

Conquest by Contract: Property Rights and the Commercial Logic of Imperialism in the Isthmus of Tehuantepec (Southern Mexico)

JULIA MCCLURE

University of Glasgow, UK

Property rights and contracts were important to the legal foundations of the Spanish Empire from the sixteenth century. The recognition of the property rights of indigenous people was part of the legal foundations of empire, but offered weak protection from the commercial logic of imperialism. In the twentieth and twenty-first centuries, the national and international recognition of indigenous property rights has increased at the same time that indigenous property has been threatened by the expansion of commercial interests in the name of development. Focusing on the Isthmus of Tehuantepec (southern Mexico), this article charts the historic tension between indigenous property rights and the expansion of commercial interests, and how, despite new rhetoric about protecting local communities and their natural resources, the shift to ‘sustainable development’ has not changed these dynamics.

Keywords: colonialism, development, Isthmus of Tehuantepec, Mexico, poverty, property, rights.

The expansion of the Spanish Empire was driven by, among other things, commercial interests. At the end of the fifteenth century, the Spanish Crown sponsored Columbus’s voyage across the Atlantic in order to find a western route to the luxury commodities markets in the Far East. While the Spanish Empire was driven by commercial logic, it had to justify any appropriation of labour and resources in moral and legal terms. Indigenous people were recognised as rights-bearing subjects as Spain laid the foundations of imperialism in the Americas in the sixteenth century and imperialism was extended via a system of legal contracts for the use of labour or resources in the Americas. The legal ecology of rights and contracts provided critical infrastructure for the construction of the Spanish Empire in Latin America. In the post-Independence era there were new recognitions of indigenous rights, but indigenous resources continued to be ceded for commercial advantage in the name of economic development. The recent shift to sustainable development has the rhetoric of protecting indigenous communities and their environments but has led to enclosure of more of their natural resources. This article uses historical analysis to contextualise indigenous communities’ experience of sustainable development within a longer legal history of imperialism. The article focuses

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on the Isthmus of Tehuantepec, a region of commercial significance since the dawn of European imperialism in the Americas.

In 1539 the Dominican friar Francisco de Vitoria (1486–1546) gave his lecture *De Indis*, which explained why the Amerindians must have property rights. Having examined the cases of property ownership among sinners, unbelievers, irrationals, children and madmen, Vitoria concluded that the Amerindians (whom he referred to as ‘barbarians’) ‘undoubtedly possessed as true dominion, both public and private, as any Christians’ (Vitoria, 1991: 250). Having established that the indigenous Americans had property rights and could not be lawfully dispossessed without good reason (which he also laid out), Vitoria explained how the Spanish could legally enter the Americas and access their resources. The first of these was the right of natural partnership and communication, *ius communicandi*, which Vitoria explained included the right to trade:

the Spaniards may lawfully trade among the barbarians, so long as they do no harm in their homeland. In other words, they may import the commodities which they lack, and export the gold, silver, or other things which they have in abundance; and their princes cannot prevent their subjects from trading with the Spaniards, nor can the princes of Spain prohibit commerce with the barbarians. (Vitoria, 1991: 250)

Vitoria’s explanations were grounded in the theory of *ius gentium*, the law of nations, which led to his recognition, by some, as the founder of international law (Brown, 1932). Vitoria helped build the legal foundations for the commercial logic of Spanish imperialism. The Spanish Empire continued to expand via a system of public–private partnerships with commercial interests.

The property rights of indigenous people were recognised early in the Spanish conquest as part of an embryonic emergence of international law, but these legal rights did not safeguard indigenous communities against the dispossession of their lands and resources. In the twentieth and twenty-first centuries the legal recognition of indigenous rights has increased at the national and international level, at the same time as indigenous communities continue to see their property rights threatened by the often state-sponsored expansion of commercial interests in the name of economic development, a process which has not been altered by the shift to sustainable development. By tracing the legal history of the Spanish Empire based on an analysis of archival material and manuscripts I demonstrate not only how law was used to construct the legitimacy of conquest, but also how law evolved to protect commercial interests. The legal recognition of indigenous property rights did not protect indigenous property, but made them equal players in an unequal game. This historical analysis provides a critical lens for understanding some of the ongoing challenges faced by indigenous communities and the continued expansion of commercial interests in their territories today, and indicates how legal rights and protocols may still be offering shallow protection from dispossession despite the rhetoric of sustainable development. This article focuses on the Isthmus of Tehuantepec, an ethnically and ecologically diverse region in southern Mexico, which has attracted international commercial interest since the sixteenth century.

Caught at the Crossroads of History: Indigenous Communities in the Isthmus of Tehuantepec

The Isthmus of Tehuantepec has long been at the crossroads of history. Only 200 km wide at its narrowest point, it is the shortest land crossing between the Atlantic and

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Pacific Oceans in Mexico, and it became one of the main routes across Mesoamerica, together with the San Juan del Sur by Lake Nicaragua and the Isthmus of Panama. In the sixteenth century, the Isthmus of Tehuantepec was of immediate importance to the commercial logic of Spanish imperialism. Spanish conquistadors first explored the region in the early sixteenth century, looking for a trans-oceanic trade route to the luxury commodity markets of the Far East. In the nineteenth century, the region was important to Mexico's economic modernisation projects. There was investment in canals and railways, leading to the construction of the Ferrocarril Transístmico (Trans-Isthmus Railway) to accelerate the movement of commodities across Mexico. As Paul Garner summarises, 'the construction of an interoceanic railway across the Isthmus of Tehuantepec through the southern states of Oaxaca and Veracruz was a 'powerful symbol of nineteenth-century modernisation' (Garner, 1995: 339). The Tehuantepec railway project was emblematic of the export-orientated development promoted by Porfirio Díaz (president of Mexico for a total of 31 years between 1876 and 1911), but it was unsuccessful at best and became obsolete with the opening of the Panama Canal in 1914. In 2016 President Enrique Peña Nieto (a member of the Institutional Revolutionary Party, IRP) established the Trans-Isthmus Corridor in the Tehuantepec Isthmus as a Special Economic Zone, a region of particular commercial interest that can attract investment. Today Andrés Manuel López Obrador (founder and member of the National Regeneration Movement) is currently seeking to develop a Trans-Isthmus corridor. From the sixteenth century to the present day, the Isthmus of Tehuantepec has been a conjuncture of international commercial interests, a place where public-private partnerships have been forged for the construction of commercial imperialism and capitalist modernity.

For centuries, the Isthmus of Tehuantepec has also been home to many indigenous populations, who have often had their access to resources challenged by the coalitions of commercial interest groups attracted to the region. The Isthmus of Tehuantepec encompasses parts of what today are the Mexican states of Tabasco, Chiapas, Veracruz and Oaxaca. The southern side of the Isthmus of Tehuantepec is in Oaxaca, one of the most ethnically and linguistically diverse states in Mexico. Oaxaca has one of the highest percentages of indigenous people. The indigenous people of Oaxaca belong to one of thirteen recognised indigenous groups, Amuzgo, Chatino, Chinanteco, Chocho, Chontal, Cuicateco, Huave, Ixcateco, Mazateco, Mixe, Mixteco, Triqui y Zapoteco. The state of Oaxaca also has one of the highest poverty rates in Mexico (61.9 percent below the national poverty line, according to the World Bank) (Schaefer I./World Bank (2013)). This intersection of indigeneity and poverty is deeply rooted in colonialism. Understanding the complexities of the history of colonialism is important to understanding the ongoing processes of impoverishment faced by indigenous communities today.

In the pre-colonial period, the Mixtec, Zapotec and Nahuatl were the main ethnic groups of the Valley of Oaxaca, most densely populated. W. B. Taylor estimates that the population of the Valley of Oaxaca declined from around 350,000 on the eve of conquest to around 150,000 at its lowest (Taylor, 1972: 17). The Huave people were the primary inhabitants of the Gulf of Tehuantepec (on the southern coast of the Isthmus), and Zapotecs were the main communities in the northern part of the Isthmus.

Across fertile ground (especially in the Valley of Oaxaca and the temperate zones of Chiapas), there was subsistence-level production for staple crops such as maize and beans. The itinerant agro-ecological milpa system was the preferred method for food production across topographically suitable parts of southern Mexico. Fishing has been

Figure 1. *Relaciones Geográficas* Map of Tehuantepec (1580)



Source: *University of Texas Libraries Collections*. 1580-09-20. [WWW document]. URL <https://collections.lib.utexas.edu/catalog/utblac:15876f70-a403-404b-a8d4-85e58e222465>

central to the survival of many coastal communities, such as the Huave. The southern coast of the Isthmus of Tehuantepec was an essential region for salt production. Textile production was also historically significant to the economies and societies of southern Mexico. The *Relaciones Geográficas* is a geographical survey compiled in 1572 at the bequest of King Philip II and is an important source for regional ecological and demographic knowledge of Central and South America. Descriptions and maps of Tehuantepec are contained in the *Relación Geográfica* of 1580, held in the Benson Library (University of Austin). One of these maps (Figure 1) shows the lagoons and waterways around San Mateo del Mar. The power of the Cortés estate is visible on this map, which labels the salt deposits as belonging to Felipe Cortés.

The Colonisation of Oaxaca and the Isthmus of Tehuantepec

Upon its 'discovery' by the Spanish, the region of Oaxaca was of immediate interest to the conquistadors for its natural resources. The conquistador Hernán Cortés noted the presence of mines in his description of the conquest of Oaxaca by a fellow conquistador,

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and although the natives resisted him and he fought fiercely with them two or three times, at last they surrendered without receiving any hurt. He wrote me a detailed account of all that had happened and informed me that the land was very fertile and rich in mines. (Cortés and Pagden, 1971: 269)

Cortés immediately sent a sample of gold from these mines to the Spanish monarch. The local lord of the province ‘Tecoantapeque’, on the Southern Sea next to Oaxaca, is said to have made a ‘gift of gold ornaments, jewellery, and articles of feather work’ which Cortés declared to have handed over to the royal treasury (Cortés and Pagden, 1971: 270).

The early terms of Spanish colonialism in the Americas dictated that the Spanish Crown automatically claimed a fifth (known as the *quinto real*) of the spoils of war and any high-value goods such as gold, silver and pearls. The rest of the extracted goods often went to paying contracted conquistadors and the costs of maintaining the empire.

This region of southern Mexico was of immediate commercial interest to the Crown due to its location. The Spanish conquistadors identified the Isthmus of Tehuantepec as the opportunity to develop trade trans-oceanic trade routes, to realise the Spanish Crown’s first commercial objective of reaching the luxury goods in the Far East. The region of Oaxaca also became necessary for intra-colonial trade, between Mexico City and Guatemala and territories to the south. Antequera (today Oaxaca city) was, for a time, an important commercial hub in the colonial trade nexus, while the Isthmus of Tehuantepec facilitated the earliest trans-oceanic trade.

The ecological impact of Spanish imperialism in southern Mexico was pronounced and began in the early years of the sixteenth century. Before the Spanish conquest, the Pacific Coast of the Isthmus of Tehuantepec was densely forested. Cortés first exploited local forestry to build ships, and later the trees were used for the ships of the Manila galleon trade linking Mexico to the luxury goods of East Asia via the Spanish East Indies in today’s Philippines (Wing, 2015: 100). Shipyards were built in Acajutla, El Salvador and Huatulco, and the forests of Tehuantepec continued to be used until the eighteenth century (Wing, 2015: 195). Today, there are few surviving traces of the region’s forestry.

Colonialism impacted upon the structure and settlement patterns of indigenous communities in different ways across Mexico. The resettlement of Indigenous populations into *congregaciones*, *reducciones* or *haciendas* was more common in northern Mexico than in the south. In the south of Mexico, the Spanish colonists worked with existing settlement patterns but tended to increase inequalities within and between indigenous communities, mimicking patterns of town and countryside existing in the Iberian Peninsula, identifying some communities as *cabeceras* (head towns) and others as *sujetos* (subject towns). The Spanish Empire recognised the lordship status of caciques (Amerindian nobles), which reinforced the hierarchical nature of indigenous communities. Pre-conquest social structures survived better in the region of Oaxaca than in many other areas of Mexico. Pre-conquest communities were ruled by caciques, many of whom reserved their status and lands after conquest. One reason for this early on was that Cortés’s Crown contract extended him sovereign power of granting *encomiendas*, leases of Amerindian tributes of labour, which elsewhere led to the decline of cacique lands and status. But Cortés reserved the privilege, which protected his own power and helped conserve pre-conquest community structures more than in other regions of Mexico (Taylor, 1972: 37).

Spanish ownership of land in the Americas could ‘legally’ come about through royal grants or private sale. It could also come about in illegal ways through simple

appropriation or squatting. Cortés abused his publicly invested powers in the Valley of Oaxaca (and other regions of Mexico that were part of his estate), seizing land that had belonged to caciques to develop his private commercial interests by building sugar plantations. In 1631 the Crown issued a *composición de tierras* decree, which forced the titling of land. Indigenous communities had to produce evidence to gain the legal titles to their land. This caused many disputes and the production of claims that created new forms of tenure. During the 1640s, following the *composición de tierras* decree, the Crown legalised many land titles of land that had been acquired through squatting or other informal means. This process often formalised the dispossession of indigenous lands that had taken place in the shadows of the ‘legal’ (according to Spanish law) colonialism of the Spanish Empire and contributed to the transformation of indigenous patterns of land tenure.

Colonial Tools: Contracts

Colonial conquest was often physically violent, but the numerous subtleties of less visible violence reverberated for centuries. For the Spanish, the dispossession of Amerindians of their land and other resources did not occur simply through naked power but using the colonial tools of rights and contracts.

The conquest of the Americas took place via a system of *asientos* or *capitulaciones* (contracts), rewards given for *merced* (military service), and *licencias* (licences). *Capitulaciones* tended to be more political, and *asientos comerciales* established particular trading rights. The earliest, and best known of these is the Capitulations of Santa Fe. This was an agreement between Christopher Columbus and the monarchs of Spain, which, in addition to setting out titles as rewards, earmarked a tenth of any income from the voyage (Archivo General de Indias [AGI], Patronato, 8, R.9). The terms of this contract were the subject of ongoing disputes between Columbus and his heirs and the monarchs. Despite ongoing conflicts with early contracts, the Crown continued to issue contracts for conquest. For example, in 1536, Juan Galbarro was given a contract for conquest in the province of Guatemala (AGI, Guatemala, 393, L.1, F.148V–161).

These contracts formed the basis of the public–private pathway to imperial state formation. Sovereign powers leveraged their political capital, their claim to jurisdiction over newly conquered territories, to mobilise private economic capital to fund the conquest. Access to lands and resources and even sovereign powers could be granted as payment. As John H. Coatsworth summarises, ‘the contracts between monarchs and the leaders of expeditions thus deliberately blurred the distinction between public and private spheres’ (Coatsworth, 2006: 243).

These conquest contracts were often issued retrospectively. In 1529 the Crown issued an *asiento* (contract) to Cortés for the conquest of territory in the south sea of New Spain in payment for the costs incurred in conquest (Colección de documentos inéditos para la historia de España [CDIHE], 1848: 108–110). This retrospectively gave Cortés a licence for conquest and made him governor of the conquered territories. In 1538, Pedro de Alvarado was issued a *capitulación* for his expanding colonisation in the south of Mexico and Guatemala, an expedition he had undertaken in 1524 (AGI, Indiferente, 417, L.1).

The contract issued to Cortés gave him extensive powers, normally associated with the sovereign. For example, it granted him jurisdiction but reserved supreme jurisdiction for the Crown. In 1529, the Crown also issued a *merced* (reward), making Cortés the

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Marquessate of the Valley of Oaxaca (CDIHE, 1848: 105–107). Cortés was empowered by the Crown to claim property for his estate in the Americas. Cortés claimed lands in the Valley of Oaxaca, in what is now the state of Morelos, and across the Isthmus of Tehuantepec. The Cortés estate became one of the biggest in the New World. This contract stressed that Cortés's heirs would inherit these privileges and much of the land claimed endured as part of the Cortés estate until the nineteenth century. Many of the privileges granted to conquistadors in the Crown contracts were not hereditary. In the later sixteenth and seventeenth centuries, the Crown passed legislation to limit the powers that earlier conquistadors had developed.

As the Spanish Empire expanded and became established across the Americas, all commercial activity and production required a licence. These were valuable as they enabled private individuals to develop lucrative monopolies over resources. In 1531, the Crown confirmed the terms of an earlier contract (*asiento*) with Juan Vázquez, that he could be factor and overseer of the metal forges (*fundiciones*) in the territories discovered under the command of Hernan Cortés in the region of the south sea of New Spain (AGI, Mexico, 1088, L.1BIS, F.100r–101v). This was particularly lucrative as ship-building grew in Tehuantepec, and there was a demand for forged metals. When Cortés began building ships on the southern coast of Mexico he complained in his letter to the Crown that the process was slow because resources, especially iron fittings that required smelting, needed to be brought from Castile via the Atlantic port of Veracruz. Issuing licences both paid rewards and facilitated the development of colonial infrastructure while protecting monopolies on resources.

The system of contractual conquest gave both a legal basis for colonisation. As the empire developed, many different colonial subjects, including Amerindians and free Black people, petitioned the Crown directly for licences to access resources or produce or trade certain products. Contracts and licences became important to the legal ecology of the Spanish Empire.

Colonial Tools: Rights

This construction of the Amerindians as rights-bearing subjects established the Amerindians as equal players on the unequal playing field of colonial conquest. The postcolonial critique of rights is now well established. As Anthony Anghie explained, while 'the Indians seem to participate in the system as equals', and 'the exchange seems to occur between equals entering knowledgeably into these transactions, each meeting the other's material lack and possessing, implicitly, the autonomy to decide what is of value to them', the reality was far different (Anghie, 2004: 21).

The Crown formally began recognising the rights of Amerindians as early as 1501, when Queen Isabel had famously declared that the Amerindians were not slaves but Crown subjects. There remained certain conditions under which enslaving Amerindians was seen as legitimate, if they had been slaves before *rescate* (conquest), if they were from regions considered naturally bellicose, or if they had waged war against the Spanish. While the Spanish Crown formerly opposed the enslavement of indigenous peoples, the *encomienda* system, which leased contracts of Amerindian labour to conquistadors, was often little different to slavery. The Crown tried to legislate against abuses. In 1529 it ruled that against the sub-contracting of *encomienda* labour (AGI, Mexico, 1088, L.1, F.43v–44r). In 1532, the Crown issued a *cédula real* (royal decree) to the Audiencia of Mexico (high court) that the Amerindians should work voluntarily to

build buildings and that they should be paid for it (AGI, Mexico, 1088, L.2, F.49v–50r). Within this system of *encomienda* contracts, Amerindian labour was appropriated while they were recognised as free subjects.

In addition to confirming the freedom of the Amerindians, the Crown confirmed indigenous land titles. In 1532 the Crown issued a *royal decree* that ‘the Indians shall continue to possess their lands, both arable tracts and grazing lands, so that they do not lack what is necessary’ (*Recopilación de leyes*, 4:12, cited in Taylor, 1972: 67). Further legislation protecting indigenous property rights was issued throughout the colonial period. In 1573 the Crown ruled that indigenous towns were entitled to an *ejido* (community pasture). At the same time, the Crown continued to issue conquest contracts and respond to requests for land grants and commercial licences to develop or exploit particular resources.

The recognition of Amerindian property rights was not a benevolent act but a pragmatic step in empire-building. On the one hand, it helped Spanish scholars construct the Spanish conquest’s legitimacy by dressing an otherwise naked articulation of power in the moral theology and legal theory of property rights. The move also had pragmatic benefits for the empire. By keeping their lands, Amerindians could continue producing food and paying tribute, in cash or kind.

Recognition of indigenous property rights did not safeguard against dispossession. Amerindians were subject to the *encomienda* system, a kind of labour tribute contracted to Spanish settlers, often as a reward for services to the empire. The Crown tried to regulate the *encomienda* contracts, which in theory could not be inherited or leased to other people. In reality, the system was open to abuse, and the excessive demands could lead to the neglect of the agricultural lands of indigenous communities. The demands of the tribute systems impoverished many indigenous communities and put many in debt. In these circumstances, many indigenous people sold their lands, often at low value to Spanish settlers, who later gained from the increase in value. While there were later attempts to regulate against the sale of indigenous lands, the combined introduction of indigenous property rights and the freedom to trade created the conditions for the expansion of European imperialism and the dispossession of indigenous peoples.

The Post-Conquest Struggle: Indigenous Rights to Common Property and Privatisation

Indigenous communities in Mexico have continued to have their rights to their property and natural resources recognised legally at the same time that these lands and resources have been subject to privatisation via a system of public-private partnerships and commercial contracts.

The independence of Mexico in 1821 did not bring about the decolonisation of land distribution. Mexican Independence was led by creole elites and did not address the poverty and inequalities faced by indigenous peoples. Instead, elite-led programmes of economic liberalisation and Western-style modernisation increased the privatisation of land and resources. In the late nineteenth century Porfirio Díaz led a programme of economic modernisation and development which accelerated privatisation. The Porfiriato programme increased inequalities, which fomented the Mexican Revolution (1910–1920). The Mexican Revolution highlighted the inequalities in Mexico. Still, it did not resolve the tension between those wanting to maintain communally owned

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resources and locally governed communities and those wanting to develop Mexico's economy through a programme of privatisation and liberalisation.

The peasant leader Emiliano Zapata (1879–1919) fought for the reform of land ownership and the recognition of communally owned lands (known as the *ejido*, but differing from the *ejidos* of the colonial era). These were set out in the Plan of Ayala in 1911. In 1917, during the Mexican Revolution, the Mexican Constitution was signed. Article 27 of the 1917 Constitution laid the foundations for land reform and was a response to Zapata's Plan of Ayala. Article 27 of the 1917 Mexican Constitution protected common property:

properties held in common by co-owners, hamlets situated on private property, pueblos, tribal congregations, tribes and other settlements which, as a matter of fact or law, conserve their communal character, shall have legal capacity to enjoy in common the waters, woods and lands belonging to them, or which may have been or shall be restored to them according to the law of 6 January 1915, until such time as the manner of making the division exclusively of the lands shall be determined by law. (Government of Mexico, Political Constitution of the United States of Mexico, signed January 21, 1917, and Promulgated February 5, 1917, Revised and Amended to April I, 1926)

The communal ownership of local resources, including land, has been central to the survival and resistance of indigenous communities throughout the different waves of colonisation. Despite constitutional recognition, communal lands and resources have been under threat of privatisation throughout the twentieth and 21st centuries. By the end of the Mexican Revolution, Zapata was marginalised, and in 1919 he was assassinated, and many of the land reforms planned by Zapata were not carried out. The Institutional Revolutionary Party (IRP, or Partido Revolucionario Institucional (PRI) in Spanish) held power for most of the post-Independence period (1929–2000). Despite its name, during this period, the IRP oversaw a programme of economic liberalisation and capitalisation that led to the privatisation of many state resources and soaring inequality.

In 1988 the IRP representative Carlos Salinas de Gortari became the president of Mexico and advocated a new programme of modernisation by changing the Constitution, including Article 27, which protected indigenous lands and resources and stipulated that the use of common lands must be for public benefit. This change paved the way for greater liberalisation of the Mexican economy and sale of communal lands to private companies. In 1993 the Programme for Certification of Ejidal Rights provided a legal framework for the privatisation of *ejido* lands, but communities did not race to privatise communally held lands (De Ita, 2008).

In 1994, the United Nations approved the Declaration on the Rights of Indigenous Peoples, and 1995–2004 was named the International Decade of the World's Indigenous People (UN Declaration on the Rights of Indigenous Peoples). In 1994 also the North American Free Trade Agreement (NAFTA) between Mexico, the United States and Canada came into effect. NAFTA removed protective regulations in the interest of expanding commercial contracts. It represented a direct threat to indigenous communities and their natural resources and led to war with the Marxist-indigenous group known as the Zapatistas in the state of Chiapas.

The historical development of indigenous rights went beyond simple recognition of individual and common property rights, to recognition of the right to self-government of common resources. In 2001 indigenous rights were introduced into the Mexican

Constitution, and Article 2 of this bill recognised the rights of communities to determine their own organisation and methods for improving and preserving their land and natural resources. This indigenous rights amendment to the Mexican Constitution recognised the *usos y costumbres* form of self-government. Just as recognition of indigenous property rights at the start of colonialism in the sixteenth century did not prevent the historic dispossession of indigenous communities, the contemporary recognition of the rights of indigenous communities not only to their property but also to self-government has not prevented the backdoor privatisation of indigenous resources. Increases in the individualisation of property rights makes it easier for commercial groups to arrange sales or leases of land, setting contractual terms in their interests.

In the twentieth and 21st centuries, much of this privatisation of indigenous resources has been done in the name of development and modernisation. A 1993 review for the Economic Commission for Latin America and the Caribbean (CEPAL) recognised the tension between indigenous communities and the modernisation programme at the heart of development. This reported that ‘many indigenous leaders and intellectuals in the region are asking themselves how the current spread of free market principles and the process of integration into a single world economy is likely to affect their cultures’ (Durstan, 1993: 89). This report posited that poverty was more an existential threat to indigenous culture than modernisation (Durstan, 1993: 96). In the age of development, economic growth and modernisation were seen as solutions to the poverty faced by indigenous communities, despite the fact that this economic growth was often the cause of the land privatisation and ecological degradation that was often at the root of indigenous impoverishment. The Peruvian economist Hernando de Soto famously argued that if the property rights of indigenous communities could be strengthened, they could end their poverty by further capitalising on their assets (Soto, 2000). However, since the beginning of colonialism in the sixteenth century, recognition of indigenous property rights had not prevented dispossession and impoverishment in the face of the expansion of commercial interests.

Many representatives of indigenous communities had long been aware of the contradictions of economic development and the challenges it poses to their common property and local governance. In 1982, the three leading organisations Organización para la Defensa de los Recursos Naturales y Desarrollo Social de la Sierra Juárez (ORDENASIJ) (Organization for the Defense of Natural Resources and Social Development of Sierra Juárez), Comité de Defensa de los Recursos Naturales y Humanos Mixes (CODREMI) (Committee for the Defense of the Mixes Natural and Human Resources) and Comité Organizador y de Consulta para la Unión de los Pueblos de la Sierra Norte de Oaxaca (CODECO) (Organizing and Consultation Committee for the Union of the Peoples of the Sierra Norte de Oaxaca), and leading intellectuals Floriberto Díaz Gómez (a Mixe from Tlahuitoltepec) and Jaime Martínez Luna (a Zapotec from Guelatao), produced a manifesto on *comunalidad*. The *comunalidad* manifesto challenged the threat posed to indigenous communities, their resources and way of life by programmes of economic development following models of liberalisation and privatisation, and developed out of earlier indigenous struggles: ‘we oppose the destruction of our natural resources in the name of “national development” and the conversion of our lands into zones of experimentation and the appropriation of our primary materials for private companies, state or para-state activities’ (cited in Rendon Monzón, 2003: 18).

Much economic development in Mexico has occurred through a varied system of public–private partnerships (*asociaciones público-privadas*), which created pathways for the privatisation of land and other resources. From the mid-1980s, public–private

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partnerships became increasingly important to the economics of so-called ‘developing’ countries and helped fund infrastructure projects, and this had the accelerated privatisation across Latin America and the Caribbean (Bloomgarden and Blumenfeld, 2013). The system of economic development and commercialisation through public–private partnerships in Mexico gained a new lease of life in 2004 with the projects provision of services scheme (Proyecto de Prestación de Servicios). This facilitated the privatisation of public resources, such as hospitals and roads (Toache et al., 2018: 16).

The Shift to Sustainable Development

The shift to sustainable development at the start of the 21st century has continued a familiar pattern of public–private partnerships for commercial interests at the expense of indigenous communities. The shift to sustainable development led to more natural resources being conceptualised as commodities; the race for renewable energy gave natural resources, such as rivers, tides and wind, new commercial potential. This shift to sustainable development has been described as ‘green extractivism’, and the spread of windfarms in the Isthmus of Tehuantepec has been identified as an important example of this (Dunlap and Correa Arce, 2021).

In 2013, as part of the constitutional commitment to reform the energy sector, the Mexican government engaged in an ambitious plan to create a ‘Wind Corridor’ on the Isthmus of Tehuantepec. While the expansion of renewable energy helps the Mexican government meet its targets to reform its energy sector and the international agenda for sustainable development, it is also providing a way for the government to pursue the economic liberalisation of the Mexican economy and accelerate the privatisation, or enclosure, of natural resources. This economic liberalisation has been central to the Mexican government’s policies since Mexico’s economic crisis in the 1980s. The building of renewable energy infrastructure has met with local opposition – because of the insufficiency of the consultation with local governments, and because the resources generated benefit private companies rather than citizens (SiPaz, 2013).

The construction of wind farms has been promoted because sustainable development is seen as something positive because it reduces the reliance on fossil fuels and is therefore often regarded as a form of ‘clean’ energy. However, wind farm construction is often managed and implemented in ways that threaten local communities, their communal property and modes of government, and wind farm construction is often met with local resistance. Communities were concerned with how contracts were allocated since the government approached landholders selectively to arrange leases to private companies for the wind farms, consultation processes were also selective, and the negotiation of contracts occurred without transparency or a level playing field (Mejía-Montero, Alonso-Serna and Altamirano-Allende, 2020).

The Zapotec and Huave people and their community resources are particularly under threat from the privatisation of natural resources taking place through the Wind Corridor project. Multinational companies own and operate over fifteen large projects in the area. Sofia Avila-Calero argues that the ‘neoliberal institutional arrangements configuring the expansion of wind energy in Mexico are playing a crucial role in creating emergent forms of environmental change and inequality’ (Avila-Calero, 2017: 993–994).

Often, the way the contracts for renewable energy projects have been issued in the region effectively leads to the privatisation of local resources on lands which are

legally communally owned by local communities in the form of *ejido* lands. In the early phases of windfarm development in the Isthmus of Tehuantepec (2001–2004), government agencies helped companies to establish land reserve contracts with *ejidos*, which transferred occupation and usufruct rights, and then developers made new contracts with individual *ejido* members (Zárate-Toledo, Patño and Fraga, 2019: 4–5). On the basis of interviews with people in Unión Hidalgo in the Juchitán District of the Isthmus of Tehuantepec, where a windfarm megaproject was approved in 2017, Dunlap and Arce concluded that ‘wind companies are a vehicle to privatise communal land, which is accompanied through public notaries’, and often the land contracts have been signed prior to consultation (Dunlap and Correa Arce, 2021, 14 and 12).

Communities such as the members of the municipalities of San Dionisio and San Mateo del Mar have denounced how the sale and transfer of communal lands have been made. They have denounced the communal property commission in this process and suggested that the planning permission for the wind turbines involved bribery and corruption (SiPaz, 2013). The Assembly in Defence of the Land and Territory of the Indigenous People in the Isthmus of Tehuantepec (APIITDIT) stated that ‘by waving the clean energy flag, private companies have turned wind into a commodity, while the wind, sun, sea and land have shaped the life and culture of our Binnizá (Zapotec) and Ikjoots (Huave) people’ (APIITDIT, n/d), cited in Avila-Calero, 2017: 1000). The way the contracts have been issued has enabled the privatisation of parts of the *ejido* lands of these communities (Huesca-Pérez et al., 2016: 959). Private companies then benefit from the sale of energy generated in the region. The fact that the construction of renewable energy infrastructure in Oaxaca is not addressing poverty in the areas where it is built is best summarised by the words of one local woman: ‘we are still poor and now we are surrounded by wind turbines’ (Dunlap, 2018: 559). Private companies and not local communities benefited from the harnessing of wind energy.

The wind farms of the Isthmus of Tehuantepec have undermined the local governance institutions. Despite the political recognition of the autonomy of indigenous communities and the legal commitments to consultation, this consultation has been used more for the performance of procedural legitimacy than to respect the integrity of the governance of local communities or the implementation of their choices. Avila-Calero’s study shows a lack of formal consultation, an inadequate provision of information, and illegal leasing of contracts (Avila-Calero, 2017). Local *asambleas* have demanded that their right to consultation be protected, but often there is no external supervision of this consultation process. It is also possible for local actors to use consultation processes to leverage their own political power in the region, for example by individuals making agreements on behalf of communities in return for favours (Friede and Lehmann, 2016).

According to an investigation conducted by the NGO Proyecto de Derechos Económicos, Sociales y Culturales (ProDESC) (Economic, Social and Cultural Rights Project) published in a policy paper by the European Center for Constitutional and Human Rights (ECCHR), in 2015, the private company Électricité de France (EDF) was able to receive a permit from the Mexican government to develop wind farms on the communal land of the Unión Hidalgo without the legally required consultation with community’s assemblies (Lavite and Müller-Hoff, 2019). Unión Hidalgo is a Zapotec community in the Juchitán District in the south-west of the Isthmus of Tehuantepec. Using data collected from community members and NGOs, it reports how legally enshrined rights to property, self-government and informed prior consultation on matters affecting communal property in practice do not protect communities from their loss of resources. Company representatives have offered various forms of bribes to

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persuade landowners to sell or lease land to the companies developing the windfarms (Lavite and Müller-Hoff, 2019: 2). They also report that the development of these wind farms generates conflict concerning the impact on the local environment and the unequal job opportunities. This conflict undermines the credibility of the meaningful consultation between companies and communities necessitated by government and state-level legislation on indigenous rights. The communities submitted *amparo* petitions, as communities facing the violations of their common property had in the Spanish Empire from the sixteenth century, but the project was not stopped.

The UN Special Rapporteur on the rights of indigenous peoples visited Mexico in 2017 and reported that ‘current development policies, which are based on megaprojects (in mining, energy, tourism, real estate and agriculture, among other areas), pose a major challenge to indigenous peoples’ enjoyment of human rights’ (United Nations General Assembly, 2018: 1). The report specifically identified the wind energy projects in Oaxaca:

In Oaxaca, the federal and state authorities have promoted large-scale wind power projects without the participation or consultation of indigenous peoples, through contracts between companies and ejido authorities, which are not necessarily the authorities that represent indigenous communities; those contracts allegedly contain serious irregularities. This has had an impact on indigenous land tenure, the environment, traditional economic activities and community life, and opponents to the projects have suffered accusations and attacks. The Zapoteca community in Juchitán, which has been affected by the Eólica del Sur wind farm project, has brought *amparo* proceedings in the hope of obtaining a suspension order; a Supreme Court decision is pending. The consultations organised by the State were allegedly flawed because they were held too late and there was a lack of appropriate information about the project and its impacts. (United Nations General Assembly, 2018: 8)

The report specifically refers to the ‘lack of prior consultation of indigenous peoples who could be affected by a second phase of expansion in wind power projects in the Isthmus of Tehuantepec’ (United Nations General Assembly, 2018: 8). It highlights the inabilities of indigenous communities to seek legal protection for their lands. The legally required consultations have often been carried out retrospectively, just as the conquest contracts of the Spanish Empire had often tried to construct legitimacy retrospectively. The UN report highlighted shortcomings of the indigenous property regime in Mexico, observing that:

The agrarian system of ejidos, community lands and private property and the agrarian authorities and institutions established under that system do not meet the needs of indigenous peoples and do not satisfy the country’s current international obligations, which require recognition of the right of indigenous peoples to the land, territories and natural resources that they have traditionally owned, occupied, used or acquired. (United Nations General Assembly, 2018: 5)

This UN report acknowledges that the existing property rights of the indigenous communities do not safeguard indigenous land and resources against the threats posed by the ongoing expansion of commercial interests. The problems caused by the development of windfarms in Oaxaca has been seen as a ‘human rights deficiency’, which could

be improved with more effective policing and enforcement and better consultation (Hamister, 2012). But the bigger problem lies in the way that concepts of property and law have evolved to serve commercial interests (see McClure, 2021) and the way the shift to sustainable development does not radically alter the logic of commerce, which was rooted in imperialism.

Conclusion

Explaining ‘the real Spanish contribution’ to international law, Martti Koskenniemi argued that the School of Salamanca (most notably Francisco de Vitoria) laid the foundations for an ‘imperialism of free trade, carried out by private companies through private transactions and private war’ (Koskenniemi, 2011: 36). The dispossession of the indigenous people of the Americas of their land and resources has followed a system of contracts between public and private actors for economic gain. Recognition of the property rights of indigenous communities stretches back to the early years of colonialism, but has offered little protection against the commercial logic of imperialism.

The shift to sustainable development has often been criticised for the ‘green-washing of capitalism’, since it facilitates business as usual for consumers without necessitating systemic change, while also having more hidden impacts on the people and places where new green energy resources are extracted. The extraction of resources often takes place via contracts which may recognise the legal rights of indigenous people while undermining the long-term interests of indigenous communities. Such legal and commercial processes are reminiscent of the ‘legal-washing of imperialism’ that began with the Spanish Empire in the sixteenth century.

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