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## CHAPTER FIVE

### THE DOUBLE LIFE OF INTERNATIONAL LAW: INDIGENOUS PEOPLES AND EXTRACTIVE INDUSTRIES

Now is an explosive time in international law. It is a time in which the common interest of international society is being dramatically restructured as new forces and legal standards shape the way human communities think and act. Of these forces, two are particularly noteworthy: the incorporation of indigenous protections into international law as part of the international human rights movement, and the ever-expanding economic role of transnational enterprises as part of the emergence of global capitalism. Both are known for their revolutionary effect on international law and for their potential to reshape conceptions of domestic governance. This Chapter addresses problems that arise when these forces crash together — too often catastrophically — in the lives of indigenous peoples. In particular, it focuses on the worldwide struggle between indigenous peoples and private sector-based natural-resource development, analyzing and assessing possibilities for reconciling their often alienating and destructive conflict.

The inclusion of indigenous protections within the human rights discourse represents an enormous achievement. Compared to the era of colonial expansion, when international law was either affirmatively involved in or conveniently blind to the oppression of indigenous peoples occurring on almost every continent subject to colonial imperialism, international law today represents one of indigenous peoples' principal weapons against mistreatment flowing from colonial legacies. Today, internationally recognized indigenous legal protections — most fully expressed in the United Nations Declaration on the Rights of Indigenous Peoples<sup>1</sup> (UNDRIP) — are vital to efforts to ensure favorable placement of indigenous priorities on the list of international concerns.

Yet the elaboration of legal protections is not the only revolutionary international legal development affecting indigenous wellbeing; globalization and global capitalism have made transnational enterprises influential international actors in their own right, and increasingly so in indigenous spaces. Transnational enterprises have capitalized on monumental opportunities to invest and appropriate surplus value in multiple jurisdictions simultaneously. The proliferation of such opportunities has been facilitated by lowered barriers to foreign trade and investment and supported by national measures and international legal structures, organizations, and instruments — all propelled by once-

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<sup>1</sup> G.A. Res. 61/295, annex, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) [hereinafter UNDRIP].

consensus notions that market liberalization of all types, including capital market liberalization, is a universally preferred economic policy.<sup>2</sup> Concomitant with and necessary to the rise of transnational enterprises is the continuing growth of treaty protections for international investors that aim to create conditions for business operations to flourish.

The collision between indigenous rights and transnational business activity frequently occurs in the context of natural-resource development. Indigenous peoples are uniquely affected by natural-resource development for at least three interrelated reasons. First, a large proportion of the world's remaining natural resources — including minerals, fresh water, and potential energy sources — are located on indigenous-occupied lands, which means natural-resource extraction increasingly occurs in or near traditional indigenous areas.<sup>3</sup> Second, global demand for natural resources has skyrocketed in recent years, driven especially by the advancing development of non-Western states — particularly China and India.<sup>4</sup> Third, the aggressive establishment of liberal investment regimes and the proliferation of risk-mitigating investment treaties have lowered the costs of global engagement in resource development, enabling transnational enterprises to operate in regions that were previously beyond reach.<sup>5</sup>

The combination of these factors has meant that indigenous peoples are increasingly confronting proposed resource-development projects on their lands — a problematic state of affairs, given that extractive industries are associated with a vast number of rights abuses perpetrated against indigenous peoples across the globe.<sup>6</sup> These abuses encompass, inter alia, violations of substantive rights, such as the right to life (for example, via direct violence resulting in death or environmental degradation), land and resource-development rights (via

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<sup>2</sup> I refer to a once-ascendant global economic vision founded on the notion that markets, liberated from the fetters of government regulation and involvement, are a “self-regulating and self-correcting” instrument to maximize efficiency and economic growth, from which prosperity will “trickle down” to the poor. DAVID BEETHAM, *UNELECTED OLIGARCHY* 5 (2011).

<sup>3</sup> Valentina S. Vadi, *When Cultures Collide: Foreign Direct Investment, Natural Resources, and Indigenous Heritage in International Investment Law*, 42 COLUM. HUM. RTS. L. REV. 797, 836 (2011); Backgrounder, United Nations Permanent Forum on Indigenous Issues: Indigenous Peoples — Lands, Territories and Natural Resources 3 (2007), [http://www.un.org/en/events/indigenousday/pdf/Backgrounder\\_LTNR\\_FINAL.pdf](http://www.un.org/en/events/indigenousday/pdf/Backgrounder_LTNR_FINAL.pdf) [<http://perma.cc/EG7M-QZBQ>].

<sup>4</sup> See Richard Cronin, *Natural Resources and the Development-Environment Dilemma*, in *EXPLOITING NATURAL RESOURCES* 63, 63 (Richard Cronin & Amit Pandya eds., 2009) (describing the “[s]teadily rising global demand for raw materials, industrial inputs, and energy” as a main driver of resource depletion in the Middle East, Southeast Asia, and South Asia); WORLD ECON. FORUM, *THE FUTURE AVAILABILITY OF NATURAL RESOURCES* 21 (2014) (describing economic growth in emerging markets as a major driver of demand for natural resources).

<sup>5</sup> Cronin, *supra* note 4, at 63–64.

<sup>6</sup> See James Anaya (Special Rapporteur on the Rights of Indigenous Peoples), *Extractive Industries Operating Within or Near Indigenous Territories*, ¶¶ 30–55, U.N. Doc. A/HRC/18/35 (July 11, 2011) (summarizing human rights violations caused by extractive operations globally).

forced displacement), cultural rights (via deprivation of land rights, which often undermines traditional belief systems and coherence of community), rights to free expression (via violent repression), and key procedural rights recognized in the UNDRIP, in particular the right to prior consultation regarding — and free, prior, and informed consent to — development activities on indigenous land.<sup>7</sup>

Although the causes of the destructive relationship between extractive industries and indigenous peoples are complex, this Chapter argues that at least one reason extractive industries infringe on indigenous rights is the power imbalance between two international legal regimes, each of which aims to accomplish diverse ends, often by demanding that states take contradictory actions with respect to the same lands and the same peoples. This power imbalance exacerbates already-existing power imbalances between indigenous communities, states, and investors, and affects the state's choice of which regime to privilege in any given scenario. When the issue is understood in this fashion, it becomes clear that improving the plight of indigenous peoples affected by resource-development projects requires a focus on balance or equalization, meant here as an alignment of law designed to structure incentives such that states and investors are more incentivized to find a point of accommodation that would allow both legal regimes to operate in the same space and accomplish their respective purposes without one obliterating the effectiveness of the other. This Chapter argues that one promising way forward in this regard is to lobby developed countries to facilitate the inclusion of indigenous norms into international investment law via treaty language, and to impose an obligation on transnational enterprises to respect such norms as a condition for claiming rights under investment agreements.

Section A provides background on the contemporary place of indigenous peoples and on the nature of transnational enterprises and investor protections in international law. It also fleshes out the international legal divergence sketched above. Section B considers potential reforms, while section C discusses this Chapter's central proposal.

### A. *Indigenous Rights Protection and Global Capitalism*

1. *Contemporary Protections for Indigenous Peoples in International Law.* — Compared to international law as it functioned in the positivist period, today's international law could not be more

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<sup>7</sup> Julian Burger, Directorate-General for External Policies of the Union, *Indigenous Peoples, Extractive Industries and Human Rights*, at 8–14, EXPO/B/DROI/2013/23 (Sept. 18, 2014); see also Anaya, *supra* note 6, ¶¶ 41–47. See generally Comm'n on Human Rights, *Discrimination Against Indigenous Peoples: Transnational Investments and Operations on the Lands of Indigenous Peoples*, U.N. Doc. E/CN.4/Sub.2/1994/40 (June 15, 1994) (detailing detrimental impacts of transnational operations on indigenous peoples in Asia and Africa).

revolutionary with respect to human rights protections for indigenous peoples. As a result of advocacy on the international level in key standard-setting bodies, “[i]ndigenous peoples moved, within a generation, [away] from being ‘the forgotten people of international law.’”<sup>8</sup> Emerging indigenous rights norms have been promulgated through three main processes: “(1) interpretation of existing international law in a way favorable to indigenous peoples’ aspirations; (2) promulgation of new international instruments specifically focused on indigenous peoples’ rights; and (3) successful litigation before international [courts].”<sup>9</sup> The result has been elaboration of a set of rights — now largely memorialized in the UNDRIP — that is unique within international law. While the indigenous rights regime contains protections of various sorts, this Chapter focuses primarily on land and participatory rights — recognizing that violations of other rights are typically derivative of disputes relating to control of land and participation of indigenous peoples in decisionmaking processes that affect them.<sup>10</sup>

Firstly, rights relating to control of land or territory represent perhaps the clearest and most relevant example of the unique correspondence of indigenous rights to the particularities of indigenous worldview, cosmology, colonial history, and current place in various domestic systems. Land rights form the central claim for many indigenous communities,<sup>11</sup> and are among the rights most susceptible to violation during natural-resource development projects.<sup>12</sup> Indigenous rights to land are protected in the UNDRIP by, inter alia, the

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<sup>8</sup> Roderic Pitty & Shannara Smith, *The Indigenous Challenge to Westphalian Sovereignty*, 46 AUSTL. J. POL. SCI. 121, 129 (2011) (quoting Pierre Lepage, *Indigenous Peoples and the Evolution of International Standards: A Short History*, in ABORIGINAL PEOPLES 1, 12 (Marie Léger ed., Arnold Bennett trans., 1994)).

<sup>9</sup> John D. Smelcer, Comment, *Using International Law More Effectively to Secure and Advance Indigenous Peoples’ Rights: Towards Enforcement in U.S. and Australian Domestic Courts*, 15 PAC. RIM L. & POL’Y J. 301, 306 (2006); see also Rep. of the Comm. on the Elimination of Racial Discrimination, U.N. Doc. A/52/18, annex V (1997); Human Rights Comm., 50th Sess., *General Comment* 23, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (Apr. 26, 1994); International Labour Organisation, Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 1650 U.N.T.S. 383 [hereinafter ILO Convention 169]; UNDRIP, *supra* note 1.

<sup>10</sup> See Siegfried Wiessner, *Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples*, 41 VAND. J. TRANSNAT’L L. 1141, 1145 (2008) (“Honoring the land rights of indigenous peoples is the first step toward preservation of their culture. The next step is to respect the structures of decisionmaking within traditional communities — a distant variant of the modern processes of decisionmaking in communities we proudly call ‘democratic.’”).

<sup>11</sup> See ALEXANDRA XANTHAKI, INDIGENOUS RIGHTS AND UNITED NATIONS STANDARDS 237–38 (2007) (describing the importance of land rights and their centrality to claims of many indigenous peoples).

<sup>12</sup> See *id.* at 238 (noting “the negative financial consequences” that recognition of indigenous land rights can visit upon states and transnational corporations, resulting in “their strong opposition to such recognition”).

combination of Articles 25 and 26. Article 25 recognizes the right of indigenous peoples “to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands,”<sup>13</sup> while Article 26 establishes that indigenous peoples have the right to the lands or territories that they have traditionally owned or used, including the right to use, development, and control, and which demands state recognition according to the traditions and land tenure systems of the peoples concerned.<sup>14</sup> These rights are further protected by landmark judgments of the Inter-American Court of Human Rights. For instance, in *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*<sup>15</sup> the court held the right to property under the American Convention on Human Rights to include the communal property of indigenous communities and ordered Nicaragua to delimit, demarcate, and title indigenous property according to indigenous law, values, and mores.<sup>16</sup> This ruling has gone on to become the cornerstone of a doctrinally robust set of indigenous rights protections within the Inter-American system, upon which both the Inter-American Court of Human Rights and the Inter-American Commission of Human Rights have relied in later cases.

At the core of the recognition of indigenous land rights is the acknowledgement that, for many indigenous peoples, territory is more than a physical possession — that “deep connections with particular lands are a constitutive aspect of indigenous cultures.”<sup>17</sup> Land rights thus intersect with cultural rights and with material wellbeing — indigenous cultures and livelihoods often cannot be preserved in locations outside traditionally indigenous territories, and as such “close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival.”<sup>18</sup>

Second, land (and other) rights intersect importantly with a set of participatory rights designed to structure the interaction between state decisionmaking bodies and indigenous communities in ways that require states to attend to indigenous perspectives in pursuing their

<sup>13</sup> UNDRIP, *supra* note 1, art. 25.

<sup>14</sup> See *id.* art. 26, cls. 1–3.

<sup>15</sup> Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001).

<sup>16</sup> See Tara Ward, *The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights Within International Law*, 10 NW. J. INT'L HUM. RTS. 54, 61–62 (2011).

<sup>17</sup> Kristen A. Carpenter & Angela R. Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 CALIF. L. REV. 173, 211 (2014); see also LEE SWEPSTON, 1 THE FOUNDATIONS OF MODERN INTERNATIONAL LAW ON INDIGENOUS AND TRIBAL PEOPLES 230–31 (2015) (describing how preparatory discussions appurtenant to ILO Convention 169 recognized the notion of territories and lands as “closely linked to the idea that indigenous and tribal peoples have a special spiritual relationship with the lands they occupy,” *id.* at 230).

<sup>18</sup> *Awas Tingni*, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 149.

objectives. These participatory rights come in two flavors: (1) consultation, and (2) free, prior, and informed consent (FPIC). On consultation, there appears to be a wide consensus that customary international law at least requires that indigenous peoples be consulted regarding any “development project that is to be undertaken within their lands and territories,”<sup>19</sup> that such consultations must be *informed* in the sense that communities must have complete and precise information on the nature and consequences of the project (including social, health, and environmental risks, to be assessed via impact studies), and that they must be meaningful: that is, conducted in good faith and in the form of a dialogic process, with the aim of securing the consent of the peoples concerned (as opposed to a series of purely formal steps or a single encounter).<sup>20</sup> FPIC is a more controversial and, at least currently, more limited right. It applies only in particular and dire situations — such as (a) development plans or projects that will lead to forced displacement of indigenous peoples from traditional lands; (b) where execution of development plans or extractive operations would prevent indigenous communities from using their lands and other natural resources as necessary for their subsistence; or (c) where storage or disposal of hazardous materials is planned on indigenous-occupied land.<sup>21</sup> The requirement of consultation, and especially of consent in some scenarios, is best understood as an attempt to protect the essential human rights of indigenous communities — including rights to life, cultural identity, and expression — that might otherwise be undermined by resource-development activities.<sup>22</sup>

2. *Transnational Enterprises and Investment Treaties.* — The present influence of transnational enterprises<sup>23</sup> is rooted in key policy

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<sup>19</sup> Ward, *supra* note 16, at 66; see also Inter-American Commission on Human Rights, *Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, 35 AM. INDIAN L. REV. 263, 441 (2011) (“The duty of consultation, consent and participation has special force, regulated in detail by international law, in the realization of development or investment plans or projects or the implementation of extractive concessions in indigenous or tribal territories, whenever such plans, projects or concessions can affect the natural resources found therein.”).

<sup>20</sup> See Inter-American Commission on Human Rights, *supra* note 19, at 437, 442, 456–59 (summarizing international legal sources on this point).

<sup>21</sup> See *id.* at 463.

<sup>22</sup> See *id.* at 462.

<sup>23</sup> Here, “transnational enterprise” (or “multinational enterprise”) refers to “a collection of entities, of whatever legal form, that pursue a common commercial purpose across more than one state, where certain components of the enterprise are in a position to control the actions of other components.” ADAM MCBETH, *INTERNATIONAL ECONOMIC ACTORS AND HUMAN RIGHTS* 247–48 (2010). These entities have home states — which are the state from which an enterprise’s operations are directed or controlled — and host states, a term that refers to all those states in which an enterprise operates apart from its home state. *Id.* Transnational enterprises are formed and maintained via foreign direct investment (FDI) — which refers to a capital transfer from an entity in one country to an entity in another with the purpose of maintaining

changes<sup>24</sup> flowing from the capital market liberalization trend beginning in the 1980s and connected to the perception that a robust flow of FDI foments development. States' efforts to make their domestic markets more attractive to transnational enterprises resulted in an enormous growth in the amount of FDI across developed and developing countries and a concomitant transnationalization of the process of production.<sup>25</sup>

Along with the growth in transnational enterprises has come a corresponding growth in investor protections provided under international law. These protections increasingly have come to represent the cutting edge of international legal evolution as it relates to economic development. Indeed, the number of investment treaties — treaties that “regulate the admission, treatment[,] and expropriation of foreign investment”<sup>26</sup> and secure certain rights to investors<sup>27</sup> — has ballooned to roughly three thousand, including bilateral treaties, regional agreements, and investment protection provisions included in free trade agreements.<sup>28</sup> The tremendous growth of these treaties — which are often highly investor-friendly — is perhaps the strongest evidence of the central role that international private initiative has come to play in advancing economic development.<sup>29</sup>

Yet the growth of the role of transnational capital in economic development — and the concomitant growth in the centrality of investment treaties to processes of development — carries with it important risks. Prior to the rise of modern international economic law, and to the rise of investment treaty regimes in particular, “international law

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“influence and control over assets” in the second state. SRIJANEE BHATTACHARYYA, *ADVOCATES FOR INT’L DEV., LEGAL REGIMES GOVERNING FOREIGN DIRECT INVESTMENT (FDI) IN HOST COUNTRIES* 3 (2012).

<sup>24</sup> See S.L. Reiter & H. Kevin Steensma, *Human Development and Foreign Direct Investment in Developing Countries: The Influence of FDI Policy and Corruption*, 38 *WORLD DEV.* 1678, 1678 (2010); Andrew Sumner, *Foreign Direct Investment in Developing Countries: Have We Reached a Policy ‘Tipping Point’?*, 29 *THIRD WORLD Q.* 239, 244–45 (2008).

<sup>25</sup> See Eric Rugraff et al., *How Have TNCs Changed in the Last 50 years?*, in *TRANSNATIONAL CORPORATIONS AND DEVELOPMENT POLICY* 9, 15 (Eric Rugraff et al. eds., 2009).

<sup>26</sup> SANTIAGO MONTT, *STATE LIABILITY IN INVESTMENT TREATY ARBITRATION* 1 (2009).

<sup>27</sup> See *id.*

<sup>28</sup> *Investment Treaties*, INT’L INST. FOR SUSTAINABLE DEV., <http://www.iisd.org/investment/law/treaties.aspx> [<http://perma.cc/CD3Q-ACX5>].

<sup>29</sup> Compare NICO SCHRIJVER, *SOVEREIGNTY OVER NATURAL RESOURCES* 3 (1997) (describing how since the 1950s “[the principle of permanent sovereignty over natural resources] was advocated by developing countries in an effort . . . to provide newly independent states with a legal shield against infringement of their economic sovereignty as a result of [contract or property] rights claimed by other states or foreign companies”), with Rudolf Dolzer, *The Impact of International Investment Treaties on Domestic Administrative Law*, 37 *N.Y.U. J. INT’L L. & POL.* 953, 955 (2004) (“The dominant debate in capitals of the third world . . . [is] about competition for foreign capital and technology, and thus about the necessary ingredients of a national investment policy which will serve to attract the foreign investor.”).

[had never] enjoyed so much authority over the regulatory state on a permanent basis and without the previous intervention of domestic courts.”<sup>30</sup> The vast majority of investment treaties do not attend to the social impacts that implementation of their provisions may visit upon local populations — by their terms, they “address the treatment of foreign investors alone and are inherently indifferent to issues of the legal system that relate to the nationals of the host state.”<sup>31</sup> Moreover, the heart of the constraint on sovereignty that investment treaties represent — the threat and reality of dispute settlement — occurs on terms that arguably favor the interests of foreign investors over the interests of host states and the nationals thereof, in that (1) the ambiguous nature of what constitutes an investment and an investor under the treaties means that nearly all economic activities of the foreign investor and any aspect of the host state’s legal system that in some way affects these economic activities could be subjected to international review,<sup>32</sup> and (2) the provisions of investment treaties to which states must adhere are less a set of clear rules than a set of abstract and open-ended standards that require extensive interpretation,<sup>33</sup> inviting arbitrators<sup>34</sup> to construct new norms of state behavior in a manner far removed from the domestic political process.

3. *Indigenous Peoples and Extractive Industries — The Interface.* — The interaction between indigenous peoples and extractive industries is structured by an immensely complex and diverse web of factors affecting governance (including issues of official competence, corruption, or goodwill), actors, and international legal protections. All the same, this Chapter submits that one important part of the conflict is captured by attending to the power imbalances between the operation of indigenous rights norms and international investment law, each of which has adopted the same broad *means* as the other, but both of which have directed those means to the accomplishment of frequently divergent *ends*. The word *means* in this context refers to reliance on internationally concluded and governed instruments to constrain particular domestic exercises of sovereign authority in order to restructure and regularize domestic relationships between particular actors. This description broadly captures the role of both indigenous rights norms and the investor protections upon

<sup>30</sup> MONTT, *supra* note 26, at 3.

<sup>31</sup> Dolzer, *supra* note 29, at 954.

<sup>32</sup> See *id.* at 956.

<sup>33</sup> MONTT, *supra* note 26, at 3 (“[I]nvestment treaties do not establish concrete *rules*, but only the most abstract and open-ended *standards*.”).

<sup>34</sup> Note that because arbitrators operate in a manner far removed from the domestic political process and render decisions that are unreviewable by domestic courts, they are in effect the primary decisionmakers whose opinions will bind a state’s political and legal branches.

which transnational enterprises rely to conduct their operations. The word *ends* in this context refers to the objectives associated with each legal regime — protection of indigenous rights versus protection of investors.

In broad outline, legal regimes facilitating the protection of indigenous peoples and those facilitating the protection of investors do not conflict out of necessity.<sup>35</sup> Indeed, in the vast majority of cases, indigenous protections and protection of investors have nothing to do with one another: they arise out of different historical contexts, govern different issues, and perform different functions. Yet the facts of the world — the demand of advancing development for natural resources, the increased rate of operation of transnational enterprises profiting through exploitation of those resources, and the reality that those resources exist on or under indigenous-occupied territory — have meant that these regimes have found applicability to the same situations, and, contrary to the assertions of some,<sup>36</sup> there does appear to be an inherent tension of sorts between them. Protection of investors requires states to act to remove barriers to investment, and to avoid erecting new ones that undermine the value of an investment; protection of indigenous peoples requires the erection of barriers that, if faithfully implemented, could undermine or destroy that value by preventing meaningful resource exploitation. While this tension need not resolve itself destructively in every particular situation as a *necessary* consequence, the incentive structure surrounding this tension makes the subordination of indigenous rights a frequent and foreseeable outcome of conflict.<sup>37</sup> This is so for several reasons.

When such conflicts occur, states have an incentive to favor the interests of transnational enterprises where the activities of those enterprises are viewed as necessary to long-term development or short-term revenue flows. International economic trends supported by an international economic legal architecture are successful in reshaping

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<sup>35</sup> See MCBETH, *supra* note 23, at 16 (describing how international economic law and international human rights contain the potential for both harmony and conflict).

<sup>36</sup> See, e.g., Ben Juratowitch, *Resolution of Disputes Involving the Rights of Indigenous Peoples and Extraction of Natural Resources by Foreign Investors*, 108 AM. SOC'Y INT'L L. PROC. 5, 6 (2014) (“[T]here is no inherent tension between the different applicable rules of international law. Those rules are expressed in broad terms. Tensions arise in the specific context of a particular project for the extraction of natural resources in a particular place, under a particular regulatory and contractual framework, and involving particular . . . groups with their own characteristics and motivations.”).

<sup>37</sup> Cf. Karen E. Bravo, *Balancing Indigenous Rights to Land and the Demands of Economic Development: Lessons from the United States and Australia*, 30 COLUM. J.L. & SOC. PROBS. 529, 532 (1997) (“In order to foster economic development, developing countries need access to the lands and natural resources that lie within their territories. However, where these resources and lands lie within the territories of indigenous peoples, conflicts arise and governments are confronted with choosing between protecting indigenous land policies and pursuing development.”).

incentives because (1) states are politically committed to economic development and/or exploitation of natural resources to enhance the prosperity of the state as a whole, and (2) the operations of transnational enterprises are perceived to be necessary to this goal.<sup>38</sup> As a consequence, and especially in situations where the indigenous group whose rights are being threatened is not well-organized and active in domestic politics,<sup>39</sup> the state itself has a strong incentive to favor the interests of transnational enterprises, and may *itself* be complicit or active in committing violations alongside that enterprise.<sup>40</sup> Meanwhile, by assiduously ensuring respect for indigenous rights, the state runs the risk of reducing its competitiveness by signaling to other investors that resource-development activity within its borders is likely to be complicated by robust indigenous protections<sup>41</sup> — hardly an attractive choice for a development-minded state to make.

Secondly, the immense imbalance of enforcement capacity between international economic legal requirements and indigenous rights requirements cements states' tendency to favor the interests of transnational enterprises over indigenous rights. State-created or sponsored obstacles to foreign investment are likely to be swiftly and consistently challenged via arbitration,<sup>42</sup> and in a treaty based on markedly pro-investor standards, a substantial award against the state is likely as

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<sup>38</sup> See Lillian Aponte Miranda, *The Hybrid State-Corporate Enterprise and Violations of Indigenous Land Rights: Theorizing Corporate Responsibility and Accountability Under International Law*, 11 LEWIS & CLARK L. REV. 135, 155 (2007) ("The government seeks the primarily economic benefits to its economy produced by foreign investment upon such lands and ultimately possesses [a] . . . significant economic stake in the [extraction of resources or large-scale development project]."); Uche Ewelukwa Ofodile, *Africa-China Bilateral Investment Treaties: A Critique*, 35 MICH. J. INT'L L. 131, 139 (2013) (describing private foreign investment as "very important" for developing countries, insofar as it has potential to bring technology transfer, an enhanced tax base, new revenue opportunities, and reduced dependence on foreign aid and external debt).

<sup>39</sup> Conversely, there is evidence that where indigenous peoples are "effectively organized for collective action," and so are more likely to be involved in decisionmaking processes, transnational enterprise performance improves. See Comm'n on Human Rights, *Transnational Investments and Operations on the Lands of Indigenous Peoples*, ¶¶ 20–21, U.N. Doc. E/CN.4/Sub.2/1994/40 (1994).

<sup>40</sup> Miranda, *supra* note 38, at 154–56 (detailing how states and transnational enterprises are often involved in collaborative enterprises whose operations infringe upon indigenous rights).

<sup>41</sup> Cf. James D. Fry, *International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity*, 18 DUKE J. COMP. & INT'L L. 77, 107–08 (2007) (noting that states only infrequently raise human rights arguments as defenses in international arbitrations, likely because they are incentivized "to avoid the negative repercussions that could result from investors . . . deciding to invest in other states that do not place human rights obligations over the interests of investors," *id.* at 108).

<sup>42</sup> See *The Arbitration Game*, THE ECONOMIST (Oct. 11, 2014), <http://www.economist.com/news/finance-and-economics/21623756-governments-are-souring-treaties-protect-foreign-investors-arbitration> [<http://perma.cc/ZF27-5WEK>] (discussing the upward trend in investor-state dispute settlement cases and the potential for immense awards, sometimes ranging in the billions of dollars).

well.<sup>43</sup> Meanwhile, indigenous rights are the subject of much more variable enforcement — the marginal status of many indigenous communities increases the difficulty of articulating legal claims, and even then obligations cannot be squarely attached to individual enterprises. Instead, indigenous groups must fight an uphill battle to obtain evidence of state involvement.<sup>44</sup> Even cases pursued in the Inter-American human rights system — widely perceived to be the most progressive in terms of recognition and enforcement of indigenous rights norms — are subject to delays caused by the consistent deluge of claims and scarce resources. This imbalance is especially noteworthy because extractive industries represent possibly the most litigious group of transnational enterprises — one report indicates that over one quarter of the cases brought to the International Centre for Settlement of Investment Disputes (ICSID) involved mining, oil, and gas companies, by far the single largest proportion of any economic sector.<sup>45</sup>

The result of these factors is that indigenous protections are often flouted in the resource-development context, even where those protections are purportedly strongest. Indeed, the factors identified above appear broadly descriptive of the practical realities of indigenous peoples facing resource-development projects in states across the globe. Of the many candidate struggles that might exemplify this conflict, this Chapter will broadly describe just a few.

(a) *Ecuador*. — The experience of indigenous peoples in Ecuador is especially illuminating. Ecuador has ratified ILO Convention 169<sup>46</sup> and, in response to sustained indigenous protest, has incorporated aspects of indigenous protections into its constitutional and statutory law in relation to preservation of culture and political organization, and (in 2008) the collective right of prior consultation where resource development is liable to affect indigenous communities.<sup>47</sup>

Yet the seeds of conflict were already sown. Ecuador's oil boom began in the 1960s with Texaco's famed discovery of oil reserves in a section of the Amazon.<sup>48</sup> The resulting extractive operation — alleged, inter alia, to have generated more than 3.2 million gallons of waste

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<sup>43</sup> See *id.*

<sup>44</sup> The UNDRIP and other human rights instruments impose obligations only on sovereign states. This means that under current law any liability under these instruments for the activities of transnational enterprises must be imposed in relation to a *state* duty.

<sup>45</sup> INT'L CTR. FOR SETTLEMENT OF INV. DISPUTES, THE ICSID CASELOAD — STATISTICS 12 (2015), [https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202015-2%20\(English\).pdf](https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202015-2%20(English).pdf) [http://perma.cc/T6M2-43FU].

<sup>46</sup> *Ratifications for Ecuador*, INT'L LABOUR ORG., [http://www.ilo.org/dyn/normlex/en/?p=1000:11200:0::NO:11200:P11200\\_COUNTRY\\_ID:102616](http://www.ilo.org/dyn/normlex/en/?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102616) [http://perma.cc/5MMS-LP4R].

<sup>47</sup> See PATRICIA I. VÁSQUEZ, OIL SPARKS IN THE AMAZON 40 (2014).

<sup>48</sup> See Maxi Lyons, *A Case Study in Multinational Corporate Accountability: Ecuador's Indigenous Peoples Struggle for Redress*, 32 DENV. J. INT'L L. & POL'Y 701, 703 (2004).

daily and to have leaked up to 16.8 million gallons of crude into the Amazon River, all without any prior treatment<sup>49</sup> — has been the subject of one of the most complex examples of transnational litigation in history, propelled by indigenous communities who claim that pervasive environmental degradation and adverse health effects from these operations have destroyed their lives and livelihoods and resulted in their displacement from traditionally occupied territories.<sup>50</sup> Since the 1960s, the operations of extractive industries of various sorts, including the oil and mining sectors, have played an increasingly large role in the state's economic structure.<sup>51</sup> Meanwhile, despite the appearance of formal protections for indigenous peoples, domestic legislation has never properly incorporated meaningful prior consultation.<sup>52</sup>

The incentive structure reviewed above is cemented by Ecuador's integration within networks of investor protection. Ecuador is party to a wide array of investment agreements with developed and developing countries alike, and is no stranger to the sometimes dramatic consequences that investment arbitration can visit upon a state that fails to adhere to an agreement's strictures.<sup>53</sup> In one recent arbitration, Chevron received an award based on Ecuador's failure to stymie the attempts of indigenous peoples to seek judicial redress for violations allegedly perpetrated by Texaco's operations in Ecuador.<sup>54</sup> According to commentary, the arbitral tribunal's willingness to extend itself so far into domestic arrangements to interfere with the right of third parties to seek redress in the domestic courts of a state party is unprecedented in investment-treaty arbitration.<sup>55</sup> Without commenting on

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<sup>49</sup> *Id.* at 704.

<sup>50</sup> *See id.* at 703–06.

<sup>51</sup> *See* JUNE S. BEITTEL, CONG. RESEARCH SERV., R43135, ECUADOR: POLITICAL AND ECONOMIC CONDITIONS AND U.S. RELATIONS 4–5 (2013). *See generally* ECUADORIAN ECUMENICAL COMM'N FOR HUMAN RIGHTS, LARGE-SCALE MINING IN ECUADOR AND HUMAN RIGHTS ABUSES (2010) (describing Ecuador's national plan to expand mining operations by attracting foreign investment via concessions in particular areas).

<sup>52</sup> *See* DUE PROCESS OF LAW FOUND., THE RIGHT OF INDIGENOUS PEOPLES TO PRIOR CONSULTATION: THE SITUATION IN BOLIVIA, COLOMBIA, ECUADOR, AND PERU 10–11 (2011); Ángela Meléndez, *Ecuador's Indigenous People Still Waiting to Be Consulted*, INTER PRESS SERV. (May 2, 2013), <http://www.ipsnews.net/2013/05/ecuadors-indigenous-people-still-waiting-to-be-consulted> [<http://perma.cc/8H7N-7BYW>].

<sup>53</sup> Ecuador was one of the parties in an arbitration that resulted in a \$1.76 billion damages award, the largest ever under the ICSID. Damon Vis-Dunbar, *US\$1.76 Billion Dollar Award Levied Against Ecuador in Dispute with Occidental; Tribunal Split over Damages*, INV. TREATY NEWS (Jan. 14, 2013), <https://www.iisd.org/itn/2013/01/14/awards-and-decisions-10> [<http://perma.cc/S74W-L2EJ>] (noting that case involved largest ever ICSID award).

<sup>54</sup> *See* Lise Johnson, *Case Note: How Chevron v. Ecuador Is Pushing the Boundaries of Arbitral Authority*, INV. TREATY NEWS (Apr. 13, 2012), <https://www.iisd.org/itn/2012/04/13/case-note-how-chevron-v-ecuador-is-pushing-the-boundaries-of-arbitral-authority> [<http://perma.cc/TQ8X-MKBL>].

<sup>55</sup> *See id.*

the correctness of the tribunal's interpretation of the bilateral investment treaty (BIT) involved, the very existence of a BIT susceptible of this interpretation cannot but help cement a state's incentives to favor the rights of investors over indigenous persons — as it directly places investor prerogatives into conflict with the ability of indigenous peoples to seek redress for violations of protected rights.

(b) *Colombia.* — The indigenous struggle in Colombia is particularly indicative of the conflict between transnational natural-resource development and indigenous rights. Colombia is one of the states with the strongest formal legal protections for indigenous peoples. Over a decade before the UNDRIP was finalized, Colombia had already ratified ILO Convention 169,<sup>56</sup> with its statement of the obligation to consult with indigenous communities, and had accorded constitutional status to some rights of self-governance and control over indigenous territory in the 1991 Constitution.<sup>57</sup> The 1991 Constitution also recognizes the dangers of natural-resource extraction for indigenous peoples: it ensures that extraction is to be performed “without impairing the cultural, social, and economic integrity” of indigenous communities and that “the government shall encourage the participation of the representatives” of indigenous communities in decisionmaking respecting resource exploitation.<sup>58</sup>

Yet at the same time that these protections were being developed, the seeds of a conflicting regime were already taking root. The development of indigenous rights as part of the 1991 Constitution occurred in parallel with the adoption of outward-looking development strategies and widespread economic liberalization programs designed to attract foreign investment.<sup>59</sup> Undergirded by a domestic commitment to national development and prompted by the reality of debt obligations, natural-resource exploitation — particularly of petroleum — became a key source of potential revenue.<sup>60</sup> Conflict soon resulted. In 1992 the Colombian government granted Occidental Petroleum Company (OXY) the right to engage in exploratory activities on U'wa-occupied lands,<sup>61</sup> and in 1995, granted that company an exploratory license, all

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<sup>56</sup> *Ratifications for Colombia*, INT'L LABOUR ORG., [http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200\\_COUNTRY\\_ID:102595](http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102595) [<http://perma.cc/T5UH-J36N>].

<sup>57</sup> See CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 330, translated in *Colombia's Constitution of 1991 with Amendments Through 2013*, CONSTITUTE (Jan. 4, 2016, 8:28 PM), [https://www.constituteproject.org/constitution/Colombia\\_2013.pdf?lang=en](https://www.constituteproject.org/constitution/Colombia_2013.pdf?lang=en) [<http://perma.cc/W29U-FCGG>].

<sup>58</sup> *Id.*

<sup>59</sup> See Leslie Wirpsa, *Oil Exploitation and Indigenous Rights: Global Regime Network Conflict in the Andes 128* (Dec. 2004) (unpublished Ph.D. dissertation, University of Southern California) (on file with author).

<sup>60</sup> See *id.* at 128–29.

<sup>61</sup> See *id.* at 158.

in the context of inadequate, half-hearted consultation.<sup>62</sup> The resulting legal battle produced two contradictory high court rulings, as well as beatings, threats, and evictions by Colombian military and police — all of which led the U'wa to threaten to commit mass suicide.<sup>63</sup> Although OXY pulled out of Colombia in 2002, disregard of prior consultation remains rampant; sources indicate that a very small number of the environmental permits awarded to enterprises are done so after adequate prior consultation, and in the case of mining, only about five such consultations were recorded as of 2011.<sup>64</sup> Importantly, these failings come as Colombia has taken affirmative steps to integrate itself within the network of legal protections afforded to transnational investors by concluding BITs and entering into free trade agreements that include investor-protection provisions.<sup>65</sup> While Colombia has not yet been involved in any reported arbitrations under these agreements, reports indicate that the threat of such a possibility has triggered a significant government-led risk management response.<sup>66</sup> Moreover, at least one scholar has already pointed to evidence of foreign investors threatening arbitration to pressure the government away from particular legal or policy choices.<sup>67</sup> Given the continued centrality of resource-development projects to the country's economic structure, and given the continued dependence on foreign capital to facilitate these projects, it is no surprise that indigenous groups and indigenous rights continue to be under pressure.<sup>68</sup>

### B. *Evaluating Proposals for Reform*

Recognizing that the world of transnational business demands investor protection as a practical matter, and that the historic plight of indigenous peoples can no longer be ignored as a moral matter, the

<sup>62</sup> See *id.* at 161–73.

<sup>63</sup> David Hill, *Will the U'was Be Forced to Threaten to Commit Mass Suicide Again?*, THE GUARDIAN (June 17, 2014, 11:57 AM), <http://www.theguardian.com/environment/andes-to-the-amazon/2014/jun/17/will-uwas-forced-threaten-commit-mass-suicide-again> [http://perma.cc/TPD4-S6SE].

<sup>64</sup> See Susan Abad, *Political Will to Apply Consultation Is Lacking*, LATINAMERICA PRESS (June 24, 2011), <http://www.latinamericapress.org/articles.asp?art=6407> [http://perma.cc/FQ98-LKJK].

<sup>65</sup> OECD, OECD INVESTMENT POLICY REVIEWS: COLOMBIA 2012, at 14–15 (2012).

<sup>66</sup> See SILVIA CONSTAIN, U.S. AGENCY FOR INT'L DEV., INVESTOR-STATE DISPUTE PREVENTION STRATEGIES 13–19 (2013).

<sup>67</sup> See JAMES ROCHLIN, PROFITS, SECURITY, AND HUMAN RIGHTS IN DEVELOPING COUNTRIES 155 (2015).

<sup>68</sup> See Rodolfo Stavenhagen (Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples), *Human Rights and Indigenous Issues*, ¶¶ 37–43, U.N. Doc. E/CN.4/2003/90 (2003) (detailing threats facing indigenous peoples in Colombia, including dam construction, oil drilling, road building, and logging, all by private companies granted licenses in disregard of consultation requirements).

question becomes how to fashion a point of accommodation that allows for the coexistence of both investor protections and indigenous-rights protections, and for the realization of their promised benefits. This section addresses that question. It begins by commenting on a number of reform options already put forth in the scholarly literature, before advocating for a novel equalization approach, which this Chapter considers to be an essential element of any reform proposal.

1. *Incorporation of the Rights Recognized in the UNDRIP into a Binding Instrument.* — At least two meaningful benefits might flow from transforming the UNDRIP from a political commitment into a binding legal one. First, rendering the UNDRIP a binding instrument (and creating a dedicated supervisory structure) might narrow the implementation gap that often afflicts broad rights-based instruments. It could accomplish this by (1) establishing a more fair and just international consensus on how commitments to indigenous rights ought to weigh against the non-indigenous public interest,<sup>69</sup> and (2) making it more difficult for states to pick and choose which aspects of indigenous rights to protect.<sup>70</sup> Second, rendering the UNDRIP binding would equalize the *formal character* of the norms at issue. This would mean that when states are considering their obligations as they relate to a potential natural-resource-development project, any conflict that would arise would be between obligations imposed by two *binding* agreements rather than between a binding agreement and a political commitment. The assumption underlying this strain of argument is that *equalizing the status of the norms* would somehow raise the cost of violating the indigenous rights norm, which might in turn affect the political calculus that currently surrounds natural-resource-development initiatives.

However, insofar as this reform does not address the conflict between the divergent regimes that impinge on state sovereignty, it likely will not stymie the destructive trends herein reviewed. A binding UNDRIP would not do enough to equalize the de facto power imbalance between indigenous-rights regimes and international investment law — meaning the perverse incentives identified in section A.3 would not be abated. Moreover, there is no indication that the binding character of the norms alone alters incentives in the direction of

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<sup>69</sup> See Megan Davis, *To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On*, 19 AUSTL. INT'L L.J. 17, 29 (2012) (noting the argument that the present consensus on balancing indigenous rights is set “at the [p]oint that any conflict is usually resolved in favour of the non-Indigenous public interest”).

<sup>70</sup> See, e.g., Nehla Basawaia, *Status of Indigenous Rights in Fiji*, 10 ST. THOMAS L. REV. 197, 209 (1997) (positing that for the (then-draft) declaration to go beyond a document representing the aspirations of indigenous peoples, “an international convention or treaty . . . is required to ensure the implementation of the principles and standards contained in [the declaration]”).

compliance. Indigenous rights norms have obtained binding status in a number of national jurisdictions and through interpretation of binding international agreements;<sup>71</sup> yet development imperatives continue to trump indigenous rights norms regularly, even in countries that have already incorporated the UNDRIP's protections or something similar into binding domestic law.<sup>72</sup> This experience suggests that any movement toward the conclusion of a binding agreement will need to be coupled with further reforms, including one or more targeting the equalization of *power* specifically.

2. *Reliance on Regional Human Rights Systems to Adjudicate and Enforce Indigenous Rights.* — From the outset, reliance on regional human rights systems can only be one part of a larger complex of reform efforts. First, the areas where the most violations occur often lack regional systems capable of rendering binding judgments. For instance, Southeast Asia sees many violations but lacks a regional system to meaningfully investigate or adjudicate them.<sup>73</sup> And even where there is a system in place, such as in the Americas, states vary significantly in their willingness to accept the competence of courts to issue binding judgments.<sup>74</sup> Moreover, as a relatively young set of court systems within a relatively young legal regime, human rights courts also face difficulties securing compliance with their judgments. The fact that these courts operate at the edge of

<sup>71</sup> See *supra* section A, pp. 1757–68.

<sup>72</sup> See 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, 669 (2012) (“[E]ven if a country enacts new laws . . . to implement UNDRIP, there is no reason to expect that the enforcement of those new laws . . . will be any more effective or consistent than that of preexisting indigenous-rights laws — which . . . has often been problematic.”).

<sup>73</sup> The Americas, Europe, and Africa all have regional human rights systems with investigative and adjudicative capabilities. See *Regional Systems*, INT'L JUSTICE RES. CTR., <http://www.ijrcenter.org/regional> [<http://perma.cc/L6AM-KN8U>]. Only recently have intergovernmental organizations charged with *monitoring* allegations of human rights abuses begun operating in the Middle East and in Southeast Asia. See *Asia*, INT'L JUSTICE RES. CTR., <http://www.ijrcenter.org/regional/asia> [<http://perma.cc/WSY4-L4AZ>]; *Middle East and North Africa*, INT'L JUSTICE RES. CTR., <http://www.ijrcenter.org/regional/middle-east-and-north-africa> [<http://perma.cc/XR4N-G6T7>].

<sup>74</sup> While a striking forty-seven states have accepted the competence of the European Court of Human Rights to directly hear cases filed against the state by individuals, *European Court of Human Rights*, INT'L JUST. RES. CTR., <http://www.ijrcenter.org/european-court-of-human-rights> [<http://perma.cc/BT9M-BGTD>], only twenty states have accepted the competence of the Inter-American Court to hear complaints against them, *Inter-American Human Rights System*, INT'L JUST. RES. CTR., [http://www.ijrcenter.org/regional/inter-american-system/#Inter-American\\_Court\\_of\\_Human\\_Rights](http://www.ijrcenter.org/regional/inter-american-system/#Inter-American_Court_of_Human_Rights) [<http://perma.cc/4BXZ-M2A7>], and only twenty-seven states have accepted the competence of the African Court of Human Rights at all, with just seven accepting petitions directly from individuals, *African Human Rights System*, INT'L JUST. RES. CTR., <http://www.ijrcenter.org/regional/african> [<http://perma.cc/67PK-HZYM>]. Consider also that the United States and Canada host sizable indigenous populations, yet neither has accepted the competence of the Inter-American Court. See *Inter-American Human Rights System*, *supra*.

political acceptability further exacerbates this problem.<sup>75</sup> Because states often have overriding practical and political reasons to facilitate natural-resource-development projects within their territory,<sup>76</sup> judgments relating to these carry a substantial risk of controversy.

The experience of indigenous communities protesting the construction of the Belo Monte Dam on the Xingu River in Brazil provides some anecdotal support for this contention. Construction of the Belo Monte dam will likely impact over a dozen local tribes inhabiting the river basin.<sup>77</sup> While construction of the dam itself will cause significant environmental degradation, further degradation and social disruption will accompany the influx of thousands of migrants, including construction workers, suppliers, security guards, and prostitutes, all of whom require basic necessities like homes, food, water, electricity, and roads.<sup>78</sup> Indigenous communities petitioned the Inter-American Commission on Human Rights, alleging violations of indigenous rights (including FPIC and rights to consultation both in the UNDRIP and in other instruments).<sup>79</sup> Originally, the Commission issued precautionary measures, demanding that Brazil halt the dam's construction and conduct consultation proceedings pursuant to its international obligations.<sup>80</sup> Yet after President Dilma Rousseff denounced the decision, suspended payment of Brazil's dues to the organization, and recalled Brazil's ambassador to the Organization of American States,<sup>81</sup> the Commission modified its order in a conciliatory direction; substituting the previously strong and unambiguous command that Brazil halt construction of the dam and engage in consultation with indigenous peoples with a bland statement that the parties' debate over prior consultation and informed consent "ha[d] turned into a discussion on the merits of the matter, which goes beyond the scope of precautionary measures."<sup>82</sup> The Inter-American system has raised no further objections to the dam's construction.

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<sup>75</sup> It is important to separate this notion from the question of legal authority. Legal authority and political acceptability sometimes diverge, and a court might be in possession of the legal authority to adjudicate an issue although the prospect of that adjudication is politically unpalatable.

<sup>76</sup> See *supra* section A.3, pp. 1762–68.

<sup>77</sup> Eve Z. Bratman, *Brazil's Ambivalent Challenge to Global Environmental Norms*, in *BRAZIL ON THE GLOBAL STAGE* 95, 111 (Oliver Stuenkel & Matthew M. Taylor eds., 2015).

<sup>78</sup> Jonathan Watts, *Belo Monte, Brazil: The Tribes Living in the Shadow of a Megadam*, *THE GUARDIAN* (Dec. 16, 2014, 3:00 PM), <http://www.theguardian.com/environment/2014/dec/16/belo-monte-brazil-tribes-living-in-shadow-megadam> [<http://perma.cc/8HLR-MH8B>].

<sup>79</sup> Bratman, *supra* note 77, at 112.

<sup>80</sup> Inter-Am. Comm'n on Human Rights, *PM 382/10 — Indigenous Communities of the Xingu River Basin, Pará, Brazil, Precautionary Measures*, *ORG. AM. STATES*, <http://www.oas.org/en/iachr/indigenous/protection/precautionary.asp#382/10> [<http://perma.cc/HWA5-24SG>].

<sup>81</sup> Bratman, *supra* note 77, at 112.

<sup>82</sup> Inter-Am. Comm'n on Human Rights, *supra* note 80; see also Bratman, *supra* note 77, at 112.

Strengthening regional systems, though difficult, is an important part of the solution. But strength alone is not enough. Something more must be done to align the purposes of, and incentives at play in the gulf between, international investment law and indigenous rights.

3. *Creating a Dedicated Tribunal Empowered to Adjudicate Violations of Indigenous Rights and to Hold Transnational Enterprises Directly Accountable.* — The establishment of a dedicated tribunal to adjudicate claims arising from violations of indigenous rights (and human rights more generally) seems an obvious solution. Indeed, there is at least one prominent proposal on the subject, which aims to establish a tribunal authorized to adjudicate general human rights-based claims according to arbitration principles.<sup>83</sup> In theory, such a tribunal could close the access-to-justice gap created by (1) home and host states' unwillingness to hear or responsibly adjudicate claims and (2) the difficulty of attaching meaningful liability via international tribunals. Since the basis in arbitration would allow for obligations to be imposed directly on transnational enterprises, state involvement would not need to be shown to trigger a violation. Further still, the availability of judgments and the well-developed international rules for enforcing arbitral awards would afford indigenous peoples a remedy.

Yet however obvious this solution seems in theory, many political obstacles obstruct its realization in fact.<sup>84</sup> Basing the tribunal on principles of arbitration imports a corollary need for consent of the parties to the dispute. The authors of the L4BB proposal suggest that this is “a relatively simple matter” resolved by encouraging parties with leverage (such as lenders and home-country investors) to demand inclusion of the relevant provisions in their contracts with transnational enterprises.<sup>85</sup> Others feel differently,<sup>86</sup> and it is difficult to see why those who presently invest in transnational enterprises involved in violations would suddenly demand such provisions. Of course, without a wide range of consenting enterprises, the tribunal would lack the necessary coverage to significantly alter incentive structures for enterprises or for states. As a secondary matter, there is presently nothing in the L4BB proposal ensuring jurisdiction over indigenous rights in particular. The purpose of having a dedicated rights regime specific to the needs

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<sup>83</sup> Lawyers for Better Business (L4BB) is currently sponsoring a team of international lawyers and human rights advocates to develop the proposal. See CLAES CRONSTEDT & ROBERT C. THOMPSON, AN INTERNATIONAL ARBITRATION TRIBUNAL ON BUSINESS AND HUMAN RIGHTS 1–3 (2015), <http://www.l4bb.org/news/TribunalV5B.pdf> [<http://perma.cc/D2HU-6DRL>].

<sup>84</sup> MCBETH, *supra* note 23, at 320–21.

<sup>85</sup> CRONSTEDT & THOMPSON, *supra* note 83, at 11.

<sup>86</sup> Hilary Stauffer, *Access to Remedy: An International Tribunal for Business and Human Rights?*, LSE HUM. RTS. (Oct. 8, 2014), <http://blogs.lse.ac.uk/humanrights/2014/10/08/access-to-remedy-an-international-tribunal-for-business-and-human-rights> [<http://perma.cc/B3NF-RZS9>] (suggesting the proposal's “rosy outlook” might be “overly optimistic”).

of indigenous peoples is that the general human rights regime is conceptually inadequate to accommodate their particular needs. If the establishment of a tribunal is to have an appropriately protective impact in the indigenous context, then it should be clearly empowered to address specifically indigenous needs.

*C. Equalizing Indigenous Rights and International Investment Law by Inclusion of Rights-Related Obligations in Investment Treaties*

So far, this Chapter has argued that (1) power differentials between international indigenous protections and international investment law play a key role in the disregard of indigenous rights protections, and (2) for various theoretical and practical reasons, many of the solutions thus far contemplated are not in a position to address these power imbalances. The logical next step is to suggest a means of reform that *can* address them. In the author's view, the presence of an observable and detrimental imbalance demands a balancing mechanism — a way to equalize indigenous rights and international investment law such that states and investors are more incentivized to resolve conflicts arising between these regimes during natural-resource exploitation via peaceful accommodation, as opposed to one-sided dominance. This section argues that reformers should pursue this goal through the inclusion of new language in investment treaties. It first describes a two-part proposed reform and then defends that reform's theoretical desirability and practical plausibility.

*1. Contours of the Equalization Approach.*

*(a) Including Indigenous Rights as a Condition Precedent.* —

For the first half of the two-part proposal, the author recommends the inclusion of express language in the relevant investment agreement imposing an obligation on investors to comply with a minimum level of indigenous rights requirements as a condition precedent for claiming rights afforded under the treaty. Should a dispute arise under the terms of the treaty for which the transnational enterprise seeks dispute settlement, that enterprise would bear the burden of showing (when relevant) that in the conduct of its operations inside the relevant country it complied with a minimum level of indigenous rights requirements. If the arbitral tribunal were to judge that the enterprise failed to comply with this minimum level, the dispute would be ruled inadmissible, and all further proceedings would be adjourned.

The implementation of this procedure would likely have two salutary effects: (1) it would directly incentivize extractive industries to respect the rights of indigenous peoples in the course of their operations by reducing the degree to which arbitral tribunals could serve their investor-protection role in direct proportion to rights violations; (2) it would reduce the pressure (somewhat) on states to bow to investor prerogatives in respect of their willingness to enforce robust

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protections for indigenous peoples by reducing the likelihood that such enforcement will be subject to dispute settlement. In this manner, the mechanism that gives international investment law so much power — dispute settlement — is infused with the need to respect international indigenous rights and cannot be accessed except by investors who are respectful of such rights. The obligation thus directly addresses power imbalances that exist between international investment law and international indigenous rights.

(b) *Expressly Permitting Affected Indigenous Peoples to Submit Evidence and Argument.* — The second prong of the two-part proposal recommends expressly granting indigenous groups a right to submit evidence and argument to arbitral panels when those groups claim to be affected by the operations of a transnational enterprise seeking the protection of treaty provisions. In effect, these indigenous groups would be accorded a sui generis form of relator status in order to permit them to rebut the enterprise's claim of adherence to a minimum level of indigenous protections.

This half of the proposal ensures that information relating to the obligation proposed in the first prong comes before the arbitral panel in a judicially cognizable manner. Human rights-related obligations might generally be raised before an arbitral tribunal in three ways: (1) by the *host state* as a means of justifying its action and defending against an investor's claim; (2) by a *home state* under treaties that would permit home states to intervene in arbitral proceedings; or (3) by amici curiae.<sup>87</sup>

The first two of these possibilities present problems in the indigenous context. Relying on host or home states to protect indigenous rights renders enforcement of an obligation designed to protect indigenous peoples dependent on state interests. Unfortunately, those interests do not always align with those of indigenous peoples, as evidenced by the current state of underprotection. Host states might welcome the inclusion of a minimum obligation provision as a potential defense in general. Yet, they may be disinclined to invoke this obligation if, for example, the evidence suggests pervasive state complicity or involvement, or the state fears scaring off future investors by rigorous argument on the subject. Likewise, home states' interest in supporting the growth and stability of their industries means that in the vast majority of cases they would prefer to support the *investor* party.<sup>88</sup>

This leaves the third option, submission of evidence and argument by amici curiae. Unlike reliance on home or host states, this option

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<sup>87</sup> See Patrick Dumberry & Gabrielle Dumas-Aubin, *When and How Allegations of Human Rights Violations Can Be Raised in Investor-State Arbitration*, 13 J. WORLD INV. & TRADE 349, 350 (2012).

<sup>88</sup> *Id.* at 368–69.

permits indigenous groups themselves to petition for participation as amici. In other words, indigenous peoples would not be reliant on other parties (or potential parties) to raise their concerns — they could have an independent voice in the proceedings. A relatively recent case typifies this possibility. In *Glamis Gold v. United States*,<sup>89</sup> a case under NAFTA concerning California regulations (including backfilling and land grading near indigenous sacred sites) that allegedly interfered with the mining interests of Canadian company Glamis Gold, the Quechan Indian Nation submitted an amicus brief detailing relevant indigenous rights and arguing that mining activities would affect enjoyment of those rights.<sup>90</sup> Although the tribunal ultimately resolved the dispute on narrow grounds that precluded any need to consider violations of indigenous rights,<sup>91</sup> the submission was significant for its rarity, for the fact that it involved the Quechan nation *itself* raising the issue of indigenous protections, and for its potential as a future model for balancing indigenous rights and international investment law.

The present proposal builds on the *Glamis Gold* approach but differs in that according indigenous peoples a sui generis form of relator status aims to do away with that approach's downsides — namely that a tribunal need not allow nonparty submissions and need not consider them in its decision.

2. *Plausibility and Desirability of the Equalization Approach.*

(a) *Theoretical Coherence.* — On a theoretical level, the principal benefit of the equalization approach is that it focuses squarely on the relationship between the power imbalance between international investment law and international indigenous protections, on the one hand, and the incentive structure partially engendered by that imbalance, on the other. It proposes to rectify both by imposing an investor obligation. In doing so, it represents a marked improvement over initiatives focused primarily on formalizing the UNDRIP, which attend too closely to formal status and too little to incentive structures. It also avoids overreliance on regional systems, which lack the capability to impose obligations directly on individual enterprises. Moreover, this proposal would address indigenous concerns specifically, bypassing the allegation of conceptual inadequacy that afflicts the current L4BB reform option. Still, one might object that the proposal is based on a mismatch between the traditional subjects and purposes of investment treaty regimes — states and investors,

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<sup>89</sup> *Glamis Gold, Ltd. v. United States of America*, Award (NAFTA Arb. Trib. June 8, 2009), <http://www.state.gov/documents/organization/125798.pdf> [<http://perma.cc/AMX6-MP2B>].

<sup>90</sup> See Judith Levine, *The Interaction of International Investment Arbitration and the Rights of Indigenous Peoples*, in *INVESTMENT LAW WITHIN INTERNATIONAL LAW* 106, 116–17 (Freya Baetens ed., 2013).

<sup>91</sup> See *Glamis Gold* at ¶ 8.

with the goal of protecting the latter from the former via a list of investor *rights* — and this reform’s emphasis on imposing investor *obligations* meant to protect non-subject indigenous communities directly.

In response to this critique, it is important to note that similar suggestions are not unprecedented in the literature discussing the relationship between business and human rights more generally.<sup>92</sup> Moreover, it is not as though rights-regarding textual provisions in investment treaties are themselves completely unprecedented. While no investment treaty to date has imposed any *obligation* on *investors* to respect a minimum level of rights,<sup>93</sup> there *are* examples of treaties that address human rights and human rights–related matters in reference to the duties of states. These references are mostly in the form of preambular statements or statements establishing general objectives on labor rights and environmental degradation, but are also in the form of more extensive labor obligations, sometimes including labor standards.<sup>94</sup> Indeed, the new generation of BITs includes an increasing number of references to the potential social impact of investment, a trend particularly observable in agreements to which the United States, Canada, and some European countries are party.<sup>95</sup> New Zealand’s efforts represent a prototypical example: New Zealand has recently included an exception in its investment agreements that allows it to take measures that might otherwise breach investment protections, so long as such measures are taken in order to protect the indigenous Maori

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<sup>92</sup> See, e.g., LUKE ERIC PETERSON & KEVIN R. GRAY, INT’L INST. FOR SUSTAINABLE DEV., INTERNATIONAL HUMAN RIGHTS IN BILATERAL INVESTMENT TREATIES AND IN INVESTMENT TREATY ARBITRATION 33 (2003) (“[I]t might be possible for an investor’s right to invoke international arbitration to be conditioned upon clear evidence that the investor has complied with minimum human rights responsibilities as set out in the treaty, or incorporated by reference.”); Yira Segrera Ayala, *Restoring the Balance in Bilateral Investment Treaties: Incorporating Human Rights Clauses*, 32 REVISTA DE DERECHO 139, 158 (2009) (“If states start to include human rights clauses into Bilateral Investment Treaties, each of the investment clauses within the treaty would have to be interpreted in the light of the realization of the state’s human rights obligations.”). Even scholars who appear to be more equivocal about the need to actively harmonize these legal regimes recognize that the adjudication of a minimum level of obligations is at least possible. See Fry, *supra* note 41, at 110–12 (noting that while it is less than ideal that this reform requires most arbitrators to overstep their expertise, “solutions need not be ideal if they are actually solutions to a problem,” *id.* at 112).

<sup>93</sup> HOWARD MANN, INT’L INST. FOR SUSTAINABLE DEV., INTERNATIONAL INVESTMENT AGREEMENTS, BUSINESS AND HUMAN RIGHTS 9 (2008).

<sup>94</sup> *Id.* at 11; cf. UNCTAD, *Policy Options for IIA Reform: Treaty Examples and Data*, INVESTMENT POLICY HUB (June 24, 2015), <http://investmentpolicyhub.unctad.org/Upload/Documents/Policy-options-for-IIA-reform-WIR-2015.pdf> [<http://perma.cc/7CCU-HZZL>] (listing treaties in force that contain preambular recognitions of the importance of rights-related legal obligations in other areas).

<sup>95</sup> MANN, *supra* note 93, at 9–10.

community pursuant to the Treaty of Waitangi.<sup>96</sup> Given these developments in law and in legal scholarship, the proposal advocated in this Chapter remains within the bounds of theoretical possibility.

(b) *Practical Plausibility.* — Whatever benefits express language of the sort discussed above might bring, the key practical concern is how to include it in treaties. One way forward might be for indigenous advocacy groups and non-specialist domestic and international NGOs to lobby within developed countries for the inclusion of such language in agreements concluded by their governments. The preexisting distribution of economic advantages and disadvantages in the world system means that the majority of global FDI outflows — around sixty percent — originate in developed economies, particularly those in North America, Europe, and East Asia.<sup>97</sup> In particular, the majority of extractive industry FDI outflows originate in developed countries,<sup>98</sup> and a large proportion of the most influential transnational enterprises engaged in extractive activities are domiciled there.<sup>99</sup> This suggests that developed countries are uniquely positioned to affect transnational enterprises' activities across the world, and while such countries clearly have an interest in supporting the growth of their industries and the stability of their investments, they are hardly caught in the same development-driven quagmire or incentive trap as are many developing countries. In this regard, it is encouraging that the latest wave of more rights regarding investment agreements is at its strongest where developed countries are parties.

Indeed, many developing countries, which are predominantly host economies, might support the call to include an obligation to respect indigenous rights (and other sorts of rights) within treaty language. Such language might conceivably provide them a credible defense against potentially costly investor claims should the relationship between the state and the investor break down. The extent to which this is the case across the board is likely to depend on the extent of normalization of the practice. Although developing countries may decline to terms that would make their economies less attractive destinations, this problem lessens as a larger fraction of investment treaties comes to include indigenous rights—regarding language. In sum, while this proposal will not be simple to implement, there is a confluence of interests and trends that make it at least possible.

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<sup>96</sup> Levine, *supra* note 90, at 123 (noting the inclusion of such provisions in several of New Zealand's Free Trade Agreements).

<sup>97</sup> UNCTAD, WORLD INVESTMENT REPORT 2014, at xiv tbl. 1 (2014).

<sup>98</sup> See UNCTAD, WORLD INVESTMENT REPORT 2007, at 100 (2007).

<sup>99</sup> See *Web Table 28: The World's Top 100 Non-Financial TNCs, Ranked by Foreign Assets, 2013*, UNCTAD, [http://unctad.org/Sections/dite\\_dir/docs/WIR2014/WIR14\\_tab28.xls](http://unctad.org/Sections/dite_dir/docs/WIR2014/WIR14_tab28.xls) [<http://perma.cc/894G-6AET>].

*D. Conclusion*

This Chapter has made three contributions. First, it has argued that one factor driving the continuing conflict between indigenous peoples and natural-resource development relates to power imbalances between two divergent international legal regimes — indigenous rights and international investment law — that demand that states act in conflicting ways regarding the same territory and peoples. This means states must choose which regime to privilege in particular situations. As a function of power imbalances between these legal regimes and the actors operating within them, states typically have an incentive to favor transnational business imperatives over indigenous peoples' interests. Second, this Chapter has argued that equalization of these divergent legal regimes is a necessary part of any reform package designed to address the dangers that natural-resource development poses to indigenous peoples. Third, this Chapter has argued that effective equalization is feasible via inclusion of express language in investment treaties (1) obligating investors to respect a minimum level of indigenous rights as a condition precedent to claiming rights under the treaty, and (2) granting affected indigenous peoples the right to be heard on this question in arbitral proceedings. Such a regime would incentivize transnational enterprises to respect indigenous rights, and to pressure states to do the same.

The equalization approach advocated here cannot do it all. It would give indigenous communities the opportunity to have a voice in distant proceedings that could affect them, but it cannot directly strengthen indigenous community cohesiveness or collective action. Furthermore, equalization guarantees no right to remedy. The approach is also underinclusive, insofar as it does not address abuses associated with natural-resource-development initiatives that lack any transnational component. A more comprehensive solution likely demands a package of interlocking measures in which each option compensates for the failings of the others.

Yet the present analysis and the potential of an equalization approach should not be undervalued. The attempt to resolve the conflict between indigenous rights and natural-resource development is itself a subset of the larger question that has haunted societies dependent on capitalist modes of production since their inception — how to compel the expanding forces of capitalism to bow to collective moral visions of human dignity. This author hopes that the approach advocated here might at least function as one more step toward accomplishing this worthy goal.