NOTES & COMMENTS

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Putting the "Sustainable" Back in Sustainable Development: Recognizing and Enforcing Indigenous Property Rights as a Pathway to Global Environmental Sustainability

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The colonization of the world by European nations has been of no small significance in creating the current global economic landscape of consumerism, industrialization, and development-based growth. By opening vast territories to settlement and natural-resource extraction, providing a steady influx of capital, and creating new markets, colonialism was instrumental in fueling the industrial revolution and launching the modern global economy.[1] Indigenous peoples[2] and their territories have been, and continue to be, casualties of this mad dash to appropriate the world's lands and resources.[3] Despite recent international and domestic ef-

[1] *See* J.M. BLAUT, THE COLONIZER'S MODEL OF THE WORLD: GEOGRAPHICAL DIFFUSIONISM AND EUROCENTRIC HISTORY 17-30, 26, 179-206 (1993); *see also* JAMES W. LOEWEN, LIES MY TEACHER TOLD ME: EVERYTHING YOUR AMERICAN HISTORY TEXTBOOK GOT WRONG 69 (First Touchstone ed. 1996) (emphasizing the role of wealth taken from the Americas in shaping the modern market economy).

[2] The United Nations has defined "indigenous peoples" as:

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

UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations*, vol. V., para. 379, UN Doc. E/CN.4/Sub.2/1986/Add.4 (1986) (*submitted by* Jose Martinez Cobo, Special Rapporteur). Indigenous peoples are remarkably diverse and make up a sizeable portion of the world's population. *See, e.g.*, The Univ. of Minn. Human Rights Res. Ctr., The Rights of Indigenous Peoples, http://www.hrusa.org/indig/introduction.pdf (last visited Oct. 2, 2006) ("Indigenous Peoples worldwide number between 300-500 million, embody and nurture 80% of the world's cultural and biological diversity, and occupy 20% of the world's land surface.").

[3] *See, e.g.*, Richard L. Herz, *Litigating Environmental Abuses Under the Alien Tort Claims Act: A Practical Assessment*, 40 VA. J. INT'L L. 545, 547-49 (2000) (detailing the environmental abuses visited upon populations in Ecuador and Indonesia by transnational corporations engaged in resource extraction); Gail Osherenko, *Indigenous Rights in Russia: Is Title to Land Essential for Cultural Survival?*, 13 GEO. INT'L ENVTL. L. REV. 695, 695-96 (2001) (noting threats from mineral, oil, and gas development; timber cutting; commercial fishing; and tourism faced by indigenous peoples in northern Russia); Inter-Am. C.H.R., *Report on the Situation of Human Rights in Brazil*, ch. VI, paras. 22, 33, 63, 65, OEA/Ser.L/V/II.97, doc. 29 rev. 1 (Sept. 29, 1997), *available at* http://www.cidh.org/ countryrep/brazil-eng/chaper%206%20.htm#HUMAN%20RIGHTS%20OF (describing a multitude of encroachments on the territories of the indigenous peoples of Brazil) [hereinafter

forts to recognize and protect indigenous rights,[4] colonialist ideals remain deeply ingrained in many of the world's political, economic, and legal power structures.[5] Although the era of overt empire building has passed, the mission once executed by the sword and the gun is now accomplished by the boardroom directives of transnational corporations and the legislative acts of political majorities[6]—the subjugation of indigenous peoples and their homelands to the economic "needs" of the so-called developed world.[7]

Brazil Report]; *see also* Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1483-89 (1994) (describing modern pressures to exploit indigenous lands and resources in the United States).

[4] *See, e.g.*, Inter-Am. C.H.R., Annual Report 1996, *Proposed American Declaration on the Rights of Indigenous Peoples* ch. IV., OEA/Ser.L/V/II.95, doc 6 (1996) (approved Feb. 26, 1997) *available at* http://www.cidh.org/annualrep/96eng/chap.4.htm [hereinafter *Proposed Declaration*].

[5] *See* BLAUT, *supra* note 1, at 1-2, 26-30. Blaut describes the continuing influence of the myth of "European diffusionism," the colonialist notion that European nations historically have been more advanced than the nations they colonized, and that Europe formed a kind of reservoir of ability, power, and intellect—an "inside" which dictated the course of world events to the "outside." *Id.* at 1. Thus, the very process of European ascendancy was proof to Europeans of the superiority of European culture—the ascendancy, it was believed, was triggered by internal forces projected outward, rather than external forces projected inward. *Id.*

[6] *See, e.g.*, Herz, *supra* note 3, at 547-49; *see also* Wood, *supra* note 3, at 1471, 1483-89 (describing the intense outside pressure to exploit, develop, and industrialize the remaining indigenous lands within the United States); *id.* at 1489-95 (describing how government action geared toward majoritarian interests threatens indigenous lands within the United States). **R**

[7] I use the term "developed world" reluctantly because the inference often will be that nations or peoples not included within the sweep of that term are somehow inferior, as in *culturally* undeveloped or underdeveloped. I use the word "developed," not in this sense, nor to refer to industrialization per se. Rather, by "developed world," I refer to a particular *kind* of socioeconomic development flowing from the political, economic, and cultural legacy of European colonization. *See* BLAUT, *supra* note 1, at 28 (Blaut refers to this process as the diffusion of "modernization."). That there is a "developing world" at all then refers, not to a process of "catching up" (although that probably is how the term generally is understood), but to a particular neocolonial process. *See id.* at 28-29 (describing the modern global influence of the colonizer's worldview). Likewise, when this Comment uses the term "development" in the general sense, it refers to the same neocolonial "modernization" model of economic development. *See id.* at 27-28. However, it is important to recognize that "development" need not occur along these lines. *Cf. Proposed Declaration*, *supra* note 4, at pmbl., para. 2 (emphasizing the right of indigenous peoples to pursue development "*in accordance with their own traditions, needs and interests*.") (emphasis added); *id.* at art. XXI, para. 1 ("The states recognize the right of indigenous peoples to decide democratically what values, objectives, priorities and strategies will govern and steer their development course, *even where they are* **R** **R**

Although, from a geopolitical perspective, colonialism may have triumphed over indigeneity, it is now clear that the economic model born of colonialism—that of consumerism, resource-intensive development, and industrialization—is no panacea for human kind. The benefits to the world's "haves" are undeniable and include wealth, technology, education, improved health care, and increased life expectancies.[8] However, the neocolonial development model has spawned environmental problems that threaten to offset any of its gains. From climate change and resource depletion to pollution and the loss of biodiversity, the benefits of development have come at a heavy price,[9] a price too often imposed on the world's "have-nots" (including indigenous peoples),[10] with the balance due charged off to future generations.[11]

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different from those adopted by the national government or by other segments of society.") (emphasis added).

Perhaps because the English language is the language of colonizers, it is difficult to choose a term that operates as a convenient shorthand for the distinction between "developed" and "developing" without implying any sort of cultural bias. I chose the "developed/developing" distinction because it is not so patently Eurocentric as distinctions between "First World" and "Third World" nations, or "civilized" and "primitive" societies. I avoid also geographical generalizations such as "North/South" because the distinction I make is not entirely geographical—it exists within nations as well as between regions. *But cf.* DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 166-67 (Robert C. Clark et al. eds., 2d ed. 2002) (making more broadly based distinctions using the same terminology).

[8] In a process that is both profitable to developed nations and serves to justify neocolonialism, the developed world promises to extend these benefits to the rest of the world through exportation of its own particular neocolonial development paradigm. *See* BLAUT, *supra* note 1, at 29. **R**

[9] *See* Lester R. Brown et al., *Foreword* to STATE OF THE WORLD 2000 at xvii, xvii-xviii (Linda Starke ed., 2000) (discussing various issues affecting the world population, including aquifer depletion and global warming) [hereinafter Brown I]; Lester R. Brown, *Challenges of the New Century, in* STATE OF THE WORLD 2000, *supra*, at 3, 4-5 (discussing positive and negative effects of the "longest peacetime economic expansion in history") [hereinafter Brown II]; HUNTER ET AL., *supra* note 7, at 1-8 (presenting an overview of current environmental issues). **R**

[10] *See, e.g.*, Herz, *supra* note 3 at 547-49 (providing specific examples of destructive environmental impacts of resource extraction on indigenous populations); *see also* HUNTER ET AL., *supra* note 7, at 54-55 (describing the income and consumption gaps between wealthy and poor nations). Conventional wisdom in the developed world holds that these inequities can be resolved by exporting to developing countries a particular paradigm of economic development. *See, e.g.*, *id.* at 179-80. However, Blaut suggests that this philosophy is more grounded in ideology than fact. *See* BLAUT, *supra* note 1, at 26-29. **R** **R**

[11] *See* Brown II, *supra* note 9, at 9 (noting that negative environmental trends jeopardize future progress). **R**

To its credit, the developed world has not ignored completely the harms and injustices of the modern global economy. Rather, the global community has employed both domestic and international law to address the environmental fallout of development, occasionally with great success.[12] The notion of "sustainable development" has become one of the central organizing principles of these efforts, especially on the international stage.[13] Although it can be difficult to identify precisely what policymakers mean by "sustainable development"—in part because the terminology marries principles that are difficult to harmonize[14]—it at least embodies the realization that the earth's ecosystems and resource pools cannot indefinitely support unmanaged and unrestrained development.[15] Accordingly, development must be tempered so that future generations can continue to reap its benefits without suffering undue environmental harms.[16]

Unfortunately, if one views sustainable development as seeking a balance between long-term management and preservation of lands and resources (sustainability) and tapping them for present consumption (development), the principle finds little ultimate validation in the realities of the modern global economy. Whatever weights have been applied to the sustainability side of the scale (e.g., in the form of stricter laws and more efficient technologies), they have been more than offset by new development, which continues apace as the global population swells, the

[12] *See, e.g.*, HUNTER ET AL., *supra* note 7, at 5 (discussing the success of international agreements aimed at halting and reversing depletion of the ozone layer). **R**

[13] *See id.* at 179-80.

[14] *See id.* at 180 (noting the "brilliant ambiguity" of the term); *see also* Ved P. Nanda, *Sustainable Development, International Trade and the DOHA Agenda for Development*, 8 CHAP. L. REV. 53, 54 (2005) (noting that sustainable development is a paradigm for "reconciling and integrating the goals of economic development, social development, and environmental protection, goals that can often be at odds with one another").

[15] *See* WORLD COMM'N ON ENV'T AND DEV., OUR COMMON FUTURE 45 (1987) ("Growth has set no limits in terms of population or resource use beyond which lies ecological disaster. . . . But ultimate limits there are.").

[16] *See, e.g.*, United Nations Conference on Environment and Development (UNCED), *Rio Declaration on Environment and Development*, princ. 3, U.N. Doc. A/CONF.151/26/Rev.1, (June 14, 1992), *reprinted in* 31 I.L.M. 874 (1992) [hereinafter *Rio Declaration*] ("The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.").

developing world industrializes, and consumerism spreads around the globe.[17]

Accordingly, the global community must do some line-drawing if it wishes to pay more than lip service to the principle of sustainability in international environmental law. While this can and should be done by instituting "hard law" treaty regimes aimed at specific environmental problems (such as climate change or pollution), a crucial step lies in rejecting the colonialist norms regarding the treatment of indigenous peoples that precipitated many of the problems in the first place. Specifically, the developed world must depart from its historical mistreatment of indigenous peoples, lands, and resources by recognizing and enforcing indigenous rights and, in particular, indigenous property rights.[18]

Recognizing and enforcing indigenous property rights promotes environmental sustainability in two specific ways: one focused on restricting external appropriators and the other on empowering indigenous occupants. First, strong indigenous property rights effectively shield vast territories and resource pools from outright appropriation by the world's largest consumers.[19] Second, such rights promote a diversity of approaches to human interaction with the environment, entrusting stewardship of particular ecosystems to the finely tuned cultural expertise that indigenous peoples have developed through millennial relationships with their ancestral lands. Because maintaining an indigenous land base is critical to the continuing survival of indigenous cultures,[20] strong indigenous property rights are key to this diversity effect.

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[17] *See* Brown I, *supra* note 9, at xvii-xviii; Brown II, *supra* note 9, at 4-8; HUNTER ET AL., *supra* note 7, at 44-45, 54-56; *see also* Nanda, *supra* note 14, at 62 (noting the failure of sustainable development to prevent environmental deterioration). R R

[18] *See* HUNTER ET AL., *supra* note 7, at 1286 (explaining the importance of rights-based approaches to achieving sustainable development). R

[19] This effect has potential to be quite large, based on the geographical distribution of indigenous peoples throughout the world. *See* Univ. of Minn. Human Rights Res. Ctr., *supra* note 2. It will be most dramatic, however, where so-called "uncontacted" tribes and their territories are shielded from outside contamination with unfamiliar technologies and customs, so as to preserve those tribes' traditional balance with their ecosystems. *See* Scott Wallace, *Into the Amazon*, NAT'L GEOGRAPHIC, Aug. 2003, 6, 11 (noting the interplay between ecological preservation and the protection of uncontacted tribes). R

[20] *See, e.g.*, Mayagna (Sumo) Awas Tingni Community v. Nicaragua, 2001 Inter-Am. Ct. H.R., (ser. C) No. 79, para. 149 (Aug. 31, 2001), *available at* http://

Strengthening the status of indigenous property rights in international law starts with liberally construing existing human rights documents to adequately account for indigenous conceptions of those rights.[21] For instance, a generic "right to property" such as that found in Article 21 of the American Convention on Human Rights[22] has little meaning as applied to indigenous peoples unless construed, as it has been, to embrace traditional modes of indigenous ownership—particularly communal ownership organized around collective land tenure.[23] Furthermore, although existing human-rights regimes provide a logical starting point, there is a need for a network of binding international agreements directly addressing indigenous property rights; such a step would confront both the historical appropriation of indigenous lands and resources by colonialist conquerors as well as continuing seizures by neocolonialist enterprises.

This Comment proceeds in four parts. Part I traces the historical development of the colonialist conception of indigenous property rights, and describes how that conception continues to facilitate the developed world's exploitation of indigenous peoples, territories, and resources. Part II discusses the failings of the sustainable development model in international environmental law. Part III proposes that using international law to decolonize the developed world's conception of indigenous property rights can play a significant role in realizing the goal of environmental sustainability. Part IV examines the Inter-American Human Rights System as a positive model for further advancements in the field of indigenous property rights, both in terms of

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www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf [hereinafter Awas Tingni Case].

21 *See, e.g.*, *id.* at para. 148; *cf.* BLAUT, *supra* note 1, at 25 (noting that European colonizers denied the existence of indigenous property rights based on the theory that indigenous people did not recognize the concept of individual ownership). **R**

22 Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L/V/II.82 doc. 6 rev. 1 at 25 (1992), *available at* http://www1.umn.edu/humanrts/oasinstr/zoas3con.htm [hereinafter American Convention].

23 *See, e.g.*, *Awas Tingni Case*, 2001 Inter-Am. Ct. H.R., (ser. C) No. 79 at para. 149; *see also id.* at para. 148 ("[I]t is the opinion of this Court that article 21 of the [American Convention] protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property . . . .").

its expansive interpretations of existing human rights documents and a draft proposal directly addressing indigenous rights.

I

FROM PAST TO PRESENT: COLONIALISM'S IMPACT ON INDIGENOUS PEOPLES AND TERRITORIES

A. Colonialist Conceptions of Indigenous Ownership

European colonization drove a particular model of economic development by supplying colonialist nations with capital, natural resources, cheap labor, new markets, and new lands for settlement.[24] However, in reaping the benefits of their colonies, Europeans were confronted with a legal and ethical dilemma posed by the millions of indigenous people already in possession of the so-called New World, a dilemma that colonialist governments resolved, in part, simply by denying that indigenous peoples possessed ownership rights sufficient to defeat colonists' claims.[25] To justify both their denial of indigenous property rights and their (often brutal) exploitations of indigenous people, European colonizers adopted a racially and culturally biased worldview that elevated European qualities and values over those of indigenous societies.[26] James W. Loewen describes this rationalization process in terms of "cognitive dissonance":

> It is always useful to think badly about people one has exploited or plans to exploit. Modifying one's opinions to bring them into line with one's actions is the most common outcome of the process known as "cognitive dissonance". . . . To treat badly another person whom we consider a reasonable human being creates a tension between act and attitude that demands resolution. We cannot erase what we have done, and to alter our future behavior may not be in our interest. To change our attitude is easier.[27]

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[24] *See* BLAUT, *supra* note 1, at 17-30; *see also* LOEWEN, *supra* note 1, at 69 (discussing the importance of American bullion to the rise of capitalism, the industrial revolution, and European dominance of the global economy). R

[25] *See* BLAUT, *supra* note 1, at 25; *see, e.g.*, Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 584 (1823) (explaining the right of the European "discoverer" to "appropriate the lands occupied by the Indians"). R

[26] *See* BLAUT, *supra* note 1, at 19-20; *see also* LOEWEN, *supra* note 1, at 60, 68; Robert A. Williams, Jr., *Columbus's Legacy: The Rehnquist Court's Perpetuation of European Cultural Racism Against American Indian Tribes*, 39 FED. B. NEWS & J. 6, 358-69 (1992) [hereinafter Williams I]. R

[27] LOEWEN, *supra* note 1, at 68 (citing LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1957)). R

Describing a particularly disturbing example of this process, Loewen recounts Christopher Columbus' interactions with the Arawaks.[28] Loewen tells us that Columbus' first impressions of the Arawaks were favorable;[29] however, those impressions changed as his brutality toward them increased:

> When Columbus was selling Queen Isabella on the wonders of the Americas, the Indians were "well built" and "of quick intelligence." "They have very good customs," he wrote, "and the king maintains a very marvelous state, of a style so orderly that it is a pleasure to see it, and they have good memories and they wish to see everything and ask what it is and for what it is used." Later when Columbus was justifying his wars and his enslavement of the Indians, they became "cruel" and "stupid," "a people warlike and numerous, whose customs and religion are very different from ours."
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> . . . .
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> Columbus gives us the first recorded example of cognitive dissonance in the Americas, for although the Indians may have changed from hospitable to angry, they could hardly have evolved from intelligent to stupid so quickly. The change must have been in Columbus.[30]

Having thus convinced themselves that the Arawaks were undeserving of basic human rights, Columbus and his men took what they wanted by force. The Spaniards hunted Arawaks for sport and murdered them for dog food.[31] They enslaved them—cutting off the hands of those who failed to pay tribute in gold or cotton[32]—and traded girls as young as nine or ten as sex slaves.[33] Within the space of a few years, the Arawak culture was completely disrupted and the Arawak people, lands, and resources were all under Spanish control. Loewen, drawing in part on primary source material, describes the Spanish "reign of terror" that ultimately resulted in the extermination of an entire people:

> [T]he colonists made the Indians mine gold for them, raise Spanish food, and even carry them everywhere they went. . . . Pedro de Cordoba wrote in a letter to King Ferdinand in 1517, "As a result of the sufferings and hard labor they have endured, the Indians choose, and have chosen suicide. Occasionally a hundred have committed mass suicide. The women,

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[28] The Arawaks were indigenous inhabitants of the Caribbean islands in 1492. *Id.* at 60.

[29] *Id.*

[30] *Id.* at 68.

[31] *Id.* at 62.

[32] *Id.*

[33] *Id.* at 65.

> exhausted by labor, have shunned conception and childbirth . . . Many, when pregnant, have taken something to abort and have aborted. Others after delivery have killed their children with their own hands, so as not to leave them in such oppressive slavery."
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> Beyond acts of individual cruelty, the Spanish disrupted the Indian ecosystem and culture. Forcing Indians to work in mines rather than in their gardens led to widespread malnutrition. The intrusion of rabbits and livestock caused further ecological disaster. Diseases new to the Indians played a role, although smallpox, usually the big killer, did not appear on the island until after 1516. . . . Estimates of Haiti's pre-Columbian population range as high as 8,000,000 people. . . . "By 1516," according to [historian and author] Benjamin Keen, "thanks to the sinister Indian slave trade and labor policies initiated by Columbus, only some 12,000 remained." [Historian] Las Cass tells us that fewer than 200 Indians were alive in 1542. By 1555, they were all gone.[34]

Haiti under Spanish rule is one of the "primary instances of genocide in all of human history."[35] However, compared with later European colonizers, there was nothing particularly unusual in the Spaniards' treatment of the Arawaks. Loewen notes that Columbus "introduced two phenomena that revolutionized race relations and transformed the modern world: the taking of land, wealth, and labor from indigenous peoples, leading to their near extermination, and the transatlantic slave trade, which created a racial underclass."[36] After watching Spain enrich itself with Arawak gold, other European nations rushed to the Americas for riches of their own, matching Spanish brutality in their treatment of the indigenous peoples they encountered.[37] Later, the United States—the world's last great colonial power[38]—followed the example set by its European predecessors, forcibly removing Native Americans to ever-shrinking reservations, and carrying forth genocidal policies well into the twentieth century.[39] Nor was colonialism confined to the Americas. By the start of the twenti-

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[34] *Id.* at 63. The population of the Americas before European colonization is a matter of great speculation. However, there is little disagreement about the fact that, whatever their original numbers, colonialism brought many indigenous peoples to or near the brink of extermination. *See, e.g.*, GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 47 (4th ed. 1998) [hereinafter GETCHES I].

[35] LOEWEN, *supra* note 1, at 63-64.

[36] *Id.* at 60.

[37] *Id.* at 66.

[38] *See* BLAUT, *supra* note 1, at 27-28. R

[39] *See, e.g.*, Rennard Strickland, *The Genocidal Premise in Native American Law and Policy: Exorcising Aboriginal Ghosts*, 1 J. GENDER RACE & JUST. 325, 327-28

eth century, "all of the non-European world had been carved up into colonies, semi-colonial spheres of control, and territories of settlement."[40] Thus, Columbus' actions, far from being an aberration, merely set an oft-followed colonialist precedent: the enslavement or displacement of indigenous peoples and the appropriation of their lands and resources.

It should be noted that not all European interactions with indigenous peoples were motivated by greed. However, even where colonialist motives were arguably altruistic—the "saving" of Indian souls by conversion to Christianity for instance—they often facilitated a kind of cultural genocide that was, in many ways, as destructive as physical violence.[41] Moreover, inasmuch as those motives arose from culturally biased notions of indigenous peoples' inferiority, and thus answered to a perceived "need" for European influence in indigenous peoples' lives and cultures,[42] they served to justify a European presence in the Americas that also catered to more sinister colonial interests.[43] As U.S. Supreme Court Chief Justice John Marshall wrote in *Johnson v. McIntosh*, "[t]he potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them

(1998) (discussing Indian removal policies and compulsory sterilization of Native American women from the 1940s to the 1980s).

[40] BLAUT, *supra* note 1, at 26. Before the mid-eighteenth century, European colonialism was largely confined to the Americas. *Id.* at 20-22. **R**

[41] *See* Allison M. Dussias, *Waging War with Words: Native Americans' Continuing Struggle Against the Suppression of Their Languages*, 60 OHIO ST. L.J. 901, 948 (1999) (noting the harmful effects of the loss of cultural identity). The United Nations has defined cultural genocide by reference to "[a]ny action which has the aim or effect of depriving [indigenous peoples] of their integrity as distinct peoples, or of their cultural values or ethnic identities" and "[a]ny form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative, or other measures." U.N. Human Rights Council, Sub-Comm. on the Prevention of Discrimination & Prot. of Minorities, *Draft Declaration on the Rights of Indigenous Peoples*, para. 7(a), (d), U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1, (Aug. 26, 1994), *available at* http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.SUB.2.RES.1994.45.En?OpenDocument [hereinafter *Draft Declaration*].

[42] *See* GETCHES I, *supra* note 34, at 51 (citing the writings of sixteenth century Dominican priest and scholar Franciscus de Victoria). **R**

[43] *See id.*; *see also* ALLEN P. SLICKPOO, SR. & DEWARD E. WALKER, JR., NOON NEE-ME-POO (WE, THE NEZ PERCES): CULTURE AND HISTORY OF THE NEZ PERCES 72 (1973) (quoting a Nez Perce tribal member) ("[M]issionaries . . . played an important role in breaking down our way of life, demoralizing and weakening our cultural values, and ending our power and freedom so that we would be dependant on the whites.").

civilization and Christianity, in exchange for unlimited independence."[44]

European racism cannot be overemphasized as a factor in the enterprise of colonization. A strong sense of cultural superiority (one with a crucial racial component) was at the very heart of Europeans' abridgement of indigenous rights, providing an ideological justification for the appropriation of indigenous lands and resources.[45] Particularly important to the colonial process was the refusal to recognize indigenous property rights, a refusal based on the theory that indigenous peoples were in a lower stage of social evolution, and thus were incapable of grasping European concepts of individual ownership.[46] Colonizers were loath to consider that indigenous modes of communal ownership could exist on equal legal footing with European conceptions of private property—to do so would de-legitimize the colonizers' very presence in the Americas. On the other hand, this marginalization of indigenous property rights legitimized, in the minds of Europeans, their appropriation of indigenous lands and resources.[47]

The refusal to grant equal legal status to indigenous modes of property ownership, and the racist underpinnings of that refusal, lay at the heart of what came to be known as the "discovery doctrine," one of the central legal and operational tenets of colonialism. The doctrine, which was an outgrowth of the same Christian legal dogma that inspired the Crusades, held that European nations acquired the underlying title to indigenous lands, notwithstanding the indigenous right of occupancy, by virtue of mere "discovery."[48] The result that flowed from the doctrine "sharply diminished the tribes' former rights of sovereignty and ownership over their territories."[49]

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[44] Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 573 (1823).

[45] *See* BLAUT, *supra* note 1, at 20, 26, 61-62; *see also* Williams I, *supra* note 26, at 358-69 (discussing colonizers' racially and culturally biased justifications for denying equal rights and privileges to colonized peoples); *id.* at 359. ("[T]he racist focuses on a perceived difference between himself or herself and the intended victim of racial discrimination. The racist perceives this difference as a deficiency: 'they' do not use the land as we do and are therefore less 'efficient' . . . ."). R

[46] BLAUT, *supra* note 1, at 25.

[47] *See id.*

[48] GETCHES I, *supra* note 34, at 42. The right of occupancy could be extinguished by the discovering sovereign through purchase or conquest. *See Johnson*, 21 U.S. (8 Wheat.) at 588. R

[49] GETCHES I, *supra* note 34, at 42. R

The United States, in seizing the colonial baton from England, also adopted this conception of indigenous property rights. In *Johnson v. McIntosh*, Chief Justice Marshall affirmed the discovery doctrine,[50] thus absorbing into U.S. law centuries of racial injustice. This affirmation echoes through history to the present day, forming a critical *legal* link between Columbus' extermination of the Arawaks and more recent abuses such as the Trail of Tears[51] and, still more recently, the U.S. government's alienation of tribal lands pursuant to its "termination" policy of the 1950s and 1960s:[52]

> *Johnson's* acceptance of the Doctrine of Discovery into United States law preserved the legacy of 1,000 years of European racism and colonialism directed against non-Western peoples. White society's exercise of power over Indian tribes received the sanction of the Rule of Law in *Johnson v. McIntosh*. The Doctrine of Discovery's underlying medievally derived ideology—that normatively divergent "savage" peoples could be denied rights and status equal to those accorded to the civilized nations of Europe—had become an integral part of the fabric of United States federal Indian law. The architects of an idealized European vision of life in the Indians' New World had successfully transplanted an Old World form of legal discourse denying all respect to the Indians' fundamental human rights. While the tasks of conquest and colonization had not yet been fully actualized on the entire American continent, the originary legal rules and principles of federal Indian law set down by Marshall in *Johnson v. McIntosh* and its discourse of conquest ensured that future acts of genocide would proceed on a rationalized, legal basis.[53]

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[50] *See Johnson*, 21 U.S. (8 Wheat.) at 572-77.

[51] *See* William Bradford, *"With a Very Great Blame on Our Hearts": Reparations, Reconciliation, and an American Indian Plea for Peace with Justice*, 27 AM. INDIAN L. REV. 1, 23 n.98 (2002/2003) (describing the forced removal of the Cherokees from their homeland in present-day Georgia to the American West).

[52] *See* GETCHES I, *supra* note 34, at 11. For a detailed account of the termination policy and its effects on specific tribes, see CHARLES WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS 57-86 (2005). **R**

[53] ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 317 (1990) [hereinafter WILLIAMS II]. Indian law scholars portray Marshall as both hero and goat. *Compare, e.g.*, Williams I, *supra* note 26, at 362 (critically discussing Marshall's adoption into U.S. law of a "medievally derived legal tradition of Christian European crusading conquest"), *with, e.g.*, David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573, 1577-83 (1996) [hereinafter Getches II] (offering a more sympathetic account of Marshall's reasoning and crediting his foundational opinions with the preservation of tribal sovereignty under U.S. law). Given the practical constraints of Marshall's office, it may be unfair to ascribe to him sole responsibility for adopting colonialist ideology into **R**

It is noteworthy that *Johnson v. McIntosh* has never been overruled, and continues to underlie modern conceptions of indigenous property rights in the United States. Even today, the federal government holds title to most Native American lands and resources, albeit in "trust" for the tribes.[54] As the next subsection illustrates, the continuance (in the United States and elsewhere) of this fundamental denial of indigenous rights informs the interactions of the developed world's "potentates" with the indigenous societies of today.[55]

U.S. law. Although Marshall's foundational Indian law opinions—often referred to as the "Marshall trilogy"—acknowledge his discomfort with the discovery doctrine, *see id.* at 1577, 1579, n.22, it may have been beyond the practical limits of his power to reject the legitimacy of colonialist land acquisitions, a step which would have, after all, undermined the territorial claims of the fledgling government he served. Indeed, Marshall expressed just such a self-consciousness about the practical limits of the Court's power. *See Johnson*, 21 U.S. (8 Wheat.) at 591 ("However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear . . . if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned."); *see also id.* at 588 ("Conquest gives a title which the Courts of the conqueror cannot deny . . . ."). In fact, in preserving some Indian rights, Marshall may have done everything practically within the power of his office to blunt the impact of colonialist land policies on tribes. *See* Getches II, *supra*, at 1583 (noting that Marshall's solicitude to tribal interests in the final installment of his trilogy of Indian law cases—*Worcester v. Georgia*—tested the limits of state compliance and incited a constitutional crisis); *see also id.* at 1580 n.24 ("It is difficult to imagine the young nation's Court being less restrictive of Indian rights in such hotly contested cases.").

[54] *See* GETCHES I, *supra* note 34, at 20-21. Although this trust relationship embodies a clear duty on the part of the federal government to protect the native land base, Wood, *supra* note 3, at 1506, it offers uneven protection in practice, and offers no practical barrier at all to the majority's political will as channeled through the U.S. Congress, *see id.* at 1508-09. Congress can—and has—used its "plenary power" in the area of Indian affairs to transfer tribal lands into non-Indian ownership. *See id.* at 1503 (discussing the plenary power doctrine); *see also* WILKINSON, *supra* note 52, at 43 (discussing the opening of certain "surplus" tribal lands to non-Indian settlement pursuant to Congress' allotment policy); *id.* at xiii, 57-86 (describing Congress' termination policy, a designed sell-off of tribal lands and assimilation of tribal peoples). Although current U.S. policy abandons the "overt land grabbing" of past policies and substitutes a commitment to tribal autonomy and self-determination, *see* Wood, *supra* note 3, at 1472-74, the possibility that Congress will exercise its nearly unlimited power in the area of Indian affairs to direct a policy reversal poses an ever-present threat to the tribal land base. *See* WILKINSON, *supra* note 52, at 242. History suggests the threat is significant: tribes lost almost 90 million acres of land pursuant to the allotment and termination policies. *See id.* at 43. R R R R

[55] *See* Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 573 (1823); *see also* GETCHES I, *supra* note 34, at 48 (noting the link between sixteenth-century Spanish legal theory and modern conceptions of indigenous rights). R

B. Neocolonialist Assaults on Indigenous Lands and Resources

Much has changed since the misdeeds of Columbus. Indigenous-rights advocates have cause for enthusiasm. In the developed world, there is a growing awareness of the importance of cultural diversity,[56] overt racism generally is disfavored, and the belief in Anglo-American cultural supremacy, while still very much alive, is at least not quite the dogma it was at the peak of the colonialist era.[57] Many major universities offer programs in ethnic studies or similar fields,[58] and "cultural competence" is a buzzword in the corporate world.[59] Indigenous peoples themselves are organizing. They have asserted themselves in domestic and international law and policy,[60] and have begun to claim legal rights and protections not extended to their ancestors.[61] Movements are afoot around the world to strengthen and protect indigenous cultures. In the United States, Native Americans, after a bleak history of removal from their ancestral lands and forced assimilation into Anglo-American culture,[62] are revitalizing their

[56] A Google search for the term "cultural diversity" returned 9,510,000 results, http://www.google.com/search?hl=en&lr=&q=%22cultural+diversity%22 (last visited Oct. 21, 2006).

[57] *See* BLAUT, *supra* note 1, at 29-30, 52. **R**

[58] *See, e.g.*, University of Oregon, Ethnic Studies Program, (Oct. 2005), http://darkwing.uoregon.edu/~ethnic/.

[59] *See* Diversity Training University International, http://www.dtui.com/bec_trainer.html (last visited Sept. 25 2006). In recent affirmative-action cases before the U.S. Supreme Court, major corporations such as General Motors filed amicus briefs on behalf of the defendant university in *favor* of affirmative-action programs. *See e.g.*, Grutter v. Bollinger, 539 U.S. 306, 330-31 (2003).

[60] *See, e.g.*, Inter-Am. C.H.R., *Third Report on the Human Rights Situation in Colombia*, ch. X, para. 6, OEA/Ser.L/V/II.102, doc. 9 rev. 1, (Feb. 26, 1999), *available at* http://www.cidh.org/countryrep/Colom99en/chapter-10.htm [hereinafter *Colombia Report*]; *see also* Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 58 (1999).

[61] *Compare, e.g.*, Awas Tingni Case, 2001 Inter-Am. Ct. H.R., (ser. C) No. 79, para. 148 (Aug. 31, 2001) *available at* http://www.corteidh.or.cr/docs/casos/ articulos/seriec_79_ing.pdf (holding that the right to property extends to the communal property of indigenous peoples), *with, e.g.*, Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 572-77 (1823) (affirming the discovery doctrine relegating indigenous property rights to a mere right of occupancy).

[62] *See* Arthur Manuel & Nicole Schabus, *Indigenous Peoples at the Margin of the Global Economy: A Violation of International Human Rights and International Trade Law*, 8 CHAP. L. REV. 229, 232-33 (2005) (discussing President Andrew Jackson's order directing the forced removal of 17,000 Cherokees from Georgia, their walk from Georgia to Oklahoma being more commonly known as the "Trail of Tears").

traditional cultures under a new era of "self-determination."[63] In the Brazilian Amazon, efforts are underway to chart the territories of the few remaining "uncontacted" indigenous tribes, so as to better protect their lands from outside encroachment.[64]

But these positive developments should be noted only with an eye to the preceding 500-year history of colonial abuses. During that period, colonizers destroyed, altered, or appropriated nearly all the indigenous world.[65] Moreover, much has *not* changed since Columbus' time. Indigenous peoples today often are subjected to abuses similar to those perpetrated on the Arawaks by Columbus: outside appropriators invade indigenous territories and seize resources, decimating the local environments and cultures in the process. These abuses can be traced to the same fundamental lack of respect for indigenous property rights that prevailed among European colonizers in the sixteenth century.[66] It makes little difference if the intrusions into indigenous territories that once came in the form of military invasions now come as transnational corporate ventures. To the indigenous victims of modernization,[67] the result under this latter type of "economic" colonialism is often the same: death, disease, poverty, and cultural disruption.[68]

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[63] *See* GETCHES I, *supra* note 34, at 230-33; WILKINSON, *supra* note 52, at xiii-xiv, 189, 352-53; Blaine Harden, *Walking the Land With Pride Once More: Tribal Renewal Sparks Wealth, Optimism*, WASH. POST, Sept. 19, 2004, at A1, *available at* http://www.washingtonpost.com/wp-dyn/articles/A31334-2004Sep18.html. **R**

[64] *See, e.g.*, Wallace, *supra* note 19, at 9-10. **R**

[65] *See supra* Part I.A.

[66] *See, e.g.*, Manuel & Schabus, *supra* note 62, at 242 (discussing the threat to indigenous peoples posed by transnational corporations seeking to expropriate traditional indigenous lands under international trade agreements); *see also Proposed Declaration*, *supra* note 4, at pmbl. para. 2 ("Concerned about the frequent deprivation afflicting indigenous peoples of their human rights and fundamental freedoms; within and outside their communities, as well as the dispossession of their lands, territories and resources."). **R** **R**

[67] *See* BLAUT, *supra* note 1, at 28. **R**

[68] *See, e.g.*, *Brazil Report*, *supra* note 3, at paras. 22, 33, 63, 65. This is not to suggest that indigenous peoples, even now, are free of the former type of outright military hostility. In this regard, see, for example, Inter-Am. C.H.R., *Fifth Report on the Situation of Human Rights in Guatemala*, ch. XI, paras. 9-16 OEA/Ser.L/V/II.111, doc. 21 rev. (Apr. 6, 2001), *available at* http://www.cidh.org/countryrep/Guate01eng/chap.11.htm, detailing the Guatemalan government's former counter-insurgency policy. Where indigenous peoples were thought to be aiding guerilla forces, the Guatemalan military slaughtered entire villages, including children and the elderly. *Id.* at para. 14. The disproportionately heavy-handed response was aimed "not only at destroying the social bases of the guerillas, but also at destroying **R**

Periodic country reports by the Inter-American Commission on Human Rights (Commission) describe the human-rights situations of the indigenous peoples of Organization of American States (OAS) member countries. These reports frequently detail the conditions of indigenous peoples, and paint a vivid picture of the modern pressures and challenges faced by indigenous peoples of the Americas. Of particular interest here are the Commission's reports regarding invasions of indigenous property interests by outside appropriators.

For example, in its 2000 report on Peru, the Commission described the "large-scale" exploitation of natural resources and raw materials in indigenous territories within the Peruvian jungle: "The actions of the lumber and oil companies in these areas, without consulting or obtaining the consent of the communities affected, in many cases lead to environmental degradation and endanger the survival of these peoples."[69] The Commission's use of the term "survival" implicitly references cultural as well as physical survival, given its finding that, "[t]he recovery, recognition, demarcation, and registration of the [indigenous] lands represents [sic] essential rights for cultural survival and for maintaining the community's integrity."[70]

Likewise, in its 1999 report on Columbia, the Commission noted a variety of pressures on indigenous lands. Despite state policies allowing indigenous groups to register lands as protected "resguardos,"[71] indigenous peoples faced encroachment by settlers and non-indigenous farmers. Some of these efforts were linked to political attempts to appropriate indigenous lands, and included violence, death threats, and even assassinations of indigenous leaders.[72] Indigenous peoples faced other threats to their territories as well, including attempts by transnational and national oil companies to drill on resguardos (allegedly without seeking legally required consultations with indigenous communities),[73] and government plans for certain infrastructure improve-

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the cultural values that fostered cohesion and collective action in the indigenous communities." *Id.* at para. 16.

[69] Inter-Am. C.H.R., *Second Report on the Situation of Human Rights in Peru*, ch. X, para. 26 OEA/Ser.L/V/II.106, doc. 59 rev. (June 2, 2000), *available at* http://www.cidh.org/countryrep/Peru2000en/chapter10.htm [hereinafter *Peru Report*].

[70] *Id.* at para. 16.

[71] *Colombia Report*, *supra* note 60, at para. 16. **R**

[72] *Id.* at paras. 22-27.

[73] *Id.* at para. 32.

ments on indigenous lands. The Commission noted that these "megaprojects" threaten natural-resource reserves on indigenous lands and "entail hazards that could prove fatal to the survival of the indigenous peoples that live in [the affected] areas."[74]

The Commission's 1997 report on Brazil reveals a similar, but more extensive, list of threats to the Yanomami people, including mercury pollution from mining, encroachments by squatters and miners, illegal exploitation of lumber and agriculture, an insufficient land base to support subsistence activities, epidemics introduced by outsiders, infrastructure improvements deep into indigenous territories, attacks by immigrants, establishment of non-indigenous settlements, and—exacerbating all other problems—judicial and political erosion of indigenous rights.[75] The Commission also identified threats to isolated indigenous groups, noting that, in one instance, cattle ranchers almost entirely "eliminated" two previously uncontacted groups.[76]

The Commission's report shows that the convergence of outside pressures on the indigenous peoples of Brazil are threatening their land base, and thus their "physical and cultural survival . . . along with protection of the ecology."[77] The Commission concluded that the state was offering grossly insufficient protection from these encroachments:

> [The] integrity [of the Yanomami] as a people and as individuals is under constant attack by both invading prospectors and the environmental pollution they create. State protection against these constant pressures and invasions is irregular and feeble, so that they are constantly in danger and their environment is suffering constant deterioration.[78]

Because the Inter-American Commission's jurisdiction is over state actors, and not private defendants,[79] its reports tend to focus on the responsibilities of OAS member countries (and the conditions of indigenous peoples within those countries), rather than on the actions of specific corporations. Richard L. Herz provides an up-close look at these actions:

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[74] *Id.* at para. 33.

[75] *Brazil Report*, *supra* note 3, at paras. 22, 33, 63, 65; *see also* Wallace, *supra* note 19, at 9-10, 17-19 (describing the destructive effects of outside interferences on the indigenous cultures of the Brazilian Amazon). R R

[76] *Brazil Report*, *supra* note 3, at para. 24.

[77] *Id.* at para. 63.

[78] *Id.* at para. 82(f).

[79] *See* HUNTER ET AL., *supra* note 7 at 1333 n.1. R

> All too often, transnational corporations (TNCs) and governments inflict devastating environmental harms on local people in developing countries. Typically, the damage is obvious and preventable, but ignored by those who cause it. Texaco's oil development in the Ecuadorian Amazon . . . [is a] noteworthy example[ ]. Texaco drilled oil in the Ecuadorian Amazon for twenty years, ending in 1992. During that time, the company opened over 300 wells and cut 18,000 miles of trail and 300 miles of road in pristine rainforest. Disregarding the established industry practice of pumping wastes back into wells, Texaco dumped massive quantities of toxic byproducts onto roads and into streams and wetlands local people used for drinking, fishing and bathing. Texaco also filled over 600 pits with toxic waste, which often washed out in heavy rain. A farmer, describing the rupture of just one of these pits, stated, "[i]t has been three years, and my wife is still covered with rashes. I have eight children. All of them have been sick with rashes, flus, their stomachs, swollen throats. We did not have that before the spill." The rupture also ruined his farm and water supply. At least 30,000 people have suffered injuries similar to those experienced by that farmer and his family as a result of Texaco's Amazonian operations.[80]

Herz goes on to describe Freeport-McMoRan's "equally outrageous" copper and gold mining operation in the highlands of West Papua (Irian Jaya), Indonesia.[81] The New Orleans-based company is in the process of strip-mining a mountain sacred to the indigenous Amungme people.[82] Every day, the company dumps hundreds of thousands of tons of untreated toxic mine tailings directly into local waterways,[83] producing an aggregate discharge of nearly 1 billion tons as of December 2005.[84] The discharges are so massive they literally are burying local ecosystems in waste rock and mine tailings.[85] Sludge "the consistency and color of wet cement, belts down the rivers, and inundates and smothers all in its path."[86] These enormous releases of sediment already have dramatically altered the landscape, but the damage has only begun—Freeport estimates it will discharge an

[80] Herz, *supra* note 3, at 547-48 (internal citations omitted). **R**

[81] *See id.* at 548.

[82] *Id.*; Jane Perlez & Raymond Bonner, *Below a Mountain of Wealth, a River of Waste*, N.Y. TIMES, Dec. 27, 2005, at A1, *available at* http://www.nytimes.com/2005/12/27/international/asia/27gold.html?ex=1293339600&en=fba5e5cb626e7d5c&ei=5088&partner=rssnyt&emc=rss.

[83] Herz, *supra* note 3, at 547-48.

[84] *See* Perlez & Bonner, *supra* note 82. **R**

[85] *Id.*

[86] *Id.*

additional 5 billion tons of waste before closing the mine.[87] Given the severity of the destruction already done, dumping such a massive additional quantity of waste into the local environment could be truly catastrophic. So far, Freeport's operation has devastated lakes, polluted ground and surface water, destroyed a coastal estuary, instigated mass die-offs of vegetation, and left local rivers barren of life.[88] The company has radically disrupted Amungme culture as well. When Freeport's explorers first arrived in the 1960s, they encountered a self-sustaining indigenous community almost totally isolated from outside contact.[89] In abruptly replacing this community with "an entirely new society and economy, all of its own making,"[90] Freeport virtually ensured the Amungmes' economic dependence on the company.[91] Thus, while the Amungme now rely on Freeport for "economic viability,"[92] the company's operations ultimately have "threatened the lives and health of the entire Amungme people, through starvation, exposure to toxic chemicals, pollution of their water, and destruction of their lands."[93]

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[87] *Id.*

[88] *Id.*; Herz, *supra* note 3, at 547-48.

[89] *See* Perlez & Bonner, *supra* note 82; Paul Raeburn et al., *Whose Globe?*, BUS. WK., Nov. 6, 2000, at 88; *see also* Michelle Conlin et al., *The Corporate Donors*, BUS. WK., Dec. 1, 2003, at 92 (noting that the Amungme tribe has inhabited the island for thousands of years). **R**

[90] Perlez & Bonner, *supra* note 82; *see also* Carolyn D. Cook, *Papuan Gold, A Blessing of a Curse? The Case of the Amungmes*, CULTURAL SURVIVAL Q., Spring 2001, at 44, *available at* http://209.200.101.189/publications/csq/csq-article.cfm?id=653&highlight=Amungme (describing the cultural disruption surrounding the replacement of the Amungmes' traditional barter economy with a market economy). **R**

[91] *See* Perlez & Bonner, *supra* note 82; Raeburn et al., *supra* note 89. An ultimately unsuccessful lawsuit filed in U.S. federal court under the Alien Tort Statute and the Torture Victim Protection Act alleged that Freeport had engaged in "cultural genocide." Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 163 (5th Cir. 1999). **R**

[92] Raeburn et al., *supra* note 89. **R**

[93] Herz, *supra* note 3, at 548. In response to escalating discontent, which culminated in a series of riots in 1996, Freeport eventually began making substantial monetary investments in the local community. Conlin et al, *supra* note 89. While these investments (one percent of local annual revenues) may be generous by industry standards, critics assert they are de minimis "greenwash" compared to the environmental harms the company has caused. *See id.* Moreover, not all of Freeport's investments are so savory: the company reportedly has issued millions of dollars in payouts to Indonesian military officials, ostensibly to provide "security," but with the effect of maintaining a network of political and military ties that help shield the company from pressures to change its environmental practices. *See* Perlez & Bonner, *supra* note 82. Finally, any local need for Freeport's money exists in the first place because the company abruptly replaced a self-sustaining indigenous economy **R** **R** **R**

The examples from these various sources are strikingly similar in motive and result to Columbus' treatment of the Arawaks in 1492: outside appropriators disregard the territorial rights of indigenous occupants and invade their lands, extract their resources, and/or establish "settlements." Usually the appropriators profit mightily, and usually the indigenous peoples suffer disruption of their cultures, ecologies, and economies. Often, indigenous peoples suffer from disease or pollution. Sometimes they are victims of intentional violence. Occasionally, entire populations disappear. Not even indigenous cultural or intellectual property is safe. Drug manufacturers transform indigenous medicinal knowledge into millions of dollars,[94] and corporations use images of Indians to market everything from cigarettes to sour cream.[95]

One might rightfully ask: what has changed in the 450 years since the last living Arawak walked the beaches of Haiti? For indigenous peoples the sad answer is, precious little. Colonialism, in a new form, continues its steady genocidal march through the ages.[96] It is true that indigenous peoples today generally are

with an economy dependant on its mining operation. *See id.* With respect to this dramatic transformation, see also Raeburn et al., *supra* note 89 (alluding to the Amungmes' prior self-sufficiency, but noting that they presently "see the mine . . . as their only means of economic viability"). **R**

[94] *See* HUNTER ET AL., *supra* note 7, at 964-65; *see also "Sharing" the Wealth? Minerals, Oil, Timber, and Now Medicines and Genetic Wealth—All Are Fair Game for Governments and Corporations*, CULTURAL SURVIVAL Q., Fall 1991, at 30, 37 (discussing "scientific poaching"). **R**

[95] *See* Angela R. Riley, *"Straight Stealing": Towards an Indigenous System of Cultural Property Protection*, 80 WASH. L. REV. 69, 76 (2005).

[96] In a way, neocolonialism is even more sinister than "classical" colonialism because present-day harms to indigenous peoples tend to occur behind the scenes. In Columbus' time, colonization was carried on in such a way that its effects on indigenous peoples created a visible moral dilemma that fostered vigorous debate about Europeans' ethical responsibilities. *See* GETCHES I, *supra* note 34, at 48-52; *see also* LOEWEN, *supra* note 1, at 67-68. Presently, despite some intermittent concern about issues such as sweat-shop labor, indigenous peoples' treatment at the hands of transnational corporations largely flies under the public radar (although, concededly, this may be changing). *See* Raeburn et al., *supra* note 89 (noting that an emerging activist movement is forcing a reversal of transnationals' former indifference to Third World environmental and human-rights issues); Conlin et al., *supra* note 89 (noting the internet's role in increasing public awareness and activism). But for the most part, to the extent of their awareness of the issue, people in the developed world tend to regard globalization as a *positive* influence. *See* BLAUT, *supra* note 1, at 2, 28-29 (discussing the belief in the diffusion of modernization). This belief appears to be grounded more in ideology than in fact. As this article illustrates at length, transnational corporations and governments involved in resource extraction visit very real harms on indigenous peoples and their lands. **R** **R** **R** **R**

granted more legal rights than those of Columbus' time; however, even assuming they can enforce those rights, they are often limited in application to state actors.[97] Transnational corporations, in particular, often operate in the gaps left by international and domestic legal regimes, gaps the free-trade era has only widened.[98]

One thing *has* changed: the world is smaller. In the centuries following Columbus' voyage, the emerging global economy had room to grow. For Europeans, there were always new "frontiers," new resources to be tapped, new peoples to be subdued. By the start of the twentieth century, this was no longer true. The frontiers had all been claimed.[99] One hundred years after that, the global economy has begun to outgrow not only the earth's physical frontiers, but also its ecological limits.[100] Even as neocolonialist enterprises encroach on the remaining indigenous lands and scrape away at the last reservoirs of unappropriated resources, the international community has awakened to a compelling new need: environmental "sustainability."

II

THE FAILINGS OF THE "SUSTAINABLE DEVELOPMENT" MODEL OF ENVIRONMENTAL PROTECTION

Colonization created new markets and tapped new resources, laying the groundwork for the rise of the modern global economy. Resource-intensive development, industrialization, and consumerism became the pathway to prosperity in the developed world, an approach that has carried over to present times. Only recently has the global community begun to catalogue and attack the environmental problems created by this economic approach.[101] There has arisen an awareness that unrestrained development can irreparably destroy the ecosystems supplying the

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97 This is the case with the Inter-American System, discussed in Part IV, *infra*, and with most of international law. *See, e.g.*, Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 794 (D.C. Cir. 1984) (per curiam) (Edwards, J., concurring); *id.* at 805-06 (Bork, J., concurring).

98 *See* Herz, *supra* note 3, at 548; Manuel & Schabus, *supra* note 62, at 241-42 (describing how the North American Free Trade Agreement (NAFTA) has weakened legal protections for indigenous property and has helped open indigenous lands to transnational corporations). R

99 *See* BLAUT, *supra* note 1, at 26. R

100 *See* Brown II, *supra* note 9, at 4. R

101 *See* HUNTER ET AL., *supra* note 7, at 170-71. R

resources for development in the first place.[102] Accordingly, governments increasingly have recognized a need to throttle back on development and control its harmful side effects (such as pollution), and thus manage development in a way that allows prosperity to continue into future generations.[103] The idea has manifested itself in international environmental law as the principle of "sustainable development."[104]

In 1987, the World Commission on Environment and Development (the Brundtland Commission) famously defined sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[105] This definition is notorious for its vagueness, and many have tried to improve it or infuse it with specific operational standards.[106] For purposes of this discussion, however, it is enough to invoke the Brundtland Commission's lowest common denominator: "At a minimum, sustainable development must not endanger the natural systems that support life on Earth: the atmosphere, the waters, the soils, and the living beings."[107]

Clearly, despite the emergence of sustainable development as *the* organizational concept in international environmental law,[108] it has thus far not succeeded in achieving even that minimum result. Lester Brown highlights the growing cost of the developed world's prosperity and catalogues the substantial and growing environmental problems facing humankind in the new millennium:

> Caught up in [the] economic excitement [of the economic expansion of the 1990s], we seem to have lost sight of the deterioration of environmental systems and resources. The contrast

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[102] *See* WORLD COMM'N ON ENV'T AND DEV., *supra* note 15, at 44-45; Brown II, *supra* note 9, at 8-9. R R

[103] *See, e.g.*, *Rio Declaration*, *supra* note 16, at princ. 3. R

[104] *See, e.g.*, *id.* at princ. 4.

[105] WORLD COMM'N ON ENV'T & DEV., *supra* note 15, at 43. R

[106] *See*, *e.g.*, Nanda, *supra* note 14, at 55; HUNTER ET AL., *supra* note 7, at 184 n.1 (citing various formulations of sustainable development). R

[107] WORLD COMM'N ON ENV'T & DEV., *supra* note 15, at 44-45. Of course the tension between the concepts embodied by the terminology can easily be resolved to yield precisely the opposite formulation: "If sustainable development means anything in practical terms, it means that environmental protection cannot destroy the economic foundation of a community." HUNTER ET AL., *supra* note 7, at 266. R R

[108] *See, e.g.*, Nanda, *supra* note 14, at 54 (referring to sustainable development as the "international paradigm for the new millennium"); *see also* HUNTER ET AL., *supra* note 7, at 208-09. R

> between our bright hopes for the future of the information economy and the deterioration of Earth's ecosystem leaves us with a schizophrenic outlook.
> Although the contrast between our civilization and that of our hunter-gatherer ancestors could scarcely be greater, we do have one thing in common—we, too, depend entirely on Earth's natural systems and resources to sustain us. Unfortunately, the expanding global economy that is driving the Dow Jones to new highs is, as currently structured, outgrowing those ecosystems. Evidence of this can be seen in shrinking forests, eroding soils, falling water tables, collapsing fisheries, rising temperatures, dying coral reefs, melting glaciers, and disappearing plant and animal species.[109]

Disturbingly, these trends have continued, despite international awareness of environmental problems and international and domestic law focused on sustainable development.[110] The question is, why? Certainly, there appears to be a disconnect between the theory of sustainable development and actual economic practice. Part of the problem is the global community's struggle to achieve effective implementation of the sustainable-development concept.[111] But this in turn begs the question of what, beyond the concept's inherent ambiguity, makes implementing sustainable development so difficult?

There are many possible answers to that question ranging from the legal to the logistical. The one I propose here is one part economics and one part ideology. First, the global market system has become unsustainable because its supply and demand components respond to short-term market forces as if underlying resources were infinite. In other words, the market does not respond naturally to ecological limits. Brown describes this process:

> The market is a remarkably efficient device for allocating resources and for balancing supply and demand, but it does not respect the sustainable yield thresholds of natural systems. In a world where demands of the economy are pressing against the limits of natural systems, relying exclusively on economic indicators to guide investment decisions is a recipe for disaster. Historically, for example, if the supply of fish was inadequate, the price would rise, encouraging investment in

[109] Brown II, *supra* note 9, at 4. Brown goes on to discuss these negative environmental trends in detail. *See id.* at 5-8; *see also* HUNTER ET AL., *supra* note 7, at 1-8. R R

[110] *See generally* Nanda, *supra* note 14. R

[111] *See id.* at 62-63; *see also id.* at 70-71 (noting mixed success in achieving sustainable development goals, particularly with respect to the contributions of the developed world).

> additional fishing trawlers. This market system worked well. But today, with the fish catch already exceeding the sustainable yield of many fisheries, investing in more trawlers in response to higher seafood prices will simply accelerate the collapse of fisheries. A similar situation exists with forests, rangelands, and aquifers.[112]

That market forces evolved without reference to the limits of natural-resource pools certainly is not surprising, given that colonialism was continually infusing the economy with new lands, resources, and capital. However, as the expanding global economy strains the earth's capacity to generate further infusions of resources, the entire system faces an inward collapse.[113] Of course, Brown's description of market forces does not account for artificially imposed limits, such as taxation, licensing, and regulation. In fact, it is tools such as these that Brown ultimately suggests can instill the system with sustainability.[114]

But therein lies the problem. The market forces Brown describes are unconscious and reactionary. Counterweights such as taxation or regulation require forethought, deliberation, consensus, and political will.[115] It follows that, where market forces collide with ecological limits, the market is predisposed to follow—of its own momentum—an unsustainable path, even in the face of concerted efforts to reign it in.

And this is where ideology comes in. J.M. Blaut suggests that the developed world still believes too strongly in the enduring colonialist myth of European cultural superiority to reject the socioeconomic model that has for so long been at the center of the myth.[116] Intuitively, this seems correct. Development and economic growth are answers, not problems. Indicators of economic growth make and break political careers (recall, for instance, the "It's the economy stupid" sound byte of the 1992 U.S. presidential campaign).[117] This is not to say that the developed world

[112] Brown II, *supra* note 9, at 9. **R**

[113] *See id.* at 8-9, 10.

[114] *See id.* at 18-19 (discussing countries that have modified their tax structure to reduce taxes on income and increase taxation on environmentally destructive activities).

[115] *See id.* at 10 (discussing the difficulty of overcoming political inertia).

[116] *See* BLAUT, *supra* note 1, at 28-29. According to Blaut, the developed world holds that model responsible for its prosperity, and seeks "diffusion" of its benefits to the developing world. *Id.*

[117] To refresh your memory, see Edwin J. Fuelner, *"It's The Economy, Stupid," Circa 1996*, HERITAGE FOUNDATION, May 16, 1996, http://www.heritage.org/Press/Commentary/ED051696b.cfm.

rejects the *principle* of sustainability—clearly it does not—but it seems unlikely the principle ever will influence, absent widespread public perception of an immediate and compelling threat, any curtailment of development that stagnates economic growth.[118]

III

RECOGNIZING AND ENFORCING INDIGENOUS PROPERTY RIGHTS AS A PATHWAY TO SUSTAINABILITY

Since "inside-out" market reforms (e.g., taxation and regulation) are unlikely to succeed alone, other approaches are needed to achieve environmental sustainability. Expanding the universe of international law protective of indigenous property rights is critical to these efforts.[119] For all of the reasons so far discussed, such a step strikes at the very foundations of colonialism. For

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[118] *See* Brown II, *supra* note 9, at 10-11 (discussing the factors motivating political change); *see also* HUNTER ET AL., *supra* note 7, at 186 (quoting C. Raghavan, *The Long March From Stockholm 72 to Rio 92,* TERRA VIVA, June 3, 1992, at 8-9). Raghavan discusses the political difficulty of seeking painful or dramatic change: R

> Ecological constraints are real and more growth for the poor must be balanced by negative throughput growth for the rich . . . Politically, it is very difficult to face up to the need for income redistribution and population stability. If the concept of sustainable development becomes a verbal formula for glossing over these harsh realities then it will have been a big step backwards.

[119] Currently, there is only one binding international treaty solely addressing indigenous rights. *See* International Labour Organization, *Convention Concerning Indigenous and Tribal Peoples in Independent Countries, No. 169*, June 27, 1989, 72 ILO Official Bull. 59, entered into force Sept. 5, 1991, *available at* http://www.ilo.org/ilolex/english/convdisp1.htm [hereinafter *ILO 169*]. While *ILO 169* contains strong protections for indigenous property rights, *see id.* at art. 13-19, fewer than twenty countries have ratified it. *See* International Labor Organization, *Convention No. C169 was Ratified by 17 Countries* (2005), http://www.ilo.org/ ilolex/cgilex/ratifce.pl?C169. In a field of law that depends so heavily on norm building, consensus, and custom, *see* HUNTER ET AL., *supra* note 7, at 273, 313-16, 367, overlapping treaty regimes are important to the creation of truly binding standards of national conduct. *See id.* at 313 (discussing the role of treaties in creating binding customary international law) ("As the number of treaties and declarations that incorporate [a] rule increases, the argument becomes stronger that an international consensus is emerging."). However, even absent further binding treaties, there is a growing consensus that general international legal principles exist regarding indigenous property rights. *See, e.g.*, Mary and Carrie Dann v. United States, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Ser.L/II.117, doc. 5 rev. 1 paras. 129-30 (2002), *available at* http://www.cidh.org/annualrep/2002eng/ USA.11140.htm [hereinafter Dann Case] (emphasizing the emergence of "general international legal principles"). Nevertheless, frequent and continuing abuses of indigenous rights militate for further efforts in this area. R

centuries, the global market economy has gorged itself on fresh infusions of lands, resources, and capital by denying indigenous peoples their basic property rights. In so doing, it has expanded to nearly every corner of the globe, instilling not just a market system, but a market *ideology*. As that ideology butts up against the planet's ecological limits, the global economy nonetheless continues to feed. Recognizing and enforcing indigenous property rights helps close the buffet, both by serving as a prophylactic limit on the appropriative reach of global markets, and by rejecting neocolonialist economic ideologies in favor of alternate—sustainable—approaches.

If colonialist and neocolonialist expansions into indigenous territories have promoted unsustainable environmental practices, it stands to reason that halting and redressing those expansions will have the opposite effect.[120] But one need not rely on that assumption. Countering colonialist expansionism with international protections for indigenous property rights furthers the goal of environmental sustainability in at least two specific ways: (1) by shielding indigenous lands and resources from non-indigenous appropriators, and (2) by preserving indigenous cultural systems best suited to the sustainable management of those lands and resources. Moreover, endorsing such protections marks an important symbolic rejection of colonialist law and practice, militates against the assimilative economic and cultural effects of globalization, and reinforces indigenous peoples' basic human rights.

A. Prophylactic Benefits of Indigenous Property Rights

First, international recognition and enforcement of indigenous property rights closes off vast territories and resource pools from outright appropriation by the world's largest consumers.[121] When corporations invade indigenous territories and extract natural resources, they often act with the permission, tacit or other-

[120] *Cf.* HUNTER ET AL., *supra* note 7, at 1281, 1286, 1292 (noting the correlation between sustainable development and human rights generally). **R**

[121] For instance, a dispute between the Maya people and Belize involved the state's grant of logging and oil concessions on more than 700,000 acres of land. *See* Maya Indigenous Communities and Their Members Against Belize, Case 12.053, Inter-Am. C.H.R. Report No. 78/00, OEA/Ser.L/V/II.111, doc. 20 rev. paras. 34, 36. (2000), *available at* http://www.cidh.org/annualrep/2000eng/ChapterIII/Admissible/Belize12.053.htm [hereinafter Belize Admissibility Decision].

wise, of national governments.[122] This is especially true of transnational corporations in the free-trade era.[123] International protections for indigenous property rights address this problem by affording indigenous communities legal recourse against national governments that participate or acquiesce in such intrusions,[124] and by providing an alternative avenue of relief where domestic legal systems prove inadequate.[125]

Thus, where a state grants a logging concession on an indigenous community's lands, the community can seek to enjoin the state's violation of its property rights under international law, thereby shielding its lands from an environmentally destructive activity.[126] A less dramatic level of protection results where an

[122] *See, e.g.*, Awas Tingni Case, 2001 Inter-Am. Ct. H.R., (ser. C) No. 79, para. 103 (Aug. 31, 2001), *available at* http://www.corteidh.or.cr/docs/casos/articulos/ seriec_79_ing.pdf (challenge to the state's grant of a logging concession on indigenous lands); Maya Indigenous Community of the Toledo District v. Belize, Case 12.053, Inter-Am. C.H.R., Report No. 40/04, OEA/Ser.L/V/II.122 doc. 5 rev. 1 para. 2 (2004), *available at* http://www.cidh.org/annualrep/2004eng/ Belize.12053eng.htm [hereinafter Maya Case] (challenge to state's grant of logging and oil concessions on indigenous lands); *see also Colombia Report*, *supra* note 60, at paras. 31-32 (describing an alleged cooperative effort between a state-owned oil company and international oil companies to engage in drilling on indigenous lands); Perlez & Bonner, *supra* note 82 (discussing the close ties between the Indonesian military and the Freeport-McMoRan mining operation that has devastated the Amungmes' ancestral homelands); *Brazil Report*, *supra* note 3, at paras. 33, 82(f) (noting the state's failure to prevent encroachments on indigenous lands). **R** **R** **R**

[123] *See* Manuel & Schabus, *supra* note 62, at 242. **R**

[124] Generally, international law does not provide redress against non-state actors. *See, e.g.*, Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 794 (D.C. Cir. 1984) (per curiam) (Edwards, J., concurring); *id.* at 805-06 (Bork, J., concurring). However, state actors may be broadly liable for their own *in* action related to the illegal acts of a third party, for example, by failing to exercise due diligence in preventing, investigating, or remedying such acts. *See* Velásquez Rodríguez Case, Inter-Am. Ct. H.R. (ser. C) No. 4, para. 172 (July 29, 1988), *available at* http://www.corteidh.or.cr/docs/ casos/articulos/seriec_04_ing.pdf.

[125] *Brazil Report*, *supra* note 3, at paras. 33, 82(f) (noting the state's failure to maintain and enforce applicable domestic legal protections). **R**

[126] *See, e.g.*, Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Order of the Inter-Am. Ct. H.R., Provisional Measures of Sept. 6, 2002, *available at* http://www.corteidh.or.cr/docs/medidas/mayagna_se_01_ing.pdf [hereinafter Awas Tingni Order] (ordering Nicaragua to take preventative measures to halt third-party resource extraction on indigenous lands). The community would first need to exhaust all adequate domestic remedies. *See, e.g.*, *Maya Case*, Case 12.053, Inter-Am. C.H.R., Report No. 40/04 at para. 175 (alluding to principle, but noting an exception where the state fails to provide an effective judicial remedy). In some instances, principles of nuisance law may further extend this protection beyond the physical boundaries of indigenous territories. For example, an indigenous community might obtain an injunction under a nuisance theory where the state permits third-party actions near indigenous lands that unreasonably interfere with the community's use

indigenous community consents[127] to resource extraction or development on or near its lands but leverages its property rights to win concessions (such as payment of fees or restrictions on the scope or impact of the activity).[128] Using the logging example above, an indigenous community might allow only selective cutting or might prohibit cutting in areas of cultural, economic, or spiritual significance. Thus, depending on the manner in which indigenous communities exert their property rights (i.e., to exclude or to condition entry), their protective effect may vary from absolute prevention to various levels of mitigation to, perhaps, mere delay.[129] However, by interposing a legal barrier in

and enjoyment of its property. *Cf*. López Ostra v. Spain, 20 Eur. H.R. Rep. 277, 289-90 (1994) (finding the state in violation of the privacy rights protected by Article 8 of the European Convention on Human Rights for allowing the operation of a waste-treatment plant twelve meters from plaintiff's home). While not a case involving indigenous property, the principle applied in *López Ostra* represents an innovative analogy to nuisance principles in international law.

127 Of course the appropriate standard should be nothing less than full, informed consent. *See, e.g.*, *Proposed Declaration*, *supra* note 4, at art. XIII, para. 7; *see also* **R**
Maya Case, Case 12.053, Inter-Am. C.H.R., Report No. 40/04 at para. 117 (asserting that indigenous communities have a right not to be deprived of the use and occupation of their lands and resources "except with fully informed consent, under conditions of equality, and with fair compensation") (citing Dann Case, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Ser.L/II.117, doc. 5 rev. 1 para. 131 (2002), *available at* http://www.cidh.org/annualrep/2002eng/USA.11140.htm).

128 *Cf.* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 14 (1982) (discussing an indigenous tribe's right to condition entry to its reservation under U.S. domestic law); *Colombia Report*, *supra* note 60, at para. 31 (noting the right of indigenous **R**
peoples under Colombian domestic law to enter into agreements restricting mining activities in their territories to certain areas).

129 If an indigenous community were to allow resource extraction on its lands solely in exchange for payment, there would be no environmental benefit, only a possible delay for negotiations. Indeed, it is not uncommon for indigenous peoples to engage in economic development activities, some of which may prove to be environmentally damaging. For instance, many tribes in the United States have partnered with non-Indian industrial interests to pursue developments on their reservations, including mines, waste-dumps, and incinerators. *See* Wood, *supra* note 3, **R**
at 1483-86. However, these initiatives are deeply controversial within Indian Country, *id.* at 1486-89, and it can generally be assumed that tribes will pursue development in at least partial accordance with their pre-colonial customs, traditions, and beliefs. *See* WILKINSON, *supra* note 52, at 317-24 (describing the conservation prac- **R**
tices of tribes). In any event, should indigenous communities opt to pursue economic development, such is their right. *See Proposed Declaration*, *supra* note 4, at art. XXI, para. 1 ("The states recognize the right of indigenous peoples to decide democratically what values, objectives, priorities and strategies will govern and steer their development course . . . ."). The legal priority in such instances is not unique to indigenous peoples, and is simply to ensure that indigenous communities are not subjected to duress, fraud, political corruption, or undue economic pressures in their dealings with majoritarian governments and corporations. Tellingly, it is usually in

situations where *outright* appropriation of indigenous lands and resources would otherwise occur,[130] international protections for indigenous property rights achieve a net environmental benefit.

This prophylactic effect essentially is an elaboration of *the* fundamental characteristic of private property in Anglo-American law—the right of the property owner to exclude others.[131] However, in the context of indigenous property, the exclusionary right must be understood in terms of the "varied and specific forms and modalities of [indigenous] control, ownership, use and enjoyment of territories and property."[132] Although indigenous ownership systems are nearly as diverse as the cultures themselves, they generally revolve around some sort of communal land tenure in which ownership of the land is "not centered on an individual but rather on the group and its community."[133] Thus,

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those instances where such abuses have occurred that indigenous peoples have tended to strike disadvantageous bargains. *See, e.g.*, WILKINSON, *supra* note 52, at 306-10 (providing an example of corrupt legal representation in an environmentally destructive and financially disastrous coal-mining project); *id.* at 40-41 (discussing a fraudulent treaty ceding over 7 million acres of tribal land); *id.* at 19-20, 50 (detailing agreements signed under government duress); *see also* Chris Ballard, *The Denial of Traditional Land Rights*, in CULTURAL SURVIVAL Q., Fall 2002, at 39, 41-42, *available at* http://209.200.101.189/publications/csq/csq-article.cfm?id=1565&highlight=Amungme (discussing a post-hoc compensation agreement signed under duress). Finally, in some cases, such as where government agencies are responsible for strictly enforcing the territorial rights of uncontacted tribes, the choice to exclude or condition entry will not rest with the indigenous community at all, and the protective effect will therefore be absolute, assuming the existence of a proxy (perhaps an NGO) that can effectively assert the indigenous community's rights in the event of the state's failure to fulfill its duties. **R**

130 Outright appropriation frequently occurs where domestic property law offers inadequate protections, *see, e.g.*, *Maya Case*, Case 12.053, Inter-Am. C.H.R., Report No. 40/04 at paras. 106-08, 110, 117, 126-27, 131, or is inadequately enforced, *see, e.g.*, *Brazil Report*, *supra* note 3, at paras. 33, 82(f). **R**

131 *See* Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 754-55 (1998); *see also* Merrion v. Jicralla Apache Tribe, 455 U.S. 130, 144-48 (1982) (discussing the right to exclude in the context of semi-sovereign indigenous tribes in the United States). This is not to suggest that indigenous property rights are defined *solely* by the right to exclude. Rather, they exist at the center of a host of cultural, economic, and political rights, including rights to self-determination and self-government. *See, e.g.*, *Awas Tingni Case*, 2001 Inter-Am. Ct. H.R., (ser. C) No. 79 at para. 149; *Proposed Declaration*, *supra* note 4, at art. XV, para. 1 (including property rights within the scope of the indigenous rights to autonomy and self government); *see also Merrion*, 455 U.S. at 146-47 (emphasizing the difference between the ordinary exclusionary rights of individual land owners and sovereign exclusionary rights belonging to indigenous tribes in the United States). **R**

132 *Proposed Declaration*, *supra* note 4, at art. XVIII, para. 1.

133 *Id.* at art. XV, para. 1; *see also* S. James Anaya & Robert A. Williams, Jr., *The Protection of Indigenous Peoples' Rights Over Lands and Natural Resources Under*

where an indigenous community has traditionally held its property as a collective, the right to exclude *must also rest with the collective*.[134] Replacing indigenous systems of communal land tenure with, for instance, Anglo-American-style individual property rights destroys the essential character of the exclusionary right, fracturing it among all the members of the community and destroying its unitary force.[135] In short, recognizing an exclusionary right that is truly protective of the indigenous land base lies, not in altering indigenous ownership patterns to fit Anglo-American property-law systems, but in expanding Anglo-American property-law systems to accommodate indigenous ownership patterns.[136]

The experience of indigenous peoples in the United States dramatically illustrates this point. For most of the period between 1870 and 1970, the U.S. government dedicated itself to destroying tribal communal property structures and forcing Anglo-American modes of individual ownership upon indigenous peoples, most notably through an "allotment" policy designed to split up tribal lands and redistribute them as privately held parcels.[137] President Theodore Roosevelt famously described allot-

the Inter-American Human Rights System, 14 HARV. HUM. RTS. J. 33, 43-44 (2001) (emphasizing the wide diversity of ownership patterns that exist among indigenous peoples, but noting that these patterns are generally grouped around notions of collective ownership).

134 *See Awas Tingni Case*, 2001 Inter-Am. Ct. H.R., (ser. C) No. 79 at para. 149 (defining an indigenous property right as "a communal form of collective property of the land, in the sense that *ownership of the land is not centered on an individual but rather on the group and its community*") (emphasis added).

135 *Compare, e.g.*, *Maya Case*, Case 12.053, Inter-Am. C.H.R., Report No. 40/04 at para. 117 (emphasizing a right of collective ownership), *with, e.g.*, 2 William Blackstone, Commentaries on the Laws of England (Wayne Morrison, ed., Cavendish Publishing 2001) (1766) (defining the right of property as "that *sole* and despotic dominion which *one man* claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe") (emphasis added).

136 *See, e.g.*, *Maya Case*, Case 12.053, Inter-Am. C.H.R., Report No. 40/04 at para. 117 ("[T]he application of the American Declaration [of the Rights and Duties of Man] to the situation of indigenous peoples requires the taking of special measures to ensure recognition of the particular and collective interest that indigenous people have in the occupation and use of their traditional lands and resources . . . .") (citing Dann Case, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Ser.L/II.117, doc. 5 rev. 1 para. 131 (2002), *available at* http://www.cidh.org/annualrep/2002eng/USA.11140.htm.).

137 Allotment was the U.S. government's official Indian policy from the 1887 passage of the General Allotment Act (or "Dawes Act"), ch. 119, 24 Stat. 388 (1887) (repealed by Pub. L. No. 106-462, § 106(a)(1), 114 Stat. 1991, 2007 (2000)), until 1934 when the policy was officially ended by the Indian Reorganization Act (IRA),

ment as "a mighty pulverizing engine to break up the tribal [land] mass."[138] His description, if crude, was apt. By fracturing communal property structures, the United States also undermined tribal solidarity, inviting a rush on tribal lands and resources by non-Indian ranchers, land-speculators, miners, loggers, and industrial interests that ultimately devastated indigenous economies and ruined local ecologies.[139] This "divide and conquer" approach was lubricated by the economic realities of reservation life. Granting valuable individual land rights to impoverished peoples at the very time their traditional economies were collapsing under the weight of assimilationist pressures virtually assured the wholesale transfer of Indian lands and resources to non-Indians.[140] And that is precisely what happened. Of the 140 million acres in tribal possession prior to the commencement of allotment in 1887, only 52 million acres remained by 1934.[141] The termination program introduced in 1953 severed an additional 1.3 million acres.[142]

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ch. 576, 48 Stat. 984 (1934) (codified at 25 U.S.C. § 461-479 (2006)). WILKINSON, *supra* note 52, at 43, 60. The professed goal of allotment was to turn Indians into farmers, thereby assimilating them into the majority culture. *Id.* at 43. To this end, Indian reservations were split into individually held plots (typically 160 acres each), with any remaining "surplus" lands opened up to non-Indian settlement. *Id.* at 43, 50. A similar "termination" policy announced by Congress in 1953 was designed to sell off tribal lands and assimilate Indian people into the majority culture. *Id.* at xiii, 81. The policy, announced by House Concurrent Resolution 108, was effectuated through individual acts targeted at specific tribes. Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L. REV. 139, 151 (1977). R

138 Getches II, *supra* note 53, at 1584 (quoting 35 CONG. REC. S90 (1901)). R

139 *See, e.g.*, WILKINSON, *supra* note 52, at 15-18, 47-51 (describing the effects of allotment on the Quinault and the Nez Perce tribes); *see also id.* at 16 ("Allotment brought woe to every tribe it touched . . . ."); *id.* at 182 ("There were no success stories among the terminated tribes. With their reservations liquidated, members fled to cities or remained near their former homeland, the sense of community shattered and their economic status diminished even more."). R

140 Allottees received fee title to their allotments upon the expiration of a twenty-five year period during which the United States held the allotments in trust for the individual allottees. General Allotment Act, ch. 119, § 5, 24 Stat. at 389. Most having little cultural inclination to farm (even if they were so inclined, their allotments often were ill-suited to farming), allottees frequently sold or leased their allotments to non-Indians, or lost them to mortgage foreclosures and tax defaults. *See* WILKINSON, *supra* note 52, at 16, 49, 71. Moreover, many tribal lands simply were designated as "surplus" and opened to immediate non-Indian settlement. *See, e.g.*, *id.* at 50 (discussing the experience of the Nez Perce). R

141 WILKINSON, *supra* note 52, at 43. R

142 *Id.* at 81. Some tribes were particularly hard hit. The Nez Perce Reservation in Idaho, once a vast, unbroken expanse of treaty-reserved territory, is now a checkerboard of tribal and (mostly) non-tribal lands. *Id.* at 51. In total, allotment cost the

The Quinault Indian Nation is one of the many tribes to have suffered the devastating consequences of allotment. The Quinault inhabit a 200,000 acre reservation along twenty-six miles of coastline on the Olympic Peninsula of Washington.[143] In the early 1950s, they were a stable, if very poor, population, able to maintain a semi-traditional subsistence economy through reliance on their abundant fisheries and rich forest resources.[144] But the prior allotment of their lands from 1905 to 1911[145] had set in motion forces that were about to alter their course dramatically. Allotment had transferred reservation ownership from a single, tribally owned block into more than 2000 individually held parcels, some of which were subsequently acquired by non-Indians.[146] These allotments held some of the most valuable commercial timber on earth, and the dissolution of communal ownership dramatically altered the management incentives, encouraging individual allottees to seek large, one-time payments in exchange for clear-cutting their parcels.[147] The BIA-managed logging operations, which began in 1922[148] but accelerated in the 1950s and continued into the 1970s, devastated the reserva-

Nez Perce 664,000 of the 750,000 acres (eighty-eight percent) of the lands the tribe had retained by treaty in 1863. *Id.* Of the remaining land, only 36,409 acres are now tribally owned; the other 49,252 acres are held as individual allotments, frozen in perpetual trust by the Indian Reorganization Act of 1934. *Id.* at 51, 60. Of course, even the tribe's pre-allotment landholdings were a mere fraction of the sweeping 13.5 million acre territory the tribe controlled heading into treaty negotiations with the United States in 1855. *See id.* at 44 tbl. Although the 1855 treaty reserved 8 million acres to the Nez Perce, miners discovered trace amounts of gold on the reservation shortly after the treaty was signed, leading to a second land reduction treaty in 1863. *Id.* at 39-40. The second treaty, which ceded an additional 7.25 million acres, was executed on behalf of the entire tribe even though several Nez Perce bands had not consented. *See id.*

143 *Id.* at 13-14.

144 *See id.* at 13-15.

145 Quinault Allottee Ass'n v. United States, 485 F.2d 1391, 1394 (1973), *cert. denied*, 416 U.S. 961 (1974).

146 As with other allotted reservations, the Quinault Reservation was immediately divided into individual parcels, but the allottees could not take fee title until the expiration of a twenty-five year trust period. General Allotment Act, Ch. 119, § 5, 24 Stat. 388, 389 (1887) (repealed by Pub. L. No. 106-462, § 106(a)(1), 114 Stat. 1991, 2007 (2000)). However, the IRA of 1934 ended the allotment policy, freezing the individual trusts indefinitely. IRA, ch. 576, § 2, 48 Stat. at 984. As a result, most (about 2/3) of the Quinault Reservation remains in trust. Mitchell v. United States, 591 F.2d 1300, 1300-01 (1979), *rev'd* 445 U.S. 535 (1980).

147 WILKINSON, *supra* note 52, at 16. **R**

148 *Quinault Allottee Ass'n*, 485 F.2d at 1395.

tion.[149] The loggers tore up the land, bulldozing streambeds to build roads and leaving behind vast clear-cuts choked with slash.[150] Erosion and stream blockages caused salmon runs to decline, and the failure to remove slash piles slowed forest regeneration to a crawl.[151] The only real winners were the non-Indian logging companies. The BIA failed to secure fair timber prices for allottees, meaning the timber companies harvested a premium resource at a bargain price while escaping costs associated with slash removal and other sound forestry practices.[152]

Of course, this sort of forced replacement of traditional modes of indigenous ownership with culturally alien ones is the very kind of human-rights abuse that international protections for indigenous property rights are designed to prevent.[153] For its own part, the United States seems finally to have foresworn assimilationist land policies in favor of tribal management and control of tribal lands.[154] Under the current policy era of tribal self-determination, indigenous peoples in the United States have actually increased their landholdings for the first time since European colonialism took root in the Western Hemisphere.[155] Not coincidentally, this bolstering of the tribal land base, accompanied by a widespread revival of traditional indigenous cultures, has mark-

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149 WILKINSON, *supra* note 52, at 16-18. Because most of the allotments remained in trust, the BIA was in charge of overseeing the logging operations, *id.* at 16, for which it charged a management fee that was subtracted from the proceeds of the timber sales. *Quinault Allottee Ass'n*, 485 F.2d at 1395-96. R

150 WILKINSON, *supra* note 52, at 17. R

151 *Id.* at 17-18.

152 *Id.* at 18. In 1971, 1465 Quinault allottees sued the United States for breach of fiduciary duty associated with the BIA's mismanagement of the Quinault logging operation. After extensive litigation and appeals, the U.S. Supreme Court held that the allottees stated a claim for compensation based on a fiduciary duty imposed on the United States by certain timber management statutes. United States v. Mitchell, 463 U.S. 206, 225 (1983).

153 *See Proposed Declaration*, *supra* note 4, at art. XVIII, para. 1 ("Indigenous peoples have the right to the legal recognition of their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property."). R

154 *See* WILKINSON, *supra* note 52, at 189-205, 242 (discussing the adoption and maintenance of the tribal "self determination" policy). However, the U.S. Supreme Court recently has blunted the impact of self-determination with decisions tending to undermine tribal jurisdiction. *See* Getches II, *supra* note 53, at 1594; *id.* at 1595-1618 (discussing pivotal cases); *see also* WILKINSON, *supra* note 52, at 241-42 (contrasting Congress' recent consistency in the area of Indian policy with the judicial turn toward "crabbed" interpretations of Indian rights). R R R

155 WILKINSON, *supra* note 52, at 207. R

place laws purporting to recognize indigenous property rights,[160] domestic law does not always—as the experience of tribes in the United States illustrates—offer full protection to indigenous *modes* of ownership.[161] Moreover, even where domestic law is substantively adequate, it is often mooted by uneven enforcement,[162] financial pressures on governments created by free-trade agreements,[163] and plain old political corruption.[164] Therefore, international law, inasmuch as it is insulated from the internal pressures and policy vacillations of individual states, has a crucial role to play in creating cohesive, universal, property-rights protections effective to halt or slow the raid on indigenous lands and resources.

B. Reciprocal Diversity and Indigenous Stewardship

Besides shielding indigenous lands and resources from destructive uses by outside appropriators, effective exclusionary rights also facilitate sustainable uses by indigenous occupants. Traditional indigenous cultures reflect a deep interconnectedness between indigenous peoples and their ancestral homelands, a relationship that promotes sustainable management and healthy ecosystems.[165] At the same time, a healthy indigenous land base is crucial to the survival of indigenous peoples themselves, who

[160] *See, e.g.*, *Brazil Report*, *supra* note 3, at paras. 5-6, 25-27 (noting Brazil's decisive recognition of indigenous property rights). R

[161] *See* Maya Case, Case 12.053, Inter-Am. C.H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 paras. 106-08, 110, 117, 126-27, 131 (2004), *available at* http://www.cidh.org/annualrep/2004eng/Belize.12053eng.htm (contrasting the state's domestic law regarding indigenous property rights with international law more sensitive to indigenous modes of communal ownership).

[162] *See, e.g.*, *Brazil Report*, *supra* note 3, at paras. 33, 82(f) (noting insufficient enforcement of domestic rights). R

[163] *See* Manuel & Schabus, *supra* note 62, at 242. R

[164] *See, e.g.*, Perlez & Bonner, *supra* note 81 (describing Freeport-McMoRan's payouts to Indonesian military officials); *see also* Ballard, *supra* note 129, at 42 (noting the role of the Indonesian military in pressuring the Amungme people into signing an inadequate post hoc compensation agreement related to Freeport's seizure of Amungme lands for its mining operation). R

[165] *See Proposed Declaration*, *supra* note 4, at pmbl. para. 3 ("Recognizing the respect for the environment accorded by the cultures of indigenous peoples of the Americas, and considering the special relationship between the indigenous peoples and the environment, lands, resources and territories on which they live and their natural resources"); Anaya & Williams, *supra* note 133, at 49 ("The land and resource rights of indigenous peoples cannot be fully understood without an appreciation of the profound, sustaining linkages that exist between indigenous peoples and their lands."); *see, e.g.*, *Brazil Report*, *supra* note 3, at para. 63 (emphasizing the role of traditional Yanomami culture in preserving the ecology); Wallace, *supra* note 19, R R R R

depend on their lands for cultural and spiritual vitality, and not merely for economic gain.[166] As noted in a 1996 United Nations report, this symbiosis has not heretofore been widely understood or adequately protected:

> Many presumed "natural" ecosystems or "wilderness" areas are in fact "human or cultural landscapes" resulting from millennial interactions with forest-dwellers[.] Traditional ecological knowledge is complex, sophisticated, and critically relevant to understanding how to conserve forest ecosystems and to utilize them sustainably[.]
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> . . . .
>
> Unfortunately, since the complex links between biological and cultural diversity have not been generally recognized in the past, this has led to the destruction of biological diversity and to the disappearance of languages, cultures and societies.[167]

Strong indigenous property rights confront this process of biological and cultural attrition by insulating from homogenizing development pressures the variegated land base needed to sustain a diversity of cultural approaches to human interaction with the environment.[168] By contrast, further assimilation of indigenous peoples into an increasingly heterogeneous global society displaces modes of living uniquely adapted to nurture particular

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at 11 (noting the connection between indigenous cultures and ecological preservation in the Brazilian Amazon).

166 Awas Tingni Case, 2001 Inter-Am. Ct. H.R., (ser. C) No. 79, at para. 149; *see also* Maya Case, Case 12.053, Inter-Am. C.H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 para. 120 (Aug. 31, 2001), *available at* http://www.cidh.org/annualrep/2004eng/Belize.12053eng.htm (emphasizing the nexus between indigenous lands and indigenous peoples as important to "not only the protection of an economic unit but the protection of the human rights of a collective that bases its economic, social and cultural development upon their relationship with the land"); *Proposed Declaration*, *supra* note 4, at pmbl. para. 5 ("Recognizing that in many indigenous cultures, traditional collective systems for control and use of land, territory and resources, including bodies of water and coastal areas, are a necessary condition for their survival, social organization, development and their individual and collective well-being"); *see, e.g.*, *Brazil Report*, *supra* note 3, at paras. 22, 82(f) (emphasizing the necessity of protecting the Yanomami land base to preserving the Yanomamis' "integrity as a people"). R R

167 *See* The Secretary General, *Implementation of Forest-Related Decisions of the United Nations Conference on Evironment at the National and International Levels, Including an Examination of Sectoral and Cross-Sectoral Linkages*, Programme Element I.3: Traditional Forest-Related Knowledge, paras. 16(b)-(c), 17, *delivered to the Ad Hoc Intergovernmental Panel on Forests*, E/CN.17/IPF/1996/9 (Feb. 12, 1996), *available at* http://www.un.org/documents/ecosoc/cn17/ipf/1996/ecn17ipf1996-9.htm [hereinafter *UN Report*].

168 *See id.* at para. 17 (Feb. 12, 1996) (noting the simultaneous erosion of biological and cultural diversity).

ecosystems, increasing human stresses on those ecosystems, and exacerbating environmental harms.[169]

Much of the evidence for the environmental advantages of indigenous stewardship can be inferred from the millennial interactions of indigenous peoples with their ancestral homelands, particularly when contrasted with the rapid environmental degradation that occurs when indigenous territories are overtaken by corporations and other appropriators. For instance, the Yanomami people have inhabited the Orinoco River region of present-day Venezuela and Brazil for at least 2000 years while maintaining a relatively stable, self-sufficient economy and relationship with their environment.[170] But beginning in the latter half of the twentieth century (and continuing today) non-indigenous demographic and economic expansionism has threatened that stability as local ecologies and indigenous communities are destroyed to make way for mining, agriculture, stockraising, and other exploitations.[171]

Halting this process and maintaining pre-colonial indigenous stewardship of lands and resources works best where uncontacted indigenous tribes are entirely shielded from non-indigenous encroachment and acculturation. As Indian rights advocate and former president of Brazil's National Foundation for the Indigenous (FUNAI)[172] Sydney Possuelo has observed, "In protecting the isolated Indian, you are also protecting millions of hectares of biodiversity."[173] Despite the overwhelming trend toward globalization, Brazil and other Latin American nations have begun to answer this call, undertaking efforts to demarcate indigenous territories so as to better preserve indigenous cultures in the face of assimilative pressures.[174] International law can bol-

[169] *See id.*; *see also* HUNTER ET AL., *supra* note 7, at 54-55 (describing the growing ecological footprint created by expanding consumerism); *see* Wood, *supra* note 3, at 1483-88 (noting that many tribes in the United States have partnered with non-Indian industrial interests and are "poised to enter the capitalist economy," posing threats to the environment). R R

[170] *Brazil Report*, *supra* note 3, at para. 63. R

[171] *Id.* at paras. 28, 33, 63, 68.

[172] FUNAI is a Brazilian agency which has tutelary jurisdiction over indigenous areas, maintains educational and health care facilities in those areas, and takes part in any legal proceeding in which an indigenous person or an indigenous community is involved. *Id.* at para. 17.

[173] Wallace, *supra* note 19, at 11 (quoting Indian rights advocate Sydney Possuelo). R

[174] *See, e.g.*, *Brazil Report*, *supra* note 3, at para. 31 (noting Brazil's efforts to demarcate indigenous lands); *see also id.* at paras. 5-16 (noting Brazil's rejection of R

ster such efforts by liberating them from competing domestic economic and political pressures.

Indigenous peoples who already have endured varying levels of acculturation present a different case. Just as the prophylactic benefits of indigenous property rights are diluted where indigenous communities do not fully exercise their exclusionary rights,[175] the benefits of indigenous land stewardship will be lessened where indigenous peoples have adopted, forcibly or otherwise, the economic practices of their colonizers. This is the inevitable result of assimilation—a loss of cultural diversity that yields a loss of biological diversity.[176] For instance, indigenous peoples in the United States have been stripped of much of their historical land base pursuant to government policies that accompanied nearly 100 years of forced acculturation.[177] As a result, they have lost their traditional means of subsistence, and their cultures have been indelibly changed;[178] notes Charles Wilkinson, "[T]he battalions of assimilation have marched on every tribe."[179] Thus, it is unsurprising that many tribal councils have partnered with non-Indian industrial interests to pursue development of tribal lands.[180]

But such forays into capitalism should be understood in terms of economic necessity,[181] not as cultural abandonment.[182] Indeed, development decisions typically invite intense intra-tribal controversy,[183] and tribal councils often are torn between the need to provide for the basic needs of their communities and the responsibility they feel for the health of their lands.[184] Moreover, despite these inner tensions, indigenous communities in the United States today are playing an active and vital role in the stewardship of lands and resources,[185] particularly as they re-

assimilationist policies and describing Brazil's constitutional protections for indigenous property and traditional indigenous uses of land and resources).

175 *See* discussion accompanying notes 126-131. **R**

176 *UN Report*, *supra* note 162, at paras. 16(b)-(c), 17. **R**

177 *See* text accompanying notes 137-152. **R**

178 *See* WILKINSON, *supra* note 52, at 353-55. **R**

179 *Id.* at 354.

180 *See* Wood, *supra* note 3, at 1483-86. **R**

181 WILKINSON, *supra* note 52, at xiv, 324, 349; GETCHES I, *supra* note 34, at 15-16. **R** (describing poor economic conditions on reservations).

182 *See* WILKINSON, *supra* note 52, at 353-55 (discussing the tenacity of the "Indian worldview" in the face of the "battalions of assimilation"). **R**

183 *See* Wood, *supra* note 3, at 1486-87. **R**

184 *See* WILKINSON, *supra* note 52, at 324. **R**

185 *See id.* at 317-24.

build their land base,[186] revive their traditional cultures,[187] and generally move out of the shadow of allotment and termination.

The recovery of the Quinault of the Pacific Northwest from destructive allotment-era land policies provides a noteworthy example. After their reservation was left in ruins by allotment and termination-era logging, the Quinault moved quickly in the 1970s to reestablish tribal management of forestlands, thereby revitalizing fisheries and instituting much greater levels of environmental protection than had existed under BIA management.[188] Said one tribal member, "We don't need to be gigantic business successes, we don't need to be gigantic property developers. We should protect the basic things of our life, the fishing, the forest, the beach, the game, and the rivers."[189] This commitment to conservation is inextricably bound up with the right of property—the right of the Quinault to manage their lands as they see fit, in accordance with their pre-colonial customs, traditions, and expertise. As the Quinault experience shows, the choice between disrespecting and respecting that right can mean the choice between a debris-choked clear-cut and a thriving forest ecosystem.

C. Systemic Benefits: Symbolism, Theory, and Human Rights

Environmental benefits aside, each new treaty, resolution, protocol, and judicial or administrative opinion advancing indigenous property rights contributes to a symbolically important renouncement of 500 years of colonialism and further discredits the racist theoretical underpinnings of many domestic property law regimes.[190] Moreover, according legal recognition to indigenous land tenure absorbs into the law a fundamentally different approach to the distribution of land and resources, one that respects development along paths unmarked by neocolonialist socioeconomic structures.[191] By thus freeing the concept of

[186] *See id.* at 207.

[187] *Id.* at 352-55.

[188] *Id.* at 318-21.

[189] *Id.* at 321 (quoting Joe DeLaCruz).

[190] *See supra* text accompanying notes 50-55, discussing the legacy of *Johnson v. McIntosh*; *see also* Jeremy Firestone et al., *Cultural Diversity, Human Rights, and the Emergence of Indigenous Peoples in International and Comparative Environmental Law*, 20 AM. U. INT'L L. REV. 219, 240-42 (2005) (noting the decolonizing effects of international indigenous rights agreements). R

[191] *See, e.g.*, *Proposed Declaration*, *supra* note 4, at pmbl. para. 2 (emphasizing the right of indigenous peoples to pursue development "*in accordance with their own traditions, needs and interests*") (emphasis added); *id.* at art. XXI, para. 1 ("The R

"development" from a particular (environmentally destructive) economic approach, the competing goals of sustainable development are brought closer into harmony.

And finally, for the indigenous peoples who have suffered for centuries at the hands of colonialist and neocolonialist invaders, the importance of indigenous property rights reaches far beyond their impact on environmental sustainability. Rather, they represent crucial *human* rights. Although property rights are important to any human-rights system (implicating, for example, the right to privacy), for indigenous peoples, they are at the absolute center of an intricate web of social, cultural, and economic rights.[192] As the Inter-American Court of Human Rights has explained:

> [T]he close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.[193]

D. Implementation and Enforcement Concerns

Of course, the bare acknowledgement of indigenous property rights is not alone adequate to achieve the environmental, ideational, or human-rights benefits discussed above. Setting aside

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states recognize the right of indigenous peoples to decide democratically what values, objectives, priorities and strategies will govern and steer their development course, *even where they are different from those adopted by the national government or by other segments of society*.") (emphasis added); *cf.* BLAUT, *supra* note 1, at 28-29. **R**

[192] *See, e.g.*, Maya Case, Case 12.053, Inter-Am C.H.R. Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 para. 120 (2004) *available at* http://www.cidh.org/annualrep/2004eng/Belize.12053eng.htm:

> [T]he protection of the right to property of the indigenous people to their ancestral territories is . . . of particular importance, because the effective protection of ancestral territories implies not only the protection of an economic unit but the protection of the human rights of a collective that bases its economic, social and cultural development upon their relationship with the land.

[193] Awas Tingni Case, 2001 Inter-Am. Ct. H.R., (ser. C) No. 79, para. 149 (Aug. 31, 2001) *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf.

certain limitations inherent to international law,[194] the following implementation and enforcement measures are critical to the efficacy of indigenous property-rights protections: (1) the establishment of international tribunals competent to identify and remedy violations of indigenous property rights, whether such violations occur at the hands of states or are precipitated by third parties acting pursuant to state authorization (or acquiescence);[195] (2) the recognition of certain supplementary procedural rights allowing indigenous peoples to actively participate in the enforcement of their substantive property rights;[196] (3) the establishment of administrative procedures obligating states to consider the effects on indigenous lands and resources of state and state-authorized actions within their national borders;[197] and (4) the

[194] These limitations include (1) the general inability of international law to impose binding duties absent state consent (*see* HUNTER ET AL., *supra* note 7 at 273, 304-05, *but see id.* at 314 (discussing "peremptory norms")); (2) the dearth of compliance mechanisms responsive to violations of international law, *see id.* at 272-73, 448-49, 479-83; (3) the need to rely on the potentially inadequate institutional capacity of state governments to implement and enforce international law, *see id.* at 469; and (4) the limited capacity of international law to impose direct duties on non-state actors, *see, e.g.*, Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 794 (D.C. Cir. 1984) (per curiam) (Edwards, J. concurring); *id.* at 805-06 (Bork, J., concurring). *But see* HUNTER ET AL., *supra* note 7, at 289 n.3 (noting increasing opportunities for participation of non-state actors in the processes of international law). **R**

[195] The Inter-American Human Rights System, discussed *infra* at Part IV, provides an example of an international court empowered to issue binding decisions with respect to international human-rights documents. Although the requirement could be fulfilled solely through new or existing domestic tribunals, *see* HUNTER ET AL., *supra* note 7, at 469, an international tribunal is probably preferable given the ineffectiveness of some domestic courts in enforcing indigenous property rights laws. *See, e.g.*, *Brazil Report*, *supra* note 3, at paras. 33, 82(f) (noting judicial and political erosion of indigenous land rights). **R** **R**

[196] In general, these "enabling rights" embrace due-process concerns and include the right to popular participation in public affairs, the right to equal protection and to be free from discrimination, the right to judicial recourse and remedy, and the right to information. *See* HUNTER ET AL., *supra* note 7, at 1312-17. Two specific procedural rights, related to information and public-participation rights, are critically important in the context of indigenous property rights. The first is the right to consultation with respect to state or state-authorized actions within indigenous territories. *See, e.g.*, *Maya Case*, Case 12.053, Inter-Am. C.H.R., Report No. 40/04 at paras. 152-53 (recognizing consultation rights). The second is the right of indigenous peoples to participate in state decisions affecting indigenous lands and resources. *See, e.g.*, *Proposed Declaration*, *supra* note 4, at art. XVIII, para. 5 (guaranteeing participatory rights). **R** **R**

[197] An effective treaty regime would require states to adopt administrative procedures that scrutinize government and government-authorized action through the lens of indigenous property rights. *Cf.*, *Proposed Declaration*, *supra* note 4, at art. XVIII, para. 5 (requiring, in conjunction with indigenous participatory rights, governmental consideration of the impacts on indigenous peoples when states engage in **R**

demarcation of indigenous territories so that states have notice of the boundaries they are charged with protecting and tribunals may more easily determine when a particular action has violated indigenous rights.[198] Such measures address many of the structural obstacles to according indigenous peoples effective property rights within the context of antagonistic domestic property law regimes—many of which have evolved, after all, to achieve the very opposite end: the *denial* of indigenous property rights to serve the asserted proprietary interests of political majorities.[199]

IV

THE INTER-AMERICAN HUMAN RIGHTS SYSTEM AND INDIGENOUS PROPERTY RIGHTS

The Inter-American Human Rights System (IAHRS) presents a promising example of the use of existing human rights struc-

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or authorize extraction of state-owned resources located on or under indigenous territories). Properly realized, these requirements would create something akin to an international "NEPA" for indigenous property rights, which individual states could then implement on the domestic level through parallel policies and enactments. *Cf.* National Environmental Policy Act (NEPA) 42 U.S.C. § 4332 (2006) (requiring U.S. government agencies to assess the environmental impacts of contemplated government action). Administrative safeguards would be especially important where indigenous peoples are unable to assert their own rights, as is the case where "uncontacted" tribes remain isolated from majoritarian societies and governments. Some states already have administrative agencies that serve, or could be adapted to serve, this purpose. *See, e.g.*, *Brazil Report*, *supra* note 3, at para. 17 (discussing FUNAI, the Brazilian agency charged with defending indigenous rights). R

198 *See, e.g.*, *Proposed Declaration*, *supra* note 4, at art. XVIII, para. 8 ("The states shall give maximum priority to the demarcation and recognition of properties and areas of indigenous use."); Awas Tingni Order, Provisional Measures of Sept. 6, 2002, *available at* http://www.corteidh.or.cr/docs/medidas/mayagna_se_01_ing.pdf; *see* Wallace, *supra*, note 19, at 9-10 (describing current efforts to demarcate the territories of uncontacted tribes in the Brazilian Amazon); Anaya & Williams, *supra* note 133, at 77 (noting the importance of demarcation). R R R

199 *See supra* Part II (discussing the evolution of colonialist conceptions of indigenous property rights); *supra* Part III.A (discussing former U.S. policies designed to open tribal lands to non-Indian settlement). *But see Brazil Report*, *supra* note 3, at paras. 5-6, 25-27 (discussing the state's decisive recognition of indigenous property rights); Anaya & Williams, *supra* note 133, at 58-59 (noting a trend in the domestic law of many nations toward recognizing indigenous property rights). For an example of how international law can be used to accord indigenous peoples supplementary legal protections in the face of inadequate domestic property law regimes, see *Maya Case*, Case 12.053, Inter-Am. C.H.R., Report No. 40/04 at paras. 106-108, 110, 117, 126-27, 131 (backstopping inadequate domestic conceptions of aboriginal property rights with international rights requiring the consultation and consent of indigenous peoples prior to governmental authorization of resource extraction on indigenous lands). R R

tures to protect indigenous property rights and provides a positive model for more expansive international efforts in the area. The IAHRS is an arm of the Organization of American States (OAS), an association of the thirty-five independent nations of the Americas.[200] Working through the Inter-American Commission on Human Rights (based in Washington, D.C.) and the Inter-American Court of Human Rights (based in San José, Costa Rica), the IAHRS provides recourse to people in the Americas who have suffered human-rights violations at the hands of the state.[201] The Commission hears petitions in individual cases and also issues reports addressing the human rights conditions of member states.[202] The Court can hear cases referred to it by the Commission, and is empowered to issue binding decisions against those members that have accepted its jurisdiction.[203]

Together, the Commission and Court have issued an impressive body of international case law articulating strong indigenous property rights. Key to their jurisprudence in this area has been their willingness to broadly interpret existing human-rights documents so as to embrace indigenous conceptions of property ownership.[204] For instance, in the much celebrated[205] case of *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, the Court broadly construed the right to property contained in Article 21 of the American Convention on Human Rights to include property held communally by indigenous peoples.[206] The decision was the "first legally binding decision by an international tribunal to uphold the collective land and resource rights of

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200 *See* Organization of American States, *About the OAS: Member States and Permanent Missions*, http://www.oas.org/main/main.asp?sLang=E&sLink=../../documents/eng/oasinbrief.asp (follow "About OAS" hyperlink) (last visited Oct. 1, 2006).

201 *See* Organization of American States, *Key OAS Issues: Protecting Human Rights*, http://www.oas.org/main/main.asp?sLang=E&sLink=http://www.oas.org/DIL/treaties_and_agreements.htm (last visited Oct. 1, 2006).

202 Jorge Daniel Taillant, *Environmental Advocacy and the Inter-American Human Rights System*, The Center for Human Rights and Environment 9 (2001), *excerpted in* HUNTER ET AL., *supra* note 7, at 1328-29. **R**

203 *Id.*

204 *See generally* Anaya & Williams, *supra* note 133. **R**

205 *See id.* at 37-38.

206 *See* Awas Tingni Case, 2001 Inter-Am. Ct. H.R., (ser. C) No. 79, para. 148 (Aug. 31, 2001), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf.

indigenous peoples in the face of a state's failure to do so."[207]

In *Awas Tingni*, the indigenous community challenged Nicaragua's grant of a logging concession to a foreign corporation on lands claimed by the community.[208] The Court began its analysis with Article 21, which states in relevant part: "Everyone has the right to the use and enjoyment of his property."[209] Noting that it was bound by the Convention to broadly interpret human-rights documents, the Court held that Article 21 embraced a right to property in a sense which includes indigenous patterns of communal ownership and possession.[210] The Court went on to clarify the nature of this right: "Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community."[211] Applying that principle to the case before it, the Court held Nicaragua in violation of Article 21 and, in a later proceeding, ordered the state to protect the community's lands from further encroachment until court-ordered demarcation procedures had been completed.[212]

Notable about the *Awas Tingni* case was the Court's clarification that Nicaraguan law did not dictate its interpretation of the Convention. It stressed that the rights articulated in international human-rights documents "have an autonomous meaning, for which reason they cannot be made equivalent to the meaning given to them [by] domestic law."[213] Although Nicaraguan law itself recognized communal property rights, the statement is important because it liberates the Court's jurisprudence from residual colonialist influences in state property law regimes. On the other hand, while the Court declined to use Nicaraguan law as a touchstone, it *did* specifically refer to Awas Tingni custom in holding that possession of the land was sufficient to establish a property right, even absent formal legal title.[214] This deferral to

[207] S. James Anaya & Claudio Grossman, *The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples*, 19 ARIZ. J. INT'L & COMP. L. 1, 2 (2002).

[208] *Awas Tingni Case*, 2001 Inter-Am. Ct. H.R. (ser. C) Case No. 79 at para. 103.

[209] *Id.* at para. 106 (citing American Convention, *supra* note 22, art. 21). **R**

[210] *See id.* at para. 148.

[211] *Id.* at para. 149.

[212] Awas Tingni Order, Provisional Measures of Sept. 6, 2002, *available at* http://www.corteidh.or.cr/docs/medidas/mayagna_se_01_ing.pdf.

[213] *Awas Tingni Case*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79 at para. 146.

[214] *Id.* at para. 151.

indigenous custom represents a marked departure from the colonialist practice of ignoring or marginalizing indigenous systems of land tenure when articulating legal rights.[215]

Several reports of the Commission in individual-petition cases echo the Court's expansive approach to indigenous property rights. A representative case is *Maya indigenous community of the Toledo District v. Belize*. There, the Maya people alleged that Belize violated Article XXIII of the American Declaration on the Rights and Duties of Man[216] by granting logging and oil concessions on over 700,000 acres of the Mayas' ancestral territories without consulting the Maya people.[217] Article XXIII protects "the right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home."[218]

Although Belize—which had inherited a colonialist property rights system from Great Britain[219]—suggested that the Maya people did not possess "aboriginal rights" in the disputed lands under Belizian common law,[220] the Commission determined that domestic law had no impact on the Maya's rights under international law.[221] It then concluded that the Mayas held an indigenous communal property right in the disputed territories,[222] a right the state was bound to protect under Article XXIII.[223] Accordingly, the state had violated Article XXIII by (1) failing to recognize and legally protect the Mayas' communal property

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[215] *See supra* text accompanying notes 46-55. **R**

[216] O.A.S. Res. XXX, *adopted by* the Ninth International Conference of American States (May 2, 1948), *reprinted in* Inter-Am. C.H.R., *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L/V/II.82 doc. 6 rev. 1 at 17 (1992), *available at* http://www.cidh.org/Basicos/basic2.htm [hereinafter American Declaration].

[217] *See* Maya Case, Case 12.053, Inter-Am. C.H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 paras. 27, 99 *available at* http://www.cidh.org/ annualrep/2004eng/Belize.12053eng.htm; Belize Admissibility Decision, Case 12.053, Inter-Am C.H.R. Report No. 78/00, OEA/Ser.L/V/II.111, doc. 20 rev. 1 paras. 34, 36 (2000), *available at* http://www.cidh.org/annualrep/2000eng/ChapterIII/ Admissible/Belize12.053.htm.

[218] American Declaration, *supra* note 216, at art. XXIII. **R**

[219] *See Maya Case*, Case 12.053, Inter-Am. C.H.R., Report No. 40/04, at para. 106.

[220] *Id.* at paras. 110, 126.

[221] *Id.* at paras. 117, 131.

[222] *Id.* at para. 127.

[223] *See id.* at para. 151.

rights, and (2) by granting logging and oil concessions in the Mayas' lands without the Mayas' consultation and consent.[224]

Besides the decisions of the Commission and Court, the IAHRS has developed a Proposed American Declaration on the Rights of Indigenous Peoples.[225] With respect to indigenous property rights, the Declaration restates and reinforces the expansive principles outlined in the decisions of the Commission and the Court. As such, it embodies a remarkable rejection of colonialist law and practice, particularly in its explicit recognition of indigenous modes of property ownership,[226] its affirmation of indigenous rights to traditionally held lands and resources,[227] and its acknowledgment of the importance of those lands and resources to the maintenance of indigenous life-systems.[228] Al-

[224] *Id.* at paras. 152, 153. For a similarly expansive, earlier application of Article XXIII of the American Declaration, see Dann Case, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Ser.L/II.117, doc. 5 rev. 1 paras. 143-45, 171-72 (2002), *available at* http://www.cidh.org/annualrep/2002eng/USA.11140.htm. Ever since the United States instituted a trespass action against Mary and Carrie Dann in 1974 for allegedly grazing cattle on federal lands without a permit, the sisters—members of an autonomous band of the Western Shoshone Tribe—have been entrenched in a court battle with the United States over its unilateral extinguishment of their aboriginal title to those lands. *See* Western Shoshone Nat'l v. United States, 415 F. Supp. 2d 1201, 1203-04 (D. Nev. 2006). After repeated defeats at the domestic level, *see, e.g.*, United States v. Dann, 470 U.S. 39 (1985), the sisters recently took their case before the Commission and won a favorable decision (although no specific relief). *See Dann Case*, Case 11.140, Inter-Am. C.H.R. Report No. 75/02 at paras. 171-72. The Commission determined that the United States had violated the Dann sisters' property rights by extinguishing their aboriginal title without the benefit of certain legal protections accorded to fee owners under U.S. law. *See id.* at paras. 143-45, 171-72. While the Commission declined to rule on the substantive issue of whether the Dann sisters retained title to the disputed lands, *see id.* para. 171, at least one commentator has noted that the Commission effectively determined that "many aspects of U.S. law relating to indigenous peoples are incompatible with international human rights law," including the rights of the United States under the discovery doctrine (discussed *supra* in text accompanying notes 48-55) to unilaterally extinguish indigenous land rights. *See* Anaya, *supra* note 159, at 46 n.138. **R** **R**

[225] *Proposed Declaration*, *supra* note 4. **R**

[226] *Id.* at art. XVIII, para. 1 ("Indigenous peoples have the right to the legal recognition of their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property.").

[227] *Id.* at art. XVIII, para. 2 ("Indigenous peoples have the right to the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied, as well as to the use of those to which they have historically had access for their traditional activities and livelihood").

[228] *Id.* at art. XVIII, para. 4 ("Indigenous peoples have the right to an effective legal framework for the protection of their rights . . . with respect to traditional uses of their lands, interests in lands, and resources, such as subsistence.").

though the Declaration is properly characterized as "soft law,"[229] the principles it states figure prominently in the decisions of the Commission and Court,[230] and may ultimately become binding as customary international law. Importantly, the Declaration was prepared in consultation with representatives of indigenous peoples themselves.[231]

V

CONCLUSION

IAHRS developments in the area of indigenous property rights serve as a positive model for future international agreements. Together with the United Nation's Draft Declaration on the Rights of Indigenous Peoples[232] and the International Labor Organization's Convention 169[233] (the only international treaty solely addressing indigenous rights), IAHRS innovations in this field infuse international law with a tolerance and respect for diverse, *sustainable* approaches to humankind's interrelationship to the environment.[234] At a minimum, they help shield indigenous lands and resources from the appropriative force of the global market economy. These effects will positively impact the global community's efforts to implement the sustainable development concept. Therefore, together with measures directly

229 *See* Pierre-Marie Dupuy, *Soft Law and the International Law of the Environment*, 12 MICH. J. INT'L L. 420, 420-35 (1991) (describing so-called soft international law). *But see Dann Cas*e, Case 11.140, Inter-Am. C.H.R. 860, Report No. 75/02 at paras. 129-30 (noting that the Declaration had emerged as "general principles" of international law).

230 *See, e.g.*, Dann Case, Case 11.140, Inter-Am. C.H.R. 860, Report No. 75/02, OEA/Ser.L/II.117, doc. 5 rev. 1 paras. 129-30 (2002), *available at* http://www.cidh.org/annualrep/2002eng/USA.11140.htm.

231 *See* Anaya & Williams, *supra* note 133, at 35. R

232 *Draft Declaration*, *supra* note 41. R

233 *ILO 169*, *supra* note 119. R

234 *See, e.g.*, *Proposed Declaration*, *supra* note 4, at pmbl. para. 5; *id.* at art. VII, para. 3: R

> Recognizing that in many indigenous cultures, traditional collective systems for control and use of land . . . is varied and distinctive and does not necessarily coincide with the systems protected by the domestic laws of the states in which they live.
>
> . . . .
>
> The states shall recognize and respect indigenous ways of life, customs, traditions, forms of social, economic and political organization, institutions, practices, beliefs and values, use of dress, and languages.

addressing specific environmental issues, further initiatives in this direction should be a central part of the international agenda for realizing environmental sustainability.