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The Indigenous Peoples of Bolivia's Amazon Basin Region and ILO Convention No. 169: Real Rights or Rhetoric?

Laurie Sargent

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THE INDIGENOUS PEOPLES OF BOLIVIA'S AMAZON BASIN REGION AND ILO CONVENTION NO. 169: REAL RIGHTS OR RHETORIC?

LAURIE SARGENT*

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I. INTRODUCTION

It is...essential to increase understanding of the profound sense of deprivation experienced by indigenous populations when the land to which they, as peoples, have been bound for thousands of years is taken away from them. No one should be permitted to destroy that bond. Systematic violations of the rights of indigenous peoples to land and its resources should cease.¹

The indigenous peoples of the Bolivian Amazon Basin would find many of their fears and aspirations reflected in the words of U.N. Special Rapporteur Cobo. Their struggle to defend their ancestral lands has become increasingly acute in response to the growing number and variety of parties who continue to encroach upon their lands.

These parties include several multinational oil companies, who were recently granted exploration rights in lands which the Bolivian government had previously designated "indigenous territories." Although the government has recently taken steps to consolidate and define the nature of indigenous peoples' rights in these territories, it continues to place a high priority on protecting third party interests to the detriment of indigenous peoples.²

The arrival in 1995 of oil companies on indigenous territory without any prior notice or consultation gave rise to great concern among indigenous peoples and the non-governmental organizations (NGOs) who support them.³ It appeared that once

1. J. MARTÍNEZ COBO, STUDY OF THE PROBLEMS OF DISCRIMINATION AGAINST INDIGENOUS POPULATIONS, U.N. Doc. E/CN:4/Sub. 2/1986/7/Add. 4 par. 510 (1986).

2. See generally 1997 1(1) Loma Santa 1 BOLETÍN INFORMATIVO DEL CENTRO DE PLANIFICACIÓN TERRITORIAL INDÍGENA DE CIDOB [hereinafter CPTI]. The election in June 1997 of former dictator turned democrat, General Banzer, as President of Bolivia is also expected to add to the uncertainty surrounding the question of indigenous land claims. Telephone interview with Lic. Carlos Romero, Director, Centro de Estudios Jurídicos e Investigación Social (CEJIS) June 1, 1997.

3. Fabián Sandoval, Consulta y Participación de los Pueblos Indígenas y el Estado en el Estado en la Gestión Ambiental de las Operaciones Petrolíferas en Areas y

again, they had been deprived of all control over entry by third parties onto their traditional lands. Moreover, many were aware of the devastating effects that oil operations have had on indigenous peoples in the Ecuadorian Amazon, where over twenty-five years of production led to major oil spills which contaminated the soil and rivers and destroyed much of the fish and wildlife on which the peoples depended.⁴ Unregulated construction of roads has led to uncontrolled "colonization" of indigenous lands, the relocation of communities, a growing dependency on low value transactions with oil workers and therefore the loss of traditional, sustainable ways of life.⁵ Cancer, skin diseases and often fatal intestinal illness have become increasingly common. This increase in disease is generally attributed to the dumping of toxic and human waste in unsealed, open pits. People have also suffered respiratory ailments due to inhalation of dust particles covered with oil.⁶ Many studies have suggested that the consequences of oil operations have been particularly severe for the fragile ecosystems of the Amazon region.⁷

The peoples of the Ecuadorian Amazon attempted to gain redress against Texaco before the U.S. Federal Court, seeking \$1.5 billion U.S. in compensation for damages suffered. After having been continually denied any redress for the injuries described above in their own country, their claim was also rejected in the United States.⁸ Bolivia's indigenous peoples do not wish to suffer the same fate. The Bolivian government has

Territorios Indígenas de Bolivia: Propuesta 1 (Trinidad: CEJIS, 1995) (unpublished manuscript, on file with *Inter-American Law Review*).

4. United Nations, ESC, Commission on Human Rights, *Discrimination against indigenous peoples* U.N. Doc.E/CN.4/Sub.2/1991/49 (1991) at 22; see also Suzana Sawyer, *Indigenous Initiatives and Petroleum Politics in the Ecuadorian Amazon*, CULTURAL SURVIVAL QUARTERLY 26 (Spring, 1996); CENTRO PARA DERECHOS ECONOMICOS Y SOCIALES, VIOLACIONES DE DERECHOS EN LA AMAZONIA ECUATORIANA (1994).

5. Victoria C. Arthaud, Note *Environmental Destruction in the Amazon*, 7 GEO. INT'L ENVTL. L. REV. 195, 201, 214 (1994).

6. *Id.* at 212-13.

7. See, e.g., INTERNATIONAL UNION FOR THE CONSERVATION OF NATURE, OIL EXPLORATION IN THE TROPICS: GUIDELINES FOR ENVIRONMENTAL PROTECTION (1991). The IUCN has developed this set of guidelines designed specifically for tropical regions such as the Amazon.

8. *Aguinda v. Texaco*, No. 93 Civ 7527 (VLB), 1994 U.S. Dist. LEXIS 18364 (S.D.N.Y. Dec. 17, 1994). The Court accepted Texaco's argument of *forum non conveniens*, although the Court also reserved the right to review its decision if negotiations between the parties remained fruitless. See generally, Arthaud, *supra* note 5.

recently taken some steps to ensure the protection of their rights through constitutional and legislative reform.⁹ Indigenous organizations have also been involved in negotiations regarding the drafting of a specific regulation for oil operations in indigenous territories.¹⁰ So far, however, there has been very slow progress on this project.

Thus, Bolivia's indigenous peoples are searching for other means of enforcing their rights and achieving preventive and effective protection of their communities and their environment. In many instances, they have looked to the International Labour Organization Convention 169 on Indigenous and Tribal Peoples (ILO 169)¹¹ as a basis for supporting their claims, given that in 1991 Bolivia ratified ILO 169 and adopted it into national law.¹²

Although it has been criticized by many indigenous organizations, particularly those of northern countries such as Canada,¹³ ILO 169 is generally viewed as an improvement over its predecessor, ILO Convention 107 Concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries of 1957 (ILO 107).¹⁴ Indigenous organizations from Central and South America have pressed for ratification of ILO 169.¹⁵ The new Convention rejects the integrationist and paternalistic approach taken by states in the past, as reflected in ILO 107. According to the International

9. See *infra* Part I(B).

10. See *infra* Part I(C).

11. Adopted by the General Conference of the International Labour Organization, Geneva, June 27, 1989; entered into force Sept. 5, 1991 [hereinafter ILO 169]. As of July 1995, Norway, Mexico, Colombia, Bolivia, Costa Rica, Paraguay, Peru, and Honduras had ratified the Convention. In Fiji, Austria, and Argentina, there had been a decision by Congress to ratify, but no instrument of ratification yet received by the ILO. To the ILO's knowledge, the Convention was under consideration for ratification in Chile, Ecuador, Brazil, Venezuela, Denmark, Finland, and the Philippines. ILO, ILO GUIDE TO CONVENTION 169 (1995) [hereinafter ILO GUIDE].

12. Bolivia ratified the Convention in July of 1991 with the deposit of its instrument of ratification, Ley de la República No. 1257 del 11 de julio 1991 [hereinafter Ley 1257]. It is important to note that the ILO Constitution proscribes reservations to its conventions. CONST. OF THE ILO, art. 19, § 5(d) (1994).

13. See, e.g., Howard R. Berman, *The International Labour Organization and Indigenous Peoples: Revision of ILO Convention No. 107 at the 75th Session of the International Labour Conference, 1988*, 41 INT'L COMN. OF JURISTS REV. 48 (1988).

14. *Convention (No. 107) Concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries of 1957*. For comments on ILO 107, see, e.g., U.N. Working Group on Indigenous Peoples (WGIP), 8th Sess., U.N. Doc. E/CN/Sub.2/1990/42 at 12.

15. S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 49 (1996).

Labour Office, ILO 169 encompasses two basic principles:

- respect for the cultures, ways of life and traditional institutions of [indigenous and tribal] peoples; and
- effective involvement of these peoples in decisions that affect them.¹⁶

Essentially, these principles seek to address the racism, marginalization and assimilationist policies that have historically characterized State conduct toward indigenous peoples and that were documented so completely by Special Rapporteur Martínez Cobo in the 1980s.¹⁷

ILO 169 is currently one of the only international instruments in force—in the countries having ratified the Convention—that deals explicitly with the rights of indigenous peoples to natural resources pertaining to their lands. Thus, at the moment, it provides one of the few positive law bases for defending indigenous land and resource rights. For Bolivia's indigenous peoples, in particular, it has been viewed as an important legal tool. It is for this reason that this article will focus on ILO 169 as a source of rights, obligations and potential recourses available to Bolivia's indigenous peoples in the face of the incursion of oil enterprises into their territories.

After providing an overview of the social and legal context in which Bolivia's indigenous peoples currently live, this Comment will analyze the obligations set out in ILO 169 relating to sub-surface resources pertaining to indigenous lands. The Bolivian government's recent conduct will be examined in light of these obligations, in an attempt to determine whether the government has failed to comply with the provisions of ILO 169.

This Comment then explores potential recourses available to the indigenous peoples of the Bolivian Amazon Basin region under national and international law. Finally, based on the experience of Bolivia's indigenous peoples and the above analysis, a critical assessment of ILO 169 will be made with a view to offering some conclusions regarding certain weaknesses of ILO 169 and its value as a strategic tool for use by indigenous

16. International Labour Organization (ILO) General Conference, 75th Sess. Rep.VI(1): *Partial Revision of the Indigenous and Tribal Populations Convention 1957 (No. 107)* 19 (1988) [hereinafter ILO Rep. VI(1)].

17. U.N. Doc. E/CN.4/Sub.2/1986/7 & Add. 1-4 (1986).

peoples in the defense of their rights and pursuit of self-determination.

II. OIL AND THE PEOPLES OF THE BOLIVIAN AMAZON BASIN REGION

In order to set the context for the legal analysis which follows, a brief overview of the social, political and cultural situation of the indigenous peoples of the Bolivian Amazon Basin will be offered. The current state of oil operations in the region will also be outlined.

A. *The Indigenous Peoples of the Amazon Basin Region*

As in most countries—particularly those with borders established by colonial powers—Bolivian society is highly diverse and characterized by complex interactions between its various peoples and social classes. The country is also one of the poorest in South America, with low average life expectancies, high infant and maternal mortality rates, serious problems of malnutrition, a high illiteracy rate, and a hefty international public debt.¹⁸ The country is about the size of the Canadian province of Ontario, rich in natural resources, and has a population of about eight million. Official statistics usually give the following rough proportions for Bolivia's "ethnic composition": thirty percent Quechua, twenty-five percent Aymara, twenty-five percent Mestizo, ten percent European, two percent lowlands Indigenous peoples and three percent other.¹⁹ In other words, the majority of the population descends from peoples who were present prior to the arrival of the Europeans.²⁰

It is only the "original peoples" of the lowlands region, however, who have tended to refer to themselves as "indígena," or indigenous. Other peoples tend to refer to themselves (or to be referred to) as *Quechua*, *Aymara* or simply as "*campesinos*"

18. Centre for Intercultural Training, Canadian International Development Agency, Bolivia—An Introduction 18-20 (1996) (unpublished manuscript, on file with author). [hereinafter CIDA].

19. H. VAZQUEZ MACHICADO, ET AL., *MANUAL DE HISTORIA DE BOLIVIA* 616 (4th ed., 1994).

20. CIDA, *supra* note 18.

(roughly translated as peasants) if they still live outside of the city. Thus, I will use the term "indigenous peoples" throughout this paper to refer specifically to the peoples of the lowlands region.

The country's population has historically been concentrated in the high plains and valleys of the Andes. This concentration was heightened after the arrival of the Spaniards, whose principal goal was to exploit the wealth of gold and silver found in the mountains. The focus of this paper, however, is on the indigenous peoples of the Amazon Basin region in the Northeastern part of Bolivia. In particular, we will be focusing on the indigenous peoples living in the Beni and Pando Departments and in the lowlands area of the Cochabamba Department.²¹ The area represents about twenty percent of Bolivia's territory, or roughly 220,000 square kilometres, an area slightly smaller than Great Britain. However, the region's population is only 330,000 or about five percent of the country's total population. The people identifying themselves as "indigenous" in the area only constitute about one fifth of the region's population, and are estimated to be approximately 60,000 in number.²²

Although their population is relatively small, there are nearly thirty different ethnic groups living in this region, including: the Araona, Baure, Cayubaba, Chimán, Ignaciano, Itonama, Masetén, Movima, Sirionó, Trinitario, Yuracaré and Yuquí.²³ They have historically remained much more isolated from contact with non-aboriginal peoples than the inhabitants of the Andean regions. Archeological studies have suggested that prior to the arrival of Spanish missionaries, there existed a family-based network of communities and peoples engaged in agriculture, fishing, hunting and some trade. The communities were located primarily along the banks of the various tributaries of the Amazon which flow through the region. Their hunting grounds and areas from which they gathered other resources,

21. The Beni and Cochabamba Departments are in fact engaged in an acrimonious dispute over certain portions of these lowlands. The dispute has implications for indigenous peoples and their lands, but those issues exceed the scope of this paper.

22. INSTITUTO INDIGENISTA BOLIVIANO, PLAN NACIONAL PARA LA DEFENSA Y EL DESARROLLO INDÍGENA (1990).

23. *Id.*

however, extended several kilometers away from the river banks.²⁴

Their culture and way of life was significantly affected by the Jesuit missionaries who "reduced" these relatively spread out communities to mission settlements prior to the eighteenth century. Today, the peoples of the Oriente are predominantly Catholic. However, their land remained relatively devoid of other settlers and industrialists until the middle of this century.²⁵ Although there is now a significant urbanized population, a large proportion of indigenous people continue to live in small villages along the rivers and in relative isolation. They depend on the resources provided by the surrounding forests and rivers on lands they have traditionally occupied. Native languages are still spoken in these communities.

This isolation sheltered these peoples in part from Bolivia's turbulent political and social history.²⁶ Over the past several decades, however, the state has increasingly allowed and promoted the exploitation of the area's rich natural resources—in particular, its forests—and has encouraged settlement by large-scale ranchers, among others.²⁷ Population pressures in the high plains region have led Quechua and Aymara farmers to "colonize" the fertile lowlands. The area has also become known as a haven for drug traffickers. Furthermore, the state and other parties have begun to invest in the economic potential of oil and natural gas resources which they believe exist in the area, judging from the experience of other Amazon region countries and according to scientific estimates.²⁸

24. See generally CIDDEBENI, Plan Preliminar de Manejo: Territorio Indígena Parque Nacional Isiboro Sécuré (1994) (unpublished, on file with author) [hereinafter CIDDEBENI].

25. *Id.* at 10. This source notes, however, that the rubber boom of the late nineteenth century did have some impact on the Beni peoples. *Id.*

26. Bolivia is famous in Latin America for having had 190 Presidents in its 171 years of Republican history.

27. See generally Jorge Vacafior, *Problèmes d'interprétation des dispositions de la Convention 169 en Bolivie*, 25 RECHERCHES AMÉRINDIENNES AU QUÉBEC 72, 74-75 (1995); CIDDEBENI, *supra* note 24.

28. See, e.g., Jay Martin, *An Attorney's Perspective on Emerging New Venture Opportunities for Petroleum Projects in Latin America*, 33 ALTA. L. REV. 270, 273 (1995) (citing studies that suggest the existence of significant hydrocarbons reserves in Bolivia as well as in Ecuador and Peru).

This increasing pressure on indigenous peoples' lands and way of life was met with complete indifference and sometimes active encouragement from the government.²⁹ Thus, indigenous people were forced to organize politically and, in August of 1990, the peoples of the Beni department began a six hundred kilometre "Marcha por el territorio y la dignidad" (March for Territory and Dignity). Their principal demands included: respect of their rights as Bolivian citizens; constitutional recognition of their indigenous identities and cultures; and legal recognition of their ancestral lands.³⁰

The march had a major impact on Bolivian society: in an unprecedented show of national solidarity, the Beni peoples were joined by other lowlands indigenous peoples, Aymara and Quechua people of the *altiplano*, as well as students from all over the country.³¹ Following the march, the indigenous peoples organized themselves on a regional level under the umbrella organization called the Confederación de Pueblos Indígenas del Oriente, Chaco y Amazonía de Bolivia (recently renamed the Confederación de Pueblos Indígenas de Bolivia—CIDOB). The solidarity demonstrated during the march to La Paz finally convinced the government to take concrete steps to recognize and guarantee the rights of indigenous peoples. A new cultural dynamic had been introduced into Bolivia's previously class-based political discourse.

Nevertheless, on the whole the reforms undertaken in the wake of the march have been viewed as slow and insufficient by CIDOB and the peoples it represents, particularly in relation to the consolidation of land rights. Thus, in August 1996, another march was undertaken in an attempt to force the government to fulfill its promises to secure legal title to indigenous territories as well as to consult indigenous peoples and their organizations in good faith regarding issues such as oil operations in indigenous territories.³²

29. Vacaflor, *supra* note 27, at 74.

30. Convention 169, *supra* note 11, at 11.

31. Vacaflor, *supra* note 27, at 75.

32. The Bolivian newspaper *La Presencia* reported that the *Ley del Instituto Nacional de Reforma Agraria* was passed on October 12. This fulfills one of Confederación de Pueblos Indígenas de Bolivia's (CIDOB) demands. However, it does not actually consolidate legal title to lands, just new procedures for doing so. Further to Resolution 216790 made by the President on Sept. 13, 1996, an inter-institutional commission (National Agrarian Reform Institute, Secretariat of Ethnic Affairs, CIDOB)

What is certain, however, is that despite their setbacks, the indigenous peoples and their organizations have gained considerable strength and experience and are now viewed as important, if not yet very powerful, players in the national political arena. Moreover, in their recent struggles, they have taken strength from the broader indigenous movement which has led to significant developments at the international level.

This international movement includes an early Draft Declaration of Principles for the Defense of the Indigenous Nations and Peoples of the Western Hemisphere, drawn up in 1977 by indigenous organizations.³³ As evidence of the growing State recognition of the special claims raised by indigenous peoples throughout the world, the United Nations constituted a Working Group on Indigenous Populations (WGIP) in 1983. Numerous indigenous organizations have participated in cooperation with Working Group members and state representatives to produce a Draft Declaration on the Rights of Indigenous Peoples.³⁴ In 1993, the U.N. General Assembly declared this to be the International Decade of Indigenous Peoples.³⁵ The Organization of American States is currently drafting an Inter-American Declaration on the Rights of Indigenous Peoples.³⁶ Finally, the ILO has played an ongoing role in raising awareness of issues relating to indigenous peoples ever since the adoption of ILO Convention 107 in 1957.

B. The Legal Context

Despite this growing international momentum, however, Bolivia's indigenous peoples remained highly marginalized prior

was to be created in order to develop and propose procedures for the identification, consolidation, establishment of boundaries and title of the lands. CPTI, *supra* note 2, at 3. The process through which the rights will flow from this title remains unclear.

33. DRAFT DECLARATION OF PRINCIPLES FOR THE DEFENSE OF THE INDIGENOUS NATIONS AND PEOPLES OF THE WESTERN HEMISPHERE, *reprinted in* U.N. Doc. E/CN.4/Sub.2/476/Add.5, Annex 4).

34. DRAFT DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES WGIP, U.N. Doc. E/CN.4/Sub.2/1993/29, Annex 1 (1993) (final WGIP version) *adopted by* U.N. Subcommission on Prevention of Discrimination and Protection of Minorities, U.N.G.A. Res. 1994/45, U.N. Doc. E/CN.4/1995/2 (1995) (currently under consideration by the Commission on Human Rights) [hereinafter U.N. DRAFT DECL.].

35. U.N.G.A. Res. 48/163 of 21 (1993), *approved by* Inter-American Commission on Human Rights, Feb. 26, 1997 (as found at: <http://www.oas.org/EN/PROG/indigena.htm>).

36. INTER-AM. DRAFT DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, O.A.S. Doc. OEA/Ser.L/V/II.90/doc.14 rev.1 (1995) [hereinafter INTER-AM DRAFT DECL.].

to the march in 1990. Until then, indigenous peoples of the lowlands were referred to in laws as "*pueblos selváticos*," or jungle peoples, and were treated as legally incompetent.³⁷ They were generally excluded from political debate and activity. After the march, however, significant legislative measures were taken with regard to the land and constitutional rights of indigenous peoples.

In 1991, the Bolivian parliament adopted the Ley 1257³⁸ which incorporates the ILO's Indigenous and Tribal Peoples Convention 169 into national law. There is no provision of the Bolivian Constitution which deals expressly with the status of international treaties in Bolivian law. However, when ratified by Congress as national laws, they must be viewed as standing at least equal to other ordinary laws within the legal hierarchy.³⁹ The ratified treaty also imposes an international obligation on signatory countries to adjust their laws in order to ensure that they conform to their international obligations.⁴⁰

The Ley 1257/ILO 169 established the framework for much of the constitutional reform which took place in 1994.⁴¹ For the first time in Bolivian history, the Constitution included a recognition in its first article of the "multicultural and multiethnic" character of the Republic.⁴² An article was also added which explicitly recognized the rights of indigenous peoples, particularly in relation to their "tierras comunitarias de origen" or collective ancestral lands.⁴³ Roughly translated, Article 171 of the Constitution reads:

I. The social, economic and cultural rights of indigenous peoples inhabiting national territory are hereby recognized, affirmed and protected by law, especially as they relate to their ancestral communal lands and the right to sustainable

37. Vacaflor, *supra* note 27, at 74.

38. Ley 1257, *supra* note 12.

39. Vacaflor, *supra* note 27, at 76-77. The hierarchy of legal norms in Bolivia is therefore: Constitution, national laws (with those adopting international conventions possibly standing superior among them), "decreto leyes" (laws passed under military dictatorships without Congressional approval), supreme decrees (emitted by the President, and usually used to regulate laws), resolutions, agreements, and so on.

40. *Id.* at 77.

41. *Id.*

42. CONSTITUCIÓN POLÍTICA DEL ESTADO (*as reformed by Ley de la República No. 1585 de 12 de agosto de 1994*, art. 1 [hereinafter CONST.]).

43. CONST., art. 171.

use and exploitation of the natural resources therein, as well as guaranteeing their identity, values, languages, customs and institutions.

In addition, beginning in 1990, former President Jaime Paz Zamora recognized certain indigenous territories by supreme decree. By the end of 1992, the President had issued Supreme Decrees recognizing eight indigenous territories.⁴⁴ Decreto Supremo 22610, for example, established a 12,000 square kilometres indigenous territory basically within the boundaries of an already existing national park spanning the border of the Beni and Cochabamba Departments,⁴⁵ the Territorio Indígena-Parque Nacional Isiboro-Sécure (TIPNIS).⁴⁶ The area lies between the Isiboro and Sécure rivers, and is home to about 4573 people living in forty-seven Mojeño, Yuracaré and Chimán communities.⁴⁷

Third party property and concession rights which had been obtained legally in the area at the time the decrees were issued were protected in each of the decrees. In certain decrees, the territories were recognized as inalienable, indivisible, imprescribable and unencumberable property held collectively.⁴⁸ In sum, slowly but surely, a regime of enforceable legal protection appeared to be emerging as a result of the 1996 march and the negotiations to which it led.

C. *The State of Oil Operations in Indigenous Territories*

Given these developments, indigenous peoples were shocked when oil company employees appeared on their lands without warning and attempted to lay seismic lines. The following is a brief overview of the events leading up to attempts by indigenous

44. JUDITH MARINISSEN, *LEGISLACIÓN BOLIVIANA Y PUEBLOS INDÍGENAS* 44 (1995).

45. Departmental jurisdiction over the Territorio Indígena-Parque Nacional Isiboro-Sécure (TIPNIS) is actually an extremely hot topic of debate in and of itself between various interested parties, including departmental authorities keen to ensure that oil and gas discovered in the area be considered theirs. The indigenous communities living in the park are caught in the middle of the debate and have not yet taken a definite side, although their inclination seems to tend toward Beni.

46. Decreto Supremo 22610 (Oct. 10, 1990) (TIPNIS) GACETA OFICIAL DE BOLIVIA 6.

47. Sandoval, *supra* note 3, at 7.

48. Decreto Supremo 22611 (Oct. 10, 1990) (Area indígena—Región de Chimanes) GACETA OFICIAL DE BOLIVIA 13.

peoples to defend their rights as defined under ILO 169. After a first set of privatization reforms to oil and gas laws in 1990, the state-run oil and gas company, Yacimientos Petrolíferos Fiscales Bolivia (YPFB), entered into two major new risk service agreements (contracts): one with BHP Petroleum (Bolivia) Inc. and Pan Andean Resources PLC in 1993; and the other with Repsol Exploración Sécure, S.A. de la Paz, Bolivia (a consortium formed by Repsol España, ELF Hydrocarbures Bolivie de Paris, BHP Bolivia and MAXUS Bolivia Inc.) in 1994.⁴⁹ The first contract granted exploration, exploitation and commercialization rights in the "Chapare block" (covering an area of about 15,500 square kilometres) for a period of up to thirty years. The second, signed in 1994, granted similar rights over the "Sécure block" (covering an area of 15,000 square kilometres square kilometres). In both cases, the exploration work has been sub-contracted to Western Geophysical.⁵⁰ The blocks overlap in part with the following indigenous territories recognized by Supreme Decree: TIPNIS, Territorio Yuqui, Territorio Indígena Chimán and Territorio Indígena Multiétnico (TIM). These territories are home to approximately 10,700 indigenous people.⁵¹

49. Sandoval, *supra* note 3, at 5. This marked the beginning of the gradual privatization of the oil industry that has begun to occur in Bolivia. Nevertheless, even under the newest Hydrocarbons Act, art. 11 states that exploration, exploitation, transportation and distribution activities are all "national projects having a public utility character that will take place under the protection of the State." Ley 1689 de Hidrocarburos del 30 abril 1996. It therefore seems fairly clear that despite the partial privatization of the hydrocarbons sector, Yacimientos Petrolíferos Fiscales Bolivia's (YPFB) role will remain such that it should be considered an "organ of the government" and therefore subject to state obligations under international and national law. In cases concerning state immunity for "public" entities such as YPFB, the test for establishing whether or not the body is entitled to immunity has sometimes been expressed in international law as an inquiry into: a) the nature of the organ's functions as set out in its enabling statute; b) the amount of control exerted by State departments over the organ. For a leading decision on this point, see *Trendlex v. Central Bank of Nigeria* [1977] 1 Q.B. 529 (C.A.); see also INTERNATIONAL LAW COMMISSION, DRAFT ARTICLES ON STATE RESPONSIBILITY, (1980) 2(II) Y.B. of the I.L.C., especially arts. 7 and 8). It seems fairly certain that YPFB would satisfy this test, given that art. 14 states that "joint venture contracts will be entered into by YPFB in the name of and as representative of the State" and that, in general, YPFB is required to carry out a supervisory role with respect to oil operations, in conjunction with appropriate government departments. Thus, applying the logic of case law and the Draft Articles, one is led to conclude that YPFB is a state organ and that its acts or omissions may entail Bolivia's responsibility under international law.

50. Sandoval, *supra* note 3, at 6.

51. *Id.* at 7.

When oil company employees appeared in the TIM (Chapare Block) without notice in 1993, the indigenous peoples' local territorial wardens set up a blockade and stopped the employees from laying their seismic lines.⁵² When Repsol activities began in the TIPNIS in May of 1995, again without any prior consultation, the indigenous peoples in the territory threatened to block the company's exploration work.⁵³ A meeting took place shortly thereafter between indigenous leaders and government representatives, at which state officials acknowledged consultations had not taken place prior to entering into the contracts.⁵⁴

At the meeting, a bi-partite commission (state-indigenous peoples) was formed with the objective of determining a feasible mechanism for the consultation and participation of indigenous peoples with regard to oil operations on their territories. Recognizing the need for expertise and assistance, CPIB, CIDOB and their NGO advisors asked an Ecuadorian consultant familiar with the experience of indigenous peoples relating to oil operations in that country to assist them in drafting a proposal to be submitted to the government.

The consultant produced a document based on ILO 169, relevant Bolivian legislation and the lessons learned from the Ecuadorian experience. Recommendations included that the technical committee be made up of representatives of the government secretariats responsible for energy, the environment and "ethnic affairs," as well as of YPFB, CIDOB, CPIB and the Guaraní people's assembly. Each representative would have the right to speak and to vote on all matters.⁵⁵

The committee would be assisted by "technical experts" from the government and from indigenous organizations; its activities would be funded by the moneys paid by contracting parties each year under the terms of their contracts. The committee's functions would include, *inter alia*:

- ensuring that all contracts included specific clauses on the consultation and participation of indigenous peoples;

52. Meeting with Don Marcial Fabricano, President of CIDOB, and J. González Humpire of CEJIS in Santa Cruz, Bolivia (July 7, 1996).

53. Sandoval, *supra* note 3, at 1.

54. *Id.* at 5.

55. *Id.* at 16-17.

- proposing and designing environmental action plans and an environmental regulation for the hydrocarbons sector;

- overseeing oil operations and ensuring that contracting parties were complying with legal obligations set out in their contracts and in national law, particularly with regard to the environment, social and cultural impacts;

- promoting citizen participation in environmental monitoring through educational campaigns;

- establishing a mechanism for participating in the monetary benefits generated by oil operations; and

- quantifying equitable compensation for any potential damages which might be incurred by indigenous peoples through loss of material and natural property and goods.⁵⁶

In the end, the government rejected these demands, stating that they were potentially illegal⁵⁷ and unconstitutional.⁵⁸ In the months following this meeting, CIDOB engaged in a process of drafting a regulation specifically for oil operations in indigenous territories. The draft regulation set out the proposals mentioned above in somewhat greater detail.⁵⁹

The draft was given to representatives of the Hydrocarbons Subsecretariat during a meeting held on July 8, 1996. A joint commission to study the possibility of adopting such a regulation was proposed. The commission was to consist of government, World Bank and indigenous representatives. Although no joint meetings had taken place by September 1996, the President of Bolivia made a statement in reaction to the August 1996 march that such a regulation would be adopted by supreme decree.⁶⁰ Moreover, the World Bank recently hired a Canadian consultant to draft this regulation.⁶¹

56. *Id.* at 14-18.

57. Contrary to the old Hydrocarbons Act, which did not contemplate citizen participation in YPFB decisions.

58. Provisions for royalties were said to be contrary the Constitution (providing for exclusive State ownership of sub-surface resources). CONST., art. 139.

59. CEJIS Trinidad, Borrador de Reglamento para Operaciones Petroleras en Territorios Indígenas (Presented to the Hydrocarbons sector Sub-Secretariat on July 18, 1996) (unpublished, on file with author).

60. Interview with J. Daniel O'Rourke, consultant to the World Bank on the project of drafting a regulation for oil operations in indigenous territories in Bolivia (Nov. 7, 1996).

61. *Id.*

The Bolivian government is therefore under significant pressure from oil companies and the World Bank to establish clear and definitive rules as soon as possible, in order to guarantee a stable and certain climate in which to carry out the operations.⁶² Meanwhile, exploration activities are proceeding. In the Sécure block, seismic surveys are still taking place, with TIPNIS wardens alleging that explosives are being detonated in river-beds,⁶³ a process which is known to be harmful to fish and other river wildlife and is contrary to international oil industry standards.⁶⁴

Needless to say, indigenous peoples are frustrated and concerned with their evident lack of control and influence over the whole process. Largely due to the knowledge they have gained through exchanges with Ecuadorian NGOs, indigenous organizations have been able to make relatively coherent proposals on this technical subject, despite their lack of training and resources. Informed by this knowledge and related concerns about the impact of oil operations on themselves and their environment, they consider it crucial that their rights also be acknowledged and set out in clear terms, in order to guarantee their protection in the midst of all these pressures. The principal source of their rights, in their view, is ILO 169.

III. EVALUATION OF WHETHER BOLIVIA IS CURRENTLY IN BREACH OF ITS INTERNATIONAL OBLIGATIONS UNDER PARAGRAPH 15(2) OF ILO 169

ILO 169 and its predecessor, ILO 107, are the two principal international conventions currently in force that deal specifically with the rights of indigenous peoples. ILO 169 replaces ILO 107 wherever States choose to ratify the more recent Convention.⁶⁵

ILO 169 is divided into ten parts, which include, among others: General Policy, Land, Employment Conditions and Contracts, Social Security and Health, Education and

62. Meeting with Ingeniero Umberto Toledo, Hydrocarbons Sector Sub-Secretariat (July 8, 1996).

63. Oral report from territorial warden, Youci Fabricano, at the XV Encuentro de Corregidores y Representantes del TIPNIS in San Miguel (July 31 to Aug. 7 1996).

64. These international standards are reflected in the new Environmental Regulations for the Hydrocarbons Sector. Decreto Supremo 24335 (July 19, 1996), art. 42(a) (prohibiting such activities).

65. ILO 169, art. 36.

Communication. I will focus only on the first two parts of the Convention, and in particular on Articles 6, 7, 14, and 15 concerning indigenous peoples' rights with respect to existing natural resources pertaining to their lands.

Article 15(2), the key paragraph for our purposes, sets out the following rights for indigenous peoples in countries where the State claims ownership of subsoil resources such as petroleum and natural gas:

2. In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.⁶⁶

To summarize, then, Article 15(2) sets out the following obligations for each signatory State:

- the obligation to consult indigenous peoples;
- the obligation to ensure participation by indigenous peoples wherever possible in the benefits of resource exploitation activities; and
- the obligation to compensate whenever any damages are sustained by these peoples.

As mentioned above, ILO 169 was ratified and adopted into Bolivian law in 1991.⁶⁷ Bolivia's international obligations under the Convention therefore came into force in 1992.⁶⁸ The context

66. ILO 169, art. 15(2).

67. As stated *supra* note 11, Bolivia ratified the Convention in July of 1991 with the deposit of its instrument of ratification: Ley de la República No. 1257 del 11 de julio 1991. It is important to note that the ILO does not accept reservations to its conventions. CONST., art. 19, § 5(d) (1994).

68. The Convention stipulates that the treaty comes into force twelve months after the date on which its ratification has been registered. ILO 169, art. 38(3).

and facts outlined above will serve as an underlying point of reference for our analysis of Bolivia's performance with respect to the obligations set out in ILO 169 regarding sub-surface resources pertaining to indigenous lands.

First, we will consider the applicability of ILO 169 to the peoples of the Bolivian Amazon region. Having determined that the peoples of Bolivia have been entitled to protection under the Convention since 1992, we will examine each of the obligations created by Article 15(2) and other relevant provisions of ILO 169 in order to determine whether the Bolivian government has breached or is currently in breach of its treaty obligations.

The Convention is still very new. Thus, any attempt to determine the standards set by ILO 169 must necessarily be somewhat speculative. These standards may be derived in part from an exercise in interpretation, similar to that which may be undertaken by an ILO Committee of Experts on the Application of Conventions and Recommendations. We will rely on the recognition that:

[T]reaties, unlike works of literature, embody a commitment to a distinctive process of interpretation.... In entering into a treaty, a State binds itself not only to the terms of the instrument (however interpreted) but also to a process of intersubjective interpretation: the interpretive task is to ascertain what the text means to the parties collectively rather than to each individually. The activities and perspectives of the interpretive communities associated with this enterprise render treaty auto-interpretation something other than the exercise of unilateral political will.⁶⁹

In the absence of any authoritative judicial interpretations of the Convention, recourse must be had to various sources, or "interpretive communities."

In his work on the Vienna Convention on the Law of Treaties (Vienna Convention),⁷⁰ I.M. Sinclair noted that approaches to interpretation "are commonly said to reflect the

69. Ian Johnstone, *Treaty Interpretation: The Authority of Interpretive Communities*, 12 MICH. J. INT'L L. 371, 380-81 (1991).

70. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (1980) [hereinafter Vienna Convention]. Bolivia ratified the Vienna Convention in 1969.

subjective (or 'intentions of the parties') approach, the objective (or 'textual') approach and the teleological (or 'object and purpose') approach. They are not, of course, mutually exclusive."⁷¹ Articles 31 and 32 of the Vienna Convention codify these approaches. They also include subsequent State practice in the application of the treaty as an important interpretive source, as well as recourse to supplementary means of interpretation such as preparatory works and the circumstances of the conclusion of the treaty in cases of ambiguity or absurdity.

The analysis which follows will therefore use the methods outlined above in order to arrive at a more sophisticated understanding of the standards established by Article 15(2). The textual and purposive approaches will be used to suggest a preliminary understanding of the normative content of Article 15(2).⁷² We will then make a detailed analysis of State practice. This will be done in two stages: first, we will consider current legislation and practice in various countries, both signatory and not, of ILO 169. We will then consider provisions similar to Article 15(2) found in two more recent instruments: the U.N. Draft Declaration on the Rights of Indigenous Peoples⁷³ and the draft Inter-American Declaration on the Rights of Indigenous Peoples.⁷⁴ These drafts are still far from gaining unanimous approval from States. However, they may be examined as potential sources of international *opinio juris* converging around certain minimal standards.⁷⁵

71. I. M. SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 70-71 (1973).

72. These approaches tend to be used "in the field of general multilateral conventions, particularly those of the social, humanitarian and law-making type." ILO 169 is multilateral and is also "social" in that it seeks to create norms regarding state interaction with indigenous peoples within their territories. See generally G. G. Fitzmaurice, *The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points*, 28 BRIT. Y.B. INT'L L. 1 (1951).

73. U.N. DRAFT DECL., *supra* note 34.

74. INTER-AM DRAFT DECL., *supra* note 36.

75. See ANAYA, *supra* note 15, at 50. Anaya asserts that a "pull toward compliance" evidenced in explicit communications by States may bring about a "convergence of understanding and expectation about rule...even in advance of a widespread corresponding pattern of physical conduct." *Id.* This fairly flexible understanding of the norm-generating process might be contested in light of the stricter tests posited in the opinions given in the *North Sea Continental Shelf Cases* (*F.R.G. v. Den.*; *F.R.G. v. Neth.*) 1969 ICJ 3 (Feb. 20), still a leading authority on this question. For the purposes of our argument, however, it is not necessary to show that customary norms equivalent to those found in ILO 169 exist, unless Bolivia for some reason attempts to evade its treaty obligations, in which case a tribunal would presumably apply the reasoning of the International Court of Justice that treaty law and customary international law "retain a

Finally, where possible, the views of indigenous peoples will also be considered. Indigenous peoples are part of the interpretive community which has been working to establish international norms for state relations with indigenous peoples. They have played a key role at the United Nations Working Group on Indigenous Populations, which opened its doors to participation by many indigenous organizations in its work on setting standards for state conduct at the international level.⁷⁶ They are also the most direct beneficiaries under these international instruments, and appear to have gained a measure of international legal personality in the process of their development.

In using all of these interpretive tools, we will endeavour to establish a relatively detailed appreciation of the standards set out in ILO 169 with respect to the consultation, benefit and compensation of indigenous peoples wherever their lands are subject to development programs for sub-surface resources.

The objective is, in part, to assert that Bolivia has breached certain obligations under the Convention. Perhaps more importantly, however, this article seeks to provide insight into the types of legal and administrative arrangements which would satisfy both the spirit and the letter of ILO 169.

A. The Applicability of ILO 169

Article 1 of the Convention states that it applies to:

- a) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country...at the time of conquest or colonisation...and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.
- b) Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.

separate existence." *Military Activities in and Against Nicaragua* 1986 I.C.J. Rep. 14, para. 175. However, the draft declarations are helpful as a means of showing the emergence of a developing consensus regarding the more specific content of the norms found in ILO 169.

76. ANAYA, *supra* note 15, at 51.

ILO 169 is one of few international instruments that include a definition of the term "peoples." In her historical overview of the definition of indigenous peoples, Chairperson-Rapporteur Erica-Irene A. Daes noted that the Convention picks up the elements of "distinctiveness" and descent from the pre-conquest inhabitants of a territory in its definition.⁷⁷ The definition also emphasizes the requirement of self-identification, generally viewed as being the key element by indigenous peoples themselves.⁷⁸

The ILO 169 definition does not make express mention, however, of two other elements identified by Special Rapporteur Martínez Cobo: that indigenous peoples "form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their *ancestral territories*... as the basis of their continued existence as peoples."⁷⁹ The special relationship between indigenous peoples and their territory has been emphasized repeatedly. It also raises one of the most controversial elements from the perspective of governments, who have continually resisted any notion of indigenous "territory" which they fear may have implications under international law for State sovereignty.⁸⁰

State parties have also resisted the use of the term "peoples" due to the potential implications of the term for self-determination under Article 1 of the International Covenant on Civil and Political Rights (ICCPR),⁸¹ among other international instruments. Nevertheless, the use of "peoples" instead of "populations" gained acceptance among States over the course of the revision of ILO 107,⁸² particularly given the new Convention's express statement that the term "peoples" as used

77. E.-I. A. Daes, U.N. Doc. E/CN.4/Sub.2/AC.4/1996/2 (1996) at 10.

78. *Id.* at 12. Article 1(2) of the Inter-American Draft Declaration includes the element of self-identification as a fundamental criterion for determining the peoples to which the Declaration will apply. INTER-AM DRAFT DECL., *supra* note 36. Interestingly, however, the U.N. Draft Declaration makes no mention of this criterion. U.N. DRAFT DECL., *supra* note 34.

79. *See supra*, note 77, at 10 (emphasis added).

80. *See id.* at 16 (reviewing documents declaring the historical relationship between indigenous people and their lands, including the Martínez Cobo Report, the U.N. Conference on Environment and Development's Agenda 21, and the International Conference on Population and Development in 1994. *See ANAYA, supra* note 15, at 53 for a brief discussion of State concerns regarding the use of the word "territory."

81. Dec. 16, 1966, G.A. Res. 2200 (XXI), 999 U.N.T.S. 171 (1976).

82. ANAYA, *supra* note 15, at 49.

in ILO 169 "shall not be construed as having any implications as regards the rights which may attach to the term under international law."⁸³

Two cases brought before the Human Rights Committee under the Optional Protocol to the ICCPR illustrate conflicting views over the use of the terms "peoples" and "territories." In both the *Mi'kmaq Case*,⁸⁴ and *Ominayak v. Canada*,⁸⁵ the Human Rights Committee heard competing claims regarding the status of the Mi'kmaq and Lubicon bands as "peoples." The authors of the communications asserted that they were peoples, emphasizing their immemorial occupation of large areas of land, their distinctive identity and, in the Mi'kmaq case, their conclusion of treaties as "free and independent nations" with French and British colonial authorities.⁸⁶ The Canadian government asserted that in neither case were the authors "peoples" as contemplated by the ICCPR, saying that the Mi'kmaq were a "thinly scattered minority dispersed among the majority,"⁸⁷ while the Lubicon Lake Band comprised only "one of 582 bands in Canada and a small portion of a larger group of Cree Indians residing in Northern Alberta."⁸⁸

In both cases, the Committee found that it could not consider a "people's" claim to self-determination under the Optional Protocol.⁸⁹ Thus, the question of whether the authors were peoples was not decided on the merits. It is submitted, however, that the Canadian government's reasoning was at the

83. ILO 169, art. 1(3); ANAYA, *supra* note 15, at 31. The International Labour Office has stated on repeated occasions that it is outside the competence of a labour-focused international organization to determine the general meaning in international law of the term "peoples." ILO, General Conference, 76th Sess. Report IV(2): Partial Revision of the Indigenous and Tribal Populations Convention 1957 (No. 107) 12 (1989)[hereinafter ILO Rep. IV(2)].

84. *Mi'kmaq Tribal Society v. Canada* (No. 205/1986), U.N. Doc. CCPR/C/39/D/205/1986 (1990) (decision on admissibility).

85. *Ominayak & the Lubicon Lake Band v. Canada* (No. 167/1984), U.N. Doc. CCPR/C/38/D/167/1984 (Human Rights Committee decision released Mar. 26, 1990).

86. *Ominayak* at para. 2.2 & *Mi'kmaq*, at para. 2.1.

87. *Mi'kmaq* at para. 4.3.

88. *Ominayak* at para. 6.2.

89. *Mi'kmaq* at para. 14.2 and *Ominayak* at para. 13.3. In both cases, the Committee used almost identical words. In *Mi'kmaq*, the Committee stated that while article 1 of the Covenant recognizes and protects in the most resolute terms a people's right to self-determination and its right to dispose of its natural resources, as an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights, this provision can neither be invoked by individuals, nor by peoples, under the Optional Protocol.

very least problematic, given that it used a colonial-imposed mode of organization (the reserve system) to defeat the claims of these groups. Thus, these arguments should not be viewed as persuasive, although they undoubtedly point out some of the strategic concerns facing indigenous peoples in the event that a group representing only one part of a recognized "ethnic group" attempts to bring a claim for a breach of its rights under international law.

Despite these definitional problems, however, the peoples of the Bolivian Amazon Basin region appear to fall quite clearly within the ILO's definition of indigenous peoples. As outlined in Part II of this paper, their oral history of pre-colonial occupation of the lands in question has been confirmed by archeological evidence such as ceramics and a system of ridges and plateaux, thought to have been constructed by communities in order to allow villages and their crops to survive the rain and flood season.⁹⁰ Jesuit "reduction" of these peoples permanently altered their modes of social organization and religious beliefs. Nevertheless, they have retained their own languages and are currently organized based on the "*cabildo*" political structure. This structure was imposed by the Jesuits, but has now become a distinct form of social organization characteristic of the lowlands indigenous peoples. Moreover, the *cabildos* provided the political and social base from which the current regional indigenous organizations, such as the Central de Pueblos Indígenas del Beni, were born.⁹¹ Most importantly, as may be gathered from the name of their organization, these peoples identify themselves as "indigenous."

On the basis of history, culture, political structures and, above all, self-identification, the peoples of the Bolivian Amazon Basin region should be viewed as entitled to benefit from the rights set out in ILO 169.

90. A Trinidad-based Bolivian NGO, CIDDEBENI, has done a great deal of work on compiling and completing archeological surveys of the area. Their *Plan Preliminar de Manejo Territorio Indígena Parque Nacional Isiboro Sécuré* provides a good overview of the pre-Columbian and missionary periods in the history of the region. See CIDDEBENI, *supra* note 24. See also MACHICADO, *supra* note 19, at 51-53.

91. CIDDEBENI, *supra* note 24, at 8-10.

B. *The Obligation to Consult*

Indigenous peoples around the world have been calling for many years for the respect of their rights to control the natural resources pertaining to their land.⁹² In their struggle with governments over the form this control should take, various solutions have been suggested. They range from full ownership rights and therefore complete control, to "co-management" of resources, to procedural guarantees of involvement in a consultation process.⁹³

Many indigenous groups argue for the first or second option, in light of the consequences they have experienced and witnessed wherever indigenous peoples have been subjected to sudden and uncontrolled contact with outsiders. The Yanomami in Brazil in particular have caught the world's attention, given the obvious threats that contact with gold miners and other outsiders posed for their very survival, when their ancestral lands were opened up as part of the construction relating to a large-scale Amazonian development project.⁹⁴

One need not look to Latin America to get a sense of the magnitude of the problem. Canadian examples are powerful enough: in the *Ominayak Case* brought before the Human Rights Committee, the court recognized that the expropriation of the lands of a traditionally isolated and self-sufficient community for the purposes of oil and gas exploitation "threatened the way of life and culture of the Lubicon Lake Band."⁹⁵

The recent U.N. Draft Declaration enshrines the response of indigenous peoples today: they will accept nothing less than the right to give "full and informed consent" to development activities on their lands.⁹⁶ The protection offered by Article 15(2) of ILO 169, however, does not provide such protection. Rather, where States such as Bolivia retain ownership of sub-surface resources, the right guaranteed under ILO 169 is procedural, not substantive: a right to be consulted, not a right to give or withhold consent. We recall again the wording of Article 15(12):

92. See, e.g., Rep. VI(1), *supra* note 16, at 57.

93. WGIP, *Report of the Expert Seminar on Practical Experience Regarding Indigenous Land Rights and Claims*, U.N. Doc. E/CN.4/Sub.2/1996/6 at 18.

94. Anaya, *supra* note 15, at 159.

95. See *Ominayak*.

96. U.N. Draft Declaration, *supra* note 34, art. 30.

In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands.⁹⁷

This norm is expressed in relatively general language in ILO 169. Evaluating whether or not Bolivia is in breach of its obligations requires a more specific understanding of the standards which have been set by the Convention, supplemented by international customary law.⁹⁸ Thus, I will attempt to determine the extent of the protection offered by this right; that is, the minimum standard for state compliance with ILO 169. First, a textual analysis of Article 15 will explore the content of the provision. We will then consider the overarching "good faith" obligation found in Article 6 of the Convention. The discussion will then turn to relevant state practice. Finally, Bolivia's conduct with respect to the obligation to consult indigenous peoples regarding the exploration and exploitation of sub-surface resources pertaining to their lands will be considered.

1. Textual Analysis Using a Purposive Approach

Article 15(1) of ILO 169 contemplates the right of indigenous peoples to participate in the use, administration, and conservation of natural resources pertaining to their lands and stipulates that these rights shall be "specially safeguarded." As set out above, Article 15(2) sets out much more limited rights cases where the State claims ownership of subsoil resources such as petroleum and natural gas.

Article 15(2) relates to the timing of consultations, which must take place prior to the opening up of indigenous lands to exploration or exploitation. It also sets out the subject-matter

97. ILO 169, art. 15(12).

98. S. James Anaya has recently posited the "existence of customary norms concerning indigenous peoples and their pull toward compliance," that is, both *opinio juris* and state practice providing evidence of a "new and emergent international law of indigenous peoples," based on his survey of international instruments and state practice with regard to indigenous peoples. See ANAYA, *supra* note 15, at 57.

for the consultations: the extent to which the interests of indigenous peoples would be prejudiced by proposed programs. On its own, however, the article provides little guidance as to how the consultations must be conducted, nor does it offer precise indications of the various types of interests which might be prejudiced.

According to the general principles of treaty interpretation as codified in art. 31 of the Vienna Convention on the Law of Treaties, ILO 169 must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty *in their context*."⁹⁹ Several additional articles of the Convention provide important context for the interpretation and application of Article 15(2).

Part I of the Convention is entitled "General Policy." Thus, its articles may be understood to provide the overarching norms which will govern the interpretation and application of ILO 169. Moreover, the International Labour Office has itself emphasized that articles 6 and 7 of the Convention "are central to the way the Convention should be applied."¹⁰⁰ Article 6 reads:

1. In applying the provisions of this Convention, governments shall: Consult the peoples concerned, through appropriate procedures and in particular, whenever consideration is being given to legislative or administrative measures through their representative institutions which may affect them directly....

2. The consultations carried out in application of this Convention shall be undertaken, *in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures*.¹⁰¹

This article therefore provides guidance as to the objectives of the consultation process and the manner in which they shall be carried out: through representative institutions, in good faith and with the objective of achieving agreement or consent.

Art. 7(1) states the general principle that indigenous peoples shall have the right to "exercise control, to the extent possible, over their own economic, social and cultural development. In

99. Vienna Convention, *supra* note 70, art. 31(1) (emphasis added).

100. ILO GUIDE, *supra* note 11, at 10.

101. ILO 169, art. 6 (emphasis added).

addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly."

Thus, in the cases contemplated by Article 15(2) in which indigenous peoples are not considered to own sub-surface resources pertaining to their lands, the consultation process must be used to enable them to exercise some control over, and participate in, decisions made respecting development plans on their lands and therefore which affect them directly. Finally, Article 7(3) adds that "governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities."

Oil and gas operations are generally large scale development projects having a major social and environmental impact. They therefore arguably require the maximum measures of protection offered by these various provisions. In sum, the text of the Convention requires the following conditions to be met regarding the development of sub-surface oil and gas resources pertaining to indigenous lands:

- Consultations must take place in good faith.
- They must be carried out in the objective of achieving agreement or consent.
- Consultations must take place prior to opening the lands to development.
- They must provide as much control as possible and participation in decisions regarding such development projects.
- They must consider the extent to which the interests of indigenous people will be prejudiced and the social, spiritual, cultural and environmental impact activities will have.

These conditions provide a general outline of the standard for consultation. It is true that Article 34 of the Convention¹⁰² recognizes that States must be given a good deal of flexibility in

102. "The nature and scope of the measures to be taken to give effect to this Convention shall be determined in a flexible manner, having regard to the conditions characteristic of each country." ILO 169, art. 34.

the way in which they carry out their obligations. It is submitted, however, that while this norm is "open-textured," to use the words of H. L. A. Hart, there are still certain types of behaviour that will fall outside its scope.¹⁰³ The provisions establish that the obligation to consult requires more than mere formalistic compliance. Requesting comments from indigenous peoples without adequate mechanisms to ensure that the comments can be prepared on an informed basis, or without providing any assurance that their views will be taken seriously will not satisfy the treaty provisions.

However, Article 6(2) also clearly allows governments to act without the consent of indigenous peoples affected by its decisions, provided some form of consultation has taken place. The obligation imposed must therefore lie somewhere between purely *pro forma* consultation and a veto right for indigenous peoples over resource development on their lands.¹⁰⁴

The purposive approach to treaty interpretation provides additional interpretive guidance. The body of the treaty, as well as its preamble and the preparatory works of the International Labour Organisation, make it clear that the purpose of these provisions generally is to provide for effective participation by indigenous peoples in decisions made regarding their land.¹⁰⁵ Above all, the obligation to consult may be viewed purposively as a procedural mechanism which seeks to ensure that States cease treating indigenous peoples in the assimilationist and paternalistic manner of the past.¹⁰⁶

It is interesting to note that Latin American judges on the I.C.J. have played an important role in advancing the use of the purposive approach to the interpretation of the U.N. Charter and other conventions "seeking to regulate matters of social or humanitarian interest with a view to improving the position of individuals" such as the Genocide Convention, as opposed to

103. H. L. A. HART, *THE CONCEPT OF LAW* 124 (1961).

104. It is important to note, however, that while a veto right for indigenous peoples would fall outside the standard set by para. 6(2), the Convention does not prohibit such behaviour. Art. 35 of the Convention states that "the application of the provisions of this Convention shall not adversely affect rights and benefits of the peoples concerned pursuant to other Conventions and Recommendations, international instruments, treaties or national laws, awards, custom or agreements." In the Bolivian case, however, no right of veto has been provided by means of additional instruments.

105. ILO Rep. VI(1), *supra* note 16, at 18-19.

106. *Id.* at 18.

conventions seeking to regulate the behaviour of states *inter se*.¹⁰⁷ Although these opinions were often given in dissent and go further than the more widely accepted maxim that "the treaty must have effect rather than be of no avail,"¹⁰⁸ they provide a compelling basis for employing a purposive approach, as well as the textual approach and state practice, where a treaty is clearly drafted in response to historical inequities perpetrated against individuals (or peoples) by the signatories to the treaty themselves, rather than as a consequence of a bargain between state parties designed solely to regulate their own interactions.

While the purposive approach can provide a helpful guide to the types of state conduct which will satisfy the obligations set out in ILO 169, it must be complemented by an understanding of the actual procedural mechanisms which will tend to meet these general standards. We will look to state practice to find evidence of the actual application of the obligation to consult and the standards such practice sets with respect to para. 15(2) of the Convention.

Before doing so, however, it will be recalled that the Bolivian government did not consult indigenous peoples at all prior to signing joint venture contracts in 1993 and 1994 with various multinational oil companies and granting them exploration blocks partially superimposed on indigenous territories recognized by supreme decree.¹⁰⁹ This must be viewed as a flagrant violation by Bolivia of the most basic, plain meaning interpretation of its obligation to consult indigenous peoples under ILO 169, which, as noted above, came into force for Bolivia in 1992.

In the *Legal Consequences Case* concerning South Africa's role as former Mandatory of South West Africa, the I.C.J. found that where an ongoing breach of an independent legal obligation (to protect human rights and fundamental freedoms for all) could be shown to have taken place, there was no need for the complainants to show in addition that the defendant was acting in bad faith.¹¹⁰

107. A. T. Leonhard, *The Teleological Approach to Treaty Interpretation*, in *DE LEGE PACTORUM: ESSAYS IN HONOR OF ROBERT REMBERT WILSON* 163 (D. Deener ed., 1970).

108. *Id.* at 166.

109. Sandoval, *supra* note 3, at 9.

110. J. F. O'CONNOR, *GOOD FAITH IN INTERNATIONAL LAW* 97 (1991).

It may be argued that the signing of two contracts in 1993 and 1994 was not an "ongoing breach" as understood in the *Legal Consequences Case*. If it does constitute a sufficiently serious breach of the obligation to consult to warrant similar analysis, however, then the good or bad faith of Bolivia at the time is irrelevant and cannot be held up by the state to defeat potential claims by the indigenous peoples of the Amazon basin region.

If these arguments are accepted, Bolivia should be viewed as having breached its obligations under the Convention on two separate occasions (1993 and 1994). These breaches may be reported to the ILO, as will be discussed below. For the purposes of our analysis, however, it is interesting to consider measures taken since that time by the Bolivian government in relation to its obligations under ILO 169. These measures include: signing an agreement with indigenous representatives providing for a very limited type of consultation procedure,¹¹¹ and adopting new Environmental Regulations for the Hydrocarbons Sector, which establish the environmental impact assessment and consultation processes to be used in the case of oil and gas operations on Bolivian territory in general.¹¹² In order to assess whether these measures satisfy the Convention's stipulations, we will consider them in light of the textual interpretation outlined above, and also of the overarching good faith principle and state practice detailed below.

2. Good Faith

Under international law, States are bound to perform their treaty obligations "in good faith."¹¹³ The evolution of this principle of international law in State practice and doctrinal writings from Roman times to the present has been traced by J. F. O'Connor in his recent work entitled *Good Faith in International Law*.¹¹⁴ After reviewing the jurisprudence of the International Court of Justice and other international arbitration decisions, he suggests the following definition of the

111. Acta con el propósito de buscar soluciones a problemas ambientales relacionados con actividades del sector petrolero en Territorios Indígenas (Sept. 18, 1995) (copy obtained from CEJIS Trinidad and on file with author) [hereinafter *Acta sobre actividades del sector petrolero en Territorios Indígenas*].

112. Decreto Supremo 24335, *supra* note 64.

113. Vienna Convention, art. 26.

114. O'CONNOR, *supra* note 110, at 124.

principle:

The principle of good faith in international law is a fundamental principle from which the rule *pacta sunt servanda* and other legal rules distinctively and directly related to honesty, fairness and reasonableness are derived, and the application of these rules is determined at any particular time by the compelling standards of honesty, fairness and reasonableness prevailing in the international community at that time.¹¹⁵

With respect to the application of treaties, O'Connor's review of relevant jurisprudence suggests that the good faith obligation has been used to judge the exercise by States of their rights, as well as the performance of their obligations. It is this latter point which is of particular concern with respect to ILO 169, since the I.C.J. has shown its willingness to use the good faith principle as an interpretive source for supplementary guidelines where a general legal obligation is found to exist in international law.

Reference by the I.C.J. to the good faith principle in the context of State obligations was made in both the *North Sea Continental Shelf Cases* and the *Fisheries Jurisdiction Cases*,¹¹⁶ after the Court found that the States in question had a legal (rather than moral) duty to negotiate.¹¹⁷ In the *North Sea Continental Shelf Cases*, the Court held that it could use the principle of good faith to justify the basic principle that negotiations had to be meaningful, and not merely a formality.¹¹⁸ Moreover, in both cases, the International Court provided practical guidelines for the parties concerning the means by which negotiations should take place, including the particular issues to be taken into account during the negotiations.¹¹⁹

Thus, according to international law, Bolivia must perform its legal obligations under ILO 169 in good faith; that is, it must act with the honesty, fairness and reasonableness that the principle requires. It is true that the obligation to consult

115. *Id.*

116. *Fisheries Jurisdiction Cases* (U.K. & N. Ireland v. Ice.), 1974 I.C.J. 3 (July 25).

117. *Id.*

118. *North Sea Continental Shelf Cases*, 1969 I.C.J., at 46-47.

119. O'CONNOR, *supra* note 110, at 95-96. The Court did not, however, proceed to outline other procedural mechanisms such as frequency of negotiation meetings.

indigenous peoples is different from the obligation of one State to negotiate with another State, since indigenous peoples are in the position of third party beneficiaries under ILO 169. On this logic, however, indigenous peoples should also be viewed as the expressly designated third party beneficiaries of the obligation to perform in good faith owed by each signatory State to the others. Furthermore, and to remove all possible doubts on this matter, the Convention itself stipulates at Article 6 that "the consultations carried out in application of this Convention shall be undertaken, in good faith...."¹²⁰

It is therefore submitted that the obligation to act in good faith must be viewed as the overarching norm governing the interpretation and application of the obligation to "establish or maintain procedures through which they shall consult" indigenous peoples found in Article 15(2). Although "good faith" cannot in and of itself be the source of obligations, it must be used as an important supplementary source for judging whether particular procedural mechanisms satisfy the obligation to consult found in Article 15(2) of ILO 169.

3. Consultation Procedures: State Practice

In order to narrow the scope of the wide range of possibilities left open by Article 15(2) and other relevant provisions, it is instructive to refer to state practice to determine if there currently exists an international model for consultation processes and, if so, what are its key components. The ILO has already compiled reports from the signatory countries to ILO 169 regarding the activities they have undertaken in light of the obligations imposed on them by the Convention. Beginning with the Latin American signatories, Colombia, Mexico and Guatemala appear to be in the early stages of establishing institutional representation and procedures for the consultation of indigenous peoples. The Colombian Constitution guarantees indigenous representation in Congress.¹²¹ The government has recognized Indigenous Territories as territorial entities, governed by councils who have some powers of self-government

120. ILO 169, art. 6.

121. Representation through the election of two indigenous members in several "special constituencies," which are similar to reserves. See ILO GUIDE, *supra* note 11, at 12.

and who must participate in decisions taken by the government with respect to the exploitation of natural resources on their land.¹²² In an earlier report, Colombia also indicated that it had adopted a national development programme for Indigenous Populations, whose administrative structure included a National Indigenous Council composed of delegates from regional and national indigenous organizations.¹²³ Mexico reported that the state retains ownership of mineral, sub-surface and other resources pertaining to land. Any exploration or exploitation in *ejidos* or *comunidades* inhabited by indigenous people is subject, however, to the "authorization" of the affected communities.¹²⁴ In Guatemala, the most recent party to ratify ILO 169, the recent Agreement on the Identity and Rights of Indigenous Peoples contains provisions to establish a bilateral commission made up of equal numbers of government and indigenous representatives.¹²⁵

The Commission will be charged with supervising the implementation of the Agreement which covers political, economic, social and cultural rights. More specifically, the Commission may consider reforms or measures regarding: the establishment of obligatory mechanisms for consultation where legislative or administrative measures are being considered and will affect indigenous peoples; forms of institutional participation in decision-making processes such as technical or consultative agencies ensuring a permanent dialogue between indigenous peoples and state organs; and measures to ensure that individuals of indigenous origin may be promoted through bureaucratic structures.¹²⁶

In Costa Rica, some form of institutionalized consultation of indigenous peoples has existed for over a decade. Reports made during the 1980s (under ILO 107) stated that the Government had adopted comprehensive programs for development of an

122. *Id.* at 16.

123. ILO Rep. VI(1), *supra* note 16, at 22.

124. *Id.* at 19.

125. Agreement on Identity and Rights of Indigenous Peoples (Guat.-Unidad Revolucionaria Nacional Guatemalteca (MINUGUA)), U.N. SCOR, 49th Sess., Annex 1, Agenda item 42, U.N. Doc. A/49/882-S/1995/256/Annex 1 (1995).

126. *Id.*, part D art. 5. In the Agreement on Social and Economic Aspects and the Agrarian Situation, the government has also undertaken a commitment to ensure participation through "urban and rural development councils" wherever matters affecting indigenous peoples arise. [MINUGUA site as found at [<http://www.un.org/Depts/minugua/pa28.htm>].]

"indigenous policy" after "full consultation" with representatives of indigenous peoples.¹²⁷

In some signatory countries, however, there has been little development in terms of representation and consultation. In Paraguay, legislation passed in the 1980s established the National Indian Institute, the official agency responsible for the administration of Indian affairs. The Institute was to have a consultative board comprised of government officials as well as non-governmental representatives from *indigenista*, church and other organizations but not indigenous organizations themselves.¹²⁸

Among non-signatory countries, Panama has shown the most willingness to establish consultative mechanisms for the country's indigenous peoples by way of a form of co-management of their lands as wildlife parks.¹²⁹ In 1988, Brazil reported significant changes in the structure of the National Indian Foundation (FUNAI), after the ILO Committee of Experts on the Application of Conventions and Recommendations indicated a need for remedying the "dangers of paternalism" within the FUNAI and for consultation with indigenous peoples.¹³⁰ In 1994, Brazil reported to the UN Working Group on Indigenous Peoples (UNGWIP) that under Article 231 of its Constitution (amended in 1988), rights to the exploitation of mineral resources existing in indigenous areas will be effective only after authorization from the National Congress pursuant to public hearings, "taking into account the interests of the affected communities."¹³¹ During these hearings, indigenous representatives may state their concerns.¹³² There is no evidence, however, that any consultative

127. ILO Rep. IV(2), *supra* note 83, at 22.

128. *Id.* at 23.

129. In Panama, indigenous peoples have significant control over their territories (in particular over the Kuna Yala Wildlands Park); this means they have greater control over development activities on their lands than is provided by a right to consultation. U.N. SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, TRANSNATIONAL INVESTMENTS AND OPERATIONS ON THE LANDS OF INDIGENOUS PEOPLES, U.N. Doc. E/CN.4/Sub.2/1992/54 at 25-29 [hereinafter TRANSNAT'L INVESTMENTS]. Furthermore, the state has engaged in negotiations with indigenous peoples concerning proposals to establish a major copper mining project within reserve lands. ILO Rep. VI(1), *supra* note 16, at 58.

130. TRANSNAT'L INVESTMENTS, *supra* note 129, at 21.

131. U.N. Doc. E/CN.4/Sub.2/AC.4/1994/2 at 7-8 (1994).

132. INTERNATIONAL DIRECTORATE, DEPARTMENT OF INDIAN AND NORTHERN AFFAIRS, BRAZIL: AN OVERVIEW 5 (1995) (unpublished, on file with author).

mechanisms have been set up specifically to consider the interests of indigenous peoples in the Congress or in FUNAI.¹³³

In Ecuador, despite the publicity generated by NGOs such as Acción Ecológica and indigenous organizations regarding the destruction of Amazon rainforest by oil companies and others, the government has not agreed to any consultation processes or granting any special rights of control to indigenous peoples over their lands.¹³⁴ Notwithstanding reports of significant changes in its policies with regard to indigenous peoples,¹³⁵ at the UNGWIP, Argentina has indicated that it does not agree with provisions of the UN Draft Declaration requiring consultation with respect to subsoil resources, given that they are national property.¹³⁶ Venezuela has generally stated that it does not support provisions which give any special rights or greater autonomy for indigenous peoples as opposed to other citizens.¹³⁷ Moreover, the country's mining legislation makes no provision for consultations with indigenous peoples where concessions are to be granted on or affecting their lands.¹³⁸

In sum, there currently exists a significant range of state practice with respect to the consultation of indigenous peoples in Latin America. In certain countries, consultation procedures do not appear to exist at all (Argentina, Ecuador, and Venezuela). In others, consultation tends to be done through governmental agencies, the "Indian Institutes" (Brazil, Paraguay) with their significant legacies of paternalism and tendency to "consult" by way of employing indigenous people, rather than setting up any procedures to consult indigenous organizations. In some

133. In response to complaints regarding the highly destructive impact that gold miners have had on Yanomami territory, President Collor de Mello signed a decree forbidding mineral prospecting on this land. Again, however, no provisions were made for consultation with indigenous peoples of the area, in part because, in the opinion of the government, at least, these peoples do not have sufficient experience or knowledge to participate in consultations regarding their rights. *Id.* at 10.

134. INTERNATIONAL DIRECTORATE, DEPARTMENT OF INDIAN AND NORTHERN AFFAIRS, ECUADOR: AN OVERVIEW (1995) (unpublished, on file with author).

135. ILO Rep. VI(1), *supra* note 16, at 22. In 1988, Argentina reported that indigenous communities would be granted separate legal personality, new land adjudication provisions were being adopted, and bilingual education would be provided. The government also established a National Institute for Indigenous Affairs which was to "operate with the participation of representatives of the communities concerned." *Id.*

136. U.N. Doc. E/CN.4/Sub.2/AC.4/1990/1 at 7 (1990).

137. *Id.* at 15.

138. René Kuppe, *The Legal Fight for Land in Venezuela*, 4 IWGLA NEWSL. 4, 8 (1993).

countries, a certain level of political participation is guaranteed through reserved seats in Congress and some powers of local self-government and control over natural resources (Colombia, Panama). Guatemala's recent Agreements have the potential to go the furthest toward institutionalizing regular consultation with indigenous organizations. The process has only just begun, however, so the details regarding procedural mechanisms through which consultation will be carried other than the bilateral commission remain undetermined.

In other parts of the world, including Norway, Australia, the United States and Canada, more detail is available regarding the consultation procedures currently in place. Norway, the only one of these countries to have ratified ILO 169, reported that in 1987, the Norwegian Parliament resolved to establish a direct national representative Sami Parliament (Sameting) with 39 elected representatives. The first Sameting was elected in 1989. It has consultative authority at the national level only, although the administration of measures respecting local affairs and Sami culture have been transferred to the Sameting. Its tasks are laid out in national legislation and include the power to raise matters, to issue statements and to present matters to public authorities and private institutions, with regard to all matters within the scope of its activities (essentially reindeer herding and fishing and the land on which they are carried out).¹³⁹ With regard specifically to environmental issues, the Norwegian Ministry of Culture has instructed the regional board responsible for managing Crown land to ask the opinion of the Sameting before taking any decisions concerning land-use projects. The reindeer herding districts are legally entitled to be consulted and have the right to be compensated in the event of economic damage.¹⁴⁰ With respect to mineral resources, licences or permits may only be obtained after consultations with the respective municipalities and the Sameting.¹⁴¹

In Australia, there have been a series of significant reforms over the past five years or so which have, among other things, created the Aboriginal and Torres Strait Islander Commission (ATSIC). Thirty-six regional Councils (aboriginal) have control over local affairs, and also elect seventeen of the nineteen

139. *Id.* at 12.

140. *Id.* at 17.

141. *Id.* at 19.

commissioners who sit on the ATSIC.¹⁴² The ATSIC formulates national programs and policies; although this body gives Aboriginal and Torres Strait Islanders direct involvement in decisions regarding their interests, they cannot participate in budget-making at the parliamentary level. With respect to natural resources pertaining to their lands, aboriginal peoples have the right to withhold consent and to control mining on their land, subject to the Parliament's right to proclaim that the national interest required mining on their lands.¹⁴³ Thus, although land issues are far from being resolved, the indigenous peoples of Australia have been concerned with consolidating their rights to self-determination and control over land, exercised through Aboriginal Land Councils, rather than with asserting a basic right to be consulted.¹⁴⁴

In the United States, Indian "tribes" have also tended to have significant control over their lands, at least as compared to the peoples of Latin America. Despite recent Supreme Court decisions, tribes have generally been viewed as having "sovereignty" (or ownership) over their territories and the resources pertaining thereto, and therefore the power to regulate third party rights on their lands.¹⁴⁵ In Alaska, however, the Alaska Native Claims Settlement Act conveyed "split estate lands" in which the surface is owned by aboriginal village corporations and the sub-surface is owned by the regional government.¹⁴⁶ The Act provides that the right to "explore, develop or remove minerals from the sub-surface estate in the lands within the boundaries of a Native Village shall be subject to the consent of the Village Corporation."¹⁴⁷ Thus, the regime is not set up in accordance with a procedural right to be consulted,

142. DEPARTMENT OF INDIAN AND NORTHERN AFFAIRS, ABORIGINAL AFFAIRS IN AUSTRALIA: AN OVERVIEW (1995) (unpublished, on file with author) 7 [hereinafter DIAN].

143. INTERNATIONAL LAW AND ABORIGINAL HUMAN RIGHTS 164 (Barbara Hocking ed., 1988).

144. DIAN, *supra* note 142, at 5.

145. See generally D. B. Suagee & C. T. Stearns, *Indigenous Self-Government, Environmental Protection, & the Consent of the Governed: A Tribal Environmental Review Process*, 5 COLO. J. INT'L ENVTL. L. & POL'Y 59 (1994). The authors discuss in particular the Environmental Protection Agency's "Policy for the Administration of Environmental Programs on Indian Reservations," which recognizes tribal governments as the primary parties for setting standards and making environmental policy decisions. *Id.* at 80.

146. James D. Linxwiler, *The Alaska Native Claims Settlement Act: The First 20 Years* 38 ROCKY MTN. MIN. L. INST. 2-1 (1992).

147. *Id.*

but rather with a right to consent to or reject the conveyancing of sub-surface rights to non-aboriginal parties.

Finally, in Canada, a range of consultation mechanisms exist depending on the regime under which aboriginal peoples hold their lands: the reservation system, co-management regimes, or comprehensive land claims agreements. Under the Indian Act, the Crown holds reserves for the "use and benefit of the respective bands for which they were set apart, and...the Governor in Council may determine whether any purpose for which the lands in a reserve are used or are to be used is for the use and benefit of the band."¹⁴⁸ Although this system produced a highly paternalistic regime in which Indian bands had little or no input into decisions regarding resource exploitation on their lands, it has begun to give way to more participatory regimes such as the one set out in the Indian Oil and Gas Regulations in 1995.¹⁴⁹

Under these regulations, Indian band councils must be consulted and their "approval"¹⁵⁰ obtained at every stage of the oil exploration and exploitation process: the granting of exploratory licences, well licences, permits to drill for gas and leases of land¹⁵¹. Moreover, the Regulations provide for notification "sufficiently in advance" of tests in prospective oil and gas zones such that band councils may be present when the tests are being carried out.¹⁵²

Recent comprehensive land claims agreements have tended to establish consultation procedures between the national government and the regional aboriginal governing body in the case of resource exploitation on aboriginal lands which are not held in fee simple by the aboriginal peoples themselves.¹⁵³ In

148. Indian Act, R.S.C., c. I-5, §18(1) (1985) (Can.).

149. SOR/94-753.

150. Approval under the Regulations is given by way of a referendum conducted by the affected band indicating that the members are willing to have oil and gas exploration take place on the reserve. If approval is given, Indian Oil and Gas Canada then consults with the Chief and Band Council through meetings and discussions which may also include the oil companies with respect to licensing and permit issuance, etc. However, whenever a decision regarding the issuance of rights is to occur, band council approval (written approval evidenced by a quorum of the Council) will be required. Letter from W.J. Douglas, Executive Director, Indian Oil and Gas Canada (June 27, 1996).

151. SOR/94-753, §§ 6 and 10.

152. *Id.*, § 11.

153. See, e.g., Agreement between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in Right of Canada (1993) art. 27 [hereinafter Nunavut Agreement];

both cases, the agreements provide that "[p]rior to opening any lands in the settlement area for oil and gas exploration, Government shall notify the Designated Inuit Organization (DIO) and provide an opportunity to present and to discuss its views with Government regarding the terms and conditions to be attached to such rights."¹⁵⁴

The Nunavut Agreement requires that the proponent of the exploration, development or production of petroleum on Crown lands in the Area consult the DIO and that the government shall also consult the same organization with respect to matters set out in the Agreement.¹⁵⁵ The Gwich'in Agreement makes the same provision, except that there is no requirement that the government consult in addition to the developer regarding the exercise of exploration, development or production rights.¹⁵⁶

In sum, the norms establishing procedures for consultation in North America, Australia and Norway tend to be more institutionalized and specific to indigenous peoples than those found in most Latin American countries. Where they are not replaced by outright ownership and self-government, these mechanisms include consultation on a regular basis, through institutionalized relationships between governments (national and aboriginal), and some form of express guarantee that indigenous concerns will be heard and considered. Despite these apparently elaborate procedural mechanisms, many of these states have continued to be criticized for failing to engage in effective consultations where bureaucratic structures have been overly burdensome for relatively small aboriginal populations to support, and where lack of clarity in legislation has led to uncertainty rather than effective consultations.¹⁵⁷

Gwich'in Comprehensive Land Claim Agreement, (1992) art. 21 [hereinafter Gwich'in Agreement].

154. Nunavut Agreement, *supra* note 153, art. 27.1.1; *see also* Gwich'in Agreement, *supra* note 153, art. 21.

155. Nunavut Agreement, *supra*, note 153, art. 27.1.2.

156. Gwich'in Agreement, *supra* note 153, art. 21.1.3.

157. *See, e.g.*, Matthew Coon-Come, *Environmental Development, Indigenous Peoples and Governmental Responsibility*, 16 INT'L LEG. PRAC. 108 (Dec. 1991) (criticizing the ineffective and overly bureaucratic structures set up under the James Bay and Northern Quebec Agreement). *See also* Linxwiler, *supra* note 146, at 2-48 (regarding the extensive litigation which has plagued the application of the Alaska Native Claims Settlement Act). *See* Marine Le Puloch, *A Tragedy of Progress: The Lubicon Cree*, 12 NATIVE AMERICAS 32 (1995) (regarding the difficulties faced by Canadian Indian bands such as the Lubicon Cree whose land claims have not been recognized by the Alberta government).

Overall, then, the outline of state practice offered above tends to show a distinctive trend toward consultation (or something more) of indigenous groups. Beyond this general observation, however, fairly different sets of norms have emerged which may be used to formulate an international standard for the obligation to consult under ILO 169. It is surely no coincidence that the more stringent norms are found in wealthier countries in which governments have long exercised significant control over national affairs including, in many cases, over indigenous peoples and their lands. These differences also reflect the fundamentally different histories of the various countries in question.

This divergence is also reflected in the Inter-American Draft Declaration on the Rights of Indigenous Peoples as opposed to the U.N. Draft Declaration. Article XVIII(5) of the Inter-American Draft Declaration simply reproduces verbatim Article 15(2) of ILO 169 requiring states to consult indigenous peoples where it owns mineral or subsoil resources, without there being any equivalent provision to the ILO's regarding the need to consult "in good faith."¹⁵⁸ Thus, the Inter-American Draft Declaration may be viewed as having the potential to lower the standard for consultation set out in ILO 169. In contrast, Article 30 of the U.N. Draft Declaration requires that states obtain the "*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."¹⁵⁹ Indeed, "free and informed consent" is the general standard set by the U.N. Draft Declaration. Consistent with its express endorsement of the notion of self-government, this instrument departs significantly from the consultative regime established in Article 15(2) of ILO 169, and would tend to provide evidence of a pull toward much higher standards in states' interactions with indigenous peoples regarding resources pertaining to their lands.¹⁶⁰

Faced with these divergent trends, several options exist with respect to formulating a standard for consultation procedures under ILO 169. First, we could view ILO 169 as having incorporated a minimum standard of consultation mechanisms

158. INTER-AM. DRAFT DECL. *supra* note 36, art. XVIII(5).

159. U.N. DRAFT DECL., *supra* note 34, art. 30 (emphasis added).

160. U.N. DRAFT DECL., *supra* note 34, arts. 19 and 20.

for all states, based on customary norms existing at the time it was drafted: that is, the standards set by Latin American practice would be viewed as having set the minimum behaviour which would satisfy state obligations under the Convention. It is submitted, however, that on the basis of the rules outlined above regarding good faith and the interpretation of "open-textured" rules, to the extent that Latin American practice itself is not carried out honestly, fairly and reasonably or is characterized by general statements of principle which, in the absence of concrete action, renders the obligation set out under articles 6(2) and 15(2) meaningless, this cannot be the standard contemplated by the Convention.

Conversely, we could suggest that the standards set by the "northern" states are only a minimum, and that in fact there is a "pull toward compliance" among states toward ever higher standards for government relations with indigenous peoples, as evidenced by the U.N. Draft Declaration. This position, although consonant with the aspirations of many indigenous peoples, would in fact lead to a re-writing of ILO 169, given that the obligation to consult would be replaced by an obligation to obtain the free and informed consent of indigenous peoples. This cannot be viewed as a viable argument with regard to the obligations which bind the parties to ILO 169. Rather, it provides evidence of the possible emergence of a customary norm which, as we have seen above, is far from being universally adhered to and would not yet meet the test for the "crystallization" of customary law set out in the *North Sea Continental Shelf Cases*.¹⁶¹

Finally, we could posit that the standard under ILO 169 should reflect minimum, but effective and good faith practices. This standard may therefore be higher than that which might be derived from the current practice of many Latin American states. It is recognized, however, that the norms established by North American, Australian and Norwegian practices do not themselves constitute a sufficiently flexible international standard to be considered the minimum standards contemplated by ILO 169. It is submitted that this final option provides the best basis for determining the standard set by ILO 169 with respect to the consultation of indigenous peoples regarding sub-

161. *North Sea Continental Shelf Cases*, 1969 I.C.J. 3, at ¶¶ 71-74.

surface resources. It allows us to abstract from the examples of state practice outlined above wherever we find examples of effective, good faith consultation mechanisms in order to suggest measures which would satisfy the obligation set out in articles 6(2) and 15(2) of the Convention.

In doing so, one finds the following general characteristics for effective consultation procedures:

- consultation takes place prior to government decisions to open indigenous land for development;
- institutional structures or relationships exist which ensure regular contact between the State and indigenous peoples concerned;
- indigenous peoples (their organizations) participate sufficiently in the relevant decision-making process to allow them to have their views heard and considered, if not always adopted; and,
- consultation is done in a framework specific enough to take into account indigenous concerns and interests susceptible of being affected by development programs.

These more pragmatic conclusions based on current state practice buttress the textual interpretation of Article 15(2) offered above, while also providing more specific standards than those derived from a purely textual interpretation of ILO 169. They confirm that consultations may be viewed as effective when carried out prior to the government's undertaking or permitting development programs on indigenous lands. Moreover, consultations must involve the establishment of procedural mechanisms which ensure regular contact and active participation in the decision-making in order to satisfy the obligation that consultations be carried out with the "objective of achieving agreement or consent" and ensure as much control as possible over the process. Finally, the tendency to establish specific procedures for the consultation of indigenous peoples as opposed to other national citizens, buttresses the obligation on states to take an active role in ensuring that the interests of indigenous people will be adequately addressed and social, cultural and environmental impacts minimized.

4. Conduct of Bolivian Government

In light of these clarifications, we may now turn to an assessment of current consultation mechanisms established in Bolivian legislation and other administrative agreements in order to determine whether they satisfy the requirements outlined above.

a. Timing

Article 15(2) establishes that governments must consult indigenous peoples prior to opening their lands for programs to explore or exploit sub-surface resources. The right to be consulted prior to government approval of petroleum and gas exploration and exploitation programs may be viewed as recognizing that the entry onto these lands by third parties is subject to at least some measure of control by indigenous peoples. In the absence of such recognition, it seems fairly certain that indigenous peoples will be placed in a weak bargaining position with respect to third parties such as oil companies.

No such prior consultation of indigenous peoples by the relevant state departments or agencies has been established in Bolivian law. As was mentioned above, in 1993 and 1994, despite having ratified and adopted ILO 169, Bolivia entered into contracts granting exploration and exploitation rights in blocks which significantly overlap with indigenous territories recognized by supreme decree.¹⁶² The only new legislation introduced since that time with respect to oil operations are the new Hydrocarbons Act¹⁶³ and Environmental Regulations for the Hydrocarbons Sector.¹⁶⁴ The Hydrocarbons Act, adopted in early 1996, does not expressly establish any public consultation as condition precedent to the granting of oil operation rights. The only general consultation procedures which have been established thus far are incorporated by reference into Article 4 of the Environmental Regulations for the Hydrocarbons Sector.¹⁶⁵

162. Sandoval, *supra* note 3, at 6.

163. Ley No. 1689 de Hidrocarburos, *supra* note 49.

164. Decreto Supremo 24335 (July 19, 1996).

165. See Regulation for Environmental Control and Prevention, art. 178 (establishing procedures for environmental impact assessments).

Read together, these regulations require any party carrying out oil operations on Bolivian territory to consult the inhabitants of affected lands regarding their environmental concerns at the planning stage of every phase of their project. These phases are referred to in the Hydrocarbons Act, and include exploration, perforation, exploitation, transportation, industrialization, marketing and distribution. Thus, the legislation does not provide for consultation prior to the State's granting of approval, by contract, of the overall oil and gas development projects.

The Supreme Decree which in 1990 established one of the indigenous territories in which oil exploration is taking place, the TIPNIS, does provide for certain consultation measures. An environmental impact assessment (EIA) is required for all new construction and development works in the TIPNIS. Local indigenous organizations are guaranteed the right to be consulted on all "development projects" and EIAs undertaken in the area.¹⁶⁶

The decree mentions in particular "roads and pipelines" serving basic infrastructure needs, but makes no express mention of resource extraction activities. It is perhaps for this reason that the government did not feel compelled in 1994 to consult with the TIPNIS leadership prior to granting oil exploration rights in the Sécure block. It is possible, however, that this decree could provide some measure of protection for the inhabitants of that particular territory with respect to future decisions on the matter.

The fact that this protection proved ineffectual in 1994 pushed leaders of Bolivia's indigenous organizations and their legal advisors to insist that the government take some steps toward establishing a consultation process specifically for oil operations in indigenous territories. On July 19, 1995, a meeting was held under the good offices of the Beni Departmental Prefect. The participants included: representatives of the National Energy Department and of the Beni branch of the state-controlled oil company, YPFB, the Presidents of CIDOB, CPIB and leaders of the TIPNIS territory and their advisors, as well as a legal advisor to the Prefecture and a representative of the REPSOL oil company.¹⁶⁷ The government representatives

166. Decreto Supremo 22610, *supra* note 46, art. 6.

167. Sandoval, *supra* note 3, at 5.

signed a memorandum of understanding promising to participate in a joint State-Indigenous Commission which would determine consultation mechanisms to be followed in the future. The agreement also contained a promise that YPFB would never again sign a contract for oil operations in indigenous territories that didn't "contemplate in its text the consultation and participation of indigenous peoples as required by law."¹⁶⁸

The full meaning of this ambiguous promise was later clarified during a subsequent series of meetings that led to another written agreement which was signed by representatives of CIDOB, CPIB, one of their legal advisors, and representatives of the Hydrocarbons Sub-Secretariat, the Sub-Secretariat of Ethnic Affairs and the Ministry of the Environment, as well as the Director of Control of Operating Contracts from YPFB.¹⁶⁹ This second agreement confirmed that the government would not accept the indigenous peoples' demand to be consulted prior to the granting of any contractual rights to third parties for petroleum and gas activities affecting their lands. The most that government representatives were willing to guarantee the indigenous peoples was the establishment of a joint committee of indigenous and government representatives that would be struck on an *ad hoc* basis to hear complaints in cases of conflict between oil companies and indigenous communities once the oil companies had begun their work.¹⁷⁰

Although they were disappointed with the government's intransigence, the indigenous representatives and some of their advisors signed the agreement, noting that this was the first time that the government had ever agreed to any form of consultation whatsoever.¹⁷¹ On the basis of their rights as set out in Article 15(2) of ILO 169 the indigenous representatives should arguably have refused to sign the agreement. Instead, they chose to accept it, but also to continue to seek stronger protection. The current situation, described above, demonstrates that the government has failed to meet its obligation to consult indigenous peoples prior to opening up their lands for

168. *Id.*

169. Acta sobre actividades del sector petrolero en Territorios Indígenas, *supra* note 111.

170. *Id.*

171. Interview with J. González Humpire, Legal Advisor to CPIB and CIDOB, at CEJIS, in Trinidad (June 10, 1996) [hereinafter González Humpire Interview].

development and has refused to put into place any measures which would ensure such prior consultations for the future.

b. Regularity of Consultation

With regard to the requirement of an institutional structure or relationship ensuring regular consultation, the only existing provisions for consultation between the government and indigenous peoples on the specific issue of oil operations in indigenous territories stems from an agreement signed in July 1996 by representatives of CIDOB, CPIB, one of their legal advisors, and representatives of the Hydrocarbons Sub-Secretariat, the Sub-Secretariat of Ethnic Affairs and the Ministry of the Environment, as well as the Director of Control of Operating Contracts from YPFB.¹⁷² In that agreement, the government undertook to ensure that a copy of any environmental impact assessments prepared by companies operating in indigenous territories would be made available to the regional indigenous organization, CIDOB. The indigenous organization would then have two weeks to forward comments to the Hydrocarbons Subsecretariat. If no comments were received, the indigenous communities would be presumed to be in agreement with the assessment and its environmental management recommendations and the government would proceed to approve the impact assessment and therefore allow the project to begin.¹⁷³

Western Geophysical has sent copies of its impact assessments to the indigenous leaders of the Beni department.¹⁷⁴ This arrangement is problematic, however, in that the agreement does not provide any mechanism through which indigenous peoples can verify that their comments are actually being read and taken into account by government officials. There is no active participation of indigenous representatives in the decision-making process itself. Moreover, the two-week period is very tight, particularly given the reality of the living conditions of indigenous communities. In general, they have only radio as a means of communication, which does not serve as

172. Decreto Supremo 24335, *supra* note 64.

173. K. Gallagher-MacKay, Legal Regimes for Consultation on Indigenous Lands 19-20 (1996) (unpublished, on file with author).

174. González Humpire interview, *supra* note 171.

a very effective means for carrying out lengthy consultations on complex and technical matters. If they wished to communicate directly with the communities affected, however, it would take members of the CIDOB or CPIB at least two days to reach the nearest communities found in the Chapare and Sécure blocks, and at least five days to reach the furthest, given their inaccessibility by means other than canoe.

The recently adopted Environmental Regulations for the Hydrocarbons Sector contains in the second annex a set of deadlines for the environmental impact assessment approval process.¹⁷⁵ This schedule establishes even shorter deadlines for the approval process for oil and gas operation EIAs than those set by the general regulation for environmental prevention and control. The new regulation establishes a total time frame for the process which ranges from thirty-six to ninety-six working days (about seven to twenty weeks), depending on the number of requests for information or clarification made by the various Secretariats involved. Although this time-frame is limited, it does not totally preclude at least minimal consultation among indigenous organizations, particularly if indigenous comments and concerns could be incorporated into the government's right to request clarifications and additional information. Nowhere is there any reference in the Regulations or their Annex, however, to the agreement referred to above under which indigenous peoples would submit their comments to the government, despite the fact that the regulation was drafted subsequent to the signing of the agreement.

In other words, at no time will Bolivian state institutions ever be required to engage directly in consultations with indigenous people with the objective of gaining their consent or approval to the opening of their lands to oil exploration or exploitation. Instead, governmental authorities will play a supervisory role in which they are expected to ensure that consultations are held, but in which they have no direct role themselves. Although this may ensure fairly regular contact between oil companies and indigenous communities, the arrangement does not satisfy the state's own obligation to consult. In light of the negative impact that multinational oil

175. Decreto Supremo 24335, *supra* note 64, annex 2.

companies have had on indigenous peoples¹⁷⁶ and their profit-oriented motivations, it is submitted that delegation by government of the consultative role to such corporations does not meet the standard set by the plain meaning of Article 15(2) read in conjunction with Article 6, that *governments* consult and/or undertake studies. Nor does it meet the good faith test of reasonableness and honesty required under the Convention: it is neither honest nor reasonable for the government to expect private corporations to carry out the social and public interest functions that are an inherent part of the decision to open lands for development in a way which adequately balances the multiple rights and interests at stake. Finally, such an arrangement does not conform to state practice, at least in countries such as Panama, Guatemala (in principle), Canada, the United States and Norway, where at a minimum governments undertake to consult indigenous peoples directly prior to opening their lands to third party interests, if not always on a continual basis after that.¹⁷⁷

c. Specific Procedures for Indigenous Peoples

Article 7(2) of ILO 169 should be recalled at this point. It states: "Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities." Surely, the "interests of indigenous peoples" contemplated by Article 15(2) include all of these aspects. Indeed, in its preparatory works on this point, the International Labour Office "took note of the damage caused to indigenous lands and lifestyles when States ... accord to entities outside these communities the right of exploration and exploitation of subsoil resources within traditional indigenous territories."¹⁷⁸ Thus, despite the fact that Article 15(2) falls within Part II of the Convention which deals specifically with land, it is clear that the possible prejudicial effects for indigenous peoples of oil and gas activities are not limited to the land alone.

176. See *supra* Part I.

177. See *supra* Part II.B.3.

178. ILO Rep. VI(1), *supra* note 16, at 58.

Evidently, the health, quality of life and cultural survival of indigenous peoples, indeed any people, are tied to the health of their physical environment. Moreover, indigenous peoples have continued to emphasize that their "deeply spiritual special relationship between [themselves] and their land are basic to their existence as such and to all their beliefs, customs, traditions and cultures."¹⁷⁹ Thus, any review of the degree to which the interests of indigenous peoples would be prejudiced by oil operations on their lands must include a review of potential environmental impacts. On this point, one need only return to the documentation of the impact of oil operations in countries such as Ecuador and Nigeria to find proof of the need for a serious review of the potential impact that oil operations may have on a delicate ecosystem such as that of the Amazon basin.¹⁸⁰

Nevertheless, it is also evident that whenever "foreigners" enter into contact with indigenous peoples who have been living in relative isolation, there often occurs a direct and serious impact on the way of life of the people that is in some sense independent of the impact on their land *per se*.¹⁸¹ More specifically, the social impact of the entry of oil companies into traditional indigenous lands in countries such as Ecuador has been documented by organizations such as the *Centro para los Derechos Sociales y Económicos* (Centre for Social and Economic Rights). According to the Centre, the introduction of a monetary economy and contact with outsiders (usually oil company employees) has shaken the traditional cultures. Alcohol and other substances introduced by these outsiders have had devastating effects on social cohesion. Furthermore, these peoples have been introduced abruptly to the racism and discrimination which still pervades Ecuadorian society.¹⁸²

Social upheaval due to a clash of cultures and ways of life is probably an inevitable consequence of the opening of indigenous lands to activities such as oil and gas exploration. To this end, a good faith consultation process should canvass potential social and environmental impacts to obtain the views of indigenous

179. MARTÍNEZ COBO, *supra* note 1.

180. See authorities cited *supra* note 4.

181. See generally MARTÍNEZ COBO, *supra* note 1.

182. CENTRO PARA DERECHOS ECONOMICOS Y SOCIALES, VIOLACIONES DE DERECHOS EN LA AMAZONIA ECUATORIANA, *supra* note 4, at 11.

peoples themselves regarding ways in which such impacts can be mitigated.

Turning to state practice, in Latin America it would appear that if consideration is given to these issues, it tends to be in the context of the environmental assessment process. Although countries such as Ecuador, Venezuela, Peru and others generally refuse to create special mechanisms for indigenous input, they do provide for general public consultation within the environmental assessment process. In other countries such as Panama and Colombia, to the extent that indigenous peoples have at least some self-government powers over recognized territories, they may be able to participate in consultations or negotiations which specifically consider their interests, as opposed to more general environmental ones.¹⁸³

In Canada, recent agreements between the government and the Gwich'in and Inuit peoples have expressly set out the matters which shall be the subject of consultations prior to the opening of indigenous lands. For example, the Gwich'in Comprehensive Land Claim Agreement at Article 21 states that the following matters shall be considered during consultations in addition to environmental impact and mitigative measures: impact on wildlife harvesting; location of camps and facilities; maintenance of public order including liquor and drug control; employment and working conditions of employees; processes for future consultation; and any other matter of importance to either party.¹⁸⁴ The Nunavut Settlement Agreement at Article 27 also includes as matters appropriate for consultation: Inuit training and hiring; language of workplace; identification, protection and conservation of archeological sites and specimens.¹⁸⁵ This latter agreement therefore expressly contemplates the possibility that the Inuit may be employed by the companies engaged in resource development, another aspect of these activities which may also have a very exploitative and negative impact if not properly handled by all parties involved.

In Bolivia, existing consultation mechanisms are found only in the context of general environmental impact (EIA) assessment regulations. The question is, therefore, whether the process

183. ILO Rep. VI(1), *supra* note 16, at 22.

184. Gwich'in Agreement, *supra* note 153.

185. Nunavut Agreement, *supra* note 153.

established therein is adequate to canvass all of the potential prejudices to the interests of indigenous peoples as contemplated in Article 15(2) of ILO 169. Under the new Environmental Regulation for the Hydrocarbons Sector, there is a provision requiring companies to consult the public on "environmental matters" during the process of drawing up their environmental impact assessments.¹⁸⁶ Thus, there is no express requirement that indigenous peoples be consulted on matters of social, cultural or economic impact. There are certain provisions in the regulations which cover some of the concerns and interests outlined above, such as a prohibition on hunting, fishing or purchasing of flora and fauna by employees or sub-contractors of oil companies (article 27(a)); evaluating whether potential sites for installations of wells or refineries contain archeological or cultural resources (article 52(a)); analyzing the biological, cultural and socio-economic impact of selecting transportation routes (article 63(a)); and selecting sites for employee camps which will create the "minimum risk" for fauna, flora and local communities" (article 109(b)). Including these specific obligations in the environmental regulation, however, does not require that oil companies actually consult indigenous communities on these questions, no matter how wise and efficient it would be to do so.¹⁸⁷

There is certainly a potential for the EIA process to encompass questions of social and economic effects as well as environmental ones. To date in Bolivia, however, the EIAs prepared by environmental consulting companies do not contain any serious examination of such effects.¹⁸⁸ There can be no doubt that efforts were made to determine which current industrial practices would minimize the environmental impact of exploration activities, which in the Sécure block, for example, are

186. Decreto Supremo 24335, *supra* note 64.

187. It is interesting to note that the environmental impact assessment (EIA) done for the exploration phase of the Sécure block did canvass certain issues relating to the social impact their activities might have on indigenous peoples, although this report was drafted prior to the adoption of these new regulations. The EIA makes it clear, however, that no consultations had taken place prior to the drafting of the report. It does mention the importance of future communication with indigenous communities in order to ensure good relations ARTHUR D. LITTLE, INC., ESTUDIO DE IMPACTO AMBIENTAL PARA U.N. PROGRAMA DE EXPLORACIÓN EN EL BLOQUE SÉCURE, BOLIVIA (1995) (on file with author).

188. These studies were conducted by Furgó-McClelland, on behalf of contracting parties in the Chapare block and by Arthur D. Little, Inc. for Western Ltd. in the Sécure block. *Id.*

expected to affect temporarily about 400 square kilometres of land due to seismic surveys, and to have a permanent impact on only a one square kilometre area in total (for well sites, helicopter bases, etc.).¹⁸⁹

The EIA makes it clear, however, that no formal consultation of indigenous organizations regarding social or economic issues took place during the environmental assessment process. Consultants apparently visited various communities and offered them medical supplies and soccer balls.¹⁹⁰ It is precisely this type of strategy which is resented by regional indigenous leaders, who feel that the lack of experience of their people in dealing with outsiders is abused in order to obtain their consent to the entry of oil workers onto their lands, without full knowledge of the potential consequences. Furthermore, it may be argued that where the focus of the process remains environmental, there will be an inevitable tendency either to reduce indigenous peoples to objects no different from their surrounding environment and to ignore their concerns as peoples and cultures altogether. The notion that EIAs are sufficient to deal with the interests of indigenous peoples may in part be an unfortunate result of the strategy used by many environmentalists whose criticisms of the conduct of oil companies in regions such as the Amazon, for example, have generally been phrased in terms of environmental damages, rather than in terms of human interests.¹⁹¹

On the other hand, the scientific measurement of environmental degradation seemed to translate their criticisms into a language that oil companies have understood somewhat better than the language of human and cultural degradation. Although this observation confirms the problems with relying on private companies to make full EIAs, it also points to the strategic value of environmental challenges as opposed to some purely cultural ones. There are therefore compelling reasons for arguing that the focus for the subject-matter in the consultation process contemplated by Article 15(2) of ILO 169 should be human-centered, which will inevitably include a consideration of environmental issues. Nevertheless, given the breadth of the

189. *Id.*

190. González Humpire Interview, *supra* note 171.

191. See, e.g., ACCIÓN ECOLÓGICA, AMAZONÍA POR LA VIDA: UNA GUÍA AMBIENTAL PARA LA DEFENSA DEL TERRITORIO AMAZÓNICO AMENAZADO POR LAS PETROLERAS (1994).

terms of the provision, Bolivia might be able to satisfy the subject-matter requirement with a consultation process established within an environmental framework.

In sum, although there are consultation mechanisms in place in Bolivia, the government does not appear to have shouldered its general obligation to consult in good faith with the objective of gaining the agreement or consent of indigenous peoples through effective participation as set out in ILO 169, particularly as interpreted in light of honest and reasonable state practice. It is recognized that the government itself has very limited resources, and that it has been under a great deal of pressure from interested oil companies to keep its deadlines and other requirements to a minimum.¹⁹² Consultation processes themselves, however, do not need to cost a great deal. The relatively resource-intensive methods, used primarily in North America, such as creating permanent commissions are not essential. Instead, an administrative agreement which guarantees direct consultation by government representatives prior to opening lands for exploration or exploitation, as well as some form of dialogue (not just written exchange of communication with no guarantee of reply) at regular intervals regarding oil company activity could be sufficient to satisfy the consultation requirement under ILO 169. In addition, indigenous representatives require some form of training even in order to begin to negotiate in a meaningful fashion. Although there are no provisions of ILO 169 which expressly oblige signatory States to provide such training and education in order to ensure meaningful consultation, such an obligation may be derived from more general provisions requiring governments to "promote the full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions."¹⁹³

192. This was made clear at a meeting with officials from the National Energy Subsecretariat (Santa Cruz, July 18, 1996), in which the pressure from oil companies to reduce administrative delays were repeatedly emphasized.

193. ILO 169, art. 2(2)(b). It is important to recognize, however, that indigenous knowledge of their lands provides significant expertise; one does not necessarily require a "western" education to understand the environmental and social impact of industrialization. Ironically, this indigenous knowledge may even be the source of free information for companies seeking to gain an understanding of the land and climate. There can be no doubt, however, that some form of training and education—preferably not from the oil companies themselves, as was proposed in Bolivia—is necessary to allow indigenous peoples to make an informed choice between various economic,

Above all, however, the consultative process required under ILO 169 involves a transformation in the government's attitude from discriminatory and paternalistic to respectful and cooperative. The Bolivian government has not yet demonstrated, either through administrative measures or otherwise, such a change of attitude, at least with respect to the exploitation of sub-surface resources pertaining to indigenous lands. It remains to be seen whether the current project to draw up a regulation specifically for oil operations in indigenous territories will be completed and if so, to what extent indigenous peoples will participate in this process.

*C. The Obligation to Allow Participation of
Indigenous Peoples Wherever Possible in the
Benefits Derived from Oil and Gas Activities in
Their Territories*

Where indigenous peoples own or are considered to hold proprietary rights over their lands, they are entitled to some portion of the economic benefits derived from the exploitation of the resources therein. In most Latin American countries, however, the State has retained ownership over mineral and petroleum resources.¹⁹⁴ State ownership began historically in Latin American countries, for example, when the Spanish Crown gave itself exclusive rights to all mineral and sub-surface resources in order to enrich its coffers.¹⁹⁵ State ownership of these resources was continued after independence from Spain, and has been justified in recent decades on the basis that all citizens, not private enterprise, should benefit from the sharing of resource revenues.

Thus, in countries such as Bolivia, the Constitution specifies that sub-surface resources are owned by the State.¹⁹⁶ This logic

environmental and social tradeoffs. See Gonzalez Humpire interview, *supra* note 171.

194. ILO Rep. VI(1), *supra* note 16, at 58-62.

195. *Id.* at 58.

196. According to the Bolivian Constitution:

Hydrocarbon resources in whatever state or form they may be found are of the direct, inalienable and imprescribable domain of the State. No concession or contract may convey these resources as property. The State shall undertake the exploration, exploitation, commercialization and transportation of hydrocarbons and their derivatives. The state may exercise this right through autonomous entities or through concessions or contracts of limited duration, to consortia of corporations or private persons in accordance

of State ownership would seem, in principle, to preclude participation by particular non-state groups in the economic benefits gained from exploiting these resources. Instead, all Bolivians are supposed to benefit from government programs funded by the royalties from these activities which are of "public utility" and are carried out under State supervision and protection.¹⁹⁷ Notwithstanding this legal constraint, Article 15(2) of ILO 169 establishes that in cases where the State retains ownership of sub-surface resources, indigenous peoples on whose land exploitation of sub-surface resources is taking place "shall wherever possible participate in the benefits of such activities." First, we must consider the meaning of the term "benefits." The most obvious definition would encompass any economic benefits derived from oil and gas operations. It is possible to imagine that a government might argue that to the extent that it is encouraging oil companies to provide work for local people, and to bring commerce and infrastructure to often isolated, subsistence lifestyle areas, it is fulfilling its obligation to ensure that indigenous peoples are benefiting from the exploitation of oil. This would be highly contestable, however, in light of the documented negative effects of oil operations on indigenous peoples in countries throughout the world as set out above.¹⁹⁸

Turning now to the standard this provision sets for State behaviour, again we are faced with an eminently open-textured norm. Thus, a reasonable interpretation of the phrase "wherever possible" must be posited.¹⁹⁹ On the one hand, the phrase "wherever possible" cannot be interpreted to mean that states must always allow for participation of indigenous people in the benefits of sub-surface resource exploitation. The insertion of these words was evidently intended to leave states some flexibility with regard to the way in which they will fulfill this obligation. On the other hand, it seems fairly clear that a reasonable interpretation would not allow "wherever possible" to mean "only wherever the State's own laws permit."

with the law.

CONST., art. 139.

197. Ley No. 1689 de Hidrocarburos, *supra* note 49, art. 11.

198. See generally Arthaud, *supra* note 5; see also Ominayak & the Lubicon Lake Band v. Canada (No. 167/1984), U.N. Doc. CCPR/C/38/D/167/1984 (Human Rights Committee decision released Mar. 26, 1990).

199. HART, *supra* note 103.

Two arguments may be used to rebut this interpretation. First, nowhere in ILO 169 is it stated that this provision should be viewed as permitting express derogation from the principle of international law regarding the application of treaties, codified at art. 27 of the Vienna Convention, that a party may not invoke its internal law to justify its failure to implement a treaty.²⁰⁰ Thus, as per the Permanent Court of International Justice in the *Polish Nationals in Danzig* case: "a State cannot adduce as against another State its own Constitution with a view to eroding obligations incumbent upon it under international law or treaties in force."²⁰¹

Second, this construction would essentially render the provision inoperative and lead to a "result which is manifestly absurd or unreasonable," given that it would make the right to participate in the benefits redundant in every case in which it might be invoked by indigenous peoples—that is, where the State claims ownership rights of sub-surface minerals. The ILO, in its recent Guide, has acknowledged that the provision gives governments the ultimate power to decide whether or not indigenous peoples will benefit from these activities.²⁰² Nevertheless, the Office, in its report on state practice in 1988, noted that several regimes for benefit-sharing exist. In Nicaragua, the Principles and Policies of the Autonomy Commission provided in 1985 that a portion of profits derived from the sale of resources from the lands on the Atlantic coast inhabited by indigenous peoples would be reinvested in the region according to their own wishes and priorities.²⁰³ In Panama, the government has negotiated an agreement for profit sharing with indigenous peoples of resources derived from a copper mining project.²⁰⁴ Brazil has long had a provision in its Indian Statute that indigenous peoples should receive the same compensation and royalties as other members of the population for the exploitation of mineral resources. The ILO also noted, however, that it could find no other evidence of profit-sharing practices in the Amazon region countries.²⁰⁵

200. Vienna Convention, *supra* note 70.

201. (1931) P.C.I.J., Ser. A/B, No. 42 at 24.

202. ILO GUIDE, *supra* note 11, at 18.

203. ILO Rep. VI(1), *supra* note 16, at 60.

204. *Id.*

205. *Id.* at 59.

Similar to the nature of consultation rights in various regions of the world, the Office observed the opposite trend in countries such as Australia, Canada and the United States. There, legislation and other administrative arrangements provide for payment by the government of a percentage of the royalties it receives from oil companies operating on indigenous lands to governing bodies of indigenous peoples or communities, even where indigenous peoples are not considered to own sub-surface resources on those lands.²⁰⁶ This recognition of indigenous political structures as part of a relatively decentralized state apparatus is just one way among many in which indigenous participation in the benefits of resource exploitation may be achieved without violating the principle of state ownership.

In an effort to suggest a reasonable interpretation of the obligation imposed in Article 15(2), recourse may also be had to other international treaties or documents which contain similar language. The phrase "wherever possible" may be interpreted as hortatory language. Such language often arises in the context of a recognition that certain states may lack the economic resources to fulfill their obligations, or that they may have to choose between the allocation of scarce resources to satisfy the vast number of obligations that they bear. That is, the impediment to implementing the treaty is not a legal but an economic one.²⁰⁷ In the case of the obligation set out in Article 15(2) of ILO 169, there is no strong argument that economic scarcity should constitute a valid justification for a State's failure to enforce this particular obligation to allow indigenous peoples to benefit from oil operations on their lands, given that the obligation is presumably only triggered by the receipt by governments of oil

206. *Id.* at 60-62. Specific examples in Canada include the Gwich'in Agreement, which provides that the government will pay the Tribal Council 7.5% of the first \$2.0 million of resource royalties received by the government in a given year and 1.5% of any additional resource royalties received in that year, and the Nunavut Agreement, which provides that the Inuit have the right to be paid 50% of the first \$2 million in resource royalty received by the government each year, and 5% of any additional royalties received. Gwich'in Agreement, *supra* note 153, art. 9; Nunavut Agreement, *supra* note 153, art. 25.

207. See, for example, international human rights documents such as the International Covenant on Economic, Social and Cultural Rights, in which much of the treaty is written in hortatory language. The treaty includes phrases such as obligations "to take steps" to "achieve progressively the full realization" and to the "maximum of its available resources" the realization of the rights guaranteed in the Covenant.

revenues. In other words, the obligation is concerned with distribution of existing resources.

Clearly, the question of distribution of scarce resources does raise serious questions, particularly in countries such as Bolivia in which a majority of the population is in need of economic resources, not just the particular indigenous peoples affected directly by the oil operations. Thus, one can certainly envision situations in which governments might decide that it was in the national interest to continue the policy of maintaining the same arrangements it has in the past with respect to the distribution of royalty payments. At the very least, however, Article 15(2) requires that states consider possible options. One such option might simply consist of ensuring that indigenous peoples participate in the sharing of resource royalties in the same way that other citizens do. This would be particularly relevant in the Bolivian case, for example, where the minority status and general exclusion of indigenous peoples from political structures would appear to militate in favour of a verification by the State that these people benefit under the general regime of royalty payments to the respective departments and their municipalities.

The Bolivian government, however, has simply refused to consider granting any portion of potential royalty rights from oil operations on indigenous territories to indigenous organizations.²⁰⁸ The government has stated that such an arrangement would be unconstitutional,²⁰⁹ given that it would imply something less than the full ownership rights to sub-surface resources for the State as entrenched in Article 139 of the Constitution.

Thus, the government is invoking the provisions of its internal law as the justification for its failure to even consider the question of profit-sharing. No willingness has been shown to consider whether the current regime of royalty distribution benefits indigenous people to the same extent as other citizens. Given that oil operations in territories such as the TIPNIS are still at the exploratory stage, the government could act prospectively to provide measures which would more likely fulfill

208. Gallagher-MacKay, *supra* note 173.

209. González Humpire Interview, *supra* note 171. Confirmed by other advisors in attendance at meetings with government representatives held in August and September of 1995.

Bolivia's obligations under the Convention. It might thereby avoid the potential claims of breach and demands for restitution that might be raised if oil operations in indigenous territories eventually begin to make a profit for the companies involved.

In sum, the obligation imposed on states to ensure that the "peoples concerned shall wherever possible participate in the benefits" of sub-surface resource exploitation activities allows for significant government discretion and flexibility in its application. It will therefore be difficult for indigenous peoples to show that the state is in breach of its obligation, which is procedural (weighing of the options) rather than substantive. There seems to be an argument to be made that the Bolivian government has not even met this low standard. Nevertheless, it is acknowledged that this argument has a weak foundation, particularly given the lack of supporting state practice outside of Norway, North America and Australia.

D. The Obligation to Ensure Fair Compensation for Any Damages Sustained by Indigenous Peoples as a Result of Oil Operations on Their Lands

In Bolivia's Amazon Basin region, oil operations are still at the exploratory stage.²¹⁰ Thus, the potential impacts of oil company activities have been limited to those related to clearing land for seismic surveys, building new roads and base camps for workers, and detonating small explosives as part of the seismic survey process.²¹¹ As has already been noted, however, neither State-owned nor private multinational oil companies have good records as regards the impact that their activities have had on the lands in which exploration and exploitation activities have taken place. Most recently, such allegations have been heard with particular force from the Ogoni peoples of Nigeria, who accused Royal Dutch/Shell of polluting the air and water of their traditional lands through gas flaring and oil spills from leaky pipes.²¹²

210. Y.P.F.B., *Resumen Contratos de Operación Vigentes* (sent as attachment to letter from Y.P.F.B. to CEJIS, May 3, 1996, on file with author).

211. ARTHUR D. LITTLE, INC. *supra* note 187.

212. Paul Lewis, *After Nigeria Represses, Shell Defends its Record*, N.Y. TIMES, Feb. 13, 1996, at A1.

In Amazon region countries such as Peru, Colombia and Ecuador, indigenous peoples and environmental groups have long been decrying the damages caused by oil operations. In a recent study of Texaco's twenty five years of operation in Ecuador, the following consequences were documented:

[Since] production began in 1972, Ecuador's trans-Andean pipeline has spilled an estimated 16.8 million gallons of crude—one and a half times that spilled by the *Exxon Valdez*. Likewise, petroleum operations discharge 4.3 million gallons of toxic waste daily. Recent studies document an increase in skin and intestinal disease, headaches and fevers among local inhabitants, and contaminants in drinking water which reached levels 1000 times the safety standards recommended by the U.S. Environmental Protection Agency.²¹³

So far, the indigenous peoples of Ecuador have been unsuccessful in obtaining compensation from either the Ecuadorian government or Texaco. They recently attempted to bring an action in negligence against Texaco in the United States. The class action suit plaintiffs, including 150,000 indigenous people, were seeking damages of US \$1.5 billion.²¹⁴ To date, the case has been unsuccessful as the court upheld the defendant's argument of *forum non conveniens*. Nevertheless, the court did reserve a power to schedule a "status conference" if no progress is made toward resolving the dispute or completing discovery for purposes of bringing the action in the United States.²¹⁵

The provisions in Article 15(2) relating to fair compensation for damages were drafted in contemplation of the repeated allegations by indigenous peoples of the Amazon and other regions of serious damages incurred due to oil operations on the lands they inhabit, and the difficulty they have had in obtaining any form of reparation. The provision is very broad: it imposes an obligation to compensate for "any damages" which may be

213. Sawyer, *supra* note 4. See also CENTRO PARA DERECHOS ECONÓMICOS Y SOCIALES, VIOLACIONES DE DERECHOS EN LA AMAZONIA ECUATORIANA, *supra* note 4 (documenting the impact of oil operations on human health and the physical environment).

214. Arthaud, *supra* note 5, at 218.

215. Aguinda v. Texaco, No. 93 Civ 7527 (VLB), 1994 U.S. Dist. LEXIS 18364 (S.D.N.Y. Dec. 17, 1994).

sustained by indigenous peoples. The obligation is also framed in imperative language: "[The peoples concerned] *shall receive* fair compensation for any damages" sustained.²¹⁶ Finally, to the extent that damages are sustained to the surface area of lands to which indigenous peoples have recognized title or to the people themselves, states cannot invoke their ownership of sub-surface resources to justify any failure to compensate for damages to indigenous peoples and their lands.

It seems certain that the Ecuadorian case of "no damages" could not constitute "fair compensation." Apart from this extreme case, however, there are other examples available for assessing the "fairness" of compensation where it is offered. Article 15(2) may be viewed as covering two general types of damages due to oil operations: first, the "damages" or prejudicial effects which will be sustained due to normal uses of the land such as clearing and occupation of forest lands for access roads and well platforms; and second, any damages, such as oil spills or the contamination of water and soil from toxic waste, incurred due to accident or fault on the part of oil companies in the conduct of their operations. These damages are not limited in the Convention to injuries to individuals' physical property; they are expressly phrased in terms of damages incurred by "peoples concerned," establishing a collective basis for any claims to be made.

The obligation to provide "fair compensation" for these damages relates to both the procedural rules which govern compensation processes, as well as the remedies available for the two types of damages considered above. In its preparatory work, the International Labour Office stated that the term "damages" was not defined in the Convention, since "this appears to be a subject which would have to be approached in a different way in each country and in each situation, in accordance with the rules and procedures laid down at the national level."²¹⁷

Once again, the ILO obviously left states a great deal of flexibility with respect to the application of this provision. Nevertheless, again according to general principles of treaty interpretation, international tribunals have always adhered to the maxim *ut res magis valeat quam pereat* (that the treaty may

216. ILO 169, art. 15(2) (emphasis added).

217. ILO Rep. IV(2), *supra* note 83, at 41.

have effect rather than be of no avail).²¹⁸ Thus, "fair" will be given some meaning in any attempt to judge whether Bolivia is in breach of its obligation under the Convention.

Both types of damages outlined above will generally be dealt with under each country's civil law of property and obligations. Clearly, this raises the broader question of the type of title granted to indigenous people over their land. In this area, many States such as Colombia, Brazil, Ecuador, Peru, Venezuela and others have been regularizing indigenous land title.²¹⁹

Land title is currently being consolidated in Bolivia.²²⁰ It is therefore difficult to provide a meaningful analysis of the level of protection that the recognition of land rights will afford. It is submitted that these rights must be sufficiently recognized so as to bring indigenous lands under the general regime for expropriation and compensation set out in the new Hydrocarbons Act. The Act provides that parties conducting oil operations must obtain surface rights with the agreement of the owners of the land. A system of arbitration is also established whereby if the landowner refuses, the oil company or YPFB may go to the National Energy Secretariat who will proceed with the expropriation of the necessary land subject to prior payment of "just compensation" to the owner.²²¹ Provided that Bolivia provides for adequate protection of surface property rights, this aspect of the obligation to compensate will be fulfilled.

In addition to compensation under civil law and the Hydrocarbons Act, indigenous peoples should also have access to courts with respect to cases of strict liability infractions, which are set out in the Environmental Act regarding civil actions for environmental damages and which seems to contemplate actions in cases of either fault or absence of fault.²²² Thus, provided indigenous land title is sufficiently protected, there are structural measures in place already under Bolivian law which should satisfy the obligation under 15(2) to compensate indigenous peoples whenever damages are sustained.

218. Leonhard, *supra* note 107, at 166.

219. R. R. Ortega, Notes on the Legal Status and Recognition of Indigenous Land Rights in the Amazon Countries (1995) (unpublished, on file with author).

220. CPTI, *supra* note 2.

221. Ley No. 1689 de Hidrocarburos, *supra* note 49, art. 53.

222. Ley de Medio Ambiente No. 1333 del 27 de abril de 1992, art. 102.

The question of what would constitute "fair compensation," or in other words, a fair remedy, also has a quantitative aspect. Again, it is not expressly dealt with in ILO 169, and there is currently very little state practice with respect specifically to compensation for damages incurred by indigenous peoples. Indeed, as mentioned above, Ecuador provides a very negative example. In Canada, on the other hand, the Gwich'in Comprehensive Agreement establishes first that "as a general principle, compensation to be offered for lands shall be the provision of alternative lands of equivalent significance and value as the expropriated lands."²²³ In cases where compensation by provision of other lands is not possible: "[i]n determining the value of lands for the purpose of compensation, the value of the lands for the purpose of harvesting of wildlife and the cultural or other special value to the Gwich'in shall be taken into account."²²⁴

Similarly, the Nunavut Settlement Agreement requires developers to compensate the Inuit for: loss or damage to property or equipment used in wildlife harvesting, present and future loss of income from wildlife harvesting; and present and future loss of wildlife harvested for personal use by claimants.²²⁵ Where indigenous peoples still live largely from their lands and in isolation from the rest of the economy, special forms of compensation may need to be established in order to ensure that fairness is achieved.

This seems consistent with recent developments in the field of environmental law generally, where work is beginning to be done to devise means of calculating the value of land and resources to inhabitants living in non-commercial societies.²²⁶ Moreover, regimes governing liability for environmental damages caused by oil spills in oceans provide some insight into the issues raised by problems of valuation where property is not readily convertible into a market commodity. For example, under the United States Oil Pollution Act of 1990, any "sovereign acting as 'trustee' for the public's natural resources may bring an

223. Gwich'in Agreement, *supra* note 153, art. 23.1.7.

224. *Id.* art. 23.1.11.

225. Nunavut Agreement, *supra* note 153, art. 6.3.1.

226. D. W. Pearce, *Valuing the Environment: Past Practice, Future Prospects*, in PROCEEDINGS OF THE FIRST ANNUAL INTERNATIONAL CONFERENCE ON ENVIRONMENTALLY SUSTAINABLE DEVELOPMENT (I. Serageldin & A. Steer eds., 1994).

NRD [Natural Resource Damage] action.”²²⁷ The agency charged with assessing the value of these damages and ensuring that they are remedied has designed a computer model that will: [E]stimate the transport and distribution of the discharged oil on the water surface, along shorelines, in the water column and sediments; quantify mortality and loss of productivity from short-term exposure to the oil and the indirect mortality due to food web losses; and determine whether restoration and/or replacement actions are warranted and, if so, the cost of such actions.²²⁸ The agency may also require a remedy of “environmental restoration” rather than monetary compensation in certain cases.²²⁹

Given the social as well as economic and environmental impacts that oil operations have been seen to have on indigenous peoples, it seems accurate to suggest that in order to be “fair,” compensation should contemplate damages to an indigenous peoples or community as a social collectivity, where appropriate, as well as for material damages to their lands. According to the examples offered above, this may require compensation to take the form of equivalent lands or restoration, instead of money damages alone.

With respect to Bolivia, there are no specific provisions in its law as of yet regarding compensation for damages caused to indigenous peoples by oil operations. However, the Environment Act does establish the remedy available under a civil law action for environmental damages, which may be brought by a person or a legally qualified representative of an affected collectivity. If successful, the action will give rise to a dual indemnification of the persons affected and the State.²³⁰ The money paid to the State will go to a Fund which will preferably be destined for the restoration of the damaged environment.²³¹

Subject to the comments made earlier in this paper regarding the potential problems raised by dealing with the interests of indigenous peoples solely under the rubric of the environment, and provided again that the courts are accessible

227. Molly Holt & Grayson Reed Cecil, *Natural Resource Damages for Oil Spills: The International Context*, NATURAL RESOURCES & ENERGY 28 (Spring 1995).

228. *Id.* at 28.

229. *Id.* at 29.

230. Ley No. 1333 del 27 de abril de 1992, art. 102.

231. *Id.*

to indigenous peoples and will actually enforce Bolivian legislation, this regime would appear to be likely to satisfy Bolivia's obligation under ILO 169 to provide fair compensation to indigenous peoples.

E. Conclusion to Part III

In sum, it has been established that the Bolivian government has breached its obligation under ILO 169 to consult indigenous peoples prior to undertaking or permitting oil operations activities in indigenous territories, and to consult effectively and in good faith by means of adequate procedures. There is also an argument to be made that the government has not fulfilled its obligation to ensure the participation of indigenous peoples in the benefits of oil and gas activities on their lands, in that it has simply held up its own domestic law as justification for its refusal to contemplate any such measures. It would seem, however, that the current regime for compensation satisfies Bolivia's treaty obligations, subject generally to the caveat that until indigenous title is given greater and clearer protection, the ability of indigenous peoples to exercise their right to fair compensation for damages to their lands is highly precarious.

Based on the above assessment of the nature of the obligations imposed by art. 15(2) and other relevant articles and Bolivia's conduct with respect to these obligations, we will now turn to the possible recourses available to indigenous peoples under ILO 169.

IV. POTENTIAL RECOURSES FOR BOLIVIA'S INDIGENOUS PEOPLES

It is all very well to establish that Bolivia is in breach of its obligation to consult under ILO 169. From the perspective of the indigenous peoples affected by this breach, it is also crucial to determine whether these rights are effectively enforceable and what remedies are available to them. We are particularly interested in determining which recourses are available directly to indigenous organizations themselves. While there may exist potential recourses under other international human rights instruments, we will confine our analysis to recourses available

for a breach of the provisions of ILO 169. Thus, we will examine the recourses which are available under the Convention both within Bolivia and the ILO system. We will then briefly discuss possible recourses within the United Nations and Inter-American systems. Two of these flow more or less directly from the Convention and its adoption into Bolivian law; one may potentially be available under the Inter-American system. The potential success and effects of such strategies will be considered.

A. Recourse Under National Law

Indigenous peoples should begin any legal action in the national court system under the Convention as it was incorporated into Bolivian law in the Ley 1257²³². Because the Convention was ratified and adopted by Congress, the courts will be competent to apply the law.²³³ This could be done in two ways. First, they could bring a claim for judicial review of administrative action before the appropriate court of first instance,²³⁴ on the basis that the decision by officials of the National Energy Secretariat and the state oil company, YPFB, to enter into risk service agreements (contracts) with Repsol in 1993 and Western in 1994²³⁵ was illegal under Article 15(2) of the Ley 1257. As set out above, their actions clearly contravened the provision that consultations must be carried out with indigenous peoples prior to the government undertaking or permitting the exploration or exploitation of subsoil resources in indigenous territories.

Secondly, indigenous peoples could attempt to bring a constitutional claim under Article 120(1) of the Bolivian Constitution. This Article establishes the Constitutional

232. Ley No. 1257, *supra* note 12.

233. We therefore do not have to deal with the complicated question of the court's competence to apply international treaty law in a dualist state such as Bolivia. To the extent that indigenous applicants tried to rely on customary norms or international principles in their argument, however, this might become an issue. Although Vacaflor has commented generally that "il n'existe pas une grande tradition de respect des accords internationaux en Bolivie," I have not had access to relevant case law on the question of application by national tribunals of international law. Vacaflor, *supra* note 27, at 75.

234. I have been unable to obtain the law setting out the competency of the different levels of courts. However, the Constitution sets out the general power of the courts to review administrative action. CONST., art. 116(3).

235. Sandoval, *supra* note 3, at 5.

Tribunal's competency to hear questions of "pure law" regarding the unconstitutionality of laws, decrees and other non-judicial resolutions. At least two possible lines of argument could be taken in a constitutional action. On the one hand, indigenous peoples might argue that the Ley 1257, the ratification instrument of an international convention, is superior to other ordinary laws. These laws, such as the Hydrocarbons Law and any regulations made pursuant thereto would be unconstitutional if they were inconsistent with the Ley 1257. This strategy is problematic, however, as the Bolivian Constitution is silent with respect to the rank held by international conventions enacted by Congress within the national legislative hierarchy.²³⁶

Thirdly, a constitutional challenge could potentially be brought before the Tribunal under Article 171 of the Constitution itself, which "recognizes, respects and protects within the limits of the law the social, economic and cultural rights of indigenous peoples...especially those relating to their 'tierras comunitarias de origen'." It could be argued that the rights set out in the Ley 1257 must be viewed as constitutionally protected rights which provide the basis for a challenge to the Hydrocarbons Act and its regulations. No such claims seem to have been made as of yet under Article 171 which, like the Constitutional Tribunal, has only existed since the constitutional reforms of 1994.²³⁷ If such an argument were accepted, the applicants would presumably then be required to prove the existence of an inconsistency between existing legislation and these rights. This might pose certain problems, given that the claim is in some sense based on the failure of the legislature to entrench the right to consultation, benefit or compensation for indigenous peoples in the Hydrocarbons Act and its regulations, rather than the inclusion of expressly conflicting provisions. Nevertheless, the possibility of making an argument under Article 171 and Ley 1257 may become more interesting in the event that a specific regulation for oil operations in indigenous territories is drafted and, in the eyes of indigenous peoples and their advisors, fails to meet the standards set out in Ley 1257.

236. See Vacaflor for an interesting discussion of this problem, as well as a comparison to other constitutions in Colombia, Costa Rica and Paraguay which do establish ratified international norms as superior to ordinary laws, although inferior to their respective constitutions. Vacaflor, *supra* note 27, at 77.

237. MARINISSEN, *supra* note 44, at 8.

B. Recourse Within the International Labour Organization

As many commentators have pointed out, one of the regrettable weaknesses of ILO 169 is that it does not give indigenous peoples standing under the formal representation and complaints procedures which exist at the ILO.²³⁸ This is because representations and complaints of a "failure to secure in any respect of the effective observance" by any party to an ILO convention may only be brought by one of the three member groups of the Organization: States, employers associations and workers unions.²³⁹ Nevertheless, the overarching indigenous organization, CIDOB, could seek out allies among union representatives from Bolivia or among international trade union organizations, for example, in order to trigger the review process. This could lead in turn to the establishment of a Commission of Inquiry to consider and report on the complaint.²⁴⁰

More generally, however, the ILO's reporting requirement for States ensures regular monitoring of Bolivia's implementation of the Convention. The ILO's reporting form actually includes the suggestion (but not the requirement) that governments consult indigenous organizations as part of the preparation for their reports. The government of Norway has complied with this suggestion and now sends its reports on ILO 169 to the Sami Parliament for comments. Both documents are then transmitted to the ILO.²⁴¹ It seems unlikely, however, that in the case of conflicting positions regarding an issue such as compliance with para. 15(2) that joint submission or consultation would prove a very realistic or useful recourse for Bolivia's indigenous peoples.

Finally, the International Labour Office has stated that it will accept information sent directly by "authentic indigenous organizations" where communications contain "verifiable information—e.g. laws, regulations, or other official documents such as land titles," that the Committee of Experts on the Application of Conventions and Recommendations can use in its

238. See, e.g., Berman, *supra* note 13, at 56.

239. ILO CONST., arts. 24-25. The ILO recommends such a strategy in its 1995 Guide. ILO GUIDE, *supra* note 11, at 28.

240. ILO CONST., art. 26.

241. ILO GUIDE, *supra* note 11, at 28.

work as a basis of comparison with government reports on the implementation of ILO 169.²⁴² S. James Anaya also suggests that executive action should be subject to international scrutiny: on this basis, the ILO might also accept for review the August 1995 Agreement made between government officials and indigenous representatives which again did not contain recognition of the right to prior consultation, or to any benefits from oil operations.²⁴³ This option may be the most strategically useful one, in that it could cause the Committee of Experts to consider the questions posed in this paper regarding consultation, for example, in the context of its general standard-setting mandate.

*C. Recourse Within the United Nations and
Organization of American States*

Within the United Nations system, the most accessible recourse available to indigenous peoples lies with the Working Group on Indigenous Peoples. Oral or written reports may be made to this group of five experts acting in their individual capacities with a mandate from the U.N. Economic and Social Council to review developments concerning indigenous peoples.²⁴⁴ An informal complaints procedure has taken form within the Working Group on Indigenous Peoples (WGIP), which now permits interventions by indigenous organizations and NGOs provided "they communicate mostly facts in an objective manner as opposed to conclusory allegations of rights violations."²⁴⁵

The WGIP is not equipped to investigate complaints or to require states to respond to such comments. However, in as much as it has played a crucial role in accepting the participation of many indigenous organizations (not just NGOs with consultative status at the U.N.) and has drafted a declaration setting out very high standards for state conduct, the Working Group would presumably be interested in gaining additional information regarding State conduct. Moreover, there is a potential for effecting a certain amount of political pressure

242. *Id.* at 29.

243. ANAYA, *supra* note 15, at 134. The contents of the agreement are outlined in Sandoval. Sandoval, *supra* note 3.

244. ANAYA, *supra* note 15, at 153.

245. *Id.* at 159.

if violations are asserted convincingly such that they embarrass one or more States in the eyes of the others.

More formal complaint procedures exist within the Commission on Human Rights and its Sub-Commission on Prevention of Discrimination and Protection of Minorities.²⁴⁶ They may examine and make studies relevant to "gross violations of human rights and fundamental freedoms" or a "consistent pattern of violations of human rights." It is not clear, however, that violations of the largely procedural rights set out in ILO 169 would satisfy either of these stipulations. If the situation with respect to oil operations in Bolivia grew considerably worse, however, recourse within this framework might be available. Within the context of the International Decade of Indigenous Peoples, the U.N. General Assembly asked the Commission on Human Rights to consider the merits of the call made in the Vienna Declaration and Programme of Action made at the 1993 World Conference on Human Rights for the establishment of a "permanent forum" for indigenous peoples within the U.N. system.²⁴⁷ The idea of a permanent forum has received significant support at the Commission. If it is set up, it might provide a more formal, although still only limited in influence, recourse available to indigenous peoples within the international system.²⁴⁸

Finally, within the Inter-American system, "any person or group of persons or non governmental entity legally recognized" of an O.A.S. member-state may submit a complaint to the Inter-American Commission on Human Rights.²⁴⁹ In order to be admissible, a complaint must satisfy the requirement of the exhaustion of domestic remedies. This requirement has been interpreted relatively flexibly, however, to include a lack of economic resources and unjustified delays as justifiable bases for the admission of complaints.²⁵⁰

246. *Id.*

247. *Id.*

248. Australia, Canada, Chile, Denmark (on behalf of the Nordic countries), El Salvador, Mexico and Peru have all expressed their support (at least in principle) for the establishment of a permanent forum for indigenous peoples. U.N. Doc. E/CN.4/1996/SR.29 13-16 and /1996/SR.30 (1996) 1-4.

249. See Regulations of the Inter-American Commission on Human Rights, reproduced in O.A.S., INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, O.A.S. Doc. OEA/Ser.L/V/II.82/doc. 6 rev. 1 (1992) art. 26.

250. Carol Hilling, *La Protection des Droits des Peuples Autochtones et de leurs*

However, the Commission must also be given sufficient information to provide the basis for the allegation of a violation of a right set out in the American Convention on Human Rights²⁵¹ (American Convention) such as the right to life and personal security, to health and well-being (generally individual rights), not just a violation under any international human rights treaty binding the member state.²⁵² If the Commission finds the complaint admissible on this ground, it may also be willing to consider the violation of other norms beyond those set out in the American Convention, as it did in the Yanomami case.²⁵³ The Commission will then engage in a fact-finding mission by reviewing the parties submissions, requesting additional information, and possibly convening on-site investigations or hearings. The Commission will make recommendations to the state party in question which, if left unimplemented, will then be published. In one case involving indigenous peoples in Nicaragua, the Commission has even engaged in an effort to mediate a settlement of a dispute raised by the Miskito people.²⁵⁴ Again, however, to the extent that Bolivia's indigenous peoples would be attempting, at least at the moment, to assert procedural (and generally preventive) rights under ILO 169 rather than current violations to their physical person, it might be difficult to obtain recourse under the Inter-American system.

V. CONCLUSION

If the analysis in this paper is correct, it has been established that the indigenous peoples of the Bolivia's Amazon Basin region should be able to invoke ILO 169 in order to seek remedy under national and international law, in both the ILO and U.N. systems for breaches of the norms set out in Article 15(2) of the Convention. Moreover, in attempting to understand the standards set by ILO 169, we have examined both the text of

Membres dans les Amériques, 41 MCGILL L.J. 855, 866 (1996).

251. American Convention on Human Rights, Nov. 22, 1969, O.A.S. Doc. OEA/Ser. K/XVI/1.1/doc. 65 rev. 1, available in 9 I.L.M. 673 (1970). Bolivia is both a member of the O.A.S. and a signatory to the American Convention. MARINISSEN, *supra* note 44, at 23.

252. Hilling, *supra* note 250, at 865.

253. In addition to finding violations of the rights to life, residence and health, the Commission observed that "international law ... recognizes the right of ethnic groups to special protection." ANAYA, *supra* note 15, at 168-169.

254. *Id.*

the Convention and State practice in the larger context of the development of international norms governing relations between States and indigenous peoples. In this larger context, it is possible to appreciate the role that the Convention has played in setting minimum standards, particularly for countries such as Bolivia. In many respects, despite our critical analysis of the Bolivian government's behaviour, Bolivia has emerged as one of the Latin American states making the most concerted efforts to satisfy its obligations under ILO 169.

This very observation, however, leads to the rather troubling conclusion that despite its general "pull toward compliance," ILO 169 provides a fairly awkward and imprecise basis for judging particular instances of any given State's behaviour. This is evidenced by the rather tortuous arguments required to establish a breach under any of the obligations found in Article 15(2): to consult, to ensure participation in the benefits "wherever possible" and to provide fair compensation. In this light, ILO 169 gives the impression of being "rhetoric," understood in the best sense of the word, but gives few signs of containing "real" (enforceable, proprietary) rights.

Given the relatively weak protection offered by the entrenchment of a right to be consulted (although still the strongest protection offered under Article 15(2) according to our analysis), one can hardly be surprised that indigenous peoples have been pushing increasingly for recognition of States' obligations to respect the right to free and informed consent, rather than simply to be consulted. In light of the emergence of a clearer and therefore more easily applicable standard, one is certainly tempted to suggest that indigenous peoples should no longer be satisfied with ILO 169. Indeed, they might wish to resist its ratification, particularly where it could potentially lower current standards, rather than raise them.

Nevertheless, our analysis still suggests that in the current international context, and in light of the obvious lack of will on the part of most States to ratify the U.N. Draft Declaration as is,²⁵⁵ the more stringent norms contained therein will not

255. At recent meetings of the Commission on Human Rights, government representatives have taken great pains to express their desire to see the Draft Declaration process continue. They have never, however, expressed approval of the U.N. Draft Declaration as it now stands. See, e.g., U.N. Doc. E/CN.4/1996/SR.29 and SR.30 (1996).

constitute binding international law in the near future. At the other end of the spectrum, the Draft Inter-American Declaration, at least as it now reads, is generally a weaker document than ILO 169. Customary norms as defined through state practice are not yet sufficiently crystallized to constitute binding international law. Thus, for the moment, ILO 169 remains more or less the only basis in international law on which indigenous peoples may defend their claims. Moreover, if the Convention is used as a strategic tool to push for interpretations which give effect to the purpose of the Convention and are in accordance with good faith obligations, ILO 169 has the potential to become an important normative instrument as it is gradually infused with higher standards and more precise rules through the current international process of standard-setting in the domain of indigenous rights.