When Drills and Pipelines Cross Indigenous Lands in the Americas

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From the Missouri River, passing through the Sonora Desert, all the way down to the Amazon Forest and the Andean Mountains, drills and pipelines are crossing over indigenous lands. In an energy-thirsty continent, there is no land left to spare, not even tribal land. Many of these energy infrastructure projects involve international investments that are protected by treaties and enforced by arbitral tribunals. At the same time, tribal communities have an internationally recognized right to receive prior and informed consultation before they are affected by projects of this nature. The Article focuses on the clash of rights between energy extraction companies investing abroad, and persons in indigenous communities whose lands are being condemned or disturbed to facilitate these companies' extraction activities. As the Article explains, international treaties force the State to protect both these interests and set up norms, backed by international judicial interpretations, that prioritize the economic benefits of resource extraction in the name of public benefits. Consequently, when the rights of investors and communities clash, governments almost categorically side with the interests of foreign investors, at the sacrifice of the interests of local communities. The Article sees this course as endorsing a societal view that elevates economic considerations over noneconomic considerations and advocates a more pluralistic societal view that sees noneconomic

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considerations on par with (and at times, of superior importance to) economic considerations.

I. INTRODUCTION

In the summer of 2015, Sempra Energy announced that it had been awarded a natural gas transportation contract worth $108 million in northern Mexico.[1] The project was one of the earliest results of the opening of Mexican energy markets to foreign investment.[2] The pipeline was to start in Arizona, stretch down 833 kilometers cutting through the Sonora Desert, and provide U.S. natural gas to a combined-cycle power generation plant of the Mexican state-owned company in Chihuahua.[3] The project exemplified the continuing integration of U.S. and Mexican energy markets. For this, and many other projects, Mexico's Minister of Energy, Pedro Joaquin Coldwell, received the 2015 "Minister of the Year" award.[4]

A year later, two members of the Loma de Bacum Yaqui indigenous community in Sonora were murdered, and three hundred others were up in arms protesting against the construction of a nine-mile stretch of the pipeline over their lands.[5] The Loma de Bacum Yaqui community complained that the government did not respect their rights to be consulted before approving the pipeline project and that the crossing of the infrastructure through their lands was a violation of their ancestral way of life.[6] The community further rejected the company's monetary compensation for their losses and the employment offers to its

[1] Dennis Fandrich & Mark Iden, *Sempra Energy Secures Gas Pipeline Transportation Contract in Chihuahua, Mexico*, PIPELINE TECH. J. (2015), https://www.pipeline-journal.net/news/sempra-energy-secures-gas-pipeline-transportation-contract-chihuahua-mexico.

[2] *See generally* Guillermo Jose Garcia Sanchez, *The Fine Print of the Mexican Energy Reform*, *in* MEXICO´S NEW ENERGY MODEL (2018) (describing the importance and legal framework of the Mexican energy reform of 2013).

[3] Fandrich & Iden, *supra* note 1.

[4] Mexico Secretary of Energy, *El Secretario de Energía, Pedro Joaquín Coldwell, recibió premio a Ministro del Año 2015* [Secretary of Energy, Pedro Joaquín Coldwell, received the 2015 Minister of the Year award], GOBIERNO DE MÉXICO (Sep. 17, 2015), https://www.gob.mx/sener/prensa/el-secretario-de-energia-pedro-joaquin-coldwell-recibio-premio-a-ministro-del-ano-2015.

[5] *Yaqui Communities Clash Over Pipeline*, MEX. NEWS DAILY (Oct. 22, 2016), https://mexiconewsdaily.com/news/yaqui-communities-clash-over-pipeline.

[6] The report explains how the activist of the loma de Baum community rejected the monetary compensation offered by the company for being an example of a model that seeks to integrate communities into an economic system that disrespects their ways of life and rights. The public policies adopted by the State displaces the communities from their ancestral lands, forces them to work for the transnational companies and attempts against their culture. Gema Villela Valenzuela, *Yaquis denuncian amenazas de Segob por gasoducto*, CIMACNOTICIAS (2016), https://cimacnoticias.com.mx/noticia/yaquis-denuncian-amenazas-de-segob-por-gasoducto (last visited Mar 3, 2021).

members.[7] By the spring of 2019, the pipeline had been sabotaged several times, and no agreement was in sight.[8] Even though the pipelines were either idle or incomplete and not delivering gas, the Mexican government had to pay investors the regular rate because the delays and circumstances were beyond the foreign investors' control.[9] Under the force majeure contract terms, circumstances out of Sempra's control included sabotages, challenges to the consultation processes with indigenous people, land title issues, and local authorities' permits.[10] In the summer of 2019, the bill piled up to around three billion dollars, and Mexico's new administration announced that it would pursue an arbitration proceeding against the companies in an effort to redefine the contract's terms.[11] The announcement brought down Sempra's shares by 1.1% and its Mexican subsidiary's shares by 4%.[12] After months of negotiation between the state-owned company and Sempra, the State signed an agreement to lower the bill but promised to continue with the project.[13] The Yaquis were left with no other option but to continue their protest.[14] Unfortunately, the Yaquis' story is not unique to Mexico but rather a phenomenon present in the Americas and connected to a deeper energy integration process.

Energy integration in the northern hemisphere is now possible because of Mexico's 2012 decision to open up its sector to private parties and the renegotiation of the North America Free Trade Agreement (NAFTA), now replaced by the U.S.-Mexico-Canada Agreement (USMCA).[15] The old NAFTA framework lacked any

[7] *Id*.

[8] Rob Nikolewski, *Sempra's Subsidiary in Mexico Looks to Put Sabotaged Pipeline Back into Service*, MORNING CALL (Mar. 4, 2019), https://www.mcall.com/sd-fi-sempra-mexico-pipeline-20190304-story.html.

[9] Sergio Chapa, *Abbot to AMLO: Wrap Up Pipeline Probe and Get Natural Gas Moving South*, HOUS. CHRON. (Aug. 6, 2019), https://www.houstonchronicle.com/business/energy/article/Abbott-to-AMLO-Wrap-up-pipeline-probe-and-get-14281518.php.

[10] *Id*.

[11] Dave Graham, *Mexico's President Defiant in Row with Canada Over Pipeline Contract*, REUTERS (June 27, 2019), https://www.reuters.com/article/us-mexico-ienova-canada/mexicos-president-defiant-in-row-with-canada-over-pipeline-contracts-idUSKCN1TS1XF.

[12] *Id*.

[13] *Mexico Reaches Deal with Private Gas Pipeline Firms,* ASSOCIATED PRESS (Aug. 27, 2019), https://apnews.com/d389467505724d84b6a9a5f85f8de72f (last visited Sep 20, 2019).

[14] *Id*.

[15] Corey Paul, *USMCA Deal to Keep Tariffs Off North American Oil, Gas Trade*, S&P GLOBAL MARKET INTELLIGENCE (Dec. 10, 2019), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/56067737 (describing how the USMCA and the opening of Mexico's sector in 2013 allow the energy markets of U.S. and Mexico to integrate further); Shawn Donnan, Andrew Mayeda, Jenny Leonard & Jeremy

protection for U.S. or Canadian companies making deals with Mexico in the production, transportation, and exploitation of hydrocarbons.[16] The state-owned companies, Comision Federal de Electricidad (CFE) and Petroleos Mexicanos (PEMEX), reserved authority over energy production and hydrocarbon development, respectively.[17] Moreover, the construction of energy infrastructure and the integration of the region are part of a broader conversation involving strategic investments in Central America in order to boost their economies and reduce migration flows.[18] An energy integration strategy that begins in the Tar Sands of Canada and continues all the way down to the Amazonian region is a key component to rebuilding governance in the Americas.[19]

All of these discussions surrounding energy integration are happening while the three nations are debating the way energy investments affect vulnerable communities.[20] In the case of Mexico, one only needs to remember that the Zapatista indigenous rebellion started the day NAFTA entered into force, and the exclusion of their rights in the treaty was one of the elements that triggered the uprising.[21] In the case of the U.S., the Keystone XL and the North Dakota pipeline conflicts with the Sioux tribes are recent reminders of the tensions that emerge among

C.F. Lin, *Trump's 'Historic' Trade Deal: How Different is it From Nafta?*, BLOOMBERG (Oct. 2, 2018), https://www.bloomberg.com/graphics/2018-nafta-vs-usmca.

[16] Guillermo J Garcia Sanchez, *The Mexican Petroleum License of 2013, in* THE CHARACTER OF PETROLEUM LICENSES: A LEGAL CULTURE ANALYSIS 27 (Tina Soliman Hunter et al. eds., 2020).

[17] *Id*. at 15, 17, 19, 27.

[18] PETER MEYER, CONG. RESEARCH SERV., U.S. STRATEGY FOR ENGAGEMENT IN CENTRAL AMERICA: POLICY ISSUES FOR CONGRESS, 6–7 (2019), https://fas.org/sgp/crs/row/R44812.pdf; Albert Wynn, *A Reliable Power Grid in Central America May Resolve Migrant Crisis* INSIDESOURCES (Sept. 10, 2019), https://www.insidesources.com/a-reliable-power-grid-in-central-america-may-resolve-migrant-crisis; Economic Commission for Latin America and the Caribbean, *ECLAC Presents the Central America-Mexico Comprehensive Development Plan to the Government of Honduras*, ECLAC (July 25, 2019), https://www.cepal.org/en/pressreleases/eclac-presents-central-america-mexico-comprehensive-development-plan-government [hereinafter Caribbean].

[19] MEYER, *supra* note 18 at 7; Wynn, *supra* note 18; Caribbean, *supra* note 18. For the impact on U.S.-Canada energy integration, see Ben Cahill, *U.S.-Canada Energy Trade in 2019*, CSIS (Dec. 1, 2020), https://www.csis.org/analysis/us-canada-energy-trade-2019.

[20] *See generally* S. James Anaya & Sergio Puig, *Mitigating State Sovereignty: The Duty to Consult with Indigenous People*, 67 U. TORONTO L.J. 435 (2017); Robert J. Miller, *Consultation or Consent: The United States' Duty to Confer with American Indian Governments*, 91 N. D. L. REV. 37 (2015).

[21] Paul Imison, *How NAFTA Explains the Two Mexicos*, ATLANTIC (2017), https://www.theatlantic.com/international/archive/2017/09/nafta-mexico-trump-trade/540906 (last visited Feb 12, 2021).

companies, authorities, and communities.[22] The same can be said of indigenous communities' anti-fracking opposition to the "Idle No More" movement in Canada, during which they were violently confronted by the Royal Canadian Mounted Police in New Brunswick.[23] According to data from the Environmental Justice Atlas, ninety active social conflicts involving fossil fuels and climate justice/energy conflicts have been reported in the three countries,[24] representing approximately 25 percent of the total active social conflicts in the three nations combined.[25]

Government negotiators often treat free trade, energy, and indigenous rights as separate fields, but in practice, they interact with and affect each other. International legal scholars typically overlook this overlap as well.[26] International business transactions courses and academic articles rarely include the study of community rights.[27] On the other hand, human rights literature usually fails to include the study of

[22] For a description of this conflict and the ongoing legal battles regarding the pipeline see James W. Coleman, *Policymaking by Proposal: How Agencies Are Transforming Industry Investment Long Before Rules Can Be Tested in Court*, 24 GEO. MASON L. REV. 497, 514–15 (2017); James W. Coleman, *Beyond the Pipeline Wars: Reforming Environmental Assessment of Energy Transport*, 2018 UTAH L. REV. 119, 137–39 (2018) [hereinafter Coleman, *Beyond the Pipeline Wars*]; James W. Coleman, *Pipelines & Power-lines: Building the Energy Transport Future*, 80 OHIO ST. L.J. 263, 281–83 (2019).

[23] Brenna Bhandar, *The First Nations of Canada Are Still Waiting for the Colonial Era to End*, GUARDIAN (Oct. 21, 2013), https://www.theguardian.com/commentisfree/2013/oct/21/canada-colonial-mentality-first-nations.

[24] Leah Temper, Daniela del Bene & Joan Martinez-Alier, *Mapping the Frontiers and Front Lines of Global Environmental Justice: the EJAtlas*, 22 J. POLIT. ECOL. 255 (2015); *Mapping Environmental Justice*, ENVIRONMENTAL JUSTICE ATLAS, https://ejatlas.org/ (last visited Sept. 25, 2019). I used the Atlas per country available on the website and categorized those conflicts as Fossil Fuels and Climate Justice/Energy. As of February 22, 2021, the Atlas identifies 24 conflicts for Mexico, 45 for the U.S., and 21 for Canada. *See Countries*, ENVIRONMENTAL JUSTICE ATLAS, https://ejatlas.org/country.

[25] *Id*. The total number of social conflicts reported by country are the following: United States 152, Mexico 139, Canada 62. *Id.*

[26] Sergio Puig, *International Indigenous Economic Law*, 52 U.C. DAVIS L. REV. 1243, 1247 (2019).

[27] Take for example the classical introductory book on International Business Transactions from Ralph Folsom et al, where there is a full section on the protection of foreign investments, regulatory takings, and international dispute resolution mechanisms, but there is no mention of the companies' obligation to respect human rights, indigenous rights, the environment, etc. RALPH FOLSOM, MICHAEL WALLACE GORDON & JOHN SPANGOLE, INTERNATIONAL BUSINESS TRANSACTIONS IN A NUTSHELL (8th ed. 2009). Another example can be found in Rudolph Dolzer and Christopher Schreuer's classical book, "Principles of International Investment Law," where there is no mention of the companies' relations with communities or human rights norms, but there is a full section of political risk insurance and the principles that protect foreign direct investment against interference with their assets. RUDOLPH DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2008).

international companies and their investment rights.[28] The investment system and the human rights regime are traditionally studied as separate silos, where specialized courts develop principles and standards to bring consistency and systematicity to each regime.[29] Scholars and adjudicators might borrow from other fields, but they do not see them as belonging to the same sphere.[30] As stated by Professor Sergio Puig: "Except for the occasional shared conference or workshop, these fields are typically separated into distinct, often insular, epistemic communities."[31] The global efforts that have tried to attend this disparity focus on the duties that nonstate actors, such as international companies, have to respect human rights.[32] Indigenous people's advocates focus on delineating the extent to which government responsibilities can be extended to powerful actors such as transnational corporations.[33] In the same vein, investment law scholars who are interested in addressing the social implications of foreign investment advocate for the inclusion of amicus briefs by affected communities in the proceedings and for the inclusion of social corporate responsibility principles in investment treaties.[34]

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[28] MARIA VICTORIA CABRERA ORMAZA, THE REQUIREMENT OF CONSULTATION WITH INDIGENOUS PEOPLES IN THE ILO (1st ed. 2017); Jason Tockman, *Eliding Consent in Extractivist States: Bolivia, Canada, and the UN Declaration on the Rights of Indigenous Peoples*, 22 INT'L J. HUM. RTS. 325 (2018); Tara Ward, *The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law*, 10 NW. J. INT'L HUM. RTS. 54 (2011); Siegfried Wiessner, *The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges*, 22 EUR. J. INT'L LAW 121 (2011).

[29] Puig, *supra* note 26, at 1251.

[30] *See generally* Sergio Puig and Gregory Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law,* 112 AM. J. INT'L LAW 361 (2018) (describing how different advocates for the reform of investment law approach the process from three different angles: efficiency (law and economics scholars), fairness (Rawlsian-oriented scholars), and interstate relations, power, and conflicts (realist-oriented scholars.)).

[31] Puig, *supra* note 26, at 1251. Another example of scholars creating a bridge to connect fields can be found in Mariana Hernandez Crespo G., *A New Chapter in Natural Resource-Seeking Investment Using Shared Decisions System Design (SDSD) to Strengthen Investor-State and Community Relationships*, 18 CARDOZO J. CONFLICT RESOL. 551, 564–65, 580, 585 (2017).

[32] U.N. Human Rights Council, Guiding Principles on Business and Human Rights, U.N. Docs. HR/PUB/11/04; James Anaya, Report of the Special Rapporteur on the Right of Indigenous People on Extractive Industries Operating Within or Near Indigenous Territories, U.N. Docs. A/HRC/18/35 (July 11, 2011), https://www.ohchr.org/Documents/Issues/IPeoples/SR/A-HRC-18-35_en.pdf.

[33] U.N. Human Rights Council, Guiding Principles on Business and Human Rights, *supra* note 32.

[34] FAROUK EL-HOSSENY, CIVIL SOCIETY IN INVESTMENT TREATY ARBITRATION: STATUS AND PROSPECTS 251–54 (2018) (offering a comprehensive study of all the efforts by the system to include civil society in the arbitral proceedings).

This Article follows the invitation of this new scholarship to reflect on whether energy projects, investor rights, and community rights should be analyzed as belonging to the same field.[35] It invites the reader to see investment law, energy law, and community rights as different views of the same cathedral. But instead of shedding light on the arcs of duties that connect government and companies in a globalized economy, it takes us to the underground crypt of the cathedral—to the foundations of the State's right to extract natural resources. The development of energy projects depends on who owns the resources necessary to produce and transport energy, and on what types of relationships emerge from the "bundle of rights" created by property law. This Article takes the view that the three fields, investment, human rights, and sovereign rights over natural resources, give normative meaning to the way international law deals with property conflicts surrounding energy development projects.

The following Parts propose a novel way to view the cathedral's foundations. Part II describes the canons of the international legal fields that impact natural resource production on indigenous land: sovereign rights over natural resources, the human rights regime, and the investment regime. Sections A–D review how each field studies and defines the protection of the right to property from third-party interference and how the regimes resolve the clash of rights. Part III looks at representative cases where the regimes clash leaving the State trapped in the middle. Finally, Part IV defines how a paradigm in the energy academia, energy justice, creates ways of understanding the value of natural resources and the interests of the actors involved in their development.

[35] LOCAL ENGAGEMENT WITH INTERNATIONAL ECONOMIC LAW AND HUMAN RIGHTS (Ljiljana Biukovic & Pitman B. Potter eds., 2017); Puig, *supra* note 26, at 1244.

II. THREE COLLIDING REGIMES: THE SOVEREIGN RIGHTS OF EXTRACTION, THE DUTY TO CONSULT INDIGENOUS PEOPLE, AND THE PROTECTION AND SECURITY OF FOREIGN INVESTORS PROPERTY

For decades, the energy industry and disenfranchised communities have had a complicated relationship.[36] Nevertheless, the social damage that energy infrastructure brings to communities was not internationally recognized until the 1990s.[37] The 1994 executions of Ogoni activists in Nigeria to protect Royal Dutch/Shell's operations changed the international perception of the industry.[38] Soon after the Nigerian outcry, other cases began to see the light of public scrutiny: BP Amoco and Occidental Petroleum's operations' connection to abusive military forces in conflict zones; Unocal and Total's Myanmar pipeline projects in partnership with government forces who condoned forced labor; Mobil Oil's natural gas fields operations in the Indonesian province of Aceh and the forced disappearance of villagers; and Enron's confabulations with local police to suppress local opposition to the construction of a power plant south of Bombay, India.[39] The conflicts have always been there, but in past decades they have translated into a rights conflict narrative that tends to be resolved through a cost-benefit analysis.

What aggravates the clash of rights is the fact that there are two competing false narratives. On the one hand, there is always the promise from governments and companies that the investments made by the extractive industries will generate some trickle-down development in the communities.[40] As such, the economic benefits to

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[36] HUMAN RIGHTS AND THE OIL INDUSTRY (Asbjorn Eide, Helge Ole Bergesen, & Pia Rudolfon Goyer eds., 2000); Ivonne Cruz, Adrian Duhalt & Pamela Lizette Cruz, *Social Conflicts and Infrastructure Projects in Mexico*, RICE UNIVERSITY'S BAKER INST. FOR PUBLIC POLICY 1, https://www.bakerinstitute.org/media/files/files/e7aec681/bi-report-062119-mex-socialconflict.pdf (last visited Sept. 25, 2019).

[37] Geoffrey Chandler, *The Responsibility of Oil Companies*, *in* HUMAN RIGHTS AND THE OIL INDUSTRY, *supra* note 36, at 5; *see also* Arvind Ganesan, *Human Rights, the Energy Industry, and the Relationship with Home Governments*, *in* HUMAN RIGHTS AND THE OIL INDUSTRY, *supra* note 36.

[38] Ganesan, *supra* note 37, at 47.

[39] *Id*. at 47–48; Chandler, *supra* note 37, at 10–14.

[40] *See generally* Sergio Puig & Gregory Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law*, 112 AM. J. INT'L LAW 361, 371–73 (2018) (describing how there are three competing goals in the reform of investment treaties, fairness, efficiency and peace, but that they ignore assessing adequately the tradeoffs of each alternative); for the role by lawyers and experts in creating institutional frameworks supporting development goals based on economic theory but ignoring the real impacts on society see David Kennedy, *The "Rule of Law," Political Choice, and Development Common Sense*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT 95 (David M

the communities should outweigh the negative effects of the infrastructure built on their land. On the other hand, there is the perception furthered by nongovernmental organizations (NGOs) that indigenous and local communities' right of previous and informed consultation is a right to approve or reject the projects that are being planned by the government.[41] Both are false narratives that fail to resolve the tensions that emerge when governments approve the concessions, licenses, and permits; infrastructure is built; communities revolt against the investor; and the State is forced to choose between protecting the investment or the communities. The State decision is informed partly by political considerations but also by the international consequences attached to treaties where the government pledged to protect both of them.

As the following Sections will show, the way international law recognizes the rights of the State to extract its natural resources and how international investment and human rights regimes deal with breaches of treaties aggravates the tension. The three regimes have ultimately monetized rights violations in a way that leaves communities on the wrong side of the government's cost-benefit analysis. This monetization arises from the fact that the foundations of the State's right to extract natural resources rely on a classical liberal and utilitarian view of property rights that overemphasizes the value of economic welfare, as opposed to recognizing community-based interest and multi-layered relationships that arise out of the existence of property rights.[42] The liberal and utilitarian foundation and its focus on economic welfare is then replicated in the indigenous and investment regimes.

A. *States' Rights Over Natural Resources and their Liberal and Utilitarian Foundations*

The purpose of this Section is to explain how the liberal and utilitarian foundations of the State's rights to extract its natural resources set the stage for the clash of rights between indigenous communities and investors. The right to extract a hydrocarbon or to

Trubeck & Alvaro Santos eds., 2006); David Kennedy, *Challenging Expert Rule: The Politics of Global Governance*, 27 SYD. L. REV. 5, 26 (2005).

41 *See generally* Anaya & Puig, *supra* note 20; Puig, *supra* note 26; Miller, *supra* note 20.

42 Joseph William Singer, *Property and Social Relations: From Title to Entitlement*, *in* PROPERTY AND VALUES: ALTERNATIVES TO PUBLIC AND PRIVATE OWNERSHIP 3–4 (Charles Geisler & Gail Daneker eds., 2000) [hereinafter Singer, *Property and Social Relations*]; *see also* Joseph William Singer, *Indian Title: Unraveling the Racial Context of Property Rights, or How to Stop Engaging in Conquest*, 10 ALBANY GOV'T L. REV. 1 [hereinafter Singer, *Indian Title*].

build infrastructure to transport energy products in the name of consumers, the State, or in general for a "public benefit" sits at the center of the conflicts that emerge. These questions are not new for property law scholars. There is a rich and longstanding debate among property law scholars on how the law deals with the tensions among individual property rights, the State's powers to infringe on them for public benefits, and the State's use of private parties to achieve the alleged social goals.[43] This Article does not intend to exhaust the debate but rather to show how these unresolved tensions are also present in the international legal regimes that regulate State exploitation of mineral resources and the protection of property of investors and indigenous people.

The unresolved debate in domestic property law reemerges at the international level because the State's right to extract resources has a liberal and utilitarian foundation. The way international law regulates the rights of the sovereign to extract resources in their territory aggravates the conflict that emerges when the governments also pledge in separate instruments to protect indigenous communities' land and foreign investors' property from third-party interference. In many energy-related projects, these two pledges collide, and the State relies

[43] *See e.g.*, Jennifer Nedelsky, *Should Property Be Constitutionalized? A Relational and Comparative Approach, in* PROPERTY LAW IN THE THRESHOLD OF THE 21ST CENTURY 417, 427 (G.E. van Maanen & A.J. van der Walt eds., 1996) ("[P]roperty implicates the very core issues of politics: distributive justice and the allocation of power."); Singer, *Property and Social* Relations, *supra* note 42; Charles E. Cohen, *Eminent Domain After* JKelo v. City of New London: *An Argument for Banning Economic Development Takings*, 29 HARV. J.L. & PUB. POL'Y 491, 497 (2006) ("Rather than advancing the goals of efficiency and justice, modern eminent domain practices in the area of economic development are tainted by the abuse of existing property owners (particularly, but not exclusively, in the form of undercompensation for taken property), capture by special interests, and inefficiency."); Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997, 998 (1999) ("In a vast and otherwise contentious literature, whether judicial opinions or scholarly books and articles, there appears to be a virtual consensus that the purposes of just compensation are essentially two[:] . . . 'efficiency' and 'justice[]'"); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1173 ("[A]n 'efficient' process is one which maximizes the total amount of welfare, of personal satisfaction, in society, and not all satisfaction is material."); Timothy M. Mulvaney, *Property-as-Society*, 2018 WIS. L. REV. 911, 912–13 (2018) (describing how the modern regulatory takings disputes unmask the competing conceptions of property: property-as-liberty, property-as-investment, and property-as-society); Eduardo M. Peñalver, *Property Metaphors and* Kelo v. New London*: Two Views of the Castle*, 74 FORDHAM L. REV. 2971, 2974 (2006) ("When owners prove unwilling or unable to sort out disagreements about . . . spillover effects on their own, the state [has] to make decisions about which spillover effects owners must tolerate and which spillover-creating actions they may not take . . . ."); Laura S. Underkuffler, *The Politics of Property and Need*, 20 CORNELL J.L. & PUB. POL'Y 363, 370 (2010) ("No societally recognized and enforced property right, which is 'normatively neutral,' actually exists.").

on a cost-benefit analysis and the monetization of the property rights to resolve the tension. The international regimes downplay the "public benefit" of the social, cultural, and spiritual connection that indigenous people have with their land and overemphasize the economic "benefits" that building energy infrastructure through private parties provides to the State.

International treaties that regulate a State's sovereign rights to extract its natural resources rely on a conception of property rights in which the emphasis is given to the land's economic value as a means to achieve development.[44] I argue that this conception is based on a liberal and utilitarian conception of property rights. It is liberal and utilitarian because it serves the purpose of protecting individual freedom, translated as State sovereignty at the international level, and also promotes economic investment in the land, downplaying other community-based values.[45] Under the liberal view, individuals are considered absolute within their own "castle" only subject to intervention in the name of a greater common good.[46] International law treats State sovereignty over its territory and resources in a similar way as the liberal view treats individual property rights. Both property views assume the existence of "permanent rights of absolute control" through the existence of the power to exclude others and "the full power to transfer those rights completely or partially on such terms as the owner may choose."[47]

The international treaties that regulate the rights of the State over their natural resources also have a utilitarian view because they conceive natural resources mainly as "tools" to advance economic

[44] *See generally* NATURAL RESOURCES AND SUSTAINABLE DEVELOPMENT. INTERNATIONAL ECONOMIC LAW PERSPECTIVES (Celine Tan and Julio Faundez eds., 2017); *see also* Singer, *Property and Social Relations, supra* note 42, at 3–4.

[45] Mulvaney, supra note 43, at 912. This is what Professor Mulvaney characterizes the traditional conceptions of property "a libertarian view sees property as creating a sphere of individual freedom and control (property-as-liberty); a pecuniary view sees property as a tool of economic investment (property-as-investment)." *Id.* Professor Mulvaney also identifies a progressive view that "sees property as serving a whole host of evolving social goals including, but not limited to, the aforementioned goals of promoting freedom and encouraging economic investment (property-as-society)." *Id.*

[46] Singer, *Property and Social Relations, supra* note 42, at 5. The traditional view of property rights has its genesis in John Locke's philosophy on the "state of nature." JOHN LOCKE, TWO TREATISES OF GOVERNMENT §§ 30–32, 37 (Thomas Hollis ed., 1764) (ebook). Under his philosophy, property has the main purpose of cultivating and improvement. Mere possession cannot be the purpose of the title. Following Locke's views on the nature or property, it is easy to conclude that indigenous possession that does not seek to generate economic benefits, as it is not transferable as a property right. Under the law of nature, indigenous property is rather a type of usufruct or habitation.

[47] Singer, *Property and Social Relations, supra* note 42, at 5.

development for the greater good.[48] Little attention is given to the fact that natural resources might serve other social values, such as cultural or religious heritage.[49] This is particularly true for social values that do not conform to the heritage of the majority of the population. Conversely, indigenous people conceive their land and natural resources primarily through social, cultural, and religious relations. These natural resources are not means to an end; they are the essence of their culture.

A liberal and utilitarian approach to property is not without contradictions. On the one hand, the liberal view affirms title owners' absolute right of exclusion, and on the other, the utilitarian foundation regulating the property of natural resources is preoccupied with the task of transforming the environment to create an agricultural and urban industrial economy.[50] The State encourages economic actors to tame the "wilderness" and transform it for development benefit.[51] In that process, regulation and property law are constructed and reconstructed to drive economic transformation forward, even above the right of exclusion of titleholders.[52] Except for in a few circumstances, preservation is discouraged and rules of landownership are shaped to incentivize economic growth.[53]

The United Nations General Assembly Resolution on Permanent Sovereignty Over Natural Resources of 1963 is a clear example of how the absolute right of exclusion and the economic drive over natural resources materialized internationally.[54] The resolution, adopted by a vote of eighty-seven to two with twelve countries abstaining, recognizes the "inalienable right of all States freely to dispose of their natural wealth and resources in accordance with their national interests and in respect for the economic independence of the States."[55] This widely accepted international instrument affirms further that "natural wealth and resources must be exercised in the interests of their national

[48] Celine Tan & Julio Faundez, *Introduction*, in NATURAL RESOURCES AND SUSTAINABLE DEVELOPMENT *supra note* 44 at 1–2; Joseph L. Sax, *Ownership, Property, and Sustainability Symposium: The Challenge of Sustainability*, 31 UTAH ENVTL, L. REV. 1, 4 (2011).

[49] Singer, *Property and Social Relations, supra* note 42, at 5. In the classical approach, the owner is identifiable "by formal title rather than by informal relations or moral claims." *Id.*

[50] Sax, *supra* note 48, at 4.

[51] *Id.* at 5.

[52] *Id.* at 6.

[53] *Id*.

[54] United Nations General Assembly Resolution on Permanent Sovereignty Over Natural Resources, 1803 GAOR 15 (1962).

[55] *Id*.

development and the well-being of the people."[56] The text of the declaration employs terms such as "exploration, development and disposition," and uses "foreign capital" to achieve these goals only subject to the "rules and conditions" set up by the different nations.[57] In other words, the resolution recognizes the absolute right of the State to exclude others, be them foreign governments or private entities, and exploit the natural resources in its territory for economic development. It is the international version of a classical and utilitarian vision of property rights, which puts exploitation over conservation first and treats property owners as absolute only subject to the limits of an undefined public good.

Here is where the paradox of the property regime in the context of indigenous rights emerges. For indigenous communities to exercise property rights against others, they must downplay their property's spiritual, religious, and social value. Instead of promoting the inclusion of the "others" into the benefits of their culture, communities are forced to argue for the exclusion of others. Once the title is recognized, the communities can exclude other private owners, but they are then subject to the limits of the State's public interests.[58] In the name of "public benefits," lands are expropriated, and communities are relocated. For the sake of benefiting loosely defined social progress, individual or indigenous property rights cannot get in the way of the "social progressive view" of property rights that trumps a titleholder's rights of exclusion.[59] It is the State's expansion over property rights in the name of public interest-oriented projects or public interest regulation.[60]

This "social" view of the value of property tends to outbalance the consequences of affecting the titleholder's individual freedom against the economic benefits that a particular project will bring into society. This restriction on the right of exclusion exists particularly in countries where mineral rights located in the same land belong to the governments, and those governments require the minerals' extraction

56 *Id.*

57 *Id*.

58 Singer, *Indian Title*, *supra* note 42, at 27.

59 Mulvaney, *supra* note 43, at 912; *see also* Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT 19, 42–43, 60 (David M Trubeck & Alvaro Santos eds., 2006) (discussing how the "social" progressive view fits under the second globalization of legal thought that sought to dismantle an over emphasis on the laissez fair, individual rights, private law, and private interests over the economy).

60 Mulvaney, *supra* note 43, at 912.

to fund social programs.[61] The government agencies may then choose to negotiate with private third parties over the exploitation of the resources and award concessions, licenses, or other contractual schemes for that purpose.[62] Companies become an "arm" of the State; they develop the resources on behalf of the nation in exchange for participation in production or profits.[63]

If the State protected indigenous peoples' communal property interest over other economic and social interests, i.e., energy consumers, the paradox would not emerge. On the contrary, indigenous communities could rely on State intervention for the protection of their communal life.[64] But the State tends to weigh the different interests and values protected by property rights, and in that cost-benefit analysis, energy infrastructure projects seem to trump communal life.[65] To be clear, I do not argue that contemporary legal systems completely disregard community values. For example, property law doctrines recognize public prescriptive easements and public nuisance. Liberal and utilitarian conceptions of property law, however, allow societies to normatively deny that indigenous culture provides the same public benefits as national historical landmarks or environmentally sensitive lands.[66] Few would argue that the economic benefits of building invasive energy infrastructure in a historical site such as Gettysburg's battlefield, the Arlington National Cemetery, or the National Cathedral in Mexico City outweigh the loss to society. We do, however, justify drilling on indigenous sacred lands in forests or the construction of

[61] Garcia Sanchez, *The Mexican Petroleum License of 2013*, *supra* note 16, at 216–17; Guillermo J. Garcia Sanchez, *A Critical Approach to International Investment Law, the Hydrocarbons Industry, and Its Relation to Domestic Institutions*, 57 HARV. INT. LAW J. 477–80, 490 (2016).

[62] *See generally* NATURAL RESOURCES AND SUSTAINABLE DEVELOPMENT, *supra note* 44; Garcia Sanchez, *The Mexican Petroleum License of 2013, supra* note 16; Garcia Sanchez, *A Critical Approach*, *supra* note 61 at 477–80.

[63] Garcia Sanchez, *The Mexican Petroleum License of 2013*, *supra* note 16, at 219–20.

[64] *See* Singer, *Indian Title, supra* note 42, at 30. Joseph Singer's proposal to solve the paradox is to limit the eminent domain powers of the State. While the state in general is free to take fee simple property for public use with just compensation, what could protect the communities is a title that allows the State to obtain tribal lands only with tribal consent.

[65] *See id.* at 32. Singer's *Johnson* case interpretation has a dual protection: "[T]he United States has a right of first refusal to tribal lands. That means that the tribe cannot transfer fee simple title to anyone other than the United States and that the United States cannot acquire tribal title without the voluntary consent of the tribe." *Id.*

[66] Contemporary legal systems, particularly in the U.S., do recognize that there are properties that are immune from eminent domain, but the question is whether indigenous lands should also be awarded the same treatment.

pipelines on tribal burial grounds as providing substantive energy benefits for the State or consumers.

B. *The International Rights of Indigenous People and the Tensions with States' Sovereign Rights over Natural Resources*

International treaties and resolutions on indigenous people's rights have mitigated the way the State exercises its sovereignty over their land, culture, and social relations.[67] There is a rich literature discussing the importance and effectiveness of the indigenous-rights treaties, conventions, and resolutions.[68] The literature tends to focus on the processes of implementing the rights of indigenous people to receive prior, free, and informed consultation for any development project in their land.[69] This Article, however, moves the debate to the perspective of the State that has a sovereign right to exploit natural resources in the name of progress. A liberal and utilitarian view of property law that diminishes the value of indigenous cultural, spiritual, and social connection to resources influences the international norms that regulate the State's sovereign rights to exploit them. The liberal and utilitarian view is so prevalent that it is replicated in other international instruments that converge around energy projects.

For example, the same international conventions that recognize indigenous communities' rights and important cultural value to humanity affirm that, when it comes to natural resources and the State's right to extract them, the only protection left to indigenous communities is the right to be consulted. These conventions also reaffirm the monetization of the property by requiring the State to integrate them in the economic benefits of the extraction. When placed in a balance, the social, cultural, and spiritual connections to the land are forcefully converted into economic benefits.

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[67] *See generally* PATRICK MACKLEM, THE SOVEREIGNTY OF HUMAN RIGHTS (Oxford University Press, 1st ed. 2015); Anaya & Puig, *supra* note 20; James Anaya, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to* Development, U.N. Doc. A/HRC/12/34, (July 15, 2009) (explaining the origins and scope of the duty of states to consult, as written by the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People) [hereinafter Anaya, *Promotion and Protection of All Human Rights*];.

[68] *See generally* Anaya & Puig, *supra* note 20; Anaya, *Promotion and Protection of All Human Rights*, *supra* note 67; MACKLEM, *supra* note 67.

[69] *See generally* Anaya & Puig, *supra* note 20; Anaya, *Promotion and Protection of All Human Rights*, *supra* note 67; MACKLEM, *supra* note 67.

The right to consultation is enshrined in international instruments, mainly the United Nations General Assembly Declaration of Indigenous Rights of 2007 ("UN Indigenous Rights Declaration")[70] and Convention 169 of the International Labor Organization of 1989 ("ILO Convention 169").[71] The preamble of the ILO Convention 169 recognizes "the aspirations of [indigenous and tribal] peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live."[72] The preamble also recognizes "the distinctive contributions of indigenous and tribal peoples to the cultural diversity and social and ecological harmony of humankind and to international co-operation and understanding."[73] The Convention then recognizes the responsibility of the State to "respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories."[74] There is a clear recognition that indigenous people have a unique relationship with the land and natural resources. The ILO Convention 169, however, also recognizes that the State can exploit the same resources, and that international law does not recognize a right to oppose such a development.[75] Article 15 of the ILO Convention 169 provides:

> In cases in which the *State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands*, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands.[76]

The right to be consulted and the duty of the State to evaluate the impact do not translate to a right to veto or oppose the project. This is even clearer when the same article adds that the "peoples concerned

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[70] A majority of 144 States voted in favor, 4 voted against (Australia, Canada, New Zealand and the United States), and 11 states abstained (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine). *See* G.A. Res. 61/295 (Oct. 2, 2007) [hereinafter *UN Indigenous Rights Declaration*].

[71] United Nations, Indigenous and Tribal Peoples Convention (No. 169), June 27, 1989, 72 ILO Official Bull. 59 [hereinafter *ILO Convention 169*].

[72] *Id*.

[73] *Id*.

[74] *Id*.

[75] *See* Anaya & Puig, *supra* note 20, at 435–36.

[76] *ILO Convention 169*, *supra* note 71, at art. 15 (emphasis added).

shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities."[77]

The same principle is recognized in Article 32 of the UN Indigenous Rights Declaration, where it provides:

> States shall consult and cooperate in good faith with the indigenous peoples . . . in order to obtain their free and informed consent prior to the approval of any project affecting their lands and territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water, or other resources.[78]

In case the project proceeds, "[s]tates shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact."[79] Additionally, Article 28 of the UN Indigenous Rights Declaration sets the "right to redress, by means that can include restitution or, when this is not possible, *just, fair and equitable compensation*, for the lands, territories and resources . . . which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent."[80]

Hence, the system both recognizes the spiritual, social, and religious connection of the indigenous people to the land and the State's rights to exploit the mineral resources when needed, subject to "just, fair and equitable compensation."[81] Again, indigenous property is treated as any other right being affected by a public purpose is treated, and the definition of what is to be considered a public benefit depends on government officials and their normative commitments. When push comes to shove, the economic benefits of contracting with private parties to develop natural resources on behalf of the State supersedes the interests of indigenous communities. At that point, the State's only duty is to mitigate the damages and compensate the communities with some economic benefit.

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77 *Id*.

78 *UN Indigenous Rights Declaration*, *supra* note 70, at art. 32.

79 *Id*.

80 *UN Indigenous Rights Declaration*, *supra* note 70, at art. 28. (emphasis added)

81 *See id*.

1. Indigenous Communities' Rights of Consultation and the Inter-American System of Human Rights

As explained further below, the Inter-American Court of Human Rights (IACtHR), sitting in San Jose, Costa Rica, has extensively developed the rights of indigenous people. Yet its jurisprudence, to my view, has not addressed the issue in a way that fully dissuades State preference for a solution based on a cost-benefit analysis.

The IACtHR cases involving indigenous communities can be divided into three categories.[82] The first involves aggressions against the communities that range from murders of activists to massacres of entire villages.[83] Most of these cases happened in contexts of internal civil wars (Guatemala), military operations against drug cartels

[82] There is one case involving electoral processes in which an indigenous activist wanted to run for local government but was denied access to the ballot, since he did not belong to any political party. Since this is only one case in the docket, I do not treat it as a category in itself. *See* YATAMA v. Nicaragua, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 127 (June 23, 2005).

[83] *See Acosta y Otros v. Nicaragua* [Acosta et al. v. Nicaragua], Preliminary Objections, Background, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 334 (Mar. 25, 2017) (involving the murder of an activist involved in the defense of the ancestral lands of his community); *Miembros de la Aldea Chichupac y comunidades vecinas del Municipio de Rabinal v. Guatemala* [Members of the Village of Chichupac and Neighboring Cmtys. of Rabinal v. Guatemala], Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 328 (Nov. 30, 2016) (involving the massacre of 32 indigenous people in 1982 during the civil war); *Tiu Tojin v. Guatemala*, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 190 (Nov. 26, 2008) (involving the forced disappearance of an indigenous activist and her newborn daughter during the civil war in Guatemala in 1990); *Chitay Nech et al. v. Guatemala*, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 212 (May 25, 2010) (involving the forced disappearance of an indigenous local municipal authority during the civil war in Guatemala in 1990); *Gudiel Álvarez et al ("Diario Militar") v. Guatemala*, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 262 (Nov. 20, 2012) (involving several massacres and extrajudicial killings of indigenous communities between 1980 and 1982 during the Guatemalan Civil War); *Escué-Zapata v. Colombia*, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 165 (July 4, 2007) (involving the extrajudicial killing of the leader of an indigenous community by the Colombian army in 1988); *Rosendo Cantú et al. v. México*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 216 (Aug. 31, 2010) (involving the sexual assault of an indigenous woman by the Mexican army during anti-drug trafficking operations by the military in Guerrero); *Fernández Ortega et al. v. México*, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 215 (Aug. 30, 2010) (involving the sexual assault of an indigenous woman by the Mexican army during anti-drug trafficking operations by the military in Guerrero); *Moiwana Cmty. v. Suriname*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 124 (June 15, 2005) (involving the massacre and forced displacement of an afro-indigenous community in Suriname in 1986); *Masacre Plan de Sanchez v. Guatemala*, Merits, Inter-Am. Ct. H.R. (ser. C) No. 105 (April 29, 2004) (involving a military operation to eradicate guerilla insurgents and the communities supporting them).

(Mexico), or guerilla activities (Colombia).[84] Some of the aggressions forced the communities to abandon their ancestral lands, and they have not recovered them since.[85] Nevertheless, the main claim in the cases had to do with acts of aggression and the lack of effective judicial proceedings to investigate human rights violations claims. In these cases, the IACtHR has mainly focused on the lack of judicial response to adequately prosecute human rights violations against communities.[86] This focus is partly because government officers were involved, and partly that indigenous communities' claims are not taken seriously in these jurisdictions. Consequently, the communities' right to effective judicial protection was ignored.

The second group of cases involves the lack of State administrative and/or judicial proceedings to take care of property or title claims from indigenous communities.[87] In the majority of these cases, third parties displaced the communities due to the lack of titles regarding their

[84] *See Acosta*, Inter-Am. Ct. H.R. (ser. C) No. 334, ¶ 33; *Members of the Village of Chichupac and Neighboring Cmtys.*, Inter-Am. Ct. H.R. (ser. C) No. 328, ¶ 60; *Tiu Tojin*, Inter-Am. Ct. H.R. (ser. C) No. 190, ¶ 40; *Chitay Nech*, Inter-Am. Ct. H.R. (ser. C) No. 212, ¶ 27; *Gudiel Álvarez*, Inter-Am. Ct. H.R. (ser. C) No. 262, ¶ 33; *Rosendo Cantú*, Inter-Am. Ct. H.R. (ser. C) No. 216, ⁋ 138; *Moiwana Cmty.*, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 3, *Masacre Plan de Sanchez,* Inter-Am. Ct. H.R. (ser. C) No. 105, ¶¶ 42.5–42.6.

[85] *See, e.g.*, *Acosta*, Inter-Am. Ct. H.R. (ser. C) No. 334; *Members of the Village of Chichupac and Neighboring Cmtys.*, Inter-Am. Ct. H.R. (ser. C) No. 328; *Tiu Tojin*, Inter-Am. Ct. H.R. (ser. C) No. 190; *Chitay Nech*, Inter-Am. Ct. H.R. (ser. C) No. 212; *Gudiel Álvarez*, Inter-Am. Ct. H.R. (ser. C) No. 262; *Escué-Zapata*, Inter-Am. Ct. H.R. (ser. C) No. 262; *Rosendo Cantú*, Inter-Am. Ct. H.R. (ser. C) No. 216; *Fernández Ortega*, Inter-Am. Ct. H.R. (ser. C) No. 215; *Moiwana Cmty*., Inter-Am. Ct. H.R. (ser. C) No. 124.

[86] *See Acosta*, Inter-Am. Ct. H.R. (ser. C) No. 334; *Members of the Village of Chichupac and Neighboring Cmtys.*, Inter-Am. Ct. H.R. (ser. C) No. 328; *Tiu Tojin*, Inter-Am. Ct. H.R. (ser. C) No. 190; *Chitay Nech*, Inter-Am. Ct. H.R. (ser. C) No. 212; *Gudiel Álvarez*, Inter-Am. Ct. H.R. (ser. C) No. 262; *Escué-Zapata*, Inter-Am. Ct. H.R. (ser. C) No. 262; *Rosendo Cantú*, Inter-Am. Ct. H.R. (ser. C) No. 216; *Fernández Ortega*, Inter-Am. Ct. H.R. (ser. C) No. 215; *Moiwana Cmty*., Inter-Am. Ct. H.R. (ser. C) No. 124.

[87] *See* Sawhoyamaxa Indigenous Cmty v. Paraguay, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 146, (Mar. 29, 2006); Yakye Axa Indigenous Cmty v. Paraguay, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶¶ 102, 103, 215, 217, 225 (June 17, 2005); Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶¶ 123–24, 127, 137–38 (Aug. 31, 2001); Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶¶ 1, 91, 107, 110, 115–16, 194 (Nov. 28, 2007); Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶ 171 (June 27, 2012) [hereinafter *Sarayaku* Merits and Reparations]; *Moiwana Cmty*., Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 209; Xákmok Kásek Indigenous Cmty. v. Paraguay, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶¶ 154, 210, 281 (Aug. 24, 2010); Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano v. Panama, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 284, ¶¶ 152, 157–58, 160, 166 (Oct. 14, 2014).

ancestral lands.[88] In these decisions, the IACtHR has ordered the States to create a system that processes the communities' land claims and is tailored according to their social, cultural, and language barriers, as well as regional necessities.[89] The development of these groups of cases reinforces the idea that indigenous communities have a right to assert full title rights in their lands, and for that purpose, there must be a process for them to acquire title.[90]

Finally, the third category of cases involves the right of indigenous communities to be consulted regarding any development project (e.g., a hydroelectric dam in Panama) or investment made in their lands or that could have an impact in their territories (e.g., oil and gas fields in Ecuador, mining concessions in Suriname, lumber extraction in Nicaragua).[91] Naturally, some of these cases also connect with the first and second categories because they involve aggression from local authorities when the communities protest against the development projects or when the right of consultation has not been respected due to the impossibility of determining the communities' title to the land.[92] These types of cases are relevant for the future of energy-related projects in the region. The way the IACtHR interprets the rights of indigenous people to have their ancestral rights recognized and to be consulted is relevant for States' decision-making processes, in which they must balance the different interests and goals involved in energy projects.

According to the IACtHR, the State's first responsibility is to establish an effective proceeding domestically that allows the communities a "delimitation, demarcation, and titling of indigenous community lands."[93] Then, the IACtHR connects this proceeding to the right to receive protection from the State regarding property rights.[94]

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88 *Xákmok Kásek Indigenous Cmty*., Inter-Am. Ct. H.R. (ser. C) No. 214 at ¶¶ 154, 310.

89 *Yakye Axa Indigenous Cmty*., Inter-Am. Ct. H.R. (ser. C) No. 125 at ¶ 63; *Tiu Tojin*, Inter-Am. Ct. H.R. (ser. C) No. 190 at ¶ 96; *Xákmok Kásek Indigenous Cmty*., Inter-Am. Ct. H.R. (ser. C) No. 214 at ¶ 270; *Rosendo Cantú*, Inter-Am. Ct. H.R. (ser. C) No. 216 at ¶ 184; *Sarayaku* Merits and Reparations, *supra* note 87, at ¶ 264.

90 *See Saramaka People*, Inter-Am. Ct. H.R. (ser. C) No. 172 at ¶¶ 172, 174–75, 194c.

91 *Id.* at ¶ 194d; *Sarayaku* Merits and Reparations, *supra* note 87, at ¶¶ 227, 301.

92 *See, e.g.*, *Acosta*, Inter-Am. Ct. H.R. (ser. C) No. 334 (involving an activist who was murdered after protesting and initiating judicial and administrative proceedings for the recognition of ancestral lands now being occupied by Greek and American real-estate developers); *Sarayaku* Merits and Reparations, *supra* note 87 (finding the Sarayaku community blocked the entrance to the oil fields and, on several occasions, attacked workers of the oil company; in exchange, the State used the police, which, on several occasions, used excessive force).

93 *See Mayagna (Sumo) Awas Tingni Cmty*., Inter-Am. Ct. H.R. (ser. C) No. 79 at ¶ 137.

94 *Id* at ¶¶ 142–55.

Article 21 of the American Convention of Human Rights ("American Convention") follows the liberal and utilitarian tenets of property rights by declaring that "no one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interests, and in the cases and according to the form established by law."[95] Moreover, it expands the liberal and utilitarian view that the essence of property rights is to exclude others from interfering in the owners' enjoyment by declaring that "everyone has the right to the use and enjoyment of its property."[96] The only exception is legislation that "may subordinate such use and enjoyment to the interests of society."[97] Consequently, the Convention recognizes that there is no absolute right of exclusion or immune property rights from the use of eminent domain for public purposes.[98] It is from this traditional premise of the liberal and utilitarian view of property rights that the IACtHR has developed its jurisprudence.

According to the IACtHR's jurisprudence, and just like any other property right recognized by the American Convention, indigenous people and tribal people must receive guarantees of effective and equal exercise of their rights over the territories that they have traditionally occupied.[99] Briefly, occupation of tribal lands must be equalized to a private property right through an effective proceeding established by the State.[100] And as such, just like any other private right, it must be protected by the State from third-party interference, subject only to limits imposed by the State for the benefit of the public interest. The textual protection provided by the American Convention is thus the protection of a property right in the most liberal way possible.

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[95] Organization of American States, American Convention on Human Rights, "Pact of San José, Costa Rica," 1144 U.N.T.S. 144, 150 (Nov. 22, 1969) [hereinafter American Convention].

[96] *Id.*

[97] *Id.*

[98] Hence, the Convention does not recognize the social, cultural and religious values that emerge from property rights and that cannot be replaced by commentary compensations. The basis of property rights in the Convention is the exclusion of others first, and then a few exceptions for public purposes, including the payment of just compensations for reasons of public interests. This right follows very closely the drafting of the Fifth Amendment of the U.S. Constitution. U.S. CONST. amend V, § 1 ("No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.").

[99] Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 91 (Nov. 28, 2007); *see also Sarayaku* Merits and Reparations, *supra* note 87, at ¶ 171.

[100] *Saramaka People*, Inter-Am. Ct. H.R. (ser. C) No. 172 at ¶ 116.

The liberal and utilitarian conceptions of property rights contrast with indigenous communities' expectations that international treaties provide them with the right to halt the investment if they do not want to give their consent.[101] Specifically, false expectations are created after obtaining title to their land, and then communities revolt against the companies, blocking access to the energy-related projects and, in some instances, exercising violence against the operators and local authorities in the region.[102] Out of the revolt against the projects, another international duty by the State is breached: the right of foreign investors to receive full protection and security. As the following Section explains, the two international obligations collide in the development of energy infrastructure projects.

C. *The Duty to Protect Foreign Investors from Third-Party Interference*

Bilateral Investment Treaties (BITs) or sections of Free Trade Agreements, such as Chapter XI of NAFTA, give special protection rights to foreign investors against government intervention.[103] These treaties give foreign investors the right to bring international claims against States in arbitral tribunals when they are being treated unfairly, in a discriminatory way, or when they have not received full protection and security.[104] In case the State does not respect these rights and is found in breach of its treaty obligations, companies can receive compensation for their losses.[105] In other words, these treaties also reinforce the liberal and utilitarian conception of private property.

Hence, whether there is a clash between the rights of consultation and of foreign investment due to the false narratives described above, the State has no option but to weigh the consequences of siding with one or the other protected interest. And this comes down to a monetary calculation. In some cases, the government might even end up paying the foreign investors and the communities. Paradoxically, the State ends up compensating indigenous communities because it did not protect

101 See *infra* Sections III.A and III.B for examples.

102 *Id*.

103 According to the United Nations Conference on Trade and Development (UNCTAD), there are 2,336 BITS in force and 323 Treaties with Investment Provisions in force globally. *See* North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 605 (1993); *International Investment Agreements Navigator*, UNCTAD INVESTMENT POLICY HUB, https://investmentpolicy.unctad.org/international-investment-agreements (last visited Mar 3, 2021); North American Free Trade Agreement, 32 ILM 605, (1993).

104 Garcia Sanchez, *A Critical Approach*, *supra* note 61, at 481–83.

105 *Id.* at 518–25.

them against the interference with their lands, while also paying the international company for not protecting it against the indigenous communities' unrest affecting their investment plans.[106]

1. International Investment Treaties and the Rights to Receive Full Protection and Security of Foreign Direct Investments

The full protection and security standard is one of the oldest obligations in international investment law. Along with the fair and equitable principle, this standard has been present in international treaties since the time of the signing of the Friendship, Commerce and Navigation (FCN) treaties of the nineteenth and twentieth centuries.[107] As an example of the type of clause included in those treaties, Article 3 of the FCN treaty between Brunei and the United States of 1850 states that "[c]itizens of the United States of America shall as far as lies within [Brunei's] power, within his dominions, *enjoy full and complete protection and security* for themselves and for *any property* which they may acquire . . . ."[108]

In these early international instruments, the standard was included alongside the fair and equitable treatment principle. The combination of both principles, together with the national treatment standard, was considered to compose the "minimum standard of treatment of aliens" prescribed by public international law.[109] To grant investors full protection and security, in essence, means that the State is obligated to take active measures to protect international investment from adverse effects. The State can inflict these adverse effects as a general policy, by its organs, or through third parties, such as indigenous communities.[110]

106 See discussion of *Burlington Resources infra* at Part II.C.2.

107 Take, for example, the FCN treaty between Mexico and the Dominican Republic of 1890 or the FCN between Venezuela and Italy of 1881, both of which include the same standard of full protection and security. Treaty of Friendship, Commerce and Navigation, Dom. Rep.-Mex., art. III, Mar. 29, 1890; Treaty of Friendship, Commerce and Navigation, It.-Venez., art. IV, Sept. 20, 1862.

108 Treaty of Peace, Friendship, Commerce and Navigation, Brunei-U.S., June 23, 1850, 10 Stat. 909; Treaty Series 33, *quoted in* Suez, Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Decision on Liability, ¶ 161 (July 30, 2010) (emphasis added).

109 RUDOLPH DOLZER & MARGARET STEVENS, BILATERAL INVESTMENT TREATIES 61 (Martinus Nijhoff Publishers, 1995); *see also* Kenneth J. Vandevelde, *The Bilateral Investment Treaty Program of the United States*, 21 CORNELL INT'L L.J. 201, 203–04 (1988); Robert R. Wilson, *Property-Protection Provisions in United States Commercial Treaties,* 45 AM. J. INT'L L. 83, 92–96 (1951).

110 DOLZER & SCHREUER, *supra* note 27, at 150–52.

International investment tribunals have confirmed such an approach in several cases.[111] The traditional interpretation of the standard calls for a pure physical protection and an obligation of due diligence from acts originated from State organs or third parties.[112] This first generation was distinctive and essential for this Article because it involved cases of social unrest and situations of armed conflict that directly affected the investors' interests in the host State.[113] Moreover,

[111] International Tribunals and Courts have faced different disputes where these harms have been alleged. These decisions are not binding precedents, but they have interpretive value that has been ignored by both tribunals and academia. For a discussion on how international investment tribunals use precedents to build a "common law" that is not recognized in treaties see generally CHESTER BROWN, A COMMON LAW OF INTERNATIONAL ADJUDICATION (2007).

[112] Elettronica Sicula, SpA (ELSI) (U.S. v. It.), Judgment, 1989 I.C.J. 15, ¶ 108 (July 20). ELSI is one of the first recorded resolutions on the full protection and security standard rendered by the International Court of Justice (ICJ). On that occasion, an American company located in the city of Palermo was requisitioned by the local government and taken over by its workers. The United States government presented a claim against Italy for the violation of the U.S.-Italy FCN treaty. The ICJ in its decision stated that the standard did not warrant protection in all circumstances. In the words of the ICJ, "[T]he provision of 'constant protection and security' cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed." *Id.*

[113] Asian Agric. Prod. Ltd. (AAPL) v. Sri Lanka, ICSID Case No. ARB/87/3, Final Award, ¶¶ 45–50 (June 27, 1990). The ELSI interpretation was confirmed by the AAPL tribunal. On that occasion, as a consequence of counter-insurgency operations, the government's military forces destroyed the company's complex. The claimant argued that the existence of the words "enjoy" and "full" made the treaty's standard one of strict liability that required the State to "achieve a result." The tribunal rejected this claim by arguing that the words' inclusion did not elevate the standard to another type of liability distinct from the one construed by the traditional view of due diligence; *see also* Am. Mfg. & Trading Inc. (AMT) v. Republic of Zaire, ICSID Case No. ARB/93/1, Award, ¶¶ 6.05–6.10, (Feb. 21, 1997). After the AAPL's interpretation was reaffirmed by the AMT tribunal. The AMT resolved a dispute between an American investor and the government of Zaire. In this case, another American company brought claims arising out of episodes of looting in which soldiers of the State armed forces destroyed, damaged or stole the investors' property. The looting happened in the context of constant riots and insurrection in the early 1990s in Zaire. The tribunal decided that the obligations "incumbent upon Zaire is an obligation of vigilance." *Id.* As such, the investor had the right to receive "all measures necessary to ensure the full enjoyment of protection and security of its investment." *Id.* The tribunal even recognized that the State could not "invoke its own legislation to detract from any such obligation." *Id.* On that occasion, the Republic of Zaire argued that it did not afford a different treatment to AMT in comparison to the one given to its own nationals and to foreign companies in the context of riots and insurrections. Furthermore, the government argued that national legislation had exonerated the State from any liability. The tribunal further concluded that the State must take all necessary actions to prevent the incident regardless of how it acted regarding its own population or other States. In this sense, the AMT tribunal seems to have elevated the standard to a stricter one. A well-administered State in the same circumstances could have been found equally guilty of the omission. The tribunal required additional protection for this investor than that afforded to its own nationals or other parties. *See also* Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No.

these cases included instances where the arbitrators had to discuss the role of governments in preventing actions taken by third parties and compare them to similar government acts taken to protect other actors, such as local populations.[114] Nevertheless, as time has passed and

ARB/98/4, Award, ¶¶ 82–85 (Dec. 8, 2000). The tribunal in *Wena* found that in light of the seizure of the hotel's premises by its workers union (EHC), there was "substantial evidence that . . . Egypt was aware of EHC's intentions to seize the hotels and took no actions to prevent EHC from doing so." *Id.* Moreover, once the seizures occurred, both the police and the Ministry of Tourism took no immediate action to restore the hotels promptly to Wena's control. *Id.* Finally, Egypt never imposed substantial sanctions on EHC or its senior officials, suggesting Egypt's approval of EHC's actions. *Id.* As such, the tribunal found a violation of the standard in the lack of actions from State action notwithstanding the absence of any evidence that it fostered the intervention directly. *Id.*

[114] *Wena Hotels Ltd*., ICSID Case No. ARB/98/4, Award, ¶¶ 82–85; Tecnicas Medioambientales TECMED S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/02, Award, ¶¶ 175–77 (May 29, 2003). TECMED is another case in which uncontrolled social protests against the investor were alleged as constituting a violation of the full protection and security standard. The TECMED tribunal had to decide whether the lack of action from the State to stop social demonstrations and disturbances at the investor's premises amounted to a violation of the standard. *Id.* The tribunal found that there was no evidence that the State contributed, encouraged or fostered the events that affected the investment. *Id.* In order for the tribunal to find the State guilty of violating the standard, it was essential to find evidence "supporting the allegation that the Mexican authorities, whether municipal, State, or federal, have not reacted reasonably, in accordance with the parameters inherent in a democratic state, to the direct action movements." *Id. See also* Nobel Ventures Inc. v. Romania, ICSID Case No. ARB/01/11, Award, ¶¶ 164–66 (Oct. 12, 2005). The same situation of social unrest presented itself in the case between the company Nobel Ventures Inc. and the government of Romania. After several labor protests in the city of Resita, the premises of the company were repeatedly occupied and damaged. Due to the similarities between the *ELSI* case and the case at hand, the tribunal used the ICJ criteria and dismissed the claims presented by the investor. *Id.* Some tribunals have even been asked to decide whether harassment from State officials could be considered as a violation of the standard. *See* Eureko BV v. Poland, UNCITRAL, Partial Award, ¶ 236–37 (Aug. 19, 2005) (involving dispute that rested in the harassment inflicted by Polish State negotiators upon Netherlands based company's representatives). In *Eureko*, the tribunal found that, although there was no evidence that the State as a whole was the instigator, if the "actions were to be repeated and sustained, it may be that the responsibility of the Government of Poland would be incurred by a failure to prevent them." *Id.* More recent decisions have involved situations in which robbery and personal attacks have been committed. *See* GEA Group Aktiengesellschaft v. Ukraine, ICSID Case No. ARB/08/16, Award, ¶¶ 239–67 (March 31, 2011) (confronting three actions that the claimant considered as a violation of the standard: unpunished theft of GEA's products, the lack of response from Ukraine in a shooting of GEA's representative, and the misrepresentations in certain negotiations of an individual from the Ukrainian partner of GEA). In its resolution, the tribunal found that the failure to present criminal complaints at the time of the robberies proved that GEA did not consider them as grave enough to request an intervention from the State. *Id.* Regarding the second allegation, the tribunal found that there were some investigations initiated by the State to find the responsible individual of the shooting, and as such there was nothing else that the State could be expected to do. *Id.* Finally, the tribunals found that the claimant failed to prove

international investment tribunals have begun to interpret it, the original essence of the standard has evolved to a point that it can even be confused with other standards.[115]

The new interpretation says that the protection must include the legal framework in force at the time that the investment was made.[116] The argument is twofold: some investments cannot receive physical protection, like contractual rights, and the only way to protect certain investments is through legal instruments. As such, the standard has evolved to resemble one related to the investor's legitimate expectations at the time of investing.[117] The danger of that tendency is that it can almost make the standard equal to a stabilization clause. It is up to the tribunals to decide which approach to take. For this Article, however, as the analysis below shows, the principle continues to entail the protection of physical infrastructure of foreign investors from third-party interference.

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that Ukraine was responsible or that it could have initiated some actions to prevent the misrepresentations of the Ukrainian company representative. *Id.*

115 This very early origin and its interpretation as part of the minimum standard has made the principle a difficult element to distinguish from the other standards, particularly the fair and equitable treatment standard. Many tribunals, when analyzing fair and equitable treatment, have been forced to enter into a discussion of full protection and security, and it seems at some points that the essence of the principles get mixed. This mixture has led some scholars to believe that in today's modern bilateral treaties, the standard cannot be envisaged independently. According to Margarete Stevens and Rudolph Dolzer, the principle was included in "less detailed" treaties in the first half of the XIX century and then was passed on into today's bilateral investment treaties without analyzing its scope or meaning according to the new investment realities. DOLZER & STEVENS, *supra* note 109, at 60–61; *see also* Vandevelde, *supra* note 109, at 204; Wilson, *supra* note 109, at 92–96.

116 *Total SA v Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability (Dec., 27 2010), ¶ 121–22 (arguing that "a claim to stability can be based on the inherently prospective nature of the regulation at issue aimed at providing a defined framework for future operations. This is the case for regimes, which are applicable to long-term investments and operations, and/or providing for 'fall backs' or contingent rights in case the relevant framework would be changes in unforeseen circumstances or in case certain listed events materialize. . . . This is the case for capital intensive and long-term investment and operations of utilities under a license, natural resources exploration and exploitation, project financing or Build Operate and Transfer schemes. The concept of 'regulatory fairness' or 'regulatory certainty' has been used in this respect").

117 *Id.*; *see* also Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, LP v. Argentine Republic, ICSID Case No ARB/01/3, Award (22 May 2007), ¶ 262 (In the context of a renewable electricity plant that required a number of years to be in operation so that the investor could benefit from the capital expenses, the tribunal argued, "[W]hat seems to be essential . . . is that these expectations derived from the conditions that were offered by the State to the investor at the time of the investment and that such conditions were relied upon by the investor when deciding to invest.").

Notwithstanding the differences between physical and intangible protection, there is a doctrinal consensus, supported by case law, that the standard is one of due diligence.[118] States are not obliged to provide protections that will cover any type of damage.[119] The liability is not considered strict.[120] Rather, States are under the obligation to act as any reasonable government would act in the same circumstances.[121]

In defining the extent and content of "due diligence," leading commentators, such as Professor Freeman, have found that it should be measured as what a "well-administered government would be expected to exercise in similar circumstances."[122] Professor Freeman's formula has been replicated by investment tribunals and defined as an "objective" standard of vigilance that could be "legitimately expected" from a "reasonably well-organized modern State."[123]

The United Nations Conference on Trade and Development (UNCTAD), after analyzing some resolved cases from international investment tribunals, described the full protection and security standard in the following terms:

> [W]hile not an obligation of result, an obligation of good faith efforts to protect the foreign-owned property has been established by these recent cases, without special regard for the resources available to do so. This has been referred to as a standard of 'due diligence' on the part of the host country. As a result, this standard should be understood as being very much a 'living' one. It places a clear premium on political stability, and the obligation of host countries to ensure that any instability does not have negative effects on foreign investors, even above the ability to protect domestic investors.[124]

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118 DOLZER & SCHREUER, *supra* note 27, at 149–53; *see also* IAN BROWNLIE, PRINCIPLES OF INTERNATIONAL LAW, 456 (Oxford University Press, 5th ed.).

119 DOLZER & STEVENS, *supra* note 109, at 61.

120 DOLZER & SCHREUER, *supra* note 27, at 149–53.

121 *Id.*

122 Alwyn Freeman, *Responsibility of States for Unlawful Acts of Their Armed Forces*, *in* COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW (1955).

123 AALP v. Sri Lanka, ICSID Case No. ARB/87/3, Final Award, ¶ 77 (June 27, 1990); *see also* IAN BROWNLIE, SYSTEM OF THE LAW OF NATIONS, STATE RESPONSIBILITY PART I 170 (Oxford Univ. Press, 1986), *quoted in* DOAK BISHOP, JAMES CRAWFORD & MICHAEL W. REISMAN, FOREIGN INVESTMENT DISPUTES: CASES, MATERIALS AND COMMENTARY 1054 (2014).

124 United Nations Conference on Trade and Development, *Investor-State Disputes Arising from Investment Treaties: A Review*, 40–41 (2005).

In sum, States violate this standard when they are negligent.[125] The standard does not impose strict liability for all acts with repercussions on the investment, and it should be compared to what any person would expect from other governments in the same circumstances.

How does this translate to cases where indigenous communities or other vulnerable groups generate social unrest against an investor's property? More importantly, should the investment regime consider the role the companies play in provoking the unrest? The investment tribunal in *Bear Creek v. Peru* faced this question and resolved that the causal link between the unrest and the company's actions in the consultation process must be substantial enough to remove the mantel of protection provided by the investment regime.[126]

2. Poking the Bear: Foreign Direct Investment and Social Licenses

As explained above, when governments sign BITs, they pledge to protect the companies doing business in their territories. Tribunals might interpret the protection as an obligation to provide political and social stability. The investment regime, however, is not clear on the responsibility that the companies have in fostering good relationships with the local population to maintain that stability. Consequently, should the tribunals consider the corporate contributory responsibility to social unrest when assessing the government's failure to provide a stable business environment?[127] This question was discussed by the *Bear Creek* tribunal in its 2017 decision.[128]

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125 BROWNLIE, *supra* note 118, at 456.

126 Bear Creek Mining Corp. v. Republic of Peru, ICSID Case No. ARB/14/21, Award, ¶¶ 400–14 (Nov. 30, 2017).

127 For a review of the *Bear Creek* case, see Jean-Michel Marcoux and Andrew Newcombe, Bear Creek Mining Corporation v Republic of Peru*: Two Sides of a 'Social License' to Operate*, 33 ICSID REV. 3, 653 (2018); Joshua Paine, *Bear Creek Mining Corporation v. Republic of Peru: Judging the Social License of Foreign Investment and Applying New Style Investment Treaties*, 33 ICSID REV. 2, 340 (2018).

128 *Bear Creek*, ICSID Case No. ARB/14/21, Award, at ¶¶ 400–14. For earlier cases in which international human rights treaties intersected with States' obligations to foreign investors, see Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Ur Partuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, Award (Dec. 8, 2016), ¶¶ 1199–1202. In *Urbaser*, the tribunal had to resolve the conflict between the investment treaty protections to foreign investors and human rights relating to dignity and adequate housing and living conditions. In that particular context the tribunal stated that the State's human rights duties "are complemented by an obligation on all parts, public and private parties, not to engage in activity aimed at destroying such rights." *Id* ¶ 1199. Moreover, the BIT had to be "construed in harmony with other rules of international law of which if forms part, including those relating to human rights." *Id.* ¶ 1200. *See also* South American Silver Limited v. Bolivia, PCA Case No. 2013-15, Award (22 November 2018) (involving a mining concession in Bolivia that was canceled due to

The *Bear Creek* case arose out of a mining project in the southern Peruvian province of Puno.[129] The project had the challenge of being located in the Santa Ana region, located fifty kilometers from the border with Bolivia, and surrounded several communities of the Aymara tribe.[130] Along with fulfilling many permitting requirements, for the

the unrest caused by indigenous communities, but which was later offered again to international investors). Bolivia contended that the BIT must be interpreted in light of other international obligations of the Bolivian State, including the American Convention on Human Rights and the ILO Convention 169. The tribunal, however, disregarded Bolivia's claims based on the fact that it had not proven that these treaties were recognized customary international law or that the United Kingdom (the country of origin of the investor) was a party to the treaties. The tribunal also found that the company could not claim a breach of its legitimate expectations when Bolivia canceled the concession due to the social unrest because the company knew in advance that it was operating in an area where indigenous communities resided and thus required special care regarding its interactions with them. *Id.* ¶¶ 656–57. The tribunal ultimately found that Bolivia breached the requirement to provide adequate compensation for the cancelation of the concession and decided not to reduce the amount, even after recognizing that the company contributed to the social conflict. *Id.* ¶¶ 874–76. *See also* Grand River Enterprises Six Nations, Ltd., et al. v. United States of America, UNCITRAL Case, Award (12 January 2011). In *Grand River*, the members of a Canadian tribe presented an investment claim against the U.S. for tax actions taken against the sale of artisanal cigarettes produced in Canada but distributed in the U.S. *Id.* ¶ 1. The claimants in the case tried to argue that as part of customary international law and the minimum standard of treatment, the U.S. government should have consulted them before enacting the general tax regulations that affected their investments. *Id.* ¶¶ 66–67. The tribunal rejected the claim that the international commitments with indigenous communities in the UN Declaration of Indigenous Rights and the ILO Convention 169 were customary international law that could fall within the definition of the minimum standard of treatment of aliens. *Id.* ¶¶ 209, 217–21. *See also* Glamis Gold, Ltd. v. United States, UNCITRAL Case, Award (June 8, 2009). The *Glamis Gold* case involved a Canadian Mining company investing in a California Desert Conservation Area that overlapped with the Quechan Indian tribe's reservation lands. *Id.* ¶ 10. Under California law, companies operating in public lands were prohibited from using the land in such manner that would cause severe or irreparable damage to tribal cultural and religious sites. California also enacted new regulations requiring backfilling and grading for mining operations in the vicinity of tribal sacred sites. *Id.* ¶ 11. The Canadian company challenged the measures, arguing that these were arbitrary, discriminatory, and targeted to the Canadian company's projects in order to make it economically unviable. Glamis contended that complying with the new regulations would constitute an expropriation under NAFTA Chapter XI. *Id.* ¶ 11. The tribunal allowed the indigenous communities to present an amicus brief arguing how the project would impact their historical sites, their ability to practice sacred traditions, and their communal life and development. *Id.* ¶¶ 285–86. Ultimately, the tribunal rejected the Canadian company's claim of arbitrary and discriminatory treatment as not reaching the level required in the minimum standard of treatment of aliens. To the tribunal, California's actions would have to be "egregious and shocking," making it impossible for the investors to access justice. *Id.* ¶ 627. In order words, the standard required a blatant unfairness and a complete lack of due process as evidence of the discrimination. In the case of the regulatory actions taken by California, none of these elements were met. *Id.* ¶ 824.

129 *Bear Creek*, ICSID Case No. ARB/14/21, Award, ¶¶ 140–49.

130 *Id*.

project to move forward, the companies had to jump through two critical legal hurdles: obtaining an environmental impact assessment that included an outreach program with the affected communities, and a "public necessity" decree granted by the Council of Ministers.[131] Under the Peruvian Constitution, foreign investors could not acquire land near Peru's borders unless the Council of Ministers issued a public necessity decree.[132] The decree was a way for the government to ensure that foreign investment in the area would not jeopardize national security and the State's territorial integrity.[133]

The public necessity decree authorizing Bear Creek to acquire mining rights for the Santa Ana Project was issued in November 2007.[134] Bear Creek then acquired seven titles to mining rights from its employee, a local Peruvian lawyer who obtained the titles in tandem with the company's application for the decree.[135] The environmental impact assessment, however, took longer and was followed by a number of workshops organized by the company and the government to inform the local population about the project.[136] Even though the project received a positive environmental impact assessment, social protests arose.[137] A majority of the communities opposed mining activities in the area and felt unheard by the company and the government.[138] The unrest took several violent forms, including the burning of the company's camp, assault on government and company officials, and a general strike in the region that lead to a blockade of the main bridge between Peru and Bolivia.[139] After three years of significant unrest in Puno, the government revoked the public necessity decree.[140]

Bear Creek argued in the arbitral proceedings that revoking the decree was tantamount to an expropriation of its investments because the revocation was politically motivated and discriminatory.[141] Moreover, according to the Canadian company, the government's failure to control the social unrest breached the full protection and security

131 *Id*.
132 *Id.* ¶ 124.
133 *Id*. ¶ 469.
134 *Id.* ¶ 149.
135 *Bear Creek*, ICSID Case No. ARB/14/21, Award, ¶ 126–28.
136 *Id.* ¶ 556.
137 *Id.* ¶¶ 170, 172–91.
138 *Id.* ¶ 170; *Bear Creek*, ICSID Case No. ARB/14/21, Philippe Sands Partial Dissenting Opinion, ¶¶ 1, 18–19.
139 *Bear Creek*, ICSID Case No. ARB/14/21, Award, ¶¶ 170, 172–91.
140 *Bear Creek*, ICSID Case No. ARB/14/21, Philippe Sands Partial Dissenting Opinion, ¶ 1.
141 *Bear Creek*, ICSID Case No. ARB/14/21, Award, ¶¶ 537–38.

standard of the Peru-Canada Free Trade Agreement.[142] The company argued that the duty to consult and engage with communities was primarily a State responsibility.[143] Bear Creek did its part by organizing workshops to inform the communities about the project and by offering job opportunities to members living close to the site.[144] According to Bear Creek, it complied with Peruvian guidelines and regulations to the satisfaction of the Ministry of Mines, and thus Peru could not blame the company for the social opposition to the project.[145] The government argued, however, that the company was partly responsible for the instability and had a duty to obtain a "social license" before investing in the region.[146] The fact that it complied with formal requirements did not, according to the government, excuse the company from engaging positively with the local communities.[147] International law thus mandated the company's good faith, active participation in making sure that the consultation process addressed community concerns.[148]

The investment tribunal sided with the company.[149] The three arbitrators recognized first that the company could have gone further in its outreach activities, but they concluded that Bear Creek was not legally required to do so and that the State could not prove that its absence caused or contributed to the social unrest.[150] In other words, there was no evidence that obtaining the "social license" was legally required or could have prevented the unrest.[151] The fact that the company "complied with all legal requirements with regard to its

142 *Id.* ¶¶ 535–36. The tribunal, however, decided not to analyze this claim since it had already found the revocation of the decree to be an indirect expropriation of the investment. *See id.* ¶ 544.

143 *Id.* ¶ 241.

144 *Id.* ¶¶ 146, 261, 406–07.

145 *Id.* ¶¶ 242–43.

146 *Id.* ¶¶ 256–57.

147 *Bear Creek*, ICSID Case No. ARB/14/21, Award, ¶¶ 256–57.

148 *Id*.

149 *Id.* ¶¶ 558–59.

150 *Id.* ¶¶ 408, 410–12. For this point, the tribunal relied on the *Abengoa S.A. y Cofides S.A. v. United Mexican States* Award where the tribunal held that, "[f]or the international responsibility of a State to be excluded or reduced based on the investor's omission or fault, it is necessary not only to prove said omission or fault, but also to establish a causal link between [the omission or fault] and the harm suffered. In other words, for the argument to succeed, there must be evidence that if a social communication program had been timely implemented since 2003, the 2009 and 2010 events that led to the loss of the claimant's investment would not have occurred." Abengoa S.A. v. United Mexican States, ICSID Case No. ARB(AF)/09/2, Award, ¶¶ 670–71 (Apr. 18, 2013).

151 *Bear Creek*, ICSID Case No. ARB/14/21, Award, ¶¶ 408, 410–12.

outreach to the local communities" was enough to consider the company's conduct sufficient.[152]

The tribunal downplayed the arguments presented by the NGO representing members of the community.[153] In an amicus brief and oral testimony, the advocates for the Aymara tribe argued that the company was not transparent in its dealings with the communities.[154] The workshops were done in Spanish, as opposed to Aymara, and focused primarily on monetary and employment compensations.[155] The community's main concerns involved preserving spiritual sites in the mining area; the environmental impact that the activities would have on the rivers, forest, and species; and the health impact on the communities.[156] Rather than being an opportunity to listen to the communities' concerns, the workshops served as a formality for the company to offer economic benefits to some community members and document that it tried to inform the rest.[157] As with many of the other cases presented in this Article, the Aymara people's concerns could not fully translate into economic demands.[158] Their spiritual connection with the land, their dependency on natural resources for their subsistence, and the community relations fostered by their connection with mother nature could not be substituted by some community members' job opportunities.[159] Both the company and the government ignored the Aymara tribe's concerns during the consultation process, as did the majority of the tribunal in the arbitration proceeding.

It is worth noting that Professor Phillips Sands was the only arbitrator to recognize the role played by the company's actions in the emergence of the social unrest.[160] Professor Sands agreed with the majority in that the decree's revocation was tantamount to expropriation, and further agreed that "other and less draconian options were available," such as a suspension of the decree, to address the growing social unrest.[161] In his partially dissenting opinion, however, he recognized that the tribunal should have reduced the amount of

152 *Id*. ¶ 412.
153 *Id.* ¶¶ 406–09.
154 *Id.* ¶ 218.
155 *Id.* ¶ 225.
156 *Id.* ¶¶ 224–26.
157 *Bear Creek*, ICSID Case No. ARB/14/21, Award, ¶¶ 224–26.
158 *Id.*, ¶¶ 408, 410–12.
159 *Id*. ¶ 226.
160 *Bear Creek*, ICSID Case No. ARB/14/21, Philippe Sands Partial Dissenting Opinion, ¶ 1 (Nov. 30, 2017).
161 *Id*. ¶ 2.

awarded damages due to Bear Creek's contribution to the social unrest.[162]

Professor Sands disagreed with the majority's assessment of the connection between the company's conduct and the circumstances that gave rise to the social unrest and the revocation.[163] In his words, "the Project collapsed because of the investor's inability to obtain a 'social license,' the necessary understanding between the Project's proponents and those living in the communities most likely to be affected by it, whether directly or indirectly."[164] To Sands, the company did not meet the conditions necessary to build trust over the long term with the local communities.[165] Sands argued that the project required local support to be viable because of its massive infrastructure and clear impact on the region.[166] A company engaging in such an activity could hardly expect that the project would run smoothly in the long run without local buy-in.

Professor Sands agreed with the tribunal's majority that ILO Convention 169 imposes direct obligations on States.[167] Still, this fact does not mean that the duty to consider the indigenous interests "is without significance or legal effects for [*foreign investors*]."[168] Article 15 of ILO Convention 169 mandates that companies and governments must consult with local communities and include them in the project's benefits.[169] Bear Creek, as a company engaging in a project that would affect the lives of indigenous communities, had, "at best, a semidetached

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[162] *Id*. ¶ 4.

[163] *Id.* ¶ 5.

[164] *Id*. ¶ 6.

[165] *Id.*

[166] *Bear Creek*, ICSID Case No. ARB/14/21, Philippe Sands Partial Dissenting Opinion, ¶ 1.

[167] *Id*. ¶ 9 (recognizing that both parties agreed that the Convention obligations applied to the Santa Ana Project and that "[i]t is the case, of course, that the obligation to implement the Convention is one that falls on States, by implementing the Convention through national laws")

[168] *Id*. ¶¶ 9–10.

[169] *Id*. ¶ 13. Article 15 of the ILO Convention 169 provides: "1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be especially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources. 2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view of ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. These peoples concerned shall wherever possible participate in the befits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities." *ILO Convention 169*, *supra* note 71, at art. 15.

relationship to the vital rights set forth in [Article 15] of the Convention."[170] The government must provide the legal framework to ensure that the consultation process complies with international law, but the company must also take the appropriate actions to obtain the "social license" necessary for the project to be successful in the long run. If the companies are aware, as in *Bear Creek*, that the local communities oppose the projects because their interests are ignored, they should pause and reassess their outreach program.

Bear Creek's strategy of moving forward with its failing outreach plan, including offering jobs to only some Aymara community members, fed into the unrest.[171] Tribunals should not ignore such attitudes toward the communities when assessing damages. To Professor Sands, the international investment regime "is not . . . an insurance policy against the failure of an inadequately prepared investor" to obtain a social license.[172] In light of Bear Creek's "significant and material" contributions to the unrest and that "its responsibilities are no less than those of the government," the tribunal should have reduced the compensation owed to the company by half for the indirect expropriation of its assets.[173]

D. *The Missed Opportunity of the USMCA (NAFTA 2.0) to Resolve the Clash*

Most international investment and trade agreements were signed in the decades preceding the end of the cold war.[174] The main discussions in the international economic community revolved around the challenges faced by the decolonized developing nations and the former Soviet republics in attracting capital from the financial capitals located in Western democracies.[175] Hence, it is no surprise that the system created around investment and trade agreements ignored the

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[170] *Bear Creek*, ICSID Case No. ARB/14/21, Philippe Sands Partial Dissenting Opinion, ¶ 12.

[171] *Id*. ¶ 33.

[172] *Id*. ¶ 37 ("It may be the function of a State or its central government to deliver a domestic law framework that ensures that a consultation process and outcomes are consistent with Article 15 of ILO Convention 169, but it is not their function to hold an investor's hand and deliver a 'social license' out of those processes. It is for the investor to obtain the 'social license,' and in this case it was unable to do so largely because of its own failures. The Canada-Peru FTA is not, any more than ICSID, an insurance policy against the failure of an inadequately prepared investor to obtain such a license.").

[173] *Id.* ¶ 39.

[174] Garcia Sanchez, *A Critical Approach*, *supra* note 61 at 481–83 (describing the role played by the World Bank in designing a system to attract foreign direct investment to less developed nations).

[175] *Id*.

impact that investment could have on minorities in the host State. What is surprising is the fact that the most recently negotiated international trade and investment agreement in North America failed to conclusively address this issue. The following Section will explain how the USMCA, enacted in 2020, had the opportunity to remedy the clash of rights head-on. Even though the agreement changed foreign investment protection in the region, it ultimately illustrated the classical and utilitarian view of property rights applied to the extraction of natural resources.

On January 16, 2020, the U.S. Senate, with an eighty-nine to ten vote, adopted implementing legislation for the revised USMCA.[176] This was a surprisingly bipartisan vote considering that House of Representatives managers presented the first articles of impeachment against President Donald J. Trump the same day.[177] Mexico ratified the agreement in June 2019, but House Democrats were able to convince White House negotiators to strengthen the enforcement mechanisms on the labor chapter with inspections, sending the ratification process into chaos.[178] Notwithstanding the blow to its sovereignty, Mexico accepted the implementation legislation, and the two nations ratified the agreement.[179] Canada's ratification followed on March 13, 2020.[180]

The historic negotiation of the USMCA in the middle of an impeachment trial, with a change of administration in Mexico a year earlier and a reluctant Canada, also started a fundamental conversation about the clash of indigenous rights and foreign investment.[181] The initial round of negotiations included a Canadian proposal for a chapter on indigenous rights that would have recognized their "roles in the

176 Emily Cochrane, *Senate Votes to Pass Revised NAFTA, Sending Pact to Trump's Desk*, N.Y. TIMES (Jan. 16, 2020), https://www.nytimes.com/2020/01/16/us/politics/usmca-vote.html.

177 *Id.*

178 Mary Beth Sheridan, *Mexico Becomes First Country to Ratify New North American Trade Deal*, WASH. POST (June 19, 2019, 8:42 PM), https://www.washingtonpost.com/world/the_americas/mexico-becomes-first-country-to-ratify-usmca-north-american-trade-deal/2019/06/19/500dd8c0-92b3-11e9-956a-88c291ab5c38_story.html; Katie Lobosco, Natalie Gallón, Allie Malloy & Maegan Vazquez, *US and Mexico Say Trade Deal Is On Track After Hurried Last-Minute Objections*, CNN (Dec. 16, 2019, 9:41 PM), https://www.cnn.com/2019/12/16/politics/usmca-mexico-labor-concerns/index.html.

179 *Id*.

180 David Ljunggren, *Canadian Parliament Rushes Through Ratification of USMCA Trade Pact*, REUTERS (March 13, 2020), https://www.reuters.com/article/us-usa-trade-usmca-canada/canadian-parliament-rushes-through-ratification-of-usmca-trade-pact-idUSKBN2102I5.

181 Jorge Barrera, *New Trade Agreement a "Step Up" from NAFTA on Indigenous Rights*, CBC NEWS (Oct. 1, 2018, 6:00 PM), https://www.cbc.ca/news/indigenous/usmca-trade-deal-indigenous-rights-1.4846073.

conservation of the environment, sustainable fisheries, forestry and biodiversity conversation."[182] In the final text, Canada's proposal was reduced and transferred to Chapter 32, Exceptions and General Provisions.[183] Article 32.5 provides that "this agreement does not preclude a Party from adopting or maintaining a measure it deems necessary to fulfill its legal obligations to indigenous peoples."[184] The exception covers the entire USMCA. The only caveat is that such measures are not "used as a means of arbitrary or unjustified discrimination against persons of the other Parties or a disguised restriction on trade in goods, services, and investment."[185]

For the first time in the region, a treaty recognized the importance of other international obligations vis-a-vis trade and investment rights. The treaty does not, however, recognize community-oriented property rights as the original Canadian draft did and does not uphold the responsibility of the State to protect those rights above the rights of foreign investors and trade agreements. In the context of energy infrastructure, it is unclear how Article 32.5 would apply. For example, if the State conducts a previous and informed consultation but the communities still reject the investment project in their lands, the State could argue that it had fulfilled its legal obligations to indigenous people and move forward with the project. Moreover, as the Bear Creek case described above shows, for investment tribunals, the State still has a duty to consult the communities. Suppose the government conducts a consultation process that does not achieve full consent from the communities and eventually faces international outcry in human rights tribunals. If the State decides to cancel the project, would the investors still be able to bring investment claims? Does Article 32.5 release the State from any liability for the government's failure to protect investors from a lack of official adequate consultation processes? The USMCA is silent on this issue. What is clear is the fact that if a concrete case arises, and the State raises a defense under Article 32.5, an international investment tribunal will have to analyze whether the State's action was done to fulfill its obligations with indigenous people, subjecting the government's measures to international scrutiny. But this review is an ex post analysis after the conflict emerges, not an a priori recognition of the value of indigenous culture over other public benefits defined by the

182 *Id.*

183 *Id*.

184 United States-Mexico-Canada Agreement, Can.-Mex.-U.S., Nov. 30, 2018, 134 Stat. 11, art. 32.5 (2020), https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between [hereinafter USMCA].

185 *Id*.

State. Even if the USMCA is a good step forward to resolving the clash of rights, we still do not have an international treaty that prioritizes the protection of communities over the State and investors' rights.

Another example of how the USMCA was a missed opportunity to avoid the clash of rights is its loose reference to corporate social responsibility.[186] Specifically, Article 14.17 is an invitation to promote corporate social responsibility—a far more benign approach than an imposition of a duty on signatories:

> [The three states] reaffirm the importance of each party encouraging enterprises operating within its territory or subject to its jurisdiction to *voluntarily* incorporate into their internal policies those internationally recognized standards, guidelines, and principles of *corporate social* responsibility that have been endorsed or are supported by that Party, which may include the OECD Guidelines for Multinational Enterprises.[187]

As examples of the issues that the standards, guidelines, and principles may address, the three States included "labor, environment, gender equality, human rights, *indigenous and aboriginal people's rights*, and corruption."[188] This provision only recognized the importance to promote these principles, rather than a duty of the signing parties or a requirement for investments made in each State.

Notwithstanding the missed opportunity to address directly the clash of rights, the investment chapter did advance four elements that will change the way foreign direct investment is protected in the region.[189] First, it defined more broadly the term investment and enumerated a nonexclusive list of examples that include licenses and concessions.[190] Second, Canada and the U.S. would not be subject to the investor-State dispute settlement (ISDS) mechanism. Moreover, Mexico and the U.S. will be subject to the mechanism only for breaches of national treatment, most-favored-nation treatment, or direct expropriation.[191] Notably, however, the USMCA excludes from these limitations Mexican government contracts with oil and gas companies, as well as contracts for power generation, telecommunications,

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186 *Id*. at art. 14.17.
187 *Id.* (emphasis added).
188 *Id.* (emphasis added).
189 *Id.*
190 USMCA, *supra* note 184, at art. 14.1.
191 *Id.* at art. 14.4, 14.5.

transportation, and infrastructure companies.[192] These types of investments receive the full protection of the investment chapter and have their own dispute resolution provisions.[193] Third, the USMCA further clarified the minimum standard of treatment of aliens, including full protection of security, to limit responsibilities to only what is required under customary international law.[194] Finally, the agreement created exceptions to claims against the adoption of environmental, health, and "public welfare" policies.[195] In this way, any policies under the social/environmental umbrella would not be considered a violation of the foreign investors' legitimate expectations.

The USMCA, however, also serves as a reaffirmation of the way liberal and utilitarian views of property rights inform the role of sovereigns in the extraction of natural resources.[196] Chapter 8 specifically regulates the ownership of hydrocarbons. It serves as a confirmation that Mexico, Canada, and the U.S. fully respect each other's sovereign rights to regulate the extraction of hydrocarbons "in accordance with their respective Constitutions and domestic laws, in the full exercise of their democratic processes."[197] It specifies that in the case of Mexico, the United States and Canada recognize that it "reserves its sovereign right to reform its Constitution and its domestic legislation," and that it "has the direct inalienable, and imprescriptible ownership of all hydrocarbons in the subsoil of the national territory, including the continental shelf and the exclusive economic zone located outside the territorial sea and adjacent thereto."[198] And consistent with

192 *Id.* at Annex 14-E (Annex 14-E specifies that it only applies to government contracts signed in Mexico in the covered sectors. The USMCA does not contain a similar provisions for government contracts signed with Canada and the U.S.).

193 *Id*.

194 *Id*. at art 14.6.2 ("For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the standard of treatment to be afforded to covered investments. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligations in paragraph 1 to provide: (a) 'fair and equitable treatment' includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and (b) 'full protection and security' requires each Party to provide the level of police protection required under customary international law.")

195 *Id.* at art. 14.16 ("Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health, safety, or other regulatory objectives.").

196 USMCA, *supra* note 184, at chap. 8.

197 *Id.*

198 *Id.*

the views that the agreement is primarily designed to protect foreign investors, Chapter 8 specifies that the recognition of the State's property over the hydrocarbons is "without prejudice of their rights and remedies available under this Agreement."[199] In other words, States have the sovereign right to regulate the extraction of the resources contained in their territory and can modify their legislation according to their own democratic processes, but the rights of companies that have signed contracts with the State shall be respected in accordance with the USMCA. This is a clear example of how companies become an extension of the State for the purposes of oil and gas extraction, and of how international law extends a mantel of protection against discriminatory policies taken against them. The USMCA does not, however, extend the same level of protection to communities.

III. EXAMPLES OF RIGHTS CLASHING FROM OIL FIELDS IN ECUADOR TO TAR SANDS IN CANADA

The following Part provides concrete examples that exemplify the clash of interests that arise when the State authorizes foreign investors to build energy infrastructure over indigenous land. This Part emphasizes the arguments presented by the three parties involved—the State, the companies, and the indigenous communities—and sheds light on the fact that the analysis for finding a breach of international obligations turns into a monetization of the value of the affected property, be that indigenous land or foreign investor assets. As Section III.A will show, the primary remedy offered by international law, with its heavy emphasis on the economic value of property, benefits the foreign investors to the detriment of the communities. A note of caution is warranted. This Part does not substantially discuss domestic proceedings initiated by the parties involved or how domestic legislation regulates the rights of indigenous people or foreign investors. It only refers to local proceedings and regulations to the extent that they connect with the arguments brought by the affected parties to international proceedings.

199 *Id.*

A. *A Tale of Two International Tribunals: The Burlington Resources ICSID Case and the Sarayaku People in the IACtHR Case*

In the past two decades, Ecuador has been accused five times of violating the right of foreign companies investing in the hydrocarbons sector.[200] All of these cases involved investments from foreign nationals in the Ecuadorian Amazonian region, which contains hydrocarbon fields.[201] Out of these five cases, the full protection and security principle was mentioned three times as one of the violated rights.[202] The violations were alleged to have originated from legislation that affected the original contractual obligations between Ecuador, its state-owned company, Petroecuador, and foreign investors.

In one of those cases, Occidental Petroleum claimed $1.77 billion in damages.[203] Ecuador was found in breach of international law in only some of the three cases. But the fact is that Ecuador has a reputation for not protecting foreign energy-related investments. This reputation has even led the State to denunciate its consent to the International Center for Settlement of Investment Disputes (ICSID) Convention in 2009.[204]

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[200] Chevron Corp. v. Republic of Ecuador, UNCITRAL, PCA Case No. 34877, Final Award, ¶ 30, 208 (Aug. 31, 2011); Perenco Ecuador Ltd. v. Republic of Ecuador, ICSID Case No. ARB/08/6, Decision on Jurisdiction, ¶ 1 (June 30, 2011); Burlington Res. Inc. v. Ecuador, ICSID Case No. ARB/08/5, Decision on Jurisdiction, ¶ 26 (June 2, 2010); Occidental Petroleum Corp. v. Republic of Ecuador, ICSID Case No. ARB/06/11, Decision on Jurisdiction, ¶ 10 (Sept. 9, 2008); EnCana Corp. v. Republic of Ecuador, LCIA Case No. UN3481, Award, ¶ 26, 27, 107 (Feb. 3, 2006); Occidental Expl. & Prod. Co. v. Republic of Ecuador, LCIA Case No. UN3467, Final Award, ¶ 6, 25, 27 (July 1, 2004).

[201] *Chevron Corp.*, UNCITRAL, PCA Case No. 34877, Final Award, ¶ 208, 211; *Perenco Ecuador Ltd.*, ICSID Case No. ARB/08/6, Decision on Jurisdiction, ¶ 1; *Burlington Res., Inc.,* ICSID Case No. ARB/08/5, Decision on Jurisdiction, ¶ 15; *Occidental Petroleum Corp.*, ICSID Case No. ARB/06/11, Decision on Jurisdiction, ¶ 2; *EnCana Corp.*, LCIA Case No. UN3481, Award, ¶ 35; *Occidental Expl. & Prod. Co.*, LCIA Case No. UN3467, Final Award, ¶ 27.

[202] *Chevron Corp.*, UNCITRAL, PCA Case No. 34877, Final Award, ¶ 39; *Burlington Res. Inc*., ICSID Case No. ARB/08/5, Decision on Jurisdiction, ¶ 212; *Occidental Expl. & Prod. Co.*, LCIA Case No. UN3467, Final Award, at ¶ 179.

[203] *Occidental Petroleum Corp.*, ICSID Case No. ARB/06/11, Award, ¶ 876; Tai-Heng and Lucas Bento, *ICSID's Largest Award in History: An Overview of Occidental Petroleum Corporation v. The Republic of Ecuador*, KLUWER ARBITRATION BLOG (Dec. 19, 2012), http://arbitrationblog.kluwerarbitration.com/2012/12/19/icsids-largest-award-in-history-an-overview-of-occidental-petroleum-corporation-v-the-republic-of-ecuador.

[204] In October 2007, the World Bank's International Centre for Settlement of Investment Disputes (ICSID) received a notice from the Republic of Ecuador that it will no longer consent to ICSID jurisdiction as a forum for resolving mining and energy disputes with foreign investors. The denunciation was extended to all disputes on July 6, 2009. Kate Cervantes-Knox & Elinor Thomas, *Ecuador Terminates 12 BITs—A Growing Trend of Reconsideration of Traditional Investment Treaties?,* DLP PIPER, (May 15, 2017), https://www.dlapiper.com/en/mexico/insights/publications/2017/05/ecuador-terminates-12-bits-a-growing-trend; *see also* ICSID News Release,

One of the best-known cases in the United States involved Chevron Corporation/Texaco because tribe groups affected by its operations in Ecuador filed class actions against its parent company in the United States.[205] In those proceedings, U.S. courts rejected the complaint according to the principle of forum non conveniens, and the local plaintiffs had to go back to Ecuador and initiate proceedings there.[206] The case became an international sensation when the Ecuadorian courts issued a $9.5 billion judgment against Chevron for the contamination of the Lago Agrio region.[207] In response, Chevron/Texaco brought a claim against Ecuador for denial of justice in an investment tribunal through the Ecuador-U.S. Bilateral Investment Treaty and parallel RICO claims against the lawyer representing the indigenous communities, Steven Donzinger, for false statements and fraudulent proceedings in Ecuador.[208]

But there are other examples of the interplay between foreign investors and indigenous rights that are less studied. One example is the case of Burlington Resources against Ecuador and the parallel proceeding brought by the Sarayaku tribe against the State in the IACtHR.[209] The Burlington Resources/Sarayaku people case is a paradigmatic example of the interplay between human rights and

Denunciation of the ICSID Convention by Ecuador (July 09, 2009), https://icsid.worldbank.org/news-and-events/news-releases/denunciation-icsid-convention-ecuador.

[205] Lago Agrio Plaintiffs v. Chevron Corp., 409 F. App'x 393, 394 (2d Cir. 2010); Aguinda v. Texaco, Inc., 303 F.3d 470, 473 (2d Cir. 2002).

[206] When the Ecuadorian courts found for the plaintiffs, Chevron/Texaco brought a claim against Ecuador for denial of justice in an investment tribunal through the Ecuador-U.S. Bilateral Investment Treaty. *See* Chevron Corp. v. Ecuador (II), PCA Case No. 2009-23, Memorial on Jurisdictional Objections of the Republic of Ecuador, ¶ 161 n.238 (Aug 31, 2011), https://www.italaw.com/cases/257.

[207] Jonathan Stempel, *Lawyer Who Took on Chevron in Ecuador is Disbarred in New York*, REUTERS (Aug. 14, 2020), https://www.reuters.com/article/us-usa-donziger-idUSKCN25A2P4.

[208] Chevron Corporation and Texaco Petroleum Company v. Republic of Ecuador, PCA Case No. 2009-23, Second Partial Award on Track II (20 August, 2018), available at the press release by Chevron summarizing the claims against Ecuador for denial of justice in Ecuadorian courts (Sept. 2018), http://chevron.com/stories/international-tribunal-rules-for-chevron-in-ecuador-case. For the U.S. claims, see Chevron Corp. v. Donziger, No. 11 Civ. 0691 (LAK), 2013 WL 1087236, at *6 (S.D.N.Y. Mar. 15, 2013); Chevron Corp. v. Donziger, No. 11 Civ. 0691, 2013 U.S. Dist. LEXIS 24086 (S.D.N.Y. Feb. 21, 2013); Chevron Corp. v. Donziger, 886 F.Supp.2d 235 (S.D.N.Y. 2012); Chevron Corp. v. Donziger, 768 F. Supp. 2d 581 (S.D.N.Y. 2011), *injunction vacated on other grounds*, Chevron Corp. v. Camacho Naranjo, 667 F.3d 232 (2d Cir. 2012). See generally Chevron's website, AMAZON POST, http://www.theamazonpost.com, about the litigation which contains court documents, video clips, media reports and other background on the case.

[209] Christina Binder & Jane A. Hofbuer, *Case Study:* Burlington Resources Inc. v. Ecuador/Kichwa Indigenous People of Sarayaku v. Ecuador, INT'L L. ASS'N, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2810062.

investment claims at the international level. It further exemplifies how the rights of indigenous people, through the lens of liberal and utilitarian property law interpretations, overlap with the property rights of foreign companies.[210]

The facts of the case begin in 1996 when Petroecuador signed a production sharing contract ("PSC") with an Argentinean-based company, CGC, for the development of two oil reserves in the Amazonian region.[211] Blocks 23 and 24 were located in a territory traditionally inhabited by indigenous communities, the largest of which belonged to the Sarayaku tribe.[212] According to the terms of the PSC, the government was responsible for relations with the indigenous communities, and for obtaining third-party permits, rights-of-way, or easement that might be necessary for the development of the area.[213] But the contractor was required to submit an environmental impact assessment for the exploration phase, which included a description of the social, economic, and cultural aspects of the population in the area.[214] The assessment by the company was completed and approved by the government in 1997.[215]

The Sarayaku tribe, composed of around 1,200 people, received official recognition and title to their land from the government in 1992.[216] The title was designed "to protect the ecosystems of the Ecuadorian Amazon basin, to improve the living standards of the indigenous communities, and to preserve the integrity of their culture[.]"[217] But the title also recognized the fact that it should "not limit the State's authority to build roads, ports, airports and other infrastructure needed for the country's economic development and security," and that the "[s]ubsoil natural resources are the property of the State, which may exploit them without interference provided that environmental protection standards are observed."[218]

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210 The case involved indigenous communities bringing claims to the IACtHR and a company bringing claims against the State for lack of full protection and security. *Sarayaku* Merits and Reparations, *supra* note 87, ¶ 2 (June 27, 2012); Burlington Res. Inc. v. Ecuador, ICSID Case No. ARB/08/5, Decision on Jurisdiction, ¶ 53 (June 2, 2010).

211 *Sarayaku* Merits and Reparations, *supra* note 87, ¶ 64.

212 *Id.* ¶ 65.

213 *Id.*

214 *Id.* ¶ 68.

215 *Id.* ¶ 69.

216 *Id.* ¶¶ 52, 61.

217 *Sarayaku* Merits and Reparations, *supra* note 87, ¶ 62.

218 *Id.*

To preserve the social, cultural, economic, and environmental integrity of the communities, the government declared in the title that it would "take into account the plans and programs that, to this end, are prepared by the respective indigenous communities and submitted to the Government's consideration."[219] The "taking into consideration" provision did not establish an upfront right to be consulted regarding projects related to the extraction of mineral resources or the infrastructure around such operations.

In 1998, two years after CGC signed the PSC, Ecuador ratified ILO Convention No. 169.[220] In 2001, the government modified the environmental regulations for hydrocarbon operations to include the right of previous and informed consultation of indigenous communities. The law describes a consultation process requiring the government to "hear their suggestions and opinions."[221] If the government reached an agreement with the communities, the contract had to be "drafted according to the principles of compensation and reparation for possible environmental impacts and damage to property that the execution of the fuel production projects might cause."[222] Additionally, compensation for the loss or damage of property "shall be calculated on the basis of the official tables in force."[223] Hence, the right of consultation is not a veto but rather a process where communities might raise their concerns and receive upfront compensation for the damage to or loss of property.

The conflict between the company and the communities started right after the environmental impact assessment was completed in 1997 and continued throughout the first years of the exploration stage.[224] In 1999, the government approved the suspension of activities in Block 23 because the companies' "activities [were] being affected by actions against the workers by indigenous organizations and destruction of the camp."[225] As a consequence, "the Ecuadorian Ministry of Defense signed a Cooperation Agreement on Military Security with the oil companies . . . in which the State undertook 'to ensure the safety of oil facilities, and of the persons who work in them.'"[226]

219 *Id*.
220 *Id.* ¶ 70.
221 *Id*. ¶ 77.
222 *Id*.
223 *Sarayaku* Merits and Reparations, *supra* note 87, ¶ 77.
224 *Id.* ¶¶ 69, 72, 81.
225 *Id*. ¶ 72
226 *Id*. ¶ 78.

The communities' opposition was considered force majeure, and as such, the suspension was extended several times until September 2002.[227] At that point, CGC had transferred 100 percent of its interests in Block 24 and 50 percent of its interests in Block 23 to Burlington Resources, an American-based company.[228] In that year, CGC issued an updated environmental impact study and the government allowed it to proceed with its operations. As the drills and explosives began to arrive, the communities organized camps around the field access points and protested the company's incursion onto their land. According to Burlington, the "opposition from the indigenous communities, in the form of violent attacks and death threats, intensified following Burlington Ecuador's acquisition."[229] Examples of these attacks included "the destruction of the contractors' seismic study base, the setting on fire of their camp, and the kidnapping of several employees."[230] The attacks continued until Burlington sought to trigger the force majeure clause in the contract due to its inability to securely access the fields. In response, the Sarayaku claimed that the government had not consulted them before authorizing the projects.

The companies tried to negotiate with the Sarayaku people, offering monetary compensations, medical care, jobs, and other benefits.[231] Part of the company's strategy involved hiring a "team of sociologists and anthropologists dedicated to planning community relations."[232] The operator also faced challenges in identifying adequate representatives of the communities, and hence engaged in negotiations with the communities both individually and with the communities' elected leaders under the Organizacion de Pueblos Indigenas de Pastanzas (OPIP). OPIP viewed the company's negotiation team as intruders who were trying to divide the communities, manipulate the leaders, and carry out defamation campaigns.[233] Notwithstanding the negative view of the negotiation team, five communities accepted the benefits, including payments that ranged between $50,600 and $222,600 per community, and formed a group in support of the company's operations.[234] Nevertheless, OPIP leadership rejected all of

[227] *Id.* ¶ 72, 81, 83.

[228] Burlington Res. Inc. v. Ecuador, ICSID Case No. ARB/08/5, Decision on Jurisdiction, ¶¶ 14–17 (June 2, 2010).

[229] *Id.* ¶ 30.

[230] *Id.* ¶ 35

[231] *Id.* ¶ 32; Binder & Hofbuer, *supra* note 209, at 5.

[232] *Sarayaku,* Merits and Reparations, *supra* note 87, ¶ 75 (June 27, 2012).

[233] *Id.* ¶ 75.

[234] *Id.* ¶¶ 73–74. According to the record in the IACtHR's decision, "On August 26, 2002, the CGC submitted to the Ministry of Energy and Mines the following five

the proposals, arguing that the companies had no right to enter their lands and that the company was fostering division among them by reaching individual deals. The division among the communities was so stark that violent attacks, threats, and harassment among different members of the Sarayaku people occurred between 2003 and 2004, forcing the Ecuadorian police to intervene to keep peace in the region.[235]

By mid-2003, the oil company had placed several explosives that destroyed caves, water resources, and underground rivers, and also cut down trees and plants that held sacred and cultural value to the communities.[236] Moreover, seismic lines passed near sacred sites used for religious ceremonies of the Sarayaku people.[237] It was at this point that things began escalating to the international fora.

1. The Paralleled Proceedings: Tribes to the IACtHR and Investors to an ICSID Arbitral Tribunal

Both the communities and investors brought claims against Ecuador in international tribunals for the same policies and events that led to the conflicts in the Amazon. As the history of the proceedings below shows, the same actions can be categorized by one tribunal as violations of the title awarded to the communities and of their right to be consulted, but in another tribunal, as violations of the full protection and security of the foreign investors' property rights.

i. The IACtHR Process

In 2003, a couple of years into the conflict, the Kichwa People of Sarayaku filed a petition before the Inter-American Commission of Human Rights.[238] The Commission investigated the human rights violation claims therein, issued a report in 2009, and brought the case to the IACtHR a year later. In its initial report, the Commission argued that Ecuador breached international human rights through the "granting by the State of a permit to a private oil company to carry out

investment agreements signed with indigenous communities or associations on August 6, 2002, before the Second Notary of the canton of Pastaza: FENAQUIPA Organization, US$194,000.00; AIEPRA Organization, Jatun Molino community and Independent Communities of Sarayaku, US$194,900.00; FENASH-P Federation, US$150,000.00; Association of Indigenous Centers of Pacayaku, US$222,600.00, and Achuar Community of Shaimi, US$50,600.00. These agreements, with the respective plan of action, were based on contributions to production projects, infrastructure, job training, health and education to be made as the seismic survey activities were carried out in their territories." *Id*. ¶ 82.

235 *Id.* ¶¶ 106, 107–11.

236 *Id.* ¶¶ 104–05.

237 *Id.* ¶ 105.

238 *Sarayaku* Merits and Reparations, *supra* note 87, ¶ 1.

exploration and exploitation activities in the territory of the Kichwa Indigenous People of Sarayaku . . . without previously consulting them and without obtaining their consent."[239] The Commission went further. It stated that "the company began the exploration phase, and even introduced high-powered explosives in several places on indigenous territory, thereby creating an alleged situation of risk for the population because, for a time, this prevented them from seeking means of subsistence and limited their rights to freedom of movement and to cultural expression."[240] Based on these facts, the Commission asked the IACtHR to "declare the international responsibility of the State for the violation of . . [t]he *right to private property*, recognized in Article 21, in relation to Articles 13, 23, and 1(1) of the American Convention, to the detriment of the Kichwa People of Sarayaku and its members."[241] The Commission also asked the court to declare the State in violation of the rights to life, judicial guarantees, judicial protection, freedom of movement and residence, personal integrity, and the obligation to adopt domestic legal measures to implement the American Convention.[242] The Commission's request is a clear example of how the structure of the claim in international tribunals begins with a liberal and utilitarian private property approach to conflicts that emerge between communities and extractive industries. Tribes might not perceive the question as one of private property but as one involving social, cultural, and religious relationships with the land they inhabit. Still, the international legal system forces them to frame the questions around property rights.

Some elements in the IACtHR's decision allow us to perceive the different views that the communities have around the land. For example, after the Commission filed its claim before the IACtHR, the communities were invited to submit their observations to the original complaint filed by the Commission, and they added the right to culture as one that should be included in the case file.[243] The tribe believed that

239 *Id*. ¶ 2.

240 *Id*.

241 *Id*. ¶ 3 (emphasis added). Article 13 recognizes freedom of expression and thought, Article 23 recognizes the right to participate in government, and Article 1 recognizes the obligation to respect rights without any discrimination. American Convention, *supra* note 95.

242 *Id*.

243 *Id.* ¶ 6 (Under Articles 35, 36 and 37 of the Rules of Procedure of the IACtHR the victims are not allowed to bring claims directly to the IACtHR. The Inter-American Commission files the claims on behalf of the victims (Article 36). Under Articles 25, 42 and 43 of the Rules of Procedure, the IACtHR allows victims to file a brief in order to give them an opportunity to voice their concerns or to add grievances not presented by the Commission. Rules of Procedure of the Inter-American Court of Human Rights,

the activities had deprived them of a life according to their culture and traditions. This was confirmed during the *in situ* visit to the fields, where the communities expressed the grievances as a loss of "ancestral knowledge" connected to forest in their land.[244] Culture and ancestral knowledge are two elements that are hardly captured by the liberal and utilitarian approach to property rights. That approach, as explained in the previous Sections, is primarily focused on the economic value of land and its potential for wealth.

For the Sarayaku tribe, land ownership does not fit the traditional utilitarian approach that the liberal and utilitarian conception inserts into property rights. The Sarayaku communities are composed of various *ayllus* (extended families) that are formed through marriages that result in alliances.[245] Farming is done in a communitarian way through *chakra* (village farms), where families plant yucca, yam, plantain, maize, potatoes, cane, fruit, palm trees, beans, chili peppers, tomatoes, and squash.[246] The *chakras* are also used for other purposes, such as to cultivate medicinal plants and timber trees and to create educational spaces for children to learn how to recognize and grow plants for the community.[247] The communities also build *purinas-tambu* (seasonal communal facilities by the river), which are used for hunting and fishing. *Yachaks* (shamans), who according to the tribe can communicate with the natural world, assist with the selection of the communal facilities.[248] To the Saryaku, the forest is alive—*kawsaka sacha*—and "every natural space is a *llakta* (village) with spiritual populations."[249] In this way, the *purinas-tambus* are built with respect for sacred locations, identifying suitable areas that will not lead to overhunting or overfishing so that the activities allow for repopulation of fauna.[250] The Sarayaku communitarian method for farming, hunting, and fishing covers 90 percent of the community's dietary needs.

Given these communities' perspective toward and connection with the land, it is hard to picture how the liberal and utilitarian view of property rights could fit. An attempt to do so would immediately attempt to monetize the value of the property or to compensate with

approved by the Court in November 16–28, 2009, available at http://www.corteidh.or.cr/reglamento.cfm?lang=en).

244 *Sarayaku* Merits and Reparations, *supra* note 87, ¶ 23.

245 The Amazon Conservation Team, *Sarayaku: In Defense of Territory*, https://www.amazonteam.org/maps/sarayaku-en (last visited Nov. 1, 2019).

246 *Id*.

247 *Id.*

248 *Id.*

249 *Id.*

250 *Id.*

other types of reparations involving a view that includes a cost-benefit analysis. It would downplay the role of the social and spiritual relations that emerge with their land as the guiding factor for resolving the conflict. A clear example of how the cost-benefit analysis loses sight of these dimensions can be found in the declarations of the Ecuadorian government before the IACtHR, after recognizing the international responsibility of the State. In the words of the Secretary of Legal Affairs of the Presidency of Ecuador:

> A new round [for the auction of the fields] will not begin without informed consultation. And what is this consultation? In particular, it deals with what was said about pollution; what should not be polluted, because rivers and communities cannot be polluted by oil activities . . . and we must *discuss the situation of the communities* themselves. What is the health situation? What about education? When we begin to discuss the oil issue, *we could have the best doctors* treating the mothers in the communities, we could have *the best health teams and best teachers coming from Quito* to the area, if there is *going to be money generated by the oil exploration*.[251]

The government's view fails to capture the spiritual value of the land and its connections to indigenous communities. Rather than protecting the way the communities socially and culturally relate to the forest, the government monetizes the problem and finds solutions that translate into "bringing" outside elements into the community to compensate for the damages caused by the extractive activities. The best doctors and professors from the capital are to be brought into the communities as if these actions were to be considered equal to, or even better than, the loss of the "ancestral knowledge" that is affected by the presence of the oil companies.

The liberal and utilitarian approach of monetizing the value of property also failed during the negotiations between the companies and the tribes in 2000, when CGC offered up to $60,000 for development projects, to provide 500 jobs for men in the community, and to send a medical team to provide care in several communities.[252] Again, this is an economic compensation approach to the loss of property. These efforts failed because the Sarayaku tribe council felt that they did not reflect the actual loss inflicted on the community.[253]

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[251] *Sarayaku* Merits and Reparations, *supra* note 87, ¶ 23 (June 27, 2012) (emphasis added).

[252] *Id.* ¶¶ 73–74.

[253] *Id*.

ii. The IACtHR's Decision and Reparations

In June 2012, the IACtHR issued its decision, finding Ecuador in violation of the Sarayaku people's right to consultation. The decision was groundbreaking for considering the cultural, social, and environmental relations generated by property rights.[254] But, as explained below, it did not fully escape the liberal and utilitarian conception of property rights recognized in international treaties. As explained previously, tribal rights must work within the internationally recognized conception of rights to protect their lands, and as such, continue to be subject to the monetization of their property's value.

For example, the IACtHR begins its analysis of property rights by recognizing that a classical and textual reading of Article 21 of the American Convention—the right to property—does not capture the "close relationships between indigenous people and their lands, and with the natural resources on their ancestral territories and the intangible element arising from these."[255] Rather, Article 21, to adequately protect indigenous lands, must be interpreted as a living instrument that includes notions of land ownership and possession that do not necessarily conform to classic conceptions of property.[256] The State must take into consideration indigenous culture, practices, customs, and beliefs; otherwise, there would only be one way to think about the use and disposal of the property—the liberal and utilitarian conception. To properly protect indigenous property, we must ensure that communities can continue their traditional way of living.[257] In this respect, the IACtHR decision is in line with the arguments presented in previous Sections.

254 *See* Anaya & Puig, *supra* note 20.

255 *Sarayaku*, Merits and Reparations, *supra* note 87, ¶ 145.

256 *Id*.

257 *Id*. ¶ 146.

In this light, the IACtHR extended the right of consultation into its communal view of the right to property.[258] For example, the State must consult the communities during the early stages of the development plan, and not when the project is already underway.[259] In doing so, the State must consult the communities in an active and informed manner, and in accordance with the indigenous communities' customs and traditions.[260] In addition, the State must conduct the consultation process with the aim of reaching an agreement and ensure that the communities are aware of the potential benefits and risks.[261]

According to the IACtHR, in the case of the Sarayaku tribe, Ecuador and the company failed to fulfill the above requirements as established by the right of consultation.[262] It was the obligation of the State, not the company, to comply with these steps. According to the court, the State cannot delegate its duties to the private company or third parties.[263] As such, even if the company had lines of communication with the communities and engaged in negotiations that resulted in some agreements and the socialization of the project, the court held that those efforts would not be enough. Moreover, the fact that the State had delegated its duties was a breach of its international responsibility.[264]

The IACtHR described the company's efforts to engage with the communities and the presence of government officials in the area to prevent violent spikes as efforts to benefit the companies as opposed to the communities.[265] The presence of military forces appears to

258 *Id*. ¶ 177 ("The Court has established that in order to ensure the effective participation of the members of an indigenous community or people in development or investment plans within their territory, the State has the obligation to consult the said community in an active and informed manner, in accordance with its customs and traditions, within the framework of continuing communication between the parties. Furthermore, the consultations must be undertaken in good faith, using culturally-appropriate procedures and must be aimed at reaching an agreement. In addition, the people or community must be consulted in accordance with their own traditions, during the early stages of the development or investment plan, and not only when it is necessary to obtain the community's approval, if appropriate. The State must also ensure that the members of the people or the community are aware of the potential benefits and risks so they can decide whether to accept the proposed development or investment plan. Finally, the consultation must take into account the traditional decision-making practices of the people or community. Failure to comply with this obligation, or engaging in consultations without observing their essential characteristics, entails the State's international responsibility.").

259 *Id.*

260 *Id*.

261 *Sarayaku* Merits and Reparations, *supra* note 87, ¶ 177.

262 *Id*. ¶ 223.

263 *Id.* ¶ 187.

264 *Id.* ¶ 188.

265 *Id*. ¶ 190–98.

encourage a climate of conflict and division. These efforts resemble confrontation rather than attempts to prevent further clashes.[266] As such, the IACtHR completely ignored the fact that the companies complained to the government that the communities were perpetrating violence and damaging their property.[267] As the next subsection will show, foreign direct investors viewed the same acts that the IACtHR described as designed to protect the companies as inadequate protection under the investment treaties.[268]

The IACtHR considered that Ecuador, almost twelve years after the signing of the contracts with foreign companies and ten years after the ratification of ILO Convention No. 169, passed a constitutional amendment to recognize the right to consultation. Article 57 of the 2008 Ecuadorian Constitution recognizes indigenous communities in conformity with human rights agreements, including their "collective rights" to "keep ownership, without subject to a statute of limitations, of their community lands, which shall be unalienable, immune from seizure and indivisible"; "[t]o keep ownership of ancestral lands and territories"; and to "participate in the use, usufruct, administration and conservation of natural renewable resources located on their lands."[269] Notwithstanding its recognition of the communal rights and the cultural and collective nature of the indigenous lands, Article 57 clearly identifies monetary compensation as the primary method to remedy any damage to indigenous lands connected to infrastructure projects. The wording of Article 57 is clear on this point. Indigenous communities have collective rights to

> free prior informed consultation, within a reasonable period of time, on the plans and programs for prospecting, producing and marketing nonrenewable resources located on their lands and which could have an environmental or cultural impact on them; to participate *in the profits* earned from these projects and *to receive compensation for social, cultural and environmental damages* caused to them. . . . If consent of the consulted community is not obtained, steps provided for by the Constitution and the law shall be taken.[270]

266 *Id.*

267 *Sarayaku* Merits and Reparations, *supra* note 87, ¶ 190–98.

268 *Id*.

269 República del Ecuador, Constitucion de 2008, art. 57, ¶¶ 5–7, *translated in* POL. DATABASE OF THE AM., http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html (last updated Jan. 31, 2011).

270 *Id*. ¶ 7 (emphasis added).

Article 57 was implemented by Decree No. 1247, which was adopted a month after the IACtHR published its decision finding Ecuador in violation of the American Convention.[271] The decree establishes the steps for considering whether the right of consultation was properly respected by the Ministry of Hydrocarbons. It specifies the type of "social programs" that can be offered in the process of consulting the communities, the actors that must be involved in the process, and the certification of the consultation process. But the decree clearly specifies that the process would not be considered null or invalid if the communities decide not to exercise their right to participate in the consultation.[272] Only the Ministry has a duty to initiate and follow the steps in the law, but it should not be confused with a veto on the project. If the communities decide not to approve the project or to participate in the offered social programs as compensation, the Ministry's only obligation is to record that and set up a contingency plan. The decree also excludes all previous licenses and contracts signed by the State from the obligation to conduct a consultation process according to Article 57.

As pecuniary damages, the court ordered the State to pay $90,000.[273] It took into consideration all the expenses incurred by the tribes in defending their rights, the territory and natural resources damages, and the effects of the suspension of production activities on the communities' financial situation.[274] The court also ordered the payment of $1.25 million to compensate the community for the impacts involving their spiritual relationship with their territory and spiritual sites.[275] Finally, to ensure nonrepetition of the actions, the court ordered the State to:

1. Remove any remaining explosives on the sites;[276]
2. Implement adequate legislation ensuring that any future project involving the ancestral land of the Sarayaku would be subject to an effective consultation process as defined by the court;[277] and

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271 *Decreto núm. 1247 que dicta el reglamento para la ejecución de la consulta previa libre e informada en los procesos de licitación y asignación de áreas y bloques hidrocarburíferos*, INT'L LABOUR ORG., https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=98181&p_country=ECU&p_count=383 (last visited Jan. 24, 2020) [hereinafter Ecuador Decree No. 1247].

272 *Id.* at Art. 19 & 20.

273 *Sarayaku* Merits and Reparations, *supra* note 87, ¶ 317.

274 *Id.* ¶¶ 316–17

275 *Id.* ¶¶ 322–23.

276 *Id.* ¶¶ 289–95.

277 *Id.* ¶¶ 296–302.

3. Conduct a public act of acknowledgment of international responsibility.[278]

As noted, these measures do not escape the tendency to favor a monetization of indigenous property. The consultation process, even if it is done following all the elements described by the court, ends up leading to a monetization of the value of the property that leaves the communities on the wrong side of the equation. Even in its decision, the court recognized that as it was drafting its resolution, the State, following its new amended constitution and legislation, was still opening bidding rounds on indigenous lands. The court acknowledged that it did not need "to rule on new oil bidding rounds that the State may have initiated," and reaffirmed that the State "should seek to carry out activities or projects for the exploration or extraction of resources," making sure that the Sarayaku people are "previously, adequately and effectively consulted, in full compliance with the relevant international standards."[279] As explained above, the standard does not provide a solution to projects that will ultimately affect the communities and their relationship to their territories.

iii. The ICSID Proceedings

On April 21st, 2008, as the Sarayaku people were presenting their case in the Inter-American Commission of Human Rights, Burlington Resources was filing a request for arbitration against Ecuador with the ICSID.[280] Burlington's claims involved not only the lack of protection by the Ecuadorian government from the indigenous community's intervention into the company's operations but also the changes in the tax legislation and violation of stabilization clauses in the contracts.[281] The company requested the arbitral tribunal to order $1.5 billion in compensation for the breach of Ecuador's treaty obligations.

The ICSID arbitral tribunal that reviewed the case, in the end, dismissed the company's claims for failure to afford full protection and security in the project on procedural grounds.[282] Accordingly, the

278 *Id.* ¶¶ 303–05.

279 *Sarayaku* Merits and Reparations, *supra* note 87, ¶ 299.

280 Burlington Res. Inc. v. Ecuador, ICSID Case No. ARB/08/5, Decision on Jurisdiction, ¶ 53 (June 2, 2010).

281 *Id.* ¶ 26 ("The dispute between the Parties arises out of the following two factual scenarios: (1) Ecuador's purported failure to protect Burlington's exploration and exploitation activities in Blocks 23 and 24 from local indigenous opposition, and (2) Ecuador's enactment of measures which, purportedly in breach of its contractual and Treaty obligations, unilaterally increased its participation under the PSCs on so-called 'unforeseen surpluses.").

282 *Id*. ¶¶ 316–18. The tribunal argued that the company was required to notify the State of the existence of dispute regarding the lack of full protection and security, and,

tribunal did not assess whether indigenous interests had any role to play regarding the substantive issues or the proceedings.[283] Notwithstanding the dismissal, the company's claims are a perfect example of the clash of internationally protected rights that arise from prioritizing the economic value of property over its social component.

According to Burlington, Ecuador's breach of the full protection and security standard originated in Ecuador's "failure to protect Burlington's exploration and exploitation activities in Blocks 23 and 24 from the indigenous oppositions."[284] The company's recounting of the facts included the several occasions in which the indigenous intervention forced the company to declare the Blocks in force majeure partly due to the communities' opposition, but also due to the communities "violent attacks and death threats."[285] Moreover, it described the failure of the Ecuadorian government in assisting with the negotiations with the communities and exercising its police powers, forcing the company to maintain the force majeure status of its operations.[286]

As evidence, Burlington submitted a letter from 2002 where CGC, the operator of Block 23, requested the government's assistance to "intercede with its good offices, and take the measures [it] deem[ed] necessary, with the purpose of ensuring that the Armed Forces and the National Police w[ould] act resolutely to procure the liberation of the hostages, as well as to facilitate the execution of the ongoing seismic project. . . . [I]t is the duty of the Ecuadorian State, and PetroEcuador in a particular, to guarantee the safety of the operations, as stated in our contractual agreement and under appropriate constitutional norms."[287] As stated by the ICSID tribunal, the "tone and the context of the letter do manifest a disagreement over rights and obligations."[288] The same plea was made again in 2005, stating that the company had "not managed to secure [Petroecuador] and the energy authorities' effective intervention in order to overcome the obstacles underlying the force majeure situation. . . . [I]t is the duty of the Ecuadorian State, through its police power, to adopt the necessary measures to guarantee the security of its

according to its interpretation of the communications between the company and the State, to deal with the indigenous communities opposition, these could not be considered as triggering the required notification prior to the initiation of arbitral proceedings.

283 *Id*.

284 *Id.*

285 *Id.* ¶¶ 27–31, 35.

286 *Burlington Res. Inc.*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, ¶¶ 32–37.

287 *Id.* ¶ 319.

288 *Id.* ¶ 320.

citizens in the territory."[289] The letters were accompanied with evidence of the damages suffered as a result of the security situation in the Blocks.

The facts, described by Burlington as grounds for Ecuador's breach of investment law obligations, are an example of the dynamic that emerges when the State is pushed on both sides of the equation to provide protection against the other party.

Ecuador did not contest the facts pertaining to the lack of protection of the company's operations. The government's position was that the tribunal lacked jurisdiction to resolve the merits of the claim because Burlington had failed to abide by a six-month waiting period contemplated in the Treaty, and that Ecuador withdrew its consent to resolve this type of dispute before Burlington brought them to arbitration.[290]

According to the Treaty Between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment ("Ecuador-U.S. BIT"), investors must wait six months before bringing a treaty claim to an investment tribunal.[291] To Ecuador, there was never a disagreement between the government and Burlington concerning the indigenous opposition in Blocks 23 and 24; even if there was, Burlington never provided proper notice of it, and hence did not comply with the six-month waiting period.[292] In fact, the government argued that Ecuador and Burlington, by accepting the force majeure status, recognized that the events in question were beyond the parties' control, and in fact "'there was a clear collaboration between [the government and the company] to solve the issue' in the Blocks concerning the indigenous opposition."[293] In other words, the government recognized that it had been cooperating with the companies, and did not deny that the opposition from the communities existed.

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289 *Id.* ¶ 323.

290 *Id.* ¶ 95(iv) ("Burlington's claim that Ecuador allegedly failed to provide full protection and security for Blocks 23 and 24 is outside the jurisdiction of the Tribunal because: (a) Burlington failed to abide by the six-month waiting period, a condition for consent under the Treaty; (b) Burlington failed to perfect consent before Ecuador withdrew its offer to arbitrate this class of disputes pursuant to its declaration under Article 25(4) of the ICSID Convention.")

291 Treaty Concerning the Encouragement and Reciprocal Protection of Investment, Ecuador-U.S., Aug. 27, 1993, S. TREATY DOC. NO. 103-15 (1993), at Article VI.3(a).

292 *Burlington Res. Inc.*, ICSID Case No. ARB/08/5, Decision on Jurisdiction, ¶ 255, 258.

293 *Id.* ¶ 257.

Ultimately, the ICSID tribunal dismissed the "full protection and security" claims on procedural grounds. It found that the companies had not provided the government adequate notice of the existence of the dispute of a treaty claim and failed to comply with the six-month cooling period required by the Treaty before bringing the claim to arbitration.[294] But, as stated above, the tribunal accepted Burlington's classification of the indigenous resistance as a force majeure that was outside the control of the company and prevented it from fulfilling its contractual obligations.[295] The ICSID tribunal did not assess the company's role in the failed consultation process with the communities.[296] The indigenous communities and their rights were treated as externalities in the process.[297]

Ecuador was found liable for unlawfully expropriating Burlington's investments through the enactment of the new taxation regime.[298] Before the tribunal calculated damages, Ecuador filed counterclaims against Burlington for breaching its environmental obligations under the contracts. Ultimately, the quantification of damages was reduced to the environmental impact on the sites where the oil wells were operating, but the decision made no mention of the communities.[299] The ICSID tribunal relied exclusively on Ecuadorian environmental law to determine the quantification of damages owed to the Ecuadorian State and completely ignored the communities' grievances.[300] In the end, Ecuador was ordered to pay $380 million for the actions taken against Burlington, while, as mentioned above, in the IACtHR, the State only paid the communities $1.38 million.[301]

294 *Id.* ¶¶ 335–40.

295 *Id*. ¶ 34.

296 Binder & Hofbuer, *supra* note 209, at 8.

297 *Id.*

298 Burlington Res. Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Liability, ¶¶ 541–46 (Dec. 14, 2012).

299 Matthew Levine, *Ecuador Awarded USD41 Million in Counterclaim Against U.S. Oil and Gas Company Burlington Resources*, INV. TREATY NEWS (Sept. 26, 2017), https://www.iisd.org/itn/2017/09/26/ecuador-awarded-41-million-counterclaim-against-u-s-oil-gas-company-burlington-resources-matthew-levine.

300 Burlington Res. Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Counterclaims, ¶¶ 48, 116, 328 (Feb. 7, 2017). The Tribunal only mentioned in its decision that communities lived in Block 21, but there was no mention of the case before the IACtHRs or the actions taken against the indigenous communities.

301 The IACtHR awarded US$90,000 for pecuniary damages and US$1,250,000.00 as compensation for non-pecuniary damage. *Sarayaku*, Merits and Reparations, *supra* note 87, ¶¶ 317, 323.

B. *Oil from Canada and North American Tribes: Keystone XL*

The effect of energy infrastructure in tribal land is not unique to developing nations. The United States, for example, is no stranger to questions surrounding the clash between indigenous communities and foreign investors.[302] In three of the seventeen investment arbitration cases in which the United States was a respondent, issues surrounding indigenous people's right to be consulted or land being affected by foreign investors were brought up in the proceedings.[303] The case described below is the latest U.S. example of how investors have an international recourse that prioritizes the quantification of damages when communities' protests affect their investments.[304] But communities are left with remedies that force them to fit their conceptions of property into the liberal and utilitarian paradigm, and hence, leave them on the wrong side of the equation.

[302] *See, e.g.,* Glamis Gold Ltd v. United States, *supra note* 128; Grand River Enterprises Six Nations, Ltd., et al. v. United States of America, *supra* note 128. For executive orders seeking to address the consultation process with indigenous communities, see Pres. George W. Bush, Executive, Memorandum: Government-to-Government Relationship with Tribal Governments, Sept. 23, 2004; Pres. William J. Clinton, Executive Order 13175, Nov. 6, 2000 (consultation and coordination with tribal governments); Pres. Barack Obama, Memorandum for the Heads of Executive Departments and Agencies—Tribal Consultation, Nov. 5, 2009.

[303] For a complete list of cases in which the U.S. has been a respondent, see *United States of America, Investment Dispute Settlement Navigator*, UNCTAD INV. POL'Y HUB, https://investmentpolicy.unctad.org/investment-dispute-settlement/country/223/united-states-of-america/respondent (last visited Mar 6, 2021). The three cases involving indigenous communities and foreign investors in the United States are Glamis Gold Ltd v. United States, *supra note* 128, Grand River Enterprises Six Nations, Ltd., et al. v. United States, *supra* note 128; and TransCanada Corp. v. United States, Notice of Intent to Submit a Claim to Arbitration Under Chapter 11 of the North American Free Trade Agreement (Jan. 6, 2016), http://www.energylawprof.com/wp-content/uploads/2016/01/TransCanada-Notice-of-Intent-January-6-2016.pdf [hereinafter Notice of Intent to Submit a Claim to Arbitration Under Chapter 11 of the NAFTA].

[304] This Article was written between October 2019 and January 2021. The Biden administration's decision was included during the editing process of the Article. As such, it does not include any analysis of the TransCanada case after January 2021.

1. A Politicized Keystone

On November 3rd, 2015, White House Press Secretary Josh Earnest stated, "I would venture to say that there's probably no infrastructure project in the history of the United States that's been as politicized as [the Keystone Pipeline]."[305] As the next paragraphs will show, President Obama's Press Secretary was far from wrong when he described the permit process of the Keystone XL pipeline.

The politicization of the project began with the existing legal framework for issuing transboundary pipeline permits.[306] In the U.S., the executive branch has traditionally issued Executive Orders establishing a process for issuing permits to pipelines crossing into the United States that would serve national interests.[307] As Professor James Coleman pointed out in his work, Congress has not provided a legal framework regulating the issuance of such permits, and in the absence of express Congressional authorization, presidents all the way back to Lyndon B. Johnson have taken unilateral action to decide when and under what circumstances cross-border permits are issued.[308]

In 2008, TransCanada Keystone Pipeline LP applied to the U.S. Department of State for a Presidential Permit to build a pipeline to carry crude oil from Canada to the United States.[309] When TransCanada filed for the Keystone XL permit, there was plenty of precedent suggesting that the pipeline would be approved.[310] In fact, this was not the first time oil from the Canadian province of Alberta was being transported via pipeline to ease the demand for fuel in America.[311] The petition itself was no different from at least three previously granted permits to carry

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305 *Press Briefing by Press Secretary Josh Earnest*, WHITE HOUSE (Nov. 3, 2015), https://obamawhitehouse.archives.gov/the-press-office/2015/11/03/press-briefing-press-secretary-josh-earnest-1132015.

306 James Coleman, *TransCanada Sues U.S. Government for Rejecting Keystone Pipelines*, U. OF CALGARY FAC. OF L. BLOG (Jan. 11, 2016), https://ablawg.ca/2016/01/11/transcanada-sues-u-s-government-for-rejecting-keystone-pipelines.

307 *See* Coleman, *Beyond the Pipeline Wars, supra* note 22, at 135.

308 Coleman, *supra* note 306 (describing how Congress had not provided a legal framework for regulating oil pipelines that cross the U.S. international borders and how "[i]n the absence of Congressional authorization, President Lyndon Baines Johnson simply issued an executive order in 1968, Executive Order 11423, that established a process for issuing permits to proposed oil pipelines that 'would serve the national interests.' Then in 2004, President George W. Bush issued a new unilateral order, Executive Order 13337 that expedited review of border crossings. Both executive orders delegate decisions on these cross-border permits to the U.S. Secretary of State.").

309 Coleman, *Beyond the Pipeline Wars, supra* note 22, at 120–21.

310 Notice of Intent to Submit a Claim to Arbitration Under Chapter 11 of the NAFTA, *supra* note 303, ¶ 1.

311 *Id*.

oil from the same location.[312] Keystone XL was intended to increase the capacity of the existing system to process 168 billion barrels of tar sands oil.[313] It would transport around 830,000 barrels across the United States to refineries on the Gulf Coast of Texas.[314] Notwithstanding the immense similarities, however, Keystone XL differed from previous petitions in one glaring way: environmental groups and Native American tribes opposed the expansion of the system.[315]

Leaders of the Fort Peck Assiniboine and Sioux tribes of the Fort Peck Reservation and the Cheyenne River tribe openly opposed the pipeline.[316] The opposition can be credited to the following: The Keystone XL "would cross less than 100 miles from the headquarters of the Fort Belknap Indian Reservation and run directly through sacred and historical sites as well as the ancestral lands of the Gros Ventre and Assiniboine Tribes."[317] Moreover, the pipeline would cross the two water sources for the Mni Wiconi Rural Water Supply Project, a water delivery system owned and operated by the Rosebud Sioux Tribe.[318] In the words of the Native American Rights Fund: "[t]here are countless historical, cultural, and religious sites in the planned path of the pipeline that are at risk of destruction, both by the pipeline's construction and by the threat of inevitable ruptures and spills if the pipeline becomes operational."[319] These tribes also participated in the protests of their neighboring tribe, the Standing Rock, who opposed the construction of the Dakota Access pipeline that would bring shale oil from the Bakken formation in North Dakota to an oil terminal in Patoka, Illinois.[320] Together the Sioux, Cheyenne, and Standing Rock tribes established

312 *Id.*

313 Melissa Denchak, *What Is the Keystone Pipeline?*, NAT. RES. DEF. COUNCIL (Apr. 7, 2017), https://www.nrdc.org/stories/what-keystone-pipeline.

314 *Id.*

315 Notice of Intent to Submit a Claim to Arbitration Under Chapter 11 of the NAFTA, *supra* note 303, ¶ 1; Denchak, *supra* note 313; *see also* Coleman, *Beyond the Pipeline Wars, supra* note 22, at 121–24.

316 Phil McKenna, *'We Will Be Waiting': Tribe Says Keystone XL Construction Is Not Welcome*, INSIDE CLIMATE NEWS (July 13, 2018), https://insideclimatenews.org/news/13072018/keystone-xl-pipeline-native-american-resistance-oil-spill-cheyenne-river-sioux-dakota-access-transcanada; *Keystone XL Pipeline,* NATIVE AM. RIGHTS FUND, https://www.narf.org/cases/keystone/ (last visited Jan. 16, 2020).

317 Vanessa Romo, *Native American Tribes File Lawsuit Seeking to Invalidate Keystone XL Pipeline Permit*, NPR (Sept. 10, 2018), https://www.npr.org/2018/09/10/646523140/native-american-tribes-file-lawsuit-seeking-to-invalidate-keystone-xl-pipeline-p; *Keystone XL Pipeline*, *supra* note 316.

318 *Keystone XL Pipeline*, *supra* note 316.

319 *Id.*

320 McKenna, *supra* note 316.

semi-permanent camps near where the pipelines would cross under the Missouri River, just upstream from the reservations.[321]

It was in the context of these social protests, both the environmental and the tribal, in which Secretary of State John Kerry denied the Keystone XL permit in 2015.[322] The White House's argument for denying the permit involved U.S. national interests. The Obama administration felt that U.S. leadership could be undercut in the ongoing climate talks because the pipeline was "perceived as enabling further [greenhouse gas] emissions globally."[323] In other words, the expansion of a pipeline that would funnel billions of barrels of one of the "dirtiest" crudes in the world into American refineries would contradict the goal of reducing "dirty" oil consumption.[324] Environmental and tribal activists leaders were successful in their campaign against the construction of the pipeline.[325]

2. TransCanada's NAFTA Claims Against the U.S.

The Keystone Pipeline odyssey did not cease with the permit denial. In January 2016, TransCanada filed a notice of intent to submit an international investment claim to arbitration under NAFTA's Chapter XI. The company alleged that President Obama's decision to cancel the permit violated "core investment protections, including national treatment (Article 1102), most-favored-nation treatment (Article 1103), treatment in accordance with international law (Article 1105), and protection against uncompensated expropriations (Article 110)."[326] To the Canadian investors, the President based his decision not on the merits of Keystone's application but on "politically-driven" factors that violated U.S. obligations under NAFTA.[327]

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321 *Id.*

322 *See* Notice of Intent to Submit a Claim to Arbitration Under Chapter 11 of the NAFTA, *supra* note 303, ¶ 6.

323 U.S. DEP'T OF STATE, RECORD OF DECISION AND NATIONAL INTEREST DETERMINATION 29 (2015), http://www.energylawprof.com/wp-content/uploads/2016/01/KeystoneXL.Record-of-Decision.pdf [hereinafter 2015 U.S. DEP'T OF STATE DETERMINATION] (The determination stated that "While the proposed Project by itself is unlikely to significantly impact the level of GHG-intensive extraction of oil sands crude or the continued demand for heavy crude oil at refineries in the United States, it is critical for the United States to prioritize actions that are not perceived as enabling further GHG emissions globally"); Coleman, *Beyond the Pipeline Wars*, *supra* note 22, at 122.

324 *See* Denchak, *supra* note 313.

325 *See* Notice of Intent to Submit a Claim to Arbitration Under Chapter 11 of the NAFTA, *supra* note 303, ¶ 6.

326 *Id.* ¶ 8.

327 *Id.* ¶ 1.

In their notice of intent, TransCanada insisted that the government misled them into investing in the U.S. while the permit was pending approval.[328] As such, the company had legitimate expectations that the project would move forward, and consequently began initial works on the south end of the pipeline, "secure[d] thousands of land easements, purchase[d] equipment[,] . . . and enter[ed] into long-term contracts with shippers to transport the[ir] oil."[329] By misleading TransCanada into investing in the project and yielding to the protesters and environmental activists, the Obama administration had breached the minimum standard of treatment of aliens including fair and equitable treatment and full protection and security.

TransCanada grounded its contention on the fact that the State Department's 2015 determination concluded that the pipeline would improve U.S. energy security, benefit the economy, and would be unlikely to increase greenhouse emissions in Canada.[330] In fact, the report suggested that by moving the transportation of oil to a pipeline instead of railroads, the project would reduce emissions in the United States.[331] Under TransCanada's views, "there was nothing unusual about the proposed pipeline or the oil it was intended to carry."[332] The administration had approved similar projects from the same company in the past (Keystone I pipeline), taking approximately twenty-seven months or less to approve the permits.[333] In the case of Keystone XL, the refusal took seven years due to the pressures exerted by activists and environmental groups, turning opposition to the Keystone XL "into a litmus test for politicians."[334]

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328 *Id.* ¶ 2 ("TransCanada Corporation ('TransCanada') and TransCanada PipeLines Limited (collectively the 'Disputing Investors') through their affiliates, including Keystone, invested billions of dollars in the pipeline project while the Keystone XL Pipeline application was pending, all with the reasonable expectation that the Administration would process Keystone's application fairly and consistently with past actions.").

329 *Id.* ¶ 2.

330 *Id*. ¶ ¶ 46–49; *see also* 2015 U.S. DEP'T OF STATE DETERMINATION *supra* note 323, at 29–31.

331 2015 U.S. DEP'T OF STATE DETERMINATION, *supra* note 323, at 23 ("With regard to GHG emissions, during operation of the No Action Alternative transportation scenarios, including rail and combination modes, the increased number of trains along the rail routes would produce GHG emissions from diesel fuel combustion and electricity generation to support terminal operations. Annual GHG emissions (direct and indirect) attributed to the No Action transportation scenarios would be greater than for the proposed Project, but those emissions relate solely to the movement of equivalent amounts of oil from Alberta to the Gulf Coast.")

332 Notice of Intent to Submit a Claim to Arbitration Under Chapter 11 of the NAFTA, *supra* note 303, ¶ 1.

333 *Id.* ¶ 10.

334 *Id.* ¶¶ 1, 11.

Moreover, TransCanada argued that the U.S. government, during the seven years in which the permit was pending, looked very carefully into the state-level litigation and required easements.[335] The federal government "worked with Keystone to develop at least [fifty-seven] changes to the proposed pipeline project to ensure that the pipeline would be built and operated in a manner that would protect health, safety, the environment, and local communities."[336]

Consequently, to TransCanada, the denial of the permit was solely based on "perceived" negative effects on the communities and the environment, not proven or documented effects that contradicted the State Department's previous findings.[337] To TransCanada, the only reason behind the decision was to appease the protesters and activists who held a "false" belief.[338]

After the filing of TransCanada's notice of intent, an ICSID-administered proceeding against the United States was registered on July 15, 2016.[339] The total damages requested by TransCanada for breach of the U.S.'s NAFTA obligations amounted to $15 billion.[340] In late 2016, the U.S. and Canada appointed their arbitrators, David R. Haigh and Sean David Murphy.[341] In early February 2017, the ICSID Secretary was about to initiate proceedings to select the president of the Tribunal when the parties agreed to suspend the proceedings for one month. Donald J. Trump had been sworn in as the forty-fifth President on January 20, 2017, and the future of the pipeline took a hard turn again.[342]

335 *Id.* ¶ 2.

336 *Id.* ¶ 2.

337 *Id.* ¶ 7.

338 Notice of Intent to Submit a Claim to Arbitration Under Chapter 11 of the NAFTA, *supra* note 303, ¶ 7.

339 TransCanada Corp. v. United States, ICSID Case No. ARB/16/21, Order of the Secretary-General Taking Note of the Discontinuance of the Proceeding, ¶ 2 (Mar. 24, 2017).

340 The Canadian Press, *TransCanada Suspends $15-Billion NAFTA Suit on Keystone XL Pipeline*, STAR (Feb. 28, 2017), https://www.thestar.com/business/2017/02/28/transcanada-suspends-15-billion-nafta-suit-on-keystone-xl-pipeline.html.

341 *See TransCanda Corp.,* ICSID Case No. ARB/16/21, Order of the Secretary-General Taking Note of the Discontinuance of the Proceeding, at ¶ 4.

342 *See* The Canadian Press, *supra* note 340.

3. The Trump Administration and the Case Before the Inter-American Commission on Human Rights

Environmentalists and tribe members had opposed the pipeline for eight years, but it took four full days on the job for President Trump to sign an executive action inviting TransCanada to resubmit the controversial proposal.[343] The Executive Order instructed the newly appointed Secretary of State and former chief executive of ExxonMobil, Rex Tillerson, to make a decision on the proposal within sixty days of receiving the application.[344] On March 23, 2017, the U.S. Department of State granted TransCanada's permit application, reversing the previous administration's decision. Suddenly, the pipeline's environmental effects and impacts on communities had no weight in the process. The seven-year odyssey under one administration was seemingly resolved in only fifty-six days by the newly elected president. The NAFTA claim was discontinued upon TransCanada's request the same day that the Trump administration approved the permit.[345]

It is no surprise that the tribes and activists complained of the Trump administration's lack of explanation for why the previous administration's factual findings were discarded.[346] According to the tribes,

> throughout the permitting process, there was no analysis of trust obligations, no analysis of treaty rights, no analysis of the potential impact on hunting and fishing rights, no analysis of potential impacts on the Rosebud Sioux Tribe's unique water system, no analysis of the potential impact of spills on tribal citizens, and no analysis of the potential impact on cultural sights in the path of the pipeline.[347]

The same week that the permit was approved, the Inter-American Commission held a hearing with the tribes on the effects of expedited environmental reviews and approval for high-priority infrastructure projects (mainly the Dakota Access and Keystone XL pipelines) on tribal

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343 Daniel Dale, *Trump Signs Order to Quickly Approve Keystone Pipeline, Trudeau Applauds*, STAR (Jan. 24, 2017), https://www.thestar.com/news/world/2017/01/24/trump-to-advance-controversial-keystone-xl-dakota-access-oil-pipelines.html.

344 *Id.*

345 *TransCanda Corp.,* ICSID Case No. ARB/16/21, Order of the Secretary-General Taking Note of the Discontinuance of the Proceeding, at ¶ 10.

346 Letter from Rodney M. Bordeaux, President of South Dakota Rosebud Sioux Tribe, to Rosebud Sioux Tribe Community (Sept. 10, 2018), https://www.narf.org/wordpress/wp-content/uploads/2017/09/20180910bordeaux-letter.pdf.

347 Natalie A. Landreth et al., *Keystone XL Pipeline, Case Updates*, NATIVE AM. RIGHTS FUND, https://www.narf.org/cases/keystone (last updated Nov. 17, 2020).

and community rights in the U.S.[348] In the hearing, tribe leaders shared with the Commission facts that reflected harassment from the U.S. federal government and a lack of a previous informed consultation process with the communities.[349]

As explained in previous subsections, the communities' relationships with the land cannot be quantified in monetary terms.[350] As President Bordeaux of the Rosebud Sioux Tribe explained in a letter to the community after the Trump administration's reversal of the permit decision, the tribes "have an inherent obligation to protect the health and wellbeing of [their] members as well as the health and welfare of Unci Maka (mother earth)." [351] To the tribes, "the land, the water, the air, and the Lakota People [(the seven Sioux tribes)] are one in the same."[352]

TransCanada tried to engage with the tribe leaders, offering to "create opportunities for an open dialogue" and "discuss potential opportunities for participation in the project."[353] Alas, the company's answer was ultimately the monetization of property rights. From the company's perspective, access to tribal lands depended on sharing some of the projects' economic benefits with them. In response, the tribal leaders answered with a resounding, "You are not welcome on our territory TransCanada."[354]

In late 2018 and early 2019, the tribes filed several federal lawsuits opposing the Trump administration's decision.[355] A judge for the United States District Court for the District of Montana repeatedly blocked TransCanada's attempts to start construction.[356] The courts' reasoning mainly relied on U.S domestic law: the lack of public notice; the lack of required environmental and safety review by the State Department; the

348 *Inter-American Commission Hearing on U.S. Executive Orders Before the Inter-American Commission on Human Rights*, INT'L JUST. RES. CTR. (Mar. 21, 2017), https://ijrcenter.org/inter-american-commission-hearing-executive-orders-travel-ban-environmental-review/.

349 Miller, *supra* note 20 (explaining how the right of consultation in international treaties is also consistent with the spirit of the U.S. federal government and tribal relations treaties and legislation).

350 *Supra* Section II.A.

351 Bordeaux, *supra* note 346.

352 *Id*.

353 McKenna, *supra* note 316 (referring to the letter sent by TransCanada to Tribal Chairman Harold Frazier which was exposed on his twitter account); CRST Chairman (@CRSTChairman), TWITTER (JUL. 12, 2018, 7:02 PM), https://twitter.com/CRST Chairman/status/1017544831566921728.

354 *Id.*

355 *See* Landreth et al., *supra* note 347.

356 Rosebud Sioux Tribe v. Trump, 428 F. Supp. 3d 282 (D. Mont. 2019)..

president's authority to decide unilaterally on granting the permit; the federal governments fiduciary's duties over tribal lands; and Congress's role in exercising its exclusive power over international commerce.[357] Notwithstanding the fascinating nature of these constitutional questions, they are beyond the focus of this Article. For this Article, it is worth mentioning that the Inter-American Commission of Human Rights monitored the situation regarding the construction of Keystone XL and the North Dakota access pipeline. The U.S. has not recognized the jurisdiction of the IACtHR, hence the most that the Commission could do would be to issue precatory measures.[358] But such measures can only be taken once the tribes prove that the domestic judicial proceedings are not addressing the violation of their human rights.

It is also worth mentioning that TransCanada alleged harm resulting from the tribe's judicial proceedings in U.S. federal court halting construction.[359] In December 2019, TransCanada stated in court that "[a]bsent a stay of the permanent injunction, [it would] continue to suffer irreparable harm."[360] In addition to the existing investments made by TransCanada, it could also fall behind the permit's schedule because the injunction created a risk that TransCanada could lose its workers.[361]

4. The Biden Administration and the Second Cancelling of the Keystone XL Project

In January 2020, Joe Biden was sworn in as the 45th President of the United States of America. During his campaign, he promised a plan for a "clean energy revolution" that included making climate change and environmental justice priorities of his administration's energy decisions.[362] The promised policies included revoking the permit

357 *Id*.

358 Press Release, *Tribes Ask International Human Rights Commission to Stop Violence Against Water Protectors at Standing Rock* (Dec. 2, 2016), https://www.indianz.com/News/2016/12/08/iachrpressrelease120216.pdf.

359 Karl Puckett, *TransCanada: "Irreparable Harm" if Keystone XL Construction Doesn't Resume*, GREAT FALLS TRIB. (Jan. 8, 2019), https://www.greatfallstribune.com/story/news/2019/01/08/transcanada-asks-court-lift-keystone-construction-ban-during-appeal-great-falls-judge-brian-morris/2516087002.

360 *Id*.

361 *Id.*

362 *9 Key Elements of Joe Biden's Plan for a Clean Energy Revolution*, JOE BIDEN FOR PRESIDENT, https://joebiden.com/9-key-elements-of-joe-bidens-plan-for-a-clean-energy-revolution (last visited Mar 5, 2021).

granted by the Trump administration for the construction of Keystone XL.[363]

On January 20, 2021, President Biden followed through with his campaign promise and issued an executive order revoking the permit.[364] The revocation order mentioned the State Department's 2015 determination and reaffirmed that the project's approval "would undermine U.S. climate leadership by undercutting the credibility and influence of the United States in urging other countries to take ambitious climate action."[365] The order did not mention the effect that the pipeline would have on indigenous lands, the environmental impact of the pipeline's construction in U.S. territory, nor the inadequate consultation of indigenous people as justifications for the revocation of the permit.[366] In other words, the U.S. did not justify its decision based on existing obligations or commitments with indigenous communities but rather on the need to reestablish U.S. leadership in the fight against climate change.

Canadian investors and the province of Alberta did not take long to respond.[367] Alberta's Premier, Jason Kenney, publicly stated that to "retroactively remove regulatory approval on the basis of which an investment was made is, in my view, a slam dunk case of a claim for damages through NAFTA under the investor protection provisions."[368] TransCanada Energy also issued a statement expressing its disappointment with the action and announcing that it would "review

363 WHITE HOUSE, EXECUTIVE ORDER ON PROTECTING PUBLIC HEALTH AND THE ENVIRONMENT AND RESTORING SCIENCE TO TACKLE THE CLIMATE CRISIS (2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-protecting-public-health-and-environment-and-restoring-science-to-tackle-climate-crisis.

364 *Id.*

365 *Id*. at § 6.(b) ("In 2015, following an exhaustive review, the Department of State and the President determined that approving the proposed Keystone XL pipeline would not serve the U.S. national interest. That analysis, in addition to concluding that the significance of the proposed pipeline for our energy security and economy is limited, stressed that the United States must prioritize the development of a clean energy economy, which will in turn create good jobs. The analysis further concluded that approval of the proposed pipeline would undermine U.S. climate leadership by undercutting the credibility and influence of the United States in urging other countries to take ambitious climate action.").

366 *Id*. at §§ 6.(c), 6.(d). The sections on which the order is based only mention the threat that climate change poses to U.S. national security and the need to strengthen U.S. international reputation to address it.

367 Robert Tuttle, *Canada May Seek U.S. Payback via NAFTA After Biden Cancels Keystone XL*, WORLD OIL (Feb. 4, 2021), https://www.worldoil.com/news/2021/2/4/canada-may-seek-us-payback-via-nafta-after-biden-cancels-keystone-xl (last visited Mar 5, 2021).

368 *Id.*

the decision, assess its implications, and consider its options."[369] The fact that the Biden administration relied on the same arguments as the ones expressed in the 2015 State Department determination leaves the door open for TransCanada to reinitiate its NAFTA claim against the U.S.[370]

The USMCA gives Canadian companies a three-year window to bring claims against the U.S. government for existing investments.[371] After that point, the ISDS mechanism will not be available for Canadian companies.[372] Any dispute would then have to be resolved solely in U.S. courts. At this point, it is uncertain how U.S. courts would implement the USMCA provisions under the new Chapter 14 or the references to the obligations to indigenous peoples in Article 32.5.[373] In the case of TransCanada, the Biden administration's revocation of the permit does not mention the U.S. government's duty to protect indigenous communities. It is thus unclear whether the U.S. could even invoke Article 32.5 as part of a plausible defense against TransCanada's investment arbitration claims. What is true, as explained in previous Sections, is that the USMCA invites continued promotion of social responsibility principles, but these principles are not a prerequisite for the investment to be protected under the treaty.[374] Moreover, it is unclear how a tribunal might interpret a failure of the State to comply with legal obligations to indigenous people as a pretext to modify existing permits or licenses that cross indigenous lands.[375]

IV. CONCLUSION

The international treaties analyzed in this Article show how international law recognizes a State's sovereign right to extract its natural resources for the benefit of its citizens. States have "absolute" authority to determine the most effective and efficient way to develop and build infrastructure to extract natural resources in their territories.

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369 TC Energy Press Release, TC Energy disappointed with Expected Executive Action revoking Keystone XL Presidential Permit, (Jan 20, 2021), https://www.tcenergy.com/announcements/2021-01-20-tc-energy-disappointed-with-expected-executive-action-revoking-keystone-xl-presidential-permit (last visited Mar 5, 2021).

370 Kyla Tienhaara, *Keystone XL Legal Risks Highlight Dangers of Putting Investors Before Climate Change*, CONVERSATION (Jan. 26, 2021), http://theconversation.com/keystone-xl-legal-risks-highlight-dangers-of-putting-investors-before-climate-change-153814 (last visited Mar 5, 2021).

371 USMCA, *supra note* 184, at Annex 14-C.

372 *Id*. at Annex 14-C.3. ("A Party's consent under paragraph 1 shall expire three years after the termination of NAFTA 1994.").

373 *Id.*

374 *Id.*

375 *Supra* Section II.D.

These treaties subtextually conceive of resources as tools for development. In the case of energy projects, it is necessary to drill wells to extract oil and gas, and to construct pipelines to transport them, to secure the flow of energy products to achieve long-term "development." In the name of undefined development, the State can infringe on the property rights of individuals, companies, and/or communities. The remedy left to the affected parties under international law is to receive monetary compensation for the infringement upon their rights.

International law, as such, recognizes both a liberal and utilitarian conception of property rights that fails to incorporate other social values not connected to the resources' economic potential.[376] This liberal and utilitarian version of property rights obscures the fact that some property rights conflict with social values not shared by the majority of the population, particularly indigenous people.[377] The conflict with these other noneconomic values is not resolved by granting land titles to the communities and forcing them to defend their property rights against third-party interference. The international system places the interests of the State to develop the resources above those of the indigenous community and grants the affected tribes remedies that monetize the value of their property.

The consequences of these liberal and utilitarian conceptions of property rights in international law are even clearer when the clash between the State and the communities also involves foreign investors extracting resources on behalf of the States. When foreign energy companies are added into the equation, international treaties provide them with remedies that are more attuned with their shareholder values. The investment regimes grant foreign investors multimillion-dollar damages compensations when the State fails to protect them. When the communities and the foreign investors' interests collide, the regime leaves governments in an intractable position to decide who to compensate, the communities or the investors. The decision becomes a cost-benefit analysis that compares the value of the investment against the value of tribal-ancestral land. One is quantifiable by nature, the other is not.

The international instruments that protect indigenous rights are insufficient to fully tame the liberal and utilitarian conceptions behind the sovereign rights of the State to extract natural resources. The international laws that protect indigenous rights, including the IACtHR's case law, reinforce the idea that communities have the right to a

376 Singer, *Property and Social Relations*, *supra* note 42, at 7.

377 For example, the right of the store owner to exclude and the rights of members of the public to enter public accommodations and to engage in contractual relationships.

consultation that accounts for their particularities, such as language and cultural accommodations and attempts to aid the communities' understanding of an investment's consequences. They emphasize the fact that the indigenous communities have a right to receive title to their property, and so it must be protected by the State. This Article, however, moved the debate to the perspective of the State facing challenges from both investors and indigenous rights. Instead of focusing on the best practices for conducting a prior and informed consultation process with indigenous communities, it invited the reader to see the conflict that emerges when government officials must decide who to protect when a conflict occurs between communities and investors. The cases presented here show how the indigenous-rights regime collides with the investment regime in the execution of energy-related projects when they are executed and not in their planning stages. This Article argued that, notwithstanding the advancements in international indigenous rights, the regime does not fully tame the State's sovereign rights to extract natural resources for the benefits of energy projects.

Even assuming that the pre-extraction consultation process respects the principles established by international law, the remedy is to compensate monetarily for the loss. When international courts like the IACtHR find violations of the right of consultation, the remedy is usually to compensate the communities, along with other public remedies such as public declarations, monuments, and creations of programs to protect their culture. But the pipeline ultimately gets constructed, the drills perforate tribal land, and roads are built around the energy infrastructure. The regime allows the State to monetize the indigenous communities' interests and compensate them when the resources located in their lands are affected by energy projects. Even if it mitigates the exercise of sovereignty, the indigenous-rights regime also recognizes the State's right to exploit their lands for a "public benefit."[378] The clash with foreign investors emerges when the State acts through private parties, a key characteristic of energy-related projects, to develop the natural resources.[379] The concessions, contracts, and licenses are protected investments in international bilateral treaties. As such, governments receive pressure to protect those investments against community unrest.

[378] Anaya & Puig, *supra* note 20, at 437. Even Anaya and Puig recognize that the "duty entails more than a mere right to be informed and heard but less than the right to veto." *Id.*

[379] *See generally* THE CHARACTER OF PETROLEUM LICENSES: A LEGAL CULTURE ANALYSIS (Tina Soliman Hunter et al., eds., 2020).

By exposing how energy projects on indigenous lands create a clash of rights, this Article sets the stage for future research. The Article invites the reader to redefine property in a way that addresses the interests of all the parties involved and the social, cultural, and spiritual relationships that natural resources create with different parties. The redefinition of property rights over mineral and energy resources should address contemporary needs like community concerns, sustainable production of energy, and the protection of companies' long-term financial interests. Perhaps we could borrow ideas from the existing literature on energy justice to address these goals and avoid a clash of interests among all the parties involved.[380] Energy justice advocates for the inclusion of communities in the decision-making process, share the benefits of sustainable production, and include their spiritual and cultural values in the way projects are designed.[381]

Energy-justice advocates argue that energy production should be democratized and foster social relations.[382] As a new paradigm guiding the planning of energy projects, energy justice aims to ensure that decisions are made in a democratic and socially inclusive manner.[383] The process is not binary like the right of consultation but rather a course of action that requires continuous engagement.[384] How do we involve communities in the benefits of energy transition?[385] How can they participate in the process of deliberation to balance different sources of energy production? These are all questions that need to be addressed as part of the process, and which go beyond the current proposals to codify further the right of consultation, expand the use of social corporate responsibility principles, or include amicus briefs in investment arbitral proceedings.

Energy transition through the lens of energy justice offers communities an opportunity to own and control clean energy resources while reducing localized environmental and health impacts associated

380 Energy justice exists as a discursive phenomenon that spans the social science and legal literatures. The most frequently referenced framework consists of the following tenets: distributive, procedural, and recognition justice. These together create the concept of energy justice.

381 *See, e.g.,* Shalanda H. Baker, *Mexican Energy Reform, Climate Change, and Energy Justice in Indigenous Communities*, 56 NAT. RES. J. 369 (2016); Kristen van de Biezenbos, *The Rebirth of Social Licence*, 14 MCGILL J. SUSTAINABLE DEV. L. 149 (2018); Shelley Welton & Joel Eisen, *Clean Energy Justice: Charting an Emerging Agenda*, 43 HARV. ENVTL. L. REV. 307 (2019); Shelley Welton, *Grasping for Energy Democracy*, 116 MICH. L. REV. 581 (2018).

382 Welton, *Grasping for Energy Democracy*, *supra* note 381, at 581.

383 *Id.*

384 *See* van de Biezenbos, *supra* note 381, at 167–78.

385 Baker, *supra* note 381.

with burning fossil fuels.[386] This transition is an opportunity for governments and companies to implement equity-centered energy policies.[387] It further offers an opportunity to reshape the socioeconomic relationships created by energy choices.[388] As opposed to a clash of rights being litigated in separate international tribunals, we can start thinking about different ways in which property rights over energy sources create social relationships and opportunities to produce renewable energy in a socially distributive way. Moreover, we can begin a conversation about ways in which the State can democratize the decision-making process for energy projects, as opposed to relying exclusively on economic considerations.[389]

Finally, as this Article explained, we should also abandon false narratives regarding the ways in which communities benefit from economic development that results from international trade and investment agreements.[390] If we continue to emphasize the monetary benefit of energy production over any other social value, as the current treaties do, communities will be affected and, in many cases, will never see the benefits that they are being promised. If there is one thing that we have learned from NAFTA, it is that international trade agreements are not the magic formula that ends poverty, migrations, and underdevelopment. The Zapatista indigenous rebellion in Chiapas, Mexico—which began the same day that NAFTA came into effect—warned us of this fact, and we ignored it. Twenty years later, the same underdeveloped regions of Mexico—Oaxaca, Guerrero, Chiapas, Tabasco—are coincidently home to most of the nation's indigenous communities, who still face high levels of poverty and exclusion. They have not seen the trickle-down benefits of the trade and investment agreements. Yet, this time, the USMCA and Mexican energy reform are bringing foreign investment to their doorsteps.[391]

386 Welton & Eisen, *supra* note 381, at 330–42.

387 *See* Felix Mormann, *Requirements for a Renewable Revolution*, 38 ECOLOGY L.Q. 903 (2011).

388 *See* Welton & Eisen, *supra* note 381.

389 *See* Hernandez Crespo G., *supra* note 31. As argued by Hernandez Crespo, mediation might help us abandon the trenches and expand the field in which parties can engage in a dialogue towards energy sustainability and social justice.

390 *Making Trade an Engine of Growth for All: The Case for Trade and for Policies to Facilitate Adjustment*, INT'L MONETARY FUND (April 10, 2017), https://www.imf.org/en/Publications/Policy-Papers/Issues/2017/04/08/making-trade-an-engine-of-growth-for-all.

391 Baker, *supra* note 381.