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SOVEREIGNTY OVER NATURAL RESOURCES UNDER EXAMINATION: THE INTER-AMERICAN SYSTEM FOR HUMAN RIGHTS AND NATURAL RESOURCE ALLOCATION

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I. INTRODUCTION

The present paper is based on the contention that, by virtue of the impact of resource exploitation on individuals, international human rights' tribunals and bodies, particularly the organs of the Inter-American System, are increasingly in the position of "allocator" of natural resources, giving new meaning to the concept of permanent sovereignty.[1]

After lying dormant in the post de-colonization period, the condition inserted into United Nations General Assembly Resolution 1803 on Permanent Sovereignty over Natural Resources, which directs sovereign states to use resources for "the well being of their peoples,"[2] has come back to the fore and is taking a new shape. A state's sovereign right to freely explore, exploit and dispose of its natural resources, and the assertion that "the extent to which the peoples in a resource rich region of a State... are entitled to (extra) benefit from resource exploitation in their

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1. Natural resources are hereby understood as defined by G. Cano in his report to the Food and Agriculture Organization of 1975 as "physical, natural goods, as opposed to those made by man." *Cited in* N.SCHRIJVER, SOVEREIGNTY OVER NATURAL RESOURCES, BALANCING RIGHTS AND DUTIES 15 (Cambridge, U.K.: Cambridge Univ. Press, 1997).

2. UNGA Res. 1803, para. 1.

region is... a matter of domestic politics,"[3] is at least questionable in light of the recent decisions and opinions of American international human rights tribunals. While the principle of permanent sovereignty continues to be of the greatest significance in connection to alien economic interests within a country's territory, it does not exempt states from the imperatives of international law generally, nor specifically from the rules of human rights law as they relate to natural resources. As understood today, permanent sovereignty over natural resources is as much an issue of state duties as it is one of state rights.[4]

In the specific case of the Americas, the practice of the Inter-American System leads to a reassessment of the Roman law-based, utilitarian principles upholding states' sovereign rights over natural resources and to the expansion of the concept of "well being" or "beneficial use" of resources. Though its roundabout manner fails to address the issue directly, the System's decisions ultimately question the notion of "well being," as included in Resolution 1803 and inherent to permanent sovereignty, as a notion based strictly on an economic/utilitarian interpretation. In revisiting and expanding the notion of beneficial use, and in stressing the duties that emanate from a state's sovereign powers over natural resources, the System's decisions and opinions have become a source of limitation to permanent sovereignty, virtually transferring decision-making on use and allocation of natural resources from municipal to international bodies. The transfer is temporary and operates to ensure that the "well being" which may derive from a state's disposition of its natural resources is assessed in a way that takes full account of both impacts and benefits, and that these results (impacts and benefits alike) are equitably spread to all individuals within a state in accordance with their specific needs.

II. ORGANIZATION

The first part of this paper includes background information on the international law on sovereignty over natural resources. It also describes the Inter-American System for Human Rights, its set-up and functions. The second part of this paper summarizes and reviews the Inter-American System's track record as it relates to natural resources use and allocation.

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3. SCHRIJVER, *supra* note 1 at 9. The author goes on to state that international law becomes relevant, however, when a state's government discriminates against a certain people and cannot therefore be taken to represent the whole.

4. *Id.* at 171; *see also* Charter of Economic Rights and Duties of States, art. 7, requiring "the full participation of its people in the process and benefits of development." U.N. Res. 3281 (XXIX), 12 Dec. 1974.

The review includes Country Reports and Commission and Court decisions. Finally, the paper offers some concluding observations.

III. PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES

The principle of permanent sovereignty over natural resources owes its existence to the struggles of newly independent and developing states in the post World War II era. At its core was the plight of those states to end economic dominance by powerful developed state interests. Its genesis was very controversial, touching primarily on issues such as nationalization of foreign property, compensation, and standards of treatment of foreign investments. As discussed in the following sections, although those issues continue to be of importance, the concept is gradually expanding to include a state's duties to its own nationals in connection with natural resources management.

The right to self-determination, including economic self-determination, and the right to development provided the basis for recognition of this principle in several United Nations instruments since 1952. In 1962, *United Nations General Assembly Resolution 1803 (XVII) on Permanent Sovereignty Over Natural Resources* declared:

> The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.[5]

Although initially fuelled by the need to preserve the rights of colonial peoples during decolonization and independence, the focus of sovereignty over natural resources nonetheless soon shifted to the rights of the state. However, this state-centred approach to sovereignty is now changing. This paper will look at the meaning and content of "well-being" in the light of current law and practice of the Inter-American Human Rights system, and on its impact on the principle's evolution and application in the Americas.

IV. THE INTER-AMERICAN SYSTEM FOR HUMAN RIGHTS

The Inter-American System for Human Rights functions under the umbrella of the Organization of American States (OAS) created in 1948.

5. Resolution 1803 (XVII), art 1, Permanent Sovereignty over Natural Resources, 14 Dec. 1962.

Peaceful coexistence through regional cooperation in dispute resolution, regional economic and social development and promotion of democratic values are the Organization's core functions, making the human rights system a fundamental component of the OAS. [6] In the years since its creation, the organization has expanded its membership to 35 countries and exerted increasing influence over its membership, particularly in the area of human rights.[7]

The Inter-American Human Rights System is governed mainly by two documents: the *American Declaration on the Rights and Duties of Man* (1948)[8] – one of its foundational documents – and the *American Convention on Human Rights* (1969) which expands and updates the principles and rights contained in the *Declaration.*[9] The OAS System provides recourse to people in the Americas who have suffered violations of their human rights and who have been unable to find justice in their own country. The pillars of the system are the *Inter-American Commission on Human Rights*, based in Washington, D.C., and the *Inter-American Court of Human Rights*, located in San José, Costa Rica. These institutions apply the regional law on human rights including the above-mentioned instruments.

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6. Art. 2 of the OAS Charter lists its objectives as follows:
a) To strengthen the peace and security of the continent;
b) To promote and consolidate representative democracy, with due respect for the principle of nonintervention;
c) To prevent possible causes of difficulties and to ensure the pacific settlement of disputes that may arise among the Member States;
d) To provide for common action on the part of those States in the event of aggression;
e) To seek the solution of political, juridical, and economic problems that may arise among them;
f) To promote, by cooperative action, their economic, social, and cultural development;
g) To eradicate extreme poverty, which constitutes an obstacle to the full democratic development of the peoples of the hemisphere; and
h) To achieve an effective limitation of conventional weapons that will make it possible to devote the largest amount of resources to the economic and social development of the Member States.
OAS Charter, <www.oas.org>.

7. Original membership was of 21 countries. Although Cuba is a member of the organization, its participation is on hold since the advent of the Castro administration.

8. OEA, AG/RES. 1591 (XXVIII-O/98); OEA/Ser.L.V./II 82 doc.6 rev.1 at 17 (1992).

9. *American Convention on Human Rights*, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 entered into force July 18, 1978, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992). In addition to the two basic human rights instruments mentioned, a relevant development of the *1969 Convention* is the *Protocol in the Area of Social, Economic and Cultural Human Rights of 1988* (*Protocol of San Salvador*); <www.oas.org/jurId.ico/english/Treaties/a-52.html>.

A. THE INTER-AMERICAN COMMISSION

In 1959, the Inter-American Commission was created as a permanent body with the mandate to promote the observance and defense of human rights.[10] The 1970 amendment of the OAS Charter changed the Commission's status to that of an official organ of the OAS with authority over all member states under the OAS Charter and the *American Declaration.* It also has jurisdiction to apply the *American Convention* to process cases brought against those countries which ratified that instrument. In either case, the Commission's powers are broad.

The Commission is empowered to receive, investigate and analyze individual allegations of human rights violations, conduct on-site visits, observe the general human rights situation in member states and publish reports with its findings, recommend the adoption of measures to improve the protection of human rights in specific states, and request states to adopt specific precautionary measures to avoid serious and irreparable harm to human rights in urgent cases. In urgent cases which involve danger to persons, the Commission may also request that the Court order provisional measures, even where a case has not yet been submitted to the Court. The fact-finding and advisory powers of the Commission are an important part of its functions. These may be exercised either as a result of a specific petition or as part of routine activities and take the form of Commission Country Reports.

Standing requirements for petitioning the Commission are broad, allowing any citizen of a member state to petition regardless of harm. However, no hypothetical or merely theoretical petitions will be entertained. [11] Petitions may proceed against the state and its agents or against any person where a *prima facie* showing demonstrates that the state failed to act to prevent a violation of human rights or failed to carry out proper follow-up after a violation, including the investigation and sanction of those responsible. The requirement of exhaustion of local remedies that is common to international tribunals also applies to the Commission's jurisdiction. Accordingly, petitioners must show that all means of remedying the situation domestically have been exhausted. Non-exhaustion of local remedies does not preclude recourse to the Commission when it can be shown that the petitioner tried to exhaust domestic remedies but failed because: 1) those remedies do not provide for adequate due process; 2) effective access to those remedies was denied, or; 3) there has been un-

10. OAS Charter, art. 106.

11. I.K. Scott, *The Inter-American System of Human Rights: An Effective Means of Environmental Protection?* 19 VA. ENVTL. L.J. 197 (2000).

due delay in the decision on those remedies. The Commission's jurisprudence is clear in that it does not constitute an ordinary appeal jurisdiction from domestic procedures and that it will refuse review where a petition "contains nothing but the allegation that the decision was wrong or unjust in itself." [12]

When the Commission receives a petition which meets, in principle, the requirements established in the rules on jurisdiction it can initiate proceedings. This decision to open a case does not prejudge the Commission's eventual decision on admissibility or the merits of the case. The Commission may still declare the petition inadmissible and terminate the process without reaching the merits or may find that no violation has occurred. If the Commission decides that a case is inadmissible, it must issue an express decision to that effect, which is usually published. On the other hand, the Commission need not formally declare a case admissible before addressing the merits. In some cases, the Commission will declare a petition admissible before reaching a decision on the merits. In others, it may include its discussion on the admissibility of a petition with its final decision on the merits.

During the course of the process, parties are given plenty of opportunities to state and prove their cases. The Commission may also carry out its own investigations, conducting on-site visits, requesting specific information from the parties, etc. Its rules and procedures emphasize its powers to broker negotiated, friendly solutions to the cases before it.

At the conclusion of a process, the Commission prepares a report containing its conclusions and, where applicable, providing recommendations to the state concerned. This report is not made public. The Commission allows the state party a set period of time to resolve the situation and to comply with its recommendations. If upon the expiration of this period of time the problem subsists, the Commission can choose to prepare a second – similar – report. If the state persists in its disregard for the Commission's recommendations, a second report will be issued and made public. Alternatively, if the country involved has accepted the jurisdiction of the Inter-American Court, the Commission can decide to submit the case to the Court for a binding decision. "The decision as to whether a case should be submitted to the Court or published should be made on the basis of the best interests of human rights in the Commission's judgment."[13]

12. *See e.g.*, Marzioni v. Argentina.
13. OAS, <www.oas.org>.

B. THE INTER-AMERICAN COURT

The Inter-American Court on Human Rights is a creature of the *American Convention*, adopted in 1969, although it started sessioning over a decade later. The Court has both advisory and adjudicatory powers.[14] Only states and the Commission have a right to submit a case to the Court. However, according to the rules of the Court, once a case is admitted, the victims and their representatives may submit pleadings, motions and evidence autonomously.[15] The Court can take provisional measures at the Commission's or the victim's request as well as *de oficio*. If a breach is found, the Court can order a state to take specific measures to ensure the enjoyment of the right or freedom violated. It can also order remedies and compensation.[16] Its judgments are binding and establish precedent.

V. DECISIONS AND OPINIONS OF THE INTER-AMERICAN ORGANS

From its creation to date, the Inter-American System has collected an extensive track record in the area of resource allocation and use. This might sound odd in light of the fact that the Inter-American System does not include a right to natural resources as a human right in itself. As will be shown below, however, it has managed to interpret individual rights and freedoms, including – but not limited to – the right to property, in such a way that domestic decisions on resource allocation and use can no longer disregard its mandates. Although a great deal of its work and decisions deal with indigenous peoples, the resulting analyses and principles may have widespread applicability as they relate to the notion of individual well being in connection with allocation of natural resources.

A. HUMAN RIGHTS REPORTS

In April 1997, the Commission issued a Report on Ecuador. In its report, the Commission denounced Ecuador's interference with the indigenous population's right to cultural and physical integrity. It stated that government-sponsored activities, including hydrocarbon, forestry and agricultural production activities, encroached upon and interfered with those peoples' use of traditional land and resources threatening their physical and cultural survival. It also found that indigenous access to land and resources was severely limited by domestic laws and practices, regard-

14. Statute of the Inter-American Court on Human Rights, OAS Res. 448 (IX-0/79), arts. 1 and 2; available at <www/oas.org>.

15. Inter-American Court on Human Rights, Rules of Procedure.

16. American Convention on Human Rights, arts. 62 & 63.

less of constitutional and legal recognition of indigenous rights to those resources.

As a result of its findings, the Commission recommended that the Ecuadorian state adopt necessary measures to guarantee the right to life and physical integrity of jungle-dwelling groups, including legal protection of the lands they inhabit. The State was also required to take adequate protective measures to guarantee cultural survival in connection with resource development, including guaranteeing meaningful indigenous participation in development decision-making. The resolution of title claims and land demarcation issues was also urged.

B. DECISIONS OF THE COMMISSION

When considering the decisions of the Commission, it is important to be reminded of the fact that only a fraction of the Commission's decisions are made public. What is in plain view may only be the tip of the iceberg. However, it may be safe to assume that all (undoubtedly numerous) other cases concerning human rights and natural resources are given similar treatment and decided with the same principles in mind. As is evident from the cases below, the Commission has no problem asserting the dominance of human rights over domestic laws and practice, even in cases where a state's sovereign right to dispose of its natural resources is at stake.

1. Yanomami Case (Brazil)

A landmark case concerning resource use is the one dealing with a petition against the Government of Brazil filed by de Yanomami indigenous group in 1980. The petition originated in the government-sponsored occupation and mineral and agricultural development of an area of the Amazon and the Territory of Roraima where official demarcation of the boundaries of Yanomami lands was pending. It was based on such disparate rights as the right to life, liberty and personal security; the right to equality before the law; the right to religious freedom and worship; the right to the preservation of health and well being; the right to education; the right to recognition of juridical personality and of civil rights; and the right to property.

After verifying that the Yanomami's territory had been invaded by mining and farming interests that brought destruction to the group, the Commission concluded that "a liability of the Brazilian Government arises for having failed to take timely and effective measures to protect

the human rights of the Yanomamis."[17] The Government's actions awarding priority to, and even promoting, economically productive uses of the land were against international human rights law. In particular, the Commission found that in failing to demarcate indigenous lands and to prevent encroachment and invasion, the Government was in violation of the right to life, liberty and personal security; the right to residence and movement; and the right to the preservation of health and to well being.

2. Maya Case (Belize)

Another case directly concerning a state's disposition of natural resources, including land, is the one concerning the Maya indigenous communities of the Toledo District of Belize. The petitioners in that case complained that Belize granted logging and oil concessions of over half a million acres of land traditionally used and occupied by the Maya, in violation of those communities' human rights to property and equality. In ruling for the petitioners, the Commission made a significant statement regarding the breadth of protection granted to property rights under the Inter-American System in saying that "the organs of the Inter-American human rights system have recognized that the property rights protected by the system are not limited to those property interests that are already recognized by states or that are defined by domestic law, but rather that the right to property has an autonomous meaning in international human rights law."[18] The Commission further states that "development activities must be accompanied by appropriate and effective measures to ensure that they do not proceed at the expense of the fundamental rights of persons who may be particularly and negatively affected."[19]

Based upon these findings, the Commission took steps to halt the State's action and to curb any future attempts to dispose of the resources against human rights law. It recommended that the State provide the Maya people with an effective remedy, including recognizing their communal property right to traditional lands, and to delimit, demarcate and title the territory in which this communal property right exists, in accordance with the customary land use practices of the Maya people. The Commission further recommended that the State abstain from any acts that might lead the agents of the State itself, or third parties acting with its acquies-

17. Inter-American Commission on Human Rights, Res. 12/85, Case 7615, Brazil, March 5, 1985, Recommendation #11.

18. Inter-American Commission on Human Rights, REPORT No. 40/04, CASE 12.053, MERITS, MAYA INDIGENOUS COMMUNITIES OF THE TOLEDO DISTRICT, BELIZE, Oct. 12, 2004, para. 117.

19. *Id.* para. 150.

cence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographic area occupied and used by the Maya people until their territory is properly delimited, demarcated and titled.

3. Western Shoshone Case (United States of America – U.S.)

Also of importance in this context is the *Dann v. United States* case (also known as Western Shoshone Case) decided and published by the Inter-American Commission in 2002. At issue in this case was the right of the indigenous petitioners to access and use traditional (allegedly public) lands and resources for livestock grazing and gathering of subsistence foods. In denying access, the United States argued that indigenous title to the lands in question had been extinguished as a result of the occupation of the West by non-indigenous settlers (inverse condemnation).

Without getting into the details of the arguments given to uphold the Government's title to the lands, the Commission determined that the procedure set up by the U.S. to decide on indigenous land claims which resulted in the alleged extinction of the petitioners' rights was defective, lacking the requisites of fully informed and mutual consent that are fundamental to the protection of the human right to property. As a result, the Commission concluded that the United States had "failed to ensure the Dann's right to property under conditions of equality... in connection with their claims to property rights in the Western Shoshone ancestral lands."[20]

Of particular importance in the resolution of this case is the fact that the Commission made clear its willingness to reach outside the main human rights instruments to interpret and define the content of the rights disputed in each case, including *inter alia* consideration of the *Draft Declaration on Indigenous Rights* as a valid source of law "to the extent that [in the present opinion of the tribunal] the basic principles reflected in provisions of the draft Declaration... reflect general international legal principles."[21] This may open the door to increasing intervention of the System's organs in resource allocation decisions, particularly if the disputes before them revolve around issues of environmental law, which is inextricably connected to resource development and the protection of human life and health.

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20. *Id.* para. 172.

21. OAS, REPORT No. 75/02, CASE 11.140, MARY AND CARRIE DANN-UNITED STATES, Dec. 27, 2002; <www.cidh.org/annualrep/2002eng/USA.11140b.htm> [hereinafter Western Shoshone Case].

4. Ralco Case (Chile)

Another important case is the one involving the construction of a hydroelectricity dam in Chile, the Ralco case. After years of bitter legal disputes over the right of the Government of Chile to allow the development of a hydroelectricity project in traditionally indigenous lands, involving significant environmental impacts on water and related resources as well as the displacement of the local inhabitants, in December 2002 a few indigenous women whose lands and families were the last remaining obstacle for the completion of the Ralco dam filed a complaint before the Inter-American Commission. The complaint was based on the right to life, the right to humane treatment, the right to a fair trial, the right to freedom of conscience and religion, the rights of the family, the right to property and the right to judicial protection of the *American Convention on Human Rights*. At the time of the petition, Ralco was 70% complete. The petitioners requested that the Commission issue precautionary measures to avoid the serious and irreparable harm that would ensue from the continuation of Ralco, particularly as a result of the imminent flooding of the reservoir. The precautionary measures were granted and the Commission requested Chilean authorities to abstain from undertaking any actions and to stay any proceedings that could result in the eviction of the petitioners from their traditional lands until the petition was reviewed and the agencies of the Inter-American System had a chance to issue their decisions.[22] Unfortunally, the Commission never got to consider the merits of the case.[23] The complaint eventually resulted in an Amicable Agreement between Chile and the petitioners that the Commission approved on March 11, 2004. Though loosely phrased, the Commission-brokered Agreement, including a series of conditions binding the Government of Chile in future natural resources-related decisions with an impact on indigenous communities, is a first step in curtailing the state's unlimited disposition powers over natural resources.[24]

22. OEA, Comisión de Derechos Humanos, Informe No. 30/04, Petición 4617/02, Solución Amistosa, M.J. Huenteao Beroiza y Otras, Chile, 11 de marzo de 2004.

23. Note that the Commission would have had to interpret the meaning and scope of Chile's reservation regarding the right to property.

24. For details of the Agreement of 16 September 2003, see <www.mapuexpress.net/publicaciones/memorandum-ralko2.htm>. The Government of Chile and the petitioners signed a simultaneous agreement where the government undertook several supplemental commitments aimed at securing the lands for ENDESA, <www.mapuexpress.net/publicaciones/memorandum-ralko.htm>.

C. DECISIONS OF THE INTER-AMERICAN COURT

1. Awas-Tingni Case (Nicaragua)

In 2001 the Inter-American Court had the opportunity to make a pronouncement in a case concerning a 1995 commercial logging concession in traditionally indigenous lands. Since then, the case of the *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (Awas Tingni Case) has become a landmark case in relation to the extension of a state's power over natural resources management. The Awas Tingni case was filed by the Inter-American Commission on behalf of a Nicaraguan indigenous community. The Commission requested the Court to decide, among other issues, whether the state violated the obligation to respect rights, the right to property and the right to judicial protection of the *American Convention.*

Prior to submitting the case to the Court, the Commission had found:

> The State of Nicaragua is actively responsible for violations of the right to property, embodied in Article 21 of the Convention, by granting a concession to the company SOLCARSA to carry out road construction work and logging exploitation on the Awas Tingni lands, without the consent of the Awas Tingni Community.[25]

Among other things, the Commission recommended that Nicaragua should:

> Suspend as soon as possible, all activity related to the logging concession within the Awas Tingni communal lands granted to SOLCARSA by the State, until the matter of the ownership of the land, which affects the indigenous communities, [is] resolved, or a specific agreement reached between the state and the Awas Tingni Community.[26]

The Inter-American Court agreed with the Commission's findings and ordered Nicaragua to take all measures to correct the country's violation of the Awas Tingni's human rights in connection with the community's property rights to its ancestral lands and natural resources.

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25. Inter-American Court of Human Rights, Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgment of August 31, 2001, para. 25.

26. *Id.*

In addition to the fact that the decision's practical effect was to curtail the country's power to dispose of natural resources within its jurisdiction, a look at the transcript reveals that the System's organs were willing to take a deep look at the operating principles behind traditional expressions of sovereignty such as disposition of land and concessions to exploit natural resources. By way of its allegations, the Commission took a close look at the status of the lands and resources at stake and found a violation in Nicaragua's assumption that "all lands not registered under formal title deed [are] to be State lands."[27] Although the Court's decision does not directly address it, the argument is significant in that it challenges the extent of state powers over those lands that may be considered *res nullius* (unowned things), thereby disputing the modern application of Roman law-based principles used to justify a states' taking of lands and natural resources that have been in operation since discovery and colonization. According to those principles, *res nullius* remain the common property of all mankind until they are put to some productive use at which time the person putting the thing to a "good" (productive) use can claim it for him/herself and obtain legal title. In other words, if lands and resources are not used to generate economic value, the state can dispose of and exploit them as it sees fit. In doing so, it can displace "lesser" (non-productive or subsistence) uses, such as the use to support subsistence lifestyles (hunting-gathering/subsistence farming), religious uses, esthetic uses, environmental uses, etc.

In questioning the continued, undisturbed application of *res nullius* principles, the System is taking a very important step towards redefining the content of a state's sovereign powers over natural resources. It is forcing a re-examination of permanent sovereignty over natural resources by questioning the traditional prevalence of economic uses/benefits over other beneficial uses, and, also importantly, by considering the impact of the exercise of sovereign powers on the individuals within a state and the extent to which they may benefit or suffer as a result.

2. Yakye Axa Case (Paraguay)[28]

This recent case concerns a claim by an indigenous community to lands registered to and used by private parties. The claim in question concerned the sale of farming establishments, known as "estancias" (ranches), by the Government of Paraguay to British interests through a public tender process that took place in London in the early Nineteenth

27. *Id.* para. 140(j).

28. Corte Inter-Americana de Derechos Humanos, Caso ComunId.ad Indígena Yakye Axa vs. Paraguay, Sentencia de 17 de junio de 2005, <www.oas.org> [hereinafter Yakye v. Paraguay].

century. Though initially the indigenous population stayed on the land as farm hands, deplorable living conditions and the promise of a better life drove the Yakye Axa to seek shelter with the Anglican missionaries charged with their "pacification." After experiencing equally taxing hardships, the indigenous group sought to recover its ancestral territory.

In 1993, the Yakye Axa initiated administrative procedures to recover the lands in question. The procedure eventually ended in a petition to the Inter-American Commission. Finally, Paraguay's recalcitrance caused the Commission to submit the case before the Court. After reviewing the case, the Court found Paraguay in violation of the right to property, among others. It ordered Paraguay to identify and transfer to the Yakye Axa the lands claimed.

In cases of conflict between private and indigenous title the Court provides the country with criteria to evaluate the admissibility of potential limitations to the claimants' right to property *vis a vis* the private title-holders under the Convention. According to the Court, admissible limitations must: 1) be declared by law, 2) be necessary, 3) be proportionate, and 4) be directed at achieving a legitimate common (as opposed to individual) objective in a democratic society. The issue of "need" should be determined in relation to whether the proposed limitations are directed to the satisfaction of a pressing objective of public interest. Significantly, the Court specifically rejects "usefulness" as an objective that *per se* can justify any restrictions to the right to property. In addition, the Court highlights the value of land for the preservation of indigenous cultures and their human rights as a factor to be taken into account in deciding on the resource's allocation.[29]

Reclaiming their abandoned ancestral lands, the Yakye Axa petition once again brought about an examination of the deeply rooted Roman-law principles upholding a state's decision in the exercise of its sovereign rights over land and resources. At the core of this legal dispute was the status of the indigenous group's original title *vis a vis* the existing title of the private land-holders. Throughout the claim procedures initiated in 1993, and in the proceedings before the organs of the Inter-American System, Paraguayan authorities, despite their recognition of the Yakye Axa's right to the land, consistently referred to the private title-holders' "rational" (i.e. productive) use of the lands as the main obstacle barring their transfer to the claimants since Paraguayan law adjudicates preemptive status to the title of the "productive owner."[30] As was explained

29. *Id.* paras. 144-156.
30. *Id.* paras. 54 (g) & 122 (f).

above, the Court rejected this utilitarian argument as insufficient justification for a rightful limitation of the human right to property under Article 21 of the Convention.

VI. CONCLUDING OBSERVATIONS

Perhaps the most remarkable transformation of the principle of sovereignty over natural resources that can be noted through the analysis of the decisions and work of the Inter-American System is that the principle's application is now beginning to stretch beyond the protection of collective rights as represented by the state. While the rights to self-determination and development provided the original basis for the collective claim to sovereignty during decolonization and independence, individual human rights as interpreted by the System's organs now operate to distribute the attributes (risks and benefits) of sovereignty over natural resources among individuals populating sovereign states.

Past decisions on resource use and allocation, including the distribution of risk and benefit, were the exclusive domain of government bureaucrats. That can seldom be said to be the case today. Largely as a result of international developments, stakeholder participation is increasingly a feature of the resource decision-making process. In the Americas, absent participation and any other requisites to ensure that the "well being" derived from resource use is widespread and that the full enjoyment of human rights is guaranteed, the organs of the Inter-American System are not shy about interfering with a state's sovereign rights over resources. Thus, the application of human rights' law to natural resource issues takes the next most logical step in the area of international natural resource law: from equality amongst states to equality amongst individuals within states, in the enjoyment of the benefits derived from the use and possession of natural resources.[31]

Notwithstanding the substantial progress made towards ensuring equitable management of natural resources for the benefit of all, a disturbing fact remains. Although all of the System's opinions and decisions are framed in terms of individual rights (property, justice, equality, health, etc.), to a certain extent the strength of the individual petitions, findings and resolutions lies in the protection owed to indigenous peoples as a group. Indeed, indigenous peoples and their cause command such attention and have such a presence in the international arena that their claims cannot be easily ignored. However laudable the attention and protection afforded to this group might be, indigenous peoples do not necessarily

31. An equitable distribution of benefits assumes an equally equitable distribution of risks.

represent all poor and marginalized peoples. One cannot help but to wonder whether the System's organs would be equally bold about interfering with states' natural resources' decisions when indigenous peoples' issues are not at stake.

Also on the down side is the fact that state responses to the System's recommendations and decisions are slow or practically non-existent.[32] Some, in fact, have gone about their business as usual, undermining the strength of the System as a whole.[33] It is encouraging to know, however, that in exercising their human rights' jurisdiction, the System's organs are willing to look at the issues independent of domestic law[34] and to apply an evolutionary[35] and constructive[36] approach to the law.

32. On the progress made by Nicaragua a year after the Court's decision, see J.P. Vuotto, *Awas Tingni v. Nicaragua: International Precedent for Indigenous Land Rights?* 22 B.U. INT'L L.J. 219; regarding Chile and Ralco see: CASO P-4617-02 – MERCEDES JULIA HUENTEAO Y OTRAS V. CHILE, INFORME SOBRE ESTADO DEL ACUERDO DE SOLUCION AMISTOSA, 14 de octubre de 2004, available at <http://www.derechosindigenas.cl/Observatorio/documentos/ralko_271004.htm>; and L.K. Barrera-Hernández, *Indigenous Peoples, Human Rights and Natural Resource Development: Chile's Mapuche Peoples and the Right to Water*, in print, XI GOLDEN GATE ANN. SURV. INT'L & COMP. L. 1 (Spring 2005).

33. An example is a recent US initiative to sell public lands, including Western Shoshone lands. *See* press release from U.S. Representative Nick Rahall, Nov. 5, 2005, <http://www.house.gov/apps/list/press/ii00_democrats/budgetmininglaw.html>.

34. Inter-American Court for Human Rights, Advisory Opinion OC-13/93, 16 July 1993.

35. In Awas Tingni the Court declared that human rights treaties are live instruments whose interpretation whose interpretation must adapt to the evolution of the times and, specifically, to current living conditions. Awas Tingni Decision, para. 148; cf. Yakye v. Paraguay, *supra* note 28, para. 120 & 125. *See also* Vuotto, *supra* note 32.

36. *See* Western Shoshone Case, *supra* note 21 and accompanying text.