Compilation of Jurisprudence, International Experiences and Policies on the Recognition of Indigenous Peoples Ownership of Territories and Natural Resources

Legal Rights and Natural Resources Center- Kasama sa Kalikasan/Friends of the Earth Philippines

June 2013

About the Author

Justine Nicole V. Torres was the staff paralegal of the Legal Rights and Natural Resources Center-Kasama sa Kalikasan/Friends of the Earth Philippines. She finished her Bachelor of Social Science degree from the University of the Philippines in Baguio and her law degree from the University of the Philippines College of Law.

About the Cover

The painting is a submission to a poster-making contest held by LRC-KsK/FoE Philippines during the 2008 State of the Indigenous Peoples Address.

Compilation of Jurisprudence, International Experiences and Policies on the Recognition of Indigenous Peoples Ownership of Territories and Natural Resources

Legal Rights and Natural Resources Center-
Kasama sa Kalikasan/Friends of the Earth Philippines

Table of Contents

No. Nor did they know that there was gold or coal under their land, or that the timber which grew on their lands had greater value than for making canoes and carvings for their houses, and so on. Is the argument now, that, because the poor savage was ignorant in 1840 of the things that have been made possible by the pakeha, he is to have no benefit or advantage from them today? If so, it will not hold water.

- Sir Apirana Ngata, in response to the question of whether the Māori knew there was oil under their lands when they signed the Treaty of Waitangi, addressing the 1937 Bill in Parliament.[1]

[1] Sir Apirana Ngata, 6 December 1937, NZ Parliament Discussions, 1937 vol. 249 p. 1044, cited in Waitangi Tribunal, The Petroleum Report, 19 May 2003, available at http://www.waitangi-tribunal.govt.nz/reports/view.asp?reportid=A181419D-48AD-4ECF-98BC-439454654765, accessed July 29 2012

Introduction

The intensifying global need for natural resources has not spared the lands and waters that Indigenous Peoples have long considered ancestral territories. Communities' experiences with these extractives ventures and large-scale development projects have unfortunately included forced displacements, environmental disasters and human rights violations. The introduction of new resource-use initiatives such as REDD-plus may likewise represent great potential for communities, but also bring attendant risks.

To respond to this, Indigenous Peoples and local communities have made use of various mechanisms and strategies to assert their rights to their ancestral territories and the natural resources within them. However, the effectivity of these remedies largely depends on context. The nature of the resource, political climate and prevailing legal landscape are only some of the factors that may influence advocacies and the sustainability of solutions.

This compilation is intended as a preliminary presentation of some of these available mechanisms and remedies, taking into account the legal contexts in which they operate. The data was gathered from a desktop review of sources from the Office of the United Nations Special Rapporteur on Indigenous Peoples, decisions of national courts and tribunals, reports from NGOs and community support groups and updates from the various national news platforms. This is with the end of informing the discussion on Indigenous Peoples' ownership of their territories and natural resources, particularly as to relevant and current strategies that they may employ in defense of their rights.

New Zealand: *Recognizing the Rohe*

The defining document for Indigenous Peoples rights in New Zealand is the Treaty of Waitangi of 1840. The Special Rapporteur noted that there were important differences in the English and Māori versions of the treaty, which was executed in both languages. Particularly:

> In the English version, Māori conveyed "sovereignty" to the British crown, but in the Māori version, they conveyed *"kawanatanga"* (governorship) but retained *"rangatiratanga"* (chieftainship, a concept somewhat analogous to self determination) over their lands, villages and *taonga* (treasures).[1]

Under the Treaty of Waitangi Act of 1975, the Waitangi Tribunal was established with the mandate to "hear claims brought by the Māori against the Government alleging breaches of the Treaty of Waitangi." This jurisdiction extends to present and future actions as well as historical claims. However, the Tribunal's recommendations are "generally not binding on the executive and legislature and are frequently ignored or criticized by the Government."[2]

EXTRACTIVES (PETROLEUM)

The Petroleum Report (Waitangi Tribunal)[3]

This report deals with several claims, namely:

1. **Claim over Petroleum and Natural Gas Condensates**
   Location: rohe of Ngã Hapū o Ngã Ruahine
   Affected Communities: Māori
   As of: July 1999 (claim filed)
   Type: Legal (domestic)

2. **Claim over Petroleum Resources**
   Location: rohe of Ngãti Kahungunu, east coast North Island
   Affected Communities: Māori
   As of: June 2000 (claim filed)
   Type: Legal (domestic)

While these claims were pending, the Ngāti te Whiri (October 2000) and Ngā Mahanga and Ngāti Tairi (December 2000) groups also filed petroleum claims

before the tribunal. The Tribunal registered these claims with the expectation that the Petroleum Report would similarly resolve them.

Facts:
The first claim relates to the natural gas and petroleum resources located within the rohe of Ngã Hapū o Ngã Ruahine. The claimants allege that "the seabed and continental shelf adjacent to that [land] area without seaward boundary" form part of their territory. Within this area are two major natural gas fields. The government was reportedly selling its interest in one of these – the Kupe field.

In 1937, New Zealand passed its Petroleum Act, which extinguished all private ownership of petroleum resources and vested ownership of these in the State.

As a consequence, the claimants alleged that:

> In terms of customary law, Māori, as part of the natural world, have proprietary rights in the resources of their universe, including the petroleum within their lands. Those rights, they say, would have endured for as long as Māori retained ownership of their lands and would have entitled Māori to profit from any commercial exploitation of the resource beneath their lands. However, by 1937 – and indeed long before then for many hapū and iwi – Māori lost ownership of much of their traditional lands, often as a result of Crown acts and policies that have since been found to have been inconsistent with the principles of the Treaty of Waitangi. The result, the claimants say is that, where Māori lost land by means that were in breach of Treaty principles, the accompanying loss of any petroleum within that land occurred by the same Treaty-breaching means. That situation, it is claimed, creates for the former Māori landowners a continuing Treaty-based interest in the petroleum resource.

The State answered that all its petroleum legislation and projects had not been inconsistent with the principles of the Treaty of Waitangi. While it did not deny that the Māori had a substantial interest in petroleum resources prior to 1937, it claimed that the extinguishment of Māori rights to petroleum resources under the Petroleum Act was done in a manner consistent with the Treaty.

Also, there were reports that the State had plans to sell its interest in the Kupe field, which the claimants argued would deprive them of the chance to negotiate for that share in future Treaty settlements. The State denied these allegations.

The State claimed that the Māori rights to petroleum resources only existed for as long as they had title to the surface of the land that contained the resource. "Once Māori title was transferred to the State or to private parties, the petroleum interest that went along with it was also transferred. It followed that, unless

rights to petroleum were expressly or by necessary implication reserved from sale or acquisition, the Māori interest in the petroleum was extinguished upon the transfer."

Nonetheless, the Tribunal preferred to "treat the Māori customary interest in petroleum as an incident of the ownership of the land surface." However, it was likewise noted that by 1937, very little of their original lands were owned by the Māori. As such, it was important to determine if the manner in which these lands were lost was consistent with the Treaty provisions.

Resolution:
The Tribunal made the following findings:

- It was upheld that the Māori had legal title to the petroleum in their land prior to 1937. As such, the alienations of the land and expropriation under the Petroleum Act of 1937 without payment of compensation or royalties amounted to loss of their legal title to the petroleum resources, an interest protected under the Treaty of Waitangi.
- As such, the government had an obligation to negotiate redress for the wrongful loss of the petroleum, and include the Māori's petroleum interests in any settlements as regards petroleum mining licenses.

Upon these findings, it was recommended that:

- The government and the Māori groups negotiate for a settlement of the grievances as regards petroleum resources; and
- In the meantime, the government withholds from sale the Kupe petroleum-mining license until a rational policy has been developed to safeguard Māori interests, or until the petroleum claims are settled.

The rights to the seabed were not argued before the Tribunal, which was of the opinion that it was a matter for the courts to decide.

Status:
In 2010, the Tribunal released a second Petroleum Report[4] to investigate the management of the resource since the claims decided in 2003. To satisfy Treaty obligations, they found that four (4) criteria had to be satisfied: 1) Māori involvement at key points in decision making processes that affected their interests; 2) ability to make well informed contributions to decisions; 3) ability to afford that level of involvement and 4) confidence that their contribution will be understood and valued.[5]

However, the Tribunal noted that these were not often met. This was due to the absence of a Māori counterpart to local government bodies and the complexity of

the petroleum management regime, which required simultaneous engagement with numerous local government procedures.[6]

In this regard, several recommendations were made:

- The establishment of a ministerial advisory committee to provide advice directly to the Minister of Energy on Māori perspectives and concerns;
- Re-establishment of district and regional representative bodies, among other things, for considering petroleum management issues;
- Use of a small percentage of the State's petroleum royalties to establish a fund to which Māori communities could apply for assistance to participate more effectively in petroleum management processes;
- Greater use of joint hearings by local authorities on matters relating to petroleum management; and
- Reform of the Crown Minerals Act, including strengthening the Treaty provisions, amending the compulsory arbitration requirements and enhancing the provisions for site protection.[7]

AQUATIC RESOURCES AND FISHERIES

THE NGAI TAHU SEA FISHERIES REPORT (WAITANGI TRIBUNAL)[8]

Location: Hawke's Bay and Wairarapa
Affected Communities: Māori
As of: August 1986 (first claim filed)
Type: Legal (domestic)

Facts:
This case was part of several claims filed between August 1986 and June 1988. However, for these purposes, only the issue of rights to sea fisheries will be dealt with.

Under this, the Ngai Tahu Māori claim that under the Treaty of Waitangi, they are entitled to "ownership of the entire marine fishery adjacent to their tribal lands, including all property and user rights, commercial and otherwise, inherent in the business and activity of fishing," without any restrictions, and to have this right protected by the State.[9]

As part of possible negotiations with the State, the Ngai Tahu Māori asked that the State acknowledge their "full and exclusive property and user rights in their tribal fishery." Only upon acceptance of this by the State would they agree to either "equal shares in the management and control of the southern fishery or an equal or at least a very substantial share in the income and benefits of fishing" and "a similar share in the equity or property involved."[10]

They likewise manifested that fishery resources had been lost, as they were denied access thereto as "a consequence of land settlement, insufficient reserves, drainage of wetlands and river straightening, acclimatization regulations and diversion of water from rivers for power supply dams."[11]

In 1983, the State introduced the Quota Management System to control fishing so as to conserve fish stocks but provide sustainable economic yields. Under this system, an Individual Transferable Quota (ITQ) was allocated to certain fishers, which could be transferred by them through sale or license. The Māori strongly opposed this scheme, saying "the Crown first took away from the Māori tribes the fishing resources which belonged to the Māori, and then purport to give these resources, or the beneficial usage of them, together with tradable property rights on an individual basis of title, to other persons."[12]

Resolution:
It was ultimately recommended that the Ngai Tahu and the State enter into negotiations for the settlement of the claims.

As to Ngai Tahu's rights under the Treaty, the Tribunal ruled that:

- They have an exclusive Treaty right to the sea fisheries surrounding the whole of their rohe to a distance of 12 miles or so, there being no waiver or agreement by them to surrender such right.
- They have a Treaty development right to a reasonable share of the sea fisheries off their rohe extending beyond the 12 miles out to and beyond the continental shelf into the deepwater fisheries within the 200-mile exclusive economic zone, such right being exclusive to Ngai Tahu.

For the conduct of the negotiations, it was recommended that the following findings be considered:

- An "appropriate allowance should be made for the serious depletion of the inshore fishery off the Ngai Tahu rohe when assessing a reasonable share of the sea fisheries to which Ngai Tahu is entitled beyond the first 12 miles or so from the shoreline."
- As to the QMS, the Tribunal ruled that it constituted a breach of Treaty principles, as it disposed of resources belonging to the Māori, without their consent and against their will. In this regard, it was recommended that negotiations include "determination of an appropriate additional percentage of quota under the QMS and that the Māori Fisheries Act of 1939 be used as the mechanism to deliver that quota to Ngai Tahu."[13]

Status:
In 1989, the State had already bought back 10 percent of the issued quota shares under the QMS and turned these over to the Treaty of Waitangi Fisheries

Commission, to be used for the benefit of the Māori. In 1992, the Māori were given a cash settlement, which was used to buy half of Sealord, New Zealand's biggest fishing company. In addition, the Māori were given 20 percent of commercial quota shares of any new species introduced into the system. Finally, "customary fishing regulations" were agreed on in 1998, which finally recognize the control that the Māori traditionally exercised over their fisheries resources.[14]

---

[1] UN Human Rights Council, Report of the Special Rapporteur on the Rights of Indigenous Peoples on the Situation of Indigenous Peoples in New Zealand, 31 May 2011, A/HRC/18/35/Add.4, p. 5 available at http://www2.ohchr.org/english/issues/indigenous/rapporteur/docs/A.HRC.18.35.Add.4_en.pdf, accessed 23 July 2012

[2] Ibid, 8-9

[3] Waitangi Tribunal, The Petroleum Report, 19 May 2003, available at http://www.waitangi-tribunal.govt.nz/reports/view.asp?reportid=A181419D-48AD-4ECF-98BC-439454654765, accessed July 29 2012

[4] Waitangi Tribunal, Report on the Management of the Petroleum Resource (Summary), 20 April 2011, available at www.waitangi-tribunal.govt.nz/reports/summary.asp?reportid={C-4B4A55A-F5CE-43BB-A63A-F01ABC25FC62}, accessed 29 July 2012

[5] Ibid

[6] Ibid

[7] Ibid

[8] Waitangi Tribunal, *The Ngai Tahu Sea Fisheries Report*, available at www.waitangi-tribunal.govt.nz/reports/view.asp?reportId=469D396B-CE85-4E30-B04F-A39DC8D03F38, 6 August 1992, accessed 20 July 2012

[9] Ibid

[10] Ibid

[11] Ibid

[12] Ibid

[13] Ibid

[14] Data from www.fish.govt.nz/en-nz/Publications/State+of+our+fisheries/MaoriMāori+Fisheries/default.htm, accessed 13 August 2012

New Caledonia (France): *Community Shares in Private Corporations*

New Caledonia's is a "sui generis collectivity" of France.

In 1998, New Caledonia and France executed the Nouméa Accord, in preparation for eventual decolonization and transfer of governmental responsibilities. Under this Accord, the indigenous Kanak people are recognized as "the original inhabitants of the territory" and consequently "prescribes a shared future in which the Kanak people, the French settler communities and others living in New Caledonia have equal rights to reside in the country."[1]

The Accord also provides for the Customary Senate, composed of representatives from the eight customary areas of New Caledonia. The Customary Senate, which includes a special advisory body on economic and social issues, must be consulted on all issues affecting the Kanak. However, it is ultimately the decision of the New Caledonia Congress that prevails.[2]

EXTRACTIVES (MINING)

Vale-NC/Goro Nickel Mine
Location: Grand Terre island, South Province
Affected Communities: Kanak
As of: 2001 (Goro Nickel project launched)
Type: Compromise, Ongoing Campaign

Facts:
Nickel mining is a major economic activity in New Caledonia.

Kanak opposition to this project was reported in 2003. Due to this, the Goro nickel mine was closed for a financial review. Since the mine opened in 2001, the Kanak had resisted the entry of mine, citing its impacts on their environment, society and culture. Kanak leaders likewise called on the mining company to "open negotiations regarding the future of the mining project."[3]

Resolution:
In September 2008, an agreement, called the *Pacte pour un développment durable du Grand Sud*, was executed between Kanak customary authorities, the Customary Senate, the indigenous environmental organization Rheebu Nuu and Vale-NC. The pact provided for "Kanak oversight of the environmental impact of

the project, and incorporated consultation with the Kanak during nearly every phase of project development. It also included provisions for reforestation of land beyond the project area, and the creation of a Customary Environmental Consultative Committee."[4]

The pact also provided for a benefit-sharing mechanism, by creating a "corporate foundation with a mandate to invest in development projects in the neighboring communities." This was to be headed by "a board of directors composed of customary authorities, Kanak environmental activists, customary senators and representatives from the mining companies."[5]

Status:
Notwithstanding this agreement, in May 2012, it was reported that the project's "start-up was delayed several years and costs soared to more than $4 billion from $1.9 billion, after protests by local islanders raised environmental concerns and soaring commodities prices boosted equipment and engineering costs." Nonetheless, this is expected to be the world's largest nickel mine, producing as much as 60,000 tonnes a year of nickel and 4,600 tonnes of cobalt a year."[6]

Koniambo Mine

Location: Koniambo island, North Province
Affected Communities: Kanak
As of: April 1998 (agreement executed)
Type: Compromise

Facts:
This mining project began as a joint venture between Canadian company Falconbridge and the Kanak Company Société Minière du Sud Pacifique (SMSP).

Resolution:
SMSP owned a 51 percent stake in the project, and Falconbridge the remaining 49 percent, by virtue of the Bercy Agreement executed in 1998. Under the Agreement, SMSP was to surrender its interest in the Poum mineral deposits, conditioned on the completion of a positive technical feasibility study by December 2005, and a US$100 million investment in equipment and services. Failing in these, Koniambo would revert to its original owners. Transfer of the Koniambo property to Falconbridge and SMSP's joint venture company was completed in 2005.[7]

Falconbridge was eventually absorbed by Noranda, and eventually in 2006, by XSTRATA. In 2006, XSTRATA and SMSP validated the final report on the revitalization of the mine, and its production phase was expected to begin in 2012.

Status:
In 2004, it was reported that support for this project remained strong amongst the Kanak and the indigenous organizations, Senat Coutoumier and the Front de Libèration Nationale Kanak et Socialiste (FLNKS).[8]

However Mining Watch Canada reported in 2009 that XSTRATA had committed serious breaches of its commitment to ensure environmental protection, particularly through its construction of a port facility that would require destruction of coral reefs and dredging of the lagoon. It was likewise alleged that there was no transparency as regards the details of this project, and that the damage done was not properly reported.[9]

---

[1] UN Human Rights Council, Report of the Special Rapporteur on the Rights of Indigenous Peoples on the Situation of Indigenous Peoples in New Caledonia, France, 14 September 2011, A/HRC/18/35/Add.6, p. 6 available at http://www2.ohchr.org/english/issues/indigenous/rapporteur/docs/A-HRC-18-35-Add6.pdf, accessed 23 July 2012

[2] Ibid, 9

[3] *New Caledonia's Kanaks Fight Nickel Mining Project*, 28 March 2003, available at www.culturalsurvival.org/news/new-caledonia-s-kanaks-fight-nickel-mining-project, accessed 30 July 2012

[4] Special Rapporteur Report on New Caledonia, 12

[5] Ibid

[6] Vale invokes force majeure at nickel project, 10 May 2012 at http://www.reuters.com/article/2012/05/10/vale-newcaledonia-forcemajeure-idUSL1E8GALBI20120510, accessed 12 August 2012

[7] Data from http://www.koniambonickel.nc/index.php?option=com_content&task=view&id=39&Itemid=91&lang=en, accessed 13 August 2012

[8] Grewal, Andrew and Saleem Ali, *New Approaches to Mining in New Caledonia*, Cultural Survival Quarterly issue 28.1 (Spring 2004), available at www.culturalsurvival.org/publications/cultural-survival-quarterly/france/new-approaches-mining-new-caledonia, dated 7 May 2010, accessed 13 August 2012

[9] *Xstrata Faces Growing Criticism Over Koniambo Nickel Project in Kanaky-New Caledonia*, 2 January 2009, available at http://www.miningwatch.ca/xstrata-faces-growing-criticism-over-koniambo-nickel-project-kanaky-new-caledonia-0, accessed 13 August 2012

Nicaragua: *The Awas Tingni Precedent*

The Nicaraguan Constitution recognizes the country's Indigenous Peoples, with an autonomous regime established for the communities on the Atlantic Coast. It goes on to provide that the Atlantic Coast communities have the right to their culture and own forms of social organization, and recognizes their communal forms of land ownership, and use and enjoyment of waters and forests on their communal lands.[1]

Furthermore, Law No. 28 (1987) provides that "rational use of the mining, forestry, fishing and other natural resources of the Autonomous Regions will recognize (the Atlantic communities') property rights to their communal lands and must benefit their inhabitants in a just proportion through agreements between the Regional government and the Central government."[2]

Demarcation of indigenous lands is covered by Decree No. 16-96 (1996), which creates the National Commission for the Demarcation of the Lands of the Indigenous Communities of the Atlantic Coast. The Commission must source the funding for the demarcation projects it will conduct.[3]

LAND (TENURIAL SECURITY AND ACCESS TO NATURAL RESOURCES)

Awas Tingni vs. Nicaragua

Location:
Affected Communities: Awas Tingni Mayagna (Sumo)
As of: 1996 (formal complaint filed)
Type: Legal (international-regional)

Facts:
In December 1993, the Nicaraguan government granted a logging concession to the foreign logging company Maderas y Derivados de Nicaragua, S.A. (MADENSA), covering 4,300 hectares of land, most of which within the lands traditionally occupied by the Mayagna. For this, the World Wildlife Fund with the Iowa College of Law assisted the community in negotiations with the government and MADENSA. Aside from sustainable timber harvesting, it was agreed that the government would not take any "action that would prejudice or undermine the Community's land claim."[4]

But soon after, the government engaged in discussions with a second foreign logging company - Sol de Caribe, S.A. (SOLCARSA) - for a logging concession covering 63,000 hectares adjacent to MADENSA's, which was also covered by the community's traditional land tenure. These discussions were under the assumption that the area involved was entirely State-owned land.[5]

The concession was formally granted to SOLCARSA in March 1996. The government agreed that some areas covered the Mayagna traditional land claim, but that "the amount of land claimed was excessive."[6]

The community, assisted by its support groups, filed an emergency action (amparo) for the revocation of the SOLCARSA license. In February 1997, the Nicaraguan Supreme Court revoked the license on the ground that "the Regional Council had not approved the concession as required" by the Nicaraguan Constitution. However, government officials cured this by securing a "*post hoc* ratification" from the Regional Council. The Council approved the concession in October 1997.[7]

In this action, as regards Article 21 of the American Convention on Human Rights, the Inter-American Commission on Human Rights argued on behalf of the community that[8]:

- "The Mayagna community has communal property rights to land and natural resources based on traditional patterns of use and occupation of ancestral territory. These rights exist even without State actions to specify them. Traditional land tenure is linked to a historical continuity, but not necessarily to a single place and to a single social conformation throughout the centuries. The overall territory of the community is possessed collectively, and the individuals and families enjoy subsidiary rights of use and occupation."
- "Traditional patterns of use and occupation of territory by the indigenous communities of the Atlantic Coast of Nicaragua generate customary property law systems, they are property rights created by indigenous customary norms and practices which must be protected, and they qualify as property rights protected by Article 21 of the Convention. Non-recognition of the equality of property rights based on indigenous tradition is contrary to the principle of non-discrimination set forth in Article 1(1) of the Convention."
- "The Constitution of Nicaragua and the Autonomy Statute of the Regions of the Atlantic Coast of Nicaragua recognize property rights whose origin is found in the customary law system of land tenure which has traditionally existed in the indigenous communities of the Atlantic Coast. Furthermore, the rights of the community are protected by the American Convention and by provisions set forth in other international conventions to which Nicaragua is a party."

- "Most inhabitants of Awas Tingni arrived during the 1940s to the place where they have their main residence, having come from their former ancestral place: Tuburús. There was a movement from one place to another within their ancestral territory; the Mayagna ancestors were here since immemorial times."
- "There are lands that have traditionally been shared by Awas Tingni and other communities. The concept of property can consist of co-ownership in access and use rights, according to the customs of indigenous communities of the Atlantic coast."

Before the Inter-American Court of Human Rights (IACHR), the government relied on the following defenses: "Awas Tingni could not claim an ancestral entitlement to land because the existence of the Community's village at its present location dates back only to the 1940s, the area claimed by the Community is too large in proportion to the Community's membership; and neighboring indigenous communities have rights to at least parts of the same area."[9]

Resolution:
Article 21 of the American Convention on Human Rights provides for the Right to Property as follows:

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.
3. Usury and any other form of exploitation of man shall be prohibited by law.[10]

In this case, the Tribunal ruled, "Article 21 of the Convention protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property, which is also recognized by the Constitution of Nicaragua."[11]

As such, the Tribunal found that the government of Nicaragua had violated the Mayagna's right under Article 21 when it "granted concessions to third parties to utilize the property and resources located in an area which could correspond, fully or in part, to the lands which must be delimited, demarcated and titled."[12]

Aside from ordering the payment of monetary reparations for immaterial damages suffered and costs and expenses incurred by the community, the IACHR ordered the government of Nicaragua to "carry out the delimitation, demarcation and titling of the members of the Awas Tingni community" and until this was completed, "abstain from any acts that might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to

affect the existence, value, use or enjoyment" of the Awas Tingni property within its territory.[13]

Status:

In December 2008, the government of Nicaragua officially granted title over 74,000 hectares of land to the Awas Tingni community.[14]

---

[1] Inter-American Court of Human Rights, Case of Awas Tingni vs. Nicaragua, Judgment of 31 August 2001, Inter-Am. Ct. H.R., (Ser. C) No. 79 (2001), available at www1.umn.edu/humanrts/iachr/AwasTingnicase.html, accessed 12 August 2012

[2] Art. 9 Law No. 28, in Ibid.

[3] Ibid.

[4] Anaya, James and Claudio Grossman, *The Case of Awas Tingni vs. Nicaragua: A New Step in the International Law of Indigenous Peoples*, Arizona Journal of International and Comparative Law vol. 19 no. 1 (2002), p. 3-4, available at www.ajicl.org/AJICL2002/vol191/introduction-final.pdf, accessed 12 August 2012

[5] Ibid

[6] Ibid, 6

[7] Ibid, 7

[8] IACHR Awas Tingni Judgment

[9] Reply of the Republic of Nicaragua to the Complaint Presented before the IACHR, p. 101-127, cited in Ibid, 9

[10] Organization of American States, American Convention on Human Rights, available at www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm, accessed 13 August 2012

[11] IACHR Awas Tigni Judgment

[12] Ibid.

[13] Ibid.

[14] *Awas Tingni People finally Receive Land Title from the Government of Nicaragua*, at www.rightsandresources.org/blog.php?id=380, accessed 13 August 2012

Suriname: *Remedies in the Absence of Domestic Legislation*

As of August 2011, Suriname had no domestic legislation to address Indigenous Peoples issues on land and resources. Nonetheless, it has several legal obligations in this regard, as State party to the ICCPR, IESCR and CERD, and as ordered by the Inter-American Court of Human Rights.[1]

LAND (DISPLACEMENT AND ACCESS TO NATURAL RESOURCES)

Saramaka People v. Suriname[2]

Location: Upper Suriname river region
Affected Communities: Maroon Saramaka
As of: October 2000 (formal complaint filed)
Type: Legal (international-regional)

Facts:
This case was brought before the Inter-American Commission on Human Rights by the Association of Saramaka Authorities and 12 Saramaka captains on their own behalf and on behalf of their people. The Commission was unable to settle the matter and it was referred to the Inter-American Court of Human Rights (IACHR) in June 2006.

In the 1960s the construction of the Afobaka hydroelectric dam along the upper Suriname River displaced Saramaka communities and created "so-called transmigration villages." It was submitted that this had "ongoing and continuous effects" on the Saramaka people, including the following:

- Lack of consent by the Saramaka people for the said construction;
- Issues regarding the compensation awarded to those displaced;
- Lack of access to electricity in the transmigration villages;
- Destruction of Saramaka sacred sites;
- Lack of respect for the interred remains of deceased Saramaka;
- Threats presented by the State's plan to increase the level of the dam.

In addition, it was alleged that the forestry and mining concessions awarded by the State to third parties for areas within the Saramaka territory, without their "full and effective consultation", violated their right to the natural resources within their lands.

Resolution:
Relevant to this case is Article 21 of the American Convention, which provides for the right to communal property. The IACHR had previously held that "the close ties the members of indigenous communities have with their traditional lands and the natural resources associated with their culture thereof, as well as the incorporeal elements deriving there from, must be secured under Article 21 of the American Convention."

Citing this, the IACHR found that the rights of the Saramaka people had been violated, and as such ordered the State to:

> "remove the legal provisions that impede protection of the right to property of the Saramaka people, and adopt in its domestic legislation, and through effective and fully informed consultations with the Saramaka people, legislative, administrative, and other measures needed to protect, through special mechanisms, the territory in which they exercise their right to communal property, in accordance with their customary land use practices, without prejudice to other tribal and indigenous communities; refrain from acts that might give rise to agents of the State itself or third parties, acting with the State's acquiescence, affecting the right to property or integrity of the territory of the Saramaka people…"

As guarantees that the violations would not be repeated, the Court also ordered the State to:

- Delimit, demarcate and grant collective title over the territory to the Saramaka, in accordance with their customary laws, and through effective and fully informed consultation, within 3 years from date of judgment;
- Grant the members of the Saramaka legal recognition of their collective juridical personality, within a reasonable time;
- Amend and adopt legislation to allow the Saramaka to hold title to the territory they have traditionally used and occupied, including lands and natural resources, within a reasonable time;
- Adopt legislative, administrative and other measures necessary to recognize the right of the Saramaka to be effectively consulted, in accordance with their traditions and customs, or when necessary, the right to free, prior and informed consent with regard to development or investment projects that may affect their territory, and to reasonably share in the benefits of such projects, within a reasonable time;
- Ensure that environmental and social impact assessments are conducted by independent and technically competent entities, prior to awarding a concession for a development or investment project within Saramaka territory, and implement adequate safeguards and mechanisms to

minimize the damaging effects of such projects on the social, economic and cultural survival of the Saramaka;

- Adopt legislative, administrative and other measures necessary to provide the Saramaka with adequate and effective resources against acts that violate their right to the use and enjoyment of their property in accordance with their communal land tenure system, within a reasonable time.

Status:

As of August 2011, the State of Suriname had yet to fully comply with the IACHR judgment, particularly as regards the demarcation and titling of Saramaka land and the development of a law to carry out this process.[3]

[1] UN Human Rights Council, Report of the Special Rapporteur on the Rights of Indigenous Peoples on the Situation of Indigenous Peoples in Suriname, 18 August 2011, A/HRC/18/35/Add.7, p. 5 available at www.ochr.org/Documents/Issues/IPeoples/SR/A-HRC-18-35-Add7_en.pdf, accessed 18 July 2012

[2] Inter-American Court of Human Rights, Case of Saramaka People vs. Suriname, Judgment of November 28, 2007, available at www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf, accessed 23 July 2012

[3] Special Rapporteur Report on Suriname, 6-7

Paraguay: *Securing Condemnation of Indigenous Lands*

The Paraguayan Constitution recognizes the country's Indigenous Peoples "as groups which have preceded the formation of the State, as well as their cultural identity, their relation with their respective habitat, and their communal characteristics of their land tenure system," as well as other specific rights.[1]

Likewise, other national laws include provisions concerning Indigenous Peoples' claims to land. Law No. 904/81 on the Status of Indigenous Communities includes provisions on processing of requests for land and procedure for recognition of indigenous leaders.

LAND (DEMARCATION AND RESTITUTION)

Sawhoyamaxa Indigenous Community vs. Paraguay
Location: Sawhoyamaxa Indigenous Community, Paraguayan Chaco
Affected Communities: Enxet-Lengua
As of: May 2001 (formal complaint filed)
Type: Legal (international-regional)

Facts:
This case was brought before the Inter-American Commission on Human Rights by the NGO Tierra Viva a los Pueblos Indigenas del Chaco. On this basis, the Commission made several recommendations to the State. The State submitted its answer to these, and the Commission referred the case to IACHR.

Prior to the submission of the complaint, efforts had been made to secure condemnation of the lands claimed by the community, both before administrative bodies and the National Congress. However, as of March 2006, negotiations were still being attempted with the landowners, and the bills filed before the Congress were eventually dismissed.

Pertinent to ancestral lands and natural resources, the complaint alleged:

> a) By failing to restore the ancestral lands and the traditional habitat to the Sawhoyamaxa community, the State has prevented their members from hunting, fishing and gathering in the claimed lands and habitat, thus affecting their cultural and religious identity, and further placing them in a situation of extreme vulnerability characterized by extreme

poverty and inadequate observance of their basic rights, such as the rights to health and food;[2]

Resolution:
The IACHR found that the right of the Saramaka under Section 21 of the American Convention, providing for the right to communal property had been violated, and in this regard, ordered the State to:

- As a reparation measure, adopt all legislative, administrative or other measures necessary to formally and physically convey to the members of the Sawhoyamaxa community ownership over their traditional lands, and consequently, the right to use and enjoy these lands, within 3 years.
- If restitution of lands is not possible, make alternative lands available, selected upon agreement with the indigenous communities' decision-making and consultation procedures, values, practices and customs, within a reasonable time.

Satus:
As of September 2011, Paraguayan authorities, local companies and Sawhoyamanxa community leaders signed an agreement to begin the process of condemnation of private land, for eventual turn over to the indigenous community. Under this agreement, the government committed to buy 14,404 hectares of land from two private companies, a move that would benefit some 90 Sawhoyamaxa families, who had formerly been living by the side of the highway.[44]

---

[1] Inter-American Court of Human Rights, Judgment of March 29, 2006, Case of the Sawhoyamaxa Indigenous Community vs. Paraguay, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_146_ing.pdf, p. 72, accessed 12 August 2012

[2] Ibid, 88

[3] *Paraguay to Restore Indigenous Community's Ancestral Lands*, at www.amnesty.org.nz/news/paraguay-restore-indigenous-community's-ancestral-lands, accessed 12 August 2012

Brazil: *Indigenous Claims in Agricultural Lands*

Indigenous Peoples' rights are addressed in Brazilian Constitution (adopted 1988), as follows:

> Article 231 calls for recognition of "their social organization, customs, languages, creeds and traditions, as well as their original rights to the lands they traditionally occupy"; provides protections for these rights, especially in relation to the exploitation of natural resources on indigenous lands; guards indigenous peoples against dispossession of or forced removal from their lands; and places a duty upon the Union to demarcate the lands traditionally occupied by indigenous peoples and "to protect and ensure respect for all their property."[1]

Indigenous Peoples and their rights are likewise subjects of the Indian Statute of 1973, though this law's "implementation has been adjusted to reflect the standards of the 1988 Constitution." As of August 2009, the Brazilian Congress was still debating on whether or not to amend this law.[2]

LAND (DEMARCATION AND TENURIAL SECURITY)

Raposa Serra do Sol
Location: Roraima, Northeastern Brazil
Affected Communities: Ingaricó, Macuxi, Patamona, Taurepang, Wapichana
As of: April 2005
Type: Legal (domestic)

Facts:
In April 2005, the Brazilian President issued a decree approving the delineation and demarcation of the Raposa Serra do Sol indigenous land, amounting to 1.74 million hectares and benefitting some 20,000 indigenous people. The decree "mandated that the rice growers leave the territory in exchange for monetary compensation from the Brazilian government. It also stated that the Roraima State no longer had rights over the land."[3]

With support from the State of Roraima, injunction was sought against the removal of the non-indigenous farmers and challenged the demarcation itself. They argued that "the demarcation of such a large territory was not only without constitutional grounding, but that it also affronted economic

development objectives. Brazilian military officials also weighed in publicly with pronouncements of concern that a quasi-autonomous indigenous territory running along a lengthy section of Brazil's border with Venezuela and Guyana would have implications for national security."[4]

This case has been marked by violence against the indigenous communities, including the shooting of several individuals in May 2008.

Response:
The case reached the highest court in Brazil, the Federal Supreme Tribunal, in March 2009. While the majority voted to uphold the demarcation, this came with the imposition of 19 conditions, which have significant implications on other claims for indigenous lands.

> Some of the 19 conditions confirm protections for indigenous lands, for example, exemption from taxation and prohibition of non-indigenous hunting, fishing and gathering activities. Several of the other conditions, however, limit constitutional protections by specifying State powers over indigenous land on the assumption of ultimate State ownership. A number of conditions affirm the authority of the federal Union, through its competent organs, to control natural resource extraction on indigenous lands, install public works projects, and to establish on these lands, without having to consult the indigenous groups concerned, police or military presence. Other provisions authorize specific Government institutions to exercise certain monitoring powers over indigenous lands, in particular for conservation purposes and to regulate entry by non-indigenous individuals.[5]

Status:
Case Resolved. However, the Special Rapporteur noted that similar incidents of violence have punctuated the struggle for Indigenous Peoples land rights in Mato Grosso do Sol (against the Guarani people), Maranhão (Guajajara people) and Pernambuco (Xukuru people).[6]

---

[1] UN Human Rights Council, Report of the Special Rapporteur on the Rights of Indigenous Peoples on the Situation of Indigenous Peoples in Brazil, 26 August 2009, A/HRC/12/34/Add.2, p. 6 available at www.wcl.american.edu/journal/ilsp/vl/2/alvarenga.pdf

[2] Ibid, p. 7

[3] Alvarenga, Aquila Mazzinghy, *The Demarcation Case of Raposa Serra do Sol Indigenous Land in Brazil*, American University Washington College of Law ILSP Law Journal, p. 89 available at www.wcl.american.edu/journal/ilsp/vl/2/alvarenga.pdf

[4] Ibid, 11

[5] Special Rapporteur Report on Brazil, 12

[6] Ibid, 10

Russia: *Preserving Access to Traditional Resources*

The Russian Federal Constitution allows for private ownership of land or natural resources, but this is not applied to Indigenous Peoples' traditional territories. Nonetheless, Indigenous Peoples are entitled to "preferential, non-competitive access" under the law "On Territories of Traditional Nature Use of Numerically-small Indigenous Peoples of the North, Siberia and the Far East of the Russian Federation" (adopted in 2001), which provides:

> The land an indigenous community utilizes for traditional economic activities may be granted a special legal designation of "territory or traditional nature use", and be assigned to that community to use free-of-charge for a certain renewable period of time. Once created, the indigenous peoples living in these territories are guaranteed the right to continue to occupy the land and use its renewable resources for traditional activities, the right to participate in decision-making when industrial development in the territory is considered, and the right to receive compensation when industrial development that interferes with their access to land or damages the environment occurs there.[1]

However, the UN Committee on the Elimination of Racial Discrimination noted with concern subsequent amendments made to the Russian federal Land Code (amended 2001), Forest Code (amended 2006) and the newly passed Water Code which "deprive indigenous peoples of their right to preferred, free, and non-competitive access to land, fauna and biological as well as aquatic resources, on which they rely for their traditional economic activities, and that the grant of licenses to private companies for activities such as logging, extraction of subsoil resources and the construction of pipelines or hydroelectric dams leads to privatization and ecological depletion of territories traditionally inhabited by indigenous peoples."[2]

LARGE SCALE DEVELOPMENT PROJECTS (DAMS)

Evenkiiskaya Dam
Location: Evenkiya district, Krasnoyarsky Krai
Affected Communities: Evenk
As of: 2008 (dam plans approved)
Type: Campaign

Facts:
In 2008, it was announced that RusHydro, a company in which the government owned majority shares, would build the dam. It was expected to flood some "one million hectares of forest and six villages and require the resettlement of about 5,000 people, including 1,600 Evenks." Moreover, the dam would adversely affect the local environment, particularly the plant and animal species that the Evenks, who were traditionally reindeer herders, depended on for their livelihood.[3]

Resolution:
In October 2009, the Council of Deputies of the Evenkiya Region ruled invalid the public hearing conducted for the dam's Environmental Impact Assessment, citing inadequate project documentation. Allegedly, the EIA did not contain "enough science-based, environmental, social or economic information to allow for an objective public hearing." This effectively halted the project.[4]

Updates:
In December 2011, it was reported that project documentation for the dam had been completed, and that it was "undergoing approval at various levels." In addition, according to a "new territorial planning scheme of the Krasnoyarsk Territory," there are plans to construct 7 new large hydropower plants along the area's rivers by 2030.[5]

---

[1] UN Human Rights Council, Report of the Special Rapporteur on the Rights of Indigenous Peoples on the Situation of Indigenous Peoples in the Russian Federation, 23 June 2010, A/HRC/15/37/Add.5, p. 10 available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/147/79/PDF/G1014779.pdf?OpenElement, accessed 9 August 2012

[2] UN Committee on the Elimination of Racial Discrimination, Concluding Observations on the Report Submitted by the Russian Federation, 22 September 2008, CERD/C/RUS/CO/19, p. 17 available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/441/78/PDF/G0844178.pdf?OpenElement, accessed 10 August 2012

[3] Special Rapporteur Report on Russia, 13

[4] *Krasnoyark Villages Halt Controversial Dam Project*, 10 October 2009, available at http://pacificenvironment.org/article.php?id=3152, accessed 11 August 2012

[5] *Russia: Evenki Hydroelectric Dam Pops Up Again*, 4 December 2011, available at http://www.iwgia.org/news/search-news?news_id=400, accessed 11 August 2012

Peru: *Seeking Redress before a Foreign Jurisdiction*

Under Peru's Native Communities Act of 1974, Indigenous Peoples may achieve legal recognition of their lands through a process of community titling. This law provides for a process of demarcation of community lands, with the possibility of expansion of these titles to include adjacent areas. However, cases have been noted wherein the award of land titles and grant of expansions have been slow, with some areas allegedly having been assigned to corporate mining interests.[1]

In 2011, Peru passed its law requiring government to consult with Indigenous Peoples before "developing new legislation or creating concessions for infrastructure, energy and mining projects" that will affect their lives and territories. However, while the law "establishes that the aim of consultation is to reach agreement or consent between the State and the Indigenous Peoples," it is the government who ultimately has the final say in case an agreement is not reached. Furthermore, it has been pointed out that the law "exonerates existing projects and legislation from the need to consultation."[2]

LAND (POLLUTION AND ACCESS TO NATURAL RESOURCES)

Carijano et al vs. Occidental Petroleum[3]
Location: Rio Corrientes, Northern Peru
Affected Communities: Achuar
As of: May 2007 (suit filed)
Type: Legal (foreign jurisdiction)

Facts:
This case was brought before the Los Angeles County Superior Court by 25 members of the Achuar community (personally and on behalf of their minor children) and Amazon Watch, a California-based support group. The suit was brought against Occidental Petroleum Corporation (Occidental), a Delaware-based company, and its indirect subsidiary Occidental Peruana (OxyPeru). Occidental and OxyPeru began operating in Achuar territories in the 1970s, and pulled out in 2000.

Plaintiffs alleged that:

- Occidental and OxyPeru "knowingly utilized out of date methods for separating crude oil that contravened United States and Peruvian law,

resulting in the discharge of millions of gallons of toxic oil byproducts in the area's waterways." Due to frequent contact with these contaminants, the Achuar community, including their children, were shown to have dangerous levels of lead and cadmium in their bloodstream, and often suffered from "gastrointestinal problems, kidney trouble, skin rashes and aches and pains attributed to the pollution."[4]

- The pollution has caused decreasing yields of fish and has been the cause of death and disease of animals traditionally hunted by the Achuar. It likewise "harmed agricultural productivity and land values."[5]
- Occidental was aware of the dangers posed by its operations but failed to warn the residents of the contamination and its effects.[6]

In their suit, Plaintiffs prayed "for damages, injunctive and declaratory relief, restitution and disgorgement of profits on behalf of the individual plaintiffs" and the classes they represented.[7] They initiated the action before a foreign forum, alleging that the Peruvian judiciary was discriminatory and corrupt, and that procedural requirements such as filing fees and documentation made it logistically difficult for communities such as the Achuar to seek redress before their domestic courts.[8]

Resolution:
In 2008, the District Court dismissed the case on *forum non conveniens* grounds, without hearing oral arguments. The District Court likewise denied Plaintiffs discovery request to ascertain "the adequacy of Peru as an alternative forum, the current location of witnesses and evidence, and limited depositions" as regards Occidental's Peruvian operations.[9]

On appeal, the United States Court of Appeals held in December 2010 that the District Court had abused its discretion ordering the dismissal of the case. The CA ruled (among others) that Occidental had failed to establish that Plaintiffs could seek an equally satisfactory remedy before their domestic courts and did not address whether a Peruvian judgment could be enforced in the United States.[10] The case was remanded to the lower court.

Status:
In 2011, Canadian oil company Talisman Energy increased its operations in the Achuar territory, which it began in 2004 in partnership with OxyPeru. By 2011, Talisman's operations covered 1.7 million hectares of rainforests and river basins. This expansion was carried out despite consistent opposition by the Achuar community, whose protests included petitions to the national government in Peru and Talisman corporate offices in Canada.[11]

[1] See Organization for the Development of Border Communities of El Cenepa (ODECOFROC), *Peru: A Chronicle of Deception*, IWGIA Report 5 – 2010, available at http://www.iwgia.org/iwgia_files_publications_files/a_chronicle_of_deception.pdf, accessed 23 September 2012

[2] McLennan, G. *Peru's Consultation Law: A Victory for Indigenous Peoples?* 22 September 2011, available at http://amazonwatch.org/news/2011/0922-perus-consultation-law-a-victory-for-indigenous-peoples, accessed 23 September 2012

[3] United States Court of Appeals 9th Circuit, *Carijano et al vs. Occidental Petroleum* Opinion [No. 08-56187 D.C. No. 2:07-cv-05068-PSG-PJW], 6 December 2010, available at http://www.ca9.uscourts.gov/datastore/opinions/2010/12/06/08-56187.pdf, accessed 23 September 2012

[4] Ibid, 19461

[5] Ibid

[6] Ibid

[7] Ibid, 19462

[8] Ibid, 19468-9

[9] Ibid, 19462

[10] Ibid, 19479

[11] *The Achuar and Talisman Energy* at http://amazonwatch.org/work/talisman, accessed 23 September 2012

Cambodia: *Increasing Concessions*

The Cambodian Law on Forestry (passed 2002) provides that forests are property of the State, and "only recognizes and ensures traditional user rights for the purpose of traditional customs, beliefs, religions and living." But because forests are publicly owned, the State is authorized to convert these into "state private lands," over which economic concessions are granted to third parties.[1]

The Cambodian Land Law (passed 2001) allows for collective land titling of indigenous territories, based on their actual use and occupation. Additional legislation to effect this was passed in 2009, but as of September 2010, no collective land title had yet been issued.[2]

Cambodian law likewise allows for the award of Social Land Concessions (SLCs), which is a "mechanism to transfer private state land for social purposes to the poor who lack land for residential and/or family farming purposes."[3] However, it is alleged that the SLCs issued to date have not complied with the process prescribed by the law, and far from fulfilling their avowed purposes, have been used to displace the poor "from their existing land, and turn it over to private companies for lucrative development projects."[4]

In September 2004, the Indigenous Peoples of Cambodia released a statement detailing their traditional management of their natural resources. Among the strategies they employ include agreements to determine traditional boundaries of forests and community lands, the principle of land as a communally held resource with allocated individual user rights, and the prohibition against selling land to non- Indigenous Peoples.[5]

PLANTATIONS

Socfinal-KCD Rubber Plantation
Location: Bousra commune, Mondolkiri province
Affected Communities: Bunong
As of: October 2008 (first land concession issued)
Type: Campaign

Facts:
The Mondolkiri land concession for rubber plantations was issued to a Joint Venture of Socfinal, a Luxembourg registered property, and Khaou Chuly Development, its Cambodian partner (Socfinal-KCD).

Land clearing for this project began in April 2008, covering seven Bunong villages in Mondolkiri province. Socfinal-KCD promised compensation to affected villagers. However, villagers alleged that the compensation offered was miserably inadequate, and negotiations were compounded with threats and intimidation. Other offers besides financial compensation included resettlement to alternative areas, with an option to cultivate rubber as part of Socfinal-KCD's "family rubber plantations." But even those who opted for this were not relocated until much later, and were transferred to an area not suitable for their needs.[6]

It is alleged that aside from the inequity involved in land acquisition for the project, Bunong workers employed by the plantations are subjected to "harsh and precarious working conditions", as they combine plantation work with harvesting their rice crops. The arrival of Khmer migrant workers for the plantations likewise allegedly threatens Bunong culture.[7]

Resolution:
Conflicts between the communities and Socfinal-KCD throughout September to December 2010 prompted the company to create an office dedicated to "relationships with the local population." Earlier, in May 2010, a meeting to discuss Free, Prior and Informed Consent had been held, but only as regards one of the concessions.[8]

Status:
As of 2010, it was reported that Socfinasia, the Luxembourg holdings company associated with this project had generated a profit of 137.28 million Euros. By September 2011, 3,000 hectares of rubber were planted for the company's Sethikula and Varanasi concessions.[9]

CIV Company Rubber Plantation

Location: Snoul district, Kratie province
Affected Communities: Stieng
As of: May 2008 (land concession issued)
Type: Campaign

Facts:
The land concessions involved were issued to the Vietnamese-owned CIV Company by the provincial government (covering 970 hectares) and to the Korean-owned Grow West Building Trading Company by the national government (covering 10,000 hectares). Primarily affected was the Sre Cha community in the

Snoul commune, composed of a mixed population of Stieng Indigenous Peoples and Khmer residents.[10]

Protests against the CIV Company were launched as early as 2008, soon after the concession issued. These resulted in criminal complaints filed by the Company against some of the protesters, which are allegedly unsubstantiated.

In 2009, villagers from the community lodged a complaint alleging forced evictions and intimidation perpetrated by CIV Company before national government agencies. As of January 2010, this complaint has not been acted on, and clearing operations for the project have continued.[11]

Resolution:
In March 2012, CIV Company allegedly acceded to return of the land under their concession to the protesting villagers, although most residents expressed doubts as to the sincerity of this offer. The company had likewise given the villagers permission to cultivate crops on the disputed lands, subject to the payment of US$500.[12]

Status:
It is reported that land titles will have been issued to 600 families in the Snoul district, over state-owned lands and lands covered by the CIV concession by September 2012.[13]

---

1 Indigenous Peoples NGO Network (IPPN) et al, *The Rights of Indigenous Peoples in Cambodia*, submission to the UN Commission to End Racial Discrimination, September 2010, p. 5-6, available at http://www2.ohchr.org/english/bodies/cerd/docs/ngos/NGO_Forum_Cambodia76.pdf, accessed 26 August 2012

2 Ibid, p. 7

3 Art. 2, 2003 Sub-decree on Social Land Concessions, cited in LICADHO Cambodian League for the Protection and Defense of Human Rights, p. 11 *Land Grabbing and Poverty in Cambodia: The Myth of Development*, May 2009, available at http://www.licadho-cambodia.org/reports/files/134LICADHOREportMythofDevelopment2009Eng.pdf, accessed 12 September 2012

4 Ibid

5 Statement by Indigenous People, made in Trang Village, Chh'en Commune, Oral District, Kompong Speu Province, 24 September 2004, available as Appendix 1 to IPPN

6 Ibid, Appendix 2, 3

7 FIDH-Cambodia, *Cambodia Lands Cleared for Rubber: Rights Bulldozed*, No. 574a, October 2011, p. 7, available at http://www.fidh.org/IMG/pdf/report_cambodia_socfin-kcd_low_def.pdf, accessed 11 September 2012

8 Ibid, p. 34

9 Ibid, p. 20, 34

10 IPPN, Appendix 5, 1

11 IPPN, Appendix 5, 1

12 Titthara, M., D*oubt Lingers Despite Kratie Dispute Accord*, in the Phnom Penh Post, 2 March 2012, available at www.phnompenhpost.com/index.php/National-neww/Page-63.html?adid=1253, accessed 12 September 2012

13 Channyda, C. *PM Will Hand-Deliver Titles*, in the Phnom Penh Post, 5 September 2012, available at www.phnompenhpost.com/index.php/2012090558506/National-news/pm-willhand-deliver-titles.htm, accessed 12 September 2012

Laos: *Introducing FPIC through REDD*

Under Laotian law, all lands and natural resources belong to the State. The State may allocate community use of these lands under the 2007 Forest Law and the 2003 Land Law. Individual land titles may be issued over agricultural and forestlands, at a maximum of 3 hectares per title.[1]

In 2007, the National Land Management Authority issued Ministerial Instruction 564 on Adjudications Pertaining to Land Use and Occupation for Land Registration and Titling, which made it possible to "issue communal titles for land used exclusively by villagers."[2] However, it was not until 2011 that the first communal land titles were issued to ethnically mixed communities in Sangthong District. In August 2011, 3-month long temporary communal land titles were issued for village production forests, which were the source of bamboo, and rattan resources relied on by the villagers for their livelihoods.[3]

These communal land titles may be issued depending on use – whether for production forests, protection forests, rotational slash and burn agriculture, agriculture plantations, etc. Relevant to this is Laos' efforts to develop comprehensive Land Use Plans, though the government admits that village participation in this has been low.[4]

REDD-PLUS

Germany-Laos Pilot REDD Project
Location: Nam Phui National Protected Area, Sayabouri Province
Affected Communities: Mixed ethnicities (Lao-Tai)
As of: October 2011
Type: Pilot Project

Facts:
This REDD-plus initiative covering eight villages in Sayabouri Province is being spearheaded by the German Agency for International Cooperation (GIZ), with assistance from the Laotian Department of Forestry and the civil society organization, the Lao Biodiversity Association.[5]

This REDD-plus project is groundbreaking in the sense that it will be the first in the country to undergo the Free, Prior and Informed Consent (FPIC) process. This is despite the absence of a national regulatory framework for FPIC.[6]

Resolution:
The Laotian Ministry of Foreign Affairs has officially endorsed the United Nations Declaration on the Rights of Indigenous Peoples, which includes the right to FPIC. As such, GIZ and the Department of Forestry have allegedly verbally agreed that "if a community rejects REDD, the project will respect its decision."[7]

Status:
Other partners such as the World Bank, SNV, JICA and Finland have also introduced other REDD-plus initiatives. Along with GIZ's project, these are all undergoing the Readiness Phase as of June 2012.[8]

Furthermore, Laos is among the countries involved in the World Bank's Forest Carbon Partnership Activity and is among those moving on to the Forest Investment Program. However, difficulty in the implementation of this program has arisen due to disputes as regards the land tenure of the subject forests.[9]

---

[1] Moore, C. et al., *REDD+ in Lao PDR: Is it Also a "Plus" for Forest-Dependent Communities?* in Lessons About Land Tenure and Forest Governance and REDD+, Naughton-Treves, L. and Day, C., eds., January 2012, p. 84-5, available at www.nelson.wise.edu/ltc/docs/Lessons-about-Land-Tenure-Forest-Governance-and -REDD+.pdf, accessed 14 September 2012

[2] Ibid.

[3] Chokkalingam, U. *Laos Issues its First Communal Forest Land Titles*, 9 November 2011, available at www.forestcarbonasia.org/articles/laos-issues-its-first-communal-forest-land-titles-national-workshop/, accessed 14 September 2012

[4] Inthavonos, C. Presentation on Communal Land Titling: Government's Policies and Plans, presented at the INCO-LWG Meeting on Communal Land Titling, 6 October 2011, available as an Annex to Chokkalingam

[5] Goetze, K., *Lao-German REDD+ Project Pioneers FPIC in Sayabouri Province*, Laos, 5 October 2011, available at www.forestcarbonasia.or/articles/lao-german-redd-project-pioneers-fpic-in-sayabouri-province-laos/, accessed 14 September 2012

[6] Ibid.

[7] *Update 2011- Laos*, available at http://www.iwgia.org/regions/asia/laos/876-update-2011-laos, accessed 14 September 2012

[8] *REDD Readiness Fact Sheet for Lao PDR*, June 2012, available at http://www.forestcarbonpartnership.org/sites/forestcarbonpartnership.org/files/Documents/PDF/June2012/Lao%20PDR%20REDD%20Readiness%20Progress%20Sheet_June%202012.pdf, accessed 14 September 2012

[9] *Update 2011-Laos*

Canada: *Indigenous Rights to Oceans and Lands*

Section 35 of Part III of the 1982 Canadian Constitution "recognizes and affirms the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada." Treaty rights as used in the provision include "rights that now exist by way of land claims agreements or may be so acquired."[1]

"Determining the nature and scope" of these rights has been the task of the Courts. The Canadian Supreme Court's decision in *Sparrow vs. Her Majesty the Queen*, as refined in subsequent aboriginal fisheries jurisprudence clarified the following interpretative principles[2]:

- The purposes of subsection 35(1) are to recognize the prior occupation of North America by Aboriginal peoples, and to reconcile that prior presence with the assertion of Crown sovereignty;
- In subsection 35(1), the term "existing" refers to rights that were "unextinguished" in 1982, i.e., not terminated or abolished;
- Subsection 35(1) rights may limit the application of federal and provincial law to Aboriginal peoples, but are not immune from government regulation;
- The Crown must justify any proven legislative infringement of an existing Aboriginal right;
- Aboriginal rights may be defined as flowing from practices, traditions and customs that were central to North American Aboriginal societies prior to contact with Europeans;
- In order to be recognized as Aboriginal rights, such practices and traditions must — even if evolved into modern form — have been integral to the distinctive Aboriginal culture;
- Subsection 35(1) protection of Aboriginal rights is not conditional on the existence of Aboriginal title or on post-contact recognition of those rights by colonial powers;
- Aboriginal title is a distinct species of Aboriginal right;
- Self-government claims are subject to the same analytical framework as other Aboriginal rights claims;
- Aboriginal rights cases are to be adjudicated by the application of principles to facts specific to each case rather than on a general basis;
- Courts should approach the rules of evidence in Aboriginal rights matters, and interpret the evidence presented, conscious of the special nature of Aboriginal claims and of the evidentiary difficulties associated

with proving a right or rights originating when there were no written records.

FISHERIES

Sparrow vs. Her Majesty the Queen[3]

Location: Fraser River, within Vancouver City
Affected Communities: Musqueam Indian
As of: March 1984 (charge filed)
Type: Legal (domestic)

Facts:
Appellant Ronald Edward Sparrow was a member of the Musqueam Indian Band. In 1984, he was charged under the 1981 Fisheries Act of "fishing with a drift net longer than that permitted by the terms of the Band Indian's food fishing license." Sparrow's drift net allegedly measured longer than the allowed 25 fathoms length. Sparrow did not deny this charge, but argued that "he was exercising an existing aboriginal right to fish and that the net length restriction was inconsistent with Section 35 of the Constitution."[4]

The First-level and County Courts dismissed the case, finding that an aboriginal right had to be "supported by a special treaty, proclamation, contract or other document," and that the aboriginal fishing right claimed was merely "said to have been exercised by the Musqueam from time immemorial."[5]

The Vancouver Court of Appeals found that the lower courts had erred in ruling that Sparrow could not rely on an aboriginal right to fish. However, while upholding the aboriginal right to fish, the Court of Appeals ruled that the right could be subjected to regulation as regards its time, place and manner.

For its part, the Crown argued that the Musqueam Band's aboriginal right to fish had been extinguished by the regulations imposed under the Fisheries Act. Sparrow argued that the fisheries regulations had the effect of extinguishing the aboriginal right, as these were issued in a manner "necessarily inconsistent with the continued enjoyment of aboriginal rights."

Resolution:
The Canadian Supreme Court made the following findings:

- The term "existing aboriginal rights" as used in the Constitutional provision must be interpreted flexibly to allow for their evolution over time. An approach to the Constitutional guarantee which would "incorporate frozen rights must be rejected." "Existing" is thus taken to mean "unextinguished", rather than "exercisable at a certain time in history."[6]

- That the aboriginal right to fish is controlled by regulations does not mean that the right is extinguished. Nothing in the Fisheries Act or its regulations evinces an intention to extinguish the Musqueam Band's aboriginal right to fish. The permits were merely a manner of controlling the fisheries for purposes of conservation, and did not define underlying rights.[7]
- The Crown has not proven that the right has been extinguished. An aboriginal right should not be defined by incorporating the ways in which it has been regulated in the past.[8]
- Section 35 (1) of the Constitution must be interpreted in a purposive way. The provision needs to be interpreted in a generous and liberal manner. The words "recognize and affirm" as used in the provision impute a fiduciary relationship that imposes some restraint on the exercise of sovereign power by the Crown. While rights "recognized and affirmed" do not preclude the regulations on their exercise, "such regulation must be enacted according to a valid objective."[9]
- The Supreme Court finally upheld Sparrow's acquittal, and ordered a new trial to determine whether or not the net length restriction constituted an infringement on the Musqueam Band's aboriginal fishing right.

Status:
It has been observed that the evolution of Canada's fishing rights policies has been "driven more by litigation than by legislation."[10]

After *Sparrow*, Courts have penned decisions on First Nation communities' right to engage in commercial fisheries, one of which is discussed below.

Furthermore, in 1992, Canada formulated an Aboriginal Fishing Strategy in response to the decision in *Sparrow*. The AFS is intended to facilitate the negotiation of mutually acceptable terms with regard to fishery resource management between the Canadian Department of Fisheries and Oceans and concerned aboriginal groups.

Ahousaht Indian Band vs. Canada (Attorney General)[11]
Location: Tolfino and Clayoquot Sound, west Vancouver Island
Affected Communities: Nuu-Chah-nulth First Nations (collective name)
As of: 2003 (case filed)
Type: Legal (domestic)

Facts:
The Nuu-Chah-nulth in this case sought declarations of their aboriginal right to harvest and market fisheries resources in their traditional territories, as well as a declaration that Canada's regulatory regime for fisheries infringed their rights. Particularly, they claimed "rights to harvest various species of fisheries resources

in their territory for food purposes, social purposes, ceremonial purposes, trade purposes, purposes of exchange for money or other goods, commercial purposes, (or purposes) of sustaining the communities."[12]

The trial judge found that the Nuu-Chah-nulth had "established aboriginal rights to fish for any species of fish within the environs of their territories and to sell that fish" that had been caught pursuant to their aboriginal right. She clarified that while this did not constitute "an unlimited right to fish on an industrial scale," it did "encompass a right to sell fish in the commercial marketplace." Furthermore, she held that "Canada's legislative regime and regulation of the fisheries constituted a *prima facie* infringement of the Nuu-Chah-nulth's rights."[13]

In their appeal, Canada alleged that the trial judged "erred in her factual findings" that trade in significant quantities of fisheries resources was integral to the Nuu-Chah-nulth's aboriginal right.[14]

The British Columbia Court of Appeals upheld the trial judge's decision, varying only the period within which the parties were directed to engage in consultation and negotiation.

Resolution:
In March 2012, the Canadian Supreme Court declined to hear Canada's appeal, and instead remanded it the British Columbia Court of Appeals for review, in accordance with its decision in the 2011 case *Lax Kw'alaams Indian Band vs. Canada* [2011 SCC 56].

In this case, the Supreme Court established a set of principles to decide questions of aboriginal commercial fishing rights, as follows[15]:

1. Identify the precise nature of the claim to an Aboriginal right;
2. Determine whether the First Nation has proved the existence of a pre-contact practice;
3. Determine whether the claimed modern right has a reasonable degree of continuity with the "integral" pre-contact practice; and
4. In the event that an Aboriginal right to trade commercially is found to exist, determine the impact of competing objectives, such as conservation, economics, fisheries by non-aboriginal groups and reconciliation of aboriginal societies with the rest of Canadian society.

Staus:
The case still appears to be pending before the British Columbia Court of Appeals.

LAND

Delgamuukw vs. British Columbia[16]

Location:	**British Columbia**
Affected Communities:	**Gitxsan or Wet'suwet'en**
As of:	**1987 (action filed)**
Type:	**Legal (domestic)**

Facts:
All Gitxsan or Wet'suwet'en hereditary chiefs, both individually and on behalf of their Houses, filed claims covering 58,000 square kilometers of land in British Columbia. This area was to be divided into 133 individual territories claimed by 71 Houses. This claim was based on "their historical use and ownership of these territories," evidenced in their oral traditions.[17]

British Columbia argued that the Wet'suwet'en had no right or interest in the territory, and that their cause of action should have been a claim for compensation from the Canadian government.[18]

The trial judge dismissed the action for ownership, jurisdiction and aboriginal rights, ruling that the Wet'suwet'en were only entitled to "use unoccupied or vacant land subject to the general law of the province." On appeal, the claims were modified as "claims for aboriginal title and self government", but the appeal was likewise ultimately dismissed.[19]

Resolution:
The Canadian Supreme Court made the following findings:

- Aboriginal title is *sui generis*, and so is inalienable and cannot be transferred, sold or surrendered to anyone other than the Crown. It is likewise held communally. Furthermore, it imposes a limitation on the lands so held such that they cannot be used in a manner that is "irreconcilable with the nature of the claimant's attachment to those lands." Aboriginal title was well recognized even prior to the 1982 Constitution and is protected accordingly by Section 35(1).[20]
- Aboriginal title varies from aboriginal rights. "Aboriginal title confers more than the right to engage in site specific activities which are aspects of the practices, customs and traditions of distinctive aboriginal cultures. Site-specific rights can be made even if title cannot. Because aboriginal rights vary with respect to their degree of connection with the land, some aboriginal groups may be unable to make out a claim to title, but will nevertheless possess aboriginal rights that are recognized and affirmed by Section 35(1), including site specific rights to engage in particular activities."[21]

- As to the question of infringement of aboriginal title, three aspects of aboriginal title were considered relevant – first, the right to exclusive use and occupation of the land, second, the right to choose to what uses the land will be put, and third, the economic component.

Status:

In 2011, the Gitxsan peoples organized the Gitxsan Development Corporation, intended to be the "economic vehicle" through which the rights recognized in the Supreme Court decision would be exercised. The Corporation has 2 subsidiaries, which deal with Forestry and Energy concerns. In July 2012, GDC entered into various agreements relative to the Northwest Transmission Line – first, a Cooperation Agreement with the Skii km Lax Ha Nation for negotiation with BC Hydro and second, a Joint Venture Agreement with Brinkman Forests, for preparations of the right of way for the project.[22]

---

[1] *Core Document forming part of the Report of States Parties (HRI/CORE/1/ Add.91.)*, 12 January 1998, available at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/03fb40eed8e59cc2802565fc00544e3c?Opendocument, accessed 15 September 2012

[2] Hurley, M. *Aboriginal Title: The Supreme Court of Canada Decision in Delgamuukw v. British Columbia*, February 2000, available at http://www.parl.gc.ca/Content/LOP/ResearchPublications/bp459-e.htm#(9)txt, accessed 15 September 2012

[3] Sparrow vs. Her Majesty the Queen Decision [1 S.C.R. 075], 31 May 1990, available at http://scc.lexum.org/en/1990/1990scr1-1075/1990scr1-1075.html, accessed 15 September 2012

[4] Ibid, 2

[5] Ibid, 2-3

[6] Ibid, 20

[7] Ibid, 3

[8] Ibid, 27

[9] Ibid, 37

[10] Tue, N. *Food Fishery Tangled in Native Net Profits*, 12 June 2012, available at www.biv.com/article/20120612/BIV0104/120619993/-1/BIV/food-fishery-tangled-in-native-net-profits, accessed 15 September 2012

[11] Ahousaht Indian Band vs. Canada, British Columbia Court of Appeals Judgement [B.C.J. No. 913], May 18, 2011, available at turtletalkfiles.wordpress.com/2011/05/5-23-11-ahousaht-indian-band-v-canada-attorney-general.pdf, accessed 18 September 2012

[12] Ibid, 5

[13] Ibid, 6-7

[14] Ibid, 14

[15] *Supreme Court of Canada Directs BC Court of Appeal to Reconsider Ahousaht Fishing Rights Decision*, 17 April 2012, available at www.bht.com/tw_0021, accessed 18 September 2012

[16] Delgamuukw vs. British Columbia Decision [3 S.C.R. 1010], December 11, 1997 available at scc.lexum.org/en/1997/1997scr3-1010.pdf, accessed 15 September 2012

[17] Ibid, 2-3

[18] Ibid

[19] Ibid, 3-4

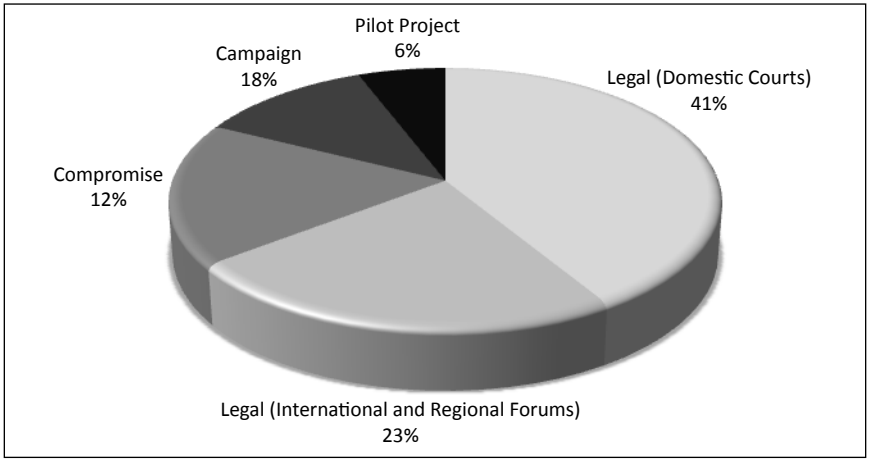
[20] Ibid, 7-8

[21] Ibid

[22] Information from: www.gitxsanbusiness.com, accessed 18 September 2012

Discussion

Various mechanisms have been maximized in asserting Indigenous ownership of lands and resources. Of the 11 countries and 17 cases surveyed, the following is the breakdown of strategies employed:



Resorting to the judiciary and other higher decision-making bodies seems to be the leading strategy. Of these cases, the following observations can be made:

1. **The availability of alternatives to domestic litigation, especially when these pertain specifically to Human Rights issues have been greatly maximized.**

Those who sought remedies from international and regional forums had the benefit of regional agreements and forums on Human Rights issues. Of the cases surveyed, this strategy was used by South American countries – Nicaragua, Suriname, Paraguay and Peru – where claimants relied in large part on the American Convention and the Inter-American Court of Human Rights.

Concerns regarding the impartiality and competence of domestic judicial bodies may also be addressed by seeking remedies before foreign courts, such as in suits involving corporations based in other jurisdictions. This strategy was employed

by the Achuar community in Peru in the case for injunction and damages against the US company Occidental Petroleum.

2. Policy and regulations on Indigenous Peoples' land and resources have been shaped by the Courts' decisions in individual claims.

The decisions of domestic courts could be used as takeoff points for new and/or expanded policies and regulations on Indigenous Peoples rights to land and resources. In New Zealand, the Waitangi Tribunal's findings in the 1992 Ngai Tahu Sea Fisheries Report were considered in the customary fishing regulations that were agreed upon six years later. Similarly, the decision in *Sparrow v. Her Majesty the Queen*, Canada's landmark case on aboriginal fisheries informed the formulation of an Aboriginal Fishing Strategy in 1992.

The value of these decisions as a source of domestic jurisprudence is likewise important. Of the surveyed cases, this is particularly exemplified in *Sparrow*, which continues to be cited in subsequent claims brought before Canadian courts, and accordingly expounded on in their decisions.

However, it must be noted that resort to courts and judicial bodies is not without attendant risks. While judicial decisions can be used as springboards to improve or reform policies and regulations, so too can they be used to entrench or fix doctrines that have been less accommodating of the recognition of Indigenous Peoples rights.

Other concerns include the costs and capacities that initiating judicial action entails. For these, some communities have relied on support from NGOs, Civil Society and the academe to bring their cases before judicial forums. Finally, judicial remedies tend to run for long periods, especially where multiple appeals are filed before higher courts. Many of the surveyed cases illustrate this, with final resolutions having been reached only after eleven years. Execution and implementation of these decisions could take longer still.

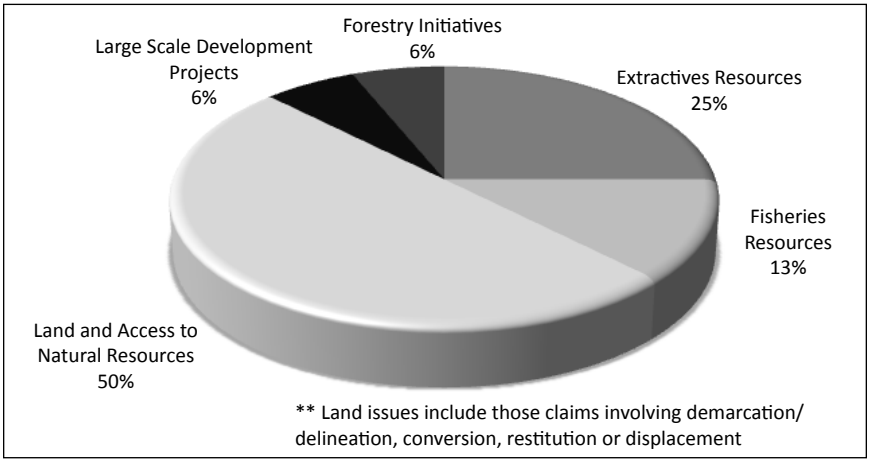
3. Both domestic and regional jurisprudence continue to inform the discourse on indigenous peoples' rights to land and resources and the interpretation of international standards and instruments in this regard.

Pentassuglia posits, "international jurisprudence is the main vehicle for articulating the content and meaning of Indigenous land rights." This takes place through a synergy of domestic courts and international judicial and quasi-judicial bodies.[1]

This is valuable given the difficulty in implementing specialized instruments such as the United Nations Declaration on the Rights of Indigenous Peoples and ILO Convention 169. Pentassuglia argues that judicial and quasi-judicial practice

"engages in jurisprudential dialogue rather than implementing specialized standards," but that ultimately, "judicial discourse is able to address Indigenous land issues in ways which account for developments under human rights law."[2]

From the cases surveyed, following is the breakdown of the claims involved:



From these, the following observations can be made:

1. Titles are helpful, but by no means absolute guarantees

Indigenous Peoples' assertions of ownership have largely focused on their traditional territories or ancestral lands. Of the cases surveyed, at least five – Nicaragua, Brazil, Paraguay, Suriname and Cambodia -- involved claims for the recognition, usually through delimitation/demarcation and titling, of the lands considered Indigenous territories.

In some jurisdictions, special forms of titles are issued for indigenous territories. Titles are held by clan groups or communities rather than individuals, recognizing the nature of Indigenous lands as communally or collectively owned. Titles can be specific to Indigenous peoples – as is the case in Canada and Brazil, where aboriginal title is considered *sui generis*. Alternatively, Indigenous communities are merely beneficiaries of a larger scheme of land distribution to landless constituents – as is illustrated by the Social Land Concessions in Cambodia.

In any case, titles are important proofs to evidence any claims of ownership. There are likewise advantages to having territories and boundaries categorically defined and demarcated, especially in asserting rights to access, use, control and benefit from the natural resources found therein.

The IACHR recognizes this in *Saramaka People v. Suriname*, citing the decisions in *Awas Tingni* and *Yakye Axa v. Paraguay* as follows:

> "[R]ather than a privilege to use the land, which can be taken away by the State or trumped by real property rights of third parties, members of indigenous and tribal peoples must obtain title to their territory in order to guarantee its permanent use and enjoyment. This title must be recognized and respected, not only in practice, but also in law, in order to ensure its legal certainty."[3]

However, how effectively these titles ensure genuine tenurial security beyond recognition on paper for Indigenous Peoples communities is yet to be tested. At the outset, lengthy processes and inadequate Guidelines have already bogged down the issuance of some of these instruments. The value of these titles as instruments by which Indigenous Peoples rights can be protected is largely dependent on the availability and efficacy of domestic policy and governance. For instance, despite the IACHR's trailblazing decision in *Awas Tingni v. Nicaragua* in 2001, it was not until 2008 that title was granted to the Awas Tingni community. Similarly, despite provisions for collective land titling of indigenous territories passed in Cambodia in 2001 and 2009, progress in securing tenurial security for the country's Indigenous peoples has been slow. The absence of any domestic legislation prevents compliance with IACHR directives on the demarcation and titling of Indigenous lands in Suriname, and limits the rights of Indigenous reindeer herders in Russia.

Furthermore, the implications of these titles in light of resource use instruments issued by the State remains to be seen. A title to traditional territories does not guarantee Indigenous Peoples full exercise of their rights to access and control of natural resources, nor does it ensure that they derive benefits from the utilization and disposition of these. Nonetheless, it is submitted that claims of Indigenous Peoples' ownership of natural resources necessarily begin with their claim to the land wherein these resources are found. If tenurial security of traditional lands is not ensured, then there is little opportunity to assert ownership of the natural resources that these contain.

2. States claim more comprehensive ownership of natural resources

Even Indigenous Peoples' traditional use of natural resources is acknowledged, States' control of natural resource use and disposition is usually more restrictive. Proceeding as they do from the argument that all natural resources belong to the State, natural resource utilization and development is usually subject to permits or resource use instruments, or pursuant to plans or projects of the State itself.

The New Zealand example in this regard is unique. In that jurisdiction, Māori traditional territories, or *rohe*, are well recognized under the Treaty of Waitangi.

With this in place, the cases decided by the Waitangi tribunal show that there is space to raise questions of ownership over natural resources such as petroleum, and to argue for wider ranges of territory that encompass not only land, but also seaward areas.

The Canadian example, on the other hand, distinguishes between "aboriginal title" and "aboriginal rights," such that "aboriginal rights which are practices, customs and traditions integral to the distinctive aboriginal culture of the group" may receive protection, even where "the use and occupation of the land where the activity is taking place is not sufficient to support a claim of title. Site-specific activities may be made out even if title cannot."[4]

New Zealand, Canada and Russia have developed mechanisms to grant special resource use permits for traditional or aboriginal livelihoods. The Canadian experience with fisheries regulations demonstrated in ***Ahousaht Indian Band vs. Canada*** has illustrated that "livelihood" in this sense can be construed to include harvesting or production on a commercial scale.

Nonetheless, the award of resource use permits to Indigenous communities is scant when compared to the award of these to investors, usually private foreign entities with significant capital and resources, who are expected to boost national and local economies. This makes these investments highly attractive to both national and local-level governments, especially in the areas where additional revenue is much needed.

Indigenous peoples' participation in the award of these permits is limited at best to conspicuously absent. Many of the cases involve claims that the Indigenous communities directly affected by large-scale plans and projects were consulted, let alone afforded the right to Free, Prior and Informed Consent (FPIC), as contained in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). This complaint is consistently noted – whether the projects are mines, plantations or hydroelectric power plants. In fact, of the cases surveyed, mechanisms for FPIC as contemplated by the UNDRIP have yet to be formally instituted.

Nonetheless, Indigenous peoples' attempts to participate in these ventures are observed in the cases from New Caledonia and Canada. The Kanak in New Caledonia have formalized benefit sharing mechanisms with mines, and have gone as far as owning as 51% stake in the mining corporation, as the host community of the project. In Canada, the Indigenous community has organized its own corporation, which enters into Joint Venture Agreements with private developers.

It is submitted that even where States claim that all natural resources within their jurisdiction are publicly owned, and thus exempt from Indigenous or

aboriginal title, State regulation of the use, development and disposition of natural resources should involve mechanisms to guard that these are done with full regard of Indigenous peoples' rights to their land, livelihoods and self-determination. This should include appropriate oversight of Indigenous peoples' participation in benefit-sharing agreements, corporations and Joint Ventures with the view of ensuring that these are not loopholes through which rights are violated.

[1] Pentassuglia, G. *Towards a Jurisprudential Articulation of Indigenous Rights*, The European Journal of International Law Vol. 22 No. 1 (2011) available at http://ejil.oxfordjournals.org/content/22/1/165.abstract, accessed 2 April 2013

[2] Ibid.

[3] Saramaka People v. Suriname, at 40

[4] Delgamuukw vs. British Columbia Decision [3 S.C.R. 1010], at 104

Conclusion

With regard to natural resources, rather than outright ownership, Indigenous Peoples have been more likely to claim one or a combination of three things – 1) access, 2) control or 3) compensation or benefits.

Claims for access to natural resources usually involve those that the Indigenous communities rely on for their livelihoods or those that are central to the practice of their customs. These arise when natural resource utilization and exploitation threaten Indigenous communities' natural resource base, either gradually (through adverse environmental impacts, as is alleged in New Caledonia), or totally (as will be the case for territories to be inundated by the proposed dams in Russia and Suriname).

Claims for control usually involve allegations that Indigenous communities were not consulted or did not give their consent to plans or projects initiated within their traditional territories. For Indigenous Peoples, this is usually exercised through the process of FPIC.

Claims for compensation or benefits may arise from States' or project proponents' failure to consult with the affected Indigenous communities before any contracts are executed or before any plans are carried out. In some cases, compensation is sought after the fact, when injury – whether community displacement or destruction of environmental resources -- has already been done, and damages are sought by way of reparation. However, in other cases, efforts have been made to devise some benefit sharing mechanism before a project's commencement – whether through Indigenous communities partnering with project proponent, as in New Caledonia, or through State directives such as legislation and Regulations, as is the case for New Zealand fisheries.

Access, control and compensation may be considered attributes of ownership to some degree – in particular, the rights to use and to benefit from the fruits (*jus utendi* and *jus fruendi*). However, these are not enough, and are often the result of grants from the ultimate owner – the State. As such, it is submitted that these do not necessarily translate into ownership.

A study done by the Rights and Resources Initiative in 2012 expands on these attributes further. RRI applied an "expanded bundle of rights" framework to compare national legislation on community and Indigenous Peoples forest tenure rights from 59 countries. This approach assessed the following:

- **Access Rights**, or the "rights held by a community and its members to enter a forest area;"[1]
- **Withdrawal Rights**, or the "right to benefit, for subsistence or commercial purposes;"[2]
- **Management Rights**, or "rights that communities have to regulate and make decisions about the forest resources and territories for which they have recognized access and withdrawal rights;"[3]
- **Exclusion Rights**, or the "right to exclude outsiders from the forest," for both offensive and defensive purposes; and
- **Alienation Rights**, or the "right to transfer one's rights to another entity."[4]

Additional dimensions included the duration of these rights, or whether they were granted for a certain period or in perpetuity, and the extinguishability of these rights, or whether communities were guaranteed compensation and due process should the State exercise its powers of eminent domain.[5]

The RRI study concluded that community rights to forest resources were restricted when one of the dimensions in the extended bundle of rights is denied or unrecognized. They further noted that even where these rights were allowed by the State through national legislation, recognition was often contingent on compliance with complex bureaucratic processes that were too difficult and costly for communities to meet.[6]

As such, while it is important that Indigenous Peoples continue to assert their rights to access natural resources in their territories, to FPIC and to equitable benefit sharing from natural resource utilization and exploitation. Indigenous Peoples cannot be considered owners of these natural resources while their exercise of these rights requires permission of the State, as it should be the other way around.

Ultimately, "indigenous land rights cannot be viewed as separate and distinct from cultural rights, from political rights, from economic rights and from religious and spiritual rights. These rights are inextricably connected, fundamental to a full appreciation of indigenous territorial rights, and most importantly, part and parcel of the right to self determination."[7]

[1] Rights and Resources Initiative, *What Rights? A Comparative Analysis of Developing Countries' National Legislation on Community and Indigenous Peoples' Forest Tenure Rights*, May 2012, available at http://www.rightsandresources.org/documents/files/doc_4924.pdf, accessed 1 June 2013, 15

[2] Ibid, 16

[3] Ibid, 17

[4] Ibid, 19

[5] Ibid, 21

[6] Ibid, 27, 32

[7] Daes, E. *Indigenous People and their Relationship to the Land, Final Working Paper presented by Erica Irene Daes, Special Rapporteur*, UN Doc. E/CN.4/Sub.2/2001/21, 11 June 2001, cited in Colchester, M. ed *A Survey of Indigenous Land Tenure* (December 2001) available at http://www.forestpeoples.org/sites/fpp/files/publication/2010/08/faolandtenurereportdec01eng.pdf, accessed 2 April 2013

References

Alvarenga, AM, ***The Demarcation Case of Raposa Serra do Sol Indigenous Land in Brazil,*** American University Washington College of Law ILSP Law Journal

Amazon Watch, *The Achuar and Talisman Energy* at http://amazonwatch.org/work/talisman

American Convention on Human Rights (1969)

Amnesty International, *Paraguay to Restore Indigenous Community's Ancestral Lands* (September 30, 2011) at www.amnesty.org.nz/news/paraguay-restore-indigenous-community's-ancestral-lands

Anaya, J. UN Human Rights Council, ***Report of the Special Rapporteur on the Rights of Indigenous Peoples on the Situation of Indigenous Peoples in Brazil*** A/HRC/12/34/Add.2 (26 August 2009)

Anaya, J. UN Human Rights Council, ***Report of the Special Rapporteur on the Rights of Indigenous Peoples on the Situation of Indigenous Peoples in the Russian Federation,*** A/HRC/15/37/Add.523 (June 2010)

Anaya, J. UN Human Rights Council, ***Report of the Special Rapporteur on the Rights of Indigenous Peoples on the Situation of Indigenous Peoples in New Zealand*** A/HRC/18/35/Add.4 (31 May 2011)

Anaya, J. UN Human Rights Council, ***Report of the Special Rapporteur on the Rights of Indigenous Peoples on the Situation of Indigenous Peoples in Suriname*** A/HRC/18/35/Add.7 (18 August 2011)

Anaya, J. UN Human Rights Council, ***Report of the Special Rapporteur on the Rights of Indigenous Peoples on the Situation of Indigenous Peoples in New Caledonia, France*** A/HRC/18/35/Add.6 (14 September 2011)

Anaya, J. and Claudio Grossman, ***The Case of Awas Tingni vs. Nicaragua: A New Step in the International Law of Indigenous Peoples,*** Arizona Journal of International and Comparative Law vol. 19 no. 1 (2002)

British Columbia Court of Appeals, ***Ahousaht Indian Band vs. Canada Judgment*** [B.C.J. No. 913], (May 18, 2011)

Bull Hauser, ***Supreme Court of Canada Directs BC Court of Appeal to Reconsider Ahousaht Fishing Rights Decision*** (17 April 2012) at www.bht.com/tw_0021

Channyda, C. *PM Will Hand-Deliver Titles*, in the Phnom Penh Post (5 September 2012) at www.phnompenhpost.com/index.php/2012090558506/National-news/pm-willhand-deliver-titles.htm

Chokkalingam, U. *Laos Issues its First Communal Forest Land Titles* (9 November 2011) at www.forestcarbonasia.org/articles/laos-issues-its-first-communal-forest-land-titles-national-workshop/

Colchester, M. ed ***A Survey of Indigenous Land Tenure*** – Forest Peoples ProgramUnited Nations Food and Agriculture Organization(December 2001)

Cultural Survival, *New Caledonia's Kanaks Fight Nickel Mining Project* (28 March 2003) at www.culturalsurvival.org/news/new-caledonia-s-kanaks-fight-nickel-mining-project

FIDH-Cambodia, *Cambodia Lands Cleared for Rubber: Rights Bulldozed,* No. 574a (October 2011) at http://www.fidh.org/IMG/pdf/report_cambodia_socfin-kcd_low_def.pdf

Forest Carbon Partnership, *REDD Readiness Fact Sheet for Lao PDR* (June 2012) at forestcarbonpartnership.org/fcp/sites/forestcarbonpartnership.org/files/Documents/PDF/June2012/Lao%20PDR%20REDD%20Readiness

Gitxsan Development Corporation, *About Information* from: www.gitxsanbusiness.com (2012)

Goetze, K., *Lao-German REDD+ Project Pioneers FPIC in Sayabouri Province, Laos* (5 October 2011) available at www.forestcarbonasia.or/articles/lao-german-redd-project-pioneers-fpic-in-sayabouri-province-laos/

Grewal, A. and Saleem Ali, ***New Approaches to Mining in New Caledonia,*** Cultural Survival Quarterly issue 28.1 (Spring 2004)

Hurley, M. Aboriginal Title: ***The Supreme Court of Canada Decision in Delgamuukw v. British Columbia*** (February 2000) at http://www.parl.gc.ca/Content/LOP/ResearchPublications/bp459-e.htm#(9)txt

Indigenous Peoples NGO Network (IPPN) et al, ***The Rights of Indigenous Peoples in Cambodia***, submission to the UN Commission to End Racial Discrimination (September 2010) at http://www2.ohchr.org/english/bodies/cerd/docs/ngos/NGO_Forum_Cambodia76.pdf

Inter-American Court of Human Rights, *Case of Awas Tingni vs. Nicaragua,* Judgment of 31 August 2001, Inter-Am. Ct. H.R., (Ser. C) No. 79 (2001)

Inter-American Court of Human Rights, *Case of the Sawhoyamaxa Indigenous Community vs. Paraguay,* Judgment of March 29, 2006, Inter-Am. Ct. H.R., (Ser. C) No. 125 (2006)

Inter-American Court of Human Rights, *Case of Saramaka People vs. Suriname,* Judgment of November 28, 2007, Inter-Am. Ct. H.R., (Ser. C) No. 172 (2007)

International Work Group for Indigenous Affairs, *Russia: Evenki Hydroelectric Dam Pops Up Again* (4 December 2011) at http://www.iwgia.org/news/search-news?newsid=400

International Work Group for Indigenous Affairs, *Update 2011- Laos,* at www.iwgia.or/regions/asia/laos/876-update-2011-laos

Koniambo Nickel SAS, *Project History* (2008) at http://www.koniambonickel.nc/index.php?option=com_content&task=view&id=39&Itemid=91&lang=en

LICADHO Cambodian League for the Protection and Defense of Human Rights, *Land Grabbing and Poverty in Cambodia: The Myth of Development* (May 2009)

McLennan, G. P*eru's Consultation Law: A Victory for Indigenous Peoples?* (22 September 2011) at http://amazonwatch.org/news/2011/0922-perus-consultation-law-a-victory-for-indigenous-peoples

Mining Watch Canada, *Xstrata Faces Growing Criticism Over Koniambo Nickel Project in Kanaky-New Caledonia* (2 January 2009) at www.miningwatch.ca/xstrata-faces-growing-criticism-ver-koniambo-nickel-project-new-caledonia-0

Moore, C. et al., *REDD+ in Lao PDR: Is it Also a "Plus" for Forest-Dependent Communities? in Naughton-Treves, L. and Day, C.,* eds., ***Lessons About Land Tenure and Forest Governance and REDD+,*** (January 2012)

New Zealand Ministry for Primary Industries, *Māori Fisheries* (16 November 2007) at www.fish.govt.nz/en-nz/Publications/State+of+our+fisheries/Māori+Fisheries/default.htm

Organization for the Development of Border Communities of El Cenepa (ODECOFROC), ***Peru: A Chronicle of Deception,*** IWGIA Report 5 – 2010 (2010) at http://www.iwgia.org/iwgia_files_publications_files/a_chronicle_of_deception.pdf

Pacific Environment, *Krasnoyark Villages Halt Controversial Dam Project* (10 October 2009) at http://pacificenvironment.org/article.php?id=3152

Pentassuglia, G. ***Towards a Jurisprudential Articulation of Indigenous Rights,*** The European Journal of International Law Vol. 22 No. 1 (2011)

Reuters, *Vale invokes force majeure at nickel project* (10 May 2012) at http://www.reuters.com/article/2012/05/10/vale-newcaledonia-forcemajeure-idUSL1E8GALBI20120510

Rights and Resources Initiative, *Awas Tingni People finally Receive Land Title from the Government of Nicaragua* (December 18, 2008), at www.rightsandresources.org/blog.php?id=380

Rights and Resources Initiative, *What Rights? A Comparative Analysis of Developing Countries' National Legislation on Community and Indigenous Peoples' Forest Tenure Rights* (May 2012) at http://www.rightsandresources.org/documents/files/doc_4924.pdf

Supreme Court of Canada, ***Delgamuukw vs. British Columbia Decision*** [3 S.C.R. 1010] (December 11, 1997)

Supreme Court of Canada, ***Sparrow vs. Her Majesty the Queen Decision*** [1 S.C.R. 075] (31 May 1990)

Titthara, M., *Doubt Lingers Despite Kratie Dispute Accord,* in the Phnom Penh Post (2 March 2012) at www.phnompenhpost.com/index.php/National-neww/Page-63.html?adid=1253

Tue, N. ***Food Fishery Tangled in Native Net Profits*** (12 June 2012) at www.biv.com/article/20120612/BIV0104/120619993/-1/BIV/food-fishery-tangled-in-native-net-profits

UN Committee on the Elimination of Racial Discrimination, ***Concluding Observations on the Report Submitted by the Russian Federation*** CERD/C/RUS/CO/19 (22 September 2008)

United Nations International Human Rights Instruments, ***Canada:Core Document forming part of the Report of States Parties*** HRI/CORE/1/Add.91. (12 January 1998)

United States Court of Appeals 9th Circuit, ***Carijano et al vs. Occidental Petroleum Opinion*** [No. 08-56187 D.C. No. 2:07-cv-05068-PSG-PJW] (6 December 2010)

Waitangi Tribunal, ***The Ngai Tahu Sea Fisheries Report*** (6 August 1992)

Waitangi Tribunal, ***The Petroleum Report*** (19 May 2003)

Waitangi Tribunal, ***Report on the Management of the Petroleum Resource -- Summary*** (20 April 2011)

Legal Rights and Natural Resources Center-Kasama sa Kalikasan/Friends of the Earth Philippines is a policy and legal research and advocacy institution. Founded in February 1988, it is a member of the Friends of the Earth International (FOEI). LRC-KsK/FoE seeks to provide policy research and advocacy support towards the fulfillment of a society where the rights of indigenous peoples and local communities are respected and upheld, and where the ownership, use, management, conservation of natural resources for all are carried out in an ecologically sustainable, culturally appropriate, gender just and equitable manner.

Legal Rights and Natural Resources Center-Kasama sa Kalikasan/
Friends of the Earth Philippines
24-A Malingap Street, Teachers' Village, Quezon City, Philippines 1101
lrcksk@lrcksk.org / www.lrcksk.org

Legal Rights and Natural Resources Center-
Kasama sa Kalikasan/Friends of the Earth Philippines
lrcksk@lrcksk.org / www.lrcksk.org