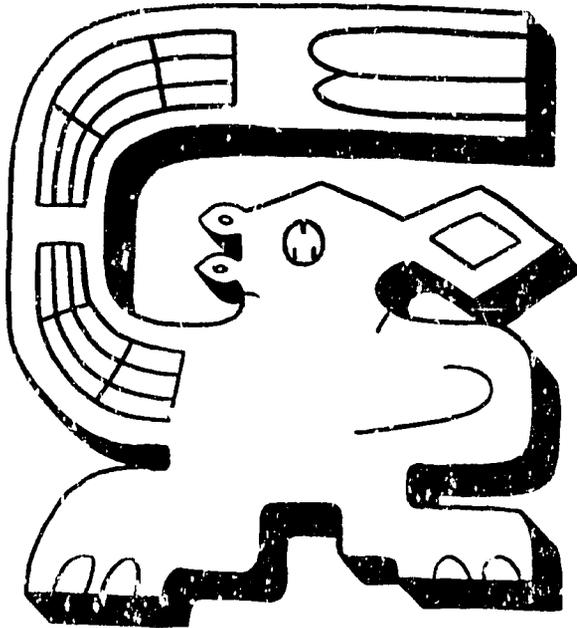


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Land and the Forest—Dwelling  
South American Indian:  
The Role of National Law

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# LAND AND THE FOREST-DWELLING SOUTH AMERICAN INDIAN: THE ROLE OF NATIONAL LAW\*

## INTRODUCTION

International attention has recently been directed towards the plight of the world's racial and cultural minorities.<sup>1</sup> These groups often find their physical and mental well-being as well as the stability of their cultural and social institutions seriously threatened. No minorities are more vulnerable and oppressed than the various forest-dwelling Amerindians of lowland South America who are being removed from their state of relative physical and cultural isolation and are facing traumatic contact with the dominant groups. This article focuses on one important aspect of such contact: the resulting separation of these forest-dwellers from land they have used since time immemorial and the role of national law in this dispossession process.

The "forest-dwellers" referred to here are the indigenous inhabitants of the more isolated areas of South America, and are only a part of the total indigenous population in South America. This article focuses only on forest-dwellers for two reasons. First, the forest-dweller is historically and culturally distinct from his more integrated counterparts who are often culturally defined as "peasants" or *campesinos*<sup>2</sup>—rural cultivators more integrated into the national state society and subject to the demands and sanctions of power-holders outside the native social stratum.<sup>3</sup> The nomadic or semi-nomadic existence of the forest-dwellers, and the fact that their relationship to the land is especially vital for welfare and survival, present a special challenge to the national land tenure system. Second, there is greater need for study of land tenure as it affects the more isolated Amerindians. Data are scarce and incomplete, while there has been substantial research relevant to the land sit-

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1. See, e.g., STUDY ON THE RIGHTS OF PERSONS BELONGING TO ETHNIC, RELIGIOUS AND LINGUISTIC MINORITIES U.N. DIV. OF HUMAN RIGHTS, SEMINAR ON THE PROMOTION & PROTECTION OF THE HUMAN RIGHTS OF NATIONAL, ETHNIC AND OTHER MINORITIES (1974).

2. J. STEWARD & L. FARON, *NATIVE PEOPLES OF SOUTH AMERICA* 4, 446 (1959).

3. E. WOLF, *PEASANTS* 11 (1966).

uation of more integrated groups.<sup>4</sup> There is a special urgency in dealing with these land tenure questions. While the population of many Indian groups is increasing, the number of forest-dwellers is decreasing exponentially,<sup>5</sup> due in part to the separation of the Indians from their forest land resources.

Effective land rights are vital for the preservation of the physical and mental well-being of the individual Amerindians and for the maintenance of the groups' cultural stability. This premise has been widely recognized by international and governmental organizations,<sup>6</sup> by other groups and individuals concerned with indigenous welfare,<sup>7</sup> and most importantly, by the Amerindians themselves.<sup>8</sup> Land rights can serve three important functions: prevention of pernicious contact with non-Indians, maintenance of an adequate economic subsistence base in the face of such contact, and preservation of sacred and spiritual connections with the land.

At the turn of the century there were 230 Indian tribes known to exist in Brazil. As a result of contact with non-Indians between 1900 and 1957, more than one-third became extinct, and those remaining were "culturally devastated and faced severe conditions of disease, depopulation, malnutrition and poverty."<sup>9</sup> A prominent anthropologist has projected that of the forty-one tribes inhabiting the areas in east-

4. See, e.g., LAND TENURE CENTER, PUBLICATIONS LIST NUMBER 25 (1976). See also INTERNATIONAL LABOR OFFICE, INDIGENOUS PEOPLES 330-31 (1953) (only two of its 628 pages are devoted to the specific topic of forest-dwellers and the occupation and allotment of land).

5. J. STEWARD & L. FARON, *supra* note 2, at 54. Note, however, that there are a few exceptions. Harner, for example, claims that the forest Jivaro populations "have turned the corner demographically" and are growing. M. HARNER, *THE JIVARO* 211 (1973). For one anthropologist's hypotheses as to why depopulation may affect some groups more violently than others, see Wagley, *Cultural Influences on Population: A Comparison of Two Tupi Tribes*, 5 *REVISTA DO MUSEU PAULISTA* 95-104 (1951).

6. See Reports & Inquiries, *The Second Session of the I.L.O. Committee of Experts on Indigenous Labor*, 70 *INT'L LAB. REV.* 420-21 (1954). See also ECOSOC, COMMISSION ON HUMAN RIGHTS, SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, *STUDIES OF THE PROBLEM OF DISCRIMINATION AGAINST INDIGENOUS POPULATIONS* (1972, 1973, 1974, 1975); *MINISTÉRIO DA AGRICULTURA, A POLÍTICA INDIGENISTA BRASILEIRA* 106 (1962).

7. See, e.g., J. BODLEY, *TRIBAL SURVIVAL IN THE AMAZON* 11 (1972); E. BROOKS, R. FUERST, J. HEMMING & F. HUXLEY, *TRIBES OF THE AMAZON BASIN IN BRAZIL* 1972, at x-xi, 3, 23 (1972) [hereinafter cited as *TRIBES OF THE AMAZON BASIN*]; *SURVIVAL INTERNATIONAL, A PHILOSOPHY FOR SURVIVAL INTERNATIONAL* 3.

8. See B. ARCAND, *THE URGENT SITUATION OF THE CUIVA INDIANS OF COLOMBIA* 24 (1972); *Brazil—Third Congress of Amazon Indians is Held*, 2 *INDÍGENA* 8 (1975-1976).

9. *INDÍGENA ORO. & AMERICAN FRIENDS OF BRAZIL, SUPYŚÁUA: A DOCUMENTARY REPORT ON THE CONDITIONS OF INDIAN PEOPLES IN BRAZIL* 6 (1974) [hereinafter cited as *SUPYŚÁUA*].

ern Bolivia, "16 will not last until the end of the 70's."<sup>10</sup> Other examples of the devastating effects of inter-ethnic contact are plentiful.<sup>11</sup>

This situation is due in large part to the effects of physical violence, disease, exploitation, and cultural instability caused by contact with non-Indians. Physical violence includes acts of homicide and genocide perpetrated to "clear" choice land for settlement or sale, to capture children for slavery, to repress for alleged Indian crimes, or merely as a result of a deep-rooted racism that attributes subhuman status to the Indian.<sup>12</sup> Epidemic disease results from sudden sedentarization<sup>13</sup> as well as from biological shock—an exceptional susceptibility to disease on the part of groups who are in biological isolation and who have not had the opportunity and time to develop immunity to European diseases.<sup>14</sup> Psychological infirmities can often be linked to the mental trauma of contact.<sup>15</sup> Forms of exploitation are caused or facilitated by a lack of understanding on the part of the Indian of the non-Indian culture within which they must function.<sup>16</sup> Forced labor<sup>17</sup> and starvation or malnutrition are common manifestations of economic exploitation. Finally, cultural stability can be disrupted by sudden contact with national society.<sup>18</sup> Because land provides an insulating barrier

10. J. RIESTER, *INDIANS OF EASTERN BOLIVIA: ASPECTS OF THEIR PRESENT SITUATION* 5 (1975).

11. See generally *THE SITUATION OF THE INDIAN IN SOUTH AMERICA* (W. Dostal ed. 1972).

12. For documented examples of such physical violence, see R. AHRENS, *GENOCIDE IN PARAGUAY* (1977); J. BODLEY, *VICTIMS OF PROGRESS* 26-29 (1975); Mosonyi, *The Situation of Indians in Venezuela: Perspectives and Solutions*, in *THE SITUATION OF THE INDIAN IN SOUTH AMERICA* 47 (W. Dostal ed. 1972).

13. J. UNDERWOOD, *BICULTURAL INTERACTIONS AND HUMAN VARIATION* 61 (1975).

14. See, e.g. J. CHIAPPINO, *THE BRAZILIAN INDIGENOUS PROBLEM AND POLICY: THE ARIPUANA PARK* 9-10 (1975); M. WEISS & A. MANN, *HUMAN BIOLOGY AND BEHAVIOR: AN ANTHROPOLOGICAL PERSPECTIVE* 349 (1975). This situation also existed during the colonial period. See J. HURALT, *Français et Indiens en Guyane* (1972); C. LEVI-STRAUSS, *Tristes Tropiques* 392 (Pocket Book ed. 1977).

15. See, e.g., J. STEWARD & L. FARON, *supra* note 2, at 4-13. See generally M. WEISS & A. MANN, *supra* note 14, at 416-19.

16. See generally *ANTI-SLAVERY SOCIETY, BOLIVIA: REPORT ON A VISIT TO INVESTIGATE ALLEGATIONS OF SLAVERY* 21 (1977); *SERVICIO NACIONAL DE LA REFORMA AGRARIA, REFORMA AGRARIA EN BOLIVIA AREA GANADERA DEL DEPARTAMENTO DE SANTA CRUZ* (1974); N. WHITTEN, *SACHA RUNA: ETHNICITY AND ADAPTATION OF ECUADORIAN JUNOLE QUICHUA* 252-54 (1976); Charles, *Tribal Society and Labour Legislation*, 65 *INT'L LAB. REV.* 425-41 (1952).

17. See, e.g., *INTERNATIONAL LEAGUE FOR HUMAN RIGHTS, REPRESENTATION SUBMITTED PURSUANT TO ARTICLE 24 OF THE ILO CONSTITUTION; VIOLATION BY PARAGUAY OF THE INDIGENOUS AND TRIBAL POPULATIONS CONVENTION, 1957* (No. 107) 6 (1976); *The London Observer*, March 25, 1973, at 8.

18. See, e.g., J. RIESTER, *supra* note 10, at 47-48 (1975); M. WEISS & A. MANN, *supra* note 14, at 395-435.

to contact, it must be removed from the "encroacher land market" to eliminate the incentive for pernicious contact with native groups.<sup>19</sup>

Land and its resources have a special and vital subsistence function in forest-dweller life. Forest tribal cultures are very directly conditioned by aspects of the natural habitat, such as climate, topography, soils, hydrography, vegetable cover, and fauna.<sup>20</sup> One important aspect of the indigenous cultural universe—food procurement and distribution—is intimately related to the physical environment.<sup>21</sup> In spite of the luxurious vegetation, the large amounts of decaying matter, and the abundance of water, the tropical soils are poor; humus is not deep and soils are deficient in mineral salts and organic material, and are subject to leaching action by the rain. Weeds quickly choke food plants,<sup>22</sup> and native horticultural exploitation must be rotated frequently and is usually of the space-demanding "swidden" or "slash-and-burn" type. Fauna and undomesticated food plants, while sufficient, are spread over wide areas, are easily exhausted, and are often only seasonally available. As a result, these nomadic and semi-nomadic groups need the use of vast areas of land to reap these varied food resources where and when they are available.<sup>23</sup> Denial of the use of only a portion of the land needed can be devastating;<sup>24</sup> the result may be severe malnutrition and starvation.

Finally, land can play an instrumental role in the preservation and respect of the tribal sacred world necessary for the maintenance of the physical and mental well-being of the group. The indigenous sacred universe is less "compartmentalized" than that of Western cultures and is intertwined with the reality of everyday life.<sup>25</sup> The immediate physi-

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19. See, e.g., R. LARAIA & R. DA MATTA, *INDIOS E CASTANHEIROS: A EMPRESA EXTRATIVA E OS INDIOS NO MÉDIO TOCANTINS* 68 (1967).

20. D. KAPLAN & R. MANNERS, *CULTURE THEORY* 91 (1972); J. STEWARD, *THEORY OF CULTURE CHANGE* 40 (1955).

21. See J. CHIAPPINO, *supra* note 14, at 13; J. LIZOT, *THE YANOMAMI IN THE FACE OF ETHNOCIDE* 10 (1976).

22. See generally N. CHAGNON, *YANOMAMÖ: THE FIERCE PEOPLE* 35 (2d ed. 1977); M. HARNER, *supra* note 5, at 48; B. MEGGERS, *AMAZONIA: MAN AND CULTURE IN A COUNTERFEIT PARADISE* (1971); P. RICHARDS, *THE TROPICAL RAINFOREST: AN ECOLOGICAL STUDY* (1952); Jordon, *Productivity of the Tropical Rainforest and its Relation to a World Pattern of Energy Storage*, 59 *J. OF ECOLOGY* 127-42 (1971); Service, *The Jivaro of South America*, in *PROFILES IN ETHNOLOGY* (1958); Stark, *Nutrient Cycling II: Nutrient Distribution in Amazonian Vegetation*, 12 *TROPICAL ECOLOGY* 177-201 (1971).

23. See B. ARCAND, *supra* note 8, at 5; A. HOLMBERG, *NOMADS OF THE LANG BOW* 48-50 (1969) (the Sirionó, now physically extinct or greatly acculturated, are an example *par excellence* of hunters and gatherers).

24. See, e.g., J. LIZOT, *supra* note 21, at 13 (1976).

25. For example, the Jivaro view the spiritual world as the "real" world, in which

cal environment often becomes the repository or focal point of intense spiritual meaning,<sup>26</sup> preservation of which is, in essence, preservation of the culture itself.

## I. LAND TENURE LAW AND THE FOREST-DWELLER

### A. *The Interplay of Interest*

One way to understand a legal system is to identify the interests that the system must address.<sup>27</sup> In the portions of the legal system concerned with Indian land rights, discrete groups of "actors" and their interests can be identified. As with any analytical framework of human social interaction, there is a great danger of oversimplifying a complex process. The following skeletal outline is intended only as a basic heuristic device.<sup>28</sup>

There are three important actors in the forest-dweller land question: encroachers, forest-dwellers, and policy and law-making entities. The encroacher is any person or entity who increases the harmful pressure on the forest-dweller by acquiring de jure or de facto interests in forest lands. There are many different types of encroacher. For example, on Guahibo territory in Colombia's western plains there are large landowners buying and fencing land for future speculation, professional colonists who buy in large blocks, and small colonists who buy small plots from the professional and live on the property.<sup>29</sup> Participants in government-directed or spontaneous colonization are ubiquitous encroachers throughout South America.<sup>30</sup> Even groups of Indians, experiencing pressure on their own lands, are often forced to encroach on the land of other forest-dwellers.<sup>31</sup> The overwhelming interest of

truth about causality can be found. Normal waking life is explicitly viewed as "false" or "a lie." M. HARNER, *supra* note 5, at 134.

26. See, e.g., V. GUTIERREZ DE PINEDA, ORGANIZACIÓN SOCIAL EN LA GUAJIRA 216 (1950); R. SMITH, THE AMUESHA PEOPLE OF CENTRAL PERU: THEIR STRUGGLE TO SURVIVE 17-18 (1974); N. WHITTEN, *supra* note 16, at 238.

27. See, e.g., Aubert, *Law as a Way of Resolving Conflicts: The Case of a Small Industrialized Society*, in LAW IN CULTURE AND SOCIETY 282-303 (L. Nader ed. 1969).

28. See P. Bohannan & L. Bohannan, *Land Rights Among the Tiv*, in CULTURAL AND SOCIAL ANTHROPOLOGY: INTRODUCTORY READINGS IN ETHNOLOGY 56 (P. Hammond ed. 1975).

29. A. REYES POSADA, LEGAL SYSTEM AMONGST THE GUAHIBO INDIANS IN COLOMBIA (1974).

30. See C. FERRAGUT, PRINCIPAL CHARACTERISTICS OF THE AGRICULTURAL COLONIES OF BOLIVIA AND SUGGESTIONS FOR A COLONIZATION POLICY (1961); INTERNATIONAL LABOR OFFICE, CENTRAL LIBRARY AND DOCUMENTATION BRANCH, BIBLIOGRAPHY: POPULATION, MIGRATION, SETTLEMENT AND COLONIZATION IN LATIN AMERICA (1978) (unpublished document).

31. See, e.g., J. CHIAPPINO, *supra* note 14, at 18.

most encroachers is to maintain or improve their economical situation, whether as poor *campesinos* fighting for survival, or multinational corporations expanding their sources of raw materials.<sup>32</sup> Encroachment is often made attractive by the extremely cheap forest real estate.<sup>33</sup>

The forest-dweller invariably finds himself in the role of a donor of land interests. His interest is at least to preserve traditional land use patterns, an interest usually in direct opposition to that of the encroacher. Very rarely does the isolated forest-dweller in an indigenous economy seek to better his economic or social situation by acquiring surplus property or by participating in the culture of consumption. Also absent is the desire to conquer any part of the tropical forest environment.

National governmental branches or agencies head the list of actors engaged in ordering large-scale land policy. This role, however, is often shared with other entities. The United States Agency for International Development provided influential financial and technical assistance in the *Plan Peruvia*, an ambitious program designed to develop settlements on 45,000 square miles of Amazon land in Peru, much of which was inhabited by Campa Indians.<sup>34</sup> In the absence of an effective governmental presence in these isolated areas, corporations and religious mission groups have, with government approval, been given great autonomy and have performed quasi-governmental functions.<sup>35</sup>

In contrast to the relatively simple interests of the encroachers and the forest-dwellers, the interest of policy and law-making entities are somewhat more complex. These interests include preserving national security near national borders and promoting economical development. Presumably, another interest of South American govern-

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32. M. TODARO, INTERNATIONAL MIGRATION IN DEVELOPING COUNTRIES 66 (1976); Wilkening, *Comparison of Migrants in Two Rural and An Urban Area of Central Brazil*, LAND TENURE RESEARCH BRIEF 2-6 (1970).

33. One explorer and indigenous activist reports that in the Brazilian forest areas, land may cost as little as "a couple of bottles of beer per acre." R. HANBURY-TENISON, A QUESTION OF SURVIVAL FOR THE INDIANS OF BRAZIL (1973).

34. See J. BODLEY, *supra* note 7.

35. In the Peruvian Amazon, petroleum companies "have the absolute and total support of the Peruvian government and the capability to exercise a coherent policy with respect to the native minorities that are found in areas of petroleum exploration and extraction." Varese, *The Conquest Continues*, 1 INDÍGENA 5 (1974). In Brazil, "although the native population on the whole is the responsibility of FUNAI [the governmental agency assigned to supervise the welfare of forest-dwellers], the agency only looks after one third of it[;] the rest is indeed entrusted to both Catholic and Protestant missions." R. FUERST, 1974 AMAZON BULLETIN 2, 28. For a well-documented account of the local power over land policy amassed by a Capuchin mission in the Colombian Amazonia, see V. BONILLA, SERVANTS OF GOD OR MASTERS OF MEN? (1972).

ments is the protection of indigenous populations. It is not uncommon, however, to find that the agency charged with that responsibility is also responsible for economic development in forested areas.<sup>36</sup> For example, "pacification teams" from FUNAI, the Brazilian government agency responsible for the welfare of forest-dwellers, are joined by exploiters of rubber plantations and Brazilian nut groves, who immediately occupy the areas made accessible by the pacification of hostile groups.<sup>37</sup> Government actors also have an interest in maintaining domestic peace, but as arbiters of conflicts between encroachers and forest-dwellers, they generally favor the interests of encroachers.<sup>38</sup> Finally, these entities have their own self-interests that often conflict with indigenous land rights. For example, it has been claimed that FUNAI must support itself financially by exploiting forest lands.<sup>39</sup>

### B. South American Land Law: An Overview

The legal systems of the South American countries remain greatly influenced by their colonial experience. Each country's basic property law is set forth in its *Código Civil*, which is derived from laws of the country's former colonial government<sup>40</sup> and from the European civil law tradition.<sup>41</sup> Land reform movements, however, have introduced some major changes to traditional real property law. Most South American republics have initiated plans of land redistribution aimed at breaking up the feudal *latifundia* systems of large landholdings. The

36. This interest in development is reflected in the title of the principal Peruvian legislation regulating the forest-dweller: "The Law of Native Communities and of Promotion of Agriculture and Cattle Raising in Forest Areas, and Areas Adjacent to the Forest" (*Ley de Comunidades Nativas y de Promoción Agropecuaria de las Regiones de Selva y Ceja de Selva*). Decreto Ley No. 20653 de 24 junio 1974.

37. C. de Araújo Moreira Neto, *Relatório sobre a Situação Atual dos Índios Kayapo*, in *BIBLIOGRAPHY OF THE INDIGENOUS PROBLEM AND POLICY OF THE BRAZILIAN AMAZON REGION (1957-1972)* 28 (R. Fuerst ed. 1972).

38. J. DE QUEIROZ CAMPOS, *NEM GENOCÍDIO NEM ETNOCÍDIO* (1970); O. BANDEIRA DE MELLO, *A POLÍTICA INDIGENISTA DO BRASIL* (1972).

39. According to a report of the Aborigines Protection Society, in 1972 10% of the income derived from Indian land went to FUNAI headquarters, 45% was returned directly to the tribe, and 45% went to continue FUNAI projects with the tribe concerned. *TRIBES OF THE AMAZON BASIN*, *supra* note 7, at 134. In that same year, however, the Brazilian President denied categorically that FUNAI was maintained by the product of Indian efforts. *Id.* at 190.

40. The modern countries dealt with in this study (and their colonizers) are: Argentina, Bolivia, Colombia, Ecuador, Panama, Paraguay, Peru, and Venezuela (Spain); Brazil (Portugal); Guyana (Netherlands, Great Britain); French Guyana (France); and Surinam (Netherlands). After independence, the liberal individualism and egalitarianism of the French Revolution, the Napoleonic Code, and German legal science were especially influential in shaping the civil codes of the new republics.

41. See generally J. MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* (1969).

remainder of this section discusses three aspects of South American real property law: the official recognition of Indian land use, the varying content of the land rights accorded indigenous peoples, and the preservation of such native rights, once recognized.

### C. *Official Recognition of Forest-Dweller Land Tenure*

Native systems of acquisition of rights and obligations over specific portions of terrain have traditionally been determined by widely varied and complex factors. Normally, an individual's membership or residence in local kinship groups, villages, bands, or tribes is sufficient to guarantee recognition of the individual's position in the various land use patterns of his community. Today, however, the forest-dweller is faced with a disruption of these native land distribution systems caused by a shortage of available land and the presence of encroachers and law-makers eager to replace native systems with their more "tangible" land titling procedures. Thus, forest-dwellers must now turn to national land tenure machinery, with its emphasis on the acquisition of title to property, to protect their interests.<sup>42</sup> In practice, many other factors may negate property benefits gained in acquiring title, but title of ownership, or similar land registration procedure, is a necessary beginning. Preservation of native interests is not necessarily guaranteed, but without title, destruction of such interests is inevitable.

1. *Acquiring real property under the civil codes.* The civil codes of the various republics have been the traditional legal instruments that regulate the relationship between man and land. Ownership (*dominio*), roughly equivalent to common law fee simple, is not absolute dominion over property. The limitations of *dominio* have been heightened in the 20th century, which has witnessed a pan-American deemphasis of the individualistic nature of property in favor of the view that property should serve a social function.<sup>43</sup>

There are five traditional means of acquiring ownership of property in civil law jurisdictions: transfer (*la tradición*), prescriptive

42. Indians without title of ownership are usually powerless in bringing any suit against any trespasser. In Latin America, possessory actions brought for the purpose of obtaining or maintaining possession of real property are normally given only to the owner of the real property right. P. EDER, A COMPARATIVE SURVEY OF ANGLO-AMERICAN AND LATIN AMERICAN LAW 124 (1950); see, e.g., CÓDIGO CIVIL arts. 946, 972 (Colombia). At the same time, possession of title by the Indians can be a formidable bar to encroachment. See N. RODRÍGUEZ, OPPRESSION IN ARGENTINA: THE MATACO CASE 11 (1975).

43. See, e.g., CONSTITUCION BOLIVIANA art. XXII (Bolivia); CÓDIGO CIVIL art. 105 (Bolivia); Ley No. 852 de 29 marzo 1963 que establece el Estatuto Agrario (Paraguay).

ownership (*la prescripción; la usucapión*), occupation (*la ocupación*), accession (*la accesión*), and succession (*la sucesión*).

In Latin America, real property is very frequently acquired through effecting *tradición*, an umbrella concept "perfecting" or "validating" a multitude of different voluntary land exchanges, including sales, designed to provide order and stability to the land tenure realm.<sup>44</sup> The purchase of land is difficult for the forest-dweller, since he is in an inferior economic and bargaining position, and is generally functioning outside of the national monetary market economy.<sup>45</sup> Therefore, these sections of the civil code usually come into play when a non-indigenous organization purchases land on behalf of Indian land users,<sup>46</sup> and when such purchases do not fall under any special legislation.

South American countries do not generally recognize prescriptive ownership claims to public land.<sup>47</sup> Since much of the forest area is owned by the national governments,<sup>48</sup> *la prescripción* is not a promising method by which forest-dwellers can acquire title to land. Also, since many forest-dwellers are nomadic or semi-nomadic, "continuous and uninterrupted possession" necessary for prescriptive ownership cannot be maintained. Prescriptive ownership has been used more often to extinguish indigenous land rights rather than to create or recognize such rights.<sup>49</sup>

Occupation is the acquisition of ownership over personal property (*muebles*), or in some jurisdictions, real property (*inmuebles*), that does not already belong to someone. Unfortunately, most of the land in South America, including isolated forest areas, already "belongs" to someone.<sup>50</sup> Furthermore, right of occupation over unowned

44. *La tradición* is an institution by which one acquires ownership rights through the transfer and delivery of something by the owner (*tradente*) to someone else (*adquirente*). The former owner must have the intent to transfer, while the new owner must have the intent to acquire. Both parties must have the capacity to enter the transaction. For a discussion of the limitations on the competency of Indians, see text accompanying notes 271-85 *infra*.

45. See text accompanying notes 134 & 142-43 *infra*.

46. See *Projects*, 2 SURVIVAL INT'L REV. 3 (1977).

47. See, e.g., CODIGO CIVIL art. 2519 (Colombia); CODIGO CIVIL art. 823 (Peru).

48. See text accompanying note 50 *infra*. National governments assume that dominion passed to them from the colonial empire upon independence. See, e.g., CODIGO CIVIL art. 707 note (Colombia, Ortega Torres ed.).

49. See text accompanying notes 146-47 *infra*.

50. For example, in Colombia property without an apparent or known owner becomes vacant property (*bien vacante*). Sentencia, Sala de Negocios Generales, 22 febrero 1937 XLIV 778 (Colombia). Any other land without a private owner is a *baldío*. Vacant property belongs to the local government units within which it is situated. CODIGO

resources, such as fish and wild game, can also be severely limited by prohibiting hunting or fishing outside of one's own land.<sup>51</sup> For these reasons, acquisition by occupation is nearly inapplicable to the forest-dweller's situation.

*Accesión* is a means of acquiring ownership over certain things (*frutos*) produced on or adjacent to property already owned.<sup>52</sup> Examples include crops and animals raised on one's land or money earned by renting property. Without initial legal ownership of some land, however, there is nothing to which the *frutos* can accede. Thus, as a vehicle for initial recognition of forest-dweller land rights, *acción* is unproductive.

*La sucesión*, the law of inheritance, is an important means of acquiring property under the civil codes. It is virtually useless to the forest-dweller, unfortunately, since they do not usually own property that they can distribute to their heirs. If forest-dwellers were to acquire property, the intestate provisions of *la sucesión*, with its nuclear family orientation, would wreak havoc with the native system of property distribution upon death. This phenomenon more often functions to destroy, rather than create, native rights in land.

2. *General problems in acquiring real property rights under traditional civil code law.* There are additional more complex barriers to effective recognition of Indian land rights at the national level that do not arise from one or two civil code sections. These problems can be grouped under two headings: the human-land relationship, and the spatial aspects of land.

a. *The human-land relationship.* The Western concepts of the relationship between land and human beings are exemplified by the institutions of property and ownership. There has been much disagreement over the existence of ownership as a legal or philosophical concept in non-Western thought systems,<sup>53</sup> and if it exists among unaccul-

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CIVIL art. 706 (Colombia). *Baldíos* belong to the federal government. Even if utilized by Indians, such lands are usually labeled as vacant. See text accompanying note 180 *infra*.

51. See, e.g., CÓDIGO CIVIL arts. 688, 691 (Colombia).

52. See R. LEE, AN INTRODUCTION TO ROMAN-DUTCH LAW 138 (4th ed. 1946). See also A. VALENCIA ZEA, 1 DERECHO CIVIL 328-38 (1967); CÓDIGO CIVIL art. 713 (Colombia).

53. Biebuyck, *Introduction: Land Tenure*, in ENCYCLOPEDIA OF THE SOCIAL SCIENCES 565 (1975); Smith, *The Concept of Native Title*, 24 U. TORONTO L.J. 1, 6 (1974).

turated forest-dwellers, it is far removed from the Western concepts that permeate the civil codes. An individual Amerindian's membership or residence in local kinship groups, villages, bands, or tribes is usually enough to guarantee recognition of the individual's position in a land use pattern.<sup>54</sup> The actual strength and scope of rights related to land vary from group to group. Not only are tribal groups self-contained cultures with their own unique land tenure systems, but groups have also undergone different levels of acculturation and therefore will vary in the extent to which they have incorporated Western ownership concepts into their culture.

The native perception of rights to an object is strongly linked to actual physical possession of the object. Indeed, in non-Western societies, and in the tribal forerunners of Western culture, ownership has been viewed as depending on physical possession rather than on a set of abstract rights.<sup>55</sup> As a result, among Indians there is little absentee ownership or surplus accumulation of title to real property that can be transferred to one's heirs.<sup>56</sup> The importance of actual physical possession, combined with the semi-nomadic and shifting nature of forest-dwelling food procurement, the quick depletion of the jungle soil, and the historic abundance of new, more fertile virgin territory, result in more ephemeral individual landholding than is recognized in the civil codes.<sup>57</sup>

A salient feature of civil code ownership is the right to exclusive enjoyment of property,<sup>58</sup> a feature not stressed in native societies. For example, "owned" property may be "borrowed" by others to grow corn and bananas among the Cuna of the Columbian Panamanian

54. Biebuyck, *supra* note 53, at 563.

55. Smith, *supra* note 53, at 6-7.

56. Among the hunting and gathering Siriono of lowland Bolivia for example, inheritance of real property is absent. A. HOLMBERG, *supra* note 23, at 44-46. Certain groups such as the Yaruro of Venezuela, however, do recognize inheritance of limited stocks of immovable property such as gardens and houses. Leeds, *The Ideology of the Yaruro Indians in Relation to Socio-economic Organization*, 9 *ANTROPOLÓGICA* 1, 1-10 (1960).

57. See F. FRIKEL, *AGRICULTURA DOS INDIOS MUNDURUKÚ* 22-23 (1959); M. HARNER, *supra* note 5, at 179; R. KARSTEN, *INDIAN TRIBES OF THE ARGENTINE AND BOLIVIAN CHACO: ETHNOLOGICAL STUDIES* 37 (1932); R. MURPHY, *THE RUBBER TRADE AND THE MUNDURUCU VILLAGE* 27 (1954); C. NIMUENDAJÚ, *THE EASTERN TIMBIRA* 157 (1946); Barker, *Memoria sobre la cultura de los Guaika*, 1 *BOLETÍN INDIGENISTA VENEZOLANO* 467 (1953).

58. According to the Brazilian Code, for example, "The ownership (*dominio*) is presumed to be *exclusive* and unlimited, until proof to the contrary." *CIVIL CODE OF BRAZIL* art. 527 (emphasis added).

Darien region. "Fishing and hunting are open to everybody everywhere, with the exception, in certain cases, of the catching of turtles."<sup>59</sup> One can never exclude another from water sources.<sup>60</sup> Even the exclusion attached to temporary forms of possessory landholding is somewhat less meaningful among many groups, since the fruits of such plots are subsequently distributed among the group.<sup>61</sup>

The collective, or corporate, form of native land tenure illustrates another difference between civil code and Indian landholding notions. In contrast to the amorphous systems of individual holding among Amerindians are strong and often well defined native concepts of group holding or territoriality.<sup>62</sup> These forms of landholding can be complex and diverse. The corporate landholding body may vary between societies. Even within the same society, a variety of individual, communal and familial patterns may be interwoven.

The largest possible landholding body is the largest group to which the forest-dweller belongs—the maximum territorial unit.<sup>63</sup> Among the Sirionó of forest Bolivia, for example, the unit is the single band of 50 to 100 members.<sup>64</sup> The landholding group is somewhat larger among the Eastern Timbira of the Brazilian Amazon, consisting of a tribe that encompasses various village communities. The tribes inhabiting the Northern Argentina Chaco have well defined territories that they defend quite vigorously.<sup>65</sup>

The various local groups within the maximum territorial unit such as village communities or other spatially defined aggregates of people may also be landholding bodies. Kinship groups may also hold land. Such groups may be larger or smaller than the local groups

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59. E. NORDENSKIÖLD, *AN HISTORICAL AND ETHNOLOGICAL SURVEY OF THE CUNA INDIANS* 40-41 (1927).

60. D. MARSHALL, *CUNA FOLK: A CONCEPTUAL SCHEME INVOLVING THE DYNAMIC FACTORS OF CULTURE, AS APPLIED TO THE CUNA INDIANS OF DARIEN* 126 (1950).

61. See, e.g., R. MURPHY, *supra* note 57.

62. See A. Leeds, *Property*, in *ENCYCLOPEDIA OF ANTHROPOLOGY* 322-23 (D. Hunter and P. Whitten eds. 1976).

63. The term "maximum territorial unit" as used here is simply the largest area inhabited by a single indigenous group.

64. See A. HOLMBERG, *supra* note 23, at 131-32.

65. See R. KARSTEN, *supra* note 57, at 103. See also Chase-Sardi, *Indian Groups of Paraguay*, in *THE SITUATION OF THE INDIAN IN SOUTH AMERICA* 420 (W. Dostal ed. 1972), and M. CHASE-SARDI, *LA SITUACIÓN ACTUAL DE LOS INDÍGENAS DEL PARAGUAY* (1972), for a classification of Indian groups in Paraguay based upon types of territorial defense.

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within the maximal territorial unit. Common kinship groups include nuclear families,<sup>66</sup> extended families,<sup>67</sup> descent groups,<sup>68</sup> and clans.<sup>69</sup>

When these complex corporate landholding patterns are replaced with a system of Western-style individual ownership, sudden individualization violently disrupts the traditional communal subsistence systems, often irreparably.<sup>70</sup> Furthermore, government failure to recognize corporately held land has historically facilitated the alienation of communal land to outsiders.<sup>71</sup>

Civil codes do have some capacity for recognition of communal ownership. Community property (*comunidad de bienes*), and "joint property" (*copropiedad*) or "joint ownership" (*codominio*)<sup>72</sup> hold some promise for preserving existing indigenous landholding patterns. Under these forms of ownership, property is held undivided by the community and each individual's share is presumed equal. Administrative decisions are made by majority vote. Individuals may freely use the land in any manner compatible with the communal ownership of the property.<sup>73</sup>

There are, however, several problems with the civil code approach to communal property. After a fixed period of time<sup>74</sup> any co-owner may demand the division and distribution of the property, and can thus destroy the community. Furthermore, given the complexity and

66. A nuclear family consists of a married couple and their children.

67. The extended family household can encompass more generations of related individuals than does the nuclear family.

68. A descent group, or lineage, is "any publicly recognized social entity such that being a lineal descendant of a particular real or fictive ancestor is a criterion of membership." W. GOODENOUGH, *DESCRIPTION AND COMPARISON IN CULTURAL ANTHROPOLOGY* 51 (1970).

69. For a legal anthropological discussion of descent systems, see Moore, *Descent and Legal Position*, in *LAW IN CULTURE AND SOCIETY* 374-400 (L. Nader ed. 1969). A clan is a higher order unit, often containing several descent group lineages, in which common descent is assumed. R. FOX, *KINSHIP AND MARRIAGE* 49 (1967).

70. See, e.g., M. HARNER, *supra* note 5, at 213.

71. INTERNATIONAL LABOR OFFICE, *supra* note 4, at 295.

72. See, e.g., *CÓDIGO CIVIL* arts. 158-172 (Bolivia); *CIVIL CODE OF BRAZIL* arts. 623-646; *CÓDIGO CIVIL DE LA REPUBLICA DE PANAMA* arts. 400-414; *CÓDIGO CIVIL DE VENEZUELA* arts. 759-770.

73. "Each participant can freely use the common objects according to their purpose and in a manner that does not prejudice the interests of the community nor impinge upon the rights of the co-participants to use the objects." *CÓDIGO CIVIL DE LA REPUBLICA DE PANAMÁ* art. 402. In Brazil each co-owner (*codomino*) or party (*consorte*) may "[f]reely use the thing according to its purpose (*destino*), and exercise all rights over it compatible with indivision." *CIVIL CODE OF BRAZIL* art. 623.

74. The period can be no greater than that provided by the Code (usually five to ten years), but by agreement the parties can fix a shorter period. See, e.g., *CIVIL CODE OF BRAZIL* art. 629 (five years); *CÓDIGO CIVIL DE LA REPUBLICA DE PANAMÁ* art. 408 (ten years).

flexibility of native landholding patterns, there is the problem of identifying the corporate groups to receive title.

As an alternative, title to lands located within the territorial scope of the villages or larger units might be vested in the indigenous political leader. Finding an individual who fits the Western concept of "leader," however, may be just as difficult as identifying a communal landholding body. It has been said of the leadership of the tropical forest chief: "[o]ne word from the chief and everyone does as he pleases."<sup>75</sup> Although this is an overstatement, forest-dweller leaders usually have little formal authority or power.<sup>76</sup>

The differences between native and national attitudes towards property ownership are a major impediment to acquisition of nationally cognizable native land rights. While forest groups see land use in terms of physical possession, temporary usufruct, communal holding, and deemphasized exclusivity, traditional civil law creates an ownership based on a permanent and exclusive set of abstract rights, which are normally held by an individual. Where the civil code provides for collective ownership, provisions are deficient, primarily due to the difficulties attached to pronouncing one native entity "owner."<sup>77</sup> Where individualization results, the dispossession process is even accelerated.

*b. The spatial aspects of land.* It is arguable whether unacculturated native groups even have a conceptual category for "land" in the Western sense. South American Indians do not use cartographic technology, but rely on natural phenomena to define territorial ranges. Any difficulties in defining land are not insurmountable, however. In spite of the wide geographic areas required by nomadic or seminomadic settlement patterns,<sup>78</sup> these patterns are not arbitrary, but usually involve a known and defined terrain.<sup>79</sup>

Regardless of how land is acquired, native land use patterns such as slash-and-burn cultivation, and hunting and gathering, do not per-

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75. Carneiro attributes the statement to Father John M. Cooper. Carneiro, *Slash and Burn Cultivation Among the Kuikuru and its Implications for Cultural Development in the Amazon Basin*, in PEOPLES AND CULTURES OF NATIVE SOUTH AMERICA 98, 122 (D. Gross ed. 1973).

76. Here, Pospisil's two-variable scheme for classifying types of political authorities is used: degree of formality and extent of power. L. POSPISIL, *KAPAUKU PAPUANS AND THEIR LAW* 260-61 (1964).

77. Nor is it likely that native groups can quickly and successfully adapt to these civil code property concepts. See M. HARNER, *supra* note 5, at 213.

78. See text accompanying notes 21-24 *supra*.

79. See M. WEISS & A. MANN, *supra* note 14, at 204. See also A. HOLMBERG, *supra* note 23, at 120-22, 132.

nit continuous and visible exploitation of the same tracts of land. Also, groups often temporarily evacuate certain sites to allow these tracts to regenerate.<sup>80</sup> People who subsist in this manner are in no way relinquishing their permanent territorial claims. Thus, protection of many superficially vacant areas is necessary. Unfortunately, the fiction of vacant land has been traditionally invoked to justify the usurpation of these native areas, leaving only smaller and grossly inadequate areas for subsistence.<sup>81</sup>

Even if the civil codes could be made to reflect accurately native interests, titling must be implemented before the forest groups have retreated and before dispossession by encroachers has taken place. The technical problems of delimiting the boundaries of native occupation are reduced if signs of such occupation can be observed and documented. This becomes more and more difficult the longer the land at issue has been abandoned by natives. Early titling reduces the number of conflicting claims, either lawful or unlawful, on Indian lands by encroachers. All other things being equal, it is easier to stop encroachment if it does not involve reversing the dispossession process.<sup>82</sup>

Even assuming a timely and accurate legal recognition of *de facto* Indian land occupation, native groups need a supplementary zone of substantial surface area surrounding the boundaries of actual use.<sup>83</sup> A buffer area is necessary to provide for the present and future needs of forest-dwellers. For example, hunting, and even disease prevention<sup>84</sup> may be adversely affected by the settlement of adjacent land. Since Western thought is unsympathetic to "inefficient" uses of land, the creation and maintenance of "empty" zones is one of the most vexing problems in the acquisition of adequate indigenous land rights.

Many forest-dwelling groups have ranges that cross international borders.<sup>85</sup> Three problems are presented by the international aspect

80. See text accompanying note 23 *supra*.

81. W. COPPENS, *THE ANATOMY OF A LAND INVASION SCHEME IN YEKUANA TERRITORY, VENEZUELA* 20 (1972).

82. See H. SIVERTS, *TRIBAL SURVIVAL IN THE ALTO MARAÑÓN: THE AGUARUNA CASE* 42 (1972).

83. Such a buffer zone cannot be acquired by prescription, since at the outset, there would be no occupation or possession in either the civil code or native sense. *La tradición* is the only real property doctrine that would pertain. See text accompanying note 44 *supra*.

84. M. WLISS & A. MANN, *supra* note 14, at 357-60.

85. The Ayoreo, for example, are constantly on the move and may be in Paraguay one day and in Bolivia the next; their habitat is the Chaco Boreal as a whole. Chase-Sardi, *The Present Situation of the Indians in Paraguay*, in *THE SITUATION OF THE INDIAN IN SOUTH AMERICA* 173, 176 (W. Dostal ed. 1972).

of the forest-dwellers' habitat. First, the international forest-dweller must acquire property rights for different portions of his land under two different legal systems. Not only is double effort needed to title land, but substantive rights as well as methods of implementation may vary on each side of the border. Second, the tribal Indian may find that the *same* portion of his land is claimed by more than one country. Finally, free movement within a plot of land, vital to native subsistence,<sup>86</sup> may be curtailed when an international boundary divides the land. In spite of the widely recognized need for international cooperation,<sup>87</sup> there is substantial opposition in official quarters to free movement of forest-dwellers across borders. Ecuador, for example, has resisted the idea on the ground that such a policy would prejudice its territorial sovereignty.<sup>88</sup>

3. *Special law relevant to the problems of land acquisition.* Many South American countries have adopted a sizeable and diverse body of law designed to protect indigenous peoples.<sup>89</sup> Because of its special

86. See Reports & Inquiries, *supra* note 6, at 418.

87. There has been some initial multilateral activity concerning indigenous lands, notably the land provisions of the International Labor Organization's Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, which most South American countries have ratified. See INTERNATIONAL LABOR OFFICE, PROTECTION AND INTEGRATION OF INDIGENOUS AND OTHER TRIBAL AND SEMI-TRIBAL POPULATIONS IN INDEPENDENT COUNTRIES, Part II 58-60 (1957); INTERNATIONAL LABOR OFFICE, RECOMMENDATION CONCERNING THE PROTECTION AND INTEGRATION OF INDIGENOUS AND OTHER TRIBAL AND SEMI-TRIBAL POPULATIONS IN INDEPENDENT COUNTRIES, Part II 78-80 (1957). For a discussion of the relevant activities of international organizations, see Swepston, *The Indian in Latin America: Approaches to Administration, Integration, and Protection*, 27 BUFFALO L. REV. 715 (1978).

88. INTERNATIONAL LABOR OFFICE, LIVING AND WORKING CONDITIONS OF INDIGENOUS POPULATIONS IN INDEPENDENT COUNTRIES: REPORT VIII(2) 96 (1956).

89. Ecuador, at one end of the continuum has no special legislation directed towards forest-dwelling Indian land, while Brazil, Colombia, and Peru all have comprehensive statutes. See *The Indian Statute (Brazil)*; *Legislación Nacional sobre indígenas, recopilación* (Colombia 1970); Law No. 6,001 of December 19, 1973, dealing with: Decreto Ley No. 20653 de 24 junio 1974, *Ley de Comunidades Nativas y de Promoción Agropecuaria de las Regiones de Selva y Ceja de Selva* (Peru). Note, however, that in Ecuador a special law for the adjudication of uncultivated lands in the tropical forest region preempts many civil code provisions. See 2 febrero 1972, Special Law for the Adjudication of Uncultivated Lands in the "Oriente" Region (Ecuador).

The Interamerican Indigenous Institute in Mexico City has published an excellent, although somewhat outdated series of compilations of this LEGISLACIÓN INDIGENISTA. See, e.g., A. GARCÍA, LEGISLACIÓN INDIGENISTA DE COLOMBIA (1952). The Venezuelan statutes are the only Indian statutes that are compiled in a current and complete volume. 7 REVISTA MONTALBAN (1977).

The majority of the special indigenous land law in force is concerned with giving legal personality to and promoting the development of the indigenous *comunidades*. *Comunidad* is a generic name for national legal recognition of the social links between members of a sedentary land-exploiting native group and the land they cultivate.

character and subsequent enactment, this law prevails over civil code provisions.<sup>90</sup> There has been a plethora of enactments from colonial times to the present that vary greatly in the exact degree to which they preempt civil code law.<sup>91</sup>

Since the Spanish arrival in the New World, there has been a special corpus of law pertaining to indigenous peoples. A typical early example of such *legislación indigenista* is one of the Spanish Laws of the Indies: "We ordain and command that Spanish who injure or offend or maltreat Indians shall be punished with greater severity than if the same tortious acts had been committed against Spaniards."<sup>92</sup> Upon independence, there was a drastic reversal of this policy. Republican egalitarianism went hand in hand with the sanctity of individual property that permeates traditional real property law.<sup>93</sup> This egalitarian

R. CAPRILES RICO & G. ARDÚZ EGÚA, *EL PROBLEMA SOCIAL EN BOLIVIA: CONDICIONES DE VIDA Y TRABAJO* 45 (1941). The roots of *comunidades* often extend back to colonial times. The Colombian *resguardo*, for example, is a territorial unit obtained "during the Colonial period by gift, allocation, or purchase." INTERNATIONAL LABOR OFFICE, *supra* note 4, at 308 n.4. See generally J. FRIEDE, *EL INDIO EN LUCIA POR LA TIERRA* (1972) for a history of *resguardo*. The *resguardo* is regulated by Ley 89 de 25 noviembre 1890, por la cual se determina la manera como deben ser gobernados los salvajes que vayan reduciéndose a la vida civilizada (Colombia). *Comunidades* are traditional agrarian lands and are not located in forest areas. Whatever the potential usefulness to the more sedentary Indians, the *comunidad* is presently inapplicable to the forest-dwellers' land needs. Note, however, that Peru has used the name *comunidad* to describe the juridically recognized forest-dwelling communities. There has been elaborate modification of the traditional *comunidad* for these purposes, however, and it should not be confused with the ancient juridical *comunidad* concept described here. See generally Decreto Ley No. 20653 de 24 junio 1974, Ley de Comunidades Nativas y de Promoción Agropecuaria de las Regiones de Selva y Ceja de Selva (Peru).

90. See, e.g., Código Civil art. 20 (Colombia).

On the other hand, derogations from general rules are to be interpreted strictly, e.g., CIVIL CODE OF BRAZIL art. 6, and in case of a direct conflict that cannot be resolved by rules of statutory interpretation, the civil code is sometimes given precedence. E.g., Código Civil art. 10 (Colombia).

91. Special land measures may supplement civil code provisions rather than replace them. The Brazilian Indian Statute for example, after providing for the establishment of special Indian land regimes, continues by adding: "The Indian or the native community, as the case may be, shall have full ownership of land obtained by any of the ways of acquiring property in the terms of civil legislation." Law No. 6.001 of December 19, 1973, dealing with: The Indian Statute art. 32 (Brazil).

Furthermore, the civil codes must not be discarded in any analysis of native land acquisition, even if they have been preempted. Code principles provide a traditional base from which to analyze the special law. See Thome, *The Process of Land Reform in Latin America*, 1968 Wis. L. REV. 9, 20 (citing A. Lopez, *Problemas Legales y Jurídicos de la Reforma Agraria*, in *LAS REFORMAS AGRARIAS EN LA AMÉRICA LATINA* 251 (O. Delgado ed. 1965)).

92. Law of December 19, 1593, Law of the Indies (Spain).

93. This ideology, the principle of universality of norms, was visible in the egalitarian spirit of the first decree of General San Martín as head of the provisional government of Peru. He proclaimed that Inca descendants should not be called "Indians" or "natives," but "Peruvians." INTERNATIONAL LABOR OFFICE, *supra* note 4, at 5.

spirit prevented the adoption of special indigenous legislation during most of the 19th century.<sup>94</sup>

During the 20th century, there has been a limited retreat from this principle. Most of the countries have some special legislation pertaining to the forest-dwellers, or the zones they occupy. In addition, there has been a spate of constitutional amendments and legislation that, while not referring specifically to the Indian, alters many basic real property principles of the civil codes.

Two forces militate against the implementation of specially directed law. First, most Latin American policy-making entities desire a rapid assimilation of the forest-dweller into national society.<sup>95</sup> Special treatment of Indians often impedes assimilation, especially where such treatment requires the creation or maintenance of physical land barriers between the Indian and the national culture. Second, it is feared that any system of legal protection of Indians, however well-intentioned, might produce results exactly opposite to those sought. Paternalism and discrimination are among the feared consequences. The classic example of this phenomenon is the colonial institution of *encomienda*. Designed as a special protective measure, the *encomienda* was transformed into a justification for exploitation and confiscation of indigenous lands.

a. *Paramount native rights: sovereignty and native title.* The familiar concepts of sovereignty and native title could be implemented to recognize a native ownership independent of the Civil Code. These concepts, however, still require definition of the boundaries of native land and translation of native land tenure patterns into nationally recognized forms of rights of "dominion" or internationally recognized "nationhood." Many of the same problems tied to acquisition of property through civil code principles may still apply.

According to the principles of indigenous sovereignty, native groups possess certain attributes of modern statehood. The Declaration of Principles for the Defense of the Indigenous Nations and Peoples of the Western Hemisphere has recently stated that "[i]ndigen-

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94. In Colombia, for example, there was no significant break with this principle until after 1890, when a regimen of "special law," including regulations over some Indian lands, came into effect. A. GARCÍA, *supra* note 89, at 16. See Ley 89 de 25 noviembre 1890, por la cual se determina la manera como deben ser gobernados los salvajes que vayan reduciéndose a la vida civilizada (Colombia).

95. To use Brazilian history as an example, "from the most distant colonial times to the present day, the efforts for the 'integration' of the Indian constituted the essential and almost sole object of the official Indian policy." THE SITUATION OF THE INDIAN IN SOUTH AMERICA 340 (W. Dostal ed. 1972).

ous peoples shall be accorded recognition as nations."<sup>96</sup> No South American country has unequivocally recognized the existence of another "sovereign" within its borders, and it is unlikely that such a recognition will soon emerge.

The concept of native title, though its meaning varies with the advocate, generally gives "recognition to the principle that the land which a people have developed and used from time immemorial belongs to them."<sup>97</sup> The proponents of a strong native title concept assert that national legislation can only recognize land rights already belonging to Indians, and cannot create such rights.<sup>98</sup>

b. *Grants flowing from original government ownership.* In terms of the quantity of land actually granted to forest-dwellers, the most important source of legal title has been special grants based on original governmental ownership of the forest areas. Invariably, forest areas are considered vacant and unowned, in spite of the presence of forest Indians.<sup>99</sup> Since all unowned land belongs to the state,<sup>100</sup> Indians must depend on governmental "munificence" to acquire rights over such land. A major weakness in the administration of government grants to Indians is the multiplicity of interests often represented by the governmental entities responsible for making grants.<sup>101</sup> Where these agencies possess discretion in making grants, this conflict of interest has led to sporadic, inconsistent, and grossly inadequate land grants.<sup>102</sup>

Finally, the federal systems of Argentina, Brazil, and Venezuela may present serious problems in attempts to vest land title in Indians.

96. SPECIAL NGO COMMITTEE ON HUMAN RIGHTS, REPORT OF THE INTERNATIONAL NGO CONFERENCE ON DISCRIMINATION AGAINST INDIGENOUS POPULATIONS IN THE AMERICAS (1977).

97. Smith, *supra* note 53, at 9.

98. Indeed, it is even argued that land rights are capable of enforcement in national courts whether or not they are recognized by the national government. See Bennett, *The Origins of Native Title: A Comparative Survey*, 11 NEWS FROM SURVIVAL INTERNATIONAL 15-18 (1975).

99. Indeed, the name often assigned to such lands is "*tierras baldías*," which translates as "uncultivated, unworked and uninhabited lands." See, e.g., Decreto Ley No. 2172 de 28 septiembre 1964, Ley de Tierras Baldías y Colonización (Ecuador).

100. See, e.g., CÓDIGO CIVIL art. 675 (Colombia). For example, Ecuadorian law puts lands without an owner or lands that remain uncultivated and unworked for 10 years under the proprietorship of the Ecuadorian Agrarian Reform Institute, as *baldías*. Decreto Ley No. 2172 de 28 septiembre 1964, Ley de Tierras Baldías y Colonización art. 1 (Ecuador).

101. See text accompanying notes 36-39 *supra*.

102. Even in Peru, where discretion is limited, 196 of the 393 officially recognized indigenous communities had no land titles in 1976, and no additional titles were granted in 1977. See generally R. SMITH, THE AMUESHA-YANACHAGA PROJECT: PERU (1977).

Although there is a trend in Brazil and Venezuela "to reduce and restrict local power generally in favor of centralization and nationalization,"<sup>103</sup> state power is important in the allocation of indigenous lands.<sup>104</sup> Establishment of a coherent national land grant program is more difficult where local jurisdictions may construct their own policies. Furthermore, in Brazil, there has been a longstanding tug-of-war between the states and the federal government.<sup>105</sup> It is reasonable to expect continuing state resistance to the further recognition of Indian occupancy or to the creation of new reserves since, under the new Indian Statute, land reverts to the federal government when no longer occupied by natives.

c. *Land reform packages.* Land reform measures, designed to replace the feudal *latifundia* system of large landholdings with a more equitable redistribution of land, have been enacted in Bolivia, Brazil, Colombia, Ecuador, Panama, Paraguay, Peru, and Venezuela.<sup>106</sup> Generally, land reform legislation affects the forest-dweller in two major ways. First, special provisions directed towards the forest-dweller are often included in land reform related statutes. Second, the land reform measures often exacerbate the forest-dweller's land acquisition problems, whether through oversight or by operation of the general policies of the reform measures.

Some land reform statutes espouse the concept of individual ownership,<sup>107</sup> thus embracing a value that conflicts with indigenous landholding patterns. The forests may even become the new fiefdoms of the landowners who were dispossessed by the reform measures. That is the case in Ecuador, where the land reform law, by emphasizing re-

103. H. CLAETT, ADMINISTRATION OF JUSTICE IN LATIN AMERICA 14 (1952).

104. In Argentina, most indigenous populations live on lands owned by the provinces. Swepston, *supra* note 87, at 734. Unowned land located within Venezuelan state boundaries belongs to those states, although unowned land located in the Venezuelan territories and federal dependencies belong to the federal government. CÓDIGO CIVIL DE VENEZUELA art. 542. In Brazil, although unoccupied lands come under the authority of the states, the Indian Statute puts most Indian lands under federal ownership. Law No. 6.001 of December 19, 1973, dealing with: The Indian Statute arts. 21-22 (Brazil).

105. Since imperial times, the state governments "took advantage of the lack of clarity in the law and the feeble efforts made by the central government to protect native lands, and disposed of them as if they were unoccupied." C. de Araujo Moreira Neto, *Some Data Concerning the Recent History of the Kaingang Indians*, in THE SITUATION OF THE INDIAN IN SOUTH AMERICA 317 (W. Dostal ed. 1972).

106. UNITED NATIONS DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, PROGRESS IN LAND REFORM 6 (1966).

107. See Ley No. 854 de 29 marzo 1963, que establece el Estatuto Agrario (Paraguay).

form in the Andes region, has allowed the forest to become a "refuge of feudal power"<sup>108</sup> helping neither *campesino* nor forest-dweller.

Another more universal goal of land reform movements is to stimulate agricultural production. This benefits the small farmers and *campesinos* who are more integrated into the national economy,<sup>109</sup> and whose interests coincide with the national desire to increase agricultural output.<sup>110</sup> Forest-dwellers are often harmed, however, since this emphasis encourages colonization of the forest and encroachment on Indian land.<sup>111</sup>

d. *Modifications of traditional real property concepts.* Special indigenous legislation related to the acquisition of land through normal real property mechanisms can be classified into statutes that: (1) liberalize prescriptive-type ownership requirements, (2) recognize collective landholding forms, (3) develop ecosystemic approaches in delimitation of boundaries, (4) establish buffer zones, and (5) remove encroachers.

In South America, one cannot normally obtain usual prescriptive ownership rights over public land.<sup>112</sup> Brazil, Colombia and Ecuador, however, have developed mechanisms similar to prescriptive ownership for the purpose of determining who will be granted these government lands.<sup>113</sup> None of these special provisions, however, accommodate the

108. A. COSTALES SAMANIEGO, *FAMILIAS, GRUPOS, COMUNIDADES ETNO-LINGÜÍSTICAS DE LA AMAZÓNIA DEL ECUADOR Y PERU* 197 (1973).

109. The Colombian law "on social agrarian reform" states that "this law has the following objective[s] . . . To stimulate the adequate economic exploitation of uncultivated or deficiently utilized lands [and] to increase the overall volume of agricultural and livestock production." Law 135 of December 13, 1961, the Colombian Agricultural Reform art. 1.

110. This is more understandable when account is taken of the fact that one of the factors behind land reform is the "increasing activity and political strength of peasant organizations." Thome, *supra* note 91, at 10.

111. The forest areas are invariably considered deficiently utilized, empty lands (*tierras baldías*) and prime targets for agricultural development. See text accompanying notes 66-70 *supra*. Colonization also relieves the government of the political difficulties of expropriating property by providing an additional source of "free" land to distribute to peasants. K. KARST, *LATIN AMERICAN LEGAL INSTITUTIONS: PROBLEMS FOR COMPARATIVE STUDY* 599, 601 (1966). For example, one of the principal political motives of the Ecuadorian regulations regarding colonization was to relieve the pressure of population on the *haciendas* in the sierra. L. Brownrigg, *Contemporary Land Reform in Ecuador* (1971) (paper presented to the Society of Applied Anthropology). See Decreto Ley No. 2172 de 28 septiembre 1964 Ley de Tierras Baldías y Colonización (Ecuador).

112. See text accompanying notes 47-49 *supra*.

113. In Brazil, anyone can acquire prescriptive ownership of any land under the Civil Code if he possesses the land without interruption or opposition for 10 years in good faith and with just title, or for thirty years without good faith or just title. CIVIL CODE OF BRAZIL arts. 489-490, 550-551. Under the Indian Statute "[t]he Indian, whether

collective and nomadic nature of forest-dweller land use. A sudden and forced culture change is a de facto prerequisite of title. Furthermore, nothing in these laws prevents encroachment on Indian land and the retreat of the Indian, which interrupts the period of continuous use of the land before the time for acquiring title has run.<sup>114</sup>

Most South American countries have ratified the International Labor Organization's Convention 107 on Tribal Populations,<sup>115</sup> which provides that the "right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy shall be recognized."<sup>116</sup> One would expect, then, to see a trend towards recognition of collective land rights.

Under the civil codes, forms of "community property," "joint property," or "joint ownership" allow for a form of collective landholding, but do not provide a source for acquiring such land rights. Nearly all special law providing for indigenous communal land tenure responds to this problem by coupling, either directly or indirectly, the collective landholding provisions with a governmental grant of land.

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integrated or not, who occupies a plot of land, less than fifty hectares (123.6 acres) in area, as his own for ten consecutive years, shall acquire full ownership thereof." Law No. 6,001 of December 19, 1973, dealing with: The Indian Statute art. 33 (Brazil). The Colombian Code has similar provisions, fixing the normal time of possession at ten and thirty years. CÓDIGO CIVIL arts. 2529, 2532 (Colombia). In the areas reserved for Indians, definite title is granted before five years have lapsed, provided that at least one-half of the land is exploited agriculturally. Ministerio de Agricultura Decreto No. 2117 de 6 diciembre 1969, por el cual se reglamenta parcialmente la Ley 135 de 1961 para la dotación de tierras, división y distribución de los Resguardos e integración de las Parcialidades Indígenas a los beneficios de la Reforma Agraria art. 2 (Colombia). While Ecuador has no measure granting indigenous peoples special treatment in matters of land ownership, some forest-dwellers may benefit from a provision in the "Special Law for the Adjudication of Uncultivated Lands," which grants ownership to colonists who can prove peaceful and uninterrupted possession for a period of not less than three years if 25% of lands held have been cultivated. ORGANIZATION OF AMERICAN STATES, A STATEMENT OF THE LAWS OF ECUADOR IN MATTERS AFFECTING BUSINESS 148-49 (1975).

114. See text accompanying notes 47-49 *supra*.

115. Convention 107, Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (1957).

Only Guyana, Surinam, and Venezuela have not ratified the Convention. INTERNATIONAL LABOR ORGANIZATION, INTERNATIONAL LABOUR CONVENTIONS. CHART OF RATIFICATION (1977). French Guyana is ineligible to sign, since Convention 107 pertains only to independent countries.

116. Convention 107, Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries art. XI (1957).

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Usually the grants are regulated by land reform or colonization legislation.<sup>117</sup>

Perhaps the most serious problem with traditional communal real property law is that of identifying the proper landholding entity to be entrusted with the land rights.<sup>118</sup> The special legislation addresses this problem with three general approaches. Some countries leave the task of identifying the native group to administrative discretion<sup>119</sup> or to traditional real property law.<sup>120</sup> Others define the group that is to hold the land in the statute, decree, or regulation.<sup>121</sup> Still others vest title in a non-Indian party who will let the group exploit the land under usufruct or another title inferior to ownership.<sup>122</sup>

Most indigenous legislation does not include provisions mandating special consideration of nomadic or semi-nomadic settlement patterns in drawing land boundaries. Administrative discretion or traditional real property concepts of land occupancy must therefore fill the vacuum.<sup>123</sup> The legislation of several countries even seems to encourage land grants incompatible with the living patterns of the Indians. The Paraguayan Agrarian Statute, for example, guarantees only enough land for a sedentary settlement pattern.<sup>124</sup> In contrast, the Brazilian and Peruvian statutes require a widening of the scope

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117. A problem with civil code communal property is the possible destruction of the community. See text accompanying notes 204-05 *infra*.

118. See text accompanying notes 62-69 *supra*.

119. See H. CLAETT, *supra* note 103, at 59-75.

120. See Ley No. 3464 de 2 agosto 1953 elevado a categoria de Ley en 29 octubre 1956, Ley Fundamental de Reforma Agraria art. 130 (Bolivia); Decreto Ley No. 07765 de 31 julio 1966, De la Colonización art. 93 (Bolivia); Laws of Guyana, Amerindian Lands Commission Act § 3; PANAMA CONST. art. 116; Ley de Reforma Agraria art. 2(d) (Venezuela).

121. See Ley de 26 enero 1968, por la cual se introducen modificaciones a la Ley 135 de 1961 sobre Reforma Social Agraria art. 27 (Colombia); Ministerio de Agricultura Decreto No. 2117 de 6 diciembre 1969, por el cual se reglamenta parcialmente la Ley 135 de 1961 para la dotación de tierras, división y distribución de los Resguardos e integración de las Parcialidades Indígenas a los beneficios de la Reforma Agraria arts. 1, 3 (Colombia); Decreto Ley No. 20653 de 24 junio 1974, Ley de Comunidades Nativas y de Promoción Agropecuaria de las Regiones de Selva y Ceja de Selva arts. 6-9 (Peru).

122. See Law No. 6.001 of December 19, 1973, dealing with: The Indian Statute arts. 21-22 (Brazil); Ley No. 854 de 29 marzo 1963 que establece el Estatuto Agrario art. 146 (Paraguay); R. BEJARANO, ¿GENOCIDIO EN EL PARAGUAY? (1974); Kloos, *Amerindians of Surinam*, in *THE SITUATION OF THE INDIAN IN SOUTH AMERICA* 352 (W. Dostal ed. 1972).

123. See Decreto Ley No. 07765 de 31 julio 1966, de la colonización arts. 91, 93 (Bolivia).

124. Ley No. 854 de 29 marzo 1963, que establece el Estatuto Agrario art. 16 (Paraguay).

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of land to be included in allocations.<sup>125</sup> In Brazil, the forest-dweller is not only entitled to permanent possession of effectively occupied land "on which he lives," but also to land on which he "exerts an activity economically useful or indispensable to subsistence . . . taking into account the current situation and the historic consensus on the length of time [the lands] have been occupied."<sup>126</sup> Although these statutes do not resolve the technical problem of ascertaining the spatial perimeters of Indian forest use, they do mandate that special attention be directed towards the nomadic and semi-nomadic modes of life.

Buffer zones surrounding the land used by forest-dwellers are necessary to assure enough land for the group's future needs and to insulate the population from sudden, harmful contact with outsiders.<sup>127</sup> Only Peru, however, specifically mandates that grants be made over and above the quantity needed for settlement and migration.<sup>128</sup> Other countries have the legal machinery for establishing "national parks," occasionally used for protecting Indian-occupied areas, which could be used to create buffer areas to protect forest-dweller lands.<sup>129</sup> Unfortunately, creation of buffer zones is rare. Assuming that Indian claims to land are recognized, South American governments will have to face the difficult issues of relocation and compensation of encroachers who occupied and improved Indian land in the belief that they were the legal owners.

Where lands designated for Indian use are expropriated from third parties by land reform, compensation, if any, could be provided through land reform expropriation/indemnification provisions,<sup>130</sup> usually in the form of government Agrarian Bonds.<sup>131</sup> If land reform or other special law does not apply, traditional civil codes and codes of

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125. Decreto Ley No. 20653 de 24 junio 1974, Ley de Comunidades Nativas y de Promoción Agropecuaria de las Regiones de Selva y Ceja de Selva art. 9(a)-(b) (Peru).

126. Law No. 6.001 of December 19, 1973, dealing with: The Indian Statute arts. 23, 25 (Brazil).

127. See text accompanying notes 83-84 *supra*.

128. Decreto Ley No. 21147 de 13 mayo 1975, Ley Forestal y de Fauna Silvestre art. 60 (Peru).

129. See, e.g., Decreto Ley No. 2172 de 28 septiembre 1964, Ley de Tierras Baldías y Colonización art. 14 (Ecuador).

130. See, e.g., Law 135 of December 13, 1961, The Colombian Agricultural Reform Law arts. 54-67.

131. Compensation via agrarian bonds usually requires holding the bond for a long amortization period at a low interest rate. See, e.g., Ley 135 de 13 diciembre 1961 sobre Reforma Social Agraria arts. 74-79 (Colombia).

civil procedure would apply.<sup>132</sup> Only Peru has enacted legislation specifically addressing this problem. Under article 10 of the Native Communities Law,<sup>133</sup> encroachers are removed from lands granted to them by the state if the lands lie within native community land. The native community must reimburse the removed individual for improvements made on the land, and the state's rural development bank must in turn lend the native community the money for the reimbursement. This article has been severely criticized for several reasons. Because of article 10, no sooner are the native communities recognized than they find themselves in debt. Also, since the forest-dwellers are unfamiliar with money, to say nothing of such abstractions as debt payment schedules, the provisions of article 10 may place unrealistic demands on the Indians.<sup>134</sup> This, coupled with problems of communication between native communities and the rural banks, may prevent any application of article 10, effectively making existing levels of encroachment permanent. Thus, Peru's special legislation, while commendable in its purpose, is not likely to result in any solution to the problem of encroachments existing on Indian land at the time that native land rights are recognized.

#### D. *Limitations on the Content of the Real Property Right Granted—Obtaining Necessary Rights*

There are many ways in which the South American owner's full enjoyment of property is limited. In several countries, for example, there are conservation restrictions on the quantity of fish and game a person may take from his land.<sup>135</sup> Enforcement of such restrictions can be devastating to the forest-dweller. Conversely, if a forest-dwelling "owner" does not have the right to prohibit hunting or lumbering on his own land, the ecological niches of forest fauna can be destroyed.<sup>136</sup>

132. In Brazil, for example, under certain circumstances an evicted party can collect "necessary or useful improvements" made to the property. CIVIL CODE OF BRAZIL art. 1112.

133. Decreto Ley No. 20653 de 24 julio 1974, Ley de Comunidades Nativas y de Promoción Agropecuaria de las Regiones de Selva y Ceja de Selva (Peru).

134. See COMISIÓN EPISCOPAL DE ACCIÓN SOCIAL PARA LA SELVA, LEY DE COMUNIDADES NATIVAS Y DE PROMOCIÓN AGROPECUARIA DE LAS REGIONES DE SELVA Y CEJA DE SELVA 2 (1974).

135. In Peru, for example, a permit from the Ministry of Agriculture is required before members of the native community may commercially exploit forest fauna. Decreto Ley No. 21147 de 13 mayo 1975, Ley Forestal y de Fauna Silvestre art. 55 (Peru).

136. See C. de Araujo Moreira Neto, *supra* note 105, at 319-20. Peru addresses this problem in its Law of the Forest and Forest Fauna. Although sport or commercial hunting requires a ministry permit, native communities may exploit such resources

Other limits on the quality, rather than the quantity, of land rights conferred on Indians may impede the prevention of harmful interethnic contact. For example, most Latin American countries limit a landowner's right to exploit the subsoil of his property, and retain some governmental power over the exploitation of subsoil deposits.<sup>137</sup> Given the petroleum, uranium, bauxite, and diamond "booms" in forest areas, the danger is obvious. Peru reserves a servitude on all forest lands for future construction of bridges, roads, petroleum pipelines, telecommunications and electrical installations, and irrigation projects.<sup>138</sup> These kinds of limitations on land ownership may cause traumatic disruption of forest-dweller life.

#### E. *The Transfer of Indigenous Land Interests to Non-Indian Entities*

1. *Devices by which land interests are extinguished.* Although restraints on alienation are traditionally discouraged in property law,<sup>139</sup> history has shown that allowing the sale of Indian land is disastrous to the less integrated communities. Simón Bolívar effectively dissolved the indigenous landholding communities in the Andes simply by permitting any member of the community to sell the communal land that he held in usufruct.<sup>140</sup> The land was sold for small amounts of money by Indians who thus contributed to the formation of many of the large estates.<sup>141</sup> The Indians' apparent inability to retain landholdings can be explained by the indigenous peoples' lack of familiarity with market economics. In the less complex economic system of the forest-dweller, land simply is not a marketable commodity.<sup>142</sup> Even in more complex systems where markets do exist, land is one of the last items to "get transacted through the price-making mechanism of market

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freely for their own subsistence. Decreto Ley No. 21147 de 13 mayo 1975, Ley Forestal de Fauna Silvestre arts. 35, 55 (Peru).

137. In Brazil, national legislation recognizes only the landowner's right of priority in the development of underground wealth and not a right of ownership of such wealth. INTERNATIONAL LABOR OFFICE, *supra* note 88.

138. Decreto Ley No. 20653 de 25 junio 1974, Ley de Comunidades Nativas y de Promoción Agropecuaria de las Regiones de Selva y Ceja de Selva art. 29 (Peru).

139. The Bolivian Civil Code defines property as "a juridical power that permits the use, enjoyment and disposal of a thing." CÓDIGO CIVIL art. 105 (Bolivia) (emphasis added); accord, CÓDIGO CIVIL DE VENEZUELA art. 545.

140. See A. GARCÍA, LEGISLACION INDIGENISTA DE COLOMBIA 24-26 (1952).

141. S. VARESE, THE FOREST INDIANS IN THE PRESENT POLITICAL SITUATION OF PERU 8 (1972).

142. See generally R. FIRTH, WORK AND WEALTH OF PRIMITIVE COMMUNITIES IN HUMAN TYPES (rev. ed. 1958).

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exchange."<sup>143</sup> A legal land transaction, whether sale, lease,<sup>144</sup> or mortgage,<sup>145</sup> is therefore meaningless to many forest Indians.

Although prescriptive ownership and liberalized prescriptive-type mechanisms requiring an "occupancy," "exploitation," or "possession" of land for a determined period of time are not workable methods of land acquisition for the forest Indian,<sup>146</sup> they are effective as a means of *extinguishing* forest-dweller land rights. Prescription was used for the first time in the New World to legalize de facto colonist occupation of Indian lands.<sup>147</sup> Any liberalization of the ownership requirements in special legislation benefits the sedentary encroachers, making their encroachment legally protected.

The physical removal of tribal peoples, and their transplantation into an alien area, is another major mechanism for extinguishing indigenous land rights.<sup>148</sup> In this way, any physical and legal man-land relationships are immediately terminated.<sup>149</sup> Where conflict between

143. Dalton, *Economic Theory and Primitive Society*, 63 AM. ANTHROPOLOGIST 14 (1961).

144. The Brazilian Congress, realizing the harmful effects of long-term leasing, included a provision in the Indian Statute that would have prohibited such leasing, but the provision was vetoed by the President. Davis, *Indian Statute Passes Into Law*, 1 INDÍGENA 7 (1974).

145. Mortgage can easily lead to dispossession in jurisdictions like Ecuador where an indigenous landowner is in the same position as any other person with regard to the mortgaging of his property as security for his debts. INTERNATIONAL LABOR OFFICE, *supra* note 88.

146. See text accompanying notes 47-49 *supra*.

147. Other sources of prescriptive ownership include Roman law, French law, Spanish law, and the other modern Civil Codes. G. TORRES PORRAS, LA PRESCRIPCIÓN 15-24 (Doctoral thesis, Pontificia Universidad Javeriana, Facultad de Ciencias Económicas y Jurídicas, Bogotá, Colombia; 1960).

148. In Guyana, the Minister is given statutory authority to "make regulations . . . prescribing the mode of removing Amerindians to a District, Area or Village, or from one District, Area or Village to another." Laws of Guyana, ch. 20:01, Amerindian Act § 40(2) [Act 22 of 1951, amended by Act 6 of 1961]. This provision, however, does not apply to those groups granted title pursuant to recommendations of the Amerindian Land Commission. See note 182 *supra*.

Under the Brazilian Indian Statute, the federal government can "intervene" and remove a tribal group "when it is quite impossible or inadvisable to allow it to remain." Law No. 6.001 of December 19, 1973, dealing with: The Indian Statute art. 20 (Brazil).

149. The ease of removal does not imply an ease of successful relocation. "Indigenous groups have established a relationship of ecological dependence during the course of a long adjustment process." ILO, *supra* note 6, at 421. As a result of this forced migration, profound changes are likely to occur in any group's cultural system as it attempts to adapt to its new physical environment. "It may take decades, perhaps even centuries, for a new adaptation to fully develop." Since various indigenous social and political units are often relocated in the same areas, it is highly likely that hostilities will occur: "Migration and warfare go hand in hand." K. OTTERBEIN, COMPARATIVE CULTURAL ANALYSIS 34 (1977).

encroachers and Indians threatens the peace, it is often easier to solve the problem by the removal of the tribal group. Since the entities that must implement Indian legislation often represent other non-Indian interests, the alternative of removal of the Indians is all too attractive to the governments involved.<sup>150</sup>

2. *Provisions designed to prevent or regulate land transactions with non-Indian entities.* The need for special restrictions on the transfers of Indian property has long been recognized in Latin American law. The Law of June 11, 1594<sup>151</sup> outlawed all transfers of Indian property not made before a judicial officer under conditions designed to ensure an adequate return on land sold. Nonetheless, there are arguments for allowing these land transfers. The forest-dweller's only marketable assets are usually his land and labor. Once the national market economy begins to displace the indigenous economy, complete reliance on labor can lead to exploitation and debt peonage; without land to offer as collateral, credit becomes difficult to obtain. For forest-dwellers in this position, restraints on alienation can become paternalistic and discriminatory. This, coupled with the traditional hostility towards restraints on alienation, causes most law and policy-making entities to strike a balance between allowing free alienation of native land and protective laws preventing such alienation.<sup>152</sup>

In practice, the delegation of decision-making responsibility to government agencies regarding native land alienation has not been

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150. See C. de Araujo Moreira Neto, *supra* note 105, at 325.

151. This law is one of the earliest of the Laws of the Indies. Law of June 11, 1594, Law of the Indies, bk. 6, tit. 1, law 27 (Spain).

152. Peru is at the protectionist end of the spectrum, having instituted prohibition on transfers of land belonging to native communities. Decreto Ley No. 20653 de 24 junio 1974, Ley de Comunidades Nativas y de Promoción Agropecuaria de las Regiones de Selva y Ceja de Selva art. 11 (Peru). Bolivia has a similar law prohibiting alienation of the forest-dweller's land, but is less precise about the degree to which mortgage seizures and other devices are included in the prohibition. Ley No. 3464 de 2 agosto 1953 elevado a categoria de Ley 29 octubre 1956, Ley Fundamental de Reforma Agraria art. 130 (Bolivia). Other jurisdictions regulate rather than prohibit transfers, placing part or all of the decision-making power in the hands of a third party. Colombia and Paraguay vest title in governmental or nongovernmental entities such as land reform agencies or religious missions. These entities are then responsible for determining if and when land is to be transferred. In Brazil, "native land cannot be the object of leasing and renting or any juridical act or negotiation that restricts the full exercise of direct possession." Law No. 6.001 of December 19, 1973, dealing with: The Indian Statute art. 18 (Brazil). On the other hand, tribal groups can be removed from their lands if there is cause for "intervention." See text accompanying notes 148-49 *supra*. Furthermore, if the executive branch determines that land is "spontaneously and definitely abandoned by a native community or tribal group," it reverts to the federal government, which can then dispose of it. Law No. 6.001 of December 19, 1973, dealing with: The Indian Statute art. 21 (Brazil).

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uniformly successful. In fact, it has provided a livelihood for the *grileiro*—a Brazilian specialist in shady land deals who obtains native land by manufacturing evidence of abandonment, by ignoring evidence of seasonal occupancy, or even by driving Indians away.<sup>153</sup>

#### F. *Problems in Remediating Violations of Indian Land Rights*

One of the key attributes of legal personality is capacity: the ability to acquire rights, to contract obligations, and to appear on one's own behalf in a judicial proceeding.<sup>154</sup> Although natural persons are presumed to have this capacity, the civil codes make exceptions by creating classes of natural persons who must be represented by a guardian or representative.<sup>155</sup> Brazil, for example, denies full capacity to minors, insane persons, certain deaf-mutes, absentees, married women, spendthrifts, and forest-dwellers.<sup>156</sup> The Indian Statute places the forest-dweller in tutelage as a protective measure, with the federal executive, through FUNAI, as the forest-dweller's guardian.<sup>157</sup>

An individual under tutelage cannot own land or exercise juridical acts on his own behalf.<sup>158</sup> Thus, whatever the protective benefits of tutelage, the forest-dweller's substantive land rights are only meaningful to the extent that they are vigorously exercised by the guardian. The guardians invariably have multiple interests and limited resources,<sup>159</sup> and judicial supervision of the guardian-ward relationship is normally ineffective.<sup>160</sup>

Because of the cultural importance of communal landholding, it may be useful for the Indian group to attain recognition as a legal per-

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153. See Lewis, *Genocide*, in SUPYBÁUA, *supra* note 9, at 14.

154. See, e.g., CÓDIGO DE PROCEDIMIENTO CIVIL art. 44 (Colombia).

155. CIVIL CODE OF BRAZIL art. 5.

156. *Id.* at arts. 5-6.

157. Law No. 6.001 of December 19, 1973, dealing with: The Indian Statute arts. 7-11 (Brazil). Tutelage is a state of civil code guardianship that is ordinarily used to provide for the special legal needs of minor orphans. See CIVIL CODE OF BRAZIL arts. 406-445, which regulate tutelage.

158. CIVIL CODE OF BRAZIL art. 84; Law No. 6.001 of December 19, 1973, dealing with: The Indian Statute art. 33 (Brazil).

159. See text accompanying notes 34-39 *supra*.

160. In Brazil, if the guardian is negligent in allowing encroachers to acquire rights over Indian land, the Indian has no recourse; the federal constitution specifically prohibits judicial acts or money judgments against FUNAI for such negligence. Nor is it likely that the Brazilian Indian will become emancipated from tutelage. Although an Indian can petition the Court of Justice to release him from tutelage, the requirements are so stringent that no Indian has yet received emancipation under this provision. Law No. 6.001 of December 19, 1973, dealing with: the Indian Statute art. 9 (Brazil).

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son. It is true, however, that an unacculturated Indian is at the mercy of the system of which he is ignorant.<sup>161</sup>

Procedural law may also prejudice Indian land rights. Among many forest groups, overt conflicts over land are unknown.<sup>162</sup> The encroacher rarely respects indigenous methods of implementing norms, however, and the native confronted with encroachment is also confronted with an alien procedural system that is often too complex for even the encroacher to understand.<sup>163</sup> Although special legislation often attempts to simplify procedures for frontier residents, there is normally a timelag between the enactment of liberalized substantive law and the implementation of corresponding procedural rules. Even "simplified" procedures can be onerous.<sup>164</sup>

Forest groups, unfamiliar with the national system, and usually unable to speak or write Spanish, cannot compete with the encroacher in the national legal and political process. The law reinforces this disadvantage by maintaining that "ignorance of the law is no excuse."<sup>165</sup> It is not surprising then that Indian groups consider the law to be chameleon-like, and of use only to those who have learned its special tricks.<sup>166</sup> In the face of these legal complexities, indigenous groups have often resorted to self-help action as their "procedure"—a tactic that is successful only as long as they maintain military superiority.

161. The republics take different approaches on this issue. Argentina, for example, "does not recognize the tribes as legal entities." SECRETARIA DE TRABAJO Y PREVISIÓN, CONSEJO AGRARIO NACIONAL, *EL PROBLEMA INDÍGENA EN LA ARGENTINA* 73-74 (1945). Peru, on the other hand, specifically "recognizes the legal existence and the juridical personality of the Native Communities." Decreto Ley No. 20653 de 24 junio 1974, *Ley de Comunidades Nativas y de Promoción Agropecuaria de las Regiones de Selva y Ceja de Selva* art. 6 (Peru).

162. When a newly married Canelos Quichua man finds that overlapping land claims in his territorial llacta may become a point of contention, he may go to his wife's family's house where he provides service to his father-in-law. The father-in-law may, in turn, offer his new son-in-law some land. N. WHITTEN, *supra* note 16, at 131-32.

163. The simplest land transaction requires, at the very least, registration in a central office, and can become extremely complex if the parcel of land in question does not have clear title. Removal of encroachers in Latin America normally involves two suits: a possessory action dealing exclusively with possession, and an ordinary suit dealing with the question of title.

164. For example, in Colombia a declaratory action of nullity must be brought to defuse illegal usucaptors of Indian-occupied land within two years after the encroacher publishes his adjudication in the Official Register. Ley No. 135 de 13 diciembre 1961, *sobre Reforma Social Agraria* art. 38 (Colombia).

165. This concept (*Nemini licet ignore leges* to the Romans) is one of the oldest presumptions in Western jurisprudence. CÓDIGO CIVIL art. 6 note (Colombia, J. Ortega Torres ed. 1972). See K. KARST, *LATIN AMERICAN LEGAL INSTITUTIONS: PROBLEMS FOR COMPARATIVE STUDY* 112-33 (1966), for a discussion of the trend away from strict application of this presumption.

166. A. Antileo Reiman, *Rol de las leyes en la población indígena de América*, 35 *AMÉRICA INDÍGENA* 66 (1975).

Money, the primary means of compensating injuries in Western jurisprudence, is an inadequate substitute for loss of indigenous land interests. Once the land is gone, the traditional subsistence base is gone forever. Since forest-dwellers are unfamiliar with monetary economy, they are easily subject to economic exploitation. Furthermore, Indians under guardianship may never benefit from a money judgment. In Brazil, for example, FUNAI administers "native income" derived from the land, and may either reinvest it "in profitable activities" or utilize it in Indian assistance programs.<sup>167</sup> In practice, Indians derive little benefit from the funds administered by FUNAI on their behalf.<sup>168</sup>

## II. FACTORS AFFECTING IMPLEMENTATION OF THE LAW

The interplay of encroacher, forest-dweller, and policy and law-making entity interests<sup>169</sup> is influential in determining the degree of the law's actual implementation in the forest areas of South America. Seven factors affecting implementation of this law merit discussion: (1) the special problems of implementation of law on the frontier; (2) the low priority given the implementation of indigenous land rights; (3) the attitudes of those who must implement the law; (4) the limited power of the judicial branch; (5) the effects of graft and political influence; (6) the native's lack of political and legal representation; and (7) the deficient state of land registration machinery.

The frontiers<sup>170</sup> are located far from the sources of national political and legal influence. Poor communication and transportation,<sup>171</sup>

167. Law No. 6.001 of December 19, 1973, dealing with: The Indian Statute arts. 39-47 (Brazil).

168. See note 39 *supra*.

169. See text accompanying notes 27-39 *supra*.

170. "Frontier" is used here to describe the area of South America adjacent to those areas unpenetrated by national settlement. Writers concerned with the situation of indigenous population, have used the concept in various composite forms such as "frontier process," "frontier history," "frontier study," "frontier theory," "frontier system," "demographic frontier," "economic frontier," "ideological frontier," "colonization frontier," and "cultural frontier." See I. SUTTON, *INDIAN LAND TENURE: BIBLIOGRAPHICAL ESSAYS AND A GUIDE TO THE LITERATURE* 205-16 (1975) for an excellent bibliographic essay summarizing the studies of indigenous peoples and land tenure on the frontier, and E. SALAZAR, *AN INDIAN FEDERATION IN LOWLAND ECUADOR* 52-62 (1977) for a brief summary of the state of anthropological research on these internal frontiers and for a description of the effects of such a frontier on the Ecuadorian Shuar.

171. These problems of communication and transportation are dramatically exemplified in the account of the London-based Aborigines Protection Society's (APS) fact-finding expedition into Brazil. In August of 1972, two members of the APS Mission were invited to join a party of delegates to the 8th Interamerican Indigenous Conference, who were to fly to two FUNAI posts in the interior in two DC-47's. The party was led by the Brazilian President. In spite of the excellent weather and visibility,

general lack of governmental resources in developing nations, and low priority given to human needs of these less populated areas diminish the influence of such centers. Indeed, the resulting administrative apparatus is so distinct that the frontier has been described as an "internal colony" of the metropolitan center.<sup>172</sup> Only social programs and national interests<sup>173</sup> of the highest priority can be forcefully implemented, and legal problems of the forest-dweller are invariably near the bottom of the national (and international) ladder.

There are many possible explanations for the low priority accorded the protection of forest-dwellers. Other national interests may be considered more compelling, especially since tribal groups are normally unable or reluctant to organize themselves into a coherent political lobby. Those in a position to affect national policy may be apathetic to the plight of the forest-dweller, may have a sense of futility or may feel that the physical or cultural extermination of the forest-dweller is inevitable. Or, they may view extermination of the forest-dweller's culture, or the forest-dweller himself, as a desirable result.

Local attitudes, particularly prevalent on the frontier, also tend to impede application of the forest-dweller's rights.<sup>174</sup> Racism<sup>175</sup> and ethnocentrism<sup>176</sup> are especially pronounced and harmful. Racism has

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after some hours of searching, neither FUNAI base could be located, and the planes returned to Cuiaba. With traditional British understatement, the mission's report concluded: "the incident must speak for itself." TRIBES OF THE AMAZON BASIN, *supra* note 7, at 34-35.

172. B. COLBY & P. VAN DER BERGHE, XI COUNTRY 3 (1969).

173. For a description of some of these national interests, see text accompanying notes 34-39 *supra*.

174. Felix Cohen, with a somewhat charitable view of metropolitan mentality, speculates on this phenomenon:

It is a striking fact that so often in the history of Spain, Spanish-America, and the United States, oppression of Indians has come from local neighbors and officials and help has come from a far-off central government. Perhaps it is easier for legal ideals to live in a place far enough from the facts to which they are applied so that perspective in judgment is possible and long-range values are not sacrificed to immediate, petty advantages.

Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, in *THE LEGAL CONSCIENCE* 230, 245 (L. Kramer Cohen ed. 1960).

175. Racism denotes the attitude that the cultural and intellectual characteristics of a population are linked to its biological character. The corollary proposition is that targeted groups are oppressed and exploited, with the rationalization that they are biologically inferior. Kroch, *Racism*, in *ENCYCLOPEDIA OF ANTHROPOLOGY* 328 (D. Hunter & P. Whitten eds. 1976).

176. This term refers to the universal tendency of humans to use the norms and values of their own culture as a basis for judging and dealing with other cultures. Rather than racist views of biological inferiority, ethnocentrism involves views of cultural inferiority. See Robertson, *Ethnocentrism*, in *ENCYCLOPEDIA OF ANTHROPOLOGY* (D. Hunter & P. Whitten eds. 1976); W. SUMER, *FOLKWAYS* 12-13 (1906).

special diachronic relevance to the native, since modern racism was born during the white-indigenous contacts of the colonial occupations.<sup>177</sup> Racist attitudes towards the Indian have continued uninterrupted since the Conquest.<sup>178</sup> In Bolivia, for example, some members of the Spanish-speaking minority claim the innate biological inferiority of the Indian.<sup>179</sup>

Ethnocentrism goes hand in glove with racism. Even where blatant expressions of racism are masked, ethnocentric views are accepted and freely displayed. The evangelical work of missionaries assumes the inherent inferiority of the indigenous sacred world and the desirability of its replacement by Christianity. The Ecuadorian President, merging egalitarianism with ethnocentrism, has declared: "There is no more Indian problem . . . ; we all become white when we accept the goals of the national culture."<sup>180</sup> Ethnocentric views underlie the widely sought goal of assimilation of indigenous peoples.<sup>181</sup>

In Latin American states, the executive is the most powerful branch of government.<sup>182</sup> It has broad decree-making power, and at times a law may be practically unenforceable because of the absence of a presidential decree to implement it. Administrative rulings having the force of law give the executive another source of power, and administrative courts and other quasi-judicial bodies, such as agrarian courts and land reform agencies, are responsible to the executive. Perhaps most important, the judiciary depends on the executive for ultimate enforcement of its dispositions. Furthermore, the executive may be even stronger on the frontier, where military and executive agencies in charge of colonization, land reform, and oil exploration contrast

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Generally speaking there was no true racial prejudice before the fifteenth century, for mankind was divided not so much into antagonistic races as into "Christians and infidels." The expansion of Europe to Africa, America, and the East changed all this and thus the story of Spanish experience has a value for those who would understand race issues on the world scene.

L. HANKE, *ARISTOTLE AND THE AMERICAN INDIANS* ix (1959) (citations omitted).

178. See *id.*; J. CASAGRANDE, S. THOMPSON & P. YOUNG, *COLONIZATION AS A RESEARCH FRONTIER: THE ECUADORIAN CASE IN PROCESS AND PATTERN IN CULTURE: ESSAYS IN HONOR OF JULIAN H. STEWARD* 94 (1964); N. WHITTEN, *supra* note 16, at 273-81 (1976).

179. Patch, *Into the Heartland I*, 5 *NEWSLETTERS: LATIN AMERICA 1954-1957*, at 5 (1957); Patch, *Attitudes*, 13 *NEWSLETTERS: LATIN AMERICA 1954-1957*, at 11 (1957).

180. N. WHITTEN, *supra* note 16, at 268.

181. See SUPYSŁUA, *supra* note 9, at 34.

182. See H. CLAORETT, *supra* note 103, at 15-18.

with the sparse judicial presence. The result is that when strong executive policy, official or unofficial, conflicts with the substantive norm, it is less likely that judicial measures supporting the norm will prevail. The judiciary, even if associated with the protection of powerless groups, is itself powerless to provide much protection.

Corruption enters the legal process through two channels: graft and political influence.<sup>183</sup> One must be careful, however, in discussing "corruption." Attaching moral opprobrium to the term may be tantamount to an ethnocentric imposition of the political and legal standards of Western industrial society on less developed countries.<sup>184</sup> To deny the importance of graft and political influence, however, is to ignore the realities of the legal process affecting the forest-dweller.<sup>185</sup>

There are numerous accounts of both political influence<sup>186</sup> and bribery<sup>187</sup> frustrating implementation of native land rights. The forest dweller, because of his low status in society, does not have the means to use these extra-legal channels of influence. Nor are others with more status in society free to engage in political action. Active political support of native rights has traditionally been discouraged. The Jesuits, powerful representatives of the Catholic Church in colonial Latin America, were expelled in 1767 as a result of colonist and local government opposition to Jesuit mission efforts among the natives.<sup>188</sup> The situation today is still tense.<sup>189</sup>

Forest-dwellers also face a formidable challenge in attempting to secure effective legal representation. Government authorities will on occasion simply forbid whites from giving Indians legal advice.<sup>190</sup> Lawyers and notaries usually live in the more populated areas of the country, inaccessible to most Indians. Furthermore, native groups find

183. R. SCHLESINGER, *COMPARATIVE LAW* 629 (1970).

184. *Id.* at 630.

185. See Thome, *supra* note 91, at 20-21.

186. See, e.g., ANTI-SLAVERY SOCIETY, BOLIVIA. REPORT ON A VISIT TO INVESTIGATE ALLEGATIONS OF SLAVERY 23 (1977); S. VARESE, *supra* note 141, at 21; Lewis, *supra* note 153.

187. See, e.g., ANTI-SLAVERY SOCIETY, BOLIVIA. REPORT ON A VISIT TO INVESTIGATE ALLEGATIONS OF SLAVERY 8 (1977); J. RIESTER, CAMBA AND PAICO: THE INTEGRATION OF THE INDIANS IN SOUTH AMERICA 144, 157 n.6 (1972); N. RODRIGUEZ, OPPRESSION IN ARGENTINA: THE MATACO CASE 15 (1975).

188. See generally M. KIEMEN, THE INDIAN POLICY OF PORTUGAL IN THE AMAZON REGION, 1614-93 (1954).

189. See, e.g., N. CHAGNON, YANOMAMÖ: THE FIERCE PEOPLE 150 (2d ed. 1977).

190. One anthropologist who, in collaboration with a national law student, provided legal assistance, advice, and counsel to natives with land problems was ordered to stop by the local governor. N. WHITTEN, *supra* note 16, at 299-300.

lawyers' fees to be prohibitively expensive.<sup>191</sup> Publicly financed legal representation is usually sporadic, incomplete, or nonexistent.<sup>192</sup>

The land registration system<sup>193</sup> also impedes the Indian in his acquisition of land, and facilitates alienation of indigenous land rights. South American *cadastro*<sup>194</sup> and real property registries are in shambles,<sup>195</sup> and are at their worst in the inaccessible and understaffed frontier regions. The effect on the forest-dweller is substantial. The procedural complexities of land registration provide a formidable barrier to titling,<sup>196</sup> especially in those countries where registration is required before the title is "perfected." Even if the forest-dweller does succeed in registering his land, the deficiently applied system provides

191. Friede recalls the case of the purchase of Aruaco land by Colombian coffee growers who only paid one-third of the agreed price. The legal representative asked for a 1,500 peso fee to aid in the dispute, almost the same amount as that owed. J. FRIEDE, *supra* note 89, at 105-06.

192. *But see* Lei No. 1.060 de 5 de fevereiro de 1950. Estabelece normas para a concessão da assistência judiciária aos necessitados.

193. The purpose of the land registration system is to provide order to the real property traffic, and security to those involved in the transactions, including third parties. The degree of stability provided by the registries varies, but a classification of three groups of countries emerges:

1. *Argentina, Bolivia, Paraguay and Venezuela.* Inscription functions only to give notice to any third parties who may be adversely affected by the land transaction. Inscription is necessary before a party can vindicate his rights against a third party who has not registered.

2. *Ecuador, Colombia and Brazil.* In addition to the effects delineated above, the inscription is an element of the land transaction itself. Without the inscription, the transfer is imperfect.

3. *Panama and Peru.* In addition to the effects in "1", inscription has *convalidante* force, i.e., even if the transaction has certain defects that may make it null and voidable, the "public faith" in the registry cures such defects for the benefit of those who have inscribed their transactions.

This classification is developed in J. VILLAVICENCIO, ESTUDIO SOBRE LA PUBLICIDAD INMOBILIARIA (REGISTRO Y CATASTRO) EN RELACIÓN CON EL DESARROLLO ECONÓMICO Y SOCIAL DE LA AMÉRICA LATINA (1966).

194. Generally, *cadastre (catastro)* is a technical record of the parcellation of the land in a given area, ideally represented on plans of suitable scale, with an authoritative documentary record, a register. The registers are part of the general public document registry system. *See* A. VALENCIA ZEA, 6 DERECHO CIVIL 541-75 (1967). *See also* Lei No. 6.015, de 31 de dezembro de 1973, dispõe sobre os Registros Públicos e dá outras providências (Brazil).

195. This situation has existed since colonial times, when proper methods and procedures were rarely enunciated or followed. *See, e.g.,* THE SPANISH TRADITION IN AMERICA 128 (C. Gibson ed. 1968). Gibson also points out that the periodic Spanish legalization (*composición*) of these defective titles "encouraged additional usurpation of Indian lands . . ." C. GIBSON, SPAIN IN AMERICA 154 (1966). *See also* Thome, *Title Problems in Rural Areas of Colombia: A Colonization Example*, 19 INTER-AMERICAN ECONOMIC AFFAIRS 82-83 & n.4 (1965).

196. *See, e.g.,* W. BECK, LAND TITLE REGISTRATION IN BRAZIL 7 (1967); J. Franco García, *La titulación jurídica de la propiedad y la reforma agraria venezolana*, 5 BOLETÍN MEXICANO DE DERECHO COMPARADO nr.15 & 17; H. SIVERTS, TRIBAL SURVIVAL IN THE ALTO MARAÑÓN: THE AGUARUNA CASE 26 (1972).

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him only precarious protection. The encroacher, on the other hand, may be able to take advantage of the imperfections in the system and acquire some measure of protection by registering illegally acquired land.<sup>197</sup>

#### CONCLUSIONS AND PROPOSALS

Several general premises must be accepted before specific legal solutions can be attempted: (1) special measures must be taken to compensate for the inferior and unique status of the frontier natives; (2) the value and complexity of indigenous resource use patterns must be respected—land rights should not entail forced culture change; (3) the magnitude of the Amerindian land problem requires a new balancing of interests: national policy must be redirected to support native interests, while interests of other actors must be channeled so as to prevent encroachment on native land; and (4) there must be a minimum of substantive and procedural impediments to vindication of native land rights, and a maximum of such impediments to restriction of such rights.

An immediate presumption of native occupancy of the *tierras baldías* is necessary to break the encroachment cycle and to destroy the legal fiction that forest lands are unoccupied.<sup>198</sup> The burden should be on the encroacher to prove that the area is not used by Indians and was not used at the time of encroachment. Failure to meet this burden should result in the denial of any rights of occupancy or ownership, and the requisite period of occupancy for prescriptive ownership should not begin running in the encroacher's favor until the presumption is overcome. All land transactions in these areas should be judicially supervised,<sup>199</sup> and all costs should be absorbed by the government, or charged to encroachers who lose a given dispute.

Vigorous steps must also be taken to create an indigenous land regime amenable to more direct national legal protection. Minimal signs of an indigenous presence<sup>200</sup> should trigger an ethnological survey that would assess the tribal land needs based on an analysis of the entire tribal ecosystem. The spatial boundaries of land to be protected

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197. See text accompanying notes 162-66 *supra*.

198. Similar presumptions favoring the native would be created for all bona fide inter-ethnic land disputes.

199. See G. BENNETT, *ABORIGINAL RIGHTS IN INTERNATIONAL LAW* (1978).

200. Such signs would include, but not be limited to, the presence of villages or hunting trails, complaints of encroachment lodged by Indians, and representations by frontier residents, government functionaries or anthropologists as to Indian presence.

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would then be determined by this survey irrespective of the traditional real property concepts of the state. Allowance should be made for an adequate buffer zone that would soften inter-ethnic contact, incorporate any land subsequently "abandoned" by the natives, and provide room for migration.<sup>201</sup> Priority should be given to areas where encroachment is beginning to take place and the results should be widely publicized and inscribed in the appropriate land register.

Those who subsequently trespass on native land, including those who survey or mark boundaries with a view to settlement, should be subject to strict criminal penalties<sup>202</sup> and should lose the protection of the state.<sup>203</sup> Knowing violation of tribal areas of sacred significance should be considered an aggravating circumstance.

Encroachers already present at the time of the survey should be removed to areas unused by forest-dwellers. Settlers with good faith color of title or right could be relocated or compensated at the state's expense. In the case of pre-existing legal title, eminent domain expropriation procedures could be invoked. Under no circumstances should the forest-dweller be removed, be required to compensate removed encroachers, or be forced to accept money damages in lieu of actual use of the land.

The actual land rights accorded the forest Indians should be superior to civil code ownership rights, paramount to the rights of the state in the land, and based on the concepts of autonomy and self-determination.

Exploitation of resources on native land should be limited to exploitation by members of the tribal groups. If the group's culture and technology has not changed to the point where a given resource can be

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201. A similar zone was proposed in 1832 by special commissioners appointed by Secretary of War Lewis Cass to gather information for developing United States Indian policy. A neutral strip of land five miles wide on which all settlement was to be prohibited was to separate whites from Indians in areas west of the Mississippi. Report of Commissioners Feb. 10, 1834, in H.R. REP. No. 474, 23d Cong., 1st Sess. 102-03. For a discussion of the Commissioner's report, see F. PRUCHA, *AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS, 1790-1834*, at 257-59 (1962).

202. There are South American precedents for special criminal legislation designed to apply to violation of Indian rights by non-Indians. In the Ecuadorian penal law, for example, it is considered an aggravating circumstance if the victim of the crime is a non-integrated Indian. INTERNATIONAL LABOR OFFICE, *supra* note 88, at 28. See also Law No. 6,001 of December 19, 1973 dealing with: The Indian Statute art. 59 (Brazil).

203. See Treaty with the Wyandots, Jan. 21, 1785, 7 Stat. 17 for a similar provision in early United States law: "If any citizen of the United States . . . shall attempt to settle on any of the lands allotted to the Wiandot and Delaware nations . . . such person shall forfeit the protection of the United States, and the Indians may punish him as they please."

exploited, or if such development is not desired by the group, it is likely that alien exploitation would lead to pernicious inter-ethnic contact.

Collective landholding should be the only recognized form of landholding, and areas should be designated as belonging to the maximum native territorial unit.<sup>204</sup> Such a unit, as well as individual Indians, should be given legal status for the limited purpose of directly vindicating rights violated by non-Indians, including policy and law-making violators. Simplified legal procedures should be established for this purpose, with presumptions created favoring the forest Indian. Any individual or intra-group land use should be controlled in the traditional way or by new means developed by the tribal group.<sup>205</sup> None of the restrictions and fragility of civil code communal property regimes should apply.

The rights attached to these native lands should be absolutely inalienable in their entirety. Inheritance or succession should be regulated by tribal tradition, and property should never revert to non-Indians or to the state. Credit facilities should replace any future loss of borrowing power created by these restraints on alienation.<sup>206</sup>

A comprehensive Indian land statute containing the norms set forth above should be promulgated and integrated with other law. The land statute must preempt all conflicting federal or local law, and create a presumption in favor of preservation of native land rights in case of any conflicts within the land statute. Conflicting law should be explicitly repealed or modified.

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204. See note 63 *supra*. Where the boundaries of two indigenous groups overlap, both groups should be designated as a single landholding entity. In establishing boundaries, it is better to err on the side of overinclusion, than to risk splitting corporate entities. In addition, such a method simplifies registration by minimizing the number of protected land parcels.

205. Forest-dwellers are adaptable to changes in circumstances where given the chance. In tropical Panama, for example, the Cuna tribal council devised new rules governing property rights after the introduction of cattle and the fencing of land into the indigenous subsistence system. U.S. DEP'T OF DEFENSE, U.S. ARMY AREA HANDBOOK FOR PANAMA 79 (1965).

206.

In order to prevent alienation of indigenous land, the policy has been gaining ground in a number of countries that the mortgaging of the land to persons or bodies not belonging to the tribe or group should be prohibited or restricted. While there can be no doubt as to the intrinsic wisdom of such a policy, attention must be drawn, however, to the fact that it is not likely to yield positive results if it is not accompanied by the extension of agricultural credit facilities to indigenous farmers that will enable them to secure the necessary capital for developing their holdings economically.

INTERNATIONAL LABOR ORGANIZATION, *LIVING AND WORKING CONDITIONS OF INDIGENOUS POPULATIONS IN INDEPENDENT COUNTRIES* REPORT VIII(1) 68-69 (1955).

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Not only should there be national legal consistency, but there should also be international consistency of norms where native land regimes cross international boundaries. Initially, a model uniform land statute could be drafted, perhaps under the auspices of the United Nations, the International Labor Organization, or an international nongovernmental organization. Its provisions could be adopted as multilateral or bilateral conventions,<sup>207</sup> but could be immediately implemented as national law while the slow treaty negotiations progress.

A uniform statute must provide for binational recognition of native regimes and must accord the forest Indians the right of free passage.<sup>208</sup> Furthermore, each country should agree to control its own non-Indian nationals who violate the Indian land statute of the neighboring country. The latter agreement is not restricted to countries with forest-dwellers, but could be subscribed to by any country.

The maximum territorial units, as determined by the ethnological surveys, should be inscribed in a special National Register of Native Communities<sup>209</sup> that takes precedence over any conflicting registration systems. Those wishing to register land in the *tierras baldías* would be required to consult the National Register. The entry would validate the native dominion with absolute probative force<sup>210</sup> against previous or subsequent claims by non-Indians. In the case of bona fide prior registrations, the encroacher's remedy would be through national eminent domain procedures.

A specialized judiciary, located near the sites of encroachment, should be assigned to supervise these land transactions. Whatever the structure of this judiciary,<sup>211</sup> it should be adequately funded and su-

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207. There are already recent moves towards international treaty cooperation in the Amazon River basin. See, e.g., Vidal, *8 Nations Discuss Treaty on Amazon*, N.Y. Times, Nov. 29, 1977, at 2, col. 3.

208. For a general discussion of the right of unrestricted entry into the United States by American Indians born in Canada, see C. GORDON & H. ROSENFELD, 2 IMMIGRATION LAW AND PROCEDURE § 6.5 (1977).

209. This term is used to designate the Peruvian registry in which 250 native communities have been granted formal recognition. M. Wrightson, *Tribal Peoples' Land Rights* 20 (1977) (unpublished manuscript).

210. The Dominican Republic *Ley de Registro de Tierras* provides similar probative force in the land registration system. Ley No. 1542 de 11 octubre 1947, la Ley de Registro de Tierras. *Gazeta Oficial* No. 6707 de 7 noviembre 1947. See J. VILLAVIGENCIO, ESTUDIO SOBRE LA PUBLICIDAD INMOBILIARIA (REGISTRO Y CATASTRO) EN RELACIÓN CON EL DESARROLLO ECONÓMICO Y SOCIAL DE LA AMÉRICA LATINA 87, 415-73 (1966), for a description of the Dominican system.

211. As Pound has suggested, courts need not be separate in order to obtain the advantages of specialization: "As has been said before and cannot be said too often, specialized courts should be replaced by specialized judges sitting in branches or departments of united courts." R. POUND, ORGANIZATION OF COURTS 271-72 (1940). But see Thome, *supra* note 91, at 68.

perior in status to other entities that may be motivated by encroachment or dual interests. Judges and their functionaries should be trained in cultural relativism<sup>212</sup> and should have access to experts such as topographers and interpreters who are either natives or non-Indians sensitive to native cultures.<sup>213</sup>

A Commission of Trustee Advocates should be established to aid in the implementation of native land rights. All members of the Commission should be selected on the basis of their sensitivity to native culture, freedom from interests in conflict with those of the forest-dweller, and ability to express native interests in the national political and legal system. There should be at least one full-time attorney and one full-time ethnologist, and positions should be filled by Amerindians.

The legal status of the Commission would be one of joint trustee of indigenous land interests.<sup>214</sup> The native landholders would be both joint trustees and beneficiaries.<sup>215</sup> For purposes of legal standing in the

212. A. Antileo Reimán, *Rol de las leyes en la población indígena de América*, 35 AMÉRICA INDÍGENA 68 (1975); ILO, *supra* note 6. Bohannan notes that the term "relativism" has created much misunderstanding in the anthropological profession. "Relativism" is valid only if it means that every society . . . must be understood on its own terms . . ." Bohannan, *Ethnography and Comparison in Legal Anthropology*, in *LAW IN CULTURE AND SOCIETY* 410 (L. Nader ed. 1969).

213. Such expert assistance could be modeled after the Colombian land reform agency's *Comisiones de Titulación* (title teams). Composed of a lawyer, topographer and other personnel, and stationed in areas of large-scale colonization, the *Comisiones* have been effective in providing free services to colonists. Thome, *Title Problems in Rural Areas of Colombia: A Colonization Example*, 19 INTER-AMERICAN ECONOMIC AFFAIRS 88 (1965).

214. Since the trust involves a divorce between legal and beneficial (or equitable) ownership—a concept foreign to later Roman law that Latin America was to inherit—it is an institution that is difficult to adapt to the civil law mold, and one that is just beginning to become known in Latin America. See P. EDER, *A COMPARATIVE SURVEY OF ANGLO-AMERICAN AND LATIN AMERICAN LAW* 86-90 (1950). At the same time, the trust has been characterized as "the most valuable contribution made by Anglo-American law to jurisprudence," and is gaining acceptance in Latin America. *Id.* at 86. See generally Goldschmidt, *Trust, Fiducia, y Simulación*, in *EL FIDEICOMISO (TRUST) EN EL DERECHO COMPARADO* 7-8 (R. Goldschmidt & P. Elder eds. 1954).

215. This protection would be supplementary and would not preempt native rights. Sections of the Laws of Guyana could provide a model for such protection:

(1) The Commissioner shall undertake the care, protection and management of the property of the Amerindians, and may . . .

(b) in his own name sue for, recover or receive money or other property due to or belonging to an Amerindian, or damages for any conversion of or injury to such property;

(c) exercise in the name of an Amerindian any power which the Amerindian may exercise for his own behalf;

(d) in the name and on behalf of an Amerindian appoint any person to act as an attorney or agent of an Amerindian for any purpose connected with his property: Provided that the powers conferred by this section shall not be

vindication of indigenous land rights, the Commission should have all rights of a property holder. At the same time, however, the trustee should be subject to the safeguards placed on the native lands, and should not deal with the trust property absolutely even with consent of the indigenous joint trustee.

The strictest duties of conscience must be imposed on the trustee to administer the trust for the sole benefit of the beneficiary.<sup>216</sup> Indians, either as individuals or as groups, should be able to maintain an action to force the trustee to perform duties, to obtain redress for past or potential breaches of trust, or to remove the trustee. Duties would include holding tracts of land pending ethnological surveys, consulting with the forest-dwellers regarding felt needs, providing free legal services to Amerindians, intervening in challenges to the presumption of occupancy of *tierras baldías* or in cases where Indian lands are to be alienated, and expelling intruders from native areas. For this purpose, the Board should have direct access to the governmental enforcement machinery. Where duties overlap with those of other entities, they should be consolidated or coordinated.<sup>217</sup> Where these duties are not those normally incident to trustee property ownership, they should be explicitly established as ancillary to this trusteeship.

For many years, various international nongovernmental organizations have vigorously dedicated themselves to the protection of the rights of native peoples.<sup>218</sup> There is, however, a need for specialized ex-

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exercised by the Commissioner without the consent of the Amerindian, except in so far as may be necessary for the preservation of his property.

(2) The Commissioner shall keep proper records and accounts of all moneys and other property received or dealt with by him under the provisions of this section.

Laws of Guyana, ch. 29:01 Amerindian Act, act 22 of 1951, as amended by act 6 of 1961 (Guyana).

216. "Every trustee has a legal duty to protect without qualification the interests of the beneficiaries under the trust, and he acts in breach of that duty if he allows himself to be placed in a position where there is even potentially a conflict of interest. Why should any lesser standard apply to the administration of aboriginal lands?" G. Bennett, *supra* note 199.

217. The need for systematic coordination is shown in Venezuela where approximately thirty entities, both public and private, are involved in regulating indigenous affairs. The phenomenon also exists in Peru, where there have been attempts to integrate the activities of such agencies. See Decreto Supremo No. 10 de 2 noviembre 1960 (Peru).

218. See generally Henley, *Report to the XII International Congress of Americanists, Mexico City, Strategies and Tactics: the Role of International Nongovernmental Organizations*, 8 NEWS FROM SURVIVAL INT'L 10-18 (London).

The oldest existing international nongovernmental organization devoted to the well-being of indigenous peoples is the London-based Aborigines Protection Society, now incorporated in the Anti-Slavery Society for the Protection of Human Rights as the Committee for Indigenous Peoples.

pertise and focused efforts in the area of native land rights. Such specialization could be provided by either a new international organization, or by cooperative efforts of existing organizations.<sup>219</sup> The entity should have access to experts in cultural geography, settlement pattern studies, tropical archaeology, ethnology, legal anthropology, comparative and international law, cartography, and computer science. Prime goals should be to incorporate as many Amerindians into the organization as soon as possible, perhaps through training and internship programs. Activities should include organizing international and national symposia with a view towards implementation of land reforms, funding a full-time permanent expert representative to international organizations, drafting model land statutes, translating laws into indigenous languages, providing technical or financial assistance to the efforts of the specialized judiciaries, Boards of Tenure Advocates, and native groups, providing a computerized clearinghouse of information concerning major land transactions in the forest, conducting the ethnological surveys, and, only as a last resort, purchasing land on behalf of Indian groups.<sup>220</sup>

These legal reforms are crucial. At the same time, however, the legal system is limited in its impact; only through profound changes in attitudes toward the forest-dweller and through major adjustments of political realities will native land rights be guaranteed.

JOSEPH C. GRASMICK

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219. Possible collaborators include the Land Tenure Center (Wisconsin), the Committee for Indigenous Peoples (CIP-London), Survival International (London), Indigenous Work Group for Indigenous Affairs (IWGIA-Copenhagen), AMAZIND (Geneva) and Cultural Survival (Cambridge, Massachusetts). South American international non-governmental organizations (INGO's) should be given special consideration.

220. See Henley, *supra* note 218, at 16.