To the Global Village and Back: International Indigenous Rights and Domestic Change in Nicaragua and Ecuador

by

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Abstract

International indigenous rights represent a special category of human rights, offering a potent tool in the community-based defense of indigenous lands and livelihoods. State sovereignty has, however, historically been used to trump indigenous claims. New transnational advocacy networks have formed to promote and support indigenous rights claims in international law. In the Americas, the Inter-American Court of Human Rights (CIDH) has assumed a lead role in issuing important rulings that validate new international norms for indigenous rights. The challenge, identified in this thesis, is the implementation of these rulings through effective domestic policy.

To realize effective implementation of international rights, domestic political realities cannot be sidestepped or ignored. This thesis focuses on indigenous property rights in the Americas. These rights are always contentious. Natural resources like oil, minerals and timber attract many powerful interests. There is an urgent need for a careful and systematic investigation into domestic level variables that can either hinder or help norm implementation.

Even universal human rights present a challenge for state compliance. A number of scholars have explored the problem of human rights norm implementation and identified a number of important variables. These include the domestic structural context, norm salience, material constraints and international influences. This thesis builds on Thomas Risse and Kathryn Sikkink’s Spiral Model of Human Rights Change (1999) by applying it to the specific case of indigenous rights to property in a comparative case study. Beginning with two important IACHR rulings for indigenous property rights, the Sarayaku case in the oil-rich Ecuadorian Amazon and the Awas Tingni case in the mahogany forests of the Caribbean Coast of Nicaragua, the Spiral Model is used to highlight key variables that can impact the process of implementation at the level of the state.
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Glossary of Acronyms

AI- Amnesty International.

ALN- Nicaraguan Political Party: National Liberal Alliance

ALPROMISU- Alianza para el Progreso de Sumus y Miskitos: Alliance for the Progress of the Miskito and Sumu.

ALCARIC- Association of Miskito farmers on Caribbean Coast, precursor to ALPROMISU.

CDES- Centro de Derechos Económicos y Sociales: Center for Economic and Social Rights.

CEJIL- Centro por la Justicia y el Derecho Internacional: Center for Justice and International Law.

CIDH- Corte Inter-Americana de Derechos Humanos: Inter-American Court of Human Rights.

CIVICUS- World Alliance for Citizen Participation.

CMS- Coordinadora Movimiento Sociales: Coordinator of Social Movements (Ecuador)

COICA- Coordinadora Indígena de la Cuenca Amazónica: Federation of Amazonian Indian Movements.


CONFENAI- Confederación de Naciones Indígenas de la Amazonia Ecuadoriana: Amazon Indigenous Confederation in Ecuador.

CSO- Civil Society Organization.

CUC- Coordinating Committee of Costeño Unity.


ECUARUNARI- Ecuador Runacunapac Riccharimui: Ecuador Highland region indigenous movement.

FEI- Federación Ecuatoriana de Indios: Ecuador’s first indigenous organization, communist ties.


FSLN- Frente Sandinista Liberación Nacional.

Human Rights Watch: transnational human rights monitoring organization, based in the USA.

IACHR- Inter-American Commission of Human Rights.

IDB – Inter-American Development Bank.

IFI- International Financial Institution.

IMF- International Monetary Fund.

MISATAN- Miskitos Asla Takanka, a Sandinista sponsored Nicaraguan Caribbean Coast indigenous organization.

MISURATA- Nicaragua-Miskitos, Sumus, Ramas working together.

MISURA-Miskitos, Sumus, Ramas Organización of Nicaragua.

MUPP- Movimiento de Unidad Plurinacional Pachakutik, Ecuadorian indigenous political Party.

MRS – Sandinista Renovation Movement.

NGO- Non-governmental organization.

OAS- Organization of American States.


PLC- Partido Liberal Constitucional, Liberal Constitutional Party (Nicaragua).

PLN- Partido Liberal Nicaragüense, Nicaraguan Liberal Party.

RAAN- Autonomous Region of the Atlantic North (Nicaragua).

RAAN- Autonomous Region of the Atlantic South (Nicaragua).


YATAMA- Indigenous political party, mainly Miskito, on Caribbean coast of Nicaragua
Map 1.0 Awas Tingni, Nicaragua and Sarayaku, Ecuador

CENTRAL AMERICA

SOUTH AMERICA
Chapter 1
Introduction

The overall objective of this thesis is to examine the impacts of both ideational and material factors on state-level government responses to rulings by the Inter-American Court of Human Rights for indigenous property rights. International indigenous rights, which include the right to traditional territories, represent a special category of human rights and offer a relatively new and potent tool in the community-based defense of indigenous lands and livelihoods. State sovereignty has historically been used to trump indigenous claims. Recently, however, transnational advocacy networks have formed to promote and support new norms for indigenous rights in international law. In the Americas, the Inter-American Court of Human Rights (CIDH) has assumed a lead role in issuing important rulings that validate these new international norms. The challenge, identified in this thesis, is the implementation of these rulings through effective domestic policy.

Clear international norms for indigenous rights to culture, language, self-government and property have emerged since the drafting of the 1989 International Labour Organization’s (ILO) Convention 169 on Indigenous and Tribal People. In 2007 the United Nations passed its own Declaration on the Rights of Indigenous Peoples (2007) while the Organization of American States (OAS) remains engaged in the drafting of its American Declaration on the Rights of Indigenous Peoples. Legal scholars, like James Anaya (2004), Patrick Thornberry (2002), and Siegfried Weissner (1999) argue that such documents represent the legal formalization of norms for indigenous rights which have been coalescing for the past twenty years.

Despite these norms, controversy and struggle for indigenous peoples rights, especially to land and resources, remains commonplace. Globalization has brought transnational corporations (TNCs) into traditional indigenous territories in search of oil, timber, gold and other natural resources. They purchase concessions from the state, but have no expressed consent or approval
from the peoples whose lives and livelihoods they disrupt most. While international norms and laws may exist to protect indigenous rights, they have not been transferred into effective practice at the state level. TNCs are generating significant profits and wealth for their shareholders. Simultaneously, indigenous communities find themselves in the midst of environmental damage, social upheaval and cultural destruction, with marginal, if any, economic benefits.

Using the Spiral Model for Human Rights Change, developed by Thomas Risse and Kathryn Sikkink (1999), and the human rights literature more generally, this thesis sets out to identify key barriers preventing the state level implementation of these important new norms. The human rights literature identifies a number of different factors which may be problematic: (i) a weak domestic political framework, (ii) poor governance quality, (iii) endemic corruption, (iv) ineffective civil society, (v) inconsistent rule of law, (vi) low norm salience, (vii) economic constraints, and (viii) little interest in international opinion. These factors will be examined in the particular case of indigenous property rights. Specifically, we will examine the domestic responses to rulings of the Inter-American Court of Human Rights (CIDH) in favor of indigenous property rights for Sarayaku, in the oil-rich Oriente region of Ecuador, and Awas Tingni, in the forests of the Caribbean Coast of Nicaragua. Using the factors identified above, we will explore what happens after the IACHR issues decisions and illuminate apparent barriers to implementation. Several years have passed since the Inter-American Court issued its decision in the case of Awas Tingni (2001), and provisional measures in the case of Sarayaku (2004). Yet despite ongoing negotiations, assurances, and considerable political change, implementation in both cases has proven onerous and, in the latter instance, inconclusive.

For the effective realization of international rights, domestic political realties cannot be sidestepped or ignored. Property rights are always contentious. Natural resources like oil, minerals and timber attract many powerful interests. In international relations, realists argue that power trumps everything, end of story. Yet the fact that indigenous peoples, as the most powerless and marginalized citizens of the Americas, have been able to generate the support of
international courts and transnational civil society suggest that the power of ideas can be a significant force.

This research builds on existing theoretical work on the implementation of norms for international human rights. There is a need for a careful and systematic investigation into domestic level variables, material and ideational, which can either hinder or help norm implementation. Even universal human rights present a challenge for state compliance. Susan Burgerman, Anne Marie Clarke, Ann Florini, Margaret Keck and Kathryn Sikkink, Sanjeev Khagram and James V. Riker have all explored problems of human rights norm implementation. The Spiral Model, explained in detail in Chapter Two, argues that new “pressure from above” generated by transnational advocacy networks will work in concert with the “pressure from below” by domestic civil society groups and eventually push the state towards the spiral of compliance. The question investigated here is whether or not this has actually happened in the case of indigenous rights, or more modestly, is this process currently underway? The thorough exploration of the cases of Sarayaku, Ecuador and Awas Tingni, Nicaragua, confirms the latter to be closer to the truth.

This research employed a triangulation of methods to develop a better understanding of the state response to IACHR rulings for indigenous rights. In-depth interviews with legal counsel for the state and indigenous communities, community indigenous leaders, NGO workers and government officials provided first-hand accounts of the events that took place around the formal court case and during the implementation stage in both cases. Key informants provided analysis, opinions, explanations and updates as to what was going on. Archival research, that included court documents, legal briefs, position papers, presentations, newspaper and journal articles as well as community and NGO websites, provided important background material. Details about the field research are available in the appendix.
1.1 Indigenous peoples in international relations

In the field of international relations (IR), intellectual interest in indigenous peoples’ issues has grown significantly over the past two decades. Colonialism once relegated indigenous nations to the status of minority populations, thus categorizing their longstanding struggles as domestic problems. This was despite the fact that many indigenous nations met traditional international legal requirements for recognition of statehood, including the possession of a territory, a resident population and stable forms of independent government. Nonetheless the so-called society of states, led by the colonizing nations themselves, refused to confer the status of nation on the lands and peoples they “discovered.” Legal recognition, of course, would have made the processes of colonization much more difficult. According to international law there are four explicit ways to assert sovereignty over new territories:

i. By formal consent or agreement, i.e. treaty.
ii. By unchallenged adverse possession
iii. By discovery of an unoccupied territory
iv. By conquest or war.

By declaring lands empty, or “terra nullius,” the Spanish, the British and the French could readily assert their own sovereignty over the Americas and begin the long process of extraction, exploitation and development. The indigenous peoples themselves became a source of cheap labour, taxes/tributes and wives/partners. The relationship was not always so easy, however, as the indigenous population was never completely pacified and remained an ongoing threat for the burgeoning settlements.

Since the first colonial contact, horrendous human rights violations including murder, genocide, forced relocation, and slavery all took place within the so-called “black box” of the state, while the international community paid little attention. IR scholar J Marshal Beier has argued that this neglect of indigenous peoples in IR reflected the dominant colonialist

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epistemology built within the idea of conquest (Beier 2007, 2). Indigenous interests were minority rights problem suitable for domestic policy discussions but certainly did not constitute international relations. This is changing, however, as disparate, but not completely unrelated pressures chip away at the hegemonic construction of what constitutes the discipline.

Although indigenous nations have not yet been afforded international support for sovereignty, the accepted definition of what constitutes IR has expanded to include non-state actors, like transnational indigenous movements. Alternative understandings of the field of IR have always been present at the margins of the discipline. The overall failure of the field to elucidate key phenomena of the late twentieth century, such as the end of the cold war, decolonization, and economic and political regionalism, provided greater opportunities for non-traditional approaches to fill in the growing gaps.

Since the end of the first “great debate” in IR between the idealists who sought to end war and create peace and the realists who argued IR could only explain the world as it was, not as it was wished to be, the latter formed the hegemonic core of accepted theory. Built on the terrifying ashes of the Second World War, and the reality that high hopes and goodwill were impotent against the mounting audacity of Nazi Germany, realism was at the right place at the right time. Nurtured by the Americans in particular, it provided the ideological foundations they craved as they prepared to take over the agenda of a super power world. Jeffry Legro and Andrew Moravcsik (1999) confirm: “Realism remains the primary or alternative theory in virtually every major book and article addressing general theories of world politics.” Determined to establish a science based on the world “as it really is”, realists built a pragmatic discipline focused on the state-centered realpolitik of a superpower world. Sovereign states were the key actors in international relations; relegating others, including indigenous peoples, social movements, churches, non-governmental organizations and even transnational corporations to the realm of domestic politics.
It is important to understand that realism itself is not a homogenous framework. It is divided into two primary branches, classical realism and neo-realism. While it is true that neo-realism came later, upon some reflection it is clear that classical realism’s original tenets have upheld the test of time far more robustly. Neo-realism makes an essential commitment to the idea of structure shaping state behavior. Classical realists, on the other hand, utilize a more nuanced and historical framework. Structure, while certainly possible, is not inevitable, nor is it the only game in town. Morgenthau, to give one example, delves into human nature for explanation. He argues that human beings are, in the Hobbesian sense, rather nasty and brutish. The ruthlessness of power politics is driven by man’s infinite lust for power and glory. Accordingly, the world can be seen in terms of:

Unceasing conflict between good and evil, reason and passion, life and death, health and sickness, peace and war– a struggle which so often ends with the victory of the forces hostile to man (Morgenthau 1946, 206).

In terms of the state, societies constructed governance regimes in order to contain the ceaseless aggression of human nature and allow for the pursuit of more pacific interests, like science and progress. Domestic politics provided an ideal platform from which society could be controlled, then develop and prosper. In international politics, however, states become the macro level manifestation of human lust with no centralized authority to constrain or control them (Morgenthau 1946, 198). Without overriding authority, Ghazi Algosaibi points out that for states: “every political action seeks to keep power, to increase power, or to demonstrate power” (Algosaibi 1965, 231).

Both classical and neo-realists agree that states are essential actors in IR and that ultimately power motivates action. Yet, in the classical realist case, Samuel Barkin notes, “This premise (state centrality) was more a matter of observation than deduction” (Barkin 2003, 327). He reminds us that E.H. Carr once presciently concluded that “though states were currently the locus of global power, they need not necessarily remain the central actor” (ibid.). This creates space for the recognition of other transnational actors that are important in this thesis, including...
multinational corporations and civil society movements. The structure of neorealism, on the other hand, relies on a state-centred model. Neorealists were not satisfied with the nuanced, historical and as such often idiosyncratic explanations of state behaviour put forth by the classical school. Citing changing intellectual currents, they dismissed human nature and the chance of history and asserted instead more “scientific” structural causes. Riding on the intellectual success of the neoclassical revolution in economics throughout the academe, neo-realism sought to make IR inherently more scientific, rational and ultimately, predictable. In this view, first formulated by Kenneth Waltz in his landmark *Theory of International Politics* (1979) the contemporary state is compelled to act by the realities of structural anarchy in the international arena. States are sovereign actors with clear interests that can be defined in terms of survival and expansion. With no overriding international authority above the state system that can regulate state behaviour, states are accountable only to themselves. It is this anarchy, and the distribution of relative power among states within the anarchical system that leads to the kind of competitive self-help behavior that fuels realpolitik. Dale C. Copeland notes:

For structural realists it is states’ uncertainty about the present and especially the future intentions of others that makes the levels and trends in relative power such fundamental causal variables…neorealists argue that uncertainty about the other’s present interests – whether the other is driven by security or non-security motives-can be enough to lead security-seeking states to fight (Copeland 2000, 193-4).

This structural foundation explains the so-called “security dilemma” of the neorealist paradigm whereas a state, uncertain about the aggressive potential of other states, builds up its armaments as a defense strategy. Neighboring states view this stockpiling as evidence of aggressive intentions and respond by building up their own military capabilities. This confirms the worst fears of the initiator; it reacts by preparing, or worse, launching a pre-emptive strike. Such behaviour, uncontrollable on both sides, can lead to the dangerous spiral of an arms race. And while this framework appears insightful in terms explaining the nuclear ambitions of North Korea, its limitations in 21st century international relations are quickly apparent. If the neorealist model held true for all states everywhere, uncertainty of others’ intentions in an anarchical self-
interested society would lead to the incessant build up of military capabilities, and with it, escalating military tensions. Yet this is hardly the rule. States do not go to war every day, nor does it remain a daily obsession. On the contrary, on a daily basis, states have allies, sign trade and other cooperation agreements, pass billions of dollars in goods across borders, and participate in humanitarian aid efforts. How can this be explained?

Within IR there have always been scholars who take exception to the realist construction of the world “as it really is.” Beginning with the idealists who sought to use IR as a vehicle to create peace and prosperity out of a world of war and destruction, the postmodernists, feminists, neo-Marxists and constructivists all would agree that the political world is a “socially constructed” project, although their epistemologies differed (Wendt 1995, 71). In terms of respective projects, there is also much variation. Most importantly here, however, is that the essential ontological shift in conventional constructivism permitted the pendulum of theory to swing back towards the possibility of change. The idealist agenda began to take on a whole new significance within the discipline. Constructivism offered a new lens with which to examine ongoing problems.

Ted Hopf, in an influential article, explains:

Constructivism offers alternative understandings of a number of the central themes in international relations theory, including the meaning of anarchy and the balance of power, the relationship between state identity and interest, an elaboration of power, and the prospects for change in world politics (Hopf 1998, 172).

Constructivists, in particular, argue that endless escalation of the neorealist security dilemma does not occur because states engage in a process of inter-state socialization whereby they create inter-subjective understandings and expectations that mitigate interpretations of state behaviour. It is this socialization process that constructivists inject into the purely micro-economic structuralism of the neo-realist framework. As Alexander Wendt points out, constructivists share the neo-realist commitment to structure, however, in terms of their assumptions regarding the composition of that structure, opinions diverge.
Neorealists think it (structure) is made only of a distribution of material capabilities, whereas constructivists think it is also made of social relationships. Social structures have three elements: shared knowledge, material resources and practices (Wendt 1995, 72-74).

Social structures are defined in terms of states’ shared understandings, expectations and/or knowledge. For example, as Wendt points out, the neorealist security dilemma is not so much about the reaction of self-preserving states to international anarchy as it is about inter-subjective understandings such that “states are so distrustful that they make worst-case assumptions about each others’ intentions, and as a result define their interests in self-help terms.” Both self-help and power politics are thus socially constructed institutions that simultaneously shape and are shaped by state behavior (ibid., 73). The fact that they are socially constructed does not make them less real. However, it does make them open to the possibility of change.

This concept of ideational social construction lies at the core of the constructivist argument. Neorealists argue that the differing material capabilities of states in the international system are structural in nature, while constructivists emphasize that the material resources of a state, such as gold or tanks, acquire meaning only through “the structure of shared knowledge in which they are embedded.” Nuclear missiles do not change in material terms, for example, but they are not interpreted in the same way when in the hands of an ally as opposed to an enemy. It is the social context in which they are interpreted that constitutes their true identity. “Ideas always matter, since power and interest do not have effects apart from the shared knowledge that constitutes them as such” (ibid.). Looking back at the example of the security dilemma, it is obvious that states do not react to the military buildup of all states equally. Some states are recognized as allies and other enemies; the process of determining which is which is essentially social.

Opening up the field of IR to the power of ideas has expanded the realm of “acceptable” subject matters considerably, although this is by no means only a recent trend. Certainly the classical realists were open to include ideas within the history and context of international relations. Samuel Barkin writes: “the classical realists argued quite explicitly that moral ideals are an integral and necessary part of the practice of international politics” (Barkin 2003, 336).
This emphasis was lost somewhat when the focus of the discipline turned to explaining and understanding the superpower world of the “cold war.” Defining norms as “a standard of appropriate behaviour for actors with a given identity,” Kathryn Sikkink and Martha Finnemore remind us:

Norms and normative issues have been central to the study of politics for at least two millennia. Students of politics have struggled with questions not only about the meaning of justice and the good society but also about the influence on human behaviour of ideas about justice and good (Finnemore and Sikkink 1998, 889).

Essentially moral in nature, norms invoke a sense of “oughtness” in action. They can be observed only indirectly through their implementation and the communications of states involved in this process. For example, international norms for human rights can be observed through the construction of numerous international, regional and national agreements, the signing ceremonies that take place for those agreements and the press releases and statements of the states that accept and those that reject the given norms (ibid.).

Classical realists recognize that “any politics of moral ideals must be tempered by a politics of power” (Barkin 2003, 336). This warning is particularly relevant to the study of indigenous property rights. Responding to international court rulings for international indigenous rights to land and territories, states may feel caught between ideational (moral) factors and the traditional politics of powerful material interests. Indeed, as both case studies illustrate, the existence of clear norms for indigenous rights and the moral significance thereof does not diminish the determination of vested interests in maintaining an often profitable status quo. Ideational and material forces can and do certainly conflict.

International norms for indigenous rights represent a unique and distinctive niche of human rights norms that evolved out of the work of indigenous communities, transnational indigenous movements, and international Non Governmental Organizations (NGOs) against widespread oppression by colonial states. The history and achievements of this transnational social movement for indigenous rights will be reviewed later, but for now it is important to
recognize that these special rights are necessary to ensure the survival of indigenous communities in the face of intensifying capitalist expansion. In the past, domestic political routes were often blocked and unsympathetic to indigenous concerns. As often minority populations, indigenous communities had little, if any, voice in the national political arena. Their recent foray into the international political arena has afforded indigenous communities new opportunities and new hopes for justice.

This thesis is indebted to both the realist and constructivist tradition in international relations. While there has been some debate that has construed these two schools as oppositional, a more progressive analysis suggests they are, in fact, complementary (Barkin 2003, 325; Sterling-Folker 2002, 73). Jennifer Sterling-Folker points out: “Realism and constructivism need each other to correct their own worst excesses” (Sterling-Folk 2002, 74). The idealism associated with constructivism suggests that because the world we live in is socially constructed, anything is possible. This, however, is misleading. Humans are emotional as well as rational creatures. As classical realists understood, the human capacity for greed, hatred and lust cannot be underestimated. While the ideas of human rights, justice and equality are broadly accepted, the reality is that states still commit atrocities, and elites are still more interested in self-preservation than social justice. Recently, globalization has worked to simultaneously strengthen the best and the worst facets of human nature. While capitalism has grown astoundingly on the principles of greed and creative destruction, new venues for social justice have evolved through the discourse of human rights, social movements, and international law.

Today, the international presence of indigenous peoples is undeniable. After centuries of domestic struggle, indigenous communities have gone global with significant success. International organizations like the UN High Commission on Human Rights, the International Labour Organization and the Organization of American States’ Inter-American Court of Human Rights have taken on the task of entrenching a new framework of human rights geared
specifically to indigenous peoples and their unique rights. They have partnered with local, national and transnational indigenous movements to change the ways states behave domestically using international legal practice. And although change is slow, it is happening.

More specifically, this thesis takes as a point of departure the ground breaking work that has been done on the global-local relationship for the realization of human rights. Although historically ignored in much of mainstream IR, human rights issues have undeniably become increasingly important in global politics (Sikkink 1998). States, civil society and transnational NGOs have all internalized the language and values of human rights, at least in principle, if not always in practice. The study of human rights has become an important sub-field of international relations.

Kathryn Sikkink, Alison Brysk, Susan Burgerman, Ann Clarke, Thomas Risse, and Ann M. Florini, to name a few, have all examined the processes of transforming ideas about human rights into international norms and domestic politics. In examining when and why states internalize international norms for human rights, state preferences cannot be exogenous. Rather than reacting mechanically to the structured realities suggested by neorealists, states can and do make choices. To fully understand this, we must revert back to classical realist traditions of understanding the unique and often idiosyncratic nature of state behaviour. All states are not the same. Only by allowing for agency, can we begin to seek meaningful answers to “why” questions about state behaviour. Further, if we can ask why, we can also ask, why not? This highlights the possibility of change and transformation in international relations that neorealism could never ontologically concede. While at the same time admitting that, because of the nature of power and material interests, change is not easy, nor is it always peaceful.

Clearly, the existing constructivist work in the field of human rights has been decidedly liberal in orientation, although this predilection has been left unstated. Because of this inherent bias, the constructivism model has tended to ignore important political realities. These are especially obvious in the study of indigenous struggles globally. The power of ideas, while
important, has not yet overshadowed the power of states and material interests. While constructivism provided new avenues for explanation of contemporary global realities, including the existence and importance of human rights, important lessons from classical realism remain pertinent. The fact that human rights exist and are widely ascribed to does not negate the fact that atrocious and systemic violations occur every single day. Samuel Barkin (2003) argues that constructivism actually represents more of a methodology than a theory per se and as such could, in conjunction with classical realism, properly address what E.H. Carr identified as the ongoing “compromise between power and morality” (Carr 1964, 210). States sign human rights treaties because it makes them look good. They later ignore them because other, more powerful, interests come into play. The fact is that the political arena is complicated, multi-layered and often contradictory.

How do normative concerns explain the application of sheer force between states? How can we explain, for example, the American invasion and subsequent war in Iraq, or the NATO sponsored invasion and ongoing presence in Afghanistan? Bluntly speaking, if the “mobilization of shame” was so effective, why would military invasion be necessary to change minds and/or regimes? The power politics of classical realism remains with us today.

Fundamental human rights, starkly stated, are about human survival: ensuring the state cannot arbitrarily dictate who will live and who will die. Indigenous rights are essential to survival as well, not only in the usual individual sense, but in terms of indigenous communities and cultures. Since the onset of colonialism, murder, genocide, assimilation and disease have ravaged indigenous populations. While culture and language rights play a key role in preserving indigenous communities, increasingly, it is being recognized that property and territorial rights are equally if not more important to indigenous survival in the long run.

James Anaya, Erica-Irene Daes and José Martínez-Cobo are among the scholars who argue that because of the spiritual connection between indigenous peoples and their lands, secure property rights for indigenous peoples are critical to ensure indigenous survival. Indigenous
peoples require the physical and spiritual space to maintain their communities, cultures and languages, pursue their livelihoods and protect themselves against the homogenizing forces of global capitalist expansion. The importance of these rights is echoed in international discussions. The International Labour organization (ILO) has included property rights protection in the *Indigenous and Tribal Peoples Convention 169.* The United Nations (UN) has included a number of important safeguards for property rights in its recent (2007) *Declaration on the Rights of Indigenous Peoples (DRIPS)*, and the OAS draft *American Declaration on the Rights of Indigenous Peoples* includes strong language for property rights as well. The challenge is to take these unique property rights in law to the point where there are effectively property rights in practice.

The objective of this thesis is to build on a realist-constructivist framework of international relations and, using empirical case studies, to examine both the material and ideational challenges facing international norms for indigenous rights to property in terms of their “cascade” into domestic policy. Scholars in the field acknowledge that the mere existence of a norm does not, by any means, guarantee its success (Sikkink 1998). Because of their common status as minority populations, the rights of indigenous peoples face more challenges than most.

For constructivists, the power to change ideas is the power to change how the world operates. For indigenous nations that have suffered over five hundred years of oppression and denial of their rights in international law, this avenue offers at least some hope for justice in the future. By maintaining a classical realist framework of understanding the world “as it really is” we prepare ourselves for the fact that meaningful change, if it is to occur, is likely to involve a power struggle, especially in the very contentious field of property rights.

After exploring the historical construction of new ideational norms for indigenous rights, this thesis will examine the transmission process which can turn these norms into domestic policy. Arguing that this transmission is far from automatic, we will examine the domestic level factors,
both material and ideational, preventing the much needed “norms cascade” that indigenous
nations are waiting for.

1.2 Globalization and indigenous resistance

On Monday, September 17, 2001 the Inter-American Court of Human Rights delivered a
landmark decision concerning the recognition of traditional indigenous property rights in the case
of the Awas Tingni (Mayagna) Sumo vs. Nicaragua. The Court found the government of
Nicaragua violated international human rights law by denying the Awas Tingni community its
rights to property, judicial protection and equal protection under the law. In the absence of formal
title, the state of Nicaragua treated traditional indigenous lands as state property and issued a
logging concession without the community’s knowledge or consent. After a lengthy battle, the
Court rejected the state’s position and ordered Nicaragua to respect the traditional property rights
of Awas Tingni. To do this, Nicaragua was ordered to demarcate and legally title the communally
held properties of not only Awas Tingni, but of all Nicaraguan indigenous communities. The state
was ordered to pay $50,000 US in compensation and an additional $30,000 US for legal fees.

The Inter-American Court of Human Rights is the judicial branch of the Organization of
American States (OAS). It exercises jurisdiction over all OAS members, including Nicaragua, as
long as they have, first, signed the American Convention of Human Rights (1969) and secondly,
formally consented. The decision of the Inter-American Court in the Awas Tingni case is
significant because it is the first case in international law that explicitly recognized the collective
rights of indigenous peoples to their traditional territories, regardless of state policy. These
property rights do not originate from the state; rather they are recognized as stemming from prior
occupancy.

This ruling is part of an emerging trend in international law that represents a dramatic shift
toward respect of indigenous rights. Historically, international law was used to serve the interests
of colonial powers against indigenous nations in the Americas. Through its application colonial governments were able to effectively extinguish title to much of their lands and resources. With an Eurocentric view of the world, lacking in appreciation of indigenous languages, cultures and polities, the new world “adventurers” were both unable and unwilling to recognize the nations that they encountered. Grounded in a distinctly linear way of reasoning they assumed that the indigenous communities they “discovered” were historical artifacts of the universal human condition prior to “civilization.” Appropriating the language of John Locke, Thomas Hobbes and others they argued they had discovered the last remnants of “natural man”. Indigenous peoples were thought to be like Europeans prior to the onset of civilization. They were categorized as backward, underdeveloped and in need of assistance. Since then, Indigenous peoples, and everything associated with their distinctive languages, cultures and customs have been looked upon or regarded as inferior. They have been neither embraced nor respected as citizens in the American state. Instead, their fate across the Americas was political, economic and social subordination. Even today, many Indigenous peoples believe they can only escape this discrimination by separating themselves politically and geographically. However, economic pressures are making the second strategy ever more difficult to pursue and maintain.

Economic pressures associated with globalization have pushed the state and investors into remote areas of the Americas in search of increasingly scarce natural resources. Historically, regions such as the Ecuadorian Amazon and the Caribbean Coast of Nicaragua were largely ignored due to their relative isolation and inaccessibility. This gave indigenous communities the physical and political space they needed to develop more or less autonomously, while maintaining traditional values, economies and lifestyles. This began to change in the 1980s when widespread economic crisis led to a political shift away from state-managed corporatism towards a new market-led neoliberalism. In addition to standard prescriptions of privatizing land markets, deregulating agricultural prices, and eliminating subsidy programs, American states began to emphasize foreign investment and intensify natural resource extraction in a bid to stimulate
economic growth. Because of this, indigenous territories became increasingly vulnerable to capitalist encroachment (Yashar 1999).

Globalization is not new. While the term has become something of a cliché of late, the notion can be traced back to the late 19th century in the works of Karl Marx and Saint–Simon. There are many different approaches to defining globalization. Some focus on economic relations, others on communications and technology. David Held and Anthony McGrew provide the following definition:

Globalization, simply put, denotes the expanding scale, growing magnitude, speeding up and deepening impact of transcontinental flows and patterns of social integration. It refers to a shift or transformation in the scale of human organization that links distant communities and expands the reach of power relations across the world’s regions and continents (Held and McGrew 2007, 1).

Using this broad definition, globalization can be traced back to the golden age of colonialism. Stagnating and over-populated European states sought to expand their power relations, circles of influence and resource base by conquering and controlling foreign lands and resources. Historian Ken Coates has argued that this expansionist urge of European nations in particular stemmed from their religious and economic ideologies that corresponded neatly to the capitalist imperative. Christians believed, unlike the indigenous peoples, that all the earth’s resources were created specifically for their own direct benefit.

In Europe, the combination of Christian certainty and the nascent imperatives of the accumulation of profit propelled a continent to see its destiny in the conquest and control of distant lands and peoples (Coates 2004, 68).

It was this church-legitimated desire for resources and power that pushed European states to fund the risky and expensive expeditions which led to the “discovery” of the Americas or “New World” in 1492, by the Spanish funded fleet of Christopher Columbus. Colonial oppression of was part of this project. Motivated by their interest in the land and its resources, the newcomers almost immediately began to formulate legal, political and religious strategies to subordinate any indigenous claims to their own land and resources.
The first decades of contact with outsiders brought dramatic changes to the indigenous world. Violent occupations upended centuries old relationships with traditional territories and left greatly diminished populations to cope with the mass invasions of their lands. Indigenous peoples were enslaved by the thousands and, as will be shown, killed by the hundreds of thousands by imported diseases (Coates 2004, 117).

While often overwhelmed militarily, the indigenous populations of the Americas did not passively accept the oppressive new regime. Forms of resistance, both open and subversive, permeated the relationships between indigenous people and colonizers. Fear of widespread indigenous uprisings shaped colonial policy and the overall colonial mindset. Some scholars have argued that it was this almost obstinate indigeneity, in the face of widespread oppression, that undermined the ability of elites to construct an effective nationalism in their quest to modernize the Latin American state. Using their distinctive identities as a resource, indigenous communities were able to use both colonial language and laws to defend their rights and present an irresolvable challenge to the modernization project of the Latin American state (Larson 2004, 21).

A defining feature of decolonization in the Americas was that it utterly and completely failed to include the indigenous populations. Instead new “mestizo” governments and institutions replaced the European versions while still maintaining the “colonial situation” of oppression for indigenous peoples and their cultures. Post-colonial society was equally hierarchical and maintained a high degree of entrenched racism. In some ways, conditions for indigenous peoples actually worsened. While colonial society included a place for indigenous peoples as subordinates, post-colonial society inclined towards a “fanatical homogenization.” In the name of national development, assimilation into the dominant mestizo identity became a common policy objective. Indigenous peoples who refused to “reform” were considered persona non grata and subsequently excluded from new citizenship regimes (Polanco 1992, 13-17).

The “diffusion model” of development posits that the processes of modernization and industrialization will eventually homogenize separate ethnic nationalities within a single state. This has not happened with indigenous Americans (Keal 2003, 46). Modernization of the

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2 Mestizo refers to individuals of mixed indigenous and European ancestry.
economy excluded the indigenous population, or at best, incorporated them as cheap or even unpaid labour and/or domestic servants. Even today, social divisions are simultaneously ethnic and economic and remain almost impossible to overcome.

Borrowing from European positivist sociology as well as evolutionary anthropology, post-colonial political elites in the Americas embraced the “laws of progress” outlined by European writers that included Henri de Saint Simon and August Comte. Using a linear rationalism, indigenous societies were categorized as “primitive” and “backward.” They were regarded with disdain, even open hostility, characterized as a barrier to the “civilization” and “modernization” so coveted by the political classes. It was widely believed that if Latin American states were ever to achieve modern industrial status they had to overcome this atavistic “primitiveness.”

By the mid twentieth century, most Latin American states were pursuing different forms of corporatism. With a view of indigenous cultures as part of shared mestizo heritage, states were not interested in recognizing their continued existence. Indigenous peoples were under pressure to become “peasants” and “agricultural workers” with no special rights or claims to the resources of the state. Indigenous groups were enticed to register as peasant communities with the promise of access to land reform programs (Yashar 1999). Government policies were designed to maintain colonial systems of oppression without the unnecessary threat of a cohesive alternative to the national identity.

Despite these efforts, states were never altogether successful at quashing indigenous identity. In some cases, the strategy backfired. The inability of corporatist state structures to reach evenly across the nation, and the peasant-focused land reforms, led to the construction of de facto indigenous spaces largely free from government interference (Yashar 1999, 76-104). Indigenous peoples adapted to the various opportunities that changing political circumstances afforded them. When they were dealing with state officials, indigenous peoples would put on a “peasant” identity” in order to be eligible for certain resources and programs; yet when they returned to their community, they would re-assert their indigenousness in terms of language, culture, and
governance. While cultivating the image of passive acceptance of mestizo superiority, indigenous peoples promoted cultural difference within their own sphere as a form of resistance to the nation-building project in Latin America (Brysk 2000, 40).

Even in the 21st century, indigenous peoples remain the subject of political and economic oppression though colonialism has long been discredited as a legitimate project in the global political arena. The right of all states to sovereignty and respect of territorial boundaries is firmly entrenched in numerous international treaties and covenants and is considered one of the foundational principles of the United Nations. Still, indigenous nations have been denied these rights. In the 1950s there was some talk that indigenous peoples should be able to enjoy the decolonization provisions extended to the former European colonies, although this was promptly rejected by the states themselves. Instead, indigenous peoples were classified as “minority populations” within states and provided special minority rights that fell significantly short of their legitimate entitlements.

The question of indigenous sovereignty was never seriously considered by the international community; however other indigenous rights have received support. In particular, there is growing support for the cultural survival of indigenous populations. Secure land and resource rights for indigenous peoples are also widely recognized as fundamental. An appreciation of the special relationship between indigenous peoples and their territories is permeating the international community and becoming apparent in emerging legal norms. Roqué Roldán Ortiga notes:

Over the past several years, the international community has become increasingly aware of the vital importance of the legal recognition of indigenous land rights to the cultural survival, economic development and self-determination of indigenous peoples and their communities (Roldán Ortiga 2004, ix).

Various advocates have pushed to translate this into codified legal rights and standards supporting indigenous peoples’ special relationship to land and their unique rights to traditional lands and resources. For example, at the behest of strong labour advocates the *International
Labour Organization (ILO) Convention 169 on Indigenous and Tribal Peoples (1989) included strong language supporting indigenous peoples’ special relationship with their lands and territories. Article 13 states:

1. In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.

International law can no longer justify the colonialist position with respect to the “inferior” status of indigenous cultures and governments at the time of contact and is shifting toward recognition of indigenous rights. The United Nations Declaration on the Rights of Indigenous Peoples (2007) and the Organization of American States Draft American Declaration on the Rights of Indigenous Peoples both build on and expand those rights laid out in ILO C169. The Inter-American Court, in its landmark Awas Tingni ruling, suggested these documents are already contributing to customary international law (Coulter 2002).

Non-state actors challenge accepted notions regarding the role of sovereign states in the international system and pave the way for ideologies which include liberal conceptions of “international society” and “political evolution.” In turn, this creates space and opportunity for social change in ways that were forgotten after the inaugural debates in international relations between realism and idealism (Doyle 2001, 23-24). At the same time it would be naïve to assume that, especially when valuable resources are involved, political change is the inevitable product of reasoned moral debate.

Nonetheless, transnational advocacy networks (TANS) are one of these important new actors changing the global political landscape. In their ground breaking work, Margaret Keck and Kathryn Sikkink identified transnational advocacy networks as a new and powerful vehicle for domestic social movements historically excluded from state politics. These networks, composed of individuals, institutions and organizations, share a core of values and/or ideas and operate simultaneously at the transnational and domestic levels to build links between actors in states,
civil society and non-governmental organizations (NGOs). They not only multiply the “channels of access” to international organizations, they also provide technical and financial resources and other support to emerging actors engaged in various domestic struggles. They collect, filter and disperse information in many formats including: posters, websites, film clips, reports, analytical papers, news briefs and in depth articles (Keck and Sikkink 1998). It would be wrong, however, to assume that their behaviour is always pacific. As the term “battle of Seattle” suggests, conflict, disruption and even violence are part of the transnational toolkit of even morally-guided organizations and networks.

These transnational resources have been especially beneficial for indigenous peoples. Foreign technical and financial assistance have strengthened domestic indigenous organizations independent of the state and helped cultivate “indigenous identity” as a valuable asset (Brysk 2000, 120). The construction of a transnational indigenous identity has created new opportunities for networking, information sharing and cooperation. With this support, groups are able to mount unprecedented challenges to state power. For example, the Confederation of Indigenous Nationalities in Ecuador or CONAIE, the national indigenous organization in Ecuador, has led nationwide uprisings that won important concessions from the government on the issue of land titling in the Amazon.

One of the main functions of transnational networks has been the establishment and promotion of new international norms based on principled values. Norm theory argues that simultaneous pressures from both transnational and local organizations can influence state leaders and affect their domestic policy choices. This realization shatters the realist conception that what occurs within the black box of domestic politics is inconsequential to international relations. Indigenous groups have been particularly successful in working with transnational advocacy networks (TANS) on their local issues, building and strengthening norms. Indigenous groups have, in partnership with these TANS, been able to mount an effective challenge to the state in the international legal arena.
Using indigenous identity as a marker of both strength and difference, indigenous communities have developed linkages with a number of different transnational advocacy networks, including environmentalists, anti-globalizationists and cultural preservationists. Their cause and their image resonate across a number of different social movement groups. Alison Brysk argues that indigenous “transnational appeal” stems from a general late twentieth century dissatisfaction with modernity and the expression of indigenous identity as a “simultaneous premodern and postmodern challenge to the hegemony of positivism, progress, individualism and the state system” (Brysk 2000, 41). Internationally, indigenous peoples can represent a romanticized notion of community, tradition and spiritual holism that challenges global capitalism and appeals to “alienated moderns” around the world.

By building on counter-hegemonic sympathy, indigenous peoples are developing significant transnational networks in defense of their communities and cultures from the growing pressures of capitalist development in American states.

Like David battling Goliath, tribal villages unexpectedly challenge the states, markets and missions that seek to crush them. Even more unexpectedly, their scattered triumphs come from David’s own arsenal: from the United Nations to the World Wide Web. Indigenous movements derive much of their impact from an unlikely combination of identity politics and internationalization (Brysk 2000, 2).

Property rights are, on their own, an important and highly contentious issue in domestic politics. These rights refer to a bundle of rights on the use, control, and transfer of assets, in this case, land and natural resources. Property rights are important because they lay out the basic economic incentive system that shapes resource allocation. In fact, property rights are often viewed as sacrosanct, along with the rights of liberty and security (Clark 1982). For this reason, they are of obvious importance to developing nations. A weak or non-existent property rights regime has been identified in many contexts as a barrier to development and economic growth. Without strong property rights, elite interests have greater potential to define, control and protect their own, as opposed to national, interests. Further, foreign investment is much less likely when ownership and control of resources and profits are not guaranteed.
The other problem with property rights is, of course, that once they are obtained they are not easily given up. States that have hitherto defined their property rights to include natural resources are not eager to transfer or even share such rights with indigenous communities. The oil reserves of Ecuador and Nicaraguan timber, for example, are seen as important national assets even when they are located on traditional indigenous territory.

Accordingly, the state remains an important actor in this story. The state defines, structures, and enforces property rights regimes. The state also determines how to allocate any benefits that may accrue from such rights. In terms of the natural resources in and around indigenous territories, little benefit from extraction actually goes to the indigenous community. States sign concessions with large, often foreign firms. Potential revenues for the state include: concession fees, sub-contracting services, taxes on profits, employment and other income, as well as various types of fees. As marginalized or “second class” citizens, indigenous peoples see little, if any, of these benefits. Development activity is more likely to cause harm than to generate much in terms of meaningful benefits (Ortiz 2004). Natural resource extraction can have a detrimental effect on indigenous cultures by destroying local eco-systems and livelihoods. The planet has been littered with toxic remnants of these so called “development” projects, particularly in the developing world where environmental standards tend to be weaker and more difficult to enforce.

With growing international support, indigenous communities are now making property rights claims on these resources that have greater and greater salience internationally. From the state perspective, these indigenous claims represent a direct threat to national development as it has been understood historically and there is little incentive to validate them. It is for this reason that international law is so important. With the help of the Inter-American system, indigenous groups have challenged domestic legal procedures and obtained favorable international rulings. This in itself is a huge achievement. Yet these rulings can only be meaningful at the community level if they are then recognized and implemented by the state. And this brings us back to the initial problem. If states were unwilling to recognize indigenous rights in the first place, why
would they now implement international court decisions that appear to contravene the national interest? While power politics at the state level may be sidestepped, in the end they cannot be ignored. What effect do these transnational legal battles have in the end? The literature on compliance with international human rights norms provides important direction.

There is a significant body of work focused on the development and transmission of international norms for human rights. With the Universal Declaration of Human Rights, for example, scholars like Alison Brysk have argued that a new international agenda has been set. This agenda is the product of determined activists who are prepared to use the tools provided by the international arena to create global consensus about what is right and good. She points out:

Human rights values derive from and are justified by reference to philosophical constructions of human nature, cultural and religious traditions, demands from civil society, and international influence. In practical importance, the latter two political factors are the most important source of human rights in the contemporary world (Brysk 2000, 4).

Alison Brysk and Thomas Risse have both examined the ways in which globalization in general has been able to generate pressure “from above” and “from below” to ensure state compliance with international human rights norms (Brysk 1993, 2000; Risse et al. 1999). This is achieved through a dynamic interaction between domestic and transnational levels of civil society. Domestic or international pressure alone is insufficient to ensure that states recognize and respect the human rights of their citizenry.

From above, international norms for indigenous right exist only because of the hard work and persistent efforts of strong transnational advocacy networks. They have been dedicated to changing the opinions of both governments and citizens to end longstanding colonial oppression of indigenous peoples’ communities and cultures by the western capitalist world. TANS have effectively constructed an international campaign that has made real gains over the past twenty years. The following chapter will review the transmission processes by which international norms are turned into effective state policy, keeping in mind, of course, that this process is not always successful. We will evaluate the theoretical models developed to explain the diffusion of human
rights norms into domestic policy and explore the role that transnational advocacy networks have played in this process. Once we understand how norms reach the door of the state, we can examine at the mechanisms that encourage or block their integration into domestic policy.

Building on the work of human rights scholars, we will tailor an appropriate intellectual framework for the more specific case of indigenous peoples’ property rights.
Chapter 2

Turning Ideals into Action: Transnational Advocacy Networks

One can develop a better understanding of the evolution of ideas into international norms and laws by reflecting on the example of human rights in general. While human rights may seem ubiquitous, modern ideas as to what constitutes these rights evolved only out of the events of the last 50 years. How we define, understand and protect human rights has been socially determined and has changed over time to reflect the changing needs of, and power relations within, any given society. While the idea of human rights has a long intellectual tradition that bridges cultures and civilizations, a universal understanding and acceptance of the inherent equality and value of all human beings is a distinctively modern innovation.

All the great religions, Judaism, Hinduism, Christianity, Islam, Buddhism and others, sought to establish their own complex moral codes of human behaviour based on some understanding of divine law. Their primary concern was not rights however; they were more interested in the duties and obligations of each person to his fellow human beings, to nature, and to God. Their construction of humanity was intrinsically hierarchical. Each included an inherent conception of privileges and status that ultimately made some people more equal than others (Lauren 2003, 5-9).

Human rights, as we understand them today, are the product of 17th and 18th century European Enlightenment. Although not the only influence, John Locke played an important role in the construction of the western liberal understanding of human rights. In 1690 he wrote: “…the natural liberty of man is to be free from any superior power on earth, and not to be under the will or legislative authority of man.” Humans consented to government, but only on the condition that liberty was protected. Locke believed in “natural law” whereas human rights existed because of God. Humans, therefore, cannot influence what these rights are. States existed to provide “civilization” and ensure that God’s laws were upheld. The state was not divine, and could be
challenged if it did not meet its responsibilities appropriately. This shifted with the development of positive law. Positivists argued that human rights were not absolute, or granted by God. Instead they took a more pragmatic approach, noting that rights can be both given and taken away by society, to suit needs which can and do change over time. Jeremy Bentham (1748-1842) wrote: “Right is a child of law; from real laws come real rights.” Rights are, therefore, as the laws that establish them, determined by society, not God. This undermined the absolutist privilege which underscored European monarchies and provided the foundation for the English Bill of Rights (1689) and both the French (1789-1799) and American Revolutions (1775-1783). God did not disappear, but the state was clearly responsible for upholding and protecting the rights of citizens.

The 21st century understanding of human rights is clearly embedded in the UN Universal Declaration of Human Rights or UDHR (1948). Prior to this, the norm of sovereignty outweighed any interest in the human suffering outside of one’s own borders. The shock and horror of the post World War Two Nuremburg Trials changed this forever. The United Nations and its inaugural documents were part of an international effort to prevent such atrocities from happening again. Support for the UDHR was nearly unanimous at the time with 48 countries in favor, 8 abstentions and no country opposed (Lauren 2003, 229). Although non-binding, the UDHR led to the development of a series of legally binding conventions as well as the transference of human rights language into domestic constitutions in countries like Costa Rica, El Salvador and Jordan.

How do ideas like women’s suffrage, universal human rights and the rejection of all forms of slavery make their way from wishful thinking to international norms and then into international law and domestic reality? To begin this explanation we must clarify what is meant by the term norm and the difference between norms, ideas, and ultimately law. Simply put, international norms represent shared understandings of certain moral standards for behaviour in given circumstances. Norms are the product of interaction among social groups (states, NGOs, activists, academics, citizens etc.) at the international level and their intention to conform to some social practice (Searle 1995). Norms are recognizable by their clarity and perseverance, as well as
their capacity for application into law or customary practice. While ideas represent cognitive commitments, norms take the relationship further by making specific behavioural claims. When states endorse a norm, for example by signing a treaty banning land mines, they are expressing agreement with the idea that land mines are harmful and unnecessary. More than this, however, they are creating the expectation that their behaviour will conform to that belief. Norms, however, do not have to be codified. This leads to the fact that norms are most evident when they are, in fact being violated (Risse et al. 1999; Kazenstein 1996; and Finnemore and Sikkink 1999).

Another important fact about norms is the fact that they are not all the same. Some norms are good while others, like attitudes of racial superiority, are not. Some norms have more support than others and such support is subject to change. For example, it was once a norm that women did not vote; however a concerted and long term campaign on the part of dedicated individuals, civil society groups, state actors and transnational organizations led to a complete normative reversal. Similar things happened around the ideas of slavery, colonialism and child labour.

Scholars have argued that there is a distinctive norm life cycle and “agreement among a critical mass of actors on some emergent norm can create a tipping point after which agreement becomes widespread…” (Finnemore and Sikkink 1998, 892-893). The norm life cycle involves three distinct phases, each with its own mechanics of progression. The first phase, or norm emergence, is initiated when dedicated individuals, or norm entrepreneurs, attach themselves to specific ideals and set about to convince the world to join in with that attachment. When a critical mass of states begins to accept the norm, there is a norm cascade. This is pushed by a number of factors including pressure for conformity, international legitimating, and a desire on the part of state leaders to enhance their self esteem. Given this process is successful; the final stage in the life cycle is norm internalization. At this stage norms are institutionalized through legal instruments or legislation. It is this final stage that represents the crucial movement from the broad acceptance of an idea or principle to the actual practice of implementation (ibid.).
For international norms to be effective there must be some type of process or mechanism to usher their implementation through domestic policy. States, for any number of reasons, vary in both willingness and ability to uphold international standards. Certain states, like Canada, take exceptional pride in their human rights record. And while most states most of the time claim to support human rights, there have been times when they have explicitly rejected them within particular circumstances. For example, China has argued that the human rights associated with freedom and democracies are less important than economic rights. This allows them to justify policy decisions not popular with western audiences. But the fact that Chinese leaders feel a need to justify their actions illustrates the salience of human rights.

Since the so-called third wave of democratization, states across the Americas have embraced both the values and vocabulary associated with human rights. After a long history of military coups, revolutions, violence, and staggering inequality, American states have embraced human rights rhetoric with a particular tenacity. Memories of political assassinations, forced disappearances, and barbaric torture created a new consciousness about the importance of human rights and strengthened their salience within civil society in particular. Latin American political elites have readily incorporated these values and ideas in an ongoing struggle to represent popular interests while at the same time maintaining structural conditions for economic growth and development. Some have argued Latin American elites deliberately got on the human rights bandwagon in effort to appease popular demands for social justice without any threat to the prevailing capitalist hegemony.

Even if application is uneven, all American states recognize human rights and acknowledge their responsibility to respect them. All have, for example, signed the 1969 OAS American Convention on Human Rights – with the interesting exceptions of the USA and Canada. This is not to suggest that there is any absence of serious human rights problems in the region. A quick scan of the IACHR/CIDH roster undermines this hypothesis; however states are generally keen to at least appear as if upholding human rights is a national priority.
This regional commitment to international human rights norms is indicative of an international phenomenon reaching far beyond the Americas. The global embrace of human rights over the last sixty years demonstrates clearly the effectiveness of a transnational campaign to change the way governments treat their citizens. This is itself a part of the phenomenon broadly recognized as globalization. More than just the increasing velocity of money and even people moving across state borders; ideas, values and norms permeate state boundaries with increasing regularity and create civil societies that mobilize well beyond any one state or region. The literature has convincingly demonstrated the role played by the transnational human rights network in the construction of human rights norms and in mobilizing shaming strategies against states for noncompliance (Finnemore and Sikkink 1998; Sikkink 1998; Brysk 1993; Risse et al. 1999).

The international human rights network is well recognized and includes many large NGOs that effectively use the media to promote their agenda. Human Rights Watch (HRW) Rights and Democracy (R&D) and Amnesty International (AI), for example, all have popular websites, publish regular reports and receive international support. With vast international networks of activists, students and funders they use “global shaming” to pressure states to conform to international human rights norms. Using all forms of media, including television, internet, newspapers, and magazines to create an international campaign and generate widespread attention and support, these organizations identify specific human rights violations, present evidence and make concrete demands for change and accountability. This action has changed the way that the international community of states does business. When it formed in 1961, Amnesty International found states more or less unwilling to hold individual states accountable for human rights violations despite the Universal Declaration. Yet since this time, Anne Marie Clarke points out:

The entire context for human rights discussions has changed….Although there is no doubt that many governments still resist practical observation of the principles they have officially endorsed, the legal force of human rights claims in the international context has grown significantly stronger over recent decades (Clarke 2001, 3-4).
Indigenous peoples have benefited from the global human rights movement. These broad networks have embraced indigenous issues and have helped construct an indigenous specific network while at the same time maintaining indigenous issues in their own broader profiles. For example, AI America has dedicated a web page to the cause of Ecuadorian indigenous peoples’ rights in the face of oil development. The site includes comprehensive background information, requests for support and recommended actions.

Because of their relationship with the earth, indigenous causes have also been advocated by transnational environmental organizations, such as the World Wildlife Fund, EarthRights International, Amazon Watch and the Rainforest Foundation. Together, human rights and environmental organizations have been working with regional, national and international indigenous groups to produce a strong and diverse network since the 1970s. While these are not always uncontroversial relationships, they have been productive. Specific details about the genesis of transnational advocacy for indigenous issues will be explored further in the next chapter.

The ground-breaking work, *Activists beyond Borders: Advocacy Networks in International Politics* (1998) by Margaret Keck and Kathryn Sikkink explores the conditions under which transnational advocacy networks emerge in international politics. They recognized that domestic groups, such as indigenous communities, approach transnational advocacy networks (TANS) when they are unable to influence their own state’s policies. The TANS include various actors working at the international level, on a specific issue, “bound together by shared values, a common discourse and dense information sharing” (Keck and Sikkink 1998, 2). The goal is to generate a “boomerang effect” using other states, international NGOs and inter-governmental organizations to pressure the state from the outside (Brysk 1993). According to Keck and Sikkink “international contacts can amplify the demands of domestic groups, pry open space for new issues, and then echo back these demands into the domestic arena” (Keck and Sikkink 1998, 7). International efforts are thus a corollary to, rather than substitute for, domestic campaigns. If
successful they can open up new channels of access to political actors for hitherto marginalized domestic groups.

Historically, TANS have operated effectively in the fields of human rights, women’s rights and environmental issues. The objective of these transnational social movements is to affect meaningful change in domestic policy issues by constructing and mobilizing social norms in the international arena. The real medium for change is what is referred to in the human rights literature as a “mobilization of shame.” Through this “mobilization” states are held accountable for behaviour which contravenes acceptable standards. While the literature documents that “mobilization” occurs through such transnational organizations as the United Nations and international NGOs like Amnesty International or Human Rights Watch, the actual effectiveness of this mobilization on domestic public policy has not received as much academic attention (Risse et al. 1999, 2).

For indigenous peoples, nothing is more important than land. Because of the strong relationship between territory, culture and survival, indigenous rights to traditional territories are essential for indigenous nations to exist, develop and thrive after centuries of colonial oppression. And as much as this right is necessary to indigenous well being it has been historically and categorically denied without apology. As impoverished minorities, indigenous peoples more than any other group across the Americas have suffered from abuse and discrimination in terms of their rights to property. National governments have not been receptive to indigenous claims on the wealth of the nation, and often there has been no recourse. Domestically, access to justice is wanting as existing legal structures serve to maintain elite interests. Because of this indigenous peoples have turned to various international forums, like the Inter-American Court of Human Rights, with the hopes of getting a fair hearing. The results have been mixed. However, even when justice prevails and indigenous groups win their claims in international courts; implementation back home remains challenging.
One of the fundamental reasons why states are unwilling to recognize indigenous rights to land is its economic value. Economic globalization has only exacerbated this pressure. If indigenous peoples were demanding rights to lands and territories that had no value and no one wanted, there would be little cause for concern. However, many current cases involve remote territories that have thus far avoided development and contain natural resources increasingly in short supply. For developing nations in particular, the past three decades of neoliberalism have meant the slashing of government budgets and the opening of domestic economies to global economic forces. States are desperate to generate investment and revenues in the short run, even if the long run viability of such strategies remains open to criticism. For example, the much critiqued “Washington Consensus” changed the direction of Latin American economies, by weakening the role of the state and strengthening that of multinational foreign interests. Coined by John Williamson, a former Director for the UN High-Level Panel on Financing for Development and World Bank Chief Economist for South Asia, the “Washington Consensus” refers to the policy advice Washington-based institutions have been forcing on Latin American countries since the late 1980s. These include: fiscal discipline, tax reform (to lower marginal rates and broaden the tax base), interest rate liberalization, a competitive exchange rate, trade liberalization, liberalization of inflows of foreign direct investment, privatization, deregulation (to abolish barriers to entry and exit), and secure property rights (Williamson, 2004).

International pressures undermined longstanding import-substitution industrialization strategies and encouraged the development of comparative advantages. For much of the undeveloped world this meant a shift towards natural resource extraction, with little subsequent processing. Raw materials, such as oil, minerals and timber are extracted and then shipped to industrialized nations. These materials are processed and re-sold as finished commodities, often at great profit, by large multinational companies. With the wane in government incentive programs, domestic firms are unable to obtain the capital required to finance such projects. Consequently,
few jobs are created and only modest economic linkages are possible. States quickly become dependent on foreign investment, with little development of domestic capacity in the long run.

This new competitive environment and focus on primary products within the economies of Latin America have made it increasingly difficult for governments to cede rights to valuable land and resources to indigenous peoples. This tension is heightened by structural adjustment programs which make debt repayment a national priority. Both Ecuador and Nicaragua are under pressure to intensify resource exploitation to meet the strict conditions of structural adjustment and debt repayment agreements, and their economies offer them few viable alternatives (Vázquez and Saltos 2006, 65-67). Even in the face of political agreement that indigenous peoples were entitled to land and resources, economic pressures would make policy to support those rights difficult to implement. Accordingly, neglect and/or denial become the order of the day.

The literature on the social construction of international norms for human rights suggests that a “mobilization of shame” will pressure states to be more accommodating to the “injured party”. Yet as Risse et al. have pointed out, human rights regimes are not automatically internalized and transferred into domestic policy and not all norms are internalized with equal success. There is a well recognized weakness in the literature in terms of specifying causal factors for effective implementation (Cortell and Davis 1996; Florini 1996; Risse et. al. 1999). And while there have been a few models developed to try and explain this relationship, they have yet to be thoroughly tested empirically.

2.1 Implementing norms for human rights

Simply put, international norms represent shared understandings of certain standards for behaviour in given circumstances. They are the product of interaction among social groups (states, NGOs, activists, academics) at the international level and represent their intention to conform to some social practice (Risse et al. 1999, 7). Social change takes place when actors are
able to codify new norms and alter state behaviour. The question then becomes a matter of which actors can instigate such and change under what conditions. Alison Brysk noted that change is triggered by a combination of national and international factors, when “the relationship between civil society and the state is mediated by the international system” (Brysk 1993, 260).

Consequently, change comes “from above and below.” Keck and Sikkink agree that domestic change can occur by applying pressure simultaneously from above and from below. The pressure from below is generated via domestic social movements which are supported and reinforced by a transnational advocacy network.

While the strength of the transnational indigenous network may be apparent, there are distinct variations in the strength, breadth and depth of national indigenous organizing in domestic civil societies. Some groups have been more successful than others in effectively “managing” the transnational network to address specifically local issues. Variables which may affect a state’s willingness to implement international norms for indigenous rights include the size, capacity and effectiveness of indigenous peoples’ organizations to generate “pressure from below”. Yet, in the two Paraguayan cases of apparent norm compliance, the indigenous communities of Enxet-Lamenxay and Kayleyphapopyet, indigenous “civil society” in the state is minimal, especially in comparison to a country like Ecuador that has one of the best organized and most militant indigenous movements in the hemisphere. Given this obvious discrepancy, the relationship is clearly neither direct nor causal. What other factors might be at play?

There have been a few attempts to establish explanatory models of domestic norm integration. Risse et al. (1999) Alison Brysk (2000), Cortell and Davis (2000), Susan Burgerman (2001) and Darren Hawkins (2001) have all formulated valuable theories to explain how international norms make their way into the domestic policy. All this work, however, has focused on a subset of universal human rights with no attention to specifically indigenous rights norms. In order to ascertain their value in the unique case of indigenous rights norms, it is important to
understand the difference between universal human rights and the narrower subset of indigenous focused rights.

Indigenous rights are human rights applied to the special case of indigenous peoples. The main difference is the acknowledgement of a special level of collective rights above and beyond the traditional liberal human rights model. While some are reluctant to accept that indigenous peoples require a separate or additional canon of rights, beyond “universal” or even “minority” rights, others counter that the existing instruments cannot sufficiently account for the necessity of special “collective” or “group” rights to preserve indigenous cultures and societies. The Chair of the Aboriginal and Torres Strait Commission explains:

It is precisely because the collective rights have not been acknowledged that the individual rights of indigenous persons, for example the right to equality of opportunity in the provision of education, employment and healthcare – have not been realized in any nation in the world. Only when our collective identities have been recognized will the appalling disadvantages that we suffer as individuals be addressed (Thornberry 2002, 5).

The United Nations Universal Declaration of Human Rights represents the clearest articulation of human rights internationally. It includes rights to liberty, equality and security, freedom from arbitrary detention, torture and/or inhumane punishment. It also includes property rights. Even here, in a document that is aimed primarily at individual rights, the UDHR reinforces communal property rights (owned in association with others) as equivalent to individual title. This is important, remembering that while property rights are recognized as important for all, it has been widely accepted that property rights are an essential human right for indigenous peoples. Because of a special relationship with land, and the need for physical space to pursue unique cultures and societies, land rights are essential for indigenous survival. Denying indigenous peoples rights to their traditional lands can have genocidal consequences.

These rights are not merely real estate issues, and shall not be conceived according to the classical civil law approach to “ownership.” Rather indigenous land rights encompass a

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3 Article 17 reads: (1) Everyone has the right to own property alone as well as in association with others and, (2) No one shall be arbitrarily deprived of his property.
broader and different concept that relates to their collective right to survival as an organized people, with control of their habitat as a condition necessary for the reproduction of their culture and for their development, or as indigenous experts prefer, for carrying ahead their “life plans” (planes de vida) and their political and social institutions (Kreimer 2004, 1).

Without exclusive management and control of a clearly demarcated land base, the economic survival of indigenous communities is not possible. Within an indigenous worldview, land is considered a sacred element, along with all of nature. Human beings have no point of privilege. Animals, rocks, and trees are all equally alive and important. Western societies, by way of contrast are human centered, both philosophically and economically. Nature exists to be dominated and exploited for human gain. Western societies focus on a notion of growth and progress that contradict indigenous notions of sacredness in mother earth. Wherever western societies have permeated indigenous spaces, they have undermined traditional communities and ways of life.

The first comprehensive attempt to understand the symbiotic relationship between domestic and international social movements necessary to change state behaviour was put forth by Alison Brysk. She pointed out that states were not the only actors in international relations and that different actors operated within any given situation. Her case study of Argentina’s human rights movement borrowed from three distinctive streams of literature: new social movements, international regimes and foreign policy studies of international pressure. Analyzing regime change from an oppressive military government to a functioning democracy respective of human rights, Brysk (1993) looked at the role of domestic human rights organizations, transnational NGOs, a transnational human rights movement, state and international political elites. She argues that domestic social movements lacking conventional sources of power are able to turn this weakness into strength by “projecting cognitive and affective information to form international alliances” which then pressure the state from above and below to conform to accepted human rights norms (Brysk 1993, 280). The main mechanisms that international actors, including TANS
and specific NGOs, can use to trigger change include international pressure, sanctions, diplomacy, the mobilization of information and the direct provision of resources. She states:

Transnational networks of non governmental organizations can make a variety of contributions to social change, even in the limiting case where they lack conventional power and resources and face a repressive, authoritarian state. The state can be transformed from above and below because it may control territory, force and resources but it cannot monopolize information and legitimacy (ibid. 261 emphasis mine).

Indigenous movements are exemplary in their lack of access to conventional sources of power within the domestic political arena. This may be a factor in their high degree of involvement with international indigenous rights, human rights, and environmental NGOs. The challenge for indigenous groups is to develop a broadly resonant transnational appeal to secure much needed support. Not surprisingly, demands for international support, attention and resources are much greater than supply. Using identity and a certain counter-hegemonic appeal, indigenous groups must compete amongst themselves and with others to secure access to these important channels.

2.2 The Spiral Model of human rights change

Building on Brysk’s idea of simultaneous pressure from above and below, the most developed model of norm implementation is the Spiral Model of human rights change put forth by Risse et al. (1999). It provides an ontological framework for the internalization of human rights norms by the state, outlining the evolution of state actions, from the outright repression of human rights to the internalization of norms and finally norm consistent behaviour. It examines, in a phase-by-phase process, the mechanisms that move human rights norms forward on the domestic agenda and ultimately enable its incorporation within domestic practice.

Using case studies of Argentina, Kenya, South Africa and others, the model examines how domestic and international pressures have triggered a real normative and legal shift in government policy from repression of human rights to gradual implementation and compliance. Based on its conceptual foundations, it would appear reasonable to assume that its mechanisms are appropriate
for understanding indigenous rights as well. There is, however, one obvious caveat. From the vantage of broad human rights compliance, the authors suggest that “Western public opinion and Western governments” are the crucial audience to which cases for the violation need to be made (Risse et al. 1999). However, it must be recognized that western governments are as likely as any other to violate indigenous rights and western publics are as likely as any other to tolerate it. One needs only examine the list of nations that have refused to sign on to the recent UN Declaration of Indigenous Rights. Wealthy western nations like Canada, the USA and Australia have not shied away from rejecting the formalization of indigenous rights within the international arena.

The mechanism which moves the state to change repressive policy is pressure from both above, through transnational advocacy networks and below, through domestic civil society and social movements. Yet arguably, the spiral mechanics of the model do not reflect the often fragmented nature of state politics. The model provides a useful framework for successful norm internalization, yet in the case of indigenous rights, norm internalization appears to be the exception rather than the rule. In this instance, the more salient question may be why norms are not being internalized. The Spiral Model is unable to explain chronic inconsistencies or situations where norms become “blocked” somewhere within the domestic political regime.

As illustrated in Figure 2.1 on page 40, pressures generated domestically “from below” work in tandem with international pressures “from above” to push states from human rights repression, to denial, towards tactical concessions and eventually prescriptive status and rule-consistent behaviour. Because of the nature of human rights repression, domestic opposition is initially weak. However, as the international community becomes more active, citizens start to feel secure enough to voice protest, building domestic opposition under the safety of the global spotlight. Interaction with international NGOs also helps build domestic organizations and enhances their capacity to act. And as domestic organizations build they are better able to provide evidence of violation and necessary information. This in turn strengthens the international campaign (Brysk 1993). The feature element to note is that to be most effective, pressure must be
simultaneous as the two sides work to legitimize the other. If, for example, strong pressure from above is not matched from below, the state can dismiss everything as foreign interference. With the engagement of a strong domestic social campaign this dismissal is less convincing.

Ultimately, Risse and Sikkink are interested in the means through which appeals to international human rights ideas and norms contribute to domestic political change. The key factor, they argue, is the socialization process that states undergo in order to participate in “international society”. Similar to Brysk (2000) they stress:

Norms influence political change through a socialization process that combines instrumental interests, material pressures, argumentation, persuasion, institutionalization and habitualization….Countries most sensitive to pressure are not those that are economically weakest, but those that care about their international image (Risse et al. 1999, 37-8).

Luckily, current levels of globalization and economic integration have made autarkical governments a relic of the past. Besides North Korea and maybe Cuba, most states are highly sensitive to international opinion, at least within their own set of allies. This does not mean that states like Iran, Israel or even the United States will not choose to make unpopular decisions. But when they do, they will provide their own justification. This socialization targets the political elites within the state that make key policy decisions either to allow or desist in repressive activities, including senior government officials, diplomats and bureaucrats.

Alison Brysk has added that instrumental “state learning” takes place whereas the international system (regime) of rewards and sanctions conditions state behaviour over time. This, of course, is the traditional realm of foreign policy: diplomacy and sanctions. States that are not part of “international society” as it is broadly understood are unable to gain access to its benefits and membership does have its privileges. For example, when the Argentine dictatorship (1976-1983) tried to secure loans through a particular multilateral development bank American representatives voted against 23 of 25 applications (Brysk 1993). One American congressman noted that “After the non-profits (NGOs) testified on Argentina, there was a general feeling that
those sadistic bastards down there were not going to get one more cent from us” (Forsythe 1983, 147). Brysk concludes: “This evolving international regime has shifted some states’ calculations from short term material interests to the long term benefits of global citizenship” (Brysk 1999, 125-132).

The Spiral Model was developed to explain the evolution of human rights norms in particular. The next question is whether or not this process of “socialization” is equally applicable in the case of indigenous property rights. Have indigenous groups, in conjunction with international actors, been able to construct an appeal so resonant that states take it as seriously as they do the broader human rights framework? The broad acceptance at the UN of the International Declaration of Indigenous Rights in November of 2007 suggests that the answer may be yes. However, the refusal of major players, like the United States, Canada, and Russia to sign shows that the process is incomplete.

Numerous scholars have observed that despite strong international norms for human rights, levels of compliance vary amongst states and in different contexts (Hawkins 2001). The Spiral Model, while it does not say so specifically, is premised on a realist model of states as more or less the same within the international context. By assuming a standard 5 phase process of human rights change, the Risse and Sikkink model suggests that all states will react in similar ways to simultaneous transnational and domestic pressure. Yet it is clear that there is variation in state response and that context is important. A second wave of research has focused on the role different domestic variables have played in the receptiveness of particular states to international norms. A number of variables have been identified that may affect the “spiraling process” moving domestic policy from repression to norm consistent behaviour. These include the domestic structural context, the domestic salience of the norms, material interests; and international influence on the state.
Figure 2.1. The Spiral Model of Human Rights Change

<table>
<thead>
<tr>
<th>Society</th>
<th>State</th>
<th>International /Transnational</th>
</tr>
</thead>
<tbody>
<tr>
<td>Weak domestic Opposition</td>
<td>1. Repression</td>
<td>Transnational networks</td>
</tr>
<tr>
<td>Domestic opposition</td>
<td>2. Denial</td>
<td>• Receive information from domestic opposition</td>
</tr>
<tr>
<td>Mobilization and strengthening of groups engaging human rights norms</td>
<td></td>
<td>• Invoke international human rights norms</td>
</tr>
<tr>
<td>• New domestic actors and sustained links to transnational networks</td>
<td></td>
<td>• Pressurize repressive state</td>
</tr>
<tr>
<td>• Normative appeals</td>
<td></td>
<td>• Mobilize international organizations and liberal states</td>
</tr>
<tr>
<td>• Information</td>
<td></td>
<td>Sustained bilateral and multilateral network pressure</td>
</tr>
<tr>
<td>• Expansion in new political space</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Human rights assuming center stage in societal discourse</td>
<td>3. Tactical concessions</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Concessions to the human rights network</td>
<td>• Policy change</td>
</tr>
<tr>
<td></td>
<td>• Reduced margin of maneuver human rights</td>
<td>• Regime change</td>
</tr>
<tr>
<td>4. Prescriptive status</td>
<td>State accepts international norm</td>
<td>Reduced network mobilization</td>
</tr>
<tr>
<td></td>
<td>Ratifies international treaties</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Institutionalizes norms domestically</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Discursive practices</td>
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</tr>
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</table>
i. Domestic structural context: Risse Kappen (1995) Lutz and Sikkink (2001) Tavanti (2001) and Rodríguez (2004) have all recognized that domestic structural context can shape the receptiveness states to international pressures. Where domestic structures are weak and poorly connected, the ability of a state to implement international norms can be compromised, even if political will is strong. Risse-Kappen defines these domestic structures as “the normative and organizational arrangements which form the state, structure society, and link the two in the polity” (Risse-Kappen 1995, 6). These include: the political institutions of the state, domestic civil society and the institutions of the policy networks linking state and society (or absence thereof) (Risse-Kappen 1995, 21-22). As relatively fresh and often incompletely consolidated democracies, Latin American states continue to struggle in all three aspects. Focusing on variations in state structures may provide important insights as to why some indigenous groups are more successful than others although they are part of the same transnational movement and are invoking the same norms.

To further complicate analysis, it is important to recognize that domestic structures can condition state response, however they are not fixed. Risse and Sikkink argue that under certain conditions “networks of domestic and transnational actors are actually able to change the domestic structures themselves” (Risse and Sikkink 1999, 4-5). Domestic structures are responsive to internal and external pressures. Once existing structures are recognized as a barrier, a two level strategy can be devised: first to change the structure, and then to facilitate the transference of the desired norm into domestic policy. For example, in states where property rights are weakly defined or subject to arbitrary assignment or withdrawal, implementation of defined property rights for indigenous communities is much more difficult. A two-pronged strategy would include the development of a sound property rights regime, then its application to indigenous cases.

ii. Norm salience: Andrew Cortell and James Davis agree on the importance of domestic structures. They point out, however, that there are also inherent qualities within each norm that
affect its marketability in domestic politics, regardless of the state structures. Some norms will be quickly absorbed while others will be outright rejected by political leaders and/or society at large. Their goal is to demonstrate “how international rules and norms can affect state behaviour through the actions of domestic political actors.” Their point is that state level officials and social movements appeal to international rules and norms when it furthers their own interests. The case they are making is an instrumental one (Cortell and Davis 1996, 67-68).

A norm’s salience is therefore a second important domestic variable. The salience of a norm refers to its social and political relevance or legitimacy within society in general. Like institutions, salience is not fixed. The pathways through which international norms can acquire domestic salience include: national political rhetoric, the material interests of domestic actors, domestic political institutions, and socializing forces. These factors are not exclusive either as they often work in combination.

While studies of domestic structural determinants of a norm’s effectiveness are relatively well developed, research related to “norm salience” has been weak (ibid., 67). This shortfall is due to two factors. First, there is a real problem defining and/or operationalizing the concept of norm salience in measurable terms.

Scholars repeatedly conclude that domestic salience is crucial to many cases of states’ compliance with international norms, but they rarely provide definitions or operational measures for the concept and, instead, merely assert that the norm in question was salient (Cortell and Davis 2000, 67).

Cortell and Davis highlight three key indicators of a norm’s salience:

1. The appearance and frequency of the norm within domestic political discourse.
2. Changes in national institutions to accommodate/support the norm.
3. Changes in the overall consistency and supportiveness of national policies in all related issue areas (ibid., 70-72).

Measuring such factors quantitatively represents a real challenge. Politics and especially politicians are fickle. Words and actions are not always congruent, so a real problem remains in providing an accurate accounting for norm salience. By disaggregating the key features of norm salience we can better determine how it can be mobilized and build on this to facilitate desired
policy changes. The relationship between norm salience and the Spiral Model is obvious. It should become increasingly apparent within the latter stages of the model. It is in the fourth phase that a norm attains “prescriptive status”. Prescriptive status would clearly indicate a government’s overall acceptance of the validity of human rights norms and points significantly towards their “salience” within domestic political society. Evidence of attainment of this “prescriptive status” would include:

- The ratification of international human rights conventions including the optional protocols;
- Human rights norms are institutionalized in the constitution and/or domestic law;
- There is some institutionalized mechanism (e.g. Ombudsman or national human rights office) for citizens to complain about human rights violations;
- The discursive practices of the government acknowledge the validity of human rights norms irrespective of the (domestic or international) audience, no longer denounce criticism as “interference in internal affairs,” and engage in dialogue with their critics (Risse and Sikkink 1999, 29).

**iii. Material interests:** Norbert Lechner (1998) and Atilio A. Borón (1998) have noted that international society operates in an explicitly neoliberal hegemonic order that aims to “depoliticize” the economy. On one hand, states are pressured to conform to international norms for both human and specifically indigenous rights. On the other, governments face different types of international economic pressures which place real constraints on their ability to make the required policy decisions. Governments may wish to implement policies to support international norms; however domestic realities, especially material interests can be real barriers. Elites in countries like Ecuador and Nicaragua are often simultaneously rich and politically connected. Governments are not eager to implement policy changes which undermine their financial supporters, especially to support a poor and relatively powerless minority.

Jeffrey Stark notes that “For the Latin American democracies, the constraints imposed by the need to maintain an attractive investment climate – which in turn depends on the endorsement of economic policies by the major international financial institutions – are substantial” (Stark 1998, 76). Especially in terms of indigenous land and natural resource claims, competing claims are almost always a matter of national governments trying to attract and keep investment, increase
exports and ultimately raise government revenues. In severely indebted countries like Ecuador and Nicaragua, the obligation of debt payments and the need to cut government spending can overshadow any desire or ability to act on salient international norms. Darren Hawkins (2001) has argued explicitly that economic and/or security crises can thwart domestic implementation.

Another pathway in which material interests can influence state policy for human rights is through conditionality clauses contained within international loan and aid agreements. In this way, material interests can be used to promote the implementation and respect of rights. World Bank (WB) policy, for example, incorporates respect for human rights as a precondition for participation in its Poverty Reduction Strategy Program (PRSP). The program in particular is attractive to debtor nations as it provides significant debt relief and other development assistance tools. The PRSP gives states substantial material incentive (i.e. political will) to make significant policy changes and at the same time gives the Bank considerable powers to shape domestic institutions. According to Cortell and Davis these institutions are key as they “…provide the rules of the game for citizens and state officials, establish rights and obligations, identify what is legitimate and what is not and in the process, help national actors define their interests domestically and internationally” (Cortell and Davis 2000, 79-80). If and when international norms become codified in domestic laws, they become part of a standard operating procedure that then permeate and constrain bureaucratic thinking. Compliance becomes a matter of habit.

iv. International image: The final factor that can affect the spiraling of international norms for human rights into domestic policy is the concern that state elites have for their international reputation. This can be important for a number of reasons, including personal beliefs and values as well as a strong desire to differentiate oneself from predecessors. Political elites are interested in not only the international reputation of their country, but often take a personal stake as well. For example, the National Party (NP), led by former president F.W. De Klerk, took a great interest in the democratic transition of South Africa as an opportunity to enhance the sullied international image of the state as it moved towards a new modern liberal democracy. The NP
reform initiatives of the 1990s, aimed at democratizing apartheid state structures were specifically designed to cultivate international approval and support. White South Africans, made painfully aware of their international pariah status though long standing sanctions, felt compelled to instigate domestic change (Black in Risse et al. 1999, 78-79).

States, eager for acceptance within the international community, make strong statements regarding human rights in order to appear “good” and will eagerly sign on to these international covenants and agreements for human rights under the spotlight of the world media. Even when done only to appease international interests, it creates a strategic opening. Rhetoric, while certainly not as immediately effective as law or policy, is still useful because it raises expectations of compliance within civil society, both domestically and abroad. And although many international agreements and covenants contain little in terms of enforcement mechanisms, they provide clear standards to which the state will eventually be held accountable and can prevent moral backsliding. When Argentine President Raúl Alfonsín (1983-1989) came to power, Alison Brysk notes, he immediately ratified a series of significant international treaties on human rights and added a Secretariat of Human Rights to the Foreign Ministry (Brysk 1993). His main goal was to differentiate the new regime from its predecessor and further entrench the idea and value of human rights in Argentine society. Alfonsín, a former human rights lawyer, saw the changing of Argentina’s public image as part of his own personal legacy. Signing international covenants enhanced the nation’s international image and increased international accountability as these agreements included external monitoring and evaluation.

Using these key variables, the next step is to explore the application of this model within the narrower context of indigenous rights. The following chapter explores the construction of an international movement for indigenous human rights. This will establish the history and content of indigenous rights norms and clarify their relationship to broader human rights norms. Once this is done, we can re-examine the human rights model from the perspective of indigenous rights cases.
Chapter 3
Building Pressure From Above: Internationalizing Indigenous Rights

The mechanism within the Spiral Model which triggers change involves simultaneous pressure from above and below the state. What many scholars label “civil society” must be active at both local and transnational levels. At the local level, indigenous resistance to colonialism and oppression is not new; historically however, this alone has proved insufficient to protect their rights and livelihoods. Within the last twenty years or so there has been significant change at the transnational level. Newly formed transnational indigenous rights movements “from above” provide domestic communities new opportunities for action, collaboration and growth.

There have been a number of fortuitous events which have worked to build support for indigenous rights. As Van Genugten and Pérez-Bustillo note, the entire framework of indigenous rights is both “constituted by and constitutive of, the relationship between legal processes at the international, regional and national levels” (2004, 379). During the last two decades in particular there has been new recognition of norms for indigenous peoples’ rights, and this has much to do with the leadership of important international organizations, like the ILO and the UN, as well as the OAS, plus a number of important NGOs.

This is no small achievement. Historically Latin American states have not acknowledged the existence of indigenous peoples, fearing alternative “identity” options might undermine national cohesion. Instead they pursued policies, explicit and implicit, aimed either to integrate indigenous peoples into modern society or leave them at the margins of the nation-state. While change has not been sweeping at the very least indigenous communities are finding that they have new spaces from which to make their demands, and certain new audiences which appear more receptive.

In terms of both international and regional developments, one of the main benefits of this new wave of activity has been the ability of indigenous leaders from all over the world to meet,
share views and strategize. Through organizations like the UN and the OAS, indigenous leaders are able to meet on a regular basis to talk about their own experiences, provide each other with support and develop what has essentially become a global presence in defense of their rights (Weissner 1999). Indigenous elites have been actively involved in the drafting of new legal and moral instruments for indigenous rights, while at the same time building personal networks across national boundaries. This network includes a plethora of active NGOs made up of both indigenous and non-indigenous representatives, including but not limited to Cultural Survival, the International Indian Treaty Council, The South and Meso American Indian Rights Center, the Center for World Indigenous Studies, Amazon Alliance and Amazon Watch. All are active NGOs with a primary interest in indigenous rights issues and they work alongside the international organizations, providing technical support, resources and considerable media savvy as well as regional level organization and coordination.

It is important to recognize indigenous peoples as the protagonists in their own story. Too often indigenous peoples have been portrayed as passive subjects of history rather than active participants. Indigenous engagement in international politics as a means to draw attention to their oppression and suffering is not new. While often romanticized as localized and pre-modern “savages”, indigenous people have been both attentive and adaptive to exigencies of modern western society. Quickly after the Europeans arrived on American shores, indigenous societies were outnumbered and more importantly, out gunned. There was little hope to defend their cultures and territories through open warfare. Instead, their strategy was based on defense, and in many cases, survival. As legal scholar Patrick Thornberry has noted, after more than five hundred years of violence, genocide and oppression the strongest testament to indigenous strength is the fact that they are still here. They have, in the face of great pressure and great odds, managed to survive as distinct peoples.

In a world dominated by the politics of soldiers and weapons, indigenous resistance seemed courageous at best. However, the forces of globalization and the increasing saliency of human
rights are slowly changing this picture. The occasional uprising is being replaced by the
development of a solid international presence. Indigenous resistance now includes the
development of simultaneously offensive and defensive strategies. As part of this, indigenous
peoples are taking their cases to the international arena to raise awareness and engage in a new
type of diplomacy. Since the birth of the League of Nations, indigenous leaders have actively
sought to engage the international arena as a strategy to pressure the state towards the recognition
and respect of their unique rights.

The Geneva based League of Nations was founded at the Post First World War Paris
Conference in 1919. Not long after it was established the Mohawk Chief Deskaheh, with his
passport from the Haudenosaunee Confederacy (now Six Nations), went to Geneva to “defend the
effects of his people to live under their own laws, on their own land and under their own faith”
against the colonial policies of the Canadian government. Although the League refused to hear
him on the grounds that the Haudenosaunee Confederation was not a state, the Mayor of Geneva
organized a special reception for Chief Deskaheh with the assembled world leaders. This marked
the beginning of indigenous efforts to use transnational organizing and activities to support their
rights in the international arena (Anaya 2004, 57).

Despite his efforts and great passion for the rights of his nation, the international
community ignored Chief Deskaheh’s pleas for support. Determined to quash the strong Mohawk
government, the Canadian government ordered the Armed Forces to invade Haudenosaunee in
1924 and forcibly remove the traditional government. In its place the Canadian government
established and funded its own Indian Act government which, because of its dependency, could
be more easily contained. Despite this, a strong traditional element is maintained in Six Nations.
The Mohawks have remained committed to their culture and rights as evidenced by the most
recent conflict in Caledonia, a suburb community on Six Nations territory. Heated protests arose
in 2006 over traditional territories that were illegally confiscated by the Canadian government,

5 For more information see: www.mcmaster.ca/indigenous/SixNationsLandClaim.htm
sold to developers and then scheduled to be turned into a profitable non-aboriginal sub-division development project.

Chief Deskaheh’s idea to use the international arena for indigenous issues was perhaps before its time. Indigenous rights issues could not have been expected to enjoy much salience in a world where human rights had yet to achieve normative status. The universal acceptance of the idea of human rights did not begin to gel until after the Second World War. Triggered by international horror over acts committed by Nazi Germany against more than six million Jews, Poles, Roma, and others, the international community recognized human rights as necessary for both human dignity and world peace (Forsythe 2006, 3). To meet this objective, governments from all corners of the world committed themselves to establishing the United Nations. Cognizant of the failure of the League of Nations, states wanted to ensure that never again would anyone be unjustly denied life, freedom, food, shelter, and nationality. Human rights standards were recognized as necessary to protect citizens from abuses by their governments, even though this clearly violated the concept sovereignty.

Concern for human rights remains a fundamental pillar of the UN and is highlighted throughout its structure. The Preamble of the UN Charter (1945) includes a pledge “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.” and the first special commission established by founding states was given the mandate to focus specifically on human rights. The UN Commission on Human Rights (UNCHR) was assigned the task of elaborating the first international document on the fundamental rights and freedoms as proclaimed in the Charter. The Universal Declaration of Human Rights (UDHR) was adopted by the UN General Assembly in 1948 (Thornberry, 90-100).

The influence of the UDHR has been substantial. Its principles have been incorporated into the constitutions of nearly all 192 UN member nations. And although a declaration is itself not legally binding, the Universal Declaration has achieved the status of customary international law
because it is regarded "as a common standard of achievement for all people and all nations" (Anaya 2004, 44). Once the idea of human rights became internationally salient, it then became possible to extend the logic to include the specific rights of indigenous peoples. Their historical abuses and mistreatment had been recorded by more progressive forces throughout the colonial period and their impoverishment and marginalization only became more apparent with time. It was, in fact, concern over the use of indigenous peoples as slave labour in the Americas that began the first international discussion on the need for protection of indigenous rights at the International Labour Organization (ILO) in Geneva. Almost 33 years after the departure of Deskaheh, in 1957 the ILO passed Convention 107 (C107) on the rights of indigenous and tribal populations, raising the international profile of indigenous peoples around the world using an anti-slavery discourse that generated a great deal of empathy and support from the so-called “developed” world. The indigenous response, however, was muted. Due to the tripartite structure of the ILO (labour, states, and business) the drafting process for the new convention did not include any real indigenous representation. Instead, indigenous people were relegated to the sidelines while sympathetic labour groups lobbied on their behalf (Anaya 2004, 44-5). Unfortunately, there were significant problems. The language of C107 was undeniably paternalistic in tone, advocating protection for the world’s indigenous peoples until such a time that they could be assimilated into the general population.

For reasons obvious in hindsight, indigenous peoples rejected C107. They were not interested in integration and countered almost immediately that they had the right to maintain their own distinct identity and cultures. Yet the end result of this paternalism was positive. Indigenous rejection of C107 led to increasing debate within indigenous circles as to how better to represent their own interests. It was clear they could not rely on the good intentions of others to advocate on their behalf. The dialogue on C107 became the catalyst for strong indigenous involvement and participation in the international arena. Indigenous leaders and intellectuals began to meet, talk and strategize about how best to respond (ibid.).
Growing opposition to C107 throughout the 1970s and early 1980s led to its eventual replacement by the ILO Convention on Indigenous and Tribal Peoples (C169) in 1989. C169 attempted to address some of the fundamental weaknesses in its predecessor. It was designed with greater, if still inadequate indigenous participation. The result was a historic document that clearly outlined specifically indigenous rights to language, culture and property. Still, lack of direct indigenous participation meant that true indigenous ambitions were constrained by national political interests. The document remained silent on fundamental issues like autonomy and self-governance. Still, it would be wrong to underestimate its overall importance. C169 was signed by numerous Latin American countries and has been used as a model for constitutional reform by a number of Latin American nations. Still its acceptance has been less than ideal. While many indigenous leaders rejected the document as weak, citing, for example, its in-text exception to the usage of the word “peoples” in the title, C169 never received the same level of state support internationally as its paternalistic predecessor.

Regardless of its limitations, the ILO efforts initiated an unprecedented wave of international indigenous organizing and lobbying. The first international conference on indigenous issues took place in 1971, and was sponsored by the World Council of Churches. The “Barbados Conference” was a meeting of anthropologists and advocates, including prominent NGOs such as Cultural Survival, Oxfam and the Inter-American Foundation. This brought interested people together from all over the world and led to the establishment of the first international networks to preserve, protect, and promote indigenous societies and their rights (Brysk 2000, 64). Through such activities, international indigenous elites began to coalesce, sharing knowledge and experiences, and devising strategies to protect and promote their rights.

Also in 1971, the United Nations Economic and Social Council authorized the Sub-Commission on Prevention of Discrimination and Protection of Minorities to undertake a study on

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6 Recognizing indigenous peoples as “peoples” under international law would afford them a certain level of important legal rights, including the rights of self determination and self-government.
the “Problem of Discrimination against Indigenous Populations.” Named for its author, José Martínez-Cobo, the study compiled extensive data on indigenous peoples and issues worldwide. It was released as a series of reports from 1981 to 1983, and quickly became “…a standard reference for the discussion of the subject of indigenous peoples within the UN system” (Anaya 2004, 62). Of particular significance to the international indigenous movement, Martínez-Cobo recommended that the UN Human Rights Commission and the Economic and Social Council (ECOSOC) establish a special Working Group that would focus on indigenous issues at the level of the UN. Since its inception in 1982, the Working Group, made up of an international team of human rights experts, was involved in the preparation of the UN Draft Declaration of Indigenous Peoples Rights. On a more informal level, it has become an important international level platform for the exchange of information and ideas among indigenous peoples, governments, and NGOs (ibid., 63).

An important achievement of the Working Group was the establishment of the Permanent Forum on Indigenous Issues. It held its first formal meeting in May 2002. Comprised of sixteen independent experts, eight nominated by governments and another eight nominated by indigenous organizations, the Permanent Forum holds annual two week sessions, usually in New York. Their mandate includes providing expert advice and recommendations on indigenous issues to the UN and its members, raising awareness and promoting indigenous issues within the UN system, as well as the preparation and communication of related information. Initial discussions were that the Forum would provide some kind of oversight for the Declaration on Indigenous Rights, which took over twenty years of drafting efforts. Now the Declaration has been passed by the General Assembly and signed by 144 nations, involved parties are attempting to revive its oversight role.

External political factors helped strengthen international indigenous organization in the region as well. Particularly in Central and South America, the 1980s saw a widespread political transition from authoritarianism to electoral democracies. This process of political opening increased both the political and public space available for the discussion of indigenous issues and
indigenous politics. Democratic reforms helped undermine some of the corporatist state structures and brought indigenous peoples into state politics for the first time through voting. This political opening led to an era of constitution writing within the Americas. Many countries, including Ecuador and Nicaragua, incorporated explicit recognition of indigenous peoples and their rights in their constitutions (Yashar 1999).

Another key event in the evolution of the international indigenous movement was the 500 Years of Resistance Campaign. The campaign united indigenous groups from throughout the Americas and led to continent wide organizing of protests and other activities. Columbus “discovered” the Americas in 1492 and 500 years later American governments were planning to celebrate the Columbus Quincentenary. To their surprise, indigenous groups across the Americas used the occasion to highlight their version of Columbus’s “discovery” of the “New World” as the beginning of slaughter, genocide, assimilation and extinguishment for indigenous peoples (Brysk 2000, 101-2). This gave widely disparate indigenous communities the unprecedented opportunity to network, strategize, and plan together at the macro level.

In 1992, the Nobel Peace Prize was awarded to a Mayan woman from Guatemala, Rigoberta Menchú Tum. This brought a new level of international recognition for indigenous leadership in general and especially for the cause of the Mayan in Guatemala who had been a target of state sponsored genocide throughout the 80s. Both Menchú Tum’s parents had been killed during the Guatemalan civil war. She had been exiled after narrating an oral history, a testimony, chronicling her experiences and that of the Mayan people with the civil war. Only after she received the prize, and the international attention that went with it, was she able to return to Guatemala safely and work to improve life for the Mayas. Menchú Tum went on to become a special ambassador for the UN International Year of Indigenous Peoples and is seen around the world as a spokesperson for indigenous rights, although some, including David Stoll in Rigoberta
Menchú and the Story of All Poor Guatemalans (1999) have tried to discredit her distinctly Mayan approach to story-telling.7

One year later, the United Nations declared 1993 the International Year of Indigenous People and subsequently announced the International Decade of Indigenous People (1995-2005). Two main objectives of the decade were to have the draft declaration adopted by the General Assembly, and the creation of a permanent indigenous forum. Work on the draft declaration continued past 2005. When the first International Decade failed to produce the final UN Declaration for approval by the General Assembly, a second International Decade for Indigenous Peoples was announced to continue work. And, as already noted, the UN Declaration on the Rights of Indigenous Peoples was passed by the General Assembly in September of 2007.

This increased international organization of indigenous groups and subsequently the increased attention to indigenous issues they have been able to generate, has been accompanied by growing support for the legal formalization of indigenous rights. Along with the UN, the Organization of American States (OAS) has also become active in drafting a new international instrument for the protection, recognition and support of indigenous rights. The OAS established a Working Group in 1999, made up of member state representatives to work in conjunction with the Indigenous Caucus on the drafting of the American Declaration on the Rights of Indigenous Peoples. Revisions continue, although Canada officially withdrew from the process in 2008, citing its similarity to the UN version (Turtle Island News, 30/04/2008). Similar to the UDHR, both the UN and OAS documents have already been recognized as customary international law (Anaya 52-3). The Inter-American Court of Human Rights referred to the Draft UN Declaration on the Rights of Indigenous Peoples as representing emerging international standards and norms for indigenous rights back in 2001.

7 There has been a great deal of controversy surrounding the publication of her life history “I, Rigoberta”. Some critics have pointed to factual errors in the text, while Rigoberta Menchu has responded that her story is the story of all Mayan people and that she has incorporated a broader perspective of the Mayan oppression in Guatemala.
In addition to these specific developments, the rise of neoliberalism and structural adjustment in the 1980s and 1990s increased poverty and inequality in the Americas, especially for indigenous peoples. Governments cut spending on all types of programs and services, especially those pertaining to poor and/or indigenous populations (Brysk 2000, 150). Structural adjustment programs generally include land reform measures that aim to increase the competitiveness of domestic agriculture by privatizing communal indigenous land holdings for sale to capitalist producers. Such policies have been included in the adjustment programs of Nicaragua, Brazil, Bolivia, Mexico, Peru and Ecuador; all countries with a significant indigenous population (ibid.). Given the importance of communal lands to indigenous cultures, indigenous groups have mobilized against these policy changes in particular. This has strengthened regional, national and international organizing to promote indigenous rights.

One example of a strong indigenous response to neoliberal development can be seen in the Ecuadorian Amazon. The exigencies of debt repayment and subsequent imposition of World Bank Country Assistance Strategies led to the intensification of national oil concessions. Concurrently, neoliberal spending cuts seriously limited capacity for environmental protection and remediation. As a result, indigenous communities suffered not only from physical encroachment of their territories, but also poorly monitored environmental damage and contamination by multinational oil and mining companies. The highly publicized Chevron Texaco case was about vast tracts of once pristine Huaorani territory in the upper Amazon basin that were turned into an industrial nightmare of toxic ponds, oil sludge and dead wildlife between 1964 and 1990. With the state unwilling/unable to enforce environmental regulations, the community was forced to turn to the international arena to try and pressure the company to clean up the mess it created.8

8 For more information regarding this environmental disaster in Ecuador see the following website: chevrontexico.com. It is the product of a joint campaign by Amazon Watch and the Amazon Defense Front to support indigenous Ecuadorians in the Amazon in their legal campaign against ChevronTexaco.
Over the past decade, the Inter-American Court system has played an increasingly important role in the international struggle for indigenous rights. Using the 1948 American Convention on the Rights and Duties of Man and the 1969 American Declaration of Human Rights, the Inter-American Commission for Human Rights (IACHR) has taken up cases from a number of indigenous communities. These include Awas Tingni in Nicaragua and Sarayaku in Ecuador, determining in both that the state violated Article 21 (property rights) of the Convention, among others. This involvement has had two important effects. First, the CIDH/IACHR is hearing these cases under general human rights law. This makes an effective statement about the overall value of indigenous rights, placing them on par with human rights law in general. Further, not only is the Inter-American system hearing the cases, but they are also ruling favorably in many instances. This unprecedented support is providing indigenous communities with a hitherto unimaginable level of international legal validation for their longstanding domestic struggles.

Overall, there has been substantive progress and change in international indigenous organizing and support. As illustrated, the events of the past few decades have worked to construct a new and powerful playing field for indigenous rights. A new transnational advocacy network (TAN) for indigenous issues has evolved out of the work of the ILO, UN and OAS, assorted NGOs, activists and indigenous leaders themselves. The next step will be to mobilize this support into effective pressure for national policy change. Only here effective realization and enjoyment of these rights can reach the lived experience of indigenous communities.
Chapter 4
Entering the Black Box: Getting International Norms for Indigenous Rights on the Agenda

The Spiral Model proposes that the mechanism of change from human rights oppression to human rights internalization and compliance is the result of simultaneous pressures from above and from below. Pressure from below, from indigenous communities themselves, has been ubiquitous since colonial times, although clearly in most cases it has been insufficient to change domestic policy. Chapter Three highlighted the long and determined struggle of indigenous leaders to develop, support and maintain new pressures “above.” There have been notable successes, not the least of which has been the creation of a much anticipated international instrument in support of indigenous rights at the United Nations.

In September of 2007, the UN General Assembly passed a historic motion to adopt the Declaration of the Rights of Indigenous Peoples after more than twenty years of negotiations. With 143 votes in favor and only four against, namely Canada, Australia, New Zealand, United States, the Declaration represents a fundamental achievement of the indigenous transnational advocacy network in the international codification of norms for indigenous rights. With the exception of Colombia, which abstained, all Latin American states supported the Declaration, including Nicaragua and Ecuador, as well as other nations with indigenous rights cases before the IACHR such as Paraguay, Peru and Guatemala. Although declarations themselves are not law, they do help clarify emerging norms and shape the ideas behind “customary law”. Further, similar to both the UDHR (1948) and the American Declaration on the Rights of Man (1948) more specified conventions can be added later.

There is a rich body of scholarship detailing the history of the transnational indigenous movement and the development of capacity on the part of local indigenous communities to mobilize within that movement. Donna Lee Van Cott, Alison Brysk, Ronald Niezen and Pamela
Martin, to name a few, have all done an excellent job in exploring the dynamics of the burgeoning movement and its impact in the realm of international politics. It is clear that indigenous peoples now enjoy an unprecedented level of international attention and support. However, we have yet to evaluate whether and or how that support has translated into improvement in terms of enjoyment of rights or access to justice. There has been no systematic exploration of the actual impact of “internationalization” on the implementation of indigenous rights by states. Almost all scholarly work on the implementation of international norms has focused on more generalized human rights, such as the right to life or freedom from arbitrary detainment or arrest.\textsuperscript{9} Even then, the primary focus has been theory rather than case studies of real domestic impacts. This may be for a number of reasons, including the epistemological difficulty in determining causality in such diffuse and multivariate circumstances as state policy making. Still, just because a task is difficult, it does not mean it is not worth pursuing. As Cortell and Davis (2000, 84) have pointed out: “The necessary next step is empirical research focusing on how specific international norms have and have not become salient in several national contexts.” This will provide scholars and activists with a better understanding of what is needed to mount an effective international campaign.

This research responds directly to the challenge put forth by Cortell and Davis to uncover the role domestic variables play in the implementation of transnational norms for indigenous rights. In this case we will focus specifically on local claims against the state by indigenous communities for their rights to their traditional lands and the natural resources within them. These claims are about property rights which are essential to cultural survival and more optimistically, growth into the future. States have not responded uniformly to these claims. At one end of the spectrum is Bolivia, which under the leadership of indigenous President Evo Morales has undertaken the construction of a new constitution based on indigenous values and philosophies. At the other, countries like Guatemala are still very actively issuing natural resource concessions.

\textsuperscript{9} For examples of this work see: Moravcsik, 1995; Checkell, 1997; Keck and Sikkink, 1998; Risse and Sikkink, 1999; Cortell and Davis, 1996, 2000; Hawkins,2001

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on indigenous territories, even when this involves forced relocation. Both nations have substantial indigenous populations although the relative political power between these communities varies considerably. Are there other important factors which can explain a state’s apparent willingness or in fact, unwillingness to change policy to reflect emerging indigenous rights norms? An understanding of such factors may in fact help illuminate the mechanisms of social change.

While the Spiral Model can help illuminate cases of domestic-level norm implementation, it does not provide much information in the more common instance: implementation failure. One approach would be to assume that the model is working and that implementation is just matter of waiting for the long run. But as the British economist Lord Keynes reminded us, in the long run we are all dead. Based on the strong inter-connection between land and cultural survival, for indigenous peoples justice delayed can in fact be justice denied.

Using a comparative case study approach, this thesis explores two important cases in which international norms for indigenous rights have not yet become integrated into national policy. Utilizing key domestic variables identified in the human rights literature, the main objective is to identify and understand the reasons why norms sometimes fail to translate into state policy. As noted previously, these variables can be divided into four major categories: domestic structures, norm salience, material interests, and international influences.

4.1 Domestic structures
First, domestic structures, in terms of government, civil society and specifically indigenous organizations, will be examined to illuminate any differences between the cases and any potential relationship these might have to implementation outcomes. The domestic structural context plays an important role in the implementation of any government policy and or program, especially concerning changes to the status quo. In an era of decentralization, this is complicated by the divestiture of power from the central to the regional and local levels. This has been a key reform throughout Latin American governments as local populations are demanding greater local
accountability. Decentralization is a popular component of World Bank country assistance plans. There is a widespread belief that decentralization will lead to enhanced efficiencies, greater transparency and accountability.

Yet in practice, decentralization can also make it significantly more difficult for national governments to implement policy changes. While states may feel international pressure to conform to international norms, regional governments are less likely to be impacted, and instead focus their attention at the local political level, where they get their votes. Especially in terms of minority populations, regional governments may be more likely to cater to dominant local political interests, rather than national or international expectations, thus creating a potential barrier to international norm implementation.

Domestic structural variables include the form and quality of governance within the state. In terms of measurement, the World Bank has developed a series of indicators it recognizes as integral to good governance. The Worldwide Governance Indicators (WGI) research project began in 1996 and covers a total of 212 countries (Kaufman et al. 2008, 2). Key indicators that are used within this study include: government effectiveness (GE), control of corruption (CC), rule of law (RL), voice and accountability (VA), as well as political stability and the absence of violence (PV). The WGI indicators include several hundred different variables measuring perceptions of governance, taken from 35 separate data sources and collected by 33 different organizations worldwide. For each WGI indicator, relevant data is compiled and then weighted to produce a median figure calculated within a given margin of error. It is important to recognize that all the data collected attempts to measure perceptions of governance by a wide range of stakeholders, including households, firm survey respondents, as well as experts in the private, public and NGO
sectors (ibid., 4). Taken together these measurements provide a quick, uniform and relatively reliable assessment of the overall effectiveness state structures for each case study.  

The effectiveness of indigenous governance is also an important factor, not only in terms of managing community interests, but also in terms of the community’s ability to negotiate consistently with regional and national non-indigenous governments. Although structures may vary considerably from the national model, indigenous governance exists at the local, regional and national levels. Indigenous governance faces the double challenge of ensuring legitimacy in the eyes of its subjects (traditional and nontraditional) while at the same time establishing and maintaining effective relationships with the state. Local indigenous governments also benefit from establishing regional and national organizations that often must be representative of multiple indigenous cultures, languages and other interests. Regionally, the ability of neighboring indigenous governments to work together can certainly improve the outcome of negotiations for land, territory and ultimately power. Communities that can develop strong alliances, and support each other’s claims have a better chance of extracting concessions from the state than those with little local support, or worse, fight at cross purposes. Governments can use this local conflict as a ready excuse for inaction.

Indigenous governance issues are complicated, and in many cases are far from resolved. Colonization, for example, has impacted different communities and individuals in those communities quite differently. Some indigenous communities have adapted to colonization by assuming its structures and even its goals, including capitalist economic development. Others remain highly traditional and committed to historic livelihoods and worldviews. In many indigenous communities both traditional and modern forms of government co-exist, if not always harmoniously. Power struggles and internal conflicts are evident in community politics. These conflicting forms of government likely hold conflicting ideas about property rights and natural

resource development as well. Traditional elder councils typically are more committed to preserving the environment and traditional livelihoods while younger community members, often educated in Spanish, are more inclined to pursue and support western style capitalist development. In some cases, clear leadership at the community level is not evident, or it is divided. Indigenous communities can be suspicious of hierarchical structures and may prefer to select a broad “leadership” team, made of up to ten or more individuals to represent community interests. In such a case, consensus and decision making can be very difficult.

Another problem has been the historical strategy of divide and conquer by both governments and the private sector which have made regional alliances amongst neighboring indigenous communities difficult. In the Amazon, for example, there are communities that have had a long history of cooperating with capitalist development and support transnational efforts to invest in local oil and mining ventures in return for infrastructure development, such as schools, roads and medical facilities, and job creation. This creates direct and often violent conflict with other communities that oppose such development in or around their traditional territories. Measuring the comparative effectiveness of indigenous governance represents a serious practical and methodological challenge. Since quantitative data is unavailable, a general qualitative assessment will be provided that examines basic factors such as the existence of apparent leadership structures, the existence and apparent effectiveness of local, regional and national indigenous governance structures, and the ability of indigenous leaders at all levels to get their issues onto the national political agenda.

The quality and level of national civil society organization is another important component of the domestic structural context. For a democracy to function effectively, citizens must have the means to organize and challenge government policy decisions without fear of reprisal. Strong civil society movements developed out of the third wave of democratization that took place across Latin America. Historically, oppressive military dictatorships throughout the region sought to undermine and circumscribe the public spaces available for citizens to openly discuss and
challenge domestic politics. Civil society groups are responding to a broad range of domestic and international issues, including the environment, free trade, women’s rights and government accountability/anti-corruption. Measuring civil society and its effectiveness represents an important methodological challenge. The World Alliance for Citizen Participation compiles a comprehensive annual Civil Society Index (CSI); however its sampling of world nations includes Ecuador, but does not include Nicaragua. Using the key assessment factors identified in the CSI, such as social participation and commitment, infrastructure and organizational levels, representation, trust and legitimacy, and relationship with the government, a general qualitative assessment of Nicaraguan civil society will be established using existing studies.

The level of activity within civil society on indigenous rights issues in particular affects the ability of the indigenous community to summon support both from above and below. It is possible to have an active, well funded and vocal civil society that simply has not paid much attention to indigenous issues. Likewise, it is possible that even where an indigenous civil society does exist, that there are no mechanisms which integrate its issue into the broader coalitions of civil society in general. For civil society to advocate effectively for international indigenous rights it needs to include a strong indigenous component and as well the desire or interest to incorporate indigenous demands into the mainstream civil society agenda. While there is no known technical measurement of civil society’s receptivity to indigenous issues, a general assessment can be made in terms of civil societies’ willingness to advocate for indigenous rights, and their overall support of indigenous causes when called upon.

In terms of domestic structures, important questions that need to be examined include: Do highly differentiated local, regional, national and international indigenous political organizations and NGOs help or hinder the ability to generate consensus and present a united front for specific policy demands? Are local civil society groups for indigenous rights able to effectively tap into transnational advocacy networks and/or transnational social movements? In terms of governance, key questions include: Are government structures effective enough to generate real policy
changes? Do states have enough centralized authority to implement international rulings or is the process contingent on the agreement of decentralized regional authorities? Does corruption play a role in domestic processes? Are minority rights issues (such as indigenous rights cases) able to generate enough interest and support within the state to garner political action?

4.2 Norm salience

Norm salience refers to the overall compatibility of a specific norm with general domestic values or beliefs. When international norms fit well with domestic culture, states are most likely to comply (Hawkins 2001). Cortell and Davis (2000, 69) add: “salient norms give rise to feelings of obligation by social actors and, when violated, engender regret or a feeling that the deviation or violation requires justification.” It seems fairly straightforward that the more that an international norm conforms to domestic values and beliefs, the more likely that it will be integrated successfully into domestic policy.

Particularly in the Americas, indigenous peoples have a long history of political and social exclusion. In the 20th century, mestizo nationalists have sought to establish indigenousness as a historical concept, rather than a contemporary social or political reality. As such the benefits of statehood and citizenship have been routinely denied to those who continue to identify themselves as indigenous, rather than conform to the national identity, i.e. Ecuadorian or Nicaraguan. In such circumstances, expected norm resonance would be minimal. Further, in the context of deep social divisions based on class, there have been few, if any accommodations for special rights or privileges associated with ethnicity. This is clear in the case of Nicaragua, where the revolutionary movement of the Sandinistas failed to incorporate or even understand indigenous aspirations.

To realize the full potential of pressure “from below” one key challenge for domestic indigenous organizations is to work at constructing and deepening norm salience in domestic society. As a minority population, it is important that indigenous groups develop strong ties and
loyalties within broader based social movements. In terms of measuring this salience, Cortell and Davis (2000) have highlighted a threefold measurement of any given norm through the investigation of changes in national discourse, state institutions, and finally state policies. This, however, assumes a close relationship between the state and its citizens which may or may not reflect the exclusionary democracies that plague much of the developing world. In the Cortell and Davis framework, sure signs of domestic salience would include the election of pro-indigenous political parties and representatives (i.e. supportive elites), active participation by the state in the ongoing negotiations for the draft indigenous rights documents within the international arena, as well as changing national constitutions and other forms of domestic policy to support indigenous peoples’ rights. The willingness of national social movements to include indigenous leaders and organizations would also be indicative of salience at a more grassroots level.

4.3 Material constraints

Given the pervasive and well documented reality of neoliberal reforms in Latin America and the effect this has had on democracy and governability in the region, the role of both international and domestic financial pressures must be examined to determine the overall ability of governments to finance implementation of international norms. It must be noted that both Ecuador and Nicaragua are burdened by high levels of external debt and have been facing immense pressure from the World Bank to maintain strict structural adjustment programs. This constrains their ability to implement policy of all sorts, including protection of indigenous rights. In both cases adjustment measures have included decentralization, privatization of public assets, promotion of foreign investment and increased rates of natural resource exploitation. Many argue this neoliberalism has increased pressure on indigenous communities throughout the world by expanding the capitalist frontier. While neoliberal policies have included language rights and multiculturalism for indigenous citizens, property rights are hardly forthcoming (Coates 2004, 203-229; Yashar 1999, 2005, 285-86).
In cases involving valuable natural resources, states would be expected to hesitate on the issue of strengthening indigenous property rights. Latin American states in particular have a long neo-colonial history of viewing natural resources as state patrimony. Wars of independence were fought to assure state sovereignty over land and wealth, notwithstanding of course, any indigenous claims. As already noted, the first real case of state recognition of indigenous rights to property within the Inter-American Human Rights system involved desert land in Paraguay that was relatively cheap to purchase and contained no known minerals or other resources.\textsuperscript{11}

Given these facts, it would be fair to assume that states would be more willing to recognize international norms for indigenous rights to property when in fact the cost of doing so is relatively cheap. In Ecuador, the question of land rights in Sarayaku involves millions of dollars of revenues for oil reserves. The state, which holds the legal subsoil rights, sees itself as the rightful owner of the resource in the name of all Ecuadorians. Given the high dependency of the national budget on oil revenues, any change in policy towards the indigenous inhabitants of the oil rich Oriente region and the rights they hold would be very costly.

The situation in Nicaragua is somewhat different. While facing greater debt and budget restrictions than Ecuador, implementation of the CIDH decision on the Caribbean Coast is much cheaper. In fact, there are international financial pressures on the state for recognition and demarcation of indigenous lands by the World Bank. Due to a range of historical factors, including revolution and natural disasters, Nicaragua is one of the most indebted countries in the Americas. It recently qualified for a significant debt bail-out program by the international community. As part of this, the World Bank became involved in the titling and registration of property throughout the country. One component of this program specifically targeted the indigenous territories of the Caribbean Coast. The Bank provides multi-year funding for the government program responsible for formal titling of properties in Nicaragua (PRODEP). PRODEP, in turn finances the Secretariat for the Caribbean Coast (SEPCA) which on behalf of

\textsuperscript{11} Enxet -Lamenxay and Kayleyphapopyet (Riachito) v Paraguay (1999).
the national government, negotiates with indigenous communities and the regional governments for land demarcation and titling in the region. SEPCA is accountable both to the PRODEP and to the World Bank.

4.4 International influences

There are many sources of international pressure that can encourage a state to comply with international norms. Transnational advocacy networks (TANS), for example, can affect state compliance in a number of ways. First they can increase moral pressure by working actively within its membership to trigger what has been termed in the literature as a “mobilization of shame.” TANS utilize a state’s interest in its international reputation as motivation for behavioural change. International awareness campaigns by Amnesty International, for example, can and have been effective means to change state behaviour. Most of the time, most states are interested in being seen as part of the so-called “society of states” based on western liberal values which include notions of democracy and human rights.

Secondly, individual NGOs, through their budgets, can place additional pressures on states to change their behaviour, especially where the state is economically weak and dependent on NGO contributions. Especially within the climate of neoliberalism which encourages dramatic reductions to government spending, NGOs become an alternative source of much needed programs and services. For example, Nicaragua, as one of the poorest nations in the hemisphere, relies on NGOs to finance nearly half of the state budget. By threatening to withhold or withdraw funds, large organizations like the World Wildlife Fund and OXFAM International have considerable influence on the Nicaraguan government and its policy decisions.

International financial organizations like the World Bank and the Inter-American Development Bank can also have significant influence on state politics for the implementation of international indigenous rights norms. Both organizations are heavily involved in development projects throughout Latin America and both have developed and mandated certain standards and
criteria for loans and projects that involve indigenous interests either directly or indirectly. Failure to live up to these standards can mean that project funds are either suspended or withdrawn. The IADB “Operational Policy on Indigenous Peoples and Strategy for Indigenous Development” and the WB “Operational Policy on Indigenous Peoples” can both be used to ensure that domestic level development projects within borrower states conform to international norms for indigenous rights, including respect for traditional indigenous territories and resources. Depending on the willingness of the Banks to evaluate, monitor and enforce the policy they could play instrumental role in ensuring norm compliance. For example, the World Bank requires borrowing states to engage in “free, prior and informed consultations” with affected indigenous communities during the lifecycle of any funded project. This language, found in article 2 of OP 4.10, is similar to Article 32 (2) of the UN International Declaration on the Rights of Indigenous Peoples.

Although clearly the Declaration’s inclusion of the requirement for “informed consent” explicitly is much stronger than the Bank’s “informed consultations” both documents require governments at least engage with indigenous rights holders and include them in the decision making process. Ultimately, however, the WB policy suggests that even when an indigenous community is not in favor of any given project within their territories, it may still go forward, with bank funding, as long consultations have occurred. The consultation process itself, however, should provide clear information as to the nature and extent of the project and if necessary, help mobilize professional support to develop a resistance campaign.

With respect to the idea of “international influences”, it is important not to underestimate the effect of “socializing forces” as they relate to the international society of states and the desire of states, through their leaders, to participate in and be seen favorably by the international community. It is interesting to note that two cases of norm compliance within the inter-American system, Guatemala and Paraguay, occurred while both states were in the process of recovery from severely repressive regimes. The Stroessner regime in Paraguay (1954-1989) and the Guatemalan Civil War (1962-1996) both involved significant levels of violence, repression and the systemic
undermining of human rights. In both instances, the IACHR cases for indigenous property rights provided freshly minted democracies the opportunity to distinguish themselves from their oppressive predecessors and prove to the international community that their states were ready to enter the distinctive club of civilized liberal democratic nations. Because of this political timing, the indigenous communities of Los Cimientos (Guatemala) and the Enxet-Lamenxay (Paraguay) were able to take advantage of the desire of political elites to re-establish their nation’s international reputation.

Guatemala’s “friendly settlement” with “Los Cimientos” took place in 2001, the same year that the IACHR issued its “Fifth Report on the Situation of Human Rights in Guatemala,” which included a chapter specifically on the rights of indigenous people. Its bloody civil war against its own largely indigenous population received much global attention, especially after the award of the Nobel Peace prize to Rigoberta Menchú in 1992. The state’s counterinsurgency policy included much publicized massacres at indigenous community of Plan de Sánchez and the mestizo community of Dos Erres. The international community was horrified as entire communities were systematically razed, and their population brutally executed. Politically, Guatemala became a pariah state. This affected its ability to trade and conduct regular international relations. The Peace Accord process provided the government with a much needed opportunity to rebuild its tarnished image, without which international aid and investment would be next to impossible to secure. In fact, the participation of Guatemala in the Peace Process was triggered by a special meeting of the international financial community hosted by the Inter-American Development Bank in Brussels in January 1997. After the meeting, the group pledged $1.9 billion in loans and donations to Guatemala to support implementation of the Peace Accords. Almost 60% of these funds came from the Inter-American Development Bank and the World Bank in the form of conditional loans (Ruthrauff nd).

Likewise, the quick response of Paraguay to the IACHR process appears to be related to its desire to improve its image internationally. The government issued final title for a required land
transfer to the Enxet-Lamenxay and Kayleyphapopyet communities during an on-site visit from the IACHR in July of 1999; two years after the initiation of the Friendly Settlement process. By this time, Paraguay had committed to the process of changing its longstanding reputation as an oppressive and authoritarian state. The 1987 IACHR team to Paraguay concluded:

That in the Republic of Paraguay the great majority of the rights recognized by the “American Declaration of the Rights and Duties of Man” and other instruments of the same nature not only were not respected in accordance with the international commitments assumed by that country, but that their violation had become common practice (IACHR 1987).

A follow-up report was issued by the IACHR in 1991 and in 1999 an additional site visit gave the state an opportunity to demonstrate its new commitment to human rights in its bid to be accepted as a civilized member of the international community. To this end, they were successful.

A press release by the IACHR at the time stated:

The Commission is appreciative of the existence, within Paraguayan society, of heightened awareness of and concern for human rights in the country. Thus, the Commission was pleased to note the presence of an increasingly active and participative human rights movement that expresses its opinions and, at the same time, works to promote and defend human rights and to strengthen the democratic system. In the commitment, dedication, and civic spirit of the human rights organizations, the IACHR sees an important resource for Paraguayan society as it meets the challenge of extending and consolidating the rule of law (IACHR August 1999).

There are other reasons a state might support international norms for indigenous rights. Clearly demarcating and titling both indigenous and non-indigenous territories provides essential infrastructure for real long term economic growth. As Peruvian economist Hernando de Soto has argued, an integrated formal property system is essential for the functioning of a modern market economy. Secure property rights are necessary in order to encourage foreign and domestic firms to invest in the economy. This security involves more than formal title. Property rights must be recognized and accepted as valid by all involved parties (de Soto, 153-162). In the Amazon this cannot be properly done without negotiating with its indigenous inhabitants. Ambiguous property rights will not encourage reputable oil companies to invest millions of dollars in exploration and development. Even if the state asserts sub-soil rights, surface rights are still implicated for
transportation and infrastructure development. Further, if the indigenous population is opposed to the development and does not recognize the validity of the state’s claim, they can effectively undermine the profitability of any development venture through a range of collective actions ranging from peaceful roadblocks, kidnapings, and/or a hostile take-over of drilling sites. In such cases, it is very difficult for the government to employ the military action needed to protect the site and its workers without committing further human rights violations against the indigenous protestors. Given the global capabilities and interests of the media and NGOs, an effective counter strategy is likely to cause serious damage to a state’s international image.

Yet in many cases there is an additional conflict between a state’s desire to maintain its image as a good place for international investment and its image as a protector/supporter of human rights. Historically, authoritarian regimes in Argentina and Chile were certainly committed to ensure the safety and profitability of foreign investment in spite of questionable human rights records. Most recently, states are more reluctant to appear so insensitive. Thus concern over international reputation, as both supportive of human rights and/or as a provider of safe long term investment opportunities, can play an important role in the decision of a government to conform, or not to international indigenous rights norms. Both sides of this question will be investigated with respect to the case studies.

Overall, the questions and variables raised in the literature on human rights appear valid, with some modification, in the narrower case of indigenous rights. The following table identifies the range of factors that will be explored as potential key variables in the two case studies. First, it examines the domestic structural context emphasized by Risse-Kappen, (1995) and Burgerman (2001). Secondly, it considers norm salience as defined by Cortell and Davis (2000) and echoed in Risse and Sikkink (1999). In addition, the model takes into account basic material constraints faced by the state. Finally, the overall vulnerability of a state to international pressure and the “socialization process” is considered. The following table summarizes the range of variables that will be taken into consideration.
## Table 4.1 Variables Impacting the Implementation of International Norms for Indigenous Rights

<table>
<thead>
<tr>
<th>Variables</th>
<th>Indicators</th>
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<tr>
<td><strong>Domestic Structural Context</strong></td>
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| State structures | i. Political stability  
ii. Voice and Accountability  
iii. Government effectiveness  
iv. Regulatory quality  
v. Rule of law  
vi. Control of corruption |
| Societal structure (weak vs. strong) | i. organizational levels  
ii. social participation  
iii. representation  
iv. relations with govt. |
| Structure of indigenous groups (nationally coordinated vs. regional, fragmented) | i. active organizations  
ii. national/ regional structures and mandates  
iii. accountability  
iv. overall coherence  
v. role of NGOs |
| Policy networks (consensual vs. polarized) | i. partnerships, committees etc.  
ii. indigenous participation state politics  
iii. level domestic conflict |
| **Norm Salience** | |
| Changes in government discourse (consistency) | i. News/press releases  
ii. official speeches  
iii. elite advocacy |
| Changes in national institutions, i.e. institutionalization of norms in constitution and/or domestic law | i. Constitutional changes  
ii. Changes in law  
iii. Changes in government departments of indigenous affairs |
| Participation in Indigenous Rights Negotiation Sessions, signing documents, etc. | i. participation in OAS Draft IR Declaration  
ii. signing of ILO 169  
iii. signing UN Declaration |
| **Material Constraints** | |
| Estimated cost implementation | i. Land costs  
ii. Legal/procedural costs  
iii. Other costs |
| Opportunity cost implementation | i. Lost revenues, concession fees etc. |
| **International Influences** | |
| Relationship with OAS | i. Involvement in committees, projects (human rights, indigenous issues)  
ii. Other initiatives |
| International Organizations | i. World Bank/IMF  
ii. IADB  
iii. NGOs |

Source: World Development Indicators database, April 2005
Chapter 5

Indigenous Property Rights in the Americas: Comparing Nicaragua and Ecuador

Simply stated, the objective of this thesis is to examine the impacts of both ideational and material factors on the willingness and ability of governments to generate appropriate policy responses to international court rulings in support of indigenous property rights. These factors include different aspects of the domestic political framework, including governance structures, norm salience, economics, and interest in international opinion. Ecuador and Nicaragua provide two very different domestic political frameworks from which to examine the absorption of the same norms for indigenous rights.

In particular, we will examine the domestic response to specific IACHR rulings in Sarayaku, Ecuador and Awas Tingni, Nicaragua. Several years have passed since the Inter-American Court system first issued a decision in the case of Awas Tingni (2001), and provisional measures in the case of Sarayaku (2004). Yet despite ongoing assurances, and considerable political changes, both states have fallen short in terms of implementation. As noted previously, a wide range of indigenous rights cases have been considered by international bodies, including the UN. The IACHR however, has taken a clear leadership role. The Inter-American system has seen a wide range of cases brought forth by indigenous communities for rights to their traditional lands, territories and resources across North, South and Central America.

It is not a coincidence that inadequate or inconsistent regimes for property rights in the Americas have been identified as a fundamental problem in the development literature. The World Bank, the Inter-American Development Bank, and many Latin American states, like Nicaragua and Ecuador, have been involved in long term land administration projects designed to establish a strong legal framework for property rights. This is recognized as a fundamental step

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towards modernization and development and heightens the political sensitivity surrounding property rights cases. A World Bank official writes:

In most societies there are competing demands on land, including development, agriculture, pasture, forestry, infrastructure, urbanization, biodiversity, customary rights, ecological and environmental protection. Many countries have great difficulty in balancing the needs of these competing demands. Land has been the cause of social, ethnic, cultural and religious conflict and many wars and revolutions have been fought over rights to land (Bell 2006, 3).

Given this contention, and the historically weak position of indigenous peoples within American societies, it is not surprising that the transfer of international indigenous rights norms into the domestic political arena is far from guaranteed. After all, it is only after centuries of domestic oppression that indigenous organizations and leaders have turned to international bodies for adjudication. Even substantive victories, like the case of Awas Tingni, cannot guarantee domestic regimes will be more receptive. The Spiral Model as highlighted in Chapter Two argues that this new “pressure from above” will work in concert with the “pressure from below” and push the state towards the spiral of compliance. But in fact, has this actually happened, or perhaps more modestly, is this process currently underway? Finally, if this Spiral Model does provide an accurate portrait of how policy change occurs, how then might indigenous leaders, communities and leaders advance the state towards the so-called tipping point, and ensure hitherto elusive prescriptive status and rule consistent behaviour?

As already suggested, thus far the case of failure for national implementation of international indigenous rights norm remains most probable. Norm consistent behaviour after all, even in the most widely accepted and validated cases, such as the right to be free from arbitrary arrest or detainment, remains far from consolidated. The first step is to broaden the normative appeal of indigenous rights, and then, similar to the path of human rights norms in general, work on the long laborious struggle for compliance. Given the widespread acceptance of human rights norms throughout the Americas, what are the specific barriers preventing the transference of general human rights norms to the unique case of indigenous peoples’ rights? Once it is
understood what is preventing indigenous rights norms from reaching domestic policy, better strategies can be developed to ensure justice will eventually prevail.

Given the range of property rights cases involving indigenous communities, a meaningful comparative case study requires cases similar enough in terms of context and content. While details are likely highly idiosyncratic, it is important to try find cases that have involved similar issues and generated similar court responses. In this case, the Awas Tingni and Sarayaku cases share many common characteristics. Both communities are located in remote regions that permitted the survival and even strengthening of traditional indigenous culture and livelihoods well into the twentieth century. Both cases involve natural resource claims whereas indigenous rights to their traditional lands are being challenged by states claiming national jurisdiction. Nicaragua and Ecuador issued concessions to multinational firms without any consultation or consent with the indigenous communities affected. Through careful examination of both cases, and especially the governments’ response to the IACHR, we will explore each of the variables delineated in my model and assess their overall role in the success and/or failure of the norm transference process.

5.1 The methodology of the comparative case study

Comparative case studies are often challenged in terms of intellectual rigor or objectivity. As Yin notes they have “…long been stereotyped as a weak sibling among social science methods.” Yet, despite ongoing criticisms, case studies are used extensively. While quantitative theorists may be skeptical about the quality, comparability and practicality of the case study approach, they are often used for exploratory, descriptive and explanatory purposes as well as to generate new theories or initiate changes in old one (Yin 1989, 15-18; Gummesson 1991).

Yin argues that there are certain types of research questions that best lend themselves to the case study approach. In general, social science research asks any one or more of the following questions: “who” “what” “where” “how” and “why”. “What” questions, for example, are best
answered by exploratory studies, surveys or archival based research strategies. “How” and “why” questions, on other hand, seek explanations that can provide information beyond quantitative analysis. Yin notes:

In contrast, “how” and “why” questions are more explanatory and likely to lead to the use of case studies, histories and experiments as the preferred research strategies. This is because such questions deal with operational links needing to be traced over time rather than mere frequencies or incidence (Yin 1994, 6).

In this case, we are exploring the domestic factors which affect the implementation of international norms for indigenous property rights at the level of the state. The question of “what” is not of interest, it is given; rather the investigation will focus on how and why different domestic level variables (beyond any experimental control) affect the implementation process.

Another methodological issue that arises in the conduct of case studies is the general applicability of findings from a small sample size (in this case two) to other cases. As Laurence Whitehead has pointed out, there are two standard objections from the perspective of social science, to small-n comparisons: that there is not enough data to either confirm or disprove any meaningful proposition; and that findings may be consciously or implicitly predetermined by the case selection process itself (in Garretón and Newton eds. 2001, 71).

The first problem is apparent even within traditional scientific experiments, as Yin (1994, 10) asks: How can you generalize from a single experiment? The key is to remember that the findings of a particular case study may not be applicable to another case in as much as they may be generalized to broader theoretical propositions. The goal of this research, therefore, is not to suggest, for example, that the findings of a comparative case study between Ecuador and Nicaragua are also applicable in the case of a specific state like Colombia. Rather, it is to test and assess domestic variables identified in theories on the implementation of international norms for human rights in the unique and hitherto ignored case of indigenous property rights. Our objective is to propose a general theoretical framework that can then be tested on further cases.
Secondly, in terms of the phenomena of interest here, there have been only a handful of indigenous land rights cases made before the IACHR. In total, there have been nine separate cases before the Inter-American Court: Yanomami vs. Brazil (1985), Enxet-Lamexay and Kaylephapopyet vs. Paraguay (1999) Los Cimientos vs. Guatemala (2003), Awas Tingni vs. Nicaragua (2001), Sarayaku vs. Ecuador (2003, 2005), Mayan Communities vs. Belize (2004), the Danns vs. USA (2002), Kankuamo vs. Colombia (2004), Yakye Axa Enxet vs. Paraguay (2003) and Xákmok Kásek Enxet Vs. Paraguay (2003). In addition, a tenth case, the Kelyenmagtegma Indigenous Community vs Paraguay, was declared admissible in 2007 by the IACHR, but understandably no decision has yet been rendered.

The first three cases provide us with a unique subset in that resolution was achieved through a “friendly settlement process.” Given the negotiated settlement, it would be expected that state implementation would not be as difficult as in cases in which the court had to impose a ruling. This leaves a total of six cases in which the state was not willing to engage in friendly settlement over indigenous land claims, although in one case, Awas Tingni, the process was initiated and then abandoned. Two of the remaining six, Colombia and Belize, were decided in 2004. This provides a shorter time frame to measure state response; in Ecuador, the IACHR released its first provisional measures in 2003 and Nicaragua, where the CIDH issued its ruling in 2001.

One of the arguments put forward by Laurence Whitehead (2001) regarding the validity of small-n cases studies is that regional context has an important role in terms of understanding state behaviour.

Although many social institutions – including political arrangements - may possess characteristics that induce predictable behavioural responses wherever they occur…the area studies perspective indicates that such responses cannot be fully understood without reference to the cultural contexts and traditions within which they are articulated. If shared symbolic meanings or cultural contexts make a difference to behavioural responses, then comparative explanations of behaviour may only prove adequate when bounded within appropriate cultural or regional limits (Garretón and Newman eds. 2001, 72).
With this in mind, the inclusion of the United States case might not be as informative for comparative purposes within a Latin American context, given the significant differences within each of the political, economic, social and cultural spheres. This leaves three remaining cases, Nicaragua, Ecuador and Paraguay. Of these, the cases in Nicaragua and Ecuador share many similarities in terms of content. One of the most important of these is that the cases involve significant natural resource concessions in indigenous territories. In both cases, the state issued concessions without consulting or informing the indigenous community. Secondly, both concessions were issued to powerful transnational firms, for oil in the case of Ecuador and timber in Nicaragua. This meant that there were powerful interests in competition with indigenous claims. Another interesting similarity between both cases is their regional isolation. Sarayaku, located in the interior of the Ecuadorian Amazon, and Awas Tingni, on the remote Caribbean Coast, were both relative latecomers to the experience of capitalist encroachment on local lands and livelihoods. This physical separation provided indigenous communities with greater opportunities to maintain traditional livelihoods, cultures and governance structures. These have proved useful for establishing both legitimacy and authenticity in the international arena.

The two Paraguayan cases before the court, on the other hand, involve land title that had been transferred to non-indigenous settlers around the turn of the 20th century. Besides the agricultural value of the land, no additional resources were at stake, and the lack of involvement of transnational interests has limited the ability of the communities to gain much international attention. Compared to the Nicaragua and Ecuadorian cases, relatively little has been written about the Enxet cases in Paraguay, mirroring perhaps an overall deficit in the production of scholarly information on the nation in general.

So, as Laurence Whitehead (2001) notes: “one argument for the use of paired comparisons would be that for certain issues of general interest and significance….the relevant universe may consist of only two core cases” (in Garretón and Newman eds. 2001, 74). This does not mean that the relevant sample size will not expand. As more cases for indigenous property rights are taken
to the CIDH, which is likely given the generally supportive position it has taken, there will be more opportunities to study the processes by which these ruling are converted into domestic policy.

Finally, the use of paired comparisons can be a useful tool to provide a deeper understanding of the unique processes within the selected nations. When trying to make generalizations from a larger sample size, it often becomes difficult to take into full account both the considerable idiosyncrasies between nations and to understand complex processes which may have implications at more than one obvious level. To understand the multifarious processes of norm implementation by a state requires a considerable amount of information, not only in terms of policy, but also in terms of practice, which is much more difficult to measure. What is lost in terms of breadth is gained in potential for real depth. This provides an opportunity to refine existing theories, including their prefabricated categories and predicted causal relations. This does not mean that paired comparisons should be pursued in lieu of broader comparative studies; rather they can be utilized in a complementary manner (ibid.).

Robert Yin provides the following two part technical definition of a case study:

1. A case study is an empirical inquiry that investigates a contemporary phenomenon within its real-life context, especially when the boundaries between phenomenon and context are not clearly evident.
2. The case study inquiry copes with the technically distinctive situation in which there will be many more variables of interest than data points, and as one result relies on multiple sources of evidence, with data needing to converge in a triangulating fashion, and as another result benefits from the prior development of theoretical propositions to guide data collection and analysis (Yin 1994, 13).

The legal foundations of indigenous rights are recent. There has been considerable work done over the past two decades in terms of codifying indigenous rights at the international level. The ILO 169 and the UN DRIPS are the two ratified legal document in this regard. Scholars like S. James Anaya argue that these rights have already been entrenched within customary international law. Since the 1970s indigenous peoples have been actively engaged with the United
Nations and other important international bodies concerning their rights. Even more important, because of this dialogue, there is a “certain new common ground about minimum standards that should govern behaviour towards indigenous peoples, and it is also evident that the standards are already in fact guiding behaviour” (Anaya 2004, 61). As a clear example of this, the Inter-American Court of Human Rights, in its landmark Awas Tingni decision, specified that it was following what it understood to be customary international law on the matter, as codified in ILO C169, pertaining to the right of state recognition for traditional indigenous lands. However, because of the relative newness of the phenomena in question, there are, as Yin suggests, more variables of interest than real data points. To date, there have been only a handful of cases in which the entrenchment of norms for indigenous rights is evident. There are no scholarly studies. Once decisions are made by international courts, implementation becomes a national responsibility. But in an age of decentralization, the domestic legal and political processes required to achieve implementation can be multivariate and complicated. Property rights regimes, for example, may be established through national policy; however realization of such a regime would involve regional and municipal levels of government as well.

Changing the established framework for property rights is not easy and there are numerous repercussions. Once a state decides to recognize indigenous property rights, it has to negotiate a process of change that will contravene established interests. These can include local, municipal and regional governments, the private sector, and anyone else who may have or want to lay claims to the land in question. In order to ascertain barriers to the implementation of policies to protect indigenous rights, a number of different factors or variables need to be explored, including political structures, civil society, norms salience, economic pressures and overall interest in international image. To date, there have been no other attempts to explain or analyze this phenomenon using either a generalized or a specified research methodology. Given this, a comparative case study is the most useful approach. To accomplish this, information has been collected through a number of sources, including an in-depth literature review, a series of key
stakeholder in-person, telephone and email interviews, as well as the use of aggregate statistics, data and reports provided by research institutions, NGOs, IFIs, and a series of national and international polling companies.

5.2 The Inter-American human rights regime

Based on the concerns outlined above, the basic methodological framework selected for this research is a paired comparative case study. Both the Awas Tingni and Sarayaku cases were chosen from the jurisprudence of the Inter-American human rights system. Relevant factors in both cases create a timeframe of about twenty years, from 1987 to 2007. Awas Tingni stands out in existing case law because it represents the landmark decision for indigenous property rights in international law. It is also unique because the state response has been mixed. Initially, the government of Nicaragua accepted the CIDH decision and completed the financial reparation component with some procedural delays. The state also initiated a new law for land titling in Nicaragua (Law 445) and began the process of negotiating indigenous titles, although Awas Tingni did not receive title until late 2007.

Unlike Nicaragua, Ecuador has historically adopted a less accommodating position towards Sarayaku and its demands for recognition of rights to its traditional territories. For many reasons, state rhetoric has been hostile towards indigenous rights in the region. The Sarayaku leadership, its legal advisors and community members have suffered ongoing human rights violations as well as ongoing economic and physical isolation with minimal state assistance.

When the American Convention on Human Rights was ratified in 1978, most nations in Central and South America were under dictatorships. Convention ratification was often a matter of window dressing, or appeasing the demands of the Carter administration, rather than any expression of a deep commitment to the document itself. This helps explain the fact that the General Assembly of the OAS at that time failed to adopt any type of budget to support the newly created Inter-American Court of Human Rights. Without the financing, ultimately provided by the
government of Costa Rica, the Court would have remained little more than a good idea
(Burguenthal in forward to Pasqualucci 2003).

Since then, with the exception of Cuba, all governments within the region have been
democratically elected and, with the exception of a few Commonwealth Caribbean nations,
Canada, and the United States, all have become a part of the human rights regime established
through the initial Convention. This began with the Inter-American Commission for Human
Rights (IACHR) established in 1960 to support the human rights provisions of both the OAS
Charter and the American Declaration of the Rights and Duties of Man (1948). Over time, the
mandate of the commission was strengthened. By 1970, through the Charter of Buenos Aires, the
Commission was transformed into a Charter organ whose “principal function shall be to promote
the observance and protection of human rights and to serve as a consultative organ of the
Organization in these matters.” Modeled after the UN International Covenants on Civil and
Political Rights (1966) as well as the European Convention for the Protection of Human Rights
and fundamental Freedoms (1953), the 1978 Convention on Human Rights added the Inter-
American Court of Human Rights (CIDH) to the overall regime.

The IACHR remains the principal body for investigating and monitoring the human rights
situation of the OAS membership. It receives its mandate through the OAS Charter and the
American Convention on Human Rights and it is made up of seven members who are elected by
the General Assembly as independents, rather than representatives of any particular country. With
its headquarters in Washington, DC, the IACHR meets several times a year to review and act on
ongoing investigations of its Executive Secretariat. The Commission is responsible for
monitoring, investigating and reporting on human rights situations in member nations.

Initially, the IACHR was established to observe the general human rights situation in OAS
member countries. To this end, it would conduct on-site visits and publish special country reports.

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13 OAS Charter, as amended, Arts 51, 112(1), now Arts 53, 106(1) available at
http://www.oas.org/main/english/
In order to proactively deal with human rights issues the mandate was expanded in 1965 to examine complaints and petitions involving specific allegations of human rights violations (Burguenthal 2006). The IACHR processes cases of alleged human rights violations by member states or their agents on behalf of individuals, groups, or NGOs. The Commission will also process claims that do not involve state violation directly, but rather a failure of state intervention once the violation occurred. In terms of jurisdiction, it is important to remember that the role of the Commission is to augment, not supplant domestic juridical institutions. In order to be considered admissible, petitioners must prove they have exhausted, or at least tried to exhaust all available domestic remedies, and that such proceedings failed to produce adequate redress.

Once the Commission accepts a case, fairly straightforward proceedings begin with the preparation of a brief for the implicated state based on the allegations and documents submitted by the petitioners. If it deems it necessary, the IACHR will conduct its own investigation, and may request further information from the state prior to submitting its brief. During processing, both parties can comment on each others’ positions. A site visit may be arranged as well. A formal hearing date is established once all relevant information is gathered in order to review the legal and factual arguments made by both sides. Prior to this, the IACHR will encourage the parties to try and resolve matters through a “friendly settlement” process. If both sides agree, the Commission will sit down with the parties as a mediator in order to facilitate negotiations. If this fails, or does not take place, the Commission will go for the formal hearing and prepare a final report for the state. This report will include the conclusions of the Commission and its recommendations to remedy the violation. Initially, at least, it is not made public.

It is important to note that the Commission has no formal powers to force states to comply with its decisions. It has no army, no economic power and thus no tangible means to apply pressure. The key tool it uses to ensure compliance with its decisions and recommendations is public opinion and the “mobilization of shame.” States voluntarily accept its jurisdiction and there is a general expectation that all American states are committed to the inherent value of human
rights and the mandate of the Inter-American system to protect them. While the final report is initially kept private, the Commission includes a finite time frame for compliance. If the state fails to respond, the report is then made public. The belief is that the overall salience of human rights norms in the region is sufficient to pressure offending states to comply rather than face the public embarrassment of having case details made public. This approach, however, has not always been successful.

If the threat of public shame is insufficient, the Commission may then take the case to the next level: the Inter-American Court of Human Rights (CIDH). In cases before the Court, it is the Commission that will present on behalf of the petitioners. Court rulings are considered binding, but the monitoring and reporting process for decision implementation remains limited. The CIDH is located in San José, Costa Rica and will hear cases that meet the following criteria:

i. The state involved has ratified the American Convention on Human Rights.
ii. The state has accepted the Court’s optional jurisdiction.
iii. The IACHR has completed its initial investigation.
iv. The case was referred to the Court either by the involved state or by the Commission within three months of the release of the Commission’s report (Human Rights Learning Center ND).

CIDH hearings are usually public, unless there is some kind of security threat to one or more of the parties involved. Proceedings are both written and oral, and consultants may provide counsel on the issues before the court. Unlike the IACHR, the judgment of the CIDH is published. The Court can and does order a state to take specific measures to rectify rights violations and will include awards for both actual damages and litigation costs as required, although there has been some concern that these are insufficient.

One of the main achievements of the Inter-American human rights regime has been application of its constituent norms into the constitutions of its member states. This has been invaluable both in terms of building general awareness for human rights within the region, and developing a working relationship with member states to promote voluntary compliance. It is
positive to note that in the case of indigenous rights the Inter-American system has become an undisputed world leader.

### 5.3 Indigenous rights in the Inter-American system

The Inter-American Human Rights system was not designed with the intention of promoting or defending indigenous rights per se; and cases involving indigenous petitioners remain a minority of total cases. Importantly, neither the IACHR nor the CIDH has specific legal frameworks for indigenous rights. Nonetheless both have taken a strong lead role in the defense of indigenous peoples’ rights in international law. They do so by applying the American Declaration on the Rights of Man (1948) and the American Convention on Human Rights (1968) to the specific case of indigenous rights. Using this human rights framework, the Inter-American regime has been involved in indigenous rights cases for more than 35 years.

The first indigenous rights case heard was Case 1690 in 1972 involving the Guahibos Community versus the state of Colombia. The IACHR ruled that Colombia had a duty to defend the lands and basic human rights of the indigenous Guahibo people against persecution and attacks from an “irregular” Department of Security and Armed Forces. As a relatively tiny minority population with little political power, Guahibo interests were ignored by the state. Only through its appeal to the international community was the community able to gain the support and attention needed to secure their own personal safety. Since then, the IACHR has taken an active interest in promoting and protecting indigenous rights throughout the Americas.

The first case specific to indigenous peoples’ property rights before the IACHR was that of the Yanomami community in Brazil. In 1985 the Commission recommended that the government of Brazil demarcate nine million hectares of the Amazon Rainforest as the Yanomami Park in order to protect “the life, liberty and security” of the Yanomami people (article 1), as well as their “right to residence and movement” (article 8) and the “right to the preservation of health and to wellbeing” (article 11) as contained in the American Declaration on the Rights of Man.
The Yanomami tribe had been threatened by Brazilian gold miners who shot at them, destroyed their villages and exposed them to new diseases as they sought claim to the gold within the traditional indigenous territories. At that time the IACHR found that indigenous peoples in Brazil deserved special protection and to ensure this, they would require secure rights to their traditional territories to adequately protect them from outside encroachment. With the support of the court, the government of Brazil agreed to establish Yanomami Park in 1992. The miners were expelled and the state assured the court that it would legally recognize indigenous land rights within the national park. While the creation of a national park did not give the Yanomami the same level of rights to their traditional lands as direct communal title, it did provide some protection against non-indigenous encroachment.

In 1999, the IACHR was involved in another indigenous property rights case and this time was able to facilitate the transfer of legal communal property title to indigenous communities. In a case involving Paraguay, the “friendly settlement” process was used to resolve an outstanding land claim between the Paraguayan state and the Enxet-Lamenxay and Kayleyphapopyet-Riachito communities. Through the process, Paraguay agreed to buy back 21,884 hectares of illegally expropriated indigenous lands and return them to the communities. In addition, the government agreed to pay relocation costs for the community and to provide some basic social services and foodstuffs to help with the resettlement.

In 2003 the IACHR facilitated another “friendly settlement” in a property rights case in post civil war Guatemala. The Mayan indigenous community of Los Cimientos (petition 11.197) had been forcibly removed during the war and ongoing tensions with the new residents of the township made re-integration impossible once the conflict was resolved. The IACHR process allowed Guatemala to redress the situation by allocating an alternative site for the original community members. While there has been some controversy over the quality of the new community lands, and the provision of adequate support services, the government of Guatemala
was commended for its cooperation with the IACHR in negotiating appropriate reparations, and ultimately the community was relocated.

While Brazil, Paraguay and Guatemala were basically amenable to the involvement of the IACHR in indigenous property rights cases, other states in the Americas have not been as agreeable. For example, Nicaragua initially agreed to participate in a “friendly settlement” process over its land demarcation dispute with Awas Tingni and then withdrew from the process. When the case was forwarded to the CIDH in 2001, the state vehemently argued that the case should be declared inadmissible on the grounds that all domestic mechanisms had not yet been exhausted. Failing this dismissal, the government proceeded to argue Awas Tingni did not have any ancestral rights to the property in question because they were only recent occupants. Finally, the state argued that the community’s claim was far too grandiose. The land it was claiming was above and beyond what it actually used and in fact encroached on the territorial claims of adjacent communities and non-indigenous neighbors. Although the Court did not comment on the validity of the size of the Awas Tingni claim, it did confirm the community’s ancestral rights and ordered the state to demarcate and title their territories. The government of Nicaragua delayed transferring land title to Awas Tingni until late 2008, although the ordered reparatory payments were made in full by the end of 2003.

In the case of Sarayaku, the state has always been wary of the IACHR process. Similar to Nicaragua, Ecuador tried to get the case thrown out by arguing for dismissal on the grounds that domestic mechanisms had not been exhausted. Unlike Awas Tingni, Sarayaku does hold a formal communal property title; however, as is the general case in Ecuador, the state maintains subsoil rights. Based on these rights, the state auctioned off concessions for oil exploration and development on Sarayaku territory without their prior knowledge or consent. Further, oil companies in the region have managed an effective divide and conquer strategy amongst indigenous groups in the Amazon. With the support of both private and public armed guards the companies have threatened the safety and well-being of Sarayaku community members as well as
impeded their ability to maintain traditional livelihoods. Despite the issuance of provisional measures for protection by both the Commission (2003) and the Court (2004), compliance remains outstanding.

Despite favorable rulings by the Inter-American court, other cases that have failed the test of implementation thus far include the case of Mayan communities vs. Belize (2004), the Dann Case in the USA (2002) Kankuamo vs. Colombia (2004) and two additional Enxet communities in Paraguay (2003). The IACHR ruled in 2004 that the property rights of the Mayan Indigenous Communities of Belize were violated by state issued oil and logging concessions on traditional Mayan territories without consultations or informed consent (Belize 12.053 Merits). The state was ordered to remediate environmental damages from said activities and to formally demarcate title and protect indigenous lands from and further damage or encroachment. To date, the government of Belize has not implemented the ruling (Hadjioannou 2006).

In the case of Mary and Carrie Dann in the United States (2002), the IACHR again found in favor of the indigenous petitioners. In this case, Mary and Carrie Dann, members of the Western Shoshone tribe, had tracts of their traditional lands confiscated without consultation or compensation by the American government and handed over for development to mining companies. The American government argued the case was not a human rights issue at all and instead contended that “the Danms’ title to lands at issue had been extinguished by lengthy litigation in the United State’s Courts, including the U.S. Supreme Court.” (IACHR Report 75/02). The government ignored the IACHR decision, forcing the Western Shoshone to continue their international appeal for justice by taking their case to the United Nations Committee for the Elimination of Racial Discrimination (CERD). The CERD also found in favor of the Shoshone and issued an “Early Warning and Urgent Action Procedure” against the US in support of Western Shoshone property rights in March of 2006, requesting that the state provide a progress report on implementation by July 15, 2006. The state has not responded.
For more than forty years Northern Colombia has been wrenched by the violent conflict between the left wing Revolutionary Armed Forces of Colombia (FARC) and the right wing paramilitaries, the United Self-Defense Forces of Colombia (AUC). Despite periodic attempts at a peace process, fighting continues and by virtue of geography and other factors, indigenous Colombians have found themselves in the middle. Guerrillas on both sides attack, threaten, and exploit indigenous communities while unethical land owners in the region have found ways to utilize the conflict and lawlessness to assert rights to territories hitherto controlled by Colombia’s indigenous communities. Since 1990, hundreds of Kankuamo Indians have been murdered and over 1500 forcibly displaced in a plan by local land owners to quell indigenous resistance to a dam project in their traditional territories. In 2004 alone over 50 members and leaders of Kankuamo community were murdered by paramilitary forces, often in front of their families and other community members who are threatened with similar treatment if they do not do as they are told.

In July 2004 the Inter-American Commission heard the case of the Kankuamo indigenous community and requested that Colombia immediately adopt special measures to protect the community. Neither local police nor the military had showed much interest in protecting the rights of the community in this case. The IACHR ordered authorities in Colombia to adopt without delay “the measures necessary to protect the life and personal integrity of all members of the Kankuamo indigenous community (Vieira 2004). To date, government response has been weak as Kankuamo leaders remain subject to violent attacks and assassinations (Human Rights Watch World Report 2005). The Commission took the case forward to the Inter-American Court of Human Rights (CIDH). In December 2006, the CIDH agreed with the IACHR and issued its own medidas provisionales, ordering the state of Colombia to adopt the necessary measures to protect the lives and personal integrity of all Kankuamo community members. Colombia was told to appear before the court on January 26, 2007 and report on the implementation progress.
Although one indigenous rights NGO reported that the killings dropped significantly after the ruling, they did not end (IACHR 2007; Galdu Resource Center).

Finally, the successful outcome of the initial case of Enxet-Lamenxay and Kayleyphapopyet-Riachito in Paraguay encouraged the additional Enxet communities of Xakmok Kasek (2003) and Sawhoyamaxa (2003) to put together similar land claims before the IACHR. Following the precedent of the earlier case a “friendly settlement” process was initiated in both cases and then later rejected by the indigenous petitioners for lack of progress. The IACHR ruled that the Paraguayan state had violated the property rights of both communities, and ordered the return of the traditional indigenous territories to their rightful owners. Yet, to date, the government remains unwilling/unable to follow the precedent set earlier. While the government initially drafted legislation to take to Congress regarding expropriation, in the end it chose not to go forward with the process, citing opposing interests.

Legal scholar, and now Special Rapporteur on Indigenous Issues, James Anaya noted in an interview that the Inter-American Court of Human Rights is a decent forum for indigenous rights cases, however there is still much room for improvement. The processing of cases still needs improvement, especially regarding procedural matters. Specifically he is referring to the Awas Tingni case where the Court was unable to adequately resolve the question of damages. On the positive side, the Inter-American system, in conjunction with the UN and ILO are clearly generating new international norms for indigenous rights (Anaya 2006).

In total, the IACHR has heard ten cases referring specifically to indigenous property rights. Of these, three clear cases (30%) resulted in of immediate norm compliance: the Yanomami case in Brazil, the Los Cimientos case in Guatemala and the Enxet Lamenxay case in Paraguay. In the case of Nicaragua, the state began with partial compliance. The most important aspect of the ruling, the titling of lands, took several years to achieve. In the remainder of cases (60%) for whatever reason, the state has failed to respond. Risse and Sikkink’s Spiral Model can help explain cases of norm implementation in human rights cases, but the question here is how to
explain cases where indigenous human rights norms fail to trigger meaningful change in domestic policy.

The case of the Awas Tingni was chosen because of its unique status in the jurisprudence of the Inter-American regime. On the one hand, Nicaragua has complied with the CIDH ruling for financial reparations, confirming that the government does take the Court’s mandate seriously and does not want to appear “rogue” to the international community. But in terms of the core issue of the case, land titling, the state failed to comply for many years. By choosing to comply relatively quickly with financial reparations and not land titling, the state may have responded to certain domestic pressures that overshadowed the international attention. Its failure to demarcate Awas Tingni territories for more than seven years after the court decision suggests that there may be significant domestic level barriers preventing internalization of the norm for indigenous property rights. A detailed exploration of the various issues and problems surrounding state activities for the implementation of this component of the court decision will illuminate the key barriers.

The case of Sarayaku represents a complete rejection of the IACHR/CIDH ruling. Despite ongoing rhetoric by the government and its legal team, the provisional measures ordered by both levels of the Inter-American system have been ignored. At the same time, government commitment to oil development in the sensitive Amazon region remained strong. For example, even after the Court issued its Provisional Measures in 2004, President Lucio Gutiérrez confirmed that oil development would continue as it was a benefit to the nation as a whole, adding that “the State has contracts signed by law it is obliged to uphold” (Latinamerican Press 2004).

In both Nicaragua and Ecuador, the state has not yet absorbed international norms for indigenous property rights. In the former case, the state verbally committed to the norm but has lagged in implementation, while in the latter case the state has denied the validity of the whole issue. In fact, one lawyer noted during an interview, Ecuadorian government representatives were furious that the Sarayaku case went before the IACHR/CIDH at all (Rodriguez-Piñero 2006). Although diverse in terms of language and culture, the indigenous peoples of these two nations
and of the American states in general, face a similar problem. From Canada through to Mexico, Central America and south to the furthest tip of Argentina, indigenous peoples are struggling with the state for recognition of their unique and now internationally recognized rights to traditional lands and resources in the face of competing claims. Land and property are key assets in any given economy, representing anywhere from half to three quarters of national wealth (Bell 2006). Not surprisingly, rights to these assets are both contentious and political.

In both Ecuador and Nicaragua, claims for the rights to the land and resources in question have been made by the national government and subsequently granted to foreign interests in return for considerable economic gain. These state claims are based on national laws which either neglected to title indigenous territories (as is the case in Nicaragua) or proffered titles which do not include rights to subsoil resources (as happened in Ecuador). In both cases, the government solicited foreign firms that pay taxes and fees for the rights to explore and extract resources within a given concession area or bloque. Generating revenue is always an attractive option for governments and the two in the study are particularly interested in attracting foreign direct investment as a means to cope with burgeoning foreign debts and the ongoing challenge of trying to develop in a neoliberal global environment. There is also the added incentive of immediate personal gain in the process. The lack of transparency in the process of awarding concessions can provide opportunities for extralegal gains by politicians and senior bureaucrats. Companies eager to win lucrative concessions may “sweeten the deal” by providing vehicles, cash and other tangible benefits to particularly helpful politicians and bureaucrats.

Ecuador and Nicaragua have been involved in the Inter-American human rights system for some time. In the case of the Awas Tingni, the IACHR became involved in 1997 and made its final ruling in May 2001. In the case of Sarayaku, the IACHR became involved in 2001, with the CIDH releasing additional precautionary measures in October 2004. The case is currently before the CIDH for final ruling. As case studies, Ecuador and Nicaragua share a number of characteristics. They are both relatively small, poor countries with large amounts of foreign debt
and long histories of corruption and political instability. In both cases, these circumstances alone could be effective barriers to norm implementation. Both states have experience with armed coup d’états, although the Nicaraguan experience of revolution and counter-revolution was certainly more bloody and divisive.

In terms of indigenous movements, however, the countries are quite different during the period under discussion. Ecuador has had one of the largest, most organized and effective indigenous movements on the continent. Indigenous peoples are organized at local, regional and national levels, and have played a strong role in international indigenous organizing activities. Indigenous groups in Ecuador have a long history of working with international NGOs and many have received money and support for their cause independent of the state. Because of this strong domestic indigenous civil society and its established linkages with the international indigenous rights movement, one would assume a high degree of effectiveness in terms of ability to generate pressure “from above” and “from below”.

On the other hand, indigenous groups in Nicaragua represent a small minority of the total population and are highly factionalized. There are no effective national organizations and regionally, tensions between different groups prevent the development of any cohesive agenda. In the Caribbean Coast, the Mayagna Sumo people have been historically oppressed by the majority Miskito. In fact, in terms of regional land titling initiatives, the more politically powerful Miskito have laid claim to a significant portion of the same land as Awas Tingni and, through their own political party, YATAMA (a Miskito acronym meaning Sons of Mother Earth), have been able to secure a political power base in the region. Yet, while Awas Tingni has been unable to garner much local support, they have been able to generate a remarkable amount of international support and aid. Similar to Ecuador, the international indigenous movement has been highly involved in the Awas Tingni case. The community has secured substantial ongoing legal support from a number of American–based NGOs, including the University of Arizona Rogers College of Law and the American Indian Law Resource Centre. In addition, amicus curiae briefs were submitted
on behalf of the community to the CIDH by indigenous organizations in both Canada and the United States. While “pressure from below” may be limited, “pressure from above” is considerable.

Finally, and significantly, in both cases, Sarayaku, Ecuador and Awas Tingni, Nicaragua, the communities are remote, located at a distance from major urban centers. This has allowed both to maintain more traditional indigenous lifestyles and strong cultural practices. This provides both groups with a certain degree of cohesiveness and increases the global appeal of the case in the international indigenous rights movement. However, this remoteness can have a price.

Although indigenous issues in Ecuador receive a significant amount of attention in the media, due to a long history of organization and action, indigenous groups in Nicaragua are effectively silenced. The remoteness of the Caribbean Coast, where the majority of indigenous peoples live, constrains national awareness of indigenous issues. This political alienation is exacerbated by regional autonomy agreements which provided self-government, but at the cost of entrenched isolation from the national political process.

5.4 Territorial rights in property regimes

Indigenous peoples’ rights to their traditional lands and territories are fundamental to the realization of even their most basic human rights. As discussed in chapter 2, territories, as opposed to the idea of property, hold a sacred place in indigenous cultures. Territory, as a concept refers physically to an area of land, but involves much more as well. Territories include physical soil, sand, rocks and clay, but also waterways, pathways and the skies above. They include the natural resources contained within them including minerals, animals, fish, plants and medicines. They also include the remains of ancestors, and their spirits, other spirits and assorted deities, little people and the fabric of dreams.

In common law countries the amicus curiae brief allows private parties outside of the litigation, to inform the court of their views and the probable effect the outcome might have on them as well.
The concept of property is quite different. Property is a western liberal capitalist concept that fundamentally includes the idea of ownership; thus it is natural to think of property in terms of property rights. Property is used for production, and therefore must be measured and controlled. The indigenous concept of territory, on the other hand, does not include the possibility of ownership; hence early negotiations for land with indigenous societies were rife with misunderstandings. From an indigenous perspective, sharing the Mother Earth’s resources appeared reasonable, handing them over in perpetuity to white foreigners: inconceivable.

Across the Americas there have been considerable tensions over the right to property between original indigenous landholders and the non-indigenous settler societies. In some cases, colonial governments negotiated “treaties” designed to legally extinguish indigenous rights to territories. In other cases, colonial governments simply assumed sovereignty and applied western-style property rights regimes to indigenous territories. In many cases, indigenous rights were simply legislated out of existence.

The definition, distribution, and protection of property rights represent contentious issues in any society. Particularly in the western capitalist context, such rights play a fundamental role in the distribution of wealth. In Latin America, land distribution has been historically skewed in favour of elites and this has exacerbated social and economic tensions, as well as inequality across nations. In extreme cases, this has led to open conflict, violence and even civil war. Property rights regimes are considered essential for economic development and growth.

Harold Demsetz explains: “they (property rights) derive their significance from the fact that they help a man form those expectations which he can reasonable hold in his dealings with others” (Demsetz 1967, 347). In any given society, these “expectations” can be expressed through laws, customs or mores about acceptable behaviour. Explicit and secure property rights, especially when legally entrenched and consistently enforced, create a positive climate for investment as rates of return can be reasonably predicted. This explains the emphasis multilateral lending institutions, such as the World Bank or the Inter-American Development Bank place on
the development and implementation of secure land titling regimes in developing economies. Economists since the time of Adam Smith have argued that these rights are required to provide incentive to produce beyond immediate need. Otherwise few individuals would be willing to sacrifice their leisure time to engage in productive activities in which they could not be certain of their personal benefit. In the absence of clear property rights, and the institutionalized protection of them, anyone could assert ownership over the finished goods and abscond with them (Leblang 1996). According to classical French economist J. B. Say, without secure property rights, “it is impossible to conceive any considerable development of the productive power of man, of land and of capital; or even to conceive of the existence of capital at all” (Say 2001, 127).

In terms of land, property rights involve the ability of an individual to control that land, utilize it, and if desired, sell it to someone else. Property rights are valuable in western capitalist society because property, and the natural resources contained within it, represent a component of the production function and hence generate wealth. This is why property rights regimes are contentious. Who gets what, or allocation of property is an essential function of government and it is determined by processes that are inherently political. It is for this reason that poor, marginalized and/or minority populations tend to fare badly. With little political or economic power or influence they are unable to gain access to property and hence generate wealth. Elite classes, on the other hand, use their political and economic power to obtain and maintain such rights. While at times Latin American states have attempted land redistribution schemes, structural inequalities are so deeply entrenched that anything short of revolutionary change had minimal effect.

In international and national law indigenous rights to property are defined somewhat differently. Because of their origin from “prior occupation” in international terms, or legal doctrine domestically, they tend to be defined as “suis generis” or in idiosyncratic terms. Unlike the common standard of simple title, “traditional” indigenous rights are recognized as being communally held, as opposed to individual ownership. Such rights also involve restricted terms of alienability and use value may be constrained to traditional types of activities, such as hunting and
gathering. In most cases, subsoil rights, or the rights to the water, minerals and oil below the surface, are not included within the definition of traditional rights, while surface rights, such as the right to the trees, plants and herbs, are included. Harvesting rights, however, may be limited to exclude commercial or for profit use.

Due to the disparity between western and indigenous understandings of the nature and content of rights involving land or territory, there have been longstanding conflicts. Even if they are sympathetic, states have difficulties drafting and implementing property rights regimes that respect traditional notions of territory. Western standards of land use and/or ownership as tests have long proven inadequate to address indigenous claims. Idiosyncratic indigenous patterns such as contiguous use, seasonal or even annual use-cycles do not translate well into mainstream ideas about land ownership. Unfortunately, when the two worldviews clash, it is the indigenous perspective that is undermined, under-valued and/or ignored.
As a country with a large indigenous population and a strong indigenous rights movement, Ecuador is an obvious choice for study. It is home to a long history of indigenous organization that precedes its relatively late and incomplete transition to democracy. Indigenous organizations have played a lead role in Ecuadorian civil society, organizing numerous demonstrations against free trade, neoliberalism and poverty. Rendered an invisible and exploited class for much of colonial history, the 1990s saw the nation’s organized and vociferous indigenous movement unite and instigate meaningful changes in national politics, although currently their influence has been weakened by internal divisions.

Like many Latin American nations, Ecuador has suffered from political and economic control by elite interests. This has alienated the majority of citizens. It is facing what numerous scholars have termed democratic deterioration. According to Freedom House between 1991 and 1998, Ecuador remained solidly in the Partly Free status. While national elections take place on a regular basis, change in leadership is not always democratic. National uprisings have ousted presidents midway through their term. Outside of these outbursts however, civil society has little influence on political decision-making.

Until the 1950s Ecuador was one of the least developed nations on the continent. Controlled by a political elite dependent on agricultural staples, the country had little industrial development and consequently no need to build or support a skilled labour force. Ecuador maintained a quasi-feudal land system until the landowners themselves decided to modernize in

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15 The Freedom House scores regimes on two dimensions; political rights and civil rights, which they measure by subjectively giving each country points on a checklist for each dimension. The scales go from 1 (most free) to 7 (least free), and according to this they classify regimes that obtain 1 – 2.5 as Free, regimes with 3 – 5.5 as Partly Free, and regimes with 5.5 – 7 as Not Free. The Freedom House comparative ranking can be found at http://65.110.65.181/uploads/FIWrank7305.xls
the 1960s. The land was turned into pasture and the indigenous peoples who lived on it as a form of feudal labour were abruptly rendered homeless (Sawyers 2005).

Ecuador is a small country with 283,560 sq km of territory, including the Galapagos Islands. It has a total population of only 13.5 million and occupies less than one third the land base of the province of Ontario. However it is home to great biodiversity due to its four distinct geographical divisions: (1) the highland Andean region, (2) the coastal region, (3) the Amazon and (4) the Sierra; each with a different climate and ecological niche (Sanchez 2005). This diversity is reflected in the population as well, with many different indigenous communities, as well as white, mestizo and Afro-Ecuadorians.

Poverty is a longstanding issue. According to the Inter-American Development Bank, the total number of households living in poverty is just under 40%. While Ecuador’s GDP per capita of $2987.25 is significantly higher than that of Nicaragua with only $908.17, inequality is a greater problem (2006 World Bank data). The Ecuadorian GINI index is nearly 10 points higher than that for the poorer Central American nation (UN HDI 2007). The UN Human Development Report (2007) ranks Ecuador as medium in terms of development levels, ranking it at 89 out of 177 countries. Nicaragua fares somewhat worse at 110. The richest 20% of Ecuadorians enjoy an astounding 58% of national income while the poorest 20% are struggling to make ends meet with a meager 3.3% (ibid.).

With a history of populism, military intervention and an impatient form of street democracy, Ecuador has a distinct political tradition of shedding itself of unpopular presidents without all the violence normally associated with a coup d’état (de la Torre 1997). Since independence (1830) the Republic has undergone an astounding eighty-six presidential inaugurations, with each administration lasting an average of only 1.75 years. Between 1997 and 2007 alone, Ecuador has seen a total of seven presidents: Abdalá Bucaram was the president of Ecuador from August 1996 to February 1997, Fabián Alarcón next held office until August 1998; then Jamil Mahuad held power until January of 2000. Gustavo Noboa was president until January
of 2003 when he was succeeded by Lucio Gutiérrez. Gutiérrez lost power during a popular uprising and was replaced by Vice President Alfredo Palacio who lasted until the current president, Rafael Correa was elected in 2006. Elected leaders have been unable to consolidate enough power to maintain functioning government for any serious amount of time.

Ecuadorian political volatility is reflected throughout external assessments of national governance. Historical factors have led to the development of chronically weak and unresponsive domestic political institutions. Since good governance has been recognized as a key feature in the neoliberal model of development a number of organizations worldwide have begun to collect and measure data in this area. This thesis relies on the *World Governance Indicators* (WGI) which are collected annually by the World Bank (WB) and published in the online *Governance Matters*. The WB collects data from numerous sources including institutes, think tanks, non-governmental organizations, and international organizations. The WGI includes a comprehensive and searchable online database of both aggregated and individual governance indicators for 212 countries and territories over the period 1996–2007. The data, which is available in both raw and aggregated forms, focuses on the measurement of six key factors in good governance: voice and accountability, political stability and the absence of violence, government effectiveness, regulatory quality, rule of law and control of corruption (ibid.). All data collected attempts to measure perceptions of key stakeholders, citizens, government workers, NGO and private sector employees and others.

Another important source of data is the Latin American Public Opinion Project or LAPOP which conducts national *Democracy Audits* with local partners in Latin America and includes information on civil society, corruption, public confidence and the judicial system. Both projects report that government effectiveness in Ecuador is the lowest in all of Latin America. Rife with corruption, mismanagement and incompetence, government offices are unable to respond to citizen concerns and implement policy in an effective, accountable, and functional way.
Between 1997 and 2007 World Bank measures of effective governance, corruption, accountability, and political stability in Ecuador remained problematic while rule of law and regulatory quality actually worsened. Ecuador consistently finds itself amongst the lowest four nations in Latin America. The Latin American Public Opinion Project (LAPOP) Ecuador Democracy Audit 2006, conducted by Vanderbilt University in the United States found that national confidence in Ecuadorian institutions was typically very low. Based on surveys of voting age Ecuadorians conducted by CEDATOS, the Gallup International affiliate in Ecuador, LAPOP found that the national government received only 21.7 (of a possible one hundred) points in terms of voter confidence. Congress scored even lower with 18.7 out of one hundred possible points. Only three national institutions, the Catholic Church, the Media and the Armed Forced received scores greater than fifty, with the national average being a miserly thirty-eight. There is widespread malaise in national institutions that is worsening over time (World Bank Indicators 2007; Seligson 2006, 62-67).

6.1 Geopolitical, class and ethnic fragmentation

One of the most striking characteristics of the Ecuadorian political landscape is its profound fragmentation. While most, if not all Latin American countries suffer from glaring class divisions, in Ecuador, ethnic and geographic divisions are also obvious (Pallares 2006). This has fractured and weakened traditional interest groups and led to a longstanding capture of the national interest by elites and subsequently the creation of a state that is divorced from the aspirations and needs of the vast majority of its citizens. Consequently, democratic consolidation remains incomplete and has actually deteriorated over the past decade.

After Bolivia, Ecuador is home to the largest indigenous population in the region. And due to what scholars have called “Andean factionalism” there is great diversity within this population as well (Sanchez 2005). While scholars have argued as to the relative importance of ethnic versus more traditionally configured economic classes, in Ecuador both play a significant role. Deeply
entrenched in the nation’s political culture is the ongoing struggle of elite classes to build a conservative nationalism while maintaining the subservient yet productive position of the popular and indigenous classes. In contrast to its Andean neighbor Colombia, which sought, at least in theory, to construct its post-colonial state on the foundations of liberalism, secularism and free markets, Ecuadorian elites took a more conservative approach to nation building. Through early control of political mechanisms, they were able to re-entrench the colonial system of caste as a guarantee of cheap labour, tribute payments, and social control over the indigenous majority. Strong authoritarian governments were seen as a necessary defense against the omnipresent fear of indigenous uprising and rebellion during the early independence years (Larson 2004, 103-107).

With mestizo, Afro-Ecuadorian, indigenous and European-descent citizens, the creation of a homogenous national identity has been challenging. Many indigenous groups have advocated for the creation of what has been termed a “plurinational” state. The dominant political powers, however, have not supported the project. This has left the state weak, fractured and unable to satisfy citizen demands for representation, responsiveness and good governance.

Pablo Davalos argues that, in terms of the political and economic structures of the state, indigenous peoples in Ecuador did not really exist until the 1990s. In fact, when the indigenous communities, led by CONAIE, began their first series of uprisings in 1990, political commentators at the time argued that the “indios” were being roused by external interests with their own political agenda. It was not considered possible that indigenous peoples could think and act for themselves. They had to have been manipulated by some unknown external forces. This, of course was untrue. This gross underestimation of indigenous resilience and strength has since been reconsidered. Indigeneity has emerged in the 21st century as the fulcrum of counter-hegemonic activity for both ethnic and non-ethnic national social movements (Davalos 2004).

Turning indigenous resistance into clear political form has been the task of the Pachakutik Plurinational Unity Movement (MUPP) which emerged from CONAIE in the early 1990s. The party, which is not exclusively indigenous, ran its first national candidates in 1996 and was part of
a winning coalition in 2002. Like CONAIE, it has tried to reconcile competing narratives: how to authentically represent indigenous groups and meaningful engagement in the national political process. Its challenge has been to construct a truly national agenda that included a strong basis in indigenous issues without alienating other strategic allies in civil society. While early electoral results appeared promising, more recent showings have disappointed.

Not only have indigenous Ecuadorians been left out of the governing process, most of the popular classes are ignored as well. This inequality helped fuel a political culture that often turned to military intervention to promote the national interest, but remained enamored with the big promises that accompany populist style politics (de la Torre 2000, 117). Politics in Ecuador are highly personalized, based on a caudillo system of favors and networks. Oligarchic battles, divided between Quito and Guayaquil, aimed for control of the spoils of the state. Prior to democratization, elite control of the state had been thorough. Until the military intervened in the 1970s to create a functioning middle/professional class, there was little in terms of reformist political parties to challenge the conservative hegemony. Unlike other Latin American states, such as Argentina, Chile and Brazil, the leftist/worker based political parties never achieved broad support (Isaacs 1991). Instead, once enfranchised, the popular classes participated in politics at the end of the caudillo networks trading favors in return for their support.

Defining populism is not a cut and dried affair. The word populism stems from the Latin word “populus” meaning simply people in English. Simply understood, populism involves “the people” all of them, involved in the process of governing. Robert Dix provides the following definition: “a political movement which challenges established elites in the name of a union between a leader and the people” undifferentiated by group or class (Dix 1978, 334). This does not guarantee that “the people” are in any way well represented by their subsequent government. Populist politics can be characterized by amazing feats of rhetoric staking out the stark contrast between the good (us) versus the most horrific of evil (them) and the conspicuous void of meaningful policy debates. Elections therefore are all about demonizing one’s opponent in no
uncertain terms, and making wide ranging promises to one’s supporters; promises which may ultimately be impossible to fulfill.

Scholars identify the onset of populist style politics in the nation with the enigmatic José María Velasco Ibarra, who was elected to the presidency on five occasions between 1934 and 1972. He incorporated the masses into Ecuadorian politics for the first time in history by giving speeches to open crowds in public spaces, something previously reserved for only the very small group of enfranchised voters. This gave him a broad base of support among the population. Secondly, he introduced to his new audience the idea of ethics in politics, as opposed to policy. He divided the country into good and evil, and he was, of course, the depiction of good, while those who opposed him represented all that was wrong with the country (Sickner 2004).

Populism remains a dominant force in Ecuadorian politics and every presidential candidate has used populist rhetoric as a key tool in his election campaign and has pursued populist policies to some degree. Although populism is associated with the entrance of the popular classes into the political realm, this form of incorporation brought with it authoritarian, delegative and non-democratic tendencies that prevent further democratic consolidation (de la Torre, 154). Instead of real policy issues, the masses are seduced by charismatic leaders with extravagant election promises. Former President Gutiérrez, a man not above populist strategies himself, comments:

In Ecuador democracy has been reduced to elections, the candidates deceive the people with all manner of promises that they never fulfill. Once the candidates get into power they forget about the people, and they use their power for their own personal benefit. That’s not democracy. So that is what we are fighting against, against that pseudo-democracy (from Velpel 2001, 9).

Serious ethnic and class divides are not the only structural weakness within Ecuador’s political foundation. These forms of fragmentation have been further complicated by the much analyzed geo-political split between the lowland/coastal region and highland/sierra. The nation has endured a longstanding struggle for power between the agro-export oriented elites of coastal Guayaquil and the traditional land owning class of the sierra based in Quito. The Ecuadorian political classes built a highly oligarchic electoral system based on regional political parties and
both sides have competed regularly to see who would get the spoils of governance. The elites, conservatives on the Coast and liberals from the inland mountains, have created a zero sum game wherein strength in one region for any political party automatically equates to weakness in the other (Pachano 2006, 122). Within this framework there has been little room for cooperation.

This fragmentation is mirrored in Congress where neither of the major political parties has been able to consolidate enough power to secure either broad national support or a simple majority, thus making political stability very difficult (Boe 2007, 63). Even when sharing a common ideological agenda, political parties had a hard time building and even more so maintaining political alliances (Pallares 2006). Instead the focus has been primarily on short term issues, like winning elections, rather than cultivating deep alliances, infrastructure and ideology. Any kind of support requires immediate disposition of favors and patronage awards; and consequently is up for renewal quite frequently (Velpel 2001).

Subsequently, the domestic political structures of Ecuador are weak and often incoherent. With pronounced division along geographical, ethnic and political lines, the country has been unable to consolidate a functional form of democracy or even governance that is effective or inclusive. Elections are generally free and fair, but representation is weak and dependent on caudillo networks of patronage. Meaningful debates on serious policy issues tend to be relegated to technical advisory teams who make decisions with little popular input. This fragmentation manifests itself regularly through legislative infighting and deadlocks, as well as large scale public protests and uprisings that can cripple the nation. Although the military formally withdrew from the business of government in 1979, three decades later the country’s democratic practices remain fragile and stochastic (Bustamente et al. 2006, 52).

There are a number of serious structural problems that have evolved out of this fragmented politics. Some of the most important include: corruption, weak rule of law, poor accountability and voice, chronic political instability and an economy that wavers between crisis and collapse. These interrelated factors shape the way that politics operates in the country and may help explain
the apparent inability of the government to make meaningful policy changes in the area of indigenous rights. Figure 6.1 traces the deterioration of Ecuadorian public perception of its government’s effectiveness between 1996 to early 2007. The solid line represents a median measure that has been calculated as part of the World Bank WGI and represents a weighted aggregation of public perception from various sectors of society, including citizens, public and private sector experts and NGO staff (Kaufmann et al. 2008, 4).

**Figure 6.1 Government Effectiveness in Ecuador 1996-2007**

![Graph showing government effectiveness in Ecuador from 1996 to 2007](image)

*Note that the two series of dotted lines indicate the range of data collected.

### 6.2 Corruption

Corruption, the use of public office for private gain, is certainly not a problem exclusive to the Ecuadorian government. All governments in all parts of the world regularly face the challenge of ensuring that individuals are not tempted to use government resources for personal enrichment. Corruption is highly problematic and is seen as a real barrier to both political and economic development. It subverts the rule of law and undermines public institutions, it wastes valuable resources, discourages investment and increases the overall cost of doing business (Shepherd 1998).

Corruption has long been recognized as a particularly serious problem in Ecuador; consistently placing it amongst the worst four Latin American nations alongside Bolivia,
Venezuela and Paraguay (Seligson 2006, 45). Corruption is not a new problem in Ecuador, and in fact a 1999 report by the World Bank suggests that under the Bucaram administration (1996-1997) corruption became state policy (World Bank 1999, 5). While it might be tempting to lay the blame at the feet of a single leader, the fact is that despite years of anti-corruption rhetoric by subsequent presidents, from Fabian Alarcón to Rafael Correa, there has been no measurable improvement. In fact, Transparency International’s Corruption Perceptions Index for Ecuador clearly illustrates the situation is serious and that it has deteriorated rather than improved over time.

Table 6.1  Corruption Perceptions Index for Ecuador* 1980-2007

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*The scores relate to perceptions of degree of corruption by business people, academics and risk analysts, scores range from 10 (highly clean) to 0 (highly corrupt).

On a global scale, Ecuador also ranks very high in terms of perceived corruption.

Transparency International’s 2007 Corruptions Perception Index (CPI) ranks Ecuador at 150 out of 177 nations in the world.16 The organization’s Global Corruption Barometer 2007 reports that corruption is widespread and has particularly impacted the nation’s political parties, the legislature, medical services and the police. Public confidence in such institutions is very weak (Seligson 2006, 74-75).

While Transparency International focuses its attention on the perception of corruption amongst representative citizens, World Bank data looks at the issue somewhat differently. Its focus is the availability and effectiveness of mechanisms to control corruption, although again it is measuring perceptions from a broad base of constituents. Data is aggregated from a number of sources including Freedom House, Business Enterprise Environment Service, Economist Intelligence Unit and the World Economic Forum Global Competitiveness Survey. A functioning

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16 With 1 being the least corrupt and 177 being the most corrupt nation.
democracy requires a series of checks and balances to ensure that corruption does not become a problem. Recent World Bank data reinforces the perceptions data: Ecuador fares poorly in terms of control of corruption. Figure 6.2 highlights the dismal performance of the state, with Ecuador ranking solidly amongst the bottom twenty percent of nations world-wide.

**Figure 6.2 Corruption Control in Ecuador 1996-2007**

Corruption impacts almost everything that happens within the country. It affects government operations and subsequently shapes citizens’ expectations. This creates a costly and negative environment for business, especially new business development as entrepreneurs are usually quite risk adverse. There are many different forms of corruption including bribery, nepotism and gross misappropriation of resources. Most of the subjects interviewed for this project suggested that various political and bureaucratic figures receive personal benefits from the issue of concessions to the private sector. This is part of the reason why indigenous communities have been unable to change policy in this area.

Bribes occur not only to facilitate lucrative million dollar deals, they occur at the daily level as well. The 2006 Democracy Audit, Ecuadorians reported commonly paying bribes in courts, public schools, for health services and municipal services (Seligson 2006, 54). Bribes ensure prompt access to medical treatment, guarantee good grades at school and even to help arbitrate the law. One Ecuadorian Congressman noted:

Corruption is present in all levels of Ecuadorian society. There is no state institution that has not experienced corruption. We have seen examples of the buying and selling of sentences in the Supreme Court of Justice, in Congress to buy votes, on behalf of the executive to get majority in Congress, and in the police and state bureaucracy more than once (Boe 2007, 93).
This corruption makes it difficult for government to implement policy in a consistent and meaningful way. Bureaucrats are accustomed to extra fees for service, and little inclined to do anything which may jeopardize them. This creates vast inefficiencies and wasted resources within government that are notoriously difficult to root out. Furthermore, the breadth and depth of this corruption is impossible to hide. Public confidence in government has been declining. Citizens do not trust the government or its politicians. Accordingly, they are unwilling to support their government or accept its regulations and legislation when not in their own particular interest (Seligson 2006, 62). Figure 6.3 illustrates the marked decline in public confidence in three key institutions: national government, national congress and political parties.

**Figure 6.3 Public Confidence in Ecuador 2001-2006**

![Bar chart showing public confidence in different institutions from 2001 to 2006.]

Source: Seligson et al. 2006, 55.

The World Bank has conducted an extensive survey of public officials, entrepreneurs and households, and ranked the twenty most corrupt institutions in Ecuador. Astonishingly, the median score of all institutions is 4.7 on a scale of 1 to 7. Based on this data, the most corrupted institution in Ecuador is the National Congress, with a median score of 5.3. The median score for the Ministry of Energy and Mines (MEM) office is 4.4; while Petroecuador rates at 4.9. The judicial system in Ecuador rates only slightly better at 4.8.

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17 With 1 indicating least corrupted and 7 indicating most corrupted.
This situation has been particularly troublesome in light of the economic crisis that has plagued the nation for the better part of the last thirty years. Good governance is not about popularity contests and eventually even the most popular leaders find themselves in the position of having to make unpopular decisions, especially in terms of fiscal and monetary policy. Economic stabilization policies entail significant hardships that stretch across a number of sectors. In the context of long term political and economic instability this can initiate disaster. When governments make unpopular decisions, citizens are quick to anger. There is no trust in the government; and no faith that short term pain may in fact lead to any long term gain. Instead, groups in civil society tend to view such decisions as “more of the same” corruption and self enrichment that has marked political history in Ecuador. Rather than wait and see if the “bad medicine” does in fact work, Ecuadorians are more likely to take to the streets and demand regime change.

6.3 Rule of law

Complicating matters is the rather obvious point that none of these factors operates independently. Corruption and lack of legitimacy are part of the reasons why rule of law is also problematic in Ecuador. Rule of law is important to democratic society because it ensures order, security and justice for everyone. Prominent legal scholar Joseph Raz defines the rule of law in eight points:

1. All laws should be prospective, open, and clear; 2. Laws should be relatively stable; 3. The making of particular laws . . . must be guided by open, stable, clear, and general rules; 4. The independence of the judiciary must be guaranteed; 5. The principles of natural justice must be observed (i.e., open and fair hearing and absence of bias); 6. The courts should have review powers . . . to ensure conformity to the rule of law; 7. The courts should be easily accessible; and 8. The discretion of crime preventing agencies should not be allowed to pervert the law (Raz 1977:198-201).

To be effective, the rule of law requires a strong non political judiciary and police force that is free of corruption. In Ecuador, this is not evident; rather rule of law tends to be weak and uneven. Crime is widespread and citizens commonly turn to the informal market for security. In Quito, for example, drivers must pay fees to private security when parking on the streets. Police
officers are either not present, or not interested in patrolling for petty crimes. Figure 6.4 provides an aggregate summary of citizens’ and experts’ perceptions of rule of law as calculated by the World Bank. There are a total of 26 separate calculations provided by such diverse organizations as Global Insight, Economist Intelligence Unit and the Gallup World Poll among others, which are then averaged. The top dotted line represents the upper limits of the data set, while the lower dotted line represents the bottom limits. The solid line in the middle represents the median figure. The situation has worsened notably since 1996, with a very serious drop after 2004, corresponding with the middle point of the Gutiérrez regime.

**Figure 6.4 Rule of Law in Ecuador 1996-2007**

Access to justice is also problematic in Ecuador especially for the indigenous and popular classes. The Ecuadorian Constitution guarantees all citizens the right to a fair trial, access to independent counsel, and the presumption of innocence until proven guilty (articles 23 and 24, 1998 Constitution). However, as Mejía Acosta (2005) points out, there are only 0.3 defense attorneys for every 100,000 habitants. As a result, “people with few resources or no political connections have difficulty obtaining a fair trial in the Ecuadorian judicial system” (ibid., 9). Bustamente et al. adds “The problem is aggravated by the survival of an old judicial system that strongly represents corporate interests” (ibid., 51). Furthermore both the national judicial and regulatory bodies have been highly politicized. This was clearly seen in December of 2004 when
President Lucio Gutiérrez backed a majority in Congress to dismiss 27 of 31 members of the Supreme Court alleging that they were biased against him. Monica Boe notes

This ‘restructuring’ of the CSJ compromised the constitutional principle of judicial independence, and furthermore demonstrated the weakness of Ecuadorian institutions and their inability to provide for adequate checks and balances (Boe 2007, 95).

According to the 2006 Democracy Audit, public confidence in the Supreme Court is abysmally low at only 24.7 out of a scale of 100 points and the justice system overall ranks only slightly better at 28.0 (Seligson 2006, 66-67). The police force does not fare much better. Police officers are often the first and most obvious liaison ordinary citizens have with the legal system. Unfortunately the reputation of the Ecuadorian police force is not much better at only 42.1 points on a scale of 1-100 with 100 representing total confidence. Not surprisingly there is a high reliance on private security (ibid., 65).

Amnesty International issued a report in 2004 related to a common police force practice of trying members internally for crimes unrelated to the line of duty. Under this system, police officers were able to commit various criminal offenses with impunity (AI Index: AMR 28/018/2004). The Economist Intelligence Unit (2007) raised concerns that the police force was poorly trained and prone to corruption. This finding is supported by Transparency International’s Global Corruption Barometer 2007 which, based on extensive surveys, rated Ecuador’s police at 4.1 out of 5 for perceived corruption.18 Ecuador’s Democracy Audit (2006) also reported that 41% of respondents reported actually watching the police receive bribes, at the same time, 12% indicated that they personally had been asked for a bribe by a police officer (Seligson 2006, 53).

Public confidence in the justice system is non-existent. Enforcing the rule of law, or certainly ensuring that no one is above the law in Ecuador is no easy task. Money and political connections can and do make a difference in terms of access to and immunity from justice in Ecuador. For indigenous peoples, the justice system is almost completely inaccessible. Mary Velpel (nd) notes: “the lack of free legal representation, translators and ombudsmen puts judicial

18 A rating of 1 would signify not at all corrupt; while a score of 5 would be extremely corrupt.
remedies beyond the reach of indigenous and campesino petitioners.” The situation in rural and remote areas is even more problematic. In and around Sarayaku, there is virtually no police presence. Private military forces have been brought in to protect state and private sector interests. Community concerns, on the other hand, are seen as a local issue with little if any state sponsored recourse (Ortiz 2004).

6.4 Accountability and voice

Rule of law is just one component of a functioning democracy. Democracies should also ensure basic personal and political rights as well as fair and free elections, although typically emphasis is placed on the latter. Mary Velpel (2001) argues that the primary reason for Ecuador’s poor democratic condition is widespread social and economic inequity. According to the Democratic Development Index of Latin America (2006) Ecuador holds the distinction of being the least democratic state in the region. This and the consequent low levels of faith in the state have led many Ecuadorians to lose faith in democracy altogether. This can be demonstrated through the quick rise of “outsider” candidate Rafael Correa in the 2006 elections and the overall ambivalence of citizens towards military governments (Boe 2007, 103).

Ecuador’s weak political parties are often cited as a serious barrier to democratic consolidation. Lacking in terms of depth and longevity, they proliferate rapidly, often as personal vehicles. Even with regulations in place, political parties abound. Catherine Conaghan (1995) for example, noted that between 1978 and 1992 a total of 23 political parties held national legal standing in Ecuador. The most recent presidential election (2006) saw a total of 13 different political parties fielding candidates for the highest position of office, creating serious divisions that could not play out until the final run off which split the vote between left and right. Correa’s left wing supporters, however, do not hold strong loyalties. Their ongoing support will require constant negotiating and deal brokering.
Often established as personal vehicles for presidential aspirants, Ecuadorian political parties suffer from a chronic lack of ideological coherence, structure and/or organizational capacity. They are shaped by the tradition of the caciques: through the giving and receiving of political and economic favors and are often built around the personal charisma of the leader. Traditional Ecuadorian politics parties are elite enterprises that fail to inspire any deep loyalty or following amongst voters. They fail to represent, mediate and moderate real citizen interests in any meaningful way. The political classes have their own agenda, which outside of election campaigns, has little to do with the populace at large. This explains the longstanding derision among the electorate that characterizes Ecuadorian politics more so than in other Latin American nations. Ecuadorians have become more than just disillusioned with political parties, they are frustrated and angry.

The chronic weakness of Ecuadorian political parties has long been recognized as a serious barrier to democratic consolidation. Political parties organized around personal leaders are tightly controlled by a system of caudillos, or bosses, that run strong family or corporate-style networks. Further, they tend to be weak in terms of ideology. Rather they are: “…almost always devoted to protecting the personal or group interests of political entrepreneurs” and “…do not take any responsibility for governance or public policy making” (Bustamente et al. 2006, 50).

No single political party has won the presidency more than once since the return to civilian government in 1979.

I cannot mention any political party that I believe represents the interests of this country. What we have here, are very weak political parties, not representing anything and think only about themselves, without any significant leadership (Velasco in Bustamente et al. 2006, 50).

Accountability is a serious problem in a democracy that political scientist Guillermo O’Donnell would classify as “delegative”. Delegative democracies, O’Donnell explains, are not consolidated. While they have democratically elected governments the so-called “second transition” requires the development of political institutions that “become important decisional
points in the flow of political power” (O’Donnell 1994, 56). Consolidation is not inevitable. As O’Donnell points out social and economic crisis, often inherited from authoritarian regimes, can prevent real democratic transformations. This has been the case in Ecuador where serious social and economic crisis have prevented the creation of democratic political institutions; in its place we find “clientelism, patrimonialism and corruption.”

Delegative democracies rest on the premise that whoever wins the election to the presidency is thereby entitled to govern as he or she sees fit, constrained only by the hard facts of existing power relations and by a constitutionally limited term of office (ibid.).

Heinz Sontag identifies the two fundamental problems of democracy in Ecuador. First of all, the highly personalist and populist style of political parties as focused election vehicles for usually charismatic individuals make a “continuous and rational” political life practically impossible (Sontag in Garretón and Newman eds 2002, 133). Secondly, he notes specifically that “the weakness of state institutions (the executive, legislative, and judiciary as well as the bureaucracy) do not allow structured decision-making based on party platforms. Once a candidate has won the presidency, the country becomes a personal resource.

Figure 6.5 provides WGI statistics for voice and accountability in Ecuador. Again, these figures represent a weighted average of a series of collected data from a variety of sources including Latinobarimetro, Gallup World Poll, and the Global Integrity Index over the years indicated. It is, again, a measure perception aggregated from statistics that focus on citizens, public sector employees, private sector and NGO experts.

**Figure 6.5 Voice and Accountability in Ecuador 1996-2007**

![Graph showing Voice and Accountability in Ecuador 1996-2007](image)

6.5 Economic and political stability

As noted by O’Donnell, social and economic crises can undermine the construction of real functioning democratic institutions and in this case, and for Ecuador this has proven to be a real problem. Without real democratic consolidation, and functioning government structures, even the best organized national and transnational lobbies can have a difficult time to change policy for indigenous rights. Further, when economic resources appear especially scant, the willingness of governments and even the majority of citizens to support policy for indigenous land rights can be easily undermined.

Recent decades especially have brought Ecuador crisis after crisis, including hyperinflation, severe recessions and a banking calamity that wiped out over half of all deposits. The 1990s were marked by high unemployment and surging rates of poverty alongside steadily deteriorating health and education indicators. In macroeconomic terms, the growth rate for per capita GDP in Ecuador has been negative for the past twenty five years. While devastating in terms of numbers, the impact on the population has been far worse. Between 1980 and 2000, per capita GDP fell 14 percent. As of 2005, it recovered 8 percent, although this has not been enough to generate pre-1980 standards of living.

The rural poor and indigenous populations have been the worst affected. Forced to shoulder a disproportionate burden, the indigenous classes have played a strategic role in fomenting popular dissent and civilian mobilizations against the policies (Fretes-Cibils, Giugale & Lopez-Calix eds. 2003; Weisbrot et al. 2006). Historically government spending in Ecuador often followed populist lines of spending: just enough, in just the right places, to secure electoral victory amongst the poor and working classes without conceding much in terms of real power or meaningful change. Spending outside of elections was geared towards personal enrichment and the maintenance of vast caudillo networks emanating out of either Quito or Guayaquil into the rural areas. Elites, split between the coast and the sierra, sought control of the state to further their own personal interests rather than to promote any type of national agenda. This regionally split
populism, with its inherent corruption, undermined Ecuador’s potential for economic development.

Like other Latin American nations, neoliberal trends, although far from consolidated in Ecuador, have undermined macroeconomic policy (Sawyers 2004, 87). This constrains the ability of any president to deliver on the often unrealistic promises used to get elected. This problem can be seen in the example of former President Lucio Gutiérrez (2003-2005) who was driven out of the presidential palace by a civilian up-rise less than two years into his mandate. Gutiérrez, who campaigned as an Ecuadorian version of Venezuela’s Hugo Chávez, promised to simultaneously drive out corruption and free the country from the tyranny of neoliberalism. He quickly alienated popular support when he appeared to cave in to pressures from the IMF/WB to maintain the status quo. His interim successor Alfredo Palacio made similar promises to clean up the nation and strengthen the national economy; and like his predecessor and former running mate, he soon discovered that the nation’s debts placed almost insurmountable constraints on domestic policy. Ecuador, similar to other developing nations, relied on IMF approval to secure its international credit rating and attract much needed foreign investment. Failing this could mean collapsing credit lines and soaring interest rates, two factors which would quickly cripple the oil dependent economy.

Ecuador’s WB Country Assistance Strategy (2006) aimed to remedy apparent structural economic imbalances by slashing government spending on social programs and the civil service, privatizing national enterprises and eliminating consumer subsidies on oil, natural gas and foodstuffs. By cutting spending, however, these policies undermined the way politics was done in Ecuador. The funding of political networks has become much more difficult, and hence the difficulty of elected leaders to maintain support once elections are over and the tedious process of managing the state and economy are underway.

Budget cuts have been particularly painful in the context of a sustained economic contraction. They have decimated the poor and further demoralized an already beleaguered,
rapidly shrinking middle class, while only a sliver of elite interests have appeared to benefit. Starting in 1993 government social spending was cut dramatically, from 9 percent of GDP down to only 4 percent in 2000. Thanks to a serious banking crisis the national poverty rate climbed by a third, reaching a high of 45 percent of the population by 2001 (Weisbrot et al. 2006). As a consequence, the standard of living for the average Ecuadorian fell dramatically. Aggravating this horrendous decline was the fact that after the painful restructuring, the nation’s elites appeared even better off than before. This has been the trend throughout Latin America (Hakim 2003).

Especially true in Ecuador, this growing inequity has served to consolidate a strong nationalist minded, anti-neoliberal, anti-globalization backlash. While historically populist traditions dealt more or less effectively with dissent, the constrained economic realities of the new neoliberal regime have frustrated efforts to maintain any kind of mass complacency. The stresses generated by economic austerity, coupled with the rising saliency of political and democratic freedoms has meant that Ecuadorian middle and popular classes, alongside the indigenous population, have found common cause in a struggle for meaningful inclusion in the state. Much of this neoliberal rejection has been fomented and led by the indigenous movement. Starting with the historic Indigenous Uprising or “Levantamiento” of 1990, the popular classes in Ecuador found common cause with national indigenous groups and joined a vocal counter-hegemonic movement that challenged the way that things were done.

As part of the “delegative democracy” there are no mechanisms for public accountability. Citizens have little input into the economic policies which shape, and often torment, their daily lives. Instead, non-elected technocrats advise the Executive, often to standards that are completely foreign controlled. Even when politicians might be willing to experiment with heterodox economic policies, policy constraints associated with structural adjustment and other aid agreements ensure that neoliberal economics remain the order of the day, creating a crisis of governability. This situation is not uncommon in developing countries.
There is a real possibility, especially in times of turmoil that troubled state may fall back to authoritarian traditions. The 2006 Democracy Audit indicates overall support for the political system in Ecuador is low at 37 percent (Seligson 2006, 137). Further, it also notes that “the proportion of Ecuadorians that are in zones of authoritarianism (low tolerance) and instability (low support to the system) continues to be the majority (ibid., 142). Given this, the future of democracy in the Andean nation is by no means certain. The 2007 Latinobarómetro reports only 35 percent of the population is satisfied with democracy, slightly less than 37 percent for the region as a whole (Latinobarómetro 2007, 80). Throughout Latin America, there are problems with democratic consolidation, especially in terms of popular support. While this does not mean citizens are rallying for a dictatorship, it does indicate a general malaise with democracy.

Over the last ten years, poor perceptions of political instability in Ecuador have been evident in global statistics. Figure 6.6 summarizes data aggregated and then weighted by the World Bank from a dozen sources including The Economist Intelligence Unit, Global Insight Global Risk Service and the Political Risk Services International Country Risk Guide. Each indicator measures perceptions of specified demographic groups. The solid line represents the median score.

**Figure 6.6 Perceptions of Political Stability in Ecuador**

Civil society is generally considered part of a healthy functioning democracy although there is some debate as to whether it is civil society that contributes to democratization or vice versa. The truth is likely a bit of both. The idea of “civil society” can conjures up images of harmony, with a plethora of diverse groups sharing common goals although maintaining some room for marginal differences. Currently in vogue is a concept of a pacific civil society that replaces earlier conflict ridden images of social classes competing for access to scarce resources. These earlier images recognized the existence of real divisions, both horizontal and vertical, that simultaneously weakens and strengthens society. Latin American society in particular is highly divisive. Yet the concept itself retains some value if one keeps in mind there may be more than one “civil society” at play (Deonandan in Close et al. 2004, 44). The challenge, many activists note, is to create a cohesive and inclusive agenda (Cunningham 2006).

Most scholars agree that an active civil society can be an invaluable asset to the democratic processes of a nation. Larry Diamond defines civil society as “the realm of organized social life that is voluntary, self generating, (largely) self supporting autonomous from the state, and bound by a legal order or set of shared rules” (Diamond 1994, 5). It is an intermediary between society and the state, and ideally works to hold officials accountable for their actions. It can help ensure that the state takes its citizens’ interests seriously. It can also foster greater civic and political participation (Carothers 1999). The problem is that there are a lot of different understandings as to what constitutes civil society, what it includes and what it does not. Diamond points out that it does not include political parties, while other scholars are not as decisive (Diamond 1994, 7). The best approach is to be as simple and inclusive as possible. Thus civil society can be defined as “the arena where people associate to promote common interests, outside of family, the market and the government” (Bustamente et al. 2006, 14). It includes not only formal types of organizations and institutions, but less formal associations and coalitions. It can include philanthropic organizations that are out to save the world, and simultaneously it can include transnational hate
groups that believe in racial superiority of one sort or another. One must be cautious therefore in defining civil society as a place where only good things can happen. Like most social institutions, civil society is what society makes of it (Bustamente et al. 2006, 14; Carothers 1999).

In the Spiral Model, civil society is expected to play an important role at both the domestic and transnational levels. During the repression stage of the model, transnational civil society, through such actors as NGOs and TANS, plays an integral role for change by building pressure “from above” receiving and disseminating information from domestic sources, invoking international norms, and mobilizing partner organizations, supportive networks and states. Internally, it is the role of domestic civil society to build local opposition by mobilizing resources, creating alliances, sending out pertinent information, making normative appeals and generally filling up the new political spaces that are created as the international campaign grows more successful. Domestic civil society is the source of pressure “from below” that works to push the state towards eventual norm compliance. Given that international civil society, as explored earlier, remains relatively constant in both case studies, the focus falls on domestic civil society as a variable and how it may or may not facilitate the implementation of international norms for indigenous rights in Ecuador and Nicaragua. Important considerations are the depth and breadth of civil society actors and especially their ability to articulate demands through political institutions. Also important is the relationship between the indigenous and non-indigenous components of civil society. Do indigenous issues make the civil society agenda?

Civil society is a relatively new phenomenon in Ecuador. Through much of its history there has been little activity in this area and what did occur was centered on the Catholic Church, unions and business associations. Historically, Ecuador had a strong corporatist tradition that included functional representation in congress. There were some trade unions, but they never reached the kind of popularity and power achieved in Brazil, Chile and Argentina.

The first formal civil society organizations (CSOs) were church-controlled groups that served the poor and vulnerable in the urban centres of Quito and Guayaquil. Workers
organizations grew in popularity in the 1930s when labor law changes triggered the establishment of the first real union in 1938, the Ecuadorian Federation of Catholic Workers (CEDOC) (World Bank Social Development Papers 2007, 7). Still, there was no great wave of CSO activity at this time. The populism of the 1930s facilitated the construction of an electoral clientelism with strong patrimonial networks that run counter to the logic of civil society organizations (Bustamente et al. 2006, 19).

When civil society did begin to take shape in the 1950s, it was at the behest of state-led economic development, financed by oil. This, on top of the existing clientelist structures led to the development of a civil society that was corporatist in disposition (Bustamente et al. 2006, 20). The state’s influence, however, was weak outside urban areas. In the Oriente region, it was the church which assumed control. Throughout the 1950s numerous church sponsored projects with Amazonian indigenous groups resulted in the development of the first real indigenous organizations in the nation. Triggered by the oil development, the church groups developed alliances with indigenous peoples to protect communities, lands and resources. Initially defensive in nature, these early associations set the foundations for an indigenous movement that would later play front and center in Ecuadorian civil society.

CSOs slowly began to reach across broader sectors of society. In the sierra, it was the Agrarian reform laws in the 1960s that triggered the formation of peasant and indigenous organizations demanding land rights, while the 1970s spurred the development of new CSOs for environmental, women’s and student movements. The real proliferation of civil society in Ecuador occurred during the 1980s where a combination of neoliberal economics and political rights spurred both organization and activity. During this decade alone nearly 200 new NGOs were formed, double the amount that had been registered over the previous eighty years. The World Bank sponsored 2007 assessment of Ecuadorian civil society notes that these new organizations were triggered by a new constitution (1979) which guaranteed basic liberties. This led to the promulgation of a whole new generation of CSOs dedicated to issues like civil, political
and cultural rights, indigenous peoples, gender equity and the environment. Through the creation of a new Coordinator for Social Movements (CMS) as well as CONAIE, Ecuadorian civil society began to coalesce and became increasingly coherent in terms of their demand for representation within formal political institutions (World Bank Social Development Papers 2007, 7).

Building momentum of over time, the new CSOs revealed their organizational capacity in the 1990s. Led by well-organized indigenous groups, widespread social mobilizations erupted in 1990 as a response to the ongoing deterioration of social and economic conditions, government corruption, and the deepening crisis of representation (ibid., 8). It was at this time that civil society began to mobilize its power base, largely through public demonstrations and protests. Hurt by economic crisis and deep neoliberal budget cuts, disparate groups began to foment a united front against the free trade agenda of the seemingly greedy and corrupted political elites. Indigenous and non-indigenous groups alike joined for the first time in concerted opposition. By 1997 civil society had amassed enough support to initiate the massive civilian uprisings that triggered the impeachment of President Abdalá Bucaram. This occurred shortly after his austerity plan angered working Ecuadorians by raising gas prices by 350 percent and telephone rates by nearly 800 percent (Workers World News Service accessed 6 March 1997). Ecuadorian civil society was developing a lot of experience with street politics and learned it could have an effect fairly quickly. Yet this has not been enough. Coalescing under the auspices of an anti-globalization banner that has united diverse actors, nonetheless, civil society has been unable to present any viable alternatives. Subsequent governments have not had strong ties with the CSOs. More often than not, the various social movements in Ecuador join coalitions to remove unpopular leaders, only to find that their replacements offer just “más de lo mismo” or more of the same.

The decade ended much the way it started, with widespread civilian discontent and public protest. President Jamil Mahuad, the president responsible for implementing the American dollar as the new national currency, was overthrown in January 2000 by a military-indigenous alliance
led by army colonel Lucio Gutiérrez, Antonio Vargas, president of CONAIE and Carlos Solórzano, former president of the Supreme Court (Walsh 2001). Although constitutional order was restored hours after the triumvirate government was announced, Mahuad was out and replaced by Vice President Gustavo Noboa. The new president was keenly aware of the organizational and coalition building skills possessed by Ecuador’s indigenous movement. Noboa continued the neoliberal program that undermined his predecessor, but when indigenous Ecuadorians organized another massive uprising in 1991, he quickly agreed to negotiate and signed a 23-point peace agreement that conceded to many indigenous concerns (CNN 8 Feb 2001).

Outside of massive public protests, indigenous peoples, students, peasants and other groups have no other access to real political representation. A wide gap remains between civil society and established political structures. When it was initially established in 1995, the Pachakutik political movement appeared to offer a democratic alternative to traditional political corruption and clientelism. Although the party was essentially created by the country’s indigenous movement through CONAIE, it included strategic partnerships with other progressive organizations under the banner of the Coordinator for Social Movements (CMS). Formed in 1996, Pachakutik placed an impressive third in its first presidential campaign, captured several seats in the national congress as well as a number of other important regional positions in both the highlands and Amazon (Mijeski and Beck 2008). There was, at least initially, considerable optimism that this new Indigenous-progressive coalition party would be able to supersede the corrupted political arena and provide Ecuadorians with a competent democratic alternative.

Pachakutik failed to maintain its support base. Non-indigenous groups from civil society that joined the movement for its grassroots democratic anti-neoliberal stance quickly felt alienated by an agenda that became more and more “indigenista.” Between 2005 and 2006, much of its mestizo support base had turned away. Its indigenous base had split as well, because of ongoing conflicts between the constitutive organizations of CONAIE (ECUARUNI and CONFENAIE),

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clientelist loyalties to Lucio Gutiérrez, and grassroots disappointment with indigenous leaders’ malfeasance and finally their willingness to create political alliances for personal gain that were not broadly supported (ibid.). Going into the 2006 election, general support for Pachakutik had waned and progressive civil society groups were open and ready for an electoral alternative that shared their derision with the Ecuadorian political establishment.

Although civil society in Ecuador is both active and diverse it remains weak. This may be the result of its relative youth, and the fact that the government offers little in terms of support, financial or otherwise. Another issue that has been raised is the low level of communication and cooperation both within and between CSOs. Societal mistrust is endemic and penetrates all institutions. Lack of funding appears to be a major issue as well, especially for CSOs with little international cachet (Bustamente et al. 2006, 45). While some Amazonian groups in particular have been able to garner a great deal of particularly European support, other groups have not been as lucky. Nationally, charitable giving is weak and not supported by any type of tax incentives.

According to the 2007 CIVICUS study, Ecuadorian civil society suffers from an overall weakness in terms of structure; yet there is surprising relative strength in terms of impact. Although lacking in money, expertise and technical skills, civil society has nonetheless managed significant achievements. One of the main problems identified is the longstanding adversarial relationship between social movements and the government. This is problematic as it forestalls the creation of any meaningful or lasting coalitions between civil society groups and either the government or political parties. Civil society, while it can publicly register its demands, had no formal channel to provide input into policy decisions or make changes. State and societal structures are very disconnected. This relegates citizen movements to the position of critic, where they have been effective, but with no mechanism for dialogue, debate and/or real inclusion in terms of government policy decision making. In the long term, this can be destabilizing (Foley & Edwards 1996, 48).
This certainly appears to be the case. While overall participation in civil society is declining, street protests remain commonplace and can become rowdy affairs. There have been numerous civilian uprisings in Ecuador which have contributed to its overall political instability. Popular indigenous-led uprisings occurred in 1990, 1992, 1994, and 2000. In 2005, there was a widespread civilian uprising that forced out then President Lucio Gutiérrez. Some commentators noted that Ecuadorian civilian society imagined itself as a “noble substitute” for representative democracy (Bustamente et al. 2006, 21-22). High levels of mistrust, touched on earlier and complete lack of legitimacy have undermined hope among the general populace that the existing political structures can be improved. When street protesters demand “Que se vayan todos!” they are serious. From their perspective, it is the established political elites that represent the greatest threat to democracy. And if Ecuador is ever to improve, they must be removed from power entirely.

Political elites see things quite differently. Within these circles civil society is often regarded as an “expression of extremist group activities, potentially violent and destructive and, in many cases, is seen as a fifth wheel which serves to hide obscure, internationally driven intentions, or as a means for foreign powers to penetrate the country” (ibid., 22). Expressed civil society interests are seen as the object of communist or foreign manipulations and hence ignored. And so the gap remains. These attitudes coupled with the chronic inability of Ecuadorian political parties to represent the electorate in any meaningful way prevent civil society interests from ever reaching the decision making circles of the state. There is no dialogue or information-sharing, nor is there any mechanism to promote collaboration or coalition building. Elites are much more likely to consult with foreign technocrats than their own population base in terms of policy decisions. This only adds to popular resentment and further undermines stability in the Andean nation.

Ecuador’s civil society also has a tense relationship with the nation’s private sector. The CIVICUS survey reports that most stakeholders believe the private sector to be largely
uninvolved and uninterested in civil society initiatives. Private sector efforts are viewed in strategic terms and emanate from a charity mindset rather than any sense of shared responsibility for the nation. Deep mistrust seems to characterize most relationships, even those internal to civil society itself. Many view civil society activism as the foray of Marxists and Chavistas and hence a threat to economic growth (ibid., 71-72).

Still, the picture is not all grim. There are a wide range of NGOs, think tanks, unions, professional, business and neighborhood associations, women’s groups, indigenous organizations, church groups, sport clubs etc. that participate in civil society. In terms of membership in CSOs, Ecuadorians actually report a higher than the regional average number of affiliations at 1.75 per person, however participation in a number of professional associations is mandatory and may skew the numbers somewhat. CSOs have been getting more involved in governance issues since 1997 and have recognized certain deficits in terms of state-society relations. Despite this, overall citizen engagement is low, reflecting growing apathy and alienation. Both CIVICUS and the Ecuador Democracy Audit report low rates of citizen participation. This includes consideration of such activities as charitable donations, non-partisan political action and volunteerism (World Bank Social Development Papers 2007, 8-9).

The 2006 Democracy Audit of Ecuador reports that civil society activity contracted between 2000 and 2005. Those who had generally been active are now less so, and overall fewer people are participating at all (Seligson et al. 2006, 43). This reflects a general malaise in society, frustration, and/or endemic lack of trust in institution in general. For those who are active, the most common choices for participation are religious groups (10%) followed by neighborhood committees (5%) sports clubs (5%) and savings and loan cooperatives (5%). Interestingly, in terms of ethnicity, indigenous Ecuadorians were far more likely to participate in CSOs than their mestizo counterparts (Bustamente et al. 29, 36-7).

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19 Supporters of Venezuelan President Hugo Chávez and his personal brand of Bolivarian revolution.
20 For example, professionals such as lawyers, doctors and accountants must be accredited by professional associations in order to practice in Ecuador.
While not engaged in formal civil society institutions, “street politics” is common and brings together diverse classes and interests. The educated and professional classes are as likely, if not more so, to take to the streets as the poor or disenfranchised (Seligson et al. 2006, 40). According to the 2006 Democracy Audit, ethnicity is not a significant factor in terms of determining the likelihood of participation in public protests (ibid., 38-41).

Given the real gap in terms of representation, coupled with longstanding governance issues, it is not surprising that the international financial institutions, like the World Bank, have taken steps to improve the quality of government in not only Ecuador, but in all countries around the world and to do this have actively engaged civil society as partners in progress. A recent World Bank sponsored study indicates that civil society has recently begun to engage in governance issues, seeking to address the well recognized deficit in accountability and transparency while reducing corruption. Civil society, rather than just registering complaints, is becoming more adamant about inclusion in the policy making process. If successful, this process could improve the overall functioning of representative, as opposed to delegative, democracy in Ecuador (ibid., 14). Table 6.2 summarizes the public policy priorities for constituent organizations in Ecuador:

<table>
<thead>
<tr>
<th>Table 6.2 Ecuadorian CSO Public Policy Priorities</th>
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<tbody>
<tr>
<td>Type of Organization/Public Policy Priorities</td>
</tr>
<tr>
<td>NGOs</td>
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<tr>
<td>Ethnic Organizations</td>
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<tr>
<td>Neighborhood Associations</td>
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<tr>
<td>Unions</td>
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<tr>
<td>Women’s Organizations</td>
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<tr>
<td>Professional Associations</td>
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<tr>
<td>Business Associations/Chambers of Commerce</td>
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Source: CSO survey conducted for this study

For the majority of the organizations, reducing overall corruption and enhancing citizen participation in public policies represent important priorities. One CSO, Participación Ciudadana, (PC) has been particularly active in terms of enhancing the breadth and depth of civil society in Ecuador. Starting in April of 2000, PC partnered with eight other CSOs and academic institutions to create the Citizen Observatory of the Congress which carefully monitors activities and maintains a public database of legislative proposals. This will help enhance both transparency and accountability. The group also monitors elections and produces a digital newspaper to promote informed voting.

In Ecuadorian civil society, historically it has been the indigenous movement that been most successful, although Gutiérrez’s divisive policies have since had serious reverberations. The indigenous movement even attempted to breach the citizen – government divide through the creation of its own political party, Pachakutik, which has had some electoral successes, especially at the municipal and regional levels.

Still, indigenous peoples do not feel well represented by Congress. There was a brief peak in indigenous-state relations with the election of the Gutiérrez government in 2003 as four Pachakutik members were given portfolios: exterior, agriculture, education and tourism. Unprecedented, two were themselves indigenous. The coalition was short lived however, as the Pachakutik members withdrew support when Gutiérrez negotiated a deal with the IMF that countered much of his pro-poor election promises. They then resumed their accustomed role as opposition members (Ortiz 2006).

In the 1990s the indigenous movement emerged as the most organized, experienced and consequently successful. Like other groups, they were interested in working with government to assure greater accountability and transparency, reduced corruption and overall responsiveness to citizen defined needs. Public protests and civilian uprisings, something Ecuadorian civil society has much experience with, can play an important role in pressuring governments to make policy changes. However these types of activities are by nature short
lived. Citizens can only camp outside of the Presidential Palace or in El Ejido Park for so many nights. Sustained action requires good organization, adequate resources and strong inter-relationships.

Unfortunately, for most CSOs these qualities are lacking. Further, the Spiral Model suggests that a good case for norm cascade occurs when national and international civil society groups can work together. In Ecuador transnational linkages appear weak. The CIVICUS 2006 survey reported that most citizens believed only very few CSOs had linkages with international networks or participated in international civil society events. As noted in interviews for this thesis, CONIAE was one of the few groups that had been able to garner international attention and financing (Bustamente et al. 2006, 40; Ortiz 2005).

6.7  *Mobilizing ethnicity: indigenous organization in Ecuador*

To operate effectively, the Spiral Model requires a strong and growing civil society, and within it, a strong and well articulated indigenous movement. Further, there must be an acceptance on the part of broader civil society to incorporate, promote and support that movement’s agenda as part of its overall list of demands. Indigenous organizations, communities and leaders, therefore, must deliberately cultivate relations with other civil society groups and actively negotiate an agenda that is inclusive. The challenge is to construct indigenous organizations that are representative of indigenous diversity and needs and at the same time able to negotiate national level projects that include the aspirations of a broad cross section of the Ecuadorian public. This, surprisingly, has been a strong point in Ecuadorian indigenous leadership.

Ecuador is broadly recognized as home to one of the largest, most successful indigenous rights movements in Latin America (Macdonald 2002; Lucero 2001; Brysk 2000, 73; and Selverston 1994, 130). There are a number of reasons for this. A fortuitous juxtaposition between global, regional and local factors advanced the development of an indigenous movement which
challenges the state not only for recognition and rights, but for the reshaping of the whole Ecuadorian political project.

The indigenous movement in Ecuador is organized along local, regional and national levels. After the 1990 uprising, there was a significant strengthening of ties at the international level as well (Martin 2003, 47). Globalization has provided communities with new opportunities for resistance and change, although it has brought with it new problems and challenges. Ecuadorian Indigenous peoples’ historical experience with the state can be characterized by dispossession, exclusion and discrimination. Globalization has intensified these pressures and led to what some indigenous groups and scholars refer to as the “second conquest”. Although indigenous nations have largely been absorbed by modern political structures, the second conquest involves the encroachment of remaining indigenous territories by transnational corporations (TNCs) in particular, searching for scarce natural resources.

As detailed in the literature on economic globalization, neoliberal economic pressures act to restructure the state, increasing its responsiveness to international economic influences while, as many critics note, decreasing its ability to respond to domestic civil society. This creates problems internally as voting citizens feel that their governments have less and less to offer them in return for their support. In Ecuador, the failure of the ruling classes to construct a representative government has triggered a significant backlash that includes small business owners, church groups, and environmentalists among others. It is in this context that indigenous organizations gained new legitimacy in their quest for greater autonomy, property rights and ultimately cultural survival (Houghton and Bell 2004). By appealing to what Alison Brysk refers to as the “twentieth century zeitgeist of dissatisfaction with modernity”, indigenous demands resonate with broader “counter-hegemonic” sympathies rooted in opposition to the global capitalist project. Their overall appeal is enhanced by a romanticized construction of indigenous culture and identity (Brysk 2000, 41). Indigenous values are taken as markers for integrity and wisdom in contrast to modern society’s corruption and greed. In Ecuador, the public is extremely frustrated with the
status quo and eager for an alternative. This represents an as of yet unrealized opportunity to advance an indigenous framework for change, although CONAIE may not be the most appropriate vehicle at this time.

Globalization is, of course, closely tied to the neoliberal economic project. It is often difficult to separate the two or discern between cause and effect. What is clear is that this neoliberalism is part of Ecuadorian politics and triggered popular discontent and a series of civil society mass mobilizations often led by indigenous organizations. Indigenous mobilization is not new. However, technological advancements and the onset of a transnational indigenous movement have shifted strategies and enhanced their overall effectiveness (Martin 2003, 47).

Regional developments in the Ecuadorian context have helped shape strong, if somewhat divided indigenous organizational structures. While Ecuador is geopolitically split between the coastal and sierra regions, indigenous Ecuador has been divided between highland and lowland communities. Egan (1996) and Zamosc (1994) have explored the pervasive differences between the two and the effects of this on the subsequent development of both regional and national indigenous organizations. As Leon Zamosc has argued: “To understand movements, one must ascertain what is at stake in the conflicts in which they are involved” (Zamosc 2007, 232). Conflicts in the highland areas have centered on issues very different from their Amazonian counterparts. The highland Andean communities underwent a state sponsored “peasantization” which deliberately sought to undermine their ethnic identity (Korovkin nd.). Subsequent mobilizations have centered on land policy and reform utilizing their experiences as a class more than as an ethnic group (Zamosc 1994). Tanya Korovkin notes:

By all accounts, the indigenous political mobilization started in Ecuador in the Andean provinces in the early 1970s, mostly in the form of invasion of the hacienda land (Korovkin 2001; Pallares 2003). In effect, it was born out of the earlier peasant mobilization, led by left-wing parties and informed at least on the surface, by class based ideologies (Korovkin nd, 2).

This did not mean that the Andean indigenous groups were unaware of ethnic issues. Ultimately the culture-blind leftist movements failed to grasp the significance of persistent ethnic
concerns and were replaced by a new cadre of indigenous intellectuals who sought to blend traditional class based issues with an explicitly indigenous agenda (ibid.).

This experience stands in sharp contrast to the Amazonian Indians who had been largely ignored by the state until the 1950s. Their isolation meant they could maintain traditional communities, governments, and lifestyles while speaking their traditional languages. Ethnic identity therefore has been far more salient and has played a much more dominant role in subsequent organizing and demands. Given the weak presence of the state in the Amazon, indigenous organizations were able to form and operate with authority; and this they did even when government policy encouraged colonists and private sector interests to make competing claims against longstanding indigenous held spaces and resources (Yashar 2005, 112; Egan 1996).

Neoliberalism in Ecuador exacerbated existing pressures in Amazonian indigenous territories by encouraging both oil development and colonization. These changes gave autonomous and historically ignored indigenous communities a reason to articulate resistance and clearly define their own claims and rights through local and regional organizations. Combining traditional and non-traditional approaches, they sought to protect their territories and especially their cultures and ways of living from encroachment by the modern mestizo nation. Deborah Yashar argues that the relative strength of today’s Ecuadorian indigenous movement as a whole exists as a result of challenging the neoliberal policies of the state. This has certainly made a real difference, however it is also important to recognize that the movement began much earlier. Modern indigenous resistance predates the current neoliberal turn. Its roots can be traced back to the indigenous response fomented by the policies of the military dictatorship. A four-man military junta passed the 1964 Agrarian Reform Laws with the double agenda of modernizing agriculture in the Sierra and encouraging colonization of the Amazon (Martin 2003, 48; Yashar 1999; Zamosc 1994). Indigenous communities in both regions were irrevocably affected. In the Sierra, the laws abolished Ecuador’s lingering feudal land holding system, the huasipungo, which was based on the exploitation of indigenous labour. This left the
indigenous peasants both homeless and unemployed, a potentially explosive combination. The government encouraged the landless indigenous peasants to move to the eastern Amazonian region, the Oriente. Colonization of the Amazon seemed an ideal solution for the growing population and economic pressures in the Sierra. Once they arrived they built houses, cut trees, and started ranching and agriculture, with little, if any thought to the indigenous territories and livelihoods on which they were encroaching (Van Cott 2005, 106; Selverston-Scher 2001, 33).

This influx of new migrants did not impress the native inhabitants. Indigenous organizations in the Amazon began to form and cooperate at both local and regional levels in defense of their lands and their ways of living. Ethnicity played the key role in the Amazonian indigenous response, much more so than it did in the highlands. One of the first organizations that responded to this new colonization was the Federation of Shuar Centers. The Federation was established in 1964 with the help of Salesian missionaries who viewed the colonists as a threat to their own carefully cultivated influence in the region (Selverston 1994). As Hendricks (1988) noted, the Federation played a fundamental role in ensuring the Shuar people were not colonized. The centers were highly structured and hierarchical, integrating traditional and missionary ideologies, and incorporating enough foreign technology and knowledge to successfully defend themselves against the incursions of colonizers. They pursued communal title to lands and initiated a successful cattle-raising program that turned tracts of forest into pastures and provided micro credit for the purchase of cattle (ibid.). Although Shuar agriculture was not eco-friendly, it prevented other colonists from claiming it empty and seeking title under federal agrarian reform policy. According to one researcher, the Shuar Federation is interested not only in protecting indigenous property rights, but sees this as an essential part of a broader scheme of rights that includes autonomy and self-determination (Trujillo 1991, 390-391).

Another important organization formed at this time was the Organization of the Indigenous Peoples of Pastaza (OPIP). OPIP emerged in the 1970s as a result of the growing incursions of oil companies on indigenous territories (Yashar 2007, 124). The mandate of OPIP is broader than the
Shuar Centers as it seeks to defend indigenous territories not only from the colonists, but also from the oil industry which now draws them into the region. The organization works with more than 130 different indigenous communities in the region, representing some 20,000 members.

According to website of the international NGO, the Advocacy Project: “OPIP strives to establish what activists call the ‘collective rights’ of its constituency: the right to full participation in decisions regarding the use of all the land and resources in their territory, and the right to share equally in the benefits resulting from that use.” OPIP has organized marches and protests, while providing long term technical support to communities in defense of their territories. These companies and the development they bring can be very destructive to indigenous communities. In an interview, one OPIP technician discussed the detrimental effect of road construction: the roads brought disease, alcohol, and contact with western cultures that had a devastating impact on youth especially. The roads brought access to the communities, but at the same time, they provided an easy way out (Ortíz 2006). One community member noted: “In this sense, the road has killed us. It has brought to us no benefits. It has killed our culture” (cited in Yashar 2007, 125).

During an interview, OPIP technician Pablo Ortíz argued that the impact of the oil companies on the indigenous communities has been rapid and brutal, not unlike rape. The shanty pubs that serve the oil workers entice indigenous youth with alcohol and “free” screenings of violent American movies. Mestizo colonists bring with them anti-indigenous racism. Newly established police stations and court processes tended to discriminate against them openly as well (Ortiz 2005c). Disputes over land rights, for example, have rarely been settled in indigenous favor (Yashar 2007, 125). The effect of these changes on the culture has been sweeping and difficult to reverse. The youth develop a negative self image and are lured into urban areas in pursuit of a lifestyle which may never exist for them (Ortiz 2005c).

In spite of this damage, support for OPIP among the communities of Pastaza province is uneven. While initially the government was directly involved in forcing the communities to accept oil development, transnational corporations quickly realized there was an easier way to win
indigenous complacency. An increasingly effective corporate strategy of divide and conquer was used to entice communities to adopt pro-development positions in exchange for bribes, gifts and small scale development projects. Expense paid trips to Quito as well as infrastructure for school houses and medical centres were proffered in addition to employment opportunities (Ortiz 2006).

The overall resonance of OPIP’s position and approach is due to the organization’s strong adherence to indigenous culture and ideology (Ortiz 2006). Unlike the Shuar position of using agrarian reform and colonization laws to their own advantage, the OPIP position was based on the principle that the indigenous peoples had a right to their territory, derived from historical occupation and not contemporary legal acts (Yashar 2007, 126). This has not amounted to a complete rejection of modernization in the Amazon; however it has taken a strong stand against oil development in principle. Still, an OPIP technician admitted, this is fundamentally because of a lack of faith in the government to share the resources equitably with the indigenous peoples whose lives are most disrupted. If oil development could be managed in a more ecologically sensitive way, with inclusion of indigenous interests, opportunities for negotiation might certainly open up (Ortiz 2005c).

The strength of Ecuadorian indigenous organizations is derived not only from grassroots organizations, but in the development of regional and national level structures that have re-conceptualized indigenous identity in new yet resonant ways. This has been essential in the construction of a common agenda which could rally wide ranging support and organize widespread protests and uprisings. Such a project was not easy, nor was it inevitable. A confluence of historical experiences, political openings and international interest provided solid foundations. Since the 1950s, both unions and churches had been actively involved in organizing and advocating for indigenous interests, albeit within the state sponsored construction of them as peasants (Yashar 2007, 106-7). As indigenous peoples began to strive towards a more indigenous centered agenda, they built on this organizational experience to design and implement their own region wide structures.
The Confederación de Nacionalidades Indígenas de la Amazonia (CONFENAIE) was formed in 1980 as the regional indigenous organization of the Oriente, eight years after the Ecuador Runacunapac Riccharimui (ECUARUNARI) was formed in the Sierra. Although eventually both coalesced around a land-centered agenda, each organization followed its own trajectory in response to unique regional circumstances.

CONFENAIE was formed after years of discussion by the Shuar Federation, OPIP and others. The primary goal was to coordinate the efforts of existing organizations within the region in order to better defend the cultures and especially the land which was seen as the foundation of everything (Yashar 2007, 129). CONFENAIE organized the Secoya, Cofán, Achuar, and Huaorani into specifically ethnic organizations, then brought them under the confederation umbrella (Van Cott 2005, 106). Ethnic identity and cultural survival were seen as the essential elements of their struggle against incursion by colonists and especially foreign-owned oil companies. Amazonian Indians have always been committed to the idea of territorial rights as opposed to merely land.

Andean indigenous communities initially focused on the concept of land rather than territorial rights. Early organizations focused on a more class-based agenda than their Amazonian counterparts. ECUARUNARI built on pre-existing networks and took advantage of new political spaces created by the pro-development military government. However, these had been constructed and defined by non-indigenous sources. Both the unions and churches that had been active in the rural Andes saw the indigenous peoples that they worked with as “peasants”. They were unable to understand, much less incorporate indigenous identity into any of their claims. While concerned about social injustices, they were by and large committed to the dominant mestizo view of nationhood that implied assimilation was the only way forward (Yashar 2007, 100).

ECUARUNARI continued in the footsteps of the unions and churches by fighting for land reform as well as taking a lead role protecting indigenous and other local communities from
growing challenges to local systems of government (Yashar 2005, 106). Part of their project during the 1970s and 1980s was to protect their autonomy from existing political parties (Van Cott 2005, 105). Their land reforms policies, while indigenous focused, resonated with other Ecuadorians as well. In its early days, the organization welcomed the participation of non-indigenous peoples, as they had shared interests and agendas, however by the mid 1970s infighting with moderate leftist Catholics threatened to divide the movement and undermine its vision of political autonomy. ECUARUNARI expelled non-Indians from the organization at the 1976 Congress (Van Cott 2005, 105). Still, it was realized that without the support of a broad base of the population, national political change would not be possible. An early class-based focus may have circumscribed early indigenous demands, but it also helped create an understanding of shared interests that would later benefit CONAIE and Pachakutik. By the mid 1980s, ECUARUNARI set out to create a national alliance with lowland organizations (ibid., 106).

Mijeski and Beck (1997) argue that one of the early challenges of ECUARUNARI was to define itself as a distinctly indigenous organization. Zamosc (1991) outlines the longstanding relationship between Andean indigenous organizations and the political left. He argues that because of the greater degree of contact with non-indigenous society, class-based appeals historically had a stronger influence in the Andes. Although union-based traditions provided strong organization and strategies, without a strong indigenous identity as a rallying point, widely ranging interests and concerns undermined the development of a strong common agenda. The problem in rural Ecuador was that indigenous communities varied widely, and this included class positioning. These differences made it difficult to advance common policy positions. For example, one early position of ECUARUNARI was the rejection of government sponsored modernization. Yet certain market-oriented communities, such as Otavalo, as well as entrepreneurial indigenous individuals, were very much in favor of modernization. This created tensions between rank and file members and the leadership that led many to predict the organization’s quick demise (ibid.).
It is important to recognize that there is no single common indigenous identity in Ecuador, or in fact anywhere. Indigenous Ecuador is made up of many heterogeneous communities, cultures and languages. To take all of these and construct a pan-Ecuadorean indigenous identity has been challenging and still remains an elusive goal, as evidenced by the ongoing challenges within CONAIE. In the Amazon, on the other hand, CONFENAI has been very successful at mobilizing around identity and culture. Years of relative isolation and autonomy have led to stronger traditional ties to community and culture. Aside from the work of the missionaries, indigenous groups have escaped assimilation, unlike their Andean counterparts.

Although historically Andean and Amazonian indigenous communities had distinct issues and objectives, the issue of land became a shared concern, making the development of a cohesive national agenda ever more appealing. The key was to redefine land rights to encompass the broader realm of territories. This provided the basis for the development of a unified national organization. The Confederation of Ecuadorian Indigenous Nationalities (CONAIE) was formed in 1986 by the leadership of CONFENAI and ECUARUNARI and sought to coordinate indigenous activities nationally and provide unity for an indigenous movement ready to take the national stage (Selverston-Scher 2004, 37). CONAIE included the membership of nearly 80 percent of the county’s community-level indigenous organizations and, by the 1990s, represented more than 220 organizations and held a permanent office in Quito (Van Cott 2005, 107). CONAIE has had many notable successes, but faced significant challenges too.

One of CONAIE’s early principles was to stay out of traditional electoral politics. Donna Lee Van Cott notes that “Some leaders, particularly those from the Sierra with a long experience of relations with parties, were concerned that participation in national elections might result in militants being co-opted by the parties, which would jeopardize the movement’s autonomy” (Van Cott 2005, 117). This explains why CONAIE only authorized local and provincial indigenous candidacies. This changed in 1994, when CONAIE began to participate in a strong national anti-neoliberal campaign that opened the eyes of the leadership to national political opportunities.
CONAIE began to take a key role leading national social movements against the policies of Durán Ballén, in particular the privatization of social security. Success on the streets led to increasing pressure to pursue political power as well. While Sierra leaders were not as convinced, Amazonian Indians were determined that a national indigenous party was the appropriate next step (ibid., 120).

It was this mix of internal conflict and external opportunity that went into the early Movimiento de Unidad Plurinacional Pachakutik (MUPP). CONFENIAE forged ahead, and CONAIE followed. According to advisor Jorge León, the labour movement was declining, and there were no other social movements capable of taking the lead. Pachakutik engaged progressives from both indigenous and non-indigenous camps and united them with a new model of politics based on traditional indigenous culture (Van Cott 2005, 122). Unfortunately, the Andean/Amazonian split did not disappear. For example, CONAIE’s early allegiance with the Gutiérrez government was supported by Amazonian, but not Andean groups, triggering internal conflicts that have not yet been resolved completely. Recent election results have been disappointing.

Looking at the Spiral Model, domestic civil society must work to engage the international community with campaigns, information and grassroots organization. This has been a real strength of CONAIE. CONAIE has established valuable transnational linkages with a series of international NGOs. This helped it secure international support and funding for a series of development and cultural projects, which helps build the organization’s reputation at the community level. Such success, however, can also backfire. Local organizations can become annoyed and/or jealous of national counterparts with whom they feel competition for resources. They vary widely in terms of their ability to develop and deliver internationally financed projects. CONAIE has developed considerable capacity and this has established its presence in the international indigenous networks. OXFAM America, The Inter-American Foundation, and the Rainforest Action Network have all funded community-based projects through the organization.
(Martin 2002, 50). Further, this ability to secure external funding has enhanced its independence and hence its ability to be critical of the government. It has also helped the organization participate in important, but costly, international meetings at the UN and the OAS.

The challenge for indigenous groups is always to get their issues, as minorities, onto the national agenda. There are two main approaches that can be taken. Internal pressure can be applied through participation in national politics, while external pressure can be applied through the maintenance of autonomous indigenous governments. Indigenous critics in particular have argued against the former by suggesting that participating in the “systems of colonization” real indigenous ambitions, authorities and identities become lost. Although initially determined to avoid the Ecuadorian political system, over the last decade, CONAIE has been part of the catalyst for the formation of a new political party that represents, among other things, indigenous interests (Brysk 2000, 73). This party, Movimiento Unidad Plurinacional Pachakutik (MUPP), has been both a good and bad experience. Participating in the national political system undermined some of its grassroots credibility. Several interviewees commented that its alliance with the Gutiérrez government led some indigenous groups to feel that CONAIE was more interested in its own power and prestige, than community problems (Ortíz 2005; Melo 2005). This position was exacerbated by Gutiérrez’s subsequent neoliberal turn. Since then, the organization has been actively working to regain its grassroots credibility.

Leon Zamosc has argued that CONAIE has been successful at the broader level precisely because of its Andean influenced class-based agenda. By appealing to class rather than just ethnicity, it has been able to take a leadership position in Ecuadorian civil society advocating against the neoliberalism of the elites. “We must remember…that many Indian movements cannot be seen as purely ethnic phenomena. Insofar as most Ecuadorian Indians are peasants, their position in the class structure is another fundamental element in the definition of the character of their movement” (Zamosc 2004, 135).
Despite this, many scholars reject a traditional Marxist class-based analysis of the Ecuadorian indigenous movement, citing the double discrimination indigenous peoples face as workers/peasants and as Indians. Melina Selverston argues that this discrimination has made any unity between working class Hispanics and working class Indians difficult, though not impossible (Selverston 1995). Indigenous identity is important within CONAIE, and its leaders’ present indigeneity through language, clothing etc. Yet at the same time, key demands made during CONAIE mobilizations promote a much broader agenda, including: subsidies to electricity, fuel and gas, fair tax reform, the end of privatization plans, and reducing foreign debt payments.

Such demands resonate among the popular classes regardless of ethnicity. This has been a key factor in CONAIE’S successful mobilizations. Surveys from the 1990s indicated that the Ecuadorian population regarded CONAIE as one of the most trustworthy institutions in the country, alongside the military and the Catholic Church. While maintaining and promoting indigenous identities, CONAIE simultaneously incorporated the long ignored demands of other sectors of the popular classes, including workers, Afro-Ecuadorians, women, students and youth (Andolina 2003). Regrettably this support has waned recently.

Overall, indigenous groups in Ecuador were highly mobilized in the period under study. They enjoyed a significant presence internationally and participated in international indigenous rights discussions at both the UN and the OAS. Indigenous participation in both the UN and OAS drafting processes for Indigenous Rights declarations has been strong (Santi, 2006). Ecuadorian indigenous communities and organizations have established relationships with a wide variety of NGOS supporting both human and indigenous rights, as well as environmental issues. NGOs provide much needed technical support, moral support and funding. Another benefit, noted by one indigenous leader, was the additional security gained by participating in the international arena. In terms of his work with the IACHR he noted: “International recognition is very important. It protects my life and it protects mother earth” (Santi 1995).
The indigenous population of Nicaragua emerged as important political actors during the Contra war when the Sandinista government pushed thousands of Miskito and Mayagna families from their homes and communities on the Caribbean Coast and forced them to seek shelter and refugee status in neighboring Honduras. Reflecting a poignant contradiction between the rhetoric of the left-wing Sandinistas and the aspirations of indigenous costeños, the conflict focused the attention of international courts on Nicaragua and its indigenous inhabitants. The Sandinistas, who saw themselves as the noble liberators of the oppressed Nicaraguan peasant classes, could not fathom that indigenous Nicaraguans had their own perspective on oppression and liberation. On the coast, the Sandinistas were considered just as oppressive, if not more so, than the Somicistas who preceded them.

It took time before the FSLN realized its error and sought peace with the indigenous peoples of the coast. As part of this effort it devised an autonomy agreement that aspired to better represent the multiethnic and multicultural population of the region. The 1987 agreement, while certainly a landmark endeavor, did not quite reconcile the long felt gap between Managua and the Caribbean Coast. While it included some policy innovations, its implementation continues to fall short of expectations. Twenty years later, costeños still feel exploited and ignored by the national government and appear ever more disillusioned with the limited gains that so-called “autonomy” has brought. In this case, as well as others, the government appears willing to legislate for real change regarding indigenous rights however reluctant it may be to make them effective.

Upon arrival in the capital city, it is immediately apparent that Managua has survived many things: some triumphs perhaps, many crises, and a lot of storms. Driving through the city, one encounters neighborhood after neighborhood of seemingly endless and unplanned sprawl. The capital city has never fully recovered from the tragic earthquake of 1972. There is no downtown,
no center of business or pedestrian traffic. Brand new high rises stand adjacent to long dilapidated ruins where the desperate poor scavenge daily to eke out a living. Even the main thoroughfares lack clear signage; streets remain nameless and official addresses are often given in reference to buildings that are no longer standing.

Economically, Nicaragua has suffered the effects of colonialism, earthquakes, hurricanes, revolution, corruption and massive debts. Despite some improvement after the end of the Sandinista era, Hurricane Mitch in 1998 struck a devastating blow. It destroyed considerable infrastructure and important crops, and increased the country’s overall indebtedness while stifling short to medium term economic potential. Mired in corruption, the government responded with policies and practices that made the situation even worse. In total, Nicaragua owes $6.3 billion dollars to creditor countries and institutions and must maintain a strict macro-economic policy framework which includes limiting government expenditures, the privatization of public enterprises and promoting export earnings in order to placate lender countries. Much needed social programs, more often than not, are dependent on the goodwill and funding of foreign NGOs (UN Commission on Human Rights Special Report on Economic, Social and Cultural Rights, 2000).

The devastating impact of revolution, war, hurricanes and earthquakes is worsened in the context of everyday Nicaraguan poverty. After Haiti, Nicaragua is the poorest country in Latin America with the majority of its citizens living on less than $2 per day. According to the 2006 World Bank “Nicaragua at a Glance” the GNI per capita is just $980 annually; a figure well below the Latin American regional average of $4767. Women and children are affected disproportionately with one in three children suffering from malnourishment. Structural adjustment programs, ostensibly designed to stimulate growth, have had the effect of stunting long term prospects for many Nicaraguans by making primary and secondary education inaccessible. In a nation of just over five million people, more than 800,000 children are unable to attend school because their families cannot afford the expense of tuitions, uniforms and/or
supplies (World Bank 2004). Without education, these youth stand little chance to find jobs and build stable futures for themselves or their country.

Consequently, socio-economic conditions for the vast majority of Nicaraguans are amongst the bleakest in the hemisphere. As measured by GDP, Nicaragua is one of the poorest countries in Latin America, alongside Bolivia, Honduras and Haiti. When quality of life indicators are taken into consideration Nicaragua actually fares even worse. Social expenditures in Nicaragua are amongst the lowest per capita in the world at a meager $68 US per person. This is just a little over half of social spending in Honduras ($126 US) and one third that of Bolivia ($136 US) (World Bank 2004). Poverty on the Caribbean coast is even more pronounced. Access to basic services, like health and education, is sporadic and generally of poor quality (McConnell 2007; Coordinadora Civil 2006, 130-133).

Trying to understand the modern nation state that is Nicaragua is impossible without a solid grasp of its unique colonial history. Foreign interference has been a recurring theme. Originally a province of the Kingdom of Guatemala, Nicaragua began its post-colonial existence as part of the United Provinces of Central America in 1821. When the republic collapsed in 1838 Nicaragua was left to construct its own state (Baracco 2005, 31). There were great hopes for the new nation. Because of its unique geography, Nicaraguan elites hoped to construct a canal route between the Pacific Ocean and the Caribbean Sea, and then reap the rewards commerce would bring. But while the canal never materialized, this strategic potential made Nicaragua much more vulnerable to foreign, and especially American, interference.

The voice of the nation’s poor and oppressed was articulated in the early phase of the Sandinista revolution. Its leaders spoke of reclaiming the nation for all Nicaraguans and ensuring everyone had access to services like education, health facilities and community development. The idealism of the revolution captured the imagination of progressive leftists not only in the region, but in North America and Europe. To many, the Sandinistas represented a real revolution of the
people, mobilized against oppression. They ignited hope that a better society, a more just and equal nation would be forthcoming.

This was, as history shows, not the case. The goals and dreams of the socialist regime were all but completely undermined by a long and costly civil war that was supported by the American government. Money that could have been spent building schools and clinics, training teachers and doctors and building long term infrastructure projects instead was used to buy weapons and fund the army. FSLN idealism quickly faded into corruption and caudillismo that rivaled that of the conservatives. The costs were impossible to recover from and led, at least in part, to a rejection of the FSLN in the 1990 elections and the resolve of most Nicaraguans to do whatever they could to reconcile with American interests.

7.1 The politics of the Caribbean coast

For a brief moment, during the height of the revolution (1979-1984), Nicaraguans appeared to be united in their rejection of Somoza and their deeply held dream of a better nation. When Nicaragua held what were widely accepted as free and fair elections in 1984, the FSLN won a clear majority of the votes. The operative word is brief. As a post-colonial society, Nicaragua has been marked by the enduring fragmentation and division that can be found throughout Latin America.

Like Ecuador, Nicaragua suffers economic, social, social, political and geographic divisions. The most pronounced geographic divide is between the Pacific and Caribbean coasts. Difficult topography and poor infrastructure meant that the two coasts were isolated from the other, with the majority of the population on the Pacific side. The Caribbean, populated primarily indigenous and black communities, was of minimal importance to the national government centered in Managua. Even the exploitation of its vast natural resources was more likely to be done by foreign firms than national ones. With its unique links to British colonialism, the Caribbean coast remained a completely foreign and separate part of Nicaragua well into the 20th
century. The creation of the Regional Autonomous Zones of the North and South (RAAN and RAAS) by the Sandinistas in 1987 was intended to finally incorporate the coast into Nicaragua on its own terms. However, lack of government funding, weak infrastructure and poor institutional development have rendered these autonomous governments largely ineffective while reconfirming the local view that Managua cares little about what happens on the coast.

The history of Nicaragua, not unlike Ecuador or other Latin American nations was shaped by colonialism and later by the domination of caudillos who governed in their own self-interest. What is distinctive in Nicaraguan history is the large geo-cultural gap between the Pacific and Caribbean Coasts. This feature is a remnant of early competition between colonial powers. Nicaragua was conquered by both Britain, on the Caribbean side, and Spain on the Pacific side. This dual-colonial history is reflected in the indigenous experiences as well. Spanish treatment of indigenous Nicaraguans was notoriously brutal, alternating between systematic extermination and horrific terms of enslavement. Black slaves were not brought into the region until the indigenous ones were worked to death. Development in the 17th century was based on land intensive cattle farms. The indigenous peoples were exploited as slave labour on these landholdings and treated with cruelty and disdain. If non compliant, they were beaten, and if that did not improve matters they could be fed to the dogs (Bourgois 1981, 27).

On the Caribbean coast the indigenous experience was notably different. Despite superior weaponry and numbers, the Spanish were never able to penetrate where Miskito and Sumo warriors ferociously defended their territories. They used their superior knowledge of the difficult terrain to outwit the Spanish soldiers. Subsequently, the indigenous communities developed a strong allegiance with the British, who were also enemies of the Spaniards in the region. The British were interested in the resources of the locale and its strategic placement on the coast. They were not interested in permanent settlements. British colonialism led to the development of a more mutually beneficial relationship which included some respect for indigenous cultures and their sovereignty under the guise of a Miskito Kingdom that was established and supported as a
British Protectorate in 1687. For the Miskitos in particular, this was a better deal than they could have negotiated from the Spaniards. Through the Kingdom, they were able to develop and maintain practical forms of autonomy while at the same time benefiting from a close relationship with the British. Through trade, they were able to obtain muskets and machetes, becoming the dominant military force in the region and keeping the Spanish out indefinitely (Bourgois 1981, 27-28).

The Miskitos remember this “Golden Age” with continued nostalgia, matched in its intensity by their hostility towards the “Spanish” Nicaraguan government. When the British finally left the region in 1860 under pressure from the United States, Nicaragua promptly dismantled the Miskito kingdom and stirred great ire amongst the Miskitos. Now reorganized as a “reserve”, the Miskitos saw their power and influence reduced considerably (Gordon et al. 2003). As part of the newly independent government’s plan to “reincorporate” the coast, non-indigenous Nicaraguans were sent in to settle the region. With the support of the federal government, they displaced the costeños as local elites. They were given the best jobs, the best land and the best opportunities; the indigenous people were marginalized. Spanish became the official language, though the locals were much more likely to speak English and/or their indigenous language. The indigenous citizenry suddenly found themselves imagined as a natural servant class and they were horrified (Hooker 2006).

Overall, the reincorporation of the Caribbean coast did not usher in a new era of economic, social or cultural integration with the rest of Nicaragua. Instead, the region was exploited for natural resources and cheap labour with subsequently little infrastructure or development. Foreign companies, especially American and Canadian firms, benefited from gold mining, logging, banana production, turtle and lobster fishing. The indigenous peoples benefited from some wage labour opportunities but also suffered from unemployment, tuberculosis, silicosis, and significant environmental degradation. The bitterness of the costeños has been long lasting and has become the foundation for its longstanding demand for regional autonomy.
The Sandinista revolution was another event which alienated the indigenous coastal population from the Nicaraguan nation at large. While the rest of Nicaragua was united around the idea of deposing the oppressive Somoza family dynasty, popular sentiment on the Caribbean Coast was quite different. Somoza had ignored the region and in the minds of most costeños being ignored was far better than being interfered with or exploited. In July 1979, when the rest of the nation followed the call of the young and idealistic FSLN leader Daniel Ortega to rise up against corruption and inequality the residents of the Caribbean Coast remained skeptical. This was just another power struggle between Spanish interests (Bourgois 1981). While the rest of Nicaragua was celebrating the victory of the Revolution and subsequent demise of the longest running family dictatorship in the Americas (1936-1979), Costeños did not like the nationalist tone of the revolutionary rhetoric. They rejected the Sandinista vision and capitalized on American interference.

The “Contra Affair” involved a covert Central Intelligence Agency (CIA) operation to destabilize the “socialist” government of Daniel Ortega, funded through the sale of arms to Iran. While revolutionary pressures existed in other corners of Latin America, Nicaragua’s Frente Sandinista de Liberación Nacional (FSLN) generated multi-class support against the military dictatorship of Anastasio Somoza and this worried the American government which could not tolerate Cuban and/or Soviet influence so nearby (Walker 1997). Despite its moderate leftist approach to the economy, and the obvious problems with the previous brutal and corrupt dictatorship, especially after the 1972 earthquake fiasco, the Sandinista government was rejected by the Americans. With its strong commitment to human rights, the government of US President Jimmy Carter was hesitant to get involved. However the Reagan government (1981-1989) quickly identified the Sandinistas as an extension of Soviet communism that needed to be eradicated (Walker 1997). The American campaign included financial and tactical support to the counter-revolutionary (Contra) army, as well as the obvious application of influence in the World Bank and Inter-American Development Bank to end lending programs to Nicaragua. The indigenous
peoples on the Coast saw American intervention as a real opportunity to join forces in order to finally get revenge and return their “Kingdom” back to indigenous control (Butler 1997, 221).

One traditional critique of Marxism is that it fails to recognize the experiences of ethnicity and its role in oppression. In Nicaragua, this was part of the problem. Using a classical Marxist lens, the Sandinistas viewed the indigenous peoples as members of the oppressed classes, much the same as the rural proletariat. They subsequently included them in their revolutionary agenda without much in the way of discussion or consultation. They had no real understanding of coastal realities or aspirations. For example, early FSLN policy for Costeño issues can be found in its Programa Histórico (1969) entitled “The Caribbean Coast will be Integrated and Developed.” The title alone highlights the wide gap between Costeño aspirations for self-government and the Sandinista vision of a united revolutionary Nicaragua.

The Miskito did not see Sandinistas as natural allies, nor did the revolutionary changes in Nicaragua do much to further their own particular interests. The Sandinistas nationalized the Caribbean Coast gold mines, as well as logging and fishing operations, but the imposition of new Sandinista bosses did not lead to the dismantling of the racial hierarchy in the workplace, nor did it improve working conditions or wages for indigenous workers. Oppression and discrimination continued. Further the FSLN’s view that indigenous interests were the same as workers ignored a longstanding sense of indigenous difference and desire for autonomy. Resentment began to build.

Ignorant of the strong ethnic and cultural component of indigenous costeño identity, the Sandinistas sought to incorporate indigenous peoples into the revolutionary state much like they would any other group of the proletariat. Taking the peasantry as a model, the Sandinistas saw grassroots participation in mass based organizations as fundamental to the revolutionary process and thus encouraged the indigenous peoples of the coast to organize themselves within the newly developing Sandinista institutions. Initially Ortega tried to convince Miskito leaders that the Farm Workers Association (ATC) would represent their interests as well. His arguments were not convincing. After ongoing discussion he ultimately agreed to the formation of MISURASATA
(Miskitos, Sumus, Ramas, and Sandinistas Working Together), an ethnic-based coalition of Miskito, Sumo and Rama indigenous peoples on the Caribbean Coast that would work with the FSLN.

The relationship between MISURASATA and the FSLN was never an easy one, although in their eighteen months in power the Sandinistas invested more per capita on the coast than anywhere else in the country (Butler 1997, 221). Tensions between the two sides culminated in 1980 when the FSLN undertook a project to map out indigenous territories in the Caribbean Coast. In 1981, before the map could be published, the FSLN accused MISURASATA leaders of being separatists and orchestrated a series of mass arrests. This event was the tipping point in government-indigenous relations and triggered the “other” counter-revolution in Nicaragua.

Unlike the Contras, whose primary objective was to oust the Soviet-friendly FSLN and replace it with an American-friendly regime, the Indians were determined to defend their own lands and territories and their right to be self-governing, just as they had some four hundred years earlier in the colonial wars with the Spanish. In their minds, both the Contras and the FSLN were interested in undermining indigenous peoples’ rights to their lands and territories by declaring state control (Nietschmann 1986). The FSLN reacted with widespread violations of indigenous peoples human rights.

The Sandinista government was eventually destabilized by the pressures of the ongoing Contra war. This war cost Nicaraguans 30,000 lives, more than $12 billion in damages and bankrupted the national treasury (Hale 1994, 180). By the 1990 elections Sandinista support was weakening, the populace was growing tired of ongoing conflict and economic deprivation as well as the government’s policy for mandatory military service. Nicaraguans fell solidly behind the United Opposition (UNO) led by Violeta Chamorro, which had strong American backing.

On the Caribbean coast, the Sandinista solution to the problems of indigenous resistance was the development of a landmark Autonomy Law. They established the National Autonomy Commission at the end of 1984, and with extensive and inclusive consultations throughout the
region a bill was passed before the National Assembly some three years later (Butler 1997, 226). Despite these efforts, the Autonomy Law achieved little in terms of building regional Sandinista support. The 1990 elections saw the costeños vote overwhelmingly against the Sandinistas as well (Hale 1994, 196).

7.2 Old caudillos, new caudillos: ¿Más de lo mismo?

The geographic divide was not the only complication on the Nicaraguan political scene. Politically, the nation is divided although these lines are not as clear or fixed. Democracy is weak and although formal dictatorships are a thing of the past, politics are dominated by caudillos that see the act of governing as little more than opportunity for self enrichment. Many observers note that the current Ortega government (2007- present) shares many traits not only with the former conservative regimes of presidents Arnoldo Alemán (1997-2002) and Enrique Bolaños (2002-07), but also the former dictator Anastasio Somoza Debayle (1967-79). The idealism and energy that surrounded the earlier Ortega government has long since vanished. The FSLN is run every bit as tightly as the Somoza family’s Nationalist Liberal Party (PLN). In fact, during the last election the FSLN and the PLN were considered electoral allies (International Press Services 09/05/2006).

At first glance, Nicaragua appears to have bi-polar political party structure with a split between the right wing PLC (Liberal Constitutionalist Party) and the ALN (National Liberal Alliance) with the leftist FSLN and its splinter party the MRS (Sandinista Renovation Movement). Yet this may be misleading. Since the creation of a controversial agreement (el Pacto) in 2002 between Alemán’s PLC and Ortega’s FSLN, the two parties have been operating with a single vision of the country: one based on power sharing and the elimination of political competition. Post Pact policies worked to undermine key democratic developments initiated by President Violeta Chamorro (1990-97). Her government’s efforts included constitutional reforms to redistribute power between the executive and legislative branches of government as well as policies to strengthen the judiciary and municipalities. For a brief period, Nicaragua’s fledgling
democracy appeared to be flourishing and institutionalizing itself (Hegg et al. 2006, 2-3). Chamorro’s UNO coalition was weak however and infighting began before any strong or effective governance institutions could be firmly established.

There are a number of reasons why Chamorro’s UNO government failed and left a vacuum that allowed Ortega and Alemán to re-assemble traditional caudillo networks to take the nation back to business as usual. Part of Chamorro’s democratic project oversaw the dismantling of the Sandinista state and its transition to a capitalist economy integrated in the global market. She aimed to set Nicaragua on a neoliberal track that may have improved long term prospects, but in the meantime caused great hardship to the poor and middle classes. Under her government, 346 of 351 state-owned enterprises were either dismantled or privatized, eliminating some 285,000 jobs from the public sector. Social programs in health and education were cut significantly (Kampwirth 1997, 120-125). Unemployment skyrocketed accompanied by a significant decline in the standard of living for the majority of Nicaraguans (Deonandan 2006). By the 1996 election, the UNO coalition had fallen apart completely and Nicaraguans turned to what they knew best: an outspoken neo-populist strongman in Arnoldo Alemán. Alemán had close ties with the former Somoza dictatorship and sought, with his administrators “…an opportunity to recoup, by hook or by crook, the economic ground lost during the revolutionary era” (Isbester 2001, 634).

In the meantime, the FSLN was busy creating its own caudillo networks. It is important to remember that the FSLN had never established itself as a political party. Former party member Vilma Nuñez de Escorcia explains: “It went straight from operating as a political-military movement, a guerrilla movement that took power through armed struggle, to forming a government that administered a country” (Nuñez de Escorcia 2000). Former FSLN Vice President Sergio Ramírez agrees: “The FSLN was not prepared, as a whole, to assume its role of party of opposition inside a democratic system because it had never been designed for this. Its vertical structure was the inspiration of Leninist manuals, of the impositions of the war and of caudillismo, our oldest cultural heritage” (in Brown and Cloke 2005, 601-630). The structure of
the FSLN undermined its development as a democratic opposition party. This internal design flaw also led to a second key problem for the party. The FSLN’s conception of itself as a revolutionary vehicle of the vanguard meant that the party could not distinguish itself from the state. Donations made to the party during the 1980s were channeled directly into state coffers. When the Sandinistas lost the 1990 election they did not know how to separate the wealth of the FSLN from the wealth of the state. It did not take party operatives long to realize the party needed its own resources as it stood to take over the role of opposition.

Once in opposition, Ortega used the party as a personal political vehicle. He took the strong linkages built with the civil service, the unions and the military and made them his own. He always maintained strong connections with his grassroots, especially when there were opportunities for photos and publicity. However grassroots representation and participation in the FSLN structures were limited. Ortega has maintained strong authoritarian control of the party and does not tolerate challenges to his personal authority (ibid.).

Like Alemán, Ortega worked hard to maintain his populist image and his caudillo style network. With the UNO coalition now defunct, Arnoldo Alemán and his Liberal Alliance handily won the 1996 election with just over 51% of the popular vote (Booth 1997, 386-393). The Alemán presidency is most famous, or rather infamous, for its astonishingly high degree of corruption. In 2003 Alemán, a former popular mayor of Managua, was convicted and sentenced to 20 years in jail for the theft of over $100 million dollars of public funds. This sentence was quickly commuted to house arrest by a sympathetic judiciary (Brown and Cloke 2005, 601-630). This was one of the “benefits” of the PLC-FSLN Pact negotiated back in 1999.

The origins of the pact can be traced back to when, just two days after his inauguration, Alemán held a not-so-secret meeting with Ortega to begin negotiations for a “new deal” (ibid.). Until then the two leaders had been ideologically-grounded opponents. Alemán’s family property had been confiscated by the FSLN and Alemán himself had been imprisoned during the revolution (ibid.). The FSLN-PLC deal was not unprecedented in Nicaraguan politics; however
that did not mean it was well received. The Alemán and Ortega power pact was widely seen as undermining the country’s democratic institutions through a series of reforms it passed through the legislative branch (ibid.). The Supreme Court of Justice, the Supreme Electoral Council and the General Comptroller of the Republic were each expanded to include an influx of new PLC/FSLN political appointees. The goal was to split the appointments and create a power sharing arrangement between the two political parties. Civil society rallied against the deal with some effect. When the government attempted another round of similar reforms again in 2004 a public outcry triggered an intervention by the OAS and the package was eventually suspended (ibid.).

With Ortega’s 2007 re-election, the Pact continues with the FSLN now holding the balance of power in the legislature. It has been widely condemned and has alienated party supporters on both sides, causing subsequent divisions in both parties. While the FSLN and PLC differ little in policy and actual governance practices, new splinter parties are attempting to reinvigorate democratic practice. The Sandinista Renovation Movement (MRS) was founded in 1995 by FSLN dissidents who grew tired of Ortega’s political bullying. Likewise, the PLC split in 2004 with the creation of the Alianza Liberal Nicaragüense (ALN) when Alemán’s corruption became too much for Harvard MBA Eduardo Montéalegre among others. While the MRS has not obtained significant numbers at the polls (6.29% in the presidential election of 2006), the PLC/ALN split has been costly. Montéalegre and the ALN received 28.30% of the vote, while José Rizo, with the PLC obtained 27.1%. This split gave the electoral victory to Ortega and the FSLN in 2006 with only 38% of the total vote (Freedom House 2007).

Given its long history of authoritarianism and weak democratic tradition it is not surprising that Nicaragua is plagued by serious governance problems. One scholar has referred to Nicaraguan governance as a form of “institutionalized chaos” (Nitlápan-Envío team, 2005). Despite the fact that Nicaraguan civil society rejected the pact and its political implications, it has not been able to organize itself in such a manner to effect change. Sofia Montenegro (2002)
writes: “The Nicaraguan state has never been institutionalized or organized. It is authoritarian rather than democratic, and is now being minimized by the decisions of the international financial institutions. If all that were not problematic enough, it is fragmented, bureaucratic, inefficient and rife with corruption.”

An ineffective government is unable to meet the demands of its citizens, either because it does not want to, it does not need to, or because it cannot. In the case of Nicaragua, all three conditions apply. The linkages that tie government to its electorate are notably weak, as is often the case in poor countries with strong authoritarian, caudillo and/or populist traditions. The motivations for government, in such cases do not involve strengthening democracy or serving their citizens. The goal instead is to mobilize state institutions to serve the personal aggrandizement of the leader and his allies (Close 2004, 120).

The World Bank defines government effectiveness to include the quality and political independence of the civil service, the quality and accessibility of public services, as well as process and commitment to government policy. Nicaragua fares poorly by all accounts and the endemic weakness in these areas exacerbate existing problems of corruption. A government that is not effective cannot legislate and implement the policies required to meet the needs of its citizens and even the most basic of standards for “good governance”. Subjects interviewed for this project agreed. Particularly on the Caribbean coast, the mechanisms and institutions of government lack the capacity to effectively respond to the legislative mandates of Managua. Figure 7.1 illustrates the steady erosion of perceptions of government effectiveness in Nicaragua from a 40th percentile ranking worldwide in 1998 down to the 15th percentile in 2007. At the present time, the Nicaraguan government is rated among the 15 percent least effective in the world, its lowest point in more than a decade (World Bank 2008, 4). At the insistence of international finance and donors, reforms have been initiated to improve governance. Many of these efforts, however, have become mired in corruption and political interference (Brown and Cloke 2005, 601-630).
7.3 Corruption

Corruption is widely cited as problematic in the Central American nation and has been a prominent feature for over seventy years. The Somoza era (1936-1974) featured a series of governments that were based on three particular principles: first, control over the national economy and its wealth, second, control over the National Guard and third, close relations with the United States. The Somoza regime unapologetically claimed the country’s resources as its own and used the strong arm tactics of the National Guard as well as a close relationship with Americans to detract from any type of criticism (Merrill ed. 1993). The tipping point of this growingly precarious position came when the Somoza family, led by son and former chief of the National Guard Anastasio Somoza Debayle misappropriated funds that were meant to help rebuild the nation after the devastating 1972 earthquake. In 1977, the administration of President Jimmy Carter began to tie their assistance packages to improvements in human rights. Violence began in 1978, and without crucial American military aid to the Somoza regime, the FSLN was able to take control. Somoza resigned in July of 1979 and fled to Miami. He moved to Paraguay where he was assassinated a few years later.

While the revolutionary government sought to change the way things were done in the poor agricultural nation, the authoritarian, populist and corrupt traditions of the past remained solidly
entrenched in state institutions. The FSLN piñata\textsuperscript{21} of 1990 highlights the willingness of the Ortega government to use the same boldness and self-interest that marked his authoritarian predecessors to benefit himself and his allies, at the expense of the nation (Close 2004, 8; Kagami 2007).

Corruption in Nicaragua took a notable turn for the worse with the 1996 election of Arnoldo Alemán. Alemán and his revived PLC party worked hard to revive a tradition that had been a prominent feature of the Somoza regime. For his efforts, Transparency International named Alemán one of the most corrupt leaders in history for appropriating over $100 million dollars from state coffers. Much of this was taken during a national crisis. The entire nation was devastated by Hurricane Mitch, but what could have been Alemán’s opportunity to show strength became a national embarrassment:

His prestige suffered greatly when his response proved inadequate: delaying donations of help for ideological reasons, directing assistance to areas on the basis of political patronage, and siphoning off aid money. Alemán’s unrepentant venality managed to offend almost everyone (Isbester 2001, 647).

Locally known as El Gordo, Aléman became so unpopular that his own party was determined to replace him for the 2001 elections, but not before he brokered a deal with Ortega and the FSLN that benefited both men and their allies with ongoing power and influence. The Pact gave the two parties nearly 90 percent of the seats in the legislature; and near dictatorial powers over the nation. It guaranteed both men seats in the national assembly for the next two terms, extending their parliamentary immunity. This was important to Aléman because of a series of fraud and embezzlement charges, and to Ortega who was being charged with the sexual abuse of his own step-daughter.

Throughout both the PLC and FSLN governments, corruption problems remain. They have been documented by a number of sources, including international NGOs, IFIs and donor nations.

\textsuperscript{21} The term piñata is used to describe the FSLN’s massive hand over of state assets, including property to its long time supporters before transferring power to the democratically elected government of Violeta Chamorro.
The 2006 Freedom House report noted that the public administration of Nicaragua is fraught with both red tape and corruption. This creates a very tempting environment for civil servants. Citizens hoping to garner any type of service from indifferent bureaucrats find they may have to enhance individual incentive in order to get results. This is expensive, inefficient and discourages foreign investment. World Bank (2006) data places Nicaragua among the bottom four Latin American nations in terms of corruption and suggests that the situation has worsened over the past ten years. Transparency International (2006) rates Nicaragua only slightly better at 26th place among 32 nations in the region with a Corruptions Perception Index of 2.6. Globally it rates at 123 of 179 nations. Though somewhat better than Ecuador at 2.3, both rank amongst the most corrupt nations of the Americas.

As noted previously, corruption is not only expensive for a nation; it erodes overall regime legitimacy. Citizens quickly lose faith in governments that they do not believe are honest, and this subsequent lack of trust permeates society in general. The 2006 LAPOP Survey of Nicaragua points out that almost 90% of Nicaraguans believe corruption among public officials is widespread. Interviews conducted for this research project concur. Both indigenous leaders and non-indigenous bureaucrats believe that political corruption played an important role in the absence of resolution in the Awas Tingni case. Politicians need personal incentives to act. Poor indigenous communities cannot offer deals in return for favors, even where that favor is the implementation of the law.

7.4 Rule of law

Corruption is most likely in situations where the rule of law is weak. Rule of law is important because it affects the ability of any government to govern consistently and fairly. Effective rule of law minimizes uncertainty in all transactions and ensures that no one is above the law (Bowen

22 Transparency International rates countries on a scale from 0 - 10 with 10 meaning clean and 0 meaning highly corrupt.
2006). While Chamorro’s government (1990-97) made measurable progress, the Pact in particular undermined standard indicators of rule of law.

There is widespread understanding that rich and poor do not face the same treatment by the Nicaraguan justice system. The system is biased in favor of elites for two reasons. First, the judiciary is highly politicized, so elites with the right political ties generally receive more favorable outcomes. Secondly, the poor do not have access to legal services, or even legal knowledge about the extent of their rights and the system that exists, if only on paper, to defend them (Picado 2006a). Lawyers, while in no short supply, are rarely available for the poor majority who cannot pay their fees. Freedom House reports that there are only 78 public defenders in the country, meeting less than one third of total need. Most poor Nicaraguans have no legal representation at all (Freedom House 2006). Former Nicaraguan Special Prosecutor Alberto Novoa (2004) argues that this stems from a legal system that is rooted in colonial inequity:

The law we now have circulates in the country like national currency, even though it wasn’t coined nationally. Those with power interpret it every day, so that it serves their minority power groups to oppress the powerless majorities.

Figure 7.2 highlights the World Bank assessment of the dismal performance of the Rule of Law in Nicaragua. There has been an astounding decline of twenty points between 1996 and 2007. It mirrors Figure 6.4 in the previous chapter, providing an aggregate summary of citizens and experts perceptions of rule of law as calculated by the World Bank. There are a total of 26 separate calculations provided by such diverse organizations as Global Insight, Economist Intelligence Unit and the Gallup World Poll among others, which are then averaged. The top dotted line represents the upper limits of the data set, while the lower dotted line represents the bottom limits. The solid line in the middle represents the median figure.

The WB is not the only body that has raised concerns about this issue in Nicaragua. International NGO Freedom House also ranks Nicaragua low in terms of rule of law with a score
3.6. It notes in particular that political influence in the judicial system is a major problem at all levels (Freedom House 2006). There have been some improvements in terms of procedural issues, but many key concerns remain.

**Figure 7.2 Rule of Law in Nicaragua 1996-2007**

![Graph showing the rule of law in Nicaragua from 1996 to 2007.](image)


Interestingly, scholar Rachel Bowen has applied the “Spiral Model” used in this thesis to the case of normative change in the rule of law in Nicaragua. She argues that it was international pressure that pushed the early Sandinista government to incorporate rule of law into the national constitution back in 1987. The FSLN needed international support in the face of American opposition and was desperate to enhance both its reputation and legitimacy. Through the constitution they entrenched both human rights and rule of law, a step that Bowen argues pushed Nicaragua towards a real prescriptive commitment, the fourth stage of the Risse-Sikkink Spiral Model (Bowen 2006). Despite this, there has been no fulfillment of the anticipated normative spiral. Bowen argues that Nicaragua remains stuck at the level of prescriptive status for two main reasons. Government interest in rule of law is focused on the placating of the international donor community which insists on some sort of commitment to rule of law. Efforts are made to appease donors, who are more focused on their own accountability measures than recipient nations. Further, Nicaraguan law obliges donor groups, including USAID, the World Bank, the European Union, and the Inter-American Development Bank etc., to carry out all their programs in

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23 Freedom House rates nations on a scale of 0-7 with 0 being the lowest possible score and 7 being the highest in terms of rule of law.
conjunction with at least one Supreme Court Judge, all of whom are political appointees. This allows judges to use foreign programs and funds as a clientelist resource while preventing any serious challenge to the judiciary itself or any of its political patrons (ibid.).

The Risse-Sikkink model assumes significant cooperation between international and domestic civil society groups to build and maintain pressure on the government for change. In Nicaragua, domestic activists have few ties to the international community. Because of historical considerations, domestic civil society has been closely tied to the existing political parties and their inherent patterns of corruption. Bowen comments:

Domestic groups in Nicaragua do not have close ties to either the international donor community or to the judiciary. These organizations are typically uninvolved in judicial politics, preferring instead to use political strategies such as mobilization and direct ties to political parties…. Because of their close ties to political parties and the widespread corruption therein, these domestic groups are unlikely to insist on holding everyone to account, even the most powerful (Bowen 2006, 26).

The widespread prevalence of corruption, caudillismo, and patronage networks undermine rule of law in all of its forms. Corruption makes the government generally unresponsive to pressure from either domestic or international activists. Although politicians may tell a different story, the reality is that inequality before the law is the effective domestic political norm. The USAID website on Nicaragua reports that the most serious obstacle to progress facing Nicaragua is an extremely politicized and weak judicial system. There exists continuous manipulation of institutions by political bosses for personal benefits and power for the elites.

Inequality before the law is even more exaggerated in the case of the Caribbean coast where regional governments are largely inoperative due to uncertain jurisdiction and inadequate funding. After more than two decades there is no clear understanding as to the actual authority of the Autonomous Councils, or the mechanisms by which they are to represent the interests of their constituents. Created through Law 28, “the Autonomy Statue” was supported by the 1987 constitutional amendments; however regulations were not passed by Parliament until 2003 to support the actual functioning of the two regional councils. Again there is a significant gap
between the rhetoric of the law and its practical application. This has created numerous problems with respect to establishing effective governance institutions and mechanisms, making the rule of law difficult if not impossible to enforce. The situation is even worse for minority indigenous communities, such as the Mayagna. The Miskito in the region have believed traditionally that they are superior to their Mayagna counterparts and have done little to support their rights (Cunningham 2006; McLean 2006).

Without adequate funding for government, courts, and police, justice is typically unavailable in remote regions. Some indigenous communities operate traditional indigenous justice systems at the local level but there is no jurisdictional coverage between and beyond these communities and nowhere to turn to for support when outsiders violate their laws. For example, Awas Tingni community members cite illegal logging as a significant problem on their traditional lands, but there are no police available in the region to prevent it or punish the perpetrators. In fact, some regional council members and/or their families are thought to be involved in this extra-legal economic activity leaving community members with little recourse (McLean 2006).

It is important to emphasize that it is not that the state cannot generate the required rules and regulations. Law 445, for example, exists to ensure that indigenous lands are properly titled, but implementation and monitoring are inadequate. Despite considerable efforts, the state has not established rule consistent behaviour. Corruption is a key problem:

The achievement of rule consistent behavior in Nicaragua in the past decade has been stymied by the problem of corruption more than anything else. While there continue to be concerns in the area of human rights, they are generally not associated with clear government repression, but rather reflect societal problems. The norm that no one should be above the law is regularly violated by the government and by politicians among others. Corruption is a pernicious problem in Nicaraguan government (Bowen 2006, 25).

Among the most vocal critics of the Nicaraguan government are international entities including the World Bank, the Inter-American Bank and USAID. However, without corresponding domestic criticism little actual pressure is placed on the government. In a personal interview, one Nicaraguan lawyer/scholar noted that because of the revolution, society is highly
divided and hence incapable of providing strong support. He explains: “Nicaragua is a weak state, with weak institutions, thus it is easy to be non-responsive” (Rizo 2006). Bowen adds: “The prevalence of corruption makes the government generally unresponsive to pressures from domestic or international activists” (Bowen 2006, 25).

7.5 Accountability and voice

According to Argentine scholar, Guillermo O’Donnell (1994) the installation of a democratically elected government, such as that of President Chamorro in 1990, should begin a second, more complex transition from the initial stage of authoritarian rule towards an institutionalized and consolidated democratic regime (O’Donnell 1994). Accountability is created through the establishment of healthy, functioning democratic institutions. It is through these institutions that patterns of representation are shaped, mediated and transmitted to government. Where such functioning institutions do not exist, the relationship between citizens and those elected to represent them will likely evolve, as it has in Nicaragua, towards clientelism and corruption.

Similar to Ecuador, the established political parties of Nicaragua, including the once revolutionary FSLN, do little to actually represent the interests of those who elect them. Although the 1990 election of Violeta Chamorro suggested the new electoral democracy was on its way towards becoming representative, subsequent developments have all but undermined this possibility. Instead, current political institutions are leaning towards a hybrid democracy that offers little in terms of either accountability or voice. Like Ecuador, Nicaragua suffers from what O’Donnell (1994, 59-60) has defined as a delegative democracy. Regular elections take place, yet competition is constrained, opposition parties are ineffectual, and both the courts and the legislature are weak vis-à-vis the executive. David Close argues that Nicaraguan democracy is actually being “undone” (Close 2008, 3). Despite Ortega’s populist rhetoric, the Pact between the FSLN and the Liberals has undermined democratic development by undermining representation and accountability. The FSLN, which came to power in 2007 with a mandate to represent all
Nicaraguans, has transformed itself through the years to become little more than a personal vehicle for yet another Nicaraguan caudillo. Accountability rarely extends beyond annual reports to external donors.

Over the last ten years Nicaragua rated in the bottom half of nations worldwide for voice and accountability. Figure 7.3, (mirroring 6.4) provides a summary of twenty different data sources measured from 1996-2007 by the WB which focus on perceptions of government accountability by different stakeholder groups. While Nicaragua’s position has eroded over the past decade, given recent concerns with the CSE it is expected that this will deteriorate further.

**Figure 7.3 Nicaraguan Public Accountability 1996-2007**

World Bank Governance Indicators Nicaragua 2008, 2.

### 7.6 Economic and political stability

Political stability is made up of a number of inter-related factors. Importantly it includes the ability of elected government to carry out their mandated terms, a feat which has been particularly hard to achieve in Ecuador. Since the violent overthrow of the Somoza regime in 1979, subsequent governments have been able to continue their mandate until end of term, with one near exception. As illustrated by Figure 12 there was a quick and sharp drop in stability between 2005 and 2006. According to the WB’s composite indicators, Nicaragua’s rating dropped 10 points to the 30th percentile. This reflected an attempt by then opposition leader Daniel Ortega and former president Arnoldo Alemán to impeach President Enrique Bolaños shortly after they gained control over the National Assembly through their political pact. Early in 2005 the PLC and FSLN
approved a series of constitutional reforms to strengthen the Assembly, while at the same time limiting the powers of the executive (de Castro 2006). In August of that year, the FSLN controlled Supreme Court granted the former president, Arnoldo Alemán, conditional freedom to travel in the department of Managua and re-assume his political career despite longstanding corruption charges (ibid.).

Economic stability in Nicaragua is another issue. As one of the poorest nations in the Americas it is not so much a matter of cyclical economic problems; rather long term entrenched economic under-development. This is part of the reason why Nicaragua qualified for assistance under the World Bank Heavily Indebted Countries Program (HIPC) and special aid assistance under the Millennium development program. Regrettably, funding for the latter initiative has been suspended over concerns of corruption and lack of accountability.

Figure 7.4, on the following page, provides an aggregate assessment of WB data on stakeholder perceptions of government stability in Nicaragua. Here Nicaragua scores notable better than Ecuador, which remains at the 20th percentile (see figure 6.5). Although perceptions of stability dropped somewhat just before the 2006 election, they have since bounced back towards the 40th percentile.

7.7 Post-revolutionary civil society

Although research on Nicaraguan civil society has not been as thorough and detailed as is the case for Ecuador, the available data points to its overall weakness, fragmentation and a tangible inability to influence either policy or legislation. Some authors highlight a high level of NGO-ization and wonder whether or not a civil society in its truest sense actually does exist (Borchgrevink 2006).
Others question whether or not the corruption that penetrates all other aspects of political life has seeped into civil society too. NGOs, church groups, unions, political parties and charities may be so enmeshed in caudillo networks that they lack any independent vision or drive for change. Some have even argued that the concept of civil society itself is inappropriate in Latin American states (Baltodaño 2006). Both Baltodaño and Deonandan, for example are more comfortable discussing pluralism, society and social classes. Civil society, they argue is an “imagined community” designed to legitimate a neoliberal worldview. Setting this particular debate aside for the moment, it is important to note that for our current purposes, we are very interested in the functioning of domestic civil society. Civil society is an important actor in the Risse-Sikkink Spiral Model because of its power to pressure the government, in tandem with international groups, for the implementation of international norms for indigenous rights.

As a post-revolutionary society with a long history of authoritarian governance it is not surprising that civil society in Nicaragua is fragmented and weak. Although it has been undergoing democratization arguably for over twenty years, strong traditions of authoritarianism, populism and new neoliberal economic policies have stymied the development of a grassroots civil society capable of mobilizing resources in a consistent and concerted fashion. Nicaraguan civil society groups have minimal influence on government policy and decision making.
Civil society, as noted previously, is “the arena where people associate to promote common interests, outside of family, the market and the government” (Bustamente et al. 2006, 14). It includes formal types of organizations and institutions and informal associations and coalitions as well. One key feature of civil society that most scholars agree on however is the fact that it is voluntary. People become involved in civil society groups out of personal interest or concern. There is no monetary compensation.

For civil society to function it must have safe political space within which to operate. Under authoritarian regimes, like that of Somoza, freedom of association and speech were non-existent. Even in subsequent “democratic” regimes civil liberties have been compromised. Karen Kampwirth (2003) documents the destructive campaign that the Alemán government waged against feminist organizations critical of his political agenda. Such persecution undermines freedom of speech and the ability of these organizations to function independently. Until international attention affords domestic civil society some modicum of protection these organizations tend to be weak, incoherent and highly fragmented.

A 1998 study by John Booth and Patricia Bayer Richard demonstrates the low level of civil society activity in Nicaragua compared to other countries in the region. This stems from the impact of the Somoza regime which did not permit opposition. Once Somoza was overthrown, the FSLN sought to mold emerging forms of popular participation through syndicates and other types of organizations directly under its control.

Since 1998, quantitative measures of civil society in Nicaragua point to considerable growth, especially considering the explosive growth in NGOs. Baltodaño, Borchgrevink and Deonandan all warn against the dangers of a NGO-led civil society, although each for different reasons. Baltodaño (2006) argues that since most NGOs are foreign-funded, they are unable to adequately represent the interests or needs of Nicaraguans. Organizational mandates, goals and accountability lay well beyond national borders, most often within the developed nations of the
so-called “global north.” In his view, staff members are motivated by external concerns and cannot advocate for grassroots issues in the way traditional civil society advocates might expect.

Domestic NGOs can be just as problematic, Kalowatie Deonandan cautions that domestic NGOs can be corrupted by the institutions that shape them. This, she argues, was obvious in the aftermath of Hurricane Mitch when new NGOs formed to ostensibly coordinate rebuilding efforts.

Many of these new organizations (all of which were ostensibly geared to assisting women and children or promoting development) were actually set up by politicians (and even the daughter of former President Alemán) in order to take advantage of funds from international donors. Realizing that Western nations were reluctant to give aid to governments plagued with corruption, but are more open to assisting civil society directly…enterprising politicians and other state actors have jumped on the bandwagon and have found the NGO alternative to be lucrative business (Deonandan 2006, 11)

Nicaraguan civil society became dominated by professional NGOs paid to advocate for certain issues. When the UNO government cut social programs after its 1990 election it left behind wide spaces for foreign-funded NGOs to deliver programs and services to the population (ibid.). The number of NGOs operating in Nicaragua surged. Table 7.1 shows the geographical location and type of registered non-profit organizations in Nicaragua. NGOs represent more than one third of all active groups in the country and more than half of these are concentrated in Managua. Other important sectors include churches, with a total of 603 registered organizations, private sector and organized interests, each with 308 and international organizations with 274. Rural Nicaragua, which includes most regions outside the capital city, appears starkly under-represented. Most of the indigenous population is located within the RAAN and RAAS, which together account for only four percent of total non-profits although the region represents some 56 percent of national territory and 10 percent of the total population.

Table 7.2 provides a closer look at the actual orientation of the NGO charity organizations shown above. The main types of registered NGOs in Nicaragua include those formed to promote women’s issues, environmental protection, and human rights. Indigenous organizations may be
included in the “other” category but were not significant enough to be measured as a separate category.

In Nicaragua, civil society is weak, fragmented and suffers from a large degree of apathy. Because of the high levels of corruption, citizens do not believe that their efforts will make any difference. Citizens are more likely to focus on the day to day struggles of survival and putting bread on the table (Deonandan 2006).

Table 7.1 Registered Non Profits in Nicaragua by Location

<table>
<thead>
<tr>
<th>Location</th>
<th>Private sector</th>
<th>Organized interests</th>
<th>NGO/charity</th>
<th>Community org</th>
<th>Cultural/arts clubs</th>
<th>Church/religion</th>
<th>Educational inst</th>
<th>Internat. org</th>
<th>Commercial</th>
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<td>216</td>
<td>23</td>
<td>102</td>
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</tr>
<tr>
<td>Matagalpa</td>
<td>11</td>
<td>12</td>
<td>41</td>
<td>19</td>
<td>10</td>
<td>34</td>
<td>3</td>
<td>20</td>
<td>5</td>
<td>175</td>
<td></td>
</tr>
<tr>
<td>Matagalpa</td>
<td>21</td>
<td>11</td>
<td>32</td>
<td>9</td>
<td>4</td>
<td>17</td>
<td>1</td>
<td>5</td>
<td>5</td>
<td>123</td>
<td></td>
</tr>
<tr>
<td>N. Segovia</td>
<td>10</td>
<td>3</td>
<td>21</td>
<td>1</td>
<td>5</td>
<td>1</td>
<td></td>
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<td>2</td>
<td>46</td>
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<td>25</td>
<td>29</td>
<td>2</td>
<td>4</td>
<td>2</td>
<td>1</td>
<td>7</td>
<td>5</td>
<td>75</td>
<td></td>
</tr>
<tr>
<td>RAAS</td>
<td>9</td>
<td>9</td>
<td>22</td>
<td>2</td>
<td>2</td>
<td>2</td>
<td>3</td>
<td>28</td>
<td>5</td>
<td>53</td>
<td></td>
</tr>
<tr>
<td>R.S. Amun</td>
<td>5</td>
<td>14</td>
<td>1</td>
<td>1</td>
<td></td>
<td>1</td>
<td></td>
<td></td>
<td>1</td>
<td>24</td>
<td></td>
</tr>
<tr>
<td>Rivas</td>
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<td>8</td>
<td>4</td>
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<td>1</td>
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<td>18</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td>21</td>
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</table>

From Borchgrevink 2006, 36

Table 7.2 NGO Focus in Nicaragua

<table>
<thead>
<tr>
<th>Women’s Groups</th>
<th>Environmental</th>
<th>Human Rights</th>
<th>Micro-credit</th>
<th>Charity</th>
<th>Other</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>139</td>
<td>86</td>
<td>69</td>
<td>27</td>
<td>57</td>
<td>794</td>
<td>1172</td>
</tr>
</tbody>
</table>

From Borchgrevink 2006, 38
Some groups do continue to protest, hold rallies and articulate problems; however the government is typically non-responsive. As one indigenous activist noted during an interview: “The government knows there is a lot of conflict between groups and they exploit that fact to do essentially nothing in the meantime” (Cunningham 2006). Populism, fuelled by a long tradition of caudillo-style politicking has facilitated a large gap between the government and the electorate that seems impossible to bridge.

Domestic groups, while not opposed to the implementation of consistent rule of law, are struggling with more immediate concerns. Civil society is in a defensive position, more likely to focus on protests against particular policies rather than the articulation of any clear agenda. Citizens feel helpless. While the Constitution (1992), for example, contains ample provisions for rights protection, accountability and democratic development, the lack of follow-up in terms of procedure render much of the exercise meaningless. Exacerbating this, of course, are the constitutional amendments initiated by the Pact over the past decade. It is not surprising that most Nicaraguans have little faith in governments to solve their problems.

Most indigenous Nicaraguans live in the isolated regions of the Caribbean Coast where they are all but completely forgotten. When they do become the focus of national attention it is usually due to a conflict with the state over land or resources. Indigenous interests represent competing interests and subsequently the majority of Nicaraguans struggling to survive in the second poorest country in the hemisphere are not naturally sympathetic. While internationally, indigenous rights norms are well articulated, the pressure “from below” is very weak. Without the necessary convergence of international and domestic pressures there is little incentive for the government to initiate the real policy changes needed to turn prescriptive commitments into rule consistent behaviour; in this case to make Law 445 effective for the Mayagna community of Awas Tingni.

Part of the immediate challenge is to build indigenous civil society and strengthen its links to other groups and organizations. While some indigenous organizations exist, such as Sukawala,
and the more political Yatama party on the Caribbean Coast, these groups have not made headway in cooperating to forge a national agenda. The next section discusses the current state of indigenous civil society in Nicaragua and assesses its overall effectiveness in terms of building the needed grassroots support to work in tandem with international forces to facilitate indigenous rights norm implementation.

7.8 Mobilizing ethnicity: regional autonomy and indigenous organization in Nicaragua

To contribute effectively to the pressure that moves governments towards norm internalization and compliance for indigenous rights, indigenous communities and organizations need to articulate and organize around clear, shared objectives. Local, regional and national indigenous organizations must be able to command broad bases of support, not only from within their own communities, but from civil society as a whole. Where indigenous populations are a small minority, this is an even greater challenge. The problem, of course is that indigenous rights represent a certain and specific claim for treatment that is not afforded to every citizen. What this often translates to is a claim for property and or resources. In the two cases presented here, indigenous communities are fighting for their traditional lands. In both cases, there are competing claims to the wealth and resources those lands contain.

While the indigenous population in Ecuador is sizeable and renown around the world for its organization and activism, indigenous communities in Nicaragua are small, fragmented and, for geo-political reasons, largely isolated from the rest of the country. In total, they make up approximately five percent of the total population. In Ecuador, the indigenous population is significantly larger. Depending on who is doing the counting, estimates of the indigenous population range from ten to more than forty percent. Ecuadorian indigenous groups have built a strong national organization centered in Quito that is well organized, highly visible and active. This is not the case in Nicaragua. There is no single national organization though at different
times, disparate groups have tried to piece something together. The indigenous movement in Nicaragua is barely visible outside the Caribbean Coast region. It is internally divided and conflict ridden. Racism, a common theme in Ecuador, takes on a new meaning in Nicaragua where different indigenous and tribal groups hold racist views in reference to each other. This has not helped the community of Awas Tingni in its bid to attract domestic allies in its international legal struggle. The ongoing Miskito – Mayagna conflict on the coast has hindered implementation of the IACHR ruling, even though, as one local lawyer pointed out during an interview, all groups would benefit from the precedent (McLean 2006). One indigenous activist in Managua noted during an interview for this project that Awas Tingni really had no domestic alliances with other communities. Rather, they were much more likely to receive international support than there were from other Nicaraguan communities. They are a small Mayagna community in a region that is primarily Miskito (Acosta 2006).

This is not a problem exclusive to Awas Tingni. One of the most obvious weaknesses of the Nicaraguan indigenous movement is the lack of solidarity or common agenda between indigenous communities in the Caribbean and Pacific regions. Particularly disturbing is the lack of recognition Caribbean indigenous groups give their Pacific neighbors. Given that indigenous peoples account for less than four percent of the population, it is important that they work together to lobby for real change in government policy. The Nicaraguan government has neglected the Caribbean region for much of its history. Given its political and geographic distance, there is little incentive, outside of election years, to pay much attention to costeño issues at all. Although the autonomous governments could potentially play strong advocacy roles, weak budgets and local politics have rendered them ineffective on many important issues. Creating a pan-indigenous organization, with a headquarters in Managua, would help raise the profile of indigenous issues in the country and provide an opportunity to generate political pressure at the national level. Given the size of the population, and the relative scarcity of resources, a
cooperative strategy that focused on the politicians with decision making authority would make a great deal of sense.

For most Nicaraguans, indigenous issues are non-existent. In a country where the vast majority of the population is poor and mestizo, it is very difficult for indigenous communities to differentiate themselves from other poor communities. Without greater understanding, generating popular support is impossible. Outside the Caribbean, which most Nicaraguans accept as distinct, most believe “Indians” to be a thing of the past. Indigenous groups in the Pacific and Central-North of the nation are only now beginning to be recognized in a distinctively ethnic context.

Marcos Membreno Idiáquez (1992) notes the national construction of the myth of Mestizo Nicaragua by the political class was particularly effective. His article in the online Journal Revisto Envío argues the myth began in the late 19th century when:

The national community created the myth of Mestizo Nicaragua as a way to deny the existence of indigenous communities in the Pacific and central-north regions. This ideology, constructed on racial criteria, automatically converts all members of the ethnic communities in these areas into mestizos or non-indigenous, which makes it easier to assimilate into the Nicaraguan nation (Idiáquez 1992).

Although they are not included in official census data, sociologist Idiáquez (1992) estimates that there are more than a dozen indigenous communities in the Pacific region, including Matagalpa, San Lucas, Veracruz, Jinotega and Muy Muy with a total population of 80-100,000. A recent article in El Nuevo Diario online (05-24-08) suggests that this population has grown to some 388,000 indigenous people, including 221,000 Chorotegas, 49,000 Sutiabas, 20,000 Nafoas and 98,000 Matagalpas. Largely left out of indigenous politics, these groups formed their own national organization, the National Federation of Indigenous Communities in Nicaragua (FENACIN) in 1992, during the quincentenary celebrations of the arrival of the Spanish in the Americas. Prior to this, indigenous organization remained exclusively local in focus. The Caribbean communities were represented there as well, through the Miskito organization and now political party, YATAMA as well as the Coordinating Committee of Costeño Unity (CUC) (Idiáquez 1992). After a brief flurry of activities surrounding the
anniversary year, the composite indigenous organizations returned once again their focus on local concerns and daily struggles.

Successive governments have taken the position that “ethnic” communities in the Pacific and North Central regions of the country are not authentically indigenous. To be officially “indigenous” certain standards had to be met including skin colour, language, communal lands, traditional hunter/gatherer livelihoods etc. Yet colonial policies in the Pacific long eradicated language and most traditional practices. Proximity meant inter-marriage was common as well. These communities, which nonetheless self-identified as indigenous, were officially mestizo, a practice that would undermine any claim to special rights or autonomy. This mestizo-ization was so successful that most Nicaraguans, including the indigenous communities of the Caribbean, believed it to be true thus undermining any common ground for national indigenous solidarity (Idíáquez 1992). If the Pacific indigenous population was to be added to the traditionally recognized RAAN/RAAS indigenous population, total numbers would be just under six hundred thousand, or approximately 10 percent of the population of Nicaragua. This new accounting would improve chances for an indigenous lobby in national politics (El Nuevo Diario online, 05-24-08).

In contrast, the indigenous population of the Caribbean Coast has been geo-politically separate enough from the mainland to maintain traditional language, customs and culture. There are three main indigenous communities or tribes: the Miskito, the Rama and the Mayagnas (Sumo). There is also a large Creole population, a growing Mestizo population and a handful of Garifunas. The Garifunas, considered indigenous by some sources, represent a mix of African and Indigenous groups that developed their own unique culture and language. In total there are more than 213 indigenous communities on the Coast, although the vast majority of them are located within the RAAN, primarily around Bilwi and Waspam. Table 7.3 shows the concentration of indigenous groups, particularly within three municipalities in the RAAN: Bilwi, Prinzapolka, and Waspán. Awas Tingni is located within Bilwi where some 48 indigenous communities exist
within 6000 square kilometers. The municipality includes a total population of only 39,771. There are less than 8,000 Mayagnas in the whole coastal region.

Nicaraguan indigenous activities are concentrated at the local level. There is little in terms of national or even regional agenda setting and solidarity. Although indigenous Costeños share common interests and goals including the strengthening of the ethnic provisions of the Autonomy Statute (1987), they have not been active in inter-tribal regional organizing. In fact, inter-tribal relations are often hostile. One Awas Tingni leader commented during an interview that the Miskito and the Mayagna in particular have had longstanding conflicts over land and resources that have carried over into current demarcation and land titling efforts (McLean 2006).

Table 7.3 Indigenous Communities in the RAAN and RAAS

<table>
<thead>
<tr>
<th>Municipalities</th>
<th>No. of inhabitants</th>
<th>No. of indigenous communities*</th>
<th>Total area (km²)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>South Atlantic Autonomous Region (RAAS)</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bluefields</td>
<td>37,254</td>
<td>8</td>
<td>4,775</td>
</tr>
<tr>
<td>Kukra Hill</td>
<td>7,455</td>
<td>0</td>
<td>1,193</td>
</tr>
<tr>
<td>Pearl Lagoon</td>
<td>6,253</td>
<td>12</td>
<td>1,963</td>
</tr>
<tr>
<td>Mouth of the Río Grande</td>
<td>3,151</td>
<td>5</td>
<td>1,739</td>
</tr>
<tr>
<td>Tortuguero</td>
<td>9,402</td>
<td>0</td>
<td>3,403</td>
</tr>
<tr>
<td>Bocana de Paimas</td>
<td>32,911</td>
<td>0</td>
<td>2,375</td>
</tr>
<tr>
<td>La Cruz de Río Grande</td>
<td>13,642</td>
<td>12</td>
<td>3,440</td>
</tr>
<tr>
<td>Corn Island</td>
<td>5,336</td>
<td>1</td>
<td>9</td>
</tr>
<tr>
<td>Muelle de los Bueyes</td>
<td>79,259</td>
<td>0</td>
<td>1,380</td>
</tr>
<tr>
<td>Nueva Guinefa</td>
<td>23,252</td>
<td>0</td>
<td>2,878</td>
</tr>
<tr>
<td>El Rama</td>
<td>54,337</td>
<td>0</td>
<td>4,594</td>
</tr>
<tr>
<td><strong>Total RAAS</strong></td>
<td>272,252</td>
<td>38</td>
<td>27,547</td>
</tr>
</tbody>
</table>

| **North Atlantic Autonomous Region (RAAN)** |                    |                                |                  |
| Siuna                         | 53,218             | 1                              | 5,240            |
| Roatta                        | 14,599             | 0                              | 2,205            |
| Bonanza                      | 11,810             | 13                             | 1,988            |
| Waspála                      | 32,924             | 0                              | 1,329            |
| Príncipalita                  | 5,312              | 28                             | 1,581            |
| Bilwi (Puerto Cabezas)        | 39,771             | 46                             | 1,985            |
| Waspán                        | 35,082             | 80                             | 3,209            |
| **Total RAAN**                | 192,716            | 175                            | 32,127           |
| **Total CARRIBBEAN**          | 484,958            | 213                            | 59,674           |

* The number of communities refers only to those demanding communal titles.
The Miskito represent by far the largest indigenous group in the territory. According to 2005 census data they make up 57 percent of the RAAN population, although they are slowly being outnumbered by migrating mestizos (Finley-Brook 2008, Grigsby 2003). The Mayagna (Sumu) population makes up less than 4% of the RAAN and only 2% of the total Coastal population (ibid.). Most historical and/or anthropological accounts of the Caribbean Coast concur that the Sumus were once the largest population along the coast, and indeed many of the towns and communities still carry Sumu names (Grigsby 2003). This changed, however, when the British allied with the Miskitos and armed them to fend off the Spanish. The Miskitos took advantage of their new military superiority by sacking Mayagna villages and stealing their wives and children. As a result, the resentment between the two communities became entrenched and population figures reversed.

According to Table 7.4, between 1987 and 1997 the growth of the Mestizo population has clearly outpaced all other groups on the coast. This demographic shift has serious political repercussions as the mestizo-ization of the region effectively undermines the original argument for autonomy. There are, within both the RAAN and RAAS governments, legislative seats set aside for ethnic representation only. As the indigenous population is rapidly marginalized, the ongoing justification for these special seats may diminish. The size of the Mayagna tribe, which includes AT, is shrinking due to an insular culture and a population that is reticent to inter-marry. Local pressure for Mayagna rights is bound to shrink as well (Envío team 1986).

On the coast indigenous peoples have been organizing and defending their rights since the 1960s. The Miskito organizations have been most vocal and controversial. Active organizations include the Association of Peasants and Agriculturalists of the Rio Coco (ACARIC), Alliance for the Progress of Miskito and Sumo people, (ALPROMISU), Miskito Sumu Rama Sandinista Asla Takanka (MISURASATA), the Children of Mother Earth, (YATAMA), the Council of Elders and the Association of Sumo communities, (SUKAWALA) (Jamieson 1999, 31-33).
ACARIC was one of the first regional indigenous organizations. Founded in 1967 it was established primarily as a cooperative venture for Miskito farmers to demand land rights (Ward 2005, 336). As it grew stronger, the Somoza government recognized its political potential and aimed instead to try and accommodate its economic demands as a strategy of containment. This uneasy peace lasted several years before ACARIC decided to capitalize on its growing popularity by restructuring to include Mayagna interests and take on a distinctly political and ethnic agenda as ALPROMISU in 1973 (Jamieson 1999, 31). ALPROMISU participated in the growing international movement for indigenous rights and pushed for self-determination. Although on paper it purported to include Mayagna and Costeño interests in general, in reality it remained a Miskito-controlled organization (Ward 2005, 336).

Table 7.4 Ethnic Composition of the Caribbean Coast 1996-97

<table>
<thead>
<tr>
<th>Ethnic group</th>
<th>Pop. 1997</th>
<th>% of total</th>
<th>Pop. 1997</th>
<th>% of total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Creoles</td>
<td>20,000</td>
<td>0.02</td>
<td>29,000</td>
<td>0.37</td>
</tr>
<tr>
<td>Garifunas</td>
<td>1,750</td>
<td>0.09</td>
<td>2,000</td>
<td>0.43</td>
</tr>
<tr>
<td>Mayangnas/Sumus</td>
<td>9,000</td>
<td>0.36</td>
<td>7,950</td>
<td>1.71</td>
</tr>
<tr>
<td>Mestizos</td>
<td>182,000</td>
<td>61.79</td>
<td>341,818</td>
<td>73.51</td>
</tr>
<tr>
<td>Miskitos</td>
<td>75,000</td>
<td>25.46</td>
<td>62,500</td>
<td>17.74</td>
</tr>
<tr>
<td>Ramas</td>
<td>850</td>
<td>0.03</td>
<td>1,100</td>
<td>0.24</td>
</tr>
<tr>
<td>Total</td>
<td>234,860</td>
<td>100.00</td>
<td>464,988</td>
<td>100.00</td>
</tr>
</tbody>
</table>


To some extent ALPROMISU was a controversial organization because of the way it promoted Miskito rights, as opposed to those of creole and Spanish-speaking people in the area. These Spanish speaking residents considered themselves as much Costeño as the Miskito, and many regarded ALPROMISU as a divisive force and thought some overall Costeño organization, not based on ethnicity, would be better for promoting development (Dennis 1981, 285).
After the revolution, ALPROMISU changed its name again, this time to MISURASATA (Miskito Sumu Rama Sandinista Asla Takanka). Daniel Ortega attended the annual meeting in 1979 and encouraged the group to respect their ethnicity but reminded them “that being poor and being Nicaraguan were more important than being Indian.” MISURATA was initially identified as a people’s organization under the revolutionary government and was given a seat on the ruling council (ibid.). Through this organization, the Miskito were able to receive funding for an ambitious literacy campaign in the Miskito language that was used to educate and radicalize their communities about Miskito rights.

By the 1980s, global economic pressures were increasing the pressure to exploit indigenous land and resources on the Coast. Further, the nationalizing agenda of the FSLN threatened indigenous peoples’ conception of the land and their rights. Through the literacy project, the Miskito were able to mobilize their members and form an alliance with the US Government to undermine the revolution in what they saw as their opportunity to reclaim the coast as their own. By August 1981, many of its members had taken up arms against the FSLN (Freeland 1989). Although MISURATA claimed to represent all indigenous peoples, the Mayagna communities were not opposed to the FSLN. Moreover, they did not trust the Miskito to represent their interests.

Seen by many costeños as the more intellectual of the indigenous populations, the Mayagna established their own organization, SUKAWALA in 1974. It focused primarily on the economic and social development of their communities as well as political and cultural rights. It was never recognized by the ALPROMISU or MISURATA. Initially, it floundered for years without technical and financial capacities; however it has since reformed itself to push for Mayagna rights including development and local autonomy (Envío team 1986).

SUKAWALA distanced itself from MISURASATA during its conflict with the FSLN. Longstanding ethnic tensions between the Mayagna and Miskito served as a real barrier to the development of a common front. Instead, SUKAWALA took a supportive, if critical, view of the
FSLN and subsequent governments. Its cooperative stance allowed it to play a more important role in government negotiations involving Mayagna interests in the region. Still it remained of minor concern politically due to low numbers (Jamieson 1999, 32).

Keeping with international trends, all indigenous organizations in Nicaragua have recognized the importance of land and resource issues. SUKAWALA, while strongly committed to securing indigenous rights to land, takes a traditional indigenous approach amenable to modern day environmentalism. It is committed to maintaining traditional livelihoods and the eco-systems of the forests and waterways that sustain them. Sukawala played a key role in the negotiation of special protected areas in the Bosawas biosphere reserve. The project included communal titles for indigenous communities in the biosphere and attracted enough international attention and support to motivate state support for indigenous participation in its overall management (Erikson 2003).

YATAMA, an indigenous political party that evolved out of MISURASATA after the civil war represents the Miskito, although it tends to use the broader language of “indigenousness” in its claims. Recently, it has taken a more cooperative approach to regional politics, focusing on participation and inclusion in the Nicaraguan political arena and more local control over regional development. Unlike SUKAWALA, it is committed to pursuing a practical political agenda. They negotiated an accord with the FSLN for their support in the November 2006 elections. Given longstanding tensions, the agreement was a historic occasion. However, many indigenous peoples themselves remain skeptical of both the alliance and the commitment of the FSLN to support YATAMA after the ballots are cast (McLean 2006).

The biggest organizational problem facing indigenous groups on the Caribbean coast is a clear ethnic division between the Miskito, the Mayagna, the Ramas and the Creole and Garifuna communities. The Miskito represent the majority; however they have alienated many potential indigenous allies. Deep animosities between the groups are reflected in the current struggle for land demarcation, for example. The groups are fighting against each other for recognition of
traditional territories, as well as fighting the Nicaragua government for title. Neither YATAMA nor the Regional Council has supported the legal demarcation of AT land rights by of the RAAN. Many Awas Tingni informants interviewed for this project believe that the Miskitu do not support their rights to the land. Further, they noted that related internal conflicts have actually made the process much lengthier and more complicated than it might have otherwise been (Cunningham 2006; McLean 2006; McLean 2005). There is no united civil society on the coast, indigenous or not, that is able to create and sustain ongoing pressure on the government “from below.”
Chapter 8

Indigenous Property Rights: The Cases of Awas Tingni and Sarayaku

Fundamentally, the challenge for indigenous communities has been for recognition and respect by national governments of their collective rights to traditional territories. Especially where valuable natural resources are involved, states have been non-supportive. Historically nations were built on the assumption that indigenous inhabitants did not hold any special rights to their territories or the resources within them. The post-colonial project involved nations constructing themselves on the premise that they held sovereignty over all land and resources within their national boundaries.

Indigenous peoples were categorized as “uncivilized” and denied any claims of sovereignty so that the Europeans via law, manipulation and brute force could usurp land, resources, and ultimately power. Indigenous claims were ignored at best, or quashed if necessary. Globalization offered new opportunities, and a new audience for raising claims against the state. Indigenous groups have circumvented blocked domestic channels by making new and cogent international appeals. The aim is for this new international pressure to “boomerang” back on the state and force domestic change.

Chapter 2 of this dissertation discusses the considerable efforts of indigenous activists and leaders to garner international attention and support for their plight. Through a process of momentum building and shaming, such efforts have in fact begun to bear fruit with some states slowly beginning to shift their positions and their policies. The focus of the American Convention on Human Rights is individual rights and not those of collectives or peoples. However, the Inter-American Commission and Court have both issued key decisions in indigenous rights cases that have, as Jo M. Pasqualucci noted, begun to shape the principles of international indigenous law (Pasqualucci 2006). Placing a strong emphasis on the role and value of property rights in general, the Inter-American system has recognized the special case of collective indigenous rights to
territories as being equal, if not stronger, in terms of legal validity as an individual’s right to property. The 2005 Yakye Axe decision of the Court opined that:

To determine whether communal ancestral land rights or current individual land rights will prevail in the same property, it could be necessary to restrict the right to individual’s private ownership of property in order to preserve the cultural identity of a democratic and pluralistic society (ibid.).

Under Article 21 of the Inter-American Convention on Human Rights, the IACHR and CIDH have made a number of noteworthy judgments in this matter, including the Mayan Communities vs. Belize (2004) Moiwana vs Suriname (2005), Yakye Axa and Sawhooyamaxa vs. Paraguay (2005), and Saramaka vs Suriname (2007). The article has been interpreted to include not only physical property, but the natural resources contained within them. The Awas Tingni and Sarayaku cases both involved significant third party claims to natural resources in traditional indigenous territories. In both instances, the state maintained that the rights to these resources were state held, although Sarayaku holds legal title and Awas Tingni does not.

Nonetheless, the small Mayagna community of Awas Tingni set an international precedent that benefits all indigenous communities in the world. On July 21, 2001 the CIDH issued a historical decision that has become the foundation of international jurisprudence in support of indigenous peoples’ rights to their traditional lands and territories based on the concept of prior occupation. The CIDH ruled that indigenous rights to territory were not dependent on any formal recognition by the contemporary state, thus the longstanding denial of these rights was insufficient to extinguish them. Citing draft declarations on indigenous rights at the UN and the OAS as evidence of emerging customary law, the court issued a strong order in favor of the community which included that the Republic of Nicaragua:

Must carry out the delimitation, demarcation and titling of the corresponding lands of the members of the Mayagna (Sumo) Awas Tingni Community and until that delimitation, demarcation and titling has been done, it must abstain from any acts that might lead the agents of the state itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographic area where the members of the Mayagna (Sumo) Awas Tingni Community live and carry out their activities…. (IACHR Judgment August 31, 2001).
The path from words to deeds can be long and winding and is by no means guaranteed. Despite this strong ruling, implementation remained a challenge for Awas Tingni and the other indigenous communities across the Americas that heralded the CIDH decision. The Mayan communities of Belize, for example, received a similar decision in 2004 for rights to titling, following Awas Tingni, but subsequently have had no more success in terms of domestic recognition. Political will is necessary to implement these international rulings through domestic policy. But, as Anthony Stocks has noted, even domestic policy change can be insufficient. Weak political institutions are incapable of initiating real change, especially when there are important interests that are not in favor. He points out: “Advances in policy, however, are not necessarily advances in application, and it takes more than paragraphs in a document to change 500 years of colonial and post colonial practices, especially when the practice involves something as essential as land” (Stocks 2005, 86).

As the case of Sarayaku illustrates, the titling of indigenous lands represents only part of the problem. As Anthony Stocks notes “In the on the ground contentious and messy world of the vindication of indigenous land rights, sometimes policy seems impossibly far away, and sometimes men with guns just take what they want” (Stocks, 2005, 86). In most cases legal title does not guarantee access to or control over the resources within them. Even when a valid claim is evident, states prefer to do nothing rather than lose potential revenue. Subsoil rights are excluded from property titles in most American states under the guise of national sovereignty. For indigenous communities that hold different visions of sovereignty and development this can be a major issue. Sarayaku holds communal title to its territories, but because this does not include subsoil rights the government maintains it has the right to issue concessions in the name of national development. This right is being challenged. As already documented, there is growing international customary law that constrains the ability of nations to exploit resources when indigenous communities are threatened. ILO Convention 169 requires that indigenous communities are consulted before development projects are undertaken. Taking this a step further,
the newly-minted UN Declaration (2007) requires states to consult with and obtain consent from indigenous communities before implementing any legislative or administrative measures that may affect them, including concessions. They must also share the profits in a reasonable manner.

Ecuador has been slow to recognize the validity of the IACHR position on indigenous rights to territories and resources. Historically, the government preferred to ignore the court, maintaining its own rights over indigenous territories. The position of the new Correa government appears to have shifted somewhat, although resolution of Sarayaku remains outstanding. The Correa government has publicly suggested that oil concessions in the Amazon in general, and especially those held by foreign firms, are not high government priorities. Still, the ability and willingness of Correa to make pro-indigenous decisions in the face of significant material constraints has yet to be proven.

The cases of Awas Tingni and Sarayaku highlight the role of both international and domestic factors in encouraging or hindering state level norm compliance. According to the Spiral Model, the chief mechanism that moves norms into domestic law and practice is simultaneous pressure from transnational and domestic civil societies. The best way to assess the value of the Spiral Model to the cases of indigenous rights is, of course, to test it with empirical evidence. For both Awas Tingni and Sarayaku we will examine the pressures being placed on the respective governments to conform to emerging international indigenous rights norms and assess whether or not eventual norm compliance should be expected and why. The first case to be examined is that of Sarayaku in Ecuador. Home to a strong and well organized indigenous movement that encompasses local, regional and national levels, one might hypothesize that domestic norm absorption would be relatively quick, certainly in comparison to nations with weaker domestic movements. This has not happened. A series of Ecuadorian governments has refused to acknowledge the validity of Sarayaku’s longstanding claim.
8.1 *Defining development in the Quichua community of Sarayaku*

Given the historical strength of indigenous organizations in Ecuador, their organization skills and political savvy, the overall failure of the Ecuadorian government to respond to the IACHR ruling is puzzling at first glance. Of course, there are powerful interests at play. Sarayaku’s claims include rights to valuable oil reserves in the Ecuadorian Amazon. As oil prices rise, state pressure to push indigenous interests aside and increase exploration and extraction increases. The international norms for indigenous rights come into direct conflict with another important international norm: profit and economic growth. In this case, profits for both the state, which holds subsoil rights, and the transnational oil companies that win concessions. This section will explore the case of Sarayaku, and its struggle to protect its land and livelihood from the environmental degradation caused by oil companies. After their domestic efforts failed, they took their case into the international arena with the technical, moral and financial support of a number of important international NGOs, including Amnesty International. To try and offset powerful material interests, Sarayaku has tried to increase international pressure. It has presented its case before both the Inter-American system and the United Nations, hoping the pressure from these powerful international organizations would move their government towards norm compliance.

Since the 1990s, Sarayaku has openly challenged oil concessions granted by the Ecuadorian government within their traditional territories. After failing to obtain remedy from the Ecuadorian judicial system, Sarayaku sought justice internationally. The community’s legal team presented its case before the IACHR in May 2003 where it was argued that the danger was so imminent to the land and the community that cautionary measures must be put in place before a long and complicated trial could be pursued. The Commission issued *Medidas Cautelares* (cautionary measures) and when this failed to yield protection for the community, the Court issued similar *Medidas Provisionales*, (provisional measures) in the following year; however, to date there has been no final ruling. Unlike Nicaragua, where land
titling remains contentious, Sarayaku does have communal title to its traditional territories. This title was a palpable achievement that flowed from domestic indigenous protest and represents a significant advancement over the Awas Tingni case. This unfortunately has not protected the community from oil development. Without their consent or knowledge, the state invited foreign companies to invest in oil exploration and development in Sarayaku territories. Such companies have been notorious for their destructive environmental practices which pose a direct threat to indigenous communities and livelihoods.

Sarayaku is a small Quichua community in the Amazonian province of Pastaza, 65km southeast of the nearest town, Puyo. Due to the nature of the terrain, access to the community is limited. There is a road that runs up to the community of Cañelos. After this, one must either walk the remaining 35 kilometers or navigate a boat down the river Bobanaza to Sarayaku. Since the initial conflict between Sarayaku and the Compañía General de Combustibles of Argentina (CGC), Cañelos residents, who support oil development, have blocked access to both the footpaths and the river. This has meant that the only available passage to Sarayaku is via air transport. This makes going in and out of the community, to get supplies, attend meetings etc., particularly onerous (Ortiz 2005; Chávez et al. 2005, 14-15).

Many parts of the Amazon, particularly along its borders, have suffered the negative consequences of colonization, deforestation and petroleum development. So far, the community of Sarayaku is an exception. Sarayaku has managed to maintain traditional indigenous livelihoods and strong cultural practices. Subsistence agriculture remains the primary economic activity, along with some fishing, hunting and gathering (Chávez et al. 2005, 16). This does not mean that the modern Ecuadorian economy plays no part in Sarayaku life. Remittances are important as many young people migrate to other parts of the country to work on plantations for cash. With the intention of creating local opportunities for employment, the community started to develop its own eco-tourism industry. However these efforts have largely been suspended due to the access problems (Ortiz 2005).
Petroleum exploration in Pastaza Province where Sarayaku is located is not new. It began in 1941 when Shell Oil initiated exploratory work and built some infrastructure, including an airport. Everything was abandoned by 1950 and the airport was handed over to evangelical missionaries. The people of Sarayaku were known to frequent the evangelical services just to get access to that airport and the regular planes that flew to and from the nearest center, Puyo, thus saving them a four day walk (Chávez et al. 2005, 28).

The Argentinean transnational ARCO received a concession (block 10) in 1988 that included a portion of Sarayaku territories (Chávez et al. 2005, 25). After the fact, ARCO officials, alongside key government employees entered the community to negotiate for permission to pursue for oil development activities (Ortiz 2005). While surprised, the community was prepared. They had been working with the Organization of Indigenous Peoples of Pastaza (OPIP) and had developed a better understanding of the negative social and environmental consequences of petroleum activity. The indigenous peoples’ experiences with the Chevron-Texaco project in the north Oriente were already well known. Large portions of the Amazon rainforest were badly contaminated by oil extraction. Animal habitats were destroyed and locals were plagued by high rates of cancer, spontaneous abortions and respiratory illnesses (San Sebastian and Hurtig 2004). The position of Sarayaku in the face of this experience was clear; they did not want this type of development in their territory (Ortiz 2005).

One Sarayaku advisor noted during an interview that the people of Sarayaku were concerned that oil development brought on by ARCO would lead to the destruction of their lands, livelihoods and communities. He suggested that if a sustainable environment management plan could be drafted cooperatively; the community position might change (Ortiz 2005). In this case they had negotiated a tripartite accord, with the assistance of OPIP which promised the community legal title to its lands and the creation of a special fund to pay for any environmental damages that might arise. In return, the community agreed to allow ARCO to proceed. However, ARCO subsequently negotiated a less costly deal with the neighboring community of
Muritikucha. They decided to abandon Sarayaku and focus their develop efforts there. In return, the government gave Muritikucha communal title to their traditional lands, which included Sarayaku hunting grounds while reneging on the Sarayaku deal (Ortiz 2005; Siren 2004, 136).

The next wave of petroleum activity in Sarayaku began in 1996 when the government of President Sixto Durán Ballén (1992-1996) issued a concession for Block 23 to the Argentinean Compañía General de Combustibles (CGC) (CDES 2004). This time around over half of the concession was on Sarayaku territory. It was granted without consulting Sarayaku or any other of the indigenous communities affected. Following the typical practice of transnational firms in the region, CGC’s initial strategy was to offer Sarayaku small amounts of money and development projects in return for its consent to the multi-million dollar oil developments (Sarayaku Archives nd). Indeed this strategy has proved successful in other parts of the Oriente. However, the community rejected what it saw as bribes. Sarayaku resolved to stop petroleum development in their communities. Through OPIP they demanded a moratorium on all petroleum activities as well as the opportunity to develop their own uniquely indigenous development plan for the region. They began to seriously consider the development of an eco-tourism project that would be complimentary to their traditional economic practices. Eco-tourism would be sustainable and compliment ongoing traditional livelihood activities while generating revenue for the community as a whole. Government actors’ behaviour to this point led the community to believe that they were better off to pursue their own community development (Ortiz 2005).

Key political actors in Ecuador, however, were not sympathetic to Sarayaku’s concerns. Instead the government of president Jamil Mahauad (1998-2000) intensified petroleum development activities in the region in 1998; signing a new concession in the nearby block 24, adding 135 kilometers of pipeline to existing infrastructure and building an additional 37 kilometers of road. All of this was designed to make investment in the region ever more attractive to foreign multinationals (Ortiz 2005). CGC, with the support of the government, remained committed to exploratory activities in the region. Having failed in Sarayaku, CGC instead sought
agreements with some of the smaller communities in the region, offering them similar token amounts of cash and small public works projects. This amounted to a divide-and-conquer strategy; some communities chose to take the deal and became vocal supporters of both the company and oil development within the Ecuadorian Amazon. Inter-community conflict became common and at times dangerous (Ortiz 2005). In an interview, OPIP advisor Pablo Ortiz admitted that an Environmental Impact Study had been conducted as per the law. However, it had been subcontracted to a foreign firm. He explained: “Four consultants came into the region, posing as tourists for four days. Then they wrote up a report without consulting with Sarayaku or any other indigenous community.” OPIP rejected the validity of the report (Ortiz 2005).

In 1999 Sarayaku argued before the ILO that the new concessions did not comply with the ILO Convention 169 on Indigenous and Tribal Peoples which Ecuador had signed in 1998, two years after CGC bought the concession on Sarayaku territory. Because the state had signed ILO 169, explicit procedures were required to issue concessions on indigenous lands. C169 Article 15.2 requires prior consultation with the community before the state can commence with resource development projects on indigenous soil along with mandatory compensation and other benefits in return for the exploitation of sub-soil rights. The state countered, however, that since the actual concession had been issued prior to the ILO signing, it could not be revoked retroactively (CDES 2004). Sarayaku was not the only community to use C169 as a defense mechanism. In the same year in nearby block 24 the Ecuadorian government contracted with another foreign owned oil company for exploration into Shuar territory without the knowledge or consent of the community. In December 1999, the Independent Shuar People from Ecuador (FIPSE) through the National Workers Union presented a claim against the Ecuadorian government before the ILO alleging violation of several articles of C169. Again the state countered that the concession had been signed prior to C169 and could not be considered retroactive. The ILO supported the Shuar, stating that although the concession may have been signed in 1998, the activities conducted under
those concessions are accountable to C169. The ILO issued a series of recommendations in
November of 2001. The government responded by noting:

That the mining products from the subsurface (including hydrocarbons, unlike that of
surface products, is the domain of the Government. And … puts forth its view that
projects for the exploration and exploitation of hydrocarbons are motors of economic
growth and therefore serve the interests of national development (Davis 2002).

CGC began to cut seismic lines in Sarayaku territory in November of 2002. In response, the
community detained three CGC workers. While the workers were later released, tensions in the
region were high. By January 2003, CGC was militarizing the region with armed guards and
paramilitaries (Gualinga nd). Detentions, gunfire, and physical attacks were commonplace. The
community declared a state of emergency, with school activities ceasing as transport in the region
was no longer considered safe.

Prior to reaching out for international assistance, the community of Sarayaku attempted to
stop CGC through a number of domestic legal procedures with limited results. Sarayaku presented
its case to the provincial ombudsman in Pastaza in the fall of 2002. The ombudsman ruled that
CGC and the former Minister of Energy and Mines had in fact violated Articles 84 and 88 of the
Ecuadorian Constitution (1998) and ILO 169 by “not having duly consulted the affected
communities before initiating the petrol prospection activities.” However, it declined to support
the Sarayaku appeal to have CGC and its armed security forces withdraw from the territory
(Ombudsman Ruling 2003). In November of 2002, OPIP, on behalf of 11 Quichua associations in
Pastaza (representing 136 communities) presented a Constitutional *Amparo* 24 action before a civil
judge in Puyo, based on the violation of articles 84, 86, and 88 of the Ecuadorian Constitution.
The judge ordered the immediate suspension of exploration activities by CGC. According to the
court documents, the sub-secretary of the minister of government did meet with indigenous
leaders in December 2002. The parties signed an Accord of Intention which promised the
suspension of CGC activities in the region until a peaceful solution was negotiated.

24 An *Amparo* action is a legal action to protect a citizen’s constitutional rights.
On December 17, 2000, despite these accords and promises, CGC was back in block 23, continuing without any new agreement. Private security guards were brought in to protect CGC employees. Community representatives continued to meet with both the president and the minister of energy and mines; however neither would revoke the concession nor suspend CGC activities (Ortiz 2005).

The next step in Sarayaku’s struggle was an investigation by the Specialized Commission of Human Rights of the National Congress of Ecuador, which visited the community in May 2003 to gather testimony. During the visit officials expressed support and confirmed that the constitutionally protected collective rights of the Quichua people of Sarayaku were violated by the contract between Ecuador and CGC. Despite this verbal support, legislators were unable to effectively end testing and the interference of CGC in local indigenous politics (IACHR 2003).

At roughly the same time, the community, with OPIP, and the help of two human rights NGOs, the Center for Economic and Social Rights (CDES), and the Center for Justice and International Law (CEJIL) presented a petition to the Inter-American Commission on Human Rights (IACHR) for precautionary measures. CDES is an Ecuadorian-based organization with a main office in Quito that supports social justice-type movements in rural Andean and Amazonian communities. Their focus includes collective and environmental rights, as well as justice issues, social and economic rights. CEJIL is a much larger organization that has affiliated offices throughout Latin America, including Washington, Argentina, Costa Rica and Brazil. According to its website, its main objective “is to achieve the full implementation of international human rights norms in the member States of the Organization of American States (OAS) through the use of the Inter-American System for the Protection of Human Rights and other international protection mechanisms.”

Arguing that the State violated their rights to private property, judicial protection, freedom of movement, personal integrity, personal liberty and others under the American Convention of Human Rights, the legal team hoped this international mechanism might ease escalating tensions
between the community and CGC. On May 5, 2003 the Inter-American Commission ordered immediate precautionary measures to protect the community and ensure recognition of its unique indigenous rights within the state of Ecuador. These included ordering the Ecuadorian government to “adopt the necessary measures in order to protect the special relation the Sarayaku community has with its territory.” The Commission provided six months for the state to fulfill the resolution, and ordered that it do so in consultation with the community (IACHR Resolution, May 2003).

Although government officials suggested that they would comply, little was done to support the community and protect its rights within its own territories (Inter-American Court of Human Rights Resolution, July 2004). Non-compliance with the original Medidas Cautelares led the community to request an additional hearing before the commission on October 11, 2003.

Lawyer for Sarayaku, José Serrano of CDES noted:

The noncompliance on part of the authorities of the Ecuadorian government of the cautionary measures dictated by the Inter-American Commission is but a reiteration of an ill-fated precedent for Ecuador in face of the national and international community, by the constant and systematic violations of the human rights established in the national and international regulations (“Hearing for Sarayaku in the IACHR” Sarayaku News Archives, Sarayaku.com 11/10/03).

The state then decided to increase the military presence within the region. The minister of energy and mines, Colonel Carlos Arboleda, told the foreign press in October that:

The government is prepared to provide all security guarantees to the CGC company so that it can continue its operations in the block 23 and fulfill the established contract. And if, in order to provide that security, according to the law, the presence of police or armed forces is necessary, the government will provide the necessary measures in accordance with its commitment to respect the contract (“Security for petrol companies…” Sarayaku News Archives, Sarayaku.com 18/10/03).

On December 12, 2003, men, women and children from Sarayaku were attacked and detained on their way to a protest march by members of the nearby Quichua Cañelos community that were employed by CGC (Ortiz 2005). Violence in block 23 was escalating and communities that had once been allies now found themselves enemies as a result of CGC’s divisive strategies.
Government support for CGC exacerbated the conflict. The Inter-American Commission heard the non-compliance case of Sarayaku five days after the assault and extended the precautionary measures for an additional six months. Once again, the Ecuadorian government agreed to respond, but failed to deliver.

The IACHR became frustrated with government foot-dragging and referred the case to the Inter-American Court of Human Rights (CIDH) whose rulings carry greater force for compliance. Ecuador, unlike the United States or Canada, is party to the American Convention on Human Rights (1978), and has accepted the jurisdiction of the Court. The CIDH heard the case in July 2004 and immediately issued *Medidas Provisionales*, which stated that Ecuador had to adopt measures to: protect the life, and personal integrity of the peoples of Sarayaku; guarantee the free movement of the people of Sarayaku; investigate the acts that brought forth the provisional measures (December 2003 attacks and subsequent threats); and implement the precautionary measures in consultation with the community (Inter-American Court of Human Rights Resolution July 2004). Yet compliance remained outstanding.

One of the main concerns of Sarayaku is that the Bobonaza River, which provides passage to Puyo, had been blocked by members of the smaller indigenous communities within the region that support the oil companies. Neighbors, supportive of the oil companies, were responsible for physical attacks and threats on Sarayaku members as they tried to navigate the waterway. This made movement in and out of the community difficult. It also stalled the community’s own economic development plan (Ortiz 2005). As of July 2005, the government had not resolved the problem. A representative from the Procuraduría General suggested in an interview that it would not take sides between the indigenous communities (Roberts, 2005). No police presence is available within the region. Security forces were hired by multinational firms to protect their own work sites and personnel.

For the legal team involved in the case, as well as community leaders, opposing the interests of oil development was dangerous. All were the target of threats, arbitrary detention
and even physical attacks. Ongoing threats and harassment, as well as the state’s non-response, led Amnesty International to issue an Urgent Action at the end of February, 2003 and once again in 2004 for Indigenous leaders Franco Viteri, José Gualinga, and Marlon Santi. Viteri and Gualinga received a number of death threats in 2003, as did Santi. According to Amnesty International, Santi was physically assaulted in Quito in February 2004, the day before he was supposed to fly to Costa Rica to attend a meeting before the Inter-American Commission on Human Rights regarding the Sarayaku case. His passport and travel documents were stolen, along with his money. According to the Amnesty International website, the government of Ecuador confirmed that the safety of all Ecuadorian citizens was guaranteed by the state, but made no specific promises for the people of Sarayaku.

As the boomerang model would predict, the community sought out international allies on a number of different fronts. While the focus of this project has been the Inter-American system, the United Nations has also played an important role in this field. Sarayaku raised their case at the UN Committee on Economic, Social and Cultural Rights. It observed that the state failed its obligations to uphold collective indigenous property rights as guaranteed by ILO C169 and the Ecuadorian Constitution with respect to ongoing oil activities in the traditional territories of Sarayaku. In June 2004, the Committee expressed concern that oil exploration activities were proceeding in the Amazon without full consent of the communities involved. It urged the state to ensure indigenous peoples are able to participate in the decisions that affect their lives. Again, as the Spiral Model predicts, governments’ initial reactions often involve denial. Ecuador was no exception. The state denied the allegations and suggested that Sarayaku actually supported the oil development, except for a few “troublemakers.” The president of Sarayaku did not agree: “the community unanimously has decided not to permit oil exploration in its territory, and defend the life space that corresponds to us” (Sarayaku.com press release, 2004). Sarayaku leaders have made numerous attempts, domestically and internationally, to stop the oil companies. The
indigenous people of Sarayaku have seen not only their property rights violated, but also basic human rights to dignity and security.

With support of local and international human rights NGOs, including CDES and CEJIL, the community first pressed its case through the local courts, the regional ombudsman and the National Human Rights Commission. Sarayaku made every effort to utilize the domestic laws and procedures to secure its rights. Subsequently, as Alison Brysk (1993) has suggested, the community was forced to turn to the international arena to create pressure which would then boomerang back to the state. The involvement of the OAS Inter-American Commission of Human Rights and Inter-American Court of Human Rights, the United Nations Committee on Economic, Social and Cultural Rights, as well as the transnational NGOs Amnesty International and Amazon Watch created pressure on the government of Ecuador to respect and protect the rights of the indigenous people of Sarayaku. A lawyer within the Procuraduría General noted in an interview: “Even if the government does not agree, it will comply. Ecuador is a member of the OAS and it signed the American Convention of Human Rights. It is obligated to comply” (Roberts 12 July 2005).

Despite mixed messages the government failed to act. As of September 2006, the Medidas Provisionales of the IACHR and CIDH had not been implemented. The river remained blocked and the attacks and threats made against the people of Sarayaku, their leaders, advisors, and legal team had not been investigated. One OPIP advisor suggested in an interview that the government was not eager to pursue the matter as it may send a negative message to international investors. “The state wants to maintain the appearance of control and assure investors of their welcome in the Amazon” (Ortiz 2006). Although pressure both from above and from below has been coherent, well organized and ongoing, there has been no movement towards domestic implementation of the norm in this case. For the most part, the government has remained in a state of denial, content to continue collecting concession fees and royalties for oil production which make up a significant share of the national budget.
8.2 Too much for too few? Awas Tingni land claims

Like much of Latin America, the turbulent history of Nicaragua since independence has been marked by ongoing and often violent property disputes between different segments of the population (Roche 2006). The Sandinista revolution itself aimed to challenge the virtual monopoly that Anastasio Somoza and his family held over lands and resources. One of the key demands of the Nicaraguan Revolution was economic equality which included sharing the land and its resources. Nearly thirty years later, the success of this endeavor is open to interpretation. Nonetheless, it is clear the Revolution failed to deal with one of the most pressing land claims, that of the Coastal indigenous peoples and that this failure was detrimental to the revolution as a whole.

Awas Tingni is a small Mayagna community with a population of roughly five hundred located within the tropical rainforests of the Caribbean coast. Because of its relative isolation, the community members maintain largely traditional livelihoods, which include forest harvesting, as well as some farming and fishing. Some community members have sought wage employment from time to time within the regional forestry industry although this is by no means steady (McLean 2006).

Awas Tingni claims their traditional territories encompass some 100,000 hectares of land which they have held and utilized “since time immemorial.” This amounts to 500 hectares of land per person. In a country where most people hold little if any property, this figure can appear stunning. And further, considering that the land holds valuable timber resources, the allocation of valuable land to such a small community raises a lot of concerns from both indigenous and non-indigenous costeños as well as that of the Nicaraguan state itself. Where indigenous territories are remote and for one reason or another considered insignificant, little challenge is made to traditional occupation and use patterns. Often isolated indigenous communities are able to practice a form of autonomy based almost entirely on negligence. However, this changes when
resources are found, or migration pressures mount. As pressure for land and resources grows, indigenous tenure grows increasingly insecure.

In the case of Awas Tingni, the question of who actually holds the rights to what they are claiming as ancestral lands was undisputed until negotiations were underway between the government of Nicaragua and transnational logging companies. The government sought to grant concessions to log rainforest which included much coveted mahogany stocks. The conflict between Awas Tingni and the Government of Nicaragua began in 1991 when MADENSA (Maderas y Derivados de Nicaragua, S.A.) became interested in Awas Tingni territory and approached the community with a proposal for a joint timber-harvesting project. In the beginning, MADENSA, which was owned in part by former Sandinistas, recognized Awas Tingni’s traditional land rights. The company negotiated with the community, which at the time was eager for economic development and employment. With a deal in hand the two parties jointly petitioned the Nicaraguan Forestry Service (an agency within the Ministerio de Recursos Naturales y Ambiente or MARENA) for a harvesting license, despite the region-wide moratorium on logging in the area that had been issued on environmental grounds. The parties believed that because the proposal included indigenous people, the government might be willing to overlook the moratorium (Anaya and Crider 1996).

The strategy of MADENSA to cooperate with Awas Tingni to obtain the license proved wise. The license was issued in 1992, despite the moratorium, citing the economic needs of the impoverished indigenous community. The permit was issued under the condition of mixed harvesting – the joint venture was to harvest a sustainable mix of local species, not just the mahogany. MADENSA began timber harvesting on the allotted 1,500 cubic metres, using local labour, however a number of problems quickly ensued.

MADENSA was not satisfied with the short term nature of the original permit. With the help of a forestry consulting group, Sweitenia, it developed a twenty-five year sustainable harvesting plan for 43,000 hectares in the vicinity of Awas Tingni. Although forestry regulations
were still in development, Sweitenia, whose senior consultants included the Nicaraguan Director of Forestry Services, submitted a proposal and began to pressure the Ministry for approval. MADENSA approached the community for a twenty-five year agreement, under the premise that the 43,000 hectares in question were within traditional Awas Tingni territories. Without legal counsel, the community signed “a vaguely worded twenty-five year agreement with few safeguards to protect the community’s lands from the company’s control” (ibid.).

As noted in the section on civil society, the international NGO community plays a significant role in Nicaragua, and environmental causes have been at the forefront of sectors to receive strong international support and assistance. In this case it was the World Wildlife Fund (WWF) that became involved in the development of sustainable forestry in Nicaragua. It was troubled by the MADENSA – Awas Tingni agreement. Arguing that Awas Tingni needed appropriate technical and legal advice prior to making any long term forestry agreements, the WWF with initial support from both MADENSA and the Forestry Service, secured legal counsel from the University of Iowa. Led by indigenous scholar James Anaya, the Iowa Project met with the community and developed a comprehensive strategy to protect the community’s long term interests while benefiting economically from its partnership with MADENSA (ibid.). Although locally, there were no groups willing or able to provide support to AT, with its new international legal team the community was able to put new pressures on the government and MADENSA that were completely unexpected.

MADENSA and the Forestry Service were taken back by the new assertive negotiating position of the community and its legal team. They quickly determined that the best way to deal with this assertiveness was to reverse their earlier position and treat the lands in question as state lands, and not indigenous territories. MADENSA then negotiated a new deal with the Chamorro government and signed a thirty-year logging concession without any community involvement. The community and its legal team challenged the legality of this agreement, arguing the state had no authority in the matter. Both the 1987 Autonomy Statute for the RAAN and the Nicaraguan
Constitution guaranteed the rights of indigenous peoples to their traditional territories.
Furthermore, jurisdiction for land and natural resources in the north Caribbean Coast is held by the RAAN, not the Nicaraguan government or the Ministry of Environment. Accordingly, the concession that was issued was both illegal and invalid.

As a source of considerable funding and technical support to the Nicaraguan government, the WWF encouraged MADENSA and the Forestry Service to backtrack and sign a new tripartite framework agreement for sustainable harvesting in May 1994. The agreement also committed the government to formally demarcate and title Awas Tingni lands. Under this agreement, MARENA promised: “To facilitate the definition of the communal lands and not to undermine the territorial aspirations of the community...Such definitions of lands should be carried out according to the historical rights of the Community and within the relevant legal framework” (Translation from Spanish by Anaya and Grossman 2002, 3-4).

Whether through incompetence, insincerity, or outright deception the government of Nicaragua misled AT and its legal team. The formal commitment to recognize the rights of the community was signed by the Chamorro government at the same time it was negotiating another concession with a second transnational logging company, the Korean-owned SOLCARSA, in Awas Tingni territory (Anaya and Grossman 2002). These discussions were held without the participation or even notification of the community. As soon as they realized what was happening, AT protested the new concession. The government chose not to respond as SOLCARSA employees undertook an inventory of timber resources in the disputed territory.

AT immediately filed a judicial appeal for an Amparo action for emergency relief. In February 1997 the Nicaraguan Supreme Court of Justice (SCJ) ruled that the concession was unconstitutional because it did not have authorization under the RAAN; the ruling confirmed that the RAAN and not the national government held jurisdiction in this case. Officials of the federal government subsequently approached the RAAN to obtain authorization ex post facto (CIDH Judgment August 31, 2001). This was obtained and the Appeal Court revoked the Amparo.
For Awas Tingni, the key issue was not that the unconstitutionality of the agreement because of the lack of RAAN approval. Whether it was the RAAN or the national government that issued the concession did not matter. What was important was the fact that any concession issued without their knowledge or consent clearly violated their property rights. Since the national court was unwilling to resolve this fundamental issue, the legal team decided that the best thing to do would be to push the case forward to the Inter-American Commission for Human Rights. National channels were clearly unsympathetic to the case and were prepared to bend the rules if necessary to favor the government and its interests. There was little, if any hope that justice could be had domestically; this led to the international appeal.

The AT legal team approached the IACHR in October 1995, shortly after they became aware of the government’s deception over the MADENSA agreement. In their petition, they included a copy of their protest letter to MARENA, the Amparo action, a resolution of the Matagalpa Court of Appeals deeming the Amparo inadmissible (due to the ex post facto RAAN authorization), and a subsequent appeal filed with the Supreme Court of Justice. The Commission agreed to look into the case, but before a hearing date could be established, the community returned asking for immediate interim “precautionary measures” to protect their lands as the state was about to issue the concession to SOLCARSA.

Rhetorically, the Nicaraguan government has always appeared to take a conciliatory approach to the case. In terms of action, however, little actual conciliation is evident. This gap between words and deeds has marked the entire history of the case. One of the unique tools at the disposal of the IACHR to resolve cases is the “friendly settlement” process. Under this process, the IACHR can act as a mediator between the two parties and help negotiate a mutually agreeable solution to the case under consideration. In April of 1996, the Commission agreed to act as mediator in a “friendly settlement process” utilizing a community drafted Memorandum of Understanding (MOU) as the basis for discussions. The state’s initial response was positive, but after a second meeting government representatives decided it could not accept the terms of the
MOU. The petitioners then suggested that the state formulate its own demarcation procedure for AT lands, and, in the meantime, suspend the SOLCARSA concession (IACHR Complaint 2002).

Negotiations under the “friendly settlement” process were not smooth. The state was once again sending mixed messages. In an October 1996 meeting, for example, the state announced the creation of a National Demarcation Commission (NDC) and invited the community to participate in the process (Inter-American Court of Human Rights Judgment August 31, 2001). Although this certainly appeared conciliatory, the SOLCARSA concession remained active. In terms of demarcation, there was the danger that by the time it was realized, the most valuable timber stocks would already have been harvested.

The case then proceeded to a formal hearing. The government’s initial strategy was based on denial. Each time government attorneys argued before the Inter-American Court, they sought to have the case dismissed, often on spurious grounds. At first, they argued that the request for precautionary measures to the IACHR should be denied as the state intended to comply with the Supreme Court Ruling on the unconstitutionality of the SOLCARSA concession. Yet what they intended, and in fact did do, was remedy the unconstitutionality by obtaining post facto authorization of the RAAN; avoiding the substance of the AT claim. The state also argued that the community had not, in fact, exhausted domestic remedies and therefore was not entitled to utilize the Inter-American Commission in this case. Both arguments were rejected and the case was ultimately referred to the Court. The CIDH rendered its precedent setting judgment in August of 2001. By a decisive vote of seven to one, the Court found that the state of Nicaragua had violated the rights to property of the Awas Tingni community as protected by Article 21 of the American Convention of Human Rights (ACHR). The judgment ordered that:

the state must adopt in its domestic law, pursuant to article 2 of the American Convention on Human Rights, the legislative, administrative, and any other measures necessary to create an effective mechanism for the delimitation, demarcation, and titling of the property of indigenous communities, in accordance with their customary law, values, customs and mores (IACHR Judgment August 31, 2001).
The government of Nicaragua was given 15 months to title the traditional lands of AT in particular. Nicaragua was also ordered to pay $30,000 for legal fees and an additional $50,000 for works or services to benefit the community as a form of compensation (ibid.).

The Spiral Model suggests that pressure from above and from below will lead the subject government to eventually make concessions and move towards compliance in terms of human rights. While at first these concessions are often isolated and piecemeal, the theory is that eventually the incremental changes will coalesce into a significant policy shift. In terms of indigenous rights what can be expected is that over time, with international involvement and ongoing domestic mobilization, states will begin to issue small concessions in favor of indigenous peoples’ rights. These concessions then inspire greater activism on the ground and internationally, increasing attention and pressure on recalcitrant states. In the end, states, as a result of these pressures, are pushed through the model and eventually make the required legislative and policy changes to ensure long term compliance. Has this in fact been the case in Nicaragua? What, if any, concessions has the Nicaraguan government made in the Awas Tingni case specifically, and for the implementation of international indigenous rights in general? Do the mechanisms of the Spiral Model appear to be working in this case?

Certainly in terms of its public position before the Court, the state of Nicaragua has always appeared amenable to fair resolution of the Awas Tingni case. Once the decision was made public, Nicaragua immediately announced its intention to comply and repeated its general commitment on several occasions. As part of this process, the state initiated a series of meetings with the community and its legal team and established two joint commissions for implementation. Joint Commission I (JC I) was charged with the negotiation of terms over the $50,000 investment the state was to make in the community. Joint Commission II (JC II) was given the more daunting task of planning the process for delimitation, demarcation and titling. JC II was also to deal with the contentious issue of ongoing illegal logging in AT territories (ibid.).
On February 22, 2002 the Representative of the Mission of Nicaragua to the OAS, Ambassador Lombardo Martínéz, provided the IACHR with a cheque for US $30,000 towards the costs of the AT legal defense, as ordered. Ambassador Martínéz stated that the payment symbolized “the will and full commitment of the government of Nicaragua to comply fully with the CIDH decision.” Nicaragua also provided the community with investment monies of $50,000 US which went towards the creation of boarding facilities in Bilwi to house AT students (CIDH Comunicado de Prensa, No.8/02). Still, despite these initial gestures, more than six years later only limited progress has been made by the JC II. Initially the state had a period of fifteen months to comply with the CIDH ruling, yet as of December 2007, the AT territories had not been titled.

The Awas Tingni legal team engaged in a long and arduous struggle to increase pressure on the government of Nicaragua for full implementation. On January 16, 2003, after a year and a half of delays, the community filed an Amparo action with the Appellate Court in Bilwi (Puerto Cabezas) requesting that the case be forwarded to the Supreme Court of Nicaragua to push for full compliance (Indian Law Resource Center, 2003). The legal team sought to hold President Enrique Bolaños, as well as various ministers and government officials personally responsible for the failure of the state to title Awas Tingni lands. It was widely believed there was no real political will to support the titling process for Awas Tingni in particular and that, while the land demarcation process underway was benefiting certain other communities, Awas Tingni was left out as punishment for the publicity the IACHR case brought. One community leader noted in an interview that the Joint Commission II met eight times with the government delegation changing frequently, often attending with little or any preparation. “None of the representatives had the mandate or the authority to make any real decisions” (McLean 2006).

There are multiple reasons for the lack of progress. Property rights cases are highly contentious because there is so much at stake. Once a claim has been legitimated through title, the balance of power will shift inalterably. For AT, the attention of the CIDH case, and the possibility of titling, encouraged neighboring communities and individuals to stake their own claims to the
same lands (Picado 2006; McLean 2006). A 1998 World Bank funded study on traditional land usage and titling in the Caribbean coast raised considerable interests and aspirations throughout the region and encouraged communities to claim large swathes of land, with minimal objective requirements. In the Awas Tingni case, the indigenous communities with competing claims are Miskito, who represent the majority of the indigenous people in the region and whose political party, YATAMA has significant power within the RAAN Council. The Miskito, with a population of around 150,000, are the culturally and politically dominant players within the RAAN. In this case, a favourable IACHR ruling and even an initial public declaration of support by the government has not been enough to ensure that the property rights of indigenous peoples in Nicaragua are respected and protected at the national level.

In May of 2005, in the community of Waspan on the Rio Coco, the president of the Republic of Nicaragua issued five property titles to the following Mayagna and Miskito communities: Kipla Sait Tasbaika, Mayagna Sauni As, Li Lamni Tasbaika Kum, and Mayagna Sauni Bu y Miskito Indian Tasbaika Kum, all located within the protected biosphere region of BOSAWAS in the RAAN. This was clearly a victory for indigenous groups in the region, and a confirmation that the government of Nicaragua was willing to recognize indigenous property rights, even if within the protected area of the BOSAWAS, logging concessions are not possible.

Nonetheless the Awas Tingni’s claim remained outstanding. Even though the final sentence of the court was submitted in 2001, provisional measures were issued in 2004, and again in mid 2006, there has been no demarcation or titling. Negotiations stalled over the amount of land, and its exact location. Regional conflict, regional politics and ultimately poor RAAN financing to cover the scope of its legal and jurisdictional mandate have proven serious barriers to action on the file (Picado 2006; Rizo 2006). The drawn-out process for demarcation and titling has actually encouraged competing claims and subsequent conflicts. AT engaged in its own Diagnostic Process in 2001 to demarcate the actual land use patterns of the community as a precursor to applying for title. This included a detailed study of the population and actual usage of traditional
territories, noting the rivers used for fishing, the lands used for hunting and agriculture as well as plant gathering, homes and communities. Shortly thereafter, the National Commission of Territorial Demarcation (CONADETI), financed by the Land Administration Project (PRODEP) and ultimately the World Bank, hired a private consulting firm to complete its own diagnostic study of the entire region to determine actual land use patterns. It was during this process that the presence of significant overlapping claims to territory became obvious. Specifically, 40,000 hectares of land claimed by AT was also being claimed by others, including adjacent Miskito communities, ex-Contra soldiers (also Miskitos) and a handful of mestizo colonists (Picado 2006).

In a region of extremely depressed economic circumstances, the potential value of the mahogany and other timber in the region represented a lucrative opportunity. Tensions over land claims have escalated substantially since the Diagnostic processes were completed, culminating in the murder of an Awas Tingni member by an ex-Contra soldier who did not support the Community’s claim to traditional rights over his particular land parcel. Illegal logging continues as neither the state nor the regional government has the resources or will to monitor the area closely (Rizo 2006; Cunningham 2006).

One of the unique problems in the case of Awas Tingni stems from the struggle to translate a traditional understanding of indigenous territories and land use patterns into western capitalist style property rights. From an indigenous perspective, contiguous land use patterns are hardly the exception. Land use patterns tended to be quite fluid, changing both seasonally and annually; thus it is not surprising that different communities used the same piece of land at different times. Overlapping land use is generally not problematic under indigenous tenure, although of course, conflicts can and do arise. The problem occurs when one is trying to translate an indigenous understanding of territory into the overall capitalist framework of the nation state. Official titles cannot be overlapping and they cannot be seasonal, nor can they be generally shared on a temporal basis. Once it is decided who is actually entitled to use the land and granted official title, relative political weights will shift and it is unlikely contiguous patterns will be allowed to
continue. Furthermore, the supply of the timber, specifically the mahogany, is finite within the short to medium term. Whoever secures legal title will get all the benefits of current endowments.

Nicaragua faces notable challenges in terms of its property rights regime overall. As one Managua lawyer noted during an interview “The legacies of Somoza, the Sandinistas and the successive liberal governments left a piecemeal process that more often than not became bogged down in personal interests and internal politics” (Rizo 2006). In this context, Law 445 represents real progress, as does the implementation process delineated under the National Commission for Demarcation and Titling (CIDT) and CONADETI. Still, it is widely recognized that political will is needed to overcome a wide range of systemic problems and move the process forward. While institutions to support indigenous rights have slowly been assembled, ensuring that they are operative represents another challenge (Alvarado and Campbell 2008, 312).

Indigenous lawyer, James Anaya, who played a lead role in the case, identified a key factor in the seemingly endless delays: “The government (of Nicaragua) does not have the expertise to know what it is supposed to do. There are insufficient institutional resources, and the institutions themselves are weak.” He added: “The government does not give this case priority. There are a lot of political wills against this and they are dragging their feet” (Anaya 2006).
Chapter 9

Indigenous Rights Norms in the Americas: Cascade or Trickle?

The impact of the Second World War helped turn emerging human rights norms into universally accepted standards for both national and international law. While indigenous rights have not enjoyed the same saliency it is clear that an international indigenous rights network has helped propel new indigenous rights norms into the legal arena. In light of a long history of colonialism, genocide and assimilation, widespread consensus developed around the fact that human rights alone are insufficient to ameliorate the plight of the world’s indigenous peoples. Starting with the ILO and then the UN and OAS, a convergence of international opinion on the need for special protections and a new political will to establish them has evolved.

Starting again with the mechanics of the Spiral Model, this chapter will look at the current state of indigenous rights norms in the Americas. Since the 1960s, transnational advocacy networks began to form and push an agenda of change to correct longstanding injustices against indigenous peoples. Using the language and strength of the human rights movement these new TANS have been working hard to establish new international standards. While based on the idea, form, and content of broader human rights principles, indigenous rights represent a unique application that better encompasses the collective nature of indigenous identity. Indigenous identity is built on a cosmology that is very different dominant from western values. This explains, at least in part, why states failed to integrate indigenous communities into their national fabrics despite longstanding official policies of assimilation. Strong indigenous resistance on the ground, coupled with an increasing attraction to these alternative cosmologies among disaffected non-indigenous, have created new opportunities for indigenous identities to be recognized by existing state structures. Are we, as the model would predict, moving towards an indigenous norm cascade of state recognition over time? There is some positive evidence.
Rejecting the notion that indigenous societies are intrinsically backward and pre-modern, states have begun to look for ways to integrate indigenous populations into the national framework. New versions of nationalism are finally being envisaged which recognize indigenous communities as a unique part of modern states. Much of this is being formalized through state constitutions. Specific articles for indigenous rights, especially for culture and language are becoming a part of constitutional re-drafting. Colombian indigenous rights specialist Roqué Roldán Ortíga notes:

Starting at the beginning of the seventies, this new vision of relations between the state and indigenous peoples began to be integrated into new constitutions as they were being adopted by various countries. The Panamanian Constitution of 1972 took the first timid steps in this direction while the Peruvian Constitution of 1979 laid out a clearer vision (Ortíga 2004, 2).

Constitutional recognition, however, does not address the entrenched inequality that has resulted from long-standing colonial subjugation. Rights to culture and language, for example, often require little in terms of state support and, more importantly, do little to challenge existing power relations that benefit primarily the non-indigenous elite. Such rights are among the first to be granted.

As highlighted in chapter 3, the international indigenous rights networks that formed over the past 20-30 years have been surprisingly successful in the construction of new norms for indigenous specific rights. ILO Convention 169, the International Declaration of Indigenous Rights (UN) and the Draft Declaration of Indigenous Rights (OAS) plus the decisions of the CIDH and IACHR discussed here, all provide clear evidence of the growing acceptance and application of these norms in international law. According to Brysk et al., a “norms cascade” will take place as more and more states accept these international norms and transfer them into domestic policy. This will then engage and encourage more local and transnational social movements, as well as other states, and together, the overall moral force for compliance will push for rule consistent behaviour. Such a cascade was obvious in the realm of human rights in the
Americas during the late 1980s. The question here is whether indigenous rights are moving towards a similar norm cascade.

The Spiral Model suggests that the first incremental steps of states towards implementation involve isolated tactical concessions by leaders, often for instrumental reasons. In Ecuador, the granting of formal property titles to Sarayaku and a handful of other Amazonian communities was directly linked to the desire of the government of Rodrigo Borja (1988-1992) to manage indigenous protest involved in the 1990 nation-wide uprising (Becker 2008). The government responded to longstanding demands only in the wake of widespread indigenous unrest and the subsequent social instability, publicity and market interruption that ensued. According to the model, although initial concessions tend to be specific, they are not necessarily isolated or onetime events. Once a single concession has occurred, it can provide both local and transnational social movements with greater political space from which to maneuver, as well as the inspiration to continue the arduous process of building pressure for more meaningful changes.

The next step involves the formal recognition of new norms through the signing of international documents and their transmission into the domestic legal framework. The ILO Convention 169 was signed by 20 states world-wide including 14 nations across the Americas, including Colombia, Brazil and Ecuador. Although Nicaragua did not sign, it modeled some of its features into its 1987 Constitution, reflecting a broader trend. Since the 1980s, indigenous rights norms have been incorporated into constitutions across Latin America.

This represents significant change. The revolutionary liberalism that brought down European colonialism in the Americas never included space for the continent’s indigenous peoples. Although there have been waves of interest in the plight of indigenous peoples, concern was largely paternalistic, in most cases romanticized, and never amounted to enough to overshadow the material interests of the new nation states. Nonetheless, throughout the region Latin American states did generate a range of policy responses.
Across Latin America, governments and their publics recognized that indigenous peoples suffered from many particular hardships including the loss of land and resources, cultural degradation, poverty and subsequent exploitation. For different reasons, states felt compelled to legislate solutions to the so-called “Indian Problem.” Nicaragua, for example, passed specific legislation to protect indigenous peoples’ territory from sale as early as 1918.²⁵ Ostensibly, this was to protect indigenous communities from the illegal appropriation and sale of their land. The law was introduced, however, after the majority of the indigenous territories in the Pacific and North Central regions had already been divested. Further, the existence of progressive legislation did not guarantee either effective or consistent application. The judicial system, which represented national elites, tended to be indifferent if not openly hostile to the claims of Indigenous peoples in Nicaragua. Cases were routinely rejected, delayed or ruled against regardless of legal validity.

The most effective protection of indigenous rights on the Caribbean coast of Nicaragua was not any national law or policy; rather it was the distance, inaccessibility and relative isolation of the indigenous territories. Separated from the more densely populated Pacific region by hundreds of miles of impenetrable forests and swamps, the indigenous tribes of the Caribbean were more or less independent. With the exception of multinational resource extraction, there was little interest by most Nicaraguans in the former Kingdom of Miskito. This provided the space to preserve indigenous culture, language and communities well into the twentieth century.

This situation was mirrored in the Ecuadorian Amazon. A remote, difficult terrain and hot, humid climate delayed mestizo colonization. Unlike indigenous communities in more accessible parts of the state, Amazonian tribes have remained strongly traditional, with livelihoods, governance structures, and cultural practices largely intact. It is only within the last generation, fuelled by state-driven oil development that pressures for assimilation and modernization pressures have overwhelmed many communities.

²⁵ El Decreto Legislativo Numero 120 de 1918, Estatuto de Comunidades Indígenas.
Similar to Nicaragua, concern for indigenous rights in Ecuadorian law is not new. The early state used the law to incorporate indigenous peoples as peasants with a distinctive role to play in the production process. While appearing progressive, the long term aim of legal changes was to assimilate highland Indians into small scale agricultural producers. The Communal Law of 1937 recognized the right of indigenous communities to exist outside the realm of the administrative divisions of the Ecuadorian state. It provided communities with a limited degree of political and economic autonomy as long as they fit into the emerging corporatist state structure. This allowed communities of 50 or more to elect their own governments, called cabildos, and to hold collective property. However, the intention of the legislation was not to create independent and viable indigenous communities. The expectation was that eventually the comunas would transform themselves into state sanctioned cooperatives. Article 3 explains that the government will adopt “the necessary means to transform the communities into cooperatives for production.” The intent was to transform ethnic indigenous communities into campesino farm cooperatives, and entrench a homogenous national identity. For many reasons this was not successful (Lucero 2003).

9.1 Constitutional change for indigenous rights

Although the transition to electoral democracy has been completed throughout Latin America, deeply rooted authoritarian legacies remain and affect the legal institutions of many states. The failure to establish rule of law in so-called “third wave democracies” impedes the consolidation of democracy because there is no widespread agreement on the political rules of the game. Constitutions, by definition, codify these rules, establishing structure, procedures, powers and duties of government. Regime change in Latin America is often accompanied by constitutional changes. Often elected with a strong mandate for change, new presidents seek to establish rules and procedures better able to support their own particular vision of government (O’Donnell, 63-64).
Explicit indigenous rights have made the constitutional change agenda since the appearance of ILO C169 (Schor 2003; Van Cott 2000). For example, Canada (1982), as well as Guatemala (1985) Nicaragua (1987) Brazil (1988) Colombia (1991) Paraguay (1992) Peru (1993) Bolivia (1994) Argentina (1994) and Ecuador (1998) included indigenous peoples within their new constitutional frameworks. In total, 15 out of 24 countries in Latin America have included constitutional provisions that recognize the rights of indigenous peoples (Kreimer 2002). In each case, the constitutional exercise was an answer to severe national crisis in terms of representation and legitimacy. It also provided states with the means to enshrine newly emerging human rights norms. Through the broad veil of human rights, indigenous groups were provided with new political spaces from which to operate and a new rights-based vocabulary which legitimized longstanding claims (Van Cott 2000). The constitutional changes, while varying in terms of depth and detail, followed the lead of the ILO. They incorporated language which, for the first time, formally recognized the distinct identities of indigenous populations within the state and the special rights contained within these identities. This achievement alone is significant. Indigenous peoples were finally recognized as legitimate actors by the state, without having to sacrifice their own identity and worldview (Van Cott 2002, 45-46).

This milestone incorporation of both indigenous identities and rights was due, Van Cott argues, to two converging phenomena. First, the late 1980s and early 1990s were a time of real crisis in terms of legitimacy and governability for states throughout the Americas. Stemming from political regimes which failed to incorporate significant sectors of the population, popular movements demanded radical political change. Secondly, by this time, indigenous organizations had matured to the point that they could influence, and in some cases actively participate in the constitutional reform processes, as had been the case in Ecuador (Van Cott in Seider 2002).

This was not the case in Nicaragua. Constitutional change to include indigenous rights was initiated by the revolutionary government as part of a peace process with the indigenous peoples of the Caribbean Coast. The Sandinistas did not sign on to ILO C169, although they did use it as a
model. The Nicaraguan Constitution (1987) included recognition of indigenous identities although it constrained them as well. Indigenous communities outside the Caribbean coast were excluded. For costeños only, indigenous rights to collective property, culture, language and identity were recognized.

9.1.1 Nicaragua

While political dissatisfaction in the Andean nations led to political change, the Nicaraguan revolution in Nicaragua stands out as one of the strongest backlashes to the longstanding political exclusion of the popular classes. Nonetheless, the revolution as already noted had not aroused sympathies in the indigenous costeños. Many chose to fight alongside opposition forces during the Contra war (1981-1988). The inclusion of indigenous rights in the 1987 constitution was negotiated as part of the Peace Process between the indigenous communities of the Caribbean coast and the Sandinista government (Reding 1991).

The redrafting of the Nicaraguan constitution (1987) was as much a pragmatic as idealistic undertaking. It took place seven years after the Sandinista revolution and was done not only to include their new goals and values, but also as a means of revamping long outdated Somoza era legal codes and norms. The Sandinistas were especially eager to emphasize the referendum based process for establishing the new constitution as a means to highlight their democratic credentials to the world (Reding 1987). It led to a constitution which combined western style civil and political rights with strong Marxist social and economic rights as well (ibid.).

Besides a strong nationalist bias, the 1987 constitution was different in that it explicitly incorporated two important international human rights documents, the UN Universal Declaration of Human Rights with its two side covenants, and the OAS American Declaration on the Rights and Duties of Man. The Sandinistas were acutely aware of these emerging international standards and norms and sought actively to incorporate them, when possible, to enhance their own legitimacy in the face of persistent opposition from the American government.
Despite this constitutional incorporation of human rights in the revolutionary state, problems arose. Without a doubt, one of the most serious failings was its early mistreatment of the Miskito Indians on the Caribbean coast. Without fully understanding why, the Miskito were put into the category of counter revolutionary and cast as an enemy of the state. However, as Andrew Reding (1987) notes, the Miskitos resented the Sandinistas for an entirely different reason than the American backed Contras.

Supported by both the Honduran army and trained by former National Guards, many of the Miskito people of the Caribbean coast fought alongside the Contras for their own reasons: land and self-determination. In Guatemala, Bolivia, and Colombia, leftist guerrillas appealed to indigenous communities by emphasizing a common experience of injustices at the hands of the ruling elites. In Nicaragua, the class based rhetoric of the Sandinistas held little appeal. (Ohland and Schneider eds. 2-4). As already noted, this stemmed from a Sandinista brand of Marxism that failed to grasp the salience of ethnicity and its relationship to class. Miskito soldiers joined the counter-revolutionaries with the hope that eventually they would be able to drive out the “new colonialists” and restore their former (indigenous) kingdom. Sandinista retaliation was quick and harsh. Its military wing was involved with the forcible removal of indigenous communities along the Honduran border, the forced disappearances of almost one hundred Miskitos in detention and a massacre of hundreds in the community of Leimus in 1982. This led to charges of genocide within the IACHR. The Sandinistas, who wanted to see themselves as the champions of the poor and downtrodden, were facing a serious public relations disaster (Reding 1987).

By 1985, the Sandinista leadership openly admitted its mistakes and made substantive changes in its policy towards the Caribbean coast. As part of this reconciliation, they included a special section in the new constitution (1987) entitled “Rights of the Indigenous Populations and Communities of the Caribbean coast.” Section four recognizes that the communities of the Caribbean coast are an indissoluble part of the Nicaraguan people and provides for the right to
preserve and develop their own cultural identity within the framework of national unity (Reding 1987).

The 1987 Constitution defines Nicaragua as a multi-ethnic state. Indigenous groups on the Caribbean Coast were given the right to their own forms of social organization and the administration of local governance, the right to recognition of their communal forms of property at the community (as opposed to regional) level, and the right to use and enjoy the water and forest resources within their communal territories. The constitution also recognized the rights to preserve indigenous languages, religions, art, and cultures; as well as to create programs to further their own development. Article 89 deals with communal property rights and the rights to enjoy the natural resources, particularly forests and water, although the language is much weaker than ILO C169 which was in the final drafting stages around the same time. The Sandinistas maintained national rights to the riches of the subsoil, including mining and oil.

The peace process initiated another important gain for indigenous rights on the Caribbean coast, the development of an autonomy agreement (Ortiz 1987). Negotiations began in 1985, not long after the government issued an amnesty for Miskito rebels and began to encourage resettlement of those who had fled the region during the fighting. The 1987 constitution supports the direction of regional autonomy in the fabric of the Nicaraguan nation. It is a regional agreement, rather than explicitly ethnic; however the creation of the Regional Autonomy Statute for both the North and South Caribbean (RAAN and RAAS) was considered an important step towards indigenous self-governance.

The response was mixed. Representatives of MISURATA, one of the armed Miskito groups, considered the Agreement a ploy to evade their much broader land claim based on the initial Miskito reserve created by the Treaty of Managua (1860) between Nicaragua and Great Britain (Reding 1987). For other indigenous groups, like the Mayagna and Garifuna, the agreement was well received. The International Indian Treaty Council acknowledged that because
of its promise of indigenous autonomy “from the perspective of indigenous rights, the Nicaraguan constitution contains the strongest guarantees in the Americas” (Reding 1987).

9.1.2 Ecuador

The Ecuadorian constitution was re-written by a National Constituent Assembly in 1998 after a popular uprising led to the impeachment of President Bucaram for reasons of incompetence. While falling short of revolution, the change was abrupt and the Assembly was invoked with the hope of restructuring the state to include the poor and working classes. Like Nicaragua, this exercise provided indigenous groups with new spaces to press for inclusion within the national framework. In Ecuador, this was particularly successful.

The national indigenous organization CONAIE was at the forefront of a mass protest against President Abdalá Bucaram in 1997. Bucaram was elected the year before on a populist campaign that promised aid to the poor. Once in office, however, he initiated a series of neoliberal policies that devastated the poor, including raising bus fares and eliminating subsidies on basic necessities like food and cooking gas. This, coupled with widespread corruption, led to a mass uprising on February 5, 1997 that forcibly removed him from power. CONAIE worked cooperatively with the Coordinator of Social Movements (CMS) to remove the unpopular leader and press for a Constituent Assembly (Becker 2008, 185).

The Constituent Assembly was initiated by Bucaram`s replacement, the former head of congress, Fabián Ernesto Alarcón Rivera to develop of a new and more inclusive constitution (Van Cott in Seider 2002, 58-59). In keeping with its origins as a backlash against corrupt and unresponsive politicians it is not surprising that the new document included specific provisions for the citizenry to revoke elected representatives and call referendums on issues of serious national importance (Barczak 2001).

From an indigenous perspective, the 1998 constitution provided much stronger wording than its Nicaraguan counterpart. Starting at the principles, it includes recognition of the state as
both pluricultural and multi-ethnic. Spanish is recognized as the official language; however Quichua and Shuar, as well as other indigenous languages have official language status within their respective communities. Also at this time, Ecuador signed ILO C169. The strong leadership of CONAIE and other indigenous organizations during the popular uprisings earlier in the year highlighted their unity and strength. Subsequently they were able to push the Assembly to adopt the Convention as part of its overall project (Van Cott 2002, 60).

While the term pluricultural is not as strong as the concept of plurinationalism advocated by CONAIE it did move the state closer to the indigenous position. Donna Lee Van Cott (2002) pointed out that significant gains were made in terms of collective rights, and Ecuador attained a kind of plurinationalism in practice. She adds that the indigenous movement played such an influential role in the constitution building process because it mobilized on three complementary fronts:

First, through its delegates to the constituent assembly, second through its representatives in the National Congress (who secured ratification of the International Labour Organization Convention 169 on the rights of indigenous peoples during the assembly), and third, through direct lobbying by CONAIE’s leadership. MUPP delegate, Nina Pacari, a former CONAIE leader, presided over the Constituent’s Assembly’s first commission, enabling her to control the timing of debate on collective rights (Van Cott 2002, 60).

Unfortunately, the outcomes from 1998 have not all been positive. In an interview, OPIP advisor Pablo Ortiz noted that the community-based decentralization that the Assembly triggered has led to a community-based power struggle between new leaders with new state recognized powers and the traditional indigenous leaders and elders. This has made it easier for oil companies to pursue their divide and conquer strategies and has helped to destabilize long term prospects of indigenous solidarity (Ortiz 2005).

Still, the news was not all bad. The indigenous movement in Ecuador mobilized at the domestic level to apply pressure on all levels of government. The development of a political party to represent indigenous among other demands, was also key. The MUPP, or the Movement for a
United Plurinational Pachakutik, was officially established in 1995, as a joint effort between CONIAE and the CMS the year before national elections. Representing a wide array of other, mostly urban social movements, the CMS helped the indigenous movement, and especially CONAIE build a political agenda that was inclusive and broadly supported. Prior to this, CONAIE explicitly rejected political participation; yet in their first national election, they took an impressive eight seats in the National Congress and became the fourth largest bloc (Beck and Mijeski 2001). Indigenous Ecuadorians were able to take advantage of the minority government by making alliances with the centre-left and pushing forward a cohesive agenda while others remained fragmented. Van Cott confirms that the ability of indigenous peoples to influence the 1998 Constitution signifies “growing public acceptance” of indigenous rights (Van Cott 2002).

Chapter five of the 1998 Ecuadorian constitution on collective rights addressed the issue of indigenous rights specifically, although the indigenous population is classified together with the black and Afro-Ecuadorians. The latter groups have a very different history with the state and a completely different set of claims and rights. Together, these groups were recognized in Article 83 as a unique and indivisible part of the Ecuadorian state. This constrained any aspirations for autonomy by clearly affirming the overriding authority of the state.

Throughout the Americas, there were longstanding debates over the rights of autonomy and self-government for indigenous populations and how this may or may not undermine the sovereignty of the nation-state. This debate was echoed throughout the negotiation process of the UN Declaration on Indigenous Rights where ultimately it was noted that “many states are prepared to take the right to self-determination as it developed in international law over the years, that is to say, emphasizing the international aspects of self-determination and preserving external self determination (secession etc.) for specific situations, like occupation after war” (Van Genugten and Pérez-Bustillo 2004, 384). The wording of the 1998 Ecuadorian constitution reflected a growing consensus with the emerging international norms in this regard. While
permitted the status of nationalities, the indigenous, black and Afro-Ecuadorian populations were not allowed the aspirations of nation.

While the list was by no means exhaustive, indigenous Ecuadorians received special rights not shared by ordinary citizens. In terms of their territories, they had the right to participate in and benefit from their natural resources. In particular, they had the right to consultation prior to the issuing of natural resource concessions on their lands. This wording is reminiscent of ILO C169 Article 15, clause 2 which called for a consultation process prior to any type of exploitation. Both documents allowed for some form of compensation in the face of environmental damages, although how the value of any damages would be determined is left ambiguous. Other important inclusions were the right to have customary law protected (clause 10), though this is clearly limited by both the Constitution and the domestic legal framework; the protection of collective property rights, and some internal autonomy that “will be determined” at some future point (Van Cott 2002, 47). Still, the real challenge is to ensure that the constitution and its progressive articles are respected in practice and in law.

For Sarayaku, constitutional rights were insufficient to protect their community and culture. The community, in conjunction with its legal team pleaded the case of constitutional rights violations, amongst others, at three levels. First they went to the Provincial Ombudsman, then they tried an Amparo action before a civil judge in Puyo and finally they engaged the Special Commission on Human Rights of the National Congress of Ecuador. All three agreed that their constitutional rights had been violated, but all were either unwilling or unable to apply effective remedy.

Returning to the Spiral Model, the pro-indigenous constitution, and the country’s signature on ILO C169, suggests Ecuador’s movement towards the “prescriptive status” stage. Signing international agreements and institutionalizing norms through the constitution should indicate that the government was taking indigenous rights seriously. Yet the lived experiences of indigenous communities suggest the state remained in the stage of “denial.” Ecuadorian indigenous interests
are routinely set aside in favor of the so-called “national interest.” This has coincided with a distinctively neoliberal approach to investment and development that undermined indigenous claims to land, resources and subsequently, autonomy as well.

UN Special Rapporteur Rodolfo Stavenhagen noted in his 2006 Report on Ecuador that although the 1998 constitution was in fact very progressive and included numerous provisions for collective rights, cultural diversity, indigenous education, identity, indigenous jurisdiction and economic development, the fact remains that these rights “have not yet been incorporated into adequate secondary legislation, which has made the management of public policies, administration of justice and allocation of resources to these people difficult” (Stavenhagen 2006, 8). Maria Hennessy adds “Ecuador’s constitutional law has been unstable and relatively easy to disregard and manipulate” (Hennessy 2003). Progressive constitutional change requires laws and regulations in order to direct their implementation.

9.2 Changing the law for indigenous rights

The inclusion of indigenous peoples within national constitutions is an important step towards making states in Latin America more inclusive and democratic. Still, constitutional rights cannot be realized if there is no domestic legal framework to uphold its values and implement its principles in the lived experiences of indigenous peoples. This is especially true when weak domestic movements are unable to generate sufficient pressure for compliance.

Rule of law however, as discussed earlier, is a contention issue throughout the Americas. It has been consistently available only to state elites. Because of marginalization, racism and poverty, indigenous communities can be especially disadvantaged. This is true in both Nicaragua and Ecuador. The following section examines some concrete changes in terms of legislation and law for the realization of indigenous peoples’ rights within the case study countries. While there has been some progress, it has been uneven, sporadic and weak on the follow through. The regional governments of Nicaragua, for example, have the jurisdiction to create and implement its
own legislation for natural resources, however they are chronically underfunded and have trouble accessing even the limited budgets they are allocated. Funds have often been delayed for political reasons (McLean 2006; Rizo 2006).

9.2.1 Nicaragua

Over the past twenty five years or so government officials in Nicaragua have demonstrated a growing recognition, at least in rhetoric, of the validity of indigenous rights in general and have taken important steps towards the entrenchment of such rights in the domestic political arena. Implementation, all sides agree, has been a slow process. A lawyer with the President’s Office, Dr. Octavio Picado, explained in an interview: “The first major step was the autonomy law. The Regional Autonomy Law was passed in the National Assembly on September 2, 1987, with the first real elections held in February of 1990” (Picado 2006a). This was a precedent-setting agreement for the indigenous communities of the Caribbean Coast that won the attention of indigenous people worldwide. Dr. Picado continued:

Another important legal innovation occurred in 2002, when the Liberal government of Enrique Bolaños introduced Law 445 for the Demarcation and Titling of Indigenous Territories. Law 445 lays out a clear and defined process to formally title traditional indigenous territories. Again, funds to support implementation have not been readily available. Nicaragua is a poor country (Picado 2006).

The Spiral Model argues that in order to ensure progress towards the implementation of rights, there must be ongoing and simultaneous pressure from above and from below. In both case studies, the pressure from above is certainly strong and consistent. As Latin American nations, both Ecuador and Nicaragua share many commonalities, not the least of which is that both have accepted the jurisdiction and authority of the Inter-American Court of Human Rights. The IACHR/CIDH took a real leadership role internationally in terms of advocating and supporting indigenous rights through its jurisprudence in particular. This created, in both cases, significant pressures for compliance, although the enforcement mechanisms are primarily moral in nature. Both lawyers and activists interviewed for this thesis agreed that this was insufficient (Santi 2005;
Anaya 2005; Rodríguez-Piñero 2005; McLean 2006; Rizo 2006; Cunningham 2006). Nicaraguan Miskito lawyer, Dr. Lottie Cunningham explained:

The OAS process is public, provides information and therefore is useful to the states. But in terms of this case, there has not been implementation. I am satisfied with the decision, (of the CIDH) yes, but there has not been enough of a role played by the court in terms of implementation. What do they do when a state does not comply? They need to reform, to clarify their role in supervising the sentence (Cunningham 2006).

Managua lawyer and activist, Mario Rizo added this commentary in an interview:

The court decision (CIDH) is certainly important. It is something, it is useful. It is an important issue for indigenous peoples and it is important in terms of educating indigenous people about their rights, their civil rights….The problem is that because the Awas Tingni community is a minority, there is no political group (domestically) that is interested in the case. There is no force, no political will (Rizo 2006).

In Sarayaku, an indigenous leader noted that he was personally very pleased with the Inter-American Court system and it support of indigenous rights however, like the Nicaraguan activists he also commented: “The mandate of the IACHR is adequate because it works to protect indigenous peoples at the highest level. However, clearly it must do more to implement its resolutions because we (indigenous peoples) depend on them” (Santi 2004).

As seen in both case studies, real changes occur only after strong indigenous resistance illustrates to the ruling elites that the status quo will no longer be acceptable. The case of the Autonomy Law in Nicaragua is a perfect example. The initial strategy of the Sandinistas towards the Caribbean coast did not involve any special recognition or designation of autonomy. Indigenous resistance reached extreme levels, with Miskito warriors, among others, prepared to take down the revolution. Indigenous soldiers joined the US-backed Contra army and took part in a bloody and costly civil war. The Sandinistas were surprised by the strength of the indigenous backlash, but the indigenous community was long aware that polite meetings and requests were insufficient to change policy.

Much has been written about the “opportunities” presented to indigenous communities as states seek to re-negotiate citizenship within a neoliberal framework. As discussed by Charles Hale, the first and easiest concessions to indigenous demands involve culture and language as
these can be least threatening to the prevailing modes of accumulation. The Sandinistas took a similar approach (Hale 2006). The first indigenous policy was Decree Number 571 on the right to education in the mother languages of the Caribbean coast (1980). Contrary to Sandinista hopes, this “progressive” program did not placate indigenous costeños. Many used the new language program to organize and revitalize indigenous resistance at the grassroots level.

Over the next eight years, ongoing tensions between the indigenous peoples and the Sandinistas led to further legal concessions for indigenous rights in Nicaragua. First the Agrarian reform law of 1986 distributed title to small parcels of indigenous territories, and then came the landmark Law 28, the Statute of Autonomy for the Regions of the Caribbean Coast of Nicaragua (Barrie, 2003, 420). It included language and cultural rights, communal land ownership, religious freedom and the recognition of the distinct nature of the Caribbean communities. Rodolfo Piño-Robles notes:

Except for the management of communal lands, all other resources are to be managed jointly by the autonomous regional governments and central government. The state powers are be shared between the central government and the autonomous council comprised of delegates from all ethnic groups and the law assures equality of rights and participation for all the ethnic groups living within the autonomous regions (Robles nd, 66).

The achievement of this limited form of autonomy was a notable event internationally for indigenous rights. Denied the right to autonomous forms of government in international law, the indigenous peoples of the Caribbean coast fought for and won precedent setting regional autonomy that covered nearly half of the national territory and more than twelve percent of the population (Grigsby 2003). Although it took armed resistance to push the Sandinista government this far, the indigenous peoples were finally given some hope they might once again achieve the self-government they had enjoyed under the earlier British regime.

The Autonomy Law 28 defines autonomy as a process:

that enriches the national culture, and recognizes and strengthens ethnic identity groups; it respects the specificities of the cultures of the communities of the Caribbean Coast; it redeems the history of the same; it recognizes property rights on communal land and
repudiates any type of discrimination; it recognizes religions freedom and; without
deepening differences, recognizes distinct identities as coming together to build national
unity (Brunnegger 2007, 5).

Translating this ambitious statement into jurisdiction and function has proved complicated
on many levels. Octavio Picado explained: “The Autonomy Statute created two regional councils,
one in the RAAN and one in the RAAS, and further, the two councils granted political
representation to each of the different ethnic groups comprising the regional population. Each
region is divided into municipalities, whose administrators are also elected, although there is no
ethnic consideration at this level” (Picado 2006b). Although accountable to the national
government, indigenous leaders saw the autonomous government as a new vehicle with which to
negotiate for substantive changes to indigenous rights in national legislation. As Miguel Gonzalez
has argued, rather than being an end in itself, “the autonomy framework created the minimal
though essential conditions to initiate a process of political struggle in a new democratic setting”
(Gonzalez 2005, 7). It did not give the communities all that they wanted, but it did create a formal
process and a structure with which the indigenous peoples felt they could use to better represent
themselves within the national framework.

Article 12 lists out the special rights given to inhabitants of the coast in the Autonomy
Statute:

1. To full equality of rights.
2. To promote and develop their languages, religions and cultures.
3. To use and benefit from their waters, forests, and communal lands, in accordance with
   national development plans.
4. To organize their social and productive activities according to their own values.
5. To be educated in their own languages, through programmes that take into account their
   historical heritage, their traditions and the characteristics of their environment, all within
   the framework of the national education system.
6. To their own forms of communal, collective, or individual ownership and transfer of
   land.

As part of this law, and supported by the constitution, indigenous communities hold communal
rights to their traditional territories, including the lands, waters and forests within them
(Grossman 2001). Section 12.3 specifies that the communities also have the right to use and
benefit from their waters, forests and lands, albeit within the framework of national development plans. The Preamble addresses the issue of natural resources specifically, stating that Autonomy will enable “the effective exercise of the right of the Communities of the Caribbean coast to participate in the design of means of exploitation of the natural resources of the region in such a way that the benefits are reinvested in the Caribbean Coast and the nation” (Reding 1991, 22). There is no attempt, however, to address exactly what this benefit sharing might look like.

Sandra Brunnegger (2007) interprets the recognition of communal rights to mean that the regional councils retain veto rights over natural resources, yet as seen in the Awas Tingni case, this is not what happens. What is clear is that the government has not given up its sovereignty. Despite initial optimism, implementation has been disappointing. She adds: “we would be well advised to consider Nicaragua’s autonomy arrangements under two headings: as they exist in law and in terms of their effects on the ground” (Brunneger 2007, 7). Certainly in the case of Awas Tingni these rights have long proved illusory. Community leader and academic, Melba McLean, noted in an interview: “The laws exist, they are written but they are not followed. They exist only on paper. For indigenous peoples, there is still discrimination” (McLean 2006).

Unfortunately even a sound legal framework cannot ensure actual implementation of rights at the community level. In a situation where rule of law is weak, even the most eloquently crafted laws can be little more than paper. This is a problem widely recognized by Nicaraguan lawyers, activists and local leaders. James Anaya noted: “The government (of Nicaragua) does not have the expertise to know how it should respond, or what it is supposed to do.” Institutions are weak and poorly funded (Anaya 2006).

The problem with the Autonomy Law has been its lack of implementation. The regional governments, established under law, are dependent on the central government and annual funding has not been reliable. Government in such a vast region, where many parts lack basic infrastructure including roads, is extremely costly. Normally, regional governments are given a
clear formula to raise revenues, such as tax credits and guaranteed budget items, like health and education. In this case, the central government has resisted handing over any real jurisdiction or even basic funding. Coastal issues remain on the backburner. One FSLN leader, Dorotea Wilson, explains:

The autonomous regional government...is limited because one hundred percent of the budget comes from the central government. So it functions only if there’s enough money to call the 45 members of each Autonomous Regional Council to a session. If the budget doesn’t arrive for two or three months, there’s no session during that time. There’s no capacity to hold meetings with their own agenda, to define their priorities and to get down to work without that outside money (Grigsby 2003, 5).

The Autonomy Law makes no specific reference to the indigenous communities. The Law itself fails to ensure proportional representation for the indigenous communities of the coast. In fact, in 2000, the much discussed FSLN-PLC Pact changed electoral laws such that the indigenous political party YATAMA was excluded from regional elections. In a law designed to cement the political positions of the two main parties, the Supreme Electoral Council developed a rule that required political parties to field candidates in at least 80% of the nation’s ridings in order to be eligible to participate. The Coastal YATAMA was excluded by definition and was forced to take, and win, its case before the Inter-American Court of Human Rights in 2005 (Finley-Brook 2008).

Another important legal innovation was the much anticipated law for the demarcation and titling of the communal properties of indigenous peoples and ethnic communities in the autonomous regions of the Caribbean Coast, Law 445 which was approved in January of 2003. This law represents the government’s response to the AT ruling and was supported by substantial financial and technical help from the World Bank. The World Bank played a lead role in the nation’s Land Administration Project, or Proyecto de Ordenamiento de la Propiedad (PRODEP) which included in its mandate the demarcation and titling of indigenous lands. The five year project (2002-2007) co-funded by the Bank, the Nordic Development Fund and the Nicaraguan government aimed to institutionalize a legal land tenure system for the nation as a whole, although indigenous titling was singled out as a priority area. State lawyer, Dr. Octavio Picado
explained during an interview: “In total, the Bank contributed $32.6 million dollars, interest free and payable over forty years after a ten year grace period. The aim was to sort out the mess of Nicaraguan property rights at the same time it dealt with the long outstanding CIDH ruling” (Picado 2006a).

The head of the AT legal team, James Anaya, noted that the Nicaraguan government, despite its intentions, simply did not have the technical expertise or sufficient institutional resources to facilitate the work required under the new law (Anaya 2006). This is where the World Bank stepped in with funding. To begin the work of implementation, the Government of Nicaragua established a National Commission for Demarcation and Titling (CONADETI) with Bank funding. This was crucial because, given the institutional weaknesses of the Nicaraguan state in general, there was little capacity to manage and implement changes in the property rights regime. Under 445, (article 43) CONADETI was charged with six specific functions:

1. Consider and resolve claims for land demarcation and land titling.
2. Direct the process of demarcation.
3. Create technical commissions, regional commissions and territorial commissions.
4. Establish its internal processes.
5. Administer its proposals
6. Coordinate with the Office of Rural Titling (OTR) about the issuance of titles for the land and territories of indigenous peoples and ethnic communities.

One government official explained: “CONADETI is made up of elected representatives from each of the ethnic communities in the region, including the Rama, Mayagna, Miskito, Garifuna, Creole and Mestizo to ensure all interests are represented throughout what has turned out to be a very contentious process” (Picado 2006a). For a community to receive title, its case had to proceed through the following stages:

1. The presentation of the request for demarcation
2. The resolving of conflict between communities over territorial claims including:
   a. Reviewing relevant diagnostic surveys
   b. Site visit to confirm actual land use
   c. Mediation and dispute resolution
3. Formal titling
4. Finalization (Picado 2006b).
Like other communities, Awas Tingni was eager to work with CONADETI for land titling. In interviews conducted for this research however both sides agreed that there were many delays (McLean 2006; Picado 2006). Awas Tingni prepared a comprehensive diagnostic study on its land use patterns with financial assistance from the WWF and others. In consultation with its advisers and technical team it was submitted first to CIDT and then to CONADETI. The case completed most of the second stage in 2007, although the process was stalled for over six months due to regional political problems, including a municipal election and the freezing of all committee activities for lack of funds. As of May 2008 the community remained locked in the dispute resolution stage (McLean 2008). One community leader explained through email correspondence: “A number of Miskito communities made competing claims for the same territory. Although there is a step for mediation and dispute resolution, no process was established to resolve the considerable third party interests. The parties met several times to no avail” (McLean 2008). The main problem appears to be a general sentiment outside of the community, that the AT land claim is simply, as Anthony Stocks has said: “too much for too few” (Stocks 2002).

The technical team for the government was led by the secretariat for the presidency for the Caribbean coast (SEPCA) which has since been disbanded under the new Sandinista government. The legal specialist for the Secretariat, Dr. Octavio Picado expressed a commitment to respect the traditional property rights of the community of Awas Tingni but nonetheless insisted that SEPCA must also protect third party interests in the region and will not move forward with the demarcation and titling process until these issues are resolved. The government, he noted, did present an offer for land titling of a non-contentious portion of the Awas Tingni claim, however, ultimately the community felt that this was insufficient and rejected it. The fear was that if they did accept the offer, any international attention and support would quickly dissipate (Picado 2006). Still, the AT legal team believes that despite few positive overtures the government does not have the political will to commit to the process (Anaya 2005).
A 2008 report prepared for the UN Human Rights Committee notes: “The institutions created by Law 445 continue to suffer from systemic deficiencies due to a lack of monetary and technical support provided by the Nicaraguan government” (Alvarado and Campbell 2008). Community representatives have argued that competing claims are being nurtured by government representatives in order to “divert attention from the lack of political will and institutional capacity necessary to advance the titling process” (ibid., 2). The fact remains in 2001, the CIDH gave Nicaragua 15 months to comply with the judgment on titling and, although some progress has been made, title remains outstanding. At the exact same time, PRODEP was able to facilitate land titling for a number of indigenous communities in the protected region of Bosawas, where logging concessions are not an issue. When it is required, political will to implement indigenous rights to lands and territories is certainly possible, especially when there are no material constraints.

9.2.2 Ecuador

In general, indigenous land titling is much more progressive in Ecuador and has been taking place for over fifteen years. General uprisings in the early 1990s led by indigenous Ecuadorians pressured the government to issue formal title to selected communities in the Amazon, including Sarayaku. This process was further entrenched in the 1998 constitution which guaranteed indigenous communities the rights to their traditional communal properties. As illustrated in the Nicaragua case, the actual process for realizing those rights is not straightforward.

Although the Ecuadorian constitution affirms the territory rights of indigenous peoples, in order to actually enjoy these rights, communities must navigate a complex system. The law demands certain criteria in order for communities to obtain legal title to their lands, including: an accurate topographical map; a socio-historical study; a management plan; a census, etc. However, many indigenous organizations have little capacity, financially and politically, to meet these criteria (Rainforest Foundation 2007).

Still, progress is being made in terms of titling, most often with substantial help from transnational advocacy networks for both indigenous and environmental issues. For example, the
international environmental NGO, Rainforest Foundation, together with its local partner Pachamama Alliance provided the Shuar people of the Ecuadorian Amazon with financial and technical supports for three years. The organization’s public website announced recently that five Shuar Associations, each representing approximately ten communities, received collective title to just over 100 thousand acres of fragile rainforest in the Oriente. Title is an important tool to ensure that colonists do not invade indigenous territories and start clear cutting farm sites.

Legal title, however, has not protected indigenous communities from other types of invaders, namely transnational oil and mining companies. Over the course of the 1990s, successive governments in Ecuador leased out over 85% of indigenous territories in the Oriente region to oil companies. Ecuadorian law identifies all unoccupied lands as national territories and further, that all subsurface minerals, including hydrocarbons, regardless of title, are the exclusive property of the state. Although the Ecuadorian Constitution contains numerous articles on both indigenous and environmental rights “in reality there is no protection for indigenous communities and their environment within the domestic legislative forum in Ecuador” (Hennessy nd, 11).

One of the key problems in Ecuador has been a lack of indigenous representation in its elite run political institutions. As noted already, the political party Pachakutik demonstrated some initial promise in terms of representation; however this has been waning with time. In terms of actual policies to support indigenous needs, there have been a few notable achievements. In order to implement the new rights of indigenous peoples recognized in the 1998 Ecuadorian constitution, the neoliberal government of President Jamil Mahuad established the Council for the Development of the Nationalities and Peoples of Ecuador, CONDENPE. The council was established in law and provided for greater indigenous involvement in government planning, development and infrastructure projects that affected their communities. Participation in the council is through representatives of different indigenous communities and nationalities, including the Quichua, Shuar, Achuar, Awa, Guarani and many others (IADB, 2004). However, it
is important to recognize that the role of CONDENPE was oversight of indigenous communities, and not indigenous inclusion in broader national issues (Lucero 2003).

CONDENPE was established to oversee and coordinate the Indigenous and Afro-Ecuadorian Peoples Development Project or PRODEPINE which was funded primarily through the World Bank (50%) and the UN International Fund for Agricultural Development (IFAD). The World Bank was eager to spearhead projects for indigenous development under the auspices of its new Indigenous Peoples Operational Directive. Although slow to start, the directive began to take hold after 1996 when the concept of “ethnodevelopment” was incorporated into Bank policy (World Bank 2000).

The primary goal of PRODEPINE was to improve the overall quality of life in indigenous and Afro-Ecuadorian communities through such things as improving access to resources, facilitating rural investments and legalization of community held property. Actual projects included the construction of irrigation systems to improve land productivity, environmental management plans, plus the legal titling of over 250,000 hectares of ancestral lands. Originally expected to last four years, PRODEPINE was extended in 2004 with a second loan for $34 million dollars. But the agreement was cancelled subsequently in 2005 by the interim government of Alfredo Palacio. Unfortunately indigenous community empowerment proved threatening both to governments and indigenous organizations. A WB evaluation reported that:

The key factors leading to GOE's decision not to sign the loan were political instability and conflict and, in particular, conflicts between national indigenous organizations over the direction of CODENPE (World Bank 2006, 5).

Prior to his departure, President Gutiérrez initiated a series of changes in the leadership of CONDENPE that were not supported by CONAIE and effectively undermined the credibility of the organization. CODENPE then became embroiled in a power struggle among its constituent indigenous organizations. The World Bank noted:

In Ecuador, both CODENPE and CODAE had structurally weak mandates, with no clear line functions, inadequate resources, and unspecified relations with sector ministries. This
ambiguity, on the other part, makes it easier for them to be used in clientelist practices and to be captured by indigenous leaders (ibid., 8-9).

Once external funding was cut, PRODEPINE faced serious crisis. A radicalized leadership began to take a critical stance against the government and quickly even internal funding dissipated. Current President Rafael Correa publicly denounced the organization and its leader Lourdes Tibán, arguing that it did “nothing for nobody” (El Comercio 26-01-09). Real indigenous inclusion in Ecuadorian politics is still a long way off.

9.3 The role of international financial institutions

Recently, scholars have considered the role that non-state actors play in the internalization of international norms within domestic law. While one usually thinks of international NGOs and transnational social movements as important actors for the internalization of international norms for indigenous rights, international financial institutions (IFIs) can also play an important role. While the ability of IFIs, like the World Bank or the Inter-American Development Bank (IADB) to influence borrower policy is dependent on a number of factors, in the absence of strong domestic legal frameworks they can be very valuable allies to civil society actors at both the national and international level.

In a world where some scholars argue there are no global governance structures, the World Bank, and other IFIs play a unique role. While there is no single global government, important IR scholars like Robert Keohane and David Held and Anthony McGrew have recognized many layers of governance that include a broad range of actors such as the International Monetary Fund (IMF), The World Bank (WB), the World Trade Organization (WTO), large multinational corporations and even transnational NGOs (Keohane 2002; Held and McGrew 2000, 2004). The World Bank has become an important player in the realm of international law since it was founded in 1944. Penny Griffin confirms: “The World Bank has transformed itself from an afterthought at Bretton Woods to one of the most powerful institutional mechanisms of contemporary global governance” (Griffin 2006, 571). It exercises considerable legal authority
over nations through two primary mechanisms: first, the incorporation of its own operational policies into its loan agreements; and secondly, the attachment of conditions to its loan agreements.

When it creates specific operational standards, such as that for indigenous peoples, borrower nations become obligated to absorb them into domestic policy and law, although consistent application is far from guaranteed. The application of the Operational Policy on Indigenous Peoples (2005) is a matter of internal debate among Bank staffers. Because of external pressure, the Bank is careful not to get involved in international projects that will demonize its international reputation. Still, project managers are eager to make loans and distribute funds as ultimately this data is used as a measure of their productivity. For political reasons, many states refuse to acknowledge the presence of any indigenous populations within their borders and thus reject the application of the Operational Policy in their specific case. The question then for the Bank is whether or not to fund the project, which may in fact be helping the poor. Internal debates over whether or not the Operational Policy will be applied in particular cases can be significantly influenced by civil society in the borrowing nation. Where indigenous and other civil society groups are strong, and ally themselves with progressive WB staff, the likelihood of the policy application increases. On the other hand, if domestic civil society is ambivalent or negative about the WB, internal pressures within the lending institution may favor the disregard of the policy (Sarfaty 2005, 1812).

Another approach to norm internalization is the application of specific conditionality to loan agreements that support the internalization of indigenous rights norms. This was the case in Nicaragua when funding for a land titling project was contingent on the creation of a specific indigenous component. Most loans given by the WB and other IFIs include “a set of requirements and preconditions that the recipient country is expected to meet in order to receive financial assistance (Sarfaty 2005, 1797). One common requirement is for borrower nations to follow a
specially tailored Country Assistance Strategies (CAS) or Country Participation Strategy (CPS), in addition to specific loan conditions.

The CAS of both Ecuador and Nicaragua include support for pro-indigenous policies. Ecuador’s CAS (2003) makes specific recommendations to increase support for economic development in indigenous communities (WB 2003, ii); while the Nicaraguan CPS (2007) includes a section on the importance of indigenous land titling (WB, 2007 14-15). Because indigenous populations are the poorest of the poor, programs and policies that target them can assist in reducing overall poverty, which is part of the WB mandate. Another inclusion in both documents is the goal of increasing availability of basic social services, like health and education to specifically indigenous populations.

Considering IFIs as important transmitters of international norms for indigenous rights may seem counter-intuitive at first. Indigenous communities in Nicaragua and Ecuador as well as throughout Latin America have often been great critics of the development projects and investments of the Bank, the IADB and other IFIs. External debts to IFIs can tie government policy considerably, pressuring governments to raise revenues by any means, including expanded exploitation of natural resources in indigenous territories. There has been no shortage of Bank sponsored development projects detrimental to indigenous peoples, however, over the past decade there has been increasing evidence that the WB is slowly absorbing and promoting international norms for human and indigenous rights, as well as environmental standards. As well, other international financial institutions are following its lead (Treakle 1998; Sarfaty 2005).

World Bank concern over the particular plight of indigenous and tribal peoples as they were affected by Bank financed development projects can be traced back to 1982. The World Bank was responding to growing criticism by international civil society that its economic model of development was having disastrous impacts on the marginalized and poor of the world, including indigenous peoples. In February of that year it issued an initial operational policy statement outlining procedures for protecting the rights of “tribal peoples.” It vowed that:
As a general policy the Bank will not assist development projects that knowingly involve encroachment on traditional territories being used or occupied by tribal people, unless adequate safeguards are provided. In those cases where environmental and/or social changes promoted through development projects may create undesired effects for tribal people, the project should be designed so as to prevent or mitigate such effects (World Bank 1982).

In 1991, the Bank put out a more comprehensive operational policy that was again revised in 2005 in response to a series of criticisms from various segments of civil society, including indigenous groups. Although few individuals within the Bank were concerned with indigenous issues and social development, the bulk of bank staffers, trained economists, preferred a narrow focus on economic development. Still, external pressures on the Bank were able to change the way it operated. The revised policy was an improvement, however, its application remains a matter of internal debate between economists (which are the majority within the Bank) eager to get new projects of the ground as quickly as possible, and the anthropologists and environmentalists who have different motivations and objectives. For example, in states that do not legally recognize indigenous populations it is very difficult for the progressive staff members at the Bank to convince project management to actually apply the policy. Doing so inevitably makes the project more costly and time consuming, and may offend the borrowing country (Sarfaty 2005, 1147).

Despite these challenges, the Bank continues to incorporate social, environmental, human and indigenous rights into its framework. Based on quantitative research of past projects the Bank developed a list of “essential elements” of successful indigenous development projects and has sought to incorporate them whenever possible. These included: (1) Basic human rights (2) food security (3) secure land and resource rights (4) indigenous participation in project planning and implementation (5) intercultural education and social capital building (6) strengthening of indigenous civil organizations (7) diversification of production (8) appropriate financial assistance (9) technical assistance and training (10) state support for indigenous self-development. It is not surprising that many of these elements echo recognized international norms for indigenous rights.
To do business with the Bank, therefore, is to incorporate its values and norms. Still, the ability of the Bank to enforce its own policies is limited by both internal organizational power struggles and the strength of domestic civil society (Sarfaty 2005). The Bank also indirectly influences a number of non-state actors that it does business with. For example, the Equator Principles, a set of voluntary social and environmental principles adopted in 2002 by 29 private banks were modeled on WB operational policy. In 2000, a group of more than 300 NGOs signed the Jakarta Declaration which included a call for binding common social and environmental guidelines no lower than those for existing public finance institutions, and it explicitly lists the World Bank (Sarfaty 2005). The World Bank clearly holds some moral force in the world and this has been used to support the internalization of norms for indigenous rights.

This is not to gloss over the often harsh criticism that has been directed at the Bank for projects that have had quite the opposite effect. The revised Indigenous Peoples Operational Directive of 2005 has not been met with unanimous approval by civil society. Indigenous groups have argued that the requirement for consultations in the IPP are weak compared to the UN Declaration on Indigenous Rights (2007). One indigenous activist noted bluntly: “Consultation sounds good, but does nothing….It is a mechanism to allow for the ultimate theft of our indigenous property interests free of charge. Prior informed consent is recognition of our land, culture, and way of life” (Clark 2002, 220).

The World Bank has been widely criticized for supporting projects that are detrimental to indigenous people’s rights, such as the Camisea natural gas development project in Peru. Located in the Lower Urubamba Basin in the south-eastern Peruvian Amazon, the $1.6 billion project included the construction of two pipelines that run to the coast, cutting through a large swathe of indigenous territory described by scientists as the last place on earth to drill for fossil fuels because of its rich biodiversity. Some of the indigenous communities in the region have been living in isolation on set aside reserve lands. While ILO 169 and the UN DRIPS are clear such
groups should not be contacted, private sector consortia members have continued to send in missionaries to pressure the communities to relocate.

Back in 1994, the Amazonian indigenous communities in Ecuador were highly critical of a proposed twenty million dollar loan to the government to finance the privatization of Petroecuador and initiate a number of other public sector reforms geared towards expanding oil exploration and production. Ecuador’s most powerful indigenous organization, CONAIE, along with other indigenous groups and non-governmental organizations, sent letters of protest to the Bank, urging it to apply Operational Directives 4.01 and 4.20 – the Bank’s established policies for the environment and indigenous peoples respectively. The Bank refused, arguing instead that the loan had no direct impact on the environment or indigenous communities (Treakle 1998).

The Bank received a lot of international criticism for these types of projects. As a response, the WB put out a number of specific operational policy papers, including the Indigenous Peoples Policy, the Environmental Policy, and the Forced Relocation Policy. Because of their relationship to the land, indigenous peoples are involved with all three. Unfortunately, explicit rhetorical commitments have not eradicated the Bank’s propensity to invest in controversial projects. The Bank’s internal watchdog, a three member Inspection Panel, is kept busy with ongoing claims that Bank projects have violated these and other standards and are causing harm to their communities.26 One Nicaraguan lawyer noted in an interview: “The WB has two sides, one for indigenous policy and the other for market policy. It is this policy, the market policy that is most important in the end” (Rizo 2006).

The World Bank is not the only IFI that has become involved in the implementation of international norms for human and indigenous rights. As the leader in the field, it has become a model for other organizations, including the Inter-American Development Bank (IDB). The IDB Operational Policy on Indigenous Peoples and Strategy for Indigenous Development was approved by its board in February of 2006. The policy aims to support indigenous defined

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26 For details see the analysis of the project at http://www.amazonwatch.org/amazon/PE/camisea/
development, build local governance capacity and safeguard indigenous peoples from adverse impacts and exclusion in bank-funded development projects (IADB 2006, 6).

The Inter-American Development Bank has a long history of working with indigenous peoples in the Americas, including helping CONAIE in Ecuador establish a special development program focusing on indigenous agriculture as early as 1994 (Brysk 2000, 157). More specifically, like the WB, its Operational Policy on Indigenous Peoples reflects many emerging indigenous rights in international law, including the recognition of indigenous property rights. Not surprisingly, the IADB is involved in many development projects that impact indigenous communities, territories and natural resources, and historically many of these relationships have been problematic. The new policy represents a real shift in the IADB approach. It is explicit in its reference to the use of applicable “legal norms” in terms of any operations that involves “territories, lands natural resources” that have been “traditionally occupied or used by indigenous peoples (IADB 2006). By recognizing these norms, the IADB is playing a role in their codification into international legal standards through customary law.

Echoing the provisions of ILO C169, the document calls for consultation, participation in decision making, benefit sharing and compensation for damages that may arise from IADB development projects (ibid.). It has funded specific projects for traditional community development in Colombian indigenous reserves, technical and financial support for indigenous policy institutions, and protection for non-contacted peoples (IADB website). Like the WB, it is to apply its policy to all IDB funded projects which implicate indigenous communities. Given that the IADB has invested nearly half a billion dollars in Nicaragua over the past five years alone, the influence of this policy, if enforced, could be significant. Still, the prominent American indigenous NGO, the Indian Law Resource Center, based in Washington DC has raised numerous criticisms.

While the document does not meet the standards of the 2007 UN Declaration on the Rights of Indigenous Peoples, it does present minimum standards, like those of the World Bank, which
have the potential for broad application. Similar to the mechanics of the Spiral Model on nations, civil society groups at both the national and international levels must continue to lobby, pressure, and negotiate with the IDB to consistently apply its Operational Policy and to make the document increasingly progressive through its application. Codification of norms into policy is just one part of the process of internalization.

The fact of international norms for indigenous rights has been largely uncontroversial over the past twenty years. Evolving through the work of transnational social movements and international organizations like the ILO, the UN and the OAS, and supportive states, such norms have become a part of what is recognized globally as “customary law” and now are slowly being integrated into international and national legal instruments. This process of norm internalization, however, has been slow. Indigenous rights represent a real challenge for states with a long history of resolving competing claims over land and resources by over-weighting the so-called “national interest.” As the Spiral Model would suggest, strong pressures from above, from these newly coalescing structures of international governance, coupled with strong civil society mobilization from below, are working to internalize the now codified series of norms. This does not, however, nullify the claims of competing interests. The struggle for realization of rights is a daily reality for indigenous communities. To date, there has been no cascade of rights. Instead, progress has been made little by little, with each successful court case, each new law, and each new acre of traditional territories titled to their long suffering indigenous inhabitants. The final stage of the model, “rule consistent behaviour” is still a long way off. The next section will examine some of the specific factors impeding the much needed cascade.
Chapter 10

The Domestic Barriers to Norm Implementation: Exploring the Evidence

There is growing evidence that a wide range of ideals and values concerning human rights for the world’s indigenous peoples are slowly being transformed into international norms. These norms are being codified in new legal instruments: the ILO Convention 169 on Indigenous and Tribal Peoples, the UN Declaration on the Rights of Indigenous Peoples, the OAS Draft Declaration of Indigenous Rights as well as the World Bank Operational Policy on Indigenous Peoples and the IDB Operational Policy on Indigenous Peoples. The UN Declaration in particular represents a landmark achievement in the field. On September 13, 2007 143 nations around the world voted in favor, including the two countries examined here.

Skeptics question the value of the declaration and conventions. In their view, international law is exclusively about written standards, codes and treaties. Even signed declarations have little meaning since there is no direct mechanism with which to enforce their articles and/or principles. This research has shown that this is not the case. While the UN Declaration may not provide immediate change, it represents a crucial step. As indigenous rights norms become more codified they are further entrenched and fill in what is known as “customary law.” The existence of the UN Declaration on the Rights of Indigenous Peoples, for example, serves as an interpretive document that can and has been used by both international and national courts when they rule on indigenous rights cases. Indigenous scholar James Anaya explains:

While there are formal “sources” of international law – namely, treaties, custom, and general principles of law – these sources and the procedures that engage them, must be evaluated and interpreted in light of the values that speak to all of us, and with attention to the realities of a changing world of diverse contexts in which previously unheard, and unheard of, groups wield increasing influence, if only by the force of their words, ideas and passion (Anaya 2004, 6-7).

Understanding the essence of international law involves understanding the norms and values that have become its interpretive filters (ibid.). When both the UN and OAS Indigenous Rights
Conventions were still in the drafting stage, the Inter-American Court took them into consideration for its assessment in Awas Tingni:

In arriving at this conclusion the Court employed what it termed an “evolutionary” method of interpretation, taking into account normative developments internationally both within and outside of the Inter-American system. In his concurring opinion, Judge García Ramírez expounded upon this interpretive methodology, making reference to United Nations and Organization of American States draft instruments on the rights of indigenous peoples and to International Labour Organization Convention (No.169) on Indigenous and Tribal Peoples, among other developments, and admonishing due regard for indigenous peoples’ own values in relation to lands and resources (Anaya and Grossman 2002, 12).

More recently, the Inter-American Court of Human Rights applied the UN Declaration (2007) in a decision it rendered in the case of the Mayan Communities of Belize (2008). This is not the only evidence that norms for indigenous rights are slowly being transformed into customary law, international law and common practice. As noted throughout this work, they have also been embedded into a number of constitutions as well as domestic law (Wiessner 2008).

The existence of international customary law for indigenous rights has been recognized for more than a decade. This body of law has been defined to include the following:

(a) Indigenous peoples are vulnerable groups worthy of law’s heightened concern.
(b) That indigenous peoples are entitled to practice their traditions, to celebrate their culture and spirituality, to protect their language and to maintain their sacred places and artifacts.
(c) That they are, in principle, entitled to demarcation, ownership, development, control, and use of their lands which they have traditionally occupied or otherwise used; and
(d) That they have, or should be given, powers of self-government, including the administration of their own system of justice; and
(e) That governments are to honor and faithfully observe their treaty commitments to indigenous nations (Weissner 1999, 109).

Nearly ten years ago, legal scholar Siegfried Weissner identified these norms as shared values in the international legal arena (ibid.). These are the principles behind international conventions, declarations operating procedures, and national constitutions and laws. Yet norms are notoriously difficult to demonstrate, especially when their everyday adherence is far from habitual. As noted throughout this thesis, the real challenge lies in transferring these norms into domestic politics or policies. Indigenous peoples, often impoverished and marginalized minority
populations, have little political influence or power. But does lack of compliance imply that such norms do not really exist? If norms and values for indigenous rights have made their way into customary international law, why is violation so commonplace? Even when courts issue judgments against nation states for failing to recognize these rights, compliance is far from guaranteed. Indeed, at this point it is far from likely.

The main objective of this study has been to take two specific cases of non-compliance with indigenous rights norms in the Americas and assess domestic factors impeding a “norm cascade” for indigenous rights. Through a comparative case study of Nicaragua and Ecuador, the mechanisms of the Spiral Model of Human Rights Change, posed by Thomas Risse and Kathryn Sikkink have been examined. As the tables 9 and 10 illustrate, progress has been slow and a general direction is far from obvious. Both countries have a long history of oppressing their indigenous populations, yet in both Ecuador and Nicaragua a recognizable shift in attitude towards indigenous rights became apparent in the 1990s. Still, improvements in policies, constitutional changes and even supportive legal institutionalization did not protect indigenous rights from growing material interests.

10.1 Ecuador in the Spiral Model

For the mechanics of the Spiral Model to be effective, there are a number of institutional conditions that need to be satisfied. Domestic and international social movements and advocacy networks need to focus their lobbying on functioning channels of the state. Not only must elites be receptive, but there must be institutions and processes which can respond appropriately to demands for change. In a country with weak political institutions, corruption, uneven rule of law, poor accountability and chronic economic instability, demands for indigenous rights are easy to ignore. The traditional political elites have shown little interest in indigenous issues, although some have attempted to include individual leaders within their caudillo networks in return for community support, particularly in the oil-rich Amazon.
State structures are weak, and civil society, while slowly growing, has remained mired in the politics of protest. There is no congruence between the interests and demands of civil society and the political elites. During the 1990s it had appeared the Ecuadorian indigenous movement had managed to bridge this. The indigenous movement, through careful organization and effort, had incited both indigenous and popular participation in public life, thus gaining real political influence. By mainstreaming indigenous demands, CONAIE gained support in numerous sectors of civil society and was part of a new political movement that promised to do things differently. These groups worked together to establish a new political party, Pachakutik, and importantly the indigenous groups played a real leadership role within the party, fielding candidates at all levels and contributing significantly to the party’s manifesto (Zamosc 2007, 1-11). With the development of Pachakutik, and its early electoral successes, it appeared as though Ecuadorians would finally be presented with a political party committed to democratic development and popular representation. Yet this potential was never realized. Indigenous participation in the coup attempt against Mahuad, alongside incessant infighting within both CONAIE and Pachakutik undermined popular faith in its democratic underpinnings. Further, the divisive strategies of Presidents Bucaram and Gutiérrez undermined both the party and the movement (ibid., 14).

Pachakutik entered the political arena with a new agenda, but by the 2006 national election it was regarded by many as much the same as the other political parties. Pachakutik’s support, both among indigenous and non-indigenous constituents, largely disappeared. It received criticism for being too indigenous at the expense of all other concerns, although at the local level it continues to enjoy some electoral success (Mijeski and Beck 2008).

Indigenous activist Pablo Ortiz noted in an interview that in the case of Sarayaku, Ecuador, successive governments have capitalized on the weaknesses within the indigenous movements to effectively stall any real policy change or even meaningful participation within the IACHR/CIDH process in spite of strong international support and advocacy. While the community developed national allies, most were from outside the region, such as the Quito office of the Center for
Economic and Social Rights, a human rights organization that provided much of the community’s legal support. Overall, pressure from below has been inconsistent. While the community has been particularly savvy in its strategizing, building both local and international allies, nationally CONAIE has been largely unsupportive due to its ties to the Gutiérrez government. He noted in particular that “they were not prepared to take a strong stand against the government or the oil companies” (Ortiz, 2005).

Further, not all communities within the Amazon have supported Sarayaku and its position against the oil companies. Post 1980s decentralization projects established local municipal governments that undermined traditional indigenous leadership and left many communities even more vulnerable to the divide and conquer strategies of wealthy oil companies. Some accepted small sums of money and development projects directly from oil companies like CGC in return for their support. In addition, as Ortiz argued, partnerships with local human rights groups were not particularly effective in that often they resulted in engagement strategies that focused on confrontation and attention, rather than long term negotiations and indigenous needs (Ortiz 2005c). This weakness has thus stalled the Spiral Model in a case that has received much international attention and strong support from the IACHR/CIDH.

Progress has been especially slow in Ecuador. By the end of the study period, in 2007, Ecuador was caught between Phase 3 Tactical Concessions and Phase 4 Prescriptive Status. Although the signing of the UN Declaration is consistent with Phase 4 Prescriptive status, more time is needed to ascertain whether or not the principles that it includes are transferred into consistent domestic recognition. As the Special Rapporteur noted in his 2006 site visit, compatible legislation is still needed to guarantee the rights promised in the 1998 Constitution (Stavenhagen 2006, 8). The far more extensive standards and principles incorporated into the DRIPS will likely take even more time and effort to operationalize.
Table 10.1 Ecuador and the Spiral Model

<table>
<thead>
<tr>
<th>Event</th>
<th>Phase</th>
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<tbody>
<tr>
<td>1964-1992: Chevron Texaco project in Northern Oriente devastates</td>
<td>Phase 1: Repression</td>
</tr>
<tr>
<td>environment and indigenous peoples within it</td>
<td></td>
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<tr>
<td>1972: The year Ecuador becomes oil exporting country, President</td>
<td>Phase 1: Repression</td>
</tr>
<tr>
<td>tells Quichua community “There is no more Indian problem, we will</td>
<td></td>
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<tr>
<td>all become white when we accept the goals of the national culture</td>
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<tr>
<td>“”</td>
<td></td>
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<tr>
<td>1987: ARCO Concession issued without indigenous participation</td>
<td>Phase 1: Repression</td>
</tr>
<tr>
<td>1992: President Ballén gives Sarayaku, and other Amazon</td>
<td>Phase 3: Tactical Concessions</td>
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<tr>
<td>communities formal communal title to traditional territories</td>
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<tr>
<td>1998: CGC Concession issued by President Mahuad, trying to</td>
<td>Phase 1: Repression</td>
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<tr>
<td>stimulate foreign investment</td>
<td></td>
</tr>
<tr>
<td>1998: Constitutional Assembly ratifies ILO C169</td>
<td>Phase 4: Prescriptive Status</td>
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<tr>
<td>1998 Constitutional Changes: Ecuador as a multicultural and multi-</td>
<td>Phase 4: Prescriptive Status</td>
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<tr>
<td>ethnic state</td>
<td></td>
</tr>
<tr>
<td>2003: December 2003, Legal team for Sarayaku launches case in</td>
<td>Phase 2: Denial</td>
</tr>
<tr>
<td>IACHR; MEM under President Gutiérrez states Sarayaku supports oil,</td>
<td></td>
</tr>
<tr>
<td>only “few troublemakers” opposed.</td>
<td></td>
</tr>
<tr>
<td>2004: IACHR issues Precautionary Measures in favor of community;</td>
<td>Phase 2: Denial</td>
</tr>
<tr>
<td>MEM: OAS no right to interfere in Ecuador</td>
<td></td>
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<tr>
<td>2004: Government of President Gutiérrez sets up meeting with</td>
<td>Phase 3: Tactical Concessions</td>
</tr>
<tr>
<td>Sarayaku to implement the Measures</td>
<td></td>
</tr>
<tr>
<td>2004: Sarayaku breaks negotiations after MEM goes on television</td>
<td>Phase 2: Denial</td>
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<tr>
<td>to denounce community and emphasizing the importance of oil</td>
<td></td>
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<tr>
<td>development for the nation.</td>
<td></td>
</tr>
<tr>
<td>2005: Inter-American Court Human Rights ratifies measures in fact</td>
<td>Phase 2: Denial</td>
</tr>
<tr>
<td>of Sarayaku</td>
<td></td>
</tr>
<tr>
<td>2006: Visit of Special Rapporteur on fundamental rights of</td>
<td>Phase 3: Tactical Concession</td>
</tr>
<tr>
<td>Indigenous Peoples to Ecuador, Interim government of Alfredo</td>
<td></td>
</tr>
<tr>
<td>Palacio Government offers to recognize rights if Sarayaku gives up</td>
<td></td>
</tr>
<tr>
<td>law suit. Sarayaku skeptical.</td>
<td></td>
</tr>
<tr>
<td>2007: CGC leaves territories because of conflict, leaves</td>
<td>Phase 3: Tactical Concessions</td>
</tr>
<tr>
<td>explosives behind.</td>
<td></td>
</tr>
<tr>
<td>2007: Community apprises the CIDH of the situation, Ecuador</td>
<td>Phase 3: Tactical Concessions</td>
</tr>
<tr>
<td>agrees to clean explosives out of community, promises to comply</td>
<td></td>
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<tr>
<td>with CIDH decision.</td>
<td></td>
</tr>
<tr>
<td>2007: Ecuador signs UN Declaration Rights of Indigenous Peoples</td>
<td>Phase 4: Prescriptive Status</td>
</tr>
<tr>
<td>under the new government of Rafael Correa</td>
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</tr>
</tbody>
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27 Cited in Whitten 1976, 7.
10.2 *Nicaragua and the Spiral Model*

Pressure from domestic and international social movements and advocacy networks need government institutions and elite advocates that are receptive to their demands. Nicaragua’s weak and corrupted political institutions, uneven rule of law, and externally focused accountability, all placed in the context of dire poverty, makes it easy for political elites to ignore indigenous demands for rights and recognition. What was exceptional in this case, however, was the level of international lobbying and pressure on a nation that is highly dependent on foreign aid and NGO funding. The establishment of an American-based legal team headed by prominent legal scholar James Anaya, who would go on to be named the UN Special Rapporteur on Indigenous and Tribal Peoples, was an important factor in the ultimate success of the case.

Another important fact was that the material incentives for the state to delay the CIDH ruling were eliminated with the implementation of the RAAS and RAAS regional autonomous governments. While initially jurisdictional uncertainty allowed the national government to make concessions, and for senior government officials to even participate in the concessions on Awas Tingni Territory, the Nicaraguan Supreme Court found that it was the Regional Government that was ultimately responsible for land and natural resources in the region. The lands in question were, by no means, state lands.

With the numerous policy and legal changes that have been made, and the fact that Awas Tingni finally did receive title to their lands in late 2008, it might appear that Nicaragua was moving towards stage 5: rule consistent behaviour. Such a finding however would be premature. More evidence is needed to prove that the state overall has become more progressive and that it is not just the idiosyncrasies of the case that led, albeit slowly, to its promising outcome.
<table>
<thead>
<tr>
<th>Event</th>
<th>Phase</th>
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</thead>
<tbody>
<tr>
<td>1979: Indigenous rejection of Sandinista revolution</td>
<td>Phase 2: Denial</td>
</tr>
<tr>
<td>1981-1987: Contra War: includes massacre Leimus, 20,000 Miskitos forced into state relocation camps while 35,000 fled to Honduras: led to charges of genocide within the IACHR</td>
<td>Phase 1: Repression</td>
</tr>
<tr>
<td>1987 Nicaragua Constitution includes Indigenous Rights</td>
<td>Phase 4: Prescriptive Status</td>
</tr>
<tr>
<td>1992 Initial joint logging concession AT and Madensa (recognize informal title) under President Chamorro</td>
<td>Phase 4: Prescriptive status</td>
</tr>
<tr>
<td>1992-1993: Madensa 25 year plan with AT New AT legal team, however Madensa and Nicaragua reject new position of community, decide lands are “national” not AT territories.</td>
<td>Phase 1: Repression</td>
</tr>
<tr>
<td>1994: Madensa and Nicaragua, negotiations with WWF and AT to include demarcation and titling of AT lands</td>
<td>Phase 3: Tactical Concession</td>
</tr>
<tr>
<td>1994: Nicaragua makes another deal with SOLCARSA for logging on AT territories, ignore AT deal and promise for title</td>
<td>Phase 1: Repression</td>
</tr>
<tr>
<td>1994: Case goes through domestic courts, violation of constitution and autonomy law, ignored.</td>
<td>Phase 1: Repression</td>
</tr>
<tr>
<td>1996: When AT takes case to CIDH, Chamorro government agrees to Friendly Settlement</td>
<td>Phase 3: Tactical Concession</td>
</tr>
<tr>
<td>1996: As part of the Friendly Settlement Process, government establishes National Demarcation Commission and invites Awas Tingni to participate.</td>
<td>Phase 4: Prescriptive Status</td>
</tr>
<tr>
<td>1997: Awas Tingi team submits, through the Court Process, a request for precautionary measures to the new government of Arnoldo Alemán. Request is rejected after delay.</td>
<td>Phase 2: Denial</td>
</tr>
<tr>
<td>1998: Inter-American Commission issues judgment in March; moves case forward to Court for lack of compliance by end of the year.</td>
<td>Phase 2: Denial</td>
</tr>
<tr>
<td>2001: Inter-American Court issues judgment, Government of Arnoldo Alemán agrees to comply.</td>
<td>Phase 3: Tactical Concession</td>
</tr>
<tr>
<td>2006: National Committee of Ethnic and Indigenous Communities recommends creation of national indigenous organization.</td>
<td>Phase 4: Prescriptive Status</td>
</tr>
<tr>
<td>2006: Government under Bolaños issues land titles to indigenous communities in Bosawas ecological reserve.</td>
<td>Phase 3: Tactical Concessions</td>
</tr>
<tr>
<td>2007: Nicaraguan Government of Ortega titles 5 indigenous territories in the RAAN, totaling 5,756.26 km² in December.</td>
<td>Phase 4: Prescriptive Status</td>
</tr>
</tbody>
</table>
In both cases, the signing of the UN Declaration on the Rights of Indigenous Peoples (DRIPS) ends the study on a positive note. Critics may note that it is only a Declaration; however, the same could have been said about the Universal Declaration of Human Rights which turned 60 in 2008. The UDHR was a path-breaking achievement in itself, and equally importantly, it spawned a whole series of conventions and treaties which further encoded its aspirations and entrenched human rights standards into a concise global framework that could be both monitored and enforced. In the language of the constructivists, it turned ideals into values and norms, which were then slowly encoded in law. While its practice is not ubiquitous, real progress has been made.

If Nicaragua and Ecuador are indicative of regional trends, the consolidation of indigenous rights norms in domestic law in Latin America is far from established. Nonetheless, Galit Sarfaty notes “countries in Latin America have generally been more supportive of indigenous rights than those in other regions. Of the seventeen countries that ratified International Labour Convention 169, thirteen are Latin American and Caribbean countries” (Sarfaty 2005, 1791). This trend is even more pronounced with support of the UN Declaration on the Rights of Indigenous Peoples (2007). All Latin American nations, with the exception of Colombia, which abstained, signed the historic document.

This thesis has explored the domestic barriers that exist in the two case studies preventing a much needed norm cascade after more than two decades of international and domestic engagement, protest and activism. Starting from the experience of international norms for human rights, the patterns and processes of state behaviour regarding specifically indigenous rights to their traditional lands and resources (property in the western sense) have been examined. Using the methodological tools of the Boomerang Model (Brysk 1999) and the Spiral Model of Human Rights Change (Risse and Sikkink 1999) research focused on two cases where state response to the rulings of the Inter-American Court of Human Rights indicated failure of norm absorption. Utilizing a series of indicators highlighted in the human rights literature by Risse Kappen (1995),
Cortell and Davis (1996; 2000) as well as Hawkins (2001) among others, a series of variables were examined to determine their potential relevance to the overall problem. These variables included the domestic structural context, norm salience, material costs, and international influences. The following section assesses the effects of these factors in both cases, comparing two very different experiences.

10.3 Domestic Structural Context

When international law is applied to national domestic juridical frameworks, a number of factors can either impede or facilitate the process. The domestic structures that shape national political life play an important role in policy formation and in its application. New democracies throughout Latin America struggle with governing institutions that are under-developed, weak and subsequently subject to elite domination. Governments are notorious for their lack of accountability and poor representation of the poor and working classes. Accordingly, political stability can be called into question when growing civil society movements are pushed to public uprisings when democratic elections fail to ensure that their interests are incorporated into the national agenda. Judiciaries, if not carefully regulated, can be rife with political bias and even outright corruption. Application of the rule of law is far from consistent, and rural populations, including indigenous communities, often have no access at all. Even where constitutions proclaim rights, without some measure of protection and support they have no effect on indigenous peoples’ lives.

In Latin America governments vary widely in their structures and operations. What matters is the effectiveness of governance that results from these configurations. These can be assessed in any number of ways. This study has focused on four key indicators of good governance as identified by the World Bank: accountability and voice, political stability, rule of law, and control of corruption.
According to World Bank 2008 data on “government effectiveness” in Latin America, Ecuador and Nicaragua scored as the bottom two of 17 nations. Given this dismal state of affairs it is not surprising that national governments face significant challenges maintaining international standards and law. Institutions like the civil service, the judiciary and even the national assembly are weak and corrupt, easily controlled by caudillo figures who take politics as a serious but very personal game. Nicaragua and Ecuador are amongst the most corrupt nations in the region; both score below the 25th percentile in terms of corruption world-wide (World Bank 2008). Even when political will exists to implement or change policy, existing institutions are not up to the task.

A Managuan lawyer recognized these barriers for Awas Tingni during an interview:

The state itself cannot speak with one united voice. The executive is not interested in this case. The National Assembly – cannot be controlled by the Executive, this creates a problem in terms of implementing Ley 445 – there is a need to control the National Assembly to ensure this process. There is a real lack of political will, direction. There is a force that wants nothing to happen, wants to do nothing (Rizo, 2006).

Political instability can also undermine the creation of supportive policies for indigenous peoples’ rights. In Ecuador, between 1998 and 2008 there have been a total of nine different presidents, each choosing to deal with the case of Sarayaku in a more or less similar way: by emphasizing the rights of the nation to the resources of the Amazon. Still, these changes complicate negotiations with the state. Top civil service jobs are political appointments and change with the presidency. The office of the Procuraduria General, which is responsible for international cases such as the Sarayaku and Awas Tingni, is no different. One human rights lawyer interviewed for this project commented that during negotiations, which have stretched out over years, past gains disappear quickly with government staffing changes. New bureaucrats can have little or no familiarity with ongoing issues and then you are back at ground zero (Melo 2005).

Another barrier to the internalization of international norms for indigenous rights is low levels of domestic civil society advocacy and few or weak ties between indigenous civil society,
broader civil society and the government itself. To achieve recognition of their rights nationally, indigenous groups must attain a voice or influence when it comes to defining the national agenda. This can be achieved through a strong organized presence in civil society and effective political representation. While indigenous political parties may have limited appeal on their own, broad based political coalitions that build on common interests and goals can expand their support base and articulate a new kind of inclusive message. Not only must the message be clearly articulated and supported by civil and political society, but the government of the day must have working institutions that can absorb and respond to indigenous needs constructively. Historically, racism categorically excluded indigenous peoples from both popular society and political elites. Indigenous groups had few political choices other than participating in protests, marches and uprisings to pressure for state action. Not surprisingly, this has been the route most commonly taken, but the politics of protest is not the same as the politics of government. This is a hard lesson from which CONAIE and Pachakutik are still recovering.

Nicaraguan civil society is slowly developing in terms of depth and breadth; however indigenous issues are still very much separate from the rest of civil society. While there is a definite indigenous presence in the regional governments, at the national level government, representation is still weak (Cunningham 2006). For indigenous communities outside the coast, even recognition is not forthcoming.

Some academics have expressed optimism in terms of the “surprising compatibility” of neoliberalism and multiculturalism. José Antonio Lucero notes that the new neoliberal governance frameworks have given indigenous groups new opportunities for voice, for a real place in national politics. The challenge has been to take this new voice and use it in ways that facilitates material, not just cultural gain (Lucero 2008, 122). Here, few gains have been made. The problem arises, as both case studies illustrate, when indigenous claims include rights to wealth and resources coveted by the neoliberal state and its multinational corporate allies. Competitions for resources in Latin America, as elsewhere, have favored those with power and
influence; two traits indigenous communities have historically lacked. Building alliances with non-indigenous sectors of society may help indigenous communities strengthen their power base and influence government decision making, but to date this has not been achieved in any sustainable way.

In the early 1990s, there was a vociferous indigenous presence in Ecuadorian civil society, though support has weakened since the Gutiérrez regime. Renowned globally for its organizational ability and strength, the Ecuadorian indigenous movement enjoyed considerable political victories during the 1990s, including winning control over the Directorate of Bilingual Education (DINEIB), the indigenous development agency (CODENPE), the Office for Indigenous Health and a key role in the World Bank funded Development Project for Indigenous and Afro-Ecuadorian Peoples (PRODEPINE). This was achieved with a strong emphasis on indigenous identity and an alternative view of politics. The indigenous movement commanded the politics of opposition and was able to gain support and develop alliances with many other facets of civil society. At its height, it established the political party Pachakutik in 1995. This provided a formal mechanism with which to participate in the national dialogue that took place during the National Constituent Assembly of 1998 (Lucero 2008 127-8). CONAIE was the lead organization. It achieved popularity based not only on the construction of shared “indigenous identity” but in the development of a broader new and inclusive agenda that was supported by the popular classes. Together, with other members of civil society writ large, CONAIE played an important, if not integral role in the political uprisings that impacted government policy making in the early 1990s. It coordinated a series of strikes, blockades and protests that forced the government to make serious concessions (Lucero 2008, 141).

Unfortunately, the tactics of oppositional politics become less effective as one tries to engage directly with government. A few indigenous leaders held important government posts during the Gutiérrez presidency, but they were marginalized in real policy making. Instead, the movement became divided between new indigenous elites and leaders claiming to represent
“authentic” or “grassroots” indigenous communities. This is the realm of compromise, both in terms of action and principles. Some indigenous organizations could not accept this. CONAIE’s overall strength deteriorated when it participated directly in the Gutiérrez government in 2003. Disagreements between CONAIE and the administration deepened after President Gutiérrez signed an agreement with the IMF and the MUPP Ministers immediately withdrew their support. This exacerbated tensions inside the indigenous movement. The Amazon wing of the organization, which lacked the Marxist ideological foundations of the Sierra, believed the ministers should have stayed to negotiate. They were not convinced that a complete political withdrawal was the path to take.

The brief relationship with the Gutiérrez government created internal conflict which raised serious contradictions within the indigenous movement. Some leaders believe the solution to years of neglect and injustices can be resolved through direct participation in the governing process, through enhancing indigenous voice within the existing democratic framework. Others argue that participation within corrupted system of government is wrong. Traditional governing elites cannot be trusted to act in the best interest of indigenous communities. Instead they favor the strengthening of indigenous governance outside the formal structures of the state. Self-government of indigenous communities would form part of a brand new “pluri-cultural” Ecuadorian nation.

Importantly, even when CONAIE was allied with the Gutiérrez government, no overtures were made to resolve the problems of Sarayaku. One community advisor suggested during an interview that CONAIE members were not as interested in promoting the interests of Sarayaku as they were in obtaining jobs in the new Gutiérrez government. This, he noted, much more than ideology, was the basis for the community’s withdrawal from negotiations with the government. There was a complete lack of confidence (Ortiz 2005).

Regardless of who held power, the state has always maintained the same position regarding the patrimony of the natural resources of the Amazon. Chronically weak institutions allowed
strong ministers to circumvent due process and accountability over the lucrative oil concessions. A former Pachakutik Congressman commented during an interview that the minister of energy and mines under the Naboa government, Colonel Carlos Arboleda, was a military officer with no understanding of international conventions or even due process. “He was used to being the boss and getting things done his way. He issued oil concessions personally, without following the proper channels which would have included Petroecuador, the state agency with the formal mandate for oil development in the Amazon” (González 2005). Institutional weaknesses also meant that existing environmental standards in the region were impossible to police or enforce. Across the Amazon, there is ample evidence that serious, non-reversible environmental damage has accompanied extraction activities that at the same time produced billions in revenues for transnational corporations.

Even though the legal team representing Ecuador to the OAS acknowledged the importance of implementing the CIDH Precautionary Measures (2004), barriers remain at other levels. For example, a lawyer interviewed from the office of the Procuraduría General noted: “I agree with the court decision and even if other members of the government do not agree, we will comply. It is an important case, we are members of the OAS, and although some Ministers may not recognize the importance of the Convention (the American Convention of Human Rights), it is important that we follow through” (Roberts 2005). Nonetheless, the government never did follow through. In the end it was CGC itself that chose to withdraw from the region, after local indigenous opposition proved relentless. The governments of Noboa, Gutiérrez, Palacio and Correa each failed to implement the provisional measures issued by both the Commission and the Court. There are many reasons for this.

In 2005, a lawyer for the government conceded during an interview that given the state of the Ecuadorian bureaucracy, it would be “very difficult to get things done” (Roberts 2005). The indigenous community was even more skeptical. According to one Sarayaku advisor interviewed for the project, the main reason nothing happened in the case was that the government had no
interest in indigenous land rights in the Amazon and further, corrupted interests were benefiting from the status quo (Ortiz 2005).

In comparative terms, it is clear that Nicaragua has been much more cooperative with the international courts regarding implementation. Unlike Ecuador, the Nicaraguan government has never denied the legitimacy of the Court and successive governments have worked slowly and steadily, albeit painfully so, towards compliance. In fact, in 2007 a number of indigenous communities in Nicaragua received title because of the CIDH ruling.

Interviews with legal representatives from both the community and the state suggest a variety of explanations of why Awas Tingni’s claim took so long to resolve. Lack of political will to support a minority Mayagna community in the majority Miskito region of the Caribbean coast was cited by both sides. Indigenous representatives mentioned general government incompetence, longstanding resentment for taking the case to the Inter-American Court, endemic corruption at all levels as well as dysfunctional institutions particularly within the RAAN (Anaya 2005; McLean 2006; Cunningham 2006; and Rizo 2006). Government representatives, on the other hand, concurred with Anthony Stocks’ assessment that the community was simply asking for “too much for too few.” Given the extreme poverty and underdevelopment in the region, neither the national nor the regional government is willing to validate the small community’s claim to so much land, especially in the face of competing claims.

10.4 Norm salience

When informants acknowledge that there is no political will to implement indigenous rights through government policy, it suggests that these rights enjoy little if any salience within domestic society. State compliance with international norms is much easier when those norms match up with national values and interests. It is important to recognize, however, that these values and interests change over time. Looking back at history for example, even the now widely accepted norm against slavery did not achieve salience in the United States until the Civil War
(1861-1865) and its victors redesigned the American economy along more industrial lines. Prior to this, Southern agriculturalists fought tenaciously for the right to exploit black slaves and a lot of people accepted that this was “normal”. Even after the war, many states imposed segregation laws that were not completely undermined until the civil rights movement of the 1960s. To achieve a complete “norm cascade” a mix of idealism, rhetoric and compulsion is required; and, depending on salience, a great deal of time.

Making indigenous rights norms salient in the Americas is no easy task. For centuries, indigenous exploitation, marginalization and general abuse was considered a colonial prerogative. As detailed in chapter 2, the international indigenous movement created new political spaces for indigenous peoples. At the domestic level, indigenous organizations have taken advantage of these spaces and articulated new heterogeneous visions of nationhood that have had some broader appeal. The key to success has been the articulation of democratic alternatives that include those long ignored by neoliberal populist hybrid regimes. In Ecuador indigenous organizations, especially CONAIE played a lead role in challenging a series of elitist, unrepresentative and corrupt governments. This raised CONAIE’s profile, and made it one of the most trusted organizations in the nation.

Successive governments in Nicaragua have also suffered from what one scholar has termed the “undoing of democracy” (Close 2006). The problem is that much of the support for counter-hegemonic alternatives has been undermined by the once revolutionary FSLN. Daniel Ortega has made himself a master of the peoples’ rhetoric even though the average Nicaraguan is no better represented politically than s/he was under the Pact’s Liberal counterpart. As noted, civil society in Nicaragua tends to be weak and defensive, with indigenous organizations barely present in national politics.

Norm salience is not a categorically easy variable to measure. Cortell and Davis remind: “scholars repeatedly conclude that domestic salience is crucial to many states’ compliance with international norms, but they rarely provide definitions or operational measures for the concept,
and, instead merely assert that the norm in question was salient” (Cortell and Davis 2000, 67). They go on to argue that a more useful measurement of norm salience can be obtained through three particular phenomena over time: change in government discourse, changes in national institutions and state policies. The danger, they note, is that the understanding of norm salience does not become a tautology; that is a norm would be considered salient if it is widely ascribed to (ibid.).

Recognizing the inherent limitations to measuring things like “changes in discourse” the following table examines the issue of norm salience. In both cases, there are signs of salience, yet there are also numerous setbacks. Some leaders, more than others recognize the importance of indigenous rights, or at least the important role of indigenous communities within the broader nation. Table 10.3 examines the development of norm salience over the past ten years in particular. At first glance, it is obvious that politically, Ecuador has been considerably less stable than its Central American counterpart. Nicaragua had a total of three presidents over the decade, while Ecuador saw seven presidents, not including a brief military-civilian triumvirate that included Colonel Lucio Gutiérrez, indigenous leader Antonio Vargas, and a former Supreme Court Chief, Carlos Solórzano, in 2000. Gutiérrez was quickly replaced by General Carlos Mendoza who then handed power over to the Vice President, Gustavo Noboa. Progress, while evident, in both cases appears slow and uneven. It is important to note, however, that towards the end of this study, the elections of both Daniel Ortega and Rafael Correa involved a new level of recognition and respect for indigenous peoples. One Pachakutik Congressman suggested that the recent history of indigenous protests has changed the Ecuadorian people, giving them greater respect for indigenous issues (Gonzalez 2005). In Nicaragua, Ortega negotiated directly with YATAMA for their support on the coast and has given its leader Brooklyn Rivera the position of Deputy in the National Assembly.

Correa too has demonstrated new respect for indigenous Ecuadorians, by including Quichua in his inaugural speech, and by undergoing a special indigenous ceremony as part of his
inauguration. This has not meant, however, that all his policy decisions have conformed within indigenous rights norms. He has been relentless in his bashing of CONAIE and Pachakutik.

Both Correa and Ortega are responsible for signing the new UN Declaration on the Rights of Indigenous Peoples (2007). Still, in neither case has the application of “free, prior and informed consent” been institutionalized within the domestic legal framework. Correa in particular has made it clear that he has no intention to make such a veto binding through the new constitution.

Table 10.3 highlights the key innovations in norm salience over the past ten years. There have been no huge cascades in acceptance of indigenous rights; however, there has been a slow and steady build up of progress and achievements.

Focusing on Ecuador, José Antonio Lucero argues that growing salience has evolved out of the ability of the organized indigenous movement to highlight the internal contradictions of the government’s neoliberal economic model (Lucero 2008, 121-2). This provided them new power and influence as part of a more broadly inclusive agenda that was appealing to a broader base of citizens. Their political movement, Pachakutik, emphasized, rather than downplayed their indigeneity. As Brysk noted (1999) their alternative world view, which includes more inclusive models of democracy and holistic development appeal to disaffected citizens at the margins of the current neoliberal state. Subsequently the concept of indigenous nations and nationalities within Ecuador enjoys more salience than elsewhere (ibid., 142).

An archival search of newspaper articles in the major papers of Ecuador (El Comercio and El Universo), and Nicaragua (El Nuevo Diario and La Prensa) illuminates one significant difference between the two countries under study. The Ecuadorian newspapers reported significantly more often on Sarayaku news than the Nicaraguan papers did of Awas Tingni.28 While this does not take into account the actual content of the news articles, it does suggest that

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28 In Ecuador, El Comercio published 170 articles on Sarayaku between 2002 and 2009; El Universo published 152 times in roughly the same time period. By way of contrast, in Nicaragua, El Nuevo Diario published only 20 articles on Awas Tingi between 1999 and 2009, while La Prensa published 18 articles. See Table 11.2 of this document.
indigenous news is viewed as more attention-worthy in Ecuador than in Nicaragua and suggests a greater salience in general society. Yet this has not been enough to secure indigenous rights to contested resources.

Importantly, the existence of nations, even within nations, implies certain kinds of rights. In Ecuador, which boasts one of the strongest and most successful indigenous movements in the world, these rights have been limited to the realm of “multi-culturalism.” Amazonian Indians, for example, have special rights to their cultural heritage, to their language and even bilingual education. Many, though not all, have obtained title to their traditional territories. None, however, have been able to successfully stop the state from taking what it assumes to be exempt from these “special rights” – valuable natural resources like oil, gold and copper. When material interests are at stake, indigenous rights clearly take a subordinate position.

This is part of a deliberate strategy, anthropologist Charles Hale argues, to create and constrain what it means to be indigenous in neoliberal Latin America, something he terms “indio permitido.” In such cases, cultural rights are given priority while socio-economic rights are ignored or denied. Bilingual education programs are popular under such a regime, but property rights remain limited. Title is certainly possible as long as it does not prevent the state from getting access to what it sees as its sovereign wealth (Hale 2002; 2004). Sarayaku well illustrates that once money and natural resources are on the table, the state’s willingness to indulge indigenous nationalities does not include any special claim over national resources. Throughout the Oriente and in the Sierra as well, wherever indigenous communities sought to counter the neoliberal agenda of oil exploration and/or mining on their traditional lands, the state insists on its rights to subsoil resources and to the development project of the nation as a whole. The indio permitido cannot challenge the state’s claims on national wealth. Thus it is no surprise that the Ecuadorian government has stood in opposition of Sarayaku’s claim throughout the Inter-
Table 10.3  Indigenous Norm Salience in Nicaragua and Ecuador (1997-2007)

<table>
<thead>
<tr>
<th>Salience Indicators</th>
<th>Nicaragua</th>
<th>Ecuador</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Public support for indigenous rights</td>
<td>97-2002 Aléman</td>
<td>96-97 Bucaram</td>
</tr>
<tr>
<td>2. Government support multiculturalism</td>
<td>2002-07 Bolaños</td>
<td>97-98 Alarcón</td>
</tr>
<tr>
<td>3. Pro-indigenous policies</td>
<td>2007-Ortega</td>
<td>98-2000 Mahuad</td>
</tr>
<tr>
<td>4. Government alliances with indigenous parties</td>
<td></td>
<td>2000-02 Noboa</td>
</tr>
<tr>
<td>5. Participation in UN Permanent Forum</td>
<td></td>
<td>2003-05 Gutiérrez</td>
</tr>
<tr>
<td>6. Repression/support for indigenous mobilization</td>
<td></td>
<td>2005-07 Palacio/Correa</td>
</tr>
<tr>
<td>1. Public support for indigenous rights</td>
<td>Aléman</td>
<td>Bolaños</td>
</tr>
<tr>
<td>4. Government alliances with indigenous parties</td>
<td>i. el Pacto undermines YATAMA; IACHR court case 2001</td>
<td>i. FSLN allies with YATAMA</td>
</tr>
<tr>
<td>5. Participation in UN Permanent Forum</td>
<td>n/a</td>
<td>i. Nicaragua joins permanent forum on indigenous issues</td>
</tr>
<tr>
<td>6. Repression/support for indigenous mobilization</td>
<td>No apparent mobilizations</td>
<td>No apparent mobilizations</td>
</tr>
</tbody>
</table>

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29 From 2003 Presentation by Government of Ecuador to the 2nd Annual Meeting of the Working Group on Indigenous Populations at the UN.
American process and the current withdrawal of CGC from the region have more to do with corporate policy than state support or intervention. Pachakutik MP Julio González commented in a 2005 interview: “In terms of importance of indigenous rights, the past government (Gutiérrez) was only interested in maintaining power; no real importance was given to the problems of indigenous peoples.”

Norms are important, but a contradictory norm, like capitalist development, cannot be easily set aside, especially when there are elite interests at stake. Concessions represent income, not only for the government, but can often mean informal “payments” and benefits to those with the power to choose who will receive them. Lack of accountability and transparency in the Ecuadorian bureaucracy has enhanced opportunities for illegal “rents” and some informants believed this was part of the explanation for serious “irregularities” regarding not only CGC’s concession, but others as well (Ortiz 2005).

Nicaraguan indigenous communities remain behind their Ecuadorian counterparts in terms of building the salience of indigenous rights norms. Nicaraguan indigenous organizations are highly local and have not achieved much in terms of alliances or partnerships with broader civil society. Regional divisions prevent the development of any cohesive national agenda. With no collective indigenous voice, the majority of Nicaraguans remain ignorant or at least disinterested in their claims. Because of the regional dynamic between Managua and the Caribbean region, most citizens pay very little attention to RAAN/RAAS politics. Poverty is widespread throughout the country, with the majority of families struggling to make ends meet. Although technically speaking poverty is worse in the indigenous regions, the hundreds of thousands of Nicaraguans living on less than $2 per day have little sympathy for indigenous concerns. Awas Tingni received far more support from international NGOs and indigenous groups than it did domestically. Instead, many neighbors within the RAAN stood in opposition to its claims.

The problem is that as a Mayagna community, Awas Tingni is not supported by the Miskito controlled government of the region. The national government, which promised on many
occasions to comply with the Inter-American ruling, has little influence on the local politics of the RAAN. Local conflicts, budgetary shortfalls and almost non-existent infrastructure mean that the issue of conflict resolution is dealt with in community meetings, led by locals with little experience and significant biases. The RAAN-controlled dispute resolution phase of the demarcation and titling process actually created more conflicts than it has resolved. AT leader Melba McLean explains:

The case of Awas Tingni is still in process. The regional government has not wanted to give them title for partisan political reasons. Both the government and the council have inclined to support a group from the Miskito community. They favor Miskito claims that overlap Awas Tingni territory even without any evidence. That’s why the case has been delayed. We are in a conflict resolution process that has no judiciary precedent. The other community is not right, but it is a political battle and that’s why the process has been delayed for so long, our people for being the ethnic minority in the region (McLean 2008).

While the creation of the autonomous governments is in many respects an innovation with potential to promote and support indigenous rights, in this particular case it has created a barrier to the implementation of the CIDH ruling and actually undermined any potential to develop norm salience. One Managuan lawyer familiar with the case agreed:

The problem is because the Awas Tingni community is a minority – there is no political group that is interested in the case of Awas Tingni, there is no force. The Miskito in the region make up the majority of the indigenous peoples on the coast, they have more power within the regional government, they believe that the territory in question belongs to them; they believe that they are superior to the Awas Tingni (Rizo 2006).

10.5 Material Constraints

Economic neoliberalism has fundamentally changed and challenged the way governments operate in the Americas. And, as many scholars have noted, this has undermined democratic development in regions in transition like Latin America, Africa and Eastern Europe. In Latin America in particular, populist governments with a penchant for “magical realism\textsuperscript{30}” make impossible and

\textsuperscript{30} Magical realism can be defined as “A narrative technique that blurs the distinction between fantasy and reality. It is characterized by an equal acceptance of the ordinary and the extraordinary. Magic realism fuses (1) lyrical and, at times, fantastic writing with (2) an
expensive promises to the electorate in exchange for their support; however once they are elected they have new masters to keep satisfied, most often external bilateral and multilateral lenders. This summarizes national political life in both Nicaragua and Ecuador.

As already noted, national material interests outweigh culturally-based claims emanating from the Amazon in Ecuador, and the Caribbean coast of Nicaragua. The main difference between the two cases is that the Nicaraguan government has already transferred jurisdiction of land and natural resources to the regional governments. Technically, the central government of Nicaragua is no longer in any position to benefit from logging or other concessions. In the Ecuadorian Amazon the central government retains all subsoil rights. Recent spikes in oil prices create strong motivation for successive governments to maximize concessions in spite of indigenous reservations or even environmental concerns. Any admission of indigenous rights to control, veto or even equal participation in planning, management and revenues would cost the government and other vested interests, significant revenues (Stavenhagen 2006, 8). The price for compliance is simply too high. One former MUPP Deputy noted during an interview:

Historically, the government has been in permanent conflict with Sarayaku. They were much more interested in protecting CGC and the concessions, rather than the rights of the community. CGC violated their territories, their livelihoods. The former Minister Lopez indicated he would apply force if necessary (González 2005).

There is potential in the World Bank through its Operational Policy on Indigenous Peoples to promote and protect indigenous rights norms as part of its global agenda. Up to now, the actual impact of the policy in Sarayaku and Awas Tingni has been questionable. While the Bank has funded small scale indigenous development projects in both countries, there is much stronger
pressure, from more important sectors of the Bank to privatize resources whether they are found on indigenous lands or not. MUPP Deputy González (2005) agreed. “The state is under pressure as part of the political economy of the WB/IMF to privatize all resources.” For Ecuador, its oil resources are amongst the most lucrative in the region. According to a 1999 study by the Ecuadorian Ministry of Energy and Mines, the Ecuadorian Amazon could yield as much as 26 billion barrels of oil with the government hoping to boast production to over 850,000 barrels per day.

At a price that once topped $100 per barrel, this would amount to $85 million in generated wealth each day in a country with an annual GNI of 41.1 billion dollars in 2007. Crude oil represents over half of total export value, some $6,934 million in 2006 while at the same time external debt continues to grow annually and stood at $16,536 million, more than three times the figure for Nicaragua. The overall costs of acceding to indigenous rights in the Amazon would be considerably more than the chainsaws and outboard motors or even the schools and clinics that have been offered for their consent.

The value of the natural resources in Awas Tingni territory, specifically hardwoods and mahogany, cannot compare to the oil reserves of the Amazon. Still, in a country rife with poverty access to resources is always contentious. The World Bank funded demarcation and titling project explicitly designed to include indigenous communities as per the CIDH ruling, could not prevent outside interests from stalling land titling for Awas Tingni in particular. As the conflict resolution stage reached its second year, more and more timber was being harvested illegally. Some locals feared that by the time formal title is issued to indigenous lands (Miskito or Mayagna) much of the valuable mahogany will already be gone. In addition, Hurricane Felix hit Nicaragua and devastated the Caribbean Coast in early September 2007. It “reduced almost all the ancestral rainforest to an impenetrable mass of tree trunks and sticks. In a matter of hours, the Community lost the forest and resources it had fought so hard to protect.” Illegal loggers have already entered
the region to sneak out valuable dead wood (University of Arizona Indigenous Peoples Law and Policy Program Update 20 March 2008).

Especially in Nicaragua, where high debt and extreme dependence on foreign assistance allow significant external influence on the national budget there is real potential, through loan conditionality, for example, to ensure that international standards for indigenous rights are respected. Yet this potential remains unrealized. A Managua lawyer noted:

There is no real international pressure on Nicaragua to respond to the ruling. Nicaragua is a weak state, with weak institutions, thus it is easy to be non-responsive. Overall, Nicaragua is not terribly interested in the case. The World Bank has a policy for indigenous rights, but its main focus is on open markets. And with increasing market pressure, there is increasing pressure on indigenous territories and resources (Rizo 2006).

Significant differences between the two case studies emerge when the economic costs of implementation are taken into consideration. If Ecuador were to accept the full implications of indigenous rights to lands, territories and resources, as delineated in their Constitution, ILO C169 and now the UN DRIPS, indigenous communities in the Amazon would have the potential to access millions of dollars in oil revenue. They could insist on high standards of environmental protection, and obtain some degree of control in terms of distribution and management of concessions. For the Ecuadorian state, this is a real sovereignty issue. If the state concedes rights it will not only lose out on a significant amount of national revenue, but Amazon indigenous communities would gain significant economic and political power. There is, clearly, a real battle ahead.

For Nicaragua, national rights to the resources of the forests of the Caribbean coast have already been ceded to the regional governments in the north and south. While FSLN interests may be more closely tied to the Miskito community and its political party YATAMA, there are no direct material costs that would accompany the titling of Awas Tingni territories. Indeed the opportunity costs of not doing so are probably much higher in light of Nicaragua’s new seat on the UN Human Rights Council.
10.6 International influences

The participation of international organizations, I believe is good, but there needs to be more multilateral and bilateral cooperation. Especially for the World Bank, they need to include compliance with the (CIDH) sentence as a condition for assistance. They need to change the public politics of Nicaragua (Cunningham 2006).

Extrapolating from the Spiral Model, a state that is immune to international pressure will not be a likely candidate for change. Thankfully, there are few states that could ostensibly fall into this category anymore. Autarky is no longer a feasible option in the age of economic globalization.

Both Nicaragua and Ecuador, not unlike most developing countries, are highly dependent on international trade and maintaining good relations with the rest of the world. They value their membership in the international society of civilized states and see their active participation in both the OAS and the UN as important. Both nations are very supportive of human rights and have taken an active report in supporting them via the new UN Human Rights Council. Both have signed the American Declaration of Human Rights, and even when they may prefer not to, they accept the mandate of the Inter-American Court of Human Rights.

Indisputably, the UN plays the central role in defining, promoting and defending human rights in the world. Both Nicaragua and Ecuador have been very active at this level. The central body at the UN responsible for Human Rights is the newly redesigned Human Rights Council (formerly the Human Rights Commission) and both nations have participated. Ecuador was a member of the Human Rights Council from 2006-2007 and Nicaragua took its seat in 2007 where it will remain until 2010. While it was on the Council, the small Andean nation of Ecuador signed each of the 13 principal international human rights treaties put forth by the United Nations with the only exception being one Optional Protocol to the Convention on the Rights of the Child.

Nicaragua’s record on human rights indicates much more room for improvement, although its current membership in the HRC may change things. Nicaragua has signed only seven of the possible 13 international human rights treaties. Some important exceptions include The Second Optional Protocol to the Convention on Civil and Political Rights regarding the death penalty, the
Optional Protocol to the Convention on the Elimination of all Forms of Discrimination against Women, and the two Optional Protocols on the Rights of the Child involving the involvement of children in armed conflict and in prostitution and pornography (Office of the UN High Commission for Human Rights 2004). Overall, and perhaps due to its very high levels of poverty, Nicaragua has much more work to do to protect the human rights of its most vulnerable citizens, women and children, as well as indigenous peoples.

Participation in the international human rights arena is an important socializing process. The growing international salience of indigenous rights norms is a product of the broader human rights cascade. The post-World War Two construction of human rights standards and expectations provided fertile ground for indigenous communities to forge their own tools in longstanding struggles against state sponsored injustice. The Commission for Human Rights, later to become the Human Rights Council (HRC) became the first UN venue in which indigenous peoples gathered to discuss self-determination and de-colonization (Henderson 2008, 37). It was quickly understood that indigenous peoples required special rights to overcome their unique experiences as individuals and as communities with racism, discrimination and colonialism (ibid., 40).

The declaration was the culmination of decades of hard work on the part of state and indigenous representatives. As a draft, the declaration was pivotal in the shaping of indigenous rights norms. Indigenous scholar James Youngblood Henderson explains:

The Declaration was drafted to confirm the existing international human rights standards that apply to other peoples. Every paragraph was based on known instances of wrongs or violations of the human rights of indigenous peoples. It crystallized the rights of indigenous peoples in international law, which have moved from a normative status to a “hardened norm,” a legal regime (Henderson 2008, 51).

The process itself brought together hundreds of indigenous and non-indigenous peoples from all over the world to talk, share, and debate and eventually agree on what should be included. The process, Henderson adds, did not so much create new rights as it did document and interpret existing rights (ibid.). Ecuador played a pivotal role in supporting the draft UN declaration by virtue of its seat on the UN Human Rights Council. In June of 2006, Ecuador
joined 29 other countries, including Brazil, Guatemala and Mexico in recommending the Draft Declaration on the Rights of Indigenous Peoples be passed by the General Assembly.

Both Nicaragua and Ecuador have also been actively involved with both the UN Working Group on Indigenous Populations and the Permanent Forum on Indigenous Issues. The UN Human Rights Council is also involved with indigenous rights as part of its mandate. In 2001, while still operating as the Human Rights Commission, the office of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people was established. The Special Rapporteur conducts site visits in specific countries to investigate special cases and/or specific themes. Ecuador was visited in 2006, but thus far Nicaragua has not been singled out. After a site visit, information collected is then compiled into annual reports that are presented to the HRC.

When the Special Rapporteur was in Ecuador, he visited Sarayaku. He stressed that: “all Ecuadorian authorities comply with the provisions of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights in the Sarayaku case, and more specifically, that the State Procurator-General unconditionally uphold the unimpeded protection of the Sarayaku community, including its rights, its land ownership and the life and physical integrity of its members” (Stavenhagen 2006, 22).

The UN-sponsored visits constitute part of the international pressure placed on nations to comply with international norms for indigenous rights. The site visits not only raise attention to specific cases of rights violations, they also raise awareness, nationally and at the local level, of the role of the United Nations in the protection and promotion for indigenous rights. Each of the indigenous communities included in site visits receive a profound education in their international rights. They are at the same time enlightened and empowered. States too can be educated by these special visits. Agreeing to cooperate with the Special Rapporteur is a positive step towards resolving conflicts. It is obviously in the state’s best interest to appear supportive and respectful towards the internationally recognized rights of its indigenous populations.
There is evidence that the visit of the Special Rapporteur had a positive impact on indigenous rights in Ecuador. While, like everything else, it offers no panacea; little by little, these initiatives are changing indigenous lives. In Ecuador, just before the visit, the government legal team attempted to initiate a “friendly settlement” through the IACHR, although the community itself rejected the solution, not believing there was enough “good will” to pursue such an option. After the Rapporteur’s report was issued, the State finally agreed to pay for the clean-up costs for 150 kilos of explosive materials left in Sarayaku traditional territories after the withdrawal of CGC. Previously, the government rejected the clean-up plan as too expensive (“Minister of Energy and Mines visits Sarayaku.” Sarayaku News Update, Sarayaku.com 4/9/07).

In addition to the Special Rapporteur, the UN Human Rights Council (HRC) has been involved in the creation of a new mechanism to support the rights of indigenous peoples. The mechanism will be made up of five experts, nominated through governments, regional groups, NGOs, international organizations and/or individuals. The mechanism will review, study, and make reports to the HRC based on particular themes or issues. They will not adopt specific resolutions or decisions on individual cases, although of course, the HRC is free to do this. This new “expert mechanism” provides yet another vehicle through which direct participation and cooperation can deepen and strengthen national entrenchment of indigenous rights norms. While Nicaragua has not participated in this forum thus far, Ecuador has three representatives, one Canari, one Quichua and one Shuar that participated in the inaugural meeting.

The redesigned Human Rights Council is well placed to advocate for human rights and for indigenous rights. The mandate of the HRC, a subsidiary body of the General Assembly, requires all its 47 member nations to submit to a periodic review of their human rights record. The UN HRC is also available to hear rights violations as they pertain to indigenous populations. Nicaragua, as a member of the HRC must submit a report on its human rights record. Its Annual Periodic Review will be examined by a troika of the HRC during the 7th session early in 2010. This gives the country some time to clean up longstanding issues regarding women and children’s
rights especially, as well as thoroughly resolve outstanding indigenous land titling as ordered by the Inter-American Court of Human Rights.

A wide range of bodies in the UN have a role to play in promoting and supporting indigenous peoples’ rights. Many UN conventions have functioning monitoring mechanisms that have been used by indigenous peoples to defend their rights. Recently, the case of Awas Tingni was raised as part of the Observations to the Third Periodic Report by Nicaragua on its Compliance with the International Covenant on Civil and Political Rights written by the University of Arizona Indigenous Peoples Law and Policy Program in March 2008. In its official reply of October 7, 2008, Nicaragua assured the Human Rights Committee that the new “Government of Reconciliation and National Unity” was making indigenous issues a much greater national priority. For Awas Tingni, the government noted that the overlap issues had been resolved and the community signed an agreement in May 2008 that was subsequently adopted by the RAAN. According to the State reply the community would receive its title by mid-September, and this, in fact, has happened (Government of Nicaragua 2008).

The issue of indigenous rights was also raised by the Human Rights Committee in its Conclusions and Recommendations on the 94th Session on October 31, 2008 (UNOG Media Briefing October 2008). While not mentioning AT specifically, the problem of resource development in indigenous territories was raised, along with issues around health and education. This creates significant and ongoing pressure on Nicaragua to respect the rights of its indigenous peoples and to create and support an adequate legal framework that can make that happen. By making the government continually responsible for its actions, or lack thereof, the UN and other international organizations can slowly push national policy in the right direction. Given Nicaragua’s new presence on the Human Rights Council, there will be more pressure than ever on the state to respond to the human rights concerns of its indigenous populations, both within the Regional Autonomous Zones as well as the rest of Nicaragua. Since it assumed its seat in 2007, Nicaragua has already taken part in the Universal Periodic Review of other states and, as one of
its lawyers in the President’s office noted during an interview, “it is slowly becoming educated and socialized in international expectations” (Picado 2006).
Chapter 11  
From Global to Local and the State in Between

The fundamental question addressed by this thesis has been applicability of Risse and Sikkink’s Spiral Model of Human Rights change to the sub-category of indigenous rights in Latin America. In this case there are codified norms for indigenous rights as evidenced by rulings of the Inter-American Commission of Human Rights and the Inter-American Court of Human Rights in particular. Is there any evidence, that like the case of human rights before them, these new indigenous rights are slowly making their way into the domestic politics of Latin American nations? Has there been an indigenous rights norm cascade, and if not, can one be expected within the near future? Based on a careful examination of two cases in particular, there is reason for guarded optimism. While the process of norm internalization is slow and far from straightforward, there is evidence in both cases that the state is working its way through the stages of the model. Given the most recent announcement of land titling for Awas Tingni is December of 2008, Nicaragua has assumed the “prescriptive status” or stage 4 of the model, though application remains far from consistent. Ecuador, while still not attaining “prescriptive status” recently signed the UN DRIPS (2007).

The most intriguing empirical finding of this study is that despite the fact that many recognized conditions for norm internalization identified in the literature are more developed in Ecuador than in Nicaragua, it is Nicaragua that has progressed most. This suggests that not all variables are equally important and in fact, one of the most effective barriers to successful norm internalization is material interests. The sheer value of the resources at stake in Ecuador, the Amazonian oil, overwhelms the norm’s growing salience. Material interests can still trump moral concerns.
The indigenous presence in modern Ecuador is undeniable, unlike Nicaragua, where indigenous communities and issues barely register outside the Caribbean Coast region. The daily newspapers in both Quito and Guayaquil frequently include articles on indigenous issues, and many are sympathetic. Although the indigenous movement is currently divided due to internal conflicts between Amazonian and Sierra factions, both have long histories of organization and developing links with broader civil society. Through Pachakutik, for example, indigenous and non-indigenous actors developed a new political option that promised greater democracy and representation for average Ecuadorians. Pachakutik support has fallen at the polls recently, due to the personal charisma and leftist appeal of President Rafael Correa and the ability of former president Lucio Gutiérrez to maintain his own indigenous support bases as he prepares for his political comeback (Mijecki and Beck 2008). Still, Ecuadorian politics are predictably unpredictable. Correa has raised popular expectations and his ability to deliver on the inclusive political agenda that he promised remains to be seen. If they can overcome serious internal issues and focus on the “bigger picture” Ecuadorian indigenous organizations, like CONAIE, can once again capture a leadership position within civil society and the state.

Thomas Risse and Kathryn Sikkink argue that norms are socialized through three parallel processes: (1) adaptation and strategic bargaining; (2) moral consciousness-raising and argumentation and persuasion; and (3) institutionalization. Through these three types of social action principled ideas/international norms become slowly internalized via identities, interests and behaviour (Risse and Sikkink 1999, 12-17). Human beings are socialized creatures, and to induce change it is necessary to strategically shape this socialization process. In this case, it is social movements, and their leaders that play a key role.

This thesis has applied Risse and Sikkink’s human rights model to the specific case of indigenous rights. The authors suggest that at first, any state compliance or response to charges of human rights violations is purely strategic. State actors agree to conform to certain standards of behaviour in exchange for something else that they desire, such as foreign aid or to defuse
domestic opposition. The World Bank, for example, made loan assistance dependent on the fulfillment of an indigenous titling project that was to include Awas Tingni.

But motives and behaviour can change over time. In the case of indigenous rights, for example, participating in the drafting committees for the Indigenous Rights declarations at the United Nations and the OAS provided state and indigenous participants with years of opportunities to discuss debate and persuade each other what the appropriate standards should be. Through “moral suasion” state actors are educated in the ideas of human and indigenous rights and slowly have become more amenable to their inclusion in domestic law and policy. Throughout Latin America, for example, the end of the 1980s saw a significant surge in the recognition of indigenous rights in national constitutions. This process ensures the institutionalization of the norm. Once norms are institutionalized, however, there is still time before they become a habit and are completely internalized within the domestic legal framework.

Alison Brysk’s book, “From Tribal Village to Global Village” (2000) focuses on indigenous social movements and emphasizes the inter-relationships between the three different levels of study: the local, the national and the global. Through the Spiral Model, Risse and Sikkink formulated a comprehensive theoretical framework that analyzes the actors and processes involved at each these levels, including the mutually constitutive relationship between transnational and domestic civil society. Table 11.1 summarizes the actors and the actions that move the Spiral Model through each of the five stages.

Because domestic repression threatened many early indigenous attempts to organize, initial pressure was established in the international arena and was then used to create domestic space. Indigenous rights began to be codified through legal instruments back in 1959 at the ILO. Progress was made with the ratification of ILO Convention 169, the work of the Inter-American Human Rights system, the development of customary law and most recently the UN Declaration of Indigenous Rights (2007).
Table 11.1 The Spiral Model: Actors and Interactions

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From Risse and Sikkink 1999, 32

Internationalization provided much needed support to domestic indigenous groups who have been fighting for recognition of their unique rights since colonization. Along with key international organizations, strong indigenous leaders began to network globally and shape this new level of pro-indigenous activity. Local indigenous communities benefited significantly from the so-called “boomerang effect” as most nations have moved out of denial and into the tactical concessions stage at the very least (ibid., 19).

One key point that both case studies support is that the state will not engage in making tactical concessions (stage three) to indigenous demands in the absence of mobilization by domestic civil society; and the stronger the mobilization, the better. The liberal prescription for persuasion and argumentation is, on its own, insufficient to generate change when material interests are at stake. Simply asking for rights or recognition is not enough. Indigenous claims have been ignored for so long in the Americas; political responsiveness requires broad, attention grabbing and coalition building strategies. Indigenous organizations in Ecuador led a series of protests and uprisings beginning in the early 1990s that made government realize that they had become a force to be reckoned with. Likewise, the Sandinistas learned the hard way that the indigenous peoples of the Caribbean coast would not automatically join the revolution. Ultimately it was their often violent role in the Contra war that pressured the government to agree to regional autonomy.
What can be concluded from the above is that since Ecuador still finds itself in the tactical concessions stage, both transnational and domestic indigenous rights networks must be vigilant in maintaining pressure, raising key issues and organizing for and demanding change. Nicaragua, on the other hand, has moved towards the fourth stage of the model, prescriptive status. Here it is essential that domestic indigenous groups better organize themselves and, as emerging leaders in civil society, ensure progressive steps are taken by the government to further entrench norms through institutionalization and force of habit. This is likely to involve the creation of a truly national indigenous organization and the development of strong linkages with other marginalized groups in civil society. Nicaraguan Indigenous communities must develop and project their own alternative sources of power.

A second, more theoretical, conclusion is that on their own, ideational forces are not enough to promote real change for indigenous rights. In spite of the constructivist case, power politics remain significant. In both case studies, states were prompted to initiate real and substantive changes for indigenous rights only after a major indigenous uprising. For otherwise powerless groups, uprisings and mobilizations offer indigenous communities the opportunity to challenge powerful elite interests.

In the Amazon, for example, Sarayaku members kidnapped CGC workers, attacked company infrastructure and generally undermined the profitability and stability of oil concessions. Although financially and numerically insignificant, this local community was able to engage in local acts of protest that had a global impact. Their acts of disruption and sabotage were important because they effectively undermined the expected rate of return on investment. The more indigenous communities disrupt production on their territories, the less likely TNCs will want to invest there. Although some state sponsored oppression may take place, this can create a human rights nightmare in the media. Further, even if the state is insensitive to negative media coverage, TNC shareholders may not be. In the case of Sarayaku, CGC withdrew from its concession because not only was the cost of production rising, shareholder tolerance for its
encroachment in the Amazon had reached its limit. This was due to a Sarayaku community strategy to take its protest to Buenos Aires, Argentina where the CGC offices were located (Santi 2005).

Similarly, it took the violence associated with indigenous participation in the Nicaraguan Contra war to ultimately “encourage” the FSLN government to undertake an important autonomy agreement. While constructivists might argue about the growing power of ideas, it is clear in both cases that it is the power of brute force that ultimately propelled real and meaningful change. This supports the argument of Samuel Barkin (2003) concerning the need for a realist constructivism. While it is clearly useful to examine international relations as a social construction, it does not undermine the central, although not singular, role of states and power in the world of international politics. Particularly in the case of indigenous rights to property, ideas alone are not enough to change state policy.

11.1 The state and international norms

In Ecuador, the indigenous population has been active in civil society mobilizations against the government for two decades. A broadly-supported indigenous uprising in 1992 paralyzed the capital city of Quito and forced the government to the negotiating table. Quichua, Achuar and Shiwar protestors marched over 250 kilometers from Pastaza province in the Oriente up the Andes and into the plaza surrounding the presidential palace, where they were met by hundreds of soldiers dressed in riot gear and accompanied by horses, dogs and tanks. This less-than-cordial welcome forced the marchers to an alternative destination some five blocks away, at the Plaza de San Francisco, however they were not dissuaded from their main goals: communal title to two million hectares of indigenous territories in Pastaza province and constitutional change for a plurinational state (Sawyer 2004, 40-42). They were ultimately successful. Title was issued to a number of communities and the Ecuadorian Constitution was changed in 1998 by the Popular Assembly to recognize the special rights of its indigenous population. While the concept of
Plurinationalism, articulated most clearly by Pachakutik, has not yet been incorporated, indigenous nationalities are recognized as a unique and indivisible part of the Ecuadorian state (Chapter 5, Art 83).

As predicted by Risse and Sikkink, effective civil society takes a two-pronged approach, simultaneously lobbying international support and generating domestic level pressure. What they do not specify, however, is that this domestic pressure must include the generation of alternative forms of power in order to show the state they mean business. Protests, petitions, and public campaigns are much more successful when they clearly demonstrate that a significant cost, material and political, can be attached to their continued denial of rights.

In addition, progress in both case studies before the Inter-American Commission of Human Rights and the Inter-American Court of Human Rights would not have been possible without considerable funding and technical support from international NGOs, legal teams and other activists. Local indigenous leaders, mobilized through their participation in new transnational indigenous projects, like the UN Declaration on Indigenous Rights and the OAS Draft Declaration, have been well-placed to participate in international forums and build strong, supportive networks. Both Sarayaku and Awas Tingni have nurtured a new generation of leaders raised with traditional cultural values but also educated in the international realm of legal rights. Without them, their dedication and hard work, even in the face of death threats and other abuses too numerous to mention, progress would not be possible.

And there has been progress. Although Ecuador remains in a state of denial regarding much of the IACHR/CIDH ruling, the Argentinean Company CGC voluntarily withdrew from Sarayaku territory in early 2003 and, for the moment anyway, seismic exploration has stopped although there was significant controversy over the explosives they left behind. Sarayaku leaders have been very successful at garnering international attention and support to their plight. They have worked with indigenous rights and environmental protection NGOs as well as the local organization
OPIP, which has helped them plan and implement their own eco-tourism development project. While the power they projected did not change state policy, it did change the policy of CGC.

There has been some evidence that the state is slowly responding as well. In late 2007, President Correa’s minister of energy and mines, Galo Chiriboga, committed to the expense of removing the CGC explosives. After a visit to the community, he announced: “The Ecuadorian state will respond positively to the international community, accepting as cautionary measures the withdrawal of the pentolite” (Sarayaku.com news update 04/09/07). Hopefully, if Ecuador’s signature on DRIPS is sincere, and indigenous pressure remains consistent, the issue of forced concessions will be a thing of the past.

In the case of Ecuador there is an evident, if slow, spiraling process that began with participation of indigenous representatives in the Popular Assembly of 1998. This event triggered the signing of ILO C169 and constitutional changes for indigenous rights. The study ends in 2007 with the signing of an international declaration that includes strong protection for indigenous rights to lands and territories and for the resources within them. The UN DRIPS includes an unprecedented clause which requires “free, prior and informed consent” to any economic development project located on the traditional lands or territories:

**Article 32**

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories or other resources.
2. States shall consult and cooperate in good faith with indigenous peoples concerned through their own representative institutions in order to obtain their **free prior and informed consent** prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources (emphasis mine).

If implemented, this amounts to an effective veto over government decision-making in indigenous territories. The respect and enforcement of this new mechanism of customary law would empower indigenous communities like Sarayaku to take control of their land, resources and even more importantly, their future development. Unfortunately, this is exactly what Correa
blocked from inclusion in the new constitution. Instead article 84 of the Ecuadorian Constitution (2008) on indigenous rights emphasizes consultation rather than consent. Indigenous peoples have the right to “be consulted on plans related to programs of exploration and exploitation of non-renewable resources found on their lands and those that may have detrimental environmental and/or cultural affects.” As well, they have the right “to have a share in the benefits that these projects will bring as soon as possible and to receive compensation for the socio-environmental damage they cause.” This language is similar to ILO C169 and provides no real assurances for indigenous communities. The “honeymoon” period between Correa and indigenous Ecuador has ended. Ecuador’s signature to the DRIPS has yet to be interpreted internationally in light of weak constitutional support; nonetheless it is clear that a real struggle for realization lies ahead.

Given the international legal significance of the DRIPS it is surprising that it received such a broad level of support from the UN General Assembly (GA). Ecuador co-sponsored its introduction at the GA, as part of its duties under the HRC. A total of 144 nations signed the Indigenous Rights Declaration, with only a small handful rejecting it outright. All Latin American nations, with the exception of Colombia, supported the DRIPS (2007). Canada and the United States both rejected the Declaration and have publicly stated they are not comfortable signing an agreement that includes an indigenous veto to development projects on indigenous lands, among other things. Because of entrenched systems for rule of law, the cost of signing, then ignoring such Declarations is much higher in western developed nations that in their Latin American counterparts. Indigenous support is, of course, sweeping. While there may be some indigenous groups who believe the Declaration does not go far enough, none will argue that the twenty year negotiation process was a waste of time and resources. Indigenous communities in both Canada and the US have been lobbying their respective governments to reverse their positions, especially after the recent reversal of Australia’s position on the document.

The only other exception to the UN DRIPS in the Americas is Colombia, which abstained. It is currently facing significant indigenous lobbying to change its position. In the fall of 2008,
Colombian indigenous peoples orchestrated a 40,000 strong MINGA, or indigenous protest, marching from the town of Popayan in the Cauca region, to Cali and Bogotá, demanding that President Alvaro Uribe sign the Declaration. Uribe agreed, with some limitations; however his position was rejected by MINGA leaders (El Tiempo 24 October 2008).

The broad acceptance of the DRIPS by nations in Latin America and globally can be seen as strong evidence that indigenous rights norms are becoming more and more salient. Already a part of international customary law, international indigenous rights are being, albeit slowly, transferred into domestic law. This is most obvious in the case of Awas Tingni. In response to the IACHR ruling, and with support from the World Bank, Nicaragua developed Law 445 on indigenous land titling and demarcation. The law, which came into effect in 2003 led to the issuing of new land titles for Mayagna Sauni As, and Li Lamni Tasbaika Kum in the RAAN as well as Miskito Indian Tasbaika Kum, Kipla Sait Tasbaika and Mayagna Sauni Bu in the Rio Coco region in 2007. In May 2008, titles were also granted to the unified territory of Awaltara Luhpia Nani within the Bluefields region of the RAAS which benefited some 16 indigenous communities, covering a total of 241,306.08 hectares (Government of Nicaragua, 6 October 2008).

The clearest evidence of the success of Law 445 however has to be the much-anticipated issuance of title to Awas Tingni which happened just after the research for this thesis concluded. Following a ruling by the Inter-American Court of Human Rights and seven years filled with active lobbying, coalition building, and negotiating by local and international community representatives the government of Nicaragua finally complied with its internationally recognized obligation. On December 14, 2008 in a special ceremony organized by the government of Nicaragua, Awas Tingni received title to 74,000 hectares of its ancestral territory. It was appropriate that the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, and former Awas Tingni legal advisor, James Anaya was present at the ceremony. He commented:
This affirmative step by the Government of Nicaragua represents an important advancement in the rights of indigenous peoples worldwide. In addition, it provides a model for other Governments to comply with their international legal obligations to recognize and protect the rights of indigenous peoples to their traditional lands and resources in practice (UN Press Release 17 December 2008).

As Anaya suggests, compliance with the landmark ruling represents another important step in the transformation of indigenous rights into customary law. By using the language of “international legal obligations” he is confirming normative recognition of indigenous rights to lands and resources. He also recognizes the importance of making these norms reality “in practice.”

As further evidence of Nicaragua’s position within stage 4 of the model (prescriptive status), the Ortega government used the land titling ceremony as an opportunity to differentiate itself from its political predecessors in terms of respect for human rights, and indigenous rights in particular. The event included representatives of the president, the attorney general, the regional Council as well as the Awas Tingni community. Legal title was procured by the attorney general, Hernan Estrada, in a formal ceremony. “We have complied with the titling, because the government of President Ortega supports Human Rights and is a faithful believer in the Political Constitution of Nicaragua, which recognizes the rights of these communities, the Autonomy Law and Law 445,” he explained (El Nuevo Diario 15 December 2008).

Although it took years to achieve, Nicaragua’s compliance with the Inter-American Court of Human Rights ruling for Awas Tingni and other indigenous communities, taken in conjunction with its signature on DRIPS, suggests that the government of Nicaragua is making real progress towards the implementation of legislation for indigenous rights. As the Spiral Model predicted, tactical concessions made in response to international pressure from the international courts, the World Bank and pertinent NGOs, pushed the state towards compliance, even in the face of weak domestic political structures and undeveloped domestic salience. While the government of the FSLN has not been known historically for its sympathetic position towards indigenous rights, it is slowly edging its way towards rule consistent behaviour (stage 5).
There are two main reasons that progress in Nicaragua is more evident than in the Ecuadorian case. First, as already noted, material interests weigh much more heavily in Ecuador. Oil and mining represents a crucial source of revenue for the state and its elites. Even with strong international and domestic pressure, material pressures are even stronger. By contrast, the government of Nicaragua had already transferred jurisdiction over coastal resources to the regional government and therefore had nothing material to lose from implementation. Rather, they had something to gain.

This introduces the second key difference between the cases. Nicaragua is, for a number of reasons, more open to international influences and opinions. While Nicaragua and Ecuador are both categorically “developing” countries, Nicaragua is significantly more indebted and impoverished. Accordingly, it is much more dependent on external aid for survival. International financial institutions, foreign aid, and transnational NGOs have a great deal of influence over the economy and the country. The International Monetary Fund’s Heavily Indebted Poor Country Initiative (HIPC) includes conditions for good governance, accountability, poverty alleviation and human rights. To maintain standing in this program, Nicaragua must comply with its requirements. Just as Ecuador is highly dependent on oil revenues, a factor that hinders the case of Sarayaku, Nicaragua is dependent on foreign assistance, a factor which benefits its indigenous inhabitants. International financial and aid organizations are much more supportive of indigenous rights norms than transnational oil companies and ultimately it was World Bank policy that pressed for the indigenous land titling. In the face of weak domestic institutions, endemic corruption and vested interests, it took World Bank insistence to include an indigenous land titling component in its overall Land Administration project that was worth more than $30 million dollars to government coffers. This was ultimately the mechanism with which Awas Tingni was able to achieve full implementation of its 2001 CIDH ruling (Picado 2006a). Back on the ideational side, given its new position of the UN Human Rights Council, Nicaragua has everything to gain by complying with international human rights courts.
11.2 Conclusions and next steps

Powerless people can change their lives and their world by projecting new identities and ideas into the global arena. This process can build community, convince some of the powerful, reshape patterns of rules and institutions, and inspire others to make common cause with the excluded (Brysk 2000, 53).

While these two particular case studies both end on a positive note, one with full compliance by the Government to the CIDH ruling (2008) and the other with virtual compliance\(^\text{31}\) (2003), this does not yet indicate a “norms cascade” for indigenous rights. One needs only look as far as Ecuador’s Andean neighbor to the north, Colombia, to find a plethora of cases involving indigenous repression and denial of rights. Currently there are several cases before the CIDH and resolution does not appear imminent.

Despite the existence of a strong transnational indigenous movement, and the ever increasing inter-connectivity linking indigenous communities across the globe, there are still thousands of individual indigenous communities that exist “off the grid.” The poorest of the poor, many indigenous communities remain isolated, marginalized and without the ability to muster attention in an internationally competitive market for donors and patrons. Both Sarayaku and Awas Tingni have benefitted from hundreds of thousands of dollars worth of legal support, advocacy, marketing and promotion. But for every internet-savvy indigenous community with a transnational team of legal advisors there are hundreds of others who do not have the leadership, the connections, or the resources to garner international attention or support.

One objective behind the examination of historical case studies through a theoretical frame is to determine some predictable pattern. In this case, identifying this pattern would assist those working in the field, with states that appear stuck in the early stages of repression or denial by pointing to appropriate strategies both “from above” and “from below.”

The Spiral Model, in its original presentation, was developed with empirical evidence gathered from a total of eleven case studies which the authors argue all fit well. Not surprisingly,

\(^{31}\) CGC is no longer engaging in oil exploration or drilling activities within the Sarayaku community.
one key consideration is the amount of time it takes for each country to work through the model. This is due to domestic political conditions, such as those examined in this thesis: structural context, norm salience, material conditions and international influences.

Each variable represents a real challenge throughout Latin America. In newly established democracies, many of which have become more delegative than representative, domestic structures in state and society are weak. The case studies illustrate that poor governance, growing corruption, uneven rule of law, low levels of accountability as well as economic and political instability have created governments that are susceptible to elite control. This exacerbates the problems of material interests. In states like Ecuador and Nicaragua, endemic corruption have closely tied elite and state interests through the provision of irregular fees for concessions, preferred contracting practices, personal favor granting with public resources, and other conflicts of interest.

In Ecuador, norm salience is one area where there has been an improvement. Indigenous leaders have, for better or worse, entered the national political arena and are making headway in legitimizing indigenous claims. While this has not eliminated racism or marginalization, it has increased the awareness of the general population of the indigenous movement in Ecuador and its main demands. Taking their lead from the human rights movement, indigenous leaders have been able to press for indigenous rights both nationally and internationally. Human rights are appealing due to their universal nature. Because they apply to everyone, everyone can support them with little difficulty. Indigenous rights, however, imply special rights for a particular segment of the population, a concept that is not easily reconcilable with liberal notions of equality. That stated, this thesis has shown that here has been real progress made concerning the domestic internalization of international norms for indigenous peoples’ rights in Ecuador and Nicaragua. Although in Ecuador, as noted, material interests remain a real problem.

A promising direction for future research would be to broaden the empirical study to include indigenous rights struggles in other Latin American nations. As mentioned earlier in this
document, there have been a number of important cases brought before the CIDH including Guatemala (2004), Paraguay (2005), Colombia (2007), and Belize (2007) among others. Examining these additional cases, and any others that may have arisen recently, is the only way to determine if there has been any discernable “norm cascade” or if it appears that a cascade is forthcoming.

We should not lose sight of the fact that material interests are a significant barrier to the internalization of international norms for indigenous property rights. In Ecuador, despite other favorable conditions, the value of the oil and other subsoil resources (minerals) in recognized indigenous territories is simply too lucrative for successive governments to admit that they do not hold the property rights historically associated with their national sovereignty. More research is needed to determine if there are any effective strategies which might offset such interests, i.e., greater international pressure, IFI policy application, domestic uprisings, protests and the like. Early evidence would suggest that the more indigenous communities are able to generate counter-hegemonic sources of power, through popular mobilizations and uprisings, the more likely the state will move to accommodate their interests.

At the other end, an important factor in the success of Awas Tingni is the high degree of international openness of the Nicaraguan state. Due to extreme poverty and high level of dependence on international aid and NGOs, the government is highly susceptible to international pressures; more so than their Ecuadorian counterparts. This has helped overcome a real and continuing problem in indigenous Nicaragua, the lack of partnerships and real cooperation within and between indigenous communities. Although the Miskitu on the Caribbean coast have been able to develop alternative sources of power in national politics, including their own political party, YATAMA, other Nicaraguan indigenous groups struggle for even recognition. There is a real need for a strong national organization to support indigenous interests in the national arena.

One thing is very clear: the size and strength of international pressure is building steadily. New international human rights organizations, like the UN office of the Special Rapporteur for
Indigenous and Tribal Peoples, the new Human Rights Council, and its newly forming Expert Mechanism on the Rights of Indigenous Peoples (2008) are poised to increase the already significant pressures on Latin American states for norm compliance. The size of this new international architecture is promising, if still untested.

The most important lesson of the Spiral Model is that indigenous communities and their advocates must ensure states are being effectively pressured from above and from below, and that this pressure needs to be continuous. The transnational indigenous rights network, including NGOs, UN and OAS Working Groups, international organizations, academics and legal advocates, have made a huge difference in terms of improvements for respect of indigenous nations, cultures and rights around the world but their work is far from done. Domestic indigenous groups generally still need significant technical and especially financial assistance to realize their full potential in terms of organization and lobbying. Transnational movements also play an ongoing role by casting international light on harmful or negative state actions and invoking shame when necessary. In many cases, this can protect indigenous lives. Clashes over property rights can trigger violent military inventions, as seen recently in Colombia and Peru.

Indigenous peoples have taken the lead in fighting for their rights within the national and international arenas. They are not, and have never been, passive subjects in international or national politics. Domestic indigenous communities, organizations and leaders have played a crucial role in shaping the transnational agenda and fostering domestic change, not just in terms of their own rights, but also by providing an important alternative vision of the world, the economy and the environment that supports the human rights of everyone. In this way they have created, as Alison Brysk (1999, 41) noted, a counter-hegemonic appeal that goes beyond ethnicity to create alliances and coalitions with other segments of civil society: “Mobilized Indian communities raise a simultaneous premodern and postmodern challenge to the hegemony of positivism, progress,
individualism and the state system.” It is only through these linkages with groups throughout civil society, that indigenous rights can achieve national salience and subsequently real power.

Key partnerships have been made between indigenous and environmental social movements, although these are not unproblematic. By emphasizing this relationship, ordinary citizens can support the application of special rights to indigenous populations, because the net effect potentially benefits everyone through a cleaner environment. This is not to say that every indigenous community is interested in traditional livelihoods and environmental management. In fact, many communities are not. But when there is a shared agenda, this holds significant political value.

Finally, the best way to make political actors responsive to indigenous issues is to ensure all citizens are well informed. Knowledge is another form of power, and educating both indigenous and non-indigenous communities about indigenous rights and histories is an important process to build norm salience and facilitate change. Many citizens are unfamiliar with indigenous views of history and have been raised with racist ideas about indigenous culture. Civil society, as seen in Ecuador, can provide new opportunities for agenda sharing and cooperation and this can go a long way towards eliminating longstanding ignorance.

While some scholars, including Deborah Yashar (1999), have echoed fears about the undemocratic nature of indigenous resistance, this thesis supports a more optimistic view. By demanding inclusion, representation and voice in national government, for not only the indigenous communities, but other marginalized populations as well, indigenous leaders can contribute significantly to the strengthening of Latin American democracies. Successful indigenous rights campaigns should be about transforming the state, not weakening it.
Table 11.2 Variables Impacting the Implementation of International Norms for Indigenous Rights.

<table>
<thead>
<tr>
<th>Variables</th>
<th>Indicators</th>
<th>Ecuador</th>
<th>Nicaragua</th>
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</table>
| **Domestic Structural Context** | State structure (weak vs. strong)                                                             | 1. Effective governance  
2. Corruption  
3. Rule of law  
4. Voice and accountability  
v. Economic and political stability  

1. According to WB data, Ecuador and Nicaragua rank at the bottom of regional statistics in terms of effective governance.  
2. Corruption is endemic and has been worsening over time. CPI rank of 150/179 nations.  
3. Rule of law weak and deteriorating. Low confidence in justice system.  
4. Poor representation in government, populism, “delegative democracy.”  
v. Economy weak, crisis prone, political stability likewise. Poor support for democracy (35% in 2007).  

1. According to WB data, Ecuador and Nicaragua rank at the bottom of regional statistics in terms of effective governance.  
2. Corruption has also been worsening over decade with the entrenchment of El Pacto. CPI rating 123/179 nations.  
3. Also weak and deteriorating during study timeframe.  
4. Also “delegative democracy”. Further decline expected as el Pacto effects are felt.  
v. Economy endemically weak and under-developed. Second poorest nation in hemisphere. Politically more support for democracy, however the cumulative effects of el Pacto are undermining democratic performance. |
| Societal structure (weak vs. strong) | 1. Strong civil society  
2. Linkages with government  
3. Ability to disrupt government  

1. Active civil society, led by indigenous groups, other groups weaker, some local and international NGOs  
2. Some groups more powerful than others, i.e. consumer and business groups  
3. Ability to disrupt governments, popular uprisings to remove presidents outside of elections.  

1. Civil society slowly growing, some strong groups, including women’s and environmental movements. Both suffer high level dependence on foreign NGOs tends to undermine credibility;  
2. Domestic civil society tends to be co-opted by political parties, especially FSLN,  
3. Protests emphasize reactionary, tend to be isolated, poor coordination. |
| Structure of indigenous groups (nationally coordinated vs. regional, fragmented) | 1. Active organizations  
2. National/ regional structures and mandates  
3. Accountability  
4. Overall coherence  
v. Role of NGOs  

1. There has been strong national organization through CONAIE and others,  
2. Historically linked to regional and community groups. Strong regional representation in Sierra and Amazon regions. There has been a coherent national agenda, although there are weaknesses.  
v. Some communities and organizations have been very successful developing partnerships with NGOs.  

1. Weak national representation, indigenous communities outside of RAAN/RAAS are ignored by everyone;  
2. Strong divisions on Coast between indigenous groups  
3. Weak groups with no national agenda, organizations outside of the Coast are ad hoc organized based on sporadic funding.  
4. No national agenda  
v. Strong NGO presence in Nicaragua, some indigenous communities have benefited. |
| Policy Networks (consensual vs. polarized) | 1. Partnerships  
2. Indigenous participation state politics  
3. Domestic conflict  

1. There have been some indigenous-non indigenous partnerships through the religious organizations, cooperatives, human rights and environmental groups, and the Coordinator of Social Movements (CMS).  

1. There have been few partnerships between indigenous and non-indigenous groups. Indigenous communities on the Coast are ethnically divided.  
2. The Miskito party YATAMA has struggled to survive, but won an important case in the IACHR that challenged |
### Variables

<table>
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<tr>
<th>Indicators</th>
<th>Ecuador</th>
<th>Nicaragua</th>
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<tr>
<td>levels</td>
<td>ii. There has been some participation, through the political party Pachakutik and through individual indigenous leaders running for traditional political parties. iii. Indigenous organizations have been very successful at the politics of protest. With uprisings, marches, etc. This has waned under the Correa government.</td>
<td>the Pact’s election rules. Still, they remain a regional party, with little voice in the National Assembly. Officially YATAMA has given its support to the FSLN. iii. While there have been public protests and demonstrations against El Pacto, and other unpopular government policies, these are isolated and change little.</td>
</tr>
</tbody>
</table>

### Norm Salience

<table>
<thead>
<tr>
<th>Changes in government discourse over timeframe (1997-2007)</th>
<th>i. Initially government very unsupportive of Sarayaku case and the interference of the IACHR.</th>
<th>i. FSLN has recognized the importance of regional autonomy made a political deal with indigenous party YATAMA for Coastal support in 2006.</th>
</tr>
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<td></td>
<td>iv. 2007 Correa inauguration addressed nation in Quichua, underwent indigenous ceremony</td>
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<td></td>
<td>v. Government news releases on Sarayaku situation (pentolite, arrests etc) not supportive.</td>
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### Changes in national institutions, i.e. norms in constitution and/or domestic law

| i. Constitutional changes | i. Indigenous role in National Assembly 1998 | i. Autonomy law 1987 |

### Participation in Indigenous Rights Negotiation Sessions, signing documents, etc.

| i. Participation of state in Draft IR Declaration negotiation sessions | i. Ecuador signs ILO C169 1998 | i. Nicaragua takes VP position of OAS Draft Declaration working group 2006 |
| | iv. Ecuador signs UN DRIPS 2007 | |

### Indigenous Community in the news

| ii. Coverage of case study community issues | ii. More news coverage on indigenous news | iii. Limited news coverage on indigenous issues in |

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<tr>
<th>Variables</th>
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<th>Nicaragua</th>
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<td></td>
<td></td>
<td>in general. Archives search of two main newspapers found that El Comercio printed 8011 articles on indigenous issues between 2002-2009 while El Universo printed 4,910 articles.(^{34})</td>
<td>general. Both El Nuevo Diario and La Prensa printed only 10 articles on indigenous issues between 2000-2009.</td>
</tr>
<tr>
<td>Material Constraints</td>
<td>Estimated cost implementation</td>
<td>1. Land already titled, key cost is value of oil in territories: potentially worth billions, depending on barrel price and actual size of reserves.</td>
<td>1. Significant procedural costs for land demarcation and titling: regional endeavor however costs have been subsidized by WB.</td>
</tr>
</tbody>
</table>
|                           | Opportunity cost implementation                | i. Lost revenues  
ii. Lost taxes, employment etc.                                                                                    | Jurisdiction over land and resources in RAAN has already been given to regional government                                                |
|                           |                                                | i. Forgone concession fees, state share of oil profits  
ii. Federal budget is highly dependent on these revenues, no immediate alternatives for generating revenue.  
iii. There is a cost associated with appearing “unfriendly” to foreign investment. |                                                                                                                                              |
ii. Member of UN Human Rights Council 2006-2007, co-sponsored DRIPS as part of its obligations.\(^{35}\)  
iii. Sarayaku has international relations designate, Jose Gualinga who travels abroad advocating for community. | i. 2007 EU announces 20.5 million dollars aid to Indigenous Groups, facilitated through European NGOs: goals include building nation-wide consensus.\(^{36}\)  
ii. Member UN Human Rights Council 2008-2010 |
|                           | Desire to attract foreign investment           | i. Government views oil development in the Amazon as ticket to development. Budget highly dependent on oil revenues.  
ii. New sustainable mining policy (1998) encourages foreign firms to invest in Ecuadorian resources – ignores indigenous rights. | i. Emphasis on development trade (agriculture) primarily with US market, interested in some tourism development.  
ii. Regional Autonomy emphasizes local control over economy and resources. |
|                           | Pressures from other international organizations WB, IADB | 1. Indigenous peoples policies  
ii. indigenous specific funding                                                                 | i. significant pressure from WB and IADB for land demarcation and titling  
ii. Nicaragua highly dependent on multilateral and bilateral foreign aid.  
iii. High degree of NGO involvement and influence in Nicaragua                                                                 |

\(^{34}\) Main newspaper archives were searched under the terms “indigena” and indígenas.” Case searches used terms: “Sarayaku” and Awas Tingni” Archives were available online and varied in start dates from 1998 (El Nuevo Diario, Managua) to 2003 (El Universo, Guayaquil).


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Appendix 1
Field Research Notes

Primary data for this thesis was collected through a series of interviews with key stakeholders in Washington DC, Quito, Ecuador, as well as Managua and Bilwi in Nicaragua. Key informants provided information and updates for both cases on an ongoing basis. Data was also collected via archival searches at universities in Quito (FLACSO), Managua (UCA) and Bilwi (URACCAN), a number of NGO offices, the archives of major newspapers in both Quito and Managua, namely El Comercio and El Universo in the former; El Nuevo Diario and La Prensa in the latter, as well as the court documents of the Inter-American Commission and Court of Human Rights. In addition, a number of statistical documents were used extensively, including the Latin American Public Opinion Project (LAPOP) out of Vanderbilt University, CIVICUS World Alliance for Citizen Participation reports and the World Bank Governance Indicators.

Field research took place in Ecuador during the months of June and July in 2005. I stayed at the bed and breakfast operated by an indigenous couple. They recommended a number of indigenous communities to visit to learn more about Ecuadorian indigenous culture, including the world-famous indigenous market town of Otavalo and the less reknown artisan community of Salasaca in Tungurahua province. In Salasaca, I met with Alonso Pilla, who took me throughout the community’s territories on horseback, explaining both its history and some of its sacred/traditional teachings. These side trips provided me with a greater understanding of indigenous communities and issues in the Ecuadorian highlands.

While I was in Quito, contacts were established with the FLACSO office in Quito as well as the Quito branch offices of two local NGOs: Amazanga, which supports
indigenous rights in the Amazon, and the Centre for Economic and Social Rights (CDES), which has a broader human rights agenda. Archival research was done at all three locations and I am grateful for all the files and materials that were made available to me.

Interviews were arranged with the lawyers, activists and academics that were actively involved in the case of Sarayaku. The first interview for the case actually took place in Washington DC at a meeting of the Working Group on the OAS Draft Declaration on Indigenous Rights in November of 2004. Preparatory materials for the Working Group included a huge volume of all the cases before the Inter-American Commission and Inter-American Court of Human Rights pertaining to indigenous rights. It was illuminating to watch the drafting process which included long, complicated and ultimately political discussions over specific words and phrases. As of 2008, this process had not yet been completed. It is not surprising that the drafting process of the United Nations Declaration on the Rights of Indigenous Peoples (DRIPS) took over a decade!

The main table was filled with national delegates to the OAS, while the indigenous caucus sat together at one end of the room. It was during this three day meeting that I was able to meet with the leader of Sarayaku, Marlon Santi who was part of this caucus. There were, in fact, indigenous representatives from all over the Americas, including Canada and the United States. It was clear that indigenous representatives were using the opportunity of the drafting session to meet, network and share their concerns regarding their rights on both a formal and informal level. This is an essential part of the transnationalisation of the indigenous movement that plays such an important role in this thesis.
In Quito, I interviewed activist scholar Pablo Ortiz, with the Amazanga institute. I had been referred to him by Professor Liisa North at York University in Canada and had actually met with Ortiz briefly a few months earlier, in February of 2005 at a conference at York entitled “Indigenous Struggles in the Americas and around the World: Land, Autonomy and Recognition.” At that same conference, Professor Tanya Korovkin presented her research on “Oil companies and indigenous peoples of the Ecuadorian Amazon”. Pablo Ortiz provided me with a number of archival materials, books and articles on Sarayaku and oil development within the Ecuadorian Amazon. Subsequently, after the formal interview, he became a key informant. We chatted extensively in Quito regarding the situation of Sarayaku and the effects of oil development in the Amazon. Once I left Quito, we maintained regular contact through email.

Also in Quito, I met and interviewed Mario Melo, a lawyer for CDES who, with Jose Serrano comprised the legal team for Sarayaku. Serrano was in Costa Rica at the time, presenting before the CIDH on the case. Melo also provided me with a number of historical documents on Sarayaku and oil development in the Amazon, as well as more general activities of the human rights NGO, CDES. He also became an informant, and we maintained email contact after my return to Canada.

Through Dr. Jorge León, I was able to arrange a meeting with the Julio Gonzaléz, the Pachakutik Deputy to Congress representing the Amazonian province of Sucumbios. Gonzaléz was particularly active in protecting the fragile eco-system of his home province from the environmental destruction caused by oil exploration and extraction. He had, in the past, worked with a number of NGOs, such as Acción Ecología, to protect vast tracts of the Amazon. He personally believed the transnational indigenous and environmental movements shared a lot of common ground. Meeting with Gonzaléz was a
daunting task for my first week in Quito. The government building where his office was located had suffered serious vandalism during recent protests and the bottom floors were emptied out, due to damage. The building was surrounded by a ten foot barbed wire fence and guarded around the clock by security officers with machine guns.

While I was in Washington, I was able to meet with representatives from the American Indian Law Resource Centre. They had been involved in the Awas Tingni case prior to James Anaya and the University of Arizona Rutgers College of Law. They provided me with contact information for a number of key members of the Awas Tingni legal team, including James Anaya and Luis Rodríguez Piñero from the University of Arizona, Dr. Lottie Cunningham a Miskitu lawyer and activist from Bilwi, and Melba McLean, an Awas Tingni leader and scholar who worked out of the Regional Autonomous University of the Caribbean Coast of Nicaragua (URACCAN). I contacted them via email prior to my trip to Nicaragua which took place in June and July of 2006.

Prior to my trip to Nicaragua, I was able to conduct telephone interviews with both James Anaya and Luis Rodríguez Piñero. They were able to recommend a number of articles that had been written about the case, as well as a couple of key Nicaraguan journals. The online archives of Revista Envío were used extensively as well as the quarterly bulletins put out by the law school, updating the situation of Awas Tingni between 2006 and 2007. Pouring through the archives of Wani-Revista del Caribe Nicaragüense, at the URACCAN provided me with a much deeper understanding of the unique culture of the Caribbean Coast.

In Nicaragua, interviews were conducted in both Managua and in Bilwi (formerly known as Puerta Cabezas). As in the Sarayaku case, participants were chosen for their particular expertise in the Awas Tingni case. My first interview in Managua was with
activist/lawyer Mario Rizo, who had been actively involved throughout the long history of Awas Tingni. He provided me with the names and contact information for the Nicaraguan government’s legal team, based out of the offices of Nicaragua’s Secretariat for the Affairs of the Atlantic Coast (SEPCA). The main office of SEPCA was located at the office of the President. I visited both SEPCAs main and satellite offices, as well as its office in Bilwi. I met with a number of SEPCA staff and was provided generous access to files, documents and archives. While I was at the SEPCA office in Bilwi, I was also able to attend a planning meeting with Awas Tingni to discuss the technical aspects of land titling under Law 445.

Before going to Bilwi, on the Caribbean Coast, I interviewed Dr. Maria Luisa Acosta of the Center of Legal Assistance for Indigenous People (CALPI). Dr. Acosta has been a strong and tireless voice for indigenous peoples’ rights in Nicaragua for many years. She had been working out of her office in Bluefields, when her husband was murdered in their family home in an attempt to silence her campaign for indigenous land rights at Monkey Point. I also interviewed Miskitu lawyer, Dr. Lottie Cunningham, who has been an active member of the international indigenous rights community, and had done some earlier work on the Awas Tingni case.

The flight to Bilwi, Nicaragua was via a small airplane that flew back and forth from Managua twice a day, six days a week. What the plane ride lacked in comfort, it compensated for with a tremendous view of the Caribbean Coast region, its winding brown rivers and lush tropical forests. The taxi ride from the airport was itself an ordeal. The road is unpaved, extremely winding and subject to frequent wash outs from rain. Thanks to the generosity of Dr. Lottie Cunningham I was able to set up in the office of the Atlantic Coast Justice and Human Rights Center (CEJUDHCAN), local human rights
NGO. There, I was able to meet and interview local human rights workers, and enjoy the only wireless internet access in the region. Service was rolling, however, as brown outs were frequent, not only on the Coast, but throughout the country, including Managua. My make-shift office consisted of a small wooden desk in the middle of a file room. One of my daily struggles was the constant relocating of the desk to avoid the many leaks in the roof during early afternoon downpours. My other struggle was to get accustomed to the millions of tiny ants that took over the coffee room. It was literally impossible to fix a cup of coffee, with powdered milk and sugar, without including hundreds of those little critters. In addition to local human rights workers, I was also able to interview Awas Tingni leader, Melba McLean, and SEPCA lawyer, Dr. Octavio Picado on the coast. I did archival research at the library of the URACCAN and the SEPCA offices.

While indigenous leaders, lawyers and activists were generally receptive to requests for interviews, political elites were not always as accessible. In Ecuador, only one national congressman agreed to be interviewed. Not surprisingly, he was member of Pachakutik and was particularly interested in indigenous rights and the case of Sarayaku. In Nicaragua, no congressman was available for an interview, although several were contacted. Obviously, better representation of the views of elected politicians would have greatly benefited the study. The perspective of government was instead gleaned from case filings and interviews with government lawyers.

Although original plans included that interviews be taped, most interviewees were uncomfortable with this and preferred that I take notes. The interviews generally lasted about an hour, and each ended with the request for additional names of individuals who were familiar with the case. The interview questions are included in this section. Two separate questionnaires were designed, one which targeted government, and the other
which targeted indigenous informants. The majority of the interviews were conducted in Spanish and this provided many challenges in itself. A local translator would have been useful especially when local or colloquial terms were used. For many of the indigenous respondents, Spanish was a second language and fluency varied, making successful communication even more challenging. In Bilwi, Nicaragua most people speak a unique mix of indigenous, English and Caribbean dialects that was particularly difficult to understand. More time spent in the field, grasping the nuances of language and communicating with locals would have been useful. I assume full responsibility for all the translations to English.
Appendix 2

Interview Questions: Government Representatives

1. In general, how would you describe the state of indigenous land rights in Ecuador/Nicaragua?

2. Generally, how has your government responded to the demands made by indigenous peoples with respect to their traditional land claims?

3. Do you believe that these claims are legitimate? Why or why not?

4. What is the official government policy regarding indigenous land claims? How are they processed? What levels of government are involved?

5. Do you think that international organizations, like the OAS, have a role to play with respect to outlining and reinforcing indigenous land rights? Why or why not?

6. Specifically, with reference to the IACHR ruling on the ___________ claim, does your government agree with the ruling? Why/Why not?
   a. Nicaragua: Why did you initially choose the friendly settlement process? Why was it unsuccessful?

7. What steps, if any, has your government taken to implement this ruling? What remains to be done? Do you have any timelines for implementation?

8. At this time, are there any barriers to full compliance with the IACHR ruling? What are they?

9. What would be the cost to your government (financial and otherwise) to implement the ruling?

10. What steps do you think are necessary to resolve the issue of outstanding indigenous land claims in Ecuador/Nicaragua?

11. How has your government been involved in the Draft Declaration of the OAS on the Rights of Indigenous People?

12. Do you think that this document will have any impact on the way that your government deals with indigenous land claims?

13. How do you think the general public in Ecuador/Nicaragua views the issue of indigenous land claims?

14. Do you feel that there is international pressure to recognize indigenous land claims in Ecuador/Nicaragua? Is this significant?
15. How has the indigenous community been involved in terms of pursuing implementation of the IACHR ruling? Have there been negotiations between the parties? Are they effective?
Interview Questions: Indigenous Organizations and Legal Team

1. How long has your community been involved in the struggle for indigenous land rights?

2. In general, are you satisfied with the government response to indigenous land claims in Ecuador/Nicaragua? Why or why not?


4. Do you believe that the involvement of international organizations, like the OAS or the UN, in clearly delineating and supporting indigenous land and resource rights is important? Why or why not?

5. Do you feel that international pressure on Ecuador/Nicaragua to recognize and respect indigenous land and resource rights is effective? Why or why not?

6. Are you satisfied with the proceedings of the IACHR concerning this case? Do you agree with the outcome?

7. Does the ruling of the IACHR play an important role in your strategy to get control over these traditional lands and resources? Has it been effective so far?

8. How has the government responded to the ruling? Have you noticed any changes with respect to your negotiations with the government?

9. In your opinion, is the role of the IACHR adequate? Should it be more involved in terms of implementation? What role should it play?

10. What do you see as the main barriers to getting the government of Ecuador/Nicaragua to recognize and support this land claim?

11. How has your community lobbied/pressured the government for implementation of the IACHR ruling? What more needs to be done? Has the government responded?

12. Have other indigenous and/or non-indigenous communities, groups, organizations, NGOs etc. supported you in this claims? (list groups and support provided) Has this support been adequate?

13. Are you familiar with the OAS Draft Declaration on the Rights of Indigenous Peoples? What role, if any, do you think this document will have in terms of your struggle for indigenous land and resource rights in Ecuador/Nicaragua?
14. In general, what steps do you think are necessary to resolve the issue of indigenous land claims in Ecuador/Nicaragua?

15. Does the general public in Ecuador/Nicaragua generally support indigenous land claims? Why/why not?