INDIGENOUS AUTONOMY

TO FIT INTO THE STATUS QUO OR CHALLENGE IT

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INTRODUCTION

This paper starts off by looking at a number of the new Latin American constitutions of the 1990s and their recognition of indigenous rights. Before going into the specific analyses looking at how one the one hand procedural rights, such as the right to consultation and on the other hand substantive rights, such as land rights and proprietary interests in natural resources are undermined, it is important to look at the overall political and economic framework and how in many cases it is adversarial to indigenous rights.

This involves looking at international policies of lending, financial and investment guidelines and even development cooperation monies that are often tied to acceptance of certain policies and can be (ab)used to push certain political and economic agendas. Although a number of Latin-American and indigenous leaders have openly criticized the neo-liberal model, and the way it is often pushed down from the North[1], it is important to acknowledge that often their countries and especially indigenous peoples both in the North and in the South are the ones most deeply impacted by this internationally predominant economic system. No longer can we ignore the impact that free trade agreements, have on the rights of indigenous peoples and how agreements such as the proposed Free Trade Area of the Americas (FTAA)[2] could effectively make any constitutional protection meaningless. In the following apart from just analyzing existing and proposed agreements this article will also advocate the strategic use of international trade law to safeguard indigenous proprietary interests. This all will be done taking into account different indigenous conceptions of rights, responsibilities and values.

[1] Inside US Trade, Doha Negotiations, September 10th, 2003, Cancun: Brazilian official urges developing countries not to liberalize without concessions from U.S. and EU"

[2] in Spanish referred to as: Area de Libre Commercio de las Americas (ALCA)

I. THE CONSTITUTIONAL FRAMEWORK

1. The New Latin American constitutions

A number of the new Latin American constitutions and provide constitutional protection for indigenous peoples and create a framework for the exercise of their rights. Especially the new Latin American constitutions of the 1990s usually recognize what academics often refer to as: "legal pluralism" at the outset.

The specific wording is often the result of a long national discussion process, resulting for example in both Bolivia[3] and Ecuador[4] in the use of the terms "multi-ethnic and pluricultural", whereas the Colombian Constitution[5] makes reference to its "pluralistic democracy" and autonomy of territorial entities, which includes indigenous territories[6], a concept that that was part of the core demands of indigenous peoples, presented by indigenous organizations such as in the case of Colombia ONIC and CRIC[7] and like in the case of Venezuela[8] by indigenous delegates, who now are working on specific implementation legislation.

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[3] República de Bolivia, Constitución Política del Estado, Texto Acordado, 1995: Articulo 1. Bolivia, libre, independiente, soberana, multiétnica y pluricultural, constituida en República unitaria, adopta para su gobierno la forma democrática representativa, fundada en la unión y la solidaridad de todos los bolivianos.

[4] Constitución Política de Ecuador, 1998: Articulo 1. El Ecuador es un estado social de derecho, soberano, unitario, independiente, democrático, pluricultural y multiétnico. Su gobierno es republicano, presidencial, electivo, representativo, responsable, alternativo, participativo y de admini stración descentralizada.

[5] Constitución Política de Colombia de 1991: Articulo 1. Colombia es un Estado social de derecho, organizado en forma de República unitaria, descentralizada, con autonomía de sus entidades territoriales, democrática, participativa y pluralista, fundada en el respeto de la dignidad humana, en el trabajo y la solidaridad de las personas que la integran y en la prevalencia del interés general.

[6] Constitución Política de Colombia de 1991, Articulo 286. Son entidades territoriales los departamentos, los distritos, los municipios y los territorios indígenas.

[7] The respective national and regional indigenous organizations in Colombia, especially CRIC, the Regional Indigenous Council of Cauca, had prepared their own demands, incorporated into more than 80 proposed articles. To draw attention to their demands more than 10.000 indigenous peoples from Cauca walked from the regional capital Popayan to Bogota. In the end over a dozen of the requested articles were included in the constitution.

[8] Indigenous Delegates in the constitutional convention in Venezuela were: Guillermo Guevara, José Luis Gonzáles and Noeli Pocaterra de Oberto and the Venezuelan Constitution opens as follows: Constitución de la República Bolivariana de Venezuela, 1999 Artículo 2. Venezuela se constituye en un Estado democrático y social de Derecho y de Justicia, que propugna como valores superiores de su ordenamiento jurídico y de su

Also in the case of Mexico[9] references to indigenous peoples were added to the constitution due to the pressure exercised by indigenous peoples in the preceding decade. Nicaragua[10] was one of the first countries to broadly inscribe the rights of indigenous peoples in their constitution, especially autonomy for indigenous communities on the Atlantic Coast.

Some earlier constitutions, where references to indigenous peoples were introduced prior to the 1990s, instead of recognizing pluralism at the outset, contain specific references to indigenous peoples, either in separate chapters, like in the Brazilian constitution Chapter VIII on Indians[11], and/or like in Panama[12] special articles in different chapters on land reform, education, etc.

In the case of Canada, references to Aboriginal peoples were introduced into the constitution in 1982. Indigenous nations in Canada have always maintained that they have a special relationship with the Crown, especially on the federal level and beyond: all the

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actuación, la vida, la libertad, la justicia, la igualdad, la solidaridad, la democracia, la responsabilidad social y en general, la preeminencia de los derechos humanos, la ética y el pluralismo político.

[9] Constitución Política de los Estados Unidos Mexicanos, incluyendo la Reforma de 14.08.2001: Artículo 2.- La Nación Mexicana es única e indivisible. La Nación tiene una composición pluricultural sustentada originalmente en sus pueblos indígenas que son aquellos que descienden de poblaciones que habitaban en el territorio actual del país al iniciarse la colonización y que conserva sus propias instituciones sociales, económicas, culturales y políticas, o parte de ellas.

[10] Constitución de Nicaragua de 1987, con Reformas de 1995: Articulo 5o. El Estado reconoce la existencia de los pueblos indígenas, que gozan de los derechos, deberes y garantías consignados en la Constitución, y en especial los de mantener y desarrollar su identidad y cultura, tener sus propias formas de organización social y administrar sus asuntos locales; así como mantener las formas comunales de propiedad de sus tierras y el goce, uso y disfrute de las mismas, todo de conformidad con la ley. Para las comunidades de la Costa Atlántica se establece el régimen de autonomía en la presente Constitución.

[11] Brazilian Constitution , 1988, Translation by the Brazilian Embassy in London: Article 231 [Native Populations and Lands]: Indians shall have their social organization, customs, languages, creeds, and traditions recognized, as well as their native rights to the lands they traditionally occupy, it being incumbent upon the Republic to demarcate them and protect and ensure respect for all their property.

[12] Constitución Política de la República de Panamá, con reformas de 1978 y 1983: Articulo 86. El Estado reconoce y respeta la identidad étnica de las comunidades indígenas nacionales, realizará programas tendientes a desarrollar los valores materiales, sociales y espirituales propios de cada uno de sus culturas y creará una institución para el estudio, conservación, divulgación de las mismas y de sus lenguas, así como la promoción del desarrollo integral de dichos grupos humanos.

way to the Queen/King of England. That was one of the reasons why so many indigenous peoples from Canada opposed the so-called “patriation of the constitution” that until the 1980s was a treaty between the United Kingdom and Canada.

The other reason was that although then Prime Minister Pierre Trudeau had vowed to “bring the constitution home”, he wanted to delete any reference to Indians. In response the Union of BC Indian Chiefs and Indian leaders in 1980 organized the Constitution Express from Western Canada to Ottawa, bringing in more than 1,000 people on a train to protest the patriation[13]. When this did not stop the process, Indian people from across Canada went to England a year later to lobby the House of Lords, although they could not stop the patriation, their efforts along with other international complaints brought to the UN Human Rights Committee and the International Court of Justice, led to the inclusion of Section 35 in the Canadian Constitution.

Section 35 (1) of the Canadian Constitution states[14]:

> *The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and confirmed.*

With constitutional protection secured the next question now is how those provisions have been implemented to date.

[13] Poplar, Mildred, “We were fighting for Nationhood not Section 35” in Walkem, Ardith and Bruce Halie (ed.) *Box of Treasures or Empty Box?* Theytus Books, 2003, Penticton, pp. 28
[14] Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11,

2. The Question of Implementation

The question that this paper will address is one of, whether Section 35 of the Canadian Constitution and the new Latin American constitutions really result in legal pluralism and indigenous autonomy or if they just re-create and endorse a neo-colonial system? Professor René Kuppe introduced the following comparison and criteria[15]: During the colonial period until the beginning of the 19th century the differences of indigenous peoples were recognized, but discriminated against, allowing impositions by both the state and churches. In the following period when so-called "nation-states" were built, all people were considered as equal and no special rights recognized, and the special relationship of indigenous peoples to their land was denied.

The postulate of a true pluralist model is that indigenous peoples' rights are recognized and protected in the constitution, creating a framework for their autonomy that is different from but equal to state powers, allowing for parallel jurisdiction and coexistence. In this context even limiting clauses[16], introduced in many of the above mentioned constitutional provisions, recognizing indigenous rights as long as they are conform with the constitution or national legislation, are problematic. Key commentators call them a Pandora's box, indicating that these provisions could either strengthen or weaken indigenous rights[17]. Interestingly Section 35 of the Canadian constitution arguably has no such limiting provision. One of the leading Aboriginal rights scholars in Canada Sakéj Henderson stated[18]:

> "In Section 35 Canada recognized all our rights and gave back everything, without introducing any limitations and denying the future operation of extinguishment policies and provisions."

In this context also implementation legislation, that defines indigenous rights in a limiting way or even more problematic tries to define or transcribe indigenous laws, falling back

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[15] René Kuppe „Die Anerkennung indigener Rechtsautonomie im interkulturellen Spannungsfeld" in: Axel Borsdorf et al. (hg) *Lateinamerika im Umbruch. Geistige Strömungen im Globalisierungstress.* Reihe: Innsbrucker Geographische Studien Bd. 32. 61-76.

[16] See ***Supra*** footnotes 3-10 regarding the respective Latin American Constitutions and Sections

[17] Diaz-Polanco, H. "Las reformas constitucionales una caja de Pandora", 2000, Presentation given at the World Congress on Legal Pluralism, Arica, Chile (published by the Commission on Legal Pluralism)

[18] Comment made by James (Sakéj) Youngblood Henderson, during the meeting of the Indigenous Bar Association, October 2003, Vancouver

into the discourse of the "recognition of customary law" of the 1980s[19], should be rejected. But whatever the discourse of the time and the specific wording introduced, the real question is how those provisions have been implemented on the ground and felt in the real lives of indigenous peoples and communities. Abadio Green, an indigenous leader who headed both the Colombian national indigenous organization ONIC and the indigenous organization of Antioquia, brought this to the point when he stated[20]:

> "A pesar de la Constitución de 1991 que reconoce que somos un Estado multiétnico y pluricultural, en realidad esto no se ve, porque ese modelo aún no esta construido, solamente esta escrito en el papel. En estos diez anios que han pasado ha augmentado la guerra contra los pueblos indígenas. La Constitución, las leyes y los decretos dicen claramente que cuando en los territorios indígenas se encuentre un recurso natural se debe dialoguar, se debe consultar, se debe consertar de buena fe para llegar a unos acuerdos, y esto nunca ha sucedido en nuestro pais."

Building on this criticism this paper will not only analyze the lack of implementation of the constitutions and specific implementation legislation, but also how both governments and companies through their policies, discourse and actions actively undermine indigenous rights and thereby the constitutions that protect them. In the following it will be argued that the new constitutions can serve as a framework for indigenous peoples to unfold their jurisdiction and autonomy. But unless national laws, government policies and practices on the ground also recognize and protect indigenous rights, we are just looking at neo-colonial states, whose constitutions pretend to recognize indigenous rights but in practice discriminate against them.

II. THE DOMINATING POLITICAL AND ECONOMIC MODEL

1. Status Quo and Business as Usual

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[19] Many of the specific investigations and proposals on codifying customary law, were never implementated. The biggest investigation ever was conducted by Prof. James R Crawford in Australia over almost a decade: Australia, The Law Reform Commission Report No 31, *The Recognition Of Aboriginal Customary Laws,* (Canberra, Australian Government Publishing Service, 1986)

[20] Abadio Green, "Aún lejos el respecto a las diferencias", in: Aníbal Suárez, Jesús (ed.) *El Debate a la Constitución, Instituto Latinoamericano de Servicias Legales Alternativos*, Universidad de Colombia, Bogotá, 2002, pp. 185 Author's translation: "Despite the constitution of 1991 that recognizes that we are a multi-ethnic and pluri-cultural state, this cannot be discerned in reality, because the model has not yet been constructed, it is only written on paper. In these 10 years that have passed the war against indigenous peoples has intensified. The constitution, the laws, the decrees, state clearly that if natural resources are found in indigenous territories, there has to be dialogue, consultation and good faith negotiations to come to an agreement and this has never happened in our country."

A more holistic and rights-based approach can be used to critically examine and help understand policies and regulations, which at first sight seem technical in nature and seem to create spaces for indigenous participation, but in reality just create never ending processes that mostly serve the interests of other stake-holders, mainly corporations.

Now that indigenous rights, due to their constitutional recognition, can no longer be totally ignored governments and companies have devised strategies to tie indigenous peoples up in these processes. At the same time they lobby to undermine and reduce their rights substantively.

On the short term these processes allow companies to carry on business as usual, often actually leading to accelerated exploitation. Sometimes indigenous communities are offered short-term agreements focusing on micro-economic development, provision of services or discretional, minimal monetary payments in return for their consent to certain mainstream developments. On the long-term these agreements can undermine indigenous rights and in some cases, although entered as no-prejudice agreements have been used against indigenous peoples[21], where other parties argue for the extinguishment of their rights.
Extinguishment of indigenous rights to maintain the "status quo" is the preferred option for companies, because it is the only way they see to ensure investment security. The Andean and Amazonas regions of Latin America alone have seen a growth of direct foreign investment of about 5.000% between 1990 and 1998[22].

The unresolved indigenous land question and assertions of rights on the other hand often deter investments from which governments draw tax revenues. Therefore governments often promote and maintain unconstitutional extinguishment policies[23].

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[21] Comments made by Bruce Wildsmith, counsel to the Mik'maq community of Indian Brook in ongoing Fishing Cases, made to the UN Special Rapporteur on Indigenous Issues, May 6th, 2003, Indian Brook, NS
[22] See: Barsh, Russel "Is the Expropriation of Indigenous Peoples' Land GATT-able?" (2001) 10 (1), RECIEL, p. 17 Map 1: Distribution of the World's Indigenous Peoples and Changes in Foreign Direct Investment
[23] for Canada see specifically: Canada, *Comprehensive Claims Policy and Status of Claims*, (Ottawa, Department of Indian and Northern Affairs, 2000). This policy is reflected in a national legislation failing to take into account indigenous land rights and in processes aiming at the extinguishment of Aboriginal rights, that are duplicated across the Americas.

This has been documented in the case of British Columbia, Canada, where the loss of direct investment due to open land claims is estimated at 12 billion Dollars annually. The provincial government even had to list open land and timber rights disputes with Aboriginal peoples as contingencies in their financial statements that serve as the basis for its credit-rating[24]. These local disputes along with the Softwood Lumber Dispute, in which indigenous peoples from British Columbia have been actively involved, were considered as risks regarding the province's economic outlook in Standard and Poor's[25] Canadian rankings.

The question if legal pluralism has become a reality on the ground or whether we have returned to a neo-colonial system that pretends to create new spaces for indigenous peoples, but in reality allows other interests to take advantage of and fill those spaces will be analyzed in detail. Country-specific case studies will look at how certain industries deal with indigenous peoples and how legislation and policies with respect to natural resource exploitation, although often passed or reformed after the new pluralist constitutions came into force, lack substantive references to indigenous rights, that would be necessary to enforce the constitutional protection, which is supposed to provide the framework for the exercise of indigenous rights and autonomy.

2. Processing Indigenous Peoples' Demands

Similar calculations and examinations could and should be done for Latin American countries and regions. One example is the "Oriente" or the lowlands of Bolivia, where the Confederación de Indigenas del Oriente de Bolivia (CIDOB)[26], similar to marches in Colombia and the Constitution Express in Canada, marched from the lowlands to the Andes to bring forward territorial demands, a concept held much stronger by indigenous peoples in the lowlands than in the Andean regions.

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[24] Province of British Columbia, *Summary Financial Statements*, (Victoria, BC, Government Publishing, 2002), Point 27, Contingencies, pp. 54

[25] Angastiniotis, Mario "Province of British Columbia, Canadian Rankings" (2002), Standard and Poor's, Toronto, pp. 1

[26] for more information on the process see: Lema, Ana Maria (1998) Pueblos Indígenas de la Amazonía Boliviana; La Paz: AIP FIDA-CAP

CIDOB kept pushing strong demands, tabling their own proposal for a law regarding indigenous rights[27], focusing on indigenous law, concepts and identity and calling for exclusive indigenous rights to lands and resources. The government proposal[28] on the other hand would just recognize limited ownership, rational use of renewable resources and priority access to non-renewable resources, access by others following consultation and revenue sharing and finally indigenous involvement in developing management plans for the areas.

What was passed in the end was a much weaker, general agrarian reform law[29], the Ley INRA, meant to clear up all national titles, that establishes the mechanisms for titling land, excluding the broader indigenous law perspective, under which indigenous peoples have to bring their territorial demands. A complex set of regulations, now determines the process, how indigenous peoples have to map their areas and develop management laws before they can get an area titled as a "territorio communitario de origen".

But there is no government funding for the process and just a few development cooperation agencies have funded titling processes, resulting in very few titles being finalized[30]. In the meantime a lot of third parties have under the very same law consolidated their titles, resulting in a drastic reduction of the final titles vis-à-vis initial demands. In some instances once titles had been concluded, it actually resulted in increased harvesting of the forests, with many special incentives offered for commercial-industrial use. So in the end this kind of titling, further fortifies the mainstream economic system and ensures investment security for other stakeholders.

The Ley INRA along with the Law of Popular Participation[31], although hailed as breakthroughs for delegation of power and collective land titling, have to a great extent

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[27] CIDOB (1993) Proyecto de Ley de Pueblos Indígenas del Oriente, Chaco y Amazonía Boliviana, Santa Cruz

[28] Republica de Bolivia (1991) Proyecto de Ley de los Pueblos Indigenas del Oriente, el Chaco, La Amazonía, La Paz

[29] Republica de Bolivia (1997) Ley INRA (Ley del Servicio Nacional de Reforma Agraria), Ley No. 1715, La Paz

[30] For more information see: Grey Postero, Nancy (2000) Bolivia's Indígena Citizen: Multi-Culturalism in a Neo-liberal Age, paper prepared for the Latin American Studies Associations Session, March 16, 2000, pp. 8

[31] Republic de Bolivia (1994) Ley de la Participacíon Popular, Ley No. 1551, La Paz

alienated indigenous peoples. The Bolivian state has been promoting a new model of incorporation, with the Vice Minister for Indigenous Affairs stating[32]:

> "Our government's policy is to use economic policies to create citizens of indigenous peoples, and participation is key."

Although pretending to take into account local concerns, the process is often locally seen as disadvantageous[33]:

> "For a majority of communities the reform has greatly increased the political power of local elites, most of whom are non-indigenous. What this means practically is that political parties are now involved in municipal and even community concerns. The State has reached into the furthest village in Bolivia."

Municipal politics limit the range of issues indigenous peoples can address and territorial autonomy is not one of them.

On the other hand as stated above there are also no other funds for the titling process and in many cases the process of mapping and establishing management plans is in itself alien to many communities[34]:

> "Even many groups which continue to be territorially based, however, such as some of the more recently contacted tribes of the northern Amazon, find the whole process of mapping and then managing their territories completely foreign to their experience and administrative capabilities."

It could even be argued that the whole system of land titling has restrictive elements and its primary purpose has always historically been to create clarity of title and thereby investment security. In Canada on the other hand some Aboriginal peoples have conducted community-driven traditional use studies where the people interviewed retained full control over the information[35]. In some cases the whole mapping and planning

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[32] Speech by Lic. Wigberto Rivero, Vice Ministro de Asuntos Indígenas , at the Annual Meeting of the Ethnographic Association, Museo de Etnología, La Paz, Bolivia, 20/10/1997

[33] Grey Postero, Nancy (2000) Bolivia's Indígena Citizen: Multi-Culturalism in a Neo-liberal Age, paper prepared for the Latin American Studies Associations Session, March 16, 2000, p. 7

[34] Idem, p. 4

[35] Adams Lake and Neskonlith Indian Bands (1999) Land Traditions of the Neskonlith and Adams Lake Shuswap, Unpublished Report, NIB + ALIB, Chase, BC, University of Lethbridge

processes was not aiming at titling but co-management of the territory and the full inclusion of indigenous knowledge[36].

In many cases this data had been collected and translated according to the highest scientific standards and made compatible with mainstream land management tools. Still the governments often failed to take traditional use information into account in the respective land management planning. This has lead to growing frustration and disenchantment with the process with people who wanted to protect their rights and many have instead taken to exercising their rights on the ground[37].

3. Caught in Court

Regarding land management or land use plans also indigenous peoples in North America have made ambiguous experiences throughout the last century. In the United States some anthropologists conducted research and even initiated land use studies that were then testified against Indian tribes in court and had a number of them bar researchers from their reservations[38]. In Canada in some cases traditional use studies were not diligently researched and have been used against them in court[39]. In some cases indigenous peoples have successfully used their traditional use studies as evidence in court. More importantly oral evidence has been recognized as a key instrument to proving indigenous rights[40].

The use of oral evidence has been upheld by a number of the highest courts in the Commonwealth and enshrined in legislation[41]. Still some indigenous peoples ask: Why should indigenous peoples have to prove their title and rights all over again, especially

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[36] Interior Alliance (2001) Traditional Knowledge Report, submitted to the International Secretariat of the CBD in response to the notification (2000) by the Executive Secretary to indigenous and local community organizations requesting "Case-studies to assess the effectiveness of existing legal and other appropriate forms of protection for the knowledge, innovations and practices of indigenous and local communities"

[37] Establishment of the Skwelkwek'welt Protection Centre based on: Secwepemc Elders' Message to Masayoshi Ohkubo, President, Sun Peaks Ski Resort Corporation, Skwelkwek'welt, November 4th, 1998

[38] See: Presentation given by Marc Pinkoski "The Reintroduction of Social Evolutionism: The Two-fold Attack on Aboriginal Title"; XXX Canadian Anthropology Conference, Panel on Indigenous Peoples and Materialist Anthropology: Representations in the Works of Steward, Dalhousie University, May 2003

[39] Skeetchestn Indian Band v. British Columbia (Reg. of Land Titles),[2000] B.C.J. NO. 1916 (B.C.C.A.)

[40] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010

[41] The Australian High Court, was one of the first to allow the presentation of oral evidence in: Mabo v. Queensland (n.2) (1992) 175 CLR, the decision was then implemented in the Native Title Act (1993) Vol. 2, no. 110. The Delgamuukw decision (see above) set out similar rules and referred to Mabo.

where they cannot afford such costly and time-consuming litigation. Instead of governments and companies should have to prove that indigenous rights have not been extinguished or at least have to come up with a justification of infringing on indigenous rights. This is a very valid point, specially in light of the fact that the very same decisions that upheld oral evidence also found that indigenous rights have not been extinguished. Extinguishment still is the preferred solution for many companies and enshrined in many policies. As pointed out previously where extinguishments has not been secured, companies and governments are eager to engage indigenous peoples in seemingly never-ending indigenous rights litigation, as long as they can carry on business-as-usual. Cases can take almost a decade to run all the way through a national judicial system, longer than the business-plans for many extractive industries in a specific area. Therefore indigenous peoples have started using injunctive relief to stop companies from entering their areas or continuing on with their destructive activities. Unfortunately these interim measures do not allow in depth presentation of rights based arguments, they usually center on a risk-analysis and "balance of convenience" tests. In many cases this test, and the mentality of the judges coming from a certain economic background, is biased, finding business-risk and the loss of business opportunity to prevail over indigenous concerns. In some cases it has been argued that non-site specific indigenous uses, like hunting and fishing, can simply move to other areas, but in reality this is almost impossible if the entire traditional territory of a tribe is already allocated to competing commercial-industrial uses.

One very recent set of cases in Canada that is important to mention in this context are the Haida decisions of the BC Court of Appeal[42]. This is a case where the Haida people opposed the transfer of a license to Weyerhaeuser, without consultation and taking their rights into account. Trying to use the above described argument, the provincial government argued, that the Haida first have to prove their substantive Aboriginal Title to the area. But the court held that Aboriginal interests whose substantive base is evident, have to be accommodated in a meaningful way[43]. It was also held that the government's business as usual approach should no longer be allowed to stand against indigenous interests. Going a step further some judges felt that companies should not be allowed to

[42] *Haida Nation v. BC and Weyerhaeuser*, [2002] BCCA 147; in the following Haida I
Haida Nation v. BC and Weyerhaeuser, [2002] BCCA 462; in the following Haida II
[43] Haida I, ***ibidem***, para. 60

hide behind the government's policy and failure to take into account Aboriginal Title and rights in violation of their fiduciary obligation and extended the latter to companies who now have to take into account directly[44]. The reaction in the business community was shock and intensive lobbying, especially after the Haida brought an Aboriginal Title Claim to the area and rejected an offer from the province to settle out of court.

III. RIGHTS BASED VERSUS PROCEDURAL APPROACH

1. Free Prior Informed Consent of Indigenous Peoples

The international equivalent of the Haida decision is the principle of free prior informed consent of indigenous peoples to any development in their traditional territories, as recognized under the Convention on Biological Diversity (CBD)[45]. These rights were fought for by indigenous peoples from around the world seeking the implementation on the convention's provisions regarding indigenous and local communities as the CBD refers to them. Indigenous representatives had been key in the negotiations before and since the convention's entering into force. The parties to the Convention recognize the key role indigenous peoples play regarding the conservation and sustainable use of biological diversity.

Although only State parties take the ultimate decisions indigenous peoples have pushed for and gained more and more access to the international negotiations. They even achieved the creation of an Ad-hoc open-ended Working Group on Article 8(j) and related provisions, in which indigenous delegates have an equal say as government representatives. Article 8(j) of the CBD, focuses on the *in situ* conservation, stating[46]:

> "Each contracting party shall, as far as possible and as appropriate, subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of

[44] ***Ibidem***, para. 58

[45] The Convention on Biological Diversity, is one of the two international environmental agreements that grew out of the Earth Summit in Rio, with the other being the UN Framework Convention on Climat Change. Unlike the letter the CBD is one of the conventions with most signatories.

[46] See: Secretariat of the Convention on Biological Diversity (1998) Convention on Biological Diversity, UNEP/CBD/94/1, Montreal, Article 8(j)

such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices."

Initially the positions presented by indigenous representatives in negotiations under the Biodiversity Convention were mainly rights-based. Especially indigenous leadership from Latin America[47] always stressed the inherent connection between Article 8(j) and land rights. They pointed out that without access to their traditional territories, indigenous elders could not pass the traditional knowledge that is intricately linked to their land on to younger generations. This was supported by indigenous delegations from across the world, fighting for their land rights and seeing the Convention as a means to bring specific complaints regarding failures of their government to implement their international obligations on the ground[48].

The majority of governments did not want to see this kind of complaints and the discussions under the convention[49] move in that direction and repeatedly stressed that the CBD was not a human rights instrument. One head of delegation of delegation once explained the distinction, criticizing that indigenous peoples thought that they could continue their rights-based discourse that they used to lead in different United Nations bodies, when the convention's focus was more technical and centered on management, not rights[50].

Also the first meeting of the Ad-hoc open-ended Working Group on Article 8(j) and the meetings that led up to its creation were often criticized for lacking focus and not being technical enough[51]. As a result some governments, especially from developed countries, added indigenous representatives to their delegations and/or funded indigenous

[47] COICA/UNDP (1994) Regional Meeting on Intellectual Property Rights and Biodiversity 1994, in: IUCN Inter-Commission Task Force on Indigenous Peoples (1994) Indigenous Peoples and Sustainability, Cases and Actions

[48] For more information see: Indigenous' organizations comments on their respective governments' implementation of Article 8j and related provisions, for example: Interior Alliance (2001) Traditional Knowledge Report submitted to the International Secretariat of the Convention on Biological Diversity

[49] CBD (2000) Notification to Indigenous and local community Organizations to submit case-studies on the Implementation of Article 8 (j) and related provisions, by Hamdallah Zedan, Executive Secretary of the CBD based on Decision V/16 of the CBD

[50] Preparatory Meeting at the Austrian Ministry for Agriculture, Forestry and Environment, BMLFUW, March 2002

[51] Earth Negotiations Bulletin (2000) Summary Report of the First Ad Hoc Inter-Sessional Open-Ended Working Group on Article 8(j), Sevilla, Spain, especially: Analysis Section

participation, recruiting more on indigenous technocrats than leadership in an attempt to institutionalize certain processes.

The result was what at some times looked like a split between more outspoken indigenous organizations from the South and indigenous representatives from the North who were trying to move the "process" along. In reality the split ran and continues to run along much more fundamental lines with indigenous leaders with a rights-based position supporting each other in pushing strong positions and not shying away from criticizing governments that work against indigenous concerns and more process oriented indigenous representatives who tend to become tied up in the processes as set out by the governments to secure future funding and participation, often refusing to take more confrontational positions.

These tensions became clear at the 2nd meeting of the Ad Hoc Inter-Sessional Open-ended Working Group on Article 8(j) in Montreal, where many governments hailed the high level of technical discussions and professionalism by indigenous delegates and on the other hand some indigenous peoples felt that the issues of special concern to them had not been dealt with satisfactorily[52].

Tensions even mounted further at COP-6 when certain countries, mostly members of JUSCAN, adamantly opposed the inclusion of the principle of prior informed consent of indigenous and local communities to any developments in their traditional territories. Other government representatives from both Europe and Latin America, especially those whose constitutions make reference to indigenous peoples' rights and some specifically to traditional knowledge were very ready to support indigenous peoples in the push for international recognition. At the same time they expressed concern about the apparent split amongst indigenous peoples, with some not wanting to take on donor governments. The supportive governments made it clear that they would only speak out in the final negotiations, if indigenous peoples presented a unified position calling for the recognition of the principle of free prior informed consent of indigenous peoples.

[52] Earth Negotiations Bulletin (2002) Summary Report of the Second Ad Hoc Inter-Sessional Open-Ended Working Group on Article 8(j), Montreal, Canada, especially: Analysis Section

It took a strong unified push from indigenous leadership around the world to turn negotiations around at the last moment, and ensure the inclusion of the long disputed provision[53]. Decision VI/10 on Article 8(j) Annex II therefore contains the following paragraph in its recommendations for the conduct of cultural, environmental and social impact assessment regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities:

> 16. Where the national legal regime requires prior informed consent of indigenous and local communities, the assessment process shall consider whether such prior informed consent has been obtained.

When the delegates who had led the push asked that the International Indigenous Forum on Biodiversity openly reject the unfair negotiating practices of certain countries, indigenous delegates who depended on funding from those governments threatened to walk out[54]. In the end those internal debates were overshadowed by Australia's last minute rejection of provisions regarding invasive alien species[55] almost broke the COP consensus. Indigenous delegates will and should remember COP-6 for their unified success in securing the principle of free PIC of indigenous peoples regarding developments in their traditional territories.

2. Access and Benefit Sharing

Of course this success might be considered as rather minor in light of the central discussions at COP-6 concerning Access and Benefit-Sharing (ABS) regarding genetic resources. PIC regarding the access was a key issue, but only discussed in the context of state PIC, despite the fact that indigenous peoples are the holders of genetic resources and should be the ones to grant access.

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[53] For a detailed description of the discussions, See: Manuel, Arthur (2002) Report on the 6th Conference of the Parties to the Convention on Biological Diversity "Vital world - Life on the Line", April 7 – 19, 2002 The Hague, The Netherlands

[54] For details see: Manuel, Arthur (2002) Report on the 6th Conference of the Parties to the Convention on Biological Diversity, The Hague, The Netherlands

[55] Earth Negotiations Bulletin (2002) Summary Report of the Sixth Meeting of the Conference of the Parties to the Convention on Biological Diversity, especially pp. 16

Only a few indigenous delegates followed these discussions on ABS and the informal working groups in the evening and just achieved some minor cosmetic changes in the wording of the ABS Guidelines, but no concessions regarding the key question of access and indigenous PIC and the guidelines were passed[56]. Although it was recommended to refer them to the WG on Article 8(j) for review, the Secretariat refused to put it on the agenda and no review occurred. In this case the narrow procedures of both SBSTTA who had earlier elaborated the draft guidelines and at the COP clearly outmaneuvered indigenous peoples.

Generally indigenous representatives had always felt less welcome at the SBSTTA meetings[57], where they were given no real space for their input unlike at the Article 8(j) meetings where they had equal opportunities to intervene. Also indigenous peoples seem to generally be much more comfortable dealing with the issue of conservation, than with access and benefit-sharing, which in the end aims at the commercialization of genetic resources. On the other hand governments saw the ABS Guidelines as a great break-through[58] and important step towards what many called the balancing of the three objectives of the convention: conservation, sustainable use and access and benefit-sharing[59].

A number of countries, even formed a coalition, the so called Like-Minded Mega-Diverse (LMMD) Countries [60], for the sole aim of working on access and benefit-sharing, it included many Latin American and Asian Countries, but none from Europe, North America or Oceania, with the first group arguing that because they held most of the world's biodiversity, they should have more of a say in negotiations.
They even wanted to block discussion of new issues and fought for assurances regarding state PIC to access, a key right also for future benefit sharing, which they are unlikely to

[56] See Decision on Access and Benefit Sharing in: UNEP/CBD/6/L.19
[57] See references to Indigenous concerns in: Earth Negotiations Bulletin (2003) Summary of the Eighth Session of the Subsidiary Body on Scientific, Technical and Technological Advice of the Convention on Biological Diversity, Montreal, Canada
[58] Earth Negotiations Bulletin (2002) Summary Report of the Sixth Meeting of the Conference of the Parties to the Convention on Biological Diversity, The Hague, The Netherlands, especially Analysis section, describing the ABS Guidelines as on of the Successes of COP-6
[59] See Article 1: Convention on Biological Diversity, UNEP/CBD/94/1, Montreal,
[60] Like-Minded Mega-Diverse Countries (2002) Cancun Declaration, 2003, Cancun, Mexico

want to share with indigenous peoples[61]. The CBD has now clearly become a hybrid instrument, carrying some elements of multi-lateral environmental agreements and parts making it look more like a trade agreement.

Where indigenous peoples seem more comfortable with the convention's earlier focus on conservation, calling for special sui generis mechanisms for the protection of traditional knowledge to be developed under the CBD, on the other end of the spectrum were countries who wanted to see much of the debate shift to the roam of trade agreements. Some countries even argued that TRIPS should be the international instrument to deal with intellectual property rights. This idea had been vehemently opposed by indigenous peoples from the outset[62], for both substantive reasons, that they do not want the debate to center around commercialization, and for procedural reasons, because the processes before the WTO are very much nation-state centered and not transparent, seemingly not open to indigenous participation.

3. Sui Generis Rights and Regimes

The discussion about how to best deal with indigenous peoples' intellectual property rights, can best be described as the struggle between indigenous peoples calling for a "sui generis" regime and some governments wanting traditional intellectual property regimes to prevail. Without entering into the whole discussion about bio-piracy and the theft and use of indigenous knowledge by for example pharmaceutical companies, it has to be made clear that traditional intellectual property instruments, such as patents have been used, to secure commercial rights and title to knowledge that really belongs to indigenous peoples.

Many indigenous peoples see those legal provisions and the agreements from which they draw their "validity" especially the WTO Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) as neo-colonial instruments, meant to undermine and appropriate indigenous peoples' real and intellectual property[63]

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[61] See references to LMMD Countries in: Earth Negotiations Bulletin (2002) Summary Report of the Sixth Meeting of the Conference of the Parties to the Convention on Biological Diversity, The Hague, The Netherlands

[62] Opening Statement of International Indigenous Biodiversity Forum at COP-6: IIBF (2002) Opening Statement, The Hague, The Netherlands

[63] GRAIN and Tebtebba (2003) Statement of the Workshop in Biodiversity, Traditional Knowledge and Rights of Indigenous Peoples, Geneva, Switzerland. 3-5 July 2003

14. One key feature of this dominant development model is the creation of the intellectual property rights (IPR) regime, which is a system based on Western legal and economic philosophy and theory and Western property law. This has its own theory of human nature and believes that private incentives are needed for people to perform labor, innovate and create wealth. It is a historically constructed worldview which arose during the industrial revolution to protect mechanical inventions. Now it is being perpetuated as natural or universal law. The universalization of IPRs is done through the harmonization efforts of the World Trade Organization and the World Intellectual Property Organization in which they are obliging their member-states to legislate or change their IPR law to fit this mold.

The concept of "sui generis" systems on the other hand describes the evolution of the overall system of property rights. Although those systems are never really been defined in detail, their negative definition is that it entails those concepts that do not fit into the Western systems of individual property rights. Courts have use the term to refer to the collectively held proprietary interests of indigenous peoples, which are recognized by Western Law but defined and given its substance by indigenous law. From the point of view of indigenous peoples, who have a much more positive and affirmative definition and understanding of their laws, sui generis systems entail their own legal systems and ways of protecting their knowledge. As stated above indigenous peoples have pushed for the development of a sui generis system to protect traditional knowledge under the CBD.

Of course such a system would center on collective rights and create space for the application of indigenous laws, which would limit access and therefore is not in the interests of companies who literally want free access to for example plant genetic resource, both without the consent and remuneration of indigenous peoples. Bodies such as the International Chamber of Commerce[64] have therefore been lobbying actively against the establishment of a regime or tried to water it down. Some countries have supported what seems to be a middle position to have the World Intellectual Property Organization (WIPO), deal with the issue. WIPO ceased the moment and set up the Intergovernmental Committee on Intellectual Property, Folklore and Traditional

[64] See: International Chamber of Commerce (2002) Position Paper on Traditional Knowlegde, Geneva, Switzerland, distributed at COP-6 in the Hague

Knowledge, that has embarked on developing a comprehensive report on the issue, but indigenous peoples have organized to oppose this mandate[65].

In Canada the Supreme Court recognized Aboriginal Title as a sui generis property right, recognized at common law, but given substance and regulated by the respective indigenous laws of the Aboriginal people that collectively holds it. The highest court in Canada further found that the protection of Section 35 that recognizes Aboriginal and treaty rights extends constitutional guarantees to Aboriginal Title. This makes indigenous property rights the only property rights that are protected under the Constitution of Canada. The drafters of the earlier constitutions could not agree on the protection of settler property rights, unlike in the United States where the protection of property is considered one of the pillars of the Constitution.

Canada and many Latin American countries today are faced with the critical question today whether to implement their constitutions and Supreme Court Decisions that recognized Aboriginal rights, or to breach their constitutions and favor other interests. Historically commercial-industrial and individual property interests have habitually been given priority over indigenous proprietary interests.

[65] See further provisions in: GRAIN and Tebtebba (2003) Statement of the Workshop in Biodiversity, Traditional Knowledge and Rights of Indigenous Peoples, Geneva, Switzerland. 3-5 July 2003

4. The Break Through

The third meeting of the Ad Hoc Open-ended Inter-Sessional Working Group on Article 8(j) and Related Provisions of the CBD, December 8th-12th, 2003, Working Group started in a very positive spirit when many parties recognized the important milestone set by COP-6: the recognition of prior informed consent of indigenous peoples and vowed to obey by COP Decision VI-10. With this threshold met, the door seemed open to a broader rights-based discussion. The stage had further been set during related discussions of the meeting of the Working Group on Access and Benefit-sharing (ABS), held a week prior to the Article 8(j) Working Group meeting. The ABS meeting called for measures to support compliance with the prior informed consent of indigenous peoples to access genetic resources, a principle not recognized in the Bonn Guidelines.

Building on the broader rights-based debates indigenous representatives also made it clear that indigenous laws and protocols might also become the key to the successful development of sui generis systems for traditional knowledge protection. Although some parties still promoted mainstream intellectual property instruments such as registers and databases as means to protect traditional knowledge, most indigenous representatives view them as a threat of unauthorized access and their concerns were noted in the final document on sui generis instruments that will still require a lot of work in the future[66]. Many parties saw the finalization of the impact assessment guidelines, now named "Akwé:kon Guidelines", based on the Mohawk word for Everything, as a great break-through. Broader indigenous participation in other convention bodies, especially SBSTTA was also recommended. Negotiations related to Article 8(j) at the Seventh Conference of the Parties went relatively smoothly, apart from some countries trying to oppose references to international law and trying to hold on to national control over Article 8(j) related issues, but accepting references to international indigenous rights in other substantive discussions especially protected areas.

5. The Breaking Point

[66] For more information see: Earth Negotiations Bulletin, *Summary Report of the third Ad Hoc Inter-Sessional Open-Ended Working Group on Article 8(j)*, Montreal, Canada, 2003; especially: Analysis Section

Similar to Australia's last minute opposition to parts of the decision on Invasive Alien Species at COP-6, New Zealand challenged the consensus regarding the decision relating to Article 8(j) at the COP-7 closing plenary along with other references to the Akwé:Kon Guidelines. In an unprecedented move the Secretariat tabled a document for approval in plenary[67] lacking references to "lands and waters traditionally used or occupied by indigenous and local communities" and a revised document that contained to reference. Still the Secretariat then took the floor in plenary to again request the deletion of that provision, to the great dismay of the majority of countries and indigenous peoples who all clearly recalled general agreement during the earlier negotiations to retain the provision.

New Zealand who in Working Group II had not opposed the retention of the reference, in return claimed that it had opposed the provision. When it became clear to New Zealand that they could not force last minute changes to the text they allowed the adoption of the document including the disputed reference, but made a reservation that the impact assessment guidelines have to be subject to national jurisdiction and simply serve as models for national legislation. This last minute strong-arming tactic might have come as a surprise to a number of delegations, but not to indigenous representatives, who had often been subject to similar last minute maneuvers. Having heard in advance of New Zealand's intention to get the text changed indigenous delegates reviewed the document in detail and ensured that it was revised according to the group consensus. The incident is also further proof that a number of countries are intending to block the implementation of the CBD provisions relating to indigenous and local communities at the national level. Again it will depend on indigenous peoples to ensure their use on the ground.

IV. STOP FREE TRADE WITH INDIGENOUS RIGHTS

1. Free Trade, the Environment and Human Rights

The following part sets out to show how fear of international trade actions and remedies has invaded policy considerations, especially regarding environmental protection and

[67] Documents tabled in plenary following in depth review and approval by a working group, are referred to as L-Documents, due to the letter L being added to the numbering. The first document tabled by the Secretariat was: UNEP/CBD/COP/7/L.19 (lacking the reference to traditional lands and waters). It is very unusual that a revised version of an L-Document be tabled, in this case upon the request of indigenous representatives UNEP/CBD/COP/7/L.19/Rev.1 (including the reference).

indigenous rights, from the local to the international level. As mentioned above, the threat of international trade remedies almost resulted in the Sixth Conference of the Parties of the CBD, almost breaking apart. Australia following advice from its international trade lawyers could not endorse the Decision on Invasive Alien Species that since then has been subject to international review. Australia had previously been the respondent in cases before the WTO on import restrictions on Chilled and Frozen Salmon from brought by both the US and Canada[68]. In this case Australia had defended its measures and concerns regarding salmon imports and possible diseases, especially because salmon is not an indigenous species to Australia, but lost. This is especially ironic in light of the fact that many environmental and indigenous groups in Canada and the US have raised increasing concerns regarding fish-farms and the introduction of Atlantic salmon in Pacific Watersheds, where they constitute an invasive alien species. Still bound by these rulings and the legal advise from its international trade lawyers, Australia that had been at the forefront of the development of a strong regime on invasive alien species under the CBD could not sign on to it at the last minute, putting the whole consensual decision making process in question[69].

These all are indications that international trade law, if not de iure, de facto overrules international environmental agreements, mainly due to the threat of trade remedies and the much stronger dispute settlement and enforcement mechanisms that are being set up parallel to international trade agreements.
There are hardly any international enforcement mechanisms or legally binding decisions that can be made by other international institutions.
International environmental and human rights law is often considered soft law, vis-à-vis international trade law that is much more enforceable and hard law. One would hope that in order to uphold international human rights and environmental obligations, governments would therefore argue that they should have priority over international trade obligations. That way they would at least have a stronger status de iure and steps could be taken to ensure that international national trade law does not de facto overrule all other international legal obligations. One would further think that in order to defend their national

[68] World Trade Organization (2000) Panel Report – Australia – Measures affecting Importation of Salmon – Recourse to Article 21.5 by Canada, WT/DS18/RW, 18 February 2000
[69] Australia routinely asks that its reservations regarding relevant documents and recommendations be noted and is often joined by other parties, such as Canada who brought the case against them.

environmental and indigenous rights policies, governments would take a more proactive position at the international level to defend those provisions.

Unfortunately lately one could observe the opposite trend: even countries such as Australia, Brazil and Argentina who have been recently hit by international trade remedies, in some cases for defending their national regulations, are now calling for international environmental agreements such as the Convention on Biological Diversity to be made conform with international trade obligations.

At the Seventh Conference of the Parties of the CBD, in Malaysia, in February 2004, trade concerns stalled negotiations regarding the most unexpected items on the agenda, such as mountain biological diversity and inland waters. In one case governments even insisted on the inclusion of a limiting provision that COP decisions could not prejudice the still ongoing Doha negotiations under the WTO[70].

This leaves one wondering if the negotiators are aware that by repeatedly introducing these limiting provisions, they might slowly be creating international customary law, both through the ongoing practice and the *opinio iuris* that international trade obligations also *de iure* have priority over international environmental law. The CBD in itself has often been criticized by indigenous peoples as a hybrid between a multilateral environmental agreement and an international trade agreement.

While indigenous representatives have always wanted to focus on the first objective of the Convention, namely conservation of biological diversity, most governments have been welcoming the shift in focus to sustainable use and fair and equitable benefit-sharing, the remaining two main objectives of the CBD[71]. With the Bonn Guidelines on Access and Benefit-Sharing approved, the CBD is now faced with the World Summit on Sustainable Development's (WSSD) mandate to develop an international regime for benefit-sharing. Interestingly neither the CBD objective nor the WSSD directly refer to the highly contentious question of access, where indigenous rights for example to prior informed consent would come into play. At some stage during the COP-7 negotiations it was even suggested to not include access provisions in the regime, leaving it up to interpretation if access should be free or nationally regulated. In response the International Indigenous

[70] For more information see: Earth Negotiations Bulletin, Summary Report of the Seventh Meeting of the Conference of the Parties to the Convention on Biological Diversity, Kuala Lumpur, Malaysia, especially Analysis section: Trade – an Invasive Alien Species

[71] See: Convention on Biological Diversity, UNEP/CBD/94/1, Montreal, Article 1 (objectives)

Forum on Biodiversity threatened to withdraw from the negotiations and groups with a strong rights-based approach called on indigenous peoples around the world to declare access-free zones[72].

By ignoring the growing gap between environmental and trade issues the CBD seems to become more and more stretched between its own objectives and lacking clear direction. An opportunity to bridge this gap might be inherent in the debate on positive and negative incentives that proved to be quite controversial at COP-7. A number of developing countries made it very clear that they are not ready to discuss positive incentives unless there was a clear agreement on mitigating perverse incentives. The simple mentioning of the term perverse incentives[73] in an official document is a great break-through, because the first proposals to phase out perverse incentives and instead use the money saved to protect the environment were flatly rejected. Some even openly rejected policies of developed countries that distort trade and references to positive incentives remained bracketed amidst fears they might be used to cover up illegal subsidies.

[72] Indigenous Peoples Council on Biocolonialism (2004) Press release: Indigenous people call for No Access Zones for Bioprospecting, Kuala Lumpur, Malaysia

[73] See: Myers, Norman and Kent, Jennifer (2001) Perverse Subsidies, How tax Dollars can Undercut the Environment and the Economy, Island Press, Washington

2. Trade Agreements threaten indigenous Rights

We are at a turn of history. The 1980s and 1990s have seen important constitutional recognition of indigenous rights, including indigenous land rights in many Latin American constitutions and Supreme Court Decisions that at the turn of the century are still awaiting implementation in the new century and millennium. And while the end of the Cold War has made the discussion about collective proprietary interests less politically charged and academic discussion of sui generis proprietary rights is on the rise, it has also marked an increase in international trade negotiations and trade liberalization. The millenary cultures of indigenous peoples survived the first waves of colonization and settlement that appropriate indigenous resources and lands, the question remains what proposed free trade with their land and resources means for their future? Presently Free Trade Agreements mainly secure unrestricted corporate access to resources and lands, without remuneration for indigenous peoples, whose real proprietary interests are constitutionally protected.

So what happens in a situation where international trade obligations and national constitutions are in potential conflict? This can probably best be illustrated by looking at the case of Mexico where collective land rights were protected in the Mexican constitution as being inalienable. A lot of those collectively held "ejido" lands, were and are in the hands of indigenous peoples, based on their historic titles to the land. As a pre-condition of joining the North American Free Trade Agreement (NAFTA) Mexico was pressured to introduce land reforms that removed those historic guarantees, in order to create a market in those lands and thereby ensure free access of international corporations. This was one of the triggers for the uprising in Chiapas, on January 1st, 1994, the day that NAFTA entered into force. In a shocking parallel the Section in the Mexican Constitution that referred to collectively held land rights and had to be changed, used the very same wording that the new constitutions across Latin America still use today to protect indigenous lands from alienation.

In a further historic irony leaders from across the Americas met in the month of the tenth anniversary of the uprising, in Mexico for the Fourth Summit of the Americas meant to revive the FTAA negotiations[74]. The FTAA would affect access to indigenous lands and resources across the Americas from the Arctic to the Antarctic. If the FTAA follows the

[74] Mark Engler (2004) Bush's Uneasy Mexican *Visita;* Democracy Uprising,, New York, January 2004

NAFTA model, would this mean that all the new Latin American constitutions referring to indigenous rights would have to be reformed or be de facto overruled?

It is important to remark that the FTAA would be the first in an all new comprehensive generation of trade agreements, meaning that it even tops the last decade's trade agreements. Already under NAFTA, Chapter 11 its investor state chapter, allows foreign investors to sue governments for denying access to their resources, with the FTAA adding water as a new resource to be freely accessed. In the case of a change in public policy for example for environmental protection they can even claim expropriation in the case of mere loss of opportunities.

On August 25, 2000 a NAFTA Chapter 11 tribunal ordered the government of Mexico to pay an American company, Metalclad, 16.7 million US because a Mexican community refused to allow the company to operate a waste disposal site on ecologically sensitive land.[75] If a regulation deprives a company of the right to profit from its investment or invest in the first place, the foreign corporation is entitled to compensation for the "expropriation" of their profits, whether actual or projected. NAFTA's provisions on investment and the rights of investors contained in Chapter 11 not only grants national treatment to foreign investors but guarantees them the right to invest despite domestic laws and regulations. They now have the ability to sue countries directly where they have lost profits or have been prohibited from investing in the first place – even when domestic companies could not do the same. Whilst multinational firms therefore can now even sue for the expropriation of profits, indigenous peoples are increasingly threatened by the ongoing illegal expropriation of their lands by multinational companies without being remunerated and with few efficient remedies available to enforce their rights.

Take for example the case of allocation of logging rights and quotas. When Canada imposed certain export quotas as part of the US Canada Softwood Lumber Agreement, US based Pope and Talbot sued the Canadian government under Chapter 11 of NAFTA

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[75] Kass, Stephen L. and McCarroll, Jean (2000) The Metalclad Decision unde NAFTA's Chapter 11, New York Law Journal, October 27, 2000

and received damages of half a million dollars[76] arguably because it had to shut down a number of mills in British Columbia. Soon after Pope and Talbot brought their case the Canadian government did not seek to renew the Softwood Lumber Agreement resulting in unlimited shipping to the US.

At approximately the same time as the Pope and Talbot litigation, the Carrier Sekani Tribal Council brought a complaint before the Inter-American Commission on Human Rights arguing a violation of their indigenous and human rights because all their traditional territories were allocated through logging licenses to integrated wood processing corporations, taking away from their peoples traditional uses. Following the precedent of Awas Tingni precedent[77] the case would have likely succeeded, but more than likely nothing would have changed on the ground. Canada has been repeatedly condemned by international human rights bodies for violating the rights of indigenous peoples[78]. The decisions focused especially on Canada's land rights policy. Despite constitutional recognition of indigenous land rights and calls by the Supreme Court of Canada on the government to implement its recognition of Aboriginal Title, Canada still maintains its extinguishment policy that also violates international human rights law. None of the decisions of international human rights bodies have been honored or implemented by the Government of Canada.

3. The Real Proprietary Interests of Indigenous Peoples versus quasi-proprietary rights of Corporations

In recent international proceedings in the US Canada Softwood Lumber Dispute Canada even took its non-recognition of the real proprietary interests of indigenous peoples to a new level, by arguing that corporations have quasi-proprietary interests in public and parallely Aboriginal Title lands. It has brought a vast array of complaints before international trade tribunals. Dispute settlement panels have been set up under the WTO and NAFTA.

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[76] NAFTA (2002) Chapter 11 Arbitration between Pope and Talbot and government of Canada, Award of Damages, May 31, 2002

[77] http://www.indianlaw.org/awas_tingni.htm

[78] UN Human Rights Committee, Canada was also found to be in violation of the Convention on the Elimination of All Forms of Racial Discrimination

The Softwood Lumber Dispute is set to create important precedent as it is the first case involving subsidy allegations in natural resource exploitation brought under the new dispute settlement understanding of the WTO. The Softwood Lumber Dispute and the ensuing proceedings before the US Department of Commerce, NAFTA and the World Trade Organization, could be characterized as a dispute mainly involving Western countries, with India being the only third party in the WTO proceedings that would not qualify as a "developed country".

This might have potential impacts on the outcome of the proceedings as is of special concern as industries from the countries involved in and following the dispute have had an important input in and influence in the proceedings. Most extracting industries are headquartered in developed countries but conduct much of their extracting in developing countries. Industries from the countries involved in the dispute have had an important input in the proceedings. Most exploitation of natural resources around the world takes place in the traditional territories of indigenous peoples and therefore their concerns and rights had to be taken into account. The input of Aboriginal peoples from the territories concerned by the Softwood Lumber Dispute allowed the articulation of broader world wide indigenous concerns regarding the exploitation of natural resources before international trade tribunals.

On the other hand Canada and its provinces, especially British Columbia often referred to as the Brazil of the North due to the dependence of its economy on the exploitation of natural resources have mainly made arguments in support of commercial-industrial interests and have even actively opposed submissions by indigenous and environmental groups. One of the reasons why these groups decided to file amicus curiae briefs before the WTO was that Canada's arguments if successful would have changed the field of natural resource extraction removing the extraction industries from the scope of countervailing duty investigations.
At the outset of its first written submission to the most recent WTO panel Canada claims[79]:

> "In Canada, natural resources, such as air, water, flora, fauna, minerals and other resources found in nature – are, for the most part, the property of provincial

[79] Government of Canada, December 19, 2002 First written Submission of Canada to the WTO panel on United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada, from now on referred to as Canada, FWS, December 19, 2002, para. 23

government. Provinces exploit and manage their natural resources in different ways, depending on the nature of the resource and also on local priorities."

In the WTO proceedings Canada contrary to its own national jurisprudence claims that stumpage is the "conferral of a right of access to exploit and in situ natural resource" with the courts having clearly ruled that ownership over the harvested timber is only fully transferred once stumpage has been paid. On the other hand Aboriginal peoples argue that there is no full transfer of ownership until there is an additional appropriate payment made for the proprietary interests of Aboriginal peoples. This all in the light of the fact that Canadian courts have recently put companies on notice that they have to consult with Aboriginal peoples and accommodate their proprietary interests in a meaningful way before extracting resources in their traditional territories especially in the absence of the government taking Aboriginal Title and Rights into account[80].

To date international trade tribunals have always found that stumpage fell into the category of provision of a good. In three prior countervailing duty investigations covering softwood lumber products from Canada[81] the US Department of Commerce has determined that stumpage programs involve the provision of a good. Canada's contention that stumpage cannot be countervailable because it is not a good was rejected by a GATT panel[82] in 1992.

Yet in order to outmaneuver the imposition of a countervailing duty and the application of the WTO SCM Agreement Canada in recent proceedings before the WTO revived this long rejected argument and did not claim ownership over timber stands on crown land vis-à-vis companies with harvesting rights.

The submissions by Aboriginal peoples uncover the double-standard and the self-serving nature of the arguments Canada makes on the international level. Vis-à-vis Aboriginal peoples Canada always claimed and continues to claim exclusive jurisdiction and ownership over public lands and therefore crown forests and refused to recognize the

[80] Haida Nation v. B.C. and Weyerhaeuser, Date: 20020819, /2002 BCCA 462 Docket: CA027999
[81] Certain Softwood Lumber Products from Canada, 48 FR 24159, 24167 (May 31, 1983) (Lumber I), Certain SL Products from Canada, 51 FR 37453 (Oct. 22, 1986) (Lumber II), Lumber III at 22584
[82] United States –Measures Affecting Imports of Softwood Lumber from Canada, BISD 40s/358, para. 346 (Feb. 19, 1993; adopted October 27th, 1993)**;** United States–Measures Affecting Imports of Softwood Lumber from Canada, BISD 40S/358, para. 346 (Feb. 19, 1993, adopted Oct. 27, 1993).

proprietary interest of indigenous peoples in forests in their traditional territories, despite its recognition by the Supreme Court of Canada as Aboriginal Title[83]. It is ironic, for Canada to now claim that it is not providing a good when it comes to the imposition of countervailing duties.

In its international submissions Canada also goes against the interests of the Canadian public, who still believe in public rights to the forests, by arguing that companies do not have to pay any remuneration for the acquisition of the right to harvest timber. Instead, the government says it is collecting part of the economic rent, like a tax. The companies would acquire limited ownership through the general licensing agreement and long before they meet all statutory requirements, including the payment of stumpage.

Canada's argument that stumpage is unrelated to any provincial ownership and more the economic equivalent of a tax, has been rejected by the courts. In 2000 the BC Supreme Court held that[84]:

> "The Crown exerts its financial interest in the forests of the Province through stumpage appraisal, a process which places value on timber harvested. Stumpage is the price a licensee must pay to the Crown for its timber."

Following Canada's arguments it has become evident that Aboriginal proprietary interests would get lost somewhere in the process of resource distribution and would not form part of any economic equation and remuneration scheme. Arguing that they are simply collecting an economic rent the provinces could in the future continue to keep indigenous peoples out of all remuneration schemes, as they do not have any tax authority.

At present Aboriginal peoples are not remunerated for their ownership and have not passed on their ownership in the timber to the governments or companies who therefore have not acquired full ownership at any point in the licensing, harvesting and marketing

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[83] *Delgamuukw v. British Columbia* (1997) 3.S.C.R., 1010, for more details see Appendix I

[84] *British Columbia* v. *Canadian Forest Products* (8 February 1998), Victoria 972176, [1999] BCJ 335 (B.C.S.C.), affirmed, 2000 BCCA 456.

process. Aboriginal peoples generally supported the recent finding of the WTO panel[85] in the US-Ca Softwood Lumber Dispute that:

> In sum, and in the context of Article 1.1(a) (1)(iii) SCM Agreement, we are of the view that where a government allows the exercise of harvesting rights, it is providing standing timber to the harvesting companies. From the perspective of the harvesting company the situation is clear: most forest land is Crown land, and if the company wants to cut the trees for processing or sale, it will need to enter into a stumpage contract with the provincial government, under which it will have to take on a number of obligations in addition to paying a stumpage fee for the trees actually harvested.

The panel therefore found that through its present stumpage system Canada was providing a good and therefore potentially a subsidy against which countervailing duties could be levied in measure of the benefit incurred by the industry. In review of this finding it has to be recognized that from the perspective of indigenous peoples they hold collective proprietary interests in their traditional territories and Aboriginal Title coexists with Crown Title, Aboriginal peoples therefore should also be part of the decision making process over their land and resources and companies are also required to remunerate their proprietary interests. Where would the Canadian argument that licenses give limited ownership have left Aboriginal proprietary interests?

This shows how many provinces try to undermine the proprietary interests of Aboriginal peoples by strengthening commercial and industrial interests. The provinces provide a financial contribution in the form of a good by making lumber from Crown and Aboriginal Title lands available to forest companies. Also revenue that is due is foregone by not collecting compensation for the collective proprietary interests of indigenous peoples, which the federal government is under an obligation to protect and take into account. A clear benefit is conferred upon companies who do not have to take Aboriginal Title into account and do not even have to compensate for it.

The federal government provides a subsidy through government action enshrined in its policy of the non-recognition of Aboriginal Title exonerating companies from having to remunerate indigenous proprietary interests. The federal policy aiming at the

[85] WTO (2002) United States - Preliminary Determinations with Respect to Certain Softwood lumber from Canada, Report of the Panel, WT/DS 236/R adopted November 1st, 2002, para. 7.18

extinguishment of Aboriginal land rights, therefore does not only violate the Constitution of Canada and numerous Supreme Court Decisions but also international trade law. Similarly the failure to implement constitutional provisions regarding indigenous rights in Latin America could be seen as a subsidy to the corporations who continue to gain free access to indigenous territories there.

4. First Ever Indigenous Amicus Curiae Brief Accepted

In making this finding the panel at the outset remarked[86]:

> As a preliminary matter, we note that in the course of these proceedings, we decided to accept for consideration one unsolicited *amicus curiae* brief from a Canadian non-governmental organization, the *Interior Alliance*. This brief was submitted to us prior to the first substantive meeting of the Panel with the parties and the parties and third parties were given an opportunity to comment on this *amicus curiae* brief. After this meeting, we received three additional unsolicited *amicus curiae* briefs. For reasons relating to the timing of these submissions, we decided not to accept any of these later briefs.

This official acceptance of the first ever substantive submission made by indigenous peoples to a WTO panel does not only set an important procedural precedent, it also shows that the panel took the arguments in the indigenous amicus curiae brief serious, because it supplied additional legal and substantive information regarding indigenous rights related to trade. Previously the WTO had rejected a number of amicus curiae briefs. On a procedural level – this amicus curiae brief has hailed as a great break through by non-governmental actors, because in the absence of institutionalized procedures for dealing with amicus curiae submissions, it constituted a great break through: Never before had any amicus brief been officially circulated to all parties and third parties for their comments. At the same time this clarified certain time lines, because in WTO proceedings third parties are only actively involved until after the first hearing by the panel or upon their specific request.

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[86] WTO (2002) United States - Preliminary Determinations with Respect to Certain Softwood lumber from Canada, Report of the Panel, WT/DS 236/R adopted November 1st, 2002 at para 7.2

Out of the 5 (third) parties only Canada and India objected to the acceptance of the brief, with India expressing its concerns that amicus curiae submissions could be used by industries that often have more resources than governments of developing countries to undermine their arguments and positions.
Aboriginal peoples involved in proceedings before the WTO have since made it clear that they would not bring industry arguments and that even if such where brought by an indigenous group arguing commercial-industrial interests over Aboriginal interests they should be rejected. This was the case in the Softwood Lumber Dispute where the Meadow Lake Tribal Council filed a submission relying on industry arguments and was rejected.

Canada opposed the filing of the Aboriginal amicus curiae brief, diverting from its previous practice of accepting amicus curiae briefs, usually filed favoring their position, for example in the Asbestos case, where a Canadian amicus brief by the industry was rejected by the panel. The United States of America were the only party who made a substantive reference to the Aboriginal amicus curiae brief in its second written submission to the panel.

Due to the often criticized lack in transparency of the WTO, Aboriginal peoples have a hard time following the proceedings, for example notification of the acceptance of their amicus curiae brief was only sent to the state parties but not the Aboriginal submitters. They relied heavily relied on discussions and information being passed on by parties and especially third parties. But even states that are usually for high transparency such as the member states of the European Union felt restricted by the rules and procedures of the World Trade Organizations. On the other hand they informed the Aboriginal peoples about proposals they had submitted in the ongoing round of negotiations to formalize amicus curiae participation. These foresee that the group submitting, has to be non-profit oriented, with a long history of representing these specific interests and supply relevant legal and substantive information.

The whole initial involvement of Aboriginal peoples in these closed proceedings and ensuing communications with state parties who for the first time had to conceptualize Aboriginal rights at this level led to an important learning process and a growing international awareness about indigenous proprietary interests.

III. FREE ACCESS TO NATURAL RESOURCES

1. The Underlying Motivation of Colonization

Especially in Latin America one of the drives of colonization was free access to lands and especially natural resources. One of the best examples is probably the Pizarro enterprise set up in only a few years and benefiting mainly the family of the conquistador and his home province:

> Un estudio de la organización empresarial de la familia Pizarro abre nuevas perspectivas en la historia de la colonización de la America española y en las relaciones establecidas entre conquistadores e indígenas en el Peru… Un simple listado de propriedades tendría indudable interés, aunque sería insuficiente para explicar el fenómeno de la empresa de conquista y su posterior establecimiento en la nueva colonia. Es por ello que se pretende expresar la significación económica de las propriedades como unidades productivas y dentro del contexto de la sociedad peruana en formación.[87]

There were even connections between the colonial enterprises in different parts of Latin America:

> Sin embargo, Hernando Cortés, el gran empresario-conquistador, busco por todos los medios ampliar su gobernación mexicana y hacerse presente en el Perú. Así, en Acapulco, el 17 de abril de 1536, al volver de su fracasada expedición a la Baja California, firmó un contrato con Juan Domingo Espinosa para que fuese al Perú como su agente mercantil.[88]

Throughout the Americas and the indigenous world, developments continued to grow and impact indigenous territories. One of the largest projects proposed in the Far North was the MacKenzie Valley Pipeline in the 1970, that would have impacted both Dene and Inuit lands and peoples. For the first and only time in Canadian history a public inquiry into the impact of such a mega-projects was mandated by parliament and headed by Justice Thomas Berger, who had just been counsel on the first Aboriginal Title case in Canada, the Calder case. The inquiry heard testimonies some declaring corporations the new colonizers[89]:

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[87] Varon, Gabai (1997) La Ilusión del Poder, Instituto de Estudios Peruanos, Lima, p. 272
[88] Varon, Gabai (1997) La Ilusión del Poder, Instituto de Estudios Peruanos, Lima, p. 128
[89] O'Malley, Martin (1976) The Past and Future Land, Peter Martin Associates Unlimited, Toronto, p. 255

> "George Manuel, former president of Canada's Nacional Indian Brotherhood and founding president of the World Council of Indigenous Peoples, told the inquiry of his trips to Africa, Australia, New Zealand, South America and Scandinavia. *"what impresses me from my travels is that Aboriginal people everywhere share a common attachment to the land, a common experience and a common struggle. The Indian people of Canada and other indigenous peoples that I have met and seen have suffered and are still suffering from deprivation and exploitation by colonizers. Today's colonizers, the corporations, are often supported by governments. Both have exploited the indigenous inhabitants by depriving them of the indigenous inhabitants by depriving them of their human rights and destroying their social, cultural, economic and political institutions. The result is the complete demoralization of the people, drunkenness and total dependence on the government… "*."

One testimony even pointed out clear parallels in the modes of operation of in some cases the same corporations in the North and the South[90]:

> "Tony Clarke of the Canadian Catholic Conference told the inquiry of the treatment of Indians in the Amazonian region of Brazil. In 1971, the Brazilian government declared the state of Rondonia a major region for the extraction of tin. "No consideration was given to how this resource extraction could proceed on Indian land. It was simply assumed that the Indian people were devised to remove or eliminate them." Two Indian tribes in Rondonia agreed to settle in Aripuana Park in 1971, but months later, despite promised government protection, the government began selling parcels of lands to settlers. More multinational corporations were given permission to use the park fro exploration and a highway was extended throughout it. In 1973, it was announced that the park would be reduced by two-thirds. The Brazilian Government granted subsoil rights in the park to ten mining companies, one of them a subsidiary of Royal Dutch Shell, whose Canadian subsidiary, Shell Canada is a member of the Mackenzie Valley pipeline."

2. Mining - Parallels and Connections between the North + South

It is interesting to not only to see this clarity of analysis already in the 1970s, but also the connections drawn between developments in the North and the South[91]:

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[90] O'Malley, Martin (1976) The Past and Future Land, Peter Martin Associates Unlimited, Toronto, p. 255

> "Mel Watkins, an economic consultant with the Indian Brotherhood, pursues the amorality of multinational corporations further, demonstrating that a state policy of torture in Chile does not stop Noranda, Amoco, Cominco and Falconbridge from business as usual. Three are major operators in the Canadian North and Noranda is currently trying to establish a presence..."

The Canadian founded Noranda, one of the world's largest integrated mining and metals companies, continues its destructive work both in South and North America till today. It has accumulated over US$1.2 million of fines for breaking environmental regulations in Canada alone and its arsenic and lead emissions remain the highest in the country[92]. Still in a historic parallel, Noranda who already runs 5 projects with major environmental impacts in Chile is currently seeking approval for an aluminum plant in the untouched wilderness of Patagonia. Noranda even indicated that it might not be able to comply with Chilean environmental regulations, because it might[93]:

> "materially adversely affect our business, financial condition, liquidity and results of operations."

The proposed Alumysa would require the construction of several hydro-dams and with more than US$2.75 billion in estimated costs it would be the biggest foreign investment project in Chile. Its opponents argue that[94]:

> "Many of the local communities who are threatened by it argue that the plant will not only have severe, irreversible environmental and social impacts of the region; it could also destroy local tradition, culture and existing economies."

This project would only be the last one in a long line of Canadian mining projects that impact indigenous territories, another prime example is the largest copper and zinc mine in the world, Antamina, a project that displaces many indigenous communities and dries out historic Inka lagoons that many more communities still rely on[95]. Many of these projects are not only directly financed by the Canadian export development corporation, also Canadian embassies on various occasions have hosted round tables introducing

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[91] O'Malley, Martin (1976) The Past and Future Land, Peter Martin Associates Unlimited, Toronto, p. 256
[92] Greenpeace (2003) Noranda from Canada to Patagonia, A Life of Crime, Greenpeace International, the Netherlands
[93] Noranda (2002) Prospectus Supplement, June 18, 2002
[94] Alianza Aysen (20030 Reserva de Vida Antecedentes generales de la Region Aysen,
[95] NGO Working Group on the Export Development Corporation (2001) Reckless Landing II: How Canada's Export Development Corporation Puts People and the Environment at Risk, May 2001

Canadian mining firms to local communities and using development corporation monies to finance accompanying measures meant to make the communities consent to the developments and at the same time pushing Canadian policies to sign agreements aiming at the extinguishment of indigenous rights analyzed in earlier chapters.

3. Deforestation – violating national and international law

Bringing the analysis back to Brazil that was earlier mentioned in one of the quotes from the Mackenzie Valley inquiry in the 1970s, the illegal land grab and logging in the Amazonian Rain Forest continues. A recent study shows how lawlessness and illegal occupations of public and indigenous lands are still often backed by violence and assassinations[96]. The State covered, Pará, is the largest timber producing and exporting region in the Amazon, accounting for 40% of the production and 60% of all the exports from all Amazonian states[97]. At the same time it accounts for one third of the total Amazonian deforestation amounting to an area larger than the size of Austria, the Netherlands, Belgium, Portugal and Switzerland combined[98].

Deforestation in Pará has been driven for over four decades by unsustainable logging. Land-use is largely a question of the illegal seizure of public lands, which are exploited for logging, the turned over to cattle ranching. A recent report by the renowned Center for International Forestry Research (CIFOR) entitled: "Hamburger Connection Fuels Amazon Destruction"[99], directly connects the five-fold increase in Brazilian beef imports over the past six years to the dramatic increase in deforestation in both the Amazon and Pará states. The General Director of CIFOR and co-author of the report, David Kaimowitz, stated[100]:

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[96] For more information see: Greenpeace (2003) State of Conflict, an Investigation into the landgrabbers, loggers and lawless frontiers in Pará State, Amazon; Greenpeace International, the Netherlands

[97] Verissimo et al (2002) Pólos Madeireiros do Estado do Pará, Amazon Institute of Man and the Environment, Imazon

[98] SECEX (2003) Secretaria de Comercio Exterior, Exportacao Brasileira, Ministério do Desenvolvimento, Indústria e Comercio Exterior.

[99] Kaimowitz, David, Mertens Benoit, Wunder, Sven and Pacheco, Pablo (20040 Hamburger Connection Fuels Amazon Destruction, Center for International Forestry Research, Barang, Indonesia

[100] CIFOR (2004) Press Release: World Appetite for Beef Making Mincemeat Out of Brazilian Rainforest According to Report from Major International Forest Research Center, April 2nd, 2004, Barang, Indonesia

> "In a nutshell, cattle ranchers are making mincemeat out of Brazil's Amazon rainforests. Brazil's success in combating foot-and-mouth disease may be good news for the cows, but it is bad news for the forest…"

In the last decade Europe's processed meat imports from Barzil rose from 40 to 74 per cent. On March 15, 2004, Brazilian President Luis Inácio (Lula) da Silva announced his "Action Plan to Prevent and Control Deforestation in the Legal Amazon." It sets out activities to reduce deforestation, including better planning for land use, greater enforcement of laws regarding deforestation and the illegal occupation of government lands, improved monitoring of deforestation, more detailed reviews of public infrastructure investments, greater support for indigenous territories and community forestry, increased support for sustainable agriculture, and greater control over credit for ranchers[101].

During the XII World Forestry Congress, held in Québec, Canada, from September 21-28, 2003, the then Brazilian Secretary of State for Environment and Sustainable Development José Carlos Carvalho presented a much applauded keynote address on: Conservación Forestal y Pobreza – Dos Cuestiones contradictories o dos lados del mismo desafío? At the beginning he sat out to explain the contradiction[102]:

> "…solamente ocurre en el Tercero Mundo, sobresaliéndose de manera más acentuada en los países subdesarrollados o en etapa de desarrollo. No hay bosques y pobreza en el Primer Mundo, no hay agua y pobreza en los países desarrollados… mas recientemente, la cara negativa de la globalización de la economía que ha acentuada la asimetría entre los países y ampliado la complejidad de las causas que crean condiciones para la pobreza. En este contexto, no es equívoco afirmar que el engranaje de que pone en marcha la pobreza es el mismo que impulsa el uso predatorio de los recursos forestales y la destrucción de la naturaleza. Este, si es el verdadero dilema."

Towards the end of his speech he concluded[103]:

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[101] President Luiz Lula da Silva launched the government's latest plan on March 15, 2004, to limit logging and land clearing in the face of figures from the National Institute for Space Research (INPE) http://www.radiobras.gov.br/internacional/materia.phtml?idioma=IG&materia=177856

[102] Carvalho, José Carlos (2003) Conservación Forestal y Pobreza, Presentación al XII Congreso Forestal Mundial, Quebec, Canadá

[103] Carvalho, José Carlos (2003) Conservación Forestal y Pobreza, Presentación al XII Congreso Forestal Mundial, Quebec, Canadá

> “Pradojalmente, en la medida en que los precios de los productos madereros y no-madereros admitidos por las reglas del libre comercio no remuneran correctamente los costos de las medidas ambientales y sociales aconsejables… principalmente en los trópicos, donde los procedimientos de explotación son más complejos, solamente son competitivos, internacionalmente, en razón del uso predatorio, del empirismo en las técnicas empleadas y la explotación del trabajo.”

He went on to explain how the WTO negotiations, including the most recent meeting in Cancún, Mexico, had not been productive, especially regarding the issue of agricultural subsidies in developed countries. He outlined how the European Union, the US and Japan, did not even want to reduce let alone eliminate their subsidies to their agriculture industries. He found that would be necessary in order to:

> “para permitir que naciones pobres, de economía básicamente agrícola, tengan acceso al mercado de las naciones desarrolladas. Esta es, hoy día, la majór distorsión de la economía mundial, no solamente por sus reflejos sociales y ambientales en las demás naciones.”

Carvalho even went a step further, concluding[104]:

> “la devastación de bosques, el uso inadecuado de la tierra, la explotación de los obreros, la baja remuneracion de la mano de obra, aunque ilegales, en algunos casos, funcionan como una especie de “subsidio indirecto” a los agentes económicos que, perversamente, encuentran en este modelo arcaico y anacronico condiciones para competir con los subsidios de los paises desarrollados.”

So his conclusion was, that developing countries paid the double prize for subsidies handed out by developed countries to their industries, firstly they could not compete in world markets due to the high subsidies and secondly they lost their pristine forests and lands due to the continuous push to expand agriculture at the lowest possible cost.

Looking at his arguments in the context of the earlier explanations of similar subsidy arguments made by indigenous peoples in the North, strong parallels become evident: indigenous peoples are the first to pay the prize for environmental destruction and loss of

[104] Carvalho, José Carlos (2003) Conservación Forestal y Pobreza, Presentación al XII Congreso Forestal Mundial, Quebec, Canadá

their indigenous economies and indigenous peoples both in the North and in the South will be poorest people in their countries as long as their land and resource rights are not recognized.

4. The Oil and Gas Industry – corporate agenda and discourse

Many industries have in recent years adopted the discourse of sustainable development to cover up their continued destructive exploitative activities. During the XII World Forestry Congress for example it became evident that the term “sustainable forest management” was very much adopted and corrupted by the corporate-industrial exploitative approach to forest management. So although the congress had started out under that theme one of the main outcomes of the congress was that in order to protect forests and ensure truly economically, culturally, socially and environmentally sustainable management, policies had to secure local and indigenous control over the forests and therefore community based forest management and co-management with indigenous peoples based on their traditional knowledge.

No other industry has probably been more skillful in using terms associated with so-called “sustainable management” than one of the most destructive industries: the oil and gas industry. In the following a number of extracts from cases studies put together by the oil and gas industry itself, supposedly documenting the sustainability of their activities, will be contrasted with contradicting analysis by environmental groups and academia.

The following case studies are taken from a publication by the International Petroleum Industry Environmental Conservation Association[105], entitled: “La industria de gas y petróleo: Operando en entornos sensibles”. The politically correct discourse of those

[105] The International Petroleum Industry Environmental Conservation Association is comprised of oil and gas companies and associations from around the world. Founded in 1974 following the establishment of UNEP, IPIECA provides the oil and gas industry’s principal channel of communication with the United Nations.

corporations also includes references to indigenous peoples. Already at the outset the publication refers to[106]:

> Consultas a las personas interesadas: La industria reconoce que las preocupaciones de la comunidad no siempre se satisfacen mediante técnicas de evaluación del riesgo convencionales, y que el diálogo con la comunidad es necesario para construir un consenso.
> Las consultas a las comunidades locales ayudan a la industria a entender y respetar sus valores culturales y sociales, sus necesidades y deseos, y a utilizar este conocimiento local. Las consultas pueden proporcionar un foro para que las comunidades debatan algunas veces prioridades irreconciliables; por ejemplo, las oportunidades de empleo aportadas por un nuevo desarrollo pueden tener que sopesarse frente a consideraciones ambientales.

It is evident from this paragraph that the oil and gas industry simply seems to consider so-called consultations as a pure formality, there are no references to indigenous rights or prior informed consent of indigenous peoples to any developments on their lands, a principle that the same industry has fought from the international to the national and local levels. The same is true in the following case study[107]:

> ***Shell en Camisea, Perú:*** **Elevando el nivel y aprendiendo nuevas lecciones en un entorno de bosque de lluvias sensible**
> El proyecto Camisea se refiere a una campaña de exploración y valoración llevada a cabo desde 1996-99 en la región del Bajo Urubamba de la alta Amazonia, a unos 500 km al este de Lima, Perú. Dos campos de categoría mundial que contienen gas natural y condensados, descubiertos en los años 80, se estudiaron bajo un contrato de dos años con las autoridades peruanas. A pesar de sus mejores esfuerzos, Shell, Mobil y el gobierno peruano fueron incapaces de encontrar soluciones para las cuestiones relacionadas con la introducción del gas de Camisea en el mercado peruano dentro del marco de tiempo permitido bajo el contrato y la licencia se devolvió a PeruPetro. La región es el hogar de una serie de comunidades indígenas basadas en seis etnias diferentes y representa un ecosistema altamente sensible. La tribu predominante es la Machiguenga que tiene una historia que se remonta unos 5.000 años. El bloque de exploración con licencia bordea el Parque Manu al este y la Reserva Apurimac al oeste. La mayor parte de las comunidades tienen el título de propiedad de la tierra.

In this case study the authors mention the land titles of the respective indigenous peoples, but fail to mention how they were trying to consistently undermine those rights and in the end where torced to abandon the Project, which they seem to simple blame on infavorable market conditions.

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[106] IPIECA (2004) La industria del gas y petróleo: operando en entornos sensibles, IPIECA, London, p.2
[107] IPIECA (2004) La industria del gas y petróleo: operando en entornos sensibles, IPIECA, London, p. 21

Another probably even more famous case where the oil and gas industry deeply impacts indigenous territories is the following[108]:

> ***Repsol YPF en Ecuador* - Producción de petróleo en áreas protegidas**
>
> El Parque Nacional Yasuni (YNP) y la Reserva Étnica Waorani (WER) están protegidas por el Gobierno Ecuatoriano, también Yasuni ha sido designada Reserva de la Biosfera por la UNESCO. Estos bosques de lluvias tropicales son de gran importancia cultural y ecológica, con comunidades indígenas no contactadas que viven en la región hasta los años 50. La compañía ha obtenido las certificaciones ISO 14001 y 9002, ha establecido Sistemas de Calidad Total y de Gestión Ambiental, y están introduciendo un Sistema de Gestión Integrada y utiliza la última tecnología para eliminar los riesgos de contaminación. Repsol YPF trabaja con los grupos Waorani y ha establecido programas participativos para mejorar su calidad de vida a la vez que respeta su cultura ancestral.

What the industry case study absolutely fails to mention is that most of the indigenous peoples have rejected the project, instead claiming that some of the indigenous peoples have just been living in the area since the 50s. It also does not mention that the national park was substantively reduced to allow for oil and gas exploitation[109]:

> El Yasuní es el hogar del pueblo Waorani. Existen dos comunidades que han rechazado todo contacto con el mundo exterior, los Tagaeri y los Taromenanes. Con la finalidad de dejar fuera de sus fronteras varios bloques petroleros , los limites del Parque Nacional Yasuní fueron modificados mediante el Acuerdo No. 191 y 202. (al la vez) el parque nacional Yasuní está afectado parcial o totalmente por cinco bloques petroleros…

The circle of this paper is best closed by connecingt this analysis with the earlier discussion about a rights-based approach to the conservation of biological diversity through the following quote:

> El Convenio dedica todo el Artículo 8 al tema de la conservación in-situ. Un fuerte componente del Artículo se relaciona a la creación de áreas protegidas, pero en muchas países miembros existe actividad petrolera dentro de las áreas protegidas. Otra norma importante fue consagrada en el Artículo 8(j) que llama a los países a respetar las prácticas y el saber tradicional. La actividad petrolera impide que las comunidades locales puedan continuar con sus prácticas tradicionales.

[108] IPIECA (2004) La industria del gas y petróleo: operando en entornos sensibles, IPIECA, London, p. 20
[109] Tegantai (1999) La Explotación Petrolera y la Conservación de la Biodiversidad, Octubre 1999, Oilwatch,

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