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Transnational Governmentality and Resource Extraction

*Indigenous Peoples, Multinational Corporations,
Multilateral Institutions and the State*

Suzana Sawyer and Edmund Terence Gomez

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Acronyms

ADB	Asian Development Bank
AU	African Union
CEO	Chief Executive Officer
CCPR	International Covenant on Civil and Political Rights
CSR	corporate social responsibility
ECOSOC	United Nations Economic and Social Council
EITI	Extractive Industries Transparency Initiative
ICC	International Chamber of Commerce
IDB	Inter-American Development Bank
IFI	international financial institution
ILO	International Labour Organization
IMF	International Monetary Fund
IOE	International Organization of Employers
IPRA	Indigenous Peoples' Rights Act
IRR	Implementing Rules and Regulations
IWGIA	International Working Group for Indigenous Affairs
MNC	multinational corporation
NGO	non-governmental organization
NRDC	Natural Resources Defense Council
OAS	Organization of American States
OECD	Organisation of Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
SAP	structural adjustment programme
SCD	Sustainable Community Development
UN	United Nations
WTO	World Trade Organization

Summary/Résumé/Resumen

Summary

International financial institutions (IFIs), including the World Bank and the International Monetary Fund (IMF), have actively promoted and financed the liberalization of the hydrocarbon and mining sectors of national economies across the globe. They have also espoused the merits of public-private cooperation as a means to sensitize businesses to the problems that accompany such extraction projects. Common wisdom holds that public-private collaborations among governments, IFIs and multinational corporations (MNCs) will enhance social well-being by eradicating poverty, promoting sustainable forms of economic development, protecting the environment and advancing the rights of indigenous peoples.

A number of IFIs, as well as the United Nations, have voiced concern over the adverse impact of resource extraction activities on the livelihood and culture of indigenous communities. Numerous extractive-industry MNCs have also advocated the need to create inclusive consultative platforms that would provide indigenous groups with an avenue to participate in decisions that affect their way of life. These new institutions would afford indigenous peoples the power to veto, sanction or reformulate projects recommended by the government, international agencies or MNCs that they see as detrimental to their way of life. In response to these concerns, a number of international agencies and governments have introduced charters and legislation to protect and promote the rights of indigenous peoples.

Yet, the scale and scope of the problems confronting indigenous peoples as a result of mineral extraction projects endorsed and funded by governments, MNCs and IFIs is monumental, even baffling. This leads to a paradox: despite the burgeoning number of international charters, state constitutions and national laws across the world that assert and protect the rights of indigenous peoples, the majority find themselves increasingly subjected to discrimination, exploitation, dispossession and racism. This study explores this paradox by creating a dialogue among researchers examining large resource extraction projects in Australia, Bolivia, Canada, Chad and Cameroon, India, Nigeria, Peru and the Philippines.

The study argues that public-private partnerships studied here eventually led to institutional capture, undermining the neutrality of the state and its capacity to protect indigenous communities. It stresses the need for governments and international agencies to create inclusive consultative platforms so that indigenous groups could have a say in decisions that affect them.

Suzana Sawyer is Associate Professor of Anthropology at the University of California, Davis. At the time of writing, Edmund Terence Gomez was Research Coordinator for the programme on Identities, Conflict and Cohesion at the United Nations Research Institute for Social Development (UNRISD).

Résumé

Les institutions financières internationales (IFI), notamment la Banque mondiale et le Fonds monétaire international (FMI), ont encouragé activement les économies nationales à travers le monde à libéraliser leurs secteurs des hydrocarbures et des mines et ont financé cette libéralisation. Elles ont aussi pris fait et cause pour la coopération public-privé comme moyen de sensibiliser les entreprises aux problèmes liés aux projets d'extraction. Selon l'opinion courante, les collaborations public-privé entre les gouvernements, les IFI et les sociétés multinationales (SMN) améliorent les conditions de vie des populations en éliminant la pauvreté, en favorisant des formes durables de développement économique, en protégeant l'environnement et en faisant avancer les droits des populations autochtones.

Nombre d'IFI, ainsi que les Nations Unies, se sont inquiétées des effets néfastes des activités d'extraction sur les moyens d'existence et la culture des communautés autochtones. De

nombreuses SMN de cette branche d'industrie ont aussi plaidé pour la création d'instances consultatives sans exclusive permettant aux populations autochtones de participer aux décisions qui affectent leur mode de vie. Ces nouvelles institutions donneraient aux populations autochtones le pouvoir de faire opposition aux projets dans lesquels elles voient une menace pour leur mode de vie, de les sanctionner ou de les reformuler, même s'ils sont recommandés par le gouvernement, des institutions internationales ou des SMN. En réponse à ces préoccupations, nombre d'institutions internationales et de gouvernements ont adopté une charte et des lois pour protéger et promouvoir les droits des populations autochtones.

Pourtant, les projets d'extraction minière approuvés et financés par des gouvernements, des SMN et des IFI ont pour les populations autochtones des conséquences lourdes et même d'une ampleur déconcertante. Il s'ensuit un paradoxe: la majorité des communautés autochtones sont de plus en plus dépossédées, en butte aux discriminations, à l'exploitation et au racisme, bien qu'à travers le monde le nombre de chartes internationales, de constitutions d'Etat et de lois nationales qui affirment et protègent leurs droits ne cesse d'augmenter. Cette étude approfondit ce paradoxe en créant un dialogue entre chercheurs ayant étudié de grands projets d'extraction de ressources en Australie, en Bolivie, au Canada, au Cameroun et au Tchad, en Inde, au Nigéria, au Pérou et aux Philippines.

Les auteurs de l'étude estiment que les partenariats public-privé étudiés ici ont finalement abouti à une confiscation des institutions et nuisent à la neutralité de l'Etat et à sa capacité de protéger les populations autochtones. Ils soulignent la nécessité pour les gouvernements et les institutions internationales de créer des instances consultatives sans exclusive qui donnent aux populations autochtones un droit de regard sur les décisions qui les concernent.

Suzana Sawyer est maître de conférences en anthropologie à l'Université de Californie, Davis. Au moment de la rédaction, Edmund Terence Gomez était coordonnateur de recherches à l'Institut de recherche des Nations Unies pour le développement social (UNRISD) pour le programme Identités, conflits et cohésion.

Resumen

Las instituciones financieras internacionales (IFI), incluidos el Banco Mundial y el Fondo Monetario Internacional (FMI), han promovido activamente y financiado la liberalización de los sectores minero y de hidrocarburos de las economías nacionales en todo el mundo. También han reconocido el valor de la cooperación público-privada como medio para sensibilizar a las empresas ante los problemas que acompañan los proyectos de extracción. La creencia popular sostiene que las colaboraciones público-privadas entre gobiernos, IFI y empresas multinacionales (EM) mejorarán el bienestar social mediante la erradicación de la pobreza, la promoción de formas sostenibles de desarrollo económico, la protección del medio ambiente y el fomento de los derechos de los pueblos indígenas.

Varias IFI, así como las Naciones Unidas, han expresado su preocupación ante los efectos adversos de las actividades de extracción minera sobre la subsistencia y la cultura de las comunidades indígenas. Numerosas EM del sector de la extracción también han defendido la necesidad de crear plataformas de consulta que brinden a los grupos indígenas la posibilidad de participar en las decisiones que afectan su forma de vida. Estas nuevas instituciones conferirían a los pueblos indígenas el poder para vetar, aprobar o reformular los proyectos recomendados por el gobierno, los organismos internacionales o las EM que en su opinión son perjudiciales para su forma de vida. En respuesta a estas inquietudes, diversos organismos internacionales y gobiernos han puesto en práctica cartas y leyes que buscan proteger y promover los derechos de los pueblos indígenas.

No obstante, la dimensión y magnitud de los problemas que encaran los pueblos indígenas como consecuencia de los proyectos de extracción minera avalados y financiados por gobiernos, EM e IFI son monumentales, y hasta desconcertantes. Esto conduce a una situación paradójica: a

pesar del creciente número de cartas internacionales, constituciones de Estado y leyes nacionales en todo el mundo que afirman y protegen los derechos de los pueblos indígenas, la mayoría de estos se ven sometidos a la discriminación, la explotación, la privación y el racismo. Este estudio explora esta paradoja mediante la creación de un diálogo entre investigadores para examinar grandes proyectos de extracción de recursos en Australia, Bolivia, Canadá, el Chad y Camerún, la India, Nigeria, el Perú y las Filipinas.

Se sostiene que las alianzas público-privadas examinadas en este documento terminaron por generar la captura institucional, al socavar la neutralidad del Estado y su capacidad para proteger a las comunidades indígenas. En este trabajo se recalca la necesidad de que los gobiernos y los organismos internacionales creen plataformas de consulta incluyentes de manera que los grupos indígenas puedan participar en las decisiones que les afectan.

Suzana Sawyer es profesora asociada de antropología en la Universidad de California en Davis. Cuando escribió este documento, Edmund Terence Gomez era coordinador de investigación del Programa sobre Identidades, conflicto y cohesión que lleva a cabo el Instituto de Investigación de las Naciones Unidas para el Desarrollo Social (UNRISD).

Introduction

Increasingly over the past three decades, international institutions such as the World Bank, the associated regional development banks and the International Monetary Fund (IMF) have actively promoted and financed the liberalization of the hydrocarbon and mining sectors of national economies across the globe. These institutions have also enthusiastically espoused the merits of public-private cooperation as a means to sensitize businesses to the problems that accompany such extraction projects. Common wisdom holds that public-private collaborations among governments, multinational corporations (MNCs) and international financial institutions (IFIs) will enhance social well-being by eradicating poverty, promoting sustainable forms of economic development, protecting the environment and advancing the rights of indigenous peoples.

A number of international institutions, including the United Nations and several multilateral development banks, have also voiced concern over the adverse impact of resource extraction activities on the livelihood and culture of indigenous communities. Numerous extractive-industry MNCs have similarly espoused the need to create inclusive consultative platforms that provide indigenous groups an avenue to participate in decisions that would affect their way of life. These new institutions would afford indigenous peoples the power to veto, sanction or reformulate projects recommended by the government, international agencies or MNCs that they see as detrimental to their way of life. In response to such concerns, a number of international agencies and governments have introduced charters and legislation to protect the rights and well-being of indigenous peoples.

Yet, the scale and scope of the problems confronting indigenous peoples as a result of mineral extraction projects endorsed and funded by governments, MNCs and IFIs is monumental, even baffling. This leads to a central paradox: despite the burgeoning number of international charters, state constitutions and national laws across the world that assert and protect the rights of indigenous peoples, they often find themselves increasingly subjected to discrimination, exploitation, dispossession and racism. This study explores this paradox by bringing into dialogue the work of researchers examining mega-development resource extraction projects in eight case studies around the world. It analyses conflicts among states, MNCs, IFIs and local indigenous communities that have erupted in the context of specific petroleum, natural gas, mineral and timber extraction projects: uranium and zinc mining in the Northern Territory and Queensland, Australia; natural gas production in the Chaco, Bolivia; petroleum extraction and transport in southern Chad and northern Cameroon; bauxite mining in Orissa, India; petroleum development in the Niger Delta, Nigeria; gas production in the Camisea, Peru; gold mining in Mindanao, Philippines; and timber extraction in British Columbia, Canada.¹ The case studies address this concern by exploring how the dynamics among state, corporate, multilateral and indigenous actors provide insights into the workings of power that sustain such a paradox. In what ways might these forces collide and/or collaborate with each other in the context of resource extraction and thereby reinforce or destabilize these paradoxical conditions?

Our analysis—advisedly controversial in some scholarly, policy, and activist circles—emerges directly from these empirical studies. Its broad outlines are as follows. A number of scholars, indigenous rights advocates and indigenous people themselves contend that the recognition of indigenous rights will lead to greater protection and empowerment of indigenous communities and to greater social justice. Numerous studies and reports detail precisely how and why this has been the case. The granting of land rights, the recognition of indigenous languages, customary authorities as well as their social organization, and greater control over resource management have clearly empowered indigenous peoples around the world. And many of the case studies in this project outline precisely this (especially the studies situated in Australia, Bolivia and Canada). But the case studies also raise a number of questions pointing to the more ambiguous, problematic and contingent dimensions of this contention.

¹ See list of case studies at the end of the bibliography.

A few examples illustrate this: Jon Altman's research in Australia, Raymundo Rovillos and Victoria Tauli-Corpuz's study of the Philippines, and Patricia Urteaga-Crovetto's work on Peru. In Altman's study of the Ranger uranium mine in Northern Territory, Australia, 26 individuals from ritually linked Mirarr aboriginal clans were ultimately legally recognized as the traditional owners of the land deemed to be affected by the mine. Through a sophisticated, multiply-networked transnational campaign, these 26 aborigines launched a spectacularly successful initiative to prevent the opening of a new mine on their lands. However, the act of both asserting their ownership of the land and stopping future mining on it had the effect of simultaneously marginalizing 264 other aborigines with whom they had formerly formed a larger indigenous association. That is, the 26 Mirarr, by acquiring exclusive voice to negotiate over and define mine operations, had in practice excluded the voices and concerns of the majority of indigenous peoples affected by the mining's environmental and political economic conditions. These more numerous silenced voices were just as "indigenous" as the Mirarr, but theirs was not the anti-mining voice expected by many Western indigenous rights advocates; rather, these voices had supported further mining.

In the case of the gold mine in Zamboanga del Norte, Mindanao, in the Philippines, the process of applying for and acquiring legal title to the land on which the mine operates has been both empowering and debilitating. As Rovillos and Tauli-Corpuz note, the law under which indigenous peoples are granted rights to their claimed ancestral territory and its future use "has exacerbated conflict over land and resources" where "competing factions of the clan 'reconstruct' their respective versions of customary law, indigenous institutions, and history". Among the Subanon, competing anti- and pro-mining indigenous groups differentially connected to state, corporate and non-governmental organization (NGO) forces have vied for the political and religious leadership that would grant them the power, legitimacy and authority to variously negotiate with, or oppose, the multinational mining firm. Internal indigenous division has largely benefited mining operations and marginalized indigenous peoples in spite of the latter acquiring rights to their land.

In the Peruvian Camisea gas production project that Urteaga-Crovetto explores, similar concerns emerge. Obtaining property deeds has both allowed the Machiguenga to legally protect their ancestral territory and, together with natural gas extractive activity, has radically transformed indigenous cultural, social political, and economic reality. The Machiguenga – who until the early 1980s were a semi-nomadic population migrating seasonally among dispersed settlements – became, with the state land titling policy, settled through the establishment of state-recognized permanent nuclear settlements. It is with *these* native communities that the Camisea gas consortium negotiated its terms of engagement with indigenous peoples. But far from being the foundation of a deeply rooted social structure, these newly created settlements lacked indigenous organization and could easily be manipulated. Different negotiations with the gas consortium obtained different outcomes, which in turn led to division within and among communities. This, together with the powerful influence of the evangelical and Catholic missions, created a situation in which, as Urteaga-Crovetto notes, "most Machiguenga understand progress as synonymous with material consumption". These spatial, cultural and ideological transformations have largely aided the Camisea project and further augmented poverty, inequity and the exploitation of indigenous people.

Irreducibly clear from these cases is the critical role that states and multinational corporations play in circumscribing and containing what is understood as indigenous rights. Indeed, case after case in this study demonstrates how a state-corporate alliance establishes a playing field – even while advocating for indigenous rights – that invariably furthers the interests of extractive industries. As we will see in the case studies, acquiring legal title and a recognition of their territories can be immensely empowering to economically, socially and politically marginalized indigenous populations. At their most progressive, rights associated with legal title require any state and/or corporate project on indigenous lands to obtain free, prior and informed consent from its residents (see the Declaration on the Rights of Indigenous Peoples) and provide indigenous people access to what amounts to a royalty from any resources extracted from their

lands. Both of these inclusions clearly aim for greater social justice. But as the case studies presented here illustrate, rights, in practice, are embedded in complex legal, political and economic strictures (forged frequently with corporate influence) that delineate who exactly counts as indigenous and what they might claim. That is, identity-based rights necessitate first, defining who officially will be recognized as rights-bearing subjects, and second, what they will have rights over. Instructively, the vast majority of the world's indigenous peoples have no recognized rights to commercially valuable resources, and especially not minerals and hydrocarbons.² Instead, those individuals legally recognized as deservingly indigenous may have surface rights to land, but beyond that they may or may not have rights to a range of mechanisms that provide degrees of leverage for negotiating with resource extraction firms. Consequently, the rigid delineation of land in the name of precise individuals deemed authentically indigenous and worthy by the state often leads to conflicts within and between indigenous communities over authenticity, history, authority and exclusion. And perhaps more insidiously, it can become a perverse mechanism through which the state and multinational corporations codify, fix and control the goals and aspirations of what were fluid and mobile collectivities.

By noting this, we are not—let us be clear—arguing against the notion of indigenous rights or indigenous title. Our point is to underscore that within the context of twenty-first century multinational resource extraction, indigeneity—its content, philosophy and aspirations—is not self-evident, but rather a terrain of struggle or contestation. Indeed, the ways in which the state, multinational corporations, multilateral institutions and indigenous peoples take up indigeneity and insinuate their interests by circumscribing what it is, has complexly influenced the sphere of engagement such that indigenous rights in and of themselves have no a priori political valence or trajectory. Seeking and acquiring indigenous rights is not in and of itself emancipatory. Rather, it recalibrates the arena of struggle.

Consequently, as a first set of conclusions, the case studies gathered here demonstrate that:

1. struggles for and the recognition of indigenous rights are potentially empowering and enabling (Australia, Bolivia and Canada), as well as constraining and divisive for indigenous communities on the ground (Australia, Peru and the Philippines);
2. a perspective exclusively advocating indigenous rights may crucially be inadequate for grasping the local predicament of indigenous peoples confronted with resource extraction (Australia, Bolivia, Chad/Cameroon, India, Nigeria and Peru);
3. struggles for indigenous rights may in actuality—counter to intentions—further multinational corporate resource extraction by unwittingly dividing and domesticating opposition, or being co-opting or transforming it to align more with state or corporate agendas (Australia, Chad/Cameroon, Peru and the Philippines); and
4. when struggles for indigenous rights stand cohesively in opposition to exploitative economic liberalization, their political platform might best extend beyond exclusively indigenous rights concerns to encompass those of a broad-based subaltern coalition (Bolivia) and/or astutely appropriate and redeploy the tools of capital for their benefit (Canada).

The diversity of contexts in which economic liberalization and the desire for increased direct foreign investment is occurring in the studies collected here underscores additional concerns. To begin with, the colonial context which had such a crucial role in codifying who is indigenous—in shaping indigenous peoples' identity and establishing their relationship with the national societies in which they came to reside—differs radically. It includes settler colonialism (Australia and Canada), creolo/mestizo colonialism (Bolivia and Peru), imperial colonialism (Philippines), and British and French colonial indirect rule (India, Nigeria and

² Many First Nations and Native Americans in North America are notable exceptions.

Chad/Cameroon). This history has also been crucial in shaping the contemporary form of the state and its position with respect to MNCs and IFIs. For instance, in the capitalist democracies of Australia and Canada with national economies deeply entrenched in economic liberalism, state regimes maintain close alliances with MNCs. In many postcolonial democracies marked by dramatic economic disparities between rich and poor (and often scarred by histories of military or near-authoritarian rule) such as India, Nigeria, Peru and the Philippines, the state is largely subservient to the desires of MNCs and IFIs. In the near-dictatorship of Chad, the state arguably has exploited its alliance with MNCs to mutual benefit, and manipulated and undermined the power of IFIs. And in the cautiously deliberalizing democracy of Bolivia (also marked by extreme economic disparity and a history of dictatorship), the state is seeking to rewrite its terms of engagement with MNCs and distance itself from the historical influence of IFIs. In all these circumstances, MNCs engage with indigenous populations in different ways—by attempting to disavow them (India), seeking to placate them with modest gifts and infrastructure (Bolivia, Peru and the Philippines), striving to gain their consent by variously providing rudimentary social works and services (Australia, Cameroon and Nigeria), seeking to integrate them into the corporation's economic venture by providing employment, even if ephemeral (Australia and Nigeria), or abiding with corporate fiscal responsibility and paying representative indigenous bodies the equivalent of royalties (Australia and Canada)—in order to secure and enhance shareholder investment by furthering corporate access to natural resources and enhancing a corporate image. And in all these circumstances, ultimately local social and environmental concerns are subordinate to economic concerns.

Consequently, as a second set of conclusions, the case studies demonstrate that:

1. where the neoliberal logic of economic liberalization has been more densely transformative of social and political life, indigenous peoples may encounter more avenues (variously constraining, conflictive and enabling) for engagement (Australia, Bolivia, Canada and the Philippines);
2. where a discourse of indigenous rights has not infused the logic of the state or indigenous peoples' senses of themselves, colonial legacies of racism gloss over the relationship of state, IFI and corporate entities with indigenous peoples, tending toward the legal, regulatory and civic manipulation of indigenous people and their potential interests (Cameroon, India, Nigeria and Peru);
3. where economic liberalization and foreign investment coexist with state repression and violence, corporations have been complicit in furthering violence against indigenous peoples and local populations (Chad/Cameroon, India and Nigeria); and
4. in the majority of cases examined here, corporate social responsibility (CSR) in its various forms (providing gifts, services or support for community projects) has served to debilitate and/or neutralize and depoliticize indigenous peoples.

Viewed together, the case studies suggest that the paradox of the increasing numbers of international and national legal instruments recognizing the rights of indigenous peoples alongside the increasing marginalization of the majority of indigenous peoples does not simply reflect the gap between law and its implementation, between *de jure* and *de facto* recognition of rights. It is indeed that, but also more. The paradox calls for greater analysis of the regimes of power at play under processes of neoliberal reform and heightened capital-intensive resource extraction.

Transnational Governmentality

In exploring the workings of modern power, Michel Foucault coined the term “governmentality”—a concept meant to open up inquiry into the myriad of more or less

calculated and systematic thoughts and actions that seek to shape, regulate or manage the way people conduct themselves by acting upon their hopes, circumstances and environment.³ He sought to suggest that governing (*gouverner*) is most effective when it colonizes modes of thought (*mentalité*). Understood as such, governmentality points to the nexus of interconnected entities that govern within our contemporary world. Crucially, the concept underscores how modern political power is exercised not simply by the state, but also by a network of actors, organizations and enterprises that seek to guide the behaviour of individuals and their relation to things.

Foucault's own work traced the history (sixteenth to nineteenth centuries) of how penal, pedagogic, medical and sexual regimes and norms simultaneously produced particular sorts of individual subjects and regulated large populations of the citizenry in France (see Foucault 1979, 1980a, 1980b, 1991). A burgeoning body of scholarship has extended Foucault's Eurocentric focus both historically and geographically to engage the predicaments of rule in colonial and postcolonial places. Significant recent scholarly work counterbalances the oft-heard critique that Foucault's notion of historical process and power is too omniscient, omnipresent and all-consuming.⁴ Rather than seeing processes of governmentality as all-determining, this work sees the historical process of attempts to manage and shape people and their relations to things as always deeply compromised prospects, composed of contradictory movements. As anthropologist Kaushik Ghosh observes, the histories of how the art of government unfolds can leave "the fragmented imprints of other forms of knowledge, ontologies, and temporalities" and these, in turn, "can produce a present reality that hardly meets the needs of a neoliberal government" obsessed with extracting resources (Ghosh 2006:525.). Similarly, as the case studies illustrate, enacting regimes of governance seeking ultimately to intensify resource extraction is hardly a *fait accompli*, but rather a process marked by singular complexities, frequent interruptions and unanticipated consequences.

Building on this research, we use the concept of transnational governmentality in an attempt to capture the multiple movements of governance: that is, to examine the emergent modes of government accompanying resource extraction in different parts of the globe.⁵ What are the strategies, tactics and authorities—both state and non-state—that aspire to fashion the conduct of people both individually and collectively in connection to resource extraction? Specifically, we seek to explore the interconnection between strategies for conceiving and directing large-scale enterprises and schemes for managing the behaviour of specific human beings (Inda 2005). In an environment of heightened trade and investment liberalism, how do states, MNCs and IFIs seek to consolidate forms of neoliberal governance that will facilitate resource extraction? What are the singular complexities, frequent interruptions and unanticipated consequences of this art of government when indigenous peoples are added to the mix, and indeed constitute an integral component of the field of contention?

The restructuring of capitalism that the world has witnessed over the past three decades has given rise to the confluence of ever-spectacular forces. The near-global embrace of policies that have simultaneously deregulated national economies, and liberalized trade and investment, has facilitated the capacity of corporations to assertively expand their operations around the world, strategically inserting and retracting capital. Multilateral financial institutions and MNCs have both compelled into existence and guided neoliberal regimes worldwide.

Concomitantly, ever-growing transnational alliances and networks among an array of civil society associations, advocacy groups and watchdog organizations have emerged to monitor the operations of MNCs and multilateral banks, and the effects of their operations on local populations, especially indigenous peoples. As states increasingly relinquish their former

³ Foucault 1991, 1997; Barry et al. 1996; Dean 1999; Inda 2005.

⁴ See Biehl (2005); Ghosh (2006); Gupta (1998); Ferguson (1994); Ferguson and Gupta (2002); Mitchell (2002); Nelson (2005); Ong (1987, 2006); Scott (1999, 2004); Stoler (1995, 2002); Watts (2004).

⁵ We draw the term "transnational governmentality" from Ferguson and Gupta (2002), although we develop it more extensively.

protection for and responsibilities to their citizenry, increasingly, MNCs and to a lesser extent, some NGOs, have assumed dimensions of government. Despite their different positioning within force fields of power, states, MNCs, IFIs and variously networked NGOs are all engaged (albeit with different agendas) in the struggle to shape the forms of regulation and governance that define resource extraction around the globe. A universal language of indigenous rights is intertwined with this in complex ways. Each of the country studies engages these concerns by focusing differentially on the tensions and contradictions that emerge among states, MNCs, IFIs and indigenous populations engaging with the challenge of resource extraction. Exploring the intersections between the production of mega resource-extraction projects and the shaping of indigenous peoples offers a fruitful analytic for dissecting modern power.

This overview offers a framework for analysis grounded in transnational governmentality, focusing in particular on four dimensions: indigenous identity, language of rights, state-IFI-MNC nexus and corporate-indigenous tensions. It concludes with a discussion on public governance that strongly advocates authorizing the UN to address corporate responsibility with respect to human rights by forcefully encouraging collaborative work between the ongoing process of designing a rights-based approach to corporate regulation and the Permanent Forum on Indigenous Issues. The paper argues that such cooperation would work toward addressing many concerns raised in this study.

Indigenous Identity

The term “indigenous peoples” is both a fragile legal category and a historically changing, collectively embodied identity. In theory, who is and who is not an indigenous person is largely defined through self-ascription, and membership is usually determined by birth. As many indigenous leaders have argued, only indigenous peoples themselves can determine who they are; for a state or state-like governing entity to be endowed with the authority to define indigenous membership would be incongruous.⁶ In practice, however, indigenous peoples are not simply those who say they are indigenous; they are those who are accepted by a global network of similarly positioned communities sharing similar claims. Moreover, merely claiming to be indigenous has not meant (either in the past or present) that relevant institutions—be they indigenous federations, state agencies, multilateral banks or international law—would recognize that status. That is because indigenous identity is neither historically fixed nor universally apparent. Rather, shifting regimes of recognition are what define one to be indigenous in lived reality.

Broadly speaking, many contemporary indigenous claims arise from various attachments—often attachments that entwine an intimately lived and living landscape with a sacred idiom that secures a peoples’ distinct place in the cosmos. As Altman describes, “Dreaming” is constitutive of Australian aboriginal identity just as the Niyamgiri mountains and Dharni Penu goddess that Virginius Xaxa discusses, are for the Dongaria Kondhs tribe in Orissa, India. In both cases, ancestral and spiritual powers inhabit what the scientific secular world calls physical geography and biochemical nature. Perhaps more than their existence, however, it is the historic and ongoing possibility of losing these attachments that makes their significance all the more palpable. As a collectively espoused, transnationally networked and globally acknowledged identity, indigeneity has emerged largely in relation to histories of state-sanctioned forms of oppression. Those who claim this identity claim to be the descendents of peoples first subjugated by colonial powers and to have survived the upheavals of imperial expansion. Over the course of history, colonial, post-colonial and corporate forces have sought to impose social, political and economic control on indigenous peoples through an array of missions seeking to convert, civilize and modernize their bodies and practices and to exploit their lands and resources. As a number of the country studies note—especially those by Thomas Perreault

⁶ Speaking to the International Working Group for Indigenous Affairs (IWGIA), a Cree spokesperson noted: “To assume a right to define indigenous peoples is to further deny our right to self-determination” (cited in Thornberry 2002:60).

(Bolivia), Xaxa (India) and Ben Naanen (Nigeria)—these are thickly layered and complex historical processes whereby specific political and economic forces have crucially shaped the particular configuration of who counts as and proclaims to be indigenous today.

As such, members of groups—both past and present—claiming indigenous identity have lived through dire experiences, often shouldering the consequences of genocide, famine, epidemics, forced labour and resettlement, varying degrees of cultural suppression, and political and economic inequality, marginalization and indifference. A critical sentiment shared by nearly all who identify themselves as indigenous is a historical sense of having endured “illegitimate, meaningless, and dishonourable suffering” (Niezen 2003:13). Both tacitly and explicitly, many indigenous leaders have rebuked the West’s purported civilizing project “by insisting that Euroamerican colonialism and capitalist expansion have been a misadventure of violence, destruction, and trampling of non-Western people” (de la Cadena and Starn 2007:5). As many indigenous leaders note, they are among those whose cultural convictions and imaginings are most at odds with the tenets of the modern Western world (Niezen 2003). And undoubtedly this is true. But it is true as a philosophical position, not as a universal truth—that is, as a factual assessment borne out by empirical evidence in all times and places.

As the case studies from Australia, Bolivia, Canada, Nigeria and the Philippines illustrate, many politically visible and globally connected indigenous communities that have experienced the socially ailing effects of abused promises, dispossession and denigration have sought to consolidate a sense of collective integrity, pride and self-worth by reinvigorating cultural practices and values. What some indigenous peoples often refer to as “recovered” or “resurrected” traditions impute a common identity, sense of community and collective distinctiveness. Although emergent, contested and consequently changing, these recuperated customs often carry weight as if they had existed through time: “They confer pride of ownership. ... They belong to no other. They are permanent and inalienable” (Niezen 2003:12). And as such, they serve as a grounding for political agency.

But as the case studies from Chad/Cameroon, India and Peru illustrate, such a self-conscious and empowered sense of identity may not exist for many less politically visible and more marginalized indigenous communities. In each of these examples, forms of social, economic and political marginalization and racism have acutely undermined opportunities for the emergence of an “indigenous” voice among the Bagyeli in Cameroon, the Kondhs in Orissa and the Machiguenga in Camisea, Peru. As Korinna Horta notes, although the Bagyeli are part of the Pygmie ethnic group in Cameroon (long idealized by Western romanticism), they have been derided and impoverished in their own country. There is no sustained and coherent Bagyeli indigenous voice. In India, Xaxa’s study show that, although *adivasis*⁷ have been prominent in struggles over resources in India, the Kondhs of Orissa are not among them. Indeed, notions of identity and indigeneity have not entered either their resistance vocabulary or strategies against the bauxite mine encroaching on their lands. Similarly, Urteaga-Crovetto shows that while the Machiguengua are a much-studied indigenous group, those of Camisea do not speak a language of indigenous identity and resistance. Rather, they have espoused the liberal sensibilities of individualism, work, consumption and progress, supporting natural gas production in their lands and adopting the dominant society’s racist stance toward more isolated indigenous peoples. This underscores how the confidence of indigeneity is not innate; it is cultivated and nurtured.

For those indigenous people conscious of their indigeneity, their identity often stands in tension with state-condoned forms of capitalist development. Indeed, any understanding of the surge of indigenous identity witnessed across the globe over the past few decades should take into account the technologies of power exercised by the state and transnational capital on indigenous bodies and indigenous-claimed lands. As many scholars note, intensified forms of economic and technological globalization since the 1970s have created ever more powerful local

⁷ The word *adivasis* means “original people”.

and global manifestations of indigenous identity.⁸ As Altman, Perreault and Naanen demonstrate, although exogenous forces undermined elements that indigenous peoples saw as signifying the uniqueness of their identity, for many those markers and the emotive energy behind them have only gained in significance. Indeed, in this sense it becomes clear that the indigenous peoples' movement and its transnational character have emerged from the double-edged sword of processes of globalization. On the one hand, the negative effects of resource extraction and economic development have increasingly disrupted indigenous lives. And on the other, the greatly expanded forms of communication and engagement have allowed ideas, identities, strategies and technology to travel.

It is important to remember, however, that concrete manifestations of indigenous identity are not expressions of an eternal essence inherent within "aborigines". A century of social science research affirms that identity does not pre-date the social but rather is constituted dialogically through it; it is, as each case study demonstrates, an effect of historically specific processes. Even isolated indigenous communities, as in the case study from Peru, have been imbricated (although differentially) in global historical processes (Wolf 1982), and often their very isolation and difference is an effect of contact, not seclusion (Gupta and Ferguson 1992). As such, contemporary expressions of indigenous identity are the consequence of past and present experiences of exploitation and exclusion *and* the imaginings of an alternative social order. They are not primordial sentiments. Like all forms of identity, indigenous identity is a historically contingent, complex and relational experience.⁹ It is the product of specific power relations wrought over time, not a time-immemorial unchanging core (despite claims to the contrary). Thus, indigeneity can be thought of as being both the entangled historical processes that have come to define the indigenous *and* the experience of inhabiting the indigenous—"a dense dialogical formation" that includes the non-indigenous in the making of the indigenous (de la Cadena and Starn 2007:7).

Each of the case studies demonstrates how colonial rule, state governance and capitalist practices have intervened historically in indigenous peoples' lives to significantly set up the playing field where they find themselves today, and establishes the parameters and rules within which their actions are circumscribed. That is, colonial and postcolonial state policies, IFI initiatives and MNC practices have been as crucial in shaping the content and expression of indigenous identity as legacies of customary practices, values and relations. Consequently, the degree and timing of formal and substantive rights of citizenship, the form or category through which the state grants recognition (such as scheduled tribe, first nation and tribal lineage), the model by which land is titled (if it is at all—in trust, collective tenancy, individual ownership, and so on), all greatly influence the form and content of indigenous identity. And these factors, as a number of the case studies show (especially those from Australia, Canada, India and Nigeria), fundamentally shape how indigenous peoples are able to engage with state entities, corporate agents and IFI representatives. That is, the exigencies and openings of national and transnational politics and the political economy have structured indigenous claims and the language in which they are voiced.¹⁰ And the predominant language for voicing them on the international stage is through the UN-sanctioned discourse of cultural rights.

International institutions and indigenous peoples

Major international institutions, long aware of the predicament of indigenous peoples in the face of national development plans and their enduring history of discrimination, have raised concerns about the ways and means of protecting indigenous culture and physical well-being. Over the past decades, both UN agencies and multilateral lending institutions have created

⁸ See Brown (2004); Li (2000); Ramos (1998); Sawyer (2004); Tsing (2005); Warren and Jackson (2002).

⁹ Swiss linguist Ferdinand de Saussure began outlining this understanding between 1907 and 1911. His work was posthumously published in *A Course in General Linguistics* (1983). See also Butler (1993); Clifford (1988).

¹⁰ Tsing 2007; Larson 2004; Sawyer 2004; Li 2007.

charters recognizing the need to address the marginalization of indigenous communities and to accord them greater political and economic capacity (see appendix 1).¹¹

The International Labour Organization (ILO) was the first international institution to draw attention to indigenous issues, its efforts dating back to 1957 with the adoption of ILO Convention 107 concerning the protection of indigenous, tribal and semi-tribal populations. ILO Convention 107 adopted an “integrationist” approach, aiming to assimilate indigenous peoples into national society, an agenda that subsequently came under heavy criticism. In 1989, this convention was revised, emerging as ILO Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries.¹² Currently, ILO Convention 169 is the only binding instrument that specifically refers to the need to protect the rights of indigenous peoples. And significantly, only 18 out of the 192 UN member states have ratified this document.¹³

Equally important at the international level is the United Nations Declaration on the Rights of Indigenous Peoples, which the UN Human Rights Council adopted on 29 June 2006, after more than a decade of debate, and the UN General Assembly adopted on 13 September 2007¹⁴ – as well as the Proposed American Declaration on the Rights of Indigenous Peoples, approved by the Inter-American Commission on Human Rights in February 1997, and the Report of the African Commission’s Working Group on Indigenous Populations/Communities adopted by the African Commission on Human and Peoples’ Rights in November 2003.

Both ILO Convention 169 and the UN Declaration have created instruments through which indigenous peoples might assert their claims to traditional lands, including the provision for autonomy over areas long associated with indigenous communities. Both urge governments to acknowledge indigenous peoples’ right of ownership over their traditional lands and the natural resources obtained from their lands so as to protect the economic, political and spiritual interests of indigenous peoples.¹⁵ Furthermore, they require governments to recognize indigenous customs and institutions and to introduce legislation that allows indigenous peoples the right to maintain and strengthen their legal, political, economic and social systems.¹⁶ More explicitly, the UN Declaration calls for the right of these communities to be able to “freely determine their political status and freely pursue their economic, social and cultural development”. It goes on to assert that “in exercising their right to self-determination”, indigenous peoples have the right to autonomy in matters relating to their internal and local affairs.¹⁷

ILO Convention 169, the UN Declaration and the Proposed American Declaration on the Rights of Indigenous Peoples also acknowledge the need for indigenous peoples to participate in the

¹¹ The UN Human Rights Council, the International Labour Organization (ILO), the Organization of American States, the African Union, as well as the World Bank, the African Development Bank, and the Inter-American Development Bank (IDB).

¹² ILO Convention 169 was adopted in 1989 and came into force in 1991. ILO Convention 107 remains in force, though now closed to further ratification. Its signatories are Angola, Bangladesh, Belgium, Cuba, Dominican Republic, Egypt, El Salvador, Ghana, Guinea-Bissau, Haiti, India, Iraq, Malawi, Pakistan, Panama, Portugal, Syrian Arab Republic and Tunisia.

¹³ The 18 countries that have ratified ILO 169 are Argentina, Bolivia, Brazil, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Guatemala, Honduras, Mexico, Netherlands, Norway, Paraguay, Peru, Spain and Venezuela.

¹⁴ In 1982, the United Nations Economic and Social Council (ECOSOC) established the Working Group on Indigenous Populations and charged it with drafting a universal declaration on the rights of indigenous peoples. On 29 June 2006, the UN Human Rights Council approved and adopted (with some amendments) the Declaration on the Rights of Indigenous Peoples; being a declaration, it is a non-binding instrument. Due to divisions long existing among governments about the wording and contents of this declaration, the council was not able to approve it by consensus and had to submit it to the vote of its members. The declaration was ultimately adopted by 30 votes, with the Russian Federation and Canada voting against adopting the document and 12 governments abstaining from voting. The United States had reservations about the entire declaration and said that it would voice its concerns during the General Assembly meeting in September 2006. Along with the United States, New Zealand and Australia withheld support for this declaration in its present form. Canada switched its previously positive position in drafting the declaration after a new conservative government came into power (see Human Rights Tribune, Geneva, at <http://humanrights-geneva.info>, accessed on 3 May 2006).

¹⁵ See, for instance, ILO Convention 169, Article 15 and UN Draft Declaration, Articles 26 and 27.

¹⁶ See, for example, ILO Convention 169, Article 8; UN Draft Declaration on the Rights of Indigenous Peoples, Articles 5, 20, 27 and 34.

¹⁷ UN Declaration, Articles 3 and 4. Similarly, the Proposed American Declaration on the Rights of Indigenous Peoples (Article 15) stresses indigenous peoples’ right to self-governance in several realms, including culture, religion, education, information, media, health, housing, employment, social welfare and economic activities.

political, social and economic life of their country. They urge governments to recognize indigenous peoples' right to participate in decision making in matters that may have a bearing on their welfare and security.¹⁸ In order to respect indigenous peoples' right to be consulted on issues affecting them, the UN Declaration, in particular, urges governments to allocate indigenous representatives the right to participate in discussions and influence relevant legislative or administrative measures.¹⁹ Similarly, ILO Convention 169 and the UN Declaration urge states to obtain free and informed consent from indigenous peoples prior to the approval of any project to extract and develop mineral resources from or on indigenous lands.²⁰

In an effort to help concretize these concerns, in July 2000, the United Nations established the Permanent Forum on Indigenous Issues as an advisory body to the United Nations Economic and Social Council (ECOSOC). Its task is to discuss indigenous issues concerning economic and social development, human rights, the environment, culture, education and health. The Permanent Forum does not have the authority to investigate complaints of rights violations nor the power to compel countries to act in accordance with international conventions. The UN Human Rights Committee and the UN Committee on the Elimination of Racial Discrimination are charged with monitoring national governments' respect of human rights and investigating claims of violations of indigenous rights. These tasks are carried out at the regional level by the African Commission on Human and Peoples' Rights, the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights (see appendix 2).

Important decisions with respect to indigenous peoples issued by these three entities are highlighted below.

The UN Committee on the Elimination of Racial Discrimination has adopted explicit recommendations with respect to indigenous peoples (see appendix 2). Here, the committee calls upon governments to:

[p]rovide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;...[e]nsure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent;...[and] recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories.²¹

At the regional level, in 2001, in a case involving the Ogoni people and the adverse impact of oil exploitation activities carried out on their lands, the African Commission on Human and Peoples' Rights concluded that the government of Nigeria had violated the Ogoni people's basic rights.²² In particular, the commission contended that the government had violated the Ogoni people's right to a satisfactory environment, to health, shelter and food, as explicitly

¹⁸ See UN Declaration, Article 20, ILO Convention 169, Article 6 (b), and Proposed American Declaration, Article XV.

¹⁹ See UN Declaration, Article 18.

²⁰ See UN Declaration, Article 30 and ILO Convention 169, Article 15.

²¹ See General Recommendation XXIII, paragraphs 4 and 5. See also the Convention on the Elimination of Racial Discrimination (Article 5) for specific reference to land rights, as well as the UN Human Rights Committee's interpretation of Article 27 of the International Covenant on Civil and Political Rights (CCPR): "culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them". See General Comment No. 23: The rights of minorities (Article 27), 08/04/94, CCPR/C/21/Rev.1/Add.5, paragraph 7, which reads: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language." This Article has been controversially applied, among others, in the case of Lubikon Lake Band of Cree v. Canada.

²² See African Commission on Human and Peoples' Rights, Communication 155/96, 2001.

acknowledged in the African Charter on the Human and Peoples' Rights.²³ Also in 2001, the Inter-American Court established the land rights of indigenous peoples in the case of *Awasi Tingi*, Nicaragua. The Inter-American Court's broad interpretation of the right to property incorporated in the American Convention on Human Rights asserts that a government is obligated to recognize and respect indigenous peoples' communal rights over traditional land, even if they do not possess a legal title.²⁴

Following a similar impetus, a number of IFIs have also drawn up guidelines dealing with the need to protect the political and economic rights of indigenous peoples (see appendix 1). As Horta argues in her analysis of the Chad/Cameroon oil and pipeline project, the World Bank became the first multilateral financial institution to adopt a policy on tribal peoples, known as Operational Manual on Tribal People in Bank-Financed Projects Statement (OMS 2.34) in 1982. In 1991, this was replaced by a new Operational Directive on Indigenous Peoples (OD 4.20), which was replaced in 2005 by Operational Policy/Bank Policy on Indigenous Peoples (OP/BP 4.10) whose jointly stated goal is to ensure that "the development process fully respects the dignity, human rights, economies, and cultures of Indigenous Peoples".²⁵

Along lines similar to directives elaborated by other multilateral development institutions, the World Bank's OP/BP 4.10 outlines specific recommendations concerning indigenous peoples that serve as a set of standards to be observed when issuing loans.²⁶ Because the Bank "recognizes that the identities and cultures of Indigenous Peoples are inextricably linked to the lands on which they live and the natural resources on which they depend", it recognizes that development projects "expose Indigenous Peoples to different types of risks and levels of impacts...including loss of identity, culture, and customary livelihoods, as well as exposure to disease". Furthermore, because "Indigenous Peoples are frequently among the most marginalized and vulnerable segments of [a national] population", they are "often limit[ed] in their capacity to defend their interests in and rights to lands, territories, and other productive resources".²⁷ Consequently, the Bank has taken upon itself to safeguard this relationship by making loans contingent on borrowers obtaining broad community support based on "free prior, and informed consultation" and recognizing "the customary rights" of indigenous peoples and "the cultural and spiritual values" they attribute to their lands and resources.²⁸

However, bridging the divide between the language of these charters and the plight of indigenous communities is daunting. There are a number of obstacles. To begin, there is no universally shared definition of the term "indigenous peoples" (see appendix 1). In 1996, the Chairperson-Rapporteur of the United Nations Working Group on Indigenous Populations, Erica-Irene Daes, observed that this collectivity is "not capable of a precise, inclusive definition

²³ See African Charter on the Human and Peoples' Rights, Articles 2, 4, 14, 16, 18, 21 and 24.

²⁴ The same statement has been made by the Inter-American Commission with regard to the provision concerning property rights contained in the American Declaration on the Rights and Duties of Man.

²⁵ See World Bank Operational Policy/Bank Policy 4.10 and Operations Directive 4.20, paragraph 1.

²⁶ The IDB points out "the potential of indigenous peoples' cultural and natural heritage for their own development and the development of society as a whole", as well as the need to "enhance the Bank's contribution to the *development with identity* of indigenous peoples" (IDB 2006b:1, emphasis in original).

References to indigenous peoples were also made in other documents relating to development, such as the Rio Declaration on Environment and Development, adopted by the UN Conference on Environment and Development in 1992, and the Johannesburg Declaration on Sustainable Development, adopted at the World Summit on Sustainable Development in 2002. The Convention on Biological Diversity contains provisions regarding indigenous peoples, as does Agenda 21. The Convention on Biological Diversity affirms respect and preservation of knowledge, innovations, and practices of indigenous communities (see Article 8). Agenda 21 focuses on empowering indigenous peoples, providing guidelines that serve to achieve this goal (see chapter 26).

²⁷ World Bank OD 4.20 and OP/BP 4.10, paragraph 2.

²⁸ World Bank OD 4.20 and World Bank OP/BP 4.10, paragraph 16. See also IDB Operational Policy on Indigenous Peoples, Article 4.3 (h). In conjunction with the many international declarations and conventions on indigenous peoples, a number of nation-states have enacted constitutional and legal reforms that recognize indigenous peoples and extend certain rights to them at the national level (see appendix 3). Far from homogeneous, these legal provisions range from very general to specific in character: from constitutional statements recognizing the multi-ethnic makeup of a nation to specific legislation asserting varying degrees of autonomy, self-determination and collective land rights for indigenous peoples. There exist, however, only a small number of institutions effectively empowered to protect and promote indigenous concerns (see appendix 2).

which can be applied in the same manner to all regions of the world”.²⁹ Early definitions of indigenous peoples were strongly criticized because they maintained that “aboriginality” and the experience of colonial domination were the two features that define their distinctive character.³⁰ Yet after centuries of movement and cultural interchange, it is in many contexts contentious (if not near impossible) to specify which communities represent descent *ab origine*—“from the beginning”—or from original inhabitants. Furthermore, indigenous peoples are not merely victims of colonization. Pre- and post-conquest history demonstrates that, in the Americas, Africa and Asia, some indigenous groups have also been capable of subjugating other local communities. For these reasons, the Working Group stopped trying to define this community in its 1993 Draft Declaration on the Rights of Indigenous Peoples.

Generally speaking, when identifying indigenous peoples, international institutions have focused on the “distinctiveness” of their culture and economy and their special attachment to and historical continuity with the lands they have traditionally used or occupied. Each of the international proclamations discussed above hinges on the “unique” identity of indigenous peoples, noting that the primary difference between indigenous peoples and the rest of the population of a country is that indigenous culture and well-being is deeply connected to the environment in which they live. In order to respect their desire to continue to live in their own particular way, they have to be accorded rights to resources that allow them to protect and maintain their livelihoods and cultural practices. For example, as elaborated in its preamble, the UN Declaration recognizes “the urgent need to respect and promote the inherent rights and characteristics of indigenous peoples, especially their rights to their lands, territories and resources, which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies” and recognizes “that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment”.

As inevitably happens with universal assertions, these proclamations rest on a certain degree of essentializing—of overstating and romanticizing indigenous lives and ambitions. Images of the noble ecological saviour, gentle spiritual healer or egalitarian world citizen commingle with thought-provoking concerns on indigenous futures. Tendencies toward romanticization, however, often misrepresent the truth of the indigenous condition in many parts of the world and do little toward imagining viable alternatives. Three dimensions of common portrayals of indigenous peoples are worth untangling: (i) the notion that indigenous peoples have deeply lived attachments to their lands; (ii) that indigenous peoples live in accordance with a morality that is inherently more communal, egalitarian and sustainable than the world around them; and (iii) that indigenous peoples’ aspirations for their future are rooted in socially and environmentally sustainable foundations.

As global pronouncements, these characterizations are *crucial*. Indeed, they capture what is unique about a “sentient stance” (see de la Cadena 2008)—a subject position that recognizes forms of agency not accepted within the realm of Western rational, secular epistemology and politics. But a dilemma arises when global pronouncements become the standards or criteria for claiming an identity, and indigenous peoples in their practices do not measure up. It is a clear disservice to indigenous peoples to measure their life trajectory, present condition and future aspirations against these pronouncements. For this sentient stance, however deeply

²⁹ For a discussion of this concept, see Daes (1996).

³⁰ See, in particular, the definition provided by José Martínez Cobo (1992:50) in his *Study on the Problem of Discrimination Against Indigenous Populations*. According to this document, “indigenous communities, peoples, and nations are those which, having historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of societies and are determined to preserve, develop, and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems”. Also see the definition provided by the ILO Convention 169, Article 1.1 (b): “Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited a country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries”.

experienced, does not alone define indigenous peoples' social, political or economic reality. Rather, as Altman notes, it lives at various degrees of tension alongside it.

First, for indigenous people who live on claimed ancestral territory, their "connection" to it does not emerge from the purity of their being. Rather, as all the case studies—especially those from Australia, Bolivia, India and Nigeria—show, the connection to land is the product of long histories of struggle—in all their spiritual and material aspects—that are part and parcel of colonial and postcolonial confrontations over governance. The belief that land is in indigenous blood or is part of an indigenous essence makes this history of struggle invisible and erases the impact of indigenous historical agency on the processes of the present. This is not to deny that many indigenous people take seriously relations to forces and spirits that do not fit within the Western category of politics—for example, by inhabiting a genealogical relation to animate natural worlds. Rather, it is to recognize that these relations also emerge as part of history, a history that both does and does not mimic a linear teleological passage of time and events.

Additionally, as Perreault notes in his case study from Bolivia, many indigenous people today no longer live on what were once their ancestors' lands, and their attachment to ancestral lands is spiritual, poetic and/or mythic. Others reside on their ancestral lands intermittently, migrating back and forth between rural and urban spaces of dwelling. These indigenous peoples are often predominantly urban (not rural) and are often intimately engaged in (while not wholeheartedly embracing) Western sensibilities, capitalist economies and state structures. This neither makes them less indigenous, nor need it be an obstacle to indigenous engagement. A deep-seated "indigenous-land" association risks denying these non-rural inhabitants their identity. And it ignores how they can be crucial actors in indigenous political change, as Perreault clearly demonstrates.

Second, the act of dwelling in ancestral lands does not *ipso facto* compel indigenous people to engage in more communal, egalitarian and sustainable practices than those in the world around them. This may indeed occur, and granting land rights undeniably enhances the possibility for such practices. But it also decidedly may not. It is not uncommon to find indigenous peoples engaged in livelihood and economic activities not too dissimilar from their non-indigenous rural neighbours, despite maintaining certain distinctive features (such as language, adornment, dress and spiritual ontology).

Third, this underscores how non-indigenous people may share many indigenous concerns and how indigenous people may engage in many non-indigenous activities. Indigenous peoples do not live lives whereby their customs and economy are self-contained products of some isolated collective coherence. As noted above, colonial and neocolonial forces have variously shaped (coercively and pedagogically) indigenous values, beliefs and modes of production. And histories of indigenous engagement (conflictive and negotiated) have shaped the way the colonial and postcolonial state has come to render indigenous people visible and containable. But of particular significance is the fact that a communal, egalitarian and sustainable life must be created; it is not an intrinsic part of being indigenous. This calls attention to how indigenous people are not a homogeneous group and how there is no single vision of indigenous development. While hopes may be shared in the abstract, indigenous aspirations for their future are always historically and geographically specific and contingent. Indigenous development is manifold, not singular.

Given their universalizing gloss, the UN and related charters present an image of indigenous identity and development that may be too sanitized to reflect the messiness of subaltern existence. A number of scholars caution against overzealous affirmations of indigenous identity. Some suggest that drawing the lines between indigenous people and other poor—often in itself a legacy of colonial systems of social classification—may obstruct efforts to forge and mobilize multiple strategies for social change. And assuming that indigeneity is intrinsically a sign of opposition or resistance may prove myopic. Working in India, anthropologist Akhil Gupta observes that

there is a heavy price to be paid for the emphasis placed by proponents of indigenous knowledge on cultural purity, continuity, and alterity. Such efforts at cultural conservation make no room for the vast majority of the world's poor, who live on the margins of subsistence and the most degraded ecological conditions but who cannot claim to be indigenous peoples in the limited definition accorded the term (Gupta 1998:289).

Similarly, anthropologist Tania Li notes that "one of the risks that stems from the attention given to indigenous people is that some sites and situations in the countryside are privileged while others are overlooked, thus unnecessarily limiting the field within which coalitions could be formed and local agendas identified and supported" (Li 2000:151).

Although voicing concerns along these lines draws desperately needed attention to the predicament of indigenous people, it also has other effects. A discourse of rights may tend to reify indigenous identity and entitlements in narrow and rigid terms (an issue that will become evident in the discussion on the 2001 ruling of the Inter-American Court of Human Rights below). This can lead to indigenous peoples themselves taking on their own popular understandings that fix them in space and time—what Li calls espousing a "sendentary metaphysics"—and this in turn can shape beliefs and practices to make them more restrictive (Li 2000). More generally, receiving state recognition of cultural, land or resource rights may create factious divisions among indigenous communities. While bestowing cultural and land rights on indigenous peoples provides many groups a degree of self-determination, the manner in which this is done may also be remarkably divisive and undermining. Even something as simple as the drawing up of maps needed for land titling can reify and parochialize indigenous communities that were previously more fluid and inclusive. And it inevitably empowers certain indigenous sectors while sapping the authority of others (Bryan 2007; Sawyer 2004). This divests indigenous peoples of the complexity, inventiveness and flexibility of their lived experience. It overlooks any sense of indigenous peoples, as Altman discusses, as always sustaining multiple temporalities, geographies, philosophies and economies within their everyday practice.

Beyond this, some scholars suggest that a transnational language of indigeneity—in its universalizing tendency—"removes all politics to the exclusive domain of transnational governance and civil society based on a discourse of abstract human rights" (Ghosh 2006:521). And what, one might ask, is wrong with that? The concern is that the only thing that gets recognized and supported as politics—nationally and transnationally—are struggles framed in terms of an abstract and universal notion of indigenous which is guaranteed through "a contractual agreement in terms of law"—cultural rights (Ghosh 2006:521). This tactic misses, however, the myriad of struggles across the globe that are not organized along these lines. And it misses on-the-ground contingencies and contradictions, the actual dynamics, that mark nearly all indigenous confrontations and challenges around resource extraction and neoliberal reform. What of the indigenous resistance to mining that assumes the colonizers' stereotype of the lazy, simple, drunken aboriginal as a stance of intransigence and transgression? What of those who take on as their own, and parody, their putative irreducible otherness in order to define themselves in opposition to state and capital and to form the basis for projects of non-cooperation? What of the multiple instances when indigenous peoples do not act in "appropriately indigenous" ways (as prescribed by internationally sanctioned Western conventions) and, in the hope of gaining access to resources, employment, cultural capital, knowledge and modernity, seek deeper engagement with—rather than opposition to—multinational extractive industries on their lands? These are indigenous struggles, yet their logic cannot be grasped by a transnational language of indigenous cultural rights. As Kaushik Ghosh contends: "the transnational discourse of indigeneity has insufficiently grasped the openings that [subaltern] populations have created in the folds of domination...and in fact it unwittingly threatens to undermine such openings by producing a different form of indigenous subjectivity that marginalizes the vast majority of the indigenous populations" in the world (Ghosh 2006:503).

Clearly, as is evident from Perreault's study of Bolivia and from Megan Davis's work of British Columbia, Canada, many indigenous peoples have effectively appropriated openings that arise from a language of rights and market reforms to build broad-based coalitions among subaltern groups. It is important to understand what allows indigenous politics to be a vehicle for articulating diverse political concerns for social justice beyond concerns exclusive to indigenous identity. And, conversely, it is important to understand the forces that can provoke division and exclusionary sentiments within indigenous communities. We now turn to exploring the language of rights.

Language of "Rights"

Without discounting the immense empowerment that comes with the recognition of legal rights, a number of scholars question what happens when social struggles come to be channelled through a discourse of identity-based rights and law.³¹ Although the language of rights is the dominant idiom for framing entitlements and obligations in our world today, its emancipatory potential is not absolute. A rights framework "has had complex and contradictory implications for individuals and groups whose claims must be articulated within its terms" (Cowan et al. 2001:1). As political theorist Wendy Brown notes, "rights have no inherent political semiotic, no innate capacity either to advance or impede radical democratic ideals" (Brown 1995:97). As such, demands for cultural recognition can equally serve a reactionary or a progressive agenda (Povinelli 2002). Brown (along with others) underscores the potential dangers of identity-based demands for rights. She observes: "While rights may operate as the indisputable force of emancipation at one moment in history...they may become at another time a regulatory discourse, a means of obstructing or co-opting more radical political demands" (Brown 1995:98).

At issue is not whether the desire for recognition is right or wrong, good or bad, but rather what yearning for and acquiring recognition does. As Brown notes, "rights converge with powers of social stratification and lines of social demarcation" and the point is to examine how such convergences might "extend as often as attenuate these powers and lines" (Brown 1995:98). The question is to what extent might the law make cultural identities "sites of regulation" and nodal points through which identities are produced, while simultaneously foreclosing other forms of political identification, imagining and action (Brown and Halley 2002).

These issues are raised in the work of Elizabeth Povinelli. Examining the process by which aboriginal land rights are recognized, Povinelli demonstrates how liberal multiculturalism in Australia perpetuates unequal systems of power (Povinelli 2002). Aboriginal legal rights to claimed land is contingent on the Australian courts judging that claimants embody – indeed live up to in their practice – impossible standards of cultural authenticity, creating a paradoxical situation for aborigines. This is what Altman, drawing on the work of Patrick Wolfe (1999), calls "repressive authenticity". On the one hand, legislation caricatures "culture" as static, bounded, homogeneous and uncontested. And consequently, if not paradoxically, it ends up shaping that which it purportedly seeks to recognize – "aboriginal culture". On the other hand, the armature of the law allows the state to atone for its prior racist practices and simultaneously transform itself into the judge of aboriginal cultural authenticity – bestowing, decertifying and negating a land rights-bearing identity to aborigines, depending on whether they demonstrate appropriate, insufficient or excessive indigeness. Povinelli's analysis demonstrates how "law is one of the primary sites through which liberal forms of recognition develop their disciplinary sides as they work with the hopes, pride, optimism and shame of indigenous and other minority subjects" (Povinelli 2002:184). That is, a "cunning" resides within liberal

³¹ Cowan et al. 2001; Brown 1995; Merry 1992, 2006a.

multiculturalism; in the very moment of acknowledging and seemingly conceding to difference and free cultural expression, the politics of cultural recognition authorizes, and in so doing disciplines, regulates and constrains otherness. Moreover, not just the state—by virtue of its power to grant and deny rights—is ensconced in disciplining and regulating its subjects. Indigenous peoples too become themselves often caught in self-monitoring and regulating who and what they are.

Along these lines, we would like to think critically about a language of rights and the practice of not just liberalism but of neoliberalism. From the early 1980s, a major economic ideological shift occurred in the United Kingdom and the United States with the ascendance to power of Margaret Thatcher and Ronald Reagan, respectively. Neoliberalism, based on ideas developed by Friedrich von Hayek and Milton Friedman, and actively pursued through the influential Thatcher and Reagan governments with strong backing from big business, advocated the need for a “small government” and the virtues of allowing the private sector to drive economic growth (Harvey 2005:19–31). The economic foundations of “Thatcherism” and “Reaganomics” included limiting state intervention in the economy, promoting the private sector as the key engine of economic growth, restraining policies that supported labour rights and checking the growth of the welfare state. The rise of both these conservative politicians was also noteworthy given their, or their parties’, close links to capital.

Institutions such as the World Bank and the IMF began adopting and espousing neoliberal ideas. The policy framework of the IFI conditionality system came to be largely based on liberal economic policy, enshrined in the underpinnings of the Washington consensus (see Williamson 1990, 1997): namely, that economic growth in developing countries could only be achieved through a combination of fiscal discipline, deregulating the market, reducing public expenditure, privatizing industry to encourage competition, reforming tax law, introducing competitive exchange rates, encouraging foreign direct investment, securing property rights and liberalizing trade.³²

The conditionality system worked as follows. IFIs designed structural adjustment programmes (SAPs)³³ to encourage wide-ranging economic liberalization. These institutions then stipulated that, in order to approve loans to a developing country, the country would need to implement and adhere to SAPs. Structured ostensibly to allow a developing country to generate income, pay off debts and industrialize its economy, SAPs actively promoted the idea that the solution to achieve sustained economic growth was privatization and liberalization of the economy. In effect, however, structural adjustment has further marginalized the poorer and more vulnerable sections of the population in the developing world. As stated by the former World Bank chief economist, Joseph Stiglitz:

structural adjustment policies—the policies designed to help a country to adjust to crises as well as to more persistent imbalances—led to hunger and riots in many countries; and even when results were not so dire, even when they managed to eke out some growth for a while, often the benefits went disproportionately to the better-off, with those at the bottom sometimes facing even greater poverty (Stiglitz 2002:xiv).

In particular, many indigenous peoples have been gravely affected as environmental and social crises—such as the displacement of communities, the deterioration of health and severe environmental degradation—have increasingly disrupted and brought chaos to their lives.

As a consequence, concerns for indigenous rights stand in opposition to many of those espoused by neoliberal reform. Indeed, examples across the world underscore how the focus of each is at odds with the other. Yet, while recognizing this to be true, we also caution against

³² The Washington consensus has been thoroughly criticized and debated. Some of the key works on this issue include Stiglitz (2002); Williamson (1990, 1997).

³³ The impact of the SAPs has been well documented, see in particular Easterly (2001, 2005); Stiglitz (2002).

assuming *a priori* that indigenous rights and neoliberalism are inherently oppositional. The case studies contain instances in which struggles for indigenous rights stand in absolute opposition to a neoliberal order (Australia, Bolivia, Canada, Nigeria and the Philippines). But there are also instances, often in the same case study, in which indigenous opposition to a neoliberal agenda unwittingly sustains and reinforces capital-intensive resource extraction (Australia, Nigeria and the Philippines); in which a language of indigenous rights clearly voices its support for and collaboration with a neoliberal agenda (Australia and the Philippines); or a language of indigenous rights is not the idiom through which native peoples engage with the extractive industry (Chad/Cameroon, India and Peru).

In 1948, human rights gained salience as a language through which to assert claims with the United Nations Universal Declaration of Human Rights. As some scholars suggest, it was not until the late 1980s, however, that a discourse of human rights became a truly worldwide idiom.³⁴ Indeed, with the fall of the Berlin Wall and collapse of communism, the language of human rights spread across the globe, often in tandem with a discourse of triumphant free-market democracy.³⁵ Similarly, the period from the late 1980s onward saw concern for indigenous rights capture the global stage. As the United Nations declared 1993 the year—and then 1995–2004 the decade—of indigenous peoples, a burgeoning indigenous rights movement surged in waves around the world. It might be instructive to see the parallel emergence and growing significance of these tendencies—neoliberal and indigenous standpoints—as something more than pure coincidence. As this paper argues, they are connected in complicated, and at times contradictory, ways.

Some scholars suggest that the emergence of an indigenous rights movement across the globe in parallel with the spread of neoliberalism is the result of interest groups forming to fill the vacuum that the state left as it disavowed its purported responsibilities toward its citizens.³⁶ According to this perspective, movements for indigenous rights represent one among various forms of resistance that social sectors have fomented in an attempt to ameliorate the dire predicaments produced by neoliberal policies. As state governments worldwide have adopted specific provisions regarding indigenous peoples, some scholars suggest that these national provisions, although far from homogeneous, reflect the force of a language of human rights on democratizing and neoliberalizing governments. That is, their adoption represents the capacity of an international moral idiom and legal framework to work from “above”—via the compulsion of international norms and institutions—and from “below”—via the organizing of civil society groups (Donnelley 2002; Ignatieff 2001).

As Shannon Speed notes, these scholars view human rights and neoliberalism to be, in their very essence, at odds;

a process in which neoliberal policies, being antithetical to human rights, create conditions of increasing oppression, and civil society increasingly turns to human rights discourse and doctrine to defend itself. Human rights are thus understood as a response to the negative impact of neoliberal globalization and as an emergent and important discourse of resistance movements all over the world (Speed 2006:31).

Undoubtedly, this is the case. However, more might well be happening. There is a risk of missing crucial insights into how power operates under neoliberalism if it is uncritically assumed that a discourse of indigenous rights would unequivocally challenge a neoliberal order. In this study, along with recognizing the radical potential of rights claims, we wish to introduce a healthy scepticism of the belief that policies that seek to recognize the unique

³⁴ Brysk 2002; Donnelly 2002; Wilson 1997.

³⁵ Fraser 1997; Kymlicka 1996; Merry 2006b; Van Cott 2000.

³⁶ Donnelly 2002; Ignatieff 2001; Selverston-Scher 2001.

character of indigenous peoples among a citizenry “will necessarily result in greater social justice” (Speed 2006:32; Cowan et al. 2001).

This is not to suggest that a language of indigenous rights is either a ruse or dispensable. Rather, it is to suggest that we need to understand the conditions of its existence and what that existence does. Some of the case studies underscore situations where free-market governance is resolutely opposed to recognizing any form of indigenous identity and the rights that might devolve from it (Chad/Cameroon and Nigeria). Other case studies highlight instances where neoliberal policies might—perhaps counter to common understandings—operate hand in hand with campaigns for indigenous rights (Australia, Peru and the Philippines). Other case studies look at places where postcolonial and neoliberal rule pre-empts, or even precludes, any public regional discussion of indigeneity to even emerge (India and Nigeria). And still other studies reveal how colonial and postcolonial rule established the conditions that allowed for a coherent and resolute indigenous stance in opposition to neoliberal hyper-exploitation but not capitalist enterprise per se (Australia, Bolivia and Canada). As Brazilian scholar Evelina Dagnino notes, contemporary global political processes are marked by “perverse confluences”³⁷ whereby movements in support of social justice commingle with movements in support of market rationality and extraction. Our point is that the worlds of neoliberal governance and indigenous activism may be as deeply intertwined as they are marked by misalignments, cleavages and confrontations.

Let us explore the relationship between neoliberalism and indigenous rights more explicitly.

In general, neoliberal rule has progressively sought to relieve the state of its responsibilities to watch over its subjects. This is a process that many scholars have referred to as the “de-governmentalization” of the state and the “de-statalization” of government.³⁸ Policies and programmes seeking to privatize the public sector, liberalize trade, deregulate the economy and decentralize administrative functions also seek gradually to release the state from its role of championing the social development and betterment of its people. Through trickle-down economics, it is thought, the market forces of a robust economy and the greater circulation of capital will resolve social problems and inequities and will establish the conditions necessary for democracy to flourish.

Although in theory neoliberal rule aims to convert the state into an administrative and calculating organ—a fiscal manager geared toward facilitating transnational capital accumulation—neoliberal polities do not seek to eliminate government per se. Rather, the processes that govern subjects are transformed, often displacing and replacing the very sites of government. Consequently, despite proponents of neoliberalism claiming that state intervention leads to a paralyzed and parasitic social body, a host of legal, institutional and cultural state interventions suffuse forms of neoliberal governing. Specific legislative reforms, institutional arrangements and social conditions need to be positively constructed to enable the market rationality of competitive entrepreneurialism to have its best effect. Through the enactment of new laws, the nurturing of national and transnational capital and the opening of spaces for private forms to watch over citizens, the exercise of neoliberal governance encompasses new techniques, devices and forms of persuasion.³⁹

As such, the work of a number of scholars suggests a broader look at neoliberal rule and its effects—viewing it as a broad-spectrum political project rather than simply a cluster of market-oriented reforms.⁴⁰ In addition to furthering its espoused economic doctrines (privatization, liberalization and deregulation), neoliberal rule touts the importance of decentralization—the diffusion of state administrative functions and decision-making powers. Agendas to

³⁷ Dagnino 2002, cited in de la Cadena and Starn 2007:21.

³⁸ Gordon 1991; Rose 1996; Burchell 1996; Escobar 1994; Ferguson 1994, 1999.

³⁹ Burchell 1996; Rose 1999; Sawyer 2004.

⁴⁰ Barry 1996; Hale 2005; Ong 1999; Postero 2006; Rose 1999.

decentralize state authority embrace (at least in theory) the belief in a trim state bureaucracy, a general understanding of human rights and some degree of political representations (Hale 2005). Likewise, in parts of virtually every region of the world, decentralization has championed a belief in civil society and its greater participation in defining social and political processes. And, in some instances, it has championed the recognition of cultural diversity and rights—a move that otherwise seems contradictory to neoliberal economic goals.

Some scholars underscore the extent to which the recognition of indigenous rights under the context of neoliberal rule can, paradoxically, increasingly enmesh indigenous groups within structures of power, while simultaneously allowing for political openings.⁴¹ They note that recognizing cultural diversity in a neoliberal context can have multiple effects: (i) it empowers the state to define who are deserving (and undeserving) rights-bearing indigenous subjects (Bryan 2007; Povenelli 2002); (ii) it allows the state to further extend its “grid of intelligibility” by confining diversity to manageable categories;⁴² and (iii) it may establish the ground for reinscribing racial hierarchies and reinforce local power structures.⁴³

To explore these contentions more fully, let us examine a prominent international court decision: the 2001 landmark judgment by the Inter-American Court of Human Rights in *The Case of the Mayangna Awas Tingi Community v. Nicaragua*.⁴⁴ In a precedent-setting judgment, the court ruled that the Nicaraguan government violated the American Convention on Human Rights by granting a Korean multinational company a logging concession on land claimed by an indigenous community. In effect, it declared that customary use and occupancy constitute a form of property that states have a duty to protect under national and international human rights. Undeniably, indigenous peoples have won a historic achievement with the international court affirming their collective right to claimed ancestral lands—a ruling with wide-ranging implications throughout the Americas and beyond. But as Bryan notes, “for residents of Awas Tingni, rights to land and resources in the wake of the Court’s decision are now as precarious as they have ever been” (Bryan 2006:1).

As noted before, property regimes are a crucial component to establishing an environment for transnational capital investment. Privatization via land adjudications creates regimes of property that can generate the revenue “for underwriting enhanced governmental powers at the local level” (Bryan 2007:306). Private property—the birthright of the autonomous Smithian individual who espouses the rational economies of competition and self-maximization—is primarily seen as the mechanism for securing capital and contracts. But to what extent might collective forms of property ownership be brought to coincide with this logic? As Hale suggests, “it might be instructive to also recognize how notions of the collective, when appropriately contained, need not impede processes of global capital accumulation” (Hale 2005:18).

Bryan underscores that in the process of implementing the Awas Tingi decision, it perhaps “mattered much less if national lands were converted to inalienable *community* property so long as those communities organized an identifiable regime of ownership capable of conducting transactions such as renting out rights to log on their lands” (Bryan 2007:327, emphasis added). In this sense, whether land is held privately or collectively may be in part a technicality if the goal is to establish a system through which to lease the rights to extract resources—the basis of a potential tax scheme. While gaining title to ancestral property clearly empowers indigenous peoples and offers possibilities for self-determination, it is important to recognize the extent to which titling land may (or may not) conjoin with a larger agenda to regularize property rights. With the benefits of acquiring titles come certain impositions.

⁴¹ Bryan 2007; Fisher and Benson 2006; Fisher 2007; Hale 2005; Postero 2005, 2006; Povenelli 2002.

⁴² Postero 2006; Hale 2005; Scott 1998.

⁴³ Fisher and Benson 2006; Postero 2005; Sawyer 2004.

⁴⁴ Inter-American Court of Human Rights (2001). Our discussion of this case relies extensively on Bryan (2007). We especially thank Vicky Tauli-Corpuz, James Anaya and Joe Bryan for their engagement and comments in this section. See also Hale (2002, 2005) for an analysis of the case.

Communal land adjudications are rarely straightforward. As the task of implementing the Awas Tingi decision demonstrated, land adjudication is as likely to generate uncertainty and conflict as reduce uncertainty and conflict. During the court proceedings, World Bank-funded maps emerged that depicted areas of overlapping claims among different indigenous communities on the Atlantic coast of Nicaragua. These overlaps reflected forest areas that served as shared hunting grounds. During the trial, the indigenous plaintiffs' lawyer, James Anaya, persuasively argued against these maps undermining the Awas Tingi community's land claim. However, as Bryan observes, in the process of implementing the ruling, "the cartographic representation[s] of these overlaps" transformed into "problems" (Bryan 2007:322). The law that Nicaragua enacted to comply with and implement the Inter-American Court's 2001 ruling required "that the overlaps be resolved into mutually exclusive spheres of ownership in order to facilitate titling and demarcation" (Bryan 2007:322-323). With competing indigenous groups claiming this land, and mounting uncertainty over its fate, many Awas Tingni community members resorted to logging disputed forests in their struggle with other indigenous (such as Miskitu) and non-indigenous groups for forest resources (Bryan 2007:324-325). Pre-emptive logging, as it were, in turn compromised ongoing disputed adjudications, as the right to have rights was contingent upon indigenous community members living up to the standards by which their claims were judged: the standard of being indigenous. The result was a landscape of divided indigenous communities beleaguered by internal conflict among those who were recognized rights-bearers, those who were intractable and those who were abject.

What, then, can we learn from the Awas Tingni case? Perhaps most importantly, it instructs caution. If identity is a social-historical formation, then we can conclude that the implementation and effect of rights grounded in identity will also be socially and historically conditioned and situated. Rights are not absolute. International decisions and declarations are implemented by states, ministries and local government agencies. And in the context of resource extraction, MNCs or their agents intensify the political and economic pressures that determine the particular parameters that land adjudication will take. This state-corporate alliance invariably interferes in a community's internal affairs by delineating the distribution of title among indigenous peoples. This in turn transforms indigenous senses of property, community and belonging, which in turn transforms social relations among indigenous peoples within and between communities (Bryan 2007; Sawyer 2004). Significantly, the regime of governance that emerges melds both neoliberal and indigenous rights concerns and in the process produces, shapes and circumscribes – rather than suppresses – cultural difference.

This is not to deny that the recognition of indigenous rights can also provide a radically democratic space from which marginalized peoples can exert influence on policies and practices. By enabling the expression of will, of hopes and aspirations for the future, the empowerment that often accompanies the recognition of indigenous rights may incrementally transform the system itself in unforeseen ways, as Davis and Perreault discuss. The complex effects of identity-based rights cannot be distilled into being an either/or solution. Struggles for indigenous rights simultaneously channel forms of resistance *and* condition hegemonic collusion, as the case studies illustrate.

Rights-based claims rooted in cultural difference constitute an expansive and unpredictable terrain of politics that offers not simply the ground for empowerment but also disempowerment, as well as insights into the workings of power, as people negotiate claims, discipline senses of self, and structure how governance acts as a broad-spectrum political project. If we recognize that global economic forces have restructured the relationship between states and their populations in many parts of the world, whereby states increasingly disavow their social responsibilities toward their citizenry, and if we accept the hypothesis that the growing force of multilateral institutions, MNCs and international and grassroots NGOs may in part be fulfilling the role of social governance, then it becomes increasingly important to grapple with the dynamics at work and to understand the ways in which concerns for

indigenous rights and a neoliberal agenda converge and diverge in the world today. It is to this multidimensional story that we now turn.

State–IFI–MNC Nexus of Power

Since the 1980s, a number of developing nations have been governed to a significant extent by transnational entities such as IFIs and MNCs, which in themselves are not governments but function in close (though not seamless) coordination with each other and with advanced industrialized states. The IMF and World Bank, perhaps the most renowned of such IFIs, have now acquired a place in popular vernaculars around the world.

It was when these IFIs, along with the UN and prominent government leaders, began to actively promote public-private cooperation as a solution to the problems that can, and do, accompany development that the issue started to acquire increasing significance. Such partnerships basically entailed international institutions and major corporations combining forces to promote public good outcomes through the formation of business ventures that could provide the latter with profit-making opportunities (Zadek 2006:4). However, there are concerns that, in the current neoliberal age, the nature of the links between states, IFIs and MNCs may evolve in ways that serve to undermine the very goals they aim to achieve.

As noted earlier, the IMF and the World Bank, along with regional development banks, often impose – through their policy of conditionality – austerity measures and structural adjustment programmes on developing nations. Yet, as Horta discusses in the case of Chad/Cameroon, despite their façade of neutrality, IFIs (without being mere puppet institutions) are dependent on and strongly influenced by their key donors – powerful countries in the developed world. And consequently, financial aid and its accompanying conditions are largely dictated by the political and economic agendas of the IFI-participating member countries that provide the majority of their funding (Dreher and Sturm 2005:3).

In general, IFIs are governed by a system of weighted voting, in which countries are allocated decision-making power based on a number of variables, the most important being monetary contribution to the institution. Moreover, larger and more influential countries, such as the United States, repeatedly impose their agendas on the IFI as a whole (Nelson 2001:421). Dreher and Jensen demonstrated the depth of US influence over major IFIs by showing that developing countries which have close ties with the United States and vote with it in the United Nations General Assembly systematically receive loans from the IMF under more favourable conditions (Dreher and Jensen 2004). Furthermore, those countries that contribute the largest amount of funds (the United States, Germany, Japan, United Kingdom, Saudi Arabia, Russia, China and France) are directly represented on the executive boards of the IMF and the World Bank. Other countries are grouped into constituencies and represented by region, leaving most individual states minimal decision-making power (Woods 2003:85). The system of weighted voting and representation is thus inherently biased towards developed countries, leaving developing countries, often reliant on IFIs, without adequate decision-making power and influence (Woods 2003:84).

The interrelationships between IFIs and developed and developing nations form a powerful and well-established system of pressure and compliance based on finance. For this reason, IFIs are often seen as indirect channels for powerful developed countries to further their economic influence and agendas in the developing world. Indeed, through technical assistance loans, the IMF and the World Bank (along with affiliated banks and agencies) have been instrumental in establishing an energy sector in the national economy of many countries and greatly expanding already existing mineral and hydrocarbon resource extraction activity. Historically, as Horta notes, the lack of accountability and transparency associated with IFIs has also facilitated

malfeasance and corruption, as neither the development projects nor the institutions themselves are directly accountable to any overseeing body.⁴⁵ Yet, as Horta also demonstrates in her case study from Chad/Cameroon, this lack of accountability can also empower more ruthless regimes to pressure the World Bank to compromise on its own purported policies and standards.

It is important to remember, however, that IFIs are not monolithic institutions. Divisions within IFIs over the promotion and implementation of extractive projects can lead to contradictory conduct by them. For instance, Rovillos and Tauli-Corpuz note that although the World Bank and the Asian Development Bank (ADB) played a major role in getting the Philippine government to introduce the Indigenous Peoples' Rights Act (IPRA), both financial agencies were also responsible for pressuring the government to introduce the Mining Act, which to a great extent undermined the objectives of the former legislation. Urteaga-Crovetto shows how in Peru, the Inter-American Development Bank (IDB), on the one hand, endorsed the Camisea project but, on the other, vacillated on a number of occasions over the award of loans for its implementation, while also actively funding the creation of public institutions to oversee the implementation of this project. Horta's study demonstrates that when the Chad/Cameroon oil pipeline project was first proposed, deep divisions emerged within the World Bank over its implementation, though these voices of dissent were subsequently silenced.

A number of factors account for these contradictions and internal divisions. Many IFIs may not view their policies on indigenous communities as wholly inconsistent with their emphasis on heightened resource extraction, given that the latter—it is thought—will lead to poverty alleviation. Rovillos and Tauli-Corpuz observe this point in the Philippines where the ADB surmised that the Mining Act would help ease poverty levels by facilitating the expenditure of foreign capital and infusing it into the national and local economy during the process of resource extraction. However, the study also reveals that the neoliberal endeavours of the World Bank and ADB, implemented with the aid of the state, have not served the interests of the Philippine economy or those of indigenous communities.

The collection of case studies demonstrates that international financial agencies have played a prominent role in determining the conditions, and in some instances the awarding, of resource extraction contracts. Yet, IFIs have failed—or have refused—to discipline either governments or multinational companies for violating the terms of their agreement (Chad/Cameroon, Nigeria, Peru and the Philippines). And even though the governments of most developing countries tend to acquiesce to the demands of international agencies, such as the World Bank, ADB and the IDB, they have not been reprimanded by the latter for undermining the public institutions funded by these agencies to monitor the extraction of sub-soil resources (Peru and the Philippines). This lack of oversight by these international agencies gives rise to concerns that they serve primarily to facilitate the smooth advance of neoliberal governance and capital accumulation on the part of MNCs.

Less analysed in the governance of resource extraction is the role of the MNCs themselves. In most electoral democracies, for example, as election campaigns have become increasingly sophisticated and expensive, political parties and politicians depend heavily on funds from leading corporate figures and business enterprises.⁴⁶ Contributions to a party by business are

⁴⁵ See Bracking (2005:2); Hawley (2005:58). Many IFIs are now attempting to address these legitimacy and accountability problems, through increased transparency and anti-corruption measures.

⁴⁶ Oil companies are among the major funders of presidential campaigns and political parties in the United States. During the 2000 presidential election campaign, the 1,000 largest US companies donated over \$187 million to candidates from the two main parties, an increase of \$20 million compared with the 1996 campaign. During the 2000 presidential campaign, major oil and gas MNCs, such as Enron Corporation, ExxonMobil, BP, Chevron Corp and Koch Industries, were leading contributors of funds to the two candidates and their parties, with the Republican nominee, George W. Bush, receiving 13 times the amount received by the Democrat nominee, Al Gore. During the 2004 presidential campaign, ExxonMobil, Koch Industries, ChevronTexaco and BP were again listed as major contributors of funds to the presidential candidates and parties, with Bush once more the primary recipient, receiving eight times the oil and gas company donations of John Kerry. In 2000, Bush received \$1,930,701 in contributions from oil and gas-related sources, while Gore received \$142,014. In 2004, Bush received \$2,627,825, and Kerry \$305,610 (Center for Responsive Politics. All information was released by the US Federal Election Committee).

normally calculated in relation to the political benefit the business can accrue in return for the funding. Politicians thus elected may become indebted to the corporations that contributed to their campaigns. Or the case may be that only candidates selected to represent particular business interests are actively funded to pursue their causes through government. In a number of countries, the state has come to be captured or strongly influenced by big business through the financing of political parties or politicians, an issue that allows corporations considerable sway over government policy. This was found to be the case especially in many developing countries.⁴⁷ In the industrialized West, the capture of the state by big businesses has allowed these corporations to exert pressure on IFIs indirectly, through governments that have representatives on the board of directors of these international institutions, to influence domestic and foreign policy.

A case in point is the 2001 US National Energy Policy report drawn up by the National Energy Policy Development Group—a task force of senior government representatives, headed by Vice President Dick Cheney, which was charged with developing a long-range plan to meet US energy needs. Seen by critics as a payback to corporate polluters and the state's justification for US domination of global oil reserves (and implicitly the Iraq war), the report, it became clear in time, was strongly shaped by corporate concerns, with industry CEOs frequenting the task force's closed-door meetings.⁴⁸ As former chairman and chief executive officer of the Halliburton (an oilfield services firm), Cheney availed himself of top executives of energy firms for advice and direction. According to the president of the Natural Resources Defense Council (NRDC, a US-based environmental organization): "Big energy companies all but held the pencil for the White House task force as government officials wrote a plan calling for billions of dollars in corporate subsidies, and the wholesale elimination of key health and environmental safeguards".⁴⁹ Resource scholar Michael Klare observes that, more insidiously, the upshot of the Cheney Report (as it is known) is to "secure more oil from the rest of the world".⁵⁰ It is hard to argue that industry has not influenced the policies of President G.W. Bush's administration.

The political influence of foreign and local MNCs over states in the developing world is no less significant. The activities of MNCs have been facilitated by financial restructuring and investment liberalization, which have been the key dimensions of neoliberal policy reform. Specific provisions enable, among other things, the unencumbered entry of foreign capital (so-called foreign direct investment), the removal of controls on currency speculation, and the right of foreign investors to acquire or hold majority equity ownership of domestic firms and repatriate huge profits. With these provisions in place, MNCs have been able to easily access mineral resources, invest and remove unlimited amounts of money, and establish enterprises in key sectors of the economy in developing economies, driving out local competitors. To encourage increased foreign investment, countries compete with each other by offering various incentives: tax exemptions, lowered labour and environmental standards and free-trade zones. Developing countries that have implemented such policies are particularly attractive to many extractive-industry MNCs, due to limited corporate regulation and state oversight.

A number of scholars have shown (in different ways) how a heavy reliance on crude oil or other minerals can shape a country; it creates a state that pursues rents, practises systems of patronage, and unhesitatingly deploys its military to protect this resource, rather than a state

⁴⁷ See, for example, Paltiel (1970); Domhoff (1983); Ewing (1987); Alexander (1989); Mendilow (1992); Dye (1995); Gomez (2001).

⁴⁸ For further details of controversy surrounding the 2001 US National Energy Policy report, see the Natural Resource Defence Council web page www.nrdc.org/air/energy/taskforce/tfinx.asp (accessed on 10 May 2007); and the SourceWatch web page www.sourcewatch.org/index.php?title=Cheney_Energy_Task_Force (accessed on 10 May 2007).

⁴⁹ NRDC President, John Adams, www.nrdc.org/media/pressreleases/020327.asp (accessed on 27 March 2002).

⁵⁰ Klare (2004). This is an analysis of how the report seeks to influence US foreign policy, specifically the explicit American mandate to secure more energy resources from foreign sources. A short excerpt: "One-third of all the recommendations in the report are for ways to obtain access to petroleum sources abroad. Many of the 35 proposals are region- or country-specific, with emphasis on removing political, economic, legal, and logistical obstacles. For example, the National Energy Policy [report] calls on the [US] secretaries of Energy, Commerce, and State 'to deepen their commercial dialogue with Kazakhstan, Azerbaijan, and other Caspian states to provide a strong, transparent, and stable business climate for energy and related infrastructure projects'". www.fpif.org/papers/03petropol/politics.html (accessed on 17 May 2007).

that builds statecraft, transparency and democratic institutions.⁵¹ Under such conditions, MNCs have been known to collude directly with state leaders to gain access to scarce resources.⁵²

A number of the case studies point to this trend—India and Nigeria (clearly), Australia and the Philippines (less clearly), Chad/Cameroon and Peru (with IFI intercession). In India, the British-based Indian mining MNC, Vedanta, was able to enter into highly lucrative joint ventures with state-owned firms by funding political parties and buying out elected representatives. In the Philippines, the newly democratized government of President Corazon Aquino was so full of members aligned to the business elite that her administration had little interest in instituting reforms targeted at improving the well-being of indigenous communities. It was only under the administration of Fidel Ramos—the president most independent of capital since the emergence of democracy in the Philippines in 1986—that legislation promoting the welfare of indigenous communities was introduced. It was, however, also during Ramos' tenure that the Mining Act was introduced, which allowed both local and foreign mining enterprises to undertake projects on land deemed to be under the protectorate of indigenous communities. Rovillos and Tauli-Corpuz's assessment of extraction activities on the lands of indigenous communities suggests that Ramos had succumbed to pressure from the IFIs to support the interests of foreign capital.

Apart from their links to governments, MNCs have also obtained IFI contracts through direct lobbying.⁵³ Politicians in government, funded by large corporations, appoint key allies to major IFIs, allowing them to have sway over these institutions. This form of “institutional capture” helps consolidate the links between MNCs, states and IFIs, enabling large corporations to promote policies and projects that are beneficial to them. As Horta demonstrates in her case study from Chad/Cameroon, this capture of institutions allows MNCs to secure control of key or scarce resources, especially in the developing world where, by encouraging structural adjustment programmes and sectoral reform, MNCs secure a route into these developing economies.

This is not to say that developing economies and indigenous groups have always been subservient to powerful MNCs and IFIs. In Bolivia, the state stood up to MNCs when the new government of Evo Morales sought to control and discipline the conduct of neoliberalism. Morales forced hydrocarbon corporations to renegotiate the contracts they had secured from previous regimes to better favour the interests of his country. In spite of their protests over the revised terms of the contracts, which were now far less favourable to them, these MNCs have retained their operations in Bolivia. In Canada, indigenous groups used legal mechanisms allowed by the World Trade Organization (WTO) to file *amicus curiae* briefs to draw attention to the serious degradation caused to the environment by the timber industry. Moreover, the cordial ties between states and MNCs can become contentious and eventually fall apart. In Peru, during the first term of President Alan Garcia (1985–1990), Shell was not successful in securing a contract in Lower Urubamba. Following its failure to come to agreement with President Alberto Fujimori over the commercialization of gas, it withdrew its involvement in the area altogether.

But a revolving-door practice of key personnel circulating among state ministries, IFIs and MNCs enables the codification and dissemination of specific knowledge and expertise (India and Peru). This authority has largely congealed to form what is called the Washington consensus—the set of market-driven theoretical postulates and practices designed to facilitate the intensification and expansion of capitalist markets and trade. The language of “truth” and “fact” advanced by neoliberal theory informs agendas and policies for addressing economic, social and environmental concerns. It establishes the proposals and frames the programmes that

⁵¹ See Coronil (1997); Karl (1997); Ross (2001).

⁵² See Rashid (2001) for an analysis of the relationship between US oil corporations and Taliban rule in Afghanistan; see Global Witness (2002) for an analysis of the relationship between US and European oil corporations and the Angolan state. See also Colby and Dennett (1995); Campbell (2004); Leith (2002).

⁵³ See Nelson (2001:421). UNCTAD (2000) noted that the financing of World Bank projects resulted in 40,000 contracts being awarded annually, which accounted for one-third of total international contracts in developing countries.

shape the circumstances and the conduct of specific actors. And it lays the foundation upon which select networks of capital, the movements of finance and state and corporate activities are able to function.

And what of local populations?

Corporate-Indigenous Relations

In both the developing and developed world, the extractive industries have had a particularly exploitative record of colonial and postcolonial predation (see Yergin 1993). A brief glance at that history tells the story of how resource extraction has gone hand in hand with ruthlessness and violence, in large part, against indigenous peoples. This violence occurs in many forms: outright repression of indigenous peoples, their removal and resettlement, or through the “paradox of plenty” that haunts many mineral-dependent states where the coproduction of enormous wealth coexists with unspeakable economic inequality.⁵⁴

This complexity is evident at the national, regional and local levels where MNCs become embroiled in various levels of corruption by selectively engaging with consensual (often elite) groups and invoking the language of indigenous rights; buying consent through building infrastructure, awarding contracts, offering scholarships or paying “salaries”; and maintaining often compromised relations with security services – be that the military, private security forces, paramilitary forces, criminal networks or disenfranchised youth (India, Chad/Cameroon, Nigeria, Peru and the Philippines).⁵⁵ In case after case, such MNC activity inflamed pre-existing tensions (be they local, regional or national), causing even greater division, and frequently sparking violent outbreaks. Particularly disturbing is the fact that the creation and perpetuation of unrest and the deployment of state violence may enhance corporate profits. In the Philippines, attempts by the multinational firm TVI to work with the Subanons and leaders of their institutions resulted in serious cleavages within this community, allowing the MNC to secure access to their lands.

In some instances, the state has played a mediating role between the MNCs and indigenous groups, in an attempt to create a relationship of joint ownership over an extraction project, presumably so that a mutually beneficial agreement can be obtained. However, when such relationships were forged, they have resulted in conflicts between and among these indigenous communities and the MNCs (Australia and the Philippines).

In Australia, where indigenous orientations toward MNC-led projects have been structured and shaped by the law, an advocacy for links between transnational firms and indigenous communities has been put into practice. Altman presents studies of attempts to create what he describes as a “hybrid economy” involving the state, MNCs and indigenous groups, whereby mutually beneficial outcomes could accrue to members of this tripartite arrangement during the extraction of minerals on indigenous territories. The results of these hybrid economy-type projects, however, differ from case to case, though the difficulty in sustaining these agreements is obvious in all instances since this nexus has only negligibly improved the socioeconomic status of indigenous communities. This has occurred even when this nexus involves an MNC such as Rio Tinto, currently a leading advocate for greater rights for these communities.

What emerges from the study of hybrid economies is that this corporate strategy between indigenous groups and MNCs may disempower some communities, even depoliticizing particular indigenous agendas. For this reason, even though these groups are not deprived of public goods such as legal rights and information when they create ties with MNCs, they end

⁵⁴ The phrase “paradox of plenty” was coined by Terry Karl (1997), among others.

⁵⁵ For a more detailed analysis of these processes in various parts of the world with respect to indigenous peoples, see Sawyer (2004); Watts (2004); Wirpsa (2004); Zalik (2004).

up in agreements that leave them with unequal gains. In Canada, as indigenous communities secure more control of forest land, MNCs have begun to view consultation with these communities as an important long-term strategy. These communities have, however, shown the capacity to establish forest corporations to protect their interests in this sector.

This would suggest that the issues of *ownership* and *control* over mineral resources and extraction projects requires further consideration, primarily because of the state's subservience to capital. Ownership of mining projects by indigenous communities does not necessarily give them control over the extraction and use of its resources, obvious in the case of Australia and the Philippines. In Canada, however, ownership as well as control of these resources has appreciably transformed the nature of the ties between indigenous communities and MNCs. Control over these resources is obviously dependent on more than just distribution of a stake in these projects among shareholders. Ownership meant little when control over the extraction and deployment of these resources remained very much with the MNCs, in spite of the presence of the state.

One reason for the failure of these tripartite agreements is that the state has selectively promoted the interests of mining firms while appearing to conform to international charters and domestic legislation. All the case studies suggest that MNCs, in patent alliance with the state, undermine indigenous interests, though tensions surface regularly between the two. MNCs and states often disagree over who should deliver basic services and infrastructure to rural areas (Australia and Nigeria).

These firms evidently have had the capacity to influence state policies and laws to serve their interests and have adopted different stances when dealing with indigenous groups. In Australia, Altman reveals that mining firms have strongly opposed legislation supporting these communities, such as the National Land Rights and Native Title Legislation, but have also proposed strategic partnerships by sponsoring the National Native Title Council. These strategic relationships appear, however, to be plans designed by MNCs to gain access to mineral resources rather than a growing realization by them that indigenous rights should be respected. And, while firms may adopt and articulate the appropriate progressive language to gain access to indigenous resources, there is no discussion about the future of these communities once these resources have been depleted.

In Davis' assessment of the corporate activities of indigenous groups in Canada, partnerships cultivated with MNCs through joint ventures have largely ended up being hostile affairs. Davis refers to some "successful relationships", though these have arisen from the MNCs' growing realization that working with increasingly entrepreneurial indigenous groups is a form of "competitive advantage".

The Bolivian study provides extremely important insights because this is a rare case where the state in a developing economy has intervened directly in the oil and gas sector to protect the national interest, and yet allowed for the continued participation of MNCs in this industry. The then new Morales government had managed to remain independent of MNCs in spite of its reliance on the firms' technology for resource extraction. Bolivia, however, appears to constitute the exception to the rule, as none of the governments in this study have fulfilled their responsibilities in a manner expected of them. When MNCs do come into contact with indigenous communities, with or without state intervention, the attitude adopted by these firms is one that tends to be patronizing. There is little evidence to suggest that MNCs involved in extractive projects involving indigenous communities contribute to reducing poverty or help shape and implement policies that favour these groups. There is ample evidence that the implementation of jointly undertaken projects has contributed to the creation of a "new poor", that is impoverishing a community that has a sustainable way of life (Chad/Cameroon, India, Nigeria, Peru and the Philippines). The repercussions of such MNC-indigenous community linkages draw attention to the need to consider another issue that has served as a mechanism to promote public-private cooperation: corporate social responsibility.

The rhetoric of CSR

Gaining strength in the late 1980s and early 1990s, a number of watchdog organizations were formed to monitor multinational activity worldwide.⁵⁶ In response to the NGO outcry denouncing a series of crises and fiascos associated with, if not directly orchestrated by, mineral and hydrocarbon firms, the business world embraced anew the notion of CSR.⁵⁷ According to the World Business Council for Sustainable Development, CSR “is the continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large” (WBCSD 1999:3). It refers not only to what companies do with their profits, but to also how they make them. Stretching, in theory, beyond the confines of philanthropy and compliance, CSR refers to how a corporation manages the economic, social and environmental impact that its operations have locally, regionally and globally.

As the Extractive Industries Transparency Initiative (EITI) – perhaps a more respected, although very limited, voluntary code concerned with the full disclosure of corporate payments – notes: “Good governance is a precondition for converting large revenues from extractive industries into economic growth and poverty reduction. When transparency and accountability are weak, the extractive industries may instead contribute to poverty, corruption and conflict – the so-called ‘resource curse’”.⁵⁸

The case studies, however, point to a disturbing common trend: the violation of the very codes of conduct and charters drawn up by MNCs. In Peru, Shell’s publicly stated goals were to protect the environment and promote its “social capital programme” which, as Urteaga-Crovetto reveals, were not only contravened, but the company also abdicated responsibility for its pollution of the environment by passing on the blame to its subcontractors. Shell also sought to divide the Matsigenka community to ensure that it did not have to compensate them for this environmental damage. In Nigeria, Naanen argues that Shell’s CSR and Sustainable Community Development (SCD) endeavours were perfunctory acts, as these projects were merely implemented to counteract the force of international campaigns that had badly tarnished the company’s reputation. Also, the quality of the social provisions for indigenous communities by MNCs has been extremely poor (Chad/Cameroon, India, Nigeria and Peru). Such outcomes reinforce the argument by a number of NGOs that the state should not abdicate to MNCs the responsibility for providing key social services and that it makes imperative statutory approaches to enforcing social and environmental standards.

Clearly, all this focus and debate about the consequences of indiscriminate resource extraction has shifted the way that MNCs talk about doing business. Yet, despite all the multilateral efforts, the social, political and environmental practices of the extractive industries are still highly problematic. As some of the case studies demonstrate, while corporations may embrace CSR in their annual reports and brochures, the ways in which they develop and maintain their operations are often questionable. The rhetoric of CSR is worlds away from the complex reality of navigating relations surrounding extractive industry operations.

⁵⁶ For a partial representation of NGOs based in Europe and the United States with campaigns focusing on corporate abuse, see Amazon Watch, Amnesty International, Bank Information Center, Business and Human Rights Resource Centre, Corporate Accountability International, EarthRights, EarthWorks, Friends of the Earth, Human Rights Watch, International Federation for Human Rights, International Rivers Network, Global Witness, GreenPeace, Multinational Monitor, Oil Change International, Oil Watch, Oxfam and Sierra Club.

⁵⁷ A collection of high-profile cases gained wide publicity in the 1990s. The crisis of the Bougainville Mine, in Papua New Guinea’s North Solomons, erupted violently; Freeport-McMoRan was sued for human rights and environmental damage at its Grasburg mine in Irian Jaya, Indonesia; Australian BHP was sued for environmental devastation in its Ok Tedi mine in Papua New Guinea; the Bhopal case went to court following the Union Carbide Plant disaster in 1984; Texaco was sued for environmental and health degradation in Ecuador; Shell was accused of grave human rights violations in the Niger Delta; and British Petroleum was similarly charged in Colombia.

⁵⁸ EITI web site: www.eitransparency.org/section/abouteiti#top (accessed on 7 June 2006). The site goes to state that EITI “supports improved governance in resource-rich countries through the verification and full publication of company payments and government revenues from oil, gas, and mining. The Initiative works to build multi-stakeholder partnerships in developing countries in order to increase the accountability of governments.”

One concern is that public debates on CSR and its sister concept, corporate governance, have a far too narrow focus. The current emphasis of debates on CSR and corporate governance pertain primarily to the duties of executives and shareholders; the constitution of fair and accountable codes of conduct; the effectiveness of monitoring guidelines, reporting initiatives and environmental responsibility; the value of corporate transparency; and the promotion of ethical labour employment conditions. As all the case studies indicate, a simple process of whole-scale adoption of corporate governance measures is discernibly inadequate to create a more accountable, transparent and equitable business environment.

The links between state, IFIs and private firms, specifically MNCs, need to be understood in any meaningful analysis of CSR and corporate governance. Debates about CSR and corporate governance, however, seldom involve any deliberation about the context in which firms are operating to develop their corporate presence. Neither is there a review of the nature of state policies that have a direct bearing on the form of firm organization and enterprise development by a transnational company within a nation. Yet, the case studies clearly point to inequitable ownership and control distribution in joint ventures favouring MNCs which allow for high levels of exploitation of the lands of indigenous groups. These studies also associate MNC involvement in resource extraction industries with high levels of corruption (Chad/Cameroon, Nigeria, Peru and the Philippines). In all cases, corrupt politicians appear to remain at arms-length from business. In actual fact, rather than arrogate the right to public resources to themselves, state leaders are more likely to sell these rents to private businesses.

Two major problems emerge with the concept of CSR. First, by advocating self-governance through CSR, MNCs can limit state regulation of their activities. By colluding with the state, these firms can ensure that fewer restrictions are imposed on their extraction activities. Second, the viability of the concept of CSR works on the assumption that all states, in the developed and developing world, can similarly implement and effectively oversee policies that would ensure efficient and just use of domestic resource rents, presumably due to the even distribution of power among the three arms of government.

The primary concern then about the viability of CSR is that, given the overwhelming influence that transnational capital can have over the state and international agencies, self-regulatory measures are unlikely to serve as an effective monitoring mechanism. What is required is not public-private compacts but an effective arms-length and accountable relationship between governments and MNCs to deal with corruption, environmental degradation and violence. A viable institutional framework is thus required to honourably compensate local populations, including indigenous peoples, for the disruptive effects of resource extraction, not involving the state, given that it lacks neutrality, but an independent monitoring body, such as the UN (and possibly NGOs). This institutionalized form of public governance of transnational corporate activities is crucial to provide effective oversight over the activities of MNCs while not necessarily undermining their performance and ability to generate wealth.

Public Governance: Toward a Rights-Based Regulatory Framework

Corporate notions of social responsibility developed alongside, and at times at odds with, international concern on the part of the UN and some member states about transnational companies' growing power and influence around the world. Since the 1970s, the UN has sought to establish international standards and operating guidelines for MNCs. At the behest of developing nations, the UN formed the Centre for Transnational Corporations in 1974 and drew up the Draft UN Code for Transnational Corporations in 1983 and 1990 (see Kinley and Chambers 2006; Ruggie 2007). In 1976, the Organisation of Economic Co-operation and Development (OECD) adopted its Guidelines for Multinational Enterprises, and the following year, the ILO adopted its Tripartite Declaration of Principles Concerning Multinational Enterprises. But the guidelines are not legally binding, and the Tripartite Declaration, while internationally agreed upon, only focuses on issues of labour rights. The Draft UN Code was

largely abandoned almost as soon as it was completed, as it became increasingly clear that the other multilateral initiatives (along with various industry and regional codes) lacked effective enforcement mechanisms to hold MNCs responsible for alleged abuses.⁵⁹ In this context, many NGOs believed that the MNCs' violation of human rights with impunity would only increase under an environment of trade liberalization and heightened foreign direct investment.⁶⁰

To address this concern, the Sub-Commission on the Promotion and Protection of Human Rights, a body created by ECOSOC in 1947 as a think tank for the UN Commission on Human Rights, established a working group in 1998 to examine the working methods and activities of MNCs. For five years the sub-commission vigorously debated and critiqued the working group's findings. In August 2003, it unanimously adopted a final version of the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights and submitted it to the Commission on Human Rights, along with several recommendations for further action.

The UN Norms (as they are known) are a mandate of the human rights obligations of transnational corporations. While making clear that states retain primary responsibility for promoting human rights, the Norms underscore the human rights obligations of MNCs within their sphere of influence. These rights include: equality of opportunity and non-discriminatory treatment; the right to security of persons; labour rights; respect for national sovereignty and human rights, including prevention of bribery and corruption; economic, social and cultural rights; and environmental and consumer protection.⁶¹

During the years of their formation, the UN Norms became quite controversial and faced vocal opposition from corporate groups, most notably the International Chamber of Commerce (ICC) and the International Organization of Employers (IOE). The Norms seek to extend mandates to implement and enforce human rights obligations to non-state entities. Furthermore, they direct national and international agencies to monitor corporate compliance with the UN Norms and set up mechanisms for compensating victims of abuse. Unquestionably the international business community does not want MNCs to be held legally accountable for any human rights abuses that they may inflict or in which they may be complicit. The UN Norms were seen as a first step toward such regulation.

In April 2004, the Commission on Human Rights asked the Office of the High Commissioner for Human Rights (OHCHR) to consult with all relevant stakeholders and compile a report setting out the scope and legal status of all existing initiatives and standards on business responsibilities with regard to human rights, including the UN Norms. While thanking the sub-commission for its work in preparing the Draft UN Norms, and confirming the importance of the issues addressed, the decision clarified that the draft proposal has no legal standing, and – crucially – that the sub-commission should not perform any monitoring function regarding the Norms.

Following wide-ranging consultation and a two-day workshop on the UN Norms in October 2004 attended by representatives from corporate, labour and human rights organizations, a comprehensive report covering all sides of the debate was published by the OHCHR in February 2005.⁶² The report recommended that the subject of business and human rights remain on the commission's agenda and that the Draft UN Norms be maintained among existing

⁵⁹ See Kinley and Chambers (2006). With the vast majority of the world's states implementing neoliberal reforms by the early 1990s, the UN virtually abandoned the Draft Code. In order to attract foreign investment, most countries desisted from posing such demands on MNCs.

⁶⁰ For a fairly comprehensive and regularly updated catalogue of types, instances and trends in human rights abuses by corporations, see the Business and Human Rights Resource Centre web site, www.business-humanrights.org/Categories/Issues/Abuses (accessed on 7 June 2006).

⁶¹ For a discussion of the Draft UN Norms, see Kinley and Chambers (2006).

⁶² Report of the United Nations High Commissioner on Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights, E/CN.4/2005/91, 15 February 2005.

initiatives and standards, with a view to their further consideration. However, opposition to the Draft Norms was strong at the commission, with certain countries, most notably the United States and Australia, maintaining that MNCs should not be held to binding human rights standards.⁶³

In 2005, after concerted debate about how to move forward with respect to the UN Norms, the Commission on Human Rights recommended that the UN Secretary-General appoint a Special Representative to further investigate the complex relationship between human rights and business.⁶⁴

In 2000, parallel to the process of drafting the UN Norms, Kofi Annan, then UN Secretary-General, launched the Global Compact, the UN's CSR flagship. The Global Compact is a voluntary initiative, engaging international business and civil society organizations in promoting human rights, labour standards, environmental protection and belatedly, anti-corruption. The Global Compact is recognized as an important step toward acknowledging the role of MNCs in the world. But, as a body comprising over 3,000 companies from 116 countries as noted in the initiative's 2007 Annual Review, the Global Compact lacks any system through which to monitor or enforce compliance of those corporations which have signed onto its "ten principles for a better world". Consequently, even though it is presented as an inclusive global political forum, it is derided by many as "a gentlemen's agreement" that merely allows transnational corporations to imprint the legitimacy of the UN on their operations.

The voluntary approach proposed through the Global Compact is problematic. Unless there are enforcement mechanisms, reparations provisions and independent third-party monitoring, many concerned about abuses associated with corporate activity feel that they are merely hollow rhetoric. The codes of conduct are either mere public relations exercises, or are only adhered to until the question of profits looms. Given the MNCs' lack of accountability and a conflict of interest in regulating themselves, a willing adherence to voluntary standards seems a challenging route through which to ensure against corporate abuse. Promoting human rights should not be beholden to cost-benefit analysis or concern for the bottom line; rather, rights should be affirmed through a system of external, transnational legal enforcement built on social, not corporate, values and expectations (see Parker 2007).

A more effective governance mechanism than the Global Compact is, however, required. As illustrated by the case studies' historical analyses of the state, public-private arrangements are problematic: the state is an institution fraught with contradictions. For example, Australia, Canada, India, Peru and the Philippines have repeatedly introduced progressive as well as reactionary laws involving indigenous peoples at different points in history. Urteaga-Crovetto deploys the concept of the "broker state" in her appraisal of the state-IFI-capital nexus to expose the gradual transformation in the Peruvian state's "public identity into a private one". Here, as well as in the case studies from Australia, Chad/Cameroon, India, Nigeria and the Philippines, the state's role to serve as a neutral arbiter between competing forces within capital and society has been compromised.

The professed neutrality of the state is further undermined by the phenomenon of institutional capture, which is manifested in numerous ways but most conspicuously through the funding of political parties by MNCs and key appointments made to the boards of directors of IFIs. Within the framework of public-private compacts, institutional capture has contributed to practices that would otherwise be severely criticized, as the case studies on Chad/Cameroon, Nigeria, India, Peru and the Philippines indicate. In Chad and Cameroon, the World Bank underwrote

⁶³ See Kinley and Chambers (2006) and Ruggie (2007) for further details.

⁶⁴ UNCHR Resolution 2005/69, Human Rights and Transnational Corporations and Other Business Enterprises, 20 April 2005. The United States, Australia and South Africa voted against the resolution, South Africa because it was not strong enough. On 27 July 2005, Professor John Ruggie of the Kennedy School of Government, Harvard University, was appointed as Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises.

the risks of private enterprises—including the leading MNC involved, ExxonMobil—in an oil extraction and pipeline project, ostensibly so that its cooperation with MNCs and these authoritarian states would help alleviate poverty. During the construction of the pipeline between Chad and Cameroon, serious questions were raised about whether the project was serving to shift the risks of this venture and the burden of new national foreign loans on to the citizens of these two countries. In Peru, the problems associated with public-private cooperation were manifested through the enormous clout that the Camisea project now has over the economy. The scale of such projects is so huge that even a change of regime does not stop the implementation of these projects. Similarly in India, MNCs have actively co-opted influential politicians through corporate appointments in public-private joint ventures as a means to secure rights to extract resources on land deemed to belong to indigenous communities.

The case studies suggest that the ties created between MNCs and the UN give these firms a veneer of respectability and acceptance in global endeavours to resolve social and environmental problems such as poverty and climate change. As Horta notes, ExxonMobil's partnership with the World Bank provided it with an opportunity to ostensibly aid the Bank's attempt to eradicate poverty, though the MNC's participation in the project served only to exacerbate the problem. While the Global Compact may serve as an instrument through which the UN hopes to instil in MNCs the need to act voluntarily to pursue just development agendas, this nexus may lead eventually to institutional capture, a criticism levelled at the World Bank.

NGOs might be able to provide a solution to monitoring MNCs. Over the past decades, many NGOs have assumed the responsibility of monitoring international capital—placing scrutiny on MNCs, IFIs and states.⁶⁵ A number of the alliances between NGOs and indigenous groups have successfully served to draw local and international attention to important issues of corporate abuse, environmental degradation, constitutional reform and UN proclamations. As the research by Altman (Australia), Davis (Canada), Naanen (Nigeria) and Perreault (Bolivia) shows, in those instances where NGOs have been able to help indigenous peoples articulate their demands more coherently, they have empowered indigenous groups to mobilize protests in opposition to MNC activities that threaten to undermine their ancestral land and ethnoscapas. Similarly, as Rovillos and Tauli-Corpuz indicate in their Philippine case and as Xaxa demonstrates for India, some NGOs have helped indigenous groups gain greater local understanding of the political and economic activities within their lands and lives.

While such exceptional work by NGOs is admirable, these organizations have little or no capacity to discipline transnational firms for violating human rights, perpetrating violence or practising corruption, apart from publicly shaming MNCs through an effective national and international campaign (Chad/Cameroon, India, Nigeria, Peru and the Philippines). Such public shaming appears to have done little to alter corporate behaviour on these issues. In spite of the good work of NGOs, there is a need therefore for an effective and accountable institutional framework that can review, with legal capacity, the activities of MNCs.

The UN Norms, unlike the Global Compact, did not involve an attempt by the UN to work with MNCs to resolve social problems. The Norms attempted to provide communities and their advocates with means to address certain inequities and abuses through a legally binding framework. This form of UN-NGO collaboration with those NGOs that have built global legitimacy as watchdog organizations and upholders of human rights could potentially comprise a force in transnational governmentality that would serve to monitor and check the shape and practice of state-MNC ties. A set of regulations such as the UN Norms would serve as a far more effective tool to deal with claims against MNCs over violation of human rights, degradation of the environment or the practice of corruption.

⁶⁵ An important point to note is that NGOs do not make up a homogeneous community. They have the potential to both co-opt, neutralize and/or radicalize movements and narratives of engagement by alternatively deploying indigenous peoples as pawns in their own agenda (The Nature Conservancy and World Wildlife Fund and the Camisea gas project in Peru); presenting foreshortened yet feasible alternatives; and intensifying and internationalizing indigenous aims for self-determination (the Mirarr aborigines' opposition to a future mine in Australia and the cultural rights NGOs' international lobbying against IFI loans in Peru).

In disputes involving indigenous communities and MNCs, given the exceptional nature of these issues, it would appear that the structure of governance associated with the design of regulatory frameworks should include members of the UN Permanent Forum on Indigenous Issues. This would entail investing more powers and autonomy in the Permanent Forum, as their inclusion in these claims would serve to provide an opportunity for indigenous groups to secure participation in decisions that affect them. Such a change in the architecture of public governance would serve to maintain the legitimacy and spirit of charters introduced to protect the interests of these communities.

This expanded role of the Permanent Forum would allow it to assume responsibilities that move it beyond being the purveyor of universal and abstract proclamations on indigenous people and their relationship to land. Indeed, it would allow the Permanent Forum to extend its concerns beyond exclusively those of indigenous peoples and forge broad-spectrum coalitions against corporate injustices. Together with a legally binding regulatory framework, the Permanent Forum could institutionalize a widely felt sentiment that it is time that industry worldwide be held accountable for the social and environmental costs of resource extraction. In the midst of a growing global debate on global warming, resource use and corporate profits, there are mounting concerns about the extractive industries. A legally binding regulatory framework, working in collaboration with the Permanent Forum could constitute a formidable institutional arrangement through which to address the gravity and magnitude of these concerns and define a global ethic for corporate activity.

Appendix 1: International Conventions and IFI Policies on Indigenous Rights

Theme	Metrics	IO/IFI	Convention/Policy	Common principles
IDENTITY	<i>Definition of indigenous peoples</i>	International Labour Organization (ILO)	ILO Convention no. 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989) (Article 1) ^a	Groups maintaining social or cultural identities distinct from that of the dominant society Self-identification and recognition by others as belonging to such a group Groups retaining some customary social, economic, cultural and political institutions
		Organization of American States (OAS)	Draft Proposed American Declaration on the Rights of Indigenous Peoples (1997) (Article 1) ^b	Social, cultural and economic conditions distinct from other sections of the national community
		African Development Bank (ADB)	ADB Policy on Indigenous Peoples (1998) (Paragraphs 8 and 9) ^c	Groups suffering from subjugation, marginalization, dispossession, exclusion or discrimination
		African Union (AU)	Report of the African Commission's Working Group of experts of indigenous populations/communities (2003, non binding)	<i>Differences:</i> Attachment to traditional habitat, ancestral territory and natural resources (ADB, World Bank, AU) (it is worth noting that the World Bank also includes groups that have lost "collective attachment to territory" due to forced severance)
		World Bank	World Bank Operational Policy on Indigenous Peoples (OP 4.10) (2005) (Article 4) ^d	Descendants from populations inhabiting the country prior to colonization/formation of modern state (ILO, IDB, ADB)
		Inter-American Development Bank (IDB)	IDB Operational Policy on Indigenous Peoples (2006) (Article 1) ^e	Status regulated by their own customs, traditions or special laws (OAS, the ILO Convention when referring to tribal peoples)
POLITICS	<i>Self-determination/autonomy</i>	ILO	ILO Convention no 169 on Indigenous and Tribal Peoples (1989)	An indigenous language often different to the official language of the state (World Bank, ADB) Economic system oriented towards a traditional system of production (ADB)
		UN Human Rights Council	UN Declaration on the Rights of Indigenous Peoples (2006) ^f	Right to retain their own customs and institutions (Art. 8) Right of self-determination: freely determine their political status and freely pursue economic, social and cultural development (Article 3) Right to determine and develop priorities and strategies for exercising their right to development (Articles 23, 30) (See also Article XXI, Proposed American Declaration and Article 7, ILO Convention) ^g

		<p>Right to maintain and strengthen legal institutions (Article 5) as well as their political, economic and social systems (Article 20)</p> <p>Due recognition shall be given to their laws, traditions, customs and land-tenure systems (Article 27)</p> <p>Right to maintain their own indigenous decision-making institutions (Article 19) (See also Article XV, Proposed American Declaration)</p> <p>Right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices (Article 34)</p> <p>Right to autonomy or self-government in matters relating to their internal and local affairs (Article 4)</p> <p>Right to self-government (Article XV)</p>
OAS	Draft Proposed American Declaration on the Rights of Indigenous Peoples (1997)	
IDB	IDB Operational Policy on Indigenous Peoples (2006)	<p>Operations shall seek to support indigenous peoples' governance through strengthening capacity, institutions, processes for management, decision making, and territorial and land administration at the local, national and regional levels (Article 4.3, h)</p>
ILO	ILO Convention no. 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989)	<p>Right to be consulted whenever consideration is being given to legislative or administrative measures which may affect them directly (Article 6)</p> <p>Right to participate in the use, management and conservation of natural resources (Article 15, paragraph 1);</p> <p>In the case of state's ownership of minerals and resources of the subsoil, right to be consulted to ascertain whether their interest would be prejudiced before undertaking exploration and exploitation of such resources (Article 15, paragraph 2).</p>
UN Human Rights Council	UN Declaration on the Rights of Indigenous Peoples (2006)	<p>Right to participate fully in the political, economic, social and cultural life of the state (Article 5)</p> <p>Right to participate in decision making in matters which may affect their rights through their chosen representatives (Article 18) (See also Proposed American Declaration, Article XV and ILO Convention, Article 6b)</p> <p>Right to give their free and informed consent before the adoption and the implementation of measures that may affect them (Article 19)</p> <p>Right to require that states obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources (Article 32)</p>

OAS	Draft Proposed American Declaration on the Rights of Indigenous Peoples (1997)	Right to be informed of measures which will affect their environment and to fully participate in formulating, planning, managing and applying governmental programmes of conservation of their lands, territories and resources (Article XIII) Right to have access and participate in all state institutions (Article XV) In the case of state's ownership of minerals and resources of the subsoil, right to participation in determining whether they would be adversely affected (Article XVIII)
ADB	ADB Policy on Indigenous Peoples (1998)	Right to have access and participate in all state institutions (Article XV) In the case of state's ownership of minerals and resources of the subsoil, right to participation in determining whether they would be adversely affected (Article XVIII)
World Bank	World Bank Operational Policy on Indigenous Peoples (OP 4.10) (2005)	Bank interventions should be conceived, planned and implemented with the informed participation of affected communities (Article 58) For a project to be financed, affected indigenous peoples shall be involved in a process of free, prior consultation resulting in broad community support for the project (Articles 1, 10 and 18)
IDB	IDB Operational Policy on Indigenous Peoples (2006)	For an operation to be considered by the Bank, it shall be based on a socio-culturally appropriate process of consultation with the indigenous peoples concerned (Article 4.2a)

ECONOMY

Land Rights

ILO	ILO Convention no 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989)	Right to the recognition of their ownership rights with respect to lands they have traditionally occupied (Article 14) (see also Draft Proposed American Declaration, Article XVIII)
UN Human Rights Council	UN Declaration on the Rights of Indigenous Peoples (2006)	Right to own, develop, control and use the lands and territories that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired (Article 26) Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, of a just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or managed without their free, prior and informed consent (Article 28) (see also Proposed American Declaration, Article XVIII)
OAS	Draft Proposed American Declaration on the Rights of Indigenous Peoples (1997)	Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, of a just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or managed without their free, prior and informed consent (Article 28) (see also Proposed American Declaration, Article XVIII)

	ADB	ADB Policy on Indigenous Peoples (1998)	
	World Bank	World Bank Operational Policy on Indigenous Peoples (OP 4.10) (2005)	Special attention shall be paid to customary rights of indigenous peoples pertaining to lands or territories traditionally owned or customarily used or occupied (Article 16)
	IDB	IDB Operational Policy on Indigenous Peoples (2006)	Similarly, the ADB policy regards this a key issue (Article 43)
	ILO	ILO Convention no 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989)	Operations affecting indigenous lands and territories shall include safeguards concerning the respect for collective and customary rights (Article 4.4 b)
	UN Human Rights Council	UN Declaration on the Rights of Indigenous Peoples (2006)	Right to the natural resources pertaining to their lands (Article 15)
	OAS	Draft Proposed American Declaration on the Rights of Indigenous Peoples (1997)	Right to own, develop, control and use resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired (Article 26)
	ADB	ADB Policy on Indigenous Peoples (1998) (Articles 43, 44)	Right to an effective legal framework for the protection of their rights with respect to the natural resources on their lands, including the ability to use, manage and conserve such resources (Article XVIII)
	World Bank	World Bank Operational Policy on Indigenous Peoples OP 4.10 (2005)	Recognition of indigenous peoples' rights over natural resources is considered to be a key issue
	IDB	IDB Operational Policy on Indigenous Peoples (2006)	Particular attention shall be paid to indigenous peoples' natural resources management practices (Article 16)
			Collective and customary rights over indigenous natural resources shall be respected (Article 4.4 b)

Notes ^a So far, the ILO Convention has been ratified by 17 countries. This convention was meant to revise an earlier one, adopted in 1957; the ILO Convention no. 107 concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries. ^b In 1989 the OAS General Assembly recommended that the Inter-American Commission on Human Rights draft an instrument aimed at protecting the rights of indigenous peoples. It was approved by the commission in 1997 and subsequently submitted to the General Assembly. It is still under negotiations. ^c This policy was formulated in 1998 and then incorporated in the ADB Operational Manual in 2004. On July 2005 the Asian Development Bank announced that it was also embarking on a safeguard policy "update" involving the operational policy on indigenous peoples. ^d The current policy replaces the Operational Directive 4.20 issued in 1991. It comes out of a process of revision started in 1994. Prior to both policies, the World Bank followed the provisions contained in the Operational Manual Statement 2.34, Tribal Peoples in Bank-Financed Projects, adopted in 1982. ^e The Operational Policy replaces an earlier policy adopted on September 2005, resulting from the 1994 Bank's Eighth Replenishment Report which required the systematic inclusion of indigenous issues in Bank policies and projects. ^f In 1982, ECOSOC established a Working Group on Indigenous Populations and charged it with the task of drafting a universal declaration on the rights of Indigenous Peoples. The Working Group agreed on a Draft Declaration in 1993 and then sent it to the Sub-Commission on Prevention of Discrimination and Protection of Minorities which adopted it in 1994. This declaration was approved—with some amendments—by the UN Human Rights Council in July 2006. ^g According to the ADB policy on Indigenous Peoples, recognition of the right of indigenous peoples to direct the course of their own development and change should be considered a key issue (Article 43).

Appendix 2: Cross-Section of Domestic Legislation Pertaining to Indigenous Rights

Country	Legislation	Date of enactment	Key elements
<i>Australia</i>	Native Title Act	1993; it was amended in 1998 by the Native Title Amendment Act ^a	Recognizes native title rights based on the traditions of the indigenous peoples of Australia, providing a process by which native title rights and compensation can be determined and establishes a National Aboriginal and Torres Strait Islander Land Fund.
<i>Bolivia</i>	National Constitution, Article 171	Modified by Law No. 2631, 20 February 2004	Recognizes, respects and protects the social, economic and cultural rights of the indigenous peoples in the national territory. Specially those related to the land of origin, guaranteeing the sustainable use and benefit from natural resources, identity, values, language, customs and institutions.
	Law No. 1257	1991	Incorporates ILO Convention 169 into national law.
	Law on Public Participation, No. 1551	Adopted in 1994 and then amended in 1996 by law No. 1702	Recognizes indigenous communities, indigenous peoples and peasant communities as basic territorial organizations.
<i>Cambodia</i>	Land Law	2001	Provides a definition of “indigenous community” (Article 23). Recognizes the indigenous communities collective ownership over those properties as described in Article 25 (Article 26). Recognizes traditional authorities by stating that the specific conditions of the land use shall be subject to the responsibility of the traditional authorities and mechanisms for decision making of the community, according to their customs (Article 27).
<i>Cameroon</i>	Constitution	1996	The state commits itself to the protection of minorities and the safeguard of indigenous populations consistently with the law. ^b
<i>Canada</i>	Constitution Act, Section 35	1982	The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed. ^c
	Inherent Right Policy	1995	Recognizes the right of aboriginal peoples to self-government as an existing right within section 35 of the Constitution Act. It focuses on reaching practical and workable agreements on the exercise of self-government.
<i>Colombia</i>	Constitution	1991	Recognizes and protects cultural and ethnic diversity (Article 7). Exploitation of natural resources shall be carried out without impairing the cultural, social and economic integrity of the indigenous communities involved. Indigenous territories will be governed by councils established in accordance with indigenous communities’ usages and customs (Article 330).
	Decree 1397	1996	The government shall involve and consult communities, peoples and indigenous organizations in any project or development plan taking place in their territory.

<i>India</i>	Constitution	1949, then amended several times from 1951 to 2005.	<p>The state shall promote the educational and economic interests...of the scheduled castes and the scheduled tribes and shall protect them from social injustice and all forms of exploitation (Article 46). Provides for the reservation of seats for scheduled castes and tribes in the House of the People and legislative assemblies of every state (Articles 330 and 332).</p> <p>A National Commission for Scheduled Castes and a National Commission for Scheduled Tribes shall be established with the duty, among others, to investigate and monitor all matters relating to the safeguards provided under the Constitution, inquire into specific complaints, report to the president upon the working of these safeguards.</p> <p>Includes special provisions with respect to the states of Nagaland and Mizoram according to which no act of parliament regarding religious or social practices of the Nagas and the Mizos, their customary law and practices, administration of civil and criminal justice involving decisions according to their customary law, ownership and transfer of land and its resources, shall apply to these states unless their legislative assembly so decides by a resolution.</p> <p>Relates to the administration and control of Scheduled Areas and Scheduled Tribes, contemplating a Tribes Advisory Council charged with the task of advising on those matters pertaining to the welfare and advancement of the Scheduled Tribes.</p> <p>Provides for the establishment of tribal areas in the form of autonomous districts with their own Councils performing legislative, executive and judicial powers.</p> <p>Safeguards AINU culture.</p>
<i>Japan</i>	Law on Ainu Culture	1997	Safeguards AINU culture.
<i>Mexico</i>	Political Constitution	Modified by "decreto" 25 April 2001	The nation has a multicultural composition based on the indigenous peoples, defined as the descendants of the inhabitants of the country at the time of colonization which have maintained their social, economic, cultural and political institutions.
<i>Peru</i>	National Constitution		Every individual has the right to an ethnic and cultural identity. The state recognizes and protects the ethnic and cultural plurality of the nation (Article 2.19).
	Law No. 27037 Article 4, Promotion of investment in the Amazonia	30 December 1998	The state respects the cultural identity of the Native communities (Article 89). The state is responsible for promoting investment in the Amazon, respecting the principles of identity, culture and organizational forms of native communities.
<i>Philippines</i>	Constitution ^d	1987	Recognizes and promotes the rights of indigenous communities within the framework of national unity and development (Article II, Section 22). Protects the rights of indigenous cultural communities to their ancestral lands to ensure their economic, social and cultural well-being (Article XII, Section 5). Recognizes the rights of indigenous cultural communities to preserve and develop their cultures, traditions and institutions (Article XIV, Section 17).

	1997	Indigenous Peoples' Rights Act (IPRA)	Empowers indigenous communities to veto development proposals and development activities in their ancestral territories.
	1998	Implementing Rules and Regulations (IRR) of IPRA	Requires prior informed consent of indigenous communities to development projects.
<i>Russia</i>	1999	Federal law on the guarantees of the Rights of Indigenous Numerically Small Peoples	Provides judicial protection for the rights of these peoples and protects the indigenous environment, lifestyle, economy and traditional cultures and languages.
<i>South Africa</i>	1996	Constitution, Section 25(7) Constitution, Section 6(2)	Provides for restitution of rights in land to persons or communities who were dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices. Promotes the protection of Khoi, Nama and San languages (referred to as indigenous languages).
	1996	Protection of Informal Land Rights Act	Recognizes informal rights to land in the terms of use, occupation or access to land in accordance to any tribal, customary or indigenous law or practice of a tribe.
	1994	Restitution of Land Act	Establishes the Commission on Restitution of Land Rights.
<i>Taiwan</i>	2005	Indigenous Peoples Basic Law	Recognizes indigenous peoples' rights to land and natural resources (Article 20). The government or private party shall consult indigenous peoples and obtain their consent or participation with regard to land development, resource utilization and ecology conservation (Article 21).
<i>Uganda</i>	1995	Constitution, Articles 3, 6 and 24 of the preamble	Every effort shall be made to integrate all the peoples of Uganda while at the same time recognizing the existence of their ethnic, religious, ideological, political and cultural diversity. The state shall ensure fair representation of marginalized groups on all constitutional and other bodies. Cultural and customary values which are consistent with fundamental rights and freedoms, may be developed and incorporated in aspects of Ugandan life.
		Constitution, Article 246	The institution of traditional leader or cultural leader may exist in any area of Uganda in accordance with the culture, customs and traditions or wishes and aspirations of the people to whom it applies. For the purposes of this article, "traditional leader or cultural leader" means a king or similar traditional leader or cultural leader by whatever name called, who derives allegiance from the fact of birth or descent in accordance with the customs, traditions, usage or consent of the people led by that traditional or cultural leader. The traditional leader has capacity to sue and be sued and to hold assets or properties in trust for itself and the people concerned.
		Constitution, Article 237	All Uganda citizens owning land under customary tenure may acquire certificates of ownership in a manner prescribed by Parliament; and land under customary tenure may be converted to freehold land ownership by registration.

Venezuela	Constitution	1999	Recognizes the existence of indigenous peoples and of their social, political, economic organization as well as their culture, customs and their ancestral rights to their traditional lands (Article 119). Indigenous peoples shall be consulted prior to the exploitation of natural resources (Article 120).
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Notes: ^a The Australian *Native Title Amendment Act* provides a number of means whereby native or indigenous title could be terminated. The Act has been attacked as discriminatory in several respects: the amendments prefer the rights of non-native title holders over those of native title holders; they fail to provide native title holders with protection of the kind given to other landowners. Indeed, the UN Committee on the Elimination of Racial Discrimination has found various provisions of the Act discriminatory. See decision (2) 54 on Australia, 18 March 1999 (A/54/18, paragraph 21). ^b The sentence referred to in the matrix is the translated version of the Cameroon's Constitution provided by the Centre for Human Rights United Nations Office at Geneva, published by Groupe Mager, P.O. Box 183, Yaounde, Cameroon and found at confinder.richmond.edu. The text in its original version reads: *L'Etat assure la protection des minorités et préserve les droits des populations autochtones conformément à la loi.* ^c However, the protection accorded by the Constitutional provisions should be read in connection with the relevant case law by the Supreme Court as to the real meaning and content of the *aboriginal title*. Justice Lamer of the Supreme Court of Canada wrote: "In my opinion, the development of agriculture, forestry, mining and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that...can justify the infringement of aboriginal title" (Delgamuukw v. The Queen, paragraph 165 of the Chief Justice's opinion, 11 December 1997). ^d It is worth noting that the Philippine Constitution grants the state the legal ownership over "water, minerals [...] all forces of potential energy, fisheries, forests or timber, wild life, flora, fauna, and other natural resources".

Appendix 3: Legal Institutions and Authorities for the Enforcement of Indigenous Rights

Region/country	Institution	Date of creation	Key functions	Important cases
INTERNATIONAL				
<i>United Nations</i>	Human Rights Committee	Its creation is related to the 1966 International Covenant on Civil and Political Rights, entered into force in 1976.	<p>The Committee on Human Rights is the body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights by its states parties. All states parties are obliged to submit regular reports to the committee on how the rights are being implemented. States must report initially one year after acceding to the covenant and then whenever the committee requests (usually every four years). The committee examines each report and addresses its concerns and recommendations to the state party in the form of "concluding observations".</p> <p>In addition to the reporting procedure, Article 41 of the covenant provides for the committee to consider interstate complaints. Furthermore, the First Optional Protocol to the Covenant gives the committee competence to examine individual complaints with regard to alleged violations of the covenant by states parties to the protocol.^a</p>	<p>Chief of the Lubicon Lake Band of Cree v. Canada.</p> <p>The Committee on Human Rights determined that Canada had violated Article 27 by allowing the provincial government of Alberta to grant leases for oil and gas exploration and timber development within the ancestral territory of the Lubicon Lake Band.</p> <p>Also see, in particular, the General Comment no. 23 providing an interpretation of Article 27. In that context, it affirmed that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples.</p>
	Committee on the Elimination of Racial Discrimination	Its creation is related to the 1965 Convention on the Elimination of All Forms of Racial Discrimination, entered into force in 1969.	<p>The Committee on the Elimination of Racial Discrimination (CERD) is the body of independent experts that monitors implementation of the Convention on the Elimination of All Forms of Racial Discrimination by its states parties.</p> <p>All states parties are obliged to submit regular reports to the committee on how the rights are being implemented. States must report initially one year after acceding to the convention and then every two years. The committee examines each report and addresses its concerns and recommendations to the state party in the form of concluding observations.</p>	<p>Besides its concluding observations on country reports, see Recommendation XXIII on Indigenous Peoples (1997) where it has called upon states, in particular, to recognize and respect indigenous distinct culture and to ensure that no decisions relating to their rights and interests are taken without their informed consent.</p>

In addition to the reporting procedure, the convention establishes three other mechanisms through which the committee performs its monitoring functions: the early-warning procedure, the examination of interstate complaints and the examination of individual complaints.^b

REGIONAL LEVEL				
<i>African Union</i>	African Commission on Human and Peoples' Rights	1986 Created by Assembly of Heads of State and Government of the Organization of African Unity	It is charged with the promotion and protection of human and peoples' rights as well as the interpretation of the African Charter on Human and Peoples' Rights	<p>The Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria, African Commission on Human and Peoples' Rights, Communication No. 155/96 (2001).</p> <p>The commission established the following facts, concluding that fundamental rights contained in the African Charter had been violated (right to a satisfactory environment, to health, to shelter and to food as explicitly or implicitly acknowledged in the African Charter on the Human and Peoples' rights in Articles 2, 4, 14, 16, 18, 21 and 24):</p> <p>The exploitation of oil reserves by Nigerian National Petroleum Co. in consortium with Shell Corporation have caused environmental and degradation, resulting in starvation and health problems among the Ogoni People;</p> <p>The Nigerian military engaged in ruthless military operations and psychological tactics of displacement against Ogoni communities.</p> <p>Awas Tingni Mayagna (Sumo) Indigenous Community v. Nicaragua (2001)</p> <p>The court held that Nicaragua had violated the right to property of the Indigenous Mayagna Community by not taking sufficient measures to guarantee the traditional land and resource tenure of the Mayagna indigenous community of Awas Tingni, and by granting a concession for logging on the community's traditional lands. According to the court, the concept of property enshrined in the American Convention on Human</p>
<i>Organization of American States</i>	Inter-American Court of Human Rights	Established by Article 33 of the American Convention on Human Rights, entered into force in 1978.	It is charged with resolving cases and disputes submitted by IACHR or OAS member states as to the interpretation or implementation of the American Convention on Human Rights. ^c	

Rights includes the communal property of indigenous peoples, even if that property is not held under a deed of title or is not otherwise specifically recognized by the state. This position has been reiterated in *Yakye Axa Indigenous Community v. Paraguay* (2005); *Comunidad Moiwana v. Suriname* (2005).
 The Commission has extended the above-mentioned reasoning of the court to the similar provision of the American Declaration on the Rights and Duties of Man. In this respect, see *Mary and Carrie Dann v. United States* (2002); Report concerning *Maya Indigenous Communities of the Toledo District, Belize* (2004).

Composed of independent experts, it is responsible for monitoring the implementation of the rights contained in both the American Convention on Human Rights and the American Declaration on the Rights and Duties of Man.

Inter-American Commission on Human Rights
 1960

NATIONAL LEVEL

New Zealand

Waitangi Tribunal
 1975

Established by the Treaty of Waitangi Act 1975. The tribunal is a permanent commission of inquiry charged with making recommendations on claims brought by Maori relating to actions or omissions of the Crown that breach the promises made in the Treaty of Waitangi. The latter is a treaty signed in 1840 between the Crown and a number of Maori chiefs.

Australia

Aboriginal and Torres Strait Islander Commission
 1990
 (it has recently been replaced by the National Indigenous Council, a government-appointed consultative council)

Elected council of indigenous representatives for the administration of indigenous affairs. Development and implementing policies and programmes for indigenous people. Assisting and advice to indigenous communities nationally and other government agencies and ministers.
 Annual budget of almost AUD 1 billion.

Aboriginal and Torres Strait Islander Social Justice Commissioner
 1992
 National Native Title Tribunal
 1994

Reports annually to federal Parliament on key issues of social justice and native title issues facing indigenous Australians.
 Mediates native title claims under the direction of the Federal Court of Australia.

Assists people in negotiations about proposed developments (future acts), such as mining. Acts as an arbitrator or umpire in some situations where the people involved cannot reach agreement about proposed developments. Assists with registration of indigenous land use agreements.

Main principle: to arrange in policies to develop the multiethnic nature of the country.

To promote the multiethnic and multicultural character of the country.
To guard for the fulfilment and application of the legislation that establish the rights and promotion of the farmer, indigenous and original sectors.

To promote the recognition of the right of ownership to the land and natural resources of farmer communities, indigenous peoples and originals.

To support the process of implementation of the jurisdiction related to farm, indigenous and original communities.

To promote and manage the incorporation of the rights of farmers communities, indigenous peoples and originals in the new laws to be approved in the country through proposals arranged and agreed in the different sectors: organizations of farmers, indigenous and originals, the state and the civil society.

Tribes Advisory Council may advise the governor to set aside or modify laws enacted by state Parliaments.
Elected tribal representatives

Samatha v. state of Andhra Pradesh (1997), Supreme Court of India
Samata, an NGO working in the scheduled area of the state of Andhra Pradesh, filed a case against the state government for leasing tribal lands to private mining companies in the scheduled areas.
The court held that transfer of mining leases to non-tribals (for example, company,

Bolivia

Consultative Council for the Indigenous Peoples of Bolivia

23 May 1998

Decreto Supremo No. 25203

Service of Juridical Assistance to Indigenous Peoples

12 April 2001

Decreto Supremo No. 26151

India

Tribes Advisory Council

Constitution, Fifth Schedule

corporate aggregate or state corporations) is unconstitutional, void and inoperative.

	Autonomous Council(s)	Constitution, Sixth Schedule	Mechanism for tribal self rule For each tribal area covered in the schedule, provides for a council of elected members with legislative, executive and judiciary powers. Subject to restrictive conditions that make it susceptible to state and national level legislatures.
<i>Philippines</i>	National Commission on Indigenous Peoples	1998 (under the Indigenous Peoples' Rights Act)	Government agency responsible for the formulation and implementation of policy, plans and programmes to promote and protect the rights of indigenous peoples.
LOCAL LEVEL			
<i>Canada</i>			
British Columbia	British Columbia [BC] Treaty Commission	1992	Neutral body responsible for facilitating treaty negotiations among the governments of Canada, BC and First Nations in BC Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010 Supreme Court of Canada held that constitutional protection afforded by Section 35 includes aboriginal title, hence a large degree of autonomy over aboriginal title lands including right to traditional economies. Imposed a positive duty on the Crown to consult with aboriginal communities on any actions affecting native land.
Nunavut	Nunavut Planning Commission, Nunavut Impact Review Board, Nunavut Water Board	1993 (Nunavut Land Claim Agreement)	These institutions interact to oversee land and resource development within the Nunavut settlement area.

Notes: ^a See the OHCHR web site, www.ohchr.org. ^b www.ohchr.org. ^c It is worth noting that the contentious jurisdiction of the court is subjected to the requirement of consent by states parties.

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