

ACHIEVING RESTITUTION: THE POTENTIAL UNJUST ENRICHMENT CLAIMS OF INDIGENOUS PEOPLES AGAINST MULTINATIONAL CORPORATIONS

DAVID N. FAGAN*

In the rush to exploit untouched resources in remote regions of developing nations, multinational corporations and their local government partners often trample on indigenous land and culture, at times committing atrocities against the indigenous peoples. In this Note, David Fagan examines the use of unjust enrichment as a theory of recovery for indigenous peoples seeking redress for these actions in U.S. courts. Fagan finds that indigenous plaintiffs likely can satisfy the elements of an unjust enrichment claim, and that such a claim is harmonious with the policies behind the unjust enrichment remedy, as well as the practical and personal considerations of these plaintiffs. He concludes that, consistent with its origin as an equitable, novel solution to difficult problems, unjust enrichment would be a particularly appropriate claim for indigenous plaintiffs to pursue.

INTRODUCTION

An indigenous person from a developing nation may tell the following story. She inhabited a land of inestimable worth. To her and her family, the land represented nothing less than life itself. It reared the children and received the elders; it sustained economic welfare; it embodied individual and collective spirituality and identity. The lushness of the land, however, contained resources that were in demand by others, including numerous foreign corporations. Eventually, one, or perhaps a few, of these corporations succeeded in either expropriating her land or having the land expropriated for them by the state that governs her tribe. She is not certain how it happened, nor does she care. She knows only that in the process of losing their land, members of her tribe have suffered, and with all or part of their land lost, they continue to suffer. She reports that they have lost their way of life, their spirituality, and their identity, and she says they have no domestic recourse.¹

* My sincere gratitude is owed to Professor Benedict Kingsbury, whose guidance and comments were invaluable to the development of this Note. Additionally, I would like to thank the staff of the *New York University Law Review*, especially Don Lepore, Seth Nesin, and Dahlia Fetouh, for their many helpful suggestions and keen editorial skills.

¹ For examples of indigenous experiences similar to those described in the opening paragraph, see *infra* Part I.B; see also Davi Yanomami, Address Before the United Nations

In response to such exploitation, indigenous peoples have explored two avenues of judicial relief. First, indigenous groups have brought to international tribunals claims based on human rights, minority rights, and self-determination principles.² Second, having little or no recourse in their own countries,³ indigenous plaintiffs have turned to the domestic courts of the countries in which multinational corporations (MNCs)⁴ are based in an attempt to hold these entities accountable for their actions overseas. Specifically, indigenous plaintiffs have brought lawsuits in the state and federal courts of the United States, asserting various state and common law tort claims, claims for violations of customary norms of international law, and claims seeking eq-

General Assembly (Dec. 1992), in *Voice of Indigenous Peoples: Native People Address the United Nations 108, 109-10* (Alexander Ewen ed., 1994) (describing impact of gold miners on Yanomami people in Brazil). See generally Judith Kimerling, *Disregarding Environmental Law: Petroleum Development in Protected Natural Areas and Indigenous Homelands in the Ecuadorian Amazon*, 14 *Hastings Int'l & Comp. L. Rev.* 849 (1991) (discussing impact of oil exploration upon indigenous people in Ecuador's Oriente region); Victoria C. Arthaud, Note, *Environmental Destruction in the Amazon: Can U.S. Courts Provide a Forum for the Claims of Indigenous Peoples?*, 7 *Geo. Int'l Envtl. L. Rev.* 195 (1994) (same).

² E.g., *Ominayak v. Canada*, U.N. GAOR Human Rights Comm., 45th Sess., Supp. No. 40, Annex IX, Communication No. 167/1984, at 27, U.N. Doc. A/45/40 (1990) (finding violations of Canadian tribe's minority rights under Article 27 of International Covenant of Civil and Political Rights); see also Benedict Kingsbury, "Indigenous Peoples" in *International Law: A Constructivist Approach to the Asian Controversy*, 92 *Am. J. Int'l L.* 414, 437-39 (1998) (providing overview of international legal claims of indigenous peoples).

³ See *infra* notes 36-39 and accompanying text. Even if there is a functioning judiciary in the nation in which the indigenous peoples live, it may be susceptible to government influence or otherwise unable to provide redress. See, e.g., Scott Holwick, Note, *Transnational Corporate Behavior and Its Disparate and Unjust Effects on the Indigenous Cultures and the Environment of Developing Nations: Jota v. Texaco, a Case Study*, 11 *Colo. J. Int'l Envtl. L. & Pol'y* 183, 203-05 (2000) (noting that, in context of indigenous claims against Texaco, volatility of Ecuador's government could affect ability to seek redress and that Ecuador's courts do not recognize class actions and may be ill-equipped to handle large-scale environmental cases).

⁴ A "multinational corporation" (MNC) has been defined as "a company with operations in two or more countries, generally allowing it to transfer funds and products according to price and demand conditions, subject to risks such as changes in exchange rates or political instability." *Black's Law Dictionary* 343 (7th ed. 1999). For purposes of this Note, the critical characteristic of a "multinational corporation" is that its operations transcend national borders, having a base in one country that controls at least part of the activities in the other countries. See Thomas Donaldson, *The Ethics of International Business* 30 (1989) (noting that MNCs characteristically entail multiple operations, with one controlling others). Therefore, the term "multinational corporation," as used in this Note, is essentially synonymous with "transnational corporation." Cf. Code of Conduct on Transnational Corporations, U.N. ESCOR, Organizational Sess. for 1988, Provisional Agenda Item 2, at 4, U.N. Doc. E/1988/39/Add.1 (1988) (defining transnational corporation as enterprise "comprising entities in two or more countries . . . which operate under a system of decision-making . . . in which the entities are so linked . . . that one or more of them may be able to exercise a significant influence over the activities of others").

uitable relief for environmental damage.⁵ Thus far, indigenous plaintiffs have had little success,⁶ although this failure may be due more to prudential concerns⁷ or poor lawyering⁸ than to any substan-

⁵ E.g., *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998) (reversing dismissal on procedural grounds of two class actions seeking money damages for tort claims and equitable relief for contamination of indigenous territory in Ecuador); *Nat'l Coalition Gov't v. Unocal, Inc.*, 176 F.R.D. 329 (C.D. Cal. 1997) (alleging defendant's complicity in perpetrating torture, forced labor, and slavery against indigenous population in Burma); *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362 (E.D. La. 1997) (alleging defendant's complicity in perpetrating genocide, environmental harms, and violent acts against Indonesian indigenous group), *aff'd*, 197 F.3d 161 (5th Cir. 1999); *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997) (holding that Burmese indigenous plaintiffs had stated actionable claims against defendant for extraterritorial conduct of its foreign partner in violation of international law); *Sequihua v. Texaco, Inc.*, 847 F. Supp. 61 (S.D. Tex. 1994) (alleging contamination of air, ground, and water of indigenous territory in Ecuador); *Alomang v. Freeport-McMoRan, Inc.*, 718 So. 2d 971 (La. Ct. App. 1998) (reversing state court decision to dismiss class action for alleged international human rights violations and environmental damages in Indonesia).

⁶ *Texaco* has invoked successfully *forum non conveniens* and concerns over international comity to defend two cases brought against it by Ecuadorian plaintiffs. *Aguinda v. Texaco, Inc.*, No. 93 Civ. 7527 (JSR), 2000 U.S. Dist. LEXIS 745, at *4-*10 (S.D.N.Y. Jan. 31, 2000) (evinced view that independent weighing of international comity and *forum non conveniens* factors, per appellate court's instructions, pointed to dismissal, but withholding final judgment pending additional submissions on impartiality of foreign courts); *Sequihua*, 847 F. Supp. at 63 (dismissing case on grounds of international comity and *forum non conveniens*).

Meanwhile, state and federal courts dismissed parallel actions alleging that Freeport-McMoRan, Inc. committed human rights violations, environmental torts, and cultural genocide against the Amungme people of Indonesia. *Beanal v. Freeport-McMoRan, Inc.*, 197 F.3d 161, 169 (5th Cir. 1999) (affirming district court dismissal on grounds that plaintiffs had failed to prove defendant's actions amounted to environmental torts or abuses under international law); *Stewart Yerton, High Court Rejects Freeport Case*, *Times-Picayune* (New Orleans, La.), Mar. 25, 2000, at C2 (reporting state court dismissal of Amungme suit against Freeport), Lexis, News Library, Notpic file.

Finally, in *Doe*, Burmese indigenous farmers achieved initial success when the district court found that jurisdiction could be asserted over Unocal for its partners' actions in violation of international law. 963 F. Supp. at 891-92; see also *Nat'l Coalition Gov't*, 176 F.R.D. at 344-45 (achieving essentially same result as in *Doe* in companion class action brought by Burmese refugees, Burmese trade union, and opposition in exile). Ultimately, however, Unocal received summary judgment on the grounds that its mere knowledge of the human rights abuses, such as slavery, was not sufficient to establish liability under international law. *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1310 (C.D. Cal. 2000).

⁷ See, e.g., *Sequihua*, 847 F. Supp. at 63 (dismissing case on basis of international comity and *forum non conveniens*).

⁸ *Beanal* provides an example. In that case, although the trial court dismissed the environmental claims, it allowed the plaintiff to amend the complaint to show actual, rather than cultural, genocide and to satisfy the state action requirement for the other torts. 969 F. Supp. at 383-84. Two subsequent amended complaints failed as well, with the court dismissing the final amended complaint because it failed to detail the personal injury suffered by the plaintiff. *Beanal v. Freeport-McMoRan, Inc.*, No. CIV.A. 96-1474, 1998 WL 92246, at *1 (E.D. La. Mar. 3, 1998). There was only one plaintiff in the case because the counsel previously had missed the deadline for filing a class action. Further, the Su-

tive defect in the claims.⁹ Regardless of the outcome in these cases, there is a common current underlying and informing all the claims: the notion that the defendants have been enriched at the plaintiffs' expense.¹⁰ Yet, indigenous plaintiffs have not pursued unjust enrichment as an independent basis of liability.

Such a novel use of unjust enrichment in the indigenous context, while potentially controversial, finds support in the doctrine's heritage. Unjust enrichment originated as a theory of recovery in order to fill gaps left uncovered by traditional legal categories, such as contract, tort, and property law.¹¹ For example, when there was a wind-fall benefit—such as money paid by mistake—in a noncontractual setting, courts invoked the fiction of a quasi-contract to provide recompense to the plaintiff and to deprive the defendant of an unjust enrichment.¹² A similar, recent example has been the use of unjust

preme Court refused to hear the case after the plaintiff missed the deadline for filing an appeal. See Yerton, *supra* note 6, at C2.

⁹ Indeed, at least one commentator has found reason for optimism in these cases. See Saman Zia-Zarifi, *Suing Multinational Corporations in the U.S. for Violating International Law*, 4 *UCLA J. Int'l L. & Foreign Aff.* 81, 114 (1999) (noting that initial success of case against Unocal and favorable statements of judge in case against Freeport are positive signs for using Alien Tort Claims Act, 28 U.S.C. § 1350 (1994), in cases against MNCs).

¹⁰ Commentators have pointed out that a notion of unjust enrichment often underlies claims in other areas of the law, such as tort. See, e.g., Andrew Kull, *Rationalizing Restitution*, 83 *Cal. L. Rev.* 1191, 1216 (1995) (noting that concept of unjust enrichment can resemble contract and tort liabilities); see also Jack Beatson, *The Use and Abuse of Unjust Enrichment: Essays on the Law of Restitution* 209 (1991) (“[T]here may be a conceptual overlap where in order to establish one claim it is necessary to prove the existence of the other claim.”). See generally Douglas Laycock, *The Scope and Significance of Restitution*, 67 *Tex. L. Rev.* 1277 (1989) (discussing all uses of restitution, including tort and contract claims and actions for replevin or ejectment).

¹¹ Beatson, *supra* note 10, at 3 (noting that restitution has been used to give “new solutions to old problems . . . [and] to fill gaps left in other categories”); see also Restatement (Second) of Restitution § 1 cmt. c (Tentative Draft No. 1, 1983) [hereinafter 1983 Tentative Draft] (noting that situations to which restitution may be applicable “cannot be enumerated exhaustively”); Albert A. Ehrenzweig, *Restitution in the Conflict of Laws: Law and Reason Versus the Restatement Second*, 36 *N.Y.U. L. Rev.* 1298, 1300 (1961) (asserting that unjust enrichment “is nothing but the rationale of disparate and isolated legal phenomena which . . . serve to correct overgeneralized rigid rules from every corner of the law”).

¹² See *Metro. Life Ins. Co. v. Solomon*, 996 F. Supp. 1473, 1475-77 (M.D. Fla. 1998) (providing overview of application of unjust enrichment in mistaken payment and granting plaintiff summary judgment for restitution of mistaken payment); see also Beatson, *supra* note 10, at 85 (discussing role of unjust enrichment when there is windfall benefit); 1 George E. Palmer, *The Law of Restitution* § 1.2, at 7 (1978) (discussing development of quasi-contract as basis for recovery).

A similar application of unjust enrichment is found in its use as a remedy for trademark infringement. See, e.g., *Bishop v. Equinox Int'l Corp.*, 154 F.3d 1220, 1222-23 (10th Cir. 1998) (discussing prevention of unjust enrichment as potential justification for awarding profits to plaintiff who has not proved damages in trademark case).

enrichment as a substantive claim in the Holocaust litigation.¹³ In this way, unjust enrichment has developed as a moral check against the retention of a benefit that would violate “good conscience,” if not another area of the law.¹⁴ Although the broad scope of this principle arguably has given rise to a rather muddled state of the law,¹⁵ it also has permitted the unique application of the doctrine,¹⁶ as in the Holocaust cases. Seen in this light, unjust enrichment would appear to have a role for indigenous plaintiffs: The problem of indigenous exploitation is steeped in history and possibly not covered by other areas of law,¹⁷ thereby necessitating an exceptional solution.¹⁸

¹³ E.g., *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117 (E.D.N.Y. 2000); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999); *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248 (D.N.J. 1999). A court has yet to rule on the substantive merits of the unjust enrichment claims in the Holocaust context. In *Iwanowa* and *Burger-Fischer*, the plaintiffs’ cases were dismissed on justiciability and procedural grounds. *Iwanowa*, 67 F. Supp. 2d at 472-75 (holding that unjust enrichment claims were time barred); *Burger-Fischer*, 65 F. Supp. 2d at 283-85 (finding that case presented political question and dismissing claims on justiciability grounds). In *Bodner*, however, the court held that the plaintiffs had standing to bring claims against the defendant banks for the assets deposited in those banks by plaintiffs or their family members. 114 F. Supp. 2d at 126. In addition, the court rejected the defendants’ various procedural and doctrinal arguments to dismiss and held the plaintiffs’ claims merited an equitable tolling. *Id.* at 126-36. In doing so, the *Bodner* court at least left open the possibility that a substantive claim of unjust enrichment could succeed.

The Holocaust cases are relevant not only because they illustrate a potentially novel use of unjust enrichment, but also because the dynamics of the cases parallel indigenous claims. As in the Holocaust litigation, indigenous plaintiffs would be bringing a claim of unjust enrichment against a corporate defendant who received an enrichment largely, though perhaps not entirely, through the actions of governmental parties. See *infra* notes 83-86 and accompanying text (discussing satisfaction of enrichment element when benefit flows from third party, such as local authorities).

¹⁴ *HPI Health Care Servs., Inc. v. Mt. Vernon Hosp., Inc.*, 545 N.E.2d 672, 679 (Ill. 1989) (stating that unjust enrichment applies when “defendant’s retention of the benefit violates the fundamental principles of justice, equity, and good conscience”); *infra* note 165 and accompanying text.

¹⁵ See Mark P. Gergen, *The Jury’s Role in Deciding Normative Issues in the American Common Law*, 68 *Fordham L. Rev.* 407, 468 (1999) (noting that state of unjust enrichment is “murky because the content and structure of the law of restitution are unsettled”); Kull, *supra* note 10, at 1191-96 (introducing discussion of restitution by describing uncertainty surrounding it and noting that American lawyers, judges, and law professors really do not understand restitution).

¹⁶ See Gergen, *supra* note 15, at 471-72 & 471 n.305 (reciting cases in which U.S. courts have found novel applications for law of unjust enrichment).

¹⁷ An indigenous plaintiff almost certainly would not have any legal title to the land, at least not title that would be enforceable against an MNC in a foreign court. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 436-38 (1964) (holding that act-of-state doctrine precludes U.S. courts from judging validity of foreign expropriation); *Doe v. Unocal Corp.*, 963 F. Supp. 880, 898 (C.D. Cal. 1997) (following rule that act-of-state doctrine “bars plaintiffs’ claims insofar as they are based on expropriation of property”). Additionally, an indigenous plaintiff would not have any contractual claim against an MNC and, as the cases brought thus far illustrate, would have difficulty asserting any tort claim unless an

This Note will examine unjust enrichment as a theory of recovery in the indigenous setting and argue that unjust enrichment is not only a facially strong claim for indigenous peoples in their cases against MNCs, but also a particularly appropriate claim to pursue insofar as it comports with larger indigenous goals and concerns. Part I provides a more detailed overview of the problem of indigenous exploitation, using the experiences of Freeport-McMoRan Copper and Gold, Inc. (Freeport) and Unocal Corporation (Unocal) in Indonesia and Burma,¹⁹ respectively, as specific examples of MNC involvement in indigenous territory. In turn, the Freeport and Unocal cases serve illustrative purposes for the remainder of the Note. Part II examines the ability of indigenous plaintiffs to satisfy the substantive elements of an unjust enrichment claim against an MNC and to survive potential substantive defenses to the claim. Finally, Part III discusses the striking parallel between the concerns and goals of indigenous peoples and the considerations that underlie unjust enrichment and describes the equally significant remedial appeal of unjust enrichment for indigenous plaintiffs.

I

AN OVERVIEW OF THE PROBLEM OF INDIGENOUS EXPLOITATION

A. Identifying the Plaintiffs: Defining Indigenous Peoples and the Problem of Exploitation

A single definition of “indigenous peoples” that succinctly incorporates all relevant or potentially relevant groups has proven elu-

MNC or one of its partners committed an act approaching a gross atrocity. See *supra* notes 5-6.

¹⁸ This is not to say that unjust enrichment is necessarily the only ground for recovery. Other claims, including those brought thus far, may be possible and even efficacious. See Zia-Zarifi, *supra* note 9, at 143 (concluding that Alien Tort Claims Act may provide “unique, powerful tool for placing MNCs directly under international law”); see also *Adelman v. Christy*, 90 F. Supp. 2d 1034, 1045 (D. Ariz. 2000) (noting that plaintiff can plead unjust enrichment claim as alternative theory of recovery to breach of contract claim). This Note is not intended as a comparison of the merits or obstacles of competing claims. Rather, it simply seeks to explore the workings of one potential theory of recovery: unjust enrichment.

¹⁹ The ruling military junta of Burma officially changed the name of the country to Myanmar upon taking power in 1988. *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1296 (C.D. Cal. 2000); for additional background, see EarthRights Int’l & Southeast Asian Info. Network, *Total Denial: A Report on the Yadana Pipeline Project in Burma (1996)* [hereinafter *Total Denial*], <http://www.ibiblio.org/freeburma/docs/totaldenial/td.html>. This Note, however, will continue to refer to the nation as Burma, as others have done elsewhere. See, e.g., *Doe*, 110 F. Supp. 2d at 1296 n.1 (noting that U.S. government continues to refer to country as Burma).

sive.²⁰ Such a definition may be impossible. After all, the term “indigenous” is intended to include “a vast range of peoples with highly different life styles, living conditions and relations to their respective nation states.”²¹ Outlooks and aspirations, means of subsistence, the degree of functional ability in dominant society, and even the level of adherence to traditional culture, all may vary among indigenous groups.²²

Despite these differences, broad unifying characteristics, experiences, and concerns exist among indigenous peoples. Generally, indigenous communities see themselves as cohesive peoples or nations

²⁰ See Maria Stavropoulou, *Indigenous Peoples Displaced from Their Environment: Is There Adequate Protection?*, 5 *Colo. J. Int'l Envtl. L. & Pol'y* 105, 105-06 (1994) (discussing difficulties in achieving universally accepted definition of indigenous peoples). Compare José R. Martínez Cobo, *Study of the Problem of Discrimination Against Indigenous Populations* ¶ 379, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4, U.N. Sales No. E.86.XIV.3 (1987) (emphasizing that indigenous peoples consist of groups that have “a historical continuity with pre-invasion and pre-colonial societies that developed on their territories”), with Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 169), June 27, 1989, art. 1, 28 I.L.M. 1382, 1384-85 (eschewing strict historical continuity requirement in definition of indigenous peoples and adding category of “tribal peoples”), and World Bank Group, *The World Bank Operational Manual, Operational Directive 4.20*, ¶ 3, (1991) (defining indigenous peoples more broadly to include “groups with a social and cultural identity distinct from the dominant society that makes them vulnerable to being disadvantaged in the development process”), <http://wbln0018.worldbank.org/institutional/manuals/opmanual.nsf>.

Not only has the process of achieving a single definition been difficult and, thus far, unsuccessful, but the definitions that have been reached also are controversial. The United Nations definition, for example, which never has been adopted officially and simply derives from a 1986 report by Special Rapporteur José Martínez Cobo, has met with criticism for its “potentially limited” approach of requiring historical continuity for a group to be recognized as indigenous. See Kingsbury, *supra* note 2, at 420 (comparing U.N., International Labour Organisation (ILO), and World Bank definitions of indigenous peoples). In addition, indigenous groups have voiced displeasure with ILO Convention No. 169 for its lack of focus on indigenous rights, including its failure to refer to a right of self-determination. *Id.* at 439 (citing Howard Berman, *Indigenous Peoples and the Right to Self-Determination*, 87 *Am. Soc'y Int'l L.* 190, 193-94 (1993)). In fact, even the notion of “indigenous peoples” can be contentious, as evidenced by the resistance of certain Asian nations to the applicability of the concept within their borders. See *id.* at 433-36 (discussing objections of India, China, and other Asian states to application of “indigenous peoples” concept within their borders). Similarly, many African governments view any definition of “indigenous peoples” with skepticism due to their “reluctance . . . to recognize specific tribal groups as ‘indigenous,’ or to accord them special protection.” *Discrimination Against Indigenous Peoples: Transnational Investments and Operations on the Lands of Indigenous Peoples*, U.N. ESCOR, *Comm'n on Human Rights, Provisional Agenda Item 15*, ¶ 8, U.N. Doc. E/CN.4/Sub.2/1994/40 (1994) [hereinafter 1994 Transnational Investments Report].

²¹ Terje Brantenberg & Henry Minde, *Introduction: The Indigenous Perspective, in Becoming Visible: Indigenous Politics and Self-Government* 3, 4 (Terje Brantenberg et al. eds., 1995).

²² See *Indep. Comm'n on Int'l Humanitarian Issues, Indigenous Peoples: A Global Quest for Justice* 31 (1987) [hereinafter ICIHI Report] (discussing lack of uniformity among indigenous peoples).

that have been victims of foreign invasion and colonization.²³ The legacy of colonialism ravaged indigenous “lands, sciences, ideas, arts and cultures”²⁴ and left many indigenous communities “not only politically, but economically, culturally, and religiously dispossessed.”²⁵ The resulting social injustice has been borne out in stark terms as some of the world’s highest rates of infant mortality, unemployment, alcoholism, disease, ill health, and incarceration pervade indigenous communities.²⁶ Moreover, the colonial process continues in parts of the world, dimming the prospects of improvement for indigenous peoples in certain states. Specifically, in the rush to exploit untouched resources in remote regions, developing nations often trample on indigenous land and culture and commit atrocities against indigenous peoples.²⁷

The importance of indigenous land and the consequential significance of its exploitation cannot be overstated when identifying indigenous groups.²⁸ First, the land is vital to the subsistence of many

²³ See S. James Anaya, *Indigenous Peoples in International Law* 85-86 (1996) (discussing general characteristics that define indigenous peoples); Brantenberg & Minde, *supra* note 21, at 5 (identifying characteristics of peoples who claim indigenesness).

²⁴ *Discrimination Against Indigenous Peoples: Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples*, U.N. ESCOR, Comm’n on Human Rights, 45th Sess., Provisional Agenda Item 14, ¶ 18, U.N. Doc. E/CN.4/Sub.2/1993/28 (1993) [hereinafter *Cultural and Intellectual Property Study*].

²⁵ Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 *Harv. Hum. Rts. J.* 57, 58-59 (1999). In addition to the brute force that orchestrated the conquest of indigenous peoples, colonial domination attempted to secure its roots in international law. See Anaya, *supra* note 23, at 9-26 (tracing developments of international law in response to European conquests and rule over indigenous peoples). While the specific legal and moral justifications for dominion over native populations changed over time, they consistently reflected a view of indigenous peoples as inherently inferior to the governing majority. See *id.* at 10-12, 22 (noting that early European jurisprudence appealed to divine law or “right reason” to justify European rule, while later international law determined indigenous peoples were simply “incapable of enjoying sovereign status or rights in international law”).

²⁶ Robin Wright, *World’s Indigenous Peoples Are the Poorest, Study Says*, *Sacramento Bee*, June 13, 1993, at A21 (restating results from 1993 ILO report); see also *Review of Developments Pertaining to the Promotion and Protection of Human Rights and Fundamental Freedoms of Indigenous People*, U.N. ESCOR, Comm’n on Human Rights, 15th Sess., Provisional Agenda Item 5(c), ¶¶ 1-6, U.N. Doc. E/CN.4/Sub.2/AC.4/1997/4 (1997) (discussing different effects of development and modernization on health of indigenous peoples).

²⁷ *Cultural and Intellectual Property Study*, *supra* note 24, ¶ 19 (describing process of colonialism repeating itself as non-European states expand activities into previously isolated areas); see also ICHH Report, *supra* note 22, at 43-67 (examining forms of exploitation of indigenous land); Kingsbury, *supra* note 2, at 453-54 (discussing shared history of disruption, dislocation, or exploitation as one of four prerequisites for group to be “indigenous people”).

²⁸ The reference to indigenous or ancestral land in the United Nations and World Bank definitions of indigenous peoples provides an evidentiary starting point for the centrality of

indigenous groups.²⁹ Damage to indigenous land, therefore, may have a socioeconomic impact on indigenous groups that would exceed the effect of similar damage on nonindigenous peoples.³⁰ Second, the land is sacred. It often is the source of indigenous worship and the object of indigenous return.³¹ Furthermore, specific sites, such as burial grounds, may have special ceremonial significance.³² In this way, the land becomes central to indigenous culture.³³ In addition, the land may be inextricable from indigenous identity. For example, many indigenous peoples consider their relationship with the land to be the source of all knowledge and creativity.³⁴ Thus, exploitation and appropriation of indigenous land is tantamount to an attack on the culture and identity of indigenous peoples.³⁵

Such exploitation nevertheless has endured, taking a public and a private form. On the public side, indigenous peoples remain vulnerable to exploitation by governing authorities.³⁶ Indigenous groups tend to be underrepresented in critical elements of the national power scheme, including government, and they possess little leverage with governing authorities.³⁷ Governmental prejudice against indigenous

land among the characteristics identifying indigenous groups. See Kingsbury, *supra* note 2, at 419-20 & 420 n.20 (reviewing competing definitions of indigenous people); cf. Holwick, *supra* note 3, at 183 (noting that members of U'wa tribe of Colombia consider it "their collective duty to care for the Earth").

²⁹ See *Discrimination Against Indigenous Peoples: Transnational Investments and Operations on the Lands of Indigenous Peoples*, U.N. ESCOR, Comm'n on Human Rights, 43rd Sess., Provisional Agenda Item 15, ¶ 22, U.N. Doc. E/CN.4/Sub.2/1991/49 (1991) [hereinafter 1991 Transnational Investments Report] (discussing effect of environmental destruction on indigenous peoples' economic organization).

³⁰ See *id.* ¶¶ 22-25.

³¹ See *Cultural and Intellectual Property Study*, *supra* note 24, ¶¶ 33-57 (reviewing indigenous peoples' rights with respect to lands holding religious significance).

³² See *id.* ¶¶ 36-43.

³³ See 1991 Transnational Investments Report, *supra* note 29, ¶ 20 (stating that "subsistence activities, social structure and culture [of indigenous peoples] are largely dependent on [their land]"); Martin A. Geer, *Foreigners in Their Own Land: Cultural Land and Transnational Corporations—Emergent International Rights and Wrongs*, 38 *Va. J. Int'l L.* 331, 349-50 (1998) (discussing significance of indigenous land to indigenous cultures); Kingsbury, *supra* note 2, at 421 (identifying importance of land and effects of modernization as unifying issues for indigenous peoples).

³⁴ *Cultural and Intellectual Property Study*, *supra* note 24, ¶ 21.

³⁵ See *id.* ¶¶ 22-26 (suggesting that attacks on land of indigenous peoples undermine integrity of their heritage, which encompasses all that is part of their distinct identity).

³⁶ Cf. Ndiva Kofele-Kale, *International Law of Responsibility for Economic Crimes: Holding Heads of State and Other High Ranking Officials Individually Liable for Acts of Fraudulent Enrichment 1-4* (1995) (discussing propensity for heads of state to exploit resources for personal gain).

³⁷ See Kingsbury, *supra* note 2, at 428 (pointing out that colonial legacy includes underrepresentation of minority groups, including indigenous peoples, in elite state and private institutions, and formation of coalitions of minority groups to counteract their inferior position). But see Anaya, *supra* note 23, at 86 (noting that more governments have become

populations and a failure to recognize the rights of indigenous peoples persist in many states.³⁸ Even constitutional provisions expressly protecting the rights of indigenous peoples do not always prevent the exploitation and destruction of indigenous land.³⁹ Consequently, indigenous peoples continue to suffer a range of harms.

Certain injuries, such as the loss of cultural knowledge and the exploitation of indigenous property, have been exacerbated in recent years by the rapid internationalization of economies.⁴⁰ On the private

amenable to using term "self-determination" in addressing indigenous peoples' concerns). There is evidence that the political status of some indigenous peoples may be improving. See, e.g., Stephen Buckley, *Upheaval in Ecuador Shows Clout of Indians: Protests Ended in President's Ouster*, Wash. Post, Jan. 27, 2000, at A21 (reviewing role of Ecuador's indigenous peoples in ouster of Ecuadorian President Mahuad); Anthony Faiola, *Peruvian Candidate Reflects New Indian Pride: U.S.-Educated Toledo Stresses Native Background*, Wash. Post, Mar. 31, 2000, at A1 (reporting on emergence of indigenous candidate as primary challenger to Peruvian President Fujimori in election).

³⁸ 1994 Transnational Investments Report, *supra* note 20, ¶¶ 6, 58 (discussing failure of governments in Africa and Asia to respect indigenous land rights and quoting Indonesian government as describing indigenous peoples as "backward, alien and isolated" with "impoverished culture").

³⁹ The example of Brazil shows that the existence of laws protecting indigenous populations does not necessarily equate with actual protection of these people. The Brazilian Constitution guarantees the protection of Indian rights to land, including the exclusive use of the natural resources in their territory. *Constituição Federal [C.F.] art. 231 (Braz.)*, reprinted in 1 *Constitutions of the Countries of the World: Brazil 133* (Gisbert H. Flanz ed., Keith S. Rosenn trans., 1998). This constitutional provision reflects a federal policy formulated in the 1980s intended to stem the destruction of indigenous land and peoples. See Wiessner, *supra* note 25, at 77 (reviewing status of indigenous population in Brazil). Yet, the 1990s witnessed the continued invasion and destruction—with government knowledge, if not complicity—of Yanomami land in Amazonia. See *id.* at 77-79 (discussing exploitation of Yanomami territory and Brazilian government's reluctance to assert strong federal policy on indigenous land rights); see also Karen E. Bravo, *Balancing Indigenous Rights to Land and the Demands of Economic Development: Lessons from the United States and Australia*, 30 *Colum. J.L. & Soc. Probs.* 529, 564-67 (pointing out failure of national government of Brazil to protect indigenous land). Massacres, rampant disease, and even suicide among the Yanomami accompanied the incursion onto their territory. Ann Gibbons, *Yanomami People Threatened*, 252 *Science* 1616 (1991) (reporting danger of Yanomami people becoming extinct due to diseases associated with invasion); Wiessner, *supra* note 25, at 77 (discussing effect of invasion on Yanomami people). Moreover, it is feared that the response of the Brazilian government—an additional decree providing for the demarcation of indigenous land—only will exacerbate the vulnerability of indigenous lands. See *id.* at 78-79.

⁴⁰ Cf. Kingsbury, *supra* note 2, at 447 (identifying common ground for indigenous groups on certain issues, such as emergent legal regimes related to international trade and intellectual property). The infringement of intellectual property rights is a grave concern to indigenous peoples. See generally *Discrimination Against Indigenous Peoples: Intellectual Property of Indigenous Peoples: Concise Report of the Secretary General*, U.N. ESCOR, Comm'n on Human Rights, 44th Sess., Provisional Agenda Item 15, U.N. Doc. E/CN.4/Sub.2/1992/30 (1992) (discussing protection of intellectual property of indigenous people). For example, indigenous peoples in Papua New Guinea accused genetic researchers of stealing their genes and patenting them. Gary Taubes, *Scientists Attacked for "Patenting" Pacific Tribe*, 270 *Science* 1112 (1995). Much of the concern in this area centers

side in particular, the activities of MNCs in this economic process intensify indigenous concerns about exploitation, especially in developing nations where governments have shown little incentive to protect their indigenous communities. Developing nations often are attractive to MNCs because of the low production costs, including the absence of governmental regulation over the exploitation of natural resources.⁴¹ In turn, from the perspective of the developing nation, the high capital requirements of national development necessitate a large MNC presence.⁴² In some instances, the government may defer entirely to the MNC, which then serves as the *de facto* ruling authority and itself may pursue repressive and exploitative actions.⁴³ In other cases, the MNC indirectly, if not directly, may support the ruling regime, which repays the MNC with concessions in indigenous areas and repression of dissent to MNC activities.⁴⁴ Given the lack of consultation with the indigenous communities, the MNC's activities effectively assist governments in looting indigenous resources without regard for the needs and rights of indigenous owners.⁴⁵

around the Human Genome Diversity Project (HGDP), which proposes to collect and analyze the genes from diverse population groups. Patricia Kahn, *Genetic Diversity Project Tries Again*, 266 *Science* 720, 720-22 (1994). A thorough discussion, however, of the vast intellectual property concerns of indigenous peoples—and, specifically, their concerns over the HGDP—is beyond the scope of this Note. For now, it is sufficient to recognize that the doctrine of unjust enrichment possibly would cover indigenous losses of intellectual property. See 2 Palmer, *supra* note 12, § 10.11, at 463 (discussing unjust enrichment claim for voluntary submission of ideas).

⁴¹ See Ariadne K. Sacharoff, Note, *Multinationals in Host Countries: Can They Be Held Liable Under the Alien Tort Claims Act for Human Rights Violations?*, 23 *Brook. J. Int'l L.* 927, 931-32 (1998) (detailing incentives for multinational corporations to invest in developing countries); see also Geer, *supra* note 33, at 336-37 (identifying transnational corporations as primary international actors in devastation of indigenous land in Amazonia region); Brad J. Kieserman, Comment, *Profits and Principles: Promoting Multinational Corporate Responsibility by Amending the Alien Tort Claims Act*, 48 *Cath. U. L. Rev.* 881, 882-83 (1999) (discussing unregulated nature of MNC activity in developing host countries).

⁴² See 1994 *Transnational Investments Report*, *supra* note 20, ¶ 19 (arguing that privatization and intense development requirements will increase role of transnational corporations in indigenous areas).

⁴³ See, e.g., Sacharoff, *supra* note 41, at 958-64 (discussing activities of Shell Oil in Nigeria).

⁴⁴ See 1994 *Transnational Investments Report*, *supra* note 20, ¶ 12 (describing vicious cycle of exploitation and violence derived from relationship between transnational corporation and government).

⁴⁵ See Geer, *supra* note 33, at 352 (giving examples of Latin American countries where transnational corporations have helped loot resources at expense of indigenous peoples (citing *Study of the Problem of Discrimination Against Indigenous Populations*, U.N. ESCOR, Comm'n on Human Rights, 36th Sess., Provisional Agenda Item 11, at 141, U.N. Doc. E/CN.4/Sub.2/1983/21/Add.4 (1983))). But cf. ICIHI Report, *supra* note 22, at 93-101 (detailing positive role government can play in development and protection of indigenous land).

B. The Freeport and Unocal Case Studies

The investments of Freeport and Unocal in Indonesia and Burma, respectively, illustrate the typical MNC experience in indigenous settings and, therefore, are useful tools for examining the potential unjust enrichment claims of indigenous peoples against MNCs more generally.⁴⁶ To begin with, each MNC forged a close relationship with the ruling authorities to help establish mutually attractive and lucrative operations. In 1966, Freeport became the first MNC to invest in Indonesia during the Suharto era, and the Indonesian government and Indonesian businesses have held minority interests in the subsidiary that runs Freeport's operations there.⁴⁷ These operations, which are centered in the remote and indigenously populated Irian Jaya region, include the Grasberg mine, one of the richest mineral deposits in the world.⁴⁸ These reserves, combined with those of the neighboring Ertzberg mines, have generated significant profits for Freeport.⁴⁹ Given this return and the massive amount of investment that Freeport has

⁴⁶ Freeport and Unocal are not the only cases available to illustrate the experience of MNCs in indigenous settings. For example, lawsuits have been brought by indigenous plaintiffs against Texaco for its actions in Amazonia. See *supra* note 5. The experience of Texaco, however, is sufficiently similar to Freeport that it would be redundant to refer to both cases throughout this Note. For background on the effect of Texaco's investment in Ecuador on that nation's indigenous population and the ensuing claims brought against Texaco, see generally Arthaud, *supra* note 1.

Additionally, it should be noted that the issue of MNC actions in indigenous settings is not unique to U.S. MNCs, and cases brought by indigenous plaintiffs against MNCs have not been limited to U.S. courts. See, e.g., *Dagi v. Broken Hill Proprietary Co.*, No. BC9502519, 1995 VIC LEXIS 1182 (Vict. Nov. 10, 1995) (suit against Australian mining company for damage caused to indigenous groups and local rivers in Papua New Guinea). For background on the effects of the Ok Tedi mine on the people and rivers of Papua New Guinea, see generally Heather G. White, *Including Local Communities in the Negotiation of Mining Agreements: The Ok Tedi Example*, 8 *Transnat'l Law* 303 (1995).

⁴⁷ 1994 Transnational Investments Report, *supra* note 20, Annex ¶ 59. The government of Indonesia has worked with Freeport to protect its interest in the mine and has profited from taxes, dividends, and purchases surrounding the project. See Kourtney Twenhafel, Comment, *Freeport McMoran's Midas Touch: Testing the Application of the National Environmental Policy Act to Federal Agency Action Governing Multinational Corporations*, 4 *Tul. J. Int'l & Comp. L.* 303, 324 (1996) (describing importance of Freeport's mining operations to government of Indonesia).

⁴⁸ Twenhafel, *supra* note 47, at 323. In fact, as of the mid-1990s, the Grasberg mine reportedly had the largest gold reserves and one of the five largest copper reserves in the world. 1994 Transnational Investments Report, *supra* note 20, Annex ¶ 60.

⁴⁹ 1994 Transnational Investments Report, *supra* note 20, Annex ¶ 60 (noting effect of Freeport's mining operations in Indonesia on its economic performance in late 1980s and early 1990s). The mines continue to produce results for Freeport: It reported "sales of 256.2 million pounds of copper and 330,500 ounces of gold during the second quarter of 2000." News Release, *Freeport-McMoRan Copper & Gold Inc., Freeport-McMoRan Copper & Gold Inc. Reports Second-Quarter and Six-Months 2000 Results* (July 18, 2000), <http://www.fcx.com/news/2q00Results.PDF>.

put into its venture in Irian Jaya, the operations in the region are considered vital to Freeport's future.⁵⁰

Unocal presents, if possible, a more controversial example with similar dynamics. In 1993, Unocal joined a consortium of energy companies that had reached an agreement with the reviled ruling military junta of Burma, the State Law and Order Restoration Council (SLORC),⁵¹ to develop the offshore Yadana natural gas field.⁵² The project represented the largest foreign investment in Burma to date.⁵³ As part of the project, SLORC had responsibility for clearing the pipeline route and providing security for the pipeline.⁵⁴ The size of the investment and the nature of the agreement raised fears among critics of the regime that it would lend credibility to the rule of SLORC,⁵⁵ which has been notorious for its brutal repression of prodemocracy forces and maltreatment of indigenous tribes.⁵⁶

Despite this criticism and numerous warnings and reports regarding SLORC's violent tactics,⁵⁷ Unocal has persisted with its involvement in the project, presumably because it deems the risk of dealing with SLORC worth the reward. Although the Yadana project will produce significant income no earlier than 2001-02,⁵⁸ it stands to provide a substantial annual revenue stream after capital expense and re-

⁵⁰ See Twenhafel, *supra* note 47, at 324 (describing importance of Freeport's mining operations to its financial health).

⁵¹ The military rulers since have changed the government's name to the benign, benevolent-sounding "State Peace and Development Council." See *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1296 n.1 (C.D. Cal. 2000).

⁵² *Id.* at 1298. In addition to Unocal, the other companies in the consortium are the French company Total, the state-owned Myanma Oil and Gas Enterprise (MOGE), and the Petroleum Authority of Thailand Exploration and Production (PTTEP). *Id.* at 1297. Unocal owns a 28.26% interest in the venture. *Id.* at 1299; Unocal Corp., *Yadana Report* March 1997 (1997), [hereinafter *Yadana Report*] (on file with the *New York University Law Review*). The consortium began commercial production from the Yadana gas field in early 2000. Unocal Corp., *Progress & Prosperity Along the Pipeline Route: The Yadana Natural Gas Development Project—April 2000*, at Project Overview [hereinafter *Progress & Prosperity*], <http://www.unocal.com/myanmar/00report/index.htm>.

⁵³ Robert J. Peterson, Comment, Political Realism and the Judicial Imposition of International Secondary Sanctions: Possibilities from *John Doe v. Unocal* and the Alien Tort Claims Act, 5 U. Chi. L. Sch. Roundtable 277, 280 (1998) (providing overview of Unocal investment in Burma).

⁵⁴ *Doe*, 110 F. Supp. 2d at 1297-98, 1301 (describing different responsibilities of parties to Yadana project and noting Unocal official's assertion that military had been hired to provide security).

⁵⁵ Peterson, *supra* note 53, at 280.

⁵⁶ David I. Becker, Note, A Call for the Codification of the *Unocal* Doctrine, 32 Cornell Int'l L.J. 183, 186 n.14 (1998).

⁵⁷ For an enumeration of the warnings and reports Unocal received concerning abuses in the region, see *Doe*, 110 F. Supp. 2d at 1298-1301.

⁵⁸ *Progress & Prosperity*, *supra* note 52, at Project Overview; *Yadana Report*, *supra* note 52.

covery for more than thirty years.⁵⁹ Indeed, participation in the project already has provided dividends to Unocal. Specifically, Unocal signed a production sharing contract to exploit an important new gas field discovered by the consortium near the Yadana field.⁶⁰ As the contract indicates, the Yadana project is significant not only for its riches, but also for its potential to facilitate future access to Burma's remunerative resources.⁶¹

The Freeport and Unocal projects are typical of MNC investments in indigenous territory not only because of their profitability and their close association with governing authorities, but also because of their cost to the respective indigenous populations. Freeport's mining operations allegedly occur on expropriated land.⁶² Loss of their land has had tremendous cultural and social repercussions for the local indigenous peoples, including population resettlement and destruction of sacred religious and burial ground of the Amungme people.⁶³ In addition, the mining activities have dumped over 114,000 tons of ground waste rock a day into local waterways.⁶⁴ These untreated deposits have produced flooding and silting, destroyed miles of rain forest, and poisoned a regional lake.⁶⁵ It is thus unsurprising that health problems among the indigenous peoples have become more prevalent.⁶⁶ Finally, Freeport security forces in 1995 allegedly

⁵⁹ Unocal has stated that MOGE, which has a fifteen percent share of the pipeline, will receive a revenue stream of approximately \$150 million annually. Yadana Report, supra note 52. Given that Unocal has a twenty-eight percent interest in the project, it would seem that Unocal's estimated annual revenue stream will be around \$280 million. See Morton Winston, *John Doe vs. Unocal: The Boardroom/Courtroom Battles for Ethical Turf*, Whole Earth, Summer 1999, at 17, 17 (reporting that Yadana pipeline is estimated to generate "as much as \$200 million a year in revenue once completed"). According to Unocal, the field will support thirty years of production. Progress & Prosperity, supra note 52, at Project Overview.

⁶⁰ Yadana Report, supra note 52.

⁶¹ In fact, Unocal considers its future success dependent upon its ventures in Asia, including Burma. See Dev George, Unocal or Unoburm, Offshore, July 1997, at 8, 8 (detailing Unocal's dedication to its ventures in Asia and its establishment of twin headquarters in Malaysia as step to securing its roots in Asia).

⁶² See Human Rights and the Environment—US Mining Corporation Sued in Federal Court by Indonesian Tribal Leader, 1996 Colo. J. Int'l Envtl. L. & Pol'y 89, 94 [hereinafter US Mining Corporation] (noting allegations that Freeport's close relationship with Indonesian government permits mining on expropriated land)

⁶³ 1994 Transnational Investments Report, supra note 20, Annex ¶¶ 65-66. The resettlement has occurred, in part, through a plan implemented by Freeport and the Indonesian government without consultation with the indigenous leaders. Id. Annex ¶ 65. Those indigenous people who have not been resettled through the joint Freeport-Indonesian efforts face pressure to do so from the influx of laborers who work the mines. Id. Annex ¶ 69.

⁶⁴ Twenhafel, supra note 47, at 325.

⁶⁵ Id.

⁶⁶ Id.

joined the Indonesian military in perpetrating various human rights abuses, including killing and kidnapping locals.⁶⁷

The allegations of human rights abuses in Irian Jaya resemble those that have arisen in the context of Unocal's Yadana project in Burma. In fulfillment of their contractual obligations, SLORC forces reportedly have used violence to relocate villages, enslave indigenous farmers, and steal property for the benefit of the pipeline.⁶⁸ Indigenous farmers also assert that the presence of the consortium has led to the assault, rape, torture, and death of various members of the indigenous population in the Tenasserim region.⁶⁹ As in Indonesia, the affected indigenous groups have been largely without domestic recourse.⁷⁰

The foregoing discussion points to some obvious distinctions between Freeport and Unocal. For instance, Freeport's venture has been of longer duration, has produced more tangible profits, and, arguably, is more directly responsible for the ensuing expense to the indigenous population. As a composite, however, the Freeport and Unocal cases present a firm basis to explore the elements of a potential unjust enrichment claim by indigenous plaintiffs against an MNC.

II

MAKING THE UNJUST ENRICHMENT CLAIM

A claim for unjust enrichment must possess the following elements: (a) an enrichment must accrue to the defendant, (b) the enrichment must occur at the expense of the plaintiff, and (c) the enrichment must be unjust.⁷¹ In addition to these three elements, an

⁶⁷ See US Mining Corporation, *supra* note 62, at 94.

⁶⁸ *Doe v. Unocal Corp.*, 963 F. Supp. 880, 883 (C.D. Cal. 1997); see also *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1296-1302 (C.D. Cal. 2000) (describing various human rights abuses allegedly committed by SLORC); Total Denial, *supra* note 19, at 32-45 (detailing forced labor and relocation resulting from Yadana project).

⁶⁹ *Doe*, 963 F. Supp. at 883; see also Total Denial, *supra* note 19, at 21-26 (detailing human rights abuses resulting from pipeline project).

⁷⁰ See 1994 Transnational Investments Report, *supra* note 20, ¶ 10 (noting that governments in Burma and Indonesia have claimed ownership over natural resources situated on indigenous land and have disposed of these resources without consultation).

⁷¹ See, e.g., *Tooltrend, Inc. v. CMT Utensili, SRL*, 198 F.3d 802, 805 (11th Cir. 1999) (citing Florida test for unjust enrichment); *Mass Transit Admin. v. Granite Constr. Co.*, 471 A.2d 1121, 1125 (Md. Ct. Spec. App. 1984) (giving test for Maryland); see also Andrew Burrows, *The Law of Restitution* 7 (1993) (identifying three questions that illustrate elements of unjust enrichment); Kit Barker, *Unjust Enrichment: Containing the Beast*, 15 Oxford J. Legal Stud. 457, 458-59 (1995) (same). It should be noted that, depending on the jurisdiction, the test for unjust enrichment may have variations upon these elements or additional requirements. For example, to assert an unjust enrichment claim under Louisiana law, a benefit must accrue to the defendant at the plaintiff's expense without justification and there must be an absence of remedy for the plaintiff at law. *McPhearson v. Shell*

unjust enrichment claim must survive any countervailing defenses or considerations.⁷² The following Sections will examine each element as it applies in the indigenous-MNC context and conclude with a discussion of potential MNC defenses to the unjust enrichment claim.⁷³

Oil Co., 584 So. 2d 373, 376 (La. Ct. App. 1991). The purpose of this Note is to provide an analysis of the general mechanics of an unjust enrichment claim as it may apply in the indigenous context. Therefore, the Note will focus on the core elements of enrichment, expense, and unjustness rather than the specific requirements of jurisdictions in which a claim may be brought.

⁷² See Burrows, *supra* note 71, at 7 (identifying issue of possible defenses as fourth question for unjust enrichment claim); Barker, *supra* note 71, at 459 (same). For a discussion of potential defenses, see *infra* Part II.D.

⁷³ This Note recognizes that the choice of which law will apply to an indigenous unjust enrichment claim is a significant—and potentially dispositive—issue. The outcome of a choice of law analysis, however, is highly variable and depends upon the rules of the forum, the alternative applicable substantive laws, and, to a greater or lesser degree, the predilection of the court. As a result, the most that this Note can state about a choice of law analysis in a hypothetical indigenous claim of unjust enrichment is that it may not matter (e.g., because the applicable laws are essentially the same, or U.S. law will apply), may matter a great deal (e.g., if the analysis dictates that foreign law will govern and that law precludes a claim), or may matter only slightly (e.g., the foreign law may be different and may govern, but its application will produce only a slightly different outcome).

Despite such uncertainties, it is possible to offer a summary regarding the bounds of a choice of law analysis in an unjust enrichment claim. Generally, the choice of law issue in this context will be one of first impression. Cf. 2 Dicey and Morris on the Conflict of Laws 1486 (Lawrence Collins et al. eds., 13th ed. 2000) (stating that, until recently, English courts rarely have addressed question of choice of law in unjust enrichment cases). The Restatement (Second) of Conflict of Laws advises that restitutionary claims should be determined by the law of the state that has the most significant relationship to the facts that give rise to the claim and the parties involved. Restatement (Second) of Conflict of Laws § 221(1) (1971). In the indigenous context, certain considerations, such as the relevant policies and interests of the foreign state and the central location of the relationship between the parties, may point to the application of the law of the state that received the MNC investment. See *id.* §§ 6(2)(c), 221(2). Other considerations may point to the application of the forum law, including the needs of the international system of law, the relevant policies of the forum, and the basic policies underlying a claim of unjust enrichment. See *id.* § 6(2)(a)-(b), (e); see also Robert A. Leflar et al., *American Conflicts Law* § 156, at 443 (4th ed. 1986) (suggesting five choice-of-law considerations for restitution problems, including forum's interests and which is "the better rule of law"). The result is that most jurisdictions in the United States apply an interest analysis that gives the court the freedom to apply whichever law it wants. See Joseph W. Dellapenna, *Suing Foreign Governments and Their Corporations* § 7.5, at 229-30 (1988) (noting that interest analysis is predominant in United States and asserting that its complexity "makes it an ideal escape device—a court can justify using any law it wants"). But see Larry Kramer, *Rethinking Choice of Law*, 90 *Colum. L. Rev.* 277, 319-38 (1990) (arguing against interest analysis and proposing canons of construction to drive analysis of conflict-of-law problems).

A good example of the unpredictability of the choice-of-law issue in an unjust enrichment setting occurred in *Phoenix Can. Oil Co. v. Texaco, Inc.*, 560 F. Supp. 1372 (D. Del. 1983). In that case, the court determined that Ecuadorian law should govern the plaintiffs' claim. *Id.* at 1382-83. Finding no unjust enrichment claim in Ecuador's civil code, the court nevertheless permitted the claim to proceed, reasoning that general principles underlying civil codes may be sufficient grounds for a claim and that the Ecuadorian code implicitly contained principles against unjust enrichment in its recognition of quasi-contract theories.

A. *Defining Enrichment*

There must be some benefit flowing to a defendant MNC in order to initiate an unjust enrichment claim against it. The concept of enrichment, however, can be quite broad, and the ease with which an enrichment may be identified can vary.⁷⁴ A common approach is to identify an enrichment as something positive—that is, as an accretion of wealth.⁷⁵ Such enrichment is most obvious when there is an accumulation of assets or an acquisition of property by the defendant.⁷⁶ Yet, determining whether an accretion of wealth has occurred may be difficult.⁷⁷ For example, it may not be possible to identify profits with any degree of certainty, or the particular “asset” at issue may have less to do with title to land and more to do with the right to perform a particular action. In these cases, certain characteristics of wealth—such as transferability, exchange value, and capacity to produce income—may point to an enrichment.⁷⁸

The experiences of Freeport and Unocal give substance to the concept of enrichment as it applies to MNCs in the indigenous context. Freeport is a transparent case: The mining operations in Irian Jaya helped to more than double Freeport’s economic performance

Id. at 1383-84. Later, the court encountered a provision in Ecuadorian law analogous to an unjust enrichment claim and applied the principles of that provision rather than the general principles against unjust enrichment. See *Phoenix Can. Oil Co. v. Texaco, Inc.*, 658 F. Supp. 1061, 1063, 1078 (D. Del. 1987) (noting that Ecuadorian court would permit unjust enrichment claim as action “de in rem verso”).

Of course, *Phoenix Canada* does not mean that the choice-of-law analysis always will be so favorable to an unjust enrichment plaintiff. As mentioned above, depending on the case, the application of foreign law could preclude an unjust enrichment claim. In the absence of an actual case on point, this Note analyzes the unjust enrichment claim on the basis of its *potential* applicability in the indigenous cases.

⁷⁴ See Nicholas J. McBride & Paul McGrath, *The Nature of Restitution*, 15 *Oxford J. Legal Stud.* 33, 47 (1995) (describing debate over what constitutes enrichment as “fruitless” because of lack of particular reference point setting out standards for determining accuracy of views defining enrichment).

⁷⁵ Lord Goff of Chieveley & Gareth Jones, *The Law of Restitution* 16 (3d ed. 1986) (“Most benefits are *positive* in the sense that they are an accretion to the defendant’s wealth.”); 1 Palmer, *supra* note 12, § 1.8, at 44-45 (arguing that one of most significant meanings of benefit arises when there is addition to defendant’s wealth).

⁷⁶ See, e.g., *Provident Life & Accident Ins. Co. v. Waller*, 906 F.2d 985, 993 (4th Cir. 1990) (noting that defendant’s double recovery in insurance case constituted “archetypal unjust enrichment scenario”); see also Peter Birks, *An Introduction to the Law of Restitution* 131 (1985) (noting that enrichment is easy issue when it simply involves change of position relating to money); Burrows, *supra* note 71, at 7 (suggesting that establishment of benefit is “straightforward” when property is at issue).

⁷⁷ See Birks, *supra* note 76, at 13 (noting difficulty of determining what may count as wealth).

⁷⁸ See Beatson, *supra* note 10, at 29-31 (providing overview of possible ways to measure wealth and therefore enrichment).

from 1987-91.⁷⁹ In addition, Freeport has the right to use the indigenous territory for its profit. This right is an enrichment insofar as it enables an income-producing activity and carries a high exchange value⁸⁰—certainly, many competitors would welcome the opportunity to access such lush land.⁸¹ Similarly, the vast capacity of the Yadana pipeline to produce income for Unocal and Unocal's ability to exchange its equity interest in the partnership for value at a later date confirm the existence of an enrichment to Unocal.⁸²

The origin of the benefit at issue also may be relevant to satisfying the enrichment element. The most straightforward enrichment occurs when something of value is transferred directly from the plaintiff to the defendant.⁸³ More important to potential indigenous plaintiffs, though, an enrichment also may occur when a defendant receives a benefit *indirectly*.⁸⁴ In other words, the defendant may receive the benefit from a third party but still be responsible to the plaintiff for retention of the benefit. For instance, suppose a husband fraudulently obtains money from a friend and uses the money to repay a debt of his wife. The wife may not know of the husband's actions, but she none-

⁷⁹ 1994 Transnational Investments Report, *supra* note 20, Annex ¶ 60.

⁸⁰ See Beatson, *supra* note 10, at 44 (arguing for exchange value as appropriate test for enrichment); cf. *United States v. Applied Pharmacy Consultants, Inc.*, 182 F.3d 603, 608 (8th Cir. 1999) (citing *Jackson v. Jones*, 22 Ark. 158 (1860), for example of case holding that when party transfers goods, such as bushels of corn, that have exchange value, recipient is enriched by fair market value of those goods).

⁸¹ To the extent that Freeport saved an expense in its acquisition of the right to mine the indigenous territory, the saved expense is considered a negative benefit and also may satisfy the enrichment element of an unjust enrichment claim. See Restatement of Restitution § 1 cmt. b (1937) (stating that benefit can be saving of expense); Goff & Jones, *supra* note 75, at 16 (noting that in exceptional cases benefit may be negative). For instance, suppose an MNC such as Freeport does not pay to use indigenous land, but rather acquires a nontransferable "right" to use the land through a deal with the government whereby the MNC's only obligation is to provide a kickback to government officials. The expense that Freeport saves in not having to provide compensation for use of the land may be considered a benefit.

⁸² See *supra* note 59 and accompanying text (discussing likely revenue stream of pipeline).

⁸³ See 1 Palmer, *supra* note 12, § 1.7, at 40 (noting that restitution cases often arise when "the defendant knowingly and often wrongfully takes a benefit directly from the plaintiff").

⁸⁴ See 1 *id.* § 1.7, at 41 (discussing two categories of indirect benefits, including when "the defendant has received from a third person a benefit to which the plaintiff has a better right"); see also *Commerce P'ship v. Equity Contracting Co.*, 695 So. 2d 383, 386 (Fla. Dist. Ct. App. 1997) ("Because the basis for recovery does not turn on the finding of an enforceable agreement, there may be recovery under a contract implied in law even where the parties had no dealings at all with each other."); 1983 Tentative Draft, *supra* note 11, § 4 cmt. a (noting that restitution may result when "wrong was committed against the claimant by the third party and restitution is claimed from the recipient of a benefit resulting from the wrong").

theless will owe the friend the amount of her repaid debt.⁸⁵ Of course, the same result holds if the defendant is aware of the third party's actions.⁸⁶ Thus, the enrichment element may be satisfied in an indigenuous case even though the MNC, such as Freeport, technically may be receiving its benefit from the local authorities.

B. *Discerning an Expense to the Plaintiff*

In addition to a benefit accruing to the MNC, an indigenous plaintiff must show some connection between the enrichment and the plaintiff's interest.⁸⁷ Unjust enrichment scholars therefore define the element of expense by focusing on the process through which the benefit is obtained.⁸⁸ An expense most obviously is present when there is a direct correlation between what the defendant has gained and what the plaintiff has lost;⁸⁹ that is, the enrichment to the defendant is the result of a subtraction from the plaintiff.⁹⁰ This element is satisfied regardless of whether the defendant actually is responsible for the loss.⁹¹ A common example occurs when the defendant receives

⁸⁵ E.g., *Wilson v. Todd*, 26 N.E.2d 1003 (Ind. 1940). A similar result occurs in the following scenario: D gives \$2000 to A in exchange for the use of a particular piece of property, which A took from its rightful owner, P. D then makes \$5000 using the piece of property. D clearly has benefited from using the property and, assuming for now the satisfaction of the expense and unjustness elements, will owe P \$5000. Cf. *Creach v. Ralph Nichols Co.*, 267 S.W.2d 132 (Tenn. Ct. App. 1953) (holding that plaintiff in quasi-contract action could recover resale value of stolen car that had been bought by defendant and resold for profit). For an explanation of why the plaintiff would be entitled to the full \$5000, see *infra* Part III.B.

⁸⁶ See *infra* notes 139-41 and accompanying text (discussing role of defendant's knowledge in vitiating bona fide purchaser for value defense).

⁸⁷ See *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912, 937 (3d Cir. 1999) (noting that unjust enrichment claim in tort context cannot proceed where plaintiffs' harm is too remote from defendant's conduct); 1 *Palmer*, *supra* note 12, § 2.10, at 134 (indicating that "[i]t is necessary to establish a connection between the interest of the plaintiff which was infringed and the benefit to the defendant"); see also *Beatson*, *supra* note 10, at 242-43 (arguing that in restitutionary claims based on wrongful acquisition of benefit, plaintiff must show enrichment is attributable to plaintiff's interest); *Goff & Jones*, *supra* note 75, at 23 ("A plaintiff must normally show that it was he or someone whom he authorised who conferred the benefit on the defendant.").

⁸⁸ See, e.g., *Beatson*, *supra* note 10, at 25 (providing overview of Birks's focus on two different forms of enrichment in showing expense to plaintiff).

⁸⁹ See *id.* at 208 ("In some cases . . . there will be an exact correlation between the defendant's gain and the plaintiff's loss."); *Goff & Jones*, *supra* note 75, at 25 ("In many cases what the plaintiff has lost will be what the defendant has gained.").

⁹⁰ See, e.g., *Beck v. N. Natural Gas Co.*, 170 F.3d 1018 (10th Cir. 1999) (affirming jury award for unjust enrichment resulting from deprivation of plaintiff landowners' rights when defendant's storage of natural gas leaked under plaintiffs' property); see also *Birks*, *supra* note 76, at 23, 132-33 (discussing concept of expense as equivalent to subtraction from plaintiff); *Burrows*, *supra* note 71, at 16, 19-20 (same).

⁹¹ See *HPI Health Care Servs., Inc. v. Mt. Vernon Hosp., Inc.*, 545 N.E.2d 672, 679 (Ill. 1989) (noting three general situations in which plaintiff can recover benefit that was trans-

money due to the plaintiff's mistake of fact.⁹² In such a scenario, plaintiff's expense is the loss of money, and the defendant must disgorge the profit.⁹³ In the indigenous context, Freeport serves as a potential example: If the loss of the land in Irian Jaya is considered the general expense to the indigenous people, then Freeport's enrichment resulted from this subtraction—after all, Freeport's profits derived from the land in question.

Of course, the expenses incurred by indigenous plaintiffs may not be easily identifiable. There may be disagreement over indigenous rights to the land at issue,⁹⁴ and the loss of culture, identity, religion, and economic way of life that often accompanies MNC exploitation may be neither quantifiable nor translatable into the defendant's gain. The potential vagueness of these costs, however, does not defeat the expense element. The plaintiff's loss need not necessarily equate with the defendant's gain.⁹⁵ Therefore, as long as the indigenous plaintiff incurs some loss, quantifiable or otherwise, the expense element can be satisfied.

When the loss to the plaintiff is not apparent, unjust enrichment theorists focus on the commission of a wrong against the plaintiff.⁹⁶ Wrongdoing may include the breach of a duty owed the plaintiff or infringement of plaintiff's legal right, such as the right to exclude others from using a resource.⁹⁷ Wrongful conduct typically associated with criminal, tort, or contract law may serve as evidence of an ex-

ferred to defendant by third party); *Lamkin v. Hill*, 419 A.2d 1077, 1080 (N.H. 1980) (noting that restitution is awarded not only when defendant is wrongdoer, but also when it would be unjust for defendant to retain honestly obtained benefits); see also *Gergen*, supra note 15, at 469 (“Restitution can also operate as a basis for obligation in circumstances when the obligor did nothing that could be considered wrongful”).

⁹² See *Goff & Jones*, supra note 75, at 25.

⁹³ *Id.*

⁹⁴ See supra note 17.

⁹⁵ See *Goff & Jones*, supra note 75, at 25 (“[T]here is no *necessary* equation between what the plaintiff has lost and what the defendant has gained at his expense.”).

⁹⁶ See *Burrows*, supra note 71, at 16-20 (noting “widespread acceptance” of unjust enrichment by wrongdoing). Although commentators usually focus on the defendant's conduct, it is not necessary that the defendant have committed the wrongdoing to satisfy the element of expense. See *McBride & McGrath*, supra note 74, at 45 (noting that recourse may be had even when expense to plaintiff does not flow from defendant's wrongdoing); infra notes 113-16 and accompanying text (same); see also *Goff & Jones*, supra note 75, at 23 (“[A] benefit may be deemed to have been conferred at the plaintiff's expense even though a third party conferred it on the defendant.”). For a detailed discussion of unjust enrichment resulting from defendant's wrongdoing, see generally *Birks*, supra note 76, at 313-57.

⁹⁷ See *Birks*, supra note 76, at 313 (describing notion of wrongs as “breaches of duty rather than blameworthy conduct”); 1 *Palmer*, supra note 12, § 2.10, at 133 (“[T]here need [not] be any loss to the plaintiff except in the sense that a legally protected interest has been invaded.”).

pense in a restitutionary setting.⁹⁸ Moreover, claimants do not have to demonstrate a tangible loss if an offense has been committed.⁹⁹ For example, if a defendant uses the property of another, there is an expense to the owner—the deprivation of the right to use the property—even if the owner did not intend to use it and therefore incurred no economic costs.¹⁰⁰

The foregoing discussion could be crucial to indigenous plaintiffs' unjust enrichment claims. The maltreatment that indigenous plaintiffs receive in connection with an MNC's venture into their territory may satisfy the second element of the plaintiffs' claim even though their greatest loss may not be captured in economic terms. Freeport provides a case in point: The duress imposed upon the indigenous people to give up their land and resettle reveals an expense.¹⁰¹ Thus, regardless of the ability of indigenous plaintiffs to state a claim under another area of law, such as tort, they could pursue an unjust enrichment claim without having to quantify the economic costs of the various physical, cultural, and other harms incurred.

C. *Providing Content to Unjustness*

The standard for injustice is whether a defendant's retention of the benefit at a plaintiff's expense would offend notions of fairness or equity.¹⁰² For a given set of facts, there may be benchmarks to suggest when this standard has been violated—namely, there may be a reason

⁹⁸ See Birks, *supra* note 76, at 313 (noting that wrongdoing includes “not only all torts but also breaches of equitable and statutory duties and breaches of contract”). For example, the exercise of duress may be evidence of an expense to the plaintiff. See Goff & Jones, *supra* note 75, at 203-04 (discussing claims arising from compulsion of plaintiff's action).

⁹⁹ *Mass Transit Admin. v. Granite Constr. Co.*, 471 A.2d 1121, 1125 (Md. Ct. Spec. App. 1984) (noting that unjust enrichment may apply “even though the plaintiff may have suffered no demonstrable losses” (quoting Dan B. Dobbs, *Handbook on the Law of Remedies: Damages, Equity, Restitution* § 4.1, at 224 (1973))); 1983 Tentative Draft, *supra* note 11, § 1 cmt. g (stating that unjust enrichment does not require claimant to “demonstrate both a loss and an offense”); see also *infra* notes 178-81 (discussing remedial possibilities under unjust enrichment when damages are not easily quantifiable).

¹⁰⁰ 1 *Palmer*, *supra* note 12, § 2.10, at 133-34; see also *Raven Red Ash Coal Co. v. Ball*, 39 S.E.2d 231, 237 (Va. 1946) (granting recovery for additional use of easement even though use caused plaintiff no tangible loss because “justice plainly requires the law to imply a promise to pay a fair value of the benefits received”). Similarly, an embezzler may replenish the amount of embezzled funds, but he or she still will have to answer the original victim's unjust enrichment claim for any profits derived from the funds, because the act of embezzlement violated the victim's rights. 1983 Tentative Draft, *supra* note 11, § 1 cmt. g.

¹⁰¹ See *supra* note 63 and accompanying text (describing pressures on indigenous groups to resettle).

¹⁰² *HPI Health Care Servs., Inc. v. Mt. Vernon Hosp., Inc.*, 545 N.E.2d 672, 679 (Ill. 1989); *Paffhausen v. Balano*, 1998 ME 47, ¶ 6, 708 A.2d 269, 271 (noting that unjust enrich-

(such as a devious act or intent) or circumstance (such as the duress of the plaintiff) that makes the retention of an enrichment unjust.¹⁰³

In instances of a subtraction from the plaintiff, courts generally have found the enrichment to be legally unjust when it was achieved mischievously or, for lack of a better term, inequitably.¹⁰⁴ For example, if a plaintiff is ignorant of the enriching qualities of an asset or does not have the capacity to protect the asset, the enrichment may be considered unjust.¹⁰⁵ On the other hand, if a plaintiff voluntarily transfers an asset to a defendant who is free from misconduct, the defendant's enrichment will not be actionable.¹⁰⁶ This latter scenario, however, is unlikely in the indigenous setting, where the benefits given up by indigenous people usually are conferred, if not entirely involuntarily, under significant duress.¹⁰⁷ In such a case, the injustice element would be satisfied.

The ability to satisfy the element of injustice by pointing to the commission of a wrong makes the indigenous claim even stronger.

ment applies when "on the grounds of fairness and justice, the law compels performance of a legal and moral duty to pay").

¹⁰³ 1 Michael Eisenstein, *Palmer's Law of Restitution* § 1.7, at 26 (Cumulative Supp. No. 2, 1996) ("There must be some operative act, intent, or situation to make enrichment unjust."); see also *HPI Health Care*, 545 N.E.2d at 679 (noting that to succeed on unjust enrichment claim, plaintiff had to show that defendant's conduct was wrongful or that its claim to benefit was superior to that of defendant). The circumstances or reasons that give rise to a finding of injustice do not always have to be delineated precisely. For example, in *Anderson v. DeLisle*, 352 N.W.2d 794 (Minn. Ct. App. 1984), the plaintiff contracted to buy real estate from the defendants and made substantial improvement upon the property. *Id.* at 795. The plaintiff ultimately defaulted on the contract, but the appellate court allowed recovery for the improvements. In support of its ruling, the court noted that the defendants contracted for improvements and purposefully were silent while the plaintiff made the improvements because they knew there was little chance of the plaintiff fulfilling the contract, thereby allowing them to keep their property with the improvements. *Id.* at 796.

¹⁰⁴ See, e.g., *Hershey Foods Corp. v. Ralph Chapek, Inc.*, 828 F.2d 989, 999 (3d Cir. 1987) (stating that to prove unjust enrichment, plaintiff "must show that the party against whom recovery is sought either wrongfully secured or passively received a benefit that would be unconscionable for the party to retain without compensating the provider"); see also *Burrows*, supra note 71, at 21-23 (introducing unjust enrichment by subtraction as method for looking at factors of unjustness).

¹⁰⁵ The cases on unjust enrichment consider the presence of the following factors as proof of what is legally unjust: "mistake, ignorance, duress, exploitation, legal compulsion, necessity, failure of consideration, illegality, incapacity, ultra vires demands by public authorities, and the retention of the plaintiff's property without his consent." *Burrows*, supra note 71, at 21.

¹⁰⁶ On this point, Professor Palmer provided the example of *Shockley v. Wickliffe*, 148 S.E. 476 (S.C. 1929). 1 *Palmer*, supra note 12, § 1.7, at 41-42. In that case, the plaintiff paid a debt, but he was unable to find proof of the payment. He therefore paid the debt a second time, and the court denied recovery because the payment was voluntary. *Shockley*, 148 S.E. at 477.

¹⁰⁷ See supra notes 36-40, 43-45 and accompanying text.

Simply put, when the defendant commits a wrong, such as a tort, the ensuing enrichment may be unjust.¹⁰⁸ Yet, the defendant does not have to commit an actionable civil wrong for the enrichment to be unjust.¹⁰⁹ For example, a defendant who benefits through the unauthorized use of his neighbor's goods may be liable for unjust enrichment regardless of whether he would be liable as a converter.¹¹⁰ Similarly, circumstances resembling defenses to the enforcement of a contract, such as undue influence, duress, and unconscionability, also may make the retention of an enrichment unjust in a noncontractual setting.¹¹¹ Perhaps most important in the indigenous context, the injustice element may be satisfied when the defendant in general has taken advantage of difficult circumstances confronting the plaintiff.¹¹² Thus, indigenous plaintiffs can satisfy the requirement of injustice when an MNC or its government partner has committed tortious conduct in violation of human rights norms, as in the Unocal setting; when the plaintiffs have been forced, without consultation, to give up their land for the benefit of an MNC, as in a Freeport-type case; or when it may be asserted that an MNC generally has taken advantage of an indigenous group's disadvantaged position.

That a third party most likely perpetrated the wrongful conduct against the indigenous plaintiffs does not preclude fulfillment of the unjustness element. The critical point is that the benefit resulted from some wrong to the plaintiff.¹¹³ Indeed, the relative innocence of a particular defendant may preclude the ability of a plaintiff to assert other claims and necessitate the claim of unjust enrichment.¹¹⁴ Put

¹⁰⁸ See Burrows, *supra* note 71, at 23 (noting that on "a general level" wrong to plaintiff is unjust but will not always warrant restitution).

¹⁰⁹ Cf. Barker, *supra* note 71, at 470 (noting that wrongful gains "can include . . . gains [that] have not been attained via the breach of any primary legal duty").

¹¹⁰ Restatement (Second) of Restitution § 45(2) (Tentative Draft No. 2, 1984) [hereinafter 1984 Tentative Draft].

¹¹¹ See 1983 Tentative Draft, *supra* note 11, § 1 cmt. b (giving circumstance where gain acquired through abuse of position is disgorged as example of deterrent function of restitution); cf. G.H.L. Fridman & James G. McLeod, *Restitution* 231-43 (1982) (discussing role of equitable analogues of compulsion, such as undue influence and unconscionability, in Canadian law of restitution).

¹¹² See generally Burrows, *supra* note 71, at 189-204 (analyzing unjust enrichment for exploitation).

¹¹³ See 1984 Tentative Draft, *supra* note 110, § 1 cmt. i ("In many cases of unjust enrichment the person who owes restitution to the claimant will have acquired a benefit either directly from the claimant or through an intermediary who wrongfully inflicted a loss on him."); 1 Palmer, *supra* note 12, § 2.20, at 221 ("One who is the innocent recipient of a benefit that came from the plaintiff by virtue of the wrongful act of a third person is obliged to make restitution . . .").

¹¹⁴ See *supra* notes 11-12 and accompanying text; see also 1 Palmer, *supra* note 12, § 1.7, at 44 ("The idea of unjust enrichment permeates almost the whole of restitution and occasionally is called upon to explain the relief given when anything more precise defies formu-

differently, “[t]here are times when about all one can say in support of restitution is that it is just for the plaintiff rather than the defendant to have the benefit.”¹¹⁵ Provided this background, indigenous plaintiffs may satisfy the final element of their claim not only because there is an identifiable act or situation that makes an MNC’s retention of the benefit unjust, but also because they simply may have a superior right to the benefits derived from the land than does an MNC.¹¹⁶

D. Potential Defenses to Unjust Enrichment Claims of Indigenous Peoples

Substantive defenses to unjust enrichment claims generally seek either to deny the existence of an enrichment or to argue against any injustice in the enrichment.¹¹⁷ For instance, a defendant may argue that whatever benefit he may have received from the plaintiff has disappeared or that he relied upon the plaintiff’s representation that the benefit was for the defendant to keep.¹¹⁸ While it is doubtful that these typical iterations of substantive defenses would bear upon indigenous claims against MNCs,¹¹⁹ the likely arguments to be offered by

lation.”) *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000), serves as a case on point. In that case, the trial judge granted summary judgment on plaintiffs’ claims under the Alien Tort Claims Act for Unocal because, though it knew about the misconduct of its government partners, it was not an active participant in the actions committed against the indigenous plaintiffs. *Id.* at 1310.

¹¹⁵ 1 Palmer, *supra* note 12, § 1.7, at 44.

¹¹⁶ Cf. Birks, *supra* note 76, at 326-27 (examining deliberate exploitation as basis for liability to make restitution).

¹¹⁷ See Burrows, *supra* note 71, at 27-28 (noting that certain defenses to unjust enrichment claims go primarily to enrichment while others go to alleged injustice).

¹¹⁸ See generally *id.* at 421-40 (discussing change of position and estoppel defenses to unjust enrichment claims).

¹¹⁹ The lucrative nature of the projects that attract MNC attention in the indigenous context and the size and stature of such MNCs make a change of position defense implausible. It is highly unlikely that a company such as Freeport would be able to argue successfully that the profits from its exploitation of indigenous land and resources had vanished and it found itself in such financial straits that any enforcement of a claim against it would be inequitable. Similarly, it would be specious for an MNC to argue that an indigenous group promised the exploitation of its land to the MNC for the MNC’s own gain. As noted previously, indigenous groups often are not consulted prior to the deprivation of their land, and if they agree to give up any territory to their detriment, it is usually because they are under duress and have no choice. See *supra* notes 36-40, 43-45 and accompanying text.

Other traditional arguments put forth by defendants include limitation, incapacity, and illegality. Burrows, *supra* note 71, at 27, 439-72. The latter two defenses apply in straightforward contract cases that do not capture the MNC-indigenous relationship. The first defense, limitation, may have some relevance to the indigenous cases, but only when the indigenous plaintiffs bring an unjust enrichment claim after the expiration of the statute of limitations and the court does not permit an equitable tolling.

MNCs still may be categorized as enrichment and injustice defenses.¹²⁰

1. *Defenses to Injustice*

Perhaps the most difficult aspect of any unjust enrichment inquiry is determining when a particular enrichment truly is unjust.¹²¹ Therefore, an MNC's preferred defense most likely would seek, first, to vitiate any alleged injustice.¹²² An MNC may begin by asserting that certain features of its investment in a particular country mitigate the unjustness of its enrichment at the indigenous plaintiffs' expense. For instance, Freeport and Unocal each would argue that their investment had a positive effect on the respective national economies of Indonesia and Burma.¹²³ From the MNC's perspective, any benefit it received consequently was just.

¹²⁰ In addition to substantive defenses, an MNC almost certainly would respond to any claim by an indigenous person with a number of prudential and procedural defenses that, if successful, would act to bar the court's jurisdiction. See *supra* note 6. For instance, Texaco successfully invoked *forum non conveniens* and the doctrine of international comity in *Sequihua v. Texaco, Inc.*, 847 F. Supp. 61 (S.D. Tex. 1994). Likewise, insofar as the conduct at issue involves official acts of a foreign state, the act-of-state and political question doctrines could be relevant in the indigenous setting. In *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997), the district court rejected Unocal's argument that the act-of-state doctrine precluded jurisdiction, *id.* at 892-95, but did note that the doctrine operated as an absolute bar to any of the plaintiffs' claims based on the expropriation of property, *id.* at 898. Additionally, if the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1602-1611 (1994), precludes jurisdiction over the government partner of an MNC, the MNC likely will argue, as Unocal did, that the case must be dismissed because the government partner is an indispensable party. *Id.* at 889.

While these prudential concerns bear on indigenous cases in general and should be considered with proper weight, the fact that they do not relate specifically to unjust enrichment claims precludes a more detailed discussion in this Note. Nevertheless, it should be acknowledged that thorough analyses of these defenses have been conducted elsewhere. See, e.g., Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. Colo. L. Rev. 1395 (1999) (analyzing resurgent formalistic application of political question doctrine, act-of-state doctrine, and dormant foreign affairs preemption); Armin Rosenzanz & Richard Campbell, *Foreign Environmental and Human Rights Suits Against U.S. Corporations in U.S. Courts*, 18 Stan. Envtl. L.J. 145, 179-205 (1999) (discussing applicability of *forum non conveniens*, international comity, act-of-state doctrine, and FSIA in suits against U.S. corporations); Zia-Zarifi, *supra* note 9, at 120-43 (examining procedural and prudential limitations of applying Alien Tort Claims Act against MNCs for conduct overseas).

¹²¹ 1 Palmer, *supra* note 12, § 1.7, at 41 ("Issues of considerable difficulty . . . arise . . . [when] the problem is whether retention of a recognizable enrichment is unjust."); Kull, *supra* note 10, at 1226 ("The central problem of the law of restitution is to identify those instances of enrichment that the law regards as unjust . . .").

¹²² The ensuing arguments are not exhaustive, but, in the absence of a real case with concrete facts, they constitute the most likely defenses to arise in the MNC-indigenous context.

¹²³ Freeport's presence in Indonesia contributed to tax and export revenues and furthered technological and infrastructure development. 1994 Transnational Investments Re-

Such a proffered justification can cut two ways. On the one hand, the activity of the MNC may be a boon in real economic terms to the economy of the hosting nation. Therefore, however unfortunate some of the consequences of the investment, on balance the MNC activity is not unjust. On the other hand, indigenous peoples often do not—and did not in the given examples—gain from any of this wealth creation. Merely producing a positive economic effect in a country may not mitigate sufficiently the unjustness to the indigenous peoples who bear the primary burden of the investment without receiving any of the benefit. After all, the retention of a benefit obtained at the expense of a largely defenseless group would seem to offend notions of “good conscience”¹²⁴ and, therefore, be precisely the activity against which the unjust enrichment doctrine is designed to protect.¹²⁵

Firms such as Freeport and Unocal, however, also would argue that they specifically sought to minimize the detrimental effect of their investment projects on indigenous peoples. To that end, Freeport has financed vocational training programs in Irian Jaya and has worked with the Indonesian government to establish social services, schools, and resettlement areas for the indigenous peoples.¹²⁶ Unocal claims that the Yadana consortium has contributed qualified medical care, new or renovated hospitals, health centers, new schools, and improved roads and water systems.¹²⁷ In addition, according to Unocal, the project has compensated indigenous landowners for the expropriation of their land at a rate of \$2000 per acre.¹²⁸

Legitimate action to improve the social welfare of the indigenous population and to compensate the indigenous peoples for the exploitation of their resources would bear on the injustice of a particular enrichment. As such, it likely would provide an MNC with its strongest defense in the event that the welfare of the indigenous population actually improved and the compensation was achieved with the agree-

port, *supra* note 20, Annex ¶ 69. For its part, Unocal asserts that its presence brings jobs, training, and benefits to the local economy. *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1301 (C.D. Cal. 2000) (citing Unocal briefing document on investment in Burma); see also *Progress & Prosperity*, *supra* note 52, at Project Overview (claiming that socio-economic program affiliated with Yadana project “has brought real and immediate benefits to the 43,000 villagers living in a remote and impoverished region”).

¹²⁴ *HPI Health Care Servs., Inc. v. Mt. Vernon Hosp., Inc.*, 545 N.E.2d 672, 679 (Ill. 1989).

¹²⁵ See *supra* notes 11-14 and accompanying text.

¹²⁶ 1994 Transnational Investments Report, *supra* note 20, Annex ¶¶ 64-65. Even a report from the United Nations concedes that “[t]hese recent efforts . . . may offset some of the negative effects the mining operations have had on the Amungme people and their land.” *Id.* Annex ¶ 64.

¹²⁷ *Progress & Prosperity*, *supra* note 52, at Lasting Improvements.

¹²⁸ Yadana Report, *supra* note 52.

ment of the indigenous leaders. Nevertheless, the reality of the indigenous experience demonstrates that MNC claims of assistance would seldom defeat the unjustness element. There is no guarantee that a unilaterally imposed payment plan will reach all, or even most, affected indigenous peoples, as Unocal claims is true with the Yadana project. Furthermore, even if all indigenous peoples receive some form of compensation, it is not likely to be sufficient to compensate the loss fully.¹²⁹ While social welfare programs, resettlement plans, and the improvement of medical care may be designed to reduce this inadequacy, they are unlikely to do so where, as with Freeport in Indonesia, they are implemented without the consultation of the indigenous populations.¹³⁰

The persuasiveness of the policy argument underpinning these fact-based defenses is equally debatable. MNCs claim that investment in a country such as Burma provides a mechanism for engaging the population and encourages the Burmese people to embrace democratic principles. In turn, through investment, MNCs offer the best hope for encouraging an alternative to the authoritarian regime.¹³¹ Even if the immediate investment results in some harm to the indigenous population, the argument goes, there is a potential long-term benefit to the entire population, including indigenous groups.¹³² Thus, the appropriate policy is to encourage investment, and there is no injustice in any enrichment that results. Yet, it is not clear that permitting an MNC to collaborate with a repressive government without fear of legal repercussions is more likely to deter additional abuses of indigenous populations than is holding an MNC accountable for the effects of its investment.¹³³

¹²⁹ Admittedly, it is debatable whether any remedy short of full restoration of the land would be adequate. Nevertheless, unjust enrichment would provide grounds for recovery that, though perhaps not completely satisfactory, will offer the closest approximation to restitution and improve the indigenous plaintiffs' position. See *infra* note 178 and accompanying text (noting ability of plaintiffs to recover profits of defendant under unjust enrichment claim).

¹³⁰ See *supra* note 63 (discussing forced resettlement of indigenous population in Indonesia).

¹³¹ See Sacharoff, *supra* note 41, at 927-28 (summarizing MNCs' response to criticism of investment in countries such as Burma, Indonesia, China, and Nigeria).

¹³² See *id.* at 928 (noting that Unocal, among others, argues that its corporate duty is to maintain presence in Burma in order to promote long-term prospects of Burmese people); see also Progress & Prosperity, *supra* note 52, at Long-Term Benefits (arguing that MNCs "can contribute significantly to improvements in the quality of life and economic prosperity in developing countries").

¹³³ This is not to say that deterrence is the principle goal of unjust enrichment. While it does play a role in unjust enrichment doctrine, see *infra* notes 168-69 and accompanying text, the primary focus of unjust enrichment is restoring equity between the parties, regardless of the effect on future behavior. See *infra* note 157 and accompanying text.

The recognition that indigenous peoples have received at the international level further weakens the MNCs' potential policy defense. The international community increasingly has shifted its focus from assimilation of indigenous groups to preservation of these groups and has come to respect, at least outwardly, indigenous cultures and identity.¹³⁴ While no consensus has been reached on a definition of indigenous peoples, the existence of multiple definitions is indicative of indigenous peoples' status as subjects of concern to various international institutions.¹³⁵ Given this broad recognition of indigenous rights and the importance of indigenous land, the international policy appears to disfavor enrichment resulting from the exploitation of indigenous peoples without their consultation or agreement.

There remain two additional defenses that MNCs may offer to the unjustness element, although indigenous plaintiffs would have strong responses to each. First, an MNC may make an argument similar to the bona fide purchaser for value defense.¹³⁶ Specifically, an MNC confronted with an indigenous claim may maintain that it conferred good value to a particular government in exchange for the benefit at issue.¹³⁷ The MNC then would reason that it would not serve

¹³⁴ S. James Anaya, *Indigenous Peoples and International Law Issues*, 92 *Am. Soc'y Int'l L. Proc.* 96, 98-99 (1998) (discussing why efforts of indigenous peoples have been noteworthy).

¹³⁵ *Id.* at 96-97 (discussing results of indigenous peoples' efforts to gain attention of international organizations). To this end, the United Nations has proposed a declaration that includes recognition of the right of indigenous peoples to self-government. Report of the Working Group on Indigenous Populations on Its Eleventh Session, U.N. ESCOR, Comm'n on Human Rights, 45th Sess., Annex 1, Agenda Item 14, art. 3, at 52, U.N. Doc. E/CN.4/Sub.2/1993/29 (1993). For more details on the function of the working group, see Anaya, *supra* note 23, at 152-54; see also Erica-Irene Daes, *The United Nations and Indigenous Peoples from 1969 to 1994, in Becoming Visible*, *supra* note 21, at 51, 52-54. The Inter-American Commission on Human Rights has proposed a similar declaration. Proposed American Declaration on the Rights of Indigenous Peoples, Inter-Am. C.H.R., art. 15, OEA/Ser/L/V/II.95, doc. 6 (1997), <http://www.summit-america.org/Indigenous/Indigenous-Declaration-end.htm>. In addition, the Rio Declaration of the 1992 Earth Summit recognized environmental security as a vital right of indigenous peoples. U.N. Conference on Env't & Dev., Rio Declaration on Environment and Development princ. 22, U.N. Doc. A/Conf.151/5/Rev.1 (1992), reprinted in 31 *I.L.M.* 874, 880 (1992). For a thorough review of the inroads that indigenous peoples have made as a subject of concern to the international community, see generally Russel Lawrence Barsh, *Indigenous Peoples in the 1990s: From Object to Subject of International Law?*, 7 *Harv. Hum. Rts. J.* 33, 34 & n.5 (1994).

¹³⁶ See Burrows, *supra* note 71, at 27, 472-75 (identifying bona fide purchaser for value as common defense to unjust enrichment claim).

¹³⁷ See 1 Palmer, *supra* note 12, § 2.20, at 221 (noting that defendant may have to make restitution "unless he gave value for the benefit").

justice to deprive it of such a benefit simply because its contracting partner had obtained the benefit in an improper fashion.¹³⁸

A bona fide purchaser for value defense, however, requires the defendant to be free from knowledge of the original wrong.¹³⁹ Freeport, Unocal, and other MNCs are sophisticated parties who know or should know that when they contract with a government to develop natural resources in a remote area, the government partner may provide for the development at the expense of the indigenous population. When such knowledge is present, as in the MNC-indigenous dynamic, the primary policy underlying the defense—the inviolability of contracts¹⁴⁰—loses its force. In fact, the MNC's knowledge of the mistreatment that indigenous peoples receive in connection with the relevant venture may provide further content to the injustice of the enrichment: The MNC presumably has a choice in pursuing the given venture, while the indigenous peoples most likely will not have a choice, for example, in giving up their land.¹⁴¹

Finally, MNCs may attempt to capitalize on the difficulty of determining the extent to which an enrichment accrues from a subsequent contribution by the defendant, thereby mitigating the unjustness of the initial enrichment.¹⁴² Since the loss of indigenous land and resources in many ways is an incalculable expense to the plaintiff, the MNC defendant could argue that the quantifiable benefit created from its ingenuity in using indigenous resources far surpasses the plaintiffs' loss.¹⁴³ In addition, the MNC may have used the original profits from the exploitation of indigenous resources wisely, thereby creating an even greater enrichment than the original cost to

¹³⁸ Cf. Birks, *supra* note 76, at 447 (“[T]he nature and purpose of the defence of *bona fide* purchase for value without notice is to allow the recipient who comes within the terms of the defence to take his enrichment free of all adverse claims.”).

¹³⁹ See 1984 Tentative Draft, *supra* note 110, § 45 *illus.* 10 (providing example of defendant's liability for restitution when defendant purchases product that defendant knows is stolen and then resells for profit); Birks, *supra* note 76, at 439 (noting that bona fide purchaser for value defense may defeat restitutionary claim if defendant is “without notice of the facts entitling the plaintiff to his claim”).

¹⁴⁰ See Burrows, *supra* note 71, at 472-73 (identifying sanctity of contracts as principal root for bona fide purchaser for value defense).

¹⁴¹ Cf. 1 Palmer, *supra* note 12, § 5.1, at 571 (analyzing defendant's choice to accept and retain benefit as reason for restitution in contractual default setting).

¹⁴² See 1983 Tentative Draft, *supra* note 11, § 1 *cmt.* i (“[T]here is an independent principle that the receipt of gain is not unjust enrichment to the extent that the recipient generated it by his own rightful contribution of effort, capital, or skill.”); 1 Palmer, *supra* note 12, § 2.12, at 161 (“One of the recurring problems in the law of restitution is to determine whether, or the extent to which, the defendant's gain is the product not solely of the plaintiff's interest but also of contributions made by the defendant.”).

¹⁴³ See Laycock, *supra* note 10, at 1287-88 (discussing instances where gains to defendant exceed loss to plaintiff).

the indigenous peoples. According to the MNC, it would not be just to award indigenous plaintiffs the gains from its own industry to the extent those gains exceed the expense to the plaintiff.¹⁴⁴

This last defense encounters a familiar problem, namely, the MNC's notice of wrongful conduct. A defendant that receives an enrichment may have to pay out the profits that derive from its own improvements to the asset if it knowingly acquired the asset in a wrongful manner.¹⁴⁵ Therefore, even though indigenous peoples would not have used the resources in the same manner as the MNC, they still may have a claim under unjust enrichment for the profits that the MNC made through its industrious, but wrongful, use of the resources.

2. *Defenses to Enrichment*

In addition to the foregoing arguments against the unjustness element, an MNC may attempt to deny the existence of an enrichment in two ways. First, an MNC may try to capitalize on the inherent difficulty of establishing the bounds of enrichment.¹⁴⁶ Freeport and Unocal both used subsidiaries to participate in the projects that gave rise to the hypothetical unjust enrichment claims of indigenous plaintiffs.¹⁴⁷ In theory, a similarly situated MNC could deny the existence of an enrichment and hope that the fundamental problem of tracing the profits from the ventures would derail the plaintiffs' case.¹⁴⁸

The second enrichment defense might focus on the nature of the enrichment. When the expense to the indigenous population occurs at the outset of a project and the benefit to the MNC is long-term, the MNC may concede that there has been a harm while denying the harm resulted in any gain for the MNC. The Unocal facts present an example of this potential defense: The indigenous population suffered

¹⁴⁴ See 1 Palmer, *supra* note 12, § 2.20, at 224-25 (noting that courts have refused to deprive innocent party of profits made through subsequent use of property received).

¹⁴⁵ See 1984 Tentative Draft, *supra* note 110, § 45 cmt. c (noting that converter owes full restitution "if when making the improvement he was aware that he had acquired the property wrongfully").

¹⁴⁶ See Barker, *supra* note 71, at 459 (suggesting that concerns over use of unjust enrichment reflect "questions about the appropriate limits of the concept of an 'enrichment'").

¹⁴⁷ *Doe v. Unocal Corp.*, 110 F. Supp. 2d 1294, 1298 (C.D. Cal. 2000) (noting that Unocal incorporated Unocal Myanmar Offshore Company to hold its interest in Yadana project); 1994 Transnational Investments Report, *supra* note 20, Annex ¶ 59 (noting that majority-owned subsidiary carries out Freeport's operations in Indonesia).

¹⁴⁸ *Texaco*, for one, sought to deny liability for harms to the Ecuadorian indigenous population on the grounds that its subsidiaries made all relevant decisions. See Eyal Press, *Texaco on Trial*, *Nation*, May 31, 1999, at 11. For a discussion of the use of tracing as a technique to obtain a remedy to an unjust enrichment claim, see Burrows, *supra* note 71, at 57-76.

severe abuses during the construction of the Yadana project's pipeline,¹⁴⁹ but Unocal's profits were—and are—dependent upon the actual operational status of the pipeline. Accordingly, a claim of unjust enrichment brought against Unocal before completion of the pipeline could be met with an argument that Unocal's actions, or those of its partners, had not produced an enrichment.

While both defenses to enrichment would be options for MNCs to consider, they are not without weaknesses. The law may look beyond the protestations of the defendant and find that simply choosing to accept the venture illustrates its enriching value.¹⁵⁰ Consequently, even if financial profits from the venture were not obtainable through an accounting, the existence of the venture itself suggests an enrichment, especially if it involves long-term investment or includes a series of agreements with governing authorities. For instance, Freeport's mining operations have involved multiple agreements with Indonesian authorities over a sustained period of time.¹⁵¹ This course of dealing could be a *prima facie* indicator that Freeport derives some benefit from its activities in Irian Jaya.¹⁵²

The ability to infer an enrichment from a course of dealing is closely related to the ability to define that element of a restitution claim in terms other than economic profit. What is really at stake for MNCs in these ventures is the right to exploit some resource. From the MNC perspective, this right is transferable—meaning it has some exchange value—and represents the capacity for future income.¹⁵³ Thus, while profits may accrue at a future date, the enrichment flows to the MNC when it procures the “right” to exploit the resources.

Seen in this light, the argument made on behalf of an MNC, such as Unocal, which receives profits from an investment years after the expense to the indigenous peoples,¹⁵⁴ is less a defense to a claim of unjust enrichment than a proposition about the appropriate remedy

¹⁴⁹ See *supra* notes 68-70 and accompanying text.

¹⁵⁰ See Birks, *supra* note 76, at 114-16 (noting that when defendant chooses to accept benefit rather than reject it, defendant loses ability subjectively to devalue benefit at issue). The element of enrichment also is satisfied when the benefit is of the kind that can be turned into money and does in fact turn into money. *Id.* at 121-24.

¹⁵¹ 1994 Transnational Investments Report, *supra* note 20, Annex ¶¶ 59-60 (detailing history of Freeport's operations in Indonesia and pointing out that Freeport signed new contract in 1991).

¹⁵² Of course, evidence such as Freeport's multiple agreements with Indonesia may not be necessary to counter an MNC claim that it has not received remuneration from its subsidiary. As has been noted, the right to mine the land is itself an enrichment. See *supra* notes 79-80 and accompanying text.

¹⁵³ These characteristics may define an enrichment. See *supra* note 78 and accompanying text.

¹⁵⁴ See *supra* note 59 and accompanying text.

for the plaintiffs. The delayed profits only mean that the MNC might not have to pay *yet*.¹⁵⁵ In other words, indigenous plaintiffs still will have a viable unjust enrichment claim, for which the appropriate judicial response may be an equitable remedy entitling the plaintiffs to a percentage of future proceeds.¹⁵⁶

III

UNJUST ENRICHMENT POLICIES AND REMEDIES IN THE INDIGENOUS CONTEXT

Thus far, this Note has examined the substantive elements of a potential unjust enrichment claim by indigenous plaintiffs against MNCs, as well as the likely substantive defenses in response. The value of an unjust enrichment claim to indigenous plaintiffs, however, does not reside solely in the ability of the plaintiffs to state a *prima facie* case. Indeed, the extent to which indigenous plaintiffs and unjust enrichment are a strong match becomes most apparent upon recognition of the harmony between indigenous concerns and the policies and remedies of unjust enrichment.

A. Correlation Between Unjust Enrichment Policies and Indigenous Goals

The primary policy undergirding an unjust enrichment claim—achieving equity between the parties by preventing the defendant's retention of a benefit wrongly achieved at the plaintiff's expense¹⁵⁷—is consistent with an indigenous plaintiff's immediate goal of holding an MNC accountable for the plaintiff's loss. There are additional policies, however, that buttress an unjust enrichment claim and are in consonance with deeper, long-term goals of indigenous peoples in general. To start, unjust enrichment reflects an underlying concern for the well-being of a resource holder and seeks to protect control of the

¹⁵⁵ See *infra* notes 178-80 and accompanying text.

¹⁵⁶ See *infra* notes 178-79 and accompanying text. This Note does not argue that any of the foregoing defenses should be dismissed casually. They are potential arguments available to MNC defendants and, on a case-by-case basis, should be evaluated to determine the extent to which they militate against an unjust enrichment claim. Nevertheless, for each substantive defense discussed, there are strong counterarguments that may protect the satisfaction of the enrichment and injustice elements, thereby offering an indigenous plaintiff hope for a successful unjust enrichment claim.

¹⁵⁷ See Restatement of Restitution § 3 (1937) (stating principle that “[a] person is not permitted to profit by his own wrong at the expense of another”). But cf. Steve Hedley, “Unjust Enrichment,” 54 *Cambridge L.J.* 578, 592-94 (1995) (noting that despite intuitive moral appeal of unjust enrichment, simply citing principle against unjust enrichment is vacuous exercise and, therefore, unjust enrichment argument must have more concrete justification to advance its use).

resource for its possessor.¹⁵⁸ To the extent that this goal encompasses resources that a plaintiff considers to be crucial to his or her identity,¹⁵⁹ it conceptually parallels indigenous desires to maintain identity and culture.

An even stronger connection exists between indigenous autonomy goals and unjust enrichment's embodiment of judicial notions of equality. Many indigenous peoples have responded to their history and the continuing precariousness of their position in society by evincing aspirations for autonomy, or at least some form of self-government, in order to combat their subordinate position and to protect their unique culture and way of life.¹⁶⁰ Yet, in light of their chronic customary underrepresentation in—and the persistent prejudice by—their governments, indigenous peoples' ability to achieve these autonomy goals through political channels may be hampered. While it is beyond the power of unjust enrichment to alter significantly the subordinate status of indigenous peoples, an unjust enrichment claim may provide at least some form of legal recognition of their equal standing.¹⁶¹ By prohibiting the enrichment of one party at the expense of another, unjust enrichment fortifies the relationships between plaintiffs and defendants as equals.¹⁶² Ultimately, a successful unjust enrichment claim could serve notice on MNCs to treat indigenous peoples more equitably, thereby allowing the indigenous peoples to achieve a form of indirect liberty heretofore foreign to them.

Broader policies supplementing the aims of unjust enrichment also may serve indigenous equality concerns to varying degrees. For example, unjust enrichment is concerned, to some degree, with distributive justice for society at large as well as corrective justice for the

¹⁵⁸ See Hanoch Dagan, *Unjust Enrichment: A Study of Private Law and Public Values* 14-16, 22 tbl.1 (1997) (examining rationales for unjust enrichment as method of recovery).

¹⁵⁹ See *id.* at 41-43 (describing sense of attachment that people may have to their resources).

¹⁶⁰ Kingsbury, *supra* note 2, at 421 (suggesting that desire for autonomy and self-determination is one area of commonality among indigenous groups). For a thorough discussion of the international practice of self-determination and its relevancy to indigenous peoples, see Anaya, *supra* note 23, at 80-88. Self-determination is not only relevant to a discussion of indigenous peoples because of their desire to attain it, but also because indigenous rights with respect to self-determination historically have been violated. See *id.* at 86 (discussing colonial legacy of violating indigenous peoples' self-determination). But cf. Donald L. Horowitz, *Self-Determination: Politics, Philosophy, and Law*, in *Ethnicity and Group Rights* 421, 421-63 (Ian Shapiro & Will Kymlicka eds., 1997) (cautioning that misuse of principles of self-determination can exacerbate conflict that they seek to avoid).

¹⁶¹ See McBride & McGrath, *supra* note 74, at 35-36 (noting that unjust enrichment expresses correct view of equal relationship between plaintiff and defendant).

¹⁶² See *id.* (asserting that purpose of common law duties is to safeguard relationships between citizens and that restitutionary duty achieves this result).

individual claimant.¹⁶³ As scholars have noted, “the moral force underpinning unjust enrichment” may be found in Aristotle’s argument that the purpose of justice is to maintain “‘an equilibrium of goods among members of society.’”¹⁶⁴ At the same time, the message underlying unjust enrichment is that one who gains at the expense of another is morally responsible for the correction of that infringement.¹⁶⁵ While it is doubtful that a successful unjust enrichment claim would achieve corrective justice for indigenous peoples,¹⁶⁶ it could promote the aims of distributive justice by disgorging the profits of an MNC and redistributing them to indigenous victims.¹⁶⁷ This outcome would not compensate indigenous peoples fully for the incalculable loss associated with their land, and it therefore would fall short of effecting real equality for the indigenous plaintiffs. Nevertheless, at a minimum, a redistribution would reflect judicial recognition of equality—an improvement from where many indigenous peoples now stand.

Finally, unjust enrichment has a deterrence rationale that coincides with indigenous peoples’ aspirations to protect their land.¹⁶⁸ By ensuring that a defendant may not benefit from a wrong, unjust enrichment seeks to deter the commission of future wrongs.¹⁶⁹ Realisti-

¹⁶³ See Dagan, *supra* note 158, at 31-33 (arguing that corrective justice explanation for unjust enrichment is too limited and that distributive justice underpins unjust enrichment); see also Barker, *supra* note 71, at 468-74 (arguing that law of restitution may be understood largely in corrective justice terms). Professor Dagan notes that the distributive nature of unjust enrichment in part dictates its aforementioned embrace of the well-being of the resource holder. Hanoch Dagan, *The Distributive Foundation of Corrective Justice*, 93 *Mich. L. Rev.* 138, 142 (1999) (“[T]he distributive scheme underlying the law of unjust enrichment corresponds with the level of control, well-being, and sharing that the relevant legal community seeks to accord its members.”).

¹⁶⁴ Burrows, *supra* note 71, at 20 (quoting L.L. Fuller & William R. Perdue, *The Reliance Interest in Contract Damages*, 46 *Yale L.J.* 52, 56 (1936)).

¹⁶⁵ See Barker, *supra* note 71, at 465 (explaining individualist justifications for unjust enrichment subscribed to by certain theorists).

¹⁶⁶ Corrective justice in the indigenous context faces two problems. First, it is unlikely that lost land would be restored to indigenous peoples. Second, assuming that it was possible to restore lost indigenous land, it is not clear that the intangible expenses associated with the original loss of the territory, such as the loss of identity and culture, truly can be restored.

¹⁶⁷ See *infra* notes 178-80 and accompanying text.

¹⁶⁸ See 1983 Tentative Draft, *supra* note 11, § 1 cmt. b (describing deterrence function of unjust enrichment, but noting that it is not primary concern of restitution); see also Dagan, *supra* note 163, at 152 (noting that deterrence rationale of unjust enrichment arises from “an entailment of the [resource holder’s] entitlement to control”).

¹⁶⁹ See Christopher T. Wonnell, *Replacing the Unitary Principle of Unjust Enrichment*, 45 *Emory L.J.* 153, 191 (1996) (noting that justification for unjust enrichment on deterrence grounds is that “first step toward discouraging people from committing wrongs is to make sure they cannot benefit from them”); see also Barker, *supra* note 71, at 465 (suggesting that argument for granting of restitutionary awards essentially is to strengthen de-

cally, most governments will not be deterred from their efforts to exploit the natural resources often found in indigenous territory.¹⁷⁰ The best hope for deterrence, then, may be to impose liability on the complicit MNC. Typically, the further an MNC is removed from an abuse, the less likely it is to take responsibility to correct the wrong.¹⁷¹ A successful unjust enrichment claim would bring responsibility to bear on the MNC, thereby encouraging other MNCs to consider the effects of future projects on indigenous populations and to consult with indigenous groups before proceeding with those projects. Such a process, in theory, could save indigenous territory.¹⁷²

B. Remedial Appeal of Unjust Enrichment

The remedial scheme of unjust enrichment is well-suited for addressing both the practical and personal considerations of potential indigenous plaintiffs. A general appeal of unjust enrichment to potential plaintiffs is the flexibility it affords courts in molding remedies.¹⁷³ If the defendant has benefited unjustly through the use of plaintiff's property, the plaintiff may seek a money judgment or specific restitution of the property.¹⁷⁴ In fact, in the absence of an appropriate reme-

terrent functions of civil law). Deterrence is beneficial not only because it protects against harm to individuals, but also because it buttresses social institutions. The conduct at issue in an unjust enrichment scenario may be harmful to society at large because it violates the institutional models, such as property and contract, upon which society depends. See I.M. Jackman, *Restitution for Wrongs*, 48 Cambridge L.J. 302, 304-21 (1989) (arguing that goal of restitution rightly is to deter conduct that subverts key institutions, including property, contract, and relationships of trust and confidence).

¹⁷⁰ See *supra* note 36 and accompanying text (noting predilection of governing authorities to exploit indigenous land for personal gain); see also *supra* note 120 (noting doctrines providing foreign governments with immunity to suit in United States).

¹⁷¹ Barbara A. Frey, *The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of International Human Rights*, 6 *Minn. J. Global Trade* 153, 154 (1997) ("[C]orporations believe the further removed they are from human rights abuse, the lesser their degree of responsibility to act.").

¹⁷² It is unlikely, however, that unjust enrichment will be able to reach and deter all misconduct against indigenous peoples. Indeed, in a case where the most serious abuses are of a human rights nature and are perpetrated by governing authorities, as in *Unocal*, the most that unjust enrichment, or any other form of liability, likely will deter is future investment by MNCs rather than the abusive conduct at issue.

¹⁷³ See *Gen. Elec. Capital Corp. v. DirecTV, Inc.*, 94 F. Supp. 2d 190, 201 (D. Conn. 1999) ("The remedy of unjust enrichment is broad and flexible . . ." (internal quotation marks omitted)); Dagan, *supra* note 163, at 140 (noting range of possible measures of recovery under unjust enrichment).

¹⁷⁴ See 1983 Tentative Draft, *supra* note 11, § 8 ("The means of effecting restitution include money judgments, accounting, orders requiring specific restitution, other remedies affecting specific assets, self help, and setoff.").

dial precedent for an unjust enrichment claim, the court is free to mold the relief as justice requires.¹⁷⁵

This remedial elasticity may allow indigenous plaintiffs to overcome potential obstacles to any recovery. For instance, the usual measure of recovery in a quasi-contract scenario is the market value of the benefit.¹⁷⁶ Recovery may be denied in the absence of a feasible valuation of the benefit that accrues to the defendant.¹⁷⁷ On this basis, an MNC could refer to the indigenous assertion of an incalculable expense and argue that even if the elements of an unjust enrichment claim, including that of expense, are satisfied, the indigenous plaintiff must be denied a remedy. Fortunately for indigenous plaintiffs, the remedial scheme of unjust enrichment permits a response: Plaintiffs may be entitled to the value of an asset, such as land, or the proceeds from the asset, whichever is greater.¹⁷⁸ Thus, if the value of the indigenous loss is not ascertainable, the plaintiffs may recover a percentage of the MNC's profits, both current and future.¹⁷⁹

A remedy that focuses on the gains to the defendant is obviously of great practical import to indigenous plaintiffs. Foremost, as illustrated above, by placing the emphasis on the defendant rather than the plaintiff, an unjust enrichment remedy uniquely permits recovery when losses are not typically quantifiable.¹⁸⁰ In addition, in the event that tortious conduct is present, an unjust enrichment claim may be preferable to a tort claim insofar as it permits the plaintiff to recover an amount greater than the valuation of damages.¹⁸¹ To take a basic example: Suppose an action causes one dollar of damages to the plaintiff, but produces a five-dollar benefit to the defendant. Under a

¹⁷⁵ See 2 Palmer, *supra* note 12, § 11.6, at 525 (arguing for remedial flexibility to address mistake in transaction and noting that “[s]ometimes . . . it becomes necessary to mold the relief so as to do substantial justice in the case at hand”).

¹⁷⁶ 1 *id.* § 2.10, at 136.

¹⁷⁷ 1 *id.*

¹⁷⁸ See 1 *id.* § 2.10, at 138, § 2.12, at 158 (discussing recovery of profits as remedy).

¹⁷⁹ See Consistent with the remedial scheme of unjust enrichment, the precise percentage would be determined on an equitable basis as a court sees fit. *Supra* note 175 and accompanying text.

¹⁸⁰ See *Mass Transit Admin. v. Granite Constr. Co.*, 471 A.2d 1121, 1126 (Md. Ct. Spec. App. 1984) (“[T]he measure of the recovery is the gain to the defendant, not the loss by the plaintiff.”); 1984 Tentative Draft, *supra* note 110, § 45 cmt. c (“[T]he measure of liability may exceed both the loss to the claimant and the economic value of the utility of the property to him.”); Goff & Jones, *supra* note 75, at 606 (noting that unjust enrichment allows plaintiff to obtain accounting despite incurring little or no loss).

¹⁸¹ See Peter D. Maddaugh & John D. McCamus, *The Law of Restitution* 509 (1990) (asserting that action for restitution would be preferable where tortfeasor's gain exceeds quantum of damages to plaintiff). The applicability of this statement to the indigenous context assumes that an indigenous plaintiff actually would be able to make a tort claim against an MNC—an assumption that is far from certain.

tort remedy, the plaintiff could recover only the one dollar in damages, assuming there is no punitive award. In contrast, an unjust enrichment claim would allow the plaintiff to reach the entire five-dollar profit.

The focus of an unjust enrichment remedy on the defendant may have specific personal appeal for indigenous plaintiffs as well. The rationale for restitution's remedial preoccupation with the defendant's benefit, rather than the plaintiff's loss, is that the defendant somehow possesses the benefit unjustly, and the goal of the remedy should be to ensure that such a benefit is not retained.¹⁸² In this sense, an unjust enrichment remedy focuses more on the defendant's bad conduct or character than on the plaintiff's status as a victim. A judicial result that does not portray indigenous peoples as victims may be attractive to potential indigenous plaintiffs and is in accord with indigenous autonomy goals.

Finally, there may be an additional symbolic reason for indigenous plaintiffs to prefer a restitutionary remedy in instances of MNC misconduct. By focusing on the harm incurred, an alternative remedy, such as tort damages, conceptually affirms the transaction that produced the harm. In contrast, an unjust enrichment remedy, by seeking to deny the defendant's retention of a benefit, disaffirms the transaction that produced the benefit.¹⁸³ This symbolic disapproval of the exploitation of indigenous land may lead indigenous plaintiffs to view unjust enrichment as a superior claim.

CONCLUSION

The indigenous people of the world number more than 300 million,¹⁸⁴ and they will survive with or without the doctrine of unjust enrichment. Unjust enrichment, however, does provide indigenous people with a tool to fight a serious problem: the exploitation of indigenous land and communities for the profit of MNCs.

This is not to say that unjust enrichment is the perfect solution. As an indigenous person once explained regarding the exploitation of the Amazon by oil companies: "I'm not looking for money for my children to inherit. It is the land that I want to leave them. That is

¹⁸² See 1 Palmer, *supra* note 12, § 2.12, at 165 (noting that basic remedial question is whether retention of benefit would be unjust).

¹⁸³ Cf. 1 *id.* § 2.4, at 68 (discussing theories of affirmance and disaffirmance as they apply to restitution and tort claims in election of remedies context). In other words, while a tort remedy merely compensates the victim but does nothing to change the prior event, a remedy under unjust enrichment would disgorge the benefit.

¹⁸⁴ José Paulo Kastrup, *The Internationalization of Indigenous Rights from the Environmental and Human Rights Perspective*, 32 *Tex. Int'l L.J.* 97, 103 (1997).

where our cultural roots are buried.’”¹⁸⁵ The ability of unjust enrichment to achieve this end is far from certain. Nevertheless, consistent with its origin as an equitable, novel solution,¹⁸⁶ unjust enrichment furnishes indigenous plaintiffs with a legitimate claim to hold MNCs accountable for their role in the exploitation of indigenous land. Furthermore, it does so in a manner that captures the characteristics and concerns of indigenous peoples. Thus, at a minimum, unjust enrichment would provide a step in the right direction for indigenous plaintiffs.

¹⁸⁵ Geer, *supra* note 33, at 350 n.68 (quoting Rafael Pandam, a director of CONAIE (Confederación de Nacionalidades Indígenas del Ecuador)).

¹⁸⁶ See *supra* notes 11-14 and accompanying text.

