

# Addressing the Land Claims of Indigenous Peoples

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*Program on Human Rights & Justice*

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Community members resist the flooding of an Adivasi village by a dam project in India.

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## **Abstract**

Indigenous people have lived in the same locations for hundreds, if not thousands of years. The national governments involved either refuse to recognize the land claims of indigenous people or are only willing to settle claims in ways unacceptable to them. However, unless these claims are resolved in such a way that First Peoples gain control sufficient, at the very least, to maintain their language and culture, they will disappear. In this paper, we explore 14 cases of indigenous land claims, concentrating on the strategies that these First Nations have pursued and the responses they have received from the dominant cultures that surround them. Our goal is to understand the preconditions for effectively resolving the land claims of indigenous peoples around the world.

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## *Introduction*

### **What is indigeneity?**

Imagine the tropical country of Tikaland where 45,000 Wuru people live in the rural hinterlands, more than 900 miles from the capital city. They have lived there for many generations, even before the colonists from nearby South Puenia entered the country in the sixteenth century and occupied the area amid violence and resistance. Despite many changes introduced by the colonists, the Wuru's cosmology, subsistence agricultural lifestyle, religion, and language are still intact and almost entirely consistent with the traditions they have followed for centuries. The way they practice agroforestry, fishing, and hunting are entirely sustainable and have no long-term impact on the ecosystems in which they live. Socially, they maintain almost no contact with the outside world and prefer to remain in isolation.

The national government believes that important gas reserves lie under the land inhabited by the Wuru and is interested in marketing these resources to multinational corporations. The government has already begun this process without consulting or informing the Wuru people. International financial institutions have encouraged the national government to seek foreign investment to extract these resources, which would ensure a flow of valuable foreign currency into the country.

In addition, the government has launched a colonization program targeting the indigenous territories and is encouraging inhabitants from the most populated cities of Tikaland to transform the land where the Wuru live into farming and grazing areas. Over the past five years, 15,000 people from the cities have migrated to the hinterlands. Their intensive grazing and farming practices are beginning to undermine the integrity of the Wuru culture. Furthermore, small-scale miners are dumping mercury into the water supporting the fish stocks on which the Wuru people downstream depend for their daily nutrition.

While this is an apocryphal account, versions of this story are not uncommon in countries with sizable indigenous populations. Despite the number of First People involved, the percentage of a total national population they represent, the constitutional rights they are or are not granted, each country's willingness to acknowledge international treaties protecting native people, the pattern of ownership of subsoil resources, or the overall pattern of economic development pursued by the government, the general situations are comparable. Unless ways can be found to allow native people to pursue their lives in a



manner consistent with their cultures and, particularly, that recognizes their unique relationships to the land, they will not survive.

Adaptation, while perhaps normal and even desirable from some points of view, begs the question: How can indigenous people survive in the context of a dominant culture that does not allow them to remain true to their traditional values or way of life? The cultural survival of indigenous peoples around the world is seriously threatened. The land claims of First Peoples are the most vivid representation of the challenges they face.

We examined 14 case studies of the land claims of indigenous peoples on six continents. Our intention was to maximize the geographical breadth of our study and seek examples from both developed and developing regions. We included nations with significant indigenous populations (10-45% of national population) as well as those with much more limited populations (<10%), and from varying political settings. Our main findings are as follows:

1. Land and attendant resources are crucial to the definition of indigeneity and to the prospects that indigenous peoples will be able to maintain their identities. Taking away their land or forcing urbanization on native populations is equivalent to destroying them.
2. Recognition of the sovereignty or autonomy of indigenous communities must be part of any effort to enable the survival of indigenous peoples. Complete sovereignty might not be a prerequisite, but some degree of autonomy over resource management, administration of public services, and the right to dictate the content of education are essential to survival.
3. While international legal support under the banner of multilateral treaties can be helpful, most of the battles between indigenous peoples and the dominant states that control their destiny are not greatly affected by assertions of international law. The involvement of international civil society networks and the presence of strong united internal leadership and capacity building within an indigenous group are more important than international law in providing support for the land claims of indigenous people because these factors are harder to ignore.
4. The most successful strategies used by indigenous peoples to gain cultural recognition and a greater degree of control over their land underscore the need to negotiate with the dominant culture and build on the support of international civil society networks.

The first section of this analysis addresses questions of land and indigeneity and the importance of control of ancestral land to the survival of indigenous communities. The second section examines the relationship between native tribes and their interactions with the dominant cultures that surround them; particular attention is paid to the nature of the borders between indigenous and dominant groups and the way these borders are controlled. Section 3 reviews the importance for indigenous peoples of maintaining a sustainable way of life through a pattern of development that is in harmony with a traditional cosmology – a people’s beliefs and culture. The fourth section focuses on the strategies used by indigenous groups to frame their land claims. Section 5 looks at the different responses (or non-responses) of the dominant states involved and how aboriginal land claims have been treated. The sixth section suggests the preconditions required for the fair and effective resolution of indigenous land claims that have not yet been resolved. The essay concludes with speculation on the future for indigenous land claims, given the strengths and weaknesses of strategies and opportunities considered in the previous chapters.

Table I summarizes the 14\* cases we examined in terms of six different features of each group’s land claims: (1) the group or tribe concerned, (2) their geographic location, (3) their population (4) the size of the area occupied, (5) the scope of the land claims, and (6) the legal and political status of these claims.

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\* The characteristics of the Bedouin in Israel and Jordan are treated in the table as two separate populations, though they are considered together as one case study among those supporting this analysis.

**Table 1**

Group/Tribe	Location (Continent, country)	Number of People	Area Occupied	Claim	Status of the Claim
Sarayaku (members of the Amazonian Quichwa)	South America, Ecuador	2,000 (self-claim) for a total of 72,000 Amazonian Quichwa <sup>1</sup>	135,000 ha (titled in 1992)	The Sarayaku claim competency within a recognized territory to gain control over the natural resources present on and under their land. Communities want to make autonomous internal decisions and be truly self-governed with the hope of implementing their own “Plan of Life”. Sarayaku want to be declared an “intangible zone” – a protected area which outsiders, especially private companies, may not enter.	<i>Unresolved.</i> In March, 2006, The Ecuadorian Attorney General offered a friendly settlement to Sarayaku, which was refused. The group is waiting for the final ruling on its case before the Inter-American Court for Human Rights on possible reparations from the Ecuadorian State and acknowledgment that the state has violated the Ecuadorian Constitution.
Mapuche	South America, Chile	Numbers are contradictory. The 1992 census found the population to be nearly 1,000,000 while the 2002 census quotes only 600,000 people.	500,000 ha (recognized by CONADI), 6.4% of the original territory <sup>2</sup>	The Mapuche are not unified in their claims. However, most do not demand sovereignty and recognize their existence as members of the Chilean state. Nearly all, however, claim control over their land, resources, and borders. They are looking for constitutional recognition and for the state to ratify ILO Convention 169.	<i>Unresolved.</i> Ley Indígena of 1993 created a water and land fund; recognized the rights of the indigenous and their legal right to be consulted and considered in decisions affecting their lives; and established a decentralized public agency to oversee the application of the law. However, the ILO Convention 169 was never ratified.. The Mapuche were not granted full control over their resources or protection of their lands. The Lagos administration (2000-2006) twice submitted a resolution for constitutional recognition of indigenous groups, but the Senate rejected it both times.

Group/Tribe	Location (Continent, country)	Number of People	Area Occupied	Claim	Status of the Claim
Amerindians	South America, Guyana	55,000 <sup>3</sup>	1.4 million hectares (legally controlled by Amerindians)	Land titling and control over the natural resources on the soil and in the subsoil.	<b>Very partially resolved.</b> More than half of Amerindian communities have received title to some land since 1976. The 2006 Amerindian Act gives more control to Amerindians over local government. However, the Minister retains the power to reject community rules; approve contracts between communities and outsiders; override community land use decisions; override a community's veto of large-scale mining if a project they believe to be in the public interest; or take land without compensation. The state remains the owner of the subsoil resources.
Pima	North America, Arizona (USA)	11,500 <sup>4</sup>	21,691 ha + 151,200 ha on two reservations	Water rights claimed after the loss of the Gila River water in the 19th century. The Gila River Indian Community (GRIC) wants sole control over water resources and a guarantee of a dependable supply of water.	<b>Claim resolved.</b> The 2004 Arizona Water Settlement Act (ASWA) settles the resource claim between the Gila River Indian Community (GRIC) and the United States. The GRIC has sole responsibility for water conveyance and possible sale. AWSA prohibits the GRIC from seeking an increase in their current groundwater rights and protects the current GRIC groundwater from pumping near reservation boundaries. Finally, the ASWA guarantees a dependable supply of water to the GRIC lands (653,500 acre-feet of water per year).

Group/Tribe	Location (Continent, country)	Number of People	Area Occupied	Claim	Status of the Claim
Passamaquoddy and Penobscot	North America, USA (Maine)	3500 - 3800 <sup>5</sup> (US Census)	300,000 acres <sup>6</sup>	The tribes want to maintain sovereignty and protection from state dominance. Most important conflict with the State of Maine is linked to the interpretation of the word “municipality” in the 1980 Main Settlement Act. The tribes argue that this provision was meant as an addition to their sovereign status while the state argues that municipal status supercedes their sovereign status.	<b>Claims unresolved.</b> In 2000, the US Environmental Protection Agency cited the 1980 settlement in awarding the state the authority to issue water quality permits on tribal lands, despite a recommendation by the US Department of the Interior to uphold tribal management of those resources. The tribes are challenging the EPA's decision in federal court.
Native Hawaiians	North America, USA (Hawaii)	283,000 <sup>7</sup>	25,000 of the Hawaiian Home Lands are homesteaded. Native Hawaiians also live elsewhere in the state. <sup>8</sup>	Claims of Native Hawaiians differ. Seventy three percent of Native Hawaiian voters support some form of sovereign government, but claims vary among compensation for lost land; limited sovereignty; nation-within-a-nation modeled after Native American policies; or a wholly-independent Hawaii under exclusive control of Native Hawaiians. Each movement involves a land claim, ranging from the 200,000 acres comprising the Hawaiian Home Lands to the state’s entire 4.1 million acres.	<b>Claims largely unresolved.</b> In 1996, in Public Access Shoreline Hawaii vs. Hawaii Planning Commission, the Hawaii Supreme Court ruled that Hawaiians retain the right to practice traditional gathering on undeveloped private land and established that Native Hawaiians and the state on their behalf could intervene to protect these rights at the expense of private interests. However, in June 2006, the Senate defeated the Native Hawaiian Reorganization, which would have formally recognized a Hawaiian governing entity and offered Hawaiians the same benefits, protections, and acknowledgment as Native Americans. Further, the Circuit and Hawaiian Supreme Courts dismissed Native Hawaiian claims to revenue generated from ceded lands in 2001, 2003, 2005, and 2006, stating that the Hawaii legislature must address ceded lands. <sup>9</sup>

<b>Group/Tribe</b>	<b>Location (Continent, country)</b>	<b>Number of People</b>	<b>Area Occupied</b>	<b>Claim</b>	<b>Status of the Claim</b>
Nisga'a	North America, Canada (British Columbia)	5,500 <sup>10</sup>	129,200 ha <sup>11</sup>	Claim to gain control over a territory occupied "since time immemorial" in the Nass Valley.	<b>Claim resolved.</b> The <i>Nisga'a Final Agreement</i> was signed by Canada, British Columbia, and the Nisga'a on August 4, 1998. It is both a land settlement and a self-government agreement.
Crimean Tatars	Europe and Asia, Crimea, Uzbekistan, Romania, Bulgaria, and Turkey	500,000-2,000,000	Undetermined because of dispersion	This group wants official status of autochthonous people; official recognition of traditional leaders as supreme representative authorities; effective representation at all levels of government; and improved socio-economic conditions.	<b>Claims unresolved.</b> No recognition of Tatars as indigenous peoples of Crimea. No legal restoration of the Crimean Tatars' rights.
Bedouins	Asia (Middle East), Israel	200,000 (in the Negev desert)	Half of the population in seven planned townships; eight new towns in the process of recognition, out of 46 unrecognized towns	The Bedouins in Israel claim the right to remain in the Negev Desert (in unrecognized villages) which they have inhabited for decades, and to pursue their traditional way of life in the Negev.	<b>Claim unresolved.</b> Forced urbanization of Bedouins in seven planned towns; failure to recognize the villages, which are considered illegal; demolition of houses and crops in these villages; Sharon five-year plan designed to encourage Bedouins to move into the recognized towns and newly recognized towns through many incentives.
Bedouins	Asia (Middle East), Jordan	The majority of Jordanian Bedouin population was of tribal origin. Accounts of "Bedouin" numbers in Jordan vary by definition.	112 towns which respect the tribal structure	The Jordanian Bedouins want to sustain a traditional way of life and make decisions about their future in collaboration with the government of Jordan.	<b>Claims mostly resolved.</b> Government has recognized the unique value of Bedouins' contribution to the Jordanian culture; incentives offered to Bedouins to progress towards modern life; basic services (education, health, and housing) provided; government and Bedouins collaborate on decisions affecting them; seats reserved in the Parliament for Bedouins.

Group/Tribe	Location (Continent, country)	Number of People	Area Occupied	Claim	Status of the Claim
Tsou	Asia, Taiwan	3,600	6,388 ha <sup>12</sup>	Effective self-governance which is resisted by Han Chinese (majority population)	<b>Claims partially resolved.</b> Status of autonomy granted but conflicts remain. Adoption of a respectable name for indigenous people “ <i>yuan-zhu-ming</i> ”, meaning original inhabitants, in the 1994 constitution; establishment of a body overseeing indigenous issues in the central government in 1997. In 1999, indigenous activists signed the <i>Treaty of New Partnership between the Indigenous Peoples and the Government of Taiwan</i> with then DPP presidential candidate Shui-bian Chen. <sup>13</sup> Several items in the <i>Treaty</i> became part of the official political agenda after Chen was inaugurated in 2000, including the promotion of indigenous self-governance. However, in practice, this autonomy is applied with difficulty.
Adivasis	Asia, India	84.3 million <sup>14</sup>	635 communities <sup>15</sup>	Opposition to the Sardar Sarovar Project (SSP), the large dam construction on with the Narmada River in the Narmada Valley because of displacement concerns.	<b>Claims unresolved.</b> In March 2004, despite the concerns of the UN Commission on Human Rights, further construction of the dam up to the height of 143 meters was allowed. The originally planned height of the dam was 138 meters.
Nama (“the Richtersveld Community”)	Africa, South Africa	10,000 (3,000 from the Richtersveld Community) <sup>16</sup>	85,000 ha <sup>17</sup>	Reoccupation of land of which the community was dispossessed of in the early 20 <sup>th</sup> century, due to prospecting by diamond miners	<b>Claims resolved.</b> In 2004, the Land Claims Court of South Africa determined that the Community would be awarded restoration of its land and mineral rights. In October, 2006 the Community reached a settlement with the South African government in the form of a R190 million (approx. \$27 million) repatriation payment, in addition to transfer of title to the land.

Group/Tribe	Location (Continent, country)	Number of People	Area Occupied	Claim	Status of the Claim
Yonggom	Oceania, Papua New Guinea	18,500 Muyu and approximately 2,000 of the Yonggom people themselves <sup>18</sup>	Ok Tedi River, Fly River and West Papua; no estimates of the area occupied	Claims filed in Australian Courts against BHP Billiton, an Australian mining company supported by the Papua New Guinea government, for widespread environmental damage due to the Ok Tedi Mine.	<b><i>Claims resolved only on paper.</i></b> Status of autonomy granted, but conflicts remain. On June 12, 1996, BHP and the indigenous plaintiff leaders reached an out-of-court settlement worth approximately \$500 million to build appropriate tailings containment; establish a trust fund for the people of the Fly River; and compensate the communities in the most heavily affected areas of the lower Ok Tedi River. However, the implementation of this settlement has been difficult. In 2004 a second settlement did not prevent mine waste and heavy metals from entering the river system.



## *Section 1*

### **Indigeneity and the land: The vital link**

Land is fundamental to the survival of indigenous peoples. Not only do most indigenous peoples define themselves through their interaction with the land, but their livelihoods depend on maintaining control over their land's resources. Although some scholars have argued that indigenous culture can persist in urban environments,<sup>19</sup> we assert that, in order to survive, indigenous peoples must ultimately have a place of their own where they can live together. Land claims imply both physical and symbolic borders between indigenous peoples and the dominant cultures that surround them. Physical boundaries help define the nature of and limits on indigenous struggles and serve as a rallying point for members of indigenous communities. They also provide a way to control the resources required to continue their way of life.

The symbolic divide associated with each physical border strengthens the identity of indigenous people by protecting sacred traditions as well as language and culture. In addition, the survival of indigenous communities depends on the recognition of their own traditions and norms. Without such recognition, indigenous cultures cannot survive. This section addresses both the symbolic and practical aspects of the relationship between indigenous peoples and their land.

#### **Land and territory in indigenous cosmologies**

Indigenous peoples have a special relationship to the locations they have occupied for centuries. Many aspects of their lives and social relations are embedded in traditional, natural settings and rely on their capacity to access these resources. For indigenous people, separating and isolating human beings from their natural settings or threatening this special relationship is tantamount to destroying family unity and challenging the continuity of life. Traditional rituals and notions of spirituality are tied to a specific landscape including sacred sites and resources. In many cases, indigenous people move within the borders of their land to honor deities and express thanks for past harvests or for the help they have received to maintain strong relations within the community.

To illustrate these concepts, we discuss the cosmologies of three different indigenous groups: (1) the Quechua and Aymara of the Andean region of South America,<sup>20</sup> (2) the Nisga'a of Northern British Columbia; and (3) the Adivasis of India.

In the Andean region of South America the Aymara notion of *chacha-warmi* (or *hari-warmi* in Quechua) is an essential element of the cosmology of the Quechua and Aymara people.

They believe that a human being (*jaqi*) is complete and an integral part of the community when s/he has formed a couple (man + woman = *chacha-warmi*). While the individual *jaqi* is created in the image of the Supreme Being, the term implies that one person is not complete without the other. The concept of *chacha-warmi* (the Andean couple) expresses the duality and complementary nature of the relationship between men and women in harmonious relationship to the surrounding land and natural resources.

From the standpoint of political anthropology, Andean people are concerned not only about the well-being of each man and woman, but also about constructing a future in unity with nature involving all the people. For this First People, “everything is *chacha-warmi*” (Aymara), “everything is *kari-warmi*” (Quechua).

“Pitaj ima niwasun kariwarmita, warmiltarita” means that everything in nature has a masculine or feminine connotation. Natural elements such as stones, mountains, or trees are complementary to one another.

In Northern British Columbia, Canada, the Nisga’a, “People of the Nass River,” are one of 600 Canadian First Nations. According to Nisga’a legend, they have lived on the Nass River “since time immemorial.”<sup>21</sup> The Nass valley is integral to the Nisga’a identity and the tribe has maintained deep spiritual ties to this location for several centuries. Their cosmology, cultural practices, and social institutions are tied to this specific area.

A Nisga’a ancient code of laws, *Ayuukhl Nisga’a*, describes how Nisga’a were placed in the Nass valley, entrusted with its protection, and how the landforms in the area were created for the Nisga’a. For example, the Nisga’a believe that *Txeemsim*, a pivotal figure for them, flattened the valley between four mountains to enable them to build long houses, and that he placed a mountain in the middle of a fishing channel to protect their fishing grounds from neighboring tribes. Another part of Nisga’a spiritual beliefs is that, long ago, 2000 Nisga’a were killed in a lava flow from a volcano. Today, the lava beds are considered sacred and ceremonies take place every year to honor the ancestors who were lost.<sup>22</sup>

For the Adivasis, a tribal population in India, the link between nature and society, including connections to ancestors and evil witches, is a central religious belief. The village stands in relation to a specific site and to ancestral spirits that populate it. However, since land owned by current families is not sufficient to provide secure livelihoods for all community members, nearby forests serve as an essential source of fodder, fiber, fruit, and medicine. In this context, one of the most important moral principles for Advivasis is reciprocity -- mutual aid based on kinship as illustrated by communal work on traditional lands during the farming season and labor without compensation during times of distress. This norm is spread through marriage

with people from other clans and villages, constructing intricate social networks of kinship over a large area.<sup>23</sup>

These three cases from South America, Canada, and India demonstrate the unique relationships that indigenous peoples have with the lands they have traditionally occupied. Attempts to undermine these connections are tantamount to challenging the fundamental cosmology of each people. The loss of harmonious connections to the natural elements involved jeopardizes the sustainability of these communities.

### **Control over specific resources tied to location**

In addition to control over their land and territory, indigenous people need to be able to decide which economic activities will best enable them to sustain their way of life and determine how they want to develop and manage resources on their land. If the state or private entities restrict the activities that indigenous people can conduct on their land, their way of life may not be sustainable. For example, the Mapuche people in Chile and native Hawaiians in the United States both depend on specific plants or fruits for nutrition. In addition to playing a role in traditional rituals, these resources also provide critical sources of revenue and economic independence.

Native Hawaiians' creation chant, the *Kumulipo*, explains that land, gods, chiefs, and people are intertwined and inseparable.<sup>24</sup> Land is a maternal figure to the Native Hawaiian people. In their cosmology, water, land, Hawaiians, *Akua* (the gods), and taro were all born from the Earth mother *Papa* and the Sky father *Wakea*. Taro and land are the older family members who feed Hawaiians in exchange for their care and honor. This relationship is the foundation of life on the islands.<sup>25</sup>

For this group, nutritional and economic subsistence as well as spiritual and cultural values depend on the capacity to cultivate taro.<sup>26</sup> For example, a decrease in taro consumption has been linked to high disease and mortality rates among Native Hawaiians.<sup>27</sup> Tending taro patches thus represents a nutritional, familial, and cultural responsibility.<sup>28</sup> The significance of the taro plant underscores the importance of land and water for Native Hawaiians. Without close ties to the land, these traditions and critical components of Hawaiian culture will cease to exist.

The very name of the Mapuche people of Chile means “people of the land” (*mapu* = land and *che* = people). Mapuches believe that their economy, customs, and spirituality are inexorably linked to their environment. Mapuches have always been dependent on traditional lands to ensure subsistence agriculture, hunting, gathering, and cattle-raising. Land and identity are integrated through religious ceremonies such as the *Nguillatun*. This annual ceremony takes place during harvest time or following a natural disaster. It allows Mapuches to thank their god of creation,

*Ngenechen*, and strengthen relationships between the past (ancestors and celestial family), present (community), and the future. Mapuches erect a *reew*, totem, representing the community's ties to the land.

One community of Mapuches, the Pehuenche, takes its name from the *pehuen* or “pine nut”, the fruit of the Araucaria tree, native to Southern Chile's rainforest. In the summer, the semi-nomadic Pehuenche leave their lowland region for the Andean forests to collect the fruits which they use to make flour, milk, alcohol, and food for their livestock. The *pehuen* is also regarded as a sacred object, integral to Puhuenche spirituality and an essential element of their cosmology.<sup>29</sup>

Both in Hawaii and Chile, indigenous people need control over economic activities and resources, such as the taro or the *pehuen*, to sustain their way of life. Attempts to impose a different community development model or restrict use of traditional lands challenges their identities.

### **Control of land use and access**

In addition to maintaining a crucial bond to the land and securing access to natural resources, indigenous peoples need to control access to an expanse of territory large enough to protect and sustain social relations in their communities, their cultural and spiritual traditions, and the security of their livelihoods. Indigeneity is both a function of land and territory. Among several indigenous peoples, the term “territory” refers to ancestral space and has a more all-embracing meaning than “land”.

In Ecuador, *tierra* (land) refers to the space with resources that indigenous people currently occupy. *Territorio* encompasses the historical range in which a people has traditionally lived. The complex connection between identity and locality cannot be bought or sold; land is not a commodity implying wealth or possession. Suzana Sawyer explains that “much more than signifying the physical and material contours of a region, *territorio* encompasses moral-cosmological and political-economic complexes that shape identity and social relations.”<sup>30</sup>

In the Latin American context, “territory” is a recent political construction. It has emerged from recent indigenous leaders, particularly in the 1970s, to mark a difference between the construction of rationally calculated blocks of land to be sold for oil extraction and the extension of land essential to the cosmology and economy of indigenous tribes. The latter concept may include multiple river basins in which multiple systems of property control coexist.

In the Department of Pastaza in the Amazon area of Ecuador, the Quichwa people of Sarayaku recognize a territory, the *Sumak Allpa*, made up of three parts, or spaces: *Jahuapacha*

(the sky), *Caipacha* (the earth), and *Ukupacha* (the subsoil). Indigenous peoples administer these three spaces and related resources according to long-standing traditions.<sup>31</sup> Quichwa leader, Inés Shiguango, says that “Mountains, rivers, cascades, and plains are strength, wisdom, protection, and nutrition given to mankind.” The rituals that Sarayakus practice set clear socio-cultural and symbolic borders between them and the dominant culture, creating two separate “worlds of meaning”.<sup>32</sup> Two places are essential for daily activities such as subsistence agriculture, hunting, fishing, fruit gathering, handicrafts, canoe making, and house building:<sup>33</sup> the “Inhabited Centers” and the *Purinas*, which are shared forest areas. Another piece of the territory is restricted to the shamans and the spirits (*Yachak*).<sup>34</sup>

Sarayaku people believe that controlling the use of natural resources (rivers, forests, oil) within their territory is the *sine qua non* for maintaining their traditional way of life, inter-community relations, social relations, and fidelity to their fundamental belief system. Since 1986, the Sarayaku people have expressed opposition to oil exploration and extraction within their territory.<sup>35</sup> The Sarayakus view the ecological and socio-economic impacts brought about by Texaco’s activities in the North of Ecuador as well as other oil production activities as incompatible with their vision of indigeneity.

According to Inés Shiguango: “We are the earth and the earth is ours. We don't exist without earth.”<sup>36</sup> She thinks that if companies extract oil, environmental damage resulting from drilling mud will destroy the earth and endanger the survival of local people. Her observations have been confirmed, at least from the Sarayaku perspective. In 2003, seismic work led to clashes among Sarayaku members as exploration triggered inter- and intra-ethnic conflict, destroyed trees and medicinal plants, and prevented ceremonies such as the *Jista* from taking place.<sup>37</sup>

In the United States, Pima Indians and their ancestors have farmed along the Gila River in central Arizona since 200 A.D. The word Pima itself means “The River People”, connecting the tribe inextricably to its geographic location. Among native tribes in Arizona, *O’odham himdag*, or “way of life”, implies an interconnectedness of things, people, and actions. According to Knudson Woods (2002), native tribes are fostering strength and wellness in their communities by translating increased economic self-sufficiency and resources derived from gaming into social, health, and educational services which maintain cultural identity, thereby providing an effective path toward the maintenance of *O’odham himdag*.<sup>38</sup> Lack of access to land and loss of gaming resources might jeopardize its very existence.

The Gila River has part been of Pima culture for several centuries. The diversion of water in the late twenty-first century profoundly disturbed the traditional native way of life based on agricultural subsistence and irrigation. Fields became barren, agriculture was unmanageable, and

poverty, malnutrition, diabetes, and even starvation began to affect native tribes. The *O'Odham himdag*, supported by a rich ceremonial life involving growing crops, hunting, warfare, and protecting community health, was also threatened.

For indigenous peoples, control over specific lands and territories enables the fulfillment of three basic goals: first, maintaining a spiritual relationship to the areas they have occupied for generations; second, preventing development patterns that endanger their way of life or prevent them from carrying out traditional activities; and third, managing resources on their land and developing economic activities consistent with their cosmology and their approach to self-sufficiency.

## Section 2

### Defining borders between indigenous peoples and dominant cultures

Indigenous people are usually citizens of a nation-state in which a dominant culture seeks to impose a set of values, norms, and institutions upon them. An indigenous people's culture has to operate within the context of the dominant culture. To survive, a native tribe will try to establish boundaries between itself and the dominant society. Their relationship to the dominant culture is often defined in terms of border control. The presence of a border indicates the existence of indigenous land and territory. The chances of survival for an indigenous people are enhanced if they can achieve some degree of control over who can cross this border and what happens within its territorial boundaries.

Donnan and Wilson (1999) identify three main types of boundaries that determine relations in or among societies. *Social and symbolic boundaries* define membership in collectivities. People might choose to shape this form of boundary in terms of different contexts and pressures. *Cultural boundaries* separate different worlds of meaning among people. *Geopolitical boundaries* define visible and tangible assets.<sup>39</sup> Indigenous peoples around the world seek control over all three types of boundaries, defining who can and cannot cross them. Boundaries separating “us” and “them” are important to a culture fighting for survival.

An interesting example from Ecuador of symbolic borders shows how indigenous people are separated from the dominant society. In January 1994, indigenous activists from CONAIE, CONFENAIE, and OPIP occupied the Ministry of Energy and Mines to protest against the opening of the seventh round of oil concession bidding and recent changes in the Hydrocarbons Law, written to reduce state control over oil operations in Ecuador. Following a 24-hour standoff, indigenous leaders met with the minister. One of his first accusations against the protestors was that they had illegally entered *mi casa* (my house). Rafael, an indigenous leader, responded that “this house belongs to all” Ecuadorian citizens and rejected the implication that a group historically excluded from Ecuadorian society had no right of citizenship or national belonging.<sup>40</sup>

Pursuing the theme of home ground and who belongs there, Rafael emphasized that, unlike an official government building, the Amazon did not belong to all. The river constituted *La selva es nuestra casa*, the Indians' hope and space of belonging. Any action by outsiders within this territory required negotiation with its indigenous owners. This exchange reveals how race and class define notions of citizenship, property, exclusion, and forums for participation.

### **Control of geographic borders**

The struggle between indigenous peoples and modern states over geographic boundaries has a long and bitter history. Because geographic borders are more tangible than symbolic and cultural borders, they are a primary way in which a state can assert control over citizens and subjects. Geographic borders create the very conditions of everyday life for indigenous tribes. Cohen (1965) points out that for Arab villages in Israel in 1959 “the reality of the border ha[d] become a major factor underlying the social organization of [...] villages and [could] not therefore be treated as a temporary, or abnormal, phenomenon.”<sup>41</sup> Even if Arab people in Israel are not considered native tribes, this example illustrates the dialectical relations between a dominant culture and minority populations through territorial borders.

In Chile, the absence of effective geographic border management prevents the Mapuche people from protecting the ecosystems in which they live. For the last 30 years, economic policies in Chile have prioritized privatization and exportation through the development of large-scale projects, several of them on Mapuche land. As a result, several highways cut through Mapuche territory. In 2000, large tree plantations encompassing 1.5 million hectares of eucalyptus and pine were planted on expropriated Mapuche land.<sup>42</sup> These commercial enterprises damaged wildlife, created soil erosion, blocked light needed to grow Mapuche’s medicinal plants, and polluted water supplies.<sup>43</sup>

The National Indigenous Development Commission, CONADI, has been unable to combat strong governmental and private interest in these projects. The 1993 Indigenous Law No. 19.253 does not give Mapuche control over the natural resources on or under their land. Nor does it give them a way to deal with boundary spillovers. Mapuche may be forced off their land whenever government or privately sponsored projects deem their removal to be in the national interest. This is a typical case in which development policies prioritized by the state facilitate the sale or concession of indigenous land and territory to private companies eager to exploit rich natural resources. Danger to the survival of indigenous people is rarely a factor in these decisions.

### **Control of symbolic borders**

In many countries, cultural emblems and differences are organizational devices that articulate social relations and create hierarchy between people (Donnan and Wilson 1999). They are also used to exclude minority populations. In Taiwan, veneration of the Han Chinese hero, Wu-feng, has created a symbolic border between the indigenous Tsou people and the dominant culture. Wu-feng was a middleman who conducted trade with the Tsou in the eighteenth century.

After Wu-feng was killed in a Tsou village, several Han Chinese authors wrote stories



about him, adding details that might not be historically true but suggested the brutality of the Tsou and affirmed the noble desire of Wu-feng to civilize them. Temples were erected for him; his story was included in text books; his life inspired artists at different times; and, as recently as 1932, a movie was made about him in Taiwan.

For the Tsou, Wu was just a manipulative middleman<sup>44</sup> who became a symbol of their stigmatization as savage and cruel; his death was the pretext for decades of action against indigenous Taiwanese. Despite recent successes of indigenous activists in finding political allies and strategically maneuvering Taiwanese politics to take a Wu-feng temple down, this veneration has continued to thrive. The Wu myth has survived two decades of indigenous activism and still represents a symbolic border between Han Chinese and the Tsou. Despite the advocacy actions of the Tsou people against the veneration of Wu-feng, their control over this border is very fragile, as demonstrated by the construction of a new temple in 2003 midway between Saviki and Tapangu, two villages that symbolize the rise of Tsou economic and political power.

In this case, the powerful resources of the dominant culture overpowered the resistance of a native people and created strong boundaries between the Tsou and the Han Chinese communities. The veneration of Wu-feng remains deep-seated, despite Tsou resistance. It remains a symbolic border as real as any physical border between any native tribe and the culture that dominates it.

### **Struggle to control administrative and social borders**

In the United States, the Penobscot and Passamaquoddy people in Maine are struggling to maintain tribal sovereignty despite the reluctance of private companies and the state government to respect previous guarantees given to the Maine tribes. This is a struggle over social and administrative borders. In 2000, the State of Maine applied to the US Environmental Protection Agency (EPA) for sole authority to issue wastewater discharge permits in the state under the National Pollutant Discharge Elimination System. The Passamaquoddy and Penobscot tribes asked the EPA to allow them to retain jurisdiction over water resources within the territories belonging to the tribes, a common arrangement in Indian country.

While waiting for the EPA decision, three paper companies—Great Northern Paper, Georgia-Pacific, and Champion International—gained broad access to tribal documents under the state's Freedom of Access Act or FOAA.<sup>45</sup> Two days later, the State of Maine demanded of the EPA the same access to records in a letter identical to the demand by the paper companies.

The motivations of the paper companies are not clear. However, as major polluters in Maine, they may have feared that the tribes could influence the EPA to enforce water quality

regulations more stringently. Since the pertinent information was already in the public record, and the state was willing to intervene, it also might have been an attempt to provoke a clarification of the limits of tribal sovereignty. In any event, the tribes opposed the request of the companies, which then invoked FOAA and filed a complaint in Maine Superior Court to force compliance.

The companies asserted that the tribes were, for all intents and purposes, municipalities, and therefore subject to state law. The Maine tribes contend that this law is not applicable to them, given their federally-protected sovereign status.<sup>46</sup> In May 2001, the Maine Supreme Judicial Court ruled in favor of the companies, stating that the Maine Freedom of Access Act does apply to the Penobscot Nation and the Passamaquoddy Tribes when they interact with other governments or agencies and when the tribes act as if they were municipalities.

This ruling suggests that authority over Indian affairs is shared between the State of Maine and the two Indian tribes. If so, relationships between Maine tribes and the state are different from those of Native American tribes in other states. The 2001 ruling also challenges the very existence of the tribes as legal or political entities with distinct rights. Even though the tribes have historically been guaranteed protected status by the federal government, they must continue to fight for control of an administrative and social border against the lobbying efforts of private companies and state officials.

Administrative border issues reflect differences in the scope of political power between indigenous peoples and the states in which they live. Such borders are always in flux. Government agencies and other groups in the dominant culture seek greater control over indigenous people by redrawing borders between the indigenous and surrounding communities and attempting to control what happens at and within those borders. A key challenge for indigenous peoples is to exert their own preferences about the extent and nature of administrative boundaries.

### *Section 3*

#### **Sustaining traditional ways of life**

The sustainability of indigenous peoples' livelihoods depends on their capacity to generate revenues from resources on or under their land and to control life within their communities. They may choose to develop these resources themselves, or ensure that they are managed in a sustainable fashion. Another objective might be to prohibit operations linked to the discovery and exploitation of natural resources if such activities cannot be handled in an environmentally or socially sustainable way.

The exploitation of oil, gas, minerals, timber, or gems might generate substantial profits, but it might also threaten the very existence of indigenous peoples in several ways.<sup>47</sup> A purely market-based exchange might extract considerable value, but distort social relations in an indigenous community. Competition for valuable resources among competing corporate interests might cause conflict within an aboriginal community as members choose sides and challenge each other for internal leadership. Patterns of development associated with some kinds of resource use and extraction practices are incompatible with traditional ways of life and cultural practices. Finally, migration of native peoples to cities or mining centers and the internal colonization of indigenous lands by outsiders--encouraged by corporate interests or the state--can destroy aboriginal lifestyles.<sup>48</sup>

During the 20<sup>th</sup> century in Papua New Guinea, the Yonggom people have shown a remarkable ability to adapt to new and changing circumstances and to maintain their traditional way of life, despite being required to move from their scattered homesteads and hamlets of their clan lands.<sup>49</sup> They have acquired land elsewhere, some of it far from their original villages, but they have tried to cultivate it in traditional ways. Environmentally unsustainable practices at the Ok Tedi mine, managed by BHP Billiton, have made it impossible for the Yonggom to continue their traditional way of life, even at their new locations. Environmentally and socially unsustainable activities practiced on the land where indigenous peoples live jeopardize their survival even more than the loss of their traditional land itself. They may be able to move to new locations and keep their culture intact, but only if state and corporate actors protect them from environmentally destructive, unsustainable practices.

#### **Control over subsurface resources**

Some of the native peoples in South Africa were able to maintain control over resources under the land they occupied for decades. This helped them generate a sustainable economic, social, and

environmental situation in the communities they now inhabit. Between the creation of the South African State in 1910 and the establishment of the apartheid regime in 1948, native Khoisan people, including those from the Nama tribe, were forced off their land into controlled reserves by white settlers eager to develop a diamond mine in the Richtersveld region in the far northwest part of the country. During apartheid, the indigenous people of the Richtersveld endured the hardship of life in the reserves more successfully than many other communities by retaining, at least to some extent, the capacity to govern themselves.

In 1994, after several years of political transition in South Africa, the Restitution of Land Rights Act promoted by the ANC (African National Congress) government offered a land reform strategy. Taking advantage of this new law, a group of Nama people who had historically occupied the Richtersveld area filed a land claim. In 2003, the Supreme Court of Appeals of South Africa held that this community was entitled to a restoration of its right to “exclusive beneficial occupation and use” of its land, including minerals, and that its dispossession many years earlier was the result of racially discriminatory legislation.<sup>50, 51</sup>

In 2004, the Court also held that the community’s historic ownership interest included communal ownership of minerals and diamonds.<sup>52</sup> The Land Claims Court awarded restoration of the right in land and minerals, with the potential for additional equitable redress, including funds for environmental remediation. In October, 2006, the South African government settled the Richtersveld claim out of court for R 190 million (approximately \$27 million).<sup>53</sup>

The court resolution in favor of the Richtersveld community and the resolution of its land claims strengthen its ability to maintain traditions essential to its survival. The land claim enhanced the Richtersveld people’s control over their natural resources and restored their livelihoods. In 2005, the community launched a community project, the Community Conservancy, which set aside 16,000 hectares of undeveloped land to be free from grazing, to preserve unique biological resources and attract tourists to the area. The community is also considering tourism around the former mine as well as some form of mariculture.

Completely controlled by the indigenous community, these activities will generate enough money to support a sustainable local economy. The sustainability of the Nama people’s way of life will depend on their capacity to leverage the funds that are now theirs, and to redirect and redistribute money throughout the community in ways that are socially equitable and in harmony with traditional decision-making processes.

### **Control over surface resources**

For indigenous peoples, control of resources on their land--at first glance an obvious element of sovereignty--can also create challenges. In the United States, natural resources on Native American land have been diverted by the federal government in several cases. This has prevented these communities from managing development in a sustainable way.

In Arizona, Indian water rights have become the subject of endless debate. Throughout the western part of the United States, large blocks of unquantified water rights remain unsettled. The Arizona Water Settlements Act of 2004 (AWSA) represents one approach that has been accepted by all parties involved -- native tribes, non-native water users, and the state. AWSA recognizes the right of the River Indian Community to have access to good quality water and to manage water on their reservation.

The water settlement offers a vision of security and stability for future generations who will be able to maintain their traditional way of life without facing the hardship of desertification.<sup>54</sup> Through the Act, the GRIC is now in control of almost half of the water in the Colorado River delivered by the Central Arizona Project, water previously delivered from Arizona to California. Through the Central Arizona Project (CAP), 1.5 million acre-feet of Colorado River water per year will be brought to the counties of Pima, Pinal, and Maricopa. This is the single largest source of renewable water in Arizona and will be essential to support the possible rebirth of traditional agricultural activities by the Pima tribe that have been abandoned over the past several decades because water was not available.

In Taiwan, community efforts to revitalize the river Tanayiku helped build social capital among the native Tsou villagers. The region of Saviki is now a prominent tourist area for Taiwanese who come to visit a community-based ecotourism park that generates revenues of about \$650,000 per year for a community of 600 people.<sup>55</sup> In 1995, the Saviki Community Development Council (SCDC) initiated a fish conservation movement that led to the Danayiku Ecology Park. The park enables Tsou communities to make their own decisions about how to balance economic development with resource protection. The park has also brought better infrastructure and generated income to support scholarships and birth subsidies. It is becoming an enviable model for other nearby villages. Its success owes much to the social virtues of mutual assistance and the clan structure of traditional Tsou culture.

Such efforts were later recognized by the government which, for the first time, granted water rights to a locality. Other Tsou communities host annual festivals or have created a Tsou foundation, such as the Tsou People Culture & Arts Foundation established in 2001, to help hold their people together. The Tsou are taking full advantage of their right to self-governance and are

working to sustain their traditional lifestyle with the resources generated by ecotourism and cultural festival projects.

The cases of Arizona and Taiwan suggest that directly controlling natural resources, particularly water, on the land will allow indigenous peoples to develop activities that support their basic needs and generate future economy-building projects in harmony with their cosmology.

### **Control over human resources**

Lastly, indigenous peoples need to control human resources in their communities in order to preserve their language, traditions, and rituals. Models of bilingual education for indigenous communities have shown great success in maintaining intergenerational connections and helping children acquire the languages, stories, and rituals essential to the practices that have been maintained for generations by their tribes. In Ecuador, in 1992, under the pressure of CONAIE (Confederation of Indigenous Nationalities of Ecuador), the government approved bilingual education for indigenous peoples. The approval recognized the diversity of ethnic groups in the country, each with its own distinct language and identity.

Bilingual education is an indigenized institution through which aboriginal peoples can better understand and develop their identities. As Suzanna Sawyer points out, “it [is] a project of and for the future: of identity creation, community formation, and self-determination. Thus, indigenous education [represents] the emergence of local alternatives to state and corporate discrimination, exploitation, and disavowal.”<sup>56</sup> It functions in parallel to the formal state education system.

One of the most successful bilingual education initiatives is the Shuar Radio Education System (SERBISH). It uses radio to reach students dispersed throughout the Shuar territory who might be too remote to attend “physical” schools. Today, radio education reaches Shuar students in 209 locations. Three hundred and fifty-one Shuar teachers’ aides assist students in Shuar territory. Knowledge of Spanish has enabled Shuars to contribute to Ecuadorian political life and build a stronger indigenous movement. Academically, students also learn about Shuar cosmology, traditions, and the local ecology.

Bilingual education has strengthened Shuar cultural identity and empowered them as a group. SERBISH is often seen as a model for bicultural education in remote indigenous communities around the world. It demonstrates how important indigenous control over education can be in helping students understand their origins and defend their rights on the national political scene.<sup>57</sup>

These brief case histories illustrate the importance for indigenous peoples of maintaining control over physical and cultural resources. Access to a clean environment and careful management of forests, water, minerals, petrochemicals, and mining will help traditional peoples protect their ways of life, if they choose, or allow them to develop in ways that are environmentally sustainable, socially equitable, and economically viable for the greatest number of people in their community. Control over the educational system will make it possible for indigenous peoples to perpetuate languages and traditions through generations.

The question is not whether indigenous peoples should maintain their traditional way of life or integrate themselves into the national economic or national political life. It is whether they are allowed to choose how they want to evolve, define their relationship with the dominant culture, and control the development of resources on their territory for their own benefit.

## *Section 4*

### **Using national and international strategies**

In order to assert control over natural resources and manage their territories in sustainable ways, indigenous peoples are using several strategies to respond to pressures created by the dominant culture. Through increased capacity-building and collaboration with other indigenous peoples they have adopted a wide range of tactics to pursue their claims. In some cases, they have built coalitions with domestic political parties willing to defend their interests. In others they have engaged in direct negotiations with the state. In a few extreme instances, they have tried to use national and international courts to pursue their land claims.

#### **Mobilization through national and international coalitions**

One of the most visible tactics chosen by indigenous groups in various parts of the world has been to build coalitions with national NGOs and transnational NGOs. It would be a mistake to assume, however, that such alliances are easy to organize and sustain.

Indigenous communities and environmental NGOs share a concern about the sustainable use of land and natural resources, but their interests often run in orthogonal directions. According to Ali (2003), alliances between indigenous tribes and certain NGOs (in particular environmental NGOs) are not necessarily based on shared environmental values. Sometimes they both oppose development, but for different reasons. In his study of indigenous tribes in the United States and Canada, Ali explains that indigenous peoples are pursuing sovereignty, which can sometimes manifest itself as resistance to certain development ventures, such as mining.

Activist groups sometimes fail to understand that tribal resistance to development does not mean that indigenous peoples will support the environmental regulatory objectives of environmental advocates. Ali claims that the priority of native tribes is to fight for new institutional arrangements that further their goal of self-governance.

Ali underlines the essential conditions for a successful alliance between NGOs and indigenous peoples: allowing native to people make their own decisions and establish their own priorities; rethinking the linkage between land claims and environmental conservation; appreciating differing interests between parties before forming alliances; allowing indigenous peoples to manage their own efforts; and encouraging a more direct relationship between indigenous peoples and private interests operating on their land.<sup>58</sup> Several examples illustrate the



intricate relationships that indigenous movements and NGOs have occasionally been able to build.

In India, activists questioning the legitimacy of a major dam sponsored by the World Bank--the Sardar Sarovar Project--formed the Narmada Dharangrasta movement in 1986 to study the likely environmental impacts of the project and to estimate the number of people who would be displaced if the project went forward. For example, the situation facing the tribal people called the Adivasis was potentially disastrous, since many Indian laws established during the British colonial regime ignored the customary use rights of native people over land and forest.

To forestall the tragic effects the dam would impose, several groups of activists launched rallies across the country and gained nationwide attention and widespread press coverage. This, in turn, helped to build first, an opposition campaign against the dam and later the Save the Narmada Movement (NBA). This movement took on an international dimension, and produced testimony at a US Congressional hearing.

In 1993, the World Bank was forced to withdraw its financial support for the Sardar Sarovar Project. The pressure created by international symposia, lobbying at the US congressional level, a campaign denouncing human rights violations, rulings by the Supreme Court of India requiring the resettlement of displaced people, and an independent expert review of the project all came into play.

In Papua New Guinea, Yonggom activists played a major role in protesting the potential impact of the Ok Tedi Mine. They undertook a "truth campaign", testified before the International Water Tribunal in The Hague against the mine, and traveled to Germany to urge German shareholders in the mine to push for mine reform. They also formed alliances in Europe and in the United States with conservation organizations. They even went to Canada to protest the acquisition of BHP.<sup>59</sup> Finally, in 1994, they found the support of an Australian law firm willing to file a \$4 billion class action suit on behalf of a group of 30,000 indigenous land owners. The suit was filed in Melbourne, a supportive legal venue where they were able to articulate their claims.<sup>60</sup>

Through the mobilization of international NGOs, indigenous peoples in India and Papua New Guinea have managed to gain greater legitimacy for their claims, exercise pressure on national governments, build the negotiating capacity of indigenous communities, and construct worldwide alliances that have allowed them to exchange experiences and strategic lessons.

### **Domestic coalitions with political parties**

A second strategy used by indigenous peoples to advance their claims has involved both short-term and long-term alliances with traditional political parties in their own countries including

coalitions with opposition candidates during campaigns. The latest example of this alliance is the election of Evo Morales in Bolivia in 2006. He was widely supported by the Aymara people in the Andes. Such alliances can be helpful in bringing indigenous peoples closer to the center of power and strengthening their political bargaining capacity.

In Chile, the democratic opposition candidate to Augusto Pinochet, Patricio Aylwin, signed an historic agreement in 1986, the Nuevo Imperial, with the Mapuche leaders, promising to make their demands part of the electoral campaign in exchange for their political support. Their main demand was recognition in the Chilean constitution of the Mapuche and other indigenous groups as “peoples”. This demonstrates how land claims and the requests for autonomy of indigenous peoples like the Mapuche can be reframed in the context of evolving international debates over human rights.<sup>61</sup> This agreement also shows the growing importance of the indigenous peoples’ movement in Chile and the level of national recognition that indigenous organizations have achieved.

### **Building representative indigenous organizations**

A third strategy developed by indigenous peoples is the development of a strong organizational capacity for native tribes through the creation of representative organizations. This suggests that unity among indigenous groups may lead to improved leadership. It certainly leads to greater visibility. Such a strategy encourages indigenous peoples to align their demands before challenging the dominant culture. To build a coherent indigenous organization, they need to clarify their goals, develop a vision for the future of indigenous peoples in their country, and to elect representatives with strong leadership capabilities. Many international development agencies are now attaching high priority to building the capacity of such organizations through development assistance. For example, Oxfam-America has been supporting COICA, the Coordinator of the Indigenous Organizations of the Amazon Basin. This has created opportunities for transnational indigenous eco-political action.<sup>62</sup>

In Guyana, Amerindians suffer from a combination of legislative intervention that limits their rights and a lack of political will on the part of the executive branch to enforce existing laws aimed at protecting their rights. Amerindians are asking for recognition of their continuing property interest in lands on which they have traditionally lived in order to exercise the rights that any private landowner is granted, such as controlling trespassing on their territory.

In this case, the indigenous people are not asking for sovereignty, and there is no discussion of cultural autonomy in the land rights debate. Their two avenues for claiming the

same rights as any other private landowner are (1) pressing the government for land title and (2) advocating reform of the Amerindian Act, neither of which they have been able to achieve.

To press their demands, the nine Amerindian tribes have presented a remarkably united face to outsiders, thanks largely to the efforts of the Amerindian People's Association (APA) which advocates on their behalf and promotes their economic, social, and cultural development. The APA has managed to build solid support in Amerindian communities where it has representation, and achieved widely recognized legitimacy among the whole Amerindian population.

Located in Georgetown, the APA headquarters can maintain close relations to the centers of power; better advocate for the rights of Amerindians; and promote their economic, social, and cultural development.<sup>63</sup> The Guyanese government has recognized the support the APA commands in Amerindian communities by granting APA a role in the community consultations it undertakes when developing policies for Amerindians.

In the case of the Mapuche, successful indigenous mobilization since the 1910s has been centered on the rejection of the state goal of integration.<sup>64</sup> In the 1910s and 1920s, the Federacion Araucana formed alliances with leftist parties and managed to prevent the passage of legislation in 1927 that would have divided up the communal reservations. Later, under the Pinochet regime, organizations such as AD-MAPU, committed to preserving Mapuche identity and culture, served as a model for later popular movements.<sup>65</sup> Mapuche leaders were key actors in drafting the 1993 Indigenous Law.

However, because of the shortcomings of this law, the Mapuche have resorted to direct action and international coalition building to strengthen support for their cause and to force the state to negotiate with them. Several organizations, such as the *Radical Consejo de Todas las Tierras* (the Radical Council of All the Land), have formed international alliances with several European countries.

Mapuches are not asking for sovereignty--they see themselves as Chilean citizens. They are asking for the return of usurped and historically occupied land, as well as control over land resources and boundaries.<sup>66</sup> They have engaged in roadblocks, land takeovers, marches, and hunger strikes, hoping that street-oriented activities and united indigenous leadership will allow them to advocate their claims more effectively.

In 2003, addressing mounting criticism from international NGOs, the Chilean government created a "History Truth and New Deal" commission to address indigenous rights (and consider reparations). The formation of this commission may be a key step in the definition of autonomy for the Mapuche people.

Both in Guyana and Chile, indigenous peoples have managed to develop a unified organizational voice through traditional representative organizations. This suggests that (1) greater unity among native people, (2) improved leadership capabilities, (3) and an ability to maintain ties to international NGOs willing to fund capacity building are all valuable steps that indigenous people can take to advance their claims.

### **Negotiation**

In several countries, indigenous tribes have found their way into direct negotiations with federal, regional, and local governments to press their land claims. Despite the cost, length, and complexity of direct negotiations, groups that have managed to get state actors to the table have found this approach quite successful.

In the twentieth century, the Nisga'a of British Columbia in Canada were forced into a 76-square-kilometer reserve, a fraction of their traditional territory of 25,000 square kilometers. For decades, they made various attempts to win back territory that they believe British Columbia had illegally stolen. Despite these efforts the government's position, based on the ethnocentric assumption that aboriginal lands could be seized without compensation, prevailed.

With the support of their chief, Frank Calder, the Nisga'a initiated a land claim in 1968 in the British Columbia Supreme court, which resulted in a 1973 decision, *Calder vs. Attorney General of B.C.*, recognizing for the first time that aboriginal land title preceded British arrival in North America.<sup>67</sup> Gathering momentum, in 1976 the Nisga'a entered negotiations with the federal government, and later, with British Columbia.

In 1998, after 20 years of negotiation among the Nisga'a, the Canadian federal government, and the provincial government, the Nisga'a Final Agreement was signed by all parties and subsequently ratified by 70 percent of the Nisga'a population. By this ratification, the Nisga'a gained autonomy within the Canadian legal framework. The Nisga'a case suggests that First Peoples can manage to pursue their claims through direct negotiations and even alter the fundamental nature of their conflictual relations with the dominant culture.

### **Litigation**

Finally, the last strategy advanced by native peoples in their claims against the dominant culture has been the use of national or international courts and international treaties, resolutions, or conventions signed and/or ratified by the state. Similar in some ways to negotiation, litigation procedures are costly, can drag on for many years, and offer no guarantee of a positive outcome for indigenous peoples. Litigation requires expert knowledge of court systems and procedures as

well as the support of legal advocacy organizations willing to defend indigenous peoples. Furthermore, indigenous claims can be undermined by a nonindependent or nontransparent judiciary.

In Ecuador, the main conflict between the Sarayaku people and the Ecuadorian state occurred in 1996 when Ecuador granted to the Argentinean company CGC (Compañía General de Combustibles) the right to carry out seismic explorations on land more than half of which is in Sarayaku territory.<sup>68</sup> In April 2003, Sarayaku, helped by two Ecuadorian NGOs, CEJIS and CDES, presented a claim to the Inter-American Commission for Human Rights against the State of Ecuador.<sup>69</sup> In May, 2003, the Inter-American Court for Human Rights ordered Ecuador to implement precautionary measures to protect the “physical, psychological, and moral integrity of Sarayaku” as well as “the special relation the community has with its territory.”

Later, in July 2004, the Court ordered “provisional measures and resolve[d] to require the Ecuadorian State to adopt, without delay, all measures necessary to protect the life and personal integrity of all members of the Kichwa indigenous peoples of Sarayaku.”<sup>70</sup> Finally, in October 2004, the Inter-American Court for Human Rights declared the admissibility of the initial petition.

Despite these court rulings and international pressure on the Ecuadorian state, in January 2005, four young people of Sarayaku were detained and tortured by CGC employees. As a result, in June 2005, the Inter-American Court of Human Rights ratified the provisional measures ordered in July 2004 in favor of Sarayaku.<sup>71</sup> A crucial point here is that the different decisions taken by the Inter-American Commission indirectly recognize human rights violations by the state.

Recently, the attitude of the state changed drastically, as shown by statements made at a hearing of the Inter-American Commission of Human Rights on March 14, 2006. During that hearing, the Attorney General offered a friendly settlement to Sarayaku which they refused, claiming that the state lacked credibility. Viewing recent violations as too serious for the state to “repair”, the community sees the Inter-American Commission as the only legitimate arbiter to judge the Ecuadorian state and order reparations.<sup>72</sup> A final ruling is expected shortly.

As suggested by this case, litigation can take several years and does not guarantee that violations of indigenous peoples’ rights will be redressed. However, when national courts rule positively in favor of native tribes, these legal decisions can be used publicly to emphasize that violations have been committed by the state. Positive rulings can also set important precedents that can help other indigenous peoples in the country. It must be noted, though, that international

court rulings are not always binding; a state may decide to ignore decisions that favor indigenous peoples.

Indigenous peoples have resorted to a wide array of strategies to press their claims, including spontaneous alliances and street mobilization; highly sophisticated negotiations; and litigation in national and international courts and tribunals.

## *Section 5*

### **State reactions to indigenous peoples' land claims**

The strategies advanced by indigenous peoples to pursue their claims have produced a wide range of outcomes and reactions. In some instances, governments are not even acknowledging native tribes' demands or are responding negatively to their claims. In others, the response of the state has been to grant indigenous groups various levels of autonomy, and sometimes even sovereignty, through the recognition of equal status for native tribes. In some instances, even autonomy is not an adequate solution; we can expect these groups to die out. The case studies presented below describe the wide range of responses by the dominant culture to the strategies chosen by indigenous peoples.

#### **Type 1 – No reaction or negative reaction by the state**

The first type of response to indigenous land claims has been an absence of reaction by the state or strong opposition to proposals put forward by native tribes.

In Israel, Bedouins have sustained their traditional way of life in the Negev desert for generations. In the late 1960s and early 1970s, the government of Israel pressed Bedouins to resettle in seven planned towns. In the design of these places little consideration was given to Bedouin culture. Lack of Bedouin involvement in the design may have something to do with the fact that more than half of the Bedouins refused to move. They claimed that the intention behind this settlement policy was not, as Israel claimed, a desire to give them access to modern services, but rather an effort to concentrate them in areas that would enable the transfer of their land to the state and lead to their ultimate assimilation.

The seven recognized Bedouin towns established at the end of the 1960s paid little attention to tribal structure, forcing tribes with a history of rivalry and antagonism to live together. The towns also offered insufficient land for Bedouin agriculture. The adaptation of Bedouins to the modern way of life in these new towns has led to conflicts between sexes, between older and younger generations, and between nuclear families and the tribes.

Bedouins who resisted resettlement remained in unrecognized villages. These are informal communities with no permanent structures or public services. Today, the government does not recognize these settlements and considers them illegal. The locations on which they have been built were classified as agricultural land in 1965 under a Planning and Construction Law that ignored the existence of Bedouin villages and localities.

As a result, all these villages are under threats of demolition and most of them do not receive basic services. A recent response to Bedouin distress has been the Sharon five-year plan, which offers numerous incentives to Bedouins willing to move into the recognized towns. However, the Israeli government has also resorted to systematic crop destruction, demolition of houses, and legal battles in court to underscore the state's land ownership claims; to make the lives of Bedouins in the villages particularly uncomfortable; and to convince them to move.

On balance, penalties overshadow incentives, leading the Bedouins to reject the whole plan and to increase their resistance to the Israeli state.<sup>73</sup> By comparison, the Jordanian response to Bedouin efforts to preserve their traditional way of life emphasizes incentives and is characterized by a heightened level of cultural awareness and sensitivity. Moreover, government decisions regarding Bedouins are made collaboratively.

In Eastern Europe, Crimean Tatars are facing similar opposition to their land claims, with the additional disadvantage of being dispersed across several countries and not having a unified organizational structure to advance their claims. Crimean Tatars are spread among several countries in Eastern Europe and Central Asia: 260,000 live in the Autonomous Republic of Crimea in Ukraine; 150,000 in Uzbekistan; 24,000 in Romania; 3,000 in Bulgaria; and an undetermined number in Turkey. The Autonomous Republic of Crimea is very diverse. Twelve percent of the population are Tatars; 64 percent Russians; 21 percent Ukrainians; and three percent other groups.

Tatars' claims in Crimea focus on five objectives. These include: achieving official status as an autochthonous or indigenous people; an official recognition of their traditional leaders as supreme representative authorities; effective representation at all levels of government; an improvement in socioeconomic conditions sufficient to allow the return of all people deported by the Soviet Regime in the 1940s; and equal rights of all peoples of Crimea regarding privatization and employment.

Other stakeholders in the region--Russia, Ukraine, the Non-Tatar population, and the government of the Autonomous Republic of Crimea--do not recognize the Tatars' claims and ignore their demands. Currently, no legislative act provides effective representation, political participation, or self-government for the Crimean Tatars, including the right of self-determination. In 1998 the Ukrainian Government even deprived Crimean Tatars who had not obtained Ukrainian citizenship of the right to vote.<sup>74</sup>

Complex features of tribal populations combined with the repeated migration of their ancestors have always made it difficult for the Adivasis of India to discuss their indigeneity. While most scholars challenge the notion, the Adivasis have been described as the only natives of



India.<sup>75</sup> For this reason, their rights have not often been articulated as those of indigenous people. However, like many native people around the world, the Adivasis have long been excluded from the national society.

During the colonial regime, the Adivasis were neglected by the British and isolated from the rest of the society. Land owners and trader-moneylenders financed their agricultural projects. As a result, many Adivasis accumulated debt and eventually lost their land.

In 1927, the Forest Act led to devastating impacts on Adivasis' use of forest resources, as it established the absolute right of the state over forest land, ignoring Adivasis' customary-use rights. After independence, scholars and social workers helped strengthen the solidarity of Adivasis across tribal lines in protest against official lack of respect for customary forest rights.<sup>76</sup> In fact, in India, the identification of Adivasis as indigenous people refers specifically to their lack of control over "their" natural resources, not to their putative claim to being the native people of India.

In the past 30 years, rapid industrialization and development, such as dam construction, have even further restricted Adivasis's use of land and forests. Since many Adivasis live in steep and remote areas, also well suited to dam construction, these projects have had especially destructive impacts on their lives. Forty percent of the people displaced by dams in India have been Adivasis, who represent only eight percent of the total population.<sup>77</sup>

Displacement destroyed two important bases of their lives: their tie to natural resources and the social bonds among the Adivasis themselves. The Sardar Sarovar Project allegedly affected up to 300,000 people through displacement by canal construction, secondary displacement, compensatory afforestation, and public health hazards.<sup>78</sup> The dam projects have ended any chance of autonomy for the Adivasis. In March 2004, further construction of the dam up to a height of 110 meters was authorized.

In these cases, indigenous peoples face strong opposition from national governments which refuse to address their concerns. Their claims have been ignored. Native tribes can wait and hope for a change in regime or a shift in the political culture of the country. Alternatively, they might bring into play one or more of the approaches discussed in the previous section.

### **Type 2– Demands are heard by the state, but disputes are not resolved**

A second type of state response to the claims of native peoples has been to acknowledge their demands and reflect publicly on ways to address them, but to make no major changes in the status of indigenous tribes or to offer no resolution of specific claims. In these instances, governments are not ready to alter their relations with indigenous peoples or to respond to their plight.

In Chile, following the election of President Patricio Aylwin in 1989, a new Indigenous Law (*Ley Indígena*) was drafted and debated at 2,000 community meetings. Although the 1993 final version of the law was much less ambitious than its original version (the ILO Convention 169 was not ratified), it did contain measures of great significance for the struggles of the Mapuche people. The law recognized Chile as a multiethnic and multicultural society; it established a water and land fund for the purpose of acquiring land and water rights; it recognized the rights of indigenous peoples and their legal representatives to be consulted when state decisions are being made; and it established a decentralized public agency with both indigenous and ministerial participation, the CONADI.

However, the *Ley Indígena* did not grant the Mapuche people control over their land or natural resources, nor did it offer them any way to deal with boundary spillovers. The CONADI has failed to block governmental and private projects on Mapuche's land and forest. Changes in the status of Mapuche people in Chile have given them more rights on paper, but the implementation of these rights is still very limited.

In Guyana, most Amerindian demands revolve around land titling and control over the natural resources present on and under the land. In 1976, the Guyanese government agreed to transfer title to 62 communities under the Amerindian Act and to give these communities authority to make land use decisions in their area. However, it also placed Amerindians under the control of government-appointed Village Captains; forbade the sale of alcohol; restricted the employment of Amerindians; and stripped them of discretion to exclude outsiders. Security of land tenure was also undermined, as Amerindians did not gain subsurface rights and received no title to lands within 66 feet of rivers and coastal areas, areas essential to maintaining their traditional way of life. They were forbidden to sell their land without approval of the Minister.

In 2006, under pressure from the World Bank, Guyana enacted a new Amerindian Act that gave the indigenous people more control over local government. However, in this new law the Minister retains power to reject community rules; approve contracts between communities and outsiders; overrule community land use decisions; and take land without compensation. Finally, and most importantly, the state retained ownership of the subsoil resources essential to Guyana's economy.<sup>79</sup>

The Amerindian Act allows gold mining within 66 feet of rivers that run through native titled land. The Minister is also allowed to override a community's veto of large-scale mining projects judged to be in the public interest. As in Chile, the Guyana case suggests that the government is hesitant to grant secure rights to native people that could compromise the economic value of mineral resources on their land.

Finally, in Ecuador, the Ecuadorian state has moved from a strong negative reaction to Sarayaku's land claims to a somewhat softer approach. After Sarayaku's protests against CGC exploration in 2001, the government militarized Sarayaku territory and ignored their claims.

The state presumed that the Inter-American Court for Human Rights would not hear Sarayaku's claim, mostly for technical reasons.<sup>80</sup> According to the government, Ecuador had no obligations under ILO Convention 169, and requested that the petition be declared inadmissible and the case closed.<sup>81</sup> Furthermore, Ecuador's Attorney General did not investigate death and rape threats claimed by Sarayaku members. To emphasize Ecuador's sovereignty, the Minister of Energy and Mines declared: "The Organization of American States does not give orders here."<sup>82</sup>

Recently, the state changed its stance towards the Sarayaku claims, offering a friendly settlement at a hearing of the Inter-American Commission of Human Rights in March 2006. This settlement encompassed voluntary withdrawal of CGC from Block 23; public recognition and apology for the human rights violations committed against Sarayaku; the creation of an economic fund for the central and southern Ecuadorian Amazon; and reforms in the prior consultation regulation for hydrocarbons.

The main issue in this case is that indigenous rights are not well defined in the national legal system. There is too much legal ambiguity regarding indigenous rights in Ecuador and no guarantees regarding their implementation.<sup>83</sup> In the 1998 Constitution, Articles 224, 225, and 241 grant collective rights to indigenous peoples and allow them to decide about the exploitation of natural resources on their land. However, the state can declare any land to be of public utility and override local choices.

Sarayaku's claims do remain in the framework of the constitution. They are not asking for sovereignty, but for legal competencies inside a recognized and framed territory, which would enable Sarayaku to make decisions about oil exploration without state interference. However, the state is not ready to negotiate on an equal basis with indigenous peoples, nor is it clear whether the state is committed to democratic participation and pluralism that would include indigenous minorities. At present, a window of opportunity for a redefinition of indigenous rights may be opening; Ecuador's new President, Rafael Correa, has promised to reform the constitution and has publicly expressed support for the Sarayaku people.<sup>84</sup>

These cases suggest that the resolution of indigenous land claims is not on the agenda of some governments and that some state actors are not yet ready to engage in a true discussion of indigenous land claims. Resolution is contingent upon the willingness of the state to meaningfully consult and equitably participate in the benefits of development with indigenous peoples. Russell Barsh observes (1997) that such consultation and participation is "contingent upon the existence

of an enabling regulatory framework, as well as on the capacity of indigenous and tribal peoples to negotiate with the State and/or the private sector, fair, and adequate terms and conditions.”<sup>85</sup>  
In none of these cases do such conditions exist.

### **Type 3 – Significant or partial resolution of land claims**

In some cases indigenous peoples have managed to advance their land claims quite successfully. States have responded openly to these demands and have been willing to engage in conflict resolution procedures to reach resolution. Through several strategies, indigenous peoples have seen their demands significantly or partially addressed. Native tribes have achieved self-determination, real autonomy, or partial autonomy, and have gained financial compensation from the government.

#### *Self Determination*

The case of the Maori people in New Zealand demonstrates one of the greatest achievements for indigenous peoples around the world, self-determination. In 1840, British settlers and Maori people signed the Treaty of Waitangi as an act of reconciliation between the Crown of England and local indigenous peoples. Article 2 of the treaty guarantees Maori the “full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and such other properties as they may collectively or individually possess, so long as it is their wish and desire to retain the same in their position.”

However, between 1852 – when the New Zealand Constitution Act granted British settlers their own government – and the 1970s, settlers confiscated Maori land and were allowed to purchase Maori land (1862 Native Lands Act). On the positive side, in 1867 seats in the New Zealand Parliament were reserved for Maori elected representatives.<sup>86</sup>

In the 1970s, a new generation of urban and well-educated Maori activists voiced frustration about the failure of successive governments to respect the principles and clauses of the 1840 treaty. Their activism led to the 1975 Treaty of Waitangi Act which officially recognized the full legal status of the original agreement. In addition, the Waitangi Tribunal was set up to investigate and settle Maori grievances, including the issue of land loss.<sup>87</sup>

Since the 1980s, successive governments have recognized the need to resolve historical Maori grievances in accordance with the Treaty of Waitangi. The Crown even agreed to allow direct negotiations that would bypass the Waitangi Tribunal. In 1988, the Treaty of Waitangi Policy Unit (renamed later “Office of Treaty Settlements”) was established within the Department

of Justice to advise on policy and assist in negotiations and litigation involving a wide range of Maori claims related to lands, forest, fisheries, and other resources.<sup>88</sup>

Maori negotiated pioneering settlements, such as Waikato-Tainui (direct negotiations that included cash and land valued at \$170 million) and Ngai Tahu. The Ngai Tahu settlement, following a Waitangi Tribunal inquiry, granted compensation of \$170 million, a confirmation of Ngai Tahu's ownership of greenstone, and allowed indigenous peoples a role in the management and conservation of estate resources within their boundaries.<sup>89</sup> In addition, the 1989 Crown Forest Assets Act protects Maori interests in former Crown-owned forest land. Claims to such land are funded through interests generated by the rental income paid by private forestry companies for the lands they had planted.

The hearing and settlement of historical claims has become a major focus of Maori energies over the past decade. Unlike many countries with indigenous people, New Zealand has seen a longstanding and bipartisan, albeit cautious, recognition of Maori self-determination.

However, recent shifts in New Zealand politics, encouraged by populist political opinion, have challenged the Maori right to self-determination, and might ultimately challenge their right to a unique identity. As O'Sullivan (2004) explains, the denial of the legitimacy of exercising a self-defined identity is the denial of the right to exist as Maori, individually and collectively.

In 2004, populist politics shifted indigenous self-determination to the periphery of elite policy thinking, as demonstrated by a Court of Appeal judgment *Ngati Apa and Others v. Attorney General*, (CA 173/01 CA75/02, 19 June 2003)<sup>90</sup> and by a speech by the opposition leader Don Brash, *Nationhood*.<sup>91</sup> As demonstrated by these two dramatic developments, some political leaders appear to be resisting grants of group rights based on tribal identity. They argue that the needs of Maori individuals are not different than those of other New Zealand citizens. This position calls into question rights based on indigeneity and the principles of reconciliation embodied in the Treaty of Waitangi.

In September 2006, Pita Sharples, co-leader of the Maori Party, announced during a Parliamentary General Debate his plan to raise some questions about the concept of self-determination. This principle has gained international traction following the adoption by the UN Human Rights Council of the Declaration on the Rights of Indigenous Peoples on June 29, 2006. However, New Zealand joined forces with the United States, Australia, Canada, and the Russian Federation to oppose UN adoption of the Declaration by the end of 2006.<sup>92</sup>

The New Zealand case suggests that, even when self-determination is accepted by a dominant culture, limits and revisions arise because self-determination is fundamentally at odds with the prevailing notion of democratic pluralism in the nation-state.

### *Partial resolution of land claims*

Native Hawaiians in the United States have made some progress addressing land claims and their right to self-determination, but many efforts have been defeated or dismissed by the state and federal government. These setbacks reflect the challenges to reaching agreement on the ultimate objectives of sovereignty and the relationship between Native Hawaiians and the state.

Both Native Hawaiian and non-Hawaiian citizens are aware of the concept of sovereignty as raised by movements that have emerged in recent decades. The spectrum of sovereignty demands includes reparations; the legal incorporation of land-based units within existing communities; “Free Association” or “Limited Sovereignty”; “Nation-Within-A-Nation” status; or a fully independent Hawaii controlled exclusively by Native Hawaiians.<sup>93</sup> These claims all focus on land, and include demand for access as well as the return of land to Native Hawaiians.

A major success in the sovereignty movement came in 1996 when the Hawaii Supreme Court ruled that Native Hawaiians retained the right to traditional gathering practices on undeveloped land. The decision in *Public Access Shoreline Hawaii vs. Hawaii Planning Commission* was significant because it upheld the rights bestowed upon Native Americans by King Kamehameha III and the Court based its decision in part upon testimony by Native Hawaiians.<sup>94</sup> The decision also stated that Native Hawaiians and their state representatives could intervene to protect these rights if private interests attempted to infringe upon them.<sup>95</sup>

Hawaiian efforts to challenge the government’s management of ceded lands achieved a victory in 1995 when Judge Daniel Heely recognized the claims of native Hawaiians and the Office of Hawaiian Affairs (OHA) to revenues generated on ceded lands. A portion of the Honolulu International Airport lies on federal land, and in 1996 Judge Heely ordered the state to pay OHA a portion of its revenues totaling between \$300 million and \$1.5 billion generated from use of ceded lands. The state appealed to the Hawaiian Supreme Court, which reversed the decision and dismissed the case in 2001 (96 Haw. 388). OHA again tried to recover airport revenues in 2003, 2005, and 2006, and the Circuit Court and the Hawaiian Supreme Court dismissed the case each time, stating that the legislature must address the ceded lands issue.<sup>96</sup> The decisions frustrated the efforts of those trying to collect revenues generated on lands that the Kingdom had originally set aside for public trust purposes.

More recently, the proposed Native Hawaiian Reorganization Act would have formally recognized a Native Hawaiian governing entity and offered Hawaiians the same benefits, protections, and acknowledgment as other Native American groups. In June 2006, the Senate defeated the Native Hawaiian Reorganization Act and its nation-within-a-nation system. Differing opinions among Native Hawaiians over the legislation demonstrate fractures among

sovereignty movements. Some believe it is a positive step towards ending more than a century of discrimination, while others feel that the bill would legitimize US treatment and control over Hawaiians.<sup>97, 98</sup> While pressure for autonomy and sovereignty continue to build, the outcome may depend on whether different groups can align their objectives.

### *Recognized and effective autonomy*

A second type of land-claim resolution occurs when states grant autonomy to native tribes through laws and regulations. Autonomy represents something less than pure self-determination in terms of rights for indigenous communities, but it enables them gain secure access to land and manage resources according to their own values and laws. It also changes power relationships between the dominant culture and indigenous peoples.

In the State of British Columbia in Canada, the 1998 Nisga'a Treaty fundamentally altered the relationship between the Nisga'a and the Canadian government. Nisga'a acquired collective ownership of 1,992 square kilometers of "Nisga'a Lands" fee simple, including the ownership of subsurface resources. The treaty delineates entitlements to water, fish, wildlife, forest, and minerals. The Nisga'a are allotted specific percentages of the salmon runs, and acquired fishing and hunting rights, within the limit of federal regulations for these industries. The Nisga'a also own the forests and are able to make laws regarding their use, even if they can log only specific amounts each year and must obey provincial forestry laws. They were also granted 300,000 cubic decameters of water annually, which they can use for any purpose.

Through this treaty, the Nisga'a will govern Nisga'a lands according to a complex and detailed self-government arrangement. Nisga'a can adopt their own constitution and are no longer subject to the Indian Act, a paternalistic federal law that tightly regulates the affairs of all First Nations. The Nisga'a gained broad legislative powers over most internal matters, including taxation, except over criminal law. However, provincial and federal laws will continue to apply to the Nisga'a.

In this historic agreement, the Nisga'a achieved solid self-governance and self-determination, but within the framework of Canadian law. In exchange for the treaty, the Nisga'a released any future aboriginal land rights claims. Most criticism of the treaty comes from other First Nations. They argue that the Nisga'a have consented to the loss of their sovereignty in exchange for limited rights delegated by British Columbia and Canada.<sup>99</sup>

The Canadian government has been willing to redefine the relationship between the state and indigenous peoples and to grant autonomous status to native tribes. However, autonomy does not equal self-determination and can involve compromises over the amount of land that is granted

or the laws and regulations that must be obeyed. It also leaves open the question of how the status of First Nations or First Peoples will be defined in the future since only a permanent grant of full sovereignty would end the discussion.

*Autonomy recognized but not implemented*

A third type of resolution of indigenous land claims consists of granting autonomy to indigenous tribes but without any special (legislated) means of implementing this new status. In Taiwan, during the presidential election of 1999, indigenous activists, supported by the DPP party, organized a campaign to push forward indigenous policies. The successfully signed “Treaty of New Partnership between the Indigenous Peoples and the Government of Taiwan” has several articles, including recognition of the natural sovereignty of Taiwan’s indigenous peoples; the promotion of self-governance for indigenous peoples; the conclusion of a land treaty with indigenous peoples; the reinstatement of traditional names of indigenous communities and natural landmarks; the recovery of traditional territories and use of natural resources for indigenous communities and peoples; and the provision of congressional representatives for each indigenous people. This agreement recognizes indigenous self-governance in theory, putting an end to the discriminative and assimilationist attitudes of the previous regime.

Since this agreement was signed, one of the Tsou villages, Saviki, initiated a self-organized community effort to safeguard the river Tanayiku that runs through the community. However, their right to act has been limited by the national government. Administrative regions have yet to be reorganized to enable indigenous people to achieve self-governance. Currently, indigenous self-governance does not mean local self-governance in the jurisdiction of the *xiang*, an administrative level smaller than the county. In Taiwan, the autonomy of the Tsou people is very limited in practice despite a treaty granting and defining self-governance for indigenous peoples.

In Papua New Guinea, the Yonggom People have been able to live and practice traditional agriculture, farming, and fishing for decades without interference from the state. The country’s 1975 constitution recognizes the customary laws of indigenous people as a binding part of the national legal system. However, in practice, the status of autonomy has been emptied of meaning mostly by conflicts related to land use and resource rights. In 1994, the Yonggom filed a lawsuit against the mining company BHP Billiton to protest against the environmental impacts of the Ok Tedi mine. In 1996, both parties reached an out-of-court settlement directing 500 million dollars to the building of appropriate tailings containment facilities by BHP Billiton; the creation



of a trust for the people of the Fly River; and a fund for communities in the most heavily affected areas of the lower Ok Tedi River.

BHP implemented the two last items, but did not construct the containment facility. Instead, the company undertook a court-mandated environmental study and decided to pull out of the mine shortly thereafter. Indigenous groups went back to court asking for more compensation for environmental damage. In 2004, the parties reached another settlement. Shortly after, BHP sold its share of the mine to another company after doing a suboptimal clean up, again without building tailings facilities. In the future, environmental degradation will get worse as the tailings settle more firmly into the river bed and penetrate the entire Fly River system, impairing the Yonggom's traditional way of life.

In this case, the two settlements did not lead to improved environmental standards or benefits for the communities that would help them sustain their livelihoods. The government of Papua New Guinea did not contest land ownership or land usage, but environmental damage upstream from the indigenous people's territory destroyed their land and prevented them from maintaining economic and culturally significant activities. In the end, sovereignty or autonomy has no real meaning when the land is unusable.

In Taiwan and Papua New Guinea, autonomy rights have been granted to indigenous tribes on paper, but are limited in practice because of the governments' unwillingness or inability to follow through on implementation.

### *Monetary compensation*

A fourth type of response to resolving indigenous land claims has been to offer monetary compensation to native tribes for the loss of sovereignty, autonomy, and/or the exploitation of resources. In this last case, there is no guarantee that clear borders will be maintained between native people and the dominant culture. In the United States, through the Arizona Water Settlement Act of 2004, the Central Arizona Project (CAP) will bring 1.5 million acre-feet of Colorado River water per year to the Arizona counties of Pima, Pinal, and Maricopa. The CAP is the largest single resource of renewable water supplies in Arizona.

The Act also guarantees \$200 million to the community, of which \$147 million will rehabilitate the San Carlos Irrigation Project and \$53 million will establish an Operations, Maintenance, and Rehabilitation Trust Fund to defray costs associated with the delivery of CAP water to the community. Through this project, the farmland of the native tribes will be revitalized and farmers will be able to restore cultivation of citrus crops, vegetables, cotton, alfalfa, and grains. However, there is no guarantee that the community will be able to effectively practice

farming after a century away from this activity or that irrigation will be carried out in ways that will most benefit indigenous peoples.

In Canada, the Nisga'a treaty provides ongoing financial payments to help native tribes sustain their way of life. According to the treaty, the Nisga'a will receive payments of \$190 million over a 14-year period. In addition, British Columbia and Canada have committed to funding the Nisga'a government so that it can provide services to its citizens "at all levels" reasonably comparable to those prevailing in Northwestern British Columbia. The total value of the treaty, including the land, capital payments, and the commitment to pay for services, is estimated at \$500-550 million.

Finally, in South Africa the Land Claims Court determined in 2004 that the Nama people of the Richtersveld community would be awarded restoration of their right to land and minerals, with the potential for additional equitable redress to provide for, among other things, remediation of environmental damage. In October, 2006, the South African government settled the Richtersveld claim out of court for R 190 million (approximately \$27 million). This payment, termed a "reparation payment", is in addition to guarantees for environmental restoration of damaged areas and formal control of the land and mineral rights. This is a significant financial victory for the Richtersveld community, although it is also a significant outlay from the public coffers. It is unknown precisely what effect this compensation will have on the Richtersveld people.

From the Richtersveld and the Nisga'a perspective, attaining autonomy over the use of the land is linked to their ability to retain their traditional knowledge and will likely contribute to preserving indigeneity. For the GRIC, attaining autonomy over the use of the water is linked to their ability to retain their traditional way of life. The question remains open, however, whether and how financial compensation will strengthen their indigeneity.

These four levels of response to the land claims of indigenous peoples vary greatly in the extent of sovereignty or autonomy granted to native tribes and in the level of effectiveness and implementation of new agreements. In Taiwan and Papua New Guinea, autonomy on paper for the communities has not translated into implementation in practice. A first explanation might be that the development model chosen by the state, especially when governments choose to exploit and extract certain natural resources from indigenous land, is inconsistent with what the indigenous people have in mind. Another reason might be the difficulty of fitting newly recognized indigenous rights into old administrative structures. Furthermore, such rights may continue to be resisted by members of the dominant culture, such as the Han Chinese in Taiwan. Financial compensation is not a panacea either, since environmental or cultural damage to

indigenous lands has occurred over long periods and estimating the value of these losses is likely to lead to intense debate and controversy. Furthermore, there is no guarantee that monetary compensation will lead to a restoration of traditional practices or preservation of the indigeneity of the native people involved.

## *Section 6*

### **Doing the ground work: Preconditions for successful claims**

Certain conditions appear to be essential to the success of land claims by indigenous peoples. First, a set of prerequisites internal to the claims must be organized in order to mount a compelling case. Second, in many cases international pressure must be brought to bear on governments resistant to the claims of indigenous peoples. Third, the values of the dominant culture must be enlisted in support of claims that do not, at first glance, appear to be consistent with their interests. Fourth, in the course of legal or alternative decision making around land issues, indigenous people must be allowed to articulate their own conception of their desired status and rights. Finally, it is necessary to put structures in place to monitor adherence to agreements between indigenous peoples and the dominant culture.

#### **Preparing conditions within the community**

Certain prerequisite conditions will enhance the likelihood that the demands of indigenous peoples will be heard or resolved. The indigenous movement needs to be cohesive, and native people must speak with a unified voice. Strong indigenous leadership is required to mobilize indigenous constituencies.

The initial step, for the people of an indigenous community, is to assume that their culture and way of life are worth fighting for. Unless this condition is met, it is unlikely that the leadership will emerge to advance indigenous claims. If indigenous people are not proud of their cultures, then their communities will eventually crumble from within, as younger generations choose to adopt the ways of the dominant cultures and fail to pass their languages and cultures along to their children. Some indigenous groups feel inferior and ashamed of their cultures. When this happens, a culture will not survive, no matter how much land is made available.

The enlistment of national and international NGOs in support the rights of indigenous peoples, depends on the assertion of the value of traditional ways that members of the community might have forgotten. For example, one of Oxfam America's programs in South America is helping indigenous Andean communities re-learn to grow crops such as quinoa, cañihua, and alfalfa.<sup>100</sup>

#### **The value of international pressure**

The cases examined in this study reveal the capacity of international NGOs to exert pressure on foreign governments. When international pressure or support do not exist or disappear, the voices

of natives will not have as much impact and a dominant culture can act with impunity. Moreover, even international financial organizations, often criticized for their support of massive private investments with unproven economic, social, and environmental benefits, can play an important supporting role if they threaten to pull out of a project.

In the Sardar Sarovar project in India, activists achieved significant victories from the late 1980s to the early 1990s due to the extensive support they received from international human rights and environmental NGOs. The major victory came when the World Bank withdrew its support for the project in 1993. However, this financial withdrawal shifted the Adivasis's struggle to the domestic arena and altered the power balance between supporters and defenders of the project. Almost any opposition by local civil society groups was subsequently countered by police forces.

When the World Bank withdrew, the stakeholding states and the central government of India gained complete control over the project by taking on the cost of the project. In March 2000, the government of India allowed further construction of the dam to a height of 110 meters despite the assertions by the UN Commission on Human Rights that the project violated the right to adequate housing; the human right to security of the home; the right to information; the right to work; the right to health; and the right to food.<sup>101</sup> In October 2000, the Indian Supreme Court confirmed the legality of the dam construction.<sup>102</sup>

In the context of growing state power, pressure from the UN Commission on Human Rights had little effect. There has been no adequate rehabilitation or resettlement of those displaced or communities disrupted by the project. In some respects, the end of international donor pressure liberated the state from the need to respect the rights of the dam-affected populations.

If the state has signed and ratified international conventions protecting the rights of indigenous peoples, native tribes may have some leverage. They will be able to appeal for international assistance and support which could influence governmental actors in their own countries. Chile is one of the three nations in the world that has failed to ratify the ILO Convention 169; this compromises the capacity of the Mapuche to assert their claims as effectively as other groups in South America.

Elements of the Chilean government see Mapuche demands for autonomy, political freedom, and land and resource security as attempts to "balkanize" the region and as threats to the foundations of Chilean economic policy and national law.<sup>103</sup> This is consonant with Chile's refusal to ratify the ILO Convention 169 and thereby accept an international binding agreement regarding the rights of indigenous peoples. In this particular case, it might be important, then, to

reframe the debate and the demands of indigenous peoples, emphasizing, for example, human rights violations or environmental degradation rather than the more basic right to autonomy.

### **Enlisting the dominant culture**

A third factor in the successful assertion of indigenous claims is to muster the support of members of the dominant culture who can, in turn, pressure governments to grant or expand the rights of indigenous people.

In Taiwan, for example, for the past two decades the activism of the Tsou people has focused on the relationship between the Tsou and the government and on the rebuilding of capacity and identity within the Tsou community. The Han Chinese inhabitants of the area have regarded the economic and political achievements of the Tsou with mistrust and bitterness and have been reluctant to accept their increasing power. For the Han Chinese in the region, the achievements of indigenous activism and Tsou self-organizing have created tensions between the two neighboring groups. The dominant inhabitants and the local police seem to feel disempowered by the rise of the Tsou.

A 2003 court decision found a Tsou headman guilty of robbery when, in his view, he was justly exercising his authority to protect Tsou resources from a Han Chinese trespasser.<sup>104</sup> The case suggests that indigenous sovereignty is often rejected by the dominant culture and its institutions when the two cultural and legal systems come into conflict. This case also demonstrates an increased tension within the Tsou community, which has taken over responsibilities that used to belong to government agencies created by the dominant culture.

If the Tsou are to achieve true self-governance, it is essential for them to redefine their relationship with the national government and with the dominant culture. They must include Han Chinese in the economic development of the region, which is being stimulated by Tsou activities. This seems to be a *sine qua non* condition for the exercise of true self-governance. The Han Chinese constitute the majority of voters and form the traditional political base of political parties; they will try to protect themselves against the resurgence of indigenous power. The consolidation of the Tsou communities will not be sustainable without direct or indirect inclusion of the dominant Han Chinese.

The willingness of governments to negotiate will be determined, at least in part, by the malleability of the leaders in charge and the general relationship between indigenous peoples and the dominant culture. In Ecuador, Rafael Correa publicly expressed his support for the struggle of Sarayaku during his successful presidential campaign. He assured the electorate that there would be no exploitation of oil in indigenous territories unless the indigenous peoples involved give

their consent.<sup>105</sup> With this support from the top, a new relationship between indigenous peoples and the dominant culture in that country may be dawning.

### **Engaging indigenous people in defining their status and rights**

A fourth set of conditions that will enable the effective resolution of indigenous land claims is the need for native tribes to be directly engaged in the design of alternatives to exclusion and domination.

An examination of Jordanian state attitudes toward Bedouins suggests that the most effective decisions regarding native people are made bilaterally by the government and the Bedouin people. Mutually acceptable decisions increase the rate of acceptance and recognition of the dominant culture of new indigene rights. In Jordan, policies designed through constructive dialogue between the government and tribal people have proven more acceptable to Bedouins than those developed in Israel. For example, in the settlement of these communities, the Jordanian government grants them parcels of land for cultivation. The government also encourages them to register the land in their own names and to cultivate the fields. Bedouins receive agricultural assistance, wells for water, and agricultural loans.

These measures ease the preservation of the tribal lifestyle by making settlement conditions more amenable to traditional forms of settlement. At the political level, Bedouins have seats set aside for them in the Parliament. They have their own police legion and are encouraged to wear their traditional clothing as their army uniforms.

Policies designed through the direct involvement of the Bedouin lead to decisions more likely to respect Bedouin culture, tradition, and identity. Bedouins do not see the dominant culture as an oppressive assimilationist power, but as a partner with which they can build a sustainable future for their people.

### **Monitoring agreements**

The final factor essential to robust long-term resolution of land claims is the monitoring of agreements between indigenous peoples and the dominant culture. Oversight by independent parties or joint monitoring is preferable. Much of the scholarship about the settlement of land claims focuses on the texts of final agreements and not on their actual implementation.

In Arizona, the 2004 Arizona Water Settlement Act guarantees a dependable supply of water to the Gila River Indian Community (653,500 acre-feet annually). While this is only a fraction of the water to which the GRIC is legally entitled, it provides them with new water sources to replace some of the Gila River water that has been lost over the last century.<sup>106</sup> The

AWSA resolves all of the GRIC claims for water, all claims for injuries to water rights, and resolves other key Arizona and local municipality issues. However, water transfers and management mechanisms are much more difficult to implement than to define. The problematic and complex nature of these settlements has limited the actual analysis of implementation. Careful monitoring will be needed to verify the implementation of the Arizona Water Settlement Act and other parallel agreements.



## *Section 7*

### **First Peoples' land claims: An uncertain future**

Can indigenous people in the Amazon, Papua New Guinea, or Chile, threatened by the actions of transnational companies and unprotected by the state, hope to achieve greater autonomy, self-determination, or political control over their territory? It is unlikely that the groups studied here will be able to survive if their land claims are not resolved in ways that acknowledge the essential nature of their relationship to their land and territory. A meaningful response to indigenous land claims balances the autonomy of First Peoples and the sovereignty of the dominant cultures that surround them. In particular, aboriginals need to control the allocation of natural resources on and under their land and the education of their children. Access to land and water resources are crucial to indigeneity.

The strategies most likely to help native people push their claims forward may hinge on internationalization of their efforts to confront the relevant nation-states and corporations. Even though final decisions about the setting of borders (and what happens at and within them) must be made by sovereign states, these governments are more likely to respond to pressure from international coalitions than they are to decisions under international law. The more quickly indigenous peoples and their support coalitions can negotiate directly with the states, the more advantageous the outcomes are likely to be. Ideally, governments and indigenous peoples might come together to address specific aboriginal claims in a fashion uniquely tailored to each situation.

The cases studied here suggest that the most productive negotiation strategies for indigenous peoples begin with claims of autonomy, rather than sovereignty; focus on principles of fairness, rather than arguments grounded in international law; and explore the possibilities of sharing revenue derived from resource utilization as long as resources are managed in a way that is sustainable and supportive of indigenous cultural practices. Negotiations such as those pursued by the Nisga'a in Canada or the Pima in the United States show that agreements can emerge when both sides mitigate their most extreme claims. Indigenous groups that try to pursue such negotiations without the support of international networks and domestic coalitions, however, are likely to fail.

A point to consider is that the resolution of one tribe's claims will affect other tribes in the same state. In Canada, the Nisga'a Treaty attracted criticism and skepticism from First Nations both inside and outside British Columbia. Some First Nations worry that the Nisga'a

Treaty will make it impossible for them to negotiate better deals with greater emphasis on sovereignty.<sup>107</sup>

Efforts to use international law are expensive, time consuming, and ultimately ineffective because states remain sovereign and, in practice, immune from international legal sanctions. For example, until the final ruling of the Inter-American Court for Human Rights is issued in 2007 and Ecuador responds, it is not possible to assess the effectiveness of Sarayaku's strategy. Even if the Inter-American Court's ruling orders Ecuador to pay reparations to Sarayaku, and declares that the country has violated the Ecuadorian Constitution as well as various international agreements, its ruling is not binding. Ecuador's reaction might not resolve the Sarayaku's claims.

Since the election of Ecuador's new President, Rafael Correa, in 2006, the government has promised to comply with the precautionary measures ordered by the Inter-American Court of Human Rights. In 2007 the government also signed an agreement with the Sarayaku people to remove explosives left behind by the company CGC in Sarayaku's territory. This promise is the minimum that the Ecuadorian government could do to respect basic human rights in Sarayaku's territory and protect the local populations against explosives. However, the government has not taken more drastic measures supporting Sarayaku's autonomy claims since it has put on hold Sarayaku's demands to declare expired the contract of CGC for oil exploration<sup>108</sup> and has not been able or willing to prevent the construction of a landing strip and of houses in a hunting and fishing area of two communities belonging to Sarayaku. This strip might benefit the Italian oil company AGIP, which has exploratory wells near those two communities.<sup>109</sup>

In summary, even when governments show a commitment to reverse previous violations of indigenous rights in the Amazon, the absence of state control over what happens in that region leaves open numerous possibilities of encroachment and penetration within the traditional territory of indigenous peoples, suggesting that addressing autonomy claims will require serious capacity building and resource transfer for local monitoring agencies within the Ministry of Energy and Mines and the Ministry of the Environment.

In Ecuador, a positive ruling from the Inter-American Court and Commission on Human Rights in 2008 is likely to have significant implications for the rights of indigenous peoples, showing that governments cannot unilaterally grant concessions to companies without the free and informed consent of the communities that occupy the land, even when the government owns the subsoil. An acceptable outcome would be the creation of a formal process of consultation to guarantee indigenous peoples free, prior, and informed consent. A positive ruling might set a precedent throughout Latin America maintaining the integrity of territory, including the sub-soil. As the writer Javier Ponce explains, what is being called into question in Ecuador is the "validity

of a conception of Ecuador as a nation and a state, unitary and homogeneous that has historically ignored the existence of its indigenous communities.”<sup>110</sup>

The Inter-American Court’s ruling will determine how valid this conception can remain. A ruling in favor of Sarayaku would also suggest that governments should give priority to traditional land and forest practices over major development projects. Finally, will the struggle of Sarayaku serve as a reference point for other indigenous peoples in Latin America looking to gain control over their territory and resources? Will a positive ruling encourage broader dialogue among communities and companies because a precedent has been set? Only time will tell.

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## **The Case Studies**

The cases referenced in this study were contributed by participants in the spring 2006 MIT Seminar on *Addressing Land Claims of Indigenous Peoples*. Isabelle Anguelovski, Summer Austin, Talia Berman-Kishony, Shunling Chen, Artur Demchuk, Andrea Glen, Autumn Graham, Shizuka Hashimoto, Jonathan Kaufman, J. Eric Kent, Steven Lewis, Maria Reyes, Alexis Schulman, Jessica Tucker-Mohl, and Katherine Wallace provided factual material and important insights brought together here by the authors of the analysis. The following are abstracts of much more extensive treatments of the cases they studied.

### **The Quichwa people of Sarayaku (Ecuador)**

*Isabelle Anguelovski*

The Sarayaku people of the Department of Pastaza in the Amazon area of Ecuador are organized into five communities of 1,000 inhabitants. They belong to the indigenous group called “Canelos Kichwas.” The communities sit on the banks of the Bobonaza River 65 kilometers southeast of Puyo, the department capital. In 1996, despite strong opposition to oil exploration and extraction from the Sarayakus dating back to 1987, Ecuador granted to the Argentinean company CGC the right to carry out seismic exploration in a 200,000 ha area called Block 23, of which 55 percent is on Sarayaku territory.

In Ecuador, most of the 4.6 billion barrels of oil reserves are located on indigenous land and in fragile ecosystems, leading to conflicts between communities, oil companies, and the state.<sup>111</sup> Oil exports are of crucial economic importance to the country, comprising 50 percent of Ecuador’s exports. As of 2004, 25 percent of the country’s total external debt was covered by oil exports.<sup>112</sup>

Ecuador’s 1998 Constitution grants consultation rights to indigenous people--35 percent of the nation’s total population--when projects are proposed on their land. However, indigenous communities have a constitutional right only to the surface, not to the subsurface of their territory. Furthermore, the state can designate any portion of aboriginal land as a “public utility.”<sup>113</sup> Most of the activities in which the Sarayaku are involved can be described as auto-consumption: subsistence agriculture, hunting, fishing, fruit gathering, handicrafts, canoe making, and house building.<sup>114</sup>

As far as the Sarayaku people are concerned, the *Sumak Allpa* (territory) is made up of three parts, or spaces: *Jahuapacha* (the sky), *Caipacha* (the earth), and *Ukupacha* (the subsoil). They administer these spaces according to their traditions.<sup>115</sup> Sarayaku people believe that controlling the use of natural resources (rivers, forests, oil) on their territory is the *sine qua non* for maintaining their traditional way of life, intercommunity relations, socialization, and remaining true to their fundamental belief system, or cosmology. The rituals they practice set clear socio-cultural and symbolic borders between themselves and the dominant culture, creating two separate “worlds of meaning”. Their main interface with the state has taken the form of legal claims and political campaigns.<sup>116</sup>

Since the creation of independent Ecuador in 1830, indigenous peoples have worked toward a “multinational state” that would guarantee their right to exist. Until the 1960s, political struggles were centered on agrarian reform and equal access to land. However, the failure to establish a more equalitarian land division in the country led indigenous people to shift their focus to the lack of democracy and the state’s failure to guarantee political participation.<sup>117</sup>

During the 1980s, the indigenous peoples pushed hard for a multicultural state and joined together in 1986 to create the Confederation of Indigenous Nationalities of Ecuador (CONAIE) which today represents 1,680 indigenous communities and claims to be an “Indigenous Self-Government”.<sup>118</sup> Following CONAIE’s objectives, the Sarayaku’s land claims focus on territorial integrity and respect for their indigeneity. According to the Sarayaku, the right to territory is fundamental to the basic collective rights of indigenous peoples. Land rights should guarantee them the prerogative to decide whether and how natural resources on their land shall be exploited, as defined in the Constitution (Art. 224, 225, 241). They are not asking for sovereignty, but claim legal competencies inside a recognized territory in order to gain control over the natural resources that they feel are theirs.

The Sarayaku tribe has refused to give CGC access to its territory granted by the state in 1996. In 1997, the company would only contact the indigenous community through the elected president, and resorted to offering him bribes for granting the company the right to enter Sarayaku territory.<sup>119</sup> Following community protests against charges of corruption,<sup>120</sup> CGC changed tactics: in 2000, a CGC representative offered to pay \$80,000 a year for 20 years of possible exploitation.

In response, the Sarayaku asked the Ecuadorian State to declare its territory a protected area and to exclude all oil activity in perpetuity. A third company strategy emerged: CGC approached other communities within Block 23 and sought to create a “Coordination Committee” consisting of community leaders assigned the dual roles of paid employees of CGC



and representatives of their communities. This group was pressed to make statements to the media denouncing “rebellious” members.

Finally, in 2002, CGC initiated seismic work in Block 23. This instantly led to clashes with Sarayaku members, triggering inter- and intra-ethnic conflicts, destroying natural resources, and preventing ceremonies from taking place.<sup>121</sup> In November 2002, two Ecuadorian organizations -- Center for Justice and International Law (CEJIL) and Center for Economic and Social Rights (CDES) -- agreed to provide legal assistance and helped file a complaint with the *Defensor del Pueblo*, the Ecuadorian constitutional ombudsman, condemning the Ecuadorian state for violating the Constitution and Principle 10 of the Rio Convention and placing the Sarayaku under its protection.

In April 2003, the tribe with the help of the CEJIL and the CDES presented its claim to the Inter-American Commission on Human Rights against the State of Ecuador.<sup>122</sup> In May 2003, the Inter-American Court for Human Rights ordered Ecuador to implement precautionary measures to protect the “physical, psychological, and moral integrity of Sarayaku” as well as “the special relation the community has with its territory.”

On December 19, 2003, the community also filed a petition at the Inter-American Court of Human Rights, claiming that the State of Ecuador is responsible for a series of acts and omissions harming the Sarayaku. In July 2004, the Court ordered “provisional measures and resolved to require the Ecuadorian State to adopt, without delay, all measures necessary to protect the life and personal integrity of the members of the Kichwa indigenous peoples of Sarayaku.”<sup>123</sup> Today, the tribe is expecting a final resolution from the Inter-American Commission and Court for Human Rights.

In addition to this litigation strategy, the Sarayaku submitted official demands to the Ecuadorian state asking that its communities be allowed to make internal decisions autonomously and become truly self-governed. The objective was to implement their own “Plan of Life” and to declare Sarayaku an “intangibile zone”--a protected area closed to outsiders.<sup>124</sup>

The Ecuadorian state reacted to Sarayaku opposition by militarizing their territory and rejecting their legal claims, mostly on technical grounds.<sup>125</sup> Recently, however, the state’s attitude changed drastically. Before a hearing of the Inter-American Commission of Human Rights in March 2006, the Ecuadorian Attorney General offered a friendly settlement to the Sarayaku, including voluntary withdrawal of CGC from Block 23; public recognition and apology for the human rights violations committed against the Sarayaku; the creation of an economic fund for the central and southern Amazon; and reforms in the prior consultation regulation for hydrocarbons.

The Sarayaku refused this friendly agreement, asserting that the state lacked credibility and considering the Inter-American Commission as the only actor with the authority to judge the Ecuadorian state and order reparations.<sup>126</sup> Until the final ruling of the Inter-American Court for Human Rights, it will be quite difficult to assess the effectiveness of Sarayaku's total confrontation strategy. Even if the Inter American-Court orders reparations from the Ecuadorian state and declares that the country has violated the Ecuadorian constitution and international agreements, its ruling is not binding, so Ecuador's reaction might be to once again ignore Sarayaku claims.

The Sarayaku's multi-faceted strategy seems to have produced a change in the state's attitude, as demonstrated by the Attorney General's offer of a friendly settlement. However, the state does not seem ready to negotiate on an equal footing with indigenous peoples, and it is not clear whether they are committed to democratic participation and pluralism.

A positive ruling from the Inter-American Court and Commission on Human Rights in 2008 might have significant implications for the rights of indigenous peoples, showing that governments cannot unilaterally grant concessions to companies without the free and informed consent of the indigenous communities that occupy the land, even when the government has title to the subsoil. A positive ruling would also recognize the integrity of Sarayaku territory, including the subsoil, and set a precedent throughout Latin America.

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## The Mapuche (Chile)

*Alexis Schulman*

Nearly 85 percent of Chile's indigenous people identify themselves as Mapuche, currently comprising between 600,000 (2000 Census) and 1,000,000 people (1992 census).<sup>127</sup> The name Mapuche may be translated literally as "people of the land" (*mapu* = land and *che* = people). The belief that the Mapuche are inextricably linked to their environment was (and remains) manifest in their economy, customs, and spirituality.

Prior to the arrival of the Spanish 500 years ago, the Mapuche occupied an enormous territory (up to 31 million hectares by some estimates) in the southern cone of South America. Unlike many native peoples of the region, the Mapuche defended their territory against the Spanish over a violent 100-year period.<sup>128</sup> In 1641, the Spanish and Mapuche signed the first of a series of *parlimentos* (treaties). The Parlamento General de Quillín, as it was known, formally recognized the Mapuche nation and authority, and established the BioBio River as the physical boundary between the two sovereignties. Although the struggle with the Spanish brought about changes in Mapuche territory, livelihood, and customs, they maintained, though uneasily, their independence and territorial control.

Chilean independence in 1818 changed this and set the stage for the current struggle. Although the new Chilean state initially respected the Treaty of Quillín, by the mid-century Chilean elites began to contemplate occupation of Mapuche territory to satisfy national economic interests in the coal-rich and agriculturally fertile south; absorb burgeoning immigration; and establish southern borders with Argentina. In 1866, parliamentary law annexed Mapuche territory to the state, opening the land to colonization, and established a commission to "settle down" the Mapuche inhabitants.<sup>129</sup> It also established the Ley de Radicación de Indígenas to administer Mapuche land settlement, resulting in two violent military conquests against the Mapuche leading to their subjugation in 1883, and de facto Chilean rule.

These laws and the Mapuche "pacification" (as the wars were euphemistically termed) set the framework for further dealings with the Mapuche. They were to be integrated into the state apparatus, and any laws or policies regarding them dealt almost exclusively with "their land and the means to incorporate them into the individual property system and economic strategies defined by the government."<sup>130</sup> Operating within this framework, the Ley de Radicación de Indígenas was used to grant Mapuche communal land title to 3000 reservations, representing less than five percent of the land recognized by the Treaty of Quillín.<sup>131</sup>

Following the military coup in 1973, Chile was set on a course of market liberalization and in 1979, the government enacted Decree 2.568 to “integrate the Mapuche definitely into the Chileanity with the rights and duties equal to the rest of the country.”<sup>132</sup> This decree brought about the division of nearly all Mapuche communally owned lands. These territories were opened up to taxation as well as resource-extracting corporations. Even leftist policies, favorable to the Mapuche, dealt with the Mapuches in this fashion, in this case contextualizing their struggle within the larger proletariat and peasant movement.<sup>133</sup>

Over 200 years of integrationist policy and land reduction, usurpation, and division resulted in the pauperization of the Mapuche. Sixty to 80 percent of the population has been forced to migrate to cities for work. In 1981, Mapuche per capita yearly income was estimated at approximately \$209, establishing them as the poorest group in the country. However, even when dispersed in reservations and cities, or during the disintegration of their communal lands under Pinochet, the Mapuche have still been able to organize, mobilize, and engage the state.

Beginning in the 1910s, several Mapuche who had gained a Chilean education through state-sponsored initiatives formed the first Mapuche organizations. While these groups adopted various strategies, most sought the same ends, namely preservation of cultural identity and livelihood. Some early strategies took an assimilationist approach and sought to meet the needs of the community through the “respectful” integration of the Mapuche into the Chilean state and by becoming actors of the state apparatus themselves.<sup>134</sup>

However, more successful approaches rejected integration and concerned themselves with sustaining Mapuche identity through state-recognized autonomy. Maintaining and protecting traditional landholdings were integral to these organizations’ mission. For example, in 1914 Miguel Alburto Panguilef founded the Sociedad Mapuche de Protección Mutua and later the Federación Araucana. A deeply political movement, the Federación formed alliances with leftist parties and politicians and was instrumental in preventing the passage of 1927 legislation that would have divided the communal reservations. Similar movements produced other favorable outcomes, including the important, albeit ephemeral, legislation enacted by President Allende, whose election was supported by Mapuche organizations.

In 1988, President Pinochet lost a plebiscite election, triggering a national democratic election process. Mapuche leaders were prepared to seize the political opportunity. By 1989, the democratic opposition candidate, Patricio Aylwin, had signed an historic agreement, the Nuevo Imperial, with Mapuche leaders. He promised to include their demands in his electoral campaign in exchange for their political support.

The key demands outlined in the Nuevo Imperial agreement demonstrated a new strategy

of reframing Mapuche demands for land reform and autonomy in the context of an evolving international debate on human rights and indigenous people.<sup>135</sup> Among these demands was the constitutional recognition of the Mapuche and other indigenous groups as “peoples” (thus recognizing their claim to territorial and economic autonomy, in accordance with international law). Also included was the ratification of the International Labour Organization’s Convention 169 on the Rights of Indigenous and Tribal Peoples (the only binding part of international law that refers to the rights of indigenous people).

Following his election, Aylwin created a special commission to draft an Indigenous Law. The draft law was debated in over 2000 community meetings; hundreds of indigenous representatives later voted on it. While the Mapuche have not always spoken in a unified voice, this draft law satisfied nearly everyone.

However, the fear of congressional conservatives of a balkanized South and the entrenchment of Pinochet’s neo-liberal policies caused the original draft to be pared down, resulting in the final legislation, the Ley Indígena. It contains many important elements, such as the creation of a water and land fund; the recognition of the rights of indigenous people and their legal representation to be consulted and considered in the making of state agency decisions which may affect their lives; and the establishment of a decentralized public agency to oversee the application of the law. However, final law did not include ratification of the ILO 169 and the Mapuche were not granted full control over their resources and adequate protection of their lands.

Since the passage of the Ley Indígena over ten years ago, its shortcomings have become patent, as tensions between the Mapuche, the state, and private corporations have escalated, in some cases turning violent. Since Pinochet’s regime, Chile’s economic policies have stressed privatization and exportation. Under the influence of globalization, this has resulted in numerous large-scale development projects, primarily for the conversion of natural resources into export commodities.

Mapuche territory is rich with resources in wood, fish, and water. Not surprisingly, many of these projects have been carried out in or around Mapuche land. Several highways, already constructed or underway, cut through Mapuche territory. Major hydroelectric dam projects have flooded Mapuche land and forced the relocation of Mapuche communities, often through illegal, coercive methods. Large tree plantations have been planted on expropriated land, damaged wildlife, and polluted water supplies. In 2000, an estimated 1.5 million hectares of eucalyptus and pine was planted in ancestral Mapuche territory that had encompassed several Mapuche communities (HRW 2004). Environmental impacts outside their territory, such as water pollution, soil erosion, and wildlife damage have spilled over onto Mapuche land.

With little recourse under the law, the Mapuche have turned to new tactics of direct action and increased internationalization to attract attention and support and to force the state to renegotiate their relationship and rights. Several organizations, such as the radical Consejo de Todas Las Tierras (the Council of All Lands), have formed international alliances. Mapuche advocacy groups exist in a number of European countries including France, Belgium, Spain, and the Netherlands. Since the late 1990s, Mapuche have engaged in numerous roadblocks and land takeovers, as well as marches and hunger strikes. They have continued to demand, primarily, the return of usurped and historically occupied land, as well as control over land resources and boundaries.<sup>136</sup>

State response has attracted additional international scrutiny. In the late 1990s, private landowners and corporations urged the government to strongly resist the Mapuche protestors. In response, Chile began to apply an anti-terrorism law, formulated under Pinochet's regime, to Mapuche protesters. This has drawn criticism from groups such as Amnesty International, Human Rights Watch, the Underrepresented Nations and People Organization, and also partially prompted a visit from the UN.

International attention, along with the continuing violence and conflict, has encouraged several state attempts to readdress Mapuche demands. While these have been piecemeal and have yet to satisfy Mapuche leaders, they nonetheless represent a continuing effort on the part of the state to recognize Mapuche concerns. In 2003, the governmental commission for "Historical Truth and New Deal" outlined a number of recommendations to be carried out by the government to address indigenous rights, including constitutional recognition and reparations. The Lagos administration (2000-2006) twice submitted a resolution for constitutional recognition of indigenous group; the Senate rejected it both times. Most recently, in May 2006 President Bachelet announced at the Euro-Latin American summit that the state would no longer apply the anti-terrorism law.

The Mapuche people and the Chilean state stand at a crossroads. The extreme conflicts that have arisen over the past decade are unlikely to disappear until the Mapuche people have full control over their land. While nearly all Mapuche organizations stress that they are not interested in sovereignty and consider themselves to be citizens of the Chilean state, control over their land, resources, and borders remain integral to their livelihood and cultural identity.

However, the orientation of Chile's economy seems to preclude these rights, and does not appear likely to shift course. Some headway has been made through strategies employing direct action and igniting international support. As of now, it is too soon to tell if Mapuche demands can be reconciled within the current context of the Chilean state. Chilean civil society has for the

most part remained silent on these issues. If citizens can be engaged in the debate and demand a redirection of Chilean priorities, a resolution may be possible.

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## **The Amerindians (Guyana)**

*Summer Austin and Jonathan Kaufman*

The indigenous peoples of the South American nation of Guyana, known collectively as Amerindians, have struggled for the recognition of their rights to traditional lands since colonial times. Although an official land claims process exists, Amerindians find themselves disempowered in their relations with the state, embattled on their own lands, and unable to assert their rights in dealings with outsiders. In order to obtain legal and practical decision-making power on the presence and activities of coastlanders and foreigners on their territory, they must find a way to act outside the set of formal options provided by the government and to reframe the land claims debate.

Amerindians, who constitute six to eight percent of the country's population, are politically disadvantaged due to the ethnic polarization of Guyanese politics and scattered geographically through the country's remote interior and western coast. A formal process to adjudicate Amerindians' claims to traditional lands has been in place predating independence in 1966, and more than half of the 128 officially recognized indigenous communities in Guyana have been granted title to some land. The land grants, however, are generally inadequate and rarely correspond to a given community's use and occupation patterns. The government has surveyed and demarcated the boundaries of only a handful of community land titles--an essential step for communities to exert legal control over their land. Furthermore, Guyanese legislation grants Amerindians unequal, imperfect, and insecure tenure even over titled lands.

Amerindians' powerlessness and inability to control their own lands has left them vulnerable to displacement, exploitation, and abuse by the large number of mining enterprises that operate in the Guyanese interior. Mineral extraction--particularly of gold, diamonds, and bauxite--is one of the few reliable sources of income for Guyana, and the dream of being a *porknocker*, a traditional independent prospector, is strong within the national ethos.

The laws relating to natural resources codify the primacy of mining in Guyana; the Amerindian land tenure laws reflect this socioeconomic reality as well. Furthermore, unchecked mining abuses are fostered by low government capacity. The administrative structures in place to regulate mining are overextended and underfunded. For example, only 11 mines officers are available to oversee compliance with regulations for the entire country. Furthermore, a weak judiciary system with minimal penetration into the interior ensures that Amerindians' legal woes are rarely heard in formal settings.



Given the hardships mining and miners impose on Amerindians, their major goal in the land claims process is to achieve a measure of control over the lands they have traditionally considered to be theirs. They are not trying to eliminate mining, but to decide when, where, and how mining is conducted, and to have the right to exclude or admit outsiders--the rights any other land owners in Guyana might assert over their own property.

The Amerindian People's Association (APA), the main organization that advocates for the rights of Amerindians in Guyana, has pursued these goals by 1) pressing for land titles through the land claims process and the courts, and 2) advocating reform of the basic laws regulating Amerindian land tenure.

To date, the methods used by the APA and the Amerindians to advance their land rights have been fairly conservative and confined mainly to the parameters set by the government. The APA has helped communities prepare land claims; lobbied for changes to the Amerindian Act and other problematic legislation; conducted community consultations for revisions of the laws relating to Amerindians; organized protests; and launched a lawsuit against the government over the land claims process.

These tactics have generally yielded minimal results. At first glance, at least, Amerindians prospects for influencing their government and the miners who are operating in the interior are not good. They constitute a small, scattered, poor, and weakly organized segment of the population. The government is under heavy pressure from international creditors to develop its natural resources and the majority groups in Guyana support pro-mining policies. Miners operate with impunity around and inside Amerindian lands, land titles have yet to be demarcated, and the government recently strengthened its power to tie communities' hands on land use decisions.

However, Amerindians could develop alternatives to playing by the government's rules and waiting for the land claims and legislative processes to grind on.

First, they must try to increase their leverage. On the international stage, they can capitalize on current interest in indigenous peoples' rights among creditors and other institutions. The World Bank has pressured Guyana to revise its Amerindian Act as a precondition for aid. The Committee on the Elimination of Racial Discrimination issued a report in 2006 that was highly critical of Guyana's treatment of its Amerindian population.

Second, they could organize themselves on the domestic front as an electoral constituency to form a potent swing bloc between the dominant ethnic groups. The APA has recently shown itself to be adept at using the media to rally public opinion and coordinate mass

action. Amerindians also retain the power to reframe the land rights debate by walking away from the process and using civil disobedience to disrupt mining operations.

Finally, they might trigger dialogue on their own terms if they were to circumvent official channels, taking advantage of low government capacity by striking mutually beneficial private deals with miners and patrolling their own borders to discourage unwelcome interlopers – in essence, asserting *de facto* the rights they may not be able to get *de jure*.

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## **The Pima: A Gila River Indian community (Arizona, United States)**

*Steven Lewis and Maria Reyes*

The Arizona Water Settlements Act of 2004 (AWSA) is the product of landmark legislation and complex negotiation between an indigenous people and a nation state. This legislation settles a critical resource claim between the Gila River Indian Community (GRIC) and the United States that dates back more than 100 years. Ultimately, the AWSA is more than just a water settlement; in a larger sense it is a sovereignty settlement because it decided issues of autonomy over the water.<sup>137</sup>

The GRIC is comprised of both the Pima and Maricopa Indians. The Pima Indians and their ancestors have farmed along the Gila River in central Arizona for many years. They were admired for their skills and self-sufficiency in the desert area of the Arizona Territory. The Pima view themselves as bound inextricably to the land and, by extension, to the flowing waters of the Gila River. In the mid-18th century, the Pima welcomed the Maricopa (or *Pee Posh*) as allies who were incorporated into the community while still maintaining their respective culture and traditions. The GRIC was established in 1859 by an Executive Order and the constitutional government was established in 1939 with the Indian Reorganization Act.<sup>138</sup>

Today the GRIC encompasses 600 square miles of land south of Phoenix, the capital city of the state of Arizona, bordering several neighboring cities and towns in a sprawling urban area. There are 14,000 members living on the GRIC reservation and approximately 21,000 members in total. The GRIC operates three casinos and a 700-room resort, golf course, business park, and a tribally owned farm.

Non-Indian settlers upstream of the Pima farmers effectively stopped the flow of the Gila River to the Pimas in the late 19th century. The devastation of the traditional life of the Pimas began to manifest itself in the health of their people. Today, the Pimas are infamously known as having the world's highest known incidence of adult-onset diabetes among all ethnic groups.<sup>139</sup> Not only is their loss of livelihood and subsistence farming important but it also points to a critical distinction between non-Indian views of water rights and Native American views rooted in culture and cosmology.<sup>140</sup>

The US federal government began a policy of negotiating rather than litigating water rights following some successfully negotiated claims in the late 1980s. For the tribes, there are three significant gains; wet water versus paper water, some autonomy over the water, and resources for

tribal development. The downside includes relinquishing current and future water rights based on the Winters Doctrine, the reality of administrative control over the water, and the tribe's right to sell or lease the water.<sup>141</sup>

Through quantification of tribal water rights, the issue of jurisdiction in administration can be addressed. Water rights negotiations can be an opportunity for the surrounding state and local non-Indian communities to understand and to appreciate the cultural beliefs, economic development needs, and agricultural interests of the Indian tribe as is the case with the GRIC. While this illustrates the value of a negotiated settlement, without the threat of litigation, there is little compulsion to negotiate.<sup>142</sup> The GRIC made a critical decision to actively support and assist in the crafting of the settlement using litigation to leverage support from other stakeholders.<sup>143</sup>

The Arizona Water Settlements Act (AWSA)<sup>144</sup> is unique in many ways. It is the largest settlement of Indian water rights in United States history. It also brought together an unprecedented number of separate parties (35), both Indian and non-Indian, most of which would have required separate negotiations and agreements to resolve the specific issues raised between them and the GRIC. The result was a large number of compromises, each of which required consideration of its overall implications and importance to the final settlement.<sup>145</sup>

The AWSA resolves all of the GRIC claims for water, all claims for injuries to water rights, and other key Arizona and local municipality issues. It outlines GRIC control of the water's destiny. This alone is a landmark decision as the GRIC now have sole responsibility for the water conveyance and possible sale.<sup>146</sup> In addition, the AWSA prohibits the GRIC from seeking an increase to the current groundwater rights and protects the current GRIC groundwater from pumping near the reservation boundaries.

Most importantly, the ASWA will guarantee a dependable supply of water to GRIC lands, a total annual entitlement of 653,500 acre-feet. While this amount is only a fraction of the water to which the GRIC is legally entitled, it provides the GRIC with new water sources to replace some of the Gila River water that has been lost over the last century.<sup>147</sup>

It is astonishing that the GRIC has retained its identity as the "River People" to this day. They have remained on their land with only a dry riverbed and an incomplete irrigation system. With over a century lost since the land was productively farmed, how will the GRIC return to farming? A few small farmers with sufficient irrigation have retained the knowledge and traditions of the GRIC. Therefore, with the delivery of water in the AWSA, the GRIC can return to the economic system inherited from their ancestors. People will return to the GRIC to take advantage of new agricultural opportunity and as long as future GRIC Councils concentrate on

agriculture, people will farm the land.<sup>148</sup> Most importantly, the revival of agriculture will bring back GRIC cultural and spiritual connection to the land.

One of the purposes of the AWSA was to provide a framework for settlement of Arizona Indian water rights claims. Senator John Kyl (R, Arizona) insisted that there be provisions for future Indian water claims. Interestingly, even with these provisions, three other Arizona tribes that have current outstanding claims tried to stop the AWSA legislation.<sup>149</sup>

Ultimately the impact of the AWSA will be determined over many years as the GRIC works to reconnect to the culture and cosmology that has been lost. In the meantime, the historic aspects of the AWSA will stand as a beacon of success for the many hundreds of people involved in two decades of active negotiations that preceded the signing of the bill. A GRIC elder shares his vision of the future with the realization of the AWSA.<sup>150</sup>

For decades, water settlement was a shared dream of our people. It was a vision of security and stability for future generations to enjoy a better quality of life here in the desert than the one many of us endured. Now that water settlement is a reality, our Community is faced not with pursuing that dream but with protecting it and building upon what past generations hoped would come to pass with our water settlement. Water is our largest and most precious renewable natural resource and we can now look forward to helping ourselves meet the future challenges. Water settlement will enhance our economy and improve our quality of life. It will ensure sustainable growth for the current and future people of our Community.

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## **The Passamaquoddy and Penobscot (Maine, United States)**

*J. Eric Kent*

The State of Maine in the northeastern United States is a mostly rural state with an economy based largely on wood products and paper mills, in addition to agriculture, fishing, and tourism. It is home to some 6000 people of four indigenous tribes: the Penobscot, Passamaquoddy, the Houlton Band of Maliseets, and the Aroostook Band of Micmacs. The Penobscot, Passamaquoddy, and Maliseet Tribes are of Algonquin-speaking origin, one of the largest indigenous linguistic groups in North America. The Micmac language is of a different family entirely. Today, only a small number speak the native language as their first language. Collectively, they are often referred to as the Abnaki or Wabanaki. They account for roughly 0.6 percent of the population of Maine.<sup>151</sup>

By the mid-19<sup>th</sup> century, the Penobscot and Passamaquoddy had lost all but a small portion of their original territory; the Maliseet and Micmac had no tribal land. Long dominated by state government and ignored by the federal government, the tribes were destitute and powerless.

In the 1970s, three of the four tribes waged a successful battle to gain federal recognition – and thereby, protection from state dominance -- and to recover land. The result was, however, a flawed and complicated settlement in which issues of autonomy and sovereignty were left ambiguous and contrary to established federal Indian law. Currently, the tribes struggle to maintain tribal sovereignty in the face of attempts by the state to assert dominance. The courts struggle to interpret the terms of the settlement, often compounding its contradictions. At issue in these conflicts are not only the independence of tribal governance, but also fundamental implications for land use, water quality, and economic development.

In the early 1970s, a local dispute with a non-Indian over title to what Passamaquoddies considered tribal land grew into a huge statewide claim when a young lawyer named Tom Tureen took over the case. Invoking the 1790 Non-Intercourse Act which reserves all matters concerning Indians to be under federal jurisdiction, Tureen claimed that since none of the treaties or land-takings in Maine, or Massachusetts which included Maine until 1820, had been ratified by the US Congress, everything that could be regarded as tribal land going back to 1790 was still tribal land. This was estimated to be some 12 million acres, close to two-thirds of the state.

Predictably, the State of Maine, and most Mainers, found this claim laughable. Even after the tribes were able to enlist the US Department of Justice on their side (having to sue the

Department to do so) the state regarded the suit as a nuisance. Yet it was deemed a serious threat to land titles by Ropes and Gray, a Boston law firm advising issuers of municipal bonds. In 1976, Maine's bond rating was downgraded and the state finally took notice. Once hopelessly deadlocked, negotiations gradually began to move forward. With DOJ and a commission appointed by President Jimmy Carter pushing both parties, an agreement was hammered out.

The key provisions of the Act are:

- The extinguishment of all Indian land claims in the State of Maine;
- \$81.5 million held in trust for the tribes; and
- The opportunity to purchase 300,000 acres to be held in trust by the federal government.

Today, the land holdings by the tribes total some 285,000 acres.<sup>152</sup> Living conditions are dramatically better than the dire poverty that governmental neglect and exploitation of tribal lands visited upon the tribes for centuries. Lifestyles are, in the main, similar to non-Indians, though such markers as health, educational level, and income lag behind the general population. Yet, impressive as these gains are, the 1980 settlement included language, insisted upon by the state that, at best, complicates the exercise of tribal sovereignty and, at worst, renders it virtually meaningless.

The act states that, except as otherwise provided, the Penobscot and Passamaquoddy, within their respective territories, "shall have, exercise, and enjoy the rights, privileges, powers and immunities of a municipality (including the power to enact ordinances and collect taxes); be subject to all the duties, obligations, liabilities, and limitations of a municipality; and be subject to the laws of the State."<sup>153</sup>

Tremendous implications depend on the interpretation of the word "municipality". The tribes argue that this provision was meant as an addition to their sovereign status—for example, granting them access to municipal funding sources for the development and repair of infrastructure on the reservation. The state argues that the municipal status replaces their sovereign status.

Nowhere else in the United States is there such a complication. Well-established federal law clearly trumps state jurisdiction over Indian tribes. The settlement confirms federal status for the Maine tribes yet, the state contends, it limits them in exerting their sovereign rights, and the state enjoys an amount of authority over the tribes.

This fundamental contradiction was not resolved in 1980, as exhausted negotiators rushed to get an agreement ratified by tribal members before the inauguration of President Ronald Reagan, who was hostile to the land claim. The issue was downplayed or explained away as a battle for another day. Inevitably, that day came.<sup>154</sup>

In 2000, the State of Maine applied to the US Environmental Protection Agency for sole authority to issue wastewater discharge permits in the state under the National Pollutant Discharge Elimination System. The Passamaquoddy and Penobscot tribes asked the EPA to let them maintain jurisdiction over water resources within the territories belonging to the tribes, a common arrangement in Indian country.

While a decision by EPA was pending, three paper companies—Great Northern Paper, Georgia-Pacific, and Champion International—approached the tribes to gain broad and virtually unfettered access to tribal documents under the State's Freedom of Access Act or FOAA. Two days later, the State of Maine made an identical demand. The motives for the requests are unclear; the paper companies, who are major polluters in the state, may have feared the tribes' relationship with the EPA and the role they might play in enforcing water quality regulations.

Since the pertinent information was already public record, and since the state saw fit to intervene, perhaps it was also a deliberate provocation for a showdown on the issue of tribal sovereignty. In any event, when the tribes refused the request, the companies invoked FOAA and sued in Maine Superior Court to force compliance. They contended that the tribes were, for all intents and purposes, municipalities, and therefore subject to state law. The tribes claimed the law did not apply given their federally protected sovereign status.<sup>155</sup>

It cannot be overstated how important the notion of sovereignty is to Maine Indians. Their nations existed long before Europeans ventured into North America. Even to recognize state jurisdiction by responding to the suit at all was a matter of debate among tribal members.<sup>156</sup> And since the FOAA includes a "right of entry" provision, the prospect of paper company lawyers walking into tribal offices and poring over the inner workings of tribal government was particularly alarming, not to mention humiliating.<sup>157</sup>

In 2001, the Maine Superior Court ruled in favor of the companies and ordered the tribes to turn over the documents. The tribes' attempt to have the case heard in federal court was blocked and an appeal was then made to the Maine Supreme Judicial Court, a less favorable venue for the tribes. The SJC looked at the 1980 Settlement Act and concluded that, in negotiating with EPA, the tribes were acting as municipalities and were bound by state law. At the same time, the court tried to limit the extent to which municipal status could apply. Depending on the circumstances, the tribes can be variously treated as a sovereign nation, a person or other entity, a business organization, or a municipal government.

Obviously, as a clarification of the act, this one is unwieldy and confusing. As recently as May 9, 2006, the Court ruled that the Passamaquoddy Tribe was not a municipality when it discussed building a liquefied natural gas plant with an Oklahoma firm. In that instance, it was a



business. The distinction seems arbitrary and self-serving. Is it the court's intention to determine the nature of a multitude of tribal activities when non-Indians seek access to tribal affairs? Does the state court have the right to make those distinctions? Even though the Passamaquoddies won the 2006 case, the parsing of their sovereignty into circumstances determined by outsiders is hardly an unqualified victory.<sup>158</sup>

To further complicate the tribes' position, the US Environmental Protection Agency cited the 1980 settlement in awarding the state the authority to issue water quality permits on tribal lands, despite a recommendation by the US Department of the Interior to uphold tribal management of those resources. This is the first instance in which the EPA has moved against the wishes of a federally protected tribe. The tribes are challenging the EPA's decision in federal court, a venue where federal Indian law will presumably be appropriately heard and applied.<sup>159</sup>

Whatever the outcome in court, whether state or federal, it is clear that certain provisions of the 1980 settlement are broken and need to be revisited. The question is how the tribes can bring about renegotiation. The Maine Indian Tribal-State Commission, set up by the 1980 settlement to iron out disputed portions of the act is one possible tool. MITSC is an advisory body only and has essentially languished for decades with little effect. But today there are new players and a guarded hope that through MITSC, the issue of sovereignty might be revisited in its entirety. One must wonder, however, what would motivate the state to change, absent a decree from the courts.<sup>160</sup>

In the decades leading to the 1980 Maine Settlement Act, the tribes forced change through a mix of activism, civil disobedience, law, and politics (and, it must be said, luck). Alliances with groups and individuals or through appeals to international bodies had marginal effect. Legal victories were certainly a great boost, but there was no definitive finding on the merits of the claim. The settlement was a political solution and the political will to settle came only partly from the strength of the tribes' legal case; more important was the potential economic impact foreshadowed by the fortuitous (for the tribes) bond crisis of 1976.<sup>161</sup>

These factors also characterize current conflicts. While the case for tribal sovereignty may be made incrementally stronger by favorable decisions in federal court, it will take a political solution to mitigate the limitations written into the 1980 law. Without that, it is likely that corporate and state players will continue to engage the Maine tribes in a war of skirmishes. Paradoxically, it may be the SJC ruling against the tribes that works to their advantage by illustrating to political leaders (since judges fail to grasp) the needlessly complicated, arbitrary, confusing, and inconsistent nature of the so-called clarifications to this flawed document.

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An excellent source for linguistic history and place names, as well as links to determine kinship, can be found at <http://www.accessgenealogy.com/native/maine/>

## The Native Hawaiians (United States)

*Katherine Wallace*

In 1893, a small group of American and European business interests supported by the US military forced the Hawaiian Kingdom's Queen Lili'uokalani to relinquish her authority. The Queen never abdicated her throne, however, because she did not believe that the US would recognize the coup and subsequent government.<sup>162, 163</sup> One hundred years later, President Clinton signed Public Law 103-150, an apology to Native Hawaiians for US involvement in the illegal overthrow of their sovereign nation and for their loss of self-determination. The law urged the US to acknowledge the full ramifications of its actions and seek reconciliation.<sup>164, 165, 166</sup> While some feared the apology was merely rhetorical, the law has furthered the debate over Hawaiians' rights to self-determination.<sup>167</sup> Despite increased attention, however, Native Hawaiian land claims remain largely unresolved.

Approximately 283,000 Native Hawaiians, or 23 percent of the state population, currently live in Hawaii.<sup>168</sup> In comparison, 800,000 to one million inhabited the islands when Captain Cook arrived in 1778.<sup>169</sup> At that time, Native Hawaiians had no conception of private property. Instead, *ali'i* (chiefs) served as stewards of the land and designated tasks to others within *ahupua'a*, or territories approximately coinciding with river valleys. The *Kumulipo*, Hawaiians' cosmogonic chant, explains that water, land, Hawaiians, *Akua* (the gods), and taro were born from the Earth Mother *Papa* and the Sky Father *Wakea*. Hawaiians care for and honor taro and land as older family members who sustain them. This relationship forms the foundation of life; critical components of Hawaiian culture would cease without land.<sup>170, 171</sup>

Foreigners arriving in the 19th century largely from the United States and Europe worked to institute private property, and in the process succeeded in separating Hawaiians from their land base. Four major events dispossessed Hawaiians of their land: the Mahele (1848); annexation by the United States (1898); the Hawaiian Homes Commission Act (1920); and statehood (1959).

King Kamehameha III, the third monarch to rule the unified kingdom, instituted the Mahele in 1848 to divide the Kingdom's land into private property so that Hawaiians would have land claims in case of invasion.<sup>172</sup> The division also satisfied sugar interests and missionaries who sought private property for their own security. Forty percent of the land was distributed to the *ali'i* and *maka'ainana* (commoners), and Kamehameha III retained approximately 60 percent of the land for the King and the government (known as Crown and Government Lands).<sup>173</sup> As trustee, the King could never transfer certain lands and resources into private property, and Native

Hawaiians retained the right to enter undeveloped lands.<sup>174</sup> Only about 25 percent (or 7000) of eligible households made claims because of requirements associated with staking land and the foreign quality of the concept of private property. Further, many who did make claims lost their land by failing to pay taxes or unintentionally selling the paper titles. Finally, the Kingdom sold much of its Crown and Government Lands to raise revenues. As a result, foreign interests owned approximately 60 percent of the land by 1860.<sup>175, 176</sup>

When the US annexed Hawaii as a territory in 1898, the Crown and Government Lands were ceded to the US government (now called ceded lands). The US set aside approximately 200,000 acres under the Hawaiian Homes Commission Act of 1920 (HHCA) to “enable Hawaiians to return to their lands in order to provide for their self-sufficiency, initiative, and preservation of their native culture.”<sup>177</sup> However, the HHCA further dispossessed Hawaiians of their lands because sugar interests lobbied Congress to limit the homelands to 200,000 acres of the territory’s worst lands. The HHCA restricted eligibility to native Hawaiians able to prove that they met a 50 percent minimum blood quantum, a difficult requirement particularly as fewer and fewer “pure” Hawaiians exist.<sup>178</sup> Until 1978, Congress limited homesteading to only 20,000 acres within any five-year period.<sup>179</sup> Lack of funding and a disorderly application process also contributed to the U.S. government’s failure to restore land to many Hawaiians.

In 1946, while Hawaii was still a US territory, the newly-formed UN categorized Native Hawaiians as a “non-self-governing people” because they neither surrendered their sovereignty through treaties nor voted to accept annexation. Queen Lili’uokalani did not abdicate her throne, and no vote sanctioned the 1898 annexation. The US government argued that Hawaii attained self-governance through the 1959 plebiscite and statehood. Consequently the UN removed Native Hawaiians from the list. However, the plebiscite did not provide independence as an option. Furthermore, while the vast majority of voters approved statehood, proportionally fewer Native Hawaiians favored the action.<sup>180</sup>

Upon statehood, the Hawaii Admissions Act (1959) transferred 1.2 million acres of the territory’s ceded lands and the 200,000 acres comprising the Hawaiian Home Lands to the newly formed state Department of Land and Natural Resources and Department of Hawaiian Home Lands, respectively. These lands were to serve five purposes, one of which being the betterment of Native Hawaiians.<sup>181</sup> The US government maintained control of the remaining ceded lands. The Hawaii Admissions Act also established a policy of wardship towards Native Hawaiians, meaning that they are considered beneficiaries and dependents of the state and the state must hold their lands in trust. Unlike other Native American peoples, they cannot form governing bodies or sue the government for breaches of trust.<sup>182</sup>

Under state control, the Hawaiian Home Lands continued to be poorly funded and failed to restore land to native Hawaiians. “Basically, they set up a reservation and kept the Hawaiians off it,” accused one attorney representing Native Hawaiians.<sup>183</sup> In 1979, native Hawaiians and other concerned citizens brought the following complaints to the Hawaii Advisory Committee of the US Commission on Civil Rights (USCCR): 1) approximately 20,000 acres were unaccounted for; 2) native Hawaiians were only homesteading 25,000 acres, or one-eighth of the lands; 3) federal, state, and county governments and private interests were leasing the homelands for as low as \$0.12 per acre; and 4) state decisions over the homelands were guided by the needs of the general public rather than trust beneficiaries.<sup>184</sup> Furthermore, recent estimates suggest that 18,000 eligible families are waitlisted for home lands even though the majority of allotted land remains unsettled by native Hawaiians.<sup>185</sup>

In response to these accusations, the USCCR Hawaii Advisory Committee released a report in 1980 summarizing the complaints and evidence. Following additional reviews, the Committee reconvened in 1990. The subsequent report, *A Broken Trust: The Hawaiian Homelands Program: Seventy Years of Failure of the Federal and State Governments to Protect the Civil Rights of Native Hawaiians*, found that the United States and the state had failed to exercise their trust obligations to native Hawaiians under the HHCA. Consequently, it recommended that native Hawaiians receive formal recognition from the US government so that they could practice some self-governance, develop political relationships with the US, and better defend their rights. This recognition would equal the civil rights and protections granted to Native Americans. The report also recommended that the government vacate its holdings on homestead lands and compensate native Hawaiians for misuse. Finally, it recommended legislation that would give native Hawaiians the right to sue the government for public trust failures.<sup>186</sup>

Hawaiian efforts to challenge the government’s management of ceded lands achieved a victory in 1995 when Judge Daniel Heely recognized the claims of native Hawaiians and the Office of Hawaiian Affairs (OHA) to revenues generated on ceded lands. A portion of the Honolulu International Airport lies on federal land, and in 1996 Judge Heely ordered the state to pay OHA a portion of its revenues totaling between \$300 million and \$1.5 billion that were generated from use of ceded lands.

The state appealed to the Hawaiian Supreme Court, which reversed the decision and dismissed the case in 2001 (96 Haw. 388). OHA again tried to recover airport revenues in 2003, 2005, and 2006, and the Circuit Court and the Hawaiian Supreme Court dismissed the case each time, stating that the legislature must address the ceded lands issue.<sup>187</sup> The decisions frustrated

the efforts of those trying to collect revenues generated on lands that the Kingdom had originally set aside for public trust purposes.

Public Access Shoreline Hawaii vs. Hawaii Planning Commission ruled more favorably on behalf of Native Hawaiians in 1996. The Hawaii Supreme Court ruled that Hawaiians retain the right to practice traditional gathering on undeveloped private land. This decision upheld rights bestowed upon Native Hawaiians by Kamehameha III.<sup>188, 189</sup> Furthermore, it established that Native Hawaiians and the state on their behalf could intervene to protect these rights at the expense of private interests.<sup>190</sup>

Courts are not the only realm in which sovereignty claims have been recognized but remain largely unresolved. Although President Clinton's Apology Resolution and *A Broken Trust* called for formal recognition of Native Hawaiians, the Senate defeated the Native Hawaiian Reorganization Act in June 2006. The act would have formally recognized a Hawaiian governing entity and offered Hawaiians the same benefits, protections, and acknowledgment as Native Americans. Senator Akaka vowed to reintroduce the legislation.<sup>191</sup>

Differing opinions among Native Hawaiians over the legislation demonstrate fractures among sovereignty movements. Some believe it is a positive step towards ending over a century of discrimination. Others feel that the bill would legitimize US treatment and control over Hawaiians.<sup>192, 193</sup>

Opposing views among Native Hawaiian sovereignty groups complicate land claims. According to a 1996 election, 73 percent of Native Hawaiian voters support some form of sovereign government; separate polls suggest that approximately two-thirds of the state population supports sovereignty.<sup>194, 195</sup> However, suggested goals and methods range from compensation for lost land to a wholly-independent Hawaii under the exclusive control of Native Hawaiians. In between, some groups support limited sovereignty within particular communities that remain subject to U.S. policies or a nation-within-a-nation modeled after Native American policies.<sup>196, 197</sup> Each movement involves a land claim, but the extent ranges from the 200,000 acres comprising the Hawaiian Home Lands to the state's entire 4.1 million acres.

US presidents have recognized the illegality of the nation's role in the overthrow and annexation of the Hawaiian Kingdom, but many Native Hawaiian claims to land and self-determination remain unresolved. Without land, Native Hawaiians risk losing their culture since so many of their beliefs and traditions are tied to place.<sup>198</sup>

The Native Hawaiian case demonstrates that both the definition and the pursuit of sovereignty are complicated. Goals vary among groups, creating both a lively political debate and a contentious environment. An important question is whether this debate strengthens claims

by challenging groups to prove their positions, or weakens them by blocking attempts to form a unified government. The outcome will yield important lessons for other indigenous people attempting to preserve their culture by re-establishing self-determination and land rights.

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## The Nisga'a (Canada)

*Andrea Glen*

The Nisga'a are the "People of the Nass River" in northern British Columbia, Canada.<sup>199</sup> Once 30,000 strong, today the Nisga'a number about 5,500.<sup>200</sup> According to Nisga'a legends, they have lived in the Nass Valley "since time immemorial," gaining their subsistence from hunting and fishing.<sup>201</sup> Throughout their history, the Nisga'a have governed themselves according to *Ayuukhl Nisga'a*, an ancient code of laws transmitted orally in the Nisga'a language.<sup>202</sup> *Ayuukhl Nisga'a* describes how the Nisga'a were placed in the Nass Valley and entrusted with its protection. It also tells how the landforms in the area were created for the Nisga'a.<sup>203</sup> The Nass Valley is thus integral to the Nisga'a economy, culture, and cosmology – that is, to their identity.

The Nisga'a lived in the Nass Valley unbothered until the 1800s, when settlers arrived from Britain. After trading amicably with the settlers for some time, in the late nineteenth century the colonial government of British Columbia seized the Nisga'a land.<sup>204</sup> This violated the Royal Proclamation of 1763, which had declared that any Indian lands not purchased to date by Britain were reserved for the Indians and outlawed future purchases of aboriginal land except by the British government.<sup>205</sup> The Nisga'a were forced onto reserves totalling 76 square kilometres in size, a fraction of their traditional territory of 25,000 square kilometres.<sup>206</sup>

And so the Nisga'a began their long struggle to win back their territory. Soon after the land was seized, Nisga'a delegations traveled to the Canadian and provincial capitals to petition the Prime Minister and Premier of BC for the return of their lands, to no avail.<sup>207</sup> In 1890, they established the Nisga'a Land Committee.<sup>208</sup> In 1913, they hired lawyers and petitioned the British Privy Council for a land and self-government treaty in accordance with the Royal Proclamation of 1763 -- again unsuccessfully.<sup>209</sup> The Nisga'a Land Committee disbanded in 1927 after Canada made it illegal for Indians to hire lawyers or pursue land claims.<sup>210</sup>

In 1955, under the leadership of Chief Frank Calder, the Nisga'a re-established the Land Committee as the Nisga'a Tribal Council.<sup>211</sup> Calder's strong leadership would prove to be a key factor in the Nisga'a struggle over the next 20 years. In 1968, Calder and the Nisga'a initiated a land claim in the BC Supreme Court. The case went up the Supreme Court of Canada, which issued its now famous decision of *Calder vs. Attorney General of British Columbia* in 1973.<sup>212</sup> In that opinion, the Court recognized, for the first time, that aboriginal title existed prior to the British arrival in North America, and that it continues to exist wherever it was not extinguished.



The Nisga'a did not win their claim because the Court split on whether Nisga'a title had been extinguished, but the acknowledgement that aboriginal title *could* exist was a victory in itself.<sup>213</sup>

The *Calder* decision was a turning point in the Nisga'a fight.<sup>214</sup> The decision called into question the title to much of British Columbia, raising the specter of a barrage of land claims. Realizing that uncertainty over land title would hurt the economy, the Canadian and provincial governments realized it was in their own best interest to try to negotiate a settlement. In the Nisga'a case, the settlement would in fact extend far beyond the narrow land claim under litigation to include a self-government agreement as well. In this way, the litigation was a catalyst for a much broader renegotiation of the relationship between the Nisga'a and Canada.

In the wake of *Calder*, the Nisga'a, led by another powerful leader Chief Joseph Gosnell, began negotiations with the federal government.<sup>215</sup> Around this time, the political context in Canada that was becoming more receptive to aboriginal rights claims. Activism in the 1970s and 1980s had placed aboriginal issues on the agenda by highlighting the inconsistency between Canada's racism towards aboriginals and its pride in its human rights record, tolerance, and provision for the welfare of citizens.<sup>216</sup> In 1990, a violent confrontation between the police and the Mohawk Indians at Oka, Quebec attracted worldwide attention, exposing Canada's treatment of aboriginals and embarrassing the government, which further aided the negotiation process.

After more than 20 years of negotiation, the *Nisga'a Final Agreement* was signed by Canada, British Columbia, and the Nisga'a on August 4, 1998.<sup>217</sup> Shortly thereafter, it was ratified by 70 percent of the Nisga'a.<sup>218</sup> The treaty was then debated in the BC legislature and the Parliament of Canada, and passed both houses over strong objections by opposition parties.<sup>219</sup> During the debates, the Nisga'a made significant efforts to win public support for the treaty by highlighting their openness to modernization and their desire to enter into business relationships with Canadian companies in the Nass Valley. The treaty received final approval and took effect in April 2000, becoming the first treaty signed with an aboriginal people in British Columbia.<sup>220</sup>

The Nisga'a Treaty is both a land settlement and a self-government agreement. Under the treaty, the Nisga'a acquired collective ownership of 1,992 square kilometers of land in fee simple, including ownership of subsurface resources.<sup>221</sup> They also obtained specific entitlements to water, fish, wildlife, forests, and minerals, subject to federal and provincial environmental and other laws. Nisga'a lands are to be governed by the Nisga'a Lisims Government, and are no longer subject to the paternalistic *Indian Act*.<sup>222</sup> The Nisga'a Lisims Government has broad legislative powers over most internal matters, including taxation, but not over criminal law.<sup>223</sup> It can establish its own police and courts, but appeals from Nisga'a court decisions will go to the regular provincial court system.<sup>224</sup> Provincial and federal laws of general application and the

Canadian *Charter of Rights and Freedoms* will continue to apply to the Nisga'a and Nisga'a lands.<sup>225</sup>

In short, the Nisga'a achieved more robust self-governance powers than they previously had, but the treaty is a far cry from full self-government. In exchange for the treaty, the Nisga'a released any future claims to land and aboriginal rights.<sup>226</sup> This treaty required a significant compromise by the Nisga'a. They made huge concessions on their sovereignty claims to obtain the one thing they had long been fighting for: their land.

The Nisga'a reaction to the treaty was mixed. Seventy percent of the Nisga'a Nation voted in favor of the treaty negotiated by Chief Joseph Gosnell as a "triumph" that would give the Nisga'a the land base and self-government needed to protect their culture and become self-sufficient."<sup>227</sup> Some tribal elders challenged the authority of the Tribal Council to negotiate the deal, perhaps reflecting a broader intergenerational conflict between older Nisga'a and a younger generation more willing to compromise and more open to modernization.<sup>228</sup>

Other indigenous peoples in Canada also had mixed reactions. Some saw it as a step forward, while others saw it as yet another oppressive and unfair colonialist document.<sup>229</sup> Many indigenous peoples with their own land claims currently pending feared that the Nisga'a Treaty would be used as a "template", representing the high water mark of what an aboriginal group might get in a negotiated settlement.<sup>230</sup>

Among non-indigenous Canadians, the treaty had both strong advocates and critics. Supporters argued the treaty would (i) end the uncertainty over land title that was hurting investment;<sup>231</sup> (ii) end Nisga'a dependence on the government and improve their living conditions; and (iii) be a step towards reconciliation between the Nisga'a and Canada after a history of racism and marginalization.<sup>232</sup> Opponents claimed (i) the treaty was too costly;<sup>233</sup> (ii) the Nisga'a got an unfair advantage in the salmon fishery;<sup>234</sup> (iii) the treaty was a dangerous precedent for any First Nation willing to accept less to settle a land claim;<sup>235</sup> (iv) entrenched collective ownership was economically inefficient; (v) tribal councils would abuse their power;<sup>236</sup> and (vi) the treaty created a race-based government akin to apartheid, which would hurt the Nisga'a by segregating them and was also unfair to non-Nisga'a within Nisga'a Lands who were excluded from the Nisga'a Lisims government.<sup>237</sup>

The Nisga'a treaty can be seen as a modern chapter in a long history of treaty relations between aboriginal peoples and Canada.<sup>238</sup> Historically, treaties were either unfair to aboriginal peoples or were ignored by Canada. Only time will tell whether the Nisga'a treaty will be a historic first step towards a positive future for the Nisga'a in Canada and whether their compromise was worth it.

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## **The Tatars of the Autonomous Republic of Crimea (Ukraine)**

*Artur Demchuk*

Crimean Tatars are descendants of Turkic peoples who settled in Eastern Europe as early as the seventh century AD. The earliest non-Turkic population (vestiges of Greek colonies and the Roman and Byzantine empires) was assimilated by this group. The current term “Crimean Tatars” has been in use since the thirteenth century when Crimea was occupied by Mongols (or Tatars, as they were known in Europe and Russia) and the majority of the population adopted Islam.

The Crimean Tatars included three ethnic groups: 60 percent Tats, in mountainous Crimea; 35 percent Yalboylus, on the southern coast; and about 15 percent Noğays, on the Crimean steppe. They emerged as a nation at the time of the Crimean Khanate, a Turkic-speaking Muslim state that was founded in 1441 and was part of the Ottoman empire from 1475 to 1775. Crimea was incorporated into the Russian Empire in 1783.

During World War II, Crimean Tatar religious and political leaders supported Hitler and Crimea was occupied by German troops. For this reason, the entire Crimean Tatar population was accused by the Soviet government of being Nazi collaborators and deported to Central Asia in May 1944. In 1967 the Soviet Union officially removed the charges against Crimean Tatars but only in 1988 were they officially allowed to return to Crimea. The Soviet government did not provide legal and financial mechanisms to facilitate their resettlement in Crimea or to make reparations of land and property.

Today, more than 250,000 Crimean Tatars have returned to their homeland in Crimea, and about 150,000 are still living in Central Asia, mainly in Uzbekistan. People of Crimean origin also now live in Turkey, Romania, and Bulgaria.

At present the total population of the Republic of Crimea, the southern region of Ukraine, includes about 2.5 million people. The ethnic composition is 12 percent Crimean Tatars; 64 percent Russians; 21 percent Ukrainians; and three percent other ethnic groups. Ninety percent of these people settled in Crimea after 1944. The official languages are Ukrainian, Russian, and Tatar.

According to the Ukrainian Constitution of 1996, indigenous peoples, together with the Ukrainians and national minorities, constitute the people of the political entity of Ukraine. No legislation has yet been adopted defining which ethnic groups are considered indigenous; what rights and obligations indigenous peoples possess; or their specific relations with either central or local authorities.

At present the main claims of Crimean Tatars, addressed primarily to the Ukrainian government and to the government of the Republic of Crimea, are:

1. To give Crimean Tatars the status of autochthonous (*indigenous*) people. The objective criteria for the determination of ethnic groups in Ukraine that could be regarded as indigenous might include: (a) descent from ancestors who had traditionally inhabited certain geographical regions of Ukraine in its current state borders; (b) the preservation of a cultural, linguistic, and/or religious group identity which differs from that of the titular ethnos and the identities of national minorities of Ukraine, and a desire to further maintain and develop this identity; (c) the existence of distinct historical traditions, social institutions, a system and organs of self-governance and other traditional institutions; and (d) the absence of an ethnically related national state or motherland beyond Ukraine's borders.

2. To give *Kurultai* and *Medjlis* the official status of supreme representative authorities of the Crimean Tatar people and to provide effective representation of Crimean Tatars at all levels of government both in the Republic of Crimea and in Ukraine.

3. To provide resources sufficient to support the return of all deported peoples to Crimea and to establish equality of rights of all the peoples of Crimea regarding privatization and employment.

In order to respond to existing claims Crimean Tatars suggested the following measures: the amendment of the Ukrainian Land Code (to include special provision for the rights of repatriates); review of the legality of land assignment made in the 1980s and 1990s by Crimean local authorities; suspension of the registration of the acts for rights to land use (and of property rights) until the Crimean Tatars' land use issue is resolved; passage of a law on the equal assignment of land with privatization rights; creation of a special Crimean land fund (non-privatized lands) for further assignment of land to the new repatriates.

Ukrainian and Crimean governments are considering these suggestions. For instance, in May 1999 the Council of Representatives of the Crimean Tatar people attached to the President of Ukraine was established (consisting of members of the *Mejlis*). This gave Crimean Tatars real opportunities for political representation and participation in the political decision-making process.

The other potential steps to resolve existing problems could include the creation of a new legal framework (amending existing laws and passing new law regarding indigenous peoples); property restitution (using the recent experience of Eastern Europe); and/or compensation. Another option is the redistribution of land "from above", a relic of the old Soviet policy style that now carries high socio-political risk.

At the same time several successful examples of addressing Crimean Tatars' land claims may be found at the local level. For example, residents of several local communities have decided to reallocate all lands to be distributed, in order to give Crimean Tatars land shares proportional to the number of shares received by other residents. This reduced the size of a land share by around 0.3 ha (from 2.5 ha to 2.2 ha). In addition, an agreement was reached allowing the land shares to be distributed among the repatriates by local *Mejlises*.

Currently, the Republic of Crimea and Ukraine are facing a number of serious economic, political, and social problems that make it difficult to respond to Crimean Tatars' claims. Very limited funds are available to address many of the needs and problems of ethnic minorities. Only a few government officials in Ukraine, and specifically Crimea, have substantial experience in dealing with the challenges posed by ethnic diversity and issues such as the resettlement of former deportees. The rule of law operates in an imperfect way in Ukraine, a country still in transition. Existing citizenship regulations do not give non-citizens (such as those returning to Crimea from Uzbekistan) legal rights to privatized land.

A great deal of intolerance, and an unwillingness to engage in negotiations that would lead to reasonable compromises to accommodate ethnic diversity, can be found in some sectors of Ukrainian society including many politicians, government officials, and community figures in Crimea. In Crimea the mainstream mass media sometimes encourage rather than discourage intolerance and xenophobia. Crimean Tatars are regularly subjected to vicious stereotyping and used as scapegoats for many of Crimea's socio-economic and political problems.

The ongoing (though not openly manifested) conflict between the Crimean Tatar minority and the majority of the Crimean population is perpetuated through "majority-based democracy". This system makes it possible to ignore any Crimean Tatars claims and demands not supported by legal mechanisms. There is a need for further negotiation and new alternative creative approaches, including the principles of consensus building and deliberative democracy.

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## **The Bedouins (Israel and Jordan)**

*Talia Berman-Kishony*

Disputes between the indigenous Bedouins in Israel's Negev Desert and the Israeli government are rooted in a clash between a traditional nomadic lifestyle and the nature of modern society. These conflicts involve complex intertwined legal issues of property, land, identity, culture, and equity. Despite sincere and serious attempts to address these conflicts, the Israeli government and the Bedouins have reached a deadlock. The conflict is threatening to escalate into violence if legal and development strategies, currently pursued by the authorities, continue to foster large-scale opposition among an increasingly disaffected Bedouin population.

A comparative study of the situation of Bedouins in Israel and in neighboring Jordan can help identify alternative strategies to avoid escalating the conflict. While Israel and Jordan both share similar tensions between the priorities of modern society and traditional nomadic lifestyles, and both have similar long-term urbanization goals, the solutions and policies selected by these two countries are quite different. The Jordanian policy is based on mutualism and relies mainly on incentives as positive persuasion measures; Israel's policy, by contrast, is largely unilateral and relies on both incentives and legal penalties as implementation tools. We suggest that a collaborative incentive-based approach could be more effective in Israel and might decrease the probability of alienating the indigenous population.

There is a fundamental clash between each state's legal right to pursue its interests and the culture survival of indigenous peoples. This clash cannot be resolved by ordinary legal methods.

The situation in Israel following decades of failed urbanization initiatives is quite complex. Israel is currently attempting to move beyond the Sharon plan to a more collaborative dispute resolution process. The unilateral nature of the five-year plan and the use of harsh penalties, despite significant incentives, have increased alienation and animosity and have made it enormously difficult to launch a mediation process.

By contrast, the Jordanian approach emphasizes incentives and is characterized by a heightened level of cultural awareness and sensitivity. Moreover, decisions regarding Bedouins are made collaboratively by the government and the Bedouins. This greatly increases chances of acceptance.

We find that the absence of forceful penalties like house demolition has played an important role in facilitating constructive dialogue between the government and Bedouin



populations in Jordan. While the situation in Israel is not analogous in important respects, we hope that the consensus-building approach currently being pursued with the help of the Consensus Building Institute may end the growing confrontation between the government of Israel and the Bedouin population in the Negev.

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## **The Tsou (Taiwan)**

*Shunling Chen*

A physical barrier once divided Taiwan into “civilized” and “savage” areas. That physical barrier no longer exists, but the symbolic border, based on the veneration of an eighteenth century Chinese trader killed by indigenous Tsou headhunters, remains. The veneration, which continues to thrive despite indigenous efforts to reinterpret the story, has been used to legitimate oppressive policies against indigenous peoples. With the resurgence of indigenous political and economic power, the tension between indigenous and Chinese societies has heightened, and is embodied in a Wu-feng temple newly built in 2003 in the heartland of the Tsou territory.

The Tsou is one of the 12 officially recognized indigenous communities in Taiwan.<sup>239</sup> Tsou people live in the central, mountainous part of the island, mostly in Alishan Xiang<sup>240</sup> in the Chia-yi County.<sup>241</sup>

Of the 42,784 hectare of land in Alishan Xiang,<sup>242</sup> 6,900 hectares<sup>243</sup> were established during the Japanese colonization as Indigenous Reserved Land.<sup>244</sup> The economy of the area has been based on the logging industry and tourism, which are now administered by the National Forestry Bureau (NFB). A railroad built in 1913 by the Japanese Colonial Government facilitated the transportation of logs, and also brought more Han Chinese settlers into the region.

The population in Alishan Xiang is now about 6,500 including 3,700 Tsou people.<sup>245</sup> Seven of the 12 villages in Alishan Xiang are predominantly inhabited by Tsou people and geographically are quite separated from the NFB-administered logging and tourism areas.<sup>246</sup>

Before the arrival of the Chinese in the seventeenth century, Tsou territory extended to the coastal plains in southeastern Taiwan. In 1684, the Manchu Qing Empire established magistrate administration in Taiwan to collect taxes and to settle disputes. However, the Manchu were reluctant to push this frontier further, fearing that this remote region could harbor Han Chinese rebels, and that settlers’ desire to acquire and cultivate land would lead to conflicts, or even bloodshed, between indigenous peoples and settlers.

The Qing erected physical borders between the imperial territory and the Fan-jie, or “savage land”, and applied severe penalties to transgressors.<sup>247</sup> They were forced to move the borderline eastward as they reluctantly recognized illegal settlements. Gradually, the settlers forced the Qing to compress the territory of indigenous peoples in Taiwan.<sup>248</sup>

The Japanese Colonial Government (1895-1945) divided indigenous peoples into two categories. Those who had more interaction with settlers were treated as Chinese,<sup>249</sup> while the rest

continued to be seen as “savages” and experienced the “Li-pan”, or “governance over the savages”, policies. The current Taiwanese government maintained the Japanese categorization of the “savage” population, and referred them as “shan-di-ren” (mountain peoples).

Wu-feng was a middleman facilitating trade between the Tsou people and Chinese settlers in the eighteenth century in the region of Taiwan now known as Chia-yi. In the course of his work, he was killed by the Tosku family of Saviki, a Tsou village. Soon after his death, an epidemic exploded in Tsou villages. Convinced that Wu’s *hucu* (or evil spirit), had brought the disease upon them, the head-hunting Tsou stopped killing settlers.<sup>250</sup>

Tsou and Chinese interpretations of this story differ significantly. For settlers, Wu not only became a symbol of the greatness of Chinese culture but has been worshiped as a local deity. In the eyes of Tsou people, Wu was a manipulative middleman<sup>251</sup> who took revenge on them by causing the epidemic.

Wu’s story was first documented in 1855.<sup>252</sup> Since then, each regime further elaborated it according to its political agenda. The Japanese emphasized that Wu sacrificed his life to civilize Tsou people, rather than to protect settlers. Such interpretation not only fit Japanese civilization policy, but also served as a cautionary tale, to discourage settlers from fighting against alien nations, either Tsou or Japanese.<sup>253</sup> The current Taiwanese government has emphasized the Confucian concept of *ren-yi* (justice) and interpreted Wu’s death as a sacrifice in the service of justice for mankind,<sup>254</sup> the ideal of Chinese political philosophy.

The first temple, Alishan Zhong-wang Tzi (Alishan Martyr Lord Temple), to venerate Wu was allegedly built in 1820. The current temple was built by the Japanese Government in 1913 and renovated and enlarged in 1982 with funding from the Taiwanese government. Wu-feng is also venerated in other community-based temples in the Chia-yi region.<sup>255</sup>

Wu’s story has been included in school textbooks since the Japanese era. Roads and regions were named after him. He has been invoked as artistic inspiration. In 1927, one painting portrayed Wu as a typical Japanese warrior. In 1932, Wu was featured in the first movie exported to Japan from colonized Taiwan. In 1962, the first colored movie made in Taiwan again featured Wu. Both movies were box office hits in their times.

For all indigenous peoples in Taiwan, Wu has become a symbol of their stigmatization and the justification of oppressive colonial policies against them. The rejection of Wu’s myth was one of the earliest goals of indigenous activism begun in the late 1970s. In 1988, Wu’s story was taken out of school textbooks and Wu-feng Xiang was renamed Alishan Xiang.

Indigenous activists aligned strategically with the then-opposition Democratic Progressive Party (DPP) and made great political progress at the national level. Achievements included the

enactment of the Indigenous Education Act (1994); the adoption of a respectable name for indigenous people *yuan-zhu-ming*, meaning “original inhabitants”; in the Constitution (1994); and the establishment of a body overseeing indigenous issues in the central government (1997).

In 1999, indigenous activists signed the Treaty of New Partnership between the Indigenous Peoples and the Government of Taiwan with then-DPP presidential candidate Shui-bian Chen.<sup>256</sup> Several issues stated in the Treaty became official elements of the political agenda after Chen was inaugurated in 2000, including the promotion of indigenous self-governance.

In this new political atmosphere, the Tsou among all the indigenous nations seem the most ready for self-governance. Since the late 1980s, the Tsou of Saviki, where Wu-feng was slain, have organized community to safeguard the River Tanayiku that runs through the village. Although acting without official authority, this group set an example for environmentalists and was later recognized by the government. In 1999, Chia-yi County conferred unprecedented water rights on the Saviki Community Development Association (SCDA, Shan-mei she-qu fa-zhang xie-hui), a nongovernmental organization founded to perform almost like a tribal government.<sup>257</sup>

These community efforts to revitalize the river had other positive impacts on the community. Saviki now runs its own eco-tourism park, which generates an annual income of 650,000 USD for a community of 600 people.<sup>258</sup> The SCDA distributes social welfare benefits funded by park revenue.

By far the most successful, the Saviki model has been imitated by other Tsou villages. In the Tapangu village – where the two *hosas* \* dwell<sup>259</sup> – annual festivals are held to bind the Tsou together as a nation. In 1992, the first Tsou National Affairs Conference (Tsou-Shi Hui-yi, TNAC) was convened after the War Festival (*Mayasvi*). In 2001, during the *Mayasvi*, the Tsou declared their aspiration to self-governance. In 2006, more than a 100 participants in the eighth TNAC agreed to establish the Tsou National Assembly as the representative body of the Tsou nation.<sup>260</sup>

However, a huge gap remains between the ideal of indigenous self-governance and their currently very limited sovereignty. In February 2003, the Tapangu Headman, Avai Peyonsi (Peyonsi means “King” in Tsou language) believed he was exercising his sovereign right on Tsou land when he confiscated a barrel of honey from a suspicious Chinese. Not recognizing his authority to protect Tsou territory from trespassers, the courts found Peyonsi guilty of stealing the barrel and sentenced him to six months in jail, with two years of probation.

The court’s failure to recognize an autonomous Tsou cultural and legal system may reflect heightened tension between the Chinese and the Tsou community, which now exercises much of

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\* Tsou parent groups

the authority traditionally wielded by agents of the dominant culture. Such heightened tension is also manifested by the erection of a Wu-feng temple in 2003 in Shi-zhou, which falls right between of Saviki and Tapangu, two villages that symbolize the rise of Tsou economic and political power.

The indigenous activism has not successfully offset the myth of Wu in the dominant culture. The symbol of the division between Chinese and Tsou society — veneration of Wu-feng — like the border excluding the “savages” in Taiwan under the Manchu Empire, continues to move eastward into the heartland of Tsou territory.

The two modern states that have ruled Taiwan since 1895 deliberately used Wu’s story as political propaganda, but the story is more than just a fiction fabricated by the state. For earlier settlers, driven from their homeland by economic pressures and struggling to settle in a new environment, the veneration of Wu-feng reflects a deep fear, despite their arrogance, of the indigenous cultures.

Both colonial policy and private settlements have threatened indigenous peoples’ livelihood, compressed their territory, and caused great suffering. However, governmental and individual actions have very different rationales and require different responses. The government may respond to political pressure by recognizing some indigenous rights, but may not make a great effort to reverse a century of ideological engineering, and may not mind profiting from those prejudices.<sup>261</sup> Chinese in the region who may, like their ancestors, have economic or political conflicts with the Tsou people may feel threatened by the achievements of indigenous activism and Tsou community organizing. In this light, it is not surprising that the Wu-feng veneration did not fade away, but continued to thrive.

Indigenous activism in Taiwan has been effective in redefining the relationship between indigenous communities and the national government and in empowering and reorganizing indigenous communities. However, the Chinese remain in control of the political system, including the political parties. To continue to pursue self-governance, overcome impediments, and form potential alliances, indigenous activists may have to focus on relationships between indigenous peoples and ordinary non-indigenous individuals, especially those neighbors who might feel threatened by the resurgence of indigenous powers.

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## **The Adivasi (India)**

*Shizuka Hashimoto*

Land claims by the Adivasi, the tribal population of India, coalesced around a campaign opposing the Sardar Sarovar Project (SSP),<sup>262</sup> a large dam construction project along the Narmada River<sup>263</sup> in the Narmada Valley. The SSP, proponents insisted, would provide drinking water to over 40 million people, irrigate 1.8 million hectares of land in the state of Gujarat, and produce much-needed hydroelectric power.<sup>264, 265</sup> The issue of displacement, however, has become the subject of heated debate since late 1980s as dam construction was to submerge 37,000 hectares of the land including 245 tribal villages. Opponents have insisted that the number of people to be affected by the project, mostly Adivasis, has been significantly underestimated since the proponents' estimate counted only those who lived in the submergence area.<sup>266</sup>

The Adivasi—the tribal inhabitants of India--include so-called “aboriginals”, “primitive tribes”, “hill tribes”, and “forest tribes”. The individual groups have been identified as “Scheduled Tribes”<sup>267</sup> under Article 336(25) and Article 342 of the Indian Constitution. In 2001 tribal populations in India included 84.3 million people, 8.2 percent of the total population.<sup>268</sup> The Adivasi comprise 461 tribal communities with 172 segments. Some Adivasis live by hunting and gathering and subsistence cultivation while others live as landless laborers or marginal farmers.<sup>269</sup>

Jawaharlal Nehru, the first Prime Minister of India, said that “steel mills and dams are the temples of modern India.” From this perspective, dam construction has been regarded as one of the crucial components of industrialization of India.<sup>270</sup> However, dam projects have had a destructive impact on the life of Adivasis, many of whom live in remote and steep areas, suitable for dam construction. In fact, the Adivasi constitute almost 40 percent of those displaced by dams while constituting only eight percent of the total population of India (Patwardhan 2000: 5).<sup>271</sup> Displacement destroys their ties to natural resources. The livelihood of the landless and those Adivasis who own only marginal amount of land is supplemented by small amounts forest produce, fish, and cattle. In addition, the land and river has been intricately woven into the religious practice of Adivasis. Furthermore, displacement places critical stress on Adivasi social bonds which are important sources of mutual aid.<sup>272</sup>

Given these circumstances, a provision on rehabilitation and resettlement stipulated by the Narmada Water Disputes Tribunal Award of 1978<sup>273</sup> for the SSP was thought to be a landmark decision<sup>274</sup> since it employed land-to-land policy. The award, however, had a fatal

flaw; it did not take into account the fact that most of the people to be displaced, mostly Adivasis, do not have formal ownership rights to land.<sup>275</sup> Although land and forests are of crucial importance for the Adivasis's subsistence, many laws established in the colonial-era ignored their customary use rights over the land. For example, the Forest Act of 1878 (superseded by the Indian Forest Act of 1927) established the state's absolute property right over forest land, ignoring Adivasis's customary use rights.<sup>276</sup> Since many Adivasis do not own a legal title to land, they have no way to receive just compensation.<sup>277</sup> Even if they are eligible for compensation, there is ample evidence that the rehabilitation and resettlement measures had serious defects in their application.<sup>278</sup>

The SSP began in earnest in 1985 when the World Bank entered into credit and loan agreement for \$450 million with India, the state of Gujarat, Maharashtra, and Madhya Pradesh. In 1986, Medha Patkar, a social worker, and other activists questioning the legitimacy of the SSP formed the *Narmada Dharangrasta Samiti*. The *Samiti* organized six rallies with its allies in three dam-affected sites and declared its total opposition to the SSP on the ground that the official assertion was unreliable on various grounds.

Gaining nation-wide attention, these actions helped build a coalition of opposition campaigns against the SSP. The growing network of local groups became known as the *Narmada Bachao Andolan* (NBA) or the Save the Narmada Movement.<sup>279</sup> The opposition movements led by the NBA led direct actions such as rallies, marches, demonstrations, fasts, and letter-writing campaigns, mobilizing a large number of people.<sup>280</sup> In addition, some opponents took legal measures to halt the SSP or to restore the rights of displaced persons.<sup>281</sup> However, stakeholding governments did not comply with court rulings and countered with legal,<sup>282</sup> political, and ideological tactics.<sup>283</sup>

In 1987 and 1989, Patkar made two trips to Washington DC to meet World Bank officials and to confer with the Environmental Defense Fund (EDF). The EDF promised to help the NBA articulate its concerns with the Bank and to build international network of activists in North America, Europe, Japan, and Australia.<sup>284, 285</sup>

This network initiated a series of international opposition campaigns,<sup>286</sup> targeting international criticism against the SSP. In 1990, the Oversea Economic of Japan, one of the important funders of the SSP, announced its withdrawal. In 1991, the World Bank commissioned an unprecedented independent review to examine the resettlement and environmental aspects of the SSP.

The review was highly critical of the project<sup>287</sup> and suggested that "the wisest course would be for the Bank to step back from the Projects and consider them afresh."<sup>288</sup> In October,



1992 six months after the publication of the review report, the Bank issued a document titled *Narmada: Next Steps*. The document said that the Bank found no reason to withdraw from the SSP since the Indian government had adopted “a comprehensive set of actions in line with the recommendations of the Bank mission.”<sup>289</sup> Morse wrote a letter to the Bank President Louis Preston and each executive director of the Bank, accusing them of misrepresenting the SSP.<sup>290</sup> In addition, a full-page letter to Preston was published in the *Financial Times* warning that if the Bank did not withdraw from the project, NGOs would launch a campaign to cut funding from donor countries to the Bank. The letter was signed by 250 NGOs and coalitions from 37 countries.<sup>291, 292</sup> Bowing to intense international public pressure, on March 31, 1993, the Government of India asked the Bank to cancel the loan.<sup>293</sup>

Even though the Bank had withdrawn from the SSP, the NBA continued to lead an opposition campaign to halt the project.<sup>294</sup> In May 1994, frustrated by the governments’ inaction, the NBA filed a petition to the Supreme Court of India, challenging the SSP on various grounds. About that time, the Narmada Control Authority (NCA), established in 1980 to implement the Narmada Water Disputes Tribunal, finally decided to suspend the river bed construction of the dam. In May 1995, the Court issued a stay order on further construction of the dam at a height of 80.3 meters (or 264.5 feet). Surprisingly, however, even as the construction was suspended formerly by the NCA and the Supreme Court, the Sardar Sarovar Nigam Limited (SSNL), which was set up by the government of Gujarat in 1988 to implement the SSP, continued construction until late 1995 when the NBA organized a massive march to Delhi demanding the cessation of the construction.<sup>295</sup> The construction work was not halted until 1999.

The situation dramatically changed in February and again in May, 1999 when two interim orders of the Supreme Court of India allowed raising the dam by another five and three meters, respectively. The NBA countered by examining tracts of land which had been allocated to the displaced and revealed them to be barren, uncultivable, or not available. It also launched intensive direct political actions in the Valley. In 2000, after careful scrutiny, the UN Commission on Human Rights suggested that “an immediate moratorium be called to any further increase in the heights of the dam so that ongoing violations come to a halt” on the ground that “the responsible authorities at local, state and the central level have failed to demonstrate either the commitment, or the capacity, to carry out the resettlement in a manner consistent with the basic human rights of the affected people.”<sup>296</sup> The government of India, however, did not take the Committee’s suggestion. In March 2004, further construction of the dam to the height of 110 meters was allowed.

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## **The Richtersveld Community (South Africa)**

*Jessica Tucker-Mohl*

One of the most high-profile land disputes to emerge out of South Africa's transition from an apartheid regime to a democratic government concerns a narrow strip of land along the west coast of the country, just below the Namibian border. This land, known as the Richtersveld, was the subject of an intense legal battle between the Nama, the indigenous people who used to occupy it, and the land's most profitable facility, a diamond mine. Approximately 3000 Nama have sought to reclaim their land, about 85,000 hectares. These 3000 are known as the Richtersveld Community (the "Community").

The Nama are primarily descended from the KhoiKhoi and the San ethnic groups that ranged across most of southern Africa for thousands of years. The KhoiKhoi were largely pastoralists, living a nomadic lifestyle of herding goats, sheep, and eventually cattle. The San were predominantly hunter-gatherers rather than farmers. Descendants of these peoples today are known as Khoisan. One of the first major interactions between the Nama people and Europeans was the discovery of a significant deposit of diamonds within the Richtersveld in 1925.

Prospectors and miners flocked to the area, forcibly driving out the Nama. In 1930, the government created a reservation for them composed of land situated far inland from the territory they had previously occupied. Similar "reserves" or "homelands" had been established for other Khoisan and Africans, following the enactment of the Native Lands Act of 1913. Forcing people into the reserves was a way to control them, and to provide land for white settlers. Reserves gave the people living there no legal rights to the land, imposing a trustlike relationship between the government and the people. For the next 60 years, the Nama community endured the hardships of life on the reserves.

In 1994, after several years of gradual transition, Nelson Mandela and the African National Congress (ANC) party gained control of the country by popular election. The new government was simultaneously presented with three enormous challenges: a legacy of injustice to confront, a population suffering from extreme poverty, and a need for economic growth.<sup>297</sup> Land was a key element of the transition for several reasons. Huge inequalities existed in the country's land ownership patterns, with over 50 percent of the non-white population living on the Reserves without land rights and another large segment living in informal settlements outside of urban areas.

This situation represented a threat to the country's stability. A pattern of land-grabbing (landless tenants rising up, often violently, against primarily white landowners) plagued neighboring Zimbabwe throughout the 1990s, and the new government was concerned that similar confrontations might occur in South Africa.<sup>298</sup> At the economic level, uncertainty around property rights threatened to slow foreign investment, something the country had lost during the previous era of economic sanctions. The 1996 Constitution provided a framework for an approach to land reform and land rights that was designed both to remedy wrongs of the past and ready the country for the future. It is within this framework that the Community pursued their claim to their land.

The Restitution of Land Rights Act of 1994 ("Restitution Act") provided a forum for communities and individuals who had been dispossessed of their land to apply for restitution. Other important land reform efforts enacted at this time included legislation to provide for tenure security for tenants<sup>299</sup> and, within a general framework of government recognition of traditional tribal authorities, recognition of "communal land rights" as understood in a traditional system. More so than the other reforms, the Restitution Act most directly tied considerations of historical injustice to decisions about who was to control land.

The Community filed a land claim and but was initially denied restitution. After several appeals, in 2003 the Supreme Court of Appeals (SCA) overturned the lower court's decision and held that the Community had a right in the land based on a customary law interest, and that the dispossession was the result of racially discriminatory legislation.<sup>300, 301</sup> The court also held that the Community's historic ownership interest had included communal ownership of the minerals and precious stones -- a significant finding, given the presence of the diamond mine.<sup>302</sup>

In 2004, ruling on the appropriate remedy, the Land Claims Court determined that the Community would be awarded restoration of the right in land and minerals, with the potential for additional equitable redress to provide for, among other things, remediation of environmental damage. In October, 2006, the South African government settled the Richtersveld claim out of court for R 190 million (approximately \$27 million).<sup>303</sup> This payment, termed a "reparation payment," is in addition to guarantees for environmental restoration of damaged areas and formal control of the land and mineral rights.

Two major themes emerge from this study of the Richtersveld Community's land claim. First, the legal reasoning used to arrive at this decision diminishes the number of other communities that might be able to bring valid restitution claims. The 2003 decision held that the Community had a right in the land based on a customary law interest, rather than aboriginal title. "Customary interest" in South African courts must be a use of land that is "certain, uniformly

observed for a long time, and reasonable.”<sup>304</sup> Aboriginal title differs in that it is inalienable to any party except the government, and is thus a stronger and more secure type of land right.

However, aboriginal title can be more difficult to demonstrate in that it needs to originate from a specific aboriginal people’s historical practices around the use of their land. The customary interest in land was subject to extinction by the British annexation of the area in the mid-nineteenth century, but the court determined that as the Community possessed “social and political organization” at and before the time of annexation, the right was not extinguished. A court holding based on aboriginal title (rather than on customary interest) would have been sufficient to indicate a right in land (and no findings on annexation would have been required). Communities seeking claims after the Richtersveld decision will need to show a customary interest in land that survived annexation, a significantly higher threshold.

The second theme concerns the significance of the Community as an indigenous people. In South Africa, the term “indigenous” refers not to an aboriginal “First People”, but is used to distinguish black Africans from Europeans and Asians. The post-apartheid South African government has sought to remove any consideration of “indigenous” or “aboriginal” rights from its policies, including land reform, in an effort to avoid singling out specific ethnic groups.<sup>305</sup>

In the context of this land restitution decision, the relevance of the Community’s indigeneity is debatable. While the Restitution Act explicitly does not mention indigeneity as a consideration, it is possible that the way the Community’s claim was assessed (focusing on its strength, cohesiveness, and the Community’s relative isolation) in fact reflected their indigenous status. Those factors are linked to, although not exclusively the domain of, indigeneity.

From the country’s perspective, restoration of land may not be the best way to amend past and present injustice. Many debate how much more time and money South Africa should spend looking backwards. The restitution process encountered a lot of public opposition in that it targeted some but not all past discrimination and continued to focus attention on the past when arguably the country’s sights should be set on the future.

From the Community’s perspective, insofar as attaining autonomy over how land use is linked to a community’s ability to retain its traditional knowledge, the ability to control the claimed land should bode well for the survival of Nama culture. The Community maintains some of the aspects that has enabled it to survive for so long. Relatively few Nama people leave their communities, despite limited (though expanding) employment opportunities, and those who move away often return.<sup>306</sup> The Richtersvelders also maintain an attitude of suspicion towards outsiders, due in part to several failed government projects aimed at improving their well-

being.<sup>307</sup> The land claim itself was a success in that the Community got what it wanted, but it remains to be seen how the dramatic changes will affect the indigeneity of the Richtersvelders.

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## **The Yonggom (Papua New Guinea)**

*Autumn Graham*

The Yonggom territory is cross-cut by the border between Irian Jaya and New Guinea. The Yonggom of Papua New Guinea number 4500-5000, with 2000 living across the border in Indonesia. They are part of a much larger cultural-linguistic group, the Muyu of Indonesia. The combined populations of the Yonggom and Muyu exceed 15,000 people.<sup>308</sup>

In Papua New Guinea, the Yonggom reside in the North Fly area of the Western Province in the North Ok Tedi, South Ok Tedi, and Moian Census Divisions. Their villages are scattered along the west bank of the Ok Tedi River and the east banks of the North Fly and Binge rivers. Traditionally, the Yonggom lived in homesteads and hamlets scattered across their vast lands. They traveled regardless of the often unmarked international border that separates Indonesia and Papua New Guinea.

The Australian colonial government, nervous over the Sukarno-led take-over of Dutch New Guinea (now Indonesia), began persuading inhabitants of the North Fly to move away from the border and congregate in villages.<sup>309</sup> They now prefer to live in the villages, where they have strong emotional ties to the land they utilize for subsistence living. Villages are small, averaging around 200 persons<sup>310</sup> with many home to as few as 13 people.

Yonggom subsistence strategies consist of (a) slash-and-burn horticulture, (b) sago extraction, (c) pig husbandry, and (d) hunting and gathering. They take part in the regional cash economy through rubber tapping and selling garden and forest products at markets. The Yonggom diet relies on fish, prawns, and turtles for protein and sago palm pith for starch.<sup>311</sup>

Over 98 percent of the land in Papua New Guinea is owned by customary title or traditional claims.<sup>312</sup> The government retains sub-surface rights to all land.<sup>313</sup> Deep in the rain forest lies the Ok Tedi mine on Mt. Fubilan in the Star Mountains of the Central Range. The venture was a considerable challenge, as the area was barely accessible and prone to high rainfall, frequent earthquake, and landslides. The mine stands at the headwaters of the Ok Tedi River, which feeds into the Fly River system, one of the world's major river systems. The facility produces copper and gold ore, and accounts for 20 percent of Papua New Guinean exports and 10 percent of Papua New Guinea's GDP.<sup>314</sup> The mine is operated by Ok Tedi Mine Ltd. (OTML), until recently a subsidiary of the Australian mining company Broken Hill Property (BHP).

The mine's tailing dam collapsed in 1983, before it was finished. The government of Papua New Guinea agreed that construction could continue without it.<sup>315</sup> With no dam and no

incentive to build a tailing containment facility, BHP operations dumped all of the mine's tailings, 80,000 tons of fine sand composed of crushed rock and metals, directly into the Ok Tedi tributary of the Fly River each day.<sup>316</sup> Since the mid 1980s, the mine has released 30 million tons of mine tailings and 40 million tons of waste rock into the river system every year.

The Ok Tedi River flows into the Fly River system before it reaches the Torres Strait. This journey leads through a dense primary tropical rain forest, wetlands, and savanna.<sup>317</sup> Over 15 years, 700 million tons of mine tailings have found their way into the surrounding environment.<sup>318</sup> However, BHP claimed that the tailings from the mine were compatible with the sediment naturally found in the river system.

The mining operations have reduced the height of Mt. Fubilan (2,095m) by over 300 meters. Seventy kilometers of the Ok Tedi 100-kilometer corridor is biologically dead.<sup>319</sup> Thirty square kilometers of dead forest surround it as far as two kilometers from the river's edge,<sup>320</sup> with another 300 square kilometers of the forest in severe distress. Estimates of the cascading effects of the pollution as it flows down the Ok Tedi River into the Fly River are based on 350 square kilometers of future vegetation dieback.<sup>321</sup>

The pollution from the mine has made life difficult for the Yonggom. Food shortages and hunger have led to increased sickness. The fish left in the river are contaminated, having very little fat and giving off bad smells. The sago palms are dying and no longer yield the palm pith needed for the Yonggom diet. Various informants note that they were told by mine company officials not to eat the fish or turtles from the river and not to make sago palm pith from plants near the river. Others were told not to plant gardens along the river.<sup>322</sup> It is no longer possible for Yonggom villagers to sell their garden products in town at the markets -- no one will buy them.<sup>323</sup> Many gardens have disappeared under mud pushed to shore by the river pollutants.<sup>324</sup>

In response, Rex Dagi and Alex Maun, two Yonggom men from villages along the river, became activists for their people and others living near the Lower Ok Tedi, whose wellbeing was being adversely affected by the mining operation's pollution of the river and surrounding forests. They undertook a truth campaign, bringing the plight of the Lower Ok Tedi peoples to the world stage. Both men testified before the International Water Tribunal in The Hague against the mine. They traveled to Bonn to urge German shareholders in the mine to use their power to bring about mine reform. Dagi staged a press conference when he was a delegate to the Earth Summit in 1992.<sup>325</sup>

Finding no recourse in the Papua New Guinea government or judiciary, the Australian law firm of Slater and Gordon filed a \$4 billion class action law suit in 1994 on behalf of a group of 30,000 indigenous land owners in the Victoria Supreme Court in Melbourne, Australia where



BHP is incorporated. The Victoria Supreme Court ruled in favor of the landowners on the question of jurisdiction and proceeded to set a date for trial.<sup>326</sup>

Following this ruling, BHP aided the government of Papua New Guinea in drafting domestic legislation to make bypassing national courts to bring suit against transnational companies in foreign courts illegal. This bill, once a law, would have criminalized those bringing suit against the company in Victoria.

When the Victoria Supreme Court held BHP in contempt of court for this action, the price of the firm's shares plummeted. While the contempt charge was ultimately overturned on a technicality, BHP recognized the weakness of its position in world opinion.<sup>327</sup> On June 12, 1996, BHP and the indigenous plaintiff leaders reached an out-of-court settlement.

The binding agreement was for approximately \$500 million. The largest part of the settlement concerned the construction of appropriate tailings containment facilities at a cost of \$350 million. A \$90 million trust was set up for the people of the Fly River and \$35 million was set aside for the communities in the most heavily affected areas of the lower Ok Tedi River. The people of the Western Province would receive 10 percent equity share in the mine, to be held in trust by the national government. In addition, both parties agreed that any further disputes would be heard not in PNG courts, but before Melbourne courts.<sup>328</sup>

A major weakness of this negotiated settlement for the Yonggom lies in the value of currency. All figures were committed and calculated in Kina, the local currency. While it was strong at the time of the case, it was devalued by over 50 percent shortly thereafter.<sup>329</sup> BHP set up and implemented the compensation packages and the equity share holdings right away. However, it did not construct the containment mechanisms, but undertook a court-mandated environmental study of the mine instead.<sup>330</sup>

When the World Bank asserted that the mine should be closed as soon as was socially and economically feasible, BHP announced the results of their study and proposed closing the mine. The PNG government opposed this move, as the mine continued to produce considerable profits. The indigenous peoples downstream objected to the BHP pull out as well. They were back in court seeking further damages from the pollution that had continued since the settlement as BHP had failed to implement a containment facility.<sup>331</sup>

In January 2004, the plaintiffs settled once again on advice from counsel that they could not prove BHP had breached the terms of the 1996 settlement.<sup>332</sup> The firm claimed that a major dredge operation undertaken in 1997 had met their contractual obligations.<sup>333</sup> The dredging operation attempted to halt the level of tailings flowing into the river.

However, the villagers contend that the dredging operation was supposed to accompany a tailings mitigation system not to simply rehabilitate the river but to stop the pollution.<sup>334</sup> High levels of heavy metal can turn toxic as the tailings turn acidic. This would spell ecological catastrophe, as they would then be impossible to mitigate.

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Kirsch S. (1996). Cleaning up Ok Tedi: Settlement favors Yonggom people. *University of Michigan Journal of the International Institute*, 4 (1). Available at <http://www.umich.edu/~iinet/journal/vol4no1/oktedi.html>

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## Notes

### *Introduction* **What is Indigeneity?**

1. According to the 1990 Population Census and the Pan American Health Organization (<http://www.paho.org/english/SHA/prflecu.htm>).
2. Gonzalez, H. (1986). Propiedad comunitaria o individual. Las leyes indigenas y el pueblo Mapuche. *Nutram*, Year II, 3.7.
3. *General Information on the Amerindian Population* available at <http://www.gina.gov/gy/natprofile.geninfoap.html>
4. US Census 2000.
5. US Census 2000. Combined total obtained from Penobscot Nation 2006 Census List and Passamaquoddy Tribe website (<http://www.wabanaki.com/index.html>) result in tribal enrollment of 5636 persons. A substantial portion live off-reservation.
6. This area was agreed upon between the tribes and the State of Maine in the 1980 Indian Land Claims Settlement Agreement, which allows Indian Tribes to purchase 300,000 acres of land (121,405 ha).
7. US Census 2000. This number represents the statistics of people self-identifying as Native Hawaiian and Other Pacific Islander alone and Native Hawaiian and Other Pacific Islander and at least one another race.
8. US Senate. (2005, March 5). *Native Hawaiian Reorganization Act, hearing before the Committee on Indian Affairs*.
9. Office of Hawaiian Affairs (OHA). (2006). Last accessed February, 8, 2007 at <http://www.oha.org>.
10. Speech by Chief Joseph Gosnell to the British Columbia Legislature, 2 December 1998, quoted in Rose, A. (Ed.). (2000). *Spirit dance at Meziadin: Chief Joseph Gosnell and the Nisga'a Treaty*. Madeira Park: Harbour Publishing.
11. This land has been acquired through the Nisga'a Treaty of 2000.
12. This area represents what is called the Indigenous Reserved Land.
13. The *Treaty* has seven articles, including: 1. recognizing the natural sovereignty of Taiwan indigenous peoples, 2. promoting self-governance for indigenous peoples, 3. concluding a land treaty with indigenous peoples, 4. reinstating traditional names of indigenous communities and natural landmarks, 5. recovering traditional territories for indigenous communities and peoples, 6. recovering use of natural resources and furthering the development of self-determination, and 7. providing congressional representatives for each indigenous peoples.
14. Singh, K.S. (1992). *People of India: An Introduction*, Oxford University Press, USA. Though the number of the Adivasis was estimated to be 84.3 million people (635 communities) as a whole, not all of them were involved in disputes over the SSP. The estimate of project affected people varies significantly depending on who calculate it. According to the independent review by Morse & Berger, estimated number of people affected by the SSP is 199,500 of which 56% (117,575) is constituted by tribal people. In 2000, the Supreme Court of India admitted that over 41,000 families are affected, while the Narmada Bachao Andolan alleged that it was 320,000 people. However, neither of them shows the number of Adivasis who were affected by the SSP.
15. According to <http://www.pucl.org/Topics/Dalit-tribal/2003/adivasi.htm>. Tribal peoples are particularly numerous in the States of Orissa, Bihar, Jharkhand, and in extreme northeastern states such as Mizoram. Recognized tribes typically live in hilly regions somewhat remote from caste settlements and are dedicated to swidden agriculture.
16. Robins, St. (2001). NGOs, 'Bushmen' and Double Vision: the  $\$$  Khomani San Land Claim and the Cultural Politics of 'Community' and 'Development' in the Kalahari. *Journal of Southern African Studies*, (27) 4, 833-53.
17. This area was awarded by the South African Land Claims Court in a ruling in 2004.
18. School, J. (1993). *Culture and change among the Muyu*. Translated by G J van Exel. Kitlv Translations Series 23. Lieden: Kitlv Press. The Yonggom are a sub-group of the Muyu. Figures from Papua web

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resources maintain consistently that the Yonggom are around 2,000 people. The most recent numbers are available at <http://www.papuaweb.org/bib/hays/loc/YONGKOM.pdf>

19. See Sissons, J. (2005). *First peoples: Indigenous Cultures and their Futures*, Chapter 3, London: Reaktion Books.

### **Section 1 Indiginity and the land: The vital link**

20. Interviews conducted by Isabelle Anguelovski in Peru and Bolivia, May-June, 2001. See also Stevenson M. (2001). *Gender and modernity in Andean Bolivia*. Austin: University of Texas Press.
21. Anthropologists disagree over how long the Nisga'a have been in North America. However, everyone agrees that they were in the Nas river valley long before the Europeans. Rose, A. (2000). *Spirit dance at Meziadin: Chief Joseph Gosnell and the Nisga'a Treaty*. Madeira Park: Harbour Publishing. 46-47
22. Rose, A. (2000). *Spirit dance at Meziadin: Chief Joseph Gosnell and the Nisga'a Treaty*. Madeira Park: Harbour Publishing. 41.44.
23. Baviskar, Amita (1995). *In the Belly of the River: Tribal Conflicts over Development in the Narmada Valley, USA*, Oxford University Press. 115-117.
24. Trask, H-K. (1992). Hawaiians and human rights: An unfulfilled promise of international law. C. Ward and S. Venne (eds.). (2004). *Islands in Captivity: The Record of the International Tribunal on the Rights of Indigenous Hawaiians*. Cambridge: South End Press. 291-301.
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26. Trask, M. (1993). The politics of oppression: The United States in Hawaii. In C. Ward and S. Venne (Eds.). (2004). *Islands in Captivity: The Record of the International Tribunal on the Rights of Indigenous Hawaiians*. Cambridge: South End Press. 191-203.
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- Wallace, Katherine. 2006. Personal communications. Honolulu and Wailuku, Hawaii. January 10 – 26.
28. Likeke Scheuer, J. (2002). *Water and power in Hawaii: The Waiahole water case and the future of the islands*. Unpublished doctoral dissertation, University of California, Santa Cruz.
29. Orellana M. (2004). Indigenous peoples, energy, and environmental justice: The Panguel/Ralco hydroelectric project in Chile's Alto BíoBío. Working Paper. Available at [http://www.ciel.org/Publications/Ralco\\_Brief\\_22Jul04.pdf](http://www.ciel.org/Publications/Ralco_Brief_22Jul04.pdf)
30. hyh Sawyer, S. (2004). *Crude chronicles*. Durham: Duke University Press. 83.
31. Information obtained during an interview between Isabelle Anguelovski and Inés Shiguango in March 2006.
32. See Hastings D. and Wilson T. (1999). *Borders: Frontiers of identity, nation and State*. New York: Oxford International Publishers. 19.
- See Sirén A. (2004). *Changing Interactions between Human and Nature in Sarayaku*, Ecuadorian Amazon. Unpublished Doctoral Dissertation, Swedish University of Agricultural Sciences.
34. FLACSO. (2005). Sarayaku, El pueblo del cenit, identidad y construcción étnica. FLACSO/CDES: Quito.
35. Marlon Santi, the former President of Sarayaku summarizes well this cosmology: "When they extract oil, it's like tons of blood: And what happens to the earth? It's like a human being, when you start taking blood from a human, he starts to decline and there is no technology to help him recover." Cited by FLACSO. (2005). Sarayaku, El pueblo del cenit, identidad y construcción étnica. FLACSO/CDES: Quito. 79
36. Information obtained during an interview between Isabelle Anguelovski and Inés Shiguango in March 2006.

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37. The prospecting activities led to inter and intra ethnic conflicts; disturbance of fishes and game due to increased noise and consequent decrease in availability of food resources; destruction of trees, medicinal plants, and leaves used to build roofs; militarization of the territory and death threats towards community members; isolation of the territory due to roads closing; impossibility to carry out ceremonies due to seismic lines crossing parts of the sacred forest, impossibility to carry out the annual celebration “Jista”, and war between shamans from the area. FLACSO. (2005). *Sarayaku, El pueblo del cenit, identidad y construcción étnica*. FLACSO/CDES: Quito.
38. Knutson Woods T., Blaine K., & Francisco L. (2002). O'odham Himdag as a source of strength and wellness among the Tohono O'odham of Southern Arizona and Northern Sonora, Mexico : Symposium on Native American wellness. *Journal of Sociology and Social Welfare*, 29 (1), 35-53.

## **Section 2 Defining borders between indigenous peoples and dominant cultures**

39. Hastings D. and Wilson T. (1999). *Borders: Frontiers of identity, nation and State*. New York: Oxford International Publishers. Chapter 2.
40. Sawyer, S. (2004). *Crude chronicles*. Durham: Duke University Press. 106-107.
41. Cohen A. (1965). *Arab border-villages in Israel; A study of continuity and change in social organization*. Manchester: Manchester University Press.
42. Human Rights Watch. (2004). Undue process: Terrorism trials, military courts, and the Mapuche in Southern Chile. *Human Rights Watch*, (16) 5. Available at: <http://www.hrw.org/reports/2004/chile1004/chile1004.pdf>
43. Human Rights Watch. (2004). Undue process: Terrorism trials, military courts, and the Mapuche in Southern Chile. *Human Rights Watch*, (16) 5. Available at: <http://www.hrw.org/reports/2004/chile1004/chile1004.pdf>
44. For another perspective on Wu-feng, see Zhang Y-f. *The evaluation of Wu-feng: a Historical perspective (Wu-feng de Li-shi Di-wei)*, (in Chinese). 18, available at [http://www.nict.gov.tw/tc/learning/b\\_3.php](http://www.nict.gov.tw/tc/learning/b_3.php). Zhang strongly argues that Wu-feng cannot have been economically exploited Tsou people as it has never been documented in any historical material. However, it is questionable whether this is a convincing reason as all the historical documents were written by the Chinese or the Japanese whose stake may be at odds with Tsou people, and who might have their own political agenda when documenting the Wu-feng story.
45. According to the State of Maine, “the Maine Freedom of Access Act (“FOAA”) grants the people of this state a broad right of access to public records while protecting legitimate governmental interests and the privacy rights of individual citizens. The act also ensures the accountability of the government to the citizens of the state by requiring public access to the meetings of public bodies.” See <http://janus.state.me.us/legis/statutes/1/title1ch13sec0.htm>.
46. It is important to note that the Aroostook Band of Micmacs was not a party to the suit that led to the settlement. Yet they were affected by the result. Any claims they might bring on their own behalf faced the challenge that such claims were outlawed. As it has turned out, the Micmacs gained federal recognition in 1991, free of the compromising language that plagues the 1980 Settlement Act. The US Congress passed the Aroostook Band of Micmacs Settlement Act (PL 102-171), granting the Band \$900,000 compensation for lost lands and 5,000 acres and clearly defined the relationship between the Band and the state of Maine. It provided the status of a fully recognized sovereign group to the Micmacs in Maine. See Brimley S. (2005). Native American sovereignty in Maine. *The Maine Policy Review*, 13 (2), 12-26. (<http://www.umaine.edu/mcsc/MPR/Vol13No2/brimley/brimley.htm>). Therefore, ironically, it may be that the Micmacs, who had no seat at the table for the historic land claim, will provide a model for redefining tribal-state relations.

## **Section 3 Sustaining traditional ways of life**

47. Anguelovski 2002.
48. These conclusions are based on field work by Isabelle Anguelovski among indigenous communities in the Andes and the Amazon and summarized in a report to Oxfam America: Anguelovski, I. (2002). *Gender Relations in the Andes of Peru, Bolivia, and Ecuador*.

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49. Burton J. (1995). *Social monitoring at the Ok Tedi project. Summary report to mid-1993*. OFSMP Report No. 7. 3.; Jackson R. (2003). *Muddying the waters of the Fly: Underlying issues or stereotypes?* Resource Management in Asia-Pacific Working Paper No. 41, Canberra: Resource Management in Asia-Pacific Program Research School of Pacific and Asian Studies, The Australian National University. 2. Available at [http://rspas.anu.edu.au/papers/rmap/Wpapers/rmap\\_wp41.pdf](http://rspas.anu.edu.au/papers/rmap/Wpapers/rmap_wp41.pdf)
50. The defendant Alexkor, the state-run diamond company, appealed the case to the Constitutional Court, which dismissed the appeal in 2004.
51. The court considered the same legislation, the Precious Stones Act of 1927, but found it to be discriminatory in that it reflected the government's policy in the 1920s of refusing to recognize the Richtersveld Community's rights in land based on the racially discriminatory assumption that the people were not sufficiently civilized. *Richtersveld Cmty. v. Alexkor Ltd.* (2003). (6) BCLR 583 (hereinafter *Richtersveld II*), para. 110.
52. The court based this finding on evidence that the Community had leased mineral prospecting rights at various times between about 1850 and 1910, and that the Community believed that it owned the minerals and behaved accordingly. *Richtersveld II*, para. 87. The government could have taken the Community's lands for mineral development, but it would have been required to pay compensation.
53. *Richtersveld Community Land Claim Breakthrough*, Press Release from South Africa's Department of Public Enterprises, October 26, 2006. Available at <http://www.info.gov.za/speeches/2006/06102710151001.htm>.
54. De Jong, D., Gila River Indian Community –Pima-Maricopa Irrigation Project, Public Information Manager, *History of the Gila River Water Settlements Act 2004*. Chapter 8.
55. For example, the revenue of Tanayiku Park was 18,577,025 NTD (580,532 USD in 2001, at the rate of 1 USD = 32 NTD), 31,273,796 NTD (977,306 USD) in 2002, and 20,476,023 (639,875) in 2003. There may also be funding from the Government for various projects, which adds up to the gross income of the Saviki community. For example, governmental funding in 2001 was 4,943,652 NTD (154,490 USD), 1,049,000 NTD (32781 USD) in 2002, and 637,260 NTD (19,914 USD). See Bang-kuen L. (2005). *Tourism Cultural Economy and Constructing Place of Aboriginal region: A Case Study of Saviki Community Tsou (Yuan-zhu-min-zu Di-qu Guan-guang Wen-hua Jin-ji yuDi-fang Jian-gou zhi Yien-Jiou: Zou-zu Shan-Mei She-qu zhi Ge-an)*. Unpublished doctoral dissertation, National Taiwan University, Department of Geography, 153-54. Available at <http://www.geog.ntu.edu.tw/research/paper2005/D89228004/index.htm>
56. Sawyer, S. (2004). *Crude chronicles*. Durham: Duke University Press. 127.

#### Section 4 Using national and international strategies

57. Lutz E. (2005). Bilingual education on the air, *Cultural Survival Quarterly*, 29 (2).
58. Ali S. (2003). *Mining, the Environment, and Indigenous Development Conflicts*. Tucson: University of Arizona Press.
59. See Kirsch, S. (1996). Acting globally: Eco-politics in Papua New Guinea, *University of Michigan Journal of the International Institute*, 3 (3), 14-25. Available at <http://www.umich.edu/~iinet/journal/vol3no3/kirsch.html>
60. Kirsch, S. (1996). Acting globally: Eco-politics in Papua New Guinea, *University of Michigan Journal of the International Institute*, 3 (3). Available at <http://www.umich.edu/~iinet/journal/vol3no3/kirsch.html>
61. Bryan, J. (2001). *By Reason or by Force: Territory, State power and Mapuche land rights in southern Chile*. Unpublished Masters Thesis, University of California, Berkeley.
- According to Bryan, the demands included the recognition in the Constitution of the Mapuche and other indigenous groups as "peoples" (thus recognizing their claim to territorial and economic autonomy, in accordance with international law), the ratification of the ILO Convention 169, and legislation on the protection and recuperation of claimed lands.
62. See Oxfam America's website available at: [www.oxfamamerica.org/newsandpublications/news\\_updates/archive2002/art3812.html/?searchterm=COICA](http://www.oxfamamerica.org/newsandpublications/news_updates/archive2002/art3812.html/?searchterm=COICA)
63. See Amerindian People's Association," available at <http://www.sdn.org.gy/apa>.



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64. The Mapuche support a status of autonomy that would be recognized by the State, through maintaining and protecting traditional landholdings, which had been usurped since the independence in violent rural confrontations and later upheld by court rulings.

65. See data from the Minorities at Risk Project (2003) available at <http://www.cidcm.umd.edu/inscr/mar/assessment.asp?groupId=15501>

See also Sznajder, M. (2003). Ethnodevelopment and democratic consolidation in Chile: the Mapuche question. In E.D. Langer, E. Munoz (eds.). *Contemporary indigenous movements in Latin America*. Wilmington: Jaguar Press.

66. Bryan, J. (2001). *By Reason or by Force: Territory, State power and Mapuche land rights in southern Chile*. Unpublished Masters Thesis, University of California, Berkeley.

67. Calder v. Attorney General of British Columbia, (1973), S.C.R. 313.

68. The oil company Burlington Resources of Texas has a 50 percent working interest in the block. See Amazon Watch [http://www.amazonwatch.org/amazon/EC/burling/index.php?page\\_number=3](http://www.amazonwatch.org/amazon/EC/burling/index.php?page_number=3).

69. Inter-American Commission on Human Rights. (2004, October 13). *Report #64/04 Petition 167/03, Admissibility, The Kichwa Peoples of the Sarayaku Community and Its Members*. Available at <http://www.cidh.org/annualrep/2004eng/Ecuador.167.03eng.htm> In their petition against the State, “The petitioners allege that the State is responsible for a series of acts and omissions harming the Kichwa peoples of Sarayaku because it has allowed an oil company to carry out activities on the ancestral lands of the Sarayaku community without its consent, it has persecuted community leaders, and has denied judicial protection and legal due process to the Sarayaku community. In addition, the State has allowed third parties to systematically violate the rights of the Sarayaku community. In light of the foregoing, they claim that the State is responsible for violating the fundamental individual and collective rights of the Sarayaku community and its members, specifically the right to property (Article 21), judicial protection (Article 25), due process (Article 8), freedom of movement (Article 22), personal integrity (Article 5), personal liberty and security (Article 7), life (Article 4), freedom of association (Article 16), political participation (Article 23), freedom of expression (Article 13), juridical personality (Article 3), freedom of conscience and religion (Article 12), the rights of the child (Article 19), equality (Article 24), health and culture (Article 26, in accordance with Articles XI and XIII of the American Declaration of the Rights and Duties of Man) under the American Convention on Human Rights (hereinafter the “American Convention” or the “Convention”). They also allege that the State has failed to comply with its general obligations to respect and guarantee the aforementioned rights (Article 1(1)) and to adopt domestic legal provisions to make them effective (Article 2), both under the American Convention”. See

<http://www.cidh.oas.org/annualrep/2004eng/Ecuador.67.03eng.htm>

70. The measures must “guarantee the right to freedom of movement of the members of the Sarayaku community, and investigate the events giving rise to the adoption of provisional measures, so as to identify those responsible and impose corresponding sanctions”. See

<http://www.cidh.org/annualrep/2004eng/Ecuador.167.03eng.htm>

71. In its resolution of the 17th of June 2005, the Inter-American Court reiterates that the Ecuadorian State must “comply strictly and immediately with the orders from the Inter-American Court of Human Rights, in order to effectively protect the life, personal integrity and free movement of all members of the indigenous people of Sarayaku.” The Court also ordered the immediate removal of the explosives placed by the CGC company within Sarayaku territory to carry out seismic exploration. See

<http://www.sarayaku.com/oil/news050624.html#eng>

72. <http://www.sarayaku.com/oil/news060317.html#eng>

### **Section 5 State reactions to indigenous peoples’ land claims**

73. See Chapter 3 of Rosen-Zvi I. (2004). *The reemergence of space: the case of the Bedouin*. Haifa University, Israel.

74. Foundation for Research and Support of the Indigenous Peoples of Crimea. (2004). *Crimean Tatar: Report*. Undertaken in accordance with the article 25th of the Framework Convention for the Protection of National Minorities Of Council of Europe. Available at <http://www.unpo.org/article.php?id=1102>

75. Xaxa, V. (1999). Tribes as Indigenous People of India. *Economic and Political Weekly*, 34 (51).

Available at: <http://www.epw.org.in/> (subscription required).

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76. Baviskar, A. (1995). *In the belly of the river: Tribal conflicts over development in the Narmada Valley*. New York: Oxford University Press.
77. Patwardhan, A. (2000). *Dams and Tribal People in India*. Contributing paper to Thematic Review 1.2: Dams, Indigenous People and vulnerable ethnic minorities, prepared as an input to the World Commission on Dams, Cape Town, available at: <http://www.dams.org/docs/kbase/contrib/soc207.pdf> (last accessed February, 8, 2007).
78. Morse, B. and Thomas B. (1992). *Sardar Sarovar: Report of the Independent Review*. Ottawa: Resources Futures International.
79. Mining products such as timber, gold, and bauxite constitute 16% of Guyana's economy. In 2006, the reserves of foreign exchange and gold amounted to \$294.9 million. See <http://www.cia.gov/cia/publications/factbook/geos/gy.html>.
80. The Ecuadorian State considers that Sarayaku did not exhaust all national instruments before presenting their claims at the international level. As a consequence, the State of Ecuador did not attend a meeting in March, 2004 called by the Inter American Commission. See Inter-American Commission on Human Rights. (2004, October 13). *Report #64/04 Petition 167/03, Admissibility, The Kichwa Peoples of the Sarayaku Community and Its Members*. Available at <http://www.cidh.org/annualrep/2004eng/Ecuador.167.03eng.htm>
81. "The oil concession is a State decision governed by the constitutional principle of public domain over natural resources of the subsoil, and that the contract legally entered into with the CGC constitutes an act doctrinally known as an act of administrative concession". (...) Should an act of this nature cause or potentially cause harm to a private individual, such as, for example, environmental harm, Ecuadorian legislation provides for another type of legal action that is adequate and effective as required by the Inter-American Court". An act of administrative concession is an act through which the State authorizes private parties to carry out certain activities that, in principle, are under its purview. See Inter-American Commission on Human Rights. (2004, October 13). *Report #64/04 Petition 167/03, Admissibility, The Kichwa Peoples of the Sarayaku Community and Its Members*. <http://www.cidh.org/annualrep/2004eng/Ecuador.167.03eng.htm>
82. The Inter American Commission on Human Rights and the Inter American Court for Human Rights are bodies of the Organization of American States. See Amnesty International (2006), *Business and Human Rights – Ecuador, Oil Rights or Human Rights*. Also, as soon as he got elected in November 2002, President Gutierrez announced that the oil extraction in the Block 23 will be carried out indefinitely and the military sent, if necessary.
83. The expression "legal ambiguity" is used by Russell Barsh in the US case in which the "autonomous authority of Indian tribes is recognized by Congress and the courts, but there are no clear boundaries between the competences of Federal, State, and Indian institutions." Barsh, R. (1997, June). *Effective negotiation by indigenous peoples*. International Labor Organization, part I, 8.
84. See <http://www.sarayaku.com/oil/news061129.html#eng>
85. Barsh, R. (1997, June). *Effective negotiation by indigenous peoples*. Geneva: International Labor Organization. 8.
86. <http://www.nzhistory.net.nz/politics/treaty/the-treaty-in-brief>
87. <http://treatyofwaitangi.govt.nz/story/shortstory.php>
88. <http://treatyofwaitangi.govt.nz/story/treatydebated.php>
89. <http://treatyofwaitangi.govt.nz/casestudies/ngaitahu.php>
90. O'Sullivan, D., *The Politics of Indigeneity and Contemporary Challenges to Maori Self-Determination*, Refereed paper presented to the Australasian Political Studies Association Conference University of Adelaide 29 September - 1 October 2004, p.5-6. In June 2003, in *Ngati Apa v. Attorney General*, the Court of Appeal was asked the following question: "Does the Maori Land Court have jurisdiction to consider title to the foreshore and seabed?" The court's answered 'yes', but with the caution that the test for such consideration resulting in fee simple title was high and likely to be granted only rarely. Following this decision, a political exaggeration about the implications of the court's decision led Maori to adopt a defensive attitude. The government's acceptance of that exaggeration is indicative of a prevailing political climate of distrusts to Maori aspiration to express its own identity.
91. O'Sullivan, D., *The Politics of Indigeneity and Contemporary Challenges to Maori Self-Determination*, Refereed paper presented to the Australasian Political Studies Association Conference University of Adelaide 29 September - 1 October 2004, p.9. According to O'Sullivan, The *Nationhood* Speech delivered



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- in January 2004 put emphasis on the notion of ‘one rule’ or ‘one law’ for all citizens, in opposition to the alleged government determination to recognize a Maori ‘birthright to the upper hand.’ As O’Sullivan explains, “the speech struck resonance with an electorate concerned by perceptions of an overemphasis on the Treaty of Waitangi as a moral and legal guide for relationships between the government and Maori.”
92. <http://www.scoop.co.nz/stories/PA0609/S00314.htm>
93. Trask, H-K. (1992). *Hawaiians and Human Rights: An Unfulfilled Promise of International Law*. C. Ward and S. Venne (Eds.). (2004). *Islands in Captivity: The Record of the International Tribunal on the Rights of Indigenous Hawaiians*. Cambridge: South End Press. 291-301.
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95. Likeke Scheuer, J. (2002). *Water and power in Hawaii: The Waiahole water case and the future of the islands*. Unpublished doctoral dissertation, University of California, Santa Cruz.
96. Office of Hawaiian Affairs (OHA). (2006). Last accessed February, 8, 2007 at <http://www.oha.org>.
97. Pang G. (2006, May 18). Lingle lobbies for Akaka Bill. *Honolulu Advertiser*.
98. U.S. Commission on Civil Rights, Hawaii Advisory Committee (USCCR). (2001). *Reconciliation at a crossroads: The implications of the apology resolution and Rice v. Cayetano for Federal and State programs benefiting Native Hawaiians. A summary report of the August 1998 and September 2000 Community Forums in Honolulu, Hawaii*. See <http://www.usccr.gov/pubs/sac/hi0601/pref.htm>

#### **Section 6 Doing the ground work: Preconditions for successful claims**

99. See Walken, A. (Fall 2000) The Nisga’a Agreement: Negotiating space in the master’s house. *Canadian Dimensions*, 1, 23-25.
100. Information obtained by Isabelle Anguelovski through an interview with the local staff of Oxfam America in Lima, Peru, May 2002.
101. Kothari, M. (2000). Letter submitted to the Indian Prime Minister by Miloon Kothari, United Nations Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, available at: <http://www.narmada.org/letters/un.letter.to.pm.html> (last accessed February, 10 2007).
102. This ruling implied that the problems associated with the rehabilitation and resettlement of dam-affected people were handled properly.
103. Morton, B. (2004). In Defense of Rakgo Mapu: Building a case for Mapuche self-determination, *CELÁNEN: A Journal of Indigenous Governance*, 1 (1).
104. The Tsou Headman, Avai Peyonsi, confiscated a barrel of honey that a Hand-Chinese trespasser had stolen.
105. See <http://www.sarayaku.com/oil/news061129.html#esp>

#### **Section 7 First Peoples’ land claims: An uncertain future**

106. *Arizona Water Settlements Act: Joint Hearing before the Subcommittee on Water and Power of the Committee on Energy And Natural Resources and the Committee on Indian Affairs*. United States Senate, 108th Congress, 1st Session on S. 437, September 30, 2003. Testimony by Richard P. Narcia, p. 28
107. See, e.g., a letter by the President of the Union of B.C. Indian Chiefs, Terry S. (1998, August). *Why the Nisga’a Agreement must not be the blueprint*, *Khatou News*.
108. See <http://www.sarayacu.com/oil/news070904.html#eng>
109. See <http://www.sarayacu.com/oil/news071213.html#eng>

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## The Quichwa people of Sarayaku (Ecuador)

110. Ponce, J. (2006). Can a Small Indigenous Community Be a Threat to a Nation. *Tierra América*. Available at <http://www.tierramerica.net/2004/0202/ianalisis.shtml>
111. See the 2005 CIA World Factbook available at <http://www.cia.gov/cia/publications/factbook/geos/ec.html>
112. According to the World Bank, in 2004, oil exports amounted to 3.9 billion dollars for a total of 7.6 billion dollars of exportations. Total Outstanding and Disbursed Debt was estimated at 16.8 billion dollars. See World Bank, (2005) *Ecuador Data At-A-Glance*, available at [http://devdata.worldbank.org/AAG/ecu\\_aag.pdf](http://devdata.worldbank.org/AAG/ecu_aag.pdf)
- Despite massive social opposition, the recent construction of the OCP Pipeline – from the Amazon region through the Andes and finishing on the Pacific Coast – is expected to boost oil production and exportation, to the United States in particular. According to the New York Times, the 300-mile pipeline is supposed to double oil production, up to 850,000 barrels per day. See Forero J. (2003, December 10). Seeking Balance: Growth vs. Culture in the Amazon. *New York Times*.
113. According to the Article 84.2 of the Ecuadorian Constitution of 1998, the State will “preserve the unprescriptible property of communal lands, which will be unalienable, unattachable and undivisible, except for the State’s faculty to declare their public utility.”
114. The strong gender labor division is reflected through masculine and feminine spaces: the agricultural land (*chakra*) belongs to women whereas the forest (home of the forest spirit *Amazanga*) belongs to men. The main exchange between men and women are the *asua* (yucca beverage), which women prepare from the yucca root, and the meat, hunted by men in the forest. See Sirén A., (2004), *Changing Interactions between Human and Nature in Sarayaku*, Ecuadorian Amazon, Doctoral thesis, Swedish University of Agricultural Sciences.
115. Information gathered during an interview between Isabelle Anguelovski and Inés Shiguango in March 2006.
116. Hastings D. and Wilson T. (1999). *Borders: Frontiers of identity, nation and state*. New York: Oxford International Publishers. 19
117. Three main indigenous organizations were created: ECUARUNARI for the Andes, CONFENAIE for the Amazon, and COICE for the Coast. In 1977, Sarayaku helped create OPIP, the Organization of Indigenous People of Pastaza. See Bonnassies V. (2004, January). *Le Mouvement Indigène en Equateur*. Montreal: Cahiers de Recherche CEIM.
118. The CONAIE represents 11 autochthonous nationalities in Ecuador and represents 3,336,000 people. Bonnassies V. (2004, January). *Le Mouvement Indigène en Equateur*. Montreal: Cahiers de Recherche CEIM.
119. Between 1997 and 1999, he benefited from free airplane rides and lodging in the Department Capital of Puyo by CGC. Sirén A., (2004), *Changing Interactions between Human and Nature in Sarayaku*, Ecuadorian Amazon, Doctoral thesis, Swedish University of Agricultural Sciences.
120. The CGC once sent an airplane with a load of school supplies but a group of young people from the community set it on fire. Sirén A., (2004), *Changing Interactions between Human and Nature in Sarayaku*, Ecuadorian Amazon, Doctoral thesis, Swedish University of Agricultural Sciences.
121. FLACSO. (2005). Sarayaku, El pueblo del cenit, identidad y construcción étnica. FLACSO/CDES: Quito.
122. Inter-American Commission on Human Rights. (2004, October 13). *Report #64/04 Petition 167/03, Admissibility, The Kichwa Peoples of the Sarayaku Community and Its Members*. Available at <http://www.cidh.org/annualrep/2004eng/Ecuador.167.03eng.htm> and <http://www.cidh.oas.org/annualrep/2004eng/Ecuador.67.03eng.htm>
123. The measures must “guarantee the right to freedom of movement of the members of the Sarayaku community, and to investigate the events giving rise to the adoption of provisional measures, so as to identify those responsible and impose corresponding sanctions.” See <http://www.cidh.org/annualrep/2004eng/Ecuador.167.03eng.htm>
124. An intangible zone is an area designed by the State to protect local indigenous peoples and the natural ecosystems and ecological processes on their territory with minimum human intervention. Outsiders cannot enter this restricted area. Several intangible zones have been created in the past few years in the Amazon

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(i.e. Yasuni National Park in Ecuador and Manu National Park in Peru). For a whole list of the resolutions, see <http://www.sarayacu.com/oil/congreso2003terr.html#eng>

125. The Ecuadorian State considers that Sarayaku did not exhaust all national instruments before presenting their claims at the international level. As a consequence, the State of Ecuador did not attend a meeting in March, 2004 called by the Inter American Commission. See Inter-American Commission on Human Rights. (2004, October 13). *Report #64/04 Petition 167/03, Admissibility, The Kichwa Peoples of the Sarayaku Community and Its Members*. Available at <http://www.cidh.org/annualrep/2004eng/Ecuador.167.03eng.htm>

126. <http://www.sarayaku.com/oil/news060317.html#eng>.

### **The Mapuche (Chile)**

127. The difference of 400,000 people between the two censuses is currently unexplained.

128. Aylwin, J. (1998). *Indigenous peoples rights in Chile: Progress and contradictions in the context of globalization*. Presented at the Canadian Association for Latin American and Caribbean Studies. XXVIII Congress. Simon Fraser University, Vancouver, Canada. March 19-21.

129. Aylwin, J. (1998). *Indigenous peoples rights in Chile: Progress and contradictions in the context of globalization*. Presented at the Canadian Association for Latin American and Caribbean Studies. XXVIII Congress. Simon Fraser University, Vancouver, Canada. March 19-21.

130. Aylwin, J. (1998). *Indigenous peoples rights in Chile: Progress and contradictions in the context of globalization*. Presented at the Canadian Association for Latin American and Caribbean Studies. XXVIII Congress. Simon Fraser University, Vancouver, Canada. March 19-21.

131. Of the 77,000 Mapuche who were relocated between the late 1800s and early 1900s, tens of thousands are estimated to have died of starvation from insufficient land and 40,000 more were left landless (Bryan 2001, Szadjer 2003).

132. Sznajder, M. (2003) Ethnodevelopment and democratic consolidation in Chile: the Mapuche question. In Langer E.D. and Munoz, E. (Eds. ), *Contemporary Indigenous Movements in Latin America*. Wilmington, DE: Jaguar Press.

133. Under Salvador Allende (1970- 1973), the socialist leader of the Popular Unity Party, 70,000 hectares of land were returned to the Mapuche and an executive body, the Institute for Indigenous Development, was formed. However, as Sznajder (2003) notes, in this context the Mapuche struggle “lost its specific character” and instead became “an integral part of the plight of...the lower classes in general.”

134. Bryan 2001.

135. Bryan 2001.

136. Bryan 2001.

### **The Pima: A Gila River Indian community (Arizona, United States)**

137. McCool, D. (1994). *Command of the waters: Iron triangles, Federal water development, and Indian water*. Tucson: The University of Arizona Press. 16.

138. The Official Website of the Gila River Indian Community – Tribal History.

<http://www.gric.nsn.us/newdirection/>

139. See Rea A. (1997). *At the desert's green edge, an ethnobotany of the Gila River Pima*. Tucson: University of Arizona Press.

140. Scherzer, M. *Negotiating Indian Water Settlements: A Less “Principled Approach”* pg. 2

141. McCool, D. (1994). *Command of the waters: Iron triangles, Federal water development, and Indian water*. Tucson: The University of Arizona Press. 14-15.

142. McCool, D. (1994). *Command of the waters: Iron triangles, Federal water development, and Indian water*. Tucson: The University of Arizona Press. 15-17.

143. Rodney Lewis, litigator for GRIC water rights for more than 33 years. Interview, May 2006.

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144. Arizona Water Settlement Act, 108 PL 451, 118 stat 3478, 2004 accessed last on February, 8 2007 [http://www.azwater.gov/dwr/Content/Hot\\_Topics/AZ\\_Water\\_Settlements/\\_PubL.pdf](http://www.azwater.gov/dwr/Content/Hot_Topics/AZ_Water_Settlements/_PubL.pdf)
145. Arizona Water Settlements Act: Joint hearing before the Subcommittee on Water and Power of the Committee on Energy and Natural Resources and the Committee on Indian Affairs. United States Senate, 108th Congress, 1st Session on S. 437, September 30, 2003. Testimony by Richard P. Narcia, p. 27
146. Rodney Lewis, litigator for GRIC water rights for more than 33 years. Interview, May 2006.
147. Arizona Water Settlements Act: Joint hearing before the Subcommittee on Water and Power of the Committee on Energy and Natural Resources and the Committee on Indian Affairs. United States Senate, 108th Congress, 1st Session on S. 437, September 30, 2003. Testimony by Richard P. Narcia, p. 28.
148. Rodney Lewis, litigator for GRIC water rights for more than 33 years. Interview, May 2006.
149. Rodney Lewis, litigator for GRIC water rights for more than 33 years. Interview, May 2006.
150. DeJong, D. (2005). Gila River Indian Community - Pima - Maricopa Irrigation Project, Public Information Manager. In *History of the Gila River Water Settlements Act 2004*. Chapter 8. Available at <http://www.gilariver.com/settlement.htm>

### **The Passamaquoddy and Penobscot (Maine, United States)**

151. 2000 US Census. There is naturally some discrepancy between the number people who self-identify as Native American and the number of people enrolled in tribes.
152. Acreage information from *Protection of Tribal Cultural Practices through the Development of Native American Exposure Pathways* by Fred Corey, Environmental Director, Aroostook Band of Micmacs. He sets the number of enrolled tribal members at 6000+. See <http://www.epa.gov/sciforum/2004/presentations/day2/reg/session2/corey-fred.pdf>
153. An excellent history of the claim and the implications of sovereignty can be found in Brimley S. (2005). Native American sovereignty in Maine. *The Maine Policy Review*, 13 (2), 12-26. (<http://www.umaine.edu/mcsc/MPR/Vol13No2/brimley/brimley.htm>)
154. The author has drawn from multiple sources, including recent interviews with principal actors and past research as a documentary filmmaker and witness to the events of the 1970's. The resulting film, *Abnaki: the Native People of Maine*, released in 1981 is not currently in distribution. The film and all its outtakes, audio recordings and photographs are archived with Passamaquoddy historian Donald Soctomah. Not specifically cited here, but of invaluable help, were Mr. Soctomah, who is also a member of MITSC and John Banks, director of Penobscot Dept. of Natural Resources.
155. It is important to note that the Aroostook Band of Micmacs was not a party to the suit that led to the settlement. Yet they were affected by the result. Any claims they might bring on their own behalf faced the challenge that such claims were outlawed. As it has turned out, the Micmacs gained federal recognition in 1991, free of the compromising language that plagues the 1980 Settlement Act. The US Congress passed the Aroostook Band of Micmacs Settlement Act (PL 102-171), granting the Band \$900,000 compensation for lost lands and 5,000 acres and clearly defined the relationship between the Band and the state of Maine. It provided the status of a fully recognized sovereign group to the Micmacs in Maine. See Brimley S. (2005). Native American sovereignty in Maine. *The Maine Policy Review*, 13 (2), 12-26. Furthermore, ironically, it may be that the Micmacs, who had no seat at the table for the historic land claim, will provide a model for redefining tribal-state relations.
156. Informal Interview by J. Eric Kent with former Penobscot Chief Barry Dana, April 2006.
157. Telephone interview by J. Eric Kent with Kaighn Smith, Jr., Attorney for the tribes, May 2006.
158. Two newspapers invoked FOAA to gain access to tribal council meeting and documents. See Thibeault, P. (2006, Summer). Maine Court Upholds Pleasant Point Reservation Denial of Access by Maine Newspapers to Tribal Meetings and Documents Concerning LNG Lease. *Wabanaki Legal News*. Thibeault notes the 4-part test that the court devised to determine which "hat" a tribe was wearing in any given circumstance.
159. Telephone interview by J. Eric Kent with Kaighn Smith, Jr., Attorney for the tribes, May 2006.
160. See Brimley article cited above, especially in regard to Executive Orders in Oregon and New Mexico regarding "government-to-government" relations.
161. Bringing economic pressure on that scale is hard to envision today. The Tribes are not an economic force, while the paper companies most certainly are. Achieving such economic clout was part of the strategy of Tom Tureen, the attorney who spearheaded the Tribes's efforts in the 1970's and who continued



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to work for the Tribes until fairly recently. His aim was to see the Tribes grow into an economic powerhouse, chiefly through the creation of a casino in southern Maine. That effort was decisively stopped by statewide referendum in 2003. Telephone interview by J. Eric Kent with Mark Chavaree, Penobscot Tribal Counsel, June 2006.

### **The Native Hawaiians (United States)**

162. Halualani, R.T. (2002). *In the name of Hawaiians: Native identities and cultural politics*. Minneapolis: University of Minnesota Press.
163. Churchill, W. and Venne S.H. (eds.). (2004). *Islands in captivity: The record of the International Tribunal on the Rights of Indigenous Hawaiians*. Cambridge: South End Press.
164. The Hawaii Constitution defines Hawaiians or Native Hawaiian as any “descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778,” the date when Captain James Cook made the first Western contact with Hawaii (Article XII, Section 7). In the 1920 Hawaiian Homes Commission Act, the US government more restrictively defines native Hawaiians as “descendants with at least one-half blood quantum of individuals inhabiting the Hawaiian Islands prior to 1778.” See U.S. Commission on Civil Rights, Hawaii Advisory Committee (USCCR). (2001). *Reconciliation at a crossroads: The implications of the apology resolution and Rice v. Cayetano for Federal and State programs benefiting Native Hawaiians. A summary report of the August 1998 and September 2000 Community Forums in Honolulu, Hawaii*. See <http://www.usccr.gov/pubs/sac/hi0601/pref.htm>
165. US Commission on Civil Rights, Hawaii Advisory Committee (USCCR). (2001). *Reconciliation at a crossroads: The implications of the apology resolution and Rice v. Cayetano for Federal and State programs benefiting Native Hawaiians. A summary report of the August 1998 and September 2000 Community Forums in Honolulu, Hawaii*. See <http://www.usccr.gov/pubs/sac/hi0601/pref.htm>
166. Craig, R. (1998) *Historical dictionary of Honolulu and Hawaii*. Lanham: The Scarecrow Press.
167. Ka Pakaukau (1993), “Reinscription: The Right of Hawai’i to be Restored to the United Nations List of Non-Self-Governing Territories,” in C. Ward and S. Venne (eds.). (2004). *Islands in Captivity: The Record of the International Tribunal on the Rights of Indigenous Hawaiians*. Cambridge: South End Press. 303-321.
168. Starting in 2000, the U.S. Census counts Native Hawaiians in two ways: as Native Hawaiian and other Pacific Islander alone, or as Native Hawaiian and other Pacific Islander in combination with at least one other race. See U.S. Census Bureau. (2001). *The Native Hawaiian and Other Pacific Islander Population: 2000*. U.S. Census Brief. C2KBR/01-14. Prepared by Elizabeth M. Grieco.
169. Field-Grace S. (1993). Anahola: The taro-roots practice of self-determination. In C. Ward and S. Venne (Eds.). (2004). *Islands in Captivity: The Record of the International Tribunal on the Rights of Indigenous Hawaiians*. Cambridge: South End Press. 205-208.
170. U.S. Commission on Civil Rights, Hawaii Advisory Committee (USCCR). (2001). *Reconciliation at a crossroads: The implications of the apology resolution and Rice v. Cayetano for Federal and State programs benefiting Native Hawaiians. A summary report of the August 1998 and September 2000 Community Forums in Honolulu, Hawaii*. See <http://www.usccr.gov/pubs/sac/hi0601/pref.htm>
171. Likeke Scheuer, J. (2002). *Water and power in Hawaii: The Waiahole water case and the future of the islands*. Unpublished doctoral dissertation, University of California, Santa Cruz.
172. *Mahele* means “divide” in the Hawaiian language.
173. Likeke Scheuer, J. (2002). *Water and power in Hawaii: The Waiahole water case and the future of the islands*. Unpublished doctoral dissertation, University of California, Santa Cruz.
174. US Commission on Civil Rights, Hawaii Advisory Committee (USCCR). (2001). *Reconciliation at a crossroads: The implications of the apology resolution and Rice v. Cayetano for Federal and State programs benefiting Native Hawaiians. A summary report of the August 1998 and September 2000 Community Forums in Honolulu, Hawaii*. See <http://www.usccr.gov/pubs/sac/hi0601/pref.htm>
175. Likeke Scheuer, J. (2002). *Water and power in Hawaii: The Waiahole water case and the future of the islands*. Unpublished doctoral dissertation, University of California, Santa Cruz.
176. Wallace K. (2006). Personal communications, Honolulu and Wailuku, Hawaii, January 10 – 26.
177. US Commission on Civil Rights, Hawaii Advisory Committee (USCCR). (2001). *Reconciliation at a crossroads: The implications of the apology resolution and Rice v. Cayetano for Federal and State*

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programs benefiting Native Hawaiians. *A summary report of the August 1998 and September 2000 Community Forums in Honolulu, Hawaii*. See <http://www.usccr.gov/pubs/sac/hi0601/pref.htm>

178 Current estimates suggest that only 5,000 “pure” Hawaiians live in the state, and they could disappear by 2044. See Churchill, W. and Venne S.H. (eds.). (2004). *Islands in captivity: The record of the International Tribunal on the Rights of Indigenous Hawaiians*. Cambridge: South End Press. 703.

179. Novak V. (1993). Hawaii’s dirty secret: The continuing denial of Native Hawaiian land rights. In C. Ward and S. Venne (Eds.). (2004). *Islands in Captivity: The Record of the International Tribunal on the Rights of Indigenous Hawaiians*. Cambridge: South End Press. 191-203.

180. Pakaukau K. (1993). Reinscription: The right of Hawai’i to be restored to the United Nations list of non-self-governing territories. In C. Ward and S. Venne (Eds.). (2004). *Islands in Captivity: The Record of the International Tribunal on the Rights of Indigenous Hawaiians*. Cambridge: South End Press. 303-321..

181. U.S. Senate. (2005, March 5). *Native Hawaiian Reorganization Act, hearing before the Committee on Indian Affairs*.

182. Trask, M. (1993). The politics of oppression: The United States in Hawaii. In C. Ward and S. Venne (Eds.). (2004). *Islands in Captivity: The Record of the International Tribunal on the Rights of Indigenous Hawaiians*. Cambridge: South End Press. 277-290.

183. Novak V. (1993). Hawaii’s dirty secret: The continuing denial of Native Hawaiian land rights. In C. Ward and S. Venne (Eds.). (2004). *Islands in Captivity: The Record of the International Tribunal on the Rights of Indigenous Hawaiians*. Cambridge: South End Press. 191-203.

184. U.S. Commission on Civil Rights, Hawaii Advisory Committee (USCCR). (2001). *Reconciliation at a crossroads: The implications of the apology resolution and Rice v. Cayetano for Federal and State programs benefiting Native Hawaiians. A summary report of the August 1998 and September 2000 Community Forums in Honolulu, Hawaii*. See <http://www.usccr.gov/pubs/sac/hi0601/pref.htm>

185. US Senate. (2005, March 5). *Native Hawaiian Reorganization Act, hearing before the Committee on Indian Affairs*.

186. US Commission on Civil Rights, Hawaii Advisory Committee (USCCR). (1991). *A broken trust: The Hawaiian Homelands Program: Seventy years of failure of the Federal and State governments to protect the civil rights of Native Hawaiians*.

187. Office of Hawaiian Affairs (OHA). (2006). Last accessed February, 8, 2007 at <http://www.oha.org>.

188. Likeke Scheuer, J. (2002). *Water and power in Hawaii: The Waiahole water case and the future of the islands*. Unpublished doctoral dissertation, University of California, Santa Cruz.

189. U.S. Commission on Civil Rights, Hawaii Advisory Committee (USCCR). (2001). *Reconciliation at a crossroads: The implications of the apology resolution and Rice v. Cayetano for Federal and State programs benefiting Native Hawaiians. A summary report of the August 1998 and September 2000 Community Forums in Honolulu, Hawaii*. See <http://www.usccr.gov/pubs/sac/hi0601/pref.htm>

190. Likeke Scheuer, J. (2002). *Water and power in Hawaii: The Waiahole water case and the future of the islands*. Unpublished doctoral dissertation, University of California, Santa Cruz..

191. Senate’s vote on Akaka bill draws reaction. (2006, June 8). *Honolulu Advertiser*.

192. Pang G. (2006, May 18). Lingle lobbies for Akaka Bill. *Honolulu Advertiser*.

193. U.S. Commission on Civil Rights, Hawaii Advisory Committee (USCCR). (2001). *Reconciliation at a crossroads: The implications of the apology resolution and Rice v. Cayetano for Federal and State programs benefiting Native Hawaiians. A summary report of the August 1998 and September 2000 Community Forums in Honolulu, Hawaii*. See <http://www.usccr.gov/pubs/sac/hi0601/pref.htm>

194. Craig R. (1998). *Historical Dictionary of Honolulu and Hawai’i*. Lanham: The Scarecrow Press.

195 Sovereignty: Most of us seem willing. (1996, February 23). *Honolulu Advertiser*.

196. Trask, H-K. (1992). Hawaiians and Human Rights: An Unfulfilled Promise of International Law. C. Ward and S. Venne (Eds.). (2004). *Islands in Captivity: The Record of the International Tribunal on the Rights of Indigenous Hawaiians*. Cambridge: South End Press. 291-301.

197. Griffin J. (2002, June 2). Sovereignty: Out of sight, not out of mind. *Honolulu Advertiser*.

198. US Commission on Civil Rights, Hawaii Advisory Committee (USCCR). (2001). *Reconciliation at a crossroads: The implications of the apology resolution and Rice v. Cayetano for Federal and State programs benefiting Native Hawaiians. A summary report of the August 1998 and September 2000 Community Forums in Honolulu, Hawaii*. See <http://www.usccr.gov/pubs/sac/hi0601/pref.htm>

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## The Nisga'a (Canada)

199. Rose, A. (ed.). (1993). *Nisga'a: People of the Nass River*. New Aiyansh: Nisga'a Tribal Council.
200. Speech by Chief Joseph Gosnell to the British Columbia Legislature, 2 December 1998, quoted Rose, A. (Ed.). (2000). *Spirit dance at Meziadin: Chief Joseph Gosnell and the Nisga'a Treaty*. Madeira Park: Harbour Publishing. 19.
201. Rose, A. (Ed.). (2000). *Spirit dance at Meziadin: Chief Joseph Gosnell and the Nisga'a Treaty*. Madeira Park: Harbour Publishing. 46-47
202. Nisga'a is part of the Tsimshianic language family. Rose, A. (ed.). (1993). *Nisga'a: People of the Nass River*. New Aiyansh: Nisga'a Tribal Council.
203. For instance, the Nisga'a believe that Txeemsim, a pivotal figure in their cosmology, flattened the valley between four mountains to enable them build long houses, and that he placed a mountain in the middle of a fishing channel to protect their fishing grounds from neighbouring tribes. *Id* at 15.
204. *Id* 8 at 71.
205. *Id*.
206. Rose, A. (ed.). (1993). *Nisga'a: People of the Nass River*. New Aiyansh: Nisga'a Tribal Council. 244.
207. *Id*. at 18, 71.
208. They were helped by Christian missionaries in doing so. One of the founding Nisga'a members of the Land Committee was Arthur Calder, whose son Frank Calder later played a vital role in the Nisga'a struggle. Raunet D. (1996). *Without surrender, without consent: A history of the Nisga'a land claims*. Vancouver: Douglas & McIntyre. 131-132; Rose, A. (Ed.). (2000). *Spirit dance at Meziadin: Chief Joseph Gosnell and the Nisga'a Treaty*. Madeira Park: Harbour Publishing. 64,82.
209. At that time, the British Privy Council was Canada's highest appeals court. It denied the Nisga'a claim because it was not an appeal from a Canadian court judgment. Coates K. (Ed.). (1992). *Aboriginal land claims in Canada: A regional perspective*. Toronto: Copp Clark Pitman. 14.
210. Rose, A. (Ed.). (2000). *Spirit dance at Meziadin: Chief Joseph Gosnell and the Nisga'a Treaty*. Madeira Park: Harbour Publishing. 244.
211. *Id*. The law banning Indian land claims had been repealed four years earlier.
212. *Calder v. Attorney General of British Columbia*, [1973] S.C.R. 313.
213. *Id*.
214. Sanders, D. 'We Intend to Live Here Forever:' A Primer on the Nisga'a Treaty. *University of British Columbia Law Review*, 35, 108.
215. Rose, A. (Ed.). (2000). *Spirit dance at Meziadin: Chief Joseph Gosnell and the Nisga'a Treaty*. Madeira Park: Harbour Publishing. 245
216. Their success at placing Aboriginal issues on the agenda is exemplified by the fact that they were able to seize the window of opportunity presented by negotiations over the repatriation of the Constitution and get provisions protecting and affirming Aboriginal rights included in the new constitution. See Raunet D. (1996). *Without surrender, without consent: A history of the Nisga'a land claims*. Vancouver: Douglas & McIntyre. 215.
217. See Raunet D. (1996). *Without surrender, without consent: A history of the Nisga'a land claims*. Vancouver: Douglas & McIntyre. 215.
218. Berger T. (2000, Sept.-Oct.). The importance of the Nisga'a Treaty to Canadians, *Canadian Speeches*, 4, 13; Molloy, T. (2000). *The world is our witness: the historic journey of the Nisga'a into Canada*. Calgary: Fifth House. 155.
219. Molloy, T. (2000). *The world is our witness: the historic journey of the Nisga'a into Canada*. Calgary: Fifth House. 157-163, 203-209.
220. Molloy, T. (2000). *The world is our witness: the historic journey of the Nisga'a into Canada*. Calgary: Fifth House. 209.
221. *Nisga'a Final Agreement*. This represents about 8% of their traditional territory. Berger T. (2000, Sept.-Oct.). The importance of the Nisga'a Treaty to Canadians, *Canadian Speeches*, 4, 13.
222. The *Indian Act* is a federal law that tightly regulates the affairs of all First Nations. It is a major source of hostility between Aboriginals and the government. Rose, A. (Ed.). (2000). *Spirit dance at Meziadin: Chief Joseph Gosnell and the Nisga'a Treaty*. Madeira Park: Harbour Publishing. 70.
223. The legislative authority of the Nisga'a Lisims Government includes, but is not limited to, education, culture, language, cultural property, land use, building standards, local business, gambling and gaming,

- marriage and divorce, children and family services, and control and sale of intoxicants. *Nisga'a Final Agreement*.
224. *Nisga'a Final Agreement*.
225. Also, the Nisga'a retain the full rights of Canadian citizenship. *Nisga'a Final Agreement*.
226. *Nisga'a Final Agreement*.
227. Speech by Chief Joseph Gosnell to the British Columbia Legislature, 2 December 1998, quoted in Rose, A. (Ed.). (2000). *Spirit dance at Meziadin: Chief Joseph Gosnell and the Nisga'a Treaty*. Madeira Park: Harbour Publishing. 19.
228. A 72-year-old elder of the Kincolith band of Nisga'a criticized the treaty on the ground that, "It was done by a bunch of young guys on the negotiation committee who don't even know our resources or our culture." DePalma A. (1998, August 5). Canada pact gives a tribe self-rule for the first time. *The New York Times*.
229. See, e.g., Interior Alliance (1998, August 3). *Interior Alliance denounces Nisga'a 'template' as a violation of human rights*. Available at <http://sisis.nativeweb.org/clark/aug0398bnis.html>
230. See, e.g., letter by the President of the Union of B.C. Indian Chiefs, Terry S. (1998, August). *Why the Nisga'a Agreement must not be the blueprint*, *Khatou News*. available at: <http://sisis.nativeweb.org/clark/aug98nis.html>
231. See, e.g., British Columbia Treaty Commission (2003, Fall). *The Business case for treaties*. Available at [http://www.bctreaty.net/files\\_3/pdf\\_documents/Business%Case20.pdf](http://www.bctreaty.net/files_3/pdf_documents/Business%Case20.pdf).
232. See e.g. Molloy, T. (2000). *The world is our witness: the historic journey of the Nisga'a into Canada*. Calgary: Fifth House. 121; Berger T. (2000, Sept.-Oct.). The importance of the Nisga'a Treaty to Canadians, *Canadian Speeches*, 4, 13. The importance of the Nisga'a Treaty to Canadians, *Canadian Speeches*, 4, 13-17. Molloy was the chief federal treaty negotiator and Berger was the lawyer who represented the Nisga'a in the *Calder* litigation.
233. DePalma A. (1998, August 5). Canada pact gives a tribe self-rule for the first time. *The New York Times*.
234. DePalma A. (1998, August 5). Canada pact gives a tribe self-rule for the first time. *The New York Times*. Non-Indigenous commercial fishermen have had very strained relations with peoples in Canada for many years because Indigenous peoples get preferences in the fishery.
235. Gibson G. (1999). Comments on the Draft Nisga'a Treaty. *Public Policy Sources*, 18, 4.
236. Gibson G. (1999). Comments on the Draft Nisga'a Treaty. *Public Policy Sources*, 7, 13
237. Gibson G. (1999). Comments on the Draft Nisga'a Treaty. *Public Policy Sources*, 3,4. Frum D. (1998, August 11). Bureaucrats sign away liberty: Nisga'a Treaty sets up principle of right to vote based on race. *Calgary Sun*, p. 15.
238. See Molloy, T. (2000). *The world is our witness: the historic journey of the Nisga'a into Canada*. Calgary: Fifth House. 3-10.

### **The Tsou (Taiwan)**

239. The officially recognized groups are: Amis (or Pangcah), Atayal, Bunun, Paiwan, Tsou, Siasiyat, Puyuma, Ruikai, Yami (or Tao), Thao, Turuku and Kavalan. Their size range from 170,000 (Amis) to less than 300 (Thao). They consist of 2% of the total Taiwan population. (See <http://www.stat.gov.tw/ct.asp?xItem=11356&ctNode=2386>.)
240. *Xiang* is the administrative unit that is one level lower than the county. Among the 319 *xiangs* in Taiwan, 30 of them are *shan-di-xiang*. Literally *shan-di-xiang* means a *xiang* located in the mountain area, but aside from the geographical meaning, it also means that the *xiang* mayor (or *xiang-zhang*), though elected both by indigenous and non-indigenous voters, has to be an indigenous person. Alishan is one of these *shan-di-xiangs*.
241. The south groups of the Tsou – the Kakanavu and the Sa'arua – live within the boundary of Kaohsiung County, whose languages are different from the north group in Chiayi. This paper focuses on the North Tsou in Chia-yi County. There is also a very small number of the North Tsou living in Nan-tou County. This paper focuses on the North Tsou in Chia-yi County.
242. See Development Plan for Jia-yi Country (*Jia-yi Xien zong-he fa-zhan ji-hua*), [http://gisapsrv01.cpami.gov.tw/cpis/cprpts/chiayi\\_county/county/district.htm](http://gisapsrv01.cpami.gov.tw/cpis/cprpts/chiayi_county/county/district.htm) (in Chinese), last accessed February, 8 2007.



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243. See Development Plan for Jia-yi Country (*Jia-yi Xien zong-he fa-zhan ji-hua*) [http://gisapsrv01.cpami.gov.tw/cpis/cprpts/chiayi\\_county/depart/depart.htm](http://gisapsrv01.cpami.gov.tw/cpis/cprpts/chiayi_county/depart/depart.htm) (in Chinese), last accessed February, 8 2007.
244. The Indigenous Reserved Land (IRL) was a Japanese colonial legacy. To be able to invest more efficiently in the mountain resources and to effectively control indigenous tribes, the Japanese Colonial Government designated 240,000 hectare of land to settle the then 80,000 indigenous individuals in the 1920s. The current Taiwanese Government has followed this land policy, but saw such policy as only temporary and shall be terminated as the indigenous population gradually adapts to the normal legal system. The Taiwanese Government started to grant individual property rights since 1960s. IRL can be only transferred between indigenous persons. No connection is made between an indigenous group and the geographical area it traditionally occupies. Therefore, a Tsou person can legally purchase IRL in a traditionally Atayal region.
245. The number is gathered from a survey in October 2005. See Development Plan for Jia-yi Country (*Jia-yi Xien zong-he fa-zhan ji-hua*) [http://gisapsrv01.cpami.gov.tw/cpis/cprpts/chiayi\\_county/country/district.htm](http://gisapsrv01.cpami.gov.tw/cpis/cprpts/chiayi_county/country/district.htm) (in Chinese), last accessed February, 8 2007.
246. The seven Tsou villages are Da-bang (*Tapangu*), Le-ye (*Lalauya*), Lai-ji (*Pnguu*), Li-jia (*Nia'ucna*), Shan-mei (*Saviki*), Shin-mei (*Singvi*), and cha-shan (*Cayamavana*).
247. Manchurian Imperial Government established the "savage borders" by either digging a ditch, or erecting fences and stones, or using earth to build a wall (*tu-niu*, or earth-buffalos) as the physical barrier to prevent Han-Chinese to enter the "savage land". On the map, a red line (*hong-xien*) was used to indicate the "earth-buffalos", or the "savage borders". From the red line westward, it was seen as Manchurian imperial territory, whereas on the other side of the line was the "savage land".
248. For a more detailed discussion about how the borderline has been shifting in Tsou area, or how the Tsou territory has been changing during Manchurian Imperial China, see Wang S-s., Wang, M-h. & Pu, C-c. (2001). *The History of Formosan Aborigines: Tsou (Tai-wan Yuan-zhu-ming Shi: Tsou-zu-shi Pien)*, (in Chinese). Nan-tou: The Historical Research Commission of Taiwan Province. 105-116
249. Those who were treated as Chinese settlers are the *Ping-pu* (plains) peoples who lived in the plain area. The *Ping-pu* peoples include Ketagalan, Taokas, Pazeh, Kahabu, Papora, Babuza, Hoanya, Siraya, and Makatao. Due to this colonial twist, nowadays, these groups are not recognized as indigenous communities and their descendents do not have official indigenous status.
250. Wang S-s., Wang, M-h. & Pu, C-c. (2001). *The History of Formosan Aborigines: Tsou (Tai-wan Yuan-zhu-ming Shi: Tsou-zu-shi Pien)*, (in Chinese). Nan-tou: The Historical Research Commission of Taiwan Province. 122-123.
251. Zhang W-F. *The evaluation of Wu-feng: a Historical perspective (Wu-feng de Li-shi Di-wei)*, (in Chinese). 18, available at [http://www.nict.gov.tw/tc/learning/b\\_3.php](http://www.nict.gov.tw/tc/learning/b_3.php). Zhang strongly argues that Wu-feng cannot have been economically exploited Tsou people, as it has never been documented in any historical material. However, it is questionable whether this is a convincing reason as all the historical documents were written by the Chinese or the Japanese whose stake may be at odds with Tsou people, and who might have their own political agenda when documenting the Wu-feng story.
252. The first documentation of Wu-feng story was Chia-mou Liu's *Hai-yin Shi*.
253. See, Li Y-y. *Folklore and Textbooks: Wu-feng Story and its Anthropological Studies (Zhuan-sho yu Ke-ben: Wu-feng Zhuan-sho ji qi Xiang-guan de Ren-lei-xie Tan-tao)*. In *Wu-feng and Its Related Questions (Wu-feng ji qi xiang-guan wen-ti Yien-jiou)*, (in Chinese). 7, available at [http://www.nict.gov.tw/tc/learning/b\\_3.php](http://www.nict.gov.tw/tc/learning/b_3.php)
254. *Ibid* p.7-13
255. Wang S-s., Wang, M-h. & Pu, C-c. (2001). *The History of Formosan Aborigines: Tsou (Tai-wan Yuan-zhu-ming Shi: Tsou-zu-shi Pien)*, (in Chinese). Nan-tou: The Historical Research Commission of Taiwan Province. 42-44.
256. The treaty has seven articles, including: 1. recognizing the natural sovereignty of Taiwan indigenous peoples, 2. promoting self-governance for indigenous peoples, 3. concluding a land treaty with indigenous peoples, 4. reinstating traditional names of indigenous communities and natural landmarks, 5. recovering traditional territories for indigenous communities and peoples, 6. recovering use of natural resources and furthering the development of self-determination, and 7. providing congressional representatives for each indigenous peoples.

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257. The Chia-yi County Government in 1999 announced rules that restrict the fishing and collecting in the River Tanayiku and within the eco-tourism park, and assigned the River Management Committee of the Saviki Community Development Association (SCDA) as the authorized agency to patrol and execute these rules. See Bang-kuen L. (2005). *Tourism Cultural Economy and Constructing Place of Aboriginal region: A Case Study of Saviki Community Tsou (Yuan-zhu-min-zu Di-qu Guan-guang Wen-hua Jin-ji yuDi-fang Jian-gou zhi Yien-Jiou: Zou-zu Shan-Mei She-qu zhi Ge-an)*. Unpublished doctoral dissertation, National Taiwan University, Department of Geography, 153-54. Available at <http://www.geog.ntu.edu.tw/research/paper2005/D89228004/index.htm>

The membership of SCDA is open for all who is registered in Saviki and above 20 year-old to apply.

258. For example, the revenue of Tanayiku Park was 18,577,025 NTD (580,532 USD in 2001, at the rate of 1 USD = 32 NTD), 31,273,796 NTD (977,306 USD) in 2002, and 20,476,023 (639,875) in 2003. There may also be funding from the Government for various projects, which adds up to the gross income of the Saviki community. For example, governmental funding in 2001 was 4,943,652 NTD (154,490 USD), 1,049,000 NTD (32781 USD) in 2002, and 637,260 NTD (19,914 USD). Bang-kuen L. (2005). *Tourism Cultural Economy and Constructing Place of Aboriginal region: A Case Study of Saviki Community Tsou (Yuan-zhu-min-zu Di-qu Guan-guang Wen-hua Jin-ji yuDi-fang Jian-gou zhi Yien-Jiou: Zou-zu Shan-Mei She-qu zhi Ge-an)*. Unpublished doctoral dissertation, National Taiwan University, Department of Geography, 153-54. Available at <http://www.geog.ntu.edu.tw/research/paper2005/D89228004/index.htm>

259. A *Hosa* is a Tsou parent group. Tapangu and Tfuya are the two parent groups of other Tsou communities in the North Tsou.

260. This meeting was attended by members from the North Tsou and the South Tsou groups.

261. Some politicians in Taiwan have called themselves “modern We-feng” to say that they are “head-hunted” or “sacrificed” by other politicians for being honest and just. President Chen, who signed the *Treaty* with indigenous peoples and promised to promote indigenous self-governance, sent the main Wu-feng Temple a tablet with inscriptions to praise Wu’s *Ren-yi* (just).

### **The Adivasi (India)**

262. The SSP is part of the Narmada Valley Development Project (NVDP) which proposed to construct 29 major, 135 medium and 3,000 minor dams. The Sardar Sarovar Dam will be ranking as the second largest in the world in terms of its aggregate volume (6.82 cubic meter). See <http://www.narmada.org/nvdp.dams/>

263. The Narmada River is the fifth largest river in India and the largest one which flows to the west. It flows westwards over a length of 1,312 km, and its total catchment areas amounts to about 100,000 km<sup>2</sup>, of which 87% lies in the state of Madhya Pradesh, 2% in Maharashtra and 11% in Gujarat (Narmada Valley Development Authority: online). See <http://www.narmada.org/nvdp.dams/>

264. Morse & Berger 1992:5

265. The opponents have strong suspicions about the project on various grounds such as the feasibility of water supply to drought prone areas, alleged benefits of irrigation, condition of resettlement and rehabilitation, and environmental impact of the project. See <http://www.narmada.org/introduction.html>

266. The estimates of project affected people show a considerable disparity depending on who made it. Proponents including the states as well as central government are more optimistic about the figure of displacement. At the outset, the official figure of displacement was considerably small; the Tribunal reported that it was 7,000 families. See Rajagopal, B. (2004). *Limits of law in counter-hegemonic globalization: The Indian Supreme Court and the Narmada Valley struggle*. Centre for the Study of Law and Governance, Jawaharlal Nehru University, New Dehli. 11-12. In 1991, when the World Bank initiated an independent review by outside experts, the official figure swell to at least 90,000 persons, while the estimate reported by the independent review of 1992 was 199,500 persons, of which 56% were tribal people. See Morse, B. and Berger T. (1992). *Sardar Sarovar: Report of the Independent Review*. Ottawa: Resources Futures International. 4,62.

Then, in 2000, the Supreme Court admitted that over 41,000 families are affected (205,000 people on the ground a family consists of 5 people on average), while the Narmada Bachao Andolan (Save the Narmada Movement), alleged that it was 320,000 people. See McCully P. (2001). *Silenced rivers: The ecology and politics of large dams*. London: Zed Books and Berkeley: International River Network. 84.

267. Criteria that are used to define “Scheduled Tribes” include a variety of aspects such as geographical isolation, simple technology, and condition of living, general backwardness to the practice of animism,

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tribal language, physical features, etc, these criteria are neither clearly formulated nor systematically applied to characterize tribal population (Xaxa 1991: online).

268. While the Adivasis has inhabited in almost all states, population concentration has been identified especially in northeastern India, central India and part of Island. In terms of topography, their habitats have been concentrated especially in the hilly areas (Singh 1992:41-2).

269. Complex features among tribal populations, combined with the fact of repeated migration of their ancestors, make it difficult to discuss their indigeneity as a whole. In fact, most of scholars consider that tribes could hardly make legitimate claims as the only natives of India (Xaxa 1991: online). There exist, however, imperative realities that Adivasis have long been aggrieved, whereas people in the dominant society have enjoyed privileges and rights. It is in this context that the description of adivasis as indigenous people emerged.

270. In fact, there are 4291 dams in India, of which 3596 have been built and 695 are under construction, which takes India to the third largest dam construction country next to China (1st) and the US (2nd) (Patwardhan 2000: 5, WCD 2000: 370).

271. The problem is, in India, there is no reliable data base on the performance and impacts of large dam construction project, notwithstanding dam construction project is thought to be the single largest cause of displacement by development projects. Independent estimates of the total displacement by development projects after independence ranges from 21.3 million to 50 million people, of which displaced people by dam construction constitute 75 to 80 % (Patwardhan 2000: 5).

272. Patwardhan 2000:14-5

273. The Award was constituted by the Government of India under the Interstate Water Disputes Act of 1956 in order to settle inter state disputes over allocation of costs and benefits of the project between the three associated states: Gujarat, Maharashtra and Madhya Pradesh.

274. India does not have a national rehabilitation and resettlement policy in large part because there is no right to property clause in the Indian Constitution. Rajagopal, B. (2004). *Limits of law in counter-hegemonic globalization: The Indian Supreme Court and the Narmada Valley struggle*. Centre for the Study of Law and Governance, Jawaharlal Nehru University, New Dehli. 16-17. The Land Acquisition Act of 1984 provides cash compensation but it does not apply to those who have no formal land rights.

275. Rajagopal 2004: 12

276. Patel 1995: 180

277. The question of “What is the just compensation?” is likely to stir debate since the land constitute the important part of adivasis’ cosmology. This is resonantly expressed by words of the adivasis who protested against displacement by the SSP; “*Our Gods cannot be moved from this place, so it is difficult also for us*” Morse, B. and Berger T. (1992). *Sardar Sarovar: Report of the Independent Review*. Ottawa: Resources Futures International. 69.

278. (1) In 1989, some 100 people were resettled from the village of Gadher to the site called Amoroli on favorable terms which included houses, a school, a dispensary, free electricity and wells for irrigation water. Even after three years passed, however, nothing became a reality. In the end, two thirds of them returned back to Gadher (Caufield 1996: 17). (2) After some oustees of the SSP were resettled in Taloda, one of the resettlement sites, the conflict arose between resettled adivasis and local adivasis who had lived in Taloda, which caused 2 murders and social friction between both communities. Considering the fact that India has stratified social structure based on the caste system, those to be displaced are highly likely to find it difficult to adjust in the new community, if they are resettled in the community comprised of higher caste or social class (Patwardhan 2000:18). (3) An oustee of the SSP submitted a letter to the Independent Review Team, which was commissioned by the World Bank in 1991. The letter publicized the plight of her resettlement site; “Forty households moved from Manibeli to Parveta. In our first year here, we watched 38 of our children die...” Morse, B. and Berger T. (1992). *Sardar Sarovar: Report of the Independent Review*. Ottawa: Resources Futures International. 160. (4) In the state of Gujarat, the inhabitant of 19 villages, all the villages to be submerged by the SSP, have been resettled in 175 separate rehabilitation site, ignoring their long standing social bond (Roy 1999:51).

279. McCully 2001: 301-2

280. For instance, in February, 1989, more than 8,000 of people gathered site in the state of Gujarat to protest against the construction. In September the same year, a gigantic rally was launched at the town of Harsud in Madhya Pradesh, in which 25,000 to 60,000 people from all over India attended to demand a comprehensive re-evaluation of the project. See Baviskar 1995:207. Also see Rajagopal, B. (2004). *Limits of law in counter-hegemonic globalization: The Indian Supreme Court and the Narmada Valley struggle*. Centre for the Study of Law and Governance, Jawaharlal Nehru University, New Dehli. 25. The rally

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blocked the Bombay-Agra Highway in Mar. 1990 and continued until when the Chief Minister of Madhya Pradesh promised to review the SSP.

281. In 1990, Dr. B.D. Sharma, the Commissioner of Scheduled Castes and Tribes, a statutory authority of India, appealed to the president of India to halt the project (Caufield 1996:15) and, in the next year, filed an appeal in the Supreme Court of India for a case regarding tribal rights undermined by the SSP. The Court ruled that resettlement should be completed at least six months before submergence. The Court also ruled that the state of Gujarat, Maharashtra and Madhya Pradesh would comply with the right to life which the Art. 21 of the Indian Constitution provided (Sangvai 2000:154). In 1991, the Lok Adhikar Sangh, a Gujarat-based oustees' rights group, filed a petition to the Gujarat High Court. The Court ruled that the submergence of the first six villages in 1960s was illegal and directed not to implement further work on dam which would cause further submergence. However, the government of Gujarat and the Sardar Sarovar Nigam Limited (SSNL), which had been set up by the government of Gujarat in 1988 to implement the SSP, continued the dam construction, ignoring the rulings by the Court (Sangvai 2000:155).

282. Under the Official Secret Act, those who are in prohibited areas, either the dam construction site or its surrounding areas, with the purpose of creating an obstacle are perceived as an offence. In addition, provisions of the Criminal Procedure Code were employed to block the opposition campaign; the Section 144, for instance, prohibits gathering of more than four people in a prohibited area and the Section 37(b) gives police powers to arrest and detain people and to prohibit political activities (Narmada International Human Rights Panel 1993: online).

283. Around 1989, the government of Gujarat started "treating the dam construction as part of an ideology of cultural nationalism", labeling all opponents as "enemies of Gujarat". Gujarat politicians reached a cross-party agreement for adopting a resolution in the state assembly to support the project. They also criticized opponents of the SSP as "anti-national agents of foreign interests." Rajagopal, B. (2004). *Limits of law in counter-hegemonic globalization: The Indian Supreme Court and the Narmada Valley struggle*. Centre for the Study of Law and Governance, Jawaharlal Nehru University, New Dehli. 24. The SSNL also launched media campaigns for the same purpose.

284. This network later became known as the Narmada Action Committee.

285. McCully 2001: 302

286. For example, (1) in 1987, NGOs blamed the Bank on India's violation of the rights of tribal people under ILO Convention 107 and petitioned the ILO's Committee of Expert. (2) In 1989, the EDF and two other US-based environmental NGOs demanded the US Congress to compel the Bank to withdraw from funding the SSP (Baviskar 1995: 204). (3) In Apr. 1990, the Friend of Earth, Japan, hosted the 1st International Narmada Symposium of the Earth in Tokyo, which received wide press coverage and, within a month, led to the withdrawal of the Oversea Economic Cooperation Fund of Japan from the SSP. This was the first time that a Japanese aid loan withdrew for environmental and human rights reasons.

Rajagopal, B. (2004). *Limits of law in counter-hegemonic globalization: The Indian Supreme Court and the Narmada Valley struggle*. Centre for the Study of Law and Governance, Jawaharlal Nehru University, New Dehli. 23.

287. In the opening of the report, Bradford Morse, one of the leaders who led the review team, wrote to Lewis Preston, the President of the World Bank, as follows: "We think the Sardar Sarovar Projects as they stand are flawed, that resettlement and rehabilitation of all those displaced by the Project is not possible under prevailing circumstances, and that the environmental impact of the Project have not been properly considered or adequately addressed. Moreover, we believe that the bank shares responsibility with the borrower for the situation that has developed." Morse, B. and Berger T. (1992). *Sardar Sarovar: Report of the Independent Review*. Ottawa: Resources Futures International. xii.

288. Morse & Berger 1992: xxv

289. Caufield 1996:26-27

290. Caufield 1996:26-27

291. US-based environmental groups published similar full page advertisements in the Washington Post and New York Times.

292. McCully 2001:302

293. Caufield 1996:28

294. In June, 1993, Medha Patkar began a fast, with an activist from Madhya Pradesh, in downtown Bombay claiming the government of India to commission a comprehensive review of the SSP. The government agreed with the claim after 14 days of the fast. However, it was soon proven to be a strategy to call off the fast as the government did not take any action. The NBA, in the next breath, countered by an extremist tactics; it announcing that 7 activists would through themselves into the Narmada river unless the

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government would commission the review by 6th of August. Finally, the government announced that it would establish a Committee comprised of five experts who took charge of reviewing all aspects of the SSP. McCully P. (2001). *Silenced rivers: The ecology and politics of large dams*. London: Zed Books and Berkeley: International River Network. 304-3005. The Committee started reviewing the project, hearing opinions from the stakeholding governments including the central government, dam-affected people and the NBA. However, the Gujarat government boycotted interview and took a legal action to delay the release of the report indefinitely. See McCully P. (2001). *Silenced rivers: The ecology and politics of large dams*. London: Zed Books and Berkeley: International River Network. 305.

295. Sangvai 2000:70-71

296. Kothari 2001

### **The Richtersveld Community (South Africa)**

297. A key piece of legislation geared towards the legacy of injustice was the establishment of the Truth and Reconciliation Commission (TRC), a fact-finding tribunal that would grant immunity to those who confessed to crimes committed under the apartheid regime. The TRC was thus designed to recognize and acknowledge specific injustices, but provide for forgiveness so that the country could begin to unite and move forward as a nation. See <http://www.usip.org/library/truth.html>

298. Sylvester, E. (2004, February 8). South African blacks waiting for land; Government slow to give back apartheid seizures as promised. *Chicago Sun Times*.

299. The Labour Tenants Act of 1996 and the Extension of Tenure Security Act of 1997 together prevented labor tenants from illegal eviction and attempted to formalize their rights to the land where they work.

300. The defendant Alexkor, the state-run diamond company, appealed the case to the Constitutional Court, which dismissed the appeal in 2004.

301. The court considered the same legislation, the Precious Stones Act of 1927, but found it to be discriminatory in that it reflected the government's policy in the 1920s of refusing to recognize the Richtersveld Community's rights in land based on the racially discriminatory assumption that the people weren't sufficiently civilized. *Richtersveld Cmty. v. Alexkor Ltd.* (2003) (6) BCLR 583, para. 10.

302. The court based this finding on evidence that the Community had leased mineral prospecting rights at various times between about 1850 and 1910, and that the Community believed that it owned the minerals and behaved accordingly. *Richtersveld Cmty. v. Alexkor Ltd.* (2003) (6) BCLR 583, para. 10. The government could have taken the Community's lands for mineral development, but it would have been required to pay compensation.

303. "Richtersveld Community Land Claim Breakthrough," Press Release from South Africa's Department of Public Enterprises, October 26, 2006. Available at <http://www.info.gov.za/speeches/2006/06102710151001.htm>

304. Trahan, Y. (2004). The Richtersveld Community & others v. Alexkor Ltd.: Declaration of a "Right in Land" through a customary interest" sets stage for introduction of Aboriginal Title into South African legal system. *Tul. J. Int'l & Comp. L.*, 12, 565, 582.

305. Robins, St. (2001). NGOs, 'Bushmen' and Double Vision: the  $\$$  Khomani San Land Claim and the Cultural Politics of 'Community' and 'Development' in the Kalahari. *Journal of Southern African Studies*, (27) 4, 833-53. See also Lee, R. (2003). Indigenous rights and the politics of identity in Post-Apartheid South Africa. In B. Dean & J. Levi (eds.). (2003). *At the risk of being heard*. Ann Arbor: University of Michigan Press. 80-104.

306. 2005, April 20. Land claim could change the destiny of a people. *Mail & Guardian Online*.

307. 2005, April 20. Land claim could change the destiny of a people. *Mail & Guardian Online*.

308. Kirsch S. (1993). Social impact of the Ok Tedi Mine on the Yonggom villages of the North Fly, 1992. Ok-Fly Social Monitoring Project Report No. 5 for Ok Tedi Mining Limited. 3.

[http://rspas.anu.edu.au/rmap/projects/Ok-Fly\\_social\\_monitoring/Ofsmp05-Kirsch1993-the-Yonggom-people.pdf](http://rspas.anu.edu.au/rmap/projects/Ok-Fly_social_monitoring/Ofsmp05-Kirsch1993-the-Yonggom-people.pdf)



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## The Yonggom (Papua New Guinea)

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315. Molloy, F. (2001, October 3). BHP abandoning Ok Tedi – PNG to clean up. *Reportage*. Available at <http://www.reportage.uts.edu.au/stories/2001/03oktedi.html>
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317. UNDP, UNEP, & World Bank. (2003). *World resources 2002–2004: Decisions for the Earth: Balance, voice, and power*. Available at [http://www.wri.org/governance/pubs\\_description.cfm?pid=3764](http://www.wri.org/governance/pubs_description.cfm?pid=3764)
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