INDIGENOUS PEOPLES AS STAKEHOLDERS: INFLUENCING RESOURCE-MANAGEMENT DECISIONS AFFECTING INDIGENOUS COMMUNITY INTERESTS IN LATIN AMERICA

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Multinational corporations and national governments who extract petroleum and other natural resources in Latin America often ignore the disastrous consequences resource development has on indigenous peoples, their habitats, and their traditional way of life. In order to reverse this trend, an indigenous peoples' rights movement has emerged recently, seeking to equip indigenous groups with legal guarantees to safeguard their welfare. Although progress on the legal front has been promising, Gerald Neugebauer concludes that it has not yet accomplished enough, as there are numerous obstacles to effectuating strong human rights protections. He thus advocates adopting an alternative approach based on the stakeholder theory of corporate management—an approach that should result in greater participation and influence in resource management decisions for indigenous groups. In short, whereas human rights are articulated in abstract terms and rely on often ineffective government institutions for their enforcement, stakeholder arguments employ corporate terminology to inform petroleum companies directly as to why protecting indigenous interests is necessary to achieve conventional business objectives.

INTRODUCTION

Those familiar with the indigenous rights movement in Latin America know all too well how petroleum development can subject local indigenous populations to deplorable atrocities of grave proportions. Texaco's operations in the Ecuadorian Amazon from 1967 until 1992, as documented by Judith Kimerling, serve as the quintessential example.[1] With little regard for the region's inhabitants, Texaco went

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[1] Judith Kimerling has studied Texaco's impact on the Ecuadorian Amazon thoroughly and published a wealth of articles on the topic; hence, her work will be cited widely here. See generally Judith Kimerling, Disregarding Environmental Law: Petroleum Development in Protected Natural Areas and Indigenous Homelands in the Ecuadorian Amazon, 14 Hastings Int'l & Comp. L. Rev. 849 (1991) [hereinafter Kimerling, Disregarding Envi-

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about discarding the harmful byproducts of its oil activity into the environment at an alarming rate, creating vast waste pits or discharging pollutants directly into rivers and streams.[2] Even "accidental" emissions of toxic agents were a regular occurrence—oil spills leaked thousands of additional gallons each week,[3] eventually depositing fifty-five percent more oil in this fragile rain forest ecosystem than the Exxon Valdez left in the Gulf of Alaska.[4] The pollution's effects on indigenous communities, not surprisingly, were drastic.

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ronmental Law] (discussing devastating effects of oil development in Ecuador's Oriente region and calling for extensive environmental impact studies and tougher government regulation and enforcement); Judith Kimerling, The Environmental Audit of Texaco's Amazon Oil Fields: Environmental Justice or Business as Usual?, 7 Harv. Hum. Rts. J. 199 (1994) [hereinafter Kimerling, Environmental Audit] (outlining Ecuadorian and international law governing environmental standards and criticizing so-called "independent and impartial" audit of Texaco's activities in Amazonian Ecuador); Judith Kimerling, Rights, Responsibilities, and Realities: Environmental Protection Law in Ecuador's Amazon Oil Fields, 2 Sw. J. L. & Trade Am. 293 (1995) [hereinafter Kimerling, Rights, Responsibilities, and Realities] (examining inequality in Ecuador's Amazon region). For additional general accounts of the problems discussed below, see generally Discrimination Against Indigenous Peoples: Transnational Investments and Operations on the Lands of Indigenous Peoples, Report of the United Nations Centre on Transnational Corporations Pursuant to Sub-Commission Resolution 1990/26, U.N. ESCOR, 43d Sess., at 21-22, U.N. Doc. E/CN.4/Sub.2/1991/49 (1991) [hereinafter U.N. Transnational Corporation Report]; Org. of Am. States Inter-Am. Comm. on Human Rights, Report on the Situation of Human Rights in Ecuador, Inter-Am. C.H.R., OEA/ser.L/V/II.96, doc. 10 rev. 1 (1997); Joe Kane, Savages (1995) (illustrating fight of Huaorani Nation against Conoco oil exploration in Ecuadorian Amazon); Francisco Lopez Bermudez, Indigenous Peoples and International Law: The Case of Ecuador, 10 St. Thomas L. Rev. 175 (1997) (assessing indigenous peoples' role in international law and actions by indigenous movement to change unjust social system); Jennifer E. Brady, Note, The Huaorani Tribe of Ecuador: A Study in Self-Determination for Indigenous Peoples, 10 Harv. Hum. Rts. J. 291 (1997) (analyzing creation of and pressures against self-determination of eastern Ecuadorian Amazon tribe). Discussions of more recent developments in Ecuador are located in Judith Kimerling, International Standards in Ecuador's Amazon Oil Fields: The Privatization of Environmental Law, 26 Colum. J. Envtl. L. 289 (2001) [hereinafter Kimerling, International Standards] (using contract negotiated between Ecuador and Occidental Petroleum to comment upon environmental problems resulting from environmental self-regulation by transnational corporation); Judith Kimerling, Rio + 10: Indigenous Peoples, Transnational Corporations and Sustainable Development in Amazonia, 27 Colum. J. Envtl. L. 523 (2002) [hereinafter Kimerling, Rio + 10] (criticizing failure of transnational corporations to achieve sustainable development in indigenous territories of Amazon); Judith Kimerling, Uncommon Ground: Occidental's Land Access and Community Relations Standards and Practices in Quichua Communities in the Ecuadorian Amazon, 11 L. & Anthropology 179 (2001) [hereinafter Kimerling, Uncommon Ground] (depicting Ecuadorian Quichua's problems with oil company activity and lack of corporate responsibility).

[2] Kimerling, Disregarding Environmental Law, supra note 1, at 860-64.

[3] Id. at 865-66. In order to clean one spill, indigenous workers were enlisted "to use their bare hands to scoop petroleum from the surface of contaminated waters into large plastic bags" and were "only given gasoline to clean their hands at the end of the day." Id. at 884; see also Kimerling, Environmental Audit, supra note 1, at 205 (alleging Texaco did not bother to clean up spills).

[4] Kimerling, Disregarding Environmental Law, supra note 1, at 872.

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Waste dumped into open pits saturated local water supplies with a host of dangerous contaminants, wiping out crops and aquatic life in addition to triggering diarrhea and rashes in the local population.[5] Oil and gas burned as part of the extraction process led to widespread respiratory ailments.[6] The environmental harm rendered local inhabitants' subsistence living tenuous and threatened their traditional diets.[7] In addition to introducing new diseases into the community, oil workers, missionaries, and colonists also introduced the vices of alcoholism and prostitution.[8] Colonization and petroleum development worked side by side in the Amazon pushing indigenous tribes onto ever-shrinking tracts of their traditional territories and endangered the very existence of their distinct cultures.[9] The population of the Cofan tribe, to offer a grim example, plummeted to 650 people from 15,000.[10] While the crude was sold on world markets for handsome profits, little trickled down to the tribes.[11]

Although Texaco's behavior paints a bleak picture, not all Latin American indigenous groups faced with hydrocarbon development were doomed to a similar fate. For example, the tribes of the Lower Urumbamba region of Peru, home to two valuable gas reserves (the Camisea project), enjoyed a vastly different experience in the early stages of a potential development project led by Shell. Instead of being helpless spectators to a large petroleum corporation running roughshod over their livelihoods, all twenty-three surrounding indigenous groups watched the company take active measures to protect, if not advance, the interests of their communities. Instead of negotiating the perils of disease and pollution, the Peruvian contingent took part in negotiations of a different sort: Through a process of consultation and sustained dialogue, these communities collaborated with Shell to design the project.[12] Instead of being summarily disregarded,

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[5] See id. at 870-871, 873, 884; see also Kimerling, Environmental Audit, supra note 1, at 205 (estimating that 3.2 million gallons per day of contaminated water supply used for bathing and drinking).

[6] See Kimerling, Disregarding Environmental Law, supra note 1, at 870.

[7] Id. at 855-56, 878-79.

[8] Kimerling, Environmental Audit, supra note 1, at 207.

[9] Kimerling, Disregarding Environmental Law, supra note 1, at 856, 877, 887.

[10] Id. at 853; Kimerling, Environmental Audit, supra note 1, at 206.

[11] Whatever benefits inured to local workers were offset by lax company safety precautions. Kimerling recounts that "Texaco's workforce was so unaware of the hazards of crude oil . . . that skilled Ecuadorian workers applied it to their heads to prevent balding. They then sat in the sun or covered their hair with a plastic cap overnight; to remove the crude, they washed their hair with diesel." Kimerling, International Standards, supra note 1, at 321 (citation omitted).

[12] See Int'l Petroleum Indus. Envtl. Conservation Ass'n (IPIECA) & Int'l Ass'n of Oil & Gas Producers, Shell in Camisea, Peru, http://www.ipieca.org/publications/biodiversity.html (last visited Apr. 10, 2003); Murray Jones & Alonzo Zarzar, Local

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the native Peruvians not only voiced their opinions and concerns, but actually influenced company decisions. Because Shell eventually abandoned its interest in Camisea (for reasons not directly related to the indigenous groups[13]), one only can speculate as to the project's ultimate effect on the locals. However, given the positive trend Shell established, it seems that if Shell had followed through with its cooperative approach (even if only partially), the Lower Urubamban indigenous peoples still would be in a far healthier state today than their Ecuadorian counterparts.[14]

Given that the Camisea project's promise of minimal disturbance stands in contrast to the widespread damage inflicted in the Ecuadorian Amazon, indigenous populations and their allies must understand how they succeeded in asserting their interests in the former, but not the latter case. Only by mimicking these steps in future resource-management decisions can indigenous peoples avert repeating disasters like those propagated by Texaco.

This Note seeks such an understanding. It argues that relying primarily on governmental mechanisms to vindicate traditional notions of human rights or other legal or regulatory entitlements is insufficient to secure adequate protection for indigenous groups, as was demonstrated in the Ecuadorian Amazon. Indigenous peoples and their advocates should adopt a different, more functional approach based on direct appeal to, and collaboration with, the enterprises carrying out the exploration. That is, instead of invoking their position as holders of abstract human rights, indigenous communities should lev-

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Consultation in the Camisea Natural Gas Project: Lessons Learned to Improve Indigenous Participation, in Indigenous People and the Effectiveness of Environmental Assessment, 1998 Int'l Ass'n for Impact Assessment (IAIA) Conf. Indigenous Peoples Sec. (on file with *New York University Law Review*).

[13] Shell ultimately withdrew since an agreement could not be reached with Peru's government concerning domestic distribution of the gas. IPIECA & Int'l Ass'n of Oil & Gas Producers, supra note 12.

[14] It is interesting to note that the hydrocarbon companies that since have undertaken the project do not appear poised to match Shell's level of community protection. See Camisea Project, Public Participation and Consultation Process: Summary and State of the Project (2002), http://www.camisea.com.pe/docs_mAmbiente/Camisea_summary.pdf. Human rights experts monitoring the situation have responded negatively. See, e.g., Conrad Feather & Shinai Serjali, Peru: Camisea Gas Project Undermines the Rights of Indigenous Peoples, World Rainforest Movement (WRM) Bulletin, Sept. 2002, at 10-11 ("Work in the reserve started in May 2002 yet engagement with its inhabitants has to date been governed by the pressures of work schedules rather than a respect for their internationally recognized rights or concern for their health and security."), http://www.wrm.org.uy/bulletin/62/Peru.html; Rainforest Action Network, Camisea Gas Field Project: A Citigroup Case Study, at http://www.ran.org/ran_campaigns/citigroup/cs_camisea.html (last visited Apr. 10, 2003) (offering details of environmental and social destruction).

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erage themselves as corporate "stakeholders," replicating what similar groups did in Camisea.[15] Initiating direct contact as a stakeholder emphasizes—in terms easily grasped by the corporate mentality—how much petroleum development impacts indigenous communities and consequently informs corporations why it is in their best long-term interest to take the indigenous perspective into account when making resource-management decisions. Making stakeholder arguments highlights that the consequences of overlooking indigenous peoples' welfare include a tarnished public image and, more importantly, a social environment marked by increased risk and instability, consequences that in turn corrode the business climate and threaten the bottom line.

Once indigenous communities succeed in establishing the indispensability of their stakeholder interests, petroleum corporations, as illustrated by Shell, will seek to factor these interests into decisions affecting native populations, thus giving these populations the influence to ensure that development is not inimical to their well-being. In sum, in order for future resource-development projects to bear a closer resemblance to Camisea, rather than the Ecuadorian Amazon, this Note urges indigenous-peoples advocates to induce more widespread application of "stakeholder" decisionmaking methodology.

Part I of this Note will describe more fully the hazards presented by petroleum development and the international human rights-based norms that recently have emerged to shield indigenous populations against these threats. Part I will show, however, that these legal standards have been skirted and therefore have failed to protect the interests of indigenous peoples. Part II will introduce and explain the stakeholder argument and contend that, by appealing directly to corporations in their own language, indigenous peoples will be more capable of instituting stronger safeguards in practice. Part III will consider potential objections to endorsing a stakeholder focus and answer these concerns.

This Note focuses on Latin America, as its characteristics make it particularly instructive for a number of reasons. First, the region is home to a large contingent of people who are unanimously recognized as indigenous.[16] Moreover, conflict between their interests and petro-

[15] Those wishing to flip ahead for a comprehensive explanation of the "stakeholder" concept and its practical application are directed to infra Part II.A.

[16] This Note therefore can steer clear of the sticky and polemical debate on the precise definition of "indigenous." See, e.g., John A. Mills, Note, Legal Constructions of Cultural Identity in Latin America: An Argument Against Defining "Indigenous Peoples," 8 Tex. Hisp. J.L. & Pol'y 49 (2002) (arguing against using standardized international legal definition of "indigenous peoples").

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leum exploitation on their land is not aberrational, for Latin America sits atop the second largest reserves in the world.[17] Developing these petroleum deposits is often a critical, easily accessible source of state revenue,[18] especially given the prevailing property rights regime.[19] In sum, the coalescence of a large indigenous population, a powerful state incentive to develop plentiful petroleum reserves, and strong state-held property rights in subsurface hydrocarbons, provide a challenging test to any system seeking to allocate more control over resource development to indigenous peoples.[20]

I
THE LEGAL RESPONSE TO THE DESTRUCTION CAUSED BY PAST RESOURCE DEVELOPMENT

Section A of this Part, after returning to Ecuador to note that legal norms and rights proved ineffective against Texaco, narrates the evolution of the indigenous rights movement and summarizes the new legal standards it prompted on international, regional, and local levels to address corporate abuse. Section B concludes that, in spite of the success of indigenous rights in attracting the attention of the international legal community, purely legal guarantees continue to be ineffective and inefficient protectors of indigenous groups.

A. Development of Indigenous Peoples' Rights Protections

The mere presence of codified, general legal standards has hardly protected indigenous peoples from oil company abuse in Latin America. Texaco in Ecuador again is exemplary, as the domestic laws, regulations, and legal institutions on the books at the time were toothless in the face of the powerful interests driving petroleum exploration.[21] For instance, special designation of indigenous peoples'

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[17] See ARPEL, Oil Sector: Reserves Production Demand, at http://www.arpel.org/lar/oil.htm (last visited Apr. 10, 2003).

[18] In Ecuador, for example, "47% of the Government's annual budget depends on revenues generated from oil exports." Gary Barker et al., Managing Nontechnical Risks Associated with Seismic Operations in the Tropical Rain Forests of Ecuador, Oil & Gas J., Apr. 21, 1997, at 50, 50.

[19] See infra notes 48-50 and accompanying text.

[20] See U.N. Transnational Corporation Report, supra note 1, at 7; Monika Ludescher, Indigenous Peoples' Territories and Natural Resources: International Standards and Peruvian Legislation, 11 L. & Anthropology 156, 173 (2001); Michael Mirande, Sustainable Natural Resource Development, Legal Dispute, and Indigenous Peoples: Problem-Solving Across Cultures, 11 Tul. Envtl. L.J. 33, 33 (1997).

[21] See Kimerling, Disregarding Environmental Law, supra note 1, at 894; Kimerling, Environmental Audit, supra note 1, at 223 (affirming that "[u]nder both Ecuadorian and international law, Texaco had environmental duties and responsibilities to the land and the peoples of the Amazon").

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territories as a "protected natural area" or "indigenous tribal land" did not result in their preservation in an "unaltered state" as required by law.[22] Noncompliance was left unabated by a government more interested in fueling the main motor of economic growth than fulfilling its duty to enforce Ecuadorian statutes and regulations.[23] In sum, "[a]lthough Ecuadorian law [was] theoretically replete with environmental rights and responsibilities . . . , the law [did] not play[ ] an effective role in protecting environmental and human rights in the Amazon."[24]

Partly as a response to the widespread failure—in Ecuador and elsewhere—of domestic laws to prevent natural resource development from harming indigenous peoples, an indigenous rights movement emerged within the mainstream of public international law, a movement constituting a more specialized arm of the general human rights regime.[25] Human rights proponents, very generally speaking, endeavor to codify norms in a series of international conventions and declarations; indigenous rights proponents attempt to tailor these norms to the specific needs and problems confronted by indigenous peoples.

Indigenous rights guarantees have been crystallized on paper in the International Labour Organization's Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169),[26] the only binding international legal instrument focused exclusively on indigenous peoples. ILO Convention 169 established

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[22] See Kimerling, Disregarding Environmental Law, supra note 1, at 850 (quoting Ley Forestal y de Conservación de Areas y Vida Silvestre, tit. II, art. 71, para. 1 (1990)).

[23] See Kimerling, Rights, Responsibilities, and Realities, supra note 1, at 324-25. "Despite a clear and consistent mandate in Ecuadorian law to protect human health and the environment, implementing regulations for environmental laws are underdeveloped and oversight and enforcement mechanisms are inept." Id. at 328-29.

[24] Id. at 295.

[25] See generally S. James Anaya, Indigenous Peoples in International Law (1996); S. James Anaya & Robert A. Williams, Jr., The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System, 14 Harv. Hum. Rts. J. 33 (2001); Russel Lawrence Barsh, Indigenous Peoples in the 1990s: From Object to Subject of International Law?, 7 Harv. Hum. Rts. J. 33 (1994); Robert B. Porter, Pursuing the Path of Indigenization in the Era of Emergent International Law Governing the Rights of Indigenous Peoples, 5 Yale Hum. Rts. & Dev. L.J. 123 (2002); Siegfried Wiessner, Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis, 12 Harv. Hum. Rts. J. 57 (1999); Robert A. Williams, Jr., Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World, 1990 Duke L.J. 660.

[26] Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 28 I.L.M. 1382 (entered into force Sept. 5, 1991) [hereinafter ILO Convention 169]. Seventeen countries have ratified the Convention: Argentina, Bolivia, Brazil, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Guatemala, Honduras, Mexico, Netherlands, Norway, Paraguay, Peru, and Venezuela. For an updated list, see ILO, Con-

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the template for subsequent documents mandating consultation[27] and participation[28] rights, and connecting them to the specific context of subsurface natural resources.[29] The main bodies of the United Nations since have put their credibility and clout behind indigenous rights, designating for example, 1993 as the International Year of the World's Indigenous People[30] and adding nine more years to crown 1995 to 2004 the International Decade of the World's Indigenous People.[31] Along the same lines as the ILO, the U.N. is promulgating its own standards of indigenous rights, drafting a nonbinding (i.e., there is no express enforcement mechanism to compel compliance)

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vention 169 Was Ratified by 17 Countries, at http://www.ilo.org/ilolex/english/convdispl.htm (last visited Apr. 10, 2003).

27 Article 6 dictates that "1. In applying the provisions of this Convention, governments shall: (a) consult the peoples concerned . . . whenever consider[ing] . . . measures which may affect them directly . . . . 2. The consultations . . . shall be undertaken . . . with the objective of achieving agreement or consent to the proposed measures." ILO Convention 169, supra note 26, art. 6, 28 I.L.M. at 1386. The pertinent subsection of Article 7 reads:

> The peoples concerned shall have the right to decide their own priorities for the process of development as it affects [them] and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programs for national and regional development which may affect them directly . . . .

Id. art. 7(1), 28 I.L.M. at 1386.

> The International Labour Organization defines consultation as "[t]he process by which a government consults its citizen about policy or proposed actions. It is not consultation unless those consulted have a chance to make their views known, and to influence the decision." Manuela Tomei & Lee Swepston, Indigenous and Tribal Peoples: A Guide to ILO Convention No. 169 (1996) [hereinafter ILO Guide], http://www.ilo.org/public/english/employment/strat/poldev/papers/1998/169guide/.

28 ILO Convention 169, supra note 26, art. 6(1)(b), 28 I.L.M. at 1386 ("[G]overnments shall: establish means by which these peoples can freely participate . . . at all levels of decision-making in . . . bodies responsible for policies and programmes which concern them . . . .").

29 Article 15 states:

> 1. The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.
>
> 2. In cases in which the State retains the ownership of mineral or sub-surface resources . . . , governments shall establish or maintain procedures through which they shall consult these peoples . . . before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands.

Id. art. 15, 28 I.L.M. at 1387.

30 G.A. Res. 164, U.N. GAOR, 45th Sess., Supp. No. 49, at 277, U.N. Doc. A/45/164 (1990).

31 G.A. Res. 163, U.N. GAOR, 48th Sess., Supp. No. 49, at 281, U.N. Doc. A/48/163 (1993).

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Declaration on the Rights of Indigenous Peoples.[32] Indigenous groups would be entitled under the Draft U.N. Declaration to participate in decisions that bear on their well-being,[33] including those implicating development or resource-management strategies for traditional tribal lands.[34] Although not a source of "rights," multilateral lending institutions—most notably the World Bank[35]—have borrowed the same instruments of participation and consultation with the aim of protecting indigenous peoples' interests in the projects they finance.[36]

The success indigenous peoples have garnered at the global level has spread to regional Latin American institutions. The Inter-American Commission on Human Rights—a regional multinational governance body—is engaged in elaborating its own version of a draft document: the Proposed American Declaration on the Rights of

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[32] Draft United Nations Declaration on the Rights of Indigenous Peoples, Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, U.N. ESCOR, 46th Sess., U.N. Doc. E/CN.4/Sub.2/1994/56 (1994) [hereinafter U.N. Draft Declaration].

[33] Article 19 states that "[i]ndigenous peoples have the right to participate fully, if they so choose, at all levels of decision-making in matters which may affect their rights, lives and destinies . . . ." Id. art. 19; see also id. art. 20 (granting participatory rights in "legislative or administrative measures that may affect them").

[34] Article 30 covers development on indigenous lands:

> Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

Id. art. 30.

Chapter 26 of Agenda 21—another outgrowth of U.N. policymaking—calls for strengthening indigenous participation in sustainable development measures. See U.N. Conference on Environment and Development, Agenda 21, U.N. Doc. A/Conf. 151/26/ at 17 ch. 26.3(b)-(c) (1992).

[35] The World Bank is currently revising its policy on Bank-funded projects impacting indigenous peoples; Draft Operational Policies (OP 4.10) and Draft Bank Procedures (BP 4.10) continue to rely heavily on participation and consultation as mechanisms to protect indigenous community interests. For a comprehensive, detailed, and organized list of revisions in table format, see World Bank, Revision of OD 4.20 (Indigenous Peoples) into OP/BP 4.10: Comparison of OD 4.20 (9/91) and Draft OP/BP 4.10 (03-23-01), http://wbln0018.worldbank.org/essd/essd.nsf/1a8011b1ed265afd85256a4f00768797/f82578d8a15fb0fc85256ad900603439/$FILE/Comparison%20matrix.pdf (last visited Apr. 10, 2003).

[36] See, e.g., Draft Report: An Assessment of UNDP Activities Involving Indigenous Peoples, U.N. Development Programme, http://www.undp.org/csopp/CSO/NewFiles/ipdocunassess.html; U.S. Agency for Int'l Dev., Participatory Development, at http://www.usaid.gov/about/part_devel/ (last visited Apr. 10, 2003) ("Participation . . . underlies two of USAID's core values: customer focus and *engagement of partners and stakeholders* through teamwork." (emphasis added)).

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Indigenous Peoples (Proposed American Declaration).[37] Although the Proposed American Declaration does not have extensive provisions—akin to ILO Convention 169—mandating consultation and participation, it guarantees indigenous peoples involvement in decisions affecting them[38] and grants a more specific right to participate in determinations concerning the extraction of state-owned petroleum.[39] Resource management also may be covered under other, more general articles pertaining to measures impacting the environment.[40]

While the Inter-American Commission on Human Rights is busy defining a system of indigenous rights on paper, its judicial sibling—the Inter-American Court of Human Rights—has exhibited greater willingness to enter the fray and decide actual disputes.[41] Finally, taking their cue from the international movement and the activity in their neighborhood, several Latin American states, including Ecuador, recently have extended special legislative protections to their individual native populations.[42]

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[37] Proposed American Declaration on the Rights of Indigenous Peoples, Inter-Am. C.H.R., 133d Sess., OEA/Ser L/V/II.95.doc.7, rev. 1997 (1997) [hereinafter Proposed American Declaration]; see also General Assembly, Organization of American States, AG/RES. 927 (XVIII-O-88) (calling for drafting of inter-American document).

[38] Article XV—the right to self-government—for example, confers on indigenous populations "the right to participate without discrimination, if they so decide, in all decision-making, at all levels, with regard to matters that might affect their rights, lives and destiny." Proposed American Declaration, supra note 37, art. XV(2).

[39] See id. art. XVIII(5):

> In the event that ownership of the minerals or resources of the subsoil pertains to the state . . . the governments must establish or maintain procedures for the participation of the peoples concerned in determining whether the interests of these people would be adversely affected and to what extent, before undertaking or authorizing any program for planning, prospecting or exploiting existing resources on their lands.

[40] See id. art. XIII(2) (granting indigenous peoples "the right to be informed of measures which will affect their environment, including information that ensures their effective participation in actions and policies that might affect it"); id. art XIII(4) ("Indigenous peoples have the right to participate fully in formulating, planning, managing and applying governmental programmes of conservation of their lands, territories and resources."); id. art XIII(7) ("When a State declares an indigenous territory as [a] protected area, any lands, territories and resources under potential or actual claim by indigenous peoples, conservation areas shall not be subject to any natural resource development without the informed consent and participation of the peoples concerned.").

[41] See, e.g., Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Case No. 79, Inter-Am. C.H.R., (Judgment of Aug. 31, 2001) (finding that Nicaragua violated rights of indigenous group to judicial protection and property by failing to demarcate traditional lands), http://www.corteidh.or.cr/seriecing/serie_c_79_ing.doc.

[42] See Kimerling, Rights, Responsibilities, and Realities, supra note 1, at 347-49 (summarizing stronger legal measures passed by Ecuador in 1993). Articles 83 through 85 of Ecuador's 1998 Constitution, for example, are devoted exclusively to indigenous peoples rights. Constitución Política de la República de Ecuador arts. 83-85.

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B. *Strong in Theory, Weak in Practice*

With so much enthusiasm for indigenous rights, the transformation of Latin America's most impoverished, marginalized groups into respected segments of society seemed imminent. Indigenous peoples were finally to have the legal tools to rise from the depths of oppression and assert themselves against the theretofore-dominant force of large-scale petroleum production driven by multinational corporations. Unfortunately, however, various shortcomings have caused these legal entitlements to malfunction and fail to deliver the protection they promised.

First, demanding that corporations respect "rights" does not offer concrete guidance on how these business enterprises might change their behavior or what they have to gain by doing so. In practical terms, abstract rights do little to tell corporate officials what specific actions they might or might not undertake, when they should or should not do so, and why it would or would not be in their interest to undertake such a course of action.[43]

Second, a system of rights is designed to coerce corporations into changing their conduct through the threat of legal penalties; such a regime functions only if the state fulfills its duty to intervene on behalf of indigenous populations and actually imposes sanctions when mandated by law.[44] But thus far the threat has shown itself to be hollow—experience has demonstrated that government machinery is a blunt instrument for protecting victims of human rights violations.

This is partially attributable to the strong incentive Latin American governments have to develop the natural resources within their boundaries, regardless of the social cost.[45] Petroleum develop-

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[43] Infra Part II.B.1 explains how the stakeholder model urged here solves this problem.

[44] Kimerling argues this in the context of the Ecuadorian Amazon. According to her,

> The obligation to guarantee the free and full exercise of human rights by Oriente residents requires the government to regulate petroleum operations by nongovernmental actors in order to prevent human rights violations. . . . Thus, the government is legally responsible for any impairment of human rights resulting from oil field operations, regardless of whether public officials carry out the harmful operations or acquiesce in violations by nongovernmental actors by permitting the operations, failing to use due diligence to prevent violations, or neglecting to respond to violations as required by international law.

Kimerling, Disregarding Environmental Law, supra note 1, at 311.

[45] In fact, the state's focus may be more "corporate" than "regulatory." See Kimerling, International Standards, supra note 1, at 336 ("Instead of assuming an authoritative, command-and-control regulatory role in environmental affairs . . . the government has essentially behaved like the industry's junior business partner. In negotiations, government officials have prioritized the need to promote oil production, locate additional reserves, and maximize the State's share of revenues and participation in hydrocarbon development . . . .").

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ment is often a vital and easy source of state revenue.[46] Latin America, with oil deposits reaching 123 billion barrels, possesses the world's second largest reserves, behind the Middle East.[47] This lucrative revenue stream can be readily tapped by the state because the prevailing property rights regime in Latin America[48] grants it title to subsurface minerals, including petroleum, no matter who holds surface rights.[49] The temptation to overlook the enforcement of indigenous peoples' "rights" in order to fill the state's coffers proves irresistible[50]—there is simply no motivation to fortify weak state institutions to match powerful transnational corporations. Given current political-economic trends, there is no reason to believe the imbalance of power between transnational corporations and nation-states will do anything but widen.[51]

Not only do rightsholders face an uphill battle in vindicating their "rights" in national courts, but similar efforts to seek justice outside national borders from international law or in the national courts where petroleum companies are headquartered[52] are likewise problematic. The conventions and declarations discussed above theoretically bind signatory states to take measures to guarantee that the human rights of individuals within their jurisdictions are not abused. Individuals, though, lack meaningful recourse to tribunals or other institutions to enforce them in most instances, as international law—although increasingly involving nonstate actors—continues to be an arena dominated by national governments pursuing claims against other countries.[53] Instead, human rights enforcement often takes the

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[46] See Barker et al., supra note 18, at 50.

[47] See ARPEL, supra note 17.

[48] See generally Steven E. Hendrix, Property Law Innovation in Latin America with Recommendations, 18 B.C. Int'l & Comp. L. Rev. 1 (1995).

[49] See ILO Guide, supra note 27; Hendrix, supra note 48, at 12 & n.67 (citing various Latin American laws and constitutional provisions conferring title on states); Ludescher, supra note 20, at 162, 173; Lee Swepston & Roger Plant, International Standards and the Protection of Land Rights of Indigenous and Tribal Populations, 124 Int'l Lab. Rev. 91, 99 (1985).

[50] An astute reader might observe at this point that simply transplanting this property entitlement from the state to indigenous communities could go a long way in shifting the disparity in power between indigenous communities and petroleum interests as well. Property rights, though, are an inadequate solution, a point explored in detail infra Part III.B.

[51] For a discussion of why national governments are becoming increasingly inept at challenging powerful transnational corporations, see Part III.B.2, infra.

[52] See, e.g., Aguinda v. Texaco, Inc., 303 F.3d 470 (2d Cir. 2002) (affirming forum non conveniens dismissal of complaint filed by Ecuadorians against Texaco since Ecuadorian court ruled to provide adequate alternative forum).

[53] But cf. Mary and Carrie Dann v. United States, Case No. 11.140, Inter-Am. C.H.R. (2001), (finding, inter alia, property rights to land were violated by United States land-claims procedures), http://www.cidh.oas.org/annualrep/2002eng/USA.11140.htm; Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Case No. 79, Inter-Am. C.H.R. (Judgment

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form of an international agency overseeing government compliance and exerting pressure on those countries that fail to observe applicable standards.

One need not look long or far to conclude that the impact of the much-touted indigenous rights discourse has been minimal; a cursory glance at the current status of various native populations indicates that the injurious encroachments plaguing indigenous communities have yet to abate. Commentators focusing on Ecuador, for example, have not been at a loss to report injustices that remain pervasive in resource development: Occidental Oil and Gas Corporation's (Occidental) recent activity has violated numerous laws to the detriment of the indigenous Quichua tribe despite claiming to have abided by modern international and Ecuadorian legal norms.[54] It consistently ignored documents such as ILO Convention 169, the Ecuadorian Constitution, and Ecuador's Law of Hydrocarbons.[55] Indigenous rights to land and consultation enshrined in those documents gave way to run-arounds, lies, bribery, and unfulfilled promises.[56] At one point, Occidental allegedly asserted that it was above the law, denying to the community that ILO Convention 169 applied to its operations.[57] As a whole, the company's conduct toward the Quichua was found to have "raise[d] serious human rights issues,"[58] prompting the gloomy conclusion that "[d]espite the recent proliferation of international agreements to recognize indigenous rights . . . the rule of law . . . has not yet reached Amazonian oil fields."[59]

The rule of law has shied away from other Latin American regions as well: NGOs and other indigenous advocates have been kept busy cataloguing similar cases of blatant disregard, cases too

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of Aug. 31, 2001) (concluding that Nicaragua violated rights of indigenous group to judicial protection and property by failing to demarcate traditional lands), http://www.corteidh.or.cr/seriecing/serie_c_79_ing.doc.

54 Occidental's purported model conduct landed it in an industry journal where it reiterated its "commitment" to international standards. See Bob Williams, Foreign Petroleum Companies Developing New Paradigm for Operating in Rain Forest Region, Oil & Gas J., Apr. 21, 1997, at 37 [hereinafter Williams, Foreign Petroleum Companies]; Bob Williams, Oxy's Strategy on Environment, Community Issues Key to Success of Project in Ecuador's Rain Forest, Oil & Gas J., Apr. 21, 1997, at 44.

55 See generally Kimerling, Uncommon Ground, supra note 1; see also Kimerling, International Standards, supra note 1, at 332 (claiming that Occidental has violated some of Ecuador's laws on regular basis).

56 See Kimerling, Rio + 10, supra note 1, at 550-58 (narrating instances of unfulfilled promises, misleading assertions, and offers of money and services in return for acquiescence in Occidental's use of indigenous land); Kimerling, Uncommon Ground, supra note 1, at 185-203 (same).

57 Kimerling, Uncommon Ground, supra note 1, at 224.

58 Id. at 234.

59 Id. at 246.

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numerous to detail here.[60] Thus, while the indigenous rights movement may deserve the proverbial, congratulatory pat on the back for its vigor, tangible progress on the ground has been rather paltry. In the words of one pundit, "[I]t must be recognized that international legal recognition of indigenous national rights is currently limited insofar as it *remains a wholly aspirational undertaking*."[61]

II

THE SOLUTION TO HUMAN RIGHTS INEFFECTIVENESS: A CONCEPTUAL SHIFT TO A "STAKEHOLDER" THEORY

To cure the current rights-based regime's impotence in functionalizing protection of indigenous groups from the unwanted ills of petroleum development, indigenous peoples should set legal, human rights pleas aside and refocus their energy toward their role as corporate "stakeholders." In brief, phrasing arguments in terms of stakeholder theory, which conceptualizes resource management in a manner more compatible with corporate decisionmaking, is more likely to sway the business-minded to give greater weight to the interests of indigenous groups than invoking abstract notions of human rights.

This Part begins with a sketch of the stakeholder approach and demonstrates that it incorporates the same procedural guarantees furnished to indigenous peoples by the legal and administrative framework advocated elsewhere. Section B holds the crux of the argument: By appealing directly to the corporate enterprise in terms readily intelligible to it, the stakeholder paradigm is functionally superior—in operationalizing these safeguards—to mere human rights-based arguments.

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[60] See generally Al Gedicks, Resource Rebels: Native Challenges to Mining and Oil Corporations (2001). For a collection of other brief examples of resource-related human rights abuses notwithstanding purported constitutional and legislative protections, see Indigenous & Tribal Peoples Centre, Legal Frameworks and Indigenous Rights, at http://www.itpcentre.org/leg_index.htm (last visited Apr. 10, 2003) (containing links to Nimia Apaza, Argentina: Depletion in the Region of Susquez, Jujuy; Paulo Celso de Oliveira Pankararu, Brazil: Exploitation of Wood Within Indigenous Territories; Ruben Chacón, Costa Rica: The Right of the Indigenous People to Biodiversity; Roy Guevara Arzu, Honduras: The Development of Tourism in the Bahia De Tela; Atencio Lopez, Panama: Mining Concessions and Indigenous Peoples in Panama; Amadeo Martinez, El Salvador: Reality and Problems of Indigenous Peoples; Luis Antonio Ortega Miticanoy, Colombia: Deforestation Within Indigenous Territories; Arecio Valiente, Panama: Do Indigenous People Have the Right to Decide About Their Own Natural Resources?).

[61] Robert H. Berry III, Indigenous Nations and International Trade, 24 Brook. J. Int'l L. 239, 241-42 (1998) (emphasis added).

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A. *Stakeholder Theory and the Ensuing Decisionmaking Framework*

Stakeholder theory arose as a corporate managerial model[62] whereby decisions are made taking into account the interests—the "stakes"—of a corporation's various "stakeholders."[63] In its simplest form, "stakeholder" refers to an individual or group *affected* by corporate operations.[64] It is important to stress that a "stakeholder" need not have any formal relationship with the corporation, nor is stakeholder status a privilege bestowed by the corporation. Rather, the determination of which entities constitute stakeholders is objective; groups are stakeholders solely by reference to the impact company decisions have on them.[65] The rationale is that any group *affected* by a corporation will eventually acquire the capacity to *affect* the corporation in turn. This causal relationship is posited by R. Edward Freeman: Those affected by the firm should be considered stakeholders since "[g]roups which 20 years ago had no effect on the

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[62] See generally R. Edward Freeman, Strategic Management: A Stakeholder Approach (1984). Freeman is largely credited for first advancing a comprehensive version of the stakeholder concept. "Stakeholder engagement" also has become the mantra of organizations espousing corporate social responsibility. See, e.g., Richard Holme & Phil Watts, Corporate Social Responsibility, Making Good Business Sense 15 (World Bus. Council for Sustainable Dev. ed., 2000), http://www.wbcsd.org/DocRoot/5mbU1sfWpqAgPpPpUqUe/csr2000.pdf.

[63] Freeman, supra note 62, at 26; Thomas Donaldson & Lee E. Preston, The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications, 20 Acad. Mgmt. Rev. 65, 67 (1995); Georgette C. Poindexter, Addressing Morality in Urban Brownfield Redevelopment: Using Stakeholder Theory to Craft Legal Process, 15 Va. Envtl. L.J. 37, 38 (1995).

[64] This definition has achieved broad consensus among commentators. See Freeman, supra note 62, at 25; see also Cmty.-Based Natural Res. Mgmt. Network, Processual Terms, at http://www.cbnrm.net/resources/terminology/terms_processual.html (last visited Apr. 10, 2003); Max B.E. Clarkson, A Stakeholder Framework for Analyzing and Evaluating Corporate Social Performance, 20 Acad. Mgmt. Rev. 92, 106 (1995); Donaldson & Preston, supra note 63, at 67; Mary R. English, Who Are the Stakeholders in Environmental Risk Decisions? How Should They Be Involved?, 11 RISK 243, 248 (2000); see also William M. Evan & R. Edward Freeman, A Stakeholder Theory of the Modern Corporation: Kantian Capitalism, in Ethical Theory and Business 75, 79 (T. Beauchamp & N. Bowie eds., 4th ed. 1993). BP Amoco, to offer a specific example, adopts the definition of stakeholder found in the academic literature in its day-to-day operations. See British Petroleum, Process, at http://www.bp.com/corp_reporting/location_rep/poland/others/process.asp (last visited Apr. 10, 2003) ("Stakeholders may be individual persons, groups who share a common issue, or coalitions mobilised around a specific objective or issue. A stakeholder is a person or an organization who impacts on, or is impacted on by, the company." (quotations omitted)).

[65] See Donaldson & Preston, supra note 63, at 81 (reiterating that "stakeholders are identified by *their* interest in the affairs of the corporation").

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actions of the firm . . . can affect it today, largely because of the actions of the firm which ignored the effects on these groups."[66]

A company should be cautious not to ignore stakeholders and sow seeds of resentment among them in order to ensure that these constituent groups do not have reason to retaliate once they gain power. The firm must take account of the views of all stakeholders in its operational decisions.[67] Although corporate-governance literature maps more detailed strategies of incorporating stakeholder perspectives into company policy, for present purposes it suffices to identify the general, overarching tactic: stakeholder involvement—via a process of engagement, consultation, dialogue, and participation[68]—in corporate decisionmaking.[69] The involvement, moreover, must be meaningful in the sense that stakeholders help shape the actual formulation of company policy in a way that protects their interests. By affording stakeholders this procedural entitlement and consequent influence, corporations appease those they impact and mitigate the chance that such groups will set out to reciprocate harm in the future.

Although most might assume that embracing stakeholders calls for corporations to broaden their focus beyond maximizing shareholder wealth,[70] this need not be the case. Corporations will "build an

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66 Freeman, supra note 62, at 46.

67 This stands in contrast to the more traditional notion that corporations only pay heed to the interests of shareholders or other parties with economic ties to the corporation. See Mark J. Roe, The Shareholder Wealth Maximization Norm and Industrial Development, 149 U. Pa. L. Rev. 2063, 2065 (2001) ("Shareholder wealth maximization is usually accepted as the appropriate goal in American business circles.").

68 One can imagine myriad ways to institute participation in practice—for example, holding regular town meetings to solicit community input on aspects of the proposed project, forming focus groups of community leaders and company officials to resolve particular problems, etc. Indeed, the endless number of forums where stakeholders can contribute to company decisions makes creating an exhaustive list of possibilities here impossible.

69 Freeman, supra note 62, at 78 (maintaining that "[o]rganizations with high Stakeholder Management Capability [inter alia] design and implement communication processes with multiple stakeholders [and] . . . explicitly negotiate with stakeholders on critical issues and seek voluntary agreements"); see also Donaldson & Preston, supra note 63, at 67; Poindexter, supra note 63, at 61. Evan and Freeman include "The Principle of Corporate Legitimacy" as one of their two "Stakeholder Management Principles": "The corporation should be managed for the benefit of its stakeholders . . . . The rights of these groups must be ensured, and, further, the groups *must participate*, in some sense, in decisions that substantially affect their welfare." Evan & Freeman, supra note 64, at 82. For an example of how a petroleum company actually consults its stakeholders, see British Petroleum, supra note 64.

70 Profit maximization, importantly, is not necessarily the pervasive corporate-governance paradigm. See Mark J. Loewenstein, Stakeholder Protection in Germany and Japan, 76 Tul. L. Rev. 1673, 1690 (2002) (remarking that "it would appear that German and Japanese companies would be sensitive and responsive to the concerns of nonshareholder stakeholders").

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ethos of participation and empowerment" until "the long-term cost of these rights-supporting activities is greater than the long-term wealth enhancement."[71] Managerial studies lend support to the instrumental value of stakeholder practice in achieving traditional financial corporate objectives[72] despite the fact that, overall, empirical evidence of discernible economic benefits remains inconclusive.[73]

As for the petroleum industry specifically, as stakeholder vocabulary seeps further into corporate parlance, the popular criticism—that natural-resource-exploiting companies fail to consider the long-term consequences of their actions—is less warranted. As one commentator sees it, "Any multinational oil executive will admit that no confrontation between security forces defending a remote jungle oil production site and a tribal group protesting an incursion into their ancestral lands will go unnoticed for very long these days."[74] Stakeholder arguments, in fact, appear to have persuaded many oil companies.[75] Petroleum trade associations,[76] as well as individual

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[71] Lee A. Tavis, Corporate Governance and the Global Social Void, 35 Vand. J. Transnat'l L. 487, 541-42 (2002).

[72] See Donaldson & Preston, supra note 63, at 7 ("[S]tudies have tended to generate 'implications' suggesting that adherence to stakeholder principles and practices achieves conventional corporate performance objectives as well or better than rival approaches.").

[73] See id. at 77-78 (observing that "[the] hypothesis has never been tested directly" and "there is as yet no compelling empirical evidence that the optimal strategy for maximizing a firm's conventional financial and market performance is stakeholder management").

[74] Scott Greathead, The Multinational and the "New Stakeholder": Examining the Business Case for Human Rights, 35 Vand. J. Transnat'l L. 719, 721-22 (2002); see also id. at 719-20 (arguing that "realit[y] of doing business in the global economy include[s] the concerns of new stakeholders such as . . . [i]ndigenous groups who will no longer passively accept the presence in their ancestral lands of big oil and mining companies that exploit natural resources without coming to terms with local communities").

[75] Cf. Donaldson & Preston, supra note 63, at 75 ("There is ample descriptive evidence . . . that many managers believe themselves, or are believed by others, to be practicing stakeholder management . . . . [A] vast majority of them apparently adhere in practice to one of the central tenets of the stakeholder theory, namely, that their role is to satisfy a wider set of stakeholders, not simply the shareowners.").

[76] See generally ARPEL, Philosophy, at http://www.arpel.org (last visited Apr. 10, 2003) (proclaiming "belief that [ARPEL] cannot achieve growth and prosperity if [they] don't contribute to the improvement of society and the protection of [the] planet's natural resources as a basis for sustainable development"); IAIA, Background & Purpose of IAIA, in IAIA, supra note 12 (describing organization's purpose as "bring[ing] together researchers, practitioners, and users of various types of impact assessment from all parts of the world"); IPIECA, Biodiversity and the Petroleum Industry: A Guide to the Biodiversity Negotiations 4-5, 7, at http://www.ipieca.org/publications/biodiversity.html (last visited Apr. 10, 2003) (warning that greater consultation of and participation by affected indigenous groups is vital to ensuring continued access to petroleum deposits); see also id. at Contents (providing anecdotal evidence of implementation of stakeholder system by Shell in Camisea, Peru); Natural Res. Cluster, Bus. Partners for Dev. (BPD), BPD Natural Resource Cluster, at http://www.bpd-naturalresources.org (last visited Apr. 10, 2003) (detailing project whose "aim was to produce practical examples . . . of how three-way

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multinational firms,[77] have acknowledged the business reasons for considering other parties—including indigenous peoples—affected by their activity.[78] Thirty-two large mining-related enterprises recently indicated that engagement of stakeholders is considered crucial to their long-term survival.[79]

Shell's conduct described earlier is a specific example of a petroleum corporation following stakeholder methodology. A closer look at the case, moreover, illustrates how the methodology functions from an indigenous group's perspective.[80] To begin with, the indigenous community has to be assertive in proclaiming that it has been, is, and will continue to be very much affected by petroleum activity—being

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partnerships involving companies, government authorities and civil society organizations can be a more effective means of reducing social risks and promoting community development").

[77] See, e.g., Williams, Foreign Petroleum Companies, supra note 54, at 41 (maintaining that "[w]hat's at stake here is nothing less than the survival of the industry."); British Petroleum, supra note 64 (outlining BP's "Process and Methods of Stakeholder Consultation"); Shell, Working with Our Stakeholders—Managing Key Relationships, at http://www.shell.com/home/Framework?siteId=Eandp-en&FC1=&FC2=&FC4=&FC5=&FC3=/Eandp-en/html/iwgen/about_shell/workwithstakehold/workwithstakehold_10171133.html (last visited Apr. 10, 2003) ("Stakeholder dialogue is as much about understanding opportunities as it is about preventing conflict and mitigating risk. It makes *good business sense* as well as good moral and political sense." (emphasis added)).

[78] See generally IAIA, supra note 12; MINGA, Int'l Dev. Research Ctr., Exploring Indigenous Perspectives on Consultation and Engagement Within the Mining Sector in LAC [Latin America and Caribbean], at http://www.nsi-ins.ca/ensi/research/research02.html#Exploring%20Effective%20Consultation (last visited Apr. 10, 2003); Mining, Minerals and Sustainable Development (MMSD), International Institute for Environment and Development (IIED), Indigenous People, at http://www.iied.org/mmsd/activities/indigenous_people.html (last visited Apr. 10, 2003).

[79] See MMSD, IIED, Mining & Minerals Sustainability Survey 2001 [hereinafter MMSD Survey] Executive Summary, 1, 4, 8-10, 23, 29, http://www.iied.org/mmsd/mmsd_pdfs/baccp_mining_minerals_sustainability_survey_2001.pdf (last visited Apr. 10, 2003). But see id. at 1, 13-21, 30 (noting fraction of mineral extracting companies queried consulted local communities regularly or have developed concrete plans to do so).

[80] Indigenous communities may have to break more of a sweat in the future to convince other corporations to adopt a stakeholder framework since Shell had an extra incentive to put its best foot forward in Camisea and listen to stakeholders: Shell recently had been widely condemned for its complicity in the 1995 executions of human rights activists in Nigeria who were sentenced to death for speaking out against the destruction wrought by the company's oil production. See generally Joshua P. Eaton, Note, The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment, 15 B.U. Int'l L.J. 261 (1997); World Bus. Council for Sustainable Dev., Shell: Community Development in Nigeria, at http://www.wbcsd.org/Plugins/DocSearch/details.asp?strDocTypeIdList=1&DocType=1&StrCharValList=&DateStart=01.01.1753&DateEnd=31.12.9999&MenuId=ODY&DocId=551&URLBack=%2Ftemplates%2FTemplateWBCSD1%2Flayout%2Easp%3FstrDocTypeIdList%3D1%26DocType%3D1%26StrCharValList%3D%26DateStart%3D01%2E01%2E1753%26DateEnd%3D31%2E12%2E9999%26MenuId%3DODY%26CurPage%3D13%26SortOrder%3Dcompany%2520asc%2C%2520country%2520desc (last visited Apr. 10, 2003) (commenting on Shell's character change).

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so "affected" undeniably gives indigenous peoples a "stake" and the right to involvement in corresponding decisions. In fact, due to the severity of resource exploration's consequences, the community needs to assert that it is one of the most critical stakeholders. This was the case for the indigenous peoples in Camisea, as accessing the valuable natural gas deposits risked destroying the delicate ecosystem on which community members both lived and depended.[81]

Since the indigenous group's involvement in these determinations is crucial and its viewpoint should be allocated substantial weight, stakeholder-indigenous peoples should significantly influence many real-world decisions such as production levels, pollution control, site location, etc. By wielding influence in this fashion, the indigenous community can have a direct hand in preventing the tragic consequences of destructive resource development. Camisea, again, was on track to bear this out, as Shell sought the views of stakeholders via a policy of engagement, consultation, and dialogue.[82] Shell came to acknowledge that accommodating a broader network of stakeholders (not just shareholders) made good business sense and was essential for long-term corporate survival.[83] The indigenous in Camisea benefited by participating in this fashion: They could ensure that they were shielded from harmful and unwanted consequences of oil exploration.

B. Stakeholder Theory Applied to Indigenous Peoples and Resource Development

It is important to observe that gaining stakeholder status results in the same basic procedural guarantees as those provided by the emerging legal regime of indigenous rights: consultation and partici-

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[81] See IPIECA & Int'l Ass'n of Oil & Gas Producers, supra note 12.

[82] See generally Shell, Establishing a Dialogue, at http://www2.shell.com/home/Framework?siteId=Listeningresponding-en&FC1=&FC2=/LeftHandNav?LeftNavState=2,0&FC4=&FC5=&FC3=/Listeningresponding-en/html/iwgen/listening/establishingthe_10220700.html (last visited Apr. 10, 2003); Shell, supra note 77.

[83] See Chris Fay, Speech to the Institute of Chartered Accountants' 21st Century Annual Report Conference (Sept. 11, 1998) ("Shell uk's wider social responsibilities form a fundamental and integral part of the way in which we do business. They are vital to our long-term economic performance."), at http://www.shell.com/home/Framework?siteId=UK-en&FC1=&FC2=&FC4=&FC5=&FC3=/Uk-en/html/iwgen/news_and_library/speeches/speech1998/speechtoinstitute_09261000.html; Mark Moody-Stuart, Putting Principles into Practice: The Ethical Challenge to Global Business, Address at the World Congress of the International Society of Business, Economics and Ethics, Sao Paolo, Brazil 4-6, 12 (July 19, 2000), at http://sociologia.usal.es/enguita/SdO/Archivos/Debates/Etica%20empresarial/Shell%20-%20Putting%20Principles%20into%20Practice.pdf; Shell, Establishing a Dialogue, supra note 82; Shell, Our Approach to Sustainable Development (on file with *New York University Law Review*).

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pation in the decisionmaking process. Nonetheless, spinning the argument for enhanced participation in stakeholder terms is a more pragmatic tactic to make the consultation and participation meaningful and effective. Three reasons can be offered to demonstrate why.

1. *Stakeholder Arguments Best Underscore Corporate Incentives to Include Indigenous Peoples in Resource-Management Decisions*

In contrast to appeals to a moral duty of beneficent global citizenship or other pleas exhibiting a naïve understanding of corporate financial motives,[84] stakeholder theory endeavors to inform corporations why it is in their business interests to consult affected groups before making decisions. Specifically, this more sophisticated effort addresses long-term business performance by stressing how a poor record of stakeholder engagement can damage reputations or increase costs associated with the heightened risk of operating in an unstable social environment.[85] As noted above, corporations have moved to adopt stakeholder practices once they have been alerted to sound fiscal reasons for doing so.[86]

Indeed, stakeholder arguments are particularly apt at drawing corporate attention to the virtue of this type of decisionmaking framework. Because stakeholder terminology originates in corporate-management theory, employs business vernacular, and is thus more responsive to the corporate modus operandi, company officials are more comfortable adhering to this familiar concept than to an abstract, foreign scheme of human rights. Given that stakeholder language is corporate-compatible, cloaking a claim in those terms is more

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[84] See, e.g., Mary Robinson, The Business Case for Human Rights, http://www.unhchr.ch/huricane/huricane.nsf/view01/E47D352DEDC39697802566DE0043B28E (last visited Apr. 10, 2003). Robinson asks,

> Are individuals whose society does not allow them to speak freely, to speak their mind and to practice their chosen religion, going to be able to speak up at work, if not allowed elsewhere? In such societies, are individuals going to provide the creativity and innovation that is so important to your businesses continuing competitive advantage. [sic] Will production errors be resolved, quality enhanced and new opportunities identified if society does not permit individuals to speak out, and to share their thoughts and ideas?

Id; Pierre Sané, Address at Launch of Global Sullivan Principles (Nov. 2, 1999), at http://www.un.org/partners/business/sullivan.htm ("[I]t is in the interest of business to see human rights protected. . . . An educated and healthy population increases economic productivity.").

[85] See Holme & Watts, supra note 62, at 6-7.

[86] See supra notes 70-83 and accompanying text.

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effective at inducing petroleum enterprises to factor the interests of indigenous communities into resource-management decisions.

Furthermore, oil companies are likely to be more receptive to a direct, contextualized appeal from stakeholders than a mandate to respect a vaguely articulated "right." When affected tribes solicit the principal decisionmaker directly, they expressly address how the corporation's particular actions will affect them (i.e., they describe why they have a legitimate stake), and why this stake consequently necessitates their participation in the determinations that control the impact on indigenous communities (i.e., the details of the project). A corporation can tailor its response to particular situations as well, with specific strategies aimed at discrete results, mimicking normal business conduct.

For example, accusing a corporation of violating the "right to life" is far less informative and constructive than notifying company headquarters that draining waste water into a certain stream threatens the local fish population on which the community depends. In the latter case, it is clear that the company must remove the damaging toxins or take other steps to protect the vitality of the fishing stock or it will provoke an angry response by locals. Thinking in terms of stakeholders, in short, tells corporate officials what they can do differently come Monday morning. Human rights pleas, in contrast, are uncomfortably less realistic, less detailed, and more theoretical, and they become even more artificial by reducing multiparty interactions to disputes between only two.[87]

What it boils down to, then, is that semantics matter: Framing the argument for greater indigenous participation in terms of stakeholder theory is simply more cogent to business culture. According to R. Edward Freeman:

> With all of the research cited above, it might legitimately be asked whether organization theorists and managers need a "new" concept such as "stakeholder." While this criticism is well taken, I can reply that words make a difference in how we see the world. By using "stakeholder," managers and theorists alike will come to see these groups as having a "stake." "Stakeholder" connotes "legitimacy," and while managers may not think that certain groups are "legitimate" in the sense that their demands on the firm are inappropriate, they had better give "legitimacy" to these groups in terms of their

[87] Since the stakeholder framework contemplates a multiparty decisionmaking process that takes into account the views of all affected people or groups, it theoretically squares all relevant parties simultaneously. This outcome is preferable to the resolution of human rights disputes, as they generally determine the rights and obligations between two parties only, leaving the interests of third parties unresolved.

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> ability to affect the direction of the firm. Hence, "legitimacy" can be understood in a managerial sense implying that it is "legitimate to spend time and resources" on stakeholders . . . .[88]

To rephrase, stakeholder language captures the attention of the corporate-minded in a way that abstract human rights language cannot. Stakeholder arguments by nonshareholder constituencies, therefore, can succeed in shifting corporate concern away from the quick profit and toward the broader community.[89]

2. *Self-Executing Stakeholder Guarantees*

As discussed above, governments traditionally have found themselves overmatched by powerful transnational petroleum enterprises.[90] Globalization has shrunk nations' clout further, for "national governments passed much of the control over the allocation of resources in their countries from the control of regulators to the uncontrolled marketplace."[91] Multinational corporations are now considered on par with governments in terms of both violating international norms *and* upholding them.[92] Put another way, since the government's traditional role was to empower weaker, underrepresented stakeholders, "[w]hen the local institution and government fail, the responsibility is foisted upon the multinational [and] multinationals become responsible for the second generation economic and social rights of their stakeholders . . . . The multinational is the institution with the linkages to these stakeholders and the resources to assure their rights."[93] If ineffective governance means "as a practical matter, corporate culture is more important than legal

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[88] Freeman, supra note 62, at 44-45.

[89] Cf. Jeffrey Nesteruk, Conceptions of the Corporation and the Prospects of Sustainable Peace, 35 Vand. J. Transnat'l L. 437, 448 (2002) (explaining how conceiving of corporations as persons instead of property causes firms to consider how their actions affect all stakeholders).

[90] See supra notes 44-51 and accompanying text.

[91] Tavis, supra note 71, at 520; see also Kimerling, International Standards, supra note 1, at 329 (witnessing "a general attitude commonly found in the oil patch: once a company has an agreement with Petroecuador and [Ecuador's Ministry of Energy and Mines] to conduct certain operations, it can essentially do as it pleases in the remote Amazon oil fields").

[92] Greathead, supra note 74, at 722; see also Kimerling, Rio + 10, supra note 1, at 572 (observing "that, for the most part, the state [Ecuador] has ceded the authority to set environmental standards and evaluate their effectiveness to the company. This amounts to the privatization of environmental law").

[93] Tavis, supra note 71, at 540; see also Eric W. Orts, War and the Business Corporation, 35 Vand. J. Transnat'l L. 549, 556 (2002) ("Many large multinational corporations have indeed become much larger, in terms of overall economic wealth and political influence, than some nation-states.").

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requirements in determining levels of environmental protection,"[94] it is pointless to petition the state to safeguard indigenous communities. In any event, petroleum companies are the agents needing convincing.

Summoning government enforcement to effectuate rights has other drawbacks. For instance, state legal coercion is antagonistic and connotes contestability; faced with this threat, a corporation's knee-jerk reaction is to assume a defensive posture. Stakeholder theory, with its emphasis on dialogue among equals, does not stir such immediate hostility and is more conducive to constructive solutions. Furthermore, legal tribunals' institutional competence lies in adjudicating entitlements—for example, declaring that companies have the right to drill for oil on a particular tract of land—not structuring the best operational regime for complex policy matters—such as, deciding to employ a certain number of community members in oil production, ensuring certain technology is used when reinjecting byproducts into a well, and other such details.[95] Additionally, due to their nature as generally applicable standards, human rights might not provide a remedy of sufficient detail necessary to correct harmful treatment. In sum, whereas vindicating human rights depends on third parties, a stakeholder approach accords a direct path to influence corporate decisionmaking and bypasses the frustrating step of working through an ineffective intermediary.

3. *The Benefits of a Consultation and Participation Framework*

Participating as a stakeholder in resource-management decisions reduces the emphasis on the conflict between competing rights and is less susceptible to ending in a costly legal fight that poor indigenous populations are prone to lose. Consultation and participation also engender a collaborative, holistic, and flexible multiparty decision-making process, one capable of adapting to the vagaries of individual disputes and producing a net-benefit resolution. This Subsection will identify more specifically three advantages of a dialogue-centered approach.

a. Fostering Cooperation Avoids Costs Inherent in Adversarial Methods of Dispute Resolution

Since stakeholder decisionmaking is premised on interaction (as opposed to a hierarchy of substantive legal entitlements), it avoids being reduced to a bitter all-or-nothing battle characteristic of a

[94] Kimerling, Rio + 10, supra note 1, at 582 n.151.

[95] See infra Part II.B.3 for a more detailed discussion of the advantage negotiation and consultation hold over litigation in crafting mineral exploration schemes.

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system organized around opposable rights. Indigenous groups are able to shed an overtly adversarial tone, initiating contact, for example, by requesting a seat at the decisionmaking table, not by chiding the corporation with threats of a legal suit to vindicate allegedly impinged rights. Imparting a sincere sense of collaboration and open-mindedness gives the petroleum firm less reason to act defensively and facilitates the construction of cooperative relationships.[96] Building lasting partnerships itself maximizes utility in the long term,[97] as it eschews the financial costs[98] and acrimony generated through litigation[99] that may result in a net social loss.

b. Multiparty Decisionmaking Provides for a Wider Range of Net-Benefit Compromises Among Varying Combinations of Constituent Groups

Additionally, the range of outcomes under a system of consultation and participation, in general, is not reduced to the binary, winner-take-all set to which disputes between competing rightsholders tend to be confined. Limiting decisions to those entirely in favor of one party over the other—be it injunctive or declaratory relief proscribing a proposed project, a judicial decree that a petroleum enterprise "consult" an indigenous group, post facto moral condemnation, or a modicum of compensation—essentially precludes crafting operational resource-management regimes. Participation and consultation deconstruct this traditionally rigid architecture and replace it with one stressing collective decisionmaking among all interested parties.

The paradigm also affords indigenous groups the opportunity to forge alliances more fluidly with organizations having congruent inter-

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[96] See Russell Lawrence Barsh & Krisma Bastien, Effective Negotiation by Indigenous Peoples: An Action Guide with Special Reference to North America 43, 50-51, 71-73 (1997) (admonishing tendency of indigenous negotiators to be hostile or argumentative and asserting how cooperative attitude establishes valuable credibility); Mirande, supra note 20, at 36 (suggesting that adversarialism "tends to harden the cultural conflict through institutionalizing the parties' roles as opponents").

[97] Barsh and Bastien repeatedly stress the importance of cultivating good will between negotiating parties and establishing a working long-term relationship. See Barsh & Bastien, supra note 96, at 46-47, 54, 58-59.

[98] Litigation's financial costs may be prohibitive for certain indigenous groups. See Geoffrey Robert Schiveley, Note, Negotiation and Native Title: Why Common Law Courts Are Not Proper Fora for Determining Native Land Title Issues, 33 Vand. J. Transnat'l L. 427, 459 (2000).

[99] Mirande catalogues some of the "soft" costs of litigation and their undesirability, maintaining that "legal conflict over resource use . . . perpetuates cultural antagonisms, saps economic efficiency, and erodes the incentives to plan and maintain long-term projects. . . . If development occurs over the long-term, it will be the subject of perpetual dispute that serves as a constant drain on the parties' resources." Mirande, supra note 20, at 33-34.

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ests. As has become standard practice already, native communities can align themselves with other adversely affected segments of the population, environmental NGOs, and others. However, coalitions with these factions are by no means a foregone conclusion, as the dispute is not limited to petroleum industry versus "everyone else." Consequently, indigenous groups are not hindered from reaching across the aisle and partnering with their former nemeses—i.e., the corporations—if it is more expedient in a given situation to do so.

More importantly, the collaborative ethos opens the door for a wider array of concessions each constituent group can tender—concessions that may seem oddly out of place if the dispute remained bilateral and narrowly confined to one party's "rights" versus another's.[100] An indigenous tribe can dicker over the design of the project, insisting, for example, on certain environmental safeguards, guaranteed employment opportunities, or an "off-limits" designation for sacred lands of special spiritual importance, and can strike bargains consisting of, to offer some more examples, lump-sum settlements; percentage shares in royalties; enhanced social, health, or educational programs; better infrastructure; or any of the myriad alternatives conceivable.[101] Indigenous communities are likewise not limited in what they conventionally have had to offer (namely, agreeing not to impede exploration or drilling)—an indigenous group too, is able to fashion a more comprehensive catalog of acceptable compromises.

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[100] It would be complicated to hammer out a multiparty agreement in two-sided litigation. See Schiveley, supra note 98, at 457 ("Given the length of most native title negotiations and the amount of compromise that is inevitably required, flexibility in the process appears to be a necessity for resolving any issues that go beyond the granting of land rights to one party versus another. The inflexibility of the . . . court system is therefore the exact opposite to what is required to achieve an appropriate solution.").

[101] Mirande analyzes the comparative advantage alternative dispute resolution has over litigation and laments litigation leading to situations where "[i]ndigenous peoples do not benefit from the infrastructure development and economic diversification that can come with sustainable development. Also, resource development companies lose the opportunity for the economic efficiencies that can arise from enduring presence and relationships." Mirande, supra note 20, at 34. Russell Barsh and Krisma Bastien point to the experience of indigenous tribes in Canada who

> generally lack power to halt development projects in the territories they claim. As a result, they negotiate agreements to co-manage key resources, or impose conditions on development projects . . . . In the final analysis, such agreements may produce more immediate, and concrete benefits, than struggling for years to regain total ownership or control of the territory.

Barsh & Bastien, supra note 96, at 20.

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c. Negotiating as an Exercise in Capacity Building

By playing a more substantial role in exploration-related decisions, either in the design or implementation phase, or by jumpstarting a project themselves, indigenous peoples bolster their community's autonomy. Rendering indigenous consultation and participation indispensable elevates tribes to the same level as traditional players: legitimate entities with legitimate interests.[102] Active, successful participation will nurture their collective self-confidence and erode any residual inhibition to adopt a more assertive posture in future affairs bearing on their communities. In addition, the independence afforded indigenous groups can prod them to be more self-reliant and act on their own instead of depending on NGOs. In short, as indigenous groups are taken more seriously both by themselves and their counterparts, they increase their control over petroleum exploration activity affecting their livelihood. The significance of becoming skilled negotiators cannot be understated, for negotiations are involved in any mineral project—even if litigation arises—to which they are not opposed outright.

III
CHALLENGES TO STAKEHOLDER THEORY: AREAS OF CONCERN THAT CAN BE ADDRESSED

As demonstrated above, arguing for widespread application of the stakeholder decisionmaking model is more likely to result in meaningful participation and consultation than asserting human rights that purport to guarantee similar protections. Nonetheless, doubts linger as to the general wisdom of strategies relying on participation and consultation to alter definitively the pattern of exploitation of indigenous peoples at the hands of petroleum development. This Part discusses two general potential criticisms and concludes that each can be answered. Section A analyzes the difficulties indigenous groups may have in their initial forays into using stakeholder negotiation and dialogue as the principal tools to uphold their interests. Next, Section B attempts to resolve a dilemma of a graver character: that the procedural guarantees of stakeholder consultation and participation simply secure indigenous groups too little of substance.

[102] See Schiveley, supra note 98, at 463 ("For a population that has been viewed from both sides of the equation as standing somewhere outside the political and legal process, the very fact of inclusion may be seen as a step in the right direction.").

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A. *Overcoming Cultural Barriers to Successful Indigenous Involvement in Resource-Management Decisions*

Attempts to broker equitable agreements that service indigenous interests are vulnerable to certain cultural impediments. As an initial matter, the sheer complexities of cross-cultural communication can cause havoc.[103] The gulf between indigenous lifestyles and majority Latin American culture is large, and the value systems of each as well as their overall cognitive processes are arguably mutually incomprehensible.[104] This problem, however, is not insurmountable if negotiators are aware of how cultural differences may lead to a communication breakdown[105] and take appropriate measures to foster a dialogue intelligible to all participants. In fact, dialogue is adept at bridging a cultural barrier and preferred over other forms of dispute resolution, especially litigation.[106]

If the cultural divide can be overcome, a more daunting hurdle looms: the capacity of indigenous groups, untutored in Western forms of negotiation, to bargain with seasoned hagglers. Indigenous representatives face several obstacles to reaching a favorable resource-management agreement. For starters, negotiations between large corporate concerns and indigenous tribes are usually marked by a patent imbalance of power.[107] Native communities are thus more susceptible to coercive and manipulative tactics and are easily intimidated if self-

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103 See generally Barsh & Bastien, supra note 96; P.H. Gulliver, Disputes and Negotiations: A Cross-Cultural Perspective (1979).

104 See Mirande, supra note 20, at 35 (warning that "[i]t is a mistake . . . to assume that the cultural differences are only matters of communication style. Often the conflicts that arise have their source in fundamental cultural considerations . . . in diametrically opposed visions").

105 See, e.g., Barsh & Bastien, supra note 96, at 34-35, 47 (explaining how conflicting cultural values can be confused with disagreements on fact and lead to early stalemates, but how understanding increases as parties spend more time together negotiating). For a discussion of the sensitivity requisite to negotiate the intricacies of a similar cultural divide (including a case study of natural resource dispute involving the Nez Perce tribe of Idaho), see id. at 33-58.

106 Litigation seems particularly ill-equipped to deal with these complexities. See Mirande, supra note 20, at 35-36 ("If cultural divides are at the heart of a dispute, it should follow that full exploration of the cultural differences is necessary for a sustainable resolution, that is, one in which the cultures find a mutual accommodation over time. Litigation, however, does not provide a sufficient opportunity for this to occur."); see also Schiveley, supra note 98, at 456 (averring that negotiation is better than litigation given "the incompatibility of native and European-based legal structures, the restrictions on indigenous populations that could keep them from adequately presenting their case to the courts, and . . . the inherent restrictions of the common law court system that make it ill-equipped to deal with native rights").

107 See Barsh & Bastien, supra note 96, at 55-59 (describing imbalance and recommending methods to combat it).

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confidence in their untested negotiating ability is fragile.[108] An information deficit compounds any baseline inequality, as wealthy corporations have more resources at their disposal to gather, process, and interpret data.[109] Even when information is available, if it is technical in nature or expressed in trade jargon, indigenous tribes may lack the expertise to fully comprehend its significance and require outside specialists to decipher it.[110] For example, a petroleum company can wield "legalese" in documents to mislead communities not fully cognizant of such language's legal import; such communities may find themselves bound by terms substantially different than those for which they thought they had bargained.[111] On a related note, unfamiliarity with the market disadvantages indigenous contingents by causing them naïvely to settle for less than the going rate[112] or make demands that will be received as outlandish. Finally, relying on a subset of the tribe to negotiate brings the possibility of bribery into the equation.[113]

Although participatory procedural mechanisms are ineffective if indigenous groups are incapable of utilizing these tools to craft favorable resource-development arrangements, this does not render models built on involvement inoperable or undesirable. Aside from the platitude that no system is perfect, incapacity can be overcome and ultimately will prove to be a minor and temporary stumbling block, especially given the capacity-building function of many NGOs. Capacity-building also can be a component of the project itself; the World Bank, for example, provides training in participatory techniques in order to empower indigenous groups "to make their own sound resource use decisions, benefiting as fully and equitably as pos-

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108 Id. at 59-70 (calling attention to "dirty tricks" so that indigenous negotiating teams are not caught off guard or intimidated by subversive bargaining tactics).

109 Id. at 26. The authors also point out, however, that familiarity with ancestral lands may provide indigenous groups with an informational upper hand. Id. at 27.

110 Id. at 27, 30-31, 40.

111 See, e.g., Kimerling, Uncommon Ground, supra note 1, at 218 (reporting how community members "did not understand the meaning of the term 'expropriation' and did not pay attention to that clause [, and thus] understood that [they] had agreed to allow Oxy to work their community temporarily, to drill a single exploratory well").

112 See Barsh & Bastien, supra note 96, at 69 (observing that indigenous negotiators often fear, unnecessarily, they have more to lose than other parties). For an example of a lopsided deal, see id. at 66 (referring to agreement whereby Native American tribe accepted royalties at one-third going market rate since they believed it was generous).

113 See id. at 64 ("[O]ne of the most common 'dirty tricks' is attempting to bribe key members of the other party's negotiating team."). Allegedly, when Occidental "wants to negotiate an agreement to enter a community, it goes from house to house, visiting one family at a time and offering cash and alcohol." Kimerling, Uncommon Ground, supra note 1, at 203.

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sible from the opportunities presented."[114] Multinational corporations would be shortsighted, moreover, to be unfaithful to stakeholder principles by shortchanging their affected constituencies. Such a disrespectful maneuver would spark future hostility.

B. *Stakeholder Muscle: Is Participation in Multiparty Resource-Management Decisions the Strongest Bulwark Possible?*

Both stakeholder and human rights models share an additional fundamental concern: Procedural mechanisms only function as an effective buffer against the unwanted ills of petroleum development if indigenous groups actually use their stakeholder leverage to substantively influence oil-production projects. Such influence, however, cannot be assumed too hastily. For starters, the concepts of "participation" and "consultation" may remain sufficiently broad and open to manipulation if they are gutted of definitional substance. A corporation, for example, can go through the motions—making a token consultation of indigenous groups (or nominally designating them "stakeholders") and technically discharge its responsibility—but ultimately accord negligible weight to the indigenous viewpoint.

Some advocates of indigenous rights find unsettling the prospect of relying so heavily on private interests as the ultimate protectorate. Kimerling concedes that "[a]s a policy matter, it is unwise because it substitutes private law for public law without democratic safeguards, and transfers control over compliance with state objectives to the special interests that need to be regulated to meet those objectives. The potential for abuse is unlimited . . . ."[115] There is no substitute, the thinking goes, to strongly enforced laws if indigenous peoples are no longer to be subject to abuse by multinational corporations.

Perhaps the most robust standard would take the form of communal legal title to both the surface and subsurface of territorial lands:[116] Ownership would permit tribes to take any stance on petroleum development, including outright opposition; trespassing on the land would be stopped by the force of law. Indeed, to the extent that indigenous groups already affect resource management, such ability may be wholly a function of valid property rights. Canadian and United States Native American tribes who largely have acquired title,

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[114] World Bank, Indigenous Peoples and Stakeholder Participation in Guyana National Protected Areas System Project: Project Preparation and Implementation, at http://wbln0018.worldbank.org/essd/essd.nsf/28354584d9d97c29852567cc00780e2a/5168a4f143fa72e88525684a006ace8e?OpenDocument (last visited Apr. 10, 2003).

[115] Kimerling, Rio + 10, supra note 1, at 573.

[116] See supra notes 45-49 and accompanying text for a discussion of property rights in Latin America.

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for example, flex stronger political muscles than groups in other regions of the world. The United Nations Centre on Transnational Corporations found that

> [i]ndigenous peoples in the United States and parts of Canada have been able to insist on participating in [transnational corporation] activities because they have secure land and resource rights. In contrast, the indigenous territories in Ecuador, Panama and Chile which have been adversely impacted by mining and logging are treated as part of the national estate, and indigenous peoples have no legally protected rights to prevent their use.[117]

Any newfound clout of indigenous peoples, including that of the Peruvian tribes in Camisea, may simply signify that their real property interests are evolving along the same lines as has been witnessed to the North.[118]

Although the United Nations Centre on Transnational Corporations makes a strong case for preferring substantive legal standards to procedural ones, a series of counterarguments quiets criticisms of the stakeholder theory and demonstrates how it results in a stronger shield against injurious mineral development.

1. Legal Title Is Not an Impenetrable Shield

As an initial matter, legal title to ancestral territory is not a panacea. Exploration and drilling that occur on adjacent properties can have equally disastrous consequences for indigenous welfare, and even "operations in apparently remote lands can have major adverse impacts on the people."[119] For instance, dumping toxins into a river pollutes a community's fishing area and main source of drinking water downstream. Thinking in stakeholder terms is superior here, as the group's "stake"—and subsequent influence in related decisions—arises from the *effect* of the oil activity regardless of where it originates. Property rights, on the other hand, hardly bring all injurious activity under community control—just that activity within the boundaries of the community's landholdings.

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[117] U.N. Transnational Corporation Report, supra note 1, at 18; see also id. ("The critical difference in [transnational corporation] performance, in these cases, appears to be the legal status of indigenous lands rather than corporate policy or corporate culture."). Barsh and Bastien also cite an example where the corporate "incentive for negotiation was provided by court decisions affirming the right of certain indigenous peoples, in accordance with their previous treaties with the United States, to manage and conserve their own fisheries." Barsh & Bastien, supra note 96, at 11 (emphasis omitted).

[118] For a comprehensive discussion of the North American evolution, see generally Judity V. Royster, Mineral Development in Indian Country: The Evolution of Tribal Control over Mineral Resources, 29 Tulsa L.J. 541 (1994).

[119] Kimerling, Rio + 10, supra note 1, at 553.

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Legal title, moreover, is sometimes little more than a formality that the oil companies technically can respect, but that in the end does not prevent the evils associated with petroleum activity. In Ecuador, for example, Occidental took the pains of executing a "purchase" of indigenous lands, but only exchanged jobs and other assistance without any obligation to be a steward to the environment.[120] Ownership, furthermore, rarely delegates absolute control—the interests of others can restrict the exercise of property rights.[121]

Property rights, in general terms, are hollow unless wielded to shape corporate decisions. Indigenous communities still must capture the corporation's attention and persuasively argue why the potential impact of hydrocarbon exploration requires their involvement in decisions on corresponding matters; indigenous communities still have to act as if they were "stakeholders."

Finally, the stakeholder approach advocated here would not entirely supplant traditional property rights protections. It is important to keep in mind that admitting lack of complete legal control does not preclude effectively saying "no" to petroleum production.[122] In fact, the open dialogue of the stakeholder model confers a fuller menu of arguments here, as indigenous groups are not stuck resorting to rights claims rigidly worded in the prepackaged language of legal instruments. They do, to be certain, maintain that option,[123] but conventional property rights redress can be added to a more comprehensive set of strategies. Instead of fragmenting their claims between different forums—legal claims in courts, political claims in the legislature, moral claims in front of the media, etc.—indigenous populations now can air them all simultaneously, with their forces pooled, at one bargaining table.

2. *Accretion to Property Rights*

As a final argument against legal title, it must be admitted that unassailable property rights or similarly stringent legal standards

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120 See id. at 552-55. The "sale," in fact, was pure fiction: Occidental already had secured access to the site by having the state oil company expropriate the land for them. See id.

121 See Donaldson & Preston, supra note 63, at 83-84 ("The important point . . . is that the contemporary theoretical concept of private property clearly does not ascribe unlimited rights to owners . . . .").

122 Nor is it akin to a loss—there exists plenty of opportunity to realize the net benefits of a constructive solution and ensure that the community is barely affected. See supra Part II.B.3.b for a discussion on the range of compromises available.

123 See Schiveley, supra note 98, at 458 ("If, through the course of negotiation, the parties are still unable to agree, the judicial process remains a viable alternative. However, the courts should always be a last resort when such multifaceted issues . . . are in dispute.").

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remain an illusion for many indigenous groups.[124] Given this reality, there is something to be said for simply requesting involvement in resource-management determinations instead of insisting on an absolute right to veto all activity. The more modest assertion—conceding a state-delegated right to extract subsurface minerals—is prudent because the state, its citizens, and the private companies engaged in the exploration of petroleum all have substantial economic interests they would be loath to surrender.[125] Despite the growing political support indigenous groups may enjoy internationally, the harsh truth is that they risk making little headway—or even walking away completely empty-handed—by attempting to stymie all development affecting their lands.[126] Accepting the realpolitik of the situation and urging the adoption of a stakeholder decisionmaking framework, represents a plausible—albeit more incremental—aim, a necessary first step to acquiring more control over relevant petroleum projects.

Native Canadian communities in the Northwest Territories can serve as a prototype for this strategy,[127] especially when contrasted with the experience of the indigenous community of Junín, Ecuador, which chose to resist all development.[128] Instead of obstinately demanding total control over all of their claimed land, the Canadian Aboriginals conceded some territory to development in exchange for substantial leasing rents and royalties. More importantly, though, they gained leverage vis-à-vis mining companies, forcing them to conduct operations further from their homes and keep the environment intact. The funds from profit-sharing fueled an entrepreneurial spirit,

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[124] The difficulty in acquiring robust property rights shows no signs of abating, for the globalized economy has empowered transnational corporations relative to nation-states who are the guarantors of property rights. See supra Part II.B.2.

[125] See Inter-Am. C.H.R., Justification and Recommendation to the General Assembly of the OAS on the Preparation of an Inter-American Instrument on This Matter, in Inter-Am. C.H.R., OEA/Ser.P/VI/II.76, doc. 10 (1989). See also id. at 246 (noting tension between reality and lofty human rights notions: "[A]t the present stage of development, the exploitation of all available resources is crucial. Nevertheless, development projects are often a threat to these populations . . . .").

[126] Geoffrey Robert Schiveley likewise spots this fact and remarks that "[l]osing some land through a bargaining process is better than the possibility of losing all of it through judicial decree." Schiveley, supra note 98, at 460.

[127] See Clifford Krauss, Native Canadians Bask in New Business Climate, N.Y. Times, Oct. 26, 2002, at A3 (reporting that past mining activity left indigenous Canadians "with little more than the chemicals and other pollutants dumped in their rivers and forests. A new generation of Native leaders vow that this will never happen again, and they are defending their interests by borrowing a page from the entrepreneurial playbook of their old exploiters.").

[128] See Edmund L. Andrews, Ecotourism Is All Very Well, But $3 a Day Isn't, N.Y. Times, Nov. 13, 2002, at A4 (recounting that choice to develop ecotourism as alternative to mining failed to spur economic growth).

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spurring indigenous-led business activity that generated five hundred million dollars of revenue.[129] The communities have built off this momentum and confidence: Thirty indigenous leaders formed the Aboriginal Pipeline Group (APG) to campaign for a natural gas pipeline of which they have the opportunity to own one-third.[130] APG also will be influential in determining the design, route, and other details of the construction[131]—a certain way to ensure the project does not threaten the vibrancy of aboriginal society. This account of aboriginal-group success differs substantially from Junín, Ecuador, where some locals have second-guessed their 1997 decision to force Mitsubishi mining operations permanently out of the area by burning the mining camp. Ecotourism, chosen as a less-damaging alternative, reportedly has not been the boon expected.[132]

Even if indigenous groups want no part in any project like the APG pipeline and prefer to use indisputable, enforceable legal standards to retain their degree of isolation, making the initial pitch for legal protections as a stakeholder—and appearing reasonable—helps give shape to new rights or breathe substance into those already on the books.[133] Making inroads infusing the stakeholder philosophy into the corporate conscience will allow, as a consequence, a corresponding legal regime to develop naturally. Freeman, who authored the seminal work on stakeholder theory, foresees this phenomenon: Stakeholder principles "recognize the eventual need for changes in the law of corporations and other governance mechanisms . . . [and] if implemented as a major innovation in the structure of the corporation, will make manifest the eventual legal institutionalization of sanctions."[134]

Interestingly, once indigenous communities have convinced a handful of corporations to include their viewpoints in devising

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129 See Krauss, supra note 127.

130 See Aboriginal Pipeline Group, Maximizing Aboriginal Ownership and Benefits of a Mackenzie Valley Natural Gas Pipeline, http://www.aboriginalpipeline.ca/pdfs/APG_brochure.pdf (last visited Apr. 10, 2003).

131 See id.

132 See Andrews, supra note 128. But see Carlos Zorrilla, Next Time You Read the New York Times . . . (Nov. 24, 2002) (offering different account of indigenous community preference for tourism industry over mining) (on file with *New York University Law Review*).

133 See Donaldson & Preston, supra note 63, at 87 (asserting that "it remains to implement in law the sanctions, rules, and precedents that support the stakeholder conception of the corporation; in short, it remains to develop the legal version of the stakeholder model").

134 Evan & Freeman, supra note 64, at 83; see also Barsh & Bastien, supra note 96, at 11 (observing that in United States, once "leaders of indigenous communities had the *capacity* to manage all their affairs, they insisted that they had the *right* to do so").

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resource-management schemes, they can recruit the new converts to put pressure on their peers—that is, corporations have a "stake" in stakeholder obligations applying uniformly to their competitors.[135] Shell, for example, has been one of stakeholder theory's more fervent corporate proponents following the public outcry for its role in atrocities in Nigeria and the resulting pressure to exhibit a greater corporate conscience.[136]

Therefore, when all is said and done, gradually and steadily increasing control over natural resources is more productive than constantly finding overly ambitious claims for absolute property rights or similar endeavors turned away with no progress.

CONCLUSION

Given the calamitous effects Latin American indigenous peoples have suffered as a result of past oil production, it is imperative that these and similarly situated communities find the most effective way to halt further devastation. To do so requires thinking pragmatically, focusing on the multinational corporations that not only carry out the actual petroleum operations but who also are the locus of power when making the critical decisions regarding the projects. In light of the practical necessities of indigenous peoples' dilemma, solidifying legal human rights guarantees to consultation and participation (or to more stringent property rights) in international treaties or invoking these rights against corporations, unfortunately, is not the best use of their energy or resources. This approach is ill-equipped alone—as demonstrated in the Ecuadorian Amazon—to help affected populations influence company decisions in a way that leaves their lifestyles and welfare intact. Redirecting their efforts in their capacities as corporate "stakeholders" will better implement similar principles of consultation and participation. Indigenous communities no longer would speak in the foreign language of human rights; rather, they would advise corporate officers directly, in familiar terminology, of the specific injury petroleum development creates and why it is in the corporation's best interest to ensure measures are taken to mitigate such harm. Corporations are more likely to respond favorably to this con-

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[135] See, e.g., Moody-Stuart, supra note 83, at 8-9 (arguing that "[g]overnments and international institutions have the primary responsibility for establishing ethical frameworks and in ensuring that all companies and individual citizens enjoy a level regulatory, legal and fiscal playing field"); Tavis, supra note 71, at 538 ("Global regulation is critically important to mitigate market pressures and to put all firms on an equal footing in which no single enterprise will be exposed to a competitive disadvantage.").

[136] See supra note 80 and accompanying text.

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textualized approach as opposed to shrugging off pleas to respect "rights."

Adopting the stakeholders approach does not entail abandoning the pursuit of human rights or other legal standards. In fact, once corporate practice has evolved to take account of indigenous peoples' interests, enshrining such protection in the form of enforceable, respected legal entitlements will be the easy next step. Becoming a stakeholder, in sum, is instrumental in giving substance to the "rights" indigenous people have or hope to acquire.

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