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**Author**

Cohan, John Alan

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# Environmental Rights of Indigenous Peoples Under the Alien Tort Claims Act, the Public Trust Doctrine and Corporate Ethics, and Environmental Dispute Resolution\*

*John Alan Cohan*

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## 1.

INTRODUCTION. GLOBALIZATION AND EMERGING  
ETHICAL PRINCIPLES OF MULTINATIONAL ENERGY PROJECTS  
AND INDIGENOUS PEOPLES

Indigenous peoples have become the subject of significant attention within the environmental movement. This article will discuss the emerging notion of environmental human rights of indigenous populations. This article will develop the thesis that international law now recognizes environmental human rights as a norm for all peoples and, as such, multinational corporations should include indigenous peoples as legitimate stakeholders in negotiations over the utilization of natural resources in developing countries.

There are many virtues in globalization. Globalization promises to increase the flow of ideas and technology, raise standards of economic opportunities, raise the level of consumer welfare and dissipate hostilities across borders by joining nations together in a spirit of cooperation over common goals. Globalization requires U.S. multinational corporations to establish comprehensive approaches to global ethics. One of the common criticisms of globalization is the hegemony imposed by multinational corporations in the exploitation of natural resources of developing countries. Globalization can induce firms to go abroad to evade their own norms, thus undercutting fundamental principles that form their own nation's economy. For instance, when Wal-Mart makes deals in China, it may avoid U.S. taxes, evade costs of a cleaner environment, hire sweatshop child labor to make clothing, and so on.<sup>1</sup> Some think globalization, if unchecked, will result in social disintegration and political instability.<sup>2</sup>

There is an emerging view that globalization involves much more than trade and commerce, ushering in a new category of human rights which extends to issues such as individual identity,

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1. See Steven Greenhouse, *Accord to Combat Sweatshop Labor Faces Obstacles*, N.Y. TIMES, Apr. 13, 1997, at A1.

2. See Eleanor M. Fox, *Globalization and Its Challenges for Law and Society*, The Wing Tat Lee Lecture, 29 LOY. U. CHI. L.J. 891, 897 (1998).

sympathies and aspirations.<sup>3</sup> Globalization involves a need to understand and absorb the perspectives and experiences of people from distinctly different cultures and to avoid parochialism, the tendency to see all issues and evaluate all norms through the lens of one's own culture.

The energy problems of the world are of a large magnitude and create deep concern. The oil industry is facing challenges in an effort to find new deposits to satisfy a world dependent on oil and to pursue overseas projects that are marketed as "environmentally friendly." Recent oil industry publications advise its members to be more "community-conscious" by entering into contracts to benefit the local population and not just the host government.<sup>4</sup>

The availability of tort claims under the Alien Tort Claims Act ("ATCA")<sup>5</sup> is a drastic but increasingly available remedy to adjudicate environmental damages claimed by foreigners for multinational projects conducted abroad. Protracted disputes and litigation are the inevitable result when a multinational company seeks to exploit foreign resources without seeking the consensus of indigenous peoples whose lives and cultures would be impacted—as illustrated in a case study of the U'wa peoples of Colombia, as well as with still-pending litigation involving indigenous peoples of Ecuador and Peru in *Maria Aguinda, et al., v. Texaco*.<sup>6</sup>

An emerging sense of ethical norms as discussed in this article suggests that multinational companies may want to adopt the model discussed in this article for resolution of environmental disputes with indigenous peoples prior to implementation of projects. This can be an enlightened means to reconcile the economic interests of multinational companies with the cultural interests of both the indigenous peoples and the foreign governments that are seeking to utilize their natural resources.

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3. See Michael D. Pendleton, *A New Human Right—The Right to Globalization*, 22 *FORDHAM INT'L L.J.* 2052, 2053 (1999).

4. See William Divine, *Where Does the Revenue Go? (revenues from concession contracts with oil companies)*, *OFFSHORE*, Dec. 1, 1998, available at 1998 WL 23379513.

5. 28 U.S.C. § 1350 (1994).

6. *Aguinda v. Texaco, Inc.*, 142 F.Supp.2d 534 (S.D.N.Y. 2001). The principal allegations of the *Aguinda* plaintiffs is that Texaco failed, intentionally or negligently, to use reasonable industry standards of oil extraction, that it failed to pump unprocessable crude oil and toxic residues into wells as is the prudent industry practice and that this practice resulted in severe personal injuries to plaintiffs and the environment. See Plaintiff's Complaint at ¶¶ 5-9, A30-31, *Aguinda*, 142 F. Supp. 2d 534.

## 2.

## DEFINITION OF "INDIGENOUS PEOPLES"

No agreed-upon definition of the term "indigenous peoples" exists. The term "indigenous peoples" usually refers to those people and groups descended from original populations of a given country. Most definitions agree that indigenous peoples descend from pre-colonial inhabitants, that they have a close connection to traditional lands and other natural resources, and that they maintain a strong sense of cultural, social, economic and linguistic identity.<sup>7</sup> Indigenous peoples include native peoples, tribal peoples, aboriginals, and "first nations."<sup>8</sup>

From 300,000,000 to 357,000,000 indigenous people live in seventy-five countries and make up about six percent of the world's population.<sup>9</sup> Indigenous peoples are diverse, from the Maaori of New Zealand to the U'wa of Colombia to pastoral nomads in the mountains of Afghanistan. Some commentators claim that indigenous peoples make up the single most disadvantaged set of populations in the world today.<sup>10</sup> Indigenous peoples are isolated socially and have managed to preserve their traditions in spite of being incorporated into countries dominated by other cultures.<sup>11</sup>

According to the Independent Commission on International Humanitarian Issues, four elements are included in the definition of indigenous peoples: (1) pre-existence; (2) non-dominance; (3) cultural difference; and (4) self-identification as indigenous.<sup>12</sup>

The World Bank's Operational Directive on Indigenous Peoples says that no single definition can cover the totality of indigenous peoples, but stresses the following characteristics: (1) close attachment to ancestral territories and natural resources; (2) self-identification and identification by others as members of a distinct cultural group; (3) possession of an indigenous language, which is often distinct from a national language; (4) presence of customary social or political institutions; and (5) subsistence-ori-

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7. See, e.g., International Labour Organization Convention 169, art. 1; see also S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 48-49 (1996).

8. Robert K. Hitchcock, *Intl. Human Rights, The Environment and Indigenous Peoples*, 5 *COL. J. INTL. ENVTL. L. & POL'Y* 1, 2 (1994).

9. *Id.*

10. *Id.*

11. *Id.*

12. INDEPENDENT COMMISSION ON INTERNATIONAL HUMANITARIAN ISSUES, *INDIGENOUS PEOPLES: A GLOBAL QUESTION FOR JUSTICE* 6 (1987).

ented production systems.<sup>13</sup> Of course, in many societies indigenous peoples do not meet all these criteria. In Africa, for instance, access to wildlife is restricted by the state, and Asian and Native American indigenous peoples have to a large extent adopted market-oriented production systems. But suffice it to say that indigenous peoples generally have ethnic, religious and linguistic traits that are different from the dominant groups in their countries, and as a rule they strive to maintain and are proud of their cultural identity that, so often, is "indigenous to" to their ancestral lands.

### **Issues Facing Indigenous Peoples and Why They are Cause for Concern**

This section will discuss the social issues and challenges facing indigenous peoples in general and explore the contours of their special needs.

### **Sociological and Cultural Issues Involving Indigenous Peoples**

Many indigenous groups lack political power in the nation in which they reside. A major reason for this is that many indigenous peoples were treated by colonial governments as "wards of the state," with no legal rights to participate in political decision-making or to control their own futures.<sup>14</sup> Presently, the Indians of Brazil are designated in the Brazilian Civil Code as under the tutelage of the state and, as such, are legally considered minors. Thus, they are neither allowed to own land or to undertake legal activities on their own behalf.<sup>15</sup>

Indigenous peoples have increasingly been forced to go along with state policies that encroach upon their lands or disrupt the ecological equanimity of the remote areas in which they usually live. Oil exploration has a major deleterious impact on the environment of indigenous peoples and on their traditional way of life.<sup>16</sup> For indigenous peoples the risks to exposure to environ-

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13. WORLD BANK, WORLD BANK OPERATIONAL MANUAL (1991) (Statement No. 2.34).

14. Hitchcock, *supra* note 8, at 5.

15. CODE CIVIL [C.C.] art. 6 (III), art. 7 ¶ 2 (Brazil). See Lee Swepston, *The Indian in Latin America: Approaches to Administration, Integration, and Protection*, 27 BUFF. L. REV. 715, 722 (1978).

16. Even less drastic developments, such as a road going through the territory of an indigenous population, has been held to violate the rights of indigenous peoples to life, liberty, personal security, residence, movement, and preservation of health and well-being. See a discussion of Inter-American Commission on Human Rights

mental damage can result in not only harms to their health, but also to their livelihood and well-being because their food, drink, bathing, and cultural rituals are all intricately connected to the land.<sup>17</sup> Thus, corporate decisions to proceed with oil exploration projects affecting indigenous habitats seriously undermine the ability of indigenous peoples to survive as a culture.

Indigenous peoples usually exercise effective dominion over a certain territory, and adjacent indigenous groups generally respect that territoriality. Usually indigenous peoples are able to maintain their dominion against encroachment by the dominant society.<sup>18</sup>

In some cases the dominant culture may work to suppress or stifle concerns of the indigenous peoples on the premise that the dominant or majority culture is superior or has a broader societal stake.<sup>19</sup> The dominant society may try to acculturate or assimilate the indigenous peoples without their consent.<sup>20</sup> Indigenous peoples generally, by definition, do not want to be assimilated into the dominant culture or even that of other indigenous groups, nor want to have their cultural identity suppressed, or their land and resource based traditions denied or denigrated. The dominant culture may be convinced that because the indigenous cultures are savage and heathen, this gives it the right to "look out for" them and speak for them.

The idea of there being an intrinsic value to the cultural identity and diversity of peoples has entered mainstream public policy in the United States and elsewhere. "Among the important values that are embraced by enlightened societies and now featured in international human rights law is the value attached to the integrity of diverse cultures."<sup>21</sup>

The interest in cultural integrity necessarily entails a different regard for those groups within society. As Professor Anaya points out:

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in a case regarding the Yanomami of Brazil, in Hari M. Osofsky, *Environmental Human Rights Under the Alien Tort Statute: Redress for Indigenous Victims of Multinational Corporations*, 20 SUFFOLK TRANSNAT'L L. REV. 335, 388-89 (1997).

17. *See id.* at 388.

18. *See* S. James Anaya, *Environmentalism, Human Rights and Indigenous Peoples: A Tale of Converging and Diverging Interests*, 7 BUFFALO ENVTL. L.J. 1, 3 (1999).

19. *See* S. James Anaya, *Ethnic Group Rights*, in ETHNICITY AND GROUP RIGHTS 228 (Ian Shapiro & Will Kymlicka eds., 1997).

20. *Id.*

21. *Id.* at 223.

Taos Indian Pueblo, a culturally distinctive community of long-standing and continuing profound significance to its members, is clearly valued within the larger society different from the Taos ski club. Indeed, one can easily observe that, on grounds of cultural integrity, we tend to attach greater importance to groups that comprise or generate distinctive cultures more than to other types of groups. Taos Indian Pueblo is understandably considered a more important nucleus of human interaction than the ski club.<sup>22</sup>

The growing recognition of the importance of cultural integrity justifies special respect and protection for indigenous peoples. Protection should be understood to include not only guarding the bare survival of a culture, but to also ensure a more robust notion of cultural flourishing and development, recognizing that these interests are inextricably linked to the habitats and lands of indigenous populations.

Respect for indigenous peoples can introduce societal complexities in that actions in deference of one culture may curtail the furtherance of another group or otherwise impose some costs on the dominant society. Respect for the cultural integrity of indigenous peoples requires sensitivity to the importance these peoples place on their natural habitat, even if this respect entails some costs to members of the dominant society or to a multinational corporation.

### 3.

#### A CASE STUDY OF THE U'WA TRIBE OF COLOMBIA AND OCCIDENTAL PETROLEUM

Petroleum operations often involve a strategy in which outsiders control most of the development decisions, and the most basic of project decisions including the project approval, which affect the indigenous peoples are frequently made within company and government offices, with no consultation with the local population.<sup>23</sup> As an example of how objectionable this approach can be, we might examine the conflict that occurred between the U'wa tribe of Colombia and Occidental Petroleum.

This case is a dramatic example of the pressure on host countries to capture a new economic opportunity by entering into a

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22. *Id.*

23. See Scott Holwick, *Transnational Corporate Behavior and Its Disparate and Unjust Effects on the Indigenous Cultures and the Environment of Developing Nations: Jota v. Texaco, a Case Study*, 11 *COLO. J. INT'L ENVTL. L. & POL'Y* 183, 198 (2000).



transnational partnership, and the temptation to ignore the environmental and human rights concerns of the local population.<sup>24</sup> Occidental Petroleum sought an oil exploration lease with the Colombian government on land occupied by the 5,000-member U'wa tribe. The U'wa have been striving to ensure the continuation of their way of life in the remote cloud forests of Colombia, where they have lived for hundreds of years.<sup>25</sup> The Colombian government wanted to allow Occidental Petroleum to drill for oil adjacent to the U'wa reservation, claiming this was essential to the economic welfare of the country, and that if the project were not completed, Colombia may have to become a net importer of oil by 2004.<sup>26</sup> The United States, the largest consumer of Colombian oil at 260,000 barrels per day, stood to have only three months of oil consumption met from Occidental's drilling operations in the contested area.<sup>27</sup>

The U'wa were concerned about the direct effects of oil drilling such as deforestation, oil spills, and ecosystem degradation from the building of roads into virgin forests.<sup>28</sup> The U'wa were further concerned that the oil project would bring political violence to the region, which had been a frequent and ongoing problem in the country, with rebel leftists targeting oil installations in their warfare against the Colombia government.<sup>29</sup> Rebels had bombed the Cao Limon pipeline more than 600 times, resulting in oil spills of 2.3 million barrels that seeped into the ground.<sup>30</sup>

The Colombian government has the duty under its 1991 Constitution to protect the people of its eighty-four indigenous tribes. However, Colombian officials and Occidental entered into the project lease without giving the U'wa people an opportunity to participate in the decisionmaking process. The Colombian government rationalized its decision to enter the Occidental lease based on the premise that the U'wa do not own the mineral

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24. See *id.* at 192; see also Alicia Gibson, *The Real Price of Oil: Cultural Survival and the U'wa of Colombia*, COLO. J. INT'L ENVTL. L. & POL'Y 2000 Y.B. 139, 145 (2000).

25. Gibson, *supra* note 24, at 139.

26. *Id.* at 141.

27. *Id.*

28. *Id.*

29. Rebels had targeted pipelines "as part of an extortion scheme and to protest foreign 'exploitation' of Colombia's resources." *Id.* at 141 (citing Jared Kotler, *U.S. Oil Company Begins Drilling Near Indian Lands*, ASSOCIATED PRESS NEWSWIRE, Nov. 3, 2000, APWIRE 21:21:00).

30. *Id.*

rights, and that the government has the duty to develop its natural resources for the benefit of all of its citizens.<sup>31</sup>

The tribe was vehemently opposed to the project because they believe that they have a sacred duty to maintain the balance between the physical and spiritual plane in order to “protect and continue life,”<sup>32</sup> that they have a collective duty to care for the Earth and, to them, oil is the blood of the Mother Earth so that extraction of oil is equivalent to killing her—a fate from which there is no escape because all life depends on her survival.<sup>33</sup> They threatened mass suicide in the face of Occidental going forward with the project, rather than “watch the destruction of their culture and homeland.”<sup>34</sup>

The U’wa tribe’s outrage reached international attention and even became an issue during the 2000 presidential campaign in that Former Vice President Gore’s father served on the board of Occidental for twenty-eight years, and Gore’s family still owned \$500,000 of Occidental stock.<sup>35</sup> Environmental groups attacked his commitment to environmental issues in advertisements reading, “Who is Al Gore? Environmental Champion or Petroleum Politician? The U’wa people need to know.”<sup>36</sup>

Activists in the United States protested at Occidental’s annual shareholder meeting to stop the project, targeted individual Occidental shareholders, and demonstrated in front of its Chairman’s home. They succeeded in convincing Fidelity Investments, the mutual-fund giant, to divest \$400 million worth of Occidental holdings.<sup>37</sup>

The Superior Court of Bagota ruled, after extensive litigation, that neither the Government nor Occidental were legally required to conduct a consultation process with the U’wa, that no fundamental rights were being violated because the drilling site

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31. See Holwick, *supra* note 23, at 184.

32. Gibson, *supra* note 24, at 140.

33. *Id.*

34. This threat has a 300-year-old precedent. A number of U’wa jumped to their deaths from a cliff to avoid colonization by Spanish missionaries and tax collectors. *Id.* See also Holwick, *supra* note 23, at 183.

35. See Gibson, *supra* note 24, at 145.

36. World Reporter, *Newspaper Ad Attacks Gore’s Environmental Record*, ENV’T NEWS SERV., Mar. 7, 2000, available at 2000 WL 7838212.

37. See Nancy Rivera Brooks, *Activists Urge Occidental Petroleum Shareholders to Sell Their Stock*, L.A. TIMES, Apr. 29, 2000, available at <http://www.forests.org/archive/centamer/uwadayac.htm>; see also Danielle Knight, *Environmental Finance: Colombia Activists Lobby U.S. Oil Investors*, INTER PRESS SERVICE, Dec. 27, 2000, available at 2000 WL 28920307.

was outside the boundaries of the U'wa reservation, and so cleared the way for the drilling permit to go forward.<sup>38</sup>

After the project got into the exploration stage, however, Occidental ended up announcing in August 2001, that it was abandoning the project because it had failed to find oil at the Gibraltar 1 well site on the U'wa's ancestral land.<sup>39</sup> The announcement came as thousands of U'wa were taking part in a traditional three month spiritual retreat for fasting, meditation, teaching, singing and prayer.

The U'wa have become a symbol of resistance to oil exploration and corporate led globalization for thousands of supporters around the world. Over the last five years, the U'wa resistance has inspired a massive international movement to challenge the aggressions by the Colombian government and Occidental and has captured headlines with hundreds of peaceful mobilizations.

The U'wa case brings out the issue of the desirability of a consultative process where indigenous populations may likely object to oil exploration. At issue is how to mediate the economic interests of the multinational company and meet the environmental concerns of the indigenous peoples by weighing such intangibles as cultural diversity and the sacred spirit that indigenous peoples believe resides in their lands. The U'wa's situation mirrors the fate of indigenous peoples around the world. As pressures for development grow stronger, ancient civilizations that have resisted colonization now face destruction of their traditional ways of life. With them go thousands of years of accumulated beliefs and knowledge systems that not only have intrinsic value to those who adhere to them, but also have much to teach those in the industrial world.

There are many other possible case studies of indigenous peoples who have objected to being disregarded in oil extraction projects between their government and multinational corporations. Recently, in Costa Rica, where each year more than 50,000 tourists visit Tortuguero National Park to see nesting green turtles, more than forty organizations, including indigenous groups, development associations, tourism boards, local communities, business owners, fishermen groups, environmental organizations and other NGOs, have protested the plans of Harken Energy

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38. See Gibson, *supra* note 24, at 146.

39. See Rainforest Action Network, *Colombia's U'wa Tribe and Supporters Celebrate Oxy's Failure to Find Oil*, RAN CURRENT NEWS, at <http://www.ran.org/news/newsitem.php?id=409> (Aug. 1, 2001).

Corporation, a Houston-based company, to extract oil from their environmentally fragile coast.<sup>40</sup> Sea turtles are important cultural icons for many of Costa Rica's indigenous cultures.<sup>41</sup> Costa Rican President Miguel Angel Rodriguez signed an international agreement in 1998 in which his government would collaborate with Nicaragua and Panama to conserve sea turtles, ensuring the participation of all local user groups in sea turtle management.<sup>42</sup> Thus, it appears the Costa Rican government was violating its own agreement by risking the degradation or destruction of this ecological sanctuary.<sup>43</sup>

Costa Rica's Supreme Court halted Harken's oil project in September 2001, siding with indigenous communities who argued that they had not been adequately consulted in the decision to move forward with oil exploration. But in November 2001, the court reversed part of its earlier finding, allowing the project to go forward.<sup>44</sup>

Another recent case of displacement of indigenous peoples occurred in the Siberian swampland range of the Khant and Mansi tribes, where negligent engineering created leaks from oil derricks which, in turn, resulted in oil spills spreading over thousands of square kilometers of swamp grasses, rendering three-fourths of the region useless for hunting, fishing and herding, thereby wiping out the herders' way of life. The largest wetlands in the world were destroyed.<sup>45</sup>

There are numerous other instances of indigenous peoples throughout the world objecting to various types of projects that they view with trepidation. For instance, the government of Thailand has approved a \$500 million gas pipeline project that villagers claim bypassed an expert panel review that local law re-

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40. See Wildlife News, *Bush's Former Oil Company Threatens Endangered Sea Turtles in Costa Rica*, available at <http://www.naturalworldtours.co.uk/articles2001/april/0701.stm> (Apr. 7, 2001).

41. *Id.*

42. *Id.*

43. More than 800 biologists and conservationists passed a resolution at the 21st International Annual Symposium on Sea Turtle Biology and Conservation, held earlier this year, calling for the Costa Rican government to ban all oil exploration in its Caribbean marine areas. According to these scientists, the drilling threatens globally significant sea turtle nesting beaches as well as indigenous species of sea turtles that use the offshore areas for mating and migration. *Id.*

44. *Id.*

45. Holwick, *supra* note 23, at 184-85.

quires.<sup>46</sup> Thailand's 1997 constitution guarantees local communities a voice in industrial projects that affect them.<sup>47</sup> Environmentalists claim that Thailand's environmental review process is an empty ritual, that the government fails to balance development and conservation and that current projects have already ravaged Thailand's waters and formerly vast tropical forests.<sup>48</sup> Villagers in the Songkhia province, where the pipeline would reach land, claim that the project would destroy their traditional way of life. One of the problems here is the failure of developers to attempt to gain the confidence of the villagers by interviewing them to gauge the project's social impact.<sup>49</sup>

In California, for 7,000 years the Quechan tribe have lived on tribal lands that are now federal property administered by the Bureau of Land Management. The tribe objects to a 1,600-acre, open-pit gold mine proposed by Glamis Gold Ltd., a company with mining operations in Nevada, California, Mexico and Honduras.<sup>50</sup> In this case, the company responded to the concerns of the tribe and has listened to their demands, offering to move some of the waste stockpiles to accommodate heritage trails of the indigenous peoples.<sup>51</sup> From the mining company's perspective, the tribe keeps changing its demands.<sup>52</sup>

In central India, controversy surrounds the Supreme Court's approval of the nation's largest hydroelectric project, the Narmada River dam.<sup>53</sup> Residents of the Narmada Valley object to the project because their homes will be engulfed when the dam is built, and they claim the project will harm small farmers and displace tens of thousands of villagers.<sup>54</sup> India's Supreme Court issued a criminal contempt order against a prize-winning Indian novelist, Arundati Roy, for criticizing the court's approval of the project.<sup>55</sup>

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46. See Wayne Arnold, *Thailand Development Faces Rare Challenge*, N.Y. TIMES Jan. 5, 2002, at B3.

47. See *id.*

48. See *id.*

49. See *id.*

50. See Nick Madigan, *Tribe Prepares for Renewed Fight Over Gold Mine*, N.Y. TIMES, Jan. 7, 2002, at A10.

51. See *id.*

52. See *id.*

53. See Associated Press, *India Jails Novelist for Criticizing a Court Ruling*, N.Y. TIMES, Mar. 7, 2002, at A4.

54. See *id.*

55. See *id.*

## 4.

## THE ALIEN TORT CLAIMS ACT AS A REMEDY FOR ENVIRONMENTAL DAMAGES OCCURRING ABROAD

There is an inevitable moral dilemma on the part of a host government such as Colombia, with its responsibility to safeguard the health and human rights of its citizens, as well as the environment, and its need to pay off debts, establish favorable economic conditions to attract foreign investment, and utilize its own natural resources in the international marketplace. Officials of developing nations generally believe that oil development ensures continuing debt payments for them.<sup>56</sup>

The principal oil-bearing zones of Latin America are almost all situated within developing countries that have limited financial resources, industrial infrastructure and technical capabilities. The large sums deployed by multinational oil companies have led these countries to seek a growing share of the revenue derived from oil production. The governments of these countries are often desperate to gain foreign investment to pay down international debt, and they are easily tempted to compromise the long-term health and welfare of their populace with minimal environmental protection. Officials in developing nations may well realize that ecologically hazardous activities within its borders will result in the dislocation of indigenous peoples, disruption of natural habitats, other environmental damage, and even a certain number of deaths, but they usually opt for the income that they think will meet overriding needs of the government in its financial situation.

There are always environmental risks involved in oil exploration, and thus it is crucial for multinational companies to maintain efficient, environmentally responsible operations across the globe. Increasing efforts to explore for oil in geographical frontiers and further offshore threaten old-growth forests in twenty-

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56. That premise has been refuted in a recent Harvard University study that assessed ninety-seven developing countries with desirable natural resources, tracking their economic growth from 1971 to 1989. The results clearly showed a negative relationship between a country's reliance on natural resource extraction and overall growth. See Project Underground, *Conclusion: Black Gold, Bleak Future*, available at <http://www.moles.org/ProjectUnderground/motherlode/drilling/bleak.html>. See also Holwick, *supra* note 23, at 198. Another refutation of the conventional belief that oil development ensures continuing debt payments can be seen with Nigeria, where oil provides eighty percent of the country's gross domestic product and ninety percent of government revenue, but employs only two percent of Nigeria's citizens. See *id.*

two countries, coral reefs in thirty-eight countries, and mangrove swamps in fifty-six countries.<sup>57</sup> The problem is compounded because indigenous populations may be opposed to a project for reasons that transcend economics. These factors make it all the more important for multinational companies to operate with a consideration of social and environmental costs.

Until recently we have seen a familiar cat and mouse game in which a developing nation will negotiate with an oil company for exploitation of natural resources, with the company implying they will leave and seek out a more favorable locale unless officials back off from strict environmental regulations and industrial practices. As a result, substantial environmental injustice has occurred within host countries where oil companies and host governments co-develop projects.<sup>58</sup>

These practices will no longer work, nor will ignoring the concerns of indigenous peoples. Rather, a new ethical paradigm has been bolstered by U.S. federal courts, which have recently started to grant jurisdiction for foreigners who claim they have suffered environmental human rights damages outside the United States at the hands of American companies.<sup>59</sup> This new line of cases suggests that multinational companies will need to take into account the values and social cohesion of indigenous peoples, as well as strict environmental standards, or else be liable for tort claims asserted in the U.S. courts.

The Alien Tort Claims Act ("ATCA")<sup>60</sup> grants federal jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."<sup>61</sup> This law provides a federal forum in which foreign plaintiffs can sue U.S. multinationals for torts that constitute certain violations of customary international law.<sup>62</sup> Jurisdiction may be barred, however, if the parties' contract or mediation agree-

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57. See Andy Rowell & Steve Kretzmann, *The New Oil Crisis: If Exxon and Mobil Are Allowed to Merge, They Will Create a Monster with Increasing Power to Conduct Exploration in Frontier Areas, with Devastating Consequences*, *Say Andy Rowell and Steve Kretzmann*, THE GUARDIAN (London), Dec. 8, 1998, available at 1998 WL 24894839.

58. See Holwick, *supra* note 23, at 192.

59. See Armin Rosencraz & Richard Campbell, *Foreign Environmental and Human Rights Suits Against U.S. Corporations in U.S. Courts*, 18 STAN. ENVTL. L.J. 145, 146 (1999).

60. 28 U.S.C. § 1350 (1994) [hereinafter ATCA].

61. 28 U.S.C. § 1350 (1993).

62. Rosencraz, *supra* note 59, at 147-48.

ment contains a forum selection clause naming the foreign country as the parties' forum of choice.<sup>63</sup>

Foreign plaintiffs will often choose to seek relief under the ATCA against multinational corporations for environmental damages because courts in their home countries often provide little hope of recovery due to lack of democratic governance, corruption, inadequate environmental legislation, insignificant environmental remedies, limited tort law, low amounts gained from such claims, nonrecognition of class action lawsuits, or an elusive notion of justice.<sup>64</sup>

There are significant procedural hurdles to go through in order to succeed in gaining jurisdiction under the ATCA for environmental torts committed abroad. In order to bring an action under the ATCA, the claim must be (1) by a foreign citizen (2) for a tort (3) in violation of the laws of nations.<sup>65</sup> A major jurisdictional problem is whether a cognizable tort claim exists under international law. While claims for human rights violation such as rape or torture have been readily granted jurisdiction under the ATCA, it is controversial whether environmental claims constitute a tort cognizable under international law or the "law of nations."

The recent case of *Aguinda v. Texaco*<sup>66</sup> illustrates the ability of foreign claimants to bring suits against U.S. multinationals for environmental damages incurred on foreign soil, and shows that federal courts have begun to recognize that environmental injuries outside the United States constitute a tort cognizable under international law.<sup>67</sup>

*Aguinda v. Texaco* is still tied up in the federal courts. It is a class action lawsuit on behalf of 30,000 Indians and farmers of the Oriente region of the Ecuadorian Amazon Basin and 25,000 downstream residents of Peru seeking personal injury and environmental damages against Texaco from discharges that caused air, water and soil damage. The claimants allege that Texaco released untreated, oil-laced water that had been pumped out of

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63. See *Blanco v. Banco Indus. de Venez., S.A.*, 997 F.2d 974, 979 (2d Cir. 1993).

64. See *Osofsy*, *supra* note 16, at 340.

65. See *Kadic v. Karadzic*, 70 F.3d 232, 238 (2d Cir. 1995).

66. *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998); *on remand consolidated suits reported as Aguinda v. Texaco, Inc.*, 142 F.Supp.2d 534 (S.D.N.Y. 2001). See also *Holwick*, *supra* note 23, at 202.

67. See *Rosencranz & Campbell*, *supra* note 59, at 147.



the ground as part of the company's oil drilling operations,<sup>68</sup> and that broken pipelines released nearly seventeen million gallons of crude oil into the Amazon forests during Texaco's operations in Ecuador, almost fifty percent more than was released by the *Exxon Valdez*.<sup>69</sup> In addition, they claim that more than four million gallons of highly toxic "produced water" were dumped daily into open pits rather than re-injected into the ground.<sup>70</sup> This dumping apparently violated Texaco's own policy stated as early as 1971 that this was "not considered to be an acceptable practice."<sup>71</sup> The resulting contamination dramatically increased cancer risks, unleashed widespread sanitation and nutritional problems and led to hundreds of cases of avoidable sickness and death.<sup>72</sup>

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68. The lack of reinjection of produced water was a violation of the laws of the principle oil producing states of the United States in 1971—Texas and Louisiana. "This practice has been outlawed in Texas." (1971 Congressional Hearings at 1710, A5326). Texas enacted a law in 1919, forbidding all fresh water contamination from oil operations. (A5375) Louisiana enacted a law in 1953 forbidding discharge of produced water into the environment. (A5382).

69. See Russell Unger, *Brandishing the Precautionary Principle Through the Alien Tort Claims Act*, 9 N.Y.U. ENVTL. L.J. 638, 639 (2001).

70. *Id.* See also Judith Kimerling, *Disregarding Environmental Law: Petroleum Development in Protected Natural Areas and Indigenous Homelands in the Ecuadorian Amazon*, 14 HASTINGS INT'L & COMP. L. REV. 849, 864-72 (1991).

71. See Unger, *supra* note 59, at 639 (quoting testimony of Richard Byrd, general counsel for the Interstate Oil Compact Commission). Texaco obtained at least two U.S. patents in 1971 and 1974 for improved technologies for reinjection of produced water. (A5655-A5659 and A5660-5662) In 1971, moreover, it published an extensive summary of the laws governing discharges of oil in the Proceedings of the American Petroleum Institute, A5663-A5670.

There is a direct relationship between profits and the dumping of produced water. Authors of a study prepared in 1995 for the Gas Research Institute concluded that the costs of reinjection of produced water can range from thirty cents to four dollars per barrel of reinjected water of production. (A5693).

72. Holwick, *supra* note 23, at 200. Texaco was accused of using vastly different and substantially outdated practices than they concurrently utilized elsewhere in the world. See *id.* In essence, instead of re-injecting toxic byproducts into the ground, which was standard oil drilling procedure in the United States, Texaco dumped waste laden with heavy metals into hundreds of unlined pits, which leaked and then overflowed during the Amazon's heavy seasonal rains. See *id.* By 1992, the pits discharged more than 30 billion gallons of untreated waste directly into creeks, rivers and lakes that were the primary sources of drinking, bathing and fishing water for the local population. See *id.* at 201.

Teams of scientists reported that the drinking water in the region developed high levels of polycyclic aromatic hydrocarbons, a crude oil toxin that the EPA considers so dangerous that any amount poses an exceptionally high risk of cancer. *Id.* Toxic contaminants in the drinking water reached 1,000 times the safety standards recommended by the EPA. See *id.* Based on these findings, the plaintiffs sought more than \$1 billion in damages. See *id.*

The *Aguinda v. Texaco* case is apparently the first time a U.S. court has granted jurisdiction to foreign indigenous peoples seeking damages for environmental tort claims committed in a foreign nation by an American company.<sup>73</sup>

ATCA jurisdiction attaches only to torts serious enough to violate the law of nations. In a pretrial ruling, the *Aguinda v. Texaco* court held that environmental claims might be brought under the ATCA, noting that "United States laws governing hazardous wastes . . . may well prohibit the conduct alleged in the complaint if carried out in the United States."<sup>74</sup> According to the court, the plaintiff may have a cause of action under the Rio Declaration, which the United States has ratified.<sup>75</sup>

It is not entirely clear whether the *Aguinda v. Texaco* case will serve as precedent or mere dictum on that point until the case reaches finality. It is presently on appeal from the trial judge's pretrial ruling dismissing the action based on *forum non conveniens* grounds, discussed below. Other courts have been reluctant to recognize environmental abuses, absent human rights violations, as causes of action under the ATCA because of a perceived lack of consensus on environmental norms in the international community. Because of the ongoing controversy as to

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73. Other recent cases have been brought under the ATCA in which indigenous peoples have claimed environmental damages stemming from mining or oil projects, but have been dismissed because the court held that environmental claims were not cognizable torts under international law. For instance, indigenous peoples in Indonesia brought a claim against the Freeport-McMoRan corporation for its mining operations in the Irian Jaya region of Indonesia. *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362 (E.D. La. 1997). The complaint stated that the mining operations and drainage practices of the defendant corporations resulted in discharges that caused a variety of environmental problems, including "pollution, disruption and alteration of natural waterways leading to deforestation," and "degradation of surface and ground water from tailings and solid hazardous waste." Complaint of Tom Beanal at 383, *Beanal*, 969 F. Supp. 362. (No. 96-1474). The plaintiffs claimed that the terrorizing, habitat destruction, and dislocation of the indigenous peoples ultimately will result in cultural genocide stating, "the cultural demise of a unique pristine heritage which is socially, culturally, and anthropologically irreplaceable." *Beanal*, 969 F. Supp. at 372. See also Osofsky, *supra* note 16, at 339 n.13 (discussing what is described as Shell's gross environmental irresponsibility against indigenous peoples of Nigeria).

74. *Aguinda*, 1994 WL 142006, at \*7.

75. Principle 2 of the Rio Declaration provides:

States have, in accordance with the Charter of the United Nation and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

whether environmental torts violate international law for purposes of ATCA jurisdiction, the paper will explore this question first, and argue that environmental torts are indeed recognized by the substantial body of international law, as presently constituted, for purposes of ATCA jurisdiction.

### **The Role of International Law in Equating Environmental Rights with Human Rights**

Just what is “international law?” International law is synonymous with the “law of nations,” which is an elusive legal term that embodies norms defined in judicial writings, national practices, international documents, regional agreements, and treaties signed by a “significant” quantum of nations.<sup>76</sup> International law is not codified in any single international agreement or decision of an international tribunal.<sup>77</sup> ATCA cases have generally involved gross human rights violations such as rape or torture, and other “shockingly egregious” violations of international law.<sup>78</sup>

International law, while being narrowly construed, also must be interpreted according to evolving standards.<sup>79</sup> The Supreme Court has recognized that over time, certain international norms attain the status of international law based on the customs and usages of civilized nations, founded on considerations of humanity.<sup>80</sup>

ATCA jurisdiction has inevitably been granted for tort cases alleging violation of certain norms known as *jus cogens* norms, of which there are very few. A *jus cogens* norm enjoys the “highest status within international law.”<sup>81</sup> As defined in the Vienna Convention on the Law of Treaties, a *jus cogens* norm is “a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permit-

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76. See, e.g., *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992) (stating that customary international law is “the direct descendant of the law of nations”). See also Holwick, *supra* note 23, at 212.

77. Unger, *supra* note 69, at 648.

78. *Id.* at 643 (citing *Zapata v. Quinn*, 707 F.2d 691, 692 (2d Cir. 1983) (per curiam)).

79. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980) (for the proposition that “courts must interpret international law not as it was in 1789, but as it has evolved and exists among nations of the world today”).

80. *The Paquete Habana*, 175 U.S. 677 (1900).

81. See *Siderman de Blake*, 965 F.2d at 714.

ted and which can be modified only by a subsequent norm of general international law having the same character.”<sup>82</sup>

Aside from rape and torture, the *jus cogens* norms routinely recognized by the courts for purposes of ATCA jurisdiction include genocide, slave trade, and summary execution, thus conferring personal jurisdiction on the defendant if the defendant resides or is found in the United States for acts committed abroad.<sup>83</sup>

Other norms that do not reach *jus cogens* status still constitute “customary international law violations” if they are recognized by international consensus.<sup>84</sup> To determine this, courts will examine “the customs and usages of civilized nations” based on widely accepted international agreements, resolutions of international organizations, the works of jurists and commentators, United Nations documents, and international conventions to see if there is a consensus as such condemning the activities in question.<sup>85</sup> The Ninth Circuit has ruled that United Nations Documents, such as Article 5 of the Universal Declaration of Human Rights, and conventions, including but not limited to Article 5(2) of the American Convention on Human Rights—describe a range of universal international law violations beyond those traditionally conferred *jus cogens* status.<sup>86</sup>

Commentators have noted that, while the United States is signatory to various environmental treaties (such as Principle 21 of the Stockholm Principles of the United Nations Conference on the Human Environment, which prohibits activities that cause damage to the environment of other States) that fact in itself does not imply a statement of a universally accepted tort.<sup>87</sup> Courts have held that environmental treaties may simply constitute evidence that “iterates the existing U.S. view of the law of nations regarding global environmental protection,” rather than serving to show an international consensus.<sup>88</sup> The federal courts are reluctant to apply idiosyncratic U.S. law into the law of nations or to take sides in ideological battles waged under the

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82. *Id.* (citing Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 332, 8 I.L.M. 679).

83. See Rosencranz & Campbell, *supra* note 59, at 154.

84. See *id.*

85. *Siderman de Blake*, 965 F.2d at 715; Rosencranz & Campbell, *supra* note 59, at 157-58.

86. See Rosencranz & Campbell, *supra* note 59, at 154.

87. *Id.* at 155.

88. See *Amlon Metals Inc. v. FMC Corp.*, 775 F. Supp. 668, 671 (S.D.N.Y. 1991).

ATCA.<sup>89</sup> Thus, proving an international consensus of environmental norms is not an easy matter, and lack of consensus on environmental norms is a common reason many cases have been dismissed for lack of subject matter jurisdiction, absent concurrent human rights (*jus cogens*) abuses, under the ATCA.<sup>90</sup>

Some courts do recognize that there is an international consensus on some environmental norms that are obligatory and definable, but dismiss ATCA cases against private tortfeasors on the basis that, to the extent any such environmental norms exist, they apply only to the actions of *states*, not to private tortfeasors.<sup>91</sup> The Fifth Circuit, for instance, has rejected the claim that the Rio Declaration provides articulable or discernable standards and regulations to identify practices that constitute international environmental torts against private, as opposed to state, agents.<sup>92</sup>

Some commentators seek to connect a body of rights and entitlements based on international human rights principles to this discourse on environmental torts, showing that, taken as a whole, human rights principles clearly constitute environmental norms recognized by international law.<sup>93</sup> A wide range of international conventions suggests that the human rights of indigenous peoples are inextricably and uniquely linked to environmental rights. The Working Group's 1993 Draft United Nations Universal Declaration of the Rights of Indigenous Peoples contains a chapter on indigenous environmental rights.<sup>94</sup> The Rio Declaration acknowledges that

Indigenous peoples and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.<sup>95</sup>

The 1994 Draft Declaration of Principles on Human Rights and the Environment provides specific rights for indigenous peoples, stating:

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89. Rosencranz & Campbell, *supra* note 59, at 156.

90. *Id.* at 155.

91. Unger, *supra* note 69, at 641-42.

92. *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 166-67 (5th Cir. 1999).

93. *See Anaya*, *supra* note 18, at 3.

94. *See Draft Declaration on the Rights of Indigenous Peoples*, U.N. COMM. ON HUMAN RIGHTS, 45th Sess., Agenda Item 14, at 8, U.N.Doc.E/CN.4/Sub.2 (1993).

95. Rio Declaration, *supra* note 75, at Principle 22.

Indigenous peoples have the right to control their lands, territories and natural resources and to maintain their traditional way of life. This includes the right to security in the enjoyment of their means of subsistence. Indigenous peoples have the right to protection against any action or course of conduct that may result in the destruction or degradation of their territories, including land, air, water, sea-ice, wild-life or other resources.<sup>96</sup>

The International Labour Organisation's Convention 169 states that "governments shall respect the special importance to the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories or both if applicable . . . ."<sup>97</sup> It further states that "[t]he rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded."<sup>98</sup>

As early as 1981 UNESCO conferees agreed, in a Declaration of San Jose, that

[f]or the Indian peoples, the land is not only an object of possession and production. It forms the basis of their existence, both physical and spiritual, as an independent entity. Territorial space is the foundation and source of their relationship with the universe and the mainstay of their world.<sup>99</sup>

The Draft Declaration of Principles for the Defense of the Indigenous Nations and People of the Western Hemisphere stated that it

shall be unlawful for any State to make or permit an action or course of conduct which will directly or indirectly result in the destruction or deterioration of an indigenous nation or group through the effects of pollution of earth, air, water . . . .<sup>100</sup>

A U.N. Indigenous Peoples Declaration specifies environmental protection of indigenous peoples, stating "Indigenous people have the right to the conservation, restoration and protection of the total environment and the productive capacity of their lands, territories and resources, as well as to assistance for this purpose

96. *1994 Draft Declaration of Principles on Human Rights and the Environment*, Part II, art. 14; see also *id.* at arts. 5, 8, & 20, reprinted in 3 *RECIEL* 259 (1994), available at <http://www.1.umn.edu/humanrts/instree/1994-dec.htm>.

97. Convention (No. 169): Convention Concerning Indigenous and Tribal People in Independent Countries, at art. 13 (adopted June 27, 1989, entered into force Sept. 5, 1990) (reprinted in 8 *ARIZ. J. INTL & COMP. L.* at 204 (1991)).

98. *Id.* at art. 15.

99. UNESCO, Doc. FS 82/WF.32 (1982) (on file with author).

100. *Draft Declaration of Principles for the Defense of the Indigenous Nations and People of the Western Hemisphere*, U.N. Doc.E/CN.4/Sub.2/476/Add.5, Annex 4 (1981).

from State and through international cooperation."<sup>101</sup> The European Parliament's Resolution on Action Required Internationally to Provide Effective Protection for Indigenous People also specifically referred to environmental protection of indigenous peoples.<sup>102</sup> Similarly, the resolution states in No. 9 that indigenous peoples deserve compensation for any "loss of land."<sup>103</sup> The draft of the Inter-American Declaration on the Rights of Indigenous Peoples set forth the right to environmental protection of indigenous peoples, stating, among other things, that "indigenous peoples are entitled to a healthy environment."<sup>104</sup>

Numerous other international instruments refer with similar language to the right of indigenous peoples to control their land and other natural resources as a necessary means to maintain their traditional way of life.<sup>105</sup> It thus appears that because indigenous peoples' way of life and very existence depends on their relationship with the land, their human rights are inextricable from environmental rights, and environmental rights are deeply intertwined with other basic rights for them. On that basis, there appears to be little doubt that the international community now regards indigenous peoples as having environmental *rights* that rise to the status of international norms.<sup>106</sup>

101. See Sevine Ercmann, *Linking Human Rights, Right of Indigenous People and the Environment*, 7 BUFF. ENVTL. L.J. 15, 28 (citing U.N. Indigenous Peoples Declaration, adopted at the 46th Session of the U.N. Sub-Committee on the Prevention of Discrimination and Protection of Minorities on Aug. 26, 1994: RES 94/95).

102. The Resolution states in No. 7 that "indigenous peoples have the right to common ownership of their traditional land sufficient in terms of area and quality for the preservation and development of their particular ways of life." *Resolution on Action Required Internationally to Provide Effective Protection for Indigenous People*, Eur. Parl. Doc. PV 58(II) (1994) (on file with author).

103. *Id.*

104. *The Draft Inter-American Declaration on the Rights of Indigenous Peoples*, O.A.S. Doc. OEA/Ser/L/V/II.90, Doc. 9 rev. 1 (1995), at art. XIII (on file with author).

105. See Osofsky, *supra* note 16, at 359.

106. See, e.g., ANAYA, *supra* note 7; S. James Anaya, *Indigenous Rights Norms in Contemporary International Law*, 8 ARIZ. J. INT'L & COMP. L. 1 (1991) (discussing international law developments involving indigenous rights); Russel L. Barsh, *Indigenous Peoples in the 1990s: From Object to Subject of International Law?*, 7 HARV. HUM. RTS. J. 33 (1994) (discussing developments in international law norms regarding the identity of indigenous peoples); Thomas S. O'Connor, "We Are Part of Nature": *Indigenous Peoples' Rights as a Basis for Environmental Protection in the Amazon Basin*, 5 COLO. J. INT'L L. & POL'Y 193 (1994) (analyzing the Inter-American Commission case involving environmental rights of the Ecuadorian Huarani people); Maria Stavroupoulou, *Indigenous Peoples Displaced From Their Environment: Is There Adequate Protection?*, 5 COLO. J. INT'L L. & POL'Y 105, 122-25 (1994) (discussing international protections for indigenous peoples' displacement from

Professor S. James Anaya has similarly shown that a cluster of basic human rights expressed in numerous international human rights documents directly imply a right to a healthy and clean environment, including such *jus cogens* norms as the right to life, the right to be free from bodily harm and the right to physical and mental health.<sup>107</sup>

Similarly, the Inter-American Commission on Human Rights, in a 1977 report, in discussions of the environmental concerns of the indigenous peoples in the Amazon, essentially articulated a human right to a healthy environment based on the well established right to life.<sup>108</sup>

Several international instruments speak of groups having a right to maintain their distinctive cultures.<sup>109</sup> For instance, Article 27 of the International Covenant on Civil and Political Rights states that minorities have the right to enjoy their own culture in community with the dominant culture.<sup>110</sup> The United Nations Human Rights Committee has interpreted Article 27 to mean that indigenous peoples have the right to maintain and develop the distinctive features of their culture including those aspects related to the environment and land resources.<sup>111</sup> The right to cultural integrity appears to go hand-in-hand with environmental rights.

Property rights may also be linked to environmental rights in that several international instruments state that indigenous peoples have the right to possess the lands they have traditionally occupied.<sup>112</sup> This implies an international norm whereby indigenous peoples have a right to the inviolability of their cultures insofar as those cultures are connected to their land, and to be protected against destruction of their environment.<sup>113</sup>

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their environment); William A. Shutkin, *International Human Rights Law and the Earth: The Protection of Indigenous Peoples and the Environment*, 31 VA. J. INT'L L. 479, 488-93 (1991) (examining environmental human rights as protecting indigenous peoples).

107. See, e.g., ANAYA, *supra* note 7; Anaya, *supra* note 106, at 6.

108. See Anaya, *supra* note 106, at 24.

109. *Id.* at 7.

110. *Id.*

111. *Id.*

112. See *id.* at 25-26 (citing the International Labor Organization's Convention on Indigenous and Tribal Peoples of 1989 (ILO Convention No. 169))

113. *Id.* at 8. See also Sevine Ercmann, *Linking Human Rights, Rights of Indigenous People and the Environment*, 7 BUFF. ENVTL. L.J. 15, 27-29 (1999) (citing several international instruments affirming the rights of indigenous peoples to their natural environment, including the right to control of their lands, territories and natural resources, and the right to maintain their traditional way of life). The diffi-



Finally, the right to self-determination—a basic norm of international law recognized in the United Nations Charter and numerous other international instruments—further strengthens the idea that international law overwhelmingly recognizes environmental rights.<sup>114</sup> The idea of self-determination is that people, individually and collectively, are entitled to pursue their own destinies, and that the institutions of government should be constituted to support that goal. Self-determination implies rights of consultation and participation in government decision-making that may affect a particular group of citizens, and implies the right of indigenous peoples to maintain their own system of decision-making regarding their customs and institutions.<sup>115</sup> Self-determination means that people have the inherent human right to maintain their social, economic, cultural and political integrity. Self-determination is thwarted with instances of non-consensual removal of peoples from their traditional territories “for reasons relating to national security, or in the interest of national economic development . . . .”<sup>116</sup>

The norm of self-determination was the centerpiece of the convention, “Universal Declaration of the Rights of Indigenous Peoples,” developed in the early 1990s by the United Nations Working Group on Indigenous Peoples.<sup>117</sup> This document emphasizes self-determination as the key to the collective and individual rights of indigenous peoples, including full recognition of their own laws and customs, land rights, ownership and control of natural resources, and institutions such as land tenure systems for

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culty here is that ordinarily even a property right of longstanding legitimacy might not include subsurface mineral rights. That is the case in most countries of South America, where it is common for states to retain ownership over all subsurface non-renewable resources, even such resources that underlie privately owned lands. Anaya, *supra* note 18, at 8. Still, if indigenous people do not own the mineral rights to their lands, encroachment upon their lands for development has certain implications in terms of deforestation and spoiling of their natural habitat. These and other incursions impact the cultural integrity of populations to their land resources. The ILO Convention No. 169 cited above specifically addressed the issue of State ownership of subsurface resources, and states that indigenous peoples have the inherent right to participate in the planning of projects that might exploit those resources. Anaya, *supra* note 18, at 9.

114. Anaya, *supra* note 18, at 9

115. *Id.*

116. *Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*, International Labour Organization Convention (No. 107), June 26, 1957, 328 U.N.T.S. 247.

117. See Hitchcock, *supra* note 8, at 11.

the management of land and natural resources.<sup>118</sup> This document underscores the importance of environmental protection and equates it with human rights as a whole, and self-determination in particular.

The foregoing discussion shows that ATCA jurisdiction may be conferred for foreign plaintiffs who allege environmental harms based upon the international consensus that environmental rights are a species of human rights, the violation of which constitutes a tort under a substantial body of international law.

### The Sovereign Immunity Hurdle

A foreign government, through its agencies and officials, is usually named as a joint and several tortfeasor with its multinational partner in an oil development project, a complicated jurisdictional problem.<sup>119</sup> In cases such as *Aguinda v. Texaco*, where the interaction between public officials and the multinational company, as well as the contract with the government, make the state a joint participant in the challenged activity, the state government is usually named as a defendant.<sup>120</sup> A joint agreement between a government and a private company can create joint action such that the court can decide that the company's action is really that of the state.<sup>121</sup>

Some cases under the ATCA may face the problem of dismissal based on the motion by a foreign government or officials invoking the doctrine of sovereign immunity. If the foreign government objects to jurisdiction of the U.S. court the question of sovereign immunity must then be addressed. Under the Foreign Sovereign Immunities Act of 1976 ("FSIA"),<sup>122</sup> a foreign state enjoys general immunity from civil actions for damages unless the damages occurred in the United States or unless there is an enumerated exception.<sup>123</sup>

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118. *Id.* See also *Report of the Working Group on Indigenous Populations on its eleventh session*, U.N. Comm. on Human Rights, Sub-Comm. on Prevention of Discrimination and Protection of Minorities, 11th Sess., Annex I, Agenda Item 14, U.N. Doc. E/CN.4/Sub.2/1993/29 (1993), reprinted in 9 ST. THOMAS L. REV. 212 (1996).

119. See Rosencranz, *supra* note 59, at 159.

120. See *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961).

121. See *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980) (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970) and *United States v. Price*, 383 U.S. 787, 794 (1966)).

122. 28 U.S.C. §§ 1602-II (1994), amended by 28 §§ 1603-II (Supp. III 1997).

123. The statute immunizes any "political subdivision of a foreign state or an agency or instrumentality of a foreign state," *id.* at § 1603(a) (Supp. III 1997), unless certain exemptions apply. These exceptions include: (1) an express or implied waiver; (2) involvement in commercial activities; (3) taking property that is currently

One enumerated exception to invoking the sovereign immunity claim is the "commercial activity exception." If the sovereign is alleged to have been engaged in a commercial activity, such as is usually the case between foreign nationals and multinational partners in oil drilling ventures, the court may find that there are inadequate grounds to seek a dismissal of the foreign officials based on sovereign immunity. However, for the commercial activity exception to apply, there must be a "direct effect" of the sovereign's commercial activity *in* the United States, and that may be extremely difficult to show.<sup>124</sup> Commentators note that only things such as transboundary pollution, or an oil spill caused by a foreign state actor that washes onto United States shores, could be considered as having a "direct effect" in the United States to satisfy the commercial activity exception.<sup>125</sup> Moreover, courts are reluctant to interfere with a foreign sovereign's ability to exploit its natural resources and, as well, are wary of implicating foreign relations (a principle of comity known as the "act of state" doctrine). Hence, courts are inclined to dismiss parties named as foreign officials based on sovereign immunity principles unless there is a clear commercial activity exception or unless the foreign government consents to jurisdiction.<sup>126</sup>

This problem is compounded in that a named foreign state may be deemed an indispensable party to the action. If a foreign government is named as a joint and several tortfeasor with the multinational company, plaintiffs may argue, in addressing a motion to dismiss based on sovereign immunity grounds, that the foreign sovereign is *not* an indispensable party even though it was a partner with the multinational company, that a remedy could exist exclusively against the multinational partner under the theory of joint and several liability in torts, and thus an adequate remedy can be fashioned without joining the sovereign party.<sup>127</sup> The outcome would depend upon numerous variables, but in principle any one of joint and several tortfeasors can be held liable for the

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present in the United States; (4) acquisition of a gift by succession of property that is currently present in the United States; (5) commission of noncommercial torts inside the United States; and (6) involvement in certain maritime activities. *Id.* at § 1605(a)(1)-(6) (1994).

124. Rosencranz, *supra* note 59, at 203.

125. Unger, *supra* note 69, at 687.

126. *See* Holwick, *supra* note 23, at 198-200.

127. *See id.* at 203-05.

entirety of the action, and therefore joinder of joint tortfeasors might not be indispensable in all cases.

### The *Forum Non Conveniens* Hurdle

There is yet another, perhaps more difficult, hurdle to go through in ATCA cases, and that is the *forum non conveniens* doctrine. The question under this doctrine is whether the United States or the foreign court is more convenient for trying the case. Courts will dismiss the action, as occurred in the *Aguinda v. Texaco* case now on appeal, if the foreign court appears to be more appropriate, based on such factors as relative ease of access to sources of proof, possibility of viewing the site, access to the bulk of the documents necessary for litigation located abroad and convenience for the attendance of witnesses.<sup>128</sup>

The threshold question is whether there is an adequate foreign court in the first place. The strategy of the plaintiff is to argue that there is *no* adequate forum in the foreign state based on evidence of statutory and common law in the foreign jurisdiction, media reports, and other evidence showing that the foreign court is not an adequate alternative because of corruption or other reasons.<sup>129</sup> Evidence of corruption can consist of local newspaper accounts of judicial corruption, World Bank Reports, and the like.<sup>130</sup> The plaintiffs in *Aguinda v. Texaco* argued that Ecuador had no adequate judicial forum on many grounds, including that the Ecuadorian government, which leased the properties to Texaco, depends on oil for nearly all of its revenues, and the various presidents of Ecuador (the government changed four times within five years) apparently wanted to soothe the fears of foreign investors by remaining neutral with regards to present or future legal actions taken against oil companies.<sup>131</sup> Plaintiffs introduced evidence showing that Ecuador for all practical purposes does not recognize tort claims or class actions.<sup>132</sup>

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128. See Rosencranz, *supra* note 59, at 184.

129. See *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997).

130. See Rosencranz, *supra* note 59, at 182.

131. *Id.* at 202-203.

132. See Memorandum of Law in Support of Plaintiffs' Appeal from a Final Decision of the District Court Dismissing This Case on the Grounds That the District Court Is Not a Convenient Forum For the Litigation, filed in an appeal from the final decision of Honorable Jed S. Rakoff, U.S.D.J. in *Maria Aguinda et al. v. Texaco Inc.*, 93 Civ. 7527 and *Gabriel Ashanga Jota et al. v. Texaco Inc.* 94 Civ. 9266. For the decision from which the appeal was taken, see 142 F. Supp. 2d 534 (S.D.N.Y. 2001). The District Court dismissed both cases on *forum non conveniens* grounds. One of plaintiffs' declarants, Professor Alberto Wray, former member of the Ecua-

Moreover, extensive evidence was submitted to show that there are substantial shortcomings in Ecuador's legal and judicial system due to inefficiency, politicization and corruption, including a report from the U.S. Department of State.<sup>133</sup>

Plaintiffs also argued that a case like this cannot receive a fair trial in Ecuador because Ecuador's courts do not recognize class action lawsuits, nor have those courts adjudicated any previous large-scale toxic tort cases. Ecuador's environmental disputes are relegated to an administrative tribunal, and to date, the largest fine assessed has been a few thousand dollars.<sup>134</sup> The trial judge himself noted in a Memorandum Order the year before that a recent military coup, in which one of the leaders of the coup was a former justice of the Supreme Court of Ecuador, had "revived lingering questions about the ability of the Ecuadorian (and Peruvian) courts to dispense independent, impartial justice in these cases."<sup>135</sup> The judge had then noted the "reasonable possibility that the Ecuadorian military, which is funded directly from oil revenues" would harass the plaintiffs if they were to

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dor Supreme Court, stated, "I have found that within a total of 6,448 cases . . . [in] only 3 was the issue of damages to property or to persons related to negligence examined." *Id.* (citing Affidavit of Prof. Alberto Wray, pg. 7, ¶8, A217). In Ecuador class actions are not recognized in that "[N]o one can bring an action in the name of another, unless he has been granted the power of representation (art. 47 CPC) and the Constitution clearly expressly forbids the exercise of this power on behalf of the people. (art. 19, num. 10 Const.) (*Id.* at 2, ¶2, A212)." *See id.*

133. The U.S. State Department issued a letter concluding that the legal system in Ecuador is "inefficient, and corrupt." (*See id.* at B.1. (d) citing letter from Judge Jed Rakoff to U.S. Attorney, A6946 to A6947.) And according to a senior advisor to the World Bank, "corrupt practices in the Ecuadorian and Peruvian courts are pervasive." *Id.* citing Aff. Edgardo Buscaglia senior advisor to the World Bank, A6386. Plaintiffs' Memorandum also points out evidence showing the inadequacy of Ecuador's legal forum in some rather daunting procedural impediments:

Testimony of the plaintiffs is not admissible. (Aff. Alberto Wray, pg. 5, ¶4, A215.)

- Plaintiffs' experts cannot testify. (*Id.* at 5, ¶4, A215.)
- Oral cross examination is not permitted. (*Id.* at 5, ¶5, A215.)
- Witnesses cannot be compelled to appear in Court and testify, thus Texaco's personnel can simply refuse to appear in the Court. (*Id.* at 5, ¶6, A215.)
- Disobeyed judicial orders result only in fines amounting to maximums of US \$90 to US \$180. (*Id.* at 6, ¶6, A216.)
- Ecuador requires that cases resulting from environmental contamination be filed only with administrative agencies not the courts. (*Id.* at 9, ¶12, A219.)
- If the administrative agencies do not act, plaintiffs can only bring an action against the Government of Ecuador, not the party responsible for the damages. (*Id.* at 10 ¶12, A220)

134. *See* Editorial, *Texaco and Ecuador*, N.Y. TIMES, Feb. 19, 1999, at A20.

135. *See* *Aguinda v. Texaco*, No. 93 Civ. 7527 (TSR), 2000 WL 122143, at \*1, \*2 (S.D.N.Y. Jan. 31, 2000).

bring suit in Ecuador.<sup>136</sup> The judge further quoted a U.S. State Department report on Ecuador stating that “[t]he most fundamental human rights abuse stems from shortcomings in [its] politicized, inefficient, and corrupt legal and judicial system . . . .”<sup>137</sup>

If the U.S. court determines that an adequate alternative forum exists in the foreign country, the court must still consider the “private interest” and “public interest” factors relevant to the case.<sup>138</sup> The “private interest” factors include those mentioned above, and issues of “the relative ease of access to sources of proof, the cost of obtaining the attendance of willing witnesses, the availability of compulsory process for obtaining attendance of unwilling witnesses, the possibility of viewing the relevant premises, and other such practical concerns.”<sup>139</sup> When all plaintiffs reside in the foreign country, and where all of the environmental damages, personal injuries, medical and property records are located or occurred in the foreign country, these private interest elements weigh heavily in favor of dismissal based on *forum non conveniens*.

The plaintiffs in *Aguinda v. Texaco* have argued that even if the forum in Ecuador is adequate, the case should not be dismissed on grounds of *forum non conveniens* because all the technical decisions made for the development of the petroleum operations in Ecuador, including blueprints and plans for perforation of the wells and construction of the oil pipelines and production stations—occurred at Texaco’s headquarters in the United States, and that no one in Ecuador made the decision to dump the produced water instead of reinjecting it.

But upon a renewed motion to dismiss, after the case was remanded by the Second Circuit from an earlier dismissal on other grounds, the judge determined that circumstances had changed to indicate that now there *was* an adequate alternative forum to

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136. *Id.* at \*1.

137. *Id.* at \*2.

138. See *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 539 (S.D.N.Y. 2001)(citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947)). See also Memorandum of Law in Support of Plaintiffs’ Appeal from a Final Decision of the District Court Dismissing This Case on the Grounds That the District Court Is Not a Convenient Forum For the Litigation, filed in an appeal from the final decision of Honorable Jed S. Rakoff, U.S.D.J. in *Maria Aguinda et al. v. Texaco Inc.*, 93 Civ. 7527 and *Gabriel Ashanga Jota et al. v. Texaco Inc.* 94 Civ. 9266. For the decision from which the appeal was taken, see 142 F. Supp. 2d 534 (S.D.N.Y. 2001).

139. *Aguinda*, 142 F. Supp. 2d at 548 (citing *Gilbert*, 330 U.S. at 508).

adjudicate these claims in Ecuador, and, finding that Ecuador would be a much more convenient forum, dismissed on grounds of *forum non conveniens*.<sup>140</sup>

Despite these jurisdictional hurdles, *Aguinda v. Texaco* in principle holds that international law recognizes environmental torts to the extent necessary to confer subject matter jurisdiction under the ATCA, and this paves the way for future cases so long as the plaintiffs can overcome a motion to dismiss based on other grounds, such as *forum non conveniens*. *Aguinda v. Texaco* is a watershed case in an emerging field called "transnational public law litigation," and suggests that the ATCA can be increasingly utilized as a mechanism for U.S. judges

to determine whether a clear international consensus has crystallized around a legal norm that protects or bestows rights upon a group of individuals that includes plaintiffs. If so, the court could . . . make violations of that norm a federal "tort" in violation of the law of nations' for purposes of the Statute.<sup>141</sup>

The precedent is significant in that it creates an opportunity for other environmental and human rights plaintiffs to pursue American-based corporate polluters in U.S. federal courts if they can show a proper jurisdictional nexus. Since many corporations have, to varying degrees, been less attentive to environmental standards in developing countries than they have been at home, it is not difficult to imagine foreign plaintiffs in other situations coming forward to demand similar relief.

Turning to the U.S. court system is hardly a panacea to insure that multinational companies will be vigilant to attend to the environmental concerns of indigenous peoples. According to legal scholar Hurst Hannum, "[t]he history of indigenous peoples is, to a large extent, the chronicle of their unsuccessful attempts to defend their land against invaders."<sup>142</sup> Today, many perceive these "invaders" to be multinational companies when they demonstrate little regard for the well-being of the people whose resources and lands they are exploiting. Typically, indigenous peoples feel they are victims of progress because the majority of development projects appear to be in the interests of governments and transnational companies rather than local people.

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140. *Id.* at 551.

141. See Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2385-86 (1991).

142. HURST HANNUM, *AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS* 92 (1990).

It is in the interest of U.S. businesses to ensure that the United States' reputation is not tarnished by unethical corporate practices of American multinational companies doing business abroad. The need to sue corporations for endangering human life and environmental contamination can dissipate if corporate misconduct stops. Such suits are burdensome, time-consuming, and create public relations havoc. Furthermore, it is not possible to say that suing under the ATCA can be regarded as an efficient or effective restraint on corporate misconduct.

## 5.

THE PUBLIC TRUST DOCTRINE AS PUBLIC POLICY  
ENDORING CORPORATE TRUSTEESHIP OF  
THE ENVIRONMENT

The public trust doctrine stems from English common law, and holds that all of a nation's public lands are held in trust by the government for the people of the entire country.<sup>143</sup> Under this doctrine the government has a duty to preserve and protect the nation's lands for the "public's common heritage."<sup>144</sup> The public trust doctrine is recognized as a tradition often pertaining to water rights and marine settings such as the seashore, by which the state as sovereign exercises supervision and control over public lands.<sup>145</sup>

Today, the principle has become broader than this traditional application, holding that the government has a duty to promote and maintain a healthy natural environment on behalf of current and future citizens.<sup>146</sup> The public trust doctrine has been recognized to include "hunting, swimming, recreational boating, aesthetics, climate, scientific study, environmental and ecological quality, open space, wildlife habitat preservation, and water allocation."<sup>147</sup> Effective implementation of the public trust doctrine

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143. *Light v. United States*, 220 U.S. 523, 537 (1911).

144. *Sierra Club v. Block*, 622 F. Supp. 842, 866 (D. Colo. 1985). See also *Massachusetts v. Andrus*, 594 F.2d 872, 890 (1st Cir. 1979).

145. See, e.g., *Nat'l Audubon Soc'y v. Superior Court of Alpine*, 658 P.2d 709, 728 (Cal. 1983).

146. See Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 556-57.

147. S. M. Kelly, *The Public Trust and the Constitution: Routes to Judicial Overview of Resource Management Decisions in Virginia*, 75 VA. L. REV. 895, 897 (1989).



is thought to require preventive measures, remediative oversight, and restorative responsibilities.<sup>148</sup>

The public trust doctrine seems to have become part of corporate global ethics in the form of corporate integrity programs that call for greater accountability and transparency. Much of the "ethos" of voluntary codes of corporate ethics appear to be derived from the public trust doctrine.<sup>149</sup> For instance, Sir John Browne, Chief Executive Officer of BP Amoco, sought to raise productivity and win public credibility and respect by declaring his company's commitment to a global ethics program that embraces an intense concern for the environment.<sup>150</sup> Unocal stated that its "record on human rights is as good or better than any other company," and that it will adhere to its voluntary code of conduct, which requires the company to "meet the highest ethical standards in all our business activities."<sup>151</sup>

Nearly fifty corporations committed themselves to the Global Compact created in January 1999,<sup>152</sup> which calls on corporations to pledge themselves to nine key principles, including the protection of international human rights and greater environmental responsibility.<sup>153</sup>

The public trust doctrine, while traditionally applicable to state actors only, has not only been embedded within company codes of ethics of many multinational companies, but also may have legal application to multinational companies when they enter

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148. See Peter Manus, *To A Candidate in Search of an Environmental Theme: Promote the Public Trust*, 19 STAN. ENVTL. L.J. 315, 318 (2000).

149. See Lisa Trojnar, *Key Human Rights Issues in the New Millennium*, 27 HUM. RTS. 8, 10 (2000).

150. Frank Vogl, *Corporate Integrity and Globalization: The Dawning of a New Era of Accountability & Transparency*, Address Before the G. Albert Shoemaker Program in Business Ethics at the Smeal College of Business Administration (Mar. 23, 2001) (transcript available at <http://www.ethics.org/articles/voglremarks.html>).

151. See John Christopher Anderson, *Respecting Human Rights: Multinational Corporations Strike Out*, 2 U. PA. J. LAB. & EMPLOYMENT L. 463, 496-97 (2000).

152. Meaghan Shaughnessy, *The United Nations Global Compact and the Continuing Debate About the Effectiveness of Corporate Voluntary Codes of Conduct*, COLO. J. INT'L. ENVTL. L. & POL'Y 2000 Y.B. 159, 160 (2001); Nicole Winfield, *U.N. Launches Partnerships*, ASSOCIATED PRESS, July 26, 2000, available at 2000 WL 24550705.

153. See Nicole Winfield, *U.N. Announces Business Initiatives*, ASSOCIATED PRESS, July 20, 2000, available at 2000 WL 24002700. The companies in the Global Compact are asked by the Global Compact to publish examples of their progress in implementing the nine principles on a United Nations website, where labor and human rights groups such as Amnesty International and Lawyers Committee for Human Rights may comment. *Id.*

into partnership agreements with foreign governments—an almost inevitable occurrence with any foreign oil project.<sup>154</sup>

While the public trust doctrine initially functioned primarily as a restriction upon government action, in recent years it has been applied as a restraint upon other parties in their exercise of private property rights. The majority of public trust cases after 1970 fall into this latter category.<sup>155</sup> United States corporations can be subject to the public trust doctrine, absent clear statutory exemption when operating on lands dedicated to the public interest. Courts have enjoined private companies based on that doctrine.<sup>156</sup> These cases usually involve the state approving diversion of lands protected by the public trust by licensing usage to private entities, without first taking into consideration the public trust values that might avoid the needless diversion or destruction of those lands.<sup>157</sup> The public trust doctrine “is an affirmation of the duty of the state to protect the people’s common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.”<sup>158</sup>

While there is no legally enforceable right to a healthful environment under the U.S. Constitution, it appears that this right is well embedded in the public trust doctrine, and is an important

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154. In 1990 the United Nations proposed a voluntary Code of Conduct on Transnational Corporations (UNCTC), which called on multinational corporations to “respect human rights and fundamental freedoms, including the prohibition of discrimination on the grounds of race, color, sex, religion, language, ethnic origin or political opinion.” Leslie Wells, *A Wolf In Sheep’s Clothing: Why Unocal Should Be Liable Under U.S. Law for Human Rights Abuses in Burma*, 32 COLUM. J.L. & SOC. PROBS. 35, 66 (1998). In 1995, President Clinton issued the Model Business Principles, saying that multinational corporations should institute “fair business employment, including the avoidance of child and forced labor and avoidance of discrimination based on race, gender, national origin or religious beliefs; and respect for the right of association and the right to organize and bargain collectively.” See Shaughnessy, *supra* note 141, at 162-63. In addition, media coverage of forced labor in China and child labor in Southeast Asia encouraged many companies to create voluntary codes of conduct, including Levi Strauss, Sears, J.C. Penney, Wal-Mart, Phillips-Van Heusen, The Gap, Nike, Reebok, and Timberland. *Id.* at 162.

155. See R. J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 632 (1986).

156. See *Gould v. Greylock Reservation Cmty*, 215 N.E.2d 114 (1966).

157. See, e.g., *Nat’l Audubon*, 658 P.2d at 712.

158. *Id.* at 724.

legal principle that guides decision-making in the area of public policy, particularly with discretionary governmental actions.<sup>159</sup>

The public trust doctrine is not fixed or inflexible. The common law of trusts allows for changing circumstances to accommodate a flexible public trust duty.<sup>160</sup> The doctrine is one which, "like all common law principles, should not be considered fixed or static, but should be molded or extended to meet changing conditions and needs of the public it was created to benefit."<sup>161</sup> In a leading case decided by the California Supreme Court in 1971, it was noted that:

The public uses . . . are sufficiently flexible to encompass changing public needs. In administering the trust the state is not burdened with outmoded classification favoring one mode of utilization over another . . . . There is a growing public recognition that one of the most important public uses of the tidelands . . . is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.<sup>162</sup>

Similarly, the public trust doctrine stands for the principle that preservation of ecological functions is a public right, and that the doctrine constitutes "an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust"<sup>163</sup>

The public trust doctrine can have a meaningful role to play in corporate environmental management. The public trust doctrine combines the requirement of public accountability with regards to decisionmaking with respect for indigenous peoples' access to their native resources. The people whose land and resources are at stake are, in trust terms, beneficiaries and possess a form of

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159. See Kenneth R. Moss, *The Public Trust Doctrine in South Carolina*, 7 S.C. ENVTL. L.J. 31 (1998).

160. See, e.g., RESTATEMENT (SECOND) OF TRUSTS § 399 (1980) ("If property is given in trust to be applied to a particular charitable purpose, and it . . . becomes impossible or impracticable or illegal to carry out the particular purpose, . . . the trust will not fail but [will apply] to some charitable purpose which falls within the general charitable intention of the settlor.")

161. *Neptune City v. Avon-by-the-Sea*, 294 A.2d 47, 54 (N.J. 1972)

162. *Marks v. Whitney*, 6 Cal.3d 251, 259-604 (Cal. 1971) (holding that the environmental preservation of tidelands in their natural state was encompassed by the public trust).

163. *Nat'l Audubon Soc'y*, 658 P.2d at 724.

sovereignty over the land and its natural resources that may be termed original ownership.<sup>164</sup>

The public trust doctrine does not spell a death knell to oil exploration or other types of extraction of nonrenewable resources. Under the public trust doctrine applied to multinational companies, the corporate trustee may point to changing market circumstances, political circumstances, or advances in the science of environmental protection to help shape, alter or innovate development projects consistent with the duties of a good steward. But a trustee must also take into account its long-term duty in light of the environmental concerns of the day.<sup>165</sup> Under this model, the corporation as trustee will want to aim at maintaining a regenerative natural environment, allow for sustainable development and insure that the natural environment will thrive and will continue to thrive as a healthy and diverse habitat for the peoples affected.

The mere fact that indigenous peoples might not “own” the mineral rights beneath their property or in the adjoining area does not mean that these resources may become the inexorable bounty of multinational projects. In the United States, due to the National Environmental Protection Act and the Clean Air Act, land developers are required to make environmental-impact studies and expose them to public scrutiny before local and state governments can approve private construction projects which may have a significant impact on the environment.<sup>166</sup>

There needs to be a balancing of the interrelated concerns of the private developers and those who are affected by the exploitation of natural resources. The interest of indigenous peoples is not something immutable, and their demands are not absolute in that they may need to be balanced against the reasonable concerns of other users, the society at large, and other principles such as sustainable development. The point is that the public trust doctrine ought to be operative as a constraint upon multinational companies with regards to utilization of natural resources throughout the world. The public trust doctrine captures a stewardship principle that stresses the duty of all parties—government, market participants and citizen beneficiaries—to compromise personal exploitation values with reference to the needs

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164. See Manus, *supra* note 137, at 324.

165. See *id.* at 330.

166. See GEORGE CABOT LODGE, *THE NEW PROPERTY*, IN *PHILOSOPHICAL ISSUES IN HUMAN RIGHTS* 236 (Patricia H. Werhane et al. eds., 1986).

of the environment. The doctrine captures the ideal of a democratic society of individuals working for the greater good even as they strive to attain individual market benefits.

We live in an age where consumers and stockholders are interested to know whether products are produced in a "socially responsible" manner. Problems such as environmental misconduct, sweatshop labor, and other human rights violations have had a detrimental impact on the bottom line of some companies. For instance, after Shell Oil announced it would "dump the Brent Spar oil platform into the sea," a consumer boycott caused sales to drop by up to fifty percent.<sup>167</sup> Critics such as one business ethicist from the Wharton School of Business at the University of Pennsylvania claim that "too many companies don't do anything with the [codes]; they simply paste them on the wall to impress employees, customers, suppliers and the public."<sup>168</sup> However, the public takes seriously the voluntary pronouncements on ethical policies by companies rather than viewing them to be mere "public relations gimmicks."<sup>169</sup>

Codes of ethics can be made more explicit, with written guidelines to establish an accepted standard of practice in seeking environmentally sensitive projects affecting indigenous peoples. A recommended protocol is presented in the following section, with procedures for public participation of indigenous peoples regarding projects affecting their environment.

The genius of U.S. corporate law is that it gives directors and officers the flexibility to balance shareholders' interests against other stakeholders.<sup>170</sup> That is, the duties of the board entail focusing on a panoply of concerns, above and beyond maximizing shareholder profits.<sup>171</sup>

For decades the prevailing theory of corporate governance rested on the shareholder-centric model, that is, on the assumption that the primary duty, or even the sole task, of officers and

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167. See Anderson, *supra* note 140, at 472.

168. Thomas Donaldson, *Values in Tension: Ethics Away from Home*, HARV. BUS. REV., Sept.-Oct. 1996, at 48.

169. *Id.* at 49.

170. See Steven M.H. Wallman, *Understanding the Purpose of the Corporation*, 24 J. CORP. L. 807 (Summ. 1999).

171. See, e.g., *Paramount Communications v. Time, Inc.*, 571 A.2d 1140, 1150 (Del. 1989) ("[A] board of directors, while always required to act in an informed manner, is not under any *per se* duty to maximize shareholder value in the short term . . .").

directors was to maximize shareholder wealth.<sup>172</sup> Increasingly we see that the model of “shareholder primacy” does not tell the whole story, and it may not be the appropriate corporate governance norm. Today it seems that most corporate officers and directors take their job to be a much more complex balancing act in which they must serve not just shareholders’ interests, but also those of other stakeholder groups such as managers, creditors, employees, other companies, the community and the environment.

The idea that directors owe their duty solely to shareholders leads to perplexing dilemmas, troubling results, and long-term disadvantages for society. Which shareholders ought to be the focus of maximizing shareholder wealth? Shareholders of the moment? Long-term shareholders? Should actions be directed to maximize the current share price? What about action that will be detrimental to the current share price but will, at least in the directors’ view, benefit long-term shareholders, or shareholders at a much later date? And in principal how can corporate action taken today to benefit long-term shareholders be detrimental to the current share price—ought it not help increase today’s share price?

It is not entirely clear how the notion focusing on promoting shareholder interests started to dominate academic discussions of corporate law. In fact, the concept that directors owe their fiduciary duty exclusively to shareholders is not now the law nor has it ever been the law in this country.<sup>173</sup> Rather, the law generally grants directors trustee status for the firm as a whole, meaning that they have the discretion to consider the interests of other corporate constituencies, in addition to the interests of shareholders, in shaping business policy.

In the late eighteenth and early nineteenth centuries, American corporations were chartered with the integral purpose of serving public interests.<sup>174</sup> As one commentator observed:

Almost all of the business enterprises incorporated . . . in the formative generation starting in the 1780’s were chartered for activities of some community interest—supplying transport, water, insurance or banking facilities. That such public-interest undertakings practi-

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172. See, e.g., Frank Easterbrook K & Daniel Fischel, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* (1991); see also Andrei Shleifer & Robert W. Vishny, *A Survey of Corporate Governance*, 52 *J. FIN.* 737, 738, 740-48 (1997).

173. See *id.* at 813.

174. See *id.*

cally monopolized the corporate form implied that incorporation was inherently of such public concern that the public authority must confer it.<sup>175</sup>

The courts recognized that this integral public-interest purpose was exacted as "a regulatory *quid pro quo*" in exchange for conferring the corporate entity status.<sup>176</sup> While it was clear that shareholders in early American corporations had legal control over the corporation, the early charters emphasized the corporation's larger public-interest purposes.

Only in the past century and a half has the United States treated the corporation as private property rather than as a creation of the state designed to serve a public function. Early corporations received charters to achieve some public purpose, such as, to build a bridge. Charters imposed strict limits on corporate organization, function, and even length of existence.<sup>177</sup>

These core principles underscore the view that the interests of the corporation historically go beyond the wealth-maximization concerns of shareholders. Its interests also include:

the interwoven interests of its various constituencies, such as . . . employees, customers, the local community, and others. Linking these interests to the corporation's interests resolves much of the tension that would otherwise exist . . . [T]hese constituencies' interests are balanced by the board of directors acting in the best interests of the corporation as a whole, as opposed to the best interests of any one particular constituency [such as the shareholders].<sup>178</sup>

A famous debate from the 1930s involved Professors Adolph A. Berle, Jr. and E. Merrick Dodd, Jr., who expressed competing views on the obligations of the corporation in *Harvard Law Review*.<sup>179</sup> Professor Berle argued that the corporation was responsible only to its stockholders.<sup>180</sup> Professor Dodd argued that a

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175. James Willard Hurst, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780-1970*, 15-17 (1970).

176. *Id.* at 15.

177. See Dennis R. Fox, *supra* note 144 at 344.

178. Steven M.H. Wallman, *The Proper Interpretation of Corporate Constituency Statutes and Formulation of Director Duties*, 21 *STETSON L. REV.* 1, 170-71 (1991).

179. See A. A. Berle, *Corporate Powers as Powers in Trust*, 44 *HARV. L. REV.* 1049 (1931); A. A. Berle, *For Whom Corporate Managers Are Trustees: A Note*, 45 *HARV. L. REV.* 1365 (1932); and E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 *HARV. L. REV.* 1145 (1932).

180. See *id.* at 44 *HARV. L. REV.* 1049, 1049.

corporation must not only profit its stockholders, but must also engage in social service.<sup>181</sup>

The debate focused on the idea that the law may be approaching a position in which it will regard all business as affected with a public interest.<sup>182</sup> Their debate discussed the public opinion of the 1930s, which had been moving towards the view that companies are economic institutions that have a social service as well as a profit-making function, and that it was unwise for corporations to emphasize the profit-maximization function. Professor Dodd noted that before modern corporations arose the law regarded engaging in business to be a public profession rather than a purely private matter, with certain high fiduciary standards that have survived in duties owed by public carriers and innkeepers.<sup>183</sup> Based on the court of public opinion, Professor Dodd argued that "our corporate managers who control business should voluntarily and without waiting for legal compulsion manage [business] in such a way as to fulfill these responsibilities."<sup>184</sup>

Professor Berle's view that the fiduciary responsibility of directors is for the exclusive benefit of shareholders has been embraced by the courts.<sup>185</sup> Thus, while the general view prior to the 1930s was that corporations have a certain societal orientation, this view got eclipsed by the "modern" belief that profit maximization for shareholders was the controlling function of firms except those classified as public utilities.<sup>186</sup>

On the other hand, over half the states (and almost all the states, absent Delaware, that have a significant number of public companies incorporated in their jurisdiction) have adopted "corporate constituency" statutes.<sup>187</sup> These laws allow boards to take into account the interests of a variety of constituencies suffi-

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181. See E. Merrick Dodd, Jr. *supra* note 179 at 1148.

182. *Id.* at 1149.

183. See *id.* at 1148.

184. *Id.* at 1153-54.

185. See, e.g., *Bangor Punta Operations, Inc. v. Bangor & A.R.R.*, 417 U.S. 703 (1974) in which a majority of the Court seemed to accept the proposition that directors are fiduciaries only for those possessing a "tangible interest in the corporation," not the public at large. See *id.* at 716 n.13.

186. See *A.P. Smith Mfg. Co. v. Barlow*, 98 A.2d 581, 583 (N.J. 1953) (tracing the general shift in the perspective on corporate activity from a public service focus, which dated from at least 1702, to a more profit-based orientation in the 1930s).

187. See Steven M.H. Wallman, *supra* note 170, at 810.



ciently broad enough to accommodate most social concerns.<sup>188</sup> These laws seem to endorse Professor Dodd's view, discussed above, by making it clear that directors do not owe their fiduciary duty exclusively to shareholders, and giving corporate managers a green light to behave as morally whole persons inside the corporate bureaucracy. These laws suggest a growing public policy that encourages directors to take into account other corporate constituencies. Proponents of shareholder primacy seemingly ignore these ubiquitous state laws that reject the shareholder-only model.

Professor Dodd's view is not inconsistent with the objective of maximizing shareholder profits, but rather provides a certain flexibility. When acting to fulfill their fiduciary duties to society and stakeholders at large within certain parameters, directors need not fear legal action on the part of shareholders for the exercise of its authority in this manner. This does not mean abandonment of the profit motive, but complements it with a broader mandate to permit corporate actors to be more responsive, and more responsible, as a market-driven institution. It means allowing corporate agents to make decisions grounded in their many relations and obligations in life, from the wellspring of their whole moral arena.

Proponents of the shareholder-primacy model may want to point out, however, that management is under no *obligation* to forego stockholder-centric philosophy in favor of public interest. Management simply has the freedom to choose among the conflicting interests involved. If it does not want to do so in any particular case, it does not violate the law.

## 6.

### ENVIRONMENTAL DISPUTE RESOLUTION ("EDR") IS A PROTOCOL TO MEDIATE ENVIRONMENTAL CONCERNS OF INDIGENOUS PEOPLES IN OIL AND MINING PROJECTS

Civil society in general is in a state of profound transition as an important new awareness of environmental ethics helps shape and move public policy and corporate policy.

Environmental problems cannot be treated in isolation, but are part of a much larger global setting. In poor countries that

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188. See, e.g., CONN. GEN. STAT. ANN. § 33-313(e) (West Supp. 1994); FLA. STAT. § 607.0830(3) (West 1993); LA. REV. STAT. ANN. § 12:92(g) (West 1994); OHIO REV. CODE ANN. § 1701.59(D) (Baldwin 1993); R.I. GEN. LAWS § 7-5.2-8 (1992).

are heavily dependent on oil revenue, the desire to conserve fragile ecosystems such as tropical forests, wetlands, and grassland savannas must override the temptation to push environmental and living standards to the lowest common denominator. Poorly advised development strategies can have a devastating effect on the lives and livelihoods of the human population, particularly those at the margins of subsistence. Environmental degradation, depletion of natural resources, and other environmental stresses can also be a destabilizing factor that leads to armed conflict and can undermine national, regional, and even global security.<sup>189</sup>

Companies now recognize that environmental damage is detrimental to a company's long-term reputation and erodes their esteem in the eyes of consumers. While environmental concerns are now frequently on the agenda, few multinational companies adequately incorporate protection of the environment into their economic equations or codes of ethics.<sup>190</sup> And their third world government partners still tend to be more concerned with economic growth and the right to exploit natural resources than the environmental human rights of indigenous peoples.

EDR is a protocol to bring all stakeholders together face-to-face, including proponents of a project, indigenous peoples, government officials, local agencies, and environmental organizations, to educate each other about their respective interests. The goal of EDR is to assist the parties in engaging in joint problem-solving, to search for mutual gains, and to reach a workable solution. Today a cadre of highly skilled mediators throughout the U.S. support EDR, and many programs are geared toward training of public dispute resolution professionals in conflict management skills.<sup>191</sup>

This mediation protocol requires a radical shift in economic assumptions of multinational companies so as to incorporate the

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189. See David A. Wirth, *Globalizing the Environment*, 22 WM. & MARY ENVTL. L. & POL'Y REV. 353, 364 (1998).

190. See E. Jane Ellis, *International Law and Oily Waters: A Critical Analysis*, 6 COLO. J. INT'L ENVTL. L. & POL'Y 31, 33 (1995).

191. See Lawrence E. Susskind & Joshua Secunda, *Environmental Conflict Resolution: The American Experience*, in ENVIRONMENTAL CONFLICT RESOLUTION 22, 26 (Christopher Napier ed., 1998). For instance, the Program on Negotiation at Harvard Law School, as well as many other programs in universities across the country, provide impetus to the growing public interest in mediation. Organizations such as the Society for Professionals in Dispute Resolution ("SPIDR"), and the National Institute for Dispute Resolution ("NIDR") consist of professional practitioners worldwide. *Id.* at 22.

value of long-term wellbeing of indigenous peoples and their environment. It requires discarding the former free market ethos that served to encourage environmental deprivation in pursuit of profits. Rather, the new economic philosophy recognizes the inherent value of indigenous peoples and their concerns. The mediation process is an effort to give an expanded set of stakeholders an opportunity to have meaningful input into the planning process and to adequately address a range of potential community concerns.

Mediation can be used in a "win-win" manner, in which both the indigenous peoples and the multinational company can move to attain mutual goals and purposes, and this can also mobilize public support. EDR negotiations can serve to create an atmosphere of trust in an international context.

### **Ground rules and procedures**

The importance of public participation in decision-making over land management practices is recognized in numerous international environmental documents.<sup>192</sup> This suggests the need for a consultative norm that is given practical effect whenever a government seeks to enter into projects that might be opposed by an indigenous community.

Effective mediation with indigenous peoples requires all stakeholders to be at the negotiating table. It is important to set procedural ground rules and to select a manageable number of stakeholder representatives. The number of representatives should be enough to secure the participation of as many legitimate stakeholders as possible to endorse the mediation effort, and not to exclude parties who may later have the power to block the implementation of an agreement or fatally oppose the agreement after it has been carefully crafted by all of the other parties. The identity of the stakeholders in an environmental mediation should include the host government officials, the indigenous peoples individually and in their representative capacity, other tribes that may be affected, various environmental groups ("NGOs") and the multinational company's representatives.

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192. See Dianne Gee, *Public Participation and Integrated Planning in Tasmanian Private Timber Reserve Process*, 18 ENVTL. & PLAN. L.J. 54, 54 n.14 (2001).

### **Public Nature of Hearings**

The proceedings should be conducted in public to check responsiveness to indigenous peoples' needs and to reflect democratic values. To be avoided at all costs is a situation such as that discussed above with Occidental Petroleum and Colombian officials where negotiations between the company and government are kept secret until the announcement of signing of a Master Agreement, and then withholding the terms and language of the Master Agreement. Sudden public announcement of an undisclosed agreement with a U.S. multinational can easily set off a wave of accusations of corruption and neo-imperialism.

The mediation process must be transparent, with objective fact-finding, and a method for collection of information that is accepted by all stakeholders as accurate. That means gathering data, analyzing data, and drawing conclusions as a body. That means, too, that technical and scientific issues need to be formulated in clear, straightforward and simple language so that everyone can have the data needed to make informed judgments. A crucial feature of successful EDR is to facilitate informed, accurate, and efficacious decisionmaking by providing pertinent information to all concerned. This also reduces long-term adverse media and public relations backlash, particularly with controversial projects where the sentiment of indigenous peoples can be assessed in advance of a final decision.

All stakeholders should have adequate notice and the opportunity to participate meaningfully in any proceeding that affects their interests. That means that indigenous leaders need to be involved *early* in the process. Early inclusion is also important to ensure that all involved may help to establish ground rules and determine the contours of the discussion.<sup>193</sup>

### **Meaningful Participation**

There needs to be respectful interaction with and meaningful participation by the affected indigenous peoples. Respectful interaction entails sensitivity to the peoples' cultures and recognizing the validity of environmental human rights as an international norm.

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193. For instance, early inclusion helps direct the discussion to questions of environmental rights and raise other issues that balance the cultural and normative assumptions of the multinational team. Also, early involvement is crucial where the concerns of indigenous peoples may be at odds with the government sponsors of the project or the dominant culture.

The voice of indigenous peoples needs to be heard throughout the process. This may entail eliciting formal and informal input from the affected peoples. The mediators should develop protocols to ensure protection of sensitive tribal information from general disclosure. Negotiators should take steps to become sufficiently conversant with the history, culture and concerns of indigenous peoples so as to permit themselves to interact with tribal members in sensitive and respectful ways. The company might hold or jointly sponsor workshops with tribes that facilitate the mutual exchange of information so as to understand their claims and to understand their religious, linguistic, aesthetic, political, economic and other social concerns. Meetings might be held, upon invitation, in community centers or in gathering places on or near affected lands.

In mediation, it is important to see how things work in the local culture. The underlying social process is more important to indigenous peoples than the formal legal process. Outsiders rarely understand how a social process works in a community that is unfamiliar to them. The result is often poor communication that will almost certainly prevent the attainment of a mutual goal.

“Indigenous communities often place non-economic values on natural resources that are tied to traditional belief systems involving religious rituals, sacred sites, and historic hunting and gathering areas.”<sup>194</sup> Indigenous peoples in Ecuador, for instance, regard their territory as ancestral space, the site that encompasses their social-political-economic complexes, and that “belongs” to no one individual but, rather, belongs to everyone.<sup>195</sup> Ignoring or undervaluing the importance of their cultural concerns in environmental negotiations can lead to policies and projects that will be met with resistance, making them difficult to implement.<sup>196</sup>

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194. John K. Gamman, *Identifying and Overcoming Obstacles to Resolving Cross-Cultural Environmental Disputes*, 15 CULTURAL SURVIVAL Q. 44 (1995).

195. See Suzana Sawyer, *Indigenous Initiatives and Petroleum Politics in the Ecuadorian Amazon*, 21 CULTURAL SURVIVAL Q. 26, 29 (1996).

196. For instance, at present Ecuadorian groups are attempting to blockade Ecuador's new Heavy Crude Oil Pipeline (OCP) machinery involved with clearing forests to build Ecuador's new heavy crude pipeline. See Rainforest Action Network, *Controversial Pipeline Construction Blockaded in Ecuadorian Cloud Forest Reserve*, available at <http://www.ran.org/action/> (Oct. 12, 2001). Their concern is principally over the environment and public health problems as pipeline spills in Ecuador are ongoing. In May, the country's existing pipeline ruptured due to a landslide, spilling

There may be numerous subtleties of the culture that are very difficult for outsiders to understand, such as classism, power relationships, and the way that the culture makes decisions, often based on “person-to-person” communication and trust between individuals that has developed over years.

### **Formulation of an Environmental Management Plan (“EMP”)**

“Environmental impact reports or environmental assessments are now required on many proposed projects in the developing world.”<sup>197</sup> However, indigenous peoples are not ordinarily given a hand in choosing the individuals or team that completes the report, and analysts who complete these reports typically are accountable only to the lead agency or project proponents.<sup>198</sup> Moreover, representatives of indigenous groups rarely have an opportunity to discuss the findings and their implications directly with the authors.<sup>199</sup>

Under the protocol suggested here, indigenous communities (and environmental NGOs) should have an opportunity to frame the issues for investigation, and to approve the composition of the environmental review team, which should consist of people not affiliated with any of the stakeholders.<sup>200</sup> The environmental report should overall be framed not on whether it is permitted to legally use a resource in a certain way, but on whether the resource *should* be used in a certain way even though, legally, other options are available.

Indigenous peoples often possess intricate knowledge of local ecosystems, local cultures, and their interactions. This knowledge may be crucial to formulating a balanced environmental report. Trust is important because indigenous peoples may be

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7,000 barrels of oil. This accident was the 14th major oil spill since 1998. The Mindo area includes steep and unstable slopes, where there is a high risk of oil spills. *Id.*

197. See Scott T. McCreary, *Independent Fact-Finding as a Catalyst for Cross-Cultural Dialogue: Assessing Impacts of Oil and Gas Development in Ecuador's Oriente Region*, 19 CULTURAL SURVIVAL Q. 50, 50 (1995).

198. *Id.*

199. *Id.*

200. Indigenous peoples might not have financial resources commensurate with the resources that multinational companies typically devote to influencing the administrative decision-making process of the host government. Acute power imbalances often exist between indigenous peoples and corporations with respect to access to capital, political power, and information. Indigenous peoples can be overwhelmed by volumes of technical information in reports. A fair process in the information gathering stage will help redress these imbalances.

reluctant to disclose information about hunting lands or sacred sites unless they trust the analysts making the assessment.

The team should include experts in hydrology, geomorphology, wildlife and forest ecology, environmental planning, and policy and impact assessment. The team should devise methods to tap the anecdotal knowledge of the indigenous community, perhaps by including a local translator or someone familiar with local traditions, as an adjunct member to the team. The environmental team should have extensive consultation with village leaders in interpreting the ecological and cultural significance of the impacts reviewed.

There should be a preliminary report conveyed to all stakeholders in a timely and efficient manner. There should be a public meeting to discuss the preliminary report, and community representatives should be able to provide input for completing the report, for sorting out factual assertions from errors, and in distinguishing areas of certainty from areas of uncertainty.

Ground rules may prescribe that the environmental report be modeled after the environmental impact statement ("EIS") prescribed under the National Environmental Policy Act ("NEPA"),<sup>201</sup> with the following points: (1) a description of the proposed project; (2) an analysis of the potentially affected environment; (3) a description of the direct and indirect potential impacts on that environment resulting from the proposed project; (4) a consideration of alternatives, *including the alternative of no action*, and the potential impacts of those alternatives; and (5) an analysis of mitigating measures; and (6) the nature of economic benefits to the local community.

The final report should be assembled after the input from the preliminary report is assimilated should ensure that environmental and cultural safeguards are in place, and should also ensure that safety, health and environmental protection personnel are incorporated at the earliest stages of involvement at each step of the exploration and development process. There should be a procedure for internal verification of quality assurance and quality control for all stages. There might be established a local advisory committee to include all affected stakeholders, including adjacent communities, to insure that the plan promotes ecological sustainability and social equity. There can be a plan to defer

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201. National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-70 (1988).

decisions on full-field development until a Preliminary Extraction Plan ("PEP") is prepared and reviewed. A PEP should be detailed enough to show where the development will occur, what technology will be used, what mitigation measures will be in place, risk assessment protocols, and fall-back measures to be taken if mitigation measures are not feasible or forthcoming.

### **Resolution of Conflicts with Indigenous Peoples**

Reporting back from the indigenous representatives to their community or village may take weeks. Thus it is unrealistic to expect indigenous representatives to actually make immediate commitments (as opposed to receiving or communicating information) unless a village-wide or region-wide assembly can be organized as part of the mediation process.

One crucial issue in the mediation process is to clarify what each party to an environmental dispute is, in fact, willing to accept by way of compensation or promises of environmental controls. Indigenous peoples may be interested to learn about new environmental advances, such as extended-reach drilling, which "allows wells to be drilled and completed at significant lateral distances (up to six miles) from the surface drill site, which provides the flexibility needed to avoid sensitive environmental areas."<sup>202</sup> New proprietary techniques permit companies to "drastically reduce the number of wells, the size of the drillsite area, and the volume of drilling waste."<sup>203</sup>

The indigenous stakeholders may, upon reflection and negotiation, end up endorsing the project along with certain environmental controls in exchange for prescribed economic benefits. The indigenous tribe may come to a consensus, upon analysis of the proposal, that technology has improved a great deal, that strict controls will be in place, and therefore they may be willing to accept the project, as flushed out in the mediation process, as being compatible with their culture and way of life. A proper mediation process will enable indigenous peoples to make a fully informed decision consistent with their right of self-determination.

NGOs, on the other hand, have something different at stake than do the indigenous peoples. NGOs may object to the project under any circumstances, arguing that the environment itself is

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202. Brian P. Flannery et al., *Oil Can*, 18 ENVTL. F. 21, 25 (2001).

203. *Id.*



the subject of concern to be protected. NGOs may want to dissuade the community from going forward with the project, claiming that the natural environment has intrinsic value, apart from the rights of the indigenous peoples, and should also ensure that exploitation of nonrenewable natural resources must simply be stopped. At some point NGOs will have to recognize that their interests might diverge from what the indigenous peoples may decide pursuant to their right of self-determination, and at that point they should politely withdraw from insisting that their mantra of concern for the environment for the environment's sake be adopted by all.

The product of most environmental negotiations is not a legally binding agreement. However, this should not undercut its usefulness if all the decision-makers are represented during negotiations and the final recommendations are produced by consensus and accepted by all.

The goal of mediation is to maximize joint gains for all stakeholders. EDR can resolve disputes more efficiently in terms of the time and money spent, and in terms of enhancing long-term relationships among multinational companies, indigenous peoples and host governments, and in terms of preventing future disputes. This is significant because most environmental disputes occur among parties that are likely to be locked into ongoing relationships.<sup>204</sup> There is a responsibility in reaching a mediation agreement in that these agreements can set precedents that have a way of becoming binding on others in similar situations.<sup>205</sup>

The stakeholders need to have a genuine desire to have objections met and problems solved through negotiation. If one party has decided to block *any* agreement in the negotiations, as may sometimes occur with NGOs that believe that the environment must be protected for its own sake, period—this will disempower the process. A marketplace reality is that if indigenous peoples' advocates are simply opposed to development in the environmentally sensitive area at all, the process can backfire because the "no agreement" alternative is for the area to be developed by another investor and, most likely, a less accommodating one. If full consensus is not possible, such as where some indigenous villages agree while others remain opposed despite assurances of environmental controls, the company faces the difficult strategic

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204. See Susskind & Secunda, *supra* note 161, at 38.

205. See *id.* at 35.

question of what constitutes sufficient consensus or what subset of the stakeholders might constitute a sustainable minimum winning coalition, or whether to abandon the project altogether.

A win-win situation could emerge by an arrangement in which the multinational company agrees to extract oil under specified environmental controls and only in specified regions, avoiding delicate habitats and ecosystems—in exchange for prescribed economic benefits for the affected communities. The indigenous peoples may be willing to accept strict controls, given how technology has improved a great deal over the last few years, with the understanding that there would still be some disruption imposed on their habitat, albeit minimal. They may accept the project based on the idea that it is for the larger good of their people due to the economic benefits they stand to gain and the extreme environmental constraints agreed upon. They could thus legitimately choose an outcome based on the free exercise of their right of self-determination.

Indigenous peoples may want to focus more on the mode of compensation and participation, given the idea that they stand to risk some environmental harm in their lands and resources. One solution is to establish a trust for the purpose of funding activities to protect and maintain the peoples' critical habitat, to establish maximum limits of pollution, and establish a monitoring system to conform the specified environmental controls. This might include plans not only to pay compensation or to share in royalties, but to plan on social infrastructure replacement, and to employ people from the local population in the project.

The utility of EDR is that its use promotes the institutionalization of a particular social ethic that includes collaboration as part of a company's social capital. The costs of EDR are relatively minor in comparison to court costs, litigation fees, opportunity costs, environmental losses such as irretrievably lost habitats, and irretrievably ruptured relationships. It is clearly advantageous for these groups to work together so they can prevent lengthy and costly court battles where there is often no real winner.

Finally, it should be noted that there could be harmonious co-existence among wildlife, oil and gas-drilling operations and natural habitats. The Rainey Wildlife Sanctuary, owned by the Audubon Society, is a 26,800-acre marsh in Louisiana managed in such a way that safeguards natural beauty and biodiversity while sustaining royalties and revenue collected from oil and

grazing fees.<sup>206</sup> On Rainey, managers have minimized environmental damage by restricting drilling during nesting season, and "grazing is carefully timed to be used as an ecological tool, and controlled burning is used to encourage growth."<sup>207</sup>

## 7.

### CONCLUSION

It is possible for multinational companies in the era of globalization to maintain a flexible, market-oriented approach that takes into account the concerns of indigenous peoples, thereby avoiding the costs of protracted litigation under the ATCA. This article hopefully offers a useful protocol that may help stimulate corporate leaders to address the important environmental and institutional questions of the twenty-first century. The participatory strategies discussed in this paper constitute a win-win situation to assist both developing nations and multinational companies reach a framework of environmental stewardship.

This paper has attempted to show that there is a widely recognized consensus in the international community that international human rights norms include and point to the existence of environmental human rights norms. The United States has a strong local interest in punishing conduct in violation of international law undertaken by its own citizens. The American judiciary is being called upon to enforce existing U.S. laws on behalf of foreign plaintiffs alleging environmental abuses under the ATCA. The revival of the ATCA by the Second Circuit in *Aguinda v. Texaco* may lead to a number of successful attempts by other foreign claimants seeking to recover damages in U.S. courts against U.S. multinationals for environmental harms. A U.S. corporation that engages in mining, drilling or other environmentally hazardous projects in a country that abuses its environment or bends the rules, risks being sued in the U.S. by citizens of that foreign country. There are numerous procedural hurdles to overcome before a foreign claimant can successfully gain jurisdiction in the U.S. courts against a U.S. multinational for environmental abuses that occur outside the United States, and then there are added problems of proof at trial. It remains

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206. See Robert H. Smith, *Livestock Production: The Unsustainable Environmental and Economic Effects of an Industry Out of Control*, 4 BUFF. ENVTL. L.J. 45, 117 (1996).

207. See *id.* at 118 (citing John A. Baden, *A Radical Proposal to Bail Out Smokey: Privatization*, SEATTLE TIMES, May 25, 1993, at A11).

off enormous national debts. Consumers in the industrialized world are torn between maintaining cheap supplies of energy, reducing dependency on Arab oil, and at the same time are against action that would tend to endanger the well-being and sanctity of native peoples and their environment. In the end, the U'wa remind us that the battles being fought in courts will not only affect the pumping stations of America, but also the lives of millions of indigenous peoples.<sup>212</sup>

Globalization appears to increase world welfare, and it seems to be impossible to hold back the tide. No longer can a country engage in international trade without considering its impact on the global community. It is important to keep in mind the words of Ethan Kapstein: "The world may be moving inexorably toward one of those tragic moments that will lead historians to ask, why was nothing done in time?"<sup>213</sup>

This discussion hopefully points to a new ethical paradigm that redefines corporate economic philosophy by removing the right of the unfettered land use and replacing it with a protocol sensitive to the environmental rights of indigenous peoples. This harkens back to community, to considerations beyond the individual, legal and economic rights of multinational companies, to the wider concerns of a public steward under the public trust doctrine.

There is a tremendous cost in being vilified for environmental damage and other global ethical breaches—a financial cost and a cost in terms of relationships with stakeholders. The EDR protocol suggested above builds on concepts of place and encourages companies to pay more attention to the particular concerns of the indigenous peoples' intimate acquaintance with the land. Indigenous peoples are engaged in attempts to articulate, defend and reclaim their roles as proprietors and stewards of natural resources of their lands. Recognition of the rights of indigenous peoples has radical implications for how the oil industry operates in future exploration efforts.

The problem of the nature and purpose of the corporation and its function in society, has been of longstanding concern. Corporations make things, do things, buy things and sell things. They have different commitments and different goals and the levels of

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212. See Dan Heck, *Columbian Oil Company Latest to Abuse Rights of Indian Tribe*, LANTERN (Ohio St. Univ.), Oct. 27, 2000, available at 2000 WL 28357181.

213. See Ethan B. Kapstein, *Workers and the World Economy*, 75 FOREIGN AFF. 16, 18 (1996).

to be seen whether the pursuit of such cases will impact the policies and performance of corporations. I believe, however, that the better course is mediation of projects in the first instance.

There are always environmental risks involved in oil exploration and extraction. There are serious questions about how national and international priorities will be made as the world approaches the final phase of oil exploration and makes a transition into alternative forms of energy. There is a finite amount of oil in the world, and the industry has found 90 percent of it. Most experts agree that about 800 billion barrels of oil ("Gbo") had been removed from the Earth by the end of 1997. A conservative estimate is that 850 Gbo of conventional oil remains. In the 1990s, oil companies discovered an average of 7 Gbo a year, and in 1998, they extracted more than three times that amount.<sup>208</sup>

More aggressive procedures and technological advances are leading to the ability to discover and extract new reservoirs of crude oil.<sup>209</sup> In the near future oil companies will be able to efficiently drill to depths of more than 3,000 meters, compared to the deepest operations depth of just over 1,700 meters beneath the surface.<sup>210</sup> Enormous deposits of "unconventional" oil such as in the Orinoco oil belt in Venezuela (with a staggering 1.2 trillion barrels of sludge known as heavy oil, and 300 billion barrels in the tar sands and shale deposits of Canada and the former Soviet Union) are substitutes for crude oil that are expensive and environmentally problematic to extract.<sup>211</sup>

Government officials in developing countries are torn between protecting the natural resources that are often so important to indigenous peoples, and exploiting these natural resources to pay

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208. See Colin J. Campbell & Jean H. Laherrère, *The End of Cheap Oil: Global Production of Conventional Oil Will Begin to Decline Sooner than Most People Think, Probably Within 10 Years*, 278 SCI. AM. 78, 80, 81 (1998), available at <http://dieoff.org/page140.htm>.

209. See Roger N. Anderson, *Oil Production in the 21st Century: Recent Innovations in Underground Imaging, Steerable Drilling and Deepwater Oil Production Could Recover More of What Lies Below*, 278 SCI. AM. 86 (1995). The advent of 4-D analysis, for instance, permits engineers to track oil, gas and water flows in the subterranean strata over time. See *id.* at 87. Injecting liquid carbon dioxide into dying oil fields increases recovery factors by ten to fifteen percent. *Id.* And new advances in directional drilling allow the tapping of bypassed deposits at a significantly lesser expense than by steering drills around obstacles. Stronger high-capacity rigs, better current tolerant risers, and more robust subsea equipment will allow oil companies to expand oil reserves by five percent. *Id.* at 90.

210. *Id.* at 91.

211. Campbell, *supra* note 208, at 82.

commitment to these goals vary. Corporations have apparently come to a crossroads with respect to taking advantage of the lack of environmental restrictions in developing nations, for resources in the third world are rapidly disappearing, largely due to unfettered exploitation. Environmental stewardship means lesser profits, and therefore companies that are more environmentally friendly may not survive in the marketplace.<sup>214</sup> Of further concern is the effort by multinationals to encourage foreign governments to lower environmental standards. A further complication is the competition between multinationals for dwindling natural resources.

General moralistic sentiment of the general public, expressed on the Internet through website activism, email alerts, and through mainstream media, which tends to view corporate misbehavior as extremely newsworthy, has exerted pressure on multinationals. While longstanding activist groups such as Greenpeace and Amnesty International have always attempted to change corporate behavior, new and diverse groups are also voicing their opinions. French farmers, for instance, caused quite a stir protesting Disney and McDonald's in an attempt to "invite the powerful to obey morality and good sense."<sup>215</sup> And environmental responsibility has become not only an issue of social activists, but of mainstream shareholders who are concerned about environmental degradation in the third world, and are forming voting blocks to demand the reduction and elimination of corporate abuses.<sup>216</sup>

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214. See Patricia Romano, *Sustainable Development: A Strategy That Reflects the Effects of Globalization on the International Power Structure*, 23 *HOUS. J. INT'L L.* 91, 98 (2000).

215. See CorpWatch, available at [http://www.corpwatch.org/trac/corner/world\\_news/other/461.htm](http://www.corpwatch.org/trac/corner/world_news/other/461.htm) (quoting *Le Figaro*).

216. See CorpWatch, available at <http://www.corpwatch.org/trac/headlines/2000/313.htm>. One coalition of over 300 churches and synagogues acquired more than one million shares of ExxonMobil stock, allowing it to have a strong presence at shareholder meetings, propose resolutions, and influence company policy on environmental-related reforms. At an April 1999 shareholders meeting of Occidental Petroleum Corporation, nearly 13% voted to appoint an independent task force to investigate the impact of the company's negative publicity arising from the U'Wa tribe controversy in Columbia. See *id.*

