants Assault Oil Industry, Abducting 9 Foreigners*, N.Y. TIMES (Feb. 19, 2006), <https://www.nytimes.com/2006/02/19/world/africa/nigerian-militants-assault-oil-industry-abducting-9-foreigners.html?mtref=www.google.com&gwh=CB63598F2B1ABA153F0EE4C17B4A7DAD&gwt=pay>.

<sup>46</sup> For a more detailed account of Shell's history in the Niger Delta region, see Oron-to Douglas & Ike Okonta, *Ogoni People of Nigeria versus Big Oil*, in PARADIGM WARS, *supra* note 13, at 153–56. See also Tife Owolabi, *New Militant Group Threatens Niger Delta Oil War*, REUTERS (June 14, 2017, 5:47 AM), [www.reuters.com/article/nigeria-security-avengers-idUSL8N1J94QB](http://www.reuters.com/article/nigeria-security-avengers-idUSL8N1J94QB).

Another significant contemporary pressure adds to typical extraction encroachments. The confluence of population growth with food and water scarcity and security has prompted a global land grab by investors and nations using a mix of private and sovereign wealth funds. South Korea has bought land in Paraguay and Uruguay, and investment companies from that country have rented or plan to develop thousands of hectares of land in the Philippines and Mongolia. Japan, China, Saudi Arabia, and Qatar are vesting their interests in land and water to maximize food security.<sup>47</sup> African nations, especially Sudan and Ethiopia, are being courted vigorously. Southeast Asia is sought after. These large-scale, some might say gigantic, land and water acquisitions represent substantial cultivated areas, promising to further displace Indigenous populations.<sup>48</sup> Of course, extraction of mineral, wildlife, and

<sup>47</sup> See Paul Brown, *Food Supply Fears Spark China Land Grab*, CLIMATE NEWS NETWORK (Sept. 26, 2016), <https://climatenewsnetwork.net/food-supply-china-land-grab>; Mona Alami, *Land Grabbing—A New Political Strategy for Arab Countries*, INTER PRESS SERV. (July 30, 2014), <http://www.ipsnews.net/2014/07/land-grabbing-a-new-political-strategy-for-arab-countries>; Kieran Cooke, *Saudi Agricultural Investment Abroad—Land Grab or Benign Strategy?*, MIDDLE EAST EYE (Oct. 5, 2016), <http://www.middleeasteye.net/columns/saudi-agricultural-investment-abroad-land-grab-or-benign-investment-strategy-218650423>.

<sup>48</sup> LAND GRABBING AND GLOBAL GOVERNANCE: CRITICAL PERSPECTIVES (Matias E. Margulis, Nora McKeon & Satumino M. Borrás Jr. eds., 2013); Maria Cristina Rulli, Antonio Savioli & Paolo D'Odorico, *Global Land and Water Grabbing*, Proceedings of the National Academy of Sciences (Jan. 15, 2013); Ryan Jacobs, *CHARTS: The Top 5 Land-Grabbing Countries*, MOTHER JONES (Feb. 6, 2013), <https://www.motherjones.com/food/2013/02/top-land-grabbing-countries>; *IFC Investments Implicated in Land Grabs in Africa*, BRETTON WOODS PROJ. (July 3, 2017), <http://www.brettonwoods-project.org/2017/07/ifc-investments-implicated-land-grabs-africa>; *The Global Land Grab: A Primer*, TRANSNAT'L INST. (Feb. 2013), [www.tni.org/files/download/landgrabbingprimer-feb2013.pdf](http://www.tni.org/files/download/landgrabbingprimer-feb2013.pdf); Sophia Murphy, *Land Grabs and Fragile Food Systems: The Role of Globalization*, INST. FOR AGRIC. & TRADE POL'Y (Feb. 2013), [https://www.iatp.org/sites/default/files/2013\\_02\\_14\\_LandGrabsFoodSystem\\_SM\\_0.pdf](https://www.iatp.org/sites/default/files/2013_02_14_LandGrabsFoodSystem_SM_0.pdf). See Lester R. Brown, *The New Geopolitics of Food*, FOREIGN POL'Y, May/June 2011; Darian Qureshi, *Foreign Agricultural Investment in Africa: The New Colonialism or a Path to Development* (unpublished paper, May, 2012); *International Land Deals: Who is Investing and Where—Get the Data*, GUARDIAN: DATABLOG, <http://www.guardian.co.uk/global-development/datablog/2012/apr/27/international-land-deals-who-investing-what>; Andrea Hart & Brett Walton, *Water Scarcity, Food Security Concerns Prompt Global Land Grab*, CIRCLE OF BLUE (Nov. 17, 2009), <https://www.circleofblue.org/2009/world/water-scarcity-food-security-concerns-prompt-global-land-grab>; Lester R. Brown, *The New Geopolitics of Food*, CORNUCOPIA (May 20, 2011), <https://www.cornucopia.org/2011/05/the-new-geopolitics-of-food>; John Vidal, *Ethiopia at Centre of Global Farmland Rush*, GUARDIAN (Mar. 20, 2011), <https://www.theguardian.com/world/2011/mar/21/ethiopia-centre-global-farmland-rush>; RISING GLOBAL INTEREST IN FARM LAND, WORLD BANK, [http://sitesources.worldbank.org/INTARD/Resources/ESW\\_Sept7\\_final\\_final.pdf](http://sitesources.worldbank.org/INTARD/Resources/ESW_Sept7_final_final.pdf). See generally *International Conference on Global Land Grabbing*, FUTURE AGRIC., <https://www.future-agricultures.org/category/events/international-conference-on-global-land-grabbing>; Chris Huggins, *The Commercial "Land Rush"—Human Rights-Based Versus Corporate Social Responsibility Models* (May 23, 2010), <https://terra0nullius.wordpress.com/2010/05/23/the-commercial-land-rush---human-rights-based-versus-corporate-social-responsibility-models>; COMM. ON

forest resources from Indigenous Peoples' territories has a long history intertwined with global colonization.<sup>49</sup>

## II. Bio-Prospecting

In recent decades, Indigenous groups have faced outside exploitation of another valuable resource: their DNA. For example, because they offered the potential for asthma treatments, blood samples from Indigenous inhabitants of Trista de Cunha in the South Atlantic were sold to a California-based company. The company subsequently sold the samples' biotechnology rights to the German pharmaceutical company Boehringer Ingelheim for \$70 million.<sup>50</sup> Commentators have noted that the Indigenous groups from which genetic material is taken see little if any of the profits made by Western corporations who use their biological material.<sup>51</sup> In 1994, an international consortium of academic researchers and government institutions organized the Human Genome Diversity Project (HGDP) to collect information on how the human genome varies among populations. The project design required that blood and tissue samples be taken from hundreds of Indigenous communities around the world.<sup>52</sup> Indigenous populations were to be a specific focus of the project because, in the words of HGDP researcher Ken Kidd, "remote populations make perfect laboratories" because their genetic materials are

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WORLD FOOD SEC., [www.fao.org/cfs/en](http://www.fao.org/cfs/en); LA VIA CAMPESINA, <https://viacampesina.org/en>.

<sup>49</sup> See MICHAEL F. BROWN, WHO OWNS NATIVE CULTURE? (2003) (companion website at [www.williams.edu/go/native](http://www.williams.edu/go/native)); Lorie Graham & Stephen McJohn, *Indigenous Peoples and Intellectual Property*, 19 WASH. U. J.L. & POL'Y 313 (2005); DE SOTO, *supra* note 26; Michael Halewood, *Indigenous and Local Knowledge in International Law: A Preface to Sui Generis Intellectual Property Protection*, 44 MCGILL L.J. 953 (1999); Nancy Kremers, *Speaking With a Forked Tongue in the Global Debate on Traditional Knowledge and Genetic Resources: Is U.S. Intellectual Property Law and Policy Really Aimed at Meaningful Protection for Native American Cultures?*, 15 FORDHAM INTEL. PROP., MEDIA & ENT. L.J. 1 (2004). See generally FOREST PEOPLES PROGRAMME, <http://www.forestpeoples.org>; TEBTEBBA, <http://www.tebtebba.org>; INDIGENOUS ENVTL. NETWORK, <http://www.ienearth.org>; AMNESTY INT'L, SOLUTIONS TO THE HISTORIC VIOLATION OF INDIGENOUS RIGHTS WILL ONLY BE FOUND THROUGH RESPECTFUL DIALOGUE, IN GOOD FAITH, WITH INDIGENOUS PEOPLES (2009), <https://www.amnesty.org/download/Documents/44000/amr010042009en.pdf> (Amnesty International's report on the Indigenous Peoples of the Americas).

<sup>50</sup> Cindy Hamilton, *The Human Genome Diversity Project and the New Biological Imperialism*, 41 SANTA CLARA L. REV. 619, 628 (2001). See also Jonathan Marks, *Human Genome Diversity Project: Impact on Indigenous Communities*, in ENCYCLOPEDIA OF LIFE SCI. (Mar. 2008).

<sup>51</sup> See Marouf Hasian, Jr. & Emily Plec, *Remembrances of Things Past: A Postcolonial Critique of the Human Genetic Diversity Project*, in NEW APPROACHES TO RHETORIC 120–21 (Patricia Sullivan & Steven Goldzwig eds., 2004). See also Andrew Kimbrell, *Biocolonization: The Patenting of Life and the Global Market in Body Parts*, in Mander, *supra* note 7, at 131.

<sup>52</sup> Benjamin Pimentel, *DNA Study of Human Migration: National Geographic and IBM Investigate Spread of Prehistoric Peoples around World*, S.F. CHRON., Apr. 13, 2005, at A1. See also The Genographic Project by National Geographic—Human Migration, Population, Genetics, <https://genographic.nationalgeographic.com>.

assumed to have mixed less with people outside the community.<sup>53</sup> Widely held as an exemplary Big Science collaborative effort in that field, the project drew vehement criticism from both specific Indigenous communities and from international organizations such as UNESCO, the Rural Advancement Foundation International, and the World Council for Indigenous Peoples.<sup>54</sup> Project critics contended that the HGDP would lead to expropriation of intellectual property from Indigenous communities, violate the human rights and societal norms of many Indigenous people, and take advantage of nebulous and culturally inappropriate standards of consent and consultation.<sup>55</sup>

The original design of the HGDP was scaled back considerably as the outcry over its aims and methods caused funding to dry up by the late 1990s.<sup>56</sup> On April 13, 2005, however, the National Geographic Society and IBM jointly announced the launch of the five-year Genographic Project, which expressly aimed to complete the unfinished work of the HGDP.<sup>57</sup>

<sup>53</sup> Quoted in Paul Salopek, *Genes Offer Sampling of Hope and Fear: Cures Possible, But Groups Worry about Exploitation*, CHI. TRIB., Apr. 28, 1997, at 18.

<sup>54</sup> See *Indigenous Peoples Opposition to the HGDP*, INDIGENOUS PEOPLES COUNCIL ON BIOCOLONIALISM, [http://www.ipcb.org/resolutions/htmls/summary\\_indig\\_opp.html](http://www.ipcb.org/resolutions/htmls/summary_indig_opp.html). “The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (ABS) to the Convention on Biological Diversity is a supplementary agreement to the Convention on Biological Diversity.” *About the Nagoya Protocol*, CONVENTION ON BIOLOGICAL DIVERSITY, <http://www.cbd.int/abs/about> (last visited Oct. 18, 2018). For an informative discussion, see Achman Gusman Siswandi, *The Nagoya Protocol: Unfinished Business Remains Unfinished*, in INDIGENOUS INTELLECTUAL PROPERTY 334 (Matthew Rimmer ed., 2015); see also U.N. Declaration on Indigenous Peoples Rights to Genetic Resources and Indigenous Knowledge, [www.pcg.org/resolutions/htmls/Decl\\_GR&IK.html](http://www.pcg.org/resolutions/htmls/Decl_GR&IK.html). Cf. *International Treaty on Plant Genetic Resources for Food and Agriculture*, U.N. FOOD & AGRIC. ORG., [www.fao.org/plant-treaty/en](http://www.fao.org/plant-treaty/en); Edward Hammond, *Amid Controversy and Irony, Costa Rica's INBio Surrenders Biodiversity Collections and Lands to the State*, THIRD WORLD NETWORK (Apr. 2, 2015), <https://www.twn.my/title2/biotk/2015/btk150401.htm> (INBIO was formerly a national institute that received royalties from the pharmaceutical giant Merck in exchange for bioprospecting rights).

<sup>55</sup> For an eloquent critique of the HGDP, see Debra Harry, *The Human Genome Diversity Project: Implications for Indigenous Peoples* (Mar. 14, 1995), <http://www.hartford-hwp.com/archives/41/024.html>. See also Steve Connor, *How Accusations of Racism Ended the Plan to Map the Genetic Diversity of Mankind*, THE INDEP. (London), Sept. 10, 2001, at 3; Kimbrell, *supra* note 51, at 142; Hasian, Jr. & Plec, *supra* note 51; Hamilton, *supra* note 50. Advocates for Indigenous Peoples portrayed it as a “vampire project” for extracting valuable medical information from the blood of endangered tribes in return for virtually nothing, while the potential for commercial exploitation of this information (via gene patenting) raised suspicions that Western drug companies would develop and patent lucrative new treatments based on the DNA of the poor and dispossessed. These arguments are well-summarized by journalist Nicholas Wade in *Geographic Society is Seeking a Genealogy of Humankind*, N.Y. TIMES, Apr. 13, 2005, at A16. See also *Indigenous Peoples Opposition to the HGDP*, INDIGENOUS PEOPLES COUNCIL ON BIOCOLONIALISM, [http://www.ipcb.org/resolutions/htmls/summary\\_indig\\_opp.html](http://www.ipcb.org/resolutions/htmls/summary_indig_opp.html) (last visited Oct. 18, 2018).

<sup>56</sup> Connor, *supra* note 55, at 3–4.

<sup>57</sup> For example, Dr. Cavalli-Sforza, project leader of the HGDP, is an advisor to the Genographic Program. Wade, *supra* note 55. In another telling statement, then

The Genographic Project aimed to collect 100,000 blood samples from Indigenous populations around the world and analyze them genetically, creating a collection of blood samples 100 times larger than that of the HGDP.<sup>58</sup> Dr. Spencer Wells, a population geneticist with the group leading the program, said he hoped to head off charges of exploitation by offering money to the tribes for education and cultural preservation,<sup>59</sup> but the Indigenous People's Council on Biocolonialism had already called the project "a recurrent nightmare . . . essentially the same project we defeated years ago."<sup>60</sup> It does seem, however, that opposition to the HGDP influenced the design of the newer project, as genetic information and materials is to be less available to expropriate commercially.<sup>61</sup>

Even apart from their own genetic code, many Indigenous people find that other aspects of their traditional knowledge<sup>62</sup> of the world are

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project leader, Spencer Wells, wrote, "We sincerely believe this may be the last generation for many [I]ndigenous populations and we are eager to collaborate with them." *Last Chance for Indigenous Gene Research*, AUSTRALIAN, May 10, 2005, at 39. Regarding the Genographic Program, see also Benjamin Pimentel, *DNA Study of Human Migration: National Geographic and IBM Investigate Spread of Prehistoric Peoples Around the World*, S.F. CHRON., Apr. 13, 2005, at A1; John Vidal, *History Repeated*, THE OBSERVER, Apr. 20, 2005, at 12.

<sup>58</sup> Wade, *supra* note 55.

<sup>59</sup> *Id.* at 16–17.

<sup>60</sup> Quoted in Vidal, *supra* note 57, at 12.

<sup>61</sup> Importantly, genetic material from the projects was not to be cultured into new cell lines as it was in the HGDP. The material had to stay in the form of raw DNA, which degrades over time and is not easily shared. Use by other scientists and appropriation via patenting is thus made more difficult. See Wade, *supra* note 55. For current discussions, see KIM TALLBEAR, NATIVE AMERICAN DNA: TRIBAL BELONGING AND THE FALSE PROMISE OF GENETIC SCIENCE (2013); Rebecca Tsosie, *Indigenous Peoples and Epistemic Injustice: Science, Ethics, and Human Rights*, 87 WASH. L. REV. 1133, 1199 (2012); Rebecca Tsosie, *Cultural Challenges to Biotechnology: Native American Genetic Resources and the Concept of Cultural Harm*, 35 J.L. MED. & ETHICS 396 (2007) (Symposium Issue on Genome Justice and Group Rights); Kimberly TallBear, *Genetics, Culture and Identity in Indian Country*, Presentation at Seventh International Congress on Ethnobiology (Oct. 2000), <https://pdfs.semanticscholar.org/136a/370fe35e749da57336654ddab310d86d7889.pdf>; James W. Zion, *Traditional Indian Law, the Intellectual Property Regime, and the Protection of Indigenous Genetic Materials*, Roundtable, Int'l Inst. for Indigenous Resource Management (June 4–5, 2001), <http://www.iiirm.org/publications/Articles%20Reports%20Papers/Intellectual%20Property/Zion,%20Genetic%20Tradlaw2001-06-10.pdf>.

<sup>62</sup> There is significant debate as to the appropriate definition of the term "traditional knowledge." See IKECHI MGBEOJI, GLOBAL BIOPIRACY: PATENTS, PLANTS, AND INDIGENOUS KNOWLEDGE (2005); Lawrence R. Helfer, *Toward a Human Rights Framework for Intellectual Property*, 40 U.C. DAVIS L. REV. 971 (2007); Halewood, *supra* note 49. There has been a vast misuse of Western-centric (or Eurocentric) intellectual property mechanisms in order to misappropriate Indigenous Peoples' knowledge. See Ian Vincent McGonigle, *Patenting Nature or Protecting Culture? Ethnopharmacology and Indigenous Property Rights*, 3 J.L. & THE BIOSCIENCES 217 (2016) (describing a patent for a genetically modified version of Hawaiian Taro); Ravi Soopramanien, *International Trade in Indigenous Cultural Heritage: What Protection Does International Law Provide for Indigenous Cultural Goods and Services in International Commerce?* 53 STAN. J. INT'L L. 225 (2017); Angela R. Riley, "Straight Stealing": Towards an Indigenous

valuable to and targeted by governmental and by external transnational entities. Aside from the issue of compensation for the collection and use of Indigenous knowledge, many Indigenous societies construe their own sources of natural law as antithetical to the values of secularized, individual property-based models. In Indigenous cosmology, certain knowledge is a gift from the Creator and their collective systems for using these gifts are complex, involving individuals, clans, and other groups. There is no public domain in traditional knowledge.<sup>63</sup> Some knowledge is held in secret, other knowledge is shared openly. Open sharing does not automatically confer a right to use the knowledge. "Many songs or stories, for example, are held by individuals or families. These songs and stories are

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*System of Cultural Property Protection*, 80 WASH. L. REV. 69 (2005); S. James Anaya, *Technical Review of Key Intellectual Property-Related issues of the WIPO Draft Instruments on Genetic Resources, Traditional Knowledge and Cultural Expressions*, WIPO/GRTKF/IC/32/INF/8 (Oct. 3, 2016); Puig, *supra* note 7. See generally Chidi Oguamanam, INTERNATIONAL LAW AND INDIGENOUS KNOWLEDGE: INTELLECTUAL PROPERTY RIGHTS, PLANT BIODIVERSITY, AND TRADITIONAL MEDICINE (2d ed., 2006); BROWN, *supra* note 49; Symposium: *Traditional Knowledge, Intellectual Property, and Indigenous Culture*, 11 CARDOZO J. INT'L & COMP. L. 239 (2003) (Paul J. Heald, *The Rhetoric of Biopiracy*, *id.* at 519; Charles R. McManis, *Intellectual Property, Genetic Resources and Traditional Knowledge Protection: Thinking Globally, Acting Locally*, *id.* at 547; Daniel J. Gervais, *Spiritual But Not Intellectual? The Protection of Sacred Intangible Traditional Knowledge*, *id.* at 467; Graeme W. Austin, *Re-Treating Intellectual Property? The WAI 262 Proceeding and the Heuristics of Intellectual Property Law*, *id.* at 333); Kremers, *supra* note 49; Shubha Ghosh, *Globalization, Patents, and Traditional Knowledge*, 17 COLUM. J. ASIAN L. 73 (2003); Pollyanna E. Folkins, *Has the Lab Coat Become the Modern Day Eye Patch? Thwarting Biopiracy of Indigenous Resources By Modifying International Patenting Systems*, 13 TRANSNAT'L L. & CONTEMP. PROBS. 339 (2003); Russel Lawrence Barsh, *Defending Indigenous Science from Biopiracy: A Choice-of-Laws Approach*, quoted in Perry Shawana, *Legal Process, Pluralism, and the Governance of Carrier Sekani Knowledge*, in INDIGENOUS LEGAL TRADITIONS (2007), referenced from Stefan Matiation, *Biotechnology, Rights and Traditional Knowledge*, in A BRAVE NEW WORLD: WHERE BIOTECHNOLOGY AND HUMAN RIGHTS INTERSECT (2005); Jack Kloppenburg, *No Hunting! Biodiversity, Indigenous Rights, and Scientific Poaching*, CULTURAL SURVIVAL Q. MAG. (Sept. 1991), <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/no-hunting-biodiversity-indigenous-rights-and-scientific>; *Patents & Biopiracy*, ETC GROUP, [www.etcgroup.org/issues/patents-biopiracy](http://www.etcgroup.org/issues/patents-biopiracy); *Bioprospecting and Biopiracy*, PACHAMAMA ALL., [www.pachamama.org/indigenous-rights/bioprospecting](http://www.pachamama.org/indigenous-rights/bioprospecting); *Biopiracy: When Indigenous Knowledge is Patented for Profit*, THE CONVERSATION (Mar. 7, 2016), <http://theconversation.com/biopiracy-when-indigenous-knowledge-is-patented-for-profit-55589>. But see *Guidelines for BIO Members Engaging in Bioprospecting*, BIOTECHNOLOGY INNOVATION ORG., <https://www.bio.org/articles/guidelines-bio-members-engaging-bioprospecting> (statement of principles and best practices).

<sup>63</sup> See Gregory Younging, *Traditional Knowledge Exists; Intellectual Property Is Invented or Created*, 36 U. PA. J. INT'L L. 1077 (2015); Susy Frankel, *Third Party Trade Marks as a Violation of Indigenous Cultural Property: A New Statutory Safeguard*, 8 J. WORLD INTELL. PROP. 83 (2005); Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, *Note on the Meanings of the Term "Public Domain" in the Intellectual Property System with Special Reference to the Protection of Traditional Knowledge and Traditional Cultural Expressions/Expressions of Folklore*, WIPO/GRTKF/IC/17/INF/8, Nov. 24, 2010.

performed in public, and may be known by all members of a community. However, the right to sing these songs or tell these stories falls only to the individuals or families who are caretakers of the Creator's gifts."<sup>64</sup>

And "[h]ow Indigenous communities choose to represent spaces or spatial information is integral to constructing and archiving cultural memory, articulating current environmental use, and dealing with evidentiary issues for title or land claim cases. For Indigenous communities around the world, the legacy of Western (often, colonial) cartography and spatial theory is disconnected from the many distinct narratives of space (and time) in Native communities."<sup>65</sup>

Specifically in legal situations, this disconnect often reflects a power struggle between a Western, Cartesian division of space and time, and a relational, dynamic capitulation of space and time by an Indigenous group. Indigenous communities attempting to utilize Western legal forums for recognition of their rights face evidentiary hurdles caused by the ethnocentrism inherently built into legal systems . . . . This discomfort is based on Western society's ideas about what constitutes reality and reliability and results in Indigenous communities being held to strictly Western and often overly lineal principles.<sup>66</sup>

In Mi'kmaq law, suckerfish, in their quest for food, leave trails on the bottom of the rivers. These imprints stand to form the Mi'kmaq maps and records and truths prior to European contact.<sup>67</sup> Sea monsters existed on European Medieval and Renaissance maps.<sup>68</sup> They were believed.

<sup>64</sup> *Statement by the Tulalip Tribes of Washington on Folklore, Indigenous Knowledge, and the Public Domain July 9, 2003*, Intergovernmental Committee on Intellectual Property and Genetic Res., Traditional Knowledge and Folklore, Fifth Session, Geneva, July 5–17, 2003, <http://www.wipo.int/export/sites/www/tk/en/igc/ngo/tulaliptribes.pdf>. See also Jane Anderson, *Indigenous/Traditional Knowledge & Intellectual Property* (2010), [http://www.law.duke.edu/cspd/pdf/ip\\_indigenous-traditionalknowledge.pdf](http://www.law.duke.edu/cspd/pdf/ip_indigenous-traditionalknowledge.pdf); Younging, *supra* note 63.

<sup>65</sup> Robert Hershey, Jennifer McCormack & Gillian Newell, *Mapping Intergenerational Memories (Part I): Proving the Contemporary Truth of the Indigenous Past 1* (Ariz. Legal Stud. Discussion Paper No. 14–01, 2014), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2377486](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2377486). See Adam Loftin & Emmanuel Vaughan-Lee, *Counter Mapping*, GLOBAL ONENESS PROJ., <https://www.globalonenessproject.org/library/films/counter-mapping> (last visited Nov. 8, 2018) (short video describing the Zuni Map Art Project, as narrated by Jim Enote, the Director of A:shiwi A:wam Museum and Heritage Center). See also Emory Sekaquaptewa & Dorothy Washburn, *They Go Along Singing: Reconstructing the Hopi Past from Ritual Metaphors in Song and Image*, 69 AM. ANTIQUITY 457 (2004); Sarracina Littlebird, *Sacred Movement: Dance as Prayer in the Pueblo Cultures of the American Southwest*, [www.barnard.edu/sites/default/files/inline/sarracina\\_littlebird.pdf](http://www.barnard.edu/sites/default/files/inline/sarracina_littlebird.pdf) (last visited Nov. 8, 2018).

<sup>66</sup> Hershey et al., *supra* note 65. See also BRUCE GRANVILLE MILLER, ORAL HISTORY ON TRIAL: RECOGNIZING ABORIGINAL NARRATIVES IN THE COURTS (2011).

<sup>67</sup> See BRENDAN FREDERICK R. EDWARDS, PAPER TALK: A HISTORY OF LIBRARIES, PRINT CULTURE, AND ABORIGINAL PEOPLES IN CANADA BEFORE 1960 (2005); *Mi'kmaq Hieroglyphic Writing*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Mi%27kmaq\\_hieroglyphic\\_writing](https://en.wikipedia.org/wiki/Mi%27kmaq_hieroglyphic_writing) (illustrations).

<sup>68</sup> Marina Warner, *Here Be Monsters*, N.Y. REV. BOOKS, Dec. 19, 2013 (reviewing CHET

Which of these narratives has come to dominate? Which expressions are entitled to credence as opposed to denigration? Which are then entitled to protection under international schema?<sup>69</sup>

Specific WTO rules such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), for instance, which permits the patenting of life forms, facilitate un- or under-compensated information extraction. Taking advantage of Indigenous knowledge about the uses of plants or animals can greatly reduce research costs for companies that can then file for patents for exclusive control over such usage information or genetic materials.<sup>70</sup> South Africa's Council for Scientific and Industrial Research (CSIR) researched San peoples<sup>71</sup>

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VAN DUZER, *SEA MONSTERS ON MEDIEVAL AND RENAISSANCE MAPS* (2013) & JOSEPH NIGG, *SEA MONSTERS: A VOYAGE AROUND THE WORLD'S MOST BEGUILING MAP* (2013).

<sup>69</sup> See Hershey et al., *supra* note 65.

<sup>70</sup> See generally *Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions/Folklore*, WORLD INTEL. PROP. ORG., [http://www.wipo.int/ip-development/en/agenda/flexibilities/resources/tk\\_gr\\_tce\\_f.html](http://www.wipo.int/ip-development/en/agenda/flexibilities/resources/tk_gr_tce_f.html) (last visited Oct. 18, 2018). Article 27(3)(b) of TRIPS is crucial in privileging rights of life sciences companies to exclusive use over patented life forms, although the patent-seekers need to demonstrate some modification of the organism. For a more detailed discussion of this article and other mechanisms by which farmers who practice traditional seed saving and sharing are criminalized because the seeds that their communities developed are now "owned" by corporations, see Vandana Shiva, *TRIPS Agreement: From the Commons to Corporate Patents on Life*, in *PARADIGM WARS*, *supra* note 13, at 81–83. See also Graeme W. Austin, *Re-Treating Intellectual Property? The WAI 262 Proceeding and the Heuristics of Intellectual Property Law*, 11 *CARDOZO J. INT'L & COMP. L.* 333 (2003) (The Maori contest New Zealand's adoption of TRIPS due to their fundamental differences in conceptions of knowledge as property.); BROWN, *supra* note 49; *The Bellagio Declaration*, SOCIETY FOR CRITICAL EXCHANGE (Mar. 11, 1993), [www.cwru.edu/affil/sce/BellagioDec.html](http://www.cwru.edu/affil/sce/BellagioDec.html).

<sup>71</sup> The San People hide out of Western European society's consciousness while remaining in plain sight. The San are indigenous to southern Africa and historically have been referred to as Bushmen, San, Sho, Basarwa, Kung, or Khwe. Some of these have negative connotations and all are not what the San call themselves. Saarti Baartman, more commonly known as the Hottentot Venus (a term considered derogatory today), was born in the eighteenth century to the larger tribe (Khoisan) of hunter-gatherers whose traditional ancestral territory of the Kalahari Desert spans most areas of South Africa, Zimbabwe, Lesotho, Mozambique, Swaziland, Botswana, Namibia, and Angola. For many, Saarti's treatment by her European capturers at the age of twenty-one until her death six years later and the subsequent 150-plus years that her dissected and extracted remains and a cast of her body were on display in a French museum are symbols of European colonial attitudes towards Africa, and Indigenous People. Her treatment after death was also considered an example of scientific curiosity at its dehumanizing worst. Return of her remains was an important issue for post-apartheid South Africa, until 2002 when her remains were brought back to her homeland. For more info, see *'Hottentot Venus' Goes Home*, BBC NEWS (Apr. 29, 2002), <http://news.bbc.co.uk/2/hi/europe/1957240.stm>. Additionally, the San have been the source of a great bit of anthropologic and genetic information, from 200-year-old cave paintings to the oldest Y-chromosome to Hoodia. With all of our interest in them, the San People are slowly dying due to environmental changes and development around them. All the same, San society has shifted—from purely hunter-gatherer to battles with Botswana for access to their ancestral homelands within the country. Most recently, the San People issued a Code of Ethics for researchers. Concepts embodied in their

knowledge of the appetite suppression properties of the Hoodia cactus, secured a patent on a substance within the plant in 1997, and then licensed its development rights to the pharmaceutical company Pfizer via another company, Phytopharm. In 2003, after vigorous objection, the CSIR agreed to share 0.003 percent of its net profits with the San, although Pfizer and Phytopharm shares go untouched. As part of the deal, San peoples are prohibited from using their own knowledge of the plant for any commercial development on their own.<sup>72</sup> Vandana Shiva has noted the irony of corporations seeking patents to exclusively control the marketing and sales of products derived from Indigenous knowledge, while simultaneously arguing against the restriction of research by Indigenous communities who, they say, want to “lock up” this information that should be available to all human beings.<sup>73</sup>

### III. Nature Conservation

Another threat to the sovereignty of Indigenous Peoples comes from what might seem like a benign portrait of globalization: nature conservation.<sup>74</sup> Many millions of people worldwide have been forced to leave their ancestral lands in the name of conservation and land preservation, and these same people are often criminalized as poachers when they return to their own lands to harvest game or plants.<sup>75</sup> In the most

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articulation include “Respect, Honesty, Justice and Fairness, Care, [and] Process.” *San Code of Ethics*, SOUTH AFRICAN SAN INST. (2017), [http://www.globalhealthethics.org/wp-content/uploads/2017/03/San-Code-of-Ethics\\_March2017.pdf](http://www.globalhealthethics.org/wp-content/uploads/2017/03/San-Code-of-Ethics_March2017.pdf).

<sup>72</sup> See Debra Harry, *High-Tech Invasion: Biocolonialism*, in PARADIGM WARS, *supra* note 13, at 71. Harry also discusses the 2006 meetings of the Convention on Biological Diversity (CBD) Ad-hoc Open-ended Working Group on Access and Benefit Sharing. While these meetings are likely to better specify (on the nation state level) how benefits of commercializing genetic resources should be distributed between industrialized and developing countries, the focus on “benefit sharing,” even if Indigenous Peoples receive some compensation, obscures the important stipulation that the nation state will be granted absolute sovereignty over genetic resources even if located on Indigenous lands.

<sup>73</sup> See Vandana Shiva, *TRIPS Agreement: From the Commons to Corporate Patents on Life*, in PARADIGM WARS, *supra* note 13, at 81; See also *Biopiracy in the Amazon*, <https://sites.duke.edu/amazonbiopiracy> (last visited Oct. 18, 2018).

<sup>74</sup> See generally Victoria Tauli-Corpuz, *Report of the Special Rapporteur of the Human Rights Council on the Rights of Indigenous Peoples: Conservation and Indigenous Peoples’ Rights, Report to the General Assembly*, U.N. Doc. A/71/150 (Jul. 29, 2016); Janis Alcorn, *Indigenous Peoples and Conservation* (MacArthur Found. Conservation White Paper Series, 2010), [https://www.macfound.org/media/files/CSD\\_Indigenous\\_Peoples\\_White\\_Paper.pdf](https://www.macfound.org/media/files/CSD_Indigenous_Peoples_White_Paper.pdf); *Human Rights in Conservation: Progress Since Durban* (Nov. 2014), [https://static1.squarespace.com/static/57add7399f745649fc9e41a6/t/57c07f022e69cfa0761dcc94/1472233221310/CIHR\\_HRs+since+Durban\\_2014.pdf](https://static1.squarespace.com/static/57add7399f745649fc9e41a6/t/57c07f022e69cfa0761dcc94/1472233221310/CIHR_HRs+since+Durban_2014.pdf).

<sup>75</sup> See John Vidal, *The Tribes Paying the Brutal Price of Conservation*, GUARDIAN (Aug. 28, 2016), <https://www.theguardian.com/global-development/2016/aug/28/exiles-human-cost-of-conservation-indigenous-peoples-eco-tourism>; Julian Brave NoiseCat, *The Forgotten History of ‘Violent Displacement’ That Helped Create The National Parks*, HUFFINGTON POST (Aug. 26, 2015), [https://www.huffingtonpost.com/entry/national-park-service-anniversary-indigenous-people\\_us\\_55dcdd7ce4b0a40aa3ac9998](https://www.huffingtonpost.com/entry/national-park-service-anniversary-indigenous-people_us_55dcdd7ce4b0a40aa3ac9998); Mark

drastic cases, when people are removed from their lands, the absence of an Indigenous population who previously could guard and watch over the lands also opens the newly “protected” area to outside poachers,<sup>76</sup> squatters, cattle ranchers, renegade loggers, bushmeat and exotic animal hunters, ivory and Chinese medicine hunters, and biodiversity thus tends to decrease without Indigenous people.<sup>77</sup> In other cases, people are allowed to remain but their traditional subsistence activities are heavily regulated or outlawed. For example, since the establishment of the Biosphere Reserve of the Upper Gulf of California, a community of Cucapá Indians who live near the mouth of the Colorado River has struggled to regain the right to legally fish in their traditional waters.<sup>78</sup>

The huge parks and reserves that are created in so-called developing nations often involve a “debt-for-nature swap” that encourages the home

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Dowie, *Conservation Refugees*, in *PARADIGM WARS*, *supra* note 13, at 123; Mark Dowie, *Conservation Refugees*, *ORION MAG.*, <https://orionmagazine.org/article/conservation-refugees> (last visited Oct. 18, 2018). See also Mark Dowie, *Eviction Slip*, *GUERNICA* (Apr. 14, 2008), [https://www.guernicamag.com/post\\_1](https://www.guernicamag.com/post_1); JIM IGOE, *CONSERVATION AND GLOBALIZATION: A STUDY OF NATIONAL PARKS AND INDIGENOUS COMMUNITIES FROM EAST AFRICA TO SOUTH DAKOTA* (2004); Fergus MacKay & Emily Caruso, *Indigenous Lands or National Parks?*, *CULTURAL SURVIVAL Q. MAG.* (Mar. 2004), <http://www.culturalsurvival.org/publications/cultural-survival-quarterly/none/indigenous-lands-or-national-parks>. In a recent ruling, the East African Court of Justice preliminarily enjoined the Tanzanian government and halted its eviction of Masai pastoralists in the Ngorongoro district. See Patty Magubira, *Leave Herders Alone*, *East African Court Tells Tanzania*, *E. AFR.* (Sept. 29, 2018), <https://www.theeastafrican.co.ke/news/ea/Leave-herders-alone-East-African-court-tells-Tanzania/4552908-4783586-1ka6i7z/index.html>; *Ololosokwan Village Council & 3 Others v. The Attorney General of the United Republic of Tanzania*, Application No. 15 of 2017 (arising from Ref. No. 10 of 2017), *E. Afr. Ct. Just.* (Sept. 25, 2018).

<sup>76</sup> Even community members can become poachers. See Mat McDermott, *Malaysian Indigenous People Paid By Poaching Syndicates to Kill Tigers*, *TREE HUGGER* (Feb. 10, 2015), <https://www.treehugger.com/natural-sciences/malaysian-indigenous-people-paid-by-poaching-syndicates-to-kill-tigers.html>.

<sup>77</sup> See Alejandra Orozco-Quintero, Lance W. Robinson & Catie Burlando, “*Conservation*” *Is Used To Justify the Displacement of Indigenous People*, *TRUTHOUT* (Jan. 02, 2016), <http://truth-out.org/news/item/34220-just-conservation>. See also Mark Dowie, *Conservation Refugees*, *supra* note 75. At the end of his essay, Dowie sounds a somewhat positive note, writing that some conservation organizations are learning “from bitter experience that national parks and protected areas surrounded by angry, hungry people [are] doomed to fail.” *Id.* at 130. He quotes one WWF official in Borneo: “It is becoming increasingly evident that conservation objectives can rarely be obtained or sustained by imposing policies that produce negative impacts on [I]ndigenous [P]eoples.” *Id.* See also *Hunters or Poachers? Survival, the Baka and WWF*, *SURVIVAL INT’L*, <https://www.survivalinternational.org/campaigns/wwf> (last visited Oct. 18, 2018).

<sup>78</sup> The Mexican national press was closely monitoring this situation and the tensions that it has created with mestizo fishermen. A good overview is Julieta Martínez, *Peligra Etnia Cucapá en Baja California*, *EL UNIVERSAL* (Apr. 24, 2005), <http://archivo.eluniversal.com.mx/estados/57028.html>. Of course, tensions remain critically flared over the battle to protect the endangered Vaquita porpoise. See Kate Linticum, *The World’s Smallest Porpoise Has Caused a Big Battle in Baja, California*, *L.A. TIMES* (June 5, 2017), <http://www.latimes.com/world/mexico-americas/la-fg-mexico-vaquita-20170604-htmlstory.html>.

country to set aside conservation land in a deal with a large conservation NGO (e.g., WWF, The Nature Conservancy, or Conservation International). Much of the funding for these NGOs comes not from individuals, but from large foundations, the World Bank, the Global Environmental Fund, USAID, and transnational corporations.<sup>79</sup> Ramachandra Guha has written eloquently of how the concept of wilderness as “untrammelled by man” (an idea developed and codified largely in the United States) has been applied inappropriately in other cultural contexts, notably in India and Africa. Guha argues that American emphasis on wilderness can be “positively harmful when applied to the Third World,” citing an example where the creation of tiger reserves in India (pushed for by American environmental groups) resulted in the physical displacement of several Indigenous communities.<sup>80</sup> Bruce Braun, in 2002, described how environmental groups have sometimes also played to images of Indigenous Peoples as primitive in order to advance their own organization’s agendas. Braun writes, “[w]hat qualifies a place as wilderness is its ability to appear to lie outside human history,” and that as a corollary wilderness designation requires that any Indigenous people that inhabit or inhabited the area be portrayed “as a natural culture, at home in the wild.” He further describes how environmental groups have used wilderness designation as a lever to wrest forest resource management away from an Indigenous community in British Columbia, writing, “[t]o the extent that the Nuu-chaa-nulth appear properly indigenous, Clayoquot Sound can be situated in a mythical place outside modernity and thus a place that both deserves preservation and requires a modern representative to speak in its name.”<sup>81</sup>

Yet there has been a surge to merge contemporary resource management practices with traditional wisdom and Indigenous conservation knowledge. Simply put, in addition to dwindling natural resources, Indigenous knowledge—which often reflects generations of observation, problem solving, and experience maintained by thousands of ethnic groups across

<sup>79</sup> Dowie, *supra* note 75. *But see supra* note 38 (describing how Maasai were ordered to leave ancestral homeland to make way for Dubai royal family hunting ground).

<sup>80</sup> Ramachandra Guha, *Radical American Environmentalism and Wilderness Preservation: A Third World Critique*, 11 ENVTL. ETHICS 71 (1989). Guha argues that because environmentalism has become equated with wilderness preservation, environmental problems that impinge far more directly on the lives of the poor—e.g., lack of fuel and fodder, water shortages, soil erosion, and air and water pollution—have not been adequately addressed. Finally, he contends that an overemphasis on wilderness protection in the United States has caused the environmental movement to lose sight of the greater problem of overconsumption of resources, essentially reinforcing such consumption by preserving small parcels of undeveloped land without questioning the unsustainable economic and ecological basis of the society as a whole.

<sup>81</sup> BRUCE BRAUN, *THE INTEMPERATE RAINFOREST: NATURE, CULTURE, AND POWER ON CANADA’S WEST COAST* 88, 94 (2002). For a review of contemporary events, see Tsimka Martin & Gisele Martin, *Comment: Tla-o-qui-aht Demand Protection of Ancient Forest*, *TIMES COLONIST* (Nov. 13, 2016), <https://www.timescolonist.com/opinion/op-ed/comment-tla-o-qui-aht-demand-protection-of-ancient-forest-1.2660515>.

the globe—is in an uncertain state.<sup>82</sup> The World Bank may be on to the fact that people are watching how their plans, agreements and policies affect the world's Indigenous communities. Claudia Sobrevila, now the Program Manager for the Global Partnership on Wildlife Conservation and Crime Prevention for Sustainable Development, then a senior biodiversity specialist in the World Bank's Environmental Department, has written of the Bank's efforts to support the participation of Indigenous Peoples in Biodiversity Conservation programs and projects. Hoping to get a better sense of what the Bank needs to know to successfully engage Indigenous people, Sobrevila suggested that Indigenous Peoples might also benefit from "the report's presentation of tools to seeking international funding for biodiversity-related activities in their ancestral territories."<sup>83</sup> She reviewed fifteen portfolios detailing the Bank's engagement with Indigenous Peoples in biodiversity for this 2008 report to make recommendations about how the Bank can better strive for "lead[ing] the way among many development agencies and governments toward different forms of engaging Indigenous peoples; respecting and realizing the rights to their territories, culture, and spirituality; enhancing their environment and development; and satisfying the Indigenous people's aspirations contained in the United Nations Declaration on the Rights of Indigenous Peoples."<sup>84</sup> She also

<sup>82</sup> See *Statement of Ms. Victoria Tauli-Corpuz, Special Rapporteur on the Rights of Indigenous Peoples at the 71st Session of the General Assembly*, Oct. 17, 2016, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20748&LangID=E>. See also INDIGENOUS ENVIL. NETWORK, [www.ienearth.org/category/we-support/no-redd](http://www.ienearth.org/category/we-support/no-redd); INT'L WORK GRP. FOR INDIGENOUS AFF., [www.iwgia.org/environment-and-development/redd](http://www.iwgia.org/environment-and-development/redd); REDD-MONITOR, [www.redd-monitor.org](http://www.redd-monitor.org); DEVELOPING POLICIES AND LEGAL FRAMEWORKS TO INCENTIVIZE FOREST PROTECTION (Mina Lee & Carolina Rosero eds., 2015), <http://mpaenvironment.ei.columbia.edu/files/2015/06/Final-Report-for-Print.pdf>.

<sup>83</sup> Claudia Sobrevila, *The Role of Indigenous Peoples in Biodiversity Conservation: The Natural But Often Forgotten Partners* (May 2008), <https://siteresources.worldbank.org/INTBIODIVERSITY/Resources/RoleofIndigenousPeoplesinBiodiversityConservation.pdf>. See also INT'L UNION FOR THE CONSERVATION OF NATURE, [www.iucn.org](http://www.iucn.org), and their *Report of the Evaluation of the World Parks Conference, International Union for the Conservation of Nature*, [http://www.cmsdata.iucn.org/downloads/world\\_parks\\_congress.pdf](http://www.cmsdata.iucn.org/downloads/world_parks_congress.pdf). At the 5th World Parks Congress held in Durban, South Africa, in 2003, international conservation NGOs were in attendance (for example, Conservation International, The Nature Conservancy, The World Wildlife Fund, and the World Resources Institute). See *2003 Durban World Parks Congress*, PARKS, [https://www.iucn.org/sites/dev/files/import/downloads/14\\_2lowres.pdf](https://www.iucn.org/sites/dev/files/import/downloads/14_2lowres.pdf); *The Dana Declaration on Mobile Peoples and Conservation*, [www.danadeclaration.org](http://www.danadeclaration.org); J. Peter Brosius, *Indigenous Peoples and Protected Areas at the World Parks Congress*, [www.danadeclaration.org/pdf/brosius.pdf](http://www.danadeclaration.org/pdf/brosius.pdf); Neil Burgess, *Outcomes of the 5th World Parks Congress, Durban*, ARC J., Mar. 2004, at 21, [http://www.tfcg.org/wp-content/uploads/2018/05/arc\\_journal\\_march2004.pdf](http://www.tfcg.org/wp-content/uploads/2018/05/arc_journal_march2004.pdf). Respecting the debate on REDD (Reducing Emissions from Deforestation and Forest Degradation), see *Engaging Indigenous Peoples and Other Forest Dependent Communities*, U.N. REDD, <http://www.unredd.net/knowledge/redd-plus-technical-issues/stakeholder-engagement.html>; *REDD and the Rights of Indigenous Peoples: Ensuring Equity and Participation in World Bank Funds*, BRETTON WOODS PROJ. (Apr. 17, 2009), <https://www.brettonwoodsproject.org/2009/04/art-564322>.

<sup>84</sup> Sobrevila, *supra* note 83.

recognized that report findings might be helpful to other Bank programs “such as the Climate Change strategic framework and the Carbon Finance initiatives and can be used to incorporate the lessons learned from 18 years of biodiversity portfolio experience into these new programs.”<sup>85</sup> Her overarching recommendations were to expand beyond national parks, tap into Indigenous knowledge, address the climate change agenda and comply with agreed policies. Of the portfolios reviewed, project activities were categorized into nine common themes: 1) Indigenous Peoples and protected-areas co-management, 2) titling and demarcation of Indigenous lands, 3) Indigenous life plans, 4) establishment of Indigenous conservation areas, 5) Indigenous community management and zoning plans, 6) Indigenous community mapping and conservation, 7) community sustainable livelihood, 8) capacity building and training, and 9) Indigenous Peoples Development Plan. Sobrevila also carefully outlines 11 lessons learned by the World Bank and 11 recommendations for action by the end of her report.<sup>86</sup> Nevertheless, these recommendations must be viewed in the light of the World Bank’s latest Environmental and Social Framework that purports to commit to the human rights of Indigenous Peoples while it simultaneously creates exceptions to those commitments.<sup>87</sup>

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> See *supra* note 37. The Global Environment Facility (GEF) was founded following the 1992 Rio Summit. See *Earth Summit*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Earth\\_Summit](https://en.wikipedia.org/wiki/Earth_Summit) (last visited Nov. 8, 2018). One of their partners is the World Bank. See *Global Environment Facility*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Global\\_Environment\\_Facility](https://en.wikipedia.org/wiki/Global_Environment_Facility) (last visited Nov. 8, 2018). The GEF has developed its policy on Agency Minimum Standards on Environmental and Social Safeguards. GLOB. ENV’T FACILITY, [https://www.thegef.org/sites/default/files/documents/Policy\\_Environmental\\_and\\_Social\\_Safeguards\\_2015.pdf](https://www.thegef.org/sites/default/files/documents/Policy_Environmental_and_Social_Safeguards_2015.pdf) (last updated Feb. 19, 2015). According to Standard V.6:

The GEF recognizes that the identities and cultures of Indigenous Peoples are inextricably linked to the lands on which they live and the natural resources on which they depend. The GEF is dedicated to ensuring that its operations fully respect the dignity, human rights, economies, cultures, and traditional knowledge of Indigenous Peoples and their members. In furtherance of this objective, the GEF adopts a standard of free, prior and informed consent (FPIC) for GEF-financed projects for which FPIC is required by virtue of the relevant state’s ratification of ILO Convention 169. While there is no universally accepted definition of FPIC, for the purposes of this paragraph, GEF Partner Agencies will ensure that project executors document: (i) the mutually accepted consultation process between the project proponent and affected indigenous communities and (ii) evidence of agreement between the parties as the outcome of the consultations. FPIC does not necessarily require unanimity and may be achieved even when individuals or groups within the community explicitly disagree.

*Id.*

It appears the requirement for documentation of process as fundamental to FPIC and that is found in ESS7 comes originally from this policy framework. The establishment of a “grievance mechanism,” as a matter of broad policy, was also first supported in this policy statement. Then, in 2012, the GEF published its Principles and Guidelines for Engagement with Indigenous Peoples. GLOB. ENV’T FACILITY, Sept. 10,

The World Bank's Environmental and Social Standard 7 (ESS7) deviates from its Operational policy 4.10 (OP 4.10). In terms of criteria for the application of the policies four grounds are indicated in both. The application of two of those grounds, however, are divergent: collective attachment to land, and a distinct language. ESS7 extends protection to those Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities (IP/SSHUTLC) that have lost cultural attachment or distinct habitats or ancestral territories in project areas because of forced severance, conflict, government resettlement programs, dispossession of their land, natural disasters, or incorporation of such territories into an urban area. OP 4.10 did not recognize these social dynamics of land loss. ESS7 does stipulate, however, that the loss of collective attachment lands must have occurred during the lifetime of members of the community or group. It also stated that the ESS7 does not apply to *individuals* that meet the criteria living in urban areas, but may if an entire distinct community is living in or near urban areas. The requirement of a distinct language does not have such a temporal limitation as collective attachment to lands. The policy recognizes that language loss may have occurred, and in such cases the criteria may still be met if the community is undertaking efforts to preserve the language in the present.

ESS7 explicitly recognizes the existence of subgroups within IP/SSAHUTLC communities. No such recognition is mentioned in OP 4.10. Similarly, ESS7 expressly recognizes the existence of internal dissent and states that such issues must be handled by providing sufficient time to allow for decisionmaking to be seen as legitimate by a majority of participants. ESS7 indicates that FPIC can only be achieved with proper documentation of the agreement and of the process that occurred to reach an agreement. No such documentation requirement of process is stated in OP 4.10. ESS7 recognizes the need to avoid undesirable contact with Voluntarily Isolated Indigenous Peoples. No mention of these communities is made in OP 4.10. The former provides eight conditions for "meaningful consultation" to occur. Meaningful consultation was not defined in OP 4.10.

Both policies indicate that relocation of affected communities may occur, but under ESS7 relocation must follow a process of Free, Prior and Informed Consent (FPIC) and require a right of return if the cause for relocation ceases to exist. Borrowers must also consider all feasible alternatives to relocation. OP 4.10 made no explicit declaration that forced eviction is disallowed. Rather, the policy stated relocation may only occur if "broad support" from the affected community is obtained. ESS7 recognizes the need to consider impacts to cultural heritage, both tangible and intangible forms. OP 4.10 recognized the rights of Indigenous Peoples to "cultural resources and knowledge." While the provisions and obligations on borrowers are largely the same between the two policies,

regardless of their distinct nomenclature, ESS7 further stipulates that priority must be given to avoidance of such impacts.

The Nature Conservancy (TNC) has written that as part of its core values is a “Commitment to People, Communities and Cultures.”<sup>88</sup> Yet, this organization has been “singled-out,” along with Conservation International and the World Wildlife Fund (WWF) for imposing their culturally bound visions of natural resource management on Indigenous Peoples without accounting for their rights under international law or their different priorities and perceptions.<sup>89</sup> The arguments against these and of a litany of other large conservation organizations center on the discrepancies between their written policies and their on-the-ground deliveries and conduct. Like all grand actors, they suffer a learning curve. There is a sense, however, that attitudes change, instilling roundness and fairness, and are matched by successful alliances between Indigenous Peoples and nature conservation organizations.<sup>90</sup> The protection of the Great Bear Rainforest in central British Columbia is one example of the Nature Conservancy’s collaboration with Aboriginal Peoples of Coastal First Nations.<sup>91</sup> TNC recognizes that successful remediation of adaptation to climate change must involve Indigenous participants.<sup>92</sup>

<sup>88</sup> *Conservation by Design*, NATURE CONSERVANCY, <https://www.nature.org/media/aboutus/conservation-by-design-20th-anniversary-edition.pdf> (last visited Oct. 18, 2018).

<sup>89</sup> MARCUS COLCHESTER, *SALVAGING NATURE: INDIGENOUS PEOPLES, PROTECTED AREAS AND BIODIVERSITY CONSERVATION* (2003). See also Madhusree Mukerjee, *Conflicted Conservation: When Restoration Efforts Are Pitted against Human Rights*, SCIENTIFIC AM. (Sept. 1, 2009), <https://www.scientificamerican.com/article/conflicted-conservation-efforts>. Worse still, they have been accused of “hoarding” the bulk of funds necessary for land acquisition. Recent allegations have been made against the WWF for human rights abuses on the Baka people of Cameroon. See Patrick Barkham, *Human Rights Abuses Complaint Against WWF to be Examined by OECD*, GUARDIAN (Jan. 5, 2017), <http://www.theguardian.com/environment/2017/jan/05/oecd-to-examine-complaint-against-wwf-over-human-rights-abuses-in-cameroon>.

<sup>90</sup> See, e.g., Stephen Schwartzman & Barbara Zimmerman, *Conservation Alliances and Indigenous Peoples of the Amazon*, 19 CONSERVATION BIOLOGY 721 (2005); *Indigenous Peoples and Conservation Organizations: Experiences in Collaboration*, WWF (Feb. 2000), [https://c402277.ssl.cf1.rackcdn.com/publications/372/files/original/Indigenous\\_Peoples\\_and\\_Conservation\\_Organizations\\_Experiences\\_in\\_Collaboration.pdf?1345737726](https://c402277.ssl.cf1.rackcdn.com/publications/372/files/original/Indigenous_Peoples_and_Conservation_Organizations_Experiences_in_Collaboration.pdf?1345737726); *The Nature Conservancy’s Guiding Principles for Indigenous and Communal Conservation*, NATURE CONSERVANCY (Oct. 5, 2011), <https://www.conservationgateway.org/Files/Pages/nature-conservancys-guidi.aspx> (aiming to be consistent with the UN Declaration on the Rights of Indigenous Peoples); Donna Craig, Presentation, *Ethical Relationships for Biodiversity Research and Benefit Sharing with Indigenous Peoples*, (Conserving Biodiversity in the Developing World: Lecture Series, Intl. Political Economy and Development Programs at Fordham University, Apr. 5, 2005).

<sup>91</sup> See *Places We Protect: Great Bear Rainforest*, NATURE CONSERVANCY, <https://www.nature.org/en-us/get-involved/how-to-help/places-we-protect/great-bear-rainforest>; COASTAL FIRST NATIONS GREAT BEAR INITIATIVE, [www.coastalfirstnations.ca](http://www.coastalfirstnations.ca) & <https://coastalfirstnations.ca/our-environment/programs/coastal-guardian-watchmen-support>. The Nature Conservancy currently abides by its “Guiding Principles on Indigenous Peoples and Conservation.” The author suggests that it press further by adopting a Human Rights-Centered Approach to Indigenous People and Conservation.

<sup>92</sup> *Our Priorities*, NATURE CONSERVANCY, <https://www.nature.org/en-us/what-we-do/>

Over a decade ago, the World Wildlife Fund published a book-length report entitled “Indigenous Peoples and Conservation Organizations: Experiences in Collaboration.”<sup>93</sup> The Annex to this book outlines that organization’s Statement of Principles between it and Indigenous Peoples. Some years later, the WWF reviewed its purported commitment to Indigenous societies in a work entitled “Strengthening WWF Partnerships with Indigenous Peoples and Local Communities: Key Findings and Recommendations.” WWF stated:

[W]e recognize that we need to do significantly more to ensure consistent application of WWF’s [I]ndigenous [P]eoples’ policy across our conservation programme. We hear concerns expressed by [I]ndigenous [P]eoples and other social groups about negative impacts of some conservation projects, and about the need for greater responsiveness to the connections between conservation interests and those of [I]ndigenous [P]eoples.

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[C]onservation bears the burden of an historical heritage of approaches that have failed to fully recognize the rights and roles of [I]ndigenous [P]eoples and local communities, particularly in government-managed protected areas overlapping traditional lands and territories.<sup>94</sup>

One of their key findings is that WWF is often seen as working primarily with national governments and other “elites” devoting less attention to alliance-building with Indigenous Peoples’ Organizations (IPOs) and related civil society interest groups. It may be ready to remedy these shortfalls. In a recent publication (October, 2011), WWF and other organizations have articulated a *Conservation Initiative on Human Rights (CIHR)* to strengthen the integration of human rights into conservation policy and practice.<sup>95</sup> This measure has also been trumpeted by Conservation International in its published book, *Indigenous Peoples and Conservation: From Rights to Resource Management*.<sup>96</sup>

An example of a global group focused on incorporating Indigenous Peoples’ perspectives in resource management and conservation efforts

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our-priorities (last visited Oct. 18, 2018).

<sup>93</sup> WWF, <https://www.worldwildlife.org/publications/indigenous-peoples-and-conservation-organizations-experiences-in-collaboration>.

<sup>94</sup> Jenny Springer & Janis Alcorn, *Strengthening WWF Partnerships with Indigenous Peoples and Local Communities: Key Findings & Recommendations* (2007), <https://c402277.ssl.cf1.rackcdn.com/publications/7/files/original/WWFBinaryitem8947.pdf?1342687921>.

<sup>95</sup> See Jenny Springer et al., *Conservation and Human Rights: Key Issues and Contexts* (Scoping Paper for the Conservation Initiative on Human Rights, Oct., 2011), [https://cmsdata.iucn.org/downloads/cihr\\_scoping\\_paper.pdf](https://cmsdata.iucn.org/downloads/cihr_scoping_paper.pdf). See also CONSERVATION INITIATIVE ON HUM. RTS., <http://www.thecihr.org>.

<sup>96</sup> (Painemilla et al. eds., 2011). See also *Respecting Human Rights in Conservation*, CONSERVATION INT’L, <https://www.conservation.org/How/Pages/Respecting-human-rights-in-conservation.aspx> (last visited Oct. 18, 2018).

is the Forest People's Programme.<sup>97</sup> This group works to create political space for forest peoples—from various regions around the world including South America, Africa, and Asia—to secure rights, control their lands and decide their own futures. Through their goals, which include: getting the rights and interests of forest peoples recognized in laws, policies and programs; building forest peoples' capacities to claim and exercise their human rights; promoting community-based sustainable forest management; and informing NGO actions on forests in line with forest peoples' visions, the group is strictly focused on self-determination for these communities who live in and have customary rights to their forests as well as developed ways of life and traditional knowledge that are attuned to their forest environments.<sup>98</sup>

Natural Justice is a nongovernmental organization that has analyzed the following foundational questions: “Which conservation actors have responsibility for upholding international human rights standards?; which international human rights standards are most relevant in a conservation context?; and which redress mechanisms are available to indigenous peoples and local communities when human rights are infringed by conservation initiatives?”<sup>99</sup> It published a Discussion Paper in 2014 entitled “Human Rights Standards for Conservation,”<sup>100</sup> which builds upon its second edition of *The Living Convention*, the first compilation of all international law respecting Indigenous and Tribal Peoples.<sup>101</sup>

The Poplar River First Nation and government of Manitoba, Canada have accorded permanent legal protection to roughly two million

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<sup>97</sup> FOREST PEOPLES PROGRAMME, <http://www.forestpeoples.org>.

<sup>98</sup> The Forest Peoples Programme (FPP) recognizes that the forests covering the planet are nearly all inhabited by peoples who live in and have customary rights to their forests, as well as have developed ways of life and traditional knowledge that are attuned to their forest environments. This is true despite policies which commonly treat forests as empty lands controlled by the state and available for ‘development’ (colonization, logging, plantations, dams, mines, oil wells, gas pipelines and agribusiness), too often forcing forest people to relocate out of their forest homes. FPP advocates for an alternative vision of how forests should be managed and controlled to help these people secure their rights, build up their own organizations, and negotiate with governments and companies about how to best achieve economic development and conservation on their lands. Working around the four themes of environmental governance, climate and forest, legal and human rights and responsible finance that break down into specific project aims such as participatory resource mapping, response to the UN Framework Convention on Climate Change (UNFCCC), rights to land and natural resources and funding by sector, the FPP is strictly focused on self-determination for these communities of forest people.

<sup>99</sup> NATURAL JUST., <http://www.naturaljustice.org>; see also *Natural Justice Annual Report 2013–2014*, NATURAL JUST., [http://naturaljustice.org/wp-content/uploads/2016/05/2013-2014\\_annual-report.pdf](http://naturaljustice.org/wp-content/uploads/2016/05/2013-2014_annual-report.pdf).

<sup>100</sup> Dilys Roe & Harry Jonas, *Human Rights Standards for Conservation: Rights, Responsibilities, and Redress*, INT'L INST. ENV'T & DEV., <https://www.iied.org/human-rights-standards-for-conservation-rights-responsibilities-redress>.

<sup>101</sup> See also Eva-Lotta Jansson, *Wildlife Protection Funding Moves Toward Community-Based Approaches*, DEVEX INT'L DEV. (Oct. 5, 2016), <https://www.devex.com/news/wildlife-protection-funding-moves-toward-community-based-approaches-88863>.

acres of boreal forest on the ancestral lands of the Poplar River First Nation peoples. The United States-based National Resources Defense Council announced a “stunning success of Poplar River’s chiefs, council members, elders, community members and the Manitoba government.”<sup>102</sup> The Vision of the Asatiwisiipe Aki Management Plan, the First Nations Protected Areas *Accord*, is instructive to all conservation organizations:

The Anishinabek of Poplar River have been a part of the traditional territory for many centuries. We believe and assert that we are part of the land. We are both in and upon the land . . . and the land is part of us of who we are. Our vision for the land is very much a vision of ourselves. The Elders of Poplar River First Nation have stated:

*The Creator has given us life, he has given us land to live from, without that land our people will die* (Poplar River First Nation, October 2002).

*Today we see ourselves as rightful caretakers of our traditional land in Poplar River. We want to run our own lives, our own affairs, and to continue our traditional heritage of living off the land. We have come to a new era where we see ourselves as a people continuing to be stewards of the land, to have a say as to what goes on in that land, in our territory* (Chief Vera Mitchell, November 2001).<sup>103</sup>

The Poplar River reserve is part of a larger ten million acre area being proposed as a UNESCO World Heritage Site.<sup>104</sup> This *accord* validates one of a legion of dynamic negotiated and substantiated cooperative arrangements between and among environmental groups and Indigenous participants.<sup>105</sup>

<sup>102</sup> Josh Mogerma, *Canada’s New Yellowstone*, NAT. RES. DEF. COUNCIL (June 16, 2011), <https://www.nrdc.org/media/2011/110616>.

<sup>103</sup> *Asatiwisiipe Aki Management Plan: Poplar River First Nation* (May 18, 2011), [https://www.gov.mb.ca/sd/lands\\_branch/pdf/pfrn\\_management\\_plan\\_18may2011.pdf](https://www.gov.mb.ca/sd/lands_branch/pdf/pfrn_management_plan_18may2011.pdf). The Plan, written by the Poplar River First Nation, is totally community-based, and one where western science verified traditional knowledge. An important analog to the Asatiwisiipe Aki Management Plan 6 Bill 6, The East Side Traditional Lands Planning and Special Protected Areas Act, provides a mechanism for communities on the East Shore of Lake Winnipeg to protect their traditional territories from development. See *New Protection Available for East Shore Wilderness Area: A Review of Bill 6*, WILDERNESS COMM. (Dec. 2, 2008), <https://www.wildernesscommittee.org/news/new-protection-available-east-shore-wilderness-area-review-bill-6>.

<sup>104</sup> There exists a Canadian Boreal Initiative to which a number of First Nations and NGOs are signatories. See *Members*, BOREAL LEADERSHIP COUNCIL, <http://borealcouncil.ca/members>; PIMACHIOWIN AKI, <http://www.pimachiowinaki.org>; Steve Kallick, *UNESCO Recognizes Indigenous Rights, Cultures in World Heritage Rules*, PEW CHARITABLE TR. (Aug. 26, 2015), <https://www.pewtrusts.org/en/about/news-room/opinion/2015/08/26/unesco-recognizes-indigenous-rights-cultures-in-world-heritage-rules>.

<sup>105</sup> The compendium that follows is not meant to be exhaustive. Nevertheless, what is collected here are references to additional nongovernmental organizations whose interests dovetail with Aboriginal societies, as well as exemplars of co-management agreements and biocultural protocols. See INDIGENOUS PEOPLES’ INT’L CTR. POL’Y RESEARCH & EDUC., [www.tebtebba.org](http://www.tebtebba.org); INT’L WORK GRP. FOR INDIGENOUS AFF., [www.iwgia.org](http://www.iwgia.org); OXFAM INT’L, <https://www.oxfam.org> (a confederation of fifteen organizations);

Ecotourism is often touted as a way to reconcile opposing goals of conservation and development, but sometimes neither set of goals is likely to benefit local people. Briefly, ecotourism, according to The International Ecotourism Society (TIES), is “responsible travel to natural areas that conserves the environment and improves the wellbeing of local people.” Ecotourism’s supporters, frequently environmentalists and economists, might describe it as a means to educate the traveler about the fragile beauty of nature and fund the ecological conservation of areas in danger.<sup>106</sup> Ideally, that happens while simultaneously directly contributing to the economic development and political empowerment of local (presumably Indigenous) communities and engendering respect for the cultural heritages and human rights of the people who live in and help preserve these untouched,

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STAND, <https://www.stand.earth> (coalition of organizations in Canada and the United States, formerly ForestEthics); [www.giz.de](http://www.giz.de) (expertise in sustainable development); NAT. JUST., [www.naturaljustice.org](http://www.naturaljustice.org) (biocultural community protocols); *Bio-Cultural Community Protocols: A Community Approach to Ensuring the Integrity of Environmental Law and Policy*, U.N. ENVTL. PROGRAMME & NAT. JUST., <http://wedocs.unep.org/handle/20.500.11822/9819>; SARSTOON TEMASH INST. FOR INDIGENOUS MGMT., <http://www.satiim.org.bz>; COORDINADORA DE LAS ORGANIZACIONES INDIGENOUS DE LA CUENCA AMAZONICA, [www.coica.org.ec](http://www.coica.org.ec); UN PERMANENT FORUM ON INDIGENOUS ISSUES, [www.un.org/esa/socdev/unpfii/index.html](http://www.un.org/esa/socdev/unpfii/index.html); INTERTRIBAL SINKYONE WILDERNESS COUNCIL, <https://lannan.org/indigenous-communities/special-projects/intertribal-sinkyone-wilderness-council-ne-mendocino-county-ca>; INDIGENOUS ENVTL. NETWORK, [www.ienearth.org](http://www.ienearth.org); INTERTRIBAL SACRED LAND TR., [www.itslt.org](http://www.itslt.org); NAT’L WILDLIFE FED’N TRIBAL LANDS CONSERVATION PROGRAM, <https://www.nwf.org/Our-Work/Our-Lands/Tribal-Lands>; U.S. FISH & WILDLIFE SERV. NATIVE AM. LIAISON, [www.fws.gov/nativeamerican/links.html](http://www.fws.gov/nativeamerican/links.html); WORLD COMM’N ON PROTECTED AREAS, [www.iucn.org](http://www.iucn.org) (Indigenous Protected Areas Program (IPA)); *Raika Bio-Cultural Protocol 2009* (Raika Indigenous Peoples of Rajasthan, India), [http://www.pastoralpeoples.org/docs/Raika\\_Biocultural\\_Protocol.pdf](http://www.pastoralpeoples.org/docs/Raika_Biocultural_Protocol.pdf); *Co-operative Management Agreement between Yorta Yorta Nation Aboriginal Corporation and The State of Victoria*, [https://www.forestsandreserves.vic.gov.au/\\_data/assets/pdf\\_file/0018/29511/Agreement2004.pdf](https://www.forestsandreserves.vic.gov.au/_data/assets/pdf_file/0018/29511/Agreement2004.pdf) (an agreement approach that recognizes customary law in water management); Donna Craig & Elizabeth Gachenga, *The Recognition of Indigenous Customary Law in Water Resource Management*, 20 J. WATER L. 278 (2009), available at [https://www.researchgate.net/publication/228275817\\_The\\_Recognition\\_of\\_Indigenous\\_Customary\\_Law\\_in\\_Water\\_Resource\\_Management](https://www.researchgate.net/publication/228275817_The_Recognition_of_Indigenous_Customary_Law_in_Water_Resource_Management); *Porcupine Caribou Harvest Management Plan*, <http://www.pcmb.ca/harvest>; Donna Craig, *Implementing Sustainable Development in the Arctic: What Principles Should Guide Environmental Governance in Traditional Areas of Indigenous Peoples Facing the Impacts of Climate Change*, in YEARBOOK OF POLAR LAW (Gudmundur Alfredsson et al. eds., 2009); Donna Craig, *Recognising Indigenous Rights Through Co-Management Regimes: Canadian and Australian Experiences*, 6 NEW ZEALAND J. ENVTL. L. 199 (2002); Martin Nie, *The Use of Co-Management and Protected Land-Use Designation to Protect Tribal Cultural Resources and Reserved Treaty Rights on Federal Lands*, 48 NAT. RES. J. 3 (2008); *Historic Preservation Plan for Medicine Wheel National Historic Landmark and Vicinity*, USDA Forest Serv. R-2, Bighorn Nat’l Forest Medicine Wheel Ranger Dist. (Sept. 1996); Rainbow Bridge Nat’l Monument, Gen. Mgmt. Plan, Dev. Concept, Interpretive Prospects (June 1993).

<sup>106</sup> See TOURISM AND INDIGENOUS PEOPLES: ISSUES AND IMPLICATIONS (Richard Butler & Tom Hinch eds., 2007). See also Jessica Coria & Enrique Calfucura, *Ecotourism and the Development of Indigenous Communities: The Good, the Bad, and the Ugly*, 73 ECOLOGICAL ECON. 47 (2012).

frequently remote locations.<sup>107</sup> But the practice has not usually met the ideal. Meant to be low impact and small scale, some countries, like South Africa, experience negative effects which outweigh the medium-term economic benefits. Further, in addition to the detrimental impacts on the land that are bound to happen with the addition of even small-scale tourism exposure, the cultural survival of local Indigenous people is again jeopardized. On one end, there are the instances of displacement and direct environmental impact.<sup>108</sup> On the other, the jobs created tend to be low-wage positions such as porters and maids, and people are drawn into this wage economy as conservation aspects of the projects curtail their access to use the land or sea. Exposure to the consumer culture of tourists makes some people think of themselves, possibly for the first time, as being “poor,” and Indigenous people often find their identities and rituals commoditized and trivialized as attractions for the visitors.<sup>109</sup>

An example is the situation with the Maasai in Kenya as detailed by Ole Kamuaro in *Ecotourism: Suicide or Development? Voices from Africa*.<sup>110</sup> About 70 percent of national parks and game reserves in East Africa are on Maasai land indicating a significant land loss for the pastoral tribe. With the loss of land, comes the loss of most of the socioeconomic structure of the tribe in an economy now focused on a school-based education to determine employment. As with many mismanaged ecotourist endeavors, the money made by the use of this land is only directed back into the community directly via low paying jobs and minor infrastructure improvements. In this sense, the struggle of Indigenous people to survive as a culture can become additional “atmosphere” contributing

<sup>107</sup> See, e.g., NATURE CONSERVANCY, [www.nature.org/ourinitiatives/regions/centralamerica/costarica/explore/cr-chocolate.xml](http://www.nature.org/ourinitiatives/regions/centralamerica/costarica/explore/cr-chocolate.xml).

<sup>108</sup> Anna Carr, Lisa Ruhanen & Michelle Whitford, *Indigenous Peoples and Tourism: The Challenges and Opportunities for Sustainable Tourism*, 24 J. SUSTAINABLE TOUR. 1067 (2016), <https://www.tandfonline.com/doi/full/10.1080/09669582.2016.1206112>; *Ecotourism: Displacement of People and Threats to Indigenous Cultures*, LINTANG BUANA TOURS (Oct. 17, 2014), <http://www.lintangbuanatours.com/tourism-reference/8335-ecotourism-displacement-of-people-and-threats-to-indigenous-cultures.html>; Julie Narimatsu, *Environmental Justice Case Study: Maasai Land Rights in Kenya and Tanzania*, <http://umich.edu/~snre492/Jones/maasai.htm> (last visited Oct. 18, 2018).

<sup>109</sup> CHRIS RYAN, *INDIGENOUS TOURISM: THE COMMODIFICATION AND MANAGEMENT OF CULTURE* (2005); Suzanne York, *Mixed Promises of Ecotourism*, in *PARADIGM WARS*, *supra* note 13, at 133. York’s essay is overall highly critical of ecotourism as a way to strengthen Indigenous communities, but notes that if carefully controlled and designed by local people at all stages of the process, it can bring meaningful benefits to a community. For example, the Toledo Ecotourism Association of Belize and RINCANCIE of Ecuador were founded by local Indigenous groups and seek to carefully distribute the benefits of such tourism equally among participating villages. See also, J. G. Colvin, *Indigenous Ecotourism: The Capirona Programme in Napo Province, Ecuador*, <http://www.fao.org/docrep/w2149e/w2149e07.htm>; HEATHER ZEPPEL, *INDIGENOUS ECOTOURISM: SUSTAINABLE DEVELOPMENT AND MANAGEMENT* (2006). The Poplar River First Nation, discussed in the text above, is planning complete self-control of ecotourism as part of its economic development strategy.

<sup>110</sup> Ole Kamuaro, *Ecotourism*, <https://www.un-ngls.org/orf/documents/publications.en/voices.africa/number6/vfa6.12.htm> (last visited Nov. 12, 2018).

to the tourist experience and completely disrespecting the culture that ecotourism is said to promote. It has to be reoriented if it is to be useful to local communities and to become sustainable.

#### IV. Additional Examples

Many other challenges to Indigenous Peoples' sustaining their self-identification as both historic and vibrant contemporary cultures need articulation. Nevertheless, the nature of this manuscript only allows for a brief mention. I realize I am just skipping stones across a lake, yet each noted impact would require a treatise on its own.

Although even the most local-seeming of resource extraction projects are tied into the global commodities market (through mineral or timber prices, for example), some environmental pressures that impact Indigenous people, such as climate change (climate disruption), are more obviously generated on a global scale. Sheila Watt-Cloutier, then Chair of the Inuit Circumpolar Conference, testified in 2004 before the US Senate to review the impacts of global warming on the Inuit, who she termed "the canary in the global coal mine." Watt-Cloutier warned of melting sea ice, rising sea level, thawing permafrost, relocation of communities, and declining marine wildlife populations. Noting that the Inuit have the highest suicide rate in North America and engage in destructive behaviors related to unemployment and poverty, she argues that what saves many Inuit is a return to the sea ice and traditional subsistence hunting. In her words, "[i]f climate change takes that source of wisdom away from us, just as we are coming through our struggle with modernization, then I profoundly fear for my people."<sup>111</sup>

<sup>111</sup> Sheila Watt-Cloutier, *Climate Change in the Arctic*, in PARADIGM WARS, *supra* note 13, at 98; BRUCE E. JOHANSEN, GLOBAL WARMING IN THE 21ST CENTURY: MELTING ICE AND WARMING SEAS 333 (2006). See also Statement by Ms. Okalik Eegeesiak, Chair of the Inuit Circumpolar Council, at the Arctic Council Ministerial Meeting in Fairbanks, May 11, 2017, <https://oaarchive.arctic-council.org/handle/11374/1914>; *Global Warming of 1.5°C*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, <http://www.ipcc.ch/report/sr15> (last visited Nov. 8, 2018); Jonathan Watts, *Stop Biodiversity Loss or We Could Face Our Own Extinction, Warns UN*, GUARDIAN (Nov. 6, 2018), <https://www.theguardian.com/environment/2018/nov/03/stop-biodiversity-loss-or-we-could-face-our-own-extinction-warns-un>; writings of Kyle Powys White, collected at [www.kylewhyte.cal.msu.edu](http://www.kylewhyte.cal.msu.edu). See especially Kyle Whyte, *Is It Colonial Déjà Vu? Indigenous Peoples and Climate Injustice*, in HUMANITIES FOR THE ENVIRONMENT: INTEGRATING KNOWLEDGES, FORGING NEW CONSTELLATIONS OF PRACTICE 88 (Joni Adamson, Michael Davis & Hsinya Huang eds., forthcoming), available at <http://ssrn.com/abstract=2925277>; *Guidelines for Considering Traditional Knowledge in Climate Change Initiatives*, CLIMATE & TRADITIONAL KNOWLEDGE WORKGROUP (CTKW) 2014, <https://climatetkw.wordpress.com>; *Carbon Pricing: A Critical Perspective for Community Resistance*, INDIGENOUS ENVTL. NETWORK (Oct. 2017), <http://www.ienearth.org/wp-content/uploads/2017/11/Carbon-Pricing-A-Critical-Perspective-for-Community-Resistance-Online-Version.pdf>; Haider Rizvi, *Climate a "Life and Death" Issue for Native Peoples*, COMMON DREAMS (Apr. 24, 2008), <https://www.commondreams.org/news/2008/04/24/climate-life-and-death-issue-native-peoples>; Alexei Barrionuevo, *Amazon's 'Forest Peoples' Seek a Role in Striking Global Climate Agreements*, N.Y. TIMES (Apr. 6, 2008), <https://www.nytimes.com/2008/04/06/world/>

Indigenous Peoples are also threatened by the global market in Indigenous artifacts, religious objects, and art styles. Sacred objects are sometimes sold, stolen or surreptitiously purchased from Indigenous territories, or they pass into the realm of private collection via antique tribal art traders or archaeological excavation.

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americas/06brazil.html; Wizipan Garriott, *Climate Change: Mitigation Processes of Indigenous Peoples* (unpublished paper prepared for Victoria Tauli-Corpuz by the Indigenous Peoples L. & Pol'y Program, U. Ariz. James E. Rogers Coll. of L., available by request at hershey@law.arizona.edu); INDIGENOUS PEOPLES BIOCULTURAL CLIMATE CHANGE ASSESSMENT INITIATIVE, [www.ipcca.info](http://www.ipcca.info); INT'L INDIGENOUS PEOPLES' FORUM ON CLIMATE CHANGE, <http://www.iipfcc.org>; SNOWCHANGE COOPERATIVE, [www.snowchange.org](http://www.snowchange.org); Rebecca Tsosie, *Climate Change, Sustainability, and Globalization: Charting the Future of Indigenous Environmental Self-Determination*, 4 ENVTL. & ENERGY L. & POL'Y J. 188 (2009); Jin Hyung Lee, *Improving Native American Tribes' Voice in International Climate Change Negotiations*, 5 AM. INDIAN L.J. 668 (2017); IPCC INITIATIVE, <http://ipcca.info>; *Report of the Indigenous Peoples Global Summit on Climate Change (2009)*, [www.un.org/ga/president/63/letters/globalsummitoncc.pdf](http://www.un.org/ga/president/63/letters/globalsummitoncc.pdf); *Indigenous Peoples' Climate Change Assessment*, IUCN (Aug. 3, 2011), <https://www.iucn.org/content/indigenous-peoples-climate-change-assessment>; *Climate Change*, UNESDA, <https://www.un.org/development/desa/indigenouspeoples/climate-change.html> (last visited Nov. 8, 2018); *Empowering Indigenous People in the Amazon to Address Climate Change*, INTERAMERICAN DEV. BANK (May 23, 2011), <http://www.iadb.org/en/news/webstories/2011-05-23/indigenous-people-climate-change,9374.html>; Simon Tisdall, *What the Sami People Can Teach Us About Adapting to Climate Change*, GUARDIAN (Mar. 10, 2010), <http://www.theguardian.com/environment/2010/mar/10/sami-finland-climate-change>; GALDU RES. CTR. FOR THE RTS. OF INDIGENOUS PEOPLES, <http://galdu.custompublish.com/home.347689.en.html>; *Indigenous Peoples, Lands, and Resources*, NAT'L CLIMATE ASSESSMENT, <https://nca2014.globalchange.gov/report/sectors/indigenous-peoples> (climate change impacts in the United States); *Reflecting on Indigenous Peoples' Engagement in COP 21 and the Implications of the Paris Agreement*, IIPFC (May 20, 2016), <http://www.iipfcc.org/blog/2016/5/20/reflecting-on-indigenous-peoples-engagement-in-cop-21-and-the-implications-of-the-paris-agreement>. Indigenous Peoples also face contentious issues within the implementation strategies of REDD+. See, e.g., *Protecting Indigenous Rights in Climate Policy*, INDIAN L. RES. CTR., <https://indianlaw.org/climate>; *Indigenous Peoples Say No to REDD+ and Durban Climate Agreement*, CULTURAL SURVIVAL, <https://www.culturalsurvival.org/news/indigenous-peoples-say-no-redd-and-durban-climate-agreement>; *Indigenous Peoples and REDD-Plus*, IUCN, <https://www.iucn.org/theme/social-policy/our-work/indigenous-and-traditional-peoples/indigenous-peoples-and-redd-plus>; *Climate Action*, IWGIA, [www.iwgia.org/environment-and-development/redd](http://www.iwgia.org/environment-and-development/redd).

Recently, a claim was filed in the Waitangi Tribunal (New Zealand) on behalf of the Mataatua. District Maori Council alleged a breach by the New Zealand Government for failing to implement adequate policies to address threats posed by global climate change. See *Mataatua District Maori Council v. New Zealand*, <http://climatecasechart.com/non-us-case/mataatua-district-maori-council-v-new-zealand> (last visited Nov. 8, 2018). Similarly, in *Armando Ferrao Carvalho and Others v. The European Parliament and the Council*, a suit brought by parents and children, supported by Indigenous Sami youth, plaintiffs contend the European Union has failed to meet its urgent responsibilities to curb greenhouse gas emissions. See *Armando Ferrao Carvalho and Others v. The European Parliament and the Council*, GRANTHAM RES. INST., <http://www.lse.ac.uk/GranthamInstitute/litigation/armando-ferrao-carvalho-and-others-v-the-european-parliament-and-the-council> (last visited Nov. 9, 2018).

There is no word for repatriation in the Kwak'wala language.<sup>112</sup> "U'mista" is the closest approximation and describes the return of people taken captive in raids. In 1922 when the potlatch tradition was banned by authorities, Kwakwaka'wakw (Kwakiutl) participants were forced to choose between forfeiting their ceremonial regalia or going to jail. Today the aim of the Kwakiutl people is u'mista of "everything we lost when our world was turned upside down, as our old people say."<sup>113</sup> There is no specific word for repatriation in Native languages like the Kwak'wala because the objects<sup>114</sup> now in the hands of museums and private collectors were never meant to leave the community in the first place.

When these belongings disappear from their communities, the absence does not diminish the belongings' importance. Nor do they lose their cultural and spiritual worth over time. When trying to repatriate a cultural belonging, Native peoples are asked to classify that "object" in terms of Western-centric conceptions of property, art, and religion. This classification fails to convey the place a belonging holds in the particular Native community or its true value. As Acoma Pueblo Governor Kurt Riley states:

Different types of Acoma cultural objects may be stored, cared for, or used differently depending on what the object is. For example, some cultural objects may be cared for and stored by individuals or families in their homes. Other times, different cultural objects may be cared for and stored in communal buildings, called kivas, by specific societies or clan groups. Other times, these objects may be placed outside in the open at sacred sites. Objects are put in special places to be left there permanently, not unlike the San Ildefonso Pueblo object at issue in the case of *Pueblo of San Ildefonso v. Ridlon*, 103 F.3d 936 (10th Cir. 1996), or the repatriation of the Zuni War Gods in the late 1980s (a well known example of the removal of cultural objects from area shrines).

\* \* \*

The clearest analogy to describe Acoma law is the legal concept of property rights being a "bundle of sticks." For Acoma, some members may have rights of possession, but they do not have the right to sell an object of cultural patrimony. In fact, traditional law dictates what is to happen to a cultural object if a caretaker can no longer care for the object. The right to sell an object of cultural patrimony, although not contemplated in Acoma traditional law, would be exclusively reserved to Acoma itself. Certainly, the Pueblo has never exercised this right.<sup>115</sup>

<sup>112</sup> Janet Catherine Berlo et al., *The Problematics of Collecting and Display, Part 1*, 77 THE ART BULL. 6, 6–10 (1995).

<sup>113</sup> *Id.* at 10.

<sup>114</sup> Depending upon the context, I am uncomfortable referencing and using the term "objects," alternatively called cultural property, cultural patrimony, funerary objects, and sacred objects. The author considers all of these terms subsumed within the category of "beings" or "belongings" of cultural heritage.

<sup>115</sup> *Field Hearing on the Theft, Illegal Possession, Sale, Transfer and Exportation of*

Native peoples should not be asked to think as collectors. Rather, their perspective as members of a given tribe, village, community, or Native Hawaiian organization should be recognized as authoritative when determining the significance of a belonging. Repatriation demands for Native cultural heritage force all involved parties to confront the uncomfortable truth of colonialism, oppression, and genocide that led to the dispersal of Native belongings from their proper homes. As Cherokee scholar Honor Keeler writes, the issue of Indigenous international repatriation is tied up with the development of globalization and international law beginning in 1492:

With such historic beginnings in the formative years of international and European domestic legal structures, the collecting of indigenous ancestral remains and cultural objects without indigenous consent became such an accepted concept within legal structures and academia that until recently, indigenous communities had made little headway in repatriation efforts.<sup>116</sup>

The retention of Native belongings of cultural heritage by non-Native collectors and curators is a continuation of the war against Native peoples in a Foucauldian sense.<sup>117</sup> The historically specifiable moment for Native peoples was European “discovery” of the North American continent. Beliefs about the imminent extinction of Native peoples fueled the mass collection of Native belongings while theories of racial superiority fueled the mass collection of Native remains.<sup>118</sup> The war against Native peoples that began in 1492 is claimed by many Native Nations to be continued by today’s museums and collectors because their collections are the results of the “discovery” and subsequent subjugation of Native peoples.<sup>119</sup>

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*Tribal Cultural Objects Before the S. Comm. on Indian Aff.*, 114th Cong. 1–2 nn.1 & 2 (2016) (statement of Kurt Riley, Governor, Pueblo of Acoma).

<sup>116</sup> Honor Keeler, *Indigenous International Repatriation*, 44 ARIZ. ST. L.J. 703, 706 (2012).

<sup>117</sup> MICHEL FOUCAULT, “SOCIETY MUST BE DEFENDED”: LECTURES AT THE COLLEGE DE FRANCE 1975–1976 90 (Alessandro Fontana & Mauro Bertani eds., 1997) (“[P]ower is war, a war continued by other means . . . The relations of power that function in a society such as ours essentially rest upon a definite relation of forces that is established at a determinate, historically specifiable moment, in war by war. Furthermore, if it is true that political power puts an end to war, that it installs, or tries to install, the reign of peace in civil society, this by no means implies that it suspends the effects of war or neutralizes the disequilibrium revealed in the final battle. The role of political power, on this hypothesis, is to perpetually reinscribe this relation through a form of unspoken warfare; to reinscribe it in social institutions, in economic inequalities, in language, in the bodies themselves of each and every one of us.”).

<sup>118</sup> Nancy Marie Mithlo, “*Red Man’s Burden*”: *The Politics of Inclusion in Museum Settings*, 28 AM. INDIAN Q. 743, 748 (2004).

<sup>119</sup> For a comprehensive review of the limitations of domestic and international laws involving repatriation, and a “Model Tribal Repatriation Law,” see Robert Alan Hershey & Breeze K. Potter, *Returning Native Belongings of Cultural Heritage To Their Proper Homes* (unpublished discussion paper) (on file with author). See also Kathy Bowrey, *International Trade in Indigenous Cultural Heritage: An Australian*

Terri-Lynn Williams-Davidson, former Executive Director of Environmental-Aboriginal Guardianship through Law and Education (EAGLE), has discussed impacts of the loss of these irreplaceable objects, but has also described a growing global industry of imitation Indigenous art (often mass produced) and the demoralizing effects that the trivialization of sacred objects has on Indigenous people.<sup>120</sup> Sergio Puig, Associate Professor of Law and Director of the International Economic Law and Policy Program at James E. Rogers College of Law, University of Arizona, has written on the intellectual property of the Guna People of Panama.<sup>121</sup> He relates that Panama has adopted innovated *sui generis* intellectual property legislation that protects cultural expressions of the Guna mola (a uniquely designed and colorful textile sewn and worn by Guna women) by criminal punishment for illegal imitation and copying. Consequently, the Guna have entered into various state supported licensing agreements.<sup>122</sup>

Two last very brief mentions before I move on: Indigenous Peoples have historically and presently seen their societies destroyed, intruded upon, or disrupted by military actions. It is of no small importance that there now (and always) exists a continuation of such threats and domination.<sup>123</sup> Significantly, too, are the horrible issues surrounding the sex

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*Perspective, in* INTERNATIONAL TRADE IN INDIGENOUS CULTURAL HERITAGE: LEGAL AND POLICY ISSUES 396–438 (Christoph B. Graber et al. eds., 2012) (“The emergence of anthropology as a specific form of scientific knowledge is inseparable from the history of colonialism and empire.”); Samantha Anderson, Note, *Do as I Say, Not as I Do: Inconsistencies in International Cultural Property Repatriation*, 24 CARDOZO J. INT’L. & COMP. L. 315 (2016); Lillia McEnaney, *The STOP Act: Proposed Legislation to Stop the Export of Native American Cultural Patrimony*, SAVING ANTIQUITIES FOR EVERYONE (Sept. 9, 2016), <http://savingantiquities.org/stop-act-proposed-legislation-stop-export-native-american-cultural-patrimony>. The Safeguard Tribal Objects of Patrimony (STOP) Act is a legislative response to the tribal experiences with French auction houses. *And see* Rebecca Tsosie, *International Trade in Indigenous Cultural Heritage: An Argument for Indigenous Governance of Cultural Property*, in INTERNATIONAL TRADE IN INDIGENOUS CULTURAL HERITAGE: LEGAL AND POLICY ISSUES, at 221; Karolina Kuprecht & Kurt Siehr, *International Trade in Moveable Tangible Cultural Heritage of Indigenous Peoples: A European Perspective*, in *id.* at 246; Susy Frankel, *Attempts to Protect Indigenous Culture Through Free Trade Agreements*, in *id.* at 118.

<sup>120</sup> Terri-Lynn Williams-Davidson, *Sacred Objects, Art and Nature in a Global Economy*, in PARADIGM WARS, *supra* note 13, at 115–20. *See also* Morgan Lee, *Fake Indian Art Threatens Native Livelihood*, SEATTLE TIMES (Jul. 7, 2017), <http://www.seattletimes.com/nation-world/senators-urge-crackdown-on-fake-indian-art>.

<sup>121</sup> Puig, *supra* note 7.

<sup>122</sup> *Id.* *See also* U.S. GOV’T ACCOUNTABILITY OFF., GAO-18-537, NATIVE AMERICAN CULTURAL PROPERTY: ADDITIONAL AGENCY ACTIONS NEEDED TO ASSIST TRIBES WITH REPATRIATING ITEMS FROM OVERSEAS AUCTIONS (2018), <https://www.gao.gov/products/GAO-18-537>.

<sup>123</sup> *See* Joseph Kowalski, *Imaginary Lines, Real Consequences: The Effect of the Militarization of the United States-Mexico Border on Indigenous Peoples*, 5 AM. INDIAN L.J. 643 (2017). *See generally*, Marianne Jensen, *Militarization and Human Rights Violations*, 2 INDIGENOUS AFF. 4 (2001), [https://www.iwgia.org/images/publications//IA\\_2-01.pdf](https://www.iwgia.org/images/publications//IA_2-01.pdf).

trafficking of Indigenous women.<sup>124</sup> The majority of writings on this issue concentrates on Native and Aboriginal women from the United States and Canada.

## V. Negotiation and Consultation

Indigenous Peoples face numerous challenges and threats associated with globalization, but it is crucial to note that many do not passively accede to domination by global market forces. Resistance, negotiation, and consultation are common features of Indigenous Peoples' interactions with transnational corporations and international economic policy bodies, but the definition and content of these terms play out very differently for different communities.<sup>125</sup> Much depends on the specific history of communities' interactions with various governments, corporations, academic institutions, or NGOs, and on the legal framework that conditions relations of power among all of these entities.<sup>126</sup> For example, one can contrast the vulnerability of Huaorani Indigenous communities in Ecuador who sought compensation for oil drilling on their lands<sup>127</sup> with the relatively stronger position of various First Nations opposed to a major natural gas pipeline proposed to run south from Canada's Mackenzie Delta.

The Huaorani example suggests that corporations will take advantage of situations in which the absence of the nation state as intermediary results in direct negotiation by a corporation with an Indigenous group. In 2001 AGIP Oil of Italy, in return for the right to build oil wells on Huaorani lands, agreed to compensate six communities with a total of

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<sup>124</sup> See *Sex Trafficking of Indigenous Women in Ontario*, ONT. NATIVE WOMEN'S ASS'N (Feb. 2016), <http://www.onwa.ca/upload/documents/report-sex-trafficking-of-indigenous-wom.pdf>; Robyn Bourgeois, *Colonial Exploitation: The Canadian State and the Trafficking of Indigenous Women and Girls in Canada*, 62 UCLA L. REV. 1426 (2015); *Elimination and Responses to Violence, Exploitation and Abuse of Indigenous Girls, Adolescents and Young Women*, INTER-AGENCY SUPPORT GRP. ON INDIGENOUS PEOPLES' ISSUES (Jun. 2014), [http://www.un.org/en/ga/president/68/pdf/wcip/IASG%20Thematic%20Paper\\_%20Violence%20against%20Girls%20and%20Women%20-%20rev1.pdf](http://www.un.org/en/ga/president/68/pdf/wcip/IASG%20Thematic%20Paper_%20Violence%20against%20Girls%20and%20Women%20-%20rev1.pdf); *Human & Sex Trafficking: Trends and Responses Across Indian Country*, NAT'L CONG. AM. INDIANS (Spring 2016), <http://www.ncai.org/policy-research-center/research-data/prc-publications/TraffickingBrief.pdf>. See also *Illicit Trafficking and Eastern Africa*, U.N. OFF. ON DRUGS & CRIME, <https://www.unodc.org/easternafrika/en/illicit-trafficking.html> (last visited Oct. 18, 2018); Victoria Tauli-Corpuz, *End of Mission Statement by the United Nations Special Rapporteur on the Rights of Indigenous Peoples*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R (Mar. 3, 2017), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21274&LangID=E>.

<sup>125</sup> See generally THOMAS D. HALL & JAMES V. FENELON, *INDIGENOUS PEOPLES AND GLOBALIZATION: RESISTANCE AND REVITALIZATION* (2009) (world systems analysis and case studies on autonomy and cultural survival).

<sup>126</sup> Puig, *supra* note 7.

<sup>127</sup> See William Langewiesche, *Jungle Law*, VANITY FAIR (Apr. 3, 2007), <https://www.vanityfair.com/news/2007/05/texaco200705>; LAWRENCE ZIEGLER-OTERO, *RESISTANCE IN AN AMAZONIAN COMMUNITY: HUAORANI ORGANIZING AGAINST THE GLOBAL ECONOMY* (2004).

“50 kilograms of rice and sugar, a bag of salt, 2 footballs, 15 plates and cups, 34 cans of tuna and sardines, some medicines, a radio, a battery and solar panel, and \$3500 to build a schoolroom.”<sup>128</sup>

In contrast, the Dehcho First Nation in Canada stalled and resisted the construction of a \$6 billion, 800-mile natural gas pipeline from the Mackenzie River Delta to Alberta. Various First Nations had used the intermediary mechanisms available to them via provincial and federal governments to mount legal challenges to the consortium of oil companies charged with building the project and to engage in legally mandated consultation processes.<sup>129</sup> For example, in February 2006 the Dene Tha, First Nation, a 2,500-member Indigenous group, sought a judicial stay of all environmental hearings by a review panel until their right to participate in negotiations was recognized.<sup>130</sup>

<sup>128</sup> See Lloyd et al., *Infrastructure Development*, in *PARADIGM WARS*, *supra* note 13, at 90.

<sup>129</sup> See *Mackenzie Gas Project—National Energy Board: Reasons for Decisions*, vol. 2, pts. 5–11, [http://reviewboard.ca/upload/project\\_document/EIR0405-001\\_National\\_Energy\\_Board\\_Reasons\\_for\\_Decision\\_Vol\\_2\\_Parts\\_5-11\\_appendices.PDF](http://reviewboard.ca/upload/project_document/EIR0405-001_National_Energy_Board_Reasons_for_Decision_Vol_2_Parts_5-11_appendices.PDF) (last visited Nov. 9, 2018). For subsequent histories, see Walter Strong, *Mackenzie Valley Pipeline Project Officially One for the History Books*, CBC NEWS (Dec. 28, 2017), <https://www.cbc.ca/news/canada/north/mackenzie-valley-gas-project-no-more-1.4465997>; *Mackenzie Valley Pipeline: 37 Years of Negotiation*, CBC NEWS, <https://www.cbc.ca/news/business/mackenzie-valley-pipeline-37-years-of-negotiation-1.902366> (last updated Jan. 11, 2011); *Don't OK Pipeline Without Land Claim: Dehcho*, CBC NEWS (Apr. 16, 2010), <https://www.cbc.ca/news/canada/north/don-t-ok-pipeline-without-land-claim-dehcho-1.908057>. Dehcho argued the pipeline should not go ahead until the First Nations resolve land claims and resource management plans for the Dehcho Territory. While the pipeline was ultimately approved in 2010, the author has not located any documents showing that it has been successfully built; in fact, in December 2017, a joint venture partnership driving the Mackenzie Valley Gas Project was dissolved. See generally Tim Reiterman, *A Stand in the Forest*, L.A. TIMES (July 2, 2006), <http://articles.latimes.com/2006/jul/02/local/me-pipeline2>. The Dehcho were not members of the Aboriginal Pipeline Group (APG), which is a part of the Imperial Oil-led pipeline consortium. See also Robert Collier, *Battle for Canada's Underground Resources*, RESILIENCE (Mar. 29, 2005), <http://www.resilience.org/stories/2005-03-29/battle-canadas-underground-resources>; Clifford Kraus, *Trout Lake Journal; Natural Gas or Nature in Canada's Far North*, N.Y. TIMES (Oct. 20, 2003), <http://www.nytimes.com/2003/10/20/world/trout-lake-journal-natural-gas-or-nature-in-canada-s-far-north.html?n=Top%2FReference%2Ftimes%2Ftopics%2Fsubjects%2FPipelines>; Gary Park, *New Aboriginal Obstacle: Northern Alberta First Nation Gains Federal Court Hearing of Mackenzie Lawsuit*, PETROLEUM NEWS (Dec. 18, 2005), <http://www.petroleumnews.com/pntruncate/800133171.shtml>.

In August 2018, the Canadian Federal Court of Appeals reversed the Canadian government's approval of the Trans Mountain Pipeline expansion project, stating that the government failed in its duty to adequately consult with First Nations. See Ian Austen, *Canadian Court Halts Expansion of Trans Mountain Oil Pipeline*, N.Y. TIMES (Aug. 30, 2018), <https://www.nytimes.com/2018/08/30/world/canada/alberta-oil-pipeline-trudeau.html> (providing a link to the decision in *Tsleil-Waututh Nation v. Canada*, 2018 FCA 153, at: <https://decisions.fca-caf.gc.ca/fca-caf/decisions/en/item/343511/index.do>).

<sup>130</sup> The Dene Tha' ultimately, in midsummer 2007, signed an agreement that resolved their concerns and agreed to end further litigation.

Not all Indigenous groups and societies are likeminded and cohesive, especially over issues of natural resource extraction and economic opportunities. The majority of Gwich'in People call the Arctic tundra in Northern Alaska "the sacred place where life begins." They oppose oil exploration in the Arctic National Wildlife Refuge (ANWR). And, in the early 1980s, some elders of the Kaktovik Inupiat also urged that oil development be explicitly excluded from the core calving grounds of the Porcupine Caribou herds. Yet, in contemporary life, most Inupiat declare that if housing and jobs are the result of development, then their opposition fades. But the coastal Inupiat's regard for whale, walrus, and other such mammals gives them pause when oil company representatives speak to them about drilling in the Beaufort and Chukchi Seas.

The Gwich'in rely on the protein of the Caribou for their sustenance and the Porcupine herd is in their songs, stories, and dances. A number of Inuit People of the North Slope, who favor developing the lands for oil extraction, ask "do the Caribou really care" if exploration takes place.<sup>131</sup> The debate over ANWR remains highly contentious.

Despite the weakened power of the nation state relative to global commerce bodies such as the WTO, Indigenous Peoples in some nations are better able to assert their rights than Indigenous groups in others. For example, according to anthropologist Susan Crate, native peoples in northern Canada have been able to apply their experience at negotiating the terms of the pipeline project to drive a harder bargain with the backers of a diamond mine in the Northwest Territories, ensuring guarantees of employment for local workers and active participation in the environmental impact assessment process. Crate compares this experience with that of the Viliui Sakha, an Indigenous group in northern Russia, who were not consulted or involved when the former USSR established diamond mines and collective farms to serve outside workers in their traditional homelands. In several Viliui Sakha towns, Crate has documented serious health problems and environmental degradation caused by mining operations and waste runoff.<sup>132</sup>

National and state laws can indeed still offer some protection for Indigenous communities actively resisting extractive industries of transnational corporations. Another anthropologist, Carol MacLennan, has

<sup>131</sup> ANWR *Information Brief*, ARCTIC POWER, <http://www.anwr.org/features/pdfs/caribou-facts.pdf> (last visited Oct. 18, 2018).

<sup>132</sup> Susan Crate, *Cows, Kin, and Karats*, Address at the Soc'y for Applied Anthropology Ann. Meeting (Mar. 31, 2006). *But see About the Region*, RIVERS WITHOUT BORDERS, [www.riverswithoutborders.org/about-the-region/iskutstikine](http://www.riverswithoutborders.org/about-the-region/iskutstikine) (last visited Oct. 18, 2018) (major threats include: Shell Canada energy exploring for coal-bed methane; Imperial Metals Red Chris Mine, an open pit copper, gold, silver mine and milling operation in the territory of the Taltan First Nation, which became fully operational as of July 2015 (Imperial Metals and Tahltan leadership negotiated and finalized a co-management agreement whereby 87 percent of Tahltan members who participated were in favor of the deal); Arctos Anthracite Project (opposed by the Kabloona Keepers Elders Society of the Iskut First Nation)). A worldwide search discovers voluminous numbers of extraction events.

documented how the Mole Potawatomi Ojibwa stopped an Exxon-sponsored copper and nickel mine in their traditional territory in Michigan's Upper Peninsula. The local Ojibwa government allied with environmental groups such as Trout Unlimited to stop the mine not through the permitting and EIS process, but by successfully lobbying for a new Michigan state law to put a moratorium on sulfide mining. The new law employed the precautionary principle, placing the burden of proof on mining companies to show a commitment to safe practices and a history of safe practices in other mines.<sup>133</sup>

Nation state involvement, however, can also work against Indigenous groups, particularly when elements of the state collude with global corporate interests. A 2005–2006 New York Times series, “The Cost of Gold,” investigated environmental abuses and ethically questionable payments made by New Orleans-based company Freeport-McMoRan to the Indonesian military to protect operations at the Grasberg gold and copper mine on the island of Papua in Indonesia.<sup>134</sup> Rock tailings from the operation, the largest gold mine in the world, have choked downstream rivers and estuaries with acid-leaching debris, but close relations between the company and the repressive Suharto dictatorship stifled potential protest for decades. The Times reporters uncovered a history of hidden payments to Indonesian military officers from 1998 to 2004 after years of company espionage of environmental groups and Amungme and Komoro tribal leaders’ communications failed to prevent 1996 riots in which local protestors destroyed equipment, shutting down the mine and its mill for three days. The \$20 million in payments included more than \$200,000 in 2003 to the Indonesian police Mobile Brigade, a paramilitary force cited by the U.S. State Department “for numerous serious human rights violations, including extrajudicial killings, torture, rape, and arbitrary detention.”<sup>135</sup>

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<sup>133</sup> Carol MacLennan, Mining and Environmental Justice on the South Shore of Lake Superior, Address at the Soc’y for Applied Anthropology Ann. Meeting (Mar. 30, 2006). See also Al Gedicks & Dave Blouin, *In Victory at Crandon, Lessons for a New Proposal*, MILWAUKEE J. SENTINEL (Oct. 9, 2013), <http://archive.jsonline.com/news/opinion/in-victory-at-crandon-lessons-for-a-new-proposal-699116285z1-227139641.html>. For historical context, see Al Gedicks & Zoltan Grossman’s 1995 article on other successful Ojibwa efforts to block American and Canadian mining corporations from establishing operations in their territories. *Wisconsin Tribes Resist Exxon and Rio Algom*, NATIVE NET, <http://www.native-net.org/archive/nl/9511/0362.html> (last visited Oct. 18 2018).

<sup>134</sup> For overview, see Jane Perlez & Raymond Bonner, *Below a Mountain of Wealth, a River of Waste*, N.Y. TIMES, Dec. 27, 2005, at A1; Jane Perlez, *After Clashes, Indonesian Troops Guard Gold Mine*, N.Y. TIMES, Feb. 25, 2006, at A7.

<sup>135</sup> For a report on the current situation, see Nithin Coca, *Indonesia’s Never-ending Freeport-McMoRan Saga*, THE DIPLOMAT (Jul. 20, 2017), <https://thediplomat.com/2017/07/indonesias-neverending-freeport-mcmoran-saga/> & Krithika Varagur, *Showdown in Indonesia Brings World’s Biggest Gold Mine to Standstill*, VOA NEWS (Feb. 27, 2017), <https://www.voanews.com/a/showdown-in-indonesia-brings-gold-mine-to-standstill/3741401.html>.

It is worth noting that the Indonesian government was not a monolithic entity in these dealings. Even while officials at all levels of the Indonesian military were accepting bribes from Freeport-McMoRan to quash opposition to the mine, the Indonesian government's environment minister, Sonny Keraf was pressuring other agencies to hold the company accountable for its destruction of rivers, forests, and fish. Although Freeport-McMoRan avoided paying any compensation, another large transnational gold mining corporation, Newmont, settled a civil lawsuit in an Indonesian court in February 2006 by agreeing to pay \$30 million for environmental and social programs to mitigate the impacts of its pollution of Indonesia's Buyat Bay. The trial was a rare case of a major American corporation facing criminal charges in a developing country where it is a major foreign investor.<sup>136</sup> The Grasberg mine in the Indonesian region of West Papua has also been extremely contentious.<sup>137</sup>

A commonly legislated solution to conflicts between Indigenous groups and other parties (be they extractive corporations, government agencies, or even universities) is mandatory consultation, but there is often fundamental disagreement about what constitutes adequate consultation. Industry and government initiatives to consult with Indigenous communities often result from economic and legal necessity, involve tight timelines, and tend to be issue-specific; in contrast, Indigenous representatives often express a desire to establish longer-term partnerships that address specific issues but within broader historical contexts.<sup>138</sup>

<sup>136</sup> On the Newmont case, see Jane Perlez, *Gold Mining Company to Pay Indonesia \$30 Million*, N.Y. TIMES, Feb. 17, 2006, at A4 & Jane Perlez, *Indonesian Says Waste from Mine Tainted Fish*, N.Y. TIMES, Feb. 4, 2006, at A5.

<sup>137</sup> See Susan Schulman, *The \$100bn Gold Mine and the West Papuans Who Say They are Counting the Cost*, GUARDIAN (Nov. 1, 2016), <https://www.theguardian.com/global-development/2016/nov/02/100-bn-dollar-gold-mine-west-papuans-say-they-are-counting-the-cost-indonesia>.

<sup>138</sup> This generalized description is drawn from the conclusions of extensive specific studies. See S. James Anaya & Sergio Puig, *Mitigating State Sovereignty: The Duty to Consult with Indigenous Peoples*, 67 U. TORONTO L.J. 435 (2017) (including case studies on wind farms in Oaxaca, Mexico, and the El Diquis dam in Costa Rica). See AMERICAN INDIANS AND THE NEVADA TEST SITE: A MODEL OF RESEARCH AND CONSULTATION 203–07 (Richard W. Stoffle, María Nieves Zedeño & David B. Halmo eds., 2001). See also Deshkan Ziiibiing/Chippewas of the Thames First Nation, *Wiindmaagewin Consultation Protocol*, Nov. 26, 2016, available at <https://www.cottfn.com/wp-content/uploads/2016/02/Wiindmaagewin-CONSULTATION-PROTOCOL-Final-Nov-2016-2.pdf>; DWIGHT G. NEWMAN, *THE DUTY TO CONSULT: NEW RELATIONSHIPS WITH ABORIGINAL PEOPLES* (2009); Gabriel S. Galanda, *The Federal Indian Consultation Right: A Front Line Defense Against Tribal Sovereignty Incursion*, FED. INDIAN LAW. (2010); *Tribal Consultation Policy*, U.S. DEPT. INT., <https://www.doi.gov/tribes/Tribal-Consultation-Policy>; Brian Schnarch, *Ownership, Control, Access and Possession (OCAP) or Self-Determination Applied to Research*, 1 J. ABORIGINAL HEALTH 80 (2004); *Indigenous Knowledge Systems and Intellectual Property Rights: An Enabling Tool for Development with Identity*, U.N. DEP'T ECON. & SOC. AFF. (Sept. 2005), [https://www.accu.or.jp/ich/en/pdf/c2006Expert\\_SUMINGUIT\\_1.pdf](https://www.accu.or.jp/ich/en/pdf/c2006Expert_SUMINGUIT_1.pdf); *Text of the Convention for the Safeguarding of the Intangible Cultural Heritage*, UNESCO (Oct. 17, 2003), <https://ich.unesco.org/en/convention>; *Model Tribal Research Code*, AM. INDIAN L. CTR. (3d ed., Sept. 1999), <https://ccph.memberclicks>.

The duty to consult<sup>139</sup> has seemingly dropped from the sky, informed in recent times by a satchel full of international documents. Yet, the derivations of laws and treaties come after 500 years of genocide, colonization, massive encroachments leading to built environments surrounding Indigenous territories, and resistance. Indigenous Peoples know this and claim that all consultations must take into account the historical genesis of their connections to the land at their doorsteps and upon their territories, and the intrusions laid upon them. Consultation that takes place after a development project is underway has generally involved a process, or a circumvention of a process, that already has been *designed* by the colonizing power. Indigenous Peoples should insist that there be a primary consultation to create the nature and structure—to hammer into place—their own design, or the “processes” by which the substance of any project shall be discussed, let alone carried out. Thomas Griffiths’ descriptions of World Bank initiatives to increase “participation” by native peoples are instructive.<sup>140</sup> In 1991, the World Bank adopted revisions to an earlier directive on Indigenous Peoples known

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net/assets/Documents/CBPRCurriculum/AppendixF/mdl-code.pdf; Monique Ross & Peggy Smith, *Meaningful Consultation with Indigenous Peoples in Forest Management: A Focus on Canada* (2003), [www.fao.org/DOCREP/ARTICLE/WFC/XII/1001-C1.html](http://www.fao.org/DOCREP/ARTICLE/WFC/XII/1001-C1.html). Consultation obligations are extensively described in the United Nations Declaration on the Rights of Indigenous Peoples (available online at [www.un.org/esa/socdev/unpfii/en/drip.html](http://www.un.org/esa/socdev/unpfii/en/drip.html)), ILO Convention 169 (available online at [www.ilo.org/indigenous/Conventions/no169/lang-en/index.html](http://www.ilo.org/indigenous/Conventions/no169/lang-en/index.html)), and the American Convention on Human Rights as construed in *Case of the Saramaka People v. Suriname*. Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007), available at [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_172\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf). See also The American Declaration on the Rights and Duties of Man, May 2, 1948; Charter of the Indigenous and Tribal Peoples of the Tropical Forests (Statement of the International Alliance of the Indigenous and Tribal Peoples of the Tropical Forests (established Penang, Malaysia, 1992, revised Nairobi, Kenya, Nov. 2002)).

<sup>139</sup> “The duty of states to consult is a cornerstone of the protection of indigenous peoples within international law’s contemporary human rights regime.” Anaya & Puig, *supra* note 138, at 1. “Specifically, the International Labour Organization’s *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (or Convention No. 169) . . . embodies the international legal duty to carry out consultations ‘whenever consideration is being given to legislative or administrative measures which may affect [indigenous peoples] directly.’” *Id.* See also James Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples*, 12–20, U.N. Doc. A/HRC/12/34 (July 15, 2009) (discussing in Part II “A Core Issue: The Duty to Consult”—the “normative grounding and general character of the duty to consult”).

<sup>140</sup> TOM GRIFFITHS, *INDIGENOUS PEOPLES AND THE WORLD BANK: EXPERIENCES WITH PARTICIPATION* 4–11 (2005), available at <http://www.forestpeoples.org/en/topics/extractive-industries/publication/2011/indigenous-peoples-and-world-bank-experiences-particip>. See also *INDIGENOUS PEOPLES & WORLD BANK PROJECTS: A COMMUNITY GUIDE TO THE WORLD BANK’S INDIGENOUS PEOPLES POLICY (OP/BP 4.10)* (2008), available at <http://www.forestpeoples.org/en/topics/indigenous-peoples-policy-od-420-obbp-410/training/2009/indigenous-peoples-world-bank-project>; Fergus MacKay, *Indigenous Peoples’ Right to Free, Prior and Informed Consent and the World Bank’s Extractive Industries Review*, 4 *SUSTAINABLE DEV. L. & POL’Y* 43 (2004). See generally *supra* note 25.

as Operational Directive 4.20 (OD4.20). Indigenous leaders criticized the World Bank at the time because the policy was not developed in consultation with Indigenous Peoples, and criticized the new policy for not meeting international standards on the rights of Indigenous Peoples, not specifying that securing Indigenous land and resource rights be an essential precondition for project appraisal and approval, not expressly prohibiting forced relocation, and not recognizing the Indigenous right to *free prior and informed consent* to any developments proposed on their lands and territories. After lengthy internal consultations among Bank staff and governments, the World Bank released its first draft of a revised Indigenous Peoples Policy to the public in 2001 as "OP4.10." Public consultations from July 2001 to February 2002 involved 25 meetings of over 1000 "stakeholders" in total. However, Indigenous Peoples who engaged with the process complained that crucial documents were not provided ahead of time for meetings, translation was inadequate, and time schedules were too tight to permit for adequate and meaningful responses by Indigenous representatives.<sup>141</sup>

In a "Collective Statement on Multilateral Development Banks and Indigenous Peoples' Rights" the Fourth Session of the UN Permanent Forum on Indigenous Issues objected to the World Bank's use of the phrase "Free Prior Informed Consultation" rather than "Free Prior Informed Consent" even though Indigenous representatives had explicitly rejected the former language during participation in the creation of the policy revision. The latest revision also did not incorporate their recommendations for third party verification of the existence or nonexistence of "broad community support" for proposed projects. In May 2005, the World Bank Board of Directors approved OD4.10 without significant changes, and OD4.20 has also been chastised.<sup>142</sup>

Article 19 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), ratified by the UN General Assembly in 2007, obligates states to "consult and cooperate in good faith with the [I]ndigenous [P]eoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures

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<sup>141</sup> On page 7 of his report, Griffiths quotes an unnamed Indigenous representative to a roundtable called by the World Bank in response to these critiques: "It is not a question of how many consultation meetings the Bank has carried out. It is a question of whether or not [I]ndigenous peoples who took part in those meetings feel that they have enjoyed proper participation and to what extent they consider that their concerns are being addressed in the revised policy." For other Indigenous representatives' responses to this October 2002 meeting at Bank headquarters, see MÓNICA CASTELO, WORLD BANK ROUND TABLE DISCUSSION OF INDIGENOUS REPRESENTATIVES ON THE REVISION OF THE WORLD BANK'S INDIGENOUS PEOPLES POLICY (2002), <http://www.forestpeoples.org/en/topics/world-banks-indigenous-peoples-policy-od-420-obbp-410/publication/2010/world-bank-round-table>.

<sup>142</sup> See discussion of World Bank Environmental and Social Framework *supra* note 37. See also S.J. ROMBOUTS, HAVING A SAY: INDIGENOUS PEOPLES, INTERNATIONAL LAW AND FREE, PRIOR AND INFORMED CONSENT (2014).

that may affect them.”<sup>143</sup> These mandates are growth from conceptual underpinnings of the interrelationship between Indigenous land tenure, culture, and self-determination,<sup>144</sup> long advocated by international human rights organizations.<sup>145</sup> The International Finance Corporation is a member of the World Bank Group, and, in January 2012, effectively updated its Performance Standard 7 and adopted the principle of free prior informed consent for projects with potential significant adverse impacts on Indigenous Peoples.<sup>146</sup> And a comprehensive report, built upon the heels of the Declaration on the Rights of Indigenous Peoples and advocated as a model for socially responsible corporate behavior toward Indigenous Peoples, was prepared in May, 2010 by Foley Hoag.<sup>147</sup> This body of work presents a thorough analysis of the evolu-

<sup>143</sup> G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), [www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf) [hereinafter UNDRIP]. Articles 10, 29, and 32 articulate FPIC as well. Whether the duty to consult means Indigenous Peoples can refuse to commit to state-sponsored projects remains hotly contested. Anaya & Puig, *supra* note 138. See generally *United Nations Declaration on the Rights of Indigenous Peoples for Indigenous Adolescents*, UNICEF, [http://files.unicef.org/policyanalysis/rights/files/HRBAP\\_UN\\_Rights\\_Indig\\_Peoples.pdf](http://files.unicef.org/policyanalysis/rights/files/HRBAP_UN_Rights_Indig_Peoples.pdf) (last visited Nov. 9, 2018).

<sup>144</sup> Alex Page, *Indigenous Peoples' Free, Prior and Informed Consent in the Inter-American Human Rights System*, 4 SUSTAINABLE DEV. L. & POL'Y 16 (2004). See also *Free Prior and Informed Consent: An Indigenous Peoples' Right and a Good Practice for Local Communities*, U.N. FOOD & AG. ORG. (Oct. 14, 2016), <https://www.un.org/development/desa/indigenouseoples/publications/2016/10/free-prior-and-informed-consent-an-indigenous-peoples-right-and-a-good-practice-for-local-communities-fao>; Sasha Boutilier, *Free, Prior, and Informed Consent and Reconciliation in Canada: Proposals to Implement Articles 19 and 32 of the UN Declaration on the Rights of Indigenous Peoples*, 7 W.J. LEGAL STUD. 1 (2017); James S. Phillips, *The Rights of Indigenous Peoples Under International Law*, 26 GLOBAL BIOETHICS 120 (2015).

<sup>145</sup> See, e.g., Comm'n on Hum. Rts., Sub-Comm'n on the Promotion and Protection of Hum. Rts., Working Grp. on Indigenous Populations, <https://www.ohchr.org/EN/HRBodies/SC/Pages/SubCommission.aspx>.

<sup>146</sup> *Performance Standard 7*, INT'L FIN. CORP. (Jan. 2012), [http://www.ifc.org/wps/wcm/connect/topics\\_ext\\_content/ifc\\_external\\_corporate\\_site/sustainability-at-ifc/policies-standards/performance-standards/ps7](http://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/policies-standards/performance-standards/ps7). This action amended its Performance Standard from 2006 that provided only information disclosure, consultation, and informed participation.

<sup>147</sup> AMY K. LEHR & GARE A. SMITH, IMPLEMENTING A CORPORATE FREE, PRIOR, AND INFORMED CONSENT POLICY: BENEFITS AND CHALLENGES (2010), <https://www.foleyhoag.com/publications/ebooks-and-white-papers/2010/may/implementing-a-corporate-free-prior-and-informed-consent-policy>. A business law firm that began in 1943, their corporate socially responsible practice has launched a blog to provide practical guidance to corporations and stakeholders to manage risk arising from evolving social expectations and legal norms. See FOLEY HOAG LLP: CORP. SOC. RESP. & THE L. BLOG, <http://www.csrandthelaw.com> (last visited Oct. 18, 2018); Amy K. Lehr, *Foley Hoag Releases Summary Report on Good Practices for Oil Pipelines, as Commissioned by the Dakota Access Consortium of Lenders*, FOLEY HOAG LLP: CORP. SOC. RESP. & THE L. BLOG (May 10, 2017), <http://www.csrandthelaw.com/2017/05/10/foley-hoag-releases-summary-report-on-good-practices-for-oil-pipelines-as-commissioned-by-the-dakota-access-consortium-of-lenders>; Sarah A. Altschuller, *Human Rights Expectations for the Banking Sector: A New Report from Foley Hoag and UNEP FI*, FOLEY HOAG LLP: CORP. SOC. RESP. & THE L. BLOG (Jan. 26, 2016), <http://www.csrandthelaw.com>.

tion of free prior informed consent in international law and voluntary initiatives; defines and operationalizes its principles; sets forth publicly available policies, published statements and guidelines; and highlights the opportunities and challenges of seeking consent.<sup>148</sup> Nevertheless, the former United Nations Special Rapporteur for Indigenous Peoples Human Rights, James Anaya, continues to stress the responsibility of nation states and transnational corporations to respect Indigenous Peoples rights.<sup>149</sup> Professor, now Dean, Anaya believes that an effective way

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com/2016/01/26/human-rights-expectations-for-the-banking-sector-a-new-report-from-foley-hoag-and-unep-fi.

In May 2013, the ICMM issued its Indigenous Peoples and mining position statement setting forth ICMM members' approach to free, prior and informed consent, thereby replacing its 2008 position statement. On October 29, 2015, the ICMM released a new iteration of its Indigenous Peoples Mining Good Practice Guide. See Kevin O'Callaghan & Zach Romano, *International Mining Industry Releases New Guidance for FPIC*, LEXOLOGY (Nov. 19, 2015), <http://www.lexology.com/library/detail.aspx?g=1ae45b6d-a119-476b-8459-ace39b27ee21>. See also John R. Owen & Deanna Kemp, 'Free Prior and Informed Consent', *Social Complexity and the Mining Industry: Establishing a Knowledge Base*, 41 RES. POL'Y 91 (2014).

<sup>148</sup> A number of UN Treaty Bodies have made official statements that support FPIC for Indigenous Peoples. The Committee on the Elimination of Racial Discrimination (CERD), for example, issued its recommendation calling upon States to ensure that "no decisions directly relating to [Indigenous Peoples'] rights and interests are taken without their informed consent." CERD, 51st Sess., General Recommendation No. 23: Rights of indigenous peoples, ¶ 4(d), U.N. Doc. A/52/18 (Aug. 18, 1997). See also U.N. Expert Mechanism on the Rights of Indigenous Peoples, *Progress Report on the Study on Indigenous Peoples and the Right to Participate in Decision-Making*, U.N. Doc A/HRC/EMRIP/2010/2 (May 17, 2010); U.N. Permanent Forum on Indigenous Issues, *Report of the International Workshop on Methodologies Regarding Free, Prior and Informed Consent and Indigenous Peoples*, U.N. Doc E/C.19/2005/3 (Feb. 17, 2005); UN GLOBAL COMPACT, <https://www.unglobalcompact.org>. Article 8(j) of the Convention on Biological Diversity calls upon signatory states to obtain the "approval" of holders of knowledge of the uses of biodiversity: "respect, preserve and maintain knowledge, innovations and practices of [I]ndigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge." United Nations Convention on Biological Diversity, Dec. 29, 1993, 1760 U.N.T.S. 79, available at <https://www.cbd.int/doc/legal/cbd-en.pdf>. The working group on the relevant clause—8(j)—has interpreted it to refer to consent. See, e.g., *COP5 Decision V/16*, CONVENTION ON BIOLOGICAL DIVERSITY, <http://www.cbd.int/decision/cop/?id=7158> (last visited Oct. 18, 2018); SECRETARIAT OF THE CONVENTION ON BIOLOGICAL DIVERSITY, AKWÉ: KON VOLUNTARY GUIDELINES (2004), <http://cbd.int/doc/publications/akwe-brochure-en.pdf>.

<sup>149</sup> See James Anaya, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, U.N. Doc. A/HRC/15/37 (July 19, 2010). See also Mogens Lykkesøft, President of 70th Sess. of U.N.G.A., *Letter to All Permanent Representatives and Permanent Observers to the United Nations*, May 27, 2016, available at [https://www.un.org/pga/70/wp-content/uploads/sites/10/2015/08/16-May\\_consultation-process-on-the-rights-of-indigenous-peoples-16-May-2016.pdf](https://www.un.org/pga/70/wp-content/uploads/sites/10/2015/08/16-May_consultation-process-on-the-rights-of-indigenous-peoples-16-May-2016.pdf); Gregor MacLennan, *Peru's Consultation Law: A Victory for Indigenous Peoples?*, AMAZON WATCH (Sept. 22, 2011), <http://amazonwatch.org/news/2011/0922-perus-consultation-law-a-victory-for-indigenous-peoples>; Gonzalo Aguilar, Sandra LaFosse, Hugo Rojas & Rébecca Steward, *South/North Exchange of 2009—The Constitutional Recognition of*

to advance the mandate of the Special Rapporteur in the forthcoming years is to elaborate a set of “guidelines or principles that will provide specific orientation to Governments, [I]ndigenous [P]eoples and corporations regarding . . . resource extraction or development projects.”<sup>150</sup> At present there exists a lack of minimum common ground for understanding the key issues by all actors, and there remains ample examples of the eruption and escalation of conflicts and a continued radicalization of positions.<sup>151</sup> I posit further that nation states should not be able to outsource their human rights obligations to nonstate actors.<sup>152</sup>

## VI. Protocol

Whether native populations are consulted or have given their consent begs critically important questions: Who controls the timetable and terms of consultation? Is the process of consent ongoing and dynamic, responding to different stages as projects develop? How are participants and the appropriate authorities in the process identified and notified? Do Indigenous people have the authority and resources to set the boundaries of the discussions? Is the interaction informational in nature or do Indigenous Peoples have the right to accept or reject proposed actions? Are recommendations of Indigenous groups taken seriously and/or acted upon?<sup>153</sup> Protocol should assume an equality

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*Indigenous Peoples in Latin America*, 2 PACE INT’L L. REV. ONLINE COMPANION 44 (Sept. 2010); Rodrigo Uprimny, *The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges*, 89 TEXAS L. REV. 1587 (2011).

<sup>150</sup> James Anaya, *Report of the Special Rapporteur on the Rights of Indigenous Peoples*, ¶ 74, U.N. Doc. A/HRC/18/35 (July 11, 2011), [https://www.ohchr.org/Documents/Issues/IPeoples/SR/A-HRC-18-35\\_en.pdf](https://www.ohchr.org/Documents/Issues/IPeoples/SR/A-HRC-18-35_en.pdf). See also U.N. OHCHR, *Guiding Principles on Business and Human Rights*, HR/PUB/11/04 (2011), [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf). See also EQUATOR PRINCIPLES, <http://equator-principles.com/about> (last visited Nov. 9, 2018).

<sup>151</sup> See Nicholas Tagliarino, Celine Salcedo-La Viña & Sam Szoke-Burke, *Strengthening Indigenous Land Rights: 3 Challenges to “Free, Prior and Informed Consent”*, WORLD RES. INST. INSIGHTS (May 9, 2016), <http://www.wri.org/blog/2016/05/strengthening-indigenous-land-rights-3-challenges-free-prior-and-informed-consent> (“FPIC is an internationally recognized human right, but isn’t always treated that way at the national level . . . . Few countries have incorporated FPIC into their national laws. . . . FPIC is not always sensitive to gender issues.”); Shalanda H. Baker, *Why the IFC Free, Prior, and Informed Consent Policy Does Not Matter (Yet) to Indigenous Communities Affected By Development Projects*, 30 WIS. INT’L L.J. 668 (2012).

<sup>152</sup> See, e.g., HUMAN RIGHTS AND NON-STATE ACTORS (Andrew Clapham ed., 2013).

<sup>153</sup> See generally *Tribal Consultation web site*, JAMES E. ROGERS COLL. OF LAW: INDIGENOUS PEOPLES L. & POL’Y PROGRAM (2013), <http://www.tribalconsultation.arizona.edu>; Deshkan Ziibiing/Chippewas of the Thames First Nation, *supra* note 138; *Ko Aotearoa Tēnei: Report on the Wai 262 Claim Released*, WAITANGI TRIBUNAL (July 2011), <http://www.waitangitribunal.govt.nz/news/ko-aotearoa-tenei-report-on-the-wai-262-claim-released>; THE ETHICS OF CULTURAL APPROPRIATION (James O. Young & Conrad G. Brunk eds., 2009); John von Doussa, *Legal Protection of Cultural Artistic Works and Folklore in Australia* (Paper to the Int’l Assoc. for the Protection of Intellectual Property & the Malaysia Bar Council’s Intellectual Property Comm. Joint Conf., Sept. 1, 2006), <http://www.humanrights.gov.au/news/speeches/site-navigation-86>; Charles R. McManus,

among the participants.<sup>154</sup> It presumes, as well, that both parties desire contact and the establishment of relations to achieve mutual objectives. But what governs contact with an Indigenous society and how does one identify the appropriate authority of that particular Indigenous group? How does one balance the principle of equality with the necessity of efficiency?

Perhaps, there are lessons in the story of the Great Emperor Powhatan.

The Jamestown settlement was located within Chief Powhatan's empire. The great Indian leader's authority extended to more than thirty Algonkian-speaking tribes in the Tidewater region of Virginia.

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While relations with the . . . tribespeople were initially peaceful, the anxious English settlers had yet to meet "the great emperor" Powhatan, spoken of in awe-stricken tones by the local Indians. Then in December 1607, John Smith was taken prisoner . . . by

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*Intellectual Property, Genetic Resources and Traditional Knowledge Protection: Thinking Globally, Acting Locally*, 11 CARDOZO J. INT'L & COMP. L. 547 (2003); Graeme W. Austin, *Re-Treating Intellectual Property? The WAI 262 Proceeding and the Heuristics of Intellectual Property Law*, 11 CARDOZO J. INT'L & COMP. L. 333 (2003); Michael Halewood, *Indigenous and Local Knowledge in International Law: A Preface to Sui Generis Intellectual Property Protection*, 44 MCGILL L.J. 953 (1999); KERRY TEN KATO & SARAH A LAIRD, *THE COMMERCIAL USE OF BIODIVERSITY: ACCESS TO GENETIC RESOURCES AND BENEFIT-SHARING* (1999); THE MANUKAN DECLARATION OF THE INDIGENOUS WOMEN'S BIODIVERSITY NETWORK (IWBN), Feb. 4-5, 2004, <http://asianindigenouswomen.org/index.php/climate-change-biodiversity-and-traditional-knowledge/biodiversity/57-the-manukan-declaration/file>; CHIDI OGUAMANAM, *INTERNATIONAL LAW AND INDIGENOUS KNOWLEDGE: INTELLECTUAL PROPERTY RIGHTS, PLANT BIODIVERSITY, AND TRADITIONAL MEDICINE* (2d ed. 2006); *The Convention on Biological Diversity's International Regime on Access and Benefit Sharing and Indigenous Peoples' Human Rights*, UNDESA (Jan. 19, 2007), <http://www.un.org/development/desa/indigenouspeoples/meetings-and-workshops/international-expert-group-meeting-on-the-convention-on-biological-diversitys-international-regime-on-access-and-benefit-sharing-and-indigenous-peoples-human-rights.html>; Michael F. Brown, *Who Owns Native Culture?* (Apr. 2014), <http://www.williams.edu/go/native>; TRADITIONAL KNOWLEDGE DIGITAL LIBRARY, <http://www.tkdlib.org>; Patrick Ngulube, *Managing and Preserving Indigenous Knowledge in the Knowledge Management Era: Challenges and Opportunities for Information Professionals*, 18 INFO. DEV. 95 (2002); INDIGENOUS INTELLECTUAL PROPERTY RIGHTS: LEGAL OBSTACLES AND INNOVATIVE SOLUTIONS (Mary Riley ed., 2004); DARRELL A. POSEY & GRAHAM DUTFIELD, *BEYOND INTELLECTUAL PROPERTY: TOWARD TRADITIONAL RESOURCE RIGHTS FOR INDIGENOUS PEOPLES AND LOCAL COMMUNITIES* (1996); Howard Mann, *Intellectual Property Rights, Biodiversity and Indigenous Knowledge: A Critical Analysis in the Canadian Context*, available at <http://nativemaps.org>.

<sup>154</sup> Webster defines *protocol* as "a preliminary memorandum (as of discussions and resolutions arrived at in negotiation) often signed by diplomatic negotiators as a basis for a final convention or treaty." *Protocol*, WEBSTER'S THIRD NEW INT'L DICTIONARY OF THE ENGLISH LANGUAGE (1981). Yet Webster also states that *protocol* is "a rigid long-established code prescribing complete deference to superior rank and strict adherence to due order of precedence and precisely correct procedure (as in diplomatic exchange and ceremonies and in the military services)." *Id.* In general, protocol is the means whereby an individual or organization makes contact and initiates a relationship with another entity in an attempt to pursue certain objectives.

Opechancanough, the emperor's brother. . . Powhatan . . . seemed inclined to execute the first white man he had probably ever seen. But according to the legend, Smith's life was . . . saved by Powhatan's preteen daughter, Pocahontas.

Powhatan at first adopted a policy of accommodation toward the English. The emperor apparently viewed the intruders, with their trade goods and novel but deadly weaponry, as potential allies to be cultivated for the maintenance and extension of his own feudal empire. The English agreed with Powhatan, but with one major difference: their intention was to use Powhatan in the extension of the English empire in Virginia.

\* \* \*

In September 1608 Christopher Newport, who had captained the *Sarah Constant* on the voyage to Virginia, returned to the colony with instructions from London to perform a "coronation" of Powhatan. To solemnize the ceremony, Newport had brought along a copper crown . . . . The company apparently desired to make Powhatan some type of vassal or minor lord, prior to any large-scale English migration. . . . By accepting the crown Powhatan might be understood to have conceded the English title, a point of considerable legal importance to the Europeans, while in the offer of it the English gave due recognition, or so presumably it was felt, to the Indian's right in the land.[] The presumptions of English Crusading-era-derived legal discourse denying infidel *dominium* were yielding to the emperor's superiority respecting forces on the ground in America.

In fact, Powhatan's reaction to the company's proposal, as well as his conduct at the coronation, suggest strongly that the imperial savage viewed the sub-infeudation ceremony from a perspective diametrically opposed to English presumptions.

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According to the company's legal analysis . . . intervention into tribal culture for purposes of corrective mediation had become necessary and just. The goal of converting the Indians to English civility and Christianity was being subverted by religious leaders of the tribe, who practiced idolatry and the worship of the devil. Idolatrous religious practices constituted those same violations of natural law that the mediievally derived Christian natural-law tradition . . . asserted could justly be punished by acts of war.<sup>155</sup>

It is no secret that Indigenous Peoples call into question the usefulness of forcing Indigenous reality into European forms.<sup>156</sup> It becomes the duty of those who would entreat with Aboriginal societies, therefore, to honor historical organizations and contemporary Indigenous aspirations, in order to forge the evolution of completely novel international relationships. Yet, by what right does one presume that making contact

<sup>155</sup> ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* 206–13 (1990).

<sup>156</sup> See Hershey et al., *supra* note 65.

and establishing relations is a desired objective of both parties? Given the historical and disastrous record of dealings between colonizing forces and Indigenous Peoples, that presumption may or may not be valid.<sup>157</sup> Smoldering enmity might just as easily be found, at least among portions of a particular Native population, for an *intention* to do *good*, without a clear understanding of historical contexts, can be particularly damaging. Biodiversity conservation, for example, may have good intentions, but it is still a foreign intervention if constructed in western science and terminology. Native Americans have been slaughtered in order to make them good Christians and hard-working pastoralists. The yellow Support-Our-Troops ribbons, with which some so proudly adorn their automobiles, are symbols derived from the standard issue yellow kerchiefs worn by Kit Carson's cavalry who were responsible for the Sand Creek Massacre. An argument can be made that the issue of protocol cannot be explored until contact is established with the Indigenous society to determine a proper course of conduct. Though circuitous, this line of reasoning leads to one principle of protocol: Informal initial contact with Indigenous Peoples should attempt to establish a formal protocol that identifies the community's needs and its political, social, and religious characteristics relevant to future contact and relations.<sup>158</sup>

Coextensively, in proposing relations, how does a person or entity from outside the Indigenous society acknowledge the valid and appropriate leadership? Often times, authority is jostled between the political governing body and the keepers of traditional knowledge. What historical confrontations, intrusions, encroachments—genocide, military, religious, linguistic, commercial, legal—have contributed to the current mediums of power demonstrated by a particular Indigenous community? What colonial cloth are the contemporary vestments sewn from? Because there exists such diverse twists in Indigenous political organizations, counterposed with the social constructionism of “imagined geographies,” each Indigenous society must be vigilant to clarify its structure of authority for

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<sup>157</sup> See VINE DELORIA, JR., *GOD IS RED: A NATIVE VIEW OF RELIGION* (1973). Emulation of the perceived Indigenous land wisdom is a recurrent theme of non-Indian environmentalists. Native Americans are believed to be the vessels of sacred truths, sages of man's ability to live harmoniously with the plant, animal and mineral world. Deloria complains that those who praise traditional Indigenous ways do not accept Native peoples as contemporary beings. Indeed, a litany of literature has been devoted to “Indian” imagery. See, e.g., ROBERT BERKHOFFER, *THE WHITE MAN'S INDIAN: IMAGES OF THE AMERICAN INDIAN FROM COLUMBUS TO THE PRESENT* (1979); DANIEL FRANCIS, *THE IMAGINARY INDIAN: THE IMAGE OF THE INDIAN IN CANADIAN CULTURE* (1992); S. ELIZABETH BIRD, *DRESSING IN FEATHERS: THE CONSTRUCTION OF THE INDIAN IN AMERICAN POPULAR CULTURE* (1996); *THE INVENTED INDIAN: CULTURAL FICTION AND GOVERNMENT POLICIES* (James A. Clifton ed., 1990); DEVON A. MIHESUAH, *AMERICAN INDIANS: STEREOTYPES AND REALITIES* (2015); James L. Huffman, *An Exploratory Essay on Native Americans and Environmentalism*, 63 U. COLO. L. REV. 901 (1992).

<sup>158</sup> Cf. Anaya & Puig, *supra* note 138. An excellent encapsulation of the necessary rigors of protocol amongst Native populations, and a must-read, can be found at CLIMATE & TRADITIONAL KNOWLEDGES WORKGROUP, <http://climatetkw.wordpress.com>.

making decisions and taking actions with respect to persons or entities from beyond the culture.<sup>159</sup>

This statement should *not* be construed as a *non-recognition* of the modern forms of Native/Indigenous/Aboriginal governance. Regardless of their historic creation as colonial administrations for the exploitation of resources, Indigenous councils (whether colonially imposed or composed by historic tradition) are acknowledged by Native and non-Native populations to legally act on behalf of their cultures.<sup>160</sup> No outsider wants to be regarded as a biocultural prospector. Indigenous Peoples, however, have appreciated that only through the articulation of their societies as *cohesive identities*, and hence conveying the understanding that authority is placed in both visible and invisible (privileged knowledge) governing bodies, will they clear the obfuscation of their cultures that have been historically altered by confrontational non-Indigenous populations. Then, Indigenous Peoples can use non-Natives to open formerly impenetrable spaces into which their aboriginal voices can be sung.

## VII. The Importance of Indigenous Control

Seneca leader John Mohawk wrote of a philosophy of wealth that provides a counter to global market forces, and that underlies many Indigenous communities' efforts to assert control over their own development. In his words:

[W]e want to have a different kind of discussion; we want to talk about "subsistence." *Subsistence living has nothing to do with materialism*. People who live a subsistence life don't think of it as, "Oh, I got seven pounds of fish today; I'm therefore materially well off." They *are* materially well off, but they don't see the world that way. They see themselves living in the world and in a relationship to the world in which not only does the world nurture them, but they have a reciprocal obligation to nurture it. They're here to maintain its survival as a coherent thing. That's what subsistence really is about. Subsistence isn't an economic exchange. It's a cultural, spiritual, social exchange that's intended to go on for generations. In fact, it's the most *moral* relationship with nature that humans have ever devised. It's a way of dealing with that which is greater than we are in a respectful and coherent and sane manner.<sup>161</sup>

<sup>159</sup> Cf. D. Anthony Tyeeme Clark & Malea Powell, Guest Editors' Introduction, *Resisting Exile in the "Land of the Free": Indigenous Groundwork at Colonial Intersections*, 32 AM. INDIAN Q. 1 (2008).

<sup>160</sup> A word of caution here: Colonial history is fraught with legacies of non-Indigenous people "appointing" specific members of Indigenous societies to be the valid representatives to entreat with, thereby bestowing on those chosen the authority to in turn grant requisite permissions and consents that the non-Indigenous people desired all along.

<sup>161</sup> John Mohawk, *Subsistence and Materialism*, in PARADIGM WARS, *supra* note 13, at 27. Other scholars have focused on what such a philosophy contrasts with. Indian economist Arunoday Saha has written eloquently of how the promotion of Western technologies is inexorably bound with: 1) the desire to control nature to serve human needs, 2) a reliance on reason to comprehend the world and solve problems, 3) an

The ability of an Indigenous group to shape such a relationship with the rest of the world depends greatly on its ability to control what happens within its own territory. Debra Harry describes various efforts by Indigenous groups to control outsiders' access to and use of their lands. In the United States, the Navajo and Cherokee Nations, among other tribes, have established Institutional Review Boards that researchers need to clear before working on tribal lands. Harry's own organization, the Indigenous Peoples Council on Biocolonialism, has developed the "Indigenous Research Protection Act," a model law that tribal governments can adapt to protect their people and resources against unwanted research, and to regulate research to which the tribe consents.<sup>162</sup>

Geographer Anthony Bebbington has noted that various Indigenous federations in Ecuador have consciously employed production-boosting Green Revolution technologies in order to stem out-migration of their youth, which is viewed as a bigger threat to group solidarity and identity than the introduction of new technologies.<sup>163</sup> Bebbington argues that any dichotomy between "Indigenous" and "modern" forms of agriculture and technology mostly exists in the realm of rhetoric—in real life, most Indigenous peoples will employ those elements of new technologies that they find useful and appropriate.<sup>164</sup>

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emphasis on individualism and improvement, and 4) with an acceptance of individual happiness (rather than group welfare) as the supreme good. His most-cited statement on the subject is *Technological Innovation and Western Values*, 20 *TECH. IN SOCIETY* 499 (1998). See also Deloria, *supra* note 157.

<sup>162</sup> Harry, *supra* note 72, at 71–76. Text of the model law can be found at *Indigenous Research Protection Act*, IPCB, <http://www.ipcb.org/publications/policy/files/irpaintro.html>. See also Navajo Nation Human Research Code, available at <http://www.nptao.arizona.edu/navajo-nation>; Doug Brugge & Mariam Missaghian, *Protecting the Navajo People Through Tribal Regulation of Research*, 12 *SCI. & ENG'G ETHICS* 491 (2006); *Process of Conducting Research on the Hopi Reservation, Arizona*, U. ARIZ. COLL. AGRIC. & LIFE SCIS. (2008), <https://extension.arizona.edu/sites/extension.arizona.edu/files/pubs/az1466.pdf>; *Process of Conducting Research on the San Carlos Apache Reservation, Arizona*, U. ARIZ. COLL. AGRIC. & LIFE SCIS. (2008), <http://extension.arizona.edu/sites/extension.arizona.edu/files/pubs/az1475.pdf>; RDI NATIVE PEOPLES TECH. ASSISTANCE OFF., <http://www.nptao.arizona.edu> (excellent compendium of research codes); Tohono O'odham Research Code, 17 Tohono O'odham Code, ch. 8 (2013), <http://www.tolc-nsn.org/docs/Title17Ch8.pdf>; Martha Macintyre, *Informed Consent and Mining Projects: Some Problems and a Few Tentative Solutions* (Oct. 2003), <http://www.minerals.csiro.au/sd/Certification/MacintyrePriorInformedConsentandMining.pdf>; Nathalie Piquemal, *Four Principles to Guide Research with Aboriginals*, *POLY OPTIONS* 49 (Dec. 2000); INT'L WORK GROUP FOR INDIGENOUS AFF., <http://www.iwgia.org/en> (last visited Oct. 18, 2018); DWIGHT G. NEWMAN, *THE DUTY TO CONSULT: NEW RELATIONSHIPS WITH ABORIGINAL PEOPLES* (2009).

<sup>163</sup> The outmigration of young people seeking wage economy jobs, an increasingly transnational movement linked to global flows of capital and labor, is a disruptive social force in many Indigenous communities. Duncan Earle and Jeanne Simonelli have noted, for example, that large-scale emigration from lowland Chiapas has threatened to undermine community solidarity in autonomous Zapatista regions. See especially DUNCAN EARLE & JEANNE SIMONELLI, *UPRISING OF HOPE: SHARING THE ZAPATISTA JOURNEY TO ALTERNATIVE DEVELOPMENT* 193–94 (2005).

<sup>164</sup> Anthony Bebbington, *Modernization From Below: An Alternative Indigenous*

Again, however, the issue becomes one of control. Many Indigenous societies have long been impacted by the actions of outsiders, and these actions have long been tied to transnational market forces; but globalization shifts the locus of control into ever more delocalized realms—from local government to national government to international finance markets where little accountability is conceivable.<sup>165</sup>

Numerous Indigenous Peoples do not passively accept globalization's impacts, however. For example, Mayan populations in southern Mexico and Central America pushed their governments to scale back the Plan Puebla-Panama (later renamed *Proyecto Mesoamerica*) (a \$10 billion regional infrastructure “megaproject” sponsored with loans from the Inter-American Development Bank, the Central American Bank for Economic Integration, and the World Bank) because they would be unable to control the imposition and impacts of highways, energy grids, dams, oil pipelines, and industrial zones on their lands.<sup>166</sup> In Bolivia, World Bank loans (with conditions to privatize a water system) generated an ultimately successful resistance movement in Cochabamba, in which Indigenous groups allied with other local farmers, labor groups, environmentalists, and human rights activists to end monopolistic control of the city's water by the San Francisco-based Bechtel Corporation.<sup>167</sup>

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*Development?*, 69 *ECON. GEOGRAPHY* 274 (1993). See also *Indigenous Knowledge and Sustainability*, TEACHING AND LEARNING FOR A SUSTAINABLE FUTURE, [http://www.unesco.org/education/tlsf/mods/theme\\_c/mod11.html](http://www.unesco.org/education/tlsf/mods/theme_c/mod11.html); Katie Pace, *Indigenous Agriculture and Sustainable Food*, SUSTAINABLE FOOD CTR. (Oct. 7, 2015, 3:00 PM), <http://www.sustainablefoodcenter.org/latest/gardening/indigenous-agriculture-and-sustainable-food>; *Through the Lens of Indigenous Agriculture*, SLOW FOOD USA BLOG (May 20, 2016), <http://www.slowfoodusa.org/blog-post/through-the-lens-of-indigenous-agriculture>.

<sup>165</sup> Anthropologist Sidney W. Mintz's *SWEETNESS AND POWER: THE PLACE OF SUGAR IN MODERN HISTORY* (1986), for example, demonstrates how increasing consumption of sugar in industrializing societies of Europe directly impacted the lives of Caribbean peoples during the colonial period. See also *LIFE AND DEBT* (Tuff Gong Pictures 2001), <http://www.lifeanddebt.org> (documentary on the impacts of the IMF, the WB and the IADB and current development policies on Jamaica); U.N. FAO, *RETHINKING PUBLIC POLICY IN AGRICULTURE: LESSONS FROM DISTANT AND RECENT HISTORY* (consolidated by Ha-Joon Chang, 2009), <http://www.fao.org/docrep/012/i1217e/i1217e.pdf>.

<sup>166</sup> See *PARADIGM WARS*, *supra* note 13, at 164–65, for an overview of the Plan Puebla-Panama. The partial success of vehement Zapatista opposition to the Plan is outlined in DUNCAN EARLE & JEANNE SIMONELLI, *UPRISING OF HOPE: SHARING THE ZAPATISTA JOURNEY TO ALTERNATIVE DEVELOPMENT* (2005). See also *Belize: Advocating Maya Peoples' Rights to Land*, MINORITY RTS. GROUP INT'L (Nov. 22, 2016), <http://www.minorityrights.org/law-and-legal-cases/maya-in-belize>.

<sup>167</sup> See Juhasz, *Global Water Wars*, in *PARADIGM WARS*, *supra* note 13, at 110–11; strictly-revolution, *Bechtel Takeover of the Bolivian Water Supply*, YOUTUBE (Apr. 28, 2013), <http://www.youtube.com/watch?v=HfFhN-tINoU>. Many other examples of current Indigenous blockades are linked via a multitude of Internet search engines. But see Nadia B. Ahmad, *Trust or Bust: Complications With Tribal Trust Obligations and Environmental Sovereignty*, 41 *VT. L. REV.* 799 (2017); Lindsay Ratcliff, Conference Report, *Water, Oil, and Tribal Sovereignty: The Fight for the Dakota Access Pipeline*, 20 *U. DENV. WATER L. REV.* 125 (2016).

The Kayapo in the Amazon had beaten back ranchers, gold miners, jaguar-skin hunters, and rubber tappers.<sup>168</sup> But for how much longer?

Several Indigenous organizations around the world are devising ways to meet the changing needs of their populations, adopting that which they consider appropriate (and rejecting that which is not) while actively defining their relationships with global consumer capitalism.<sup>169</sup> The book *Paradigm Wars*, published by the International Forum on Globalization, provides a partial listing (including contact information) of then active Indigenous organizations in an appendix.<sup>170</sup> Many of these organizations integrate specific political action with efforts to revitalize language and culture, pursuing locally controlled “development”—in contrast to the blunt and sometimes harmful instruments of international aid agencies and financial institutions.

Achievements in the larger context of international policy have also helped in local battles. Victoria Tauli-Corpuz, now the current UN-SRIHR, has written that increasing recognition of the human rights of collective groups, as opposed to individual rights, has been one of the most important advances for Indigenous Peoples in the past four decades. In the recent past, new spaces for Indigenous rights advocacy included the UN Permanent Forum on Indigenous Issues, the establishment of which meant Indigenous Peoples were no longer required to present their arguments in reductionist terms of human rights, the environment, or biodiversity alone. The triumphant culmination of Indigenous human rights advocacy is bound in the UN Declaration on the Rights of Indigenous Peoples passed by the General Assembly in 2007.<sup>171</sup> This declaration

<sup>168</sup> Chip Brown, *Kayapo Courage*, NAT'L GEOGRAPHIC MAG. (Jan. 2014), <https://www.nationalgeographic.com/magazine/2014/01/kayapo-courage/?user.testname=None>. The Kayapo and other similarly situated Indigenous Peoples in the Amazon continue to battle the construction of large dam infrastructure projects. See *Amazon Culture Clash Over Brazil's Dams*, BBC NEWS (Jan. 10, 2017), <https://www.bbc.com/news/world-latin-america-38391377>.

<sup>169</sup> For a compilation of several Indigenous movements in the Americas, see generally *Indigenous Movements in the Americas*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Indigenous\\_movements\\_in\\_the\\_Americas](http://en.wikipedia.org/wiki/Indigenous_movements_in_the_Americas) (last visited Oct. 20, 2018). See also Duane Champagne, *The Indigenous Peoples' Movement: Theory, Policy, and Practice*, Mar. 13, 2008, <https://artsandscience.usask.ca/sociology/documents/39th%20Annual%20Sorokin%20Lecture.pdf>.

<sup>170</sup> Another book by the International Forum on Globalization, provides further detail about what it terms “People’s Alternative Initiatives”—efforts around the world to build local economies responsive to local needs. ALTERNATIVES TO ECONOMIC GLOBALIZATION: A BETTER WORLD IS POSSIBLE 253–67 (John Cavanagh & Jerry Mander eds., 2004). The most famous efforts at alternative development are probably those of the Zapatistas autonomous regions in Lacandon jungle. Zapatista “solidarity economics” of partial disengagement from the market economy is well-described in DUNCAN EARLE & JEANNE SIMONELLI, *supra* note 163, at 179–210.

<sup>171</sup> See UNDRIP, *supra* note 143; see also “Plain Language” version of the [Draft] Declaration, <https://www.ohchr.org/Documents/Publications/ABCannexesen.pdf> (last visited Nov. 9, 2018); Victoria Tauli-Corpuz, *The Prospect Ahead*, in *PARADIGM WARS*, *supra* note 13, at 211. See also, Tauli-Corpuz’s essay *Our Right to Remain Separate and Distinct*, in *PARADIGM WARS*, *supra* note 13, at 13. There are a number of nation states which

that the UN describes as “an important standard for the treatment of Indigenous Peoples that will undoubtedly be a significant tool towards eliminating human rights violations against the planet’s 370 million Indigenous people and assisting them in combating discrimination and marginalization,” was not supported by all nations as it is writ. Australia, Canada, New Zealand, and the United States, all former United Kingdom colonies, rejected it in 2007<sup>172</sup> but have since endorsed the declaration. Former United Nations Secretary-General Ban Ki-moon proclaimed the Declaration “a visionary step towards addressing the human rights of Indigenous Peoples . . . . [I]t provides a momentous opportunity for States and Indigenous Peoples to . . . promote reconciliation and ensure that the past is not repeated.” In general, the worldwide Indigenous response was in the same vein. Of particular interest is the The Canadian Friends Service Committee’s Aboriginal Committee’s 12 page collection of statements in support of the Declaration which references leaders, organizations and community groups representative of every continent.

And important victories in international courts, such as the decision in the Inter-American Court of Human Rights against the state of Nicaragua for permitting a company to build roads and log forests on Awas Tingni lands (enforcement of the decision was made a condition for a World Bank loan to Nicaragua), signal a movement towards Indigenous collective rights.<sup>173</sup>

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have reformed or articulated Indigenous respect in their national constitutions. See Bartolomé Clavero, *Cultural Supremacy, Domestic Constitutions, and the Declaration on the Rights of Indigenous Peoples*, in MAKING THE DECLARATION WORK: THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 344 (Claire Charters & Rodolfo Stavenhagen eds., 2009), <http://www.iwgia.org/images/documents/popular-publications/making-the-declaration-work.pdf>; S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* (2d ed. 2004).

<sup>172</sup> Countries abstaining from the vote were Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine.

<sup>173</sup> S. James Anaya & Claudio Grossman, *The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples*, 19 ARIZ. J. INT’L & COMP. L. 1 (2002). See also Press Release, Hul’qumi’num Treaty Group, International Human Rights Commission Admits Hul’Qumi’Num Treaty Group Case (Dec. 1, 2009), [http://www.hulquminum.bc.ca/pubs/media\\_release\\_HTG\\_IACHR\\_01Dec09.pdf?lbisphreq=1](http://www.hulquminum.bc.ca/pubs/media_release_HTG_IACHR_01Dec09.pdf?lbisphreq=1). See also *The Dann Case Before the Inter-American Commission on Human Rights: A Summary of the Commission’s Report and its Significance for Indian Land Rights*, INDIAN L. RES. CTR. (July 2006), available at <http://www.msbillings.edu/cas/NAMS/taliman/1%2015%20Dann%20Case%20Inter-American%20Comm%20on%20Human%20Rights%20summary.pdf>; Danielle DeLuca, *Maya Win Unprecedented Land Rights in Belize at International Courts*, CULTURAL SURVIVAL Q. MAG. (June 2015), <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/maya-win-unprecedented-land-rights-belize-international>; Canadian Federal Court of Appeals decision halting the Trans Mountain Pipeline, *supra* note 129; *Tsilhqot’in First Nation Granted B.C. Title Claim in Supreme Court Ruling*, CBC NEWS (June 26, 2014), <https://www.cbc.ca/news/politics/tsilhqot-in-first-nation-granted-b-c-title-claim-in-supreme-court-ruling-1.2688332>; David Crouch, *Sweden’s Indigenous Sami People Win Rights Battle Against State*, GUARDIAN (Feb. 3, 2016), <https://www.theguardian.com/world/2016/feb/03/sweden-indigenous-sami-people-win-rights-battle-against-state>;

While a good deal of the writing thus far has focused on negative impacts, some aspects of globalization can work to the advantage of an Indigenous group. For example, the presence of NGOs or other outside entities may sometimes limit the ability of national governments, powerful companies, or local elites to violently repress Indigenous movements for social justice.<sup>174</sup> Even the rules of the WTO may sometimes be useful to an Indigenous organization in its local political battles.<sup>175</sup> The late Secwepemc leader Arthur Manuel, for example, argued that Canadian refusal to recognize Indigenous rights and sovereignty in areas logged of softwood lumber constituted an illegal export subsidy under the guidelines set out by the WTO.<sup>176</sup> The United States unilaterally imposed high tariffs on Canadian softwood lumber imports, which it claimed were heavily subsidized by Canada—an “unfair trade practice” under WTO rules. The Canadian constitution recognizes and affirms Aboriginal Title to all lands that have not been the subject of treaties between Canada and Indian nations. Manuel focused on British Columbia, where there have been no such treaties for almost all of the logged lands. He argued that the Canadian government thus acted illegally by giving free logging concessions on forest lands to corporations. Neither the government nor the companies have compensated Indian nations neither for the use of the resource nor for damage to the lands, and he argued that these actions are thus an illegal subsidy for Canadian softwood exports. He also stated that the government actions violated the “prior informed consent” requirement before any development is to take place on Indigenous Peoples’ lands (ILO169,<sup>177</sup> Convention on Biological Diversity Article 8j,<sup>178</sup> and then-pending UN Draft Declaration

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Ricarda Roesch, *The Ogiek Case of the African Court on Human and Peoples’ Rights: Not So Much News After All?*, EUROPEAN J. INT’L L. BLOG (June 16, 2017), <https://www.ejiltalk.org/the-ogiek-case-of-the-african-court-on-human-and-peoples-rights-not-so-much-news-after-all>.

<sup>174</sup> Janet Lloyd, Atossa Soltani, and Kevin Koenig provide comments in *Infrastructure Development in South American Amazon*, in PARADIGM WARS, *supra* note 13, at 89–94. In yet another example, the Accompaniment Project of the Network in Solidarity with the People of Guatemala places volunteers side-by-side with Indigenous rights activists who might otherwise be at higher risk of retaliation for their political activities. See more on the Guatemala Accompaniment Project at <http://misgua.org/gap>.

<sup>175</sup> One can argue that even WTO rules which work against Indigenous groups may not have teeth in all cases. Terri-Lynn Williams-Davidson notes that Article 46 of the Vienna Convention on the Law of Treaties states that while rules such as those of the WTO normally trump domestic laws, they do not do so in the case of “fundamentally important” internal laws. She argues, specifically with regard to Canada, that fiduciary obligations to aboriginal interests are of such fundamental importance. Terri-Lynn Williams-Davidson, *Sacred Objects, Art and Nature in a Global Economy*, in PARADIGM WARS, *supra* note 13, at 115–20.

<sup>176</sup> Arthur Manuel, *Indigenous Brief to WTO: How the Denial of Aboriginal Title Serves as an Illegal Export Subsidy*, in PARADIGM WARS, *supra* note 13, at 203. Whether this argument sustains itself in light of the new United States-Mexico-Canada trade agreement remains to be seen.

<sup>177</sup> See *Global Governance*, IWGIA, <http://www.iwgia.org/human-rights/international-human-rights-instruments/ilo-convention-no-169> (last visited Oct. 20, 2018).

<sup>178</sup> *Article 8(j)—Traditional Knowledge, Innovations and Practices*, CONVENTION ON

on the Rights of Indigenous Peoples). This basic argument—exalted by the ratification of UNDRIP—can be useful for Indigenous people around the world who fight the extraction of timber, oil, minerals, fish, freshwater, etc., from their lands. Manuel’s organization, the Indigenous Network on Economics and Trade has at least received an audience (via acceptance of amicus curiae briefs in 2002) from the WTO, which he said was “the first time *ever* that the WTO or any other trade bureaucracy officially accepted substantive [I]ndigenous submissions to a pending case, thus finally recognizing our legal standing.”<sup>179</sup> Manuel saw this acceptance of the briefs by the WTO as showing promise that Indigenous people can find some new opportunities in globalization, as this otherwise “dangerous bureaucracy” provides a medium through which Indigenous people can seek justice via the “hard” enforcement mechanisms (e.g., sanctions) of trade law (as opposed to the harder-to-enforce “soft” mediums of human rights and environmental law).<sup>180</sup> Indeed, Sergio Puig believes that not all view the international trade system as incompatible with the protection of human rights, and that governments can rely on exceptions designed to protect specified objectives.<sup>181</sup> He notes that recently the “Appellate Body [] of the WTO . . . held that key justificatory exceptions can be used to excuse [violations] when trade restrictive measures are adopted to protect the interests of indigenous groups.”<sup>182</sup> Puig claims that “[s]uch recognition has begun to take place in certain domestic courts; notably, the Costa Rican Constitutional Court struck down draft legislation aimed at implementing the Central America Free Trade Agreement because the government failed to consult with [I]ndigenous peoples beforehand.”<sup>183</sup>

### VIII. Technology and Indigenous Rights

Given what sometimes seems like the inevitability of globalization, it is inspiring that those people who value health, security, and community can sometimes refashion its manifestations into tools of resistance and solidarity. In fact there is good reason for hope. The resistance of many Indigenous Peoples to the effects of globalization has arisen not from abstract concerns, but from real struggles for control over and access to their land, knowledge, and resources. So, from unique websites to documentaries exposing injustices to land claims supported by sophisticated technology, Indigenous Peoples around the world have set

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BIOLOGICAL DIVERSITY, <http://www.cbd.int/traditional> (last visited Oct. 20, 2018).

<sup>179</sup> Manuel, *supra* note 176.

<sup>180</sup> See SEVENTH GENERATION FUND FOR INDIGENOUS PEOPLES, <http://www.7genfund.org>.

<sup>181</sup> See Puig, *supra* note 7.

<sup>182</sup> *Id.* See also Appellate Body Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 5.173, WTO Doc. WT/DS400/AB/R & WT/DS401/AB/R (May 22, 2014).

<sup>183</sup> Puig, *supra* note 7.

about blending modern technology into their cultural dynamisms. Novel strikes against colonial paradigms are fostered.<sup>184</sup>

If indigenously founded Internet resources and technologies are any indication of Indigenous Peoples' willingness to embrace the technological era, the answer is that many Indigenous communities see telecommunication and computer technologies as a way to improve, rather than hinder, self-sufficiency, preservation of culture, real sovereignty, and general economic conditions.<sup>185</sup> As noted in one 1999 Benton Foundation study, "[a]mong the tools recognized by tribes as essential to their future growth are telecommunications and information technology, and tribes are looking for opportunities to acquire the level of technological infrastructure that will ensure their place on the Information Superhighway."<sup>186</sup> The Benton Foundation has since encouraged the development of Indigenous language websites.<sup>187</sup>

Currently, Indigenous Peoples are utilizing technological tools for social media, financial transactions, and digitization of documents.<sup>188</sup> The majority of these technologies are used to preserve and promote Indigenous culture, tradition, history, and human rights advocacy.<sup>189</sup> "The ability of Indigenous Peoples to communicate directly in a common language without intermediaries is critical, even if the common language is not their own."<sup>190</sup> Further, the Internet is a "technological tool to focus, frame and affect the internal and external discourse which is the thread that draws us together . . . . Process, power, and control are . . . contested areas . . . . Ultimately, it is a battle that pits the chthonic legal tradition against the dominant legal tradition of the nation-state."<sup>191</sup> Today, there

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<sup>184</sup> See ROBERT ALAN HERSHEY, *The Impact of Digital Technology on Indigenous Peoples*, in GLOBALIZATION AND THE TRANSFORMATION OF CULTURES & HUMANITY: A CURRICULUM AND TOOLKIT FOR THE EFFLORESCENCE OF ECOLOGICAL LITERACY IN LEGAL AND BUSINESS SCHOOL EDUCATION (2010), [http://www.ecoliteratelaw.com/09\\_DigitizationIndig.cfm?sect=text](http://www.ecoliteratelaw.com/09_DigitizationIndig.cfm?sect=text).

<sup>185</sup> See generally AJ Johnson, *A New Understanding of Culture and Communication: The Impact of Technologies on Indigenous Peoples*, <http://www.ischool.utexas.edu/~vlibrary/edres/pathfinders/ajohnson/pathfinder.html> (last visited Oct. 20, 2018); Laurel Dyson, *Indigenous Peoples on the Internet*, in THE HANDBOOK OF INTERNET STUDIES (Mia Consalvo & Charlie Ess eds., 2011).

<sup>186</sup> JAMES CASEY, RANDY ROSS & MARCIA WARREN, NATIVE NETWORKING: TELECOMMUNICATIONS AND INFORMATION TECHNOLOGY IN INDIAN COUNTRY 1 (Jean Smith ed., 1999), <https://files.eric.ed.gov/fulltext/ED430769.pdf>.

<sup>187</sup> Katharine Schwab, *The Internet Isn't Available in Most Languages*, ATLANTIC (Nov. 30, 2015), <https://www.theatlantic.com/technology/archive/2015/11/the-internet-isnt-available-in-most-languages/417393>.

<sup>188</sup> See Ellie Rennie & Tyson Yunkaporta, *Aboriginal Communities Embrace Technology, But They Have Unique Cyber Safety Challenges*, THE CONVERSATION (Nov. 28, 2016, 2:15 PM), <http://theconversation.com/aboriginal-communities-embrace-technology-but-they-have-unique-cyber-safety-challenges-69344>.

<sup>189</sup> *Id.*; see also Christine Zuni Cruz, *Shadow War Scholarship, Indigenous Legal Tradition, and Modern Law in Indian Country*, 47 WASHBURN L.J. 631 (2008).

<sup>190</sup> Zuni Cruz, *supra* note 189, at 638.

<sup>191</sup> *Id.* at 634; see also *Counter-mapping*, <https://en.wikipedia.org/wiki/Counter-mapping> (last visited Nov. 9, 2018). See *Digital Technology for Indigenous*

are multiple organizations and educational programs dedicated to the utilization of technology in Indigenous communities.<sup>192</sup>

In December of 2003, more than 11,000 people from over 175 Native Nations assembled in Geneva, Switzerland, to discuss “bridging the digital divide” between developed and developing nations.<sup>193</sup> The United Nations and the International Telecommunication Union assembled the World Summit on the Information Society (WSIS) with Indigenous Peoples’ particular needs in mind—seeking to gain equitable access to technologies while retaining “rights, cultural identities, traditional territories [and] resources.”<sup>194</sup> Indigenous Peoples themselves, it was articulated, are best at deciding how and when they access and use new technologies.<sup>195</sup>

In March of 2004, the Aboriginal Canada Portal and Connectivity Working Group hosted another conference in Canada, where Indigenous Peoples from around the world discussed and shared work they were already doing to make themselves a part of the information society. This included “online applications for improving public health and governance, the role of new technology in [I]ndigenous media and the arts, and the influence the digital revolution has had on culture, gender, and the U.N. Millennium Development Goals.”<sup>196</sup> The consequent Geneva Plan 2003 articulated various goals for promoting the rights and interests of Indigenous Peoples, such as Indigenous language websites and the digitization of Indigenous educational, scientific, and cultural heritage.

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*Empowerment*, CHRISTENSEN FUND (Sept. 5, 2012), <https://www.christensenfund.org/2012/09/05/digital-technology-for-indigenous-empowerment>; WIPO’s Indigenous and Local Communities Portal; Robin Young & Karyn Miller-Medzon, *How Determination and Technology Are Fostering the Chickasaw Language’s Rebirth*, WBUR 90.9 (Oct. 6, 2016), <http://www.wbur.org/hereandnow/2016/10/06/oklahoma-chickasaw-language>.

<sup>192</sup> See *id.* See generally *The Indigenous Internet*, SCI. DAILY (Jan. 25, 2016), <http://www.sciencedaily.com/releases/2016/01/160125090810.htm> (“Improving computer literacy and building internet and communications technology (ICT) skills in Indigenous communities is more about understanding the opportunities rather than imposing ‘Western’ style learning programs.”). The author of a new study, Michelle Eady of the University of Wollongong, New South Wales, Australia, writes of her eleven-point plan to facilitate the adoption of internet technologies in Indigenous communities, which includes embracing Aboriginal ways of knowing and learning via Elder wisdom. Michelle J. Eady, *Eleven Design-Based Principles to Facilitate the Adoption of Internet Technologies in Indigenous Communities*, 3 INT’L J. SOCIAL MEDIA & INTERACTIVE LEARNING ENVIRONMENTS 267 (2015); see also Roberto Múkaro Borrero (Borikén Taño), *Innovation and Technology for Indigenous Peoples*, <http://www.un.org/esa/socdev/egms/docs/2013/ict/innovation-technology-indigenous.pdf> (last visited Oct. 20, 2018).

<sup>193</sup> Jamie Brown & Tara Tidwell Cullen, *Indigenous Peoples at the World Summit on the Information Society*, 29 CULTURAL SURVIVAL Q. MAG. 13, 13 (2005).

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* “Some American Indian tribes, for example, refuse to put information about their cultures online because they believe that traditional knowledge should be passed on in specific ways to specific peoples.” *Id.* at 14.

<sup>196</sup> *Id.*

In November of 2005, Phase II of the WSIS was held in Tunis, Tunisia. The purpose of the event was to continue the dialogue initiated in Phase I, and to “review actions to date in relation to international Indigenous connectivity, to share regional experiences regarding the same, including best practices and challenges, to explore the viability of, and issues regarding, an International Indigenous Portal, and to allow participants the opportunity to craft an International Indigenous e-Strategy in the post-WSIS environment.”<sup>197</sup> Phase II of the WSIS concluded by issuing six recommendations: 1) An Indigenous-led initiative; 2) analysis of existing sites and portals;<sup>198</sup> 3) thematic focus of an international Indigenous portal; 4) information and communications (ICT) development and broader development issues; 5) cooperation between Indigenous portal initiatives; 6) international Indigenous portal architecture and content.<sup>199</sup>

The current era has been termed the “age of information,” and this term generally carries a positive connotation. In Native societies, however, a dichotomy exists between those who embrace the Internet as a tool to protect, maintain, and promote cultural diversity, and those who believe that the Internet serves only to endorse capitalist ideals and sanction products of the modern industrial society.<sup>200</sup> This dichotomy provokes the question, is the Internet friend or foe of Indigenous Peoples? Imagery is the front face of Native/Indigenous/Aboriginal policy around the world. There have been so many ascriptions and stereotypes of Native Peoples, a corollary question might be, who seizes the narrative of identity? Will the Internet provide only an illusion of power?

And does the Internet provide opportunities for Indigenous economic development by creating a global market for businesses and products, making possible the participation of Indigenous communities in the global economy—on their own terms—and enhancing long-term economic viability? Secondly, can the Internet promote Indigenous self-determination and cultural diversity by contributing to the sense of organization and autonomous self-governance, even to those communities within repressive regimes, often through online bulletin boards, mass e-mailings, and general websites? The Internet allows communities to be strategic and mobilize a world community of advocates to exert political

<sup>197</sup> INDIGENOUS PEOPLES & THE INFO. SOCIETY, *Phase 2: World Summit on the Information Society, Indigenous Peoples and the Information Society: “Towards an International Indigenous Portal, Final Report 1* (Nov. 14, 2005), [http://www.un.org/esa/socdev/unpfi/documents/report\\_en.pdf](http://www.un.org/esa/socdev/unpfi/documents/report_en.pdf).

<sup>198</sup> A “portal” is defined as “a web presence or other services that promote universal connectivity and offer a broad array of information and resources.” *Id.* at 2.

<sup>199</sup> The Overall Review of the Implementation of the Outcomes of the World Summit on the Information Society was held by the General Assembly in 2015 that adopted Resolution A/70/125 calling for close alignment between the WSIS process and the 2030 Agenda for Sustainable Development. G.A. Res. 70/125 (Dec. 16, 2015), [http://www.unctad.org/en/PublicationsLibrary/ares70d125\\_en.pdf](http://www.unctad.org/en/PublicationsLibrary/ares70d125_en.pdf).

<sup>200</sup> See *Diversity in the Age of Globalization*, EARTHWATCH INST., [http://www.wadsworth.com/anthropology\\_d/special\\_features/ext/earthwatch/index.html](http://www.wadsworth.com/anthropology_d/special_features/ext/earthwatch/index.html) (last visited Oct. 20, 2018) [hereinafter “EarthWatch”].

and economic pressure and lend all manner of aid. Finally, websites and other web-based media create spaces where Indigenous Peoples' art, language, culture, histories, and traditions can be shared, learned, promoted, and distributed.<sup>201</sup>

Dr. John Senyo C. Afele<sup>202</sup> has argued that Native peoples “should aim to digitize [their] oral cultures . . . and identify complementary knowledge from global resources.”<sup>203</sup> Assuming that Indigenous Peoples can actively assert dominance over the reflection of their own knowledge, in a primarily western-dominated medium, Dr. Afele has asserted that “there is ample room for all cultures to be represented on the Internet.”<sup>204</sup> Realizing the untapped potential that these areas present, technology-based corporations are increasingly expanding into Indigenous communities. Accordingly, “there are no longer technological barriers to deployment of information technology anywhere in the world today; it is political will and imagination of institutions that will determine how much a culture benefits from the Internet.”<sup>205</sup> Dr. Afele argues that it is up to Indigenous Peoples themselves to assert dominance in this area, and realize the exceptional ways in which this media can be tailored to local situations.

Robyn Kamira,<sup>206</sup> on the other hand, argues that the Internet serves only to reinforce negative stereotypes that have plagued Indigenous communities since their first encounters with what has now become the dominant voice in society.<sup>207</sup> According to Kamira, “[g]overnment databases collect abundant data about [Indigenous Peoples] with no predetermined purpose, and publish it with little regard for context or benefit to [those people]. Instead, [Indigenous Peoples] are subjected to research findings from these databanks that continue to reinforce the

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<sup>201</sup> I once again invoke a caveat here. Just who has the authority or permission to disseminate the traditional knowledge of each distinct community? How is improper cultural appropriation stymied?

<sup>202</sup> “Dr. John Afele, originally from Ghana, is director of the International Program for Africa at the University of Guelph, Ontario . . . and director of Village Telecom in Ghana.” *Roundtable: Indigenous Internet*, EARTHWATCH INST., [http://www.wadsworth.com/anthropology\\_d/special\\_features/ext/earthwatch/rt.html](http://www.wadsworth.com/anthropology_d/special_features/ext/earthwatch/rt.html) (last visited Oct. 20, 2018).

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> JOHN SENYO AFELE, *DIGITAL BRIDGES: DEVELOPING COUNTRIES IN THE KNOWLEDGE ECONOMY* 192 (2003).

<sup>206</sup> Robyn Kamira, Managing Director, Pava Interface, Ltd., is from the Maori tribal groups of Te Rarawa and Te Aupouri. She works with Indigenous communities in New Zealand on issues in information technology. See *Robyn Kamira*, CMTY. RESEARCH, <http://www.communityresearch.org.nz/researchers/robyn-kamira> (last visited Oct. 18 2018). See also Robyn Kamira, *Tangata Whenua, the Treaty and the New Zealand Digital Strategy*, 2 AOTEAROA ETHNIC NETWORK J. 14 (Apr. 2007), <http://www.aen.org.nz/journal/2/1/aenj.2.1.Kamira.pdf>; USING COMMUNITY INFORMATICS TO TRANSFORM REGIONS (Stewart Marshall et al. eds., 2004).

<sup>207</sup> See *Roundtable*, *supra* note 202.

most negative stereotypes.”<sup>208</sup> As such, because colonizers are the ones with the resources to be in control of this information, the Internet, for the most part, is only a modern tool for further colonization. And, there is always the risk that others, who have no stake in Indigenous Peoples’ integrity or survival, will circulate stories, histories, cultures, and traditions devoid of respect for the principles underlying the veracity of those principles. Although there may be reason to believe otherwise, history has shown that the stories of “[I]ndigenous [P]eoples worldwide . . . have been told and manipulated by others, only to be reduced to fantasy, novelty, myth, and untruth. [Indigenous] knowledge was validated, discarded, or modified to suit a strategy of colonization, conquering both geography and knowledge systems.”<sup>209</sup>

Which view is correct? Assuming that the Internet does present a threat to the value of Indigenous Peoples’ culture and tradition, is there a way to prevent the devaluation indicated by Kamira? Or, does the benefit conferred to Indigenous communities, as indicated by Afele, outweigh the harm that the dispersion of sensitive information may cause? Are the values even commensurable? If they are, what values should be assigned where? Indigenous communities vary vastly around the world, culturally, physically, religiously, linguistically, and economically. Is there *one* resolution to this quandary? Can there be? Should it not be left up to Indigenous communities, themselves, to decide whether to become caught up in this “age of information”?<sup>210</sup>

An edited volume entitled *Indigenous Data Sovereignty*, published in 2016, surveys the means by which Indigenous Peoples across the globe are harnessing the power of the “data revolution” to secure their own interests and pursue self-determination.<sup>211</sup> It moves beyond the normative argument of whether the information society can benefit Indigenous Peoples and toward a position that claims an inherent and inalienable right for Indigenous nations to collect, own, apply, and control data that concerns them, or that it is about their life-ways and territories.

These debatable questions see more sides than dragonfly eyes. And, with the advent of advanced technical ability around storing and manipulating geographical information digitally, some Indigenous People have grasped a unique opportunity to document Indigenous knowledge and detail their homelands. Geographic Information System (GIS) tracking, which is basically any multilayered digitized mapping system, has found creative uses in the hands of Indigenous Peoples around the globe seeking to document their land claims for the purposes of increased management of tribal lands. This is sometimes referred to as participatory GIS (PGIS).<sup>212</sup>

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> Websites for Indigenous Cultures and the Internet are appended in Annex I.

<sup>211</sup> INDIGENOUS DATA SOVEREIGNTY: TOWARD AN AGENDA (Tahu Kukutai & John Taylor eds., 2016), <http://press-files.anu.edu.au/downloads/press/n2140/pdf/book.pdf?referer=2140>.

<sup>212</sup> See generally David Mark, *Cultural Differences, Technological Imperialism and*

In use among people such as the Ecuadorian Waorani, who sought assistance representing and documenting their occupational use of land within the Yasuni National Park, part of the Yasuni Biosphere Reserve, to support their claim of rights within the park before a management plan devoid of their right to input could be developed.<sup>213</sup> Scholars have done similar work in Bolivia and Peru, as well as outside the Amazon Basin, in Guatemala and Nicaragua. GIS technology represents a less expensive, more efficient means of surveying landscapes formerly considered a challenge to map. Further, its use allows geographically remote Indigenous People to complete data collection, detailing their own traditional land uses. Using this technology to counter government maps which have a long history of ignoring or discounting both Indigenous Peoples' presence and ecological knowledge about the land on which they live increases the Native societies' bargaining position around land use decisions while removing several layers of potential confusion due to translation.<sup>214</sup>

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*Indigenous GIS*, DIRECTIONS MAG. (May 24, 2006), <http://www.directionsmag.com/articles/cultural-differences-technological-imperialism-and-indigenous-gis/123137>. According to the article summary, Mark considers some difficult questions such as, "Do all people, from all cultures and all languages, think about geographic space and geographic processes in more or less the same way? Or are there significant cross-cultural variations in how different peoples conceptualize and reason about geographic processes, features and places?" *Id.* He examines potential answers, the issues and their ramifications for non-Eurocentric users of geospatial technologies. In the process, Mark considers how cross cultural focus/emphasis can change, such as how one improves translation of the language of "about 500 Yindjibarndi speakers [near Roebourne, Australia, who] keep[] their language alive after being forcibly removed from their traditional lands almost a century ago." *Id.* Much like Keith Basso's 1996 analysis of Western Apache place names, Mark finds that the semantics of geographic expression hold important differences in the way the Yindjibarndi speakers experience the varieties of riverbeds and water, as well as in the Navajo experience of landscape language categories in northern Arizona and New Mexico. This leads him to consider the need for Indigenous defined categories for spatial data infrastructure code types/features (as in landscape language categories). *See also* Nitesh Tripathi & Shefali Bhattarya, *Integrating Indigenous Knowledge and GIS for Participatory Natural Resource Management: State-of-the-Practice*, 17 ELECTRONIC J. OF INFO. SYSTEMS IN DEVELOPING COUNTRIES 1 (2004) <http://www.ejisdc.org/ojs2/index.php/ejisdc/article/view/105/105>; Garth Harmsworth, *Indigenous Values and GIS: A Method and a Framework*, 6 INDIGENOUS KNOWLEDGE & DEV. MONITOR 3 (Dec. 1998), [http://www.iapad.org/publications/ppgis/indigenous\\_values\\_and\\_gis-a\\_method\\_and\\_a\\_framework.pdf](http://www.iapad.org/publications/ppgis/indigenous_values_and_gis-a_method_and_a_framework.pdf); Kate Moore, *Towards a Post-Colonial GIS*, in GISRUUK 2007: PROCEEDINGS OF THE GEOGRAPHICAL INFORMATION SCIENCE RESEARCH UK CONFERENCE 7 (Adam C. Winstanley ed., 2007), <https://www.geos.ed.ac.uk/~gisteac/proceedingsonline/GISRUUK2007/PDF/CompleteProceedings.pdf>.

<sup>213</sup> *See* Jen Osha & Daniel Weiner, *Participatory GIS—A Paradigm Shift in Development?*, DIRECTIONS MAG. (Dec. 15, 2006), <http://www.directionsmag.com/article/2764>; Aliya Ryan, *Mapping Waorani Territory: Update from the Ecuadorian Amazon*, DIGITAL DEMOCRACY (Mar. 28, 2017), <http://www.digital-democracy.org/blog/update-from-the-ecuadorian-amazon>.

<sup>214</sup> Mac Chapin, Zachary Lamb & Bill Threlkeld, *Mapping Indigenous Lands*, 34 ANN. REV. ANTHROPOLOGY 619 (2005). The mapping of Indigenous lands to secure tenure, manage natural resources, and strengthen cultures began in Canada and Alaska in the 1960s and moved to use in other regions during the 1990s. A variety of methodologies,

Groups like the Indigenous Mapping Network<sup>215</sup> began polling Indigenous communities on their interest in and barriers to the use of remote sensing, essentially data gathering information about an object or

ranging from highly participatory approaches involving village sketch maps to more technical efforts with geographic information systems (GIS) and remote sensing have been utilized successfully. In general, Indigenous mapping has shown itself to be a powerful tool, spreading rapidly, although the distribution of mapping projects is uneven, as opportunities are scarce in many parts of the world. This review covers the beginning and evolution of Indigenous mapping, different methodologies and their objectives, the development of Indigenous atlases and guidebooks for mapping Indigenous lands, and the often uneasy mix of participatory community approaches with technology. By many respects, Native Peoples have embraced these technologies in order to corroborate their traditional knowledge, which is often challenged by the intransigence of non-Indigenous forums. See Hershey et al., *supra* note 65 (extensive bibliography on challenges of documenting cartographically land rights of Indigenous Peoples). See also PACIFIC WORLDS, <http://www.pacificworlds.com/homepage/about.cfm> (last visited Oct. 20, 2018). This is a brochure on Geography as a discipline of study for potential Indigenous scholars. Pacific Worlds is a vehicle for cultural preservation and the perpetuation of Indigenous traditions in the Pacific, presenting the Pacific Islands' cultures and environments, from Pacific-Islander perspectives.

#### Geography, GIS and Map Websites

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|---|---|
| Association of American Geographers                                     | <a href="http://www.aag.org">http://www.aag.org</a>   |
| Indigenous Mapping Network  | <a href="https://www.aaas.org/page/indigenous-mapping-network">https://www.aaas.org/page/indigenous-mapping-network</a>   |
| Aboriginal Mapping Network  | <a href="http://www.nativemaps.org">http://www.nativemaps.org</a>   |
| ESRI Native Conservation Resources                                      | <a href="http://www.conservaiongis.org/links/native1.html">http://www.conservaiongis.org/links/native1.html</a>   |
| Living Cybercartographic Atlas of Indigenous Perspectives and Knowledge | <a href="https://library.carleton.ca/find/maps/online-maps/living-cybercartographic-atlas-indigenous-perspectives-and-knowledge">https://library.carleton.ca/find/maps/online-maps/living-cybercartographic-atlas-indigenous-perspectives-and-knowledge</a> |
| Landmark Indigenous and Community Land Map                              | <a href="http://www.landmarkmap.org">http://www.landmarkmap.org</a>   |
| American Indian Map Pages   | <a href="http://www.americanindian.net/links7.html">http://www.americanindian.net/links7.html</a>   |
| Ethnographic Mapping Lab  | <a href="http://www.uvic.ca/socialsciences/ethnographicmapping">http://www.uvic.ca/socialsciences/ethnographicmapping</a>   |
| Google Earth Training workshops   | <a href="http://www.cynthiaannett.org/google-outreach-training-workshops">http://www.cynthiaannett.org/google-outreach-training-workshops</a>   |
| Maps of Native American Nations (1997)                                  | <a href="http://www.kstrom.net/isk/maps/mapmenu.html">http://www.kstrom.net/isk/maps/mapmenu.html</a>   |
| Native Geographies and Countermapping links                             | <a href="http://academic.evergreen.edu/g/grossmaz/nations.html">http://academic.evergreen.edu/g/grossmaz/nations.html</a>   |

<sup>215</sup> See *Indigenous Mapping Network*, AM. ASSOC. FOR THE ADVANCEMENT OF SCI., <http://www.aaas.org/page/indigenous-mapping-network> (last visited Oct. 18, 2018). The Indigenous Mapping Network has a mission "to empower Native communities by connecting them with the tools they need to protect, preserve, and enhance their way of life within their aboriginal territories" through bringing traditional "mapping" practices and modern mapping technologies closer together to serve Native needs. Towards that end, IMN hopes to serve as a conduit for Native groups and individuals to meet, build relationships and assist one another in attaining sovereignty goals. The group has launched a multilayered digital social media network with several broadcasts available via Ustream, plus LinkedIn, Twitter, Facebook, and MySpace. They have also begun an annual conference.

place without direct contact such as with satellite or thermal imaging, and which can be helpful for measuring environmental shifts and impacts. As of March, 2010, IMN's Indigenous Remote Sensing Collaborative (IRSC) had begun a collaborative project tasked with developing an improved version of the aerial imaging system tested in the course of 13 training surveys with Maya and Garifuna conservation groups in Toledo, Belize, and equipping four areas (the first is Toledo; the others in the Pacific, Eastern Africa, and Canada/USA in any order). Google Earth Outreach has pursued similar aims with Indigenous Peoples, particularly with the Surui Tribe of the Brazilian Amazon. The Surui Cultural Map project has helped them to demarcate their territories and resources and to instruct a global audience about their history.<sup>216</sup> Each of the four projects demonstrated collaborations with community-based groups with GIS capacities. The groups are determining the data-gathering priorities that frame the training exercises, learning to plan data acquisition missions, operating the system in the air and processing the data retrieved.<sup>217</sup>

I do not just gather these thoughts in Pollyanna fashion. All mapping projects are fraught with challenges, such as demarcating hard and fast lines over traditional joint-or-several societies' claims to have used the lands (which can be used as a pretext by nation states to delay or avoid demarcation alleging that the creation of cartographic boundaries would promote ethnic conflict), the extent to which societal wisdom-keepers' knowledge remains intact, the time it takes for internal dialogue in the face of natural resource extractive pressures, and the splitting of these same communities' desires by governments and further outside forces, and the financial wherewithal to conduct such surveys and cartographic representations, to name but a few.

At this point, all indicators are that despite large disparities in income and sometimes education, Indigenous groups and organizations have found ways to use cutting edge technology to do more than just

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<sup>216</sup> Rebecca Moore, *The Surui Cultural Map*, GOOGLE EARTH BLOG (June 18, 2012), <https://www.blog.google/products/earth/surui-cultural-map>.

<sup>217</sup> *But see*, Wayne Madsen, *Protecting Indigenous Peoples' Privacy from "Eyes in the Sky,"* in PROCEEDINGS OF THE CONFERENCE ON LAW AND INFORMATION POLICY FOR SPATIAL DATABASES 223–31 (Harlan Joseph Onsrud ed., 1994). This paper considers remote sensing from space-based platforms as they relate to the protection of the rights of indigenous peoples around the world. Many nations and international organizations recognize a right of individual privacy, but what about a right to collective privacy or "communal right of privacy?" And how does this relate to the rights of Indigenous people to eschew data collection on their lands and waters (collected from orbiting surveillance and sensing platforms)?

Indigenous peoples argue that since they are the direct descendants of the original peoples who settled their lands before conquest by outsiders, they have an 'inalienable' right to their territories and the natural resources contained therein. Clearly, the sparse number of international treaties and other regimes that seek to protect the rights of Indigenous people to their lands and resources must be strengthened to address privacy protections against wanton snooping from overhead surveillance satellites.

bridge geographically expansive locations, build pan-Indigenous community, or even protest the policies of the WTO. Indeed, a number of Indigenous groups and organizations are intent on preserving their homelands and easing the difficulty of Indigenous knowledge acquisition in current times through what has been considered cutting edge technology. With any hope, Indigenous techniques that have created Navajo star maps and other multilayered concepts of landscape and place will begin to inform how the Western world sees the comparatively simple, flat, two dimensional papers with which many of us receive direction. It is crucial not to lose sight of the issue-specific, pragmatic nature of Indigenous resistance movements. It is necessary to differentiate between particular places and situations, tied to real local histories—it's neither useful nor interesting to make blanket statements about how "Indigenous culture" has been affected by globalization. There is a growing worldwide movement by Native Nations to rebalance the global economy by starting with what people know to be true regarding their traditional lands.<sup>218</sup>

## IX. Annex I

1. *Aboriginal Mapping Network (AMN)*: <http://nativemaps.org>. In 1998 the joint initiative of the Gitksan and Ahousaht First Nations and Ecotrust Canada formed the Aboriginal Mapping Network (AMN) to share knowledge and information about traditional knowledge mapping on a global level. Originally fueled by local First Nations technicians, leaders and decision makers it has become a strategic resource for practitioners of traditional knowledge mapping. The AMN now supports Aboriginal and Indigenous peoples facing similar issues as the original group (such as land claims, treaty negotiations and resource development) with common tools (i.e., such as traditional use studies, GIS mapping and other information systems according to the website). There are four main areas of activity: 1) the website listed above which is a portal for "data sources, training resources, funding, and relevant, timely news stories," 2) the mostly annual international GIS conference, where First Nations organize and present mapping issues on First Nations terms, 3) publications including a "best practices" series designed to answer website queries as well as help "fill the information vacuum in the field" and another series on cultural mapping and land use and occupancy research coproduced with the Union of B.C. Indian Chiefs, and 4) informal roundtable workshops reflecting common themes which surface on the AMN website as well as direct discussions with First Nations and specialized project-based workshops such as the three-day *Referrals Web-based Geospatial Tool* development workshop, cohosted with the Haida Nation and Lil'wat Nation in September 2007.

2. *American Indian Library Association*: <http://ailanet.org>.

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<sup>218</sup> See importantly TERRY N. TOBIAS, *LIVING PROOF: THE ESSENTIAL DATA-COLLECTION GUIDE FOR INDIGENOUS USE-AND-OCCUPANCY MAP SURVEYS* (2009).

3. *The Ainu Museum*: <http://www.ainu-museum.or.jp/english/english.html>. This website features background about Japan's indigenous Aniu population. Illustrated essays discuss traditional diet, maintenance of sustenance, agriculture, clothing, housing, religion, marriage, and family life.

4. *Aniu of Japan*: <http://ankn.uaf.edu/IEW/ainu.html>. A small collection of annotated links to resources about the Aniu culture. Part of a series on world Indigenous cultures from the Alaska Native Knowledge Network, University of Alaska Fairbanks.

5. *Assembly of First Nations*: <http://www.afn.ca>.

6. *Association of American Indian Affairs*: <https://www.indian-affairs.org>.

7. *At-LA North American Cultural/Ethnic Resources*: <http://www.at-la.com/@la-amer.htm>. General links to American Indian Studies/Canadian First Nation/Native American resources.

8. *Australian Indigenous Peoples: Aboriginal and Torres Strait Islander Inhabitants of Australia*: <http://www.trinity.wa.edu.au/pldiffurc/indig>. An extensive collection of links to websites related to indigenous populations in Australia.

9. *Christensen Fund*: <https://christensenfund.org>.

10. *Cultural Survival*: <https://www.culturalsurvival.org>.

11. *Digital Libraries: Technology and Management of Indigenous Knowledge for Global Access 6th International Conference on Asian Digital Libraries, ICADL 2003, Kuala Lumpur, Malaysia, December 8–12, 2003: Proceedings (Lecture Notes in Computer Science—Volume 2911, 2003, DOI: 10.1007/b94517)*. Documents the proceedings of the conference and includes 68 revised full papers presented together with 15 poster abstracts and 3 invited papers. The papers are organized in topical sections on information retrieval techniques, multimedia digital libraries, data mining and digital libraries, machine architecture and organization, human resources and training, human-computer interaction, digital library infrastructure, building and using digital libraries, knowledge management, intellectual property rights and copyright, e-learning and mobile learning, data storage and retrieval, digital library services, content development, information retrieval and Asian languages, and metadata. What seems relevant to this topic is the treatment of the Digital Divide as experienced by Indigenous professionals in *So Near and Yet So Far* and the rapid convergence of computing, communications and Indigenous content development initiatives in E-learning environments as discussed in *Indigenous Digital Multimedia Content Development for E-learning*.

12. *First Nations Development Institute*: <http://www.firstnations.org>. “Founded in 1980, First Nations Development Institute is a national American Indian-led 501(c)(3) non-profit organization. Through a three-pronged strategy of educating grassroots practitioners, advocating systemic change, and capitalizing Indian communities, First Nations Development Institute is working to restore Native control and culturally-compatible stewardship of the assets they own—be they land,

human potential, cultural heritage, or natural resources—and to establish new assets for ensuring the long-term vitality of Native communities.”

13. *First People Worldwide*: <http://www.firstpeoples.org>. The first U.S.-based global Indigenous Peoples NGO, which makes grants and provides technical assistance and advocacy directly to Indigenous-led development projects. Rebecca Adamson has worked directly with grassroots tribal communities, both domestically and internationally, as an advocate of local tribal issues since 1970. She established the premiere U.S. development institute.

14. *Forest Peoples Programme*: <http://forestpeoples.org>.

15. *Indianz.com*: <http://www.indianz.com>. News, information, and entertainment from a Native American perspective.

16. *Indigenous Australia*: <http://www.dreamtime.net.au>. This site includes links to information regarding storytelling, cultures, and histories of Australian Indigenous Peoples. Features timelines, audio, and video about cultural heritage, spirituality, family, land, and social justice.

17. *Indigenous Peoples Literature*: [http://www.indigenouspeople.net/ipf\\_final.html](http://www.indigenouspeople.net/ipf_final.html). An archive of cultural material by the Indigenous Peoples of the world, ranging from literature and music to prayers and history. Contains a listing of tribes, chiefs, and the complete texts of key documents, such as tribal constitutions.

18. *The Indigenous Portal*: <http://www.indigenousportal.com>. This web interface, or portal, is built, owned written, maintained and for Indigenous people from all over the world with a mission to disseminate reliable online information about Indigenous traditions, values, history, language and aspirations in their own voices. In their own words: “The Indigenous Portal is an outcome of the World Summit on the Information Society (WSIS), [which was] a two-phase United Nations (UN) sponsored series/summit about information and communication. The Geneva Summit in December 2003 laid the foundations with a Declaration of Principles and a plan of action. The Tunis Summit aimed to monitor and evaluate progress on the action plan and devise an agenda that will target goals for achievement by 2015. From these events came the WSIS Declaration and Plan of Action, as well as the Declaration and Plan of Action of the Global Forum of Indigenous Peoples and the Information Society . . . . Together, these documents provide guidance to states, Indigenous peoples, UN agencies, non-governmental organizations, the private sector and academics interested in using new technologies to improve communications and the quality of life for Indigenous peoples around the world.” Divided into eight regions (Africa, Arctic, Asia, Caribbean, the “Eastern Block,”<sup>219</sup> Central and South America, North America and the Pacific), the portal offers information in 5 languages in articles,<sup>220</sup> audio, video and web links.

<sup>219</sup> Eastern and Central Europe, Russian Federation, Central Asia and Transcaucasia.

<sup>220</sup> The articles are further divided into the categories of culture, environment, education, economic development, entertainment, Indigenous knowledge, technology,

19. *International Indian Treaty Council (IITC)*: <http://www.treatycouncil.org>. A site featuring news, action alerts, treaties and related documents, and materials such as prisoners, racism, and human rights. The organization is dedicated to promoting Indigenous “sovereignty and self-determination . . . and the recognition and protection of indigenous rights, treaties, traditional cultures, and sacred lands.”

20. *International Institute for Indigenous Resources Management*: <http://www.iiirm.org>.

21. *International Workgroup for Indigenous Affairs (IWGIA)*: <https://www.iwgia.org/en>.

22. *Island of the Spirits*: <http://www.pbs.org/wgbh/nova/hokkaido>. Website of the 1999 PBS Nova documentary on the Ainu Indigenous Peoples of Japan. Features cover the origins of the Ainu, Ainu legends and beliefs (about animals such as the crane, the bear, and the flying squirrel), and animal migration.

23. *Lannan Foundation*: <https://lannan.org>.

24. *Minority Rights Group International*: <https://minorityrights.org>.

25. *National Congress of American Indians*: <http://www.ncai.org>.

26. *National NAIDOC*: <http://www.naidoc.org.au>. General information on the National Aborigines and Islanders Day. The holiday is actually held throughout Australia during the first full week of July to “celebrate the history, culture, and achievements of Aboriginal and Torres Strait Islander People.”

27. *Native American Resources*: <http://www.cowboy.net/native>. A list of internet resources available. Includes links to locally hosted URLs, Native American organizations, tribal homepages, Indian education and learning resources, government resources, and native art and culture.

28. *Native American Rights Fund National Indian Law Library*: <https://www.narf.org/nill>.

29. *Native Maps*: <http://www.kstrom.net/isk/maps/mapmenu.html>. GIS maps that “window” Native information about Pre-contact Native North America. Active State maps for reservations in MN, WI, MI, CA, AK, ND, SD, NY, AZ (linked to AZ is historical background of Navajo-Hopi Black Mountain land dispute and page of links on this dispute), NM, WA, OR; Canada treaty maps; Canadian Bands-by-provinces, contact info; Material culture maps; Pre-contact housing information.

30. *Native Web*: <http://www.nativeweb.org>. “Information from and about indigenous nations, peoples, and organizations around the world.” Includes an annotated directory of related websites, job listings, and a discussion forum.

31. *Northwest Regional Educational Laboratory: Indian Education Resources*: <http://www.educationnorthwest.org/rural-and-native-education>. Links to general Northwest Native American resources.

32. *Oregon State University, American Indian Initiatives*: [http://oregonstate.edu/dept/indian/indian\\_resources.html](http://oregonstate.edu/dept/indian/indian_resources.html). Links to American

Indian information, American Indian organizations, and news and events throughout Indian Country.

33. *Seventh Generation Fund*: <http://www.7genfund.org>.

34. *Survival International*: [www.survivalinternational.org/tribes/aboriginals](http://www.survivalinternational.org/tribes/aboriginals).

35. *Terralingua*: <https://terralingua.org>.

36. *Traditional Knowledge Digital Library*: <http://www.tkdl.res.in>. Thousands of years' worth of traditional Indian remedies, medicines, cures, and practices have been put on the public domain and, it is hoped, out of the reach of western biotech companies.

37. *Turtle Talk*: <https://turtletalk.wordpress.com>.

38. *Virtual Library—American Indians*: <http://www.hanksville.org/Naresources>. Website providing “information resources to the Native American community . . . . The information is organized, insofar as possible, to make it useful to the Native American community and the education community.”

39. *The World Wide Web Virtual Library: Indigenous Studies*: <http://cwis.org/GML/wwwvirtuallibrary>. A virtual library site directing visitors to sites about native peoples of Africa, Asia, the Middle East, Central and South America, Europe, North America, Melanesia, Polynesia, and Micronesia.

40. *University of Arizona, James E. Rogers College of Law: ArizonaNativeNet*: <http://www.arizonanativenet.com>. ArizonaNativeNet is a virtual university outreach and distance learning telecommunications center devoted to the higher educational needs of Native Nations in Arizona, the United States and the world through the utilization of the worldwide web and knowledge-based and technical resources and expertise. It is a vital resource for Native Nations seeking to strengthen their nationbuilding efforts through telecommunications-based higher education, leadership and management training, and distance learning programs.

41. *University of New Mexico School of Law: Indian Law Resources*: <http://lawschool.unm.edu/indian/resources>. “This resources page provides links to many established Indian law organizations and institutions, as well as links to various on-line Indian law research materials.”

42. *University of Wisconsin American Indian Resources on the Web*: <http://www.uwec.edu/LIBRARY/research/guides/aislinks.html>. Includes general links, gaming, genealogy, health, history, culture, archeology, museums and historical societies, treaty rights/law, and Wisconsin Indian information.

43. *The U.S. Gen Web Project: Native American Resources*: <http://www.rootsweb.ancestry.com/~usgwnar>. General resource list. Includes mailing lists, general resources, state/county projects, and state resources.

## Postscript

This Article is painted with broad brushstrokes, no doubt. Every Indigenous community and society is distinct and has its own story of origination, emergence, and historical challenges to genocide and colonization, and of resistance. All their legacies are nuanced and gnashed by the teeth of non-Native superimposed structures of administration and all forms of globalized intrusions occasioning displacement and migration from customary homelands.

The connection between forced removal and language loss is glaring. Logging that results in an intense change to landscape also supplants an Indigenous vocabulary of the forest and the loss of, for example, a color of “blue,” which is the only known name to (and represented by) that population’s florescent butterfly. Its clear-cut disappearance rests alongside the miner’s canary. “Cooloola,” a cypress pine, commonly known by some Aboriginal Peoples as “kululu” or “kuloloi,” takes its name, some suggest, by the sound of a seabreeze murmuring in dense foliage. Does the sound lose its name too when the forest is no longer?

Palm oil plantations follow the illegal felling of hardwood, murders accompany resistance, Indigenous Peoples become miners, whalers, fishers, always tossed between competition, livelihood, and rites of heritage. Who wears the vestments of authority within an Indigenous community, one must ask? How has traditional authority been disrupted, corrupted?

My questions are not meant as tricks of magic. I’m no magician, nor am I an anthropologist, an ethnographer, or a demographer. I loathe words ending in “ism.” Perhaps, I would want to be named “Big Spoon,” for I stir pots of thoughtful and sometimes contentious stews; the prerogative of a law professor and a litigator. This manuscript is meant solely to provide a structure of ideas where Indigenous Peoples can find a compendium of resources to couple with their own unique knowledges.

The Text requires continual updating, and it calls out for additional written accounts and references. It is meant to be shared as a teaching tool, for advocacy, and nothing more. And, for my final two cents, I hope it inspires Indigenous Peoples to design (and demand) the control of the ‘processes’ of consultation according to their own wisdom. Make the rules.