

**LAND IN THE SECOND DECADE:  
THE EVOLUTION OF INDIGENOUS PROPERTY  
RIGHTS AND THE ENERGY INDUSTRY IN THE  
UNITED STATES AND BRAZIL**

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*“[T]here is no quicker way to dampen the ardor of the great majority of businesses willing to venture large financial sums to support cutting-edge activity than to inform them that the law surrounding such is rife with ambiguity.”<sup>1</sup>*

I. INTRODUCTION

In December 2004, the United Nations declared that the years 2005-2015 would mark the Second International Decade of the World’s Indigenous People (Second Decade).<sup>2</sup> As this Second Decade comes to a close, the rights of indigenous peoples have achieved wide acceptance, yet the practical implications

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1. REX J. ZEDALIS, INTERNATIONAL ENERGY LAW: RULES GOVERNING FUTURE EXPLORATION, EXPLOITATION AND USE OF RENEWABLE RESOURCES 204 (Ashgate Publ’g Ltd. ed. 2001).

2. G.A. Res. 59/174, U.N. Doc. A/RES/59/174 (Dec. 20, 2004). (The Second Decade is a proclamation to foster nondiscrimination and accountability, as well as the inclusion of indigenous peoples in benefit sharing and policy, resource, and development decisions).

of these rights remains unsettled and open to varied interpretation by States, the energy industry, and other interested parties.<sup>3</sup>

For the energy industry, the development of indigenous property rights may present important strategic opportunities to work directly with new tribal partners, who have been granted the rights of self-determination for the development of their lands and resources through Convention 169 of the International Labour Organisation and the 2007 U.N. Declaration on the Rights of Indigenous Peoples.<sup>4</sup> Conversely, the new landscape of indigenous property rights may present substantial financial risk and legal ambiguity for members of the energy industry.<sup>5</sup> For example, the exploration and production of oil in Ecuador from the 1960s through the 1990s resulted in the pollution of watersheds used by indigenous tribes.<sup>6</sup> Twenty-five years later, after litigation in multiple countries, with judgments totaling almost twenty billion dollars, the rise of indigenous property rights may place the energy industries' past practices in the legal crosshairs.<sup>7</sup> A comprehensive understanding of the international trend towards the expansion of indigenous rights and the effects of these rights on the possession of land and natural resources could help foster an environment of mutual benefit and progress, thereby reducing economic and social consequences.<sup>8</sup>

An increasingly prominent figure in the production of hydrocarbons,<sup>9</sup> Brazil has become a contemporary reenactment of conflicts long at issue in the United States regarding indigenous property rights. Brazil and the United States share a common history of colonization, native displacement, slavery, war,

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3. See generally Aliza Gail Organick, *Listening to Indigenous Voices: What the UN Declaration on the Rights of Indigenous Peoples Means for U.S. Tribes*, 16 U.C. DAVIS J. INT'L L. & POL'Y 171 (2009); Lee J. Alston & Bernardo Mueller, *Property Rights, Land Conflict and Tenancy in Brazil* (Nat'l Bureau of Econ. Research, Working Paper No. 15771, 2010); Gerald P. Neugebauer III, *Indigenous Peoples As Stakeholders: Influencing Resource-Management Decisions Affecting Indigenous Community Interests in Latin America*, 78 N.Y.U. L. REV. 1227 (2003).

4. See, e.g., United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007); INTERNATIONAL LABOUR ORGANISATION, THE ILO CONVENTION ON INDIGENOUS AND TRIBAL PEOPLES (No. 169) (June 7, 1989) [hereinafter ILO C169], available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---normes/documents/publication/wcms\\_100897.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_100897.pdf) (an UN agency instrument covering land rights and access to natural resources, outlining how indigenous peoples achieve more control over their own economic, social, and cultural development, and urging dialogue between nations and their native population); Neugebauer III, *supra* note 3, at 1229-30 (discussing a successful arrangement between Shell and indigenous peoples in Peru).

5. Guido Nejamkis & Eduardo Garcia, *Argentine Judge Embargoes \$19 Billion Chevron Assets*, REUTERS (Nov. 7, 2012), <http://www.reuters.com/article/2012/11/08/us-argentina-chevron-idUSBRE8A62AL20121108?type=companyNews>. Chevron's exploration for and production of oil in Ecuador from the 1960s through the 1990s resulted in the pollution of watersheds used by indigenous tribes. When Chevron failed to pay a judgment levied by an Ecuadorean court to compensate sickened indigenous people, the plaintiffs petitioned an Argentinian court for an embargo of Chevron's assets in Argentina. *Id.*

6. *Id.*

7. *Id.*

8. Neugebauer III, *supra* note 3, at 1228-30.

9. BRAZIL ENERGY DATA, STATISTICS AND ANALYSIS, ENERGY INFORMATION ADMINISTRATION, available at <http://www.eia.gov/cabs/brazil/Full.html>. "EIA forecasts Brazilian oil production to reach 2.8 million bbl/d in 2012 and 3.0 million bbl/d in 2013." *Id.*

independence, and a surge of economic development and industrialization.<sup>10</sup> By using the United States as an analogue, this paper lays out the development of indigenous property rights in Brazil, contrasts the past and present policy differences between the two countries, and assesses prospects for future cooperation between the energy industry and indigenous populations.

By utilizing a macro- and micro-analysis of indigenous property rights, this paper will address the global shift in policy and the local development of these rights in the United States and Brazil. The first part of this comment will present the history of indigenous property rights chronologically, incorporating the related histories and policies of the United States and Brazil from the colonial era until the most recent wave of development in the Second Decade. The second part of this comment will analyze the historical information presented, then set forth the likely trajectory of indigenous property rights globally and for the United States and Brazil. The final section of this article will discuss theories and strategies that may reduce the risk of loss or litigation against the energy industry when investing in projects on indigenous lands worldwide.

## II. BACKGROUND

### A. *Historical Indigenous Property Rights and the Discovery Doctrine*

#### 1. Discovery of the Americas and Subsequent Colonialism

Prior to the arrival of Christopher Columbus in 1492, indigenous peoples lived throughout the New World, exercising their rights to the land and its resources according to their cultures and customs. The New World eventually came under the control of the British, Spanish, Portuguese, and French governments, ultimately becoming the modern countries comprising North and South America.<sup>11</sup>

In the territory that became the United States, many Native American tribes were killed or forced to leave their lands.<sup>12</sup> During this time, a clash of paradigms surrounding property rights and the meaning of “ownership” also

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10. See generally BORIS FAUSTO, A CONCISE HISTORY OF BRAZIL (Arthur Brakel trans., 1999); HARRY CRANBROOK ALLEN, THE UNITED STATES OF AMERICA: A CONCISE HISTORY (2nd prtg. 1965).

11. See generally HERBERT EUGENE BOLTON & THOMAS MAITLAND MARSHALL, THE COLONIZATION OF NORTH AMERICA, 1492-1783 (Nabu Press 2012) (1921); Robert J. Miller & Micheline D’Angelis, *Brazil, Indigenous Peoples, and the International Law of Discovery*, 37 BROOK. J. INT’L L. 1 (2011); FAUSTO, *supra* note 10. This is a simplification, glossing over several hundred years of conflict and territorial disputes, which is not the focus of this paper.

12. See generally DAVID W. MILLER, THE TAKING OF AMERICAN INDIAN LANDS IN THE SOUTHEAST: A HISTORY OF TERRITORIAL CESSIONS AND FORCED RELOCATION, 1607-1840 (2011). Perhaps the most vivid example of forced removal in the United States is known as the “Trail of Tears,” the relocation of several Native American tribes to a designated Indian Territory (modern Oklahoma) following the Indian Removal Act of 1830. *Id.*

erupted.<sup>13</sup> Eventually, the establishment of reservations allowed a tenuous safe-haven for Native American tribes and their cultures.<sup>14</sup>

In the territory that became Brazil, the arrival of the Portuguese heralded a similar story. Pedro Álvares Cabrai arrived on the shores of modern Brazil on April 22, 1500, staying only ten days and naming the land Vera Cruz.<sup>15</sup> Over the following centuries, despite disputes with Spain, the Portuguese established dominion over the territory and asserted ownership of the land and its resources.<sup>16</sup> To accomplish this, the Portuguese enslaved many indigenous peoples under the guise of alleged rescue from barbarianism and assimilated entire communities in the name of civilization and faith.<sup>17</sup>

By 1934, Brazil's Constitution prohibited indigenous peoples from alienating their property to anyone other than the government.<sup>18</sup> This restriction was preserved in the 1937, 1946, and 1967 Constitutions.<sup>19</sup> While the current Brazilian Constitution, promulgated in 1988, speaks to alienability, it stipulates that acts of possession or ownership of indigenous lands aimed at the exploitation of natural resources will be null and void, except when conducted by the State.<sup>20</sup>

## 2. Concepts of Property, Mineral Rights, and State Ownership

Globally, the concept of property differs from country to country and culture by culture.<sup>21</sup> In the United States, property is privately held, and includes both the surface and subsurface rights to that area of land.<sup>22</sup> It is important to note however, that the United States' recognition of privately held surface and subsurface ownership is rare among the world community.<sup>23</sup> More commonly,

13. Cf. Donald A. Krueckeberg, *The Difficult Character of Property: To Whom Do Things Belong?*, 61.3 J. AM. PLANNING ASS'N 301 (2007) (discussing land use and the concept of ownership and a shift in America from common usage to private ownership).

14. *Frequently Asked Questions*, INDIANAFFAIRS.GOV (Mar. 22, 2013, 3:01 PM), <http://www.bia.gov/FAQs/index.htm>.

15. Miller & D'Angelis, *supra* note 11, at 28.

16. See, e.g., *id.*

17. *Id.* at 45-48. The cited article includes an interesting and comprehensive discussion of false claims of cannibalism relied upon to justify enslavement of native populations in Brazil during the colonial period.

18. *Id.* at 39-41.

19. *Id.* at 41.

20. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 231.6 (Braz.) (Oct. 5, 1988). Acts aiming at occupation, domain, and possession of the lands referred to in this article, or at exploitation of the natural riches of the soil, rivers, and lakes existing thereon, are null and void and of no legal effect, except in the case of relevant public interest of the Republic, according to a supplemental act; such nullity and voidness shall not create a right to indemnity or to sue the Republic, except as to improvements derived from occupation in good faith in accordance with the law. See generally Lisa Valenta, *Disconnect: The 1988 Brazilian Constitution, Customary International Law, and Indigenous Land Rights in Northern Brazil*, 38 TEX. INT'L L.J. 643 (2003); COLIN M. MACLACHLAN, *A HISTORY OF MODERN BRAZIL: THE PAST AGAINST THE FUTURE* (2001).

21. See generally John Edward Cribbet, *Concepts in Transition: The Search for a New Definition of Property*, 1 U. ILL. L. REV. 1 (1986).

22. JOHN G. SPRANKLING, *UNDERSTANDING PROPERTY LAW* 520 (2007).

23. So foreign is the concept of privately held surface and subsurface rights, that many United Nations Documents presume retention of mineral rights by the State. See, e.g., G.A. Res. 2158 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/RES/2158(XXI), at 29 (Nov. 25, 1966) (a resolution reaffirming "the inalienable right of all countries to exercise permanent sovereignty over their natural resources in the interest of

surface rights are granted to an individual for use, while the state retains ownership and rights to exploit subsurface mineral resources on the property.<sup>24</sup> In Brazil for example, subsurface rights are retained by the Federal Union and open to exploitation for “relevant public interest of the Union.”<sup>25</sup>

Moreover, when discussing indigenous property rights, it is also important to recognize the distinction between “tribal property” and “individual property.”<sup>26</sup> Tribal property is a common and legally enforceable interest in land held by the tribe.<sup>27</sup> Whereas, an individual right to property would exist if a tribal member were independently given an interest in property.<sup>28</sup> Under the concept of tribal property, the interest in land may not be divided among the individuals, or be subject to individual alienation or inheritable interest.<sup>29</sup> In the United States for example, individual interests that would allow such transfers of property may only exist when a federal or tribal law specifically allows.<sup>30</sup> Additionally, tribes may have legal claims to lands beyond their current holdings—even lands owned by others.<sup>31</sup>

### 3. The Discovery Doctrine

The earliest conflicts in property rights between Europeans and indigenous populations were settled by use of the Discovery Doctrine.<sup>32</sup> In simplest terms, the Discovery Doctrine (Doctrine) provides that the first European nation to discover a piece of land is automatically granted sovereignty and property rights over that territory, even though Natives clearly possessed those same lands.<sup>33</sup>

The property right European nations acquired was a future right of ownership, a sort of limited fee simple title; an exclusive title held by the discovering European country that was subject, however, to the Indigenous peoples’ use and occupancy rights. In addition, the discoverer also gained a limited form of sovereignty over natives and their governments, which restricted Indigenous political, commercial, and diplomatic rights. This transfer of

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their national development”); G.A. Res. 1803 (XVII), U.N. GAOR, 17th Sess., U.N. Doc. A/RES/1803(XVII), at 15 (Dec. 14, 1962) (“The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.”).

24. *Mining Rights in Brazil*, AMARILLO GOLD, <http://www.amarillogold.com/mining-rights-brazil> (last visited Sept. 5, 2013).

25. *Id.*; CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] (Braz.), *supra* note 20.

26. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 963-1072 (Nell Jessup Newton et al. eds., 2005).

27. *Id.* at 966.

28. *Id.* at 1036-37.

29. *Id.* at 966.

30. *Id.*

31. *Id.* According to Cohen’s Handbook, Native Americans are permitted to own land outside of areas designated as reservations, or held in trust, “or tribes may claim rights to land now occupied by others by virtue of original possession and exercise of sovereignty, or rights reserved by treaty.” *Id.* at 967 (emphasis added).

32. See generally Miller & D’Angelis, *supra* note 11, at pt. I.

33. *Id.* at 4-5. While the broad concept of the Discovery Doctrine imputes sovereign and property rights to the discovering nation, the mere physical discovery, independent of other elements of the Doctrine, would not suffice to establish a fully enforceable title. Multiple elements of the Doctrine were required to be fulfilled prior to establishing sovereign or property rights, as discussed below.

sovereign and property rights was accomplished without the knowledge or the consent of native peoples, and without any payment.<sup>34</sup>

It is believed that the Doctrine was developed during the Crusades, dating back to the eleventh century.<sup>35</sup> Today, certain elements of the Doctrine are still used in international law, and have been asserted in claims to secure mineral rights and sovereignty over the floor of the Arctic Ocean and the South China Sea.<sup>36</sup>

The Doctrine consists of the following ten elements and justifications: (1) first discovery, (2) actual occupancy, (3) preemption or European title, (4) native title, (5) tribal limited sovereign and commercial rights, (6) contiguity, (7) *terra nullius*, (8) Christianity, (9) civilization, and (10) conquest.<sup>37</sup> Each of these elements justified the European belief in a right to assert new legal regimes upon “discovered” territories and indigenous peoples.<sup>38</sup>

The first five elements encapsulate the practical steps taken to establish title rights for the conquering European nation, as well as the effect of their arrival for indigenous communities.<sup>39</sup> In order to acquire a complete title to the newly discovered land, the European nation must have arrived at the territory before any other Europeans and must have taken actual physical possession of those lands, either through the establishment of settlements or by symbolic possession—often the erection of large wooden crosses.<sup>40</sup> The elements of preemption and native title establish that the discovering European nation is the only nation that may legally purchase land from the indigenous populations in the new territory.<sup>41</sup> Individuals, private entities, and other governments were prohibited from purchasing land from indigenous peoples.<sup>42</sup> Native title allowed the indigenous populations to retain their right of occupation and use until they consented to sell. However, preemption demanded that the only purchaser be the government of the conquering European nation.<sup>43</sup> The final element, tribal limited sovereign and commercial rights, also restricted the trade and commercial opportunities of indigenous people to the discovering European nation.<sup>44</sup>

In the context of the United States, this concept resulted in conflicts surrounding the rights of Native Americans to own, or transfer ownership of, property to the original colonists.<sup>45</sup> The seminal court decision in the United States regarding this issue was *Johnson v. M'Intosh*, wherein the Supreme Court

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34. *Id.* at 4-5.

35. *Id.* at 9.

36. *Id.* at 3.

37. *Id.* at 7-9.

38. *See generally id.* at 4-9.

39. *Id.* at 27-48.

40. *Id.* at 7, 18, 36.

41. *Id.* at 7.

42. *Id.*

43. *Id.* It is important to recognize that, *inter alia*, the preemption may have served to protect indigenous peoples from substantially larger losses of land to businesses or private citizens.

44. *Id.*

45. *Id.* at 40-41.

adopted the Doctrine as precedential law.<sup>46</sup> “Under the discovery doctrine, European nations claimed the right to acquire ownership of land from [N]ative Americans, exclusive both of other European nations and of their own subjects.”<sup>47</sup> The holding in *Johnson* meant that any original conveyances by Native Americans to individual colonists were supplanted by later conveyances to the United States of that same property.<sup>48</sup> More importantly, this decision recognized that the Native Americans held the “native title” to the land, restricting the right to convey it, exclusively, to the United States government.<sup>49</sup>

In order for a tribe to assert native title over a particular piece of land, the tribe must demonstrate “actual, exclusive, and continuous use and occupancy ‘for a long time’ prior to the loss of the property.”<sup>50</sup> In addition, tribes are not limited to claims of native or original title to land used prior to colonization or the creation of the United States, and may assert this right to land at any time.<sup>51</sup> It is clear that the matter of ownership to lands previously occupied by Native Americans is still unsettled and open to argument.<sup>52</sup>

### B. *The Pre-Declaration Era of International Interest in Indigenous Rights*

For centuries, international interest in the rights of indigenous peoples was largely limited to paternalistic efforts to civilize or assimilate native tribes.<sup>53</sup> Moreover, such interests were bolstered by mandates from religious leaders and righteous ideologies like “manifest destiny.”<sup>54</sup> In the mid-twentieth century, however, the international community began to recognize the need for basic human rights protections and formed the United Nations in 1945.<sup>55</sup>

Initially, the U.N. did not specifically address indigenous communities, but rather the universal need for human rights.<sup>56</sup> In the 1970s, the Sub-Commission on Prevention of Discrimination and Protection of Minorities (Commission) authorized research into discrimination and the rights of indigenous peoples, and in response to this research, the Working Group on Indigenous Populations (Working Group) was established in 1982.<sup>57</sup> The Working Group provided the first forum for direct communication between indigenous peoples and the

46. *Johnson v. M’Intosh*, 21 U.S. 543 (1823); COHEN’S HANDBOOK, *supra* note 26, at 970.

47. *Johnson*, 21 U.S. at 573; COHEN’S HANDBOOK, *supra* note 26, at 970.

48. COHEN’S HANDBOOK, *supra* note 26, at 971.

49. *Id.* at 970.

50. *Sac & Fox Tribe of Okla. v. United States*, 383 F.2d 991, 997-98 (1967) (quoting *Sac & Fox Tribe of Indians of Okla. v. United States*, 315 F.2d 896, 903 (1963)).

51. COHEN’S HANDBOOK, *supra* note 26, at 970.

52. Native American property rights remain a complicated and unsettled legal issue to this day. *E.g.*, Transcript of Newscast, *For Great Sioux Nation, Black Hills Can’t Be Bought for \$1.3 Billion*, PBS NEWSHOUR (Aug. 24, 2011), [http://www.pbs.org/newshour/bb/social\\_issues/july-dec11/blackhills\\_08-24.html](http://www.pbs.org/newshour/bb/social_issues/july-dec11/blackhills_08-24.html).

53. *See generally* Miller & D’Angelis, *supra* note 11.

54. Miller & D’Angelis, *supra* note 11, at 52-59.

55. Organick, *supra* note 3, at 178.

56. *Id.*; Universal Declaration on Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d. Sess., 1st plan. mtg., U.N. Doc. A/8 10 (Dec. 12, 1948).

57. Organick, *supra* note 3, at 178.

international community, and “[i]ndigenous leaders spoke for the first time directly from the podium at the General Assembly on December 10, 1992.”<sup>58</sup>

A year later, the General Assembly established The International Decade of the World’s Indigenous People (First Decade), to last from 1995-2004.<sup>59</sup> During this period, significant efforts were made to enhance and affirm the rights of indigenous peoples, including their rights to culture, self-determination, property and resources, and compensation for losses and damages.<sup>60</sup> Recognizing the scope and importance of indigenous rights, a permanent forum of representatives from both governmental and indigenous communities was established in 1995.<sup>61</sup>

Aside from the efforts of the United Nations, the International Labour Organization (ILO) worked to improve indigenous rights.<sup>62</sup> The first international legally binding instrument produced by the ILO was Convention 107, adopted in 1957.<sup>63</sup> By 1989, indigenous peoples heavily advocated for their recognition as independent communities within the boundaries of national states.<sup>64</sup> ILO C169 was the second legally binding international instrument presented by the ILO and sought to address these concerns, as well as the rights of self-determination and, among others, rights to property and natural resources.<sup>65</sup> Article 38 provided that members of the ILO who ratified C169 were bound by its terms, and it allowed twelve months for implementation.<sup>66</sup>

ILO C169 specifically allows indigenous peoples to decide their own priorities in the development of the land they occupy and requires the governments “to protect and preserve the environment of the territories they inhabit.”<sup>67</sup> Part II of ILO C169 also specifically addresses issues related to land.<sup>68</sup> For example, Article 14 recognizes the rights of ownership and possession of lands by indigenous peoples, and provides that the government shall protect these interests.<sup>69</sup> Moreover, Article 15 addresses natural resources by stating that they will be “specially safeguarded,” and that indigenous peoples will have the right to “participate in the use, management and conservation of these resources.”<sup>70</sup> Article 15 also describes the right of indigenous peoples to

58. *Id.* at 180.

59. International Decade of the World’s Indigenous People, G.A. Res. 48/163 U.N. Doc. A/RES/48/163 (Dec. 21, 1993).

60. ILO C169, *supra* note 4.

61. Organick, *supra* note 3, at 181.

62. *ILO Convention 169: 20 Years Later*, UNREPRESENTED NATIONS AND PEOPLES ORGANIZATION (June 26, 2009), <http://www.unpo.org/article/9746>.

63. *Id.*

64. *Id.*

65. ILO C169, *supra* note 4.

66. *Id.* at art. 38.

67. *Id.* at art. 7(1).

68. *Id.* at art. 13-19.

69. *Id.* at art. 14.

70. *Id.* at art. 15.

(1) The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.

(2) In cases in which the *State retains the ownership of mineral or sub-surface resources* or rights to other resources pertaining to lands, governments shall establish or maintain procedures through



benefit from the use of their resources, and receive compensation for damages.<sup>71</sup> With respect to land rights, ILO C169 has been recognized as applying to both communal and individual property rights, and respects traditional forms of land transfers and tenure.<sup>72</sup> Additionally, the language of Article 15 seeks to balance the interests of indigenous peoples with those of the State in countries that have nationalized their minerals and other natural resources.<sup>73</sup>

More than two decades after ILO C169 was adopted by the ILO, only twenty countries have ratified its terms.<sup>74</sup> Brazil adopted ILO C169 in July 2002, a decision that was consistent with efforts to reform the Constitution and adopt later legislation that improves the legal standing of indigenous Brazilians.<sup>75</sup> Interestingly, almost all Latin American countries have ratified ILO C169, a decision affecting, collectively, the second largest reserve of oil in the world.<sup>76</sup> The United States, however, has not demonstrated an interest in adopting international instruments to regulate its relationship with Native Americans and has not adopted ILO C169.<sup>77</sup>

The end of the First Decade saw the international recognition of indigenous rights greatly improved, but still in flux. The Working Group was fully entrenched in research while developing and approving a draft of the document that would become the 2007 Declaration on the Rights of Indigenous Peoples.<sup>78</sup>

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*which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.*

*Id.* (emphasis added). The implications of Convention 169 in areas where the State retains ownership of resources on indigenous lands are consistent with the argument presented by this paper regarding the expansion of indigenous property rights.

71. *Id.*

72. INTERNATIONAL LABOUR ORGANISATION, THE ILO CONVENTION ON INDIGENOUS AND TRIBAL PEOPLES: A GUIDE TO ILO CONVENTION NO. 169 (2009), available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---normes/documents/publication/wcms\\_106474.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_106474.pdf).

73. ILO C169, *supra* note 4, at art. 15.

74. See also *ILO Convention 169: 20 Years Later*, *supra* note 62.

75. See also CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] (Braz.), *supra* note 20, art. 231.6; Ratifications for United States, INTERNATIONAL LABOUR ORGANIZATION, [https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200\\_COUNTRY\\_ID:102871](https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102871) (last visited Aug 28, 2013); Rupert Rowling, *Venezuela Passes Saudis to Hold World's Biggest Oil Reserves*, BLOOMBERG.COM (June 14, 2012), <http://www.bloomberg.com/news/2012-06-13/venezuela-overtakes-saudis-for-largest-oil-reserves-bp-says-1-.html>; Bill Kovarik, *The Oil Reserve Fallacy: Proven Reserves Are Not a Measure of Future Supply*, RADFORD UNIVERSITY, <http://www.radford.edu/~wkovarik/oil/> (last visited Mar. 22, 2013). While Brazil's Constitution discusses alienability, any purchase of indigenous lands for exploiting that land's natural resources is a nullity, except when done so by the State. This constitutional language, when applied in tandem with adopted international policies, results in a contradiction that presents a questionable environment for investments in property potentially under the ownership of indigenous populations. As touched on above, the issue may be further complicated by differences in the cultural perceptions of property.

76. See also Rowling, *supra* note 75; Kovarik, *supra* note 75.

77. Ratifications for United States, *supra* note 75.

78. Organick, *supra* note 3, at 182-84.

### C. *The Second Decade and the UNDRIP*

Since the early 1980s, the U.N. had slowly worked to develop a large-scale international agreement that would clearly assert the rights of indigenous peoples, as well as affirm the newly solidified support of the international community for those rights.<sup>79</sup> Ultimately, these efforts resulted in the 2007 U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP).<sup>80</sup> The effect and application of the UNDRIP has been subject to a wide array of analysis; however, it has done little to stabilize the tenuous nature of title rights in areas of conflict between indigenous peoples and the modern need for energy and resources.<sup>81</sup>

One hundred forty-three countries voted in favor of the UNDRIP, while Australia, Canada, New Zealand, and the United States represented the only four votes against its adoption.<sup>82</sup> Each of these withholding countries had an especially pronounced history of embattled land title claims and continues to engage in the modern discussion on indigenous land rights.<sup>83</sup> Since 2007, all four countries have changed their positions and officially supported the UNDRIP, however only after articulating their own interpretation of its language to fit their current national practices.<sup>84</sup>

### D. *The UNDRIP as International Law*

The UNDRIP is not binding international law; it is a policy, which acts as a concrete documentation of “international legal norms,” and demonstrates a “commitment of states to move in certain directions, abiding by certain principles.”<sup>85</sup> Generally, while there has been an international shift towards the recognition of indigenous rights, as seen by the widespread adoption of the UNDRIP, and bolstered by a recent court decision in Belize, which applied the

79. *Id.*

80. United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 4.

81. *See generally* MAKING THE DECLARATION WORK: THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (Claire Charters & Roldolfo Stavenhagen eds., 2009) (containing a collection of works assessing the UNDRIP and its implementation).

82. Press Release, General Assembly Adopts Declaration on Rights of Indigenous Peoples: ‘Major Step Forward’ Towards Human Rights for All, Says President, U.N. Press Release GA/10612, Annex (Sept. 13, 2007) [hereinafter General Assembly Vote], *available at* <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>.

83. The legal and political implications surrounding the opposing votes regarding adoption of the Declaration are beyond the scope of this paper.

84. U.S. DEP’T OF STATE, ANNOUNCEMENT OF U.S. SUPPORT FOR THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, *available at* [www.state.gov/documents/organization/153223.pdf](http://www.state.gov/documents/organization/153223.pdf); Organick, *supra* note 3, at 188-201.

85. FREQUENTLY ASKED QUESTIONS: DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, UNITED NATIONS, *available at* [www.un.org/esa/socdev/unpfii/documents/FAQsindigenousdeclaration.pdf](http://www.un.org/esa/socdev/unpfii/documents/FAQsindigenousdeclaration.pdf).

The Declaration is expected to have a major effect on the rights of indigenous peoples worldwide. . . . [I]t will establish an important standard for the treatment of indigenous peoples and will undoubtedly be a significant tool towards eliminating human rights violations against the over 370 million indigenous people worldwide and assist them in combating discrimination and marginalization.

*Id.*

UNDRIP as customary international law,<sup>86</sup> efforts to establish the principles of the UNDRIP as customary international law have not yet been widely successful.<sup>87</sup> Despite this, legal scholars have expressed the need for and the importance of a legally binding document that solidifies the rights of indigenous populations around the globe.<sup>88</sup> The UNDRIP is consistent with the terms of ILO C169, but it also expands these principles.<sup>89</sup> If such a document were to become customary international law, it would likely have significant impacts on the status of property claims around the world.<sup>90</sup>

In 1984 and 1985, the Working Group presented a list of proposed principles to the General Assembly, including several which specifically addressed property and natural resource rights.<sup>91</sup> The exact language selected by the Working Group included “surface and subsurface rights, inland and coastal waters, renewable and non-renewable resources, and the economies based on these resources.”<sup>92</sup> Additionally, the principles provided that indigenous peoples were “entitled to immediate restitution, including compensation for the loss of use, without extinction of original title,” where lands had previously been taken or used by methods newly recognized as impermissible by the Working Group.<sup>93</sup> The principles were considered by the General Assembly, and the adopted language of the 2007 UNDRIP significantly reduced the specificity of resource-related language proposed by the Working Group.<sup>94</sup>

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86. *Maya Village of Santa Cruz v. Attorney General of Belize*, [2007] (S. Ct. of Belize), available at [http://www.law.arizona.edu/depts/iplp/advocacy/maya\\_belize/documents/ClaimsNos171and172of2007.pdf](http://www.law.arizona.edu/depts/iplp/advocacy/maya_belize/documents/ClaimsNos171and172of2007.pdf).

87. See generally REFLECTIONS ON THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (Stephen Allen & Alexandra Xanthaki eds., 2011) (containing a collection of works discussing the application of the UN Declaration as an aspirational document, despite its lack of recognition as customary international law); MAKING THE DECLARATION WORK, *supra* note 81, pt. 4.

88. REFLECTIONS ON THE UN DECLARATION, *supra* note 87; MAKING THE DECLARATION WORK, *supra* note 81.

89. REFLECTIONS ON THE UN DECLARATION, *supra* note 87, at 174.

90. Cf. Organick, *supra* note 3, at 188.

91. Working Group on Indigenous Populations, *Study of the Problem of Discrimination Against Indigenous Populations, Declaration of Principles*, U.N. Doc. E/CN.4/Sub.2/1985/22 at 27, Annex IV, available at [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=E/CN.4/Sub.2/1985/22](http://www.un.org/en/ga/search/view_doc.asp?symbol=E/CN.4/Sub.2/1985/22).

4. Indigenous nations and peoples are entitled to the permanent control and enjoyment of their aboriginal ancestral-historical territories. *This includes surface and subsurface rights, inland and coastal waters, renewable and non-renewable resources, and the economies based on these resources.*

5. Rights to share and use land, subject to the underlying and inalienable title of the indigenous nation of people, may be granted by their free and informed consent, as evidenced in a valid treaty or agreement.

6. Discovery, conquest, settlement on a theory of *terra nullius* and unilateral legislation are never legitimate bases for States to claim or retain the territories of indigenous nations or peoples.

7. In cases where lands taken in violation of these principles have already been settled, the indigenous nation or people concerned is *entitled to immediate restitution, including compensation for the loss of use, without extinction of original title. Indigenous peoples' desire to regain possession and control of sacred sites must always be respected.*

*Id.* (emphasis added). The concept of *terra nullius* being used to assert possession of land and its resources is beyond the scope of this paper.

92. *Id.*

93. *Id.*

94. United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 4.

The difference in this language demonstrates that the principles and intent of the UNDRIP remained intact, however less significance was placed on the specificity of language related to resources. Additionally, the UNDRIP does not define the term “indigenous” or clarify the meaning of the term “traditionally owned.”<sup>95</sup> The absence of these definitions allows for individual countries to assess and implement their own interpretations under the UNDRIP.<sup>96</sup> The priority of the UNDRIP, to bolster the rights of indigenous populations and to prevent the international discrimination against indigenous peoples, remains intact, however the implementation of the UNDRIP may still be open to manipulation by each country’s chosen understanding of these terms.<sup>97</sup>

As the Second Decade’s prescribed time winds down, the adoption of the UNDRIP has been a great step forward in the progress of indigenous rights. Nevertheless, many questions remain unanswered with respect to property and natural resources on indigenous lands. While ILO C169 and the UNDRIP set forth the rights of indigenous peoples to self-determination and ownership of their traditional lands, many terms are open to interpretation.<sup>98</sup> The UNDRIP itself is not a codification of customary international law and is not legally binding; however, recent court decisions and the widespread acceptance of the UNDRIP may foretell a rapid shift in international law with regard to these rights.

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Article 8(2) States shall provide effective mechanisms for prevention of, and redress for: . . . Any action which has the aim or effect of dispossessing the of their lands, territories or resources

....

Article 10 Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

....

Article 26(1) Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. (2) Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired. (3) States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

....

Article 29(1) Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

*Id.*

95. *Id.*

96. *See, e.g.*, ANNOUNCEMENT OF U.S. SUPPORT, *supra* note 84.

97. *Id.*

98. United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 4, arts. 3, 4, 8, 26; ILO C169, *supra* note 4, at pt. II.

## III. ANALYSIS

A. *The International Trend of Increasing Recognition of Indigenous Rights*

An international trend towards the expansion and recognition of indigenous rights has steadily gained momentum since the passage of the United Nations Universal Declaration on Human Rights in 1948.<sup>99</sup> This trend has been demonstrated by a dramatic increase in direct representation of indigenous peoples within the United Nations, the recognition of two separate “Decades” focused on indigenous rights, and the promulgation of both binding and aspirational documents.<sup>100</sup>

With respect to investments by the energy industry, this trend should be expected to continue and will likely result in new complications for future projects. It is important for the energy industry to acknowledge this trend and engage in business practices that will comport with future expansions of indigenous rights, as well as insulate investments from policy or legal changes developed in the future. “The consequences of overlooking indigenous peoples’ welfare include a tarnished public image and, more importantly, a social environment marked by increased risk and instability, consequences that in turn corrode the business climate and threaten the bottom line.”<sup>101</sup> Investments and projects involving the use or development of land and resources potentially claimed by indigenous peoples should be undertaken with an awareness of local developments in this area of law, as well as a broader sense of the international trend.<sup>102</sup>

Specifically, the international trend has sought to protect indigenous populations and entitle such peoples to compensation, benefits, and self-determination in the development and use of natural resources on their lands.<sup>103</sup> In 2012, “the Inter-American Court of Human Rights ruled that Ecuador’s government had ignored the rights of [indigenous] residents when granting permission for an energy project.”<sup>104</sup> The effect of this ruling was to place “governments in the Americas on notice that *big physical investments are not legal until the indigenous people they affect have had their say.*”<sup>105</sup>

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99. Universal Declaration on Human Rights, *supra* note 56.

100. International Decade of the World’s Indigenous People, *supra* note 59; Second International Decade of the World’s Indigenous People, *supra* note 2; ILO C169, *supra* note 4; United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 4.

101. Neugebauer III, *supra* note 3.

102. Many large oil companies have already begun instituting human rights policies and promoting internal recognition of human rights issues. See e.g., *Human Rights*, CHEVRON (May 2012), <http://www.chevron.com/globalissues/humanrights/> (last updated May 2013) (“We adopted a Human Rights Policy in 2009.”); *Respecting Human Rights*, SHELL GLOBAL, <http://www.shell.com/global/environment-society/society/human-rights.html> (last visited Sept. 5, 2013).

103. ILO C169, *supra* note 4, at art. 15, 16; United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 4, at art. 3, 28. See also *Indigenous Rights in South America (1), Cowboys and Indians*, ECONOMIST, (July 28, 2012), <http://www.economist.com/node/21559653>; Nejamkis & Garcia, *supra* note 5.

104. ECONOMIST, *supra* note 103.

105. *Id.* (emphasis added).

### 1. United States Support for the UNDRIP

Global adoption of the 2007 UNDRIP offered a clear view into on the international perception of indigenous rights. As previously noted, one hundred and forty-three countries, including Brazil, voted in favor of the UNDRIP, and only the United States, Canada, Australia, and New Zealand initially voted against its adoption.<sup>106</sup> As of 2011, all four of the dissenting countries have changed their position, in at least as far as issuing statements recognizing and supporting the UNDRIP and its principles.<sup>107</sup>

The initial hesitancy of the United States in adopting the UNDRIP was related to the implementation of several specific provisions, including Article 26, which would have “require[d] ‘recognition of indigenous rights to lands without regard to other legal rights’ that currently exist.”<sup>108</sup> In his announcement declaring support for the UNDRIP, President Obama reconciled this original concern with current legal practice and several tribal successes in the American court system.<sup>109</sup> While the United States recognized the provisions of the UNDRIP as calling for national laws that fully acknowledge both current and future claims in lands and natural resources by indigenous peoples, the United States asserted that its current legal system achieves this goal and will continue to be employed.<sup>110</sup> Additionally, the announcement provided examples of the Obama Administration’s efforts to promote these principles through the acquisition of 34,000 acres of land held in trust on behalf of Native American tribes, and political support for extremely large settlements in favor of Native American court claims.<sup>111</sup>

### 2. International Support for ILO Convention 169

While ILO C169 has only been ratified by twenty-two countries, it should not be perceived as supplanted by the UNDRIP, or as a relic of international law.<sup>112</sup> ILO C169 is more relevant today than ever. As recently as 2010, new

106. General Assembly Vote, *supra* note 82. See also Organick, *supra* note 3, at 188-207 (discussing the motivations and concerns of New Zealand, Canada, and Australia regarding adoption of the UNDRIP).

107. ANNOUNCEMENT OF U.S. SUPPORT, *supra* note 84; Announcement of New Zealand’s Support for the Declaration on the Rights of Indigenous Peoples (Apr. 19, 2010), available at [http://www.docip.org/gsd/collect/cendocdo/index/assoc/HASH01cb/db7dfb1c.dir/declarendors\\_NZ.pdf#search=Pita%20SHARPLES](http://www.docip.org/gsd/collect/cendocdo/index/assoc/HASH01cb/db7dfb1c.dir/declarendors_NZ.pdf#search=Pita%20SHARPLES); Statement on the United Nations Declaration on the Rights of Indigenous Peoples (Apr. 3, 2009), available at [http://www.un.org/esa/socdev/unpfi/documents/Australia\\_official\\_statement\\_endorsement\\_UNDRIP.pdf](http://www.un.org/esa/socdev/unpfi/documents/Australia_official_statement_endorsement_UNDRIP.pdf); Canada’s Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples (Nov. 12, 2010), available at <http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142>.

108. Organick, *supra* note 3, at 205.

109. ANNOUNCEMENT OF U.S. SUPPORT, *supra* note 84.

110. The United States declared its intent

to continue to work so that the laws and mechanisms it has put in place to recognize existing, and accommodate the acquisition of additional, land, territory, and natural resource rights under US law function properly and to facilitate, as appropriate, access by indigenous peoples to the traditional lands, territories and natural resources in which they have an interest.

*Id.*

111. *Id.*; see, e.g., Cobell v. Salazar, 679 F.3d 909 (D.C. Cir. 2012).

112. *List of Ratifications of International Labour Conventions, Indigenous and Tribal Peoples Convention, 1989 (No. 169)*, INTERNATIONAL LABOUR ORGANIZATION,

countries have ratified the terms of ILO C169, including the Central African Republic and Nicaragua.<sup>113</sup> It is also important to note that many of the ratifying countries are located in South America, including Brazil in 2002.<sup>114</sup> While fewer countries have ratified ILO C169 than the UNDRIP, ILO C169 is a legally binding document,<sup>115</sup> indicating a high level of support for its principles by countries that voluntarily ratify its terms.

### B. *Instability of Third Party Rights*<sup>116</sup>

As a direct result of the international trend, the rights of third-party investors are unstable. This instability is demonstrated in the original language of the UNDRIP, as presented by the Working Group's Draft Principles in 1985.<sup>117</sup> Had the UN adopted the language of the principles without change, it would have entitled Indigenous peoples to seek compensation for, or restitution of, lands acquired by methods that may have been deemed as strictly legal at the time of acquisition but newly recognized as impermissible.<sup>118</sup> Importantly, acquisition of land is not the only area of interaction with indigenous populations that is subject to instability as a result of legal, political, or policy change.

#### 1. The United States, Third Parties, and Policy Change

From the late 1970s to the end of the 1980s, the United States' policy regarding Native American tribes and recognition of their right to self-determination shifted, sometimes negatively impacting third parties.<sup>119</sup> Several cases between 1981 and 1990 examined the legality of damages to third-party investors acting on Native American reservations via leases approved by the Department of the Interior.<sup>120</sup>

In *Merrion v. Jicarilla Apache Tribe*, the Supreme Court recognized the right of a tribe to impose taxes on non-Indians conducting business within the boundaries of their reservation.<sup>121</sup> Twenty-one non-Indian lessees objected to the enforcement of a new severance tax imposed, "on oil and gas production on

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[http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300\\_INSTRUMENT\\_ID:312314](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312314)  
(last visited Nov. 9, 2013).

113. *Id.*

114. *Id.*

115. ILO C169, *supra* note 4, at art. 38.

116. Tom Fredericks & Andrea Aseff, *When Did Congress Deem Indian Lands Public Lands?: The Problem of BLM Exercising Oil and Gas Regulatory Jurisdiction in Indian Country*, 33 ENERGY L.J. 119 (2012) (discussing the extreme complexity of oil and gas development on Native American Lands and the approval required by four Department of Interior agencies).

117. Working Group on Indigenous Populations, *supra* note 91.

118. *See, e.g., supra* text accompanying note 91 (specifically referencing pts. 4 and 7).

119. *See generally* *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982).

120. *Id.*; *United Nuclear Corp. v. United States*, 912 F.2d 1432 (1990); *Montana v. Blackfoot Tribe of Indians*, 471 U.S. 759 (1985); Eric E. Freedman et. al., *Department of Interior Streamlines Lease Approval Process for Developing Renewable Energy Projects on Tribal Lands*, K&L GATES L.L.P. 1 (Dec. 10, 2012), [http://m.klgates.com/files/Publication/e8f81b90-82d5-4db9-91a1-dfe8ae85d80e/Presentation/PublicationAttachment/9f9271b9-2ea7-4cec-9d06-ef8f4506de6/Energy\\_Alert\\_12102012.pdf](http://m.klgates.com/files/Publication/e8f81b90-82d5-4db9-91a1-dfe8ae85d80e/Presentation/PublicationAttachment/9f9271b9-2ea7-4cec-9d06-ef8f4506de6/Energy_Alert_12102012.pdf) ("As part of its trust responsibility for 56 million acres of land that [the Department of Interior (DOI)] holds for the benefit of tribes and individual Indians, the Department is required to approve leases on Indian lands.")

121. *Merrion*, 455 U.S. at 137-38.

tribal land.”<sup>122</sup> The Supreme Court held that “the taxing power is an inherent attribute of tribal sovereignty,” and upheld the tribe’s new tax despite the impact on pre-existing third-party lessees.<sup>123</sup> The Court further discussed the effects of several legislative acts, including the Natural Gas Policy Act of 1978, and stated that there was a, “widely held understanding within the Federal Government . . . that *federal law to date has not worked a divestiture of Indian taxing power.*”<sup>124</sup>

In 1990, the United States Court of Appeals for the Federal Circuit assessed another claim by a third party, non-Indian, lessee operating on tribal lands in *United Nuclear Corporation v. United States*.<sup>125</sup> In this case, United Nuclear Corporation (United), filed a complaint after the Navajo Tribe delayed approval for United’s mining operations and “indicated . . . that an additional \$10 million would be necessary,” before approval could be granted.<sup>126</sup> The Tribe’s delay continued for over four years, and ultimately resulted in a lapse of United’s lease.<sup>127</sup> Prior to the dispute, United invested over \$5 million for resource exploration on the reservation and paid the Tribe over \$300,000 in rent, royalties, and bonus money.<sup>128</sup> Despite United’s ultimate courtroom success related to its leases, the court stated that it was, “unlikely that United [would] be able to recover any of this money.”<sup>129</sup>

Moreover, *United Nuclear Corporation* presented a documented demonstration of policy change in action. Despite testimony that “hundreds of exploration or mining plans submitted . . . for approval” had never been denied on the basis of tribal approval, the government argued that it had given the tribe a veto power which was, “intended to promote the Indians’ right to and development of self-determination.”<sup>130</sup> While the veto power was deemed to be a taking under the facts of this case, the court stated that, “it would have been reasonable and prudent for [United] to question at the outset whether rules, regulations and requirements under the existing scheme, to which it voluntarily submitted itself, *would change* during the 10 year term of its lease.”<sup>131</sup> It is this reasoning that underscores the vital importance of acknowledgement by the energy industry, and any potential investor, that an international trend is expanding and strengthening indigenous rights. It is only prudent to heed the signs of change now, and avoid negative consequences in the future.

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122. *Id.* at 136-37.

123. *Id.*

124. *Id.* at 149. The Supreme Court also held that the tribe had not violated the Commerce Clause when imposing the severance tax; however, a deeper discussion of this issue is beyond the scope of this paper.

125. *United Nuclear Corp.*, 912 F.2d 1432.

126. *Id.* at 1437.

127. *Id.* at 1434-35.

128. *Id.*

129. *Id.* at 1435.

130. *Id.* at 1434, 1437.

131. *Id.* at 1436 (emphasis added). Additionally, the court stated that United should have considered the future changes of “regulations of the [Secretary] [of the Interior] *now or hereafter in force* and relative to such leases. . . .” *Id.* (quoting *United Nuclear Corp. v. United States*, 17 Cl. Ct. 768, 775 (1989) (first alteration in original) (emphasis added)).



## 2. Brazil and the United States Analogue

As previously discussed, the United States and Brazil share a similar historical background, including application of the Discovery Doctrine and a flourishing of industrialization and economic growth.<sup>132</sup> Despite political unrest in the 20th century, Brazil in the modern era is rapidly becoming an economic superpower and has been thriving during a global fiscal crisis.<sup>133</sup> While the last decade has proven challenging for the United States economically, some may still argue that the United States and its progressive expansion of Native American self-determination, act as an analogue for near-future indigenous policy development in Brazil.

In 1988, with the drafting of a new Constitution, Brazil took a step forward in the global acknowledgement of indigenous rights by specifically providing for cultural and territorial recognition of the country's tribal populations.<sup>134</sup> In 2002, Brazil ratified ILO C169.<sup>135</sup> In 2007, Brazil voted for the adoption of the UNDRIP.<sup>136</sup> Each of these actions indicates that Brazil is open to developments aimed at indigenous rights, and will likely follow—or perhaps lead—the international trend.

The relevance of this trend in Brazil to the energy industry cannot be underestimated. In the last fifty years, Brazil's oil industry has undergone a political upheaval, primarily centered on the nationalized oil company, Petrobras.<sup>137</sup> While Petrobras' government sanctioned monopoly was removed in 1997, the company still retains a “de facto monopoly,” especially in offshore oil fields.<sup>138</sup> Onshore, Brazil has become increasingly open to international oil companies, with approximately 300 blocks<sup>139</sup> of land being developed independently and without connection to Petrobras.<sup>140</sup> Additionally, another 100 blocks are being developed by an international oil company in conjunction with Petrobras.<sup>141</sup> Only an approximate 100 blocks of onshore land are being developed exclusively by Petrobras.<sup>142</sup> The focus of national oil projects has

132. See generally *supra* Section II(A).

133. *Brazil: The World's Next Economic Superpower?*, CBS NEWS (June 23, 2011), [http://www.cbsnews.com/8301-18560\\_162-20073776.html](http://www.cbsnews.com/8301-18560_162-20073776.html).

134. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] (Braz.), *supra* note 20, at art. 231.

135. See generally *List of Ratifications of International Labour Conventions*, *supra* note 112.

136. General Assembly Vote, *supra* note 82.

137. See generally Adilson De Oliveira, *Brazil's Petrobras: Strategy and Performance*, in *OIL AND GOVERNANCE: STATE-OWNED ENTERPRISES AND THE WORLD ENERGY SUPPLY* 515 (David G. Victor et al. eds. 2012).

138. *Id.* at 516, 538.

139. *Oil Exploration Block*, WIKIINVEST, [http://www.wikinvest.com/wiki/Oil\\_exploration\\_block](http://www.wikinvest.com/wiki/Oil_exploration_block) (last visited Aug. 23, 2013).

An oil exploration block is a large area of land, typically in 1000s of sq. kilometers, that is awarded to oil drilling and exploration companies by a country's government. It is either awarded by the government and paid for by taxes on the company, or it is auctioned by the government that owns the land.

*Id.*

140. Oliveira, *supra* note 137.

141. *Id.*

142. *Id.*

shifted to the large-scale and lucrative offshore sites,<sup>143</sup> precipitating a necessary increase in contact between international oil companies and indigenous populations in Brazil.

This combination of intensified interaction between tribal peoples, international oil companies, and the Brazilian energy industry, and the international trend towards the expansion of indigenous rights should encourage investors to expect policy changes in the future and insulate their business practices from these changes.

### C. Cooperation Strategies

In order for the energy industry to continue its work in areas populated by indigenous peoples, new strategies must be employed to insulate these activities against future changes in indigenous rights, both locally and internationally. Cooperative strategies may provide a means of pursuing projects with indigenous populations while satisfying the spirit of the international trend and documents like ILO C169 and the UNDRIP.<sup>144</sup> Voluntary steps taken by the energy industry to engage and involve indigenous peoples while developing projects could significantly reduce the instability of such investments with relation to indigenous rights.<sup>145</sup>

“By playing a more substantial role in exploration-related decisions, either in the design or implementation, . . . indigenous peoples bolster their community’s autonomy. Rendering indigenous consultation and participation indispensable elevates tribes to the same level as traditional players: *legitimate entities with legitimate interests*.”<sup>146</sup> The stakeholder theory is a corporate model that integrates the interests of all potential “stakeholders” in a business decision.<sup>147</sup> “The rationale is that any group affected by a corporation will eventually acquire the capacity to affect the corporation in turn.”<sup>148</sup> A stakeholder is identified as any entity that may be affected by the project or decision at issue.<sup>149</sup> In the context of energy projects, such as oil exploitation or pipeline construction, indigenous peoples living on the land to be developed would be considered stakeholders.

The stakeholder theory emphasizes the importance of considering the stakeholder’s interest to avoid future repercussions because, “[g]roups which 20 years ago had no effect on the actions of [a business] . . . can affect it today, largely because of the actions of the [business] which ignored the effects on

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143. *Id.*

144. Neugebauer III, *supra* note 3, at 1233-35.

145. *Id.* at 1228-30; Ryan D. Dreveskracht, *Alternative Energy in American Indian Country: Catering to Both Sides of the Coin*, 33 ENERGY L.J. 431 (2012) (discussing the willingness of Native Americans to pursue energy development on their lands if allowed to participate in decisions regarding said development, as well as the regulatory and legislative obstacles to developing natural resources on Native American lands).

146. Neugebauer III, *supra* note 3, at 1252 (emphasis added). A comprehensive discussion of the stakeholder model and its application in the energy industry may be found in Neugebauer’s article.

147. *Id.* at 1241.

148. *Id.*

149. *Id.*

these groups.”<sup>150</sup> An example of this phenomenon can be seen in the litigation between the indigenous peoples of Ecuador and Chevron, which has resulted in a \$19 billion embargo by multiple South American countries, forcing Chevron to conduct its business in the region through complicated subsidiaries.<sup>151</sup> Application of the stakeholder model to the initial project development in Ecuador may well have avoided the fallout and litigation that has consumed years and countless resources for both Chevron and the indigenous tribes.

In 2002, IPIECA, “the global oil and gas industry association for environmental and social issues,” began promoting good practice and training in human rights.<sup>152</sup> IPIECA has endorsed a multi-stakeholder consultation process, and “in 2011, the United Nations endorsed the Guiding Principles for Business and Human Rights (Guiding Principles).”<sup>153</sup> The Guiding Principles set forth three pillars of conduct, including (1) the State’s obligation to respect and protect human rights and freedoms, (2) business obligations to comply with the law, and (3) the accessibility of remedies for violations of these principles.<sup>154</sup>

Cooperative strategies, whether modeled under a stakeholder-theory, the Guiding Principles, or non-traditional voluntary efforts to promote negotiation and involvement with indigenous populations, provide a buffer for actors in the energy industry with regard to future policy and legal developments that may shift the validity of investments on indigenous lands. This legal foothold may allow indigenous populations to assert more power and control over the actions of the energy industry when conducting business on native lands, and should be recognized by potential investors or project developers. Additionally, in an era of hyper-connectivity, the benefit of positive publicity is not insignificant. Cooperative strategies provide social, anthropological, and psychological good will, as well as reduce the likelihood of negative publicity in the event of future accidents or mishaps.<sup>155</sup>

150. *Id.* at 1241-42; R. EDWARD FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH 46 (1984).

151. Nejamkis & Garcia, *supra* note 5.

152. *Human Rights*, IPIECA, <http://www.ipieca.org/focus-area/human-rights> (last visited Sept. 5, 2013).

153. *Global Engagement*, IPIECA, <http://www.ipieca.org/topic/human-rights/global-engagement> (last visited Sept. 5, 2013); Special Representative of the U.N. Secretary-General, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, Advance Edited Version U.N. Doc. A/HRC/17/31 (Mar. 21, 2011), available at <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>.

154. *Guiding Principles on Business and Human Rights*, *supra* note 153, ¶¶ 47-49. For a comprehensive discussion regarding the U.N. Guiding Principles and their application in the Oil and Gas industry related to human rights, see Rae Lindsay et al., *Human Rights Responsibilities in the Oil and Gas Sector: Applying the UN Guiding Principles*, 6 J. WORLD ENERGY L. & BUS. 1 (2013).

155. The topic of public relations and the nexus of sociological, anthropological, and psychological impacts are beyond the scope of this paper; however, for further reading regarding the corporate impact of positive and negative publicity, see Dwane Hal Dean, *Consumer Reaction to Negative Publicity: Effects of Corporate Reputation, Response, and Responsibility for a Crisis Event*, 41.2 J. BUS. COMM’N 192 (2004); Mitch Griffin et al., *An Empirical Investigation of the Impact of Negative Publicity on Consumer Attitudes and Intentions*, 18 ADVANCES IN CONSUMER RESEARCH 334 (1991); Rohini Ahluwalia et al., *Consumer Response to Negative Publicity: The Moderating Role of Commitment*, 37.2 J. MKTG. RESEARCH 203 (2000).

## IV. CONCLUSION

As the Second Decade comes to a close, an international trend that recognizes and expands the rights of indigenous peoples has flourished. The United States may act as an appropriate analogue for Brazil in understanding and predicting the development of indigenous rights on a national scale. Brazil has actively engaged in policy development to protect its indigenous peoples through its Constitution and the adoption of international agreements and may be poised to surpass the United States in the development of indigenous property rights.

The spirit of ILO C169 and the UNDRIP emphasize the rights of indigenous peoples, including self-determination, consultation, consent, and remedies for breaches of those rights. Offering front-end opportunities for indigenous tribes to voice their interests, acknowledging those interests, and engaging in meaningful negotiation, would satisfy the spirit of the international trend, and help insulate investments against future legal and policy change. As Henry R. Luce stated, "business, more than any other occupation, is a continual dealing with the future; it is a continual calculation, an instinctive exercise in foresight."<sup>156</sup> As indigenous peoples gain a voice and the international community responds, energy companies cannot afford to ignore the momentum of human and indigenous rights. At the end of the Second Decade, to ignore the shift is to ignore the future.

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156. *Henry R. Luce Quotes*, FAMOUS QUOTES, <http://www.famousquotes.com/author/henry-r-luce> (last visited Sept. 5, 2013).

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