

AMAZONIAN INDIGENOUS VIEWS ON THE STATE: A PLACE FOR CORPORATE SOCIAL RESPONSIBILITY?¹

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I. INTRODUCTION

Shortly after dinner on November 16, 1532, Father Vicente de Valverde, chaplain to Francisco de Pizarro, explained to their Inca host Atahualpa that he must pay tribute in gold and silver to God, through King Charles IV of Spain.² The Inca responded to this circuitous logic with a series of well-reasoned questions.³ Instead of answering, the Spanish assemblage leapt from their seats, attacked their hosts, and stole the Incas' wealth. From that point on, argues Mexican philosopher Enrique Dussel, the possibility of a genuine multi-ethnic dialogue with indigenous peoples of Latin America has remained permanently quagmired in asymmetry.⁴ The sovereign state and the interests it represents, he argues, now dominate the debate.⁵

While genuine multi-ethnic dialogue remains quagmired, it may not permanently be so. Some recent Amazonian indigenous responses to the impact of oil development and the distribution of its spoils from the Amazon—far more complex, illogical, and circuitous than Spanish tribute—illustrate a resurgence of dialogue, which is a requisite for the foundational human right to self-determination in modern democracies.⁶ In turn, the states' responses invite new approaches for corporate social responsibility by international oil

1. This paper is part of a longer study now underway, and incorporates text from several of the author's works.

2. See ENRIQUE DUSSEL, *THE INVENTION OF THE AMERICAS: ECLIPSE OF THE "OTHER" AND THE MYTH OF MODERNITY* 53, (Michael D. Barber trans., Continuum 1995); Ute Bühler, "Discursive Democracy in the Age of Globalization and Exclusion?" (paper presented at the 51st Political Studies Conference, Manchester, England, 1-2 April 2001) (stating asymmetry between Latin American Communities precludes genuine dialogue).

3. Bühler, *supra* note 2, at 1-2.

4. *Id.* at 10-12

5. DUSSEL, *supra* note 2, at 55

6. See S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 97-115 (2004) (discussing dialogue as requirement for the foundation principle of self-determination).

companies, now the states' latter day conquistadors, handsomely paid to explore and fill the sovereign's treasuries.⁷

When this five-century leap from initial contact lands on the platforms of oil development in the Upper Amazon, it illustrates many of the human rights aspirations and dilemmas of indigenous peoples. From the late 1980s to the present, indigenous leaders of the Andean/Amazonian region sound like students of Jürgen Habermas when he argues that “political participation and communication . . . do not guarantee freedom from external compulsion, but guarantee *the possibility of participating in a common practice*, through which citizens can make themselves into what they want to be—*politically responsible subjects of a community of free and equal citizens.*”⁸

While environmental degradation, crime, and economic abuse continue to plague native peoples of the Upper Amazon, their responses and their respondents have changed considerably.⁹ External advocates, from Fray Bartolomé de Las Casas to Amnesty International to OXFAM, would be and still are welcomed.¹⁰ Indigenous people, however, now often speak for themselves. Their messages, though sometimes coded in complex local metaphors, are generally clear and their messengers often pass along to new formalized national human rights avenues or into international arenas, examples of which include the Organization of American States (OAS) and the World Bank, both of which are currently drafting specific indigenous rights declarations or policy papers. The United Nations, which passed its historic Declaration on the Rights of Indigenous Peoples on September 13, 2007, and the International Labor Organization's 1989 Convention number 169, concerning Indigenous and Tribal Peoples in Independent Countries offer other avenues for protections.¹¹

7. See *infra* notes Part V (noting increased corporate responsibility necessary to prevent such injustice).

8. Jürgen Habermas, *THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY* 241 (2000) (emphasis added).

9. See ANAYA, *supra* note 6, at 15-94 (explaining historical context and modern development of human rights in region).

10. See ANAYA, *supra* note 6, at 16 (describing Bartolomé advocacy movement).

11. U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Oct. 2, 2007); International Labor Organization, Convention Number 169, *Concerning Indigenous and Tribal Peoples in Independent Countries*, available at <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169> [hereinafter ILO Convention No. 169]; see ANAYA, *supra*

In these new times and settings, indigenous peoples and their organizations no longer voice pleas solely to *stop* killings, *desist* from seizing land and natural resources, *end* forced relocation, or *cease* cultural denigration.¹² While such violations and proscriptive denunciations persist, there are also new demands calling for states to fulfill their obligations to give power and voice so that indigenous peoples can realize their prescriptive rights and positive freedoms.¹³ High on the list are demands for inclusive and effective political and economic participation without loss of identity.¹⁴ Indigenous peoples now seek to engage democratic states as members of civil society, not simply to repel violations by states or agent's of the state.¹⁵ Meanwhile, international treaties and formal commissions now support and emphasize state obligations to advance the realization of the participatory rights.¹⁶ The case could hardly be clearer than in the Amazon.

Beginning in the late 1960s and early 1970s oil rigs broke open the canopy of the Amazon rainforest, where they remain today.¹⁷ Because of oil development's breadth, speed, and impact on indigenous peoples and communities, nothing like it has occurred in the Amazon since the late 19th century Rubber Boom.¹⁸ In contrast to that era's river transport of rubber gatherers and their products, oilmen and their massive equipment travel largely by roads constructed especially for them.¹⁹ Wherever roads penetrate the

note 6, at 61-72 (describing more formal response through international community's response to needs of indigenous peoples).

12. See ANAYA, *supra* note 6, at 34 (tracing indigenous movement roots to colonial attempts to breakdown indigenous cultural practices and land holding).

13. See *infra* notes Part II.B (describing demands for power and voice by indigenous peoples).

14. See *infra* note Part III (describing demands for political and economic participation).

15. See *infra* note Part III (describing demands for membership in civil society).

16. See ILO Convention No. 169; U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 11; see also ANAYA, *supra* note 6; INTERNATIONAL LABOR ORGANIZATION, INDIGENOUS AND TRIBAL PEOPLES' RIGHTS IN PRACTICE: A GUIDE TO ILO CONVENTION 169 (2009) [hereinafter GUIDE TO ILO CONVENTION].

17. See JUDITH KIMERLING, AMAZON CRUDE 43 (1991) (describing beginning of oil boom in Amazon).

18. See generally BARBARA WEINSTEIN, THE AMAZON RUBBER BOOM, 1850-1920 (1983).

19. See KIMERLING, *supra* note 17, at 75-76 (describing environmental impact of building roads in Amazon).

forest, most of the adjacent space is quickly logged for timber and then occupied by colonists.²⁰ These colonists arrive either spontaneously or with strong government encouragement and modest subsidies.²¹ Unlike previous natural resource booms the direct (landscape change) and indirect (colonization) impact of oil development is permanent in terms of environmental impact and enclosure of indigenous communities and territories.

The oil industry in the Amazon is often imagined by critics as massive, flaring, oil wells and passive indigenous victims.²² Sometimes that simple image is accurate and unavoidable, as in the situation of voluntarily isolated communities or similarly marginal populations who cannot or choose not to speak for themselves.²³ And a simple David versus Goliath metaphor is often invoked by journalists or NGOs working on behalf of indigenous peoples.²⁴

This article, however, emphasizes the broad and proactive indigenous response to oil development as part of their general status as colonized people and, in this light, suggests an expanded approach to corporate social responsibility.²⁵ The article asks who this indigenous David is, whom he is aiming at, whether or not he wants that powerful giant's head, and what might take place after the fight? To suggest a reply, this paper interprets actions and patterns observed by the author since the mid-1970s.²⁶ Responses are first considered as broad theoretical human rights debates and then illustrated through specific cases from Colombia, Ecuador, and Peru.²⁷ The ideas presented here draw on first hand observations of several highly publicized disputes between the oil industry and indigenous people in Ecuador and Colombia as well as participation

20. *See id.*

21. *See id.*

22. *See* KIMERLING, *supra* note 17, at 75-76 (describing impact of burning oil and gas attendant to the arrival of oil development in the Amazon); CRUDE, THE PRICE OF REAL OIL (Third Eye Motion Picture Company 2009) (showing flaring oil wells as representation of oil development in the Amazon).

23. *See* Christina Lamb, *The Tribe That Stood Their Ground*, TIMES ONLINE, Feb. 15, 2009, http://www.timesonline.co.uk/tol/news/world/us_and_americas/article5716227.ece (showing relative powerlessness of Brazilian Indian tribe to stop land developers in Amazon).

24. *Id.*

25. *See infra* note Part V (advocating for corporate social responsibility as necessary in order to prevent abuses of indigenous people).

26. *See infra* note Part IV (examining case studies and their implications).

27. *See infra* note Part IV (considering specific instances).

in a series of multi-stakeholder dialogues hosted by Harvard University.

Mindful of transnational corporate oil wealth and power, this article nonetheless suggests that current indigenous rights claims and oil disputes are aimed largely, and accurately, at the state. For them, governments are not only the legal guarantors of rights to security, health, and safety, but also as the primary foci for debate and dialogue over citizenship rights and freedoms. Through regular public statements, indigenous peoples now speak clearly of their right to participation, consultation, and prior informed consent on all political and economic policies and projects that affect them. International treaties, declarations, and court decisions now define rights and freedoms as well as help to seek recourse for violations. Finally, this article considers ways to include and advance these broad claims into the growing human rights thinking on corporate social responsibility.²⁸

II. INDIGENOUS AMAZONIAN PERSPECTIVES

What are Amazonian indigenous opinions on oil development? To answer this question one must distinguish between local communities and regional or national organizations. The only way to characterize the views of indigenous communities in the Amazon is heterogeneous; their opinions are probably as varied as their three hundred plus languages.²⁹ The Ecuadorian Amazon, or Oriente, is an excellent illustration.³⁰ Here oil development can be divided into three sectors—north, central, and south. In the north, the area, often identified by its major facility at Lago Agrio, above and adjacent to the Napo River has been extensively explored, and the resulting pollution has caused controversy since the 1970s.³¹ In the central

28. See *infra* note Part V (concluding that corporate social responsibility is both possible and required for true progress in preserving indigenous rights).

29. See ALEXANDRA Y. AIKHENVALD, *LANGUAGE CONTACT IN AMAZONIA 2* (Oxford Linguistics, Oxford University Press) (2002) (identifying number of languages spoken in Amazon).

30. See *CRUDE, THE PRICE OF REAL OIL* (Third Eye Motion Picture Company 2009) (addressing public perception of oil development in light of Amazon Chernobyl case); KIMERLING, *supra* note 17 (discussing effects of oil development on Oriente).

31. See MIKE TIDWELL, *AMAZON STRANGER: A RAINFOREST CHIEF BATTLES BIG OIL* 10-11 (The Lyons Press, 2001) (discussing oil exploration in and around Napo River area); Logan A. Hennessy, *Discursive Spearpoints: Contentious Interventions in Amazonian Indigenous Environments*, in *CONTENTIOUS GEOGRAPHIES: ENVIRONMENTAL KNOWLEDGE, MEANING, SCALE* 97, 101-03

Oriente, between the Napo and Pastaza Rivers, oil development is more recent, less extensive, and regulated by new environmental technologies so there is less environmental damage.³² In the south, oil work has hardly developed.³³ The varied reactions and responses of the indigenous peoples in each of these regions are discussed below.

A. Heterogeneous Communities

In the north from the 1970s through the 1990s, the roughly 600 Cofán people were almost totally circumscribed by oil roads and subsequent colonization. In 2007 they were granted a 100,000 acre territory close to the Peruvian border, where most reside today. The 300 Secoya and the related Siona live largely alongside the Aguarico River and close to the extensive Lago Agrio oil fields. From roughly 1993 until today community members have been highlighted as plaintiffs in a case of environmental damage and health against Texaco (now Chevron).³⁴ In the late 1980s, however, the same communities negotiated a Best Practices agreement with Occidental Oil and Gas, which later provided local control and economic payments in return for exploration and test drilling rights near their communities.

Several of the more numerous Kichwa communities, with a population between 30,000 and 40,000 including many who colonized the lower Napo in the 1970s, have working agreements with nearby oil companies. Some leaders have also performed clean-up work, while others have led protests against oil practices.

In the central Oriente, the Kichwa community of Sarayacu filed a complaint against the Ecuadorian government, which the Inter-American Commission on Human Rights accepted and subsequently

(Michael K. Goodman, Max Boykoff, Kyle Evered, eds. 2008) (reviewing oil exploration in Amazon, particularly Napo River region).

32. See KIMERLING, note 17, at 48-54 (discussing importance and development of environmental and health controls).

33. See *Chevron (CVX) in the Amazon – Oil Rights or Human Rights? Texaco's legacy, Chevron's responsibility*, AMNESTY INTERNATIONAL USA, <http://www.amnestyusa.org/business-and-human-rights/chevron-corp/chevron-in-ecuador/page.do?id=1101670> (noting success of resistance to oil exploration in Southern Amazon).

34. AMAZON DEFENSE COALITION, UNDERSTANDING CHEVRON'S "AMAZON CHERNOBYL": DETAILED BACKGROUND ON LANDMARK LEGAL CASE OVER CHEVRON'S ENVIRONMENTAL CONTAMINATION IN ECUADOR 6 (2009), available at <http://amazonwatch.org/documents/ecuador-press-kit/detailed-background.pdf>.

passed on to the Inter-American Court of Human Rights in Costa Rica regarding the failure of consultation and prior informed consent by Argentine-owned CGC Inc. (*Compañía General de Combustibles*).³⁵ Other indigenous people from the area were involved in a short-lived indigenous run natural gas company (Amazon Gas) until the project was abandoned due to protests from the Ecuadorian oil workers union.

In the relatively undeveloped South, 6,000 Achuar have gained considerable fame for successfully saying no to oil development in their area. Their low population density has allowed them to secure needed cash through modest Ecotourism. Their more numerous linguistic relatives and neighbors, the Shuar, population of 30,000 to 40,000, have also said no to oil development for the time being, asserting that they want neither the mess nor pollution of Lago Agrio, nor the inequitable distribution of oil profits from the region. In sum, there are many “Davids” and it would be inaccurate to claim any uniform indigenous response to or attitude toward oil development.

B. Policy-Focused Organizations

Indigenous ethnic federations first appeared in Ecuador and Peru in the 1960s and 1970s as unified and coordinated responses to colonization, land loss, and economic development. Following these pioneering efforts, the number of such organizations in Ecuador and Peru grew exponentially in the 1980s. Today there is hardly a cluster of indigenous communities in both countries, or anywhere in Latin America, that is not in some way organized and legally recognized. These ethnic organizations have, in turn, confederated into regional, national, and international inter-ethnic organizations. Nearly all are genuinely representative, community-based, democratically-run, officially recognized, and supported by international law.

At this level of political organization, there is considerable unity with regard to oil development. Beneath often sweeping and sharp denunciations, or interpellations,³⁶ there is usually a fairly

35. Amazon Watch, *ConocoPhillips Oil Projects vs. Indigenous Communities in the Amazon*, http://www.amazonwatch.org/amazon/EC/burling/index.php?page_number=3 (last visited May 20, 2010) (describing complaint concerning Sarayacu before Inter-American Commission on Human Rights)

36. Dussel's central category of 'interpellation' (*intervention and appellation*) is one "that disrupts the real communication community."

consistent message. For example, following many of the large indigenous protests, mobilizations, and other actions over the past twenty-five years, there are agreements with the government. They generally include “shopping lists” of specific demands, which respond to the numerous and varied local community inputs. More important, the agreements contain a consistent underlying demand for a *mesa de dialogo*—a meeting space or forum, generally a permanent one, for dialogue with the government and government agents.

This consistent demand speaks to the importance of citizenship rights and similar expressions of self-determination, dignity, and recognition. This is not to suggest that there are no other concerns when oil development takes place, whether from an environmental or economic perspective. Leaders and communities are, of course, concerned with the massive environmental problems and minimal redistribution of oil wealth locally, such as occurred with oil development in Ecuador’s Lago Agrio region. But now some of these demands can be relatively easily met with new technologies and through democratic distribution of oil income. Dignity, however, is a more elusive goal, as it requires the “Positive Liberty” of self-determination.³⁷

III. CITIZENSHIP CLAIMS

Citizenship rights, and the dignity they provide, are now major thrusts of indigenous organizations. While indigenous peoples continue to suffer disproportionate threats to their life, property and livelihood, their organizations recognize that an exclusively defensive emphasis on civil and political rights protection obscures the broad purpose of indigenous movements—increased agency—and neglects the more subtle and equally significant citizenship claim—self-determination. There are obvious and significant differences between *not placing* civil and political obstacles in the way of self-determination and *enabling* economic and social self-determination. Enabling requires collaboration and effective communication between the state and indigenous peoples.

Interpellation is a speech act that ‘expresses a demand that comes from exclusion from the community, from being without rights and participation.’” Bühler, *supra* note 2, at 8.

37. See Isaiah Berlin, *Two Concepts of Liberty*, in ISAIAH BERLIN: LIBERTY 166 (Henry Hardy ed., Oxford Univ. Press 2004).

New legal instruments, along with efforts to apply them, provide a means not simply to secure particular rights *from the state* but also to define the practice of citizenship through discourse *with the state*. Normative instruments like the International Labor Organization's Convention No. 169 (ILO Convention No 169)³⁸ and the United Nations' Declaration of the Rights of Indigenous Peoples³⁹ not only elevate indigenous peoples to the status of all other citizens but also provide them with some "special" status prerogatives based on group-differentiated citizenship rights.⁴⁰ Will Kymlicka argues that such rights promote equality for those minorities that, unlike immigrants, previously occupied the territory and now find themselves living in a state not necessarily of their choosing.⁴¹ Thus, "were it not for these group-differentiated rights, the members of [indigenous national] minority cultures would not have the same ability to live and work in their own language and culture that members of the majority cultures take for granted."⁴² Special rights permit inclusion as distinct equals. ILO Convention No. 169, for example, obligates States to seek consensus-based development and assumes multi-sectoral dialogue and negotiation over definitions and mechanisms for locating, designing, implementing, and monitoring development projects that affect indigenous peoples.⁴³

38. ILO Convention No. 169, *supra* note 11.

39. U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 11.

40. Guide to ILO Convention 169, *supra* note 11; U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 11.

41. See WILL KYMLICKA, MULTICULTURAL CITIZENSHIP (1995) [hereinafter MULTICULTURAL CITIZENSHIP]; WILL KYMLICKA, POLITICS IN THE VERNACULAR (2001) [hereinafter POLITICS IN THE VERNACULAR].

42. MULTICULTURAL CITIZENSHIP, *supra* note 41.

43. GUIDE TO ILO CONVENTION, *supra* note 16.

IV. CASES STUDIES

*A. Colombia – The Samoré Case*⁴⁴

The Samoré oil development block is located in the eastern foothills of the Department of Arauca, in northeast Colombia. At its most public level, the isolated, nearly-monolingual, rain-forest group, the U'wa (previously known as Tunebo), was pitted against *Occidental de Colombia*, the Colombian affiliate of U.S. Occidental Oil and Gas.⁴⁵ Despite the rural substance of the conflict, many of the battles took place in Bogota and internationally between 1994 and 1999.

The case was global news for a while, with public symbolism declaring that, for the U'wa, oil was the “blood of the earth” and if exploration progressed they threatened mass suicide by jumping off a cliff.⁴⁶ The issue that brought all of the affected actors onto the stage, however, was consultation with the communities.

Community consultations are part of a larger “environmental license” mandated by Colombia before exploration—seismic studies or test wells—may be undertaken. In the absence of any state mandated procedures for consultation, Occidental moved ahead in 1995 with a consultative process created by their office of community affairs. Initially, the government office in charge of oversight, the General Directorate for Indigenous Affairs (DGAI), approved the consultations, and the required environmental license was prepared, opening the way for exploration. Shortly thereafter, an indigenous congressman and the leaders of the Colombia National Indian Organization (ONIC) charged that the consultations were not done properly. Their objections were motivated and supported, in part, by a national effort to advance the promises of recent

44. See Oil Exploration, Indigenous Peoples, and Global Environmental Ideologies (unpublished MS, on file with author) (describing conflict from Occidental Oil's perspective). *But see* Lena Van Haren, *Environmental Justice Case Study: The U'wa struggle against Occidental Petroleum*, <http://www.umich.edu/~snre492/Jones/uwa.htm> (last visited May 20, 2010) (describing conflict from perspective of indigenous people); or U'WA DEFENSE WORKING GROUP, RESPONSE TO OCCIDENTAL'S PUBLIC RELATIONS CAMPAIGN, <http://www.ratical.com/ratville/Columbia/OxyPRcampRebut.html> (also describing conflict as perceived by indigenous peoples).

45. See THEODORE MACDONALD, S. JAMES ANAYA, AND YADIRA SOTO, *THE SAMORÉ CASE: OBSERVATIONS AND RECOMMENDATIONS*, (1997).

46. See Pamela Mercer, *Land Clash Pits Indians Vs. Oilmen in Colombia*, *NEW YORK TIMES*, 6 October 1996, A9.

progressive legislation.⁴⁷

At the time, ONIC was riding high on a wave of popular support and was working to implement Colombia's 1991 constitution. The new constitution incorporated much of the participatory language of ILO Convention No. 169, particularly as it relates to development projects and community consultation, but these new legal instruments had not been tested yet. The Samoré project, along with the Urubá hydroelectric dam which ran through the Embera people's settlements in the western Darien lowlands, became test cases for defining participation and consultation. The indigenous organizations argued that they, not Occidental or DGAI alone, should help define the process and should participate in any decision-making as an equal member. But they became deadlocked in acrimonious and polarizing public debates.⁴⁸

In mid-1995 a lawsuit filed by the newly established Human Rights Ombudsman challenging Occidental's consultation was heard in the Bogota Superior Court, which ruled the consultations improper. On appeal, however, the Colombian Supreme Court of Justice overruled the Superior Court. The Council of State, a higher order body, was then asked to review the case, and declared that the U'wa had been granted their constitutional right. While some cried power politics, the judges for the Council of State clearly stated that, given the unspecified mandate for state consultation at that time, *they had no basis on which to reject it*. Meanwhile three government agencies set about drafting procedures for the future consultative process. These agencies never advanced very far and, besides, their efforts would probably have been rejected by the indigenous organizations because none participated in the drafting.⁴⁹ There was stalemate.

Consequently, a mission from the Organization of American States, requested by Colombia's Ministry of Foreign Relations, reviewed the case and made recommendations. The first was for a cessation of oil activities, so as to create an environment amenable to calm discussion. Beyond that there were detailed recommendations for inclusive consultation and training sessions to assure that indigenous peoples were adequately informed of the nature and extent of oil development. All parties accepted the recommendations but no subsequent action was ever taken by the U'wa or ONIC.

47. See MACDONALD, ANAYA, AND SOTO, *supra* note 45.

48. *Id.*

49. *Id.*

After a series of palliative measures (land tilting and reduction of block), Colombia granted Occidental Oil permission, and Occidental began drilling. The well turned up relatively dry (i.e., not commercially viable), however, so Occidental abandoned it and the well reverted to the Colombian state oil company Ecopetrol. Although no national consultative process resulted, the indigenous organization's goal from the onset was clear and consistent. It focused on their efforts to advance indigenous citizenship through participation and consultation in national development projects.⁵⁰

B. Conflicts in Ecuador in the 1990s

Ecuador's indigenous peoples, through their national organization CONAIE, garnered much publicity, support, and international attention during the 1990s as they undertook a series of strikes and non-violent "uprisings" (*levantamientos*, 1990, 1992, 2000).⁵¹ The demands of the Ecuadorian indigenous groups illustrate yet another case of indigenous self-determination through citizenship.

CONAIE's greatest advance in long-term indigenous rights occurred in late 1997, when a constitutional assembly, with a significant number of indigenous delegates, drafted a new constitution. Ratified in 1998, the constitution included broad recognition of indigenous rights and drew heavily from the language of ILO Convention No. 169.⁵² CONAIE saw itself not simply as a legitimate ethnic political force, but also as the vanguard for even broader popular participation and democratization. CONAIE argued that indigenous peoples were filling the widely recognized gap created and perpetuated by traditional parties between representative and participatory democracy.⁵³

In the August 1998 elections the indigenous party Pachacutik gained additional congressional seats, and initial relations with the government of President Jamil Mahuad were quite good. President Mahuad's government worked closely and amicably with CONAIE to create the highly participatory *Consejo de Desarrollo de las*

50. *Id.*

51. Theodore Macdonald, *Ecuador's Indian Movement: Pawn in a Short Game or Agent of State Reconfiguration*, in *THE POLITICS OF ETHNICITY: INDIGENOUS PEOPLES IN LATIN AMERICAN STATES*, (David Maybury-Lewis ed. 2002) 169-197 [hereinafter *Ecuador's Indian Movement*].

52. ILO Convention No. 169, *supra* note 11.

53. *Ecuador's Indian Movement*, *supra* note 51.

Nacionalidades y Pueblos del Ecuador (Development Council for the Nations and Peoples of Ecuador, or PRODENPE), and to create an "indigenous fund"(fondo indígena) for local development projects. Equally important for CONAIE, the organization negotiated a time and space for a regular dialogue with the government. Consequently, through early 1999 the government was receiving strong praise from CONAIE's president.⁵⁴

The positive working-relationship, however, was short-lived. In February 1999, when the banking crisis, frozen assets, and subsequent scandals emerged, the funds promised for PRODENPE were unavailable and dialogue stalled. By March 1999, CONAIE was calling for another *levantamiento*. With CONAIE addressing broad public frustration with unpopular issues, there was strong popular support. CONAIE, once again, dramatically but peacefully brought the country to a halt. A subsequent March 19, 1999 agreement between CONAIE and the government included a regular dialogue with indigenous peoples.⁵⁵

Unfortunately, as the economic situation deteriorated and the political crisis worsened, no agreements were met. Equally unsettling to CONAIE and others, the Pachacutik/CONAIE plans for participatory decision-making were neglected by the government. All actions or planning undertaken by the government were done through closed decision-making. This was interpreted as a direct rejection of the dialogue agreements, which CONAIE had proudly brokered. The resulting sense of marginalization from any decision-making provoked, in large part, the unlikely alliance with the army officers and the *levantamiento* coup of January 2000, which ended the Mahuad presidency. From the indigenous perspective, the broken promises to include them in dialogues was ample reason for the president to lose his job.⁵⁶

*C. Harvard Dialogues of 1997-2001*⁵⁷

During the 1990s, most major international oil companies were active in the Upper Amazon. Disputes were frequent, misunderstandings were rampant, and transnational oil companies

54. *Id.*

55. *Id.*

56. *Id.*

57. Theodore Macdonald, Perspectives on Consultation: A Review from the Dialogues on Oil in Fragile Environments, Manuscript presented at the Program on Nonviolent Sanctions and Cultural Survival, Harvard University (2001).

were largely demonized and anxious to change their image. At the time, the oil companies' interest in changing the image coincided with the indigenous organizations' desire for the sort of face-to-face engagement associated with the new citizenship rights. Thus, the *Dialogues on Oil in Fragile Environments* were initiated at Harvard University's Weatherhead Center for International Affairs in 1997.

The Harvard Dialogues were created as an informal means to talk in an impartial setting about the highly sensitive and controversial issues surrounding oil development in the Upper Amazon. What distinguished the Harvard Dialogue group from most others was heterogeneity; they included most of the major stakeholder groups: regional indigenous organizations, environmental NGOs, and transnational oil companies. The only sector absent at this stage was the state representatives from the Amazonian countries. At the time, each representative was directly involved in one or more regional disputes or oil development project in the Amazon. Although there were no formal objectives or efforts to obtain agreements, all of the stakeholders agreed that community consultation was among the most problematic, due to the unspecified, informal, and often conflictive manner in which such consultations were being carried out.⁵⁸

At that time, and today as well, national governments invited international oil companies simply by announcing the availability of a "block," or concession site, and subsequently received bids--with little or no prior knowledge of social conditions or consultation. Despite ratification of ILO Convention No. 169, there was no prior consultation as to whether or not bids should be considered for a particular area and, if so, under what considerations and limitations. While some participants asserted that many governments *state* that their policies toward consultation are clearly defined and fully operational, dialogue participants were unable to cite a single example that demonstrated government clarity regarding consultation.⁵⁹

Consequently, the consensus of the dialogue participants was that future "best practices" lay in the ability of the companies, jointly with the state, to consult with and evaluate needs with the communities on a case-by-case basis and then develop individual processes for each. Consultation, they argued, should be undertaken through formal, public processes with direct government presence.

58. *Id.*

59. *Id.*

Legislation, they argued, was not sufficient; some form of regular, multi-stakeholder dialogue was required.⁶⁰

The dialogue participants emphasized that they see governments as obstacles. From the perspective of environmental NGOs and indigenous peoples, governments prefer to work only with the companies, and thus marginalize NGOs and communities from any decision-making process. The dialogue participants suggested that, after the development of a formal consultative process, governments and companies should support and/or undertake the following, in collaboration with NGOs and communities:

- (1) Schedules of consultations.
- (2) Procedures for subcontracting.
- (3) Monitoring procedures to be carried out in conjunction with community and company.
- (4) Joint contingency planning by local organizations and companies.⁶¹

In brief, the Harvard dialogues operated under an understanding that consultation is now obligatory by international law, but that the actual consultative processes were insufficient. Mutually acceptable procedures, or at least agreed-upon guidelines, needed to be established collaboratively. Finally, the participants argued that companies should not be obliged to make independent decisions without a formal, established consultative process to frame their decisions.⁶²

D. The Conflict in the Bagua Province of Peru in 2009

As indigenous protests organized by the regional ethnic federation, the *Interethnic Association for the Development of the Peruvian Rainforest* (AIDSESP),⁶³ throughout Peru's Amazon region expanded, violence erupted. Shortly before dawn on June 5, 2009, "killings unfolded . . . after the police fired from helicopters on hundreds of protesters who had blocked the highway in the northern Bagua Province, with at least twenty-two civilians killed."⁶⁴ Peru's

60. *Id.*

61. *Id.* Moreover, the participants stressed that one of the government's roles should also be to gather, compile, and facilitate access to social and environmental data prior to any bidding on a block. *Id.*

62. *Id.*

63. See [AIDSESP.org.pe](http://www.aidesepp.org.pe). Historia de AIDSESP, <http://www.aidesepp.org.pe/index.php?id=3> (noting AIDSESP stands for la Asociación Interétnica de Desarrollo de la Selva Pervana).

64. Simon Romero, *Fatal Clashes Erupt in Peru at Roadblock*, N.Y. TIMES,

Interior Minister argued that the police did not initiate the violence but were instead “victims of the frenzy.”⁶⁵ After the violence subsided, the Prime Minister reported 11 police officers and 3 Indians had been killed, and protesters had abducted 38 police officers and a civilian engineer.⁶⁶ While the exact nature of the violence is still under investigation, the national impact is clear: the protests disrupted oil production and pipelines, blocked commerce on roads and waterways, and halted flights at remote airports.⁶⁷

To explain the protests the Peruvian government made unsubstantiated accusations of foreign (Evo Morales of Bolivia) or guerilla (Peru’s Shining Path) influence on the protestors. One indigenous leader more accurately described the motivations simply by stating “[w]e want an immediate halt to every project that was conceived without consulting those of us who live in the forest.”⁶⁸ Meanwhile, the national and international media reported that the catalyst for the protests was Peru’s acceptance of a Free Trade Agreement with the U.S., one that would open up indigenous communal land to markets and encourage natural resource exploitation.⁶⁹

As the detailed reports by the Office of the U.N. Special Rapporteur on Indigenous Issues under James Anaya and another by his predecessor Rudolfo Stavenhagan demonstrate, the protests and their causes were the product of the long-term frustration of the indigenous peoples.⁷⁰ A year earlier, between March and June of 2008, Peru’s executive branch passed over 100 decrees. Among them was a decree related to the U.S.-Peru Free Trade arrangements,

June 5, 2009 available at

<http://www.nytimes.com/2009/06/06/world/americas/06peru.html>.

65. *Id.* (noting Peru’s insistence police did not start violence)

66. *Id.* (listing victims of the violent protests)

67. *Id.* (noting effects of protests on Peru’s infrastructure). The real concern of the Peruvian government was not the failure of infrastructure in the Amazon, but rather that failure reaching the major coastal cities were the majority of the population and foreign investors live. *Id.*

68. *Id.*

69. *Id.* (citing new Peruvian free trade acts as motivating protests)

70. See U.N. Human Rights Council, U.N. Special Rapporteur on Indigenous Issues, *Observaciones sobre La Situación de los Pueblos Indígenas de al Amazonía y Los Sucesos de 5 de Junio y Días Posteriores en las Provincias de Bagua y Utcubamba, Perú*, U.N. Doc. A/HRC/12/34/add.8 (Aug. 18, 2009) [hereinafter *Observaciones*]; FEDERACIÓN INTERNACIONAL DE DERECHOS HUMANOS, *DERRAMAMIENTO DE SANGRE EN EL CONTEXTO DEL PARO AMAZÓNICO: URGE ABRIR DIALOGO DE BUENA FE* (Oct. 20, 2009) available at http://www.fidh.org/IMG/article_PDF/article_a7137.pdf.

which passed all legislative powers on this matter to Peru's President. The Special Rapporteur noted that the objections to the decree were "as much due to the fact that the government *had not undertaken consultations directly with the indigenous peoples* as for the content of decree."⁷¹ The Peruvian government's approach also went directly against AIDSESEP's expressed concerns over the land and resources. The most odious of these new decrees was Decree No. 1015, which made it relatively easy to subdivide indigenous communal lands by lowering the quorum for such a decision from two-thirds to one-half of the community members.⁷²

In light of AIDSESEP's protests, the President of Peru established a multi-party commission in late 2008 to study the matter and make recommendations in a participatory manner. At the same time, the government promised to modify the procedures of Peru's Congress to coincide with the spirit of consultation laid out in ILO Convention No. 169, which Peru ratified. They also agreed to eliminate the laws on breaking up communal lands (Decree No. 1015 as well as its predecessor Decree No. 1073). By the end of March 2009, however, AIDSESEP argued that no progress had been made. In response the Peruvian government set up a permanent *mesa de dialogo* on March 23, 2009. AIDSESEP rejected this plan, arguing that delegates approved by the government were not representative leaders of their member communities.⁷³

Faced with stalemate, AIDSESEP member communities began to strike and blockade government work places and transit in the region. In response, the Peruvian government sent in the national police. The government also attempted to establish a dialogue with AIDSESEP, but the organization left, complaining the government did not want a true dialogue, but rather only wanted to reiterate the government position. Following the arrest of the president of AIDSESEP on May 22, deadly violence broke out in Bagua. Recently, the situation has improved, and the Peruvian government has drawn back on its most aggressive decrees. But the tragic Bagua events illustrate, once again, the difficulty with the basic rights to self-determination and the participatory dialogical process to secure

71. See *Observaciones*, *supra* note 70, at 5 (describing chronology of events).

72. This is similar to the US Dawes Act of 1887, which divided up indigenous territories and effectively ended indigenous-owned communal lands in the United States.

73. See Romero, *supra* note 64 (noting disapproval and rejection of government plans by indigenous leaders)

them.

E. Case Study: Summary

The message from each of these cases is clear: consultation, participation, and prior informed consent are major concerns. Each directly relates to the positive freedoms of self-determination and the respect, recognition, and dignity associated with it. To continue denying such rights is not only a violation of much international and recent national law, but also an invitation to indigenous organizations to confront states and states' agents, such as international oil companies.

V. CITIZENSHIP RIGHTS THROUGH CORPORATE SOCIAL RESPONSIBILITY

At first glance, and theoretically, securing citizenship rights through acts of corporate social responsibility seems difficult and probably inappropriate. Citizenship issues are classic state matters. Transnational oil companies, however, already undertake other tasks generally associated with state obligations. These include health centers, schools, transportation, and local infrastructure, such as roads, bridges, and drainage. Companies undertake such public works as a demonstration of good will, and often because the state cannot or will not fulfill its obligations. Moreover, the oil companies absorb the costs, and no one complains about this aspect of their work. So joint fulfillment of local obligations, duties, and responsibilities is not unheard of and corporations could even meet additional needs as well. Although most public service work is undertaken only after oil has been found, contracts and working arrangements can easily be reworked to include more public services. Companies would most likely welcome the opportunities for the positive public relations and increased goodwill from the indigenous groups.

Unfortunately, governments may react differently. Opening the door to indigenous voices in decision-making requires changes that the existing government may be unwilling to make. While few governments would deny their obligation to provide schools and health care, and many would welcome assistance, encouraging indigenous participation requires changing the political status quo, which is a perceived threat to the existing government's power. Although many governments would deny that they regard indigenous

peoples as “outside” of national life, and few would admit that indigenous participation is discouraged, such treatment remains all too common. Yet such exclusion is no longer acceptable under most international and much national law, which is increasingly ratifying and constitutionalizing norms such as ILO Convention No. 169 and the U.N. Declaration on the Rights of Indigenous Peoples.⁷⁴ States, in brief, are now obligated to take indigenous citizenship demands seriously and act on them.

Following the principles recently established by the current UN Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, companies have a range of human rights *responsibilities*.⁷⁵ Advancing citizenship rights could be included among them. What’s more, it is in the long-term economic interests of oil companies to support claims that will advance their work without protests, work disruptions, negative press, and legal battles.

If companies increasingly take on public functions and responsibilities, they would require some kind of regulation. Earlier, Phillip Alston, writing on non-state actors, concluded:

international law’s capacity adequately to regulate the cross-boundary activity of TNCs [transnational companies] lags considerably behind the social and economic realities of globalized production and trade. Existing domestic and international legal mechanisms are, to a considerable extent, unable to ensure that their enforcement of human rights obligation is effective when it comes to the activities of TNCs and other non-state actors.⁷⁶

Alston also noted the independent collaborative efforts to develop informal standards though multi-stakeholder groups were perhaps the best option. Some recent examples are the Voluntary Principles on Security and Human Rights and the new Institute for Human Rights and Business (IHRB). The benefits of these informal arrangements are limited, because they are largely good will gestures

74. ILO Convention No. 169, *supra* note 11; U.N. Declaration on the Rights of Indigenous Peoples, *supra* note 11.

75. See U.N. Comm’n on Human Rights, *Report of the Special Representative of the Sec’y-Gen. on the Issue of Human Rights and Transnat’l Corps. and Other Bus. Enters.*, delivered to the Human Rights Council, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008)[hereinafter *Report of the Special Representative*].

76. Philip Alston, *The “Not-a-Cat” Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?* in NON-STATE ACTORS AND HUMAN RIGHTS (Philip Alston ed. 2005) 3, 30; See *supra* Part IV.C (discussing Harvard Dialogues as an example of multi-lateral stakeholder talks)

without the direct support of the governments in the countries where the companies work.

Recent and well-received policy guidelines set forth by John Ruggie could be adopted by transnational oil companies working in the Amazon.⁷⁷ The policy framework builds on three general points or principles: the state duty to protect, the corporate responsibility to respect, and the need to increase access to remedies. The state's duties were previously discussed in Part III.⁷⁸ The second principle, corporate responsibility to respect, is a soft law concept telling companies that "[t]o respect rights essentially means not to infringe on the rights of others—put simply, do no harm."⁷⁹ To do that "what is required is due diligence, a process whereby companies not only ensure compliance with national laws but also manage the risk of human rights harm with a view to avoiding it."⁸⁰ The lack of consultation and prior informed consent certainly fit the definition of a human rights harm that should and can be avoided. Given the length of time required for any consultative procedures to develop, either as national guidelines or as project specific agreements, there is plenty of time for companies to collaborate with both government and indigenous peoples and to assure the process is undertaken properly.

To date the only regional legal decision on consultation is the case of the *Saramaka People v. Suriname* from the Inter-American Court of Human Rights.⁸¹ The Inter-American Court of Human Rights interpreted "proper" consultation to be a set of locally generated agreements that must be contextualized on a case-by-case basis and must draw mainly from community decisions on representation and other procedures.⁸² The question then becomes not *whether* to consult and prior inform, but *how* to advance such work.

One option exists within the idea of "shared responsibility." In situations where the state lacks the capacity or abdicates responsibility, the corporate sphere looms large by default. As this is a new rights area, what is to be shared would need to be determined

77. See *Report of the Special Representative*, *supra* note 75 (setting forth principles).

78. See *supra* Part III (discussing state's obligations to citizenship claims).

79. *Report of the Special Representative*, *supra* note 75, at 9.

80. *Id.*

81. *Saramaka People v. Suriname*, Inter-Am. C.H.R., Series C No. 185 (Aug. 12, 2008).

82. *Id.*

case-by-case. Nevertheless, if a company and a state simply recognize their mutual obligations to listen to and include indigenous peoples, they will have made an important step forward.

VI. CONCLUSION

Most indigenous peoples, rather than slay some state or corporate Goliath with stones, now want to talk as equals. Indigenous peoples do not want Goliath dead; they want to be an equal part of his essential locus of power. Just as David eventually became a king who exercised more constructive and formal power, indigenous peoples now demand a similar stake. It would, of course, be incorrect to assume that all indigenous leaders have the sovereign aspirations of David, but it is quite reasonable to suggest that access to political power and office is not a grandiose scheme but a foundational exercise of basic citizenship rights.