

Dam(n) Displacement: Compensation, Resettlement, and Indigeneity

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Hydroelectric dams produce electricity, provide flood control, and improve agricultural irrigation. But the building and operation of these dams frequently involve forced displacement of local communities. Displacement often has an outsized impact on indigenous persons, who are disproportionately poor, repressed, and politically marginalized. One can limit these adverse effects in various ways: (1) taking seriously the ethics of dam-induced development, (2) rooting out corruption, (3) paying compensation at or near the beginning of dam projects, (4) using land-for-land exchanges, (5) disbursing resettlement funds as needed until displaced persons are firmly established in their new locations, and (6) having entities that loan money to foreign governments for power dams insist that a percentage of the loan be sequestered to cover compensation and resettlement costs.

This sextet of sensible measures must, however, be applied to highly different countries and indigenous persons. This application will be unsuccessful unless these measures fit the local situations on the ground. This Article shows how one can succeed in two quite different countries—China and Guatemala—in which past efforts have proved inadequate.

Maya Achi displaced by the Chixoy Dam in Guatemala are an “indigenous people” under any traditional definition. Ethnic minorities displaced by dams in China are not traditional indigenous peoples because historical narratives of outsider conquest and colonization do not apply to them. They are, however, *indigenous* ethnic minorities. The Han Chinese supermajority dominates, represses, and discriminates against them. China ought to treat them in basically the same way that other countries ought to treat their indigenous peoples.

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Introduction

Building power dams is one way in which many countries seek to improve the lives of their inhabitants by developing infrastructure that exploits natural resources. Benefits of these dams include better flood and irrigation control in the vicinity of the dam and downriver as well as more electricity for cities, small towns, and rural areas. However, these dams also have some adverse effects. Construction disrupts the normal life of

valley dwellers. Once dam reservoirs fill, persons who previously lived in upstream neighboring valleys can no longer do so in areas that are under water. As a result, dam projects frequently displace some valley dwellers and cause them harm.

Building power dams may dislodge both indigenous and nonindigenous populations. The term “indigenous peoples” lacks a definition that is both precise and generally accepted. Elsewhere Kal Raustiala and I defined an “indigenous people” as “a transtemporal cultural group whose members have lived in a subregion of a country or countries prior to conquest or colonization, who are a small minority of and to some extent isolated from the main populations of that country or countries, and who have distinctive social, linguistic, and political features.”¹ That definition worked well for the purposes of our paper on intellectual property rights in traditional knowledge.

We and Martínez Cobo² both defined indigenous peoples in relation to, or as a condition of, a historical narrative of outsider invasion, conquest, or colonization. However, there are difficulties in applying this narrative to countries without a history of European invasion, conquest, or colonization. The Chinese government, for example, has refused to apply the term “indigenous peoples” to various ethnic minorities who, along with the dominant ethnic majority (Han Chinese), make up China’s population.³ Part I shows that while what China calls “ethnic minorities” are not indigenous peoples as that term is usually understood, its ethnic minorities, which are indigenous to China, should have the same protections as indigenous peoples in other parts of the globe.⁴

For the moment, I use the term “indigenous groups” to encompass both “indigenous peoples” and “indigenous ethnic minorities.” This Article concentrates chiefly on indigenous groups in China’s Hubei and Yunnan provinces and Guatemala’s Rabinal municipality. Usually, indigenous

1. Stephen R. Munzer & Kal Raustiala, *The Uneasy Case for Intellectual Property Rights in Traditional Knowledge*, 27 *CARDOZO ARTS & ENT. L.J.* 37, 49 n.25 (2009) [hereinafter Munzer & Raustiala]. Raustiala and I were well aware that some international documents and other authors define the term differently, or leave it undefined. See *id.*

2. “Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.” *ASIA PACIFIC FORUM OF NAT’L HUMAN RIGHTS INST. & OFFICE OF THE U.N. HIGH COMM’R FOR HUMAN RIGHTS, THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: A MANUAL FOR NATIONAL HUMAN RIGHTS INSTITUTIONS* 6 (2013) (quoting José Martínez Cobo, *Study of the Problem of Discrimination Against Indigenous Populations*, E/CN/4/Sub.2/1986/7/Add.4, para. 379) [hereinafter *INDIGENOUS PEOPLES MANUAL*] (emphasis omitted).

3. See Benedict Kingsbury, “*Indigenous Peoples*” in *International Law: A Constructive Approach to the Asian Controversy*, 92 *AM J. INT’L L.* 414, 417–18 (1998) [hereinafter Kingsbury, “*Indigenous Peoples*”] (discussing China’s refusal).

4. See *infra* text accompanying notes 50–99.

groups consist of the poorest individuals in a nation state. These individuals are often politically marginalized as well. As a result, it is all too easy for the wealthy, the well-connected, and even middle class persons—who are not likely to be indigenous—to ignore the negative effects building dams in river valleys exert upon dispossessed indigenous groups. My argument does not rest on the assumption that, some populations should have special protections or rights simply because they are indigenous. Instead, the argument is that, as a practical matter, countries often have a moral and political duty to protect heightened procedural rights for indigenous groups, and occasionally countries should grant slightly different substantive rights to indigenous groups—for instance, in regard to resettlement options.⁵ This argument is consistent with the position that poor persons who are not indigenous have, or should have, largely the same rights and protections as members of indigenous groups.

I focus on indigenous groups in China and Guatemala for four reasons. First, it would take more than one *book* to deal with indigenous groups everywhere, because their characteristics and situations vary so widely. It is more realistic to say something in satisfying detail about two countries with indigenous groups. Second, China is a fine example of a partly developed, but still partly developing nation that in recent decades has built many hydroelectric dams.⁶ China is distinctive in that it has a sometimes-shifting economic system that combines its communist past and present with some capitalist features,⁷ and places significant restrictions on land-use rights.⁸ Its economic development no longer depends on aid from foreign countries. The United States has little leverage on how China treats its ethnic minorities. Third, Guatemala is a developing country that has many Maya groups as indigenous peoples. Guatemala has one main hydroelectric dam—the Chixoy Dam—which was built between 1977–1983.⁹ The construction of that dam took a heavy toll on one indigenous group in particular—namely, the Maya Achi people¹⁰ who suffered

5. Philosophically, this assumption rests in part on what can be called a threat-protection view of moral and political rights. This view attaches importance to the fact that some right-holders are often in a poor position to assert and protect their own rights. Children, for example, occupy this position in regard to some of their rights. Legal examples include a child's right to have a voice through a trustee in custody cases and a right in neglect hearings against the parents. See generally Joel Feinberg, *The Child's Right to an Open Future*, in WHOSE CHILD? CHILDREN'S RIGHTS, PARENTAL AUTHORITY, AND STATE POWER 126 (William Aiken & Hugh LaFollette eds., 1980). To forestall misunderstanding, I am not infantilizing indigenous persons or viewing them as helpless victims but just pointing out that subordination, oppression, and linguistic marginalization can inhibit their ability to insist on their moral, political, and legal rights.

6. See *infra* text accompanying note 93.

7. See *infra* text accompanying note 118.

8. See *infra* text accompanying notes 104–46.

9. See *infra* text accompanying notes 273–75, 294–315.

10. Maya Achi are indigenous to Alta and Baja Verapaz and number about 75,000 to 85,000 persons, of whom about 1,500 live or lived in the Rio Negro valley. Jaroslava Colajacomo, *The Chixoy Dam: The Maya Achi' Genocide. The Story of Forced Resettlement 1* (World Comm'n on Dams, Working Paper, 1999) [hereinafter Colajacomo]. The

killings, torture, and other forms of violence.¹¹ Displaced from the Rio Negro valley in Rabinal, they relocated mostly to other parts of Guatemala, but received almost no compensation or resettlement aid from the government.¹² The United States has some leverage on the Guatemalan government, whether through the U.S. Treasury Department or entities such as the World Bank, the International Monetary Fund (“IMF”), or the Inter-American Development Bank (“IADB”). Fourth, though China and Guatemala differ in many ways, they have at least three things in common: economic inequality, corruption, and inadequate provision for displaced indigenous groups.¹³

It is not possible to address all questions about the pairing of China and Guatemala. Some might ask, for example, why not investigate China-India or Guatemala-Honduras? No doubt China-India could generate an interesting discussion. But because India claims it has no indigenous peoples in the colonial contact sense, it would not further my project to bring the indigenous peoples literature into contact with the literature on Chinese ethnic minorities. Comparing Guatemala and Honduras could also prove fruitful. In Honduras, the El Cajón Dam produces hydroelectric power despite challenges,¹⁴ and the murder of a Honduran environmentalist who opposed the Agua Zarca dam project on the Gualcarque River, viewed as sacred by Lenca indigenous people, led international investors to withdraw funding.¹⁵ However, dam-related violence is a small part of the story of dam construction in Honduras whereas it is at the center of the narrative, and extensive literature, concerning the Chixoy Dam in Guatemala. Moreover, a Guatemala-Honduras comparison would foreclose the opportunity to discuss both the treatment of indigenous peoples in Central America and the treatment of indigenous ethnic minorities in China. In any case, it is no part of my argument that pairing China and Guatemala generates, hands-down, the most fruitful comparison of dam displacement and indigeneity.

This Article shows how better provision for indigenous groups can be both politically and economically realistic and how it can improve the lives

native language of Maya Achi is Achi. Gary F. Simons & Charles D. Fennig, *Achi*, in *ETHNOLOGUE: LANGUAGES OF THE WORLD* (21st ed., SIL International, 2018), <https://www.ethnologue.com/language/acr/21> (click on “acr” identifier).

11. See *infra* text accompanying notes 303–13.

12. See *infra* text accompanying notes 298–302, 314, 323–30, 564–94.

13. “China is no monolith. While residents of Shanghai and Beijing are almost as well off as those in Switzerland by some income measures, parts of the country live more like they were in Guatemala.” *China’s Got a \$43,000 Wealth Gap Problem*, BLOOMBERG NEWS (May 28, 2018), <https://www.bloomberg.com/news/articles/2018-05-20/china-s-wealth-gap-teslas-for-the-rich-footpaths-for-the-poor>. “Guizhou and Yunnan provinces in the south and Gansu in the north each had per capita GDP income below \$10,000 last year, ranking them among Ukraine, El Salvador and Guatemala.” *Id.* On corruption, see *infra* Sections III.E.2 and III.F.2 (China) and Section IV.D.3.c (Guatemala).

14. See Christoph Lehmann, *Of Dams and Hurricanes: Lessons and Recommendations from El Cajon*, 21 MOUNTAIN RES. & DEV. 10, 13 (2001).

15. Nina Lakhani, *Backers of Honduran Dam Opposed by Murdered Activist Withdraw Funding*, GUARDIAN (June 4, 2017), <https://www.theguardian.com/world/2017/jun/04/honduras-dam-activist-bertha-caceres> [<https://perma.cc/3L44-DLC8>].

of indigenous persons. Better provision requires money that is wisely spent. There are at least two ways to get the money. One is to generate the economic rent by exploiting natural resources, such as the topography of a valley and the existence of flowing water.¹⁶ A second is to carve out, say, ten percent of a loan made by the World Bank to a foreign government or closely-related entity that will build the dam. The carve-out can partly offset negative impacts on indigenous groups. The *World Bank Operations Manual* requires that the Bank respect the interests of indigenous persons when disbursing funds to a foreign government or closely-related entity.¹⁷ The United States helps fund the World Bank, but Congress has no direct authority over it.¹⁸ By statute, however, the U.S. Secretary of the Treasury must protect the interests, and above all the human rights, of indigenous persons.¹⁹ Whatever the source of funds, it is important to get the money upfront when possible. If an indigenous group and a foreign government or lender do not come to ready agreement on what the group needs, an impartial body can process the claims of the group and its members, because all members may not be equally affected.²⁰

A government solution to problems created by dam projects might seem absurdly simple. First, adhere to an ethics of development that protects indigenous groups from unnecessary or unjustified dam projects. Second, root out corruption that diverts money intended for these projects into the pockets of politicians, government officials, and business people. Third, disburse compensation as soon as a taking of private or communal

16. Michael M. Cernea, *Compensation and Benefit Sharing: Why Resettlement Policies and Practices Must Be Reformed*, 1 WATER SCI. & ENGINEERING 89, 95 (2008) [hereinafter Cernea, *Resettlement*]. Cernea defines “economic rent” as “a surplus (or windfall) over and above the value of the invested capital, materials, labor costs, and other factors of production employed to exploit natural resources.” *Id.* at 95. For other ambitious scholarship on hydroelectric dams, see Amy McNally et al., *Hydropower and Sustainability: Resilience and Vulnerability in China’s Powersheds*, 90 J. ENV’T MGMT. S286 (2009) (using the spatial abstraction of a power shed to analyze resilience and vulnerability); Thi Dieu Nguyen, *The State versus Indigenous Peoples: The Impact of Hydraulic Projects on the Indigenous Peoples of Asia*, 7 J. WORLD HIST. 101 (1996) (using historical analysis with specific reference to the role of the World Bank).

17. WORLD BANK, WORLD BANK OPERATIONS MANUAL (2015), available at http://sitereources.worldbank.org/EXTOPMANUAL/Resources/EntireOM_ExternalUpdatedJuly1-2015.pdf [<https://perma.cc/KKB4-SMTQ>]. The World Bank (“the Bank”) has to “screen[]” to see if an indigenous people has an attachment to the project area.” *Id.* 4.10, ¶¶ 6, 8. If it does, the borrowing nation has to make a social assessment and create an Indigenous Peoples Plan (“IPP”), respond to any negative social outcomes with a detailed plan for mitigation, compensation, and resettlement if needed, and ensure that the indigenous people receive “culturally appropriate” benefits from the project. *Id.* at ¶¶ 6, 9-12, 15, 16. For details, see *id.* at Annexes A and B.

18. Kristina Daugirdas, *Congress Underestimated: The Case of the World Bank*, 107 AM J. INT’L L. 517, 520 (2013) [hereinafter Daugirdas, *World Bank*].

19. The main statutes are the Foreign Assistance Act of 1961, as amended, and the International Financial Institutions Act of 1977, as amended, both codified in scattered sections of 22 U.S.C. Key provisions include 22 U.S.C.A. §§ 262d, 262o-4, 2151(a)(1), 2151n, 2169, 2271(b).

20. A generic name for such a body is “claims resolution facility,” of which there are many varieties. Francis E. McGovern, *The What and Why of Claims Resolution Facilities*, 57 STAN. L. REV. 1361-62 (2005).

property occurs, including the value of ongoing businesses and livelihoods wiped out by the taking. Fourth, set up some land-for-land exchanges as in-kind compensation. Fifth, disburse resettlement funds as needed until displaced persons are firmly established in their new locations. Sixth, have entities that loan money to countries seeking funds for power dams impose an obligation on recipient governments to sequester part of the loan amount to cover compensation and resettlement costs, and create an independent auditing process to make sure the sequestered money is actually going toward compensation and resettlement.

Some will claim that the problem of improving the conditions of indigenous groups who frequently bear the negative impacts of new power dams cannot possibly be that simple. There is some truth to this claim. Countries sometimes ignore the ethics of development.²¹ Although the economic-rent point is sound, often the rent does not materialize until the dam project is complete or nearly so. Indigenous groups often lack title—i.e., legal recognition of robust property rights—to the land on which they live and work.²² Thus, even if a law requires compensation for private property taken for a dam project, there may be little legal recourse for indigenous groups if they have no legally recognized private property, or perhaps have no property interest at all, in the land on which they live and work. Moreover, many societies today show scant regard for indigenous groups.²³ All too often, indigenous groups all over the world tend to be viewed as obstacles to economic development rather than individuals whose lives are as valuable as the lives of other persons in society.²⁴ In worst-case scenarios, national governments, their armies, or private militias sometimes murder and terrorize indigenous persons to get them to leave river valleys where dams will be built.²⁵ Lastly, even if a country's statutes seem to create a sensible law-on-the-books, it is the law-on-the-ground that counts. These matters receive intensive discussion later in this Article.

The foregoing difficulties are challenging but not intractable. Corruption also merits serious attention. This Article offers some general discussion of dams, land use, economic development, migration, and indigenous groups. It briefly discusses the ethics of dam-induced development²⁶ and grapples with particular developing countries, the extent of their need for hydroelectric power, and the affected indigenous groups and their cultures.

21. See *infra* Part II.G (China) and Part III.D (Guatemala).

22. See *infra* text accompanying notes 118, 113–20 (China). Guatemalan recognition of Maya Achi land rights has been spotty, even when Maya Achi seem to have had legal titles; see *infra* text accompanying notes 303–04.

23. See *Indigenous Peoples*, AMNESTY INTERNATIONAL, <https://www.amnesty.org/en/what-we-do/indigenous-peoples> [<https://perma.cc/APC4-G3QR>] (last visited Jan. 23, 2019).

24. See U.N. DEP'T OF ECON. & SOCIAL AFF., STATE OF THE WORLD'S INDIGENOUS PEOPLES 87–88, U.N. Doc. ST/ESA/328 (Jan. 10, 2010), available at https://www.un.org/esa/socdev/unpfii/documents/SOWIP/en/SOWIP_web.pdf [<https://perma.cc/Q4SP-YPYK>].

25. See *infra* text accompanying notes, 303–07, 309–13 (Guatemala).

26. See *infra* Part II.G (China) and Part III.E (Guatemala).

Two contrasting examples inform the discussion at a concrete level. The first is dam building and operation in contemporary China. China has a good deal of law on how to treat those displaced by dam projects.²⁷ But frequently, the law-on-the-books and the law-on-the-ground differ.²⁸ The laws and regulations that guide local authorities often need improvement in practice. Furthermore, the compensation offered and the pertinent resettlement policies are far from perfect, and corruption is a constant problem.²⁹ China nevertheless gets more things right in dealing with indigenous peoples than many other countries.

The second example is dam building and operation in Guatemala, and specifically the construction of the Chixoy Dam in the Rio Negro Valley. Corruption haunted Guatemala generally, and legal recourse for the indigenous Maya Achi who lived in the area was almost nonexistent.³⁰ Worse, local militias tortured, raped, and murdered individuals, burned homes and businesses, and generally terrorized the Maya Achi population.³¹ Compensation was decades late and many dollars short.³² Resettlement opportunities were dismal.³³ Only after decades of struggle did Maya Achi ever receive any financial recompense, and even then the dollar amount provided was paltry in relation to the harm done.³⁴ As Part III will show, the politics of Guatemala have recently, though fitfully, begun to change, and the U.S. Secretary of the Treasury can and should play a more effective role in securing a carve-out of World Bank and IADB loans that the United States funds, in whole or in part, for many recipients of U.S. foreign aid. Guatemala can learn something from China, and vice versa.³⁵

This Article tackles many issues. In an effort to avoid reader fatigue, I do not consider: (1) whether indigenous groups should have a legal immunity against being displaced; (2) whether they should have a legal right to block the taking or regulation of their property, be it individually or collectively held, despite the overall desirability of a power dam; (3) whether their rights should be the same in developing and developed countries; (4) how to appraise tradeoffs, if a country needs more electric power, between building a hydroelectric dam and burning coal to generate electricity; and (5) whether and, if so, how race is related to indigeneity or ethnicity. I do consider, however, whether compensation and resettlement related to dam projects can ever entirely offset the harms these projects impose on indige-

27. See *infra* Part II.A.

28. See *infra* text accompanying notes 146 (discussing the unavailability of certificates memorializing land-use contracts in China), 520-65 (discussing the law-on-the-books and the law-on-the-ground regarding World Bank operations in Guatemala).

29. By "corruption" I mean generally an abuse of trust for personal, familial, or political gain. For more on this understanding, see *infra* Part II.F.2.

30. See *infra* text accompanying notes 303-04 (discussing the assembly of a "book" of land titles by two Maya Achi, who "disappeared" along with their "book" on the way to Guatemala City).

31. See *infra* text accompanying notes 307, 309-13.

32. See *infra* text accompanying note 314.

33. *Id.*

34. *Id.*

35. See *infra* text accompanying notes 89-100.

nous groups.³⁶ To set the inquiry in context, I shall at once discuss issues of development and indigenous groups.

I. Development and Indigeneity

In discussions of international development, scholars often overlook indigeneity and often do not consider international development in relation to issues of indigeneity. This part remarks on development and indigeneity, mentions connections between them, and sets the stage for the subsequent treatment of dam building in China (Part II) and Guatemala (Part III).

A. Development

The Introduction opened with a somewhat optimistic statement that power dams are a way for countries to benefit inhabitants by improving infrastructure and harnessing natural resources.³⁷ Here, I offer some nuance to the benefits and drawbacks of the World Bank, the International Monetary Fund (“IMF”),³⁸ and related institutions such as the Asian Development Bank (“ADB”) and the Asian Infrastructure Investment Bank (“AIIB”).

Even if the mission of these institutions is benevolent, one might question whether their programs have uniformly benign effects on the countries to which loans are made. Should one of these institutions decide to loan money to a country for a power dam, it understandably might seek some changes in how that country operates. In case the country has a reputation for corruption, the lender might insist that the country reduce corruption before approving the loan and that monitoring during the dam project be a condition of receiving loan installments. If a country has a record of inefficiency and lacks experience with large infrastructure projects, the lender might require terms that decrease the risk of default and increase the probability of success. After all, a lender will have less funds available for future loans to this or other countries if default occurs.

Some economists and political theorists criticize certain Structural Adjustment Agreements (“SAAs”) between lenders and recipient countries.³⁹ The terms of SAAs vary but often require recipient countries to commit to:

making the private sector the primary engine of [a country’s] economic growth, maintaining a low rate of inflation and price stability, shrinking the size of its state bureaucracy, maintaining as close to a balanced budget as possible, . . . eliminating and lowering tariffs, removing restrictions on foreign investment, . . . increasing exports, privatizing state-owned industries

36. See *infra* Part II.G (China) and Part III.E (Guatemala).

37. See *supra* text accompanying note 1.

38. Together the World Bank Group and the IMF are known as the International Financial Institutions (“IFIs”). M. RODWAN ABOUHARB & DAVID CINGRANELLI, HUMAN RIGHTS AND STRUCTURAL ADJUSTMENT 3 (2007) [hereinafter ABOUHARB & CINGRANELLI]. For extended discussion of the World Bank and Guatemala, see *infra* Part III.D.

39. ABOUHARB & CINGRANELLI, *supra* 38, at 11.

and utilities, deregulating capital markets, making its currency convertible [to dollars or other stable currencies], [and] . . . deregulating its economy to promote as much domestic competition as possible . . .⁴⁰

Terms like these illustrate how SAAs often serve a neoliberal agenda by promoting open markets, private industry, and deregulation.⁴¹ Controversially, such terms also rely on a positive assessment of the role of globalization in economic and social development.⁴²

Clearly, empirical evidence is necessary to assess claims about the harms SAAs arguably inflict. Rodwan Abouharb and David Cingranelli provide evidence that SAAs are often a hardship for the poor and increase civil conflict, undermine the rights of workers, and interfere with human rights.⁴³ They argue that, in fact, respecting human rights fosters economic development.⁴⁴ Unlike some scholars,⁴⁵ Abouharb and Cingranelli do not criticize the World Bank and the IMF on the grounds that SAAs disrupt democratic institutions and destabilize civil liberties.⁴⁶ Instead they claim that “[d]eveloping countries are likely to have a higher rate of economic growth if they have democratic political institutions and if their citizens have protections of their civil liberties.”⁴⁷ It is, however, worth investigating whether countries that dispense development aid not only seek to gain political influence in recipient countries but also see the harms of dam-induced displacement and corruption as predictable or just as the way the world works.

No consensus exists on the best way to promote economic and social development. Matt Andrews, for example, argues that reforms signaling better “short-term” performance are “often unrealistic” and that what he calls institutional reform through “problem-driven iterative adaptation” is

40. THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* 103 (2000).

41. See ABOUHARB & CINGRANELLI, *supra* note 38, at 67–68, 75–77, 191–95 (discussing neo-liberal economics and the effects of SAAs). A new issue on the horizon concerns the rise of Chinese financing and outbound investment, which have a different view of development from the IFIs and are less likely to attach conditions to financing. See, e.g., Bushra Bataineh, Michael Bennon & Francis Fukuyama, *Beijing’s Building Boom*, FOREIGN AFFAIRS (May 21, 2018), <https://www.foreignaffairs.com/articles/china/2018-05-21/beijings-building-boom> (stating that “[t]he Chinese tend to overvalue the beneficial economic spillover effects of infrastructure projects, while undervaluing the potential harms, whether economic, social, or environmental”).

42. Compare JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (2002) (discussing the failures of globalization), with MARTIN WOLF, *WHY GLOBALIZATION WORKS* (2004) (touting the benefits of globalization).

43. ABOUHARB & CINGRANELLI, *supra* note 38, at 144, 168–69, 201. Another term for SAAs is Structural Adjustment Programs (“SAPs”). *Id.* at 4.

44. *Id.* at 29. SAMUEL MOYN, *NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD* (2018) is, of course, correct to argue that protecting human rights does not always reduce social and economic inequalities. However, a human rights agenda coming from the political center has a better chance of reducing inequalities than the political left agenda of human rights that Moyn criticizes.

45. See ABOUHARB & CINGRANELLI, *supra* note 38, at 203 (citing AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999)).

46. See ABOUHARB & CINGRANELLI, *supra* note, at 38.

47. *Id.* Chinese lenders affiliated with the ADB and the AIIB are unlikely to have the same view. See *supra* note 41.

preferable.⁴⁸ A less sanguine example resides in neo-Marxist theories that claim that developing countries suffer from chronic underdevelopment, as capitalism and the institutions that promote capitalism change form over time.⁴⁹

An extensive exploration of economic investment is outside the scope of this Article. But development and indigeneity are not isolated topics. Rather, each can affect the other. Thus, an awareness of the power of international investment institutions and policies and the need for accountability in development dealings are crucial to the evaluation of dam building and its effects on indigenous lives, lands, and affairs. For instance, development SAAs that insist on discontinuing government aid programs could have a negative impact on indigenous groups who benefit from these programs. The perils of economic development play a role in my evaluation of the dams constructed in China and Guatemala.

B. Indigeneity

Is there a principled way to acknowledge that China has no “indigenous peoples” as generally understood but nevertheless has “indigenous ethnic minorities” who are entitled to basically the same protections that ought to be given to indigenous peoples in most other areas in the globe?⁵⁰ I argue that such a way exists. Indigeneity is an abstract noun that encompasses both indigenous peoples and indigenous ethnic minorities.

Let us start at the beginning. The adjective “indigenous” comes from the Latin word *indigena*, meaning “native.”⁵¹ This word brings in the idea of being native to a place or territory. The phrase “indigenous peoples” has a legal dimension as a result of the United Nations Declaration on the Rights of Indigenous Peoples⁵² and the efforts of scholars to clarify it.⁵³

48. MATT ANDREWS, *THE LIMITS OF INSTITUTIONAL REFORM IN DEVELOPMENT: CHANGING RULES FOR REALISTIC SOLUTIONS* xi–xii (2013).

49. For articulation and discussion of such theories, see B. N. GHOSH, *DEPENDENCY THEORY REVISITED* 16–17 (2001); MANNING MARABLE, *HOW CAPITALISM UNDERDEVELOPED BLACK AMERICA: PROBLEMS IN RACE, POLITICAL ECONOMY, AND SOCIETY* 24–26 (2015); WALTER RODNEY, *HOW EUROPE UNDERDEVELOPED AFRICA* 10, 14, 95 (1972).

50. I say “most other areas” because some other Asian countries, such as Japan, frequently claim that they have no indigenous peoples either. See, e.g., Kingsbury, “*Indigenous Peoples*,” *supra* note 3, at 429–30 (discussing Japan’s position on Ainu).

51. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1151 (Philip Babcock Gove ed., 2002), s.v., “indigenous.” In turn, the word “native” applied to persons sometimes means “to inhabit a territorial area at the time of its discovery or its becoming familiar to a foreigner.” *Id.* at 1505, s.v., “native,” sense 12a. “Native” sometimes means “inherent” or “inborn,” *id.*, s.v., “native,” sense 1, or when applied to plants, it means “living or growing naturally in a given region,” *id.* sense 6c.

52. See generally G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) (offering no definition of the phrase). See also Article 1(1)(b) of the Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169), June 27, 1989, 28 I.L.M. 1382, 1384–85 (1989) (glossing “peoples . . . who are regarded as indigenous”). Because the meanings of “indigenous peoples” are so varied and porous, manifold problem cases arise. (1) Should Bedouin Arabs in Israel count as indigenous peoples? For discussion, see Seth J. Frantzman et al., *Contested Indigeneity: The Development of an Indigenous Discourse on the Bedouin of*

The embedded word “peoples” indicates that more than a family or a clan is at stake. Yet the size and nature of a sociocultural group large enough to count as a “people” is left indefinite. The newer word “population,” as used for example in population genetics, might add a patina of scientific inquiry, but it is not yet a common word in the present context.

We are indebted to Benedict Kingsbury for a landmark article on the definition of “indigenous peoples.”⁵⁴ He wisely rejects efforts to give a “precise definition” which he calls “positivist”⁵⁵ by, say, specifying singly necessary and jointly sufficient conditions for applying the phrase “indigenous peoples.” Instead, he proposes a “constructivist” definition.⁵⁶ The definition, which is flexible and tentative, has “essential requirements” and “relevant indicia.”⁵⁷ Here is his list of each:

Essential Requirements

- Self-identification as a distinct ethnic group
- Historical experience of, or contingent vulnerability to, severe disruption, dislocation or exploitation
- Long connection with the region
- The wish to retain a distinct identity

Relevant Indicia

(1) Strong Indicia

- Nondominance in the national (or regional) society (ordinarily required)
- Close cultural affinity with a particular area of land or territories (ordinarily required)
- Historical continuity (especially by descent) with prior occupants of land in the region

(2) Other Relevant Indicia

- Socioeconomic and sociocultural differences from the ambient population
- Distinct objective characteristics such as language, race, and material or spiritual culture

the Negev, Israel, 17 ISRAEL STUD. 78, 78-79 (2012). (2) What do we say about groups that move from place to place in the national parks of various countries? For discussion, see Marcus Colchester, *Indigenous Peoples and Protected Areas: Rights, Principles and Practice*, 7 NOMADIC PEOPLES 33, 33-35 (2003). (3) Are Maasai and other groups in Africa indigenous peoples? For discussion, see Dorothy L. Hodgson, *Becoming Indigenous in Africa*, 52 AFRICAN STUD. REV. 1 (2009). (4) Can Japan decline in good faith to say that Ainu are indigenous peoples? See Kingsbury, “*Indigenous Peoples*,” *supra* note 3, at 429-30 (raising the issue). (5) Can India—with its caste system, *dalits*, and *adivasi*—claim in good faith “that the concept of ‘indigenous peoples’ does not apply within its borders”? See *id.* at 433 (caste); Dipesh Chakrabarty, *Politics Unlimited: The Global Adivasi and Debates About the Political*, in INDIGENITY IN INDIA 235, 240-41 (Bengt G. Karlsson & Tanka B. Subba eds., 2006) (*dalits* and *adivasi*).

53. *See supra* text accompanying notes 2-3.

54. *See generally* Kingsbury, “*Indigenous Peoples*,” *supra* note 3.

55. *Id.* at 414 and *passim*. See Kingsbury associates positivism with analytic philosophy but does not tie it to any particular thinker. *Id.*

56. *Id.* at 415 and *passim*.

57. *Id.* at 455 (emphasis omitted).

- Regarded as indigenous by the ambient population or treated as such in legal and administrative arrangements⁵⁸

How does Kingsbury's constructivist definition stack up against China's position? China signed the U.N. Declaration on the Rights of Indigenous Peoples.⁵⁹ But China maintains that it has no "indigenous peoples," only "ethnic minorities" (shǎoshùmínzú, 少数民族).⁶⁰ And yet, it might seem that these ethnic minorities could count as indigenous peoples under Kingsbury's constructivist definition, for it nowhere requires that indigenous peoples have a history of invasion, conquest, or colonization.⁶¹ If that is a correct understanding of Kingsbury's definition, this understanding nevertheless sidesteps China's position because it does not grapple with China's underlying reasoning on this matter. The Chinese government reasons that the term "indigenous peoples" applies only to peoples who were harmed by European colonialism, and that the minority nationalities and ethnicities that make up part of China's population have historically had little or no contact with European colonizers.⁶² In 1995, well prior to signing the Declaration, China stated:

As in the majority of Asian countries, the various nationalities in China have all lived for aeons on Chinese territory. Although there is no indigenous peoples' question in China, the Chinese government and people have every sympathy with indigenous peoples' historical woes and present plight. . . . [T]he draft declaration must clearly define what indigenous peoples are, in order to guarantee that the special rights it establishes are accurately targeted at genuine communities of indigenous people and are not distorted, arbitrarily extended or muddled.⁶³

Suppose that, under the Martínez Cobo definition⁶⁴ and "positivist" definitions which require a history of colonial invasion or conquest, Chinese ethnic minorities do not count as indigenous *peoples*. Suppose also that the Chinese government would have a sound argument against counting them as indigenous *peoples* under Kingsbury's "constructivist" definition. However, it is a spark of sound sense to say that they are *indigenous* ethnic minorities. After all, in the passage quoted above, China insists that these ethnic minorities or minority nationalities "have all lived for aeons on

58. *Id.* (italics, bullet points, and enumeration in original).

59. United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 52.

60. The Chinese term is also translated as "minority nationalities." For the linguistic background and its historical context, see Ma Rong, *A New Perspective in Guiding Ethnic Relations in the 21st Century: "De-Politicization" of Ethnicity in China*, 2 *PROCEDIA SOC. & BEHAV. SCI.* 6831 (2010). Although China's population may include more than fifty-five ethnic minorities, only fifty-five are officially recognized. HUANG CHI-PING, *THE INDIGENOUS WORLD* 2015 241 (2015). As of November 13, 2018, the population of China was 1,418,386,516—not counting Taiwan, Hong Kong, or Macau. *China Population 2018*, <http://worldpopulationreview.com/countries/china-population/> [https://perma.cc/G5TT-TK5W] (last visited Feb. 27, 2019).

61. See Kingsbury, "Indigenous Peoples," *supra* note 3, at 455.

62. See Comm'n Hum. Rts., Consideration of a Draft United Nations Declaration on the Rights of Indigenous Peoples, U.N. Doc. E/CN.4/WG.15/2 (Oct. 10, 1995).

63. *Id.*

64. See *INDIGENOUS PEOPLES MANUAL*, *supra* note 2, at 6.

Chinese territory.”⁶⁵ The abstract noun “indigeneity” thus embraces both indigenous peoples and Chinese indigenous ethnic minorities. As indicated in Part I, non-indigenous individuals, such as poor Ladinos in Guatemala and poor Han farmers in China, can also suffer from dam-induced development and should be treated accordingly. My examination here, however, focuses on indigenous persons.

The foregoing argument splits apart three things that Kingsbury neglects to disentangle. First, his constructivist position on indigenous peoples may well be superior to positivist positions, even if it leads to the conclusion that China has no indigenous *peoples*. Second, the ethnic minorities in China qualify as *indigenous* because they have lived on Chinese territory for many hundreds of years, and in some cases, for two millennia. It would be a mistake to accept China’s apparent position that its ethnic minorities are not indigenous. These minorities *are* indigenous regardless of what the Chinese government proclaims. Third, whether indigenous ethnic minorities in China are the functional equivalents of indigenous peoples depends on how the Han majority has treated them and continues to treat them.

Let us build on the third point. Functional equivalence, let us suppose, requires that Chinese ethnic minorities meet Kingsbury’s Essential Requirements and Strong Indicia.⁶⁶ Of his Essential Requirements, “historical experience” of “severe disruption, dislocation or exploitation” seems especially important.⁶⁷ The Strong Indicia of “nondominance in the national” society and “close cultural affinity with a particular area of land or territories” also seem important.⁶⁸ It is appropriate to defer until Part III to explain how these and other requirements and indicia are met in particular cases. For the moment, it helps to see how various indigenous ethnic minorities have suffered at the hands of Han Chinese, who make up about 91.64% of the overall population.⁶⁹ The ethnic minorities which figure prominently in Part II are Tujia, Miao, Lisu, and Tibetan ethnicities along with Bai, Nu, Pumi, and Dulong.⁷⁰

At least three good reasons exist to say that indigenous ethnic minorities in China are the functional equivalent of indigenous peoples in countries adversely affected by European colonialism. First, the Han have dominated China’s political and cultural elite for the last century. Ever since the Qing dynasty, led by Manchus, collapsed in 1912, “China’s top leaders have been Han, while the Han have also been overrepresented

65. See *supra* text accompanying note 63.

66. See *supra* text accompanying note 58.

67. Kingsbury, “*Indigenous Peoples*,” *supra* note 3, at 453.

68. *Id.* at 455.

69. The fifty-five ethnic minorities make up the balance of the population of about 8.36%. For a list of all fifty-six ethnic groups, including statistics and accessible background information, see RONGXING GUO, CHINA ETHNIC STATISTICAL YEARBOOK 2016 ix-x (2017). Zhuang make up the largest ethnic minority with about 16,178,811 people. *Zhuang Ethnic Minority*, CHINA TRAVEL (Nov. 13, 2018), <https://www.chinatravel.com/facts/zhuang-ethnic-minority.htm> [<https://perma.cc/E3PJ-R4FX>].

70. See *infra* text accompanying notes 161, 176, 178, 187, 191-92.

amongst the political, economic and social elites.”⁷¹ Current Chinese government policy on ethnic minorities goes back to the rise of the Communist Party of China (“CCP”), which declared that ethnicity was “fixed at birth.”⁷² Curiously, “the dominant majority Han nationality . . . groups together a wide array of culturally diverse populations.”⁷³ Pragmatically, the eventual fifty-five ethnic minorities included some groups—including “the Miao, Yi, Tibetans, Mongols and Hui”—that received “special treatment . . . for their support” during the Long March of 1934–1935 and World War II.⁷⁴

Second, Han often dominate other recognized and unrecognized ethnic minorities in ways that parallel relationships between settler groups and indigenous peoples in countries like Guatemala.⁷⁵ Xiaogang Wu and Xi Song write about the ethnicity-based social order in China that results in an increasingly poor relationship between Han and Uighur ethnic groups.⁷⁶ In Xinjiang, since 2014, the government has sent Uighurs to “transformation camps” for weeks or months to curb Uighur culture and weaken the practice of Islam.⁷⁷ Han also dominate unofficial ethnic minorities, such as the Mosuo and Chuanqing, in part by refusing to recognize them. Under the Martínez Cobo Study,⁷⁸ for example, self-identifica-

71. Reza Hasmath & Andrew W. MacDonald, *Beyond Special Privileges: The Discretionary Treatment of Ethnic Minorities in China's Welfare System*, 47 J. SOC. POL'Y. 295, 295 (2018) [hereinafter Hasmath & MacDonald].

72. *Id.* at 296. On the role of the Soviet Union in the emergence of the CCP's policy on ethnic minorities, see XIAOYUAN LIU, RECAST ALL UNDER HEAVEN: REVOLUTION, WAR, DIPLOMACY, AND FRONTIER CHINA IN THE 20TH CENTURY 109–32 (2010); Yash Ghai, *Autonomy Regimes in China: Coping with Ethnic and Economic Diversity*, in AUTONOMY AND ETHNICITY: NEGOTIATING COMPETING CLAIMS IN MULTI-ETHNIC STATES 77 (Yash Ghai ed., 2000); Rong Ma, *Reflections on the Debate on China's Ethnic Policy: My Reform Proposals and Their Critics*, 15 ASIAN ETHNICITY 237, 238 (2014) (“the ‘nationality theory’ of the Communist Party of China (CPC) since 1921 and the PRC's theory and practice of minority policies since 1949 have followed Soviet theory and model, with the exception of establishing regional autonomy instead of federalism for minority regions”). *Cf.* James Leibold, *Ethnic Policy in China: Is Reform Inevitable?*, 68 POL'Y STUD. 1, 5 (2013) (“the CPC did ‘sinicize’ some important aspects of Marxist-Leninist theory on the national question”).

73. Hasmath & MacDonald, *supra* note 71, at 296. *See also* Michael Dillon, *Majorities and Minorities in China: An Introduction*, 39 ETHNIC & RACIAL STUD. 2079, 2082, 2085 (2016) (describing linguistic differences among those designated as Han and the origins of using “Han” to “denote an ethnic group”).

74. Hasmath & MacDonald, *supra* note 71, at 297. *See also* Barry Sautman, *Preferential Policies for Ethnic Minorities in China: The Case of Xinjiang*, 4 NATIONALISM & ETHNIC POL'Y. 86 (1998) (discussing a range of preferential policies for some non-Han ethnic groups).

75. Kingsbury, “*Indigenous Peoples*,” *supra* note 3, at 424.

76. *See generally* Xiaogang Wu & Xi Song, *Ethnic Stratification amid China's Economic Transition: Evidence from Xinjiang Uyghur Autonomous Region*, 44 SOC. SCI. RES. 158 (2014).

77. Chris Buckley, *The Leaders Who Unleashed China's Mass Detention of Muslims*, N.Y. TIMES, Oct. 13, 2018, at A1. Some Chinese academics, it appears, persuaded the government that giving ethnic groups greater autonomy “had contributed to the breakup of the Soviet Union by encouraging ethnic separatism” and that it would behoove China “[t]o avoid similar troubles.” *Id.*

78. *See supra* text accompanying note 2.

tion is a common feature of indigenous peoples.⁷⁹ Also under Kingsbury's constructivist definition, "self-identification as a distinct ethnic group"⁸⁰ is an Essential Requirement of being an indigenous people. Without adequate justification, Chinese policy on ethnic minorities disallows self-identification from figuring as even one feature or partial criterion of ethnic minority, minority nationality, or indigeneity.⁸¹

Third, Gray Tuttle argues that the Chinese government is guilty not only of repressing ethnic minorities but also of embracing racism.⁸² Because Tuttle does not define "race," "racism," or "racial," it is hard to evaluate his specific claim of racism. Yet, his discussion of Beijing's treatment of Tibetans supports his claim of ethnic repression. What the Chinese state media occasionally refers "euphemistically" to "Han Chauvinism" qualifies as ethnic repression.⁸³ Examples include "deep and broad hostility and discrimination toward Tibetans and other non-Han Chinese citizens;"⁸⁴ treating Tibetans "as second-class citizens" and "depriv[ing them] of basic opportunities, rights, and legal protections that Han Chinese enjoy;"⁸⁵ "ethnic profiling" of Tibetans by "[s]ecurity and law enforcement personnel" in the form of "extra attention and questioning;"⁸⁶ museums "distort[ing] Tibet's past" by "depicting it as a 'hell on earth' and portraying Tibetans as a savage, backward people in need of civilizing."⁸⁷ Tuttle notes—"Beijing spun this recognition [of ethnic minorities] as a sign of China's respect for minorities. In reality, it was merely a step in codifying inequality."⁸⁸

The foregoing arguments make a strong case for saying that China has indigenous ethnic minorities, and that they are similarly situated to indigenous peoples in countries adversely affected by European colonialism. In the context of building and operating power dams, the foregoing arguments also warrant giving pride of place to the treatment of minority

79. INDIGENOUS PEOPLES MANUAL, *supra* note 2, at 6 ("consider themselves distinct from other sectors" of society).

80. See *supra* text accompanying note 58.

81. "[T]he Mosuo and Chuangqing peoples self-identify as ethnic minorities but are not recognized as such." John E. Petrovic & Roxanne M. Mitchell, *Comparative Reflections on Philosophies of Indigenous Education Around the World*, in INDIGENOUS PHILOSOPHIES OF EDUCATION AROUND THE WORLD 249, 250 (John E. Petrovic & Roxanne M. Mitchell eds., 2018). Mosuo, who usually refer to themselves as Na, live in the Tibetan foothills. See Eileen Rose Walsh, *From Nü to Nü'er Guo: Negotiating Desire in the Land of the Mosuo*, 31 MODERN CHINA 448, 449-51 (2005) (reporting that since the 1990s, Mosuo have embraced tourism and sexualized their culture in response to tourists' desires).

82. Gray Tuttle, *China's Race Problem: How Beijing Represses Minorities*, 94 FOREIGN AFF. 39, 39 (2015).

83. *Id.* at 44.

84. *Id.* at 39.

85. *Id.* at 40.

86. *Id.*

87. *Id.* at 43.

88. *Id.* at 42. I recognize that Tibetan and Xinjian Uighur repression is driven partly by Chinese efforts to gain control of the hinterlands populated by these groups, and involves intentional destruction of religion and local culture. Even so, dam-induced displacement is scarcely incidental in its impact on indigenous ethnic minorities in China.

groups by the dominant group or groups. Hence, the Chinese government ought to treat its indigenous ethnic minorities in basically the same way that countries with indigenous peoples ought to treat those peoples.

There are, moreover, concrete benefits from discussing China and Guatemala together. China can learn from Guatemala's treatment of Maya Achi people in building the Chixoy Dam. The inadequate record-keeping and porous enforcement of Guatemala's system of private and communal ownership did little to safeguard Maya Achi from exploitation by the government.⁸⁹ The absence of a *hukou* system in Guatemala gave Maya Achi, other indigenous groups, and the government the prospect of more flexibility for employment and habitation elsewhere, even if in the recent past Guatemala has squandered this opportunity.⁹⁰ Extreme violence by paramilitary groups and others in Guatemala decimated Maya Achi, violated human rights, heightened inequality, and inflicted severe trauma.⁹¹ Corruption in government, the military, and business enterprises lowered the socioeconomic welfare of citizens, dragged down GDP, and created bad publicity internationally.⁹² This short list is only a start.

By the same token, Guatemala can learn from China's treatment of ethnic minorities in building the Three Gorges Dam in Hubei Province and ongoing dam projects in Yunnan Province. China's system of property, with almost no protection for private and communal property interests in land, reduced incentives for efficient use and failed to shelter indigenous ethnic minorities from exploitation by the government and corrupt businesspersons, politicians, and officials.⁹³ All the same, the detailed rules in Chinese property law gave indigenous groups a fairly determinate, if not always welcome, sense of what they could expect from the government in the way of compensation.⁹⁴ A *hukou* system, or anything like it, would be a bad fit for Guatemala because it unduly restricts movement to areas with better employment opportunities; such a system would also impose bureaucratic costs on the government.⁹⁵ Use of even moderate state force in evicting and resettling indigenous groups would create civil unrest, foster collective protests, increase economic inequality, and have a negative impact on the mental health of ethnic minorities.⁹⁶ The lesson about cor-

89. See *infra* text accompanying notes 303-04.

90. A *hukou* system, officially called *hujj*, is a household registration system in China and a few other East Asian countries. See FEI-LING WANG, ORGANIZING THROUGH DIVISION AND EXCLUSION: CHINA'S HUKOU SYSTEM (2005). Dating from the early 1950s in China, this complicated registration system is key to who can live where and who has access to educational and social benefits in a particular location. See, e.g., Kam Wing Chan, *The Chinese Hukou System at 50*, 50 EURASIAN GEOGRAPHY & ECON. 197, 197-98 (2009) [hereinafter Chan, *Hukou*] (discussing the ramifications of this system for industrialization and urbanization in China). See *infra* text accompanying notes 304-13.

91. See *infra* text accompanying notes 303-13.

92. See *infra* text accompanying notes 556-83.

93. See *infra* text accompanying notes 97-141, 222-23, 225, 237-57.

94. See *infra* text accompanying notes 104-42.

95. See Chan, *Hukou*, *supra* note 90, at 196-97.

96. See *supra* text accompanying notes 28-30. See also *infra* text accompanying notes 144-58.

ruption is in many ways the same for Guatemala as it is for China.⁹⁷ This list, too, is only a start.

A related way of seeing benefits in the pairing of China and Guatemala is to focus on the best and worst practices of each country's approach to power dams. China's best practices are an elaborate system of property and administrative laws that apply to the building and operation of dams. This system applies as well to the compensation and resettlement of migrants, through which China at least acknowledges a duty to compensate and resettle, even if the expenditures are inadequate.⁹⁸ China's worst practices are rampant corruption and the *hukou* system. Guatemala's best practices include its entering, in 1999, into a peace pact that set up an international commission to rein in corruption.⁹⁹ Its worst practices in the recent past include extreme violence against Maya Achi and prolonged efforts to avoid paying anything more than token compensation to those wronged.¹⁰⁰

II. Dam Building in China: Problems of Resettlement and Compensation

Chinese legal materials and the secondary literature usually refer to persons displaced by dam construction and operation as "migrants,"¹⁰¹ and I shall use that word in this part. Some migrants are Han Chinese, and some are indigenous ethnic minorities. I focus mainly on the latter. I first explain the Chinese laws and regulations that govern migrant compensation and resettlement. Next, I examine the outcome of migrant resettlement during the construction of the Three Gorges Dam in Hubei Province. Then I look at the effects of similar dam projects in Yunnan Province, and at the possible effects of proposed dam projects on the Nu River in the northwestern part of Yunnan Province, with special emphasis on the effects of resettlement on the ethnic minority populations there. Finally, I scrutinize several proposed strategies for improving compensation and resettlement, and point out problems and potential solutions, specific to

97. See *infra* text accompanying notes 577-85. As Susan Rose-Ackerman makes clear, corruption is an economic, cultural, and political problem in many countries. But she considers reform achievable. See generally SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES, AND REFORM (1999) [hereinafter ROSE-ACKERMAN].

98. See Pu Wang et. al., *Compensation Policy for Displacement Caused by Dam Construction in China: An Institutional Analysis*, 48 GEOFORUM 1, 5-7 (2013).

99. This international-national arrangement, known as the International Commission Against Impunity in Guatemala ("CICIG"), receives support from the United States, which also reflects a welcome change in U.S. policy toward Guatemala. See Eric A. Witte, *Why the U.S. Should Aid Guatemala's Anti-Corruption Push*, AMERICAS Q. (Mar. 1, 2018), <http://americasquarterly.org/content/how-us-can-aid-guatemalas-anti-corruption-push> [https://perma.cc/G5AP-Z8H9] [hereinafter Witte, *Guatemala*] (reaffirmation by Nikki Haley, U.S. ambassador to the U.N., on Feb. 28, 2018).

100. See *supra* text accompanying notes 303-14.

101. See *infra* text accompanying note 105.

Chinese policies and practices.¹⁰²

A. Resettlement, Compensation, and the Law

The legal materials governing property in China include, in descending level of authority, the Property Law of the P.R.C. (“Property Law”),¹⁰³ the Land Administration Law of the P.R.C. (“Land Administration Law”),¹⁰⁴ and the Regulation on Land Requisition Compensation and Resettlement of Migrants for Large and Medium Water Conservation and Power Construction Projects (“Regulation on Land Requisition”).¹⁰⁵ The Property Law makes no distinction between the real and personal property rights of ethnic minorities and those of Han Chinese.¹⁰⁶

Article 47 of the Land Administration Law provides for land expropriation and compensation.¹⁰⁷ This provision does not mention ethnic minorities or migrants but does discuss expropriation, compensation, and resettlement.¹⁰⁸ In the case of expropriated agricultural (cultivated) land, the amount offered covers (1) land compensation, (2) resettlement fees, and (3) an award for standing structures and green crops.¹⁰⁹ Land compensation ranges from six to ten times the average output value over the three preceding years.¹¹⁰ The resettlement fee for each “agricultural person” is four to six times the average output value.¹¹¹ The sum of (1) and (2), which might be called the base compensation, ranges from ten to sixteen times the average output value.¹¹² Article 47 recognizes that even the

102. The aid of Chong Luo has been invaluable in understanding population movements and hydroelectric dams in China. I owe much to her research, Chinese language skills, and knowledge of contemporary China.

103. Zhōnghuá Rénmín Gònghéguó Wùquán Fǎ (中华人民共和国物权法) [Property Law of the People’s Republic of China] (Order of the President of the P.R.C. (no. 62)) (promulgated by the Tenth Nat’l People’s Cong., Mar. 16, 2007, effective Oct. 1, 2007), available at <http://en.pkulaw.cn/display.aspx?id=6642&lib=law&SearchKeyword=property%20law&SearchCKeyword> [https://perma.cc/8GCF-4U3G] [hereinafter Property Law] (in Chinese with English translation).

104. See Zhōnghuá Rénmín Gònghéguó Tǔdì Guǎnlǐ Fǎ (中华人民共和国土地管理法) [Land Administration Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 28, 2004, effective Aug. 28, 2004), available at http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383939.htm [https://perma.cc/3KVQ-NQN8] [hereinafter Land Administration Law].

105. See Dàzhōngxíng Shuǐli Shuǐdiàn Gōngchéng Jiànshè Zhēngdì Bùcháng hé Yímín Ānzhì Tiáoli (大中型水利水电工程建设征地补偿和移民安置条例) [Regulation on Land Requisition Compensation and Resettlement of Migrants for Large and Medium Water Conservation and Power Construction Projects] (promulgated by the St. Council, July 7, 2006, effective Sept. 1, 2006), available at <http://en.pkulaw.cn/Display.aspx?Lib=law&Id=5462&keyword=> [https://perma.cc/LBT5-WYHT] [hereinafter Regulation on Land Requisition].

106. Cf. Property Law, *supra* note 103, art. 51 (implying that “cultural relics” (*wénwù*, 文物) belong to the state).

107. See Land Administration Law, *supra* note 104, art. 47.

108. See *id.*

109. See *id.*

110. See *id.*

111. See *id.*

112. See *id.*

upper end of this range might be insufficient.¹¹³ However, it makes clear that the base compensation may not exceed thirty times the average output value, save perhaps in special circumstances.¹¹⁴ This provision does not specify how to determine the value of structures and green crops but refers instead to the main points of Chinese compensation and resettlement policy.¹¹⁵

Article 51, however, deals with the particular case of dam projects: “The rate of compensation for expropriation of land to build large[-] or medium-sized water conservancy or hydroelectric projects and the measures for resettling relocated people shall be prescribed separately by the State Council.”¹¹⁶

To U.S. readers, Articles 47 and 51 might seem peculiar in both the arithmetical calculations and the separate treatment of dam projects and water conservancy from other public works. In the United States, the Takings Clause of the Fifth Amendment applies to “private property,” and “just compensation” is, by case law, virtually always put at fair market value.¹¹⁷ But as explained shortly, under China’s Property Law, there is a “socialist market economic order,” “public ownership” plays “a dominant role,”¹¹⁸ and private property interests in land are severely circumscribed. Moreover, the relation between Articles 47 and 51 might seem peculiar to U.S. readers in another way: it is unclear whether Article 51 intentionally sets up the possibility that compensation under that Article can be lower than compensation under Article 47.

An official explanation of Article 51 gives five reasons for the different arrangements for dam and water conservancy projects compared to other public works.¹¹⁹ First, these projects are quite large. Second, the land requisitioned for these projects is more geographically concentrated than, say, for railways and highways, and the migrants are also more geographically concentrated. Third, dam reservoirs are generally in outlying areas used for agriculture, and the displaced migrants typically are resettled in non-agricultural areas. Fourth, the living conditions and living standards of migrants displaced by dam and water conservancy projects are usually lower than those of migrants displaced for other public works, and farmers in particular may experience long-term difficulties unless they are well settled. Fifth, compensation funds for these projects are often insufficient, which in practice means that compensation given to migrants is initially

113. See *id.*

114. *Id.*

115. See *id.*

116. *Id.* art. 51.

117. U.S. CONST. amend. V; see, e.g., *United States v. 564.54 Acres of Land*, 441 U.S. 506, 506-11 (1979) (using fair market value as the metric for just compensation).

118. Property Law, *supra* note 103, arts. 1, 3. “Public ownership” in Article 3 includes both collective ownership and state ownership. *Id.* art. 3.

119. See Zhōnghuá Rénmín Gònghéguó Tǔdì Guǎnlǐ Fǎ Shìyì (中华人民共和国土地管理法释义) [Explanation of The Law of Land Administration of the People’s Republic of China], available at http://www.npc.gov.cn/npc/flsyywd/xingzheng/2000-11/25/content_8294.htm [https://perma.cc/W7T7-QVMP] (last visited Nov. 22, 2017).

low; giving migrants longer-term support—once these projects are complete and generate profits—can remedy this situation.¹²⁰ The last reason is the most important and the most vulnerable to criticism, for the government should compensate migrants fully at the beginning of their displacement.

The Regulation on Land Requisition follows the general outline of the Land Administration Law but recapitulates the unclarity between Articles 47 and 51.¹²¹ Articles 20 to 25 of the Regulation address land compensation for large- and medium-sized power dam and water conservancy projects.¹²² Under Article 22 of this Regulation, the sum of “the land compensation and resettlement subsidies shall be 16 times of the average annual output of the cultivated land”¹²³ in the preceding three years. A factor of sixteen is more generous than the lower end of the base compensation—namely, a factor of ten under Article 47 of the Land Administration Law.¹²⁴ But it is less generous than the maximum available for base compensation—namely, a factor of thirty under Article 47.¹²⁵

All the same, the Regulation on Land Requisition is far more detailed on the resettlement of migrants than is the Land Administration Law. Migrants need not be members of an ethnic minority.¹²⁶ Yet the state frequently chooses to build new dams in areas of China in which members of

120. *Id.* Here is an English translation of the official explanation (translation courtesy of Chong Luo):

“The standards for land compensation and method of resettlement for land requisitioned for building large and medium-sized water conservancy projects and hydroelectric power projects shall be determined separately by the State Council because compared with other projects, large and medium-sized water conservancy projects and hydroelectric power projects have some special features:

First, the areas of requisitioned land for large[-] and medium-sized water conservancy projects and hydroelectric power projects are large and usually occupy tens of thousands of mu [one mu = 0.1647 acres] of agricultural land.

Second, unlike the railway and highway projects which involve many towns and villages, the requisitioned land for water conservancy projects and hydroelectric power projects is comparatively concentrated, and therefore the migrants are comparatively concentrated.

Third, the locations of reservoirs are usually outlying. These places lack requisitioned lands for resettling the migrants by changing their jobs from agricultural to non-agricultural. The only method that can be used to resettle the migrants is comprehensive agricultural and non-agricultural development, including agricultural, foresting, fishing, sheepherding, assorted small industries, and starting township enterprises.

Fourth, because the economic and natural conditions [in reservoir areas] are comparatively worse and people’s living standard is comparatively lower, there will be long-term difficulties for farmers if they are not well settled.

Fifth, the investments in the water conservancy projects and hydroelectric power projects are insufficient, so only low-standard resettlement compensation can be given to migrants. Migrants can get additional support and compensation after the water conservancy projects and hydroelectric power projects are finished and earn profits.”

121. See Regulation on Land Requisition, *supra* note 105, art. 1.

122. See *id.* arts. 20–25.

123. *Id.* art. 22.

124. Land Administration Law, *supra* note 104, art. 47.

125. *Id.*

126. See generally Regulation on Land Requisition, *supra* note 105, art. 11.

ethnic minorities are present in significant numbers, and Article 11 of the Regulation on Land Requisition refers to “minority ethnic groups.”¹²⁷

Chinese regulatory provisions reflect care in thinking about the socio-economic impact of power dams in ways that many countries do not. For example, Article 3 of the Regulation on Land Requisition says that the state “shall make the migrants’ living level [i.e., standard of living] reach or exceed their former one by combining the early stage compensations and subsidies with follow-up support.”¹²⁸ Article 5 makes the state and its lower political subdivisions, including the “local people’s governments at the county level or above,” responsible for handling migrant resettlement related to power dam projects.¹²⁹ A “project legal person”—basically, the legal entity in charge of the project—has to prepare a detailed plan for resettling those who will be displaced.¹³⁰ The plan is a condition of approval, and must be publicly announced and approved by the “province, autonomous region or municipality.”¹³¹ Some provisions, however, seem to hedge on the protections for migrants, and no recourse exists for persons who do not want to move.¹³²

A resettlement plan under the Regulation on Land Requisition must consider the value of all submerged land including standing structures,

127. *Id.*

128. *Id.* art. 3.

129. *Id.* art. 5.

130. *Id.* arts. 6–19.

131. *Id.* arts. 6, 22.

132. For instance, Article 15 requires that the project legal person or project administrative department “widely listen to the opinions of migrants and residents of the migrant resettlement areas,” but has to hold a hearing only “[w]here necessary.” Article 38 provides that, once a resettlement plan is approved but is later seen to require “adjustment or modification,” only the “local people’s government” or other “original approval organ” may change the plan. *Id.* arts. 15, 38. However, Article 38 does not explicitly give migrants a voice in adjusting or modifying a resettlement plan. Migrants could complain to the provincial or central government, or go to court, but in either case their prospects for changing the resettlement plan are uncertain.

Within the last ten years, government expropriation of land has sometimes sparked mass protests and violent confrontations. See Zhu Keliang & Roy Prosterman, *Land Reform Efforts in China*, CHINA BUS. REV. (Oct. 1, 2012), <http://www.chinabusinessreview.com/land-reform-efforts-in-china/> [<https://perma.cc/9AG6-BZ78>] (stating that “Chinese officials estimate that approximately 2 million rural residents lose their land each year” and that in late 2011 there was a “highly-publicized mass protest against local authorities’ land expropriations in Wukan, Guangdong”).

As for the absence of recourse, China is not much different from the United States. The U.S. legal system does not generally allow landowners to refuse to sell if the government has a land use plan that is for a “public use” under U.S. CONST. amend. V, and landowners are generally limited to “just compensation” (understood as fair market value) under that amendment. See STEPHEN R. MUNZER, *A THEORY OF PROPERTY* 442–48 (1990). Dam building in Appalachia under the Tennessee Valley Authority Act, 48 Stat. 58 (May 18, 1933), was upheld in *Ashwander v. TVA*, 297 U.S. 288, 322–23 (1936). Controversially, *Kelo v. City of New London*, 545 U.S. 469, 477 (2005), upheld the use of eminent domain to transfer land from one private owner to another because the transfer was part of a comprehensive redevelopment plan, and thus for a public use. The *Kelo* decision elicited howls of protest.

green crops,¹³³ forests, and vegetation.¹³⁴ Article 11 states that the plan must take into account the “load capacity . . . and environment” of the submerged areas when deciding where to resettle migrants, and that “[t]he preparation of a migrant resettlement plan shall respect the production and living forms, habits and customs of the minority ethnic groups.”¹³⁵ Article 11 is important to these groups, and much depends on how the plan will support their economic and cultural welfare.

As to the mechanism of compensation, the local government must pay initial compensation and any subsequent support directly to each migrant.¹³⁶ This provision is, however, subject to an exception if the local government believes that the money would be better spent on projects to “strengthen the communication, energy, water conservation, environmental protection, telecommunication, culture, education, health, radio, television, and other infrastructure construction so as to support the development of the migrant resettlement areas.”¹³⁷ This exception might enable local governments to divert funds intended for the resettlement and compensation of displaced migrants to uses that provide public goods, in the economic sense, for non-migrants. It is one thing if local governments rarely invoke this exception. But it is quite another if they regularly deprive displaced migrants of the benefits due to them in order to enrich non-migrants who are unaffected by the projects that necessitate such compensation in the first place.

Migrants can also be shortchanged by the property rules applicable in rural China. There, migrants receive compensation based on the average annual output of their land over a three-year period because Chinese farmers do not own the land they use and have only a contract right to use “their” land for a fixed period of time.¹³⁸ Farmers do not have title to the land in which they work.¹³⁹ Under Chinese law on real property interests, there is no equivalent to the common law’s fee simple absolute. Unlimited duration of individual property in land does not exist in China. Local collectives own all farmland, and farmers bargain with collectives for a contract right to use a plot of land.¹⁴⁰ Payment for a land-use contract is made

133. “Green crops” are crops already planted on the land that will not be ready for harvest by the date of resettlement. The compensation value of green crops is calculated based on the fair market value of crops of that kind in the local area. Junhua Chen, *Urban Development and Migrant Housing in Contemporary China*, in *URBAN CHINA IN THE NEW ERA: MARKET REFORMS, CURRENT STATE, AND THE ROAD FORWARD* 52–53 (Zhiming Cheng et. al. eds., 2014).

134. See Regulation on Land Requisition, *supra* note 105, art. 16.

135. *Id.* art. 11.

136. *Id.* art. 32.

137. *Id.* arts. 40–41. See also Philip H. Brown & Kevin Xu, *Hydropower Development and Resettlement on China’s Nu River*, 19 J. CONTEMP. CHINA 777, 796–97 (2010) [hereinafter Brown & Xu] (containing a table of other relevant legal provisions).

138. See Brown & Xu, *supra* note 137, at 796.

139. See Jonas Alsén, *An Introduction to Chinese Property Law*, 20 MD. J. INT’L L. 1, 57–58 (1996) [hereinafter Alsén].

140. If a lease is a contract, it does not follow that all contracts are leases. To say that Chinese farmers have a contract right to use land is not necessarily to say that they have a “lease” in one or more of the many senses in which that word is used in Anglo-Ameri-

with a percentage of the land's yield.¹⁴¹

Collectives' land-use contracts transfer a limited property interest in the land to farmers. Collectives may grant land-use rights only for a period of up to thirty years.¹⁴² Land-use contracts are transferable by the holder solely as a result of death and inheritance or by authorized sale, and in either case only for the period remaining on the contract.¹⁴³ Further, farmers may use the land solely for agriculture, and they may not sell their contract to any party for any other use.¹⁴⁴ By law, rural collectives must provide farmers with a certificate memorializing their land-use contract.¹⁴⁵ In fact, however, only one in ten farmers receives such a certificate, which limits farmers' incentives to invest in their property and their ability to legally defend such limited property rights they have.¹⁴⁶ It takes little imagination to see that the absence of a written contract or certificate might dissuade farmers from seeking legal protection of their contracts.

B. The Three Gorges Dam Project in Hubei Province

A specific example illuminates many of the problems with dam displacement in China. The legal provisions just sketched, or close cousins of them, applied to the construction of the Three Gorges Dam (1994–2009), which is China's, and the world's, largest hydropower project to date.¹⁴⁷ Construction of the dam and its reservoir displaced over 1.13 million people in China's Hubei Province.¹⁴⁸ The reservoir inundated an estimated "20 counties or municipal districts, 227 townships . . . 680 villages . . . and 23,800 [hectares] of farmland."¹⁴⁹

An analysis halfway through the project concluded that resettlement had not gone well.¹⁵⁰ Officials resettled some migrants from fertile river bottoms to "steep, infertile slopes."¹⁵¹ They also resettled some younger

can landlord-tenant law. See Benjamin W. James, *Expanding the Gap: How the Rural Property System Exacerbates China's Urban-Rural Gap*, 20 COLUM. J. ASIAN L. 451, 461 (2006).

141. *Id.*

142. See Alsén, *supra* note 139, at 58.

143. See Property Law, *supra* note 103, art. 128.

144. In contrast, urban property holders can sometimes use their land for commercial or industrial purposes as well, which can add value to the land. See James, *supra* note 140, at 480.

145. See *id.* at 451, 471.

146. See *id.* However, the Ministry of Agriculture has stated that it plans to register all landholdings and issue corresponding registration certificates within five years from March 1, 2015. See Bùdòngchǎn Dēngjì Zhānxíng Tiáolì (不动产登记暂行条例) [Interim Regulation on Real Estate Registration] (promulgated by the State Council, Nov. 24, 2014, effective Mar. 1, 2015), CLI.2.240136(EN) (China).

147. The dams were completed in 2006 and fully operational by 2012. See Pu Wang et al., *supra* note 98, at 6.

148. See *id.*

149. Brooke Wilmsen et al., *Involuntary Rural Resettlement: Resources, Strategies, and Outcomes at the Three Gorges Dam, China*, 20 J. ENV'T & DEV. 355, 358 (2011).

150. See Li Heming et al., *Reservoir Resettlement in China: Past Experience and the Three Gorges Dam*, 167 GEOGRAPHICAL J. 195, 20–09 (2001).

151. *Id.* at 203.

migrants to cities and provided them with jobs in factories, but migrants “found that they often soon lost their new urban jobs, though they did experience an improvement in infrastructure and social services.”¹⁵² Premier Zhu Rongji took some of the officials to task “for corruption and misuse of relocation funding,” but “[m]ore importantly, he was dissatisfied with the quality of relocation programmes.”¹⁵³ Zhu envisioned a new policy of placing migrants in locations with adequate jobs and resources to help them resettle comfortably, but this policy had the perverse effect of resettling many migrants even farther away from their communities of origin, to locations where many found it hard to rebuild livelihoods, lamented the loss of social networks, and considered the new environment unfamiliar and unsatisfactory.¹⁵⁴ Migrants from rural areas in particular faced discrimination in their new communities.¹⁵⁵

After the dam’s completion, news reports indicated that migrants forced to resettle did not receive adequate compensation.¹⁵⁶ A government-led audit of the Three Gorges Dam project bore out reports that revealed that over 2 billion¹⁵⁷ Yuan (\$44.9 million USD) out of the 85 billion Yuan (\$13.6 billion USD) resettlement fund had been mismanaged or fraudulently misappropriated.¹⁵⁸ A study of two villages forced to resettle because of the Three Gorges Dam project showed that, although some villagers’ monthly incomes saw an increase immediately after resettlement, there was a decline over the longer term in income and financial stability owing to inadequate land grants, increased housing expenses, and unemployment.¹⁵⁹ Moreover, a survey of over 1,000 migrants following resettle-

152. *Id.*

153. *Id.* at 204.

154. *Id.* at 205–06.

155. *See id.* at 208–09.

156. *See* Luo Wangshu & Tan Yingzi, *Senior Chongqing Official Investigated for Graft Allegations*, CHINA DAILY (May 5, 2014), http://www.chinadaily.com.cn/china/2014-05/05/content_17483454.htm [<https://perma.cc/C8VH-272P>]; ASSOCIATED PRESS, *Chinese Displaced by the Three Gorges Dam Protest*, SAN DIEGO TRIB. (Mar. 4, 2009), <https://www.sandiegouniontribune.com/sdut-china-three-gorges-protest-030409-2009mar04-story.html> [<https://perma.cc/TCDD-7ETN5>]; *China to Increase Supervision, Audits of the Three Gorges Project*, BBC INT’L REP. (Asia) 1, 1–2 (Mar. 29, 2005); Martin Fackler, *China Speeds Up Resettlements*, MIDLAND DAILY NEWS (Jan. 19, 2002), <https://www.ourmidland.com/news/article/China-Speeds-Up-Resettlements-7081426.php> [<https://perma.cc/M9DW-XXKW>]; Cox Washington Bureau, *China dams up dissent of Three Gorges Project*, PROBE INT’L (July 28, 2008), <https://journal.probeinternational.org/2008/07/29/china-dams-dissent-three-gorges-project-1/> [<https://perma.cc/T5GD-L3AY>]; Ching-Ching Ni, *China’s Uprooted Peasants Find Life in “City” Is Awash in Difficulty*, L.A. TIMES (Sept. 23, 2000), <http://articles.latimes.com/2000/sep/23/news/mn-25332> [<https://perma.cc/6N5U-643N>].

157. Here and throughout “billion” means “1,000,000,000,” i.e., American billion rather than British billion.

158. *See Audit Results of the Draft Financial Final Accounts for Fulfillment of the Three Gorges Project*, Nat’l Audit Office of the P.R.C., No. 23 of 2013 (General Serial No. 165), Section B, <http://www.audit.gov.cn/en/n746/n752/n769/c66744/content.html> [<https://perma.cc/9W9K-4ZEV>] (last visited June 23, 2017).

159. Wilmsen et al., *supra* note 149, at 370–71. For more information on the negative effects of the Three Gorges Dam resettlement, see Juan Xi & Sean-Shong Hwang, *Relocation Stress, Coping, and Sense of Control Among Resettlers Resulting from China’s Three*

ment showed an overall increase in symptoms of depression across all age groups.¹⁶⁰ These tangible and intangible negative effects of the Three Gorges Dam project were accentuated by the associated destruction of cultural heritage, such as archeological and historic sites, which affected Tujia and Miao ethnic minorities in particular.¹⁶¹

Gorges Dam Project, 104 SOC. INDICATORS RES. 507, 508-09 (2011) (citing a series of articles on the negative effects on migrants of the Three Gorges Dam).

Resistance to dam projects based on not-in-my-backyard (“NIMBY”) reactions by ethnic minorities and Han residents is understandable and not necessarily selfish. Some two hundred miles from the Three Gorges project, construction of the Gangkouwan Reservoir project in Anhui Province elicited local resistance. See W.S. Lin et al., *Impacts of Large Construction Projects on Residents’ Living Status in China: A Reservoir Project Case*, in PROCEEDINGS OF THE 21ST INTERNATIONAL SYMPOSIUM ON ADVANCEMENT OF CONSTRUCTION MANAGEMENT AND REAL ESTATE 879 (K.W. Chau et al. eds., 2018) (analyzing NIMBY events and negative and positive impacts of the project).

160. See Juan Xi, Sean-Shong Hwang & Patricia Drentea, *Experiencing a Forced Relocation at Different Life Stages: The Effects of China’s Three Gorges Project-Induced Relocation on Depression*, 3 SOC’Y & MENTAL HEALTH 59, 68-69 (2012). The literature on migrants’ mental health problems in China is sparser than that on similar problems in Guatemala. See *infra* text accompanying notes 350-352.

161. See, e.g., Paola Demattè, *After the Flood: Cultural Heritage and Cultural Politics in Chongqing Municipality and the Three Gorges Areas, China*, 9 FUTURE ANTERIOR 46, 54-57 (2012) (describing the adverse effects on cultural heritage). Today, Tujia number about 8 million persons. *Tujia Nationality*, CHINA TRAVEL GUIDE, <https://www.travelchina.guide.com/intro/nationality/tujia/> [https://perma.cc/LMQ2-WJHP] (last visited Nov. 13, 2018) [hereinafter *Tujia Nationality*]. By 910 C.E., “Tujia emerged from their legendary origins and became a recognized people of the western Hunan region.” 2 BARBARA J. WEST, ENCYCLOPEDIA OF THE PEOPLES OF ASIA AND OCEANIA 825 (2009) [hereinafter WEST, ENCYCLOPEDIA]. Tujia live at higher elevations, up to 5,000 feet; they hunt, fish, and grow crops. *Id.* In the last 100 years they have relied less on their native languages and often speak Mandarin. *Id.* “Tujia today practice a syncretic religion with aspects from Taoism, ancestor worship, shamanism, and animism.” *Id.* They have distinctive crafts and clothes, are proud of the scenic beauty of their area and the folklore and art reflected in the Nuo Drama. *Tujia Nationality*, *supra* note 161. Tujia, like Miao, have houses in which livestock are on the lower floor and bedrooms are on the upper floor. *Id.*

Miao (Hmong) number almost 9 million people. *Miao Nationality*, <https://www.travelchinaguide.com/intro/nationality/miao/> [https://perma.cc/9RW2-Z8UN] (last visited Nov. 13, 2018) [hereinafter *Miao Nationality*]. Norma Diamond, writing nearly a quarter of a century ago, found the Miao to be a disparate group in southwestern China, including Hubei Province. Norma Diamond, *Defining the Miao: Ming, Qing, and Contemporary Views*, in CULTURAL ENCOUNTERS ON CHINA’S ETHNIC FRONTIERS 92, 92-99 (Stevan Harrell ed., 1995). Miao may go back to the third century B.C.E. and historically resisted assimilation and control by Han Chinese, who saw them as “barbarians.” *Id.* at 99-100, 104, 106, 110. Nonetheless, Han sometimes also saw Miao as having a colorful culture and liberal sexual practices. *Id.* at 100-04, 106-12. In the 1980s, Miao seem to have had rather less access to education than Han. *Id.* at 113. Diamond observes that “the Miao are the poorest of any of the ethnic groups” and that Han regard them as “backward and ignorant.” *Id.* at 116. 1 WEST, ENCYCLOPEDIA, *supra* note 161, at 286-89, prefers the name Hmong over Miao, and remarks on their conjectural origins and their suffering under Mao Zedong’s Great Leap Forward. She adds, “The traditional Hmong religious beliefs all generally concern spirits and other powerful forces that are associated with specific natural features: groves of trees, caves, mountains, large stones, and the like.” *Id.* at 289. West is not alone in calling Miao “Hmong.” Some confusion, disagreement, or contextual differences lurk in who is or uses “Hmong” versus “Miao;” “Miao” seems more encompassing and has greater use in China whereas “Hmong,” which in Chinese contexts covers a subset of Miao, is a more common term in Southeast

C. Dam Projects in Yunnan Province

The early years of this century provide another specific example of dam-induced problems. In this period, the Chinese government sought to build thirteen dams along the upper reaches of the Nu River.¹⁶² The Nu (also called the Nujiang River), which is a tributary of the Mekong River, flows from southeastern Tibet Autonomous Province into the northwest corner of Yunnan Province.¹⁶³ China has already completed several dams on the lower stretches of the Mekong in southern Yunnan, where the people forced to resettle have experienced difficulties similar to those faced by the Three Gorges migrants.¹⁶⁴ However, the negative effects of resettlement have been exacerbated by the higher ethnic minority population, the lack of adequate infrastructure (e.g., passable roads, irrigation, and electrical grid), and the rugged terrain in Yunnan Province.¹⁶⁵ For example, in western China, low slopes suitable for rice paddy fields are the most desirable agricultural land, but these are in short supply because of the steep terrain.¹⁶⁶ Construction of the Manwan Dam on the Mekong River in southern Yunnan Province in 1996 exacerbated the existing shortage of low-sloping land, as the average ratio of paddy-field to dry-land holdings per farmer fell from 6:4 to 4:6, which led to an overall loss in agricultural production and income for those who lived near the river.¹⁶⁷

One news source alleged that resource mismanagement and corruption significantly affected dam building in Yunnan Province: The hydro-power company that constructed the Manwan Dam requisitioned a large parcel of land in the village of Xiaohe for temporary use during construction.¹⁶⁸ The company then failed to return the land to the village after construction and ceased paying for its use.¹⁶⁹ Similar misfortune struck a village of 4,000 people who were displaced in 2000 by construction of the

Asian contexts and in the West. Nicholas Tapp, *Cultural Accommodations in Southwest China: The 'Han Miao' and Problems in the Ethnography of the Hmong*, 61 *ASIAN FOLKLORE STUD.* 78-81 (2002). A recent travel guide reports that Miao "believe that everything in nature has a spirit," attach much importance to ancestors, and make distinctive jewelry, handicrafts, and traditional clothes. *Miao Nationality*, *supra* note 161.

162. See Brown & Xu, *supra* note 137, at 777.

163. See *id.* at 778. In China, the Mekong is often called the Salween River. *Id.* See also Tom Phillips, *Joy as China Shelves Plans to Dam "Angry River,"* THE GUARDIAN (Dec. 2, 2016), <https://www.theguardian.com/world/2016/dec/02/joy-as-china-shelves-plans-to-dam-angry-river> [<https://perma.cc/NV2V-HPSQ>] [hereinafter Phillips, "Angry River"]. In Thailand, the Nu is called the Salween River and in parts of Myanmar the Thanlwin River. See *id.*

164. See generally Brendan A. Galipeau, Mark Ingman & Bryan Tilt, *Dam-Induced Displacement and Agricultural Livelihoods in China's Mekong Basin*, 41 *HUM. ECOLOGY* 437 (2013).

165. See Bryan Tilt, Yvonne Braun & Daming He, *Social Impacts of Large Dam Projects: A Comparison of International Case Studies and Implications for Best Practice*, 30 *J. ENVTL. MGMT.* 5254, 5254 (2008).

166. See *id.*

167. *Id.* Inadequate and ill-maintained irrigation exacerbated this problem. See *id.*

168. See Meng Si, *Life in the Shadow of the Mekong Dams*, in *CHINADIALOGUE* 31, 31 (2013).

169. *Id.*

Dachaoshan Dam on the Mekong, downriver from the Manwan Dam.¹⁷⁰ The government installed irrigation in the area to which the village was resettled.¹⁷¹ However, the government spent only a fraction of the money it claimed to have allotted for the irrigation project and stopped pumping water altogether when the area was struck by drought.¹⁷² Moreover, the local government did not pay the migrants all the resettlement money they were due.¹⁷³

For socioeconomic reasons, the areas around the proposed dams on the Nu River may be more vulnerable to such negative effects than were areas around the Three Gorges Dam in Hubei Province.¹⁷⁴ Heightened awareness of this vulnerability combined with other factors may affect plans for future dams.¹⁷⁵ On December 2, 2016, “China’s State Energy Administration published a policy roadmap for the next five years that contained no mention of building any [new] hydroelectric dams on the Nu.”¹⁷⁶ The roadmap is indirect evidence that new dams are on pause. It is not the equivalent of a cancellation notice, in part because the government does not like to acknowledge that it has bowed to public pressure. Although some pronounce that China has “shelve[d] plans to dam”¹⁷⁷ the Nu, it is premature to draw this conclusion. There are reasons besides public pressure to put new dams on hold: environmental degradation, seismic activity in the southwestern China, and a slowing economy.¹⁷⁸ If in the future these reasons seem less weighty, China could put new power dams back on the table. It therefore makes sense to consider previously proposed new dams and their likely effects.

Nujiang Prefecture, where eight of the previously proposed 13 dams on the Nu River would be built, has a higher poverty rate than the areas affected by the Three Gorge Dam, and the vast majority of the Nujiang population consists of ethnic minorities.¹⁷⁹ Twenty-two of China’s 55 officially recognized ethnicities are represented in Nujiang Prefecture, including Lisu, Bai, Nu, Pumi, and Dulong. Over half of the people in Nujiang Prefecture are of Lisu ethnicity and ethnic minorities account for over 92% of the total population. All four counties in Nujiang Prefecture are still designated as “national key poverty counties” and Nujiang Prefecture remains one of the poorest ethnic minority autonomous prefectures in

170. See Meng Si, *The Fate of People Displaced by the Mekong Dams*, in CHINADIALOGUE, 25, 25 (2013).

171. *Id.*

172. *Id.*

173. *Id.*

174. See Philip H. Brown, Darrin Magee & Yilin Xu, *Socioeconomic Vulnerability in China’s Hydropower Development Programs*, 19 CHINA ECON. REV. 614, 623 (2008).

175. Phillips, “Angry River,” *supra* note 163.

176. *Id.*

177. This pronouncement is the interpretation of Phillips, “Angry River,” *supra* note 163.

178. See *id.* (listing these reasons).

179. *Id.* at 624.

China.¹⁸⁰

The eight previously proposed dams in Nujiang Prefecture would displace over 36,000 persons who belong to ethnic minorities.¹⁸¹ These populations are vulnerable to mistreatment and economic hardship as a result of resettlement because of their distinctive cultural practices and the fact that many do not speak Mandarin, the official government language.¹⁸² Without the ability to communicate effectively with government officials, these ethnic minorities face hurdles to participation in community meetings and regional dialogues about dam projects.¹⁸³ Furthermore, even if the affected minority populations overcome the language barrier, there is no clear or direct way for those affected to appeal to the local government, and appealing to federal courts is expensive, difficult, and often ineffective.¹⁸⁴

180. Brown & Xu, *supra* note 137, at 779-80. Bai seem to have emerged in the third century B.C.E. from an earlier Kunming community, and live mainly in the Dali Bai Autonomous Prefecture in western Yunnan Province. 1 WEST, *ENCYCLOPEDIA, supra* note 161, at 78, 80. "Most Bai people are subsistence farmers and herders." *Id.* at 79. Culturally, Bai are known for quarrying marble, song and dance festivals, and a syncretic religion marked by village gods, Buddhism, Taoism, and Confucianism. *Id.* at 79-80. Information on Nu dates from the eighth century C.E., and they live chiefly in rugged parts of Yunnan Province. 2 WEST, *ENCYCLOPEDIA, supra* note 161, at 602. Over the centuries, Nu came under the influence and sometimes subjugation of Naxi, Bai, and Tibetans, until they became citizens of China in 1949. *Id.* Nu society was patrilineal and patrilocal; farming was the main occupation. *Id.* at 602-03. "Nu religion recognized a wide variety of nature spirits, including the sun, moon, various animals, mountains, rivers, . . . as well as their dead ancestors." *Id.* at 603.

Pumi "live in northwestern Yunnan Province as well as in Sichuan Province." *Id.* at 674. Like Nu, Pumi are socially patrilineal and patrilocal, but, interestingly, they often marry cross-cousins. *Id.* They practiced swidden agriculture until the 1950s, and also raised farm animals. *Id.* The Pumi indigenous religion ascribed "power [to] both nature and ancestral spirits," though now "Pumi are nominally Buddhists." *Id.*

Dulong (also known as Derung, Drung, T'rung, and other names) are a tiny ethnic minority who live along "the Dulong River valley in northwestern Yunnan Province." 1 WEST, *ENCYCLOPEDIA, supra* note 161, at 186. They hark back to at least the Tang dynasty in the seventh century C.E. *Id.* Often Dulong were at the mercy of other groups, such as Bai, Dai, Lisu, or Naxi. *Id.* at 186-87. Many Dulong are farmers, and they marry outside their own patrilineal clans. *Id.* at 187. Most Dulong are animists, and "[u]ntil 50 years ago [Dulong] women were known for traditional facial tattooing." *Id.* at 187. Dulong speak a Tibeto-Burman language, which they see "as closely bound up with their ethnic identity," and which is on the verge "of endangerment." Ross Perlin, *Language Attitudes of the T'rung*, 32 *LINGUISTICS OF THE TIBETO-BURMAN AREA* 91, 92, 108 (2009).

181. Desiree D. Tullos et. al., *Biophysical, Socioeconomic, and Geopolitical Vulnerabilities to Hydropower Development on the Nu River, China*, 18 *ECOLOGY & SOC'Y* 16, 19 (table 2) (2013) [hereinafter Tullos et al.]. The table presents a conservative estimate. *Id.* at 18.

182. *See id.* at 17, 24.

183. *Id.* Although the Chinese government officially supports the use of minority languages, officials often speak only Mandarin. Also, while Mandarin is taught in Chinese primary and secondary schools, minority populations have high dropout rates, especially in isolated rural areas like Nujiang Prefecture. *See* Yuxiang Wang & JoAnn Phillion, *Minority Language Policy and Practice in China: The Need for Multicultural Education*, 11 *INT'L J. MULTICULTURAL EDUC.* 1, 4, 6 (2009).

184. *See* James, *supra* note 140, at 478, 483 (remarking that appeals are often ineffective owing to Chinese courts' "lack [of] meaningful independence").

It is likely that most of the 36,000 persons to be displaced by the eight possible dams in Nujiang Prefecture will be members of the Lisu ethnic minority.¹⁸⁵ Barbara West identifies Lisu as “a highland people of Yunnan Province,”¹⁸⁶ and observes that “[f]or the most part Lisu communities established themselves in the high elevations of their new [i.e., nineteenth-century] homes, between 4,265 and 9,845 feet.”¹⁸⁷ Lisu villagers traditionally practiced swidden (slash-and-burn) agriculture, which China abolished “in favor of the irrigated fields and wet-rice agriculture of the Han.”¹⁸⁸

Lisu identity is partly a function of village residence and “membership in a patrilineal clan group or *zo*.”¹⁸⁹ Because each clan group “has its own set of ancestral and other important beliefs, religious rituals and beliefs,”¹⁹⁰ it is difficult to pick out a unifying thread among them. Some suggest that Lisu religious practice honors special relationships cultivated between Lisu persons and all components of their surroundings.¹⁹¹

Paul Durrenberger, writing about Lisu in Thailand thirty years ago, opines that important parts of Lisu religious practice include the recognition of social relationships between living Lisu and their departed ancestors, who are honored with earthen burials (which are often prohibited in densely populated areas of China).¹⁹² For Lisu, he says, each village’s burial ground is protected by spirits who guard the graves of the newly deceased until their souls are able to detach from their bodies.¹⁹³ Rivers also figure strongly in Lisu religious practices. Some of the most powerful ritual events in Lisu persons’ lives, he points out, take place near ceremonial bridges erected over moving water.¹⁹⁴ The loss of access to rivers and to ancestral burial grounds could have negative psychosocial effects on Lisu persons. If their sense of identity rests partly on being in harmony with their surroundings, then moving them away from these surroundings could destabilize their sense of identity.¹⁹⁵

Recent work on Lisu by Michele Zack remarks on their independence,

185. See Tullos et al., *supra* note 181, at 23.

186. 1 WEST, ENCYCLOPEDIA, *supra* note 161, at 466.

187. *Id.*

188. *Id.* at 466-67.

189. *Id.*

190. *Id.*

191. See *The Lisu Ethnic Minority*, <http://www.china.org.cn/e-groups/shaoshu/shao-2-lisu.htm> [<https://perma.cc/3QJV-VQCZ>] (last visited Nov. 13, 2018).

192. See E. Paul Durrenberger, *Lisu Religion* 21, 28, 30 (1989) (Ctr. for Se. Asian Stud., N. Ill. Univ., Occasional Paper No. 13, 1989) (discussing Lisu in northern Thailand but also how religious practices are similar among all Lisu groups). Mathew Desser, *Burial Now Illegal in Chinese Province*, TALKDEATH (June 3, 2014), <http://www.talkdeath.com/burial-now-illegal-chinese-province/> [<https://perma.cc/MRR7-EA7B>].

193. *Id.* at 28.

194. See *id.* at 25.

195. See Huang Ji et al., *An Ethnobotanical Study of Medicinal Plants Used by the Lisu People in Nujiang, Northwest Yunnan, China*, 58 ECON. BOTANY S253, S254, S256 (2004). Lisu medicine uses some fifty-two medicinal plants, and increasing exploitation and deforestation threaten some of these plants. *Id.*

industriousness, and adjustment to contemporary China.¹⁹⁶ Zack's book is less scholarly but more journalistic than Durrenberger's, and it offers separate discussions of Lisu in Thailand, Burma/Myanmar, and China along with excellent photographs.¹⁹⁷ She reports that a large power dam across the Nu River has "been planned since the 1980s," but there "have been resistance and delays in starting such projects."¹⁹⁸

Another group affected by dam displacement are Tibetans living in Yunnan Province. Tibet is familiar to many people across the globe because of its political plight, the Dalai Lama, and Tibet's distinctive, if syncretic, form of Buddhism.¹⁹⁹ Tibet may have existed as a separate country as long ago as the first century B.C.E.²⁰⁰ Invaded by the British in 1904 and by the Chinese in 1910, Tibet eventually succumbed to the Chinese army in the 1950s and 1960s.²⁰¹ "[M]any Tibetans themselves believe they came from India, . . . [though] many contemporary historians and anthropologists believe that Tibetans have the same origins as most other Chinese populations and speakers of Sino-Tibetan languages."²⁰² Tibetans have often been nomadic herders who rely on their livestock and high-altitude varieties of barley, potatoes, and other crops for food.²⁰³ Buddhism remains an important part of Tibetan culture,²⁰⁴ even if the Chinese government tries to repress monasteries and convents. Tibetan marriage practices include "simple monogamy," "fraternal and father-son polyandry," "sororal polygyny," and "mother-daughter polygyny."²⁰⁵ Monasteries and convents remain an option for those who do not marry.²⁰⁶

Ethnic minorities, like Tibetans or Lisu, who live in western regions of China are not prosperous. Hydropower in these regions is a large part of a key national development strategy: the "Great Western Opening" (*xībù dākāifā*).²⁰⁷ Within the lower Mekong Basin in Yunnan, the central government has planned a cascade of seven dams, four of which have been completed.²⁰⁸ The Tibetan village of Geze is located in the upper cascade of the Lancang River, in Deqin County in northwestern Yunnan Province. Just downstream from the village is the projected site of the Gushui Dam. Once built, it will inundate Geze, displacing its inhabitants and interfering with

196. See MICHELE ZACK, *THE LISU: FAR FROM THE RULER* (2017) [hereinafter ZACK].

197. *Id.* at 187–302.

198. *Id.* at 278 (discussing "a personal communication from Piaporn Deetes of the NGO International Rivers (Berkeley, CA) on July 13, 2017").

199. See 2 WEST, *ENCYCLOPEDIA*, *supra* note 161, at 804–09 (discussing the origins, history, and culture of Tibet).

200. *Id.* at 804–05.

201. *Id.* at 805, 808.

202. *Id.* at 804.

203. *Id.* at 808.

204. *Id.* at 808–09.

205. *Id.* at 808.

206. *Id.* at 809.

207. Brendan A. Galipeau, *Socio-Ecological Vulnerability in a Tibetan Village on the Mekong River, China*, 34 *HIMALAYA* 38, 39 (2014).

208. Darrin Magee, *The Dragon Upstream: China's Role in Lancang-Mekong Development*, in *POLITICS AND DEVELOPMENT IN A TRANSBOUNDARY WATERSHED: THE CASE OF THE LOWER MEKONG BASIN* 171, 187 (Joakim Öjendal et al. eds., 2012).

their livelihoods.²⁰⁹ Geze villagers rely on agricultural products and local natural resources—especially grapes and caterpillar fungus—for household income.²¹⁰

It is unlikely that villagers will be resettled in a nearby location where it would be possible for them to retain their geographic and cultural heritage, such as ancestral lands and local natural resources. All too often, communities have to move to regions with a different topography and make substantial economic and lifestyle changes. Alterations in cropping patterns and socio-ecological relationships, losses of cultural identities and ecological knowledge, and a shift away from traditional agricultural income strategies to less secure forms of wage labor are common occurrences elsewhere in China and will likely replicate in Geze when the Gushui Dam is built.²¹¹

An especially aggravating problem for Tibetans in Geze and throughout Yunnan Province is the frequent lack of government payment for land requisition. This failure to pay generally strips displaced migrants of a viable means to develop new livelihoods, while also inhibiting their ability to maintain significant links to their cultural pasts. Although “the Ministry of Land and Resources recognized at least 168,000 cases of illegal land deals in 2003, the actual number of cases violating rights of [displaced farmers] could significantly exceed it.”²¹²

D. Attempted Reforms

China’s model for resettlement and compensation is more thorough and effective than that of many other countries, but this model and the laws undergirding it have not achieved their full potential.²¹³ This section seeks to identify problems facing China and to advance some possible solutions.

Scholars have made suggestions for improving China’s resettlement and compensation practices, and I begin by surveying some of these proposals. In a perceptive article, Michael Cernea suggests some strategies for

209. Galipeau, *supra* note 207, at 39.

210. *Id.* at 42. The relevant fungus is *Ophiocordyceps sinensis*, which Tibetans and some other ethnic minorities use medicinally. Jiyue Chen et al., *Ethnomycological Use of Chinese Caterpillar Fungus, Ophiocordyceps sinensis (Berk.) G. H. Sung et al. (Ascomycetes) in Northern Yunnan Province, SW China*, 12 INT’L J. MEDICINAL MUSHROOMS 427, 427 (2010).

211. Like Lisu persons’ deep connections to their surroundings discussed in *supra* text accompanying notes 182–91, ethnic Tibetan villagers of Geze “not only have a highly place-based economy, but also a place-based culture and cultural practices [in] which things like caterpillar fungus are indeed a part of in addition to being market commodities; these things are part of their village identity. Villagers continually describe how fortunate they are to live in a region with a mountain that is rich with resources, not just for markets, but also for their daily life needs and spiritual beliefs, which others have also commented on the importance of with regards to the landscape of the upper Mekong” Galipeau, *supra* note 207, at 48.

212. Elena Barabantseva, *Development as Exclusion: Ethnic Minorities in China’s Western Development Project 8* (British Inter-University China Centre Working Paper Series No. 7, 2007).

213. See Cernea, *Resettlement*, *supra* note 16, at 111.

improving resettlement and compensation practices.²¹⁴ He stresses that mere compensation for the value of requisitioned land is inadequate, and that strong resettlement support and continued assistance are crucial to the long-term security of resettled communities.²¹⁵ Cernea proposes that resettlement costs be calculated *ex ante* and extracted from the economic rents generated by dam projects.²¹⁶ A familiar governmental position is that the government cannot disburse any economic rents to migrants until a project is completed or nearly so. This position is untenable because China has the financial resources to compensate migrants before a project is complete.²¹⁷ Cernea also proposes that hydropower companies enable migrants to share in the peripheral benefits of projects, such as subsidized electricity and water, and employment opportunities related to the construction and operation of dams.²¹⁸

Shi Guoqing offers some additional suggestions. Shi recommends that China improve its resettlement and compensation plans through third-party monitoring (project supervision and auditing) and by focusing on improved infrastructure.²¹⁹ Shi suggests further that hydropower companies and local governments increase funding for infrastructure (e.g., irrigation, roads, and bridges) in order to ensure the financial security of the resettled persons.²²⁰ Shi also proposes that resettlement planners craft detailed policies and procedures to mitigate the loss of significant cultural knowledge and practices.²²¹

While Cernea and Shi offer suggestions for change, some scholars praise the progress China has made in the recent past. Such scholars point out that China's resettlement and compensation policies have been getting better since the 1980s and will likely continue to improve.²²² They emphasize that compensation rates have increased along with public awareness and concern over the life prospects of resettled persons.²²³ Moreover, a public outcry in China over the socioeconomic and ecological impact of the Nu River dams led to a salutary delay in these projects, which intimates that government officials might take more care now that public awareness

214. *See id.*

215. *Id.* at 117.

216. *Id.* at 95.

217. *Id.*

218. *Id.* at 105.

219. *See* Shi Guoqing, *China's Experiences: Involuntary Resettlement in Hydropower Development*, Slide 31-32, 41, <http://antioquiapresente.org/sitio/sites/default/files/Profesor-Shi.pdf> [<https://perma.cc/5LTK-68XY>] [hereinafter Shi, *China's Experiences*] (last visited Nov. 13, 2018). Shi is the director of the National Research Center for Resettlement and Social Development Institute, and the Dean of the Public Administration School of Hohai University. *See generally* Shi Guoqing et al., *Post-Resettlement Support: Policy Aimed at Poverty Alleviation and Sustainable Development*, in *ADVANCES IN WATER RESOURCES & HYDRAULIC ENGINEERING* 1446-55 (Changkuan Zhang & Hongwu Tang eds., 2009).

220. *See* Shi, *China's Experiences*, *supra* note 219, slide 34.

221. *See id.* at slide 41.

222. *See, e.g.,* Pu Wang et al., *supra* note 98, at 6.

223. *See id.* at 7-8.

and concern have risen.²²⁴ Nevertheless, though Chinese officials may disclose more information than they used to,²²⁵ migrants might not know how to access or evaluate it.

The proposals and strategies just reviewed could lead to better resettlement and compensation policies in many parts of the world. However, China faces some salient challenges to implementing change, as we shall see immediately.

E. China's Challenges

1. *Problems of Law, Regulation, Policy, and Compensation*

First, Chinese rural property law complicates the calculation of adequate compensation. Collective ownership of land is a vestige of China's total commitment to agrarian socialism during the Great Leap Forward.²²⁶ Because of the nature of collective ownership, current resettlement funding can compensate individual farmers only for lost agricultural production for a limited time, even if the government is requisitioning their land for more profitable commercial uses. This systemic undervaluation of land may help China meet its ambitious hydropower goals. But it disincentivizes land development and agricultural improvements by farmers holding limited land-use contracts. With some justification, many in China believe it is necessary to urbanize and advance to a modern economy, yet funneling displaced farmers into cities often leaves them leading precarious lives.²²⁷ Hu Shuli notes that, unless both rural and urban land trade in something closer to a free market, rural "residents are cut off from sharing the gains of rising land prices," and that "restricting the trade of such a key factor of production leads only to inefficiencies"²²⁸ and, I would add, increased socioeconomic inequality.

Second, the manner of resettlement has led to problems, especially with resettling displaced migrants on land that is inferior to the land they lost. Government support for irrigation and electricity has been spotty. Moreover, many resettlement communities offer housing that is both undersized and overpriced.²²⁹ China could mitigate these problems by sharing water and power resources produced by dams, but it would be even

224. See *id.* at 8. See also Cernea, *Resettlement*, *supra* note 16, at 97-98 (also mentioning lack of political will as a factor).

225. See, e.g., Arthur Mol et al., *Information Disclosure in Environmental Risk Management: Developments in China*, 3 J. CURRENT CHINESE AFF. 163, 164 (2011).

226. See Vince Wong, *Land Policy Reform in China: Dealing with Forced Expropriation and the Dual Land Tenure System* 11-13 (Faculty of Law, Univ. of Hong Kong, Occasional Paper No. 25, 2014) (discussing the Great Leap Forward and the Cultural Revolution as part of a larger history of land policy in China from 1911 to 2014), available at <http://www.law.hku.hk/ccpl/pub/OP%20No%2025%20Vince%20Wong.pdf> [<https://perma.cc/BY77-5NAQ>]. For an earlier discussion, see Alsén, *supra* note 139, at 57.

227. See Hu Shuli, *Without Land Reform, China Cannot Meet Its Policy Goal of Urbanisation*, SOUTH CHINA MORNING POST (May 30, 2013), <http://www.scmp.com/comment/insight-opinion/article/1249134/without-land-reform-china-cannot-meet-its-policy-goal> [<https://perma.cc/NAT7-AJUZ>].

228. *Id.*

229. Brown & Xu, *supra* note 137, at 791-92.

better to have sound housing design and construction for the benefit of resettled persons.

Standing over these problems of migration, urban and rural regulations, and social and spatial stratification is the *hukou* system. Though this system appeals to China's preference for centralized government, it receives frequent criticism as a major obstacle to just and sensible development.²³⁰ Over the years, workers have migrated to Beijing, but under China's "household registration" (*hukou*) system, city officials periodically evict them *en masse* with little in the way of due process.²³¹

2. *Problems of Dam Performance and Corruption*

First, Chinese dams are running below capacity: a 2015 report revealed that China is producing less than half the electricity it could be producing.²³² Proper engineering needed for reliable hydroelectric dams has been common industry knowledge for decades, and yet engineering problems bedevil Chinese dams. These problems undercut the ability of hydropower companies to provide long-term resettlement support. Evidence exists that corruption of business persons in the bidding and procurement process encourages the use of inferior construction materials, which are a common cause of dam underperformance.²³³

Second, a core problem with China's resettlement programs is the corruption of government officials.²³⁴ One survey of persons forced to resettle in China found that "in only twenty two percent of all land takings were farmers actually consulted about their compensation, and nearly two thirds of those surveyed responded that the amount of compensation promised was inadequate."²³⁵ One should worry about officials as adept

230. See Chan, *Hukou*, *supra* note 90, at 197, 198, 202, 206, 216 (criticizing the system's rigidity and complexity, the suffering caused by the system, and the division between urban and rural and between agricultural and nonagricultural status and location which now poses "a major obstacle" to China).

231. See, e.g., Benjamin Haas, *China: "Ruthless" Campaign to Evict Beijing's Migrant Workers Condemned*, THE GUARDIAN (Nov. 26, 2017), <https://theguardian.com/world/2017/nov/27/china-ruthless-campaign-to-evict-beijings-migrant-workers-condemned> (reporting that an open letter to China's leadership called the evictions "a serious trampling of human rights").

232. See David Stanway, *RPT-Dam Waste: Planning Chaos Drains China's Hydro Ambitions*, REUTERS NEWS (June 7, 2015), <https://www.reuters.com/article/china-renewables-hydropower/dam-waste-planning-chaos-drains-chinas-hydro-ambitions-idUSL3N0YB3UB20150607> [<https://perma.cc/MYD6-P6MQ>] ("If China fully exploited hydropower, total annual output should be around 2.2 trillion kWh, compared to about 1 trillion kWh now.").

233. See X.L. Ding, *The Quasi-Criminalization of a Business Sector in China: Deconstructing the Construction-Sector Syndrome*, 35 CRIME, L. & SOC. CHANGE 177, 183 (2001) (connecting, in the case of the Three Gorges Dam project, (1) government-construction company corruption and (2) "substandard materials and shoddy workmanship" in a bridge collapse related to the project).

234. This Article concentrates on dam-related corruption in China, but for a sound, if now slightly older, monograph on corruption generally in China see MELANIE MANION, *CORRUPTION BY DESIGN: BUILDING CLEAN GOVERNMENT IN MAINLAND CHINA AND HONG KONG* (2004).

235. James, *supra* note 140, at 482.

at skimming money as magicians are at pulling rabbits out of hats. Shi's proposed supervision measures might improve the situation. However, China has a single-party system, and the state exercises its power through the Communist Party without much effective outside supervision. That is one reason why China's famously opaque political processes create considerable difficulty in limiting corruption by way of independent supervision, though the new Supervision Commission, founded in March 2018, may prove helpful.²³⁶

F. Addressing China's Challenges

1. Law, Regulation, Policy, and Compensation Methods

From these problems, I move to solutions that could improve China's handling of its dam projects. First and foremost, China would do well to revise its land policies. These policies are complicated; their revision will be no less complicated. A good place to start would be to increase the compensation for agricultural land, which at present remains, with qualifications, at ten to sixteen times its average annual output. It would be desirable to have something that is closer to a market price for land. Given China's legal structure, it is a high hurdle to develop even a proxy for market price. One can, however, key off current practices regarding the price of buildings on urban land. Expropriated buildings in urban areas are valued at prices by which the government calculates. No such practice currently exists for agricultural land. Developing such a practice would put farmers in a position more closely resembling the economic situation of persons who occupy houses in urban areas, though urban dwellers may also find their compensation inadequate.

Second, allied with a reconfiguring of rural land values would be a policy that uses multiple methods of compensation. Examples of these methods are employment for displaced migrants, shareholding cooperatives, assurance of social security, and an interest in the retained land of

236. China's Central Discipline Inspection Commission—an internal organization whose lack of autonomy hinders investigations of fraud and corruption—audits China's governmental entities and the Communist Party. See generally Xuezhi Guo, *Controlling Corruption in the Party: China's Central Discipline Inspection Commission*, 219 CHINA Q. 597 (2014); Jamie P. Horsley, *Toward a More Open China*, in THE RIGHT TO KNOW: TRANSPARENCY FOR AN OPEN WORLD 54–91 (Ann Florini ed., 2007); Susan Shirk, *What China's Lack of Transparency Means for U.S. Policy*, CHINA FILE (May 28, 2015), <http://www.chinafile.com/reporting-opinion/two-way-street/what-chinas-lack-transparency-means-us-policy> [https://perma.cc/6X7C-PW9E]. On the national Supervision Commission, see *China Aims to Set up State Anti-Corruption Unit Next Year*, CHINA DAILY (Oct. 29, 2017), <https://www.reuters.com/article/us-china-congress-corruption/china-aims-to-set-up-anti-corruption-unit-next-year-idUSKBN1CY0DT> [https://perma.cc/T28L-UMV4] (discussing the new commission that will expand President Xi Jinping's anti-corruption efforts); see also Jaime P. Horsley, Op-ed, *What's so controversial about China's new anti-corruption body*, BROOKINGS (May 30, 2018), <https://www.brookings.edu/opinions/whats-so-controversial-about-chinas-new-anti-corruption-body/> [https://perma.cc/HDS4-73V9].

rural collectives.²³⁷ The aim of these and other methods is to make sure that migrants are no worse off than if they had not been displaced at all. Otherwise, China can expect resistance to dam projects by indigenous ethnic minorities.²³⁸

Third, China should consider land-for-land exchanges, particularly where unoccupied or sparsely occupied land exists that is a good substitute for the requisitioned land. Admittedly, establishing equivalence will be a challenge. How good a substitute unoccupied or sparsely occupied land is turns on many factors: propinquity, topography, climate, similarity of biodiversity, and so on. India's Sardar Sarovar Project ("SSP") illustrates some of the issues besetting land-for-land exchanges.²³⁹ The SSP was for a large dam that would make water available for drought-prone areas.²⁴⁰ A tribunal "explicitly provided for allotment of agricultural land to a land-holding family (minimum 2 hectares) in lieu land lost" by "tribal people."²⁴¹ For complicated reasons, the arrangement fell apart,²⁴² but a taller version of the dam was inaugurated on September 17, 2017.²⁴³

Fourth, resettlement planning should recognize the strong cultural links that some indigenous ethnic minorities have to their physical surroundings. For instance, Lisu and Tibetans have distinctive cultural relationships to their native locations.²⁴⁴ Project planners should tailor housing designs to migrants' budgets and cultural preferences, or allow migrants to plan and construct their own communities and housing with resettlement funds. Because the Regulation on Land Requisition already requires that resettlement planners consult with migrants before they are resettled, improved monitoring and enforcement of those requirements would be beneficial.

Fifth, it makes sense to limit the scope of land requisition by narrowing what counts as the "public interest" in particular projects. Article 42 of

237. See Zhu Qian, *Land Acquisition Compensation in Post-Reform China: Evolution, Structure and Challenges in Hangzhou*, 46 *LAND USE POL'Y* 250, 255 (table 1) (2015).

238. See, e.g., *Green Watershed*, EQUATOR INITIATIVE (May 28, 2017), <https://www.equatorinitiative.org/2017/05/28/green-watershed/> [<https://perma.cc/VHV6-S4AJ>] (describing resistance to the Lashihai dam project in 1998 after inadequate compensation for members of the Yi ethnic minority).

239. For excellent studies of this project, see *TOWARD SUSTAINABLE DEVELOPMENT: STRUGGLING OVER INDIA'S NARMADA RIVER* (William W. Fisher ed., 1995) [hereinafter *NARMADA RIVER*].

240. Anil Patel, *What Do the Narmada Valley Tribals Want?*, in *NARMADA RIVER*, *supra* note 239, at 179.

241. *Id.* at 179–80.

242. See *id.* at 179–200; William W. Fisher, *Development and Resistance in the Narmada Valley*, in *NARMADA RIVER*, *supra* note 239, at 3; Kingsbury, "Indigenous Peoples," *supra* note 3, at 444.

243. "Engineering Miracle," Says PM Narendra Modi: 10-Point Guide to Sardar Sarovar Dam, NDTV [INDIA], <https://www.ndtv.com/india-news/sardar-sarovar-dam-project-10-things-to-know-1751285> [<https://perma.cc/5QPA-RR8T>] (reporting also that according to some claims "40,000 families . . . would be displaced" when the reservoir is filled to capacity) (last updated Sept. 17, 2017).

244. Lisu culture, for example, attaches importance to ancestral burial grounds and ceremonies performed over moving water. Tibetan culture, for example, prizes access to Buddhist monasteries and convents. See *supra* text accompanying notes 186–200.

the Property Law states: “To meet the needs of the public interest, collectively-owned lands, premises owned by entities and individuals or other real properties may be expropriated in accordance with the power[,] scope[,] and procedures provided by laws.”²⁴⁵ Most infrastructure projects fall within a broad understanding of the public interest. For years, the Chinese government decided which projects would go forward and pronounced that they were in the public interest.²⁴⁶ But in 2011, the State Council announced a new Regulation on the Expropriation of Buildings on State-Owned Land and Compensation.²⁴⁷ Statutorily, roads, dams, national defense, health, education, and housing for low-income persons all qualify as being in the public interest.²⁴⁸ But commercial development, such as the building of shopping malls, is a closer question. Anyway, this expropriation regulation applies only to *buildings* on state-owned land. China needs a parallel regulation for projects built on agricultural land.

Sixth, the Chinese government could increase resettlement funding and encourage greater investment in agriculture by extending the duration of land-use contracts for resettled migrants. Migrants who are allowed a longer contract period would be motivated to improve their land and agricultural practices because the resulting value added would provide an enduring, inheritable benefit. This benefit would, over time, allow owners and their children to increase production and build family assets. China might object that such a benefit goes too far. Even if one accepts this objection, longer-term contracts and the extension of existing contracts, coupled with greater investment in irrigation and other infrastructure, could improve the outlook and productivity of resettled migrants with little change to the nature of Chinese property law.

2. Solutions Relating to Dam Performance and Corruption

First, the problems of land undervaluation and dam underperformance raise serious questions as to how authorities are to adequately compensate migrants. One solution would be to require hydropower companies to purchase migrants’ land at prices comparable to its commercial market value. This requirement would make the process of land valuation easier and increase initial compensation payments to migrants. Moreover, greater upfront costs would force hydropower companies to decrease reliance on an inflated pool of anticipated economic rents. Since China’s

245. Property Law, *supra* note 103, art. 42. I use “the public interest” as a more common English expression than “public interests” as employed in the above translation. The relevant Chinese expression (*gōnggònglìyì*, 公共利益) does not mark a difference between singular and plural, which must be inferred from the context.

246. See Wong, *supra* note, 226, at 63.

247. Guóyóu Tǔdìshàng Fángwū Zhēngshōu yǔ Bùcháng Tiáoli (国有土地上房屋征收与补偿条例) [Regulation on the Expropriation of Buildings on State-owned Land and Compensation] (promulgated by the State Council of the P.R.C., Jan. 21, 2011, Order No. 590, effective Jan. 21, 2011), Lawinfochina, <http://www.lawinfochina.com/display.aspx?id=8580&lib=law&SearchKeyword=Regulation%20on%20the%20Ex%20proportion%20of%20Buildings&SearchCKeyword> [https://perma.cc/6HY2-TQ78].

248. See *id.* art 8.

dams are operating under capacity almost across the board, hydropower companies may focus on raising production by improving infrastructure if funding a dam upfront becomes more expensive. That would be better than displacing more people to build additional inferior dams.

Second, though it is important to recognize that the roots of corrupt practices run deep, despairing over it is unhelpful.²⁴⁹ Corruption, as understood generally in this Article, is an abuse of trust for personal, familial, or political gain.²⁵⁰ And by way of elaboration, *trust* is assured reliance based on moral, social, and legal rules.²⁵¹ Many scholars employ the Transparency International's Corruption Perceptions Index ("CPI") to measure corruption.²⁵² But strictly speaking, the CPI measures perceptions of corruption rather than corruption itself. Wholly accurate measurements of corruption are elusive,²⁵³ for corrupt individuals typically do their own dirty work to avoid detection.

Corruption creates systemic harm.²⁵⁴ It does so by increasing inequality, which in turn may engender even greater corruption.²⁵⁵ As Jiangnan Zhu points out in his study of corruption in China, corruption permeates institutions and increases economic inequality.²⁵⁶ Zhu picks

249. See MANION, *supra* note 234, at 1-26, 200-08 (arguing confidently and realistically for anti-corruption efforts in China).

250. See *supra* note 29.

251. Other scholars think of corruption in similar although not identical ways. See, e.g., MANION, *supra* note 234, at 5 (proffering that in government, corruption is "abuse of public office for private gain") (emphasis omitted); DENNIS F. THOMPSON, *ETHICS IN CONGRESS: FROM INDIVIDUAL TO INSTITUTIONAL CORRUPTION* 29 (1995) (stating that corruption in government involves "a gain by a public official, service to a private citizen, and an improper connection between the gain and the service"); Sung Hui Kim, *The Last Temptation of Congress: Legislator Insider Trading and the Fiduciary Norm Against Corruption*, 98 CORNELL L. REV. 845, 897 (2013) (arguing that "under most modern definitions, corruption involves an abuse of trust . . ."); Chilik Yu, *Measuring Public Perceptions of Corruption in Asia*, in *ROUTLEDGE HANDBOOK OF CORRUPTION IN ASIA* 224, 224-25 (Ting Gong & Ian Scott eds., 2017) (arguing that corruption is "the abuse of entrusted power for private gain" following what Yu considers the "working definition of corruption" used by Transparency International) [hereinafter *HANDBOOK OF CORRUPTION*]. Some scholars offer further distinctions under a general understanding of corruption. See, e.g., Benjamin Nyblade & Steven R. Reed, *Who Cheats? Who Loots? Political Competition and Corruption in Japan, 1947-1993*, 52 AM J. POL. SCI. 926, 926 (2008) ("distinguishing between two types of corruption by politicians: illegal acts for material gain (looting) and illegal acts for electoral gain (cheating)") (emphasis omitted).

252. Yu, *supra* note 251, at 224-25. For China's ranking under the CPI, see TRANSPARENCY INT'L, *CORRUPTION PERCEPTION INDEX 2016* (2017), available at https://issuu.com/transparencyinternational/docs/2016_cpireport_en?e=2496456/43483458 [<https://perma.cc/Q444-4YHK>].

253. Yu, *supra* note 251, at 224-25; see also Paul M. Heywood & Jonathan Rose, "Close But no Cigar": *The Measurement of Corruption*, 34 J. PUB. POL'Y 507, 507 (2014) (opining that so far no one gets a cigar for the best measurement of corruption).

254. Cf. MANION, *supra* note 234, at 12 (noting that "the illegality of corrupt transactions produces costs that are higher than those associated with legal market activity").

255. Jong-sung You, *Corruption and Inequality in Asia*, in *HANDBOOK OF CORRUPTION*, *supra* note 251, at 97. "The reciprocal causality may create a vicious cycle of high corruption and high inequality." *Id.* (citations omitted).

256. Jiangnan Zhu, *Corruption Networks in China: An Institutional Analysis*, in *HANDBOOK OF CORRUPTION*, *supra* note 251, at 27.

out a trio of institutional factors that foster a network of corruption: “1) power concentration in a geographically and functionally fragmented authoritarian regime; 2) business-government collusion in a transitional economy; and 3) the prevalence of informal politics, particularly factionalism and family members’ involvement in public affairs.”²⁵⁷

Corruption also has a negative impact on individuals because it is “a lived experience for real people.”²⁵⁸ As Michael Johnston puts it, corruption “affect[s] [real persons] wellbeing, their values and choices, their political voice (or lack of it), their relationships with other citizens as well as with officials and their future chances in life.”²⁵⁹

The issue now becomes what China can do about it. A handful of steps will be generally helpful. First, establish an anti-corruption agency that is independent of both the Chinese government and the Chinese Communist Party.²⁶⁰ Second, collectively protest corruption. Protests of this sort by Chinese citizens can be risky but are increasing as China grows more transparent.²⁶¹ Third, build institutions so as to prevent, or at least lessen, corruption—this step has seen success in Singapore and Hong Kong.²⁶² Fourth, use both carrots and sticks—reward those who are incorruptible, hold down corruption by others, and punish those who engage in corrupt practices. Fifth, adjust constitutional and other legal rules so that they convincingly signal a determined interest in clean government to both the corrupt official and the ordinary citizen.²⁶³ Sixth, transform the character of individuals.²⁶⁴ The idea here is to instill values and norms that prompt individuals to act in ways that are morally good.²⁶⁵

257. *Id.* at 39. Zhu cites the case of Zhou Yongkang as an example of the impact of these factors on corruption in China. *Id.* at 35–39.

258. Michael Johnston, *Thinking About Corruption as Though People Mattered*, in HANDBOOK OF CORRUPTION, *supra* note 251, at 165 (emphasis omitted).

259. *Id.*

260. See MANION, *supra* note 234, at 201–03 (indicating that more than one anti-corruption agency may be needed); ROSE-ACKERMAN, *supra* note 97, at 159–62 (pointing out that such agencies have been notably effective in Hong Kong and Singapore).

261. See Andrew Wedeman, *Corruption and Collective Protest in China*, in HANDBOOK OF CORRUPTION, *supra* note 251, at 179–181 (discussing the association between corruption and unrest) [hereinafter Wedeman]. Wedeman points out ordinary citizens are more likely to see and protest minor (low-level) corruption than major (high-level) corruption because the latter “takes place behind closed doors and in discrete places.” *Id.* at 192. Protesting high-level corruption has higher risks and costs than protesting low-level corruption. *Id.*

262. Jin-Wook Choi, *Corruption Prevention: Successful Cases*, in HANDBOOK OF CORRUPTION, *supra* note 251, at 262, 265–74.

263. See MANION, *supra* note 234, at 205–08.

264. Robert Gregory conceives of this suggestion as integrity-based but other virtues, values, and norms are also available, and he draws attention to Confucian values. See Robert Gregory, *Rule-Based and Integrity-Based Anti-Corruption Approaches in Asia*, in HANDBOOK OF CORRUPTION, *supra* note 251, at 277, 287. He wisely stresses that a combination of rule-based and integrity-based approaches may work well. *Id.* at 277, 282–83, 288.

265. Work on virtue ethics in analytic moral philosophy may provide helpful bedrock for such an idea. See generally ROBERT MERRIHEW ADAMS, *A THEORY OF VIRTUE* (2006); CHRISTINE SWANTON, *VIRTUE ETHICS: A PLURALISTIC VIEW* (2003). P. F. Strawson, *Social*

In addition to reforms in land and compensation policies, ongoing monitoring is necessary to root out corruption and create trust between the government and migrants. Increasing supervision is likely to require either better internal auditing or better third-party or international auditing, or both. Battalions of auditors and accountants might, however, prove of little use unless the government has the political will to protect migrants.

In 2012, the 18th National Congress of the Communist Party and General Secretary Xi Jinping began to take government corruption seriously through the Central Commission for Discipline Inspection (“CCDI”).²⁶⁶ The CCDI has pursued high-level officials and minor civil servants alike, though the former gets the most international press.²⁶⁷ However, the fairness of these investigations has come under question.²⁶⁸ It remains unclear how effective this new push will be in the case of corrupt dam-building practices. If the push is effective, it would facilitate better provision of compensation and resettlement for displaced migrants.

G. Displacement, Resilience, and the Ethics of Dam-Building

Suppose that China were to implement every mutually compatible suggestion for compensation and resettlement discussed thus far. Would that make migrants whole in the sense of entirely offsetting the harms imposed on indigenous ethnic minorities by dam building? It would not, at least for most individual indigenous ethnic minorities or proper subsets of these individuals such as families, clans, or communities. Although some individuals might prefer their post-compensation and post-resettlement lives to the lives they had before displacement, many individuals and proper subsets of them will not. As Michael Cernea writes, the “potential risks intrinsic to [development-induced] displacement” are “landlessness,” “joblessness,” “homelessness,” “marginalization,” “food insecurity,” “increased morbidity and mortality,” “loss of access to common property,” and “social disarticulation.”²⁶⁹ Furthermore, one has to take into account the costs—like disruption, stress, and trauma—of moving from migrants’ earlier lives to their post-compensation and post-resettlement lives. Granted that some migrants may experience personal growth in the pro-

Morality and Individual Ideal, 36 *PHIL.* 1, 1-2 (1961), is a seminal paper on ideals. On character, see CHRISTIAN B. MILLER, *CHARACTER AND MORAL PSYCHOLOGY* (2014).

266. Xuezhi Guo, *Controlling Corruption in the Communist Party: China’s Central Discipline Inspection Commission*, 219 *CHINA Q.* 597, 613 (2014). It is not encouraging that Wedeman finds evidence that China under Xi Jinping had an increase in high-level corruption in the period 2012–2015. Wedeman, *supra* note 263, at 179.

267. E.g., Chris Buckley, *China’s Antigraft Push Snares an Ex-General*, *N.Y. TIMES*, July 1, 2014, at A6.

268. See, e.g., Andrew Jacobs & Chris Buckley, *Presumed Guilty in China’s War on Corruption, Targets Suffer Abuses*, *N.Y. TIMES*, Oct. 20, 2014, at A1.

269. Michael M. Cernea, *Why Economic Analysis Is Essential to Resettlement: A Sociologist’s View*, in *THE ECONOMICS OF INVOLUNTARY RESETTLEMENT: QUESTIONS AND CHALLENGES* 17-18 (Michael M. Cernea ed., 1999) [hereinafter Cernea, *Economic Analysis*] (citations and large and small capital letters omitted).

cess of moving from the former to the latter,²⁷⁰ transition costs nevertheless exist in moving from one to the other.²⁷¹

The last forty years have seen many studies of responses to the stresses resulting from dam displacement, economic migration, violence, and related causes. The positive vocabularies employed in these studies vary: resilience, grit, flexibility, coping, hardiness, positive emotions/psychology, post-traumatic growth, and more.²⁷² These words overlap across authors, and a given word may have somewhat different meanings for different authors. Perhaps the most common of these words in the psychologist's lexicon is "resilience," which usually means a person's capacity or ability to adapt to adversity or trauma.²⁷³ It requires no imagination to see that the development and possession of resilience in this sense are highly advantageous to migrants displaced by dam projects.

Let us now turn specifically to dam-induced displacement, resilience, and the ethics of development. We know that displacement creates serious potential risks and that often these risks materialize. When they materialize, migrants frequently bear many costs of the resulting harms. They also bear many transition costs of leaving a deeply rooted cultural and geographic community for a new and unfamiliar one. Resilience may lower the costs of transition, but developing resilience requires the support and

270. See, e.g., Roni Berger & Tzipi Weiss, *Posttraumatic Growth in Latina Immigrants*, 4 J. IMMIGRANT & REFUGEE STUD. 55, 55 (2006) [hereinafter Berger & Weiss] (finding "a moderate level of stress and a high level of PTG [post-traumatic growth] but no association between stress and growth variables"); Jane Shakespeare-Finch & Janine Lurie-Beck, *A Meta-Analytic Clarification of the Relationship between Posttraumatic Growth and Symptoms of Posttraumatic Distress Disorder*, 28 J. ANXIETY DISORDERS 223, 233 (2014) (finding linear and curvilinear relations between PTSD and PTG).

271. See David Eades, *Resilience and Refugees: From Individualised Trauma to Post Traumatic Growth*, 16 M/C J. MEDIA & CULTURE (2013) (suggesting that as refugees move from their original social and geographical setting to a new setting, they lose "their social network and cultural roots, resulting in a sense of homelessness between two worlds" that is "outside normal time and place, a passage between past and future") (citations omitted).

272. See, e.g., ANGELA DUCKWORTH, *GRIT: THE POWER OF PASSION AND PERSEVERANCE* (2016) ("grit"); Berger & Weiss, *supra* note 270 ("post-traumatic growth"); Eades, *supra* note 271 ("resilience"); Barbara L. Fredrickson et al., *What Good Are Positive Emotions in Crises? A Prospective Study of Resilience and Emotions Following the Terrorist Attacks on the United States on September 11th, 2001*, 84 J. PERSONAL & SOC. PSYCHOL. 365 (2003) ("positive emotions"); Todd B. Kashdan & Jonathan Rottenberg, *Psychological Flexibility as a Fundamental Aspect of Health*, 30 CLINICAL PSYCHOL. REV. 865 (2010) ("flexibility"); Salvatore R. Maddi et al., *Hardiness: An Operationalization of Existential Courage*, 44 J. HUMANISTIC PSYCHOL. 279 (2004) ("hardiness"); Martin E. P. Seligman & Mihaly Csikszentmihalyi, *Positive Psychology: An Introduction*, 55 AM. PSYCHOLOGIST 5 (2000) ("positive psychology"); Maria Theodoratou et al., *Refugees' Coping Strategies*, 4 J. PSYCHOL. & CLINICAL PSYCHIATRY 227 (2015) ("coping"). I leave to one side grand theories of successful human responses to stress, such as salutogenesis (the generation of a sense of coherence and, more broadly, an orientation toward health). See generally AARON ANTONOVSKY, *HEALTH, STRESS AND COPING* (1979); *THE HANDBOOK OF SALUTOGENESIS* (Maurice B. Mittelmark et al. eds., 2017).

273. Małgorzata Peciflo, *The Concept of Resilience in OSH Management: A Review of Approaches*, 22 INT'L J. OCCUPATIONAL SAFETY & ERGONOMICS 291, 291-94 (2016) (discussing the word "resilience" and the concept of resilience in different fields). For definitions of "resilience" in psychology, see *id.* at 292-93.

resources that are frequently unavailable to ethnic minorities. In short, indigenous ethnic minorities, as compared to other migrants, are sometimes more vulnerable and are less likely to be in positions that foster their resilience.

If this conclusion is correct, then it is a start on an argument that China has a moral and political obligation to take special steps to protect its indigenous ethnic minorities when it is considering whether to build a new hydroelectric dam.²⁷⁴ First, is another dam necessary or at least highly desirable all things considered? If not, that is a good but not decisive reason why the government should not build it. Second, even if another dam is necessary or highly desirable, should it be built in a particular area even though it will harm an indigenous ethnic minority? If not, that is, again, a good but not decisive reason why the government should investigate other locations to see whether they offer a better site. Third, if no better site can be found, that is a good but not decisive reason why the government should take all reasonable measures to minimize the resulting harm and assorted costs that an indigenous ethnic minority will suffer.²⁷⁵

III. The Chixoy Dam and the Fate of Maya Achi in Guatemala²⁷⁶

In the period 1977-1983, the Chixoy Dam in the Rio Negro valley of Guatemala was constructed amid widespread violence in the country and against vehement opposition from the local population.²⁷⁷ Some years ago I discussed this case briefly with some of the sources available through 2010.²⁷⁸ Now I use a much richer and up-to-date set of sources to examine the Chixoy Dam controversy with specific reference to the compensation and resettlement of Maya Achi villagers whose communal life was upended by the building of the dam. This part discusses construction of the dam and traces the relevant history of the region as well the effects dam construction had on indigenous Maya Achi. I begin by sketching Guatemalan history as it pertains to colonialism, land, and indigeneity in Rabinal Prov-

274. Brad Evans & Julian Reid make a stronger and broader point: "When policy-makers engage in the discourse of resilience, they do so in terms which aim explicitly at preventing humans from conceiving of danger as a phenomenon from which they might seek freedom and even, in contrast, as that to which they must now expose themselves." BRAD EVANS & JULIAN REID, *RESILIENT LIFE: THE ART OF LIVING DANGEROUSLY* 57 (2014).

275. This three-pronged suggestion is milder than the approach of Evans and Reid, who offer a trenchant attack on current political uses of resilience. *Id.* at 202-03 ("Liberal regimes are putting so much effort into imagining the necessity and possibility of the resilient subject, equipped only ever to adapt to a world outside its control, because in reality the real world is a human one, replete with politics, creativity, action, imagination and transformative potential.").

276. In this part, I owe much to the Spanish language skills and exemplary research assistance of Michael Dutton. Jeremy Peretz and Sarah Rahimi contributed additional research.

277. See Stephen R. Munzer, *Corrective Justice and Intellectual Property Rights in Traditional Knowledge*, in *NEW FRONTIERS IN THE PHILOSOPHY OF INTELLECTUAL PROPERTY* 58, 67-68 (Annabelle Lever ed., 2012) [hereinafter Munzer, *Corrective Justice*]; Barbara Deutsch Lynch, *The Chixoy Dam and the Achi Maya: Violence, Ignorance, and the Politics of Blame* 5, 7-8 (Mario Einaudi Ctr. for Int'l Stud., Working Paper No. 10-06, 2006).

278. Munzer, *Corrective Justice*, *supra* note 277, at 58, 67-69.

ince, where the Rio Negro is located. Next, I examine how the building of the dam adversely affected indigenous Maya Achi in the Rio Negro valley. Then I turn to the dam-related migration of many Maya Achi to other areas of Guatemala. Finally, I discuss how the World Bank, the U.S. Congress, and corruption in Guatemala have contributed to inadequate compensation and resettlement options for displaced Maya Achi.

A. Historical Context

In 1524, Spain invaded and colonized the territory now known as Guatemala.²⁷⁹ From 1560 to 1821, it existed as the Captaincy General of Guatemala, and from 1823 until 1840, it was part of the Federal Republic of Central America along with what is now El Salvador, Honduras, Nicaragua, and Costa Rica.²⁸⁰ Since 1847, Guatemala has been an independent country with its borders as known today.²⁸¹ Authoritarian rulers in those early years catered to the aristocracy and foreign business interests.²⁸² Jorge Ubico, who came to power in 1931 after a military coup, was such a ruler.²⁸³ Even in the first few years of Ubico's rule, indigenous persons were often enslaved, but a vagrancy law passed in 1934 made workers, especially indigenous workers, liable to forced labor on plantations.²⁸⁴ Ubico encouraged foreign investment, crushed labor unions, and favored cash crops rather than sustainable food production for Guatemalans.²⁸⁵ One scholar reports that at this time "[m]ost of the country's holdings were owned by U.S. business interests, particularly the United Fruit Company (UFCO)," which later became Chiquita Banana Brands International.²⁸⁶

The period 1944–1954 saw the Guatemalan Revolution: the progressive Juan Arévalo succeeded the rightist Ubico in 1944, and in 1951, the even more left-wing Jacobo Arbenz Guzmán followed.²⁸⁷ Arévalo's policies included a labor code favorable to workers, a social security system, regulation of foreign enterprises, and the encouragement of indigenous groups to organize in *campesino* leagues to advocate for their interests.²⁸⁸ Arbenz also supported agrarian reform, which consisted of the expropriation of

279. *Guatemala Profile—Timeline*, BBC NEWS (May 31, 2018), <https://www.bbc.com/news/world-latin-america-19636725> [<https://perma.cc/9MWX-PDAD>] [hereinafter *Guatemala Profile*]; *Central America*, BRITANNICA ACADEMIC (Aug. 8, 2018).

280. *Capitan General*, ENCYCLOPAEDIA BRITANNICA (Mar. 22, 2007); *Guatemala Profile*, *supra* note 279; *United Provinces of Central America*, ENCYCLOPAEDIA BRITANNICA (Nov. 11, 2011); *Guatemala*, ENCYCLOPAEDIA BRITANNICA (Oct. 31, 2018).

281. *Guatemala*, ENCYCLOPAEDIA BRITANNICA *supra* note 280; *Central America*, *supra* note 280.

282. *Guatemala*, ENCYCLOPAEDIA BRITANNICA *supra* note 280.

283. *Id.*; *Jorge Ubico*, ENCYCLOPAEDIA BRITANNICA (Nov. 6, 2018).

284. *Guatemala*, ENCYCLOPAEDIA BRITANNICA *supra* note 280; *Jorge Ubico*, *supra* note 283.

285. Laura Moyer, *The United States Intervention in Guatemala*, 73 INT'L SOC. SCI. REV. 44, 44 (1998) [hereinafter Moyer].

286. *Id.*; Daniel Kurtz-Phelan, *Big Fruit*, N.Y. TIMES (Mar. 2, 2008), <https://www.nytimes.com/2008/03/02/books/review/Kurtz-Phelan-t.html> [<https://perma.cc/9J22-KPRM>].

287. *Guatemala*, ENCYCLOPAEDIA BRITANNICA *supra* note 280.

288. *Guatemala Profile*, *supra* note 279.

plantations owned by UFCO or white Guatemalans, and the redistribution of unused and fallow land from wealthy Guatemalans to indigenous Maya groups.²⁸⁹

Arbenz's policy change hit large landowners and foreign businesses hard. UFCO had let vast amounts of land lie fallow for future use, and it lost a third of its land under the Arbenz government.²⁹⁰ UFCO also had a monopoly on imports to and exports from the country, as it controlled the railway, port, and fleet used for transporting goods.²⁹¹ To gain control of the Guatemalan economy, Arbenz ordered the construction of highways and a new port.²⁹² However, the C.I.A. began destabilizing the Guatemalan government,²⁹³ and in 1953, President Eisenhower ordered the C.I.A. to overthrow Arbenz.²⁹⁴ After the 1954 coup d'état that unseated Arbenz, Carlos Castillo Armas—a U.S.-backed military leader in the coup—gained power and began undoing his predecessor's policies: "He extirpated communist influence, quashed agrarian reform, and broke labour and peasant unions with considerable violence"²⁹⁵ The coup led to further military governments and eventually a fierce civil war in the period from 1962 to 1996.²⁹⁶

It was in this strife-torn historical context that the Guatemalan government decided, in 1975, to build hydroelectric dams as a way to avoid the high costs of buying oil.²⁹⁷ Consorcio Lami, a government-hired consulting firm, planned four dams, one of which would become the Chixoy Dam across the Rio Negro.²⁹⁸ The estimated cost of the Chixoy Dam alone was \$270 million.²⁹⁹ The Guatemalan government obtained loans from the Inter-American Development Bank ("IADB") and the World Bank for \$105 million and \$72 million, respectively.³⁰⁰ The government obtained no consent or input from the approximately 1,500 Maya Achi who lived in the Rio Negro valley; in fact, initial feasibility studies of the area stated that the valley was uninhabited.³⁰¹

289. Moye, *supra* note 285, at 45. According to PIERO GLEIJESES, *SHATTERED HOPE: THE GUATEMALAN REVOLUTION AND THE UNITED STATES, 1944-1954* 149-62 (1992), the principal beneficiaries of Arbenz's agrarian reform were indigenous peoples.

290. Moye, *supra* note 285, at 45.

291. *Id.*

292. *Id.*

293. *Guatemala Profile*, *supra* note 279.

294. Moye, *supra* note 285, at 48.

295. *Guatemala Profile*, *supra* note 279.

296. *Id.*

297. Colajacomo, *supra* note 10, at 2. The name is variously written as Achi, Achi', Achí, and Achi the text dispenses with accent and diacritical marks.

298. *Id.* at 1. The name "Rio Negro" applies both to the river on which the Chixoy Dam was built and to a cluster of valley villages near that river in the department of Baja Verapaz.

299. *Id.* at 2.

300. *Id.*

301. 2 BARBARA ROSE JOHNSTON, *CTR. POL. ECOLOGY, CHIXOY DAM LEGACY ISSUES STUDY, CHIXOY DAM LEGACY ISSUES DOCUMENT REVIEW: CHRONOLOGY OF RELEVANT EVENTS AND ACTIONS* 8 (2005) [hereinafter JOHNSTON, *CHIXOY DAM LEGACIES*]. Johnston reports that plans for the other three dams were dropped. *Id.* at 63. The name "Achi" applies both to the people and to the language they speak. The word "Achi" in that language means

Maya Achi are an indigenous people in their own right rather than a mere subgroup of Maya people generally.³⁰² Only in 1976, when a World Bank-funded earthquake reconstruction survey identified the local population, did Guatemala's creditors compel the government to create a resettlement and compensation plan for the individuals who would be displaced by the dam and reservoir.³⁰³ Maya Achi themselves found out about the dam when government officials, who flew over to the people living in the Rio Negro valley, announced by loudspeaker that a dam would soon flood the Maya Achi ancestral homelands.³⁰⁴ Still, the government had to come up with a resettlement and compensation plan, and it promised Maya Achi homes, farmlands, trucks, boats, and tractors in return for giving up their lands.³⁰⁵

At this point, everything descended into chaos and violence. Maya Achi met and created a "book" that catalogued their land titles in the Rio Negro valley and riverbanks, recorded the government's promises, rejected those promises as inadequate, and named two of their members to meet with government officials in Guatemala City.³⁰⁶ On their way to the capital, the two representatives were kidnapped and disappeared along with the "book," containing the land titles and record of promised resettlement and compensation.³⁰⁷ Maya Achi reiterated that they did not want to leave, and

"man." SERGIO NAVARRETTE PELLICER, *MAYA ACHI MARIMBA MUSIC IN GUATEMALA* 229 n.229 (2005) [hereinafter NAVARRETTE PELLICER].

302. Some scholars classify the Achi language as part of a larger group of K'iche' languages. See, e.g., BRIGITTINE M. FRENCH, *MAYA ETHNOLINGUISTIC IDENTITY: VIOLENCE, CULTURAL RIGHTS, AND MODERNITY IN HIGHLAND GUATEMALA* 66-74 n.300 (2010) [hereinafter FRENCH]. Historical, academic, and political relationships have maintained ethnolinguistic distinctions that make Achi people in many ways separate from K'iche' people even though their languages are often considered practically the same. *Id.* at 1-5, 21-39, 58-76.

303. Barbara Rose Johnston, *Chixoy Dam Legacies: The Struggle to Secure Reparations and the Right to Remedy in Guatemala*, 3 *WATER ALTERNATIVES* 341, 349 (2010) [hereinafter Johnston, *Reparations in Guatemala*].

304. See Colajacomo, *supra* note 10, at 2.

305. See Interview by Monti Aguirre with Cristóbal Osorio Sanchez (Apr. 26, 2004), https://www.carnegiecouncil.org/publications/archive/dialogue/2_11/online_exclusive/4454 [<https://perma.cc/4UFL-Z7XQ>] [hereinafter Aguirre].

306. *Id.* See also JOHNSTON, *CHIXOY DAM LEGACIES*, *supra* note 301, at 40. The Maya Achi leaders who were kidnapped and disappeared were Everisto Osorio and Valeriano Osorio Chen. *Id.* at 3. I do not know whether they were related to Cristóbal Osorio Sanchez (mentioned in note 298 *supra*). Colajacomo, *supra* note 10, at 67, states without naming these leaders that "the mutilated bodies of the two were later discovered."

307. See Aguirre, *supra* note 305; Colajacomo, *supra* note 10, at 67 (calling the "book" or "document" a *Libro de Acta*); Johnston, *Reparations in Guatemala*, *supra* note 303, at 349-50. Uncertainty exists on the nature of these land titles. First, it is unclear whether the land titles in the "book" were copies or originals. Second, Colajacomo, *supra* note 10, at 67, seems to indicate that the titles were communal rather than individual titles. In contrast, Johnston, *Reparations in Guatemala*, *supra* note 303, at 349, writes that: "[A]ll the lands affected by the Chixoy dam had, at the time of development, properly registered titles. The dates for the first inscriptions vary between 1883 and 1910. In 2004, of the 26 lots involved, only one lot was in the name of the developer (INDE), while the rest were in the names of private owners, communal title or representatives of the indigenous communities of the area. In other words, submerged lands, a portion of the dam and the hydrologic works were built on lands still legally titled to their original

violence erupted.³⁰⁸ Across five massacres, paramilitary squads killed over 400 Maya Achi.³⁰⁹ In one particular massacre, 107 children were killed, and seventy-three women were raped and tortured before being murdered.³¹⁰ Later in 1983 during the filling of the reservoir, additional Maya Achi were killed while attempting to flee or to resist forcible resettlement.³¹¹

The building of the Chixoy Dam on the Rio Negro in 1977-1983 occupied a special place in Guatemalan history. It occurred during a civil war between rightwing politicians, the army, and paramilitary forces on one side, and leftist rebels, ethnic Maya, and Ladino farmers on the other.³¹² The war was coterminous with a period known as *la Violencia*, which was marked by rebel atrocities and especially by the indiscriminate killing and terror the Guatemalan government and its death squads inflicted upon the rural poor.³¹³ The local population consisted predominantly of Maya Achi.³¹⁴ The government and its allies removed some villagers by force, tortured others, and killed many.³¹⁵ The treatment of Maya individuals during *la Violencia* amounted to genocide and crimes against humanity.³¹⁶ The government offered only feeble resettlement efforts and even into the new millennium refused to pay anything more than token compensation or reparations to Maya Achi.³¹⁷ Maya people generally make up nearly forty percent of Guatemala's inhabitants.³¹⁸

owners. The failure [of INDE] to secure land title legally is a direct violation of loan agreements and bank lending policies. In one instance of communal title, to retain rights to cultivate upslope, the [communal] owners are still paying taxes on sub-merged lands." Because Johnston hired a land title researcher (*id.*), her position seems more compelling than Colajacomo's. INDE did not have title to the land in question, except for one lot. *Id.*

308. Aguirre, *supra* note 305.

309. *Id.*

310. *Id.*

311. Colajacomo, *supra* note 10, at 5.

312. STEPHEN CONNELLY BENZ, *GUATEMALAN JOURNEY* (1996); RACHEL McCLEARY, *DICTATING VIOLENCE* (1999).

313. AMNESTY INTERNATIONAL, *GUATEMALA: A GOVERNMENT PROGRAM OF POLITICAL MURDER* (1981).

314. Colajacomo, *supra* note 10, at 3.

315. Johnston, *Reparations in Guatemala*, *supra* note 303, at 349.

316. Colajacomo, *supra* note 10. Former dictator José Efraín Ríos Montt was convicted of genocide, though his conviction was later overturned by the Guatemala Constitutional Court on the ground that he was cognitively unfit to stand trial. *Id.* at 355. New legal proceedings began in 2017, and they continued until Ríos Montt died on April 1, 2018, at the age of 91. *Efraín Ríos Montt*, in *ENCYCLOPEDIA BRITANNICA*, <https://www.britannica.com/biography/Jose-Efrain-Rios-Montt> [<https://perma.cc/M9YD-4CSX>] (last visited Feb. 28, 2019).

317. 1 JOHNSTON, *CHIXOY DAM LEGACIES*, *supra* note 301, at 18-21. JOHNSTON's five-volume report, the first four of which are in English and the last in Spanish, was submitted to the Government of Guatemala Presidential Commission Human Rights, the World Bank, and the Inter-American Development Bank, see *Chixoy Dam Legacy Issues Study*, CTR. POL. ECOLOGY, www.centerforpolitical ecology.org/chixoy.html (last visited July 13, 2018).

318. As of January 23, 2019, the total population of Guatemala was about 17,467,853. *Guatemala Population 2018*, WORLD POPULATION REVIEW, <http://worldpopulationreview.com/countries/guatemala-population/> [<https://perma.cc/QX5H-JXSE>]

One can trace the effects of the dam construction and operation on Rio Negro Maya Achi and their descendants by (1) outlining the situation of the inhabitants of Rabinal, where many Maya Achi still remain; (2) examining the experiences of indigenous peoples living in Guatemala City, where many Maya Achi moved in search of work; and (3) describing two common work options for Maya Achi—the *maquiladoras* (factories that make goods for export) and the palm oil plantations.

B. Maya Achi Then and Now

I begin with the entire municipality of Rabinal. Information on this part of Guatemala is not limited to those affected by the Chixoy Dam, but it helps to understand the average lives of those Maya Achi still living in their place of origin. Next, I concentrate on the resettlement community of Pacux, where most survivors of the Rio Negro massacres eventually went. Finally, I deal with the resettlement of villages in and around Rio Negro.

1. Rabinal and Its Surroundings

The municipality of Rabinal, located in the department of Baja Verapaz, had a population of 39,409 in the year 2000. The municipality included the village of Rio Negro, Pacux, various other villages, and the town of Rabinal.³¹⁹ Over eighty percent of the population identified itself as Maya Achi.³²⁰ Only twenty percent of the Maya Achi inhabitants of the municipality lived in the town of Rabinal.³²¹ The rest lived in smaller villages in the surrounding areas.³²² The economy of Rabinal depended mostly on agriculture, especially the subsistence farming of corn and beans.³²³ Roughly forty percent of the population was illiterate in the early twenty-first century.³²⁴ Over the last few decades, the inhabitants of Rabinal have seen a drop in the quality of life, owing to soil degradation and inadequate land.³²⁵ Some eighty-seven percent of *Rabileños*, as the denizens of Rabinal are known, lived in poverty and “nearly half of the population periodically migrate[d] in search of seasonal agricultural jobs

(last visited Mar. 1, 2019). According to the 2010 census, Mestizos (Ladinos) made up about forty-one percent of the population, and Maya groups (thirty-nine percent) and whites of European descent (18.5%) added most of the rest. *Id.* Persons of African or Asian descent constituted the remaining 1.5%. *Id.* It is not clear whether the figure for total population included some 110,000 Salvadorans living in Guatemala. *Id.*

319. DORA RUTH DEL VALLE CÓBAR, VIOLENCIA POLÍTICA Y PODER COMUNITARIO EN RABINAL, BAJA VERAPAZ [Political Violence and Community Power in Rabinal, Baja Verapaz] 46-47 (2004) [hereinafter DEL VALLE CÓBAR].

320. *Id.* at 48.

321. Maeve Hautecoeur et al., *Las Barreras de Acceso a los Servicios de Salud en la Población Indígena de Rabinal en Guatemala* [The Barriers to Accessing Health Services in the Indigenous Population of Rabinal in Guatemala], 49 SALUD PÚBLICA DE MÉXICO 86, 87 (2007) [hereinafter Hautecoeur et al.].

322. *Id.*

323. DEL VALLE CÓBAR, *supra* note 319, at 51.

324. *Id.* at 51.

325. See Julie Stewart, *When Local Troubles Become Transnational: The Transformation of a Guatemalan Indigenous Rights Movement*, 9 MOBILIZATION: AN INT'L J. 259, 265 (2004) [hereinafter Stewart].

or work in the capital.”³²⁶ Most migrants were younger people, who often opted for a job in the *maquiladoras*³²⁷ found in different parts of the country.³²⁸ Some young women migrated for jobs as domestic helpers.³²⁹ Over the past few decades, some inhabitants have also gone to the United States in search of work.³³⁰

Despite frequent migration, at the turn of the millennium “there exist[ed] relative stability in the speaking of indigenous languages” in Rabinal.³³¹ *Rabileños* were more likely to speak the language of their grandparents than were many indigenous peoples living in other areas of Guatemala.³³² For example, in the municipality of San Martín Jilotepeque, in the department of Chimaltenango, 68.7% of inhabitants aged fifty or older spoke an indigenous language, while only 20.4% of inhabitants aged three to six spoke an indigenous language.³³³ Because younger speakers of indigenous languages were failing to replace older ones, the evidence from San Martín Jilotepeque suggested that some, perhaps many, indigenous languages might eventually disappear. By contrast, in Rabinal, seventy percent of those aged fifty or older spoke Achi, and nearly sixty percent of those aged three to six spoke Achi.³³⁴ Although those who stayed in Rabinal tended to retain their families’ language, many migrants living outside of the department of Baja Verapaz may have had lower language retention rates. Nonetheless, across Guatemala there was some support for the use of indigenous languages, and this phenomenon may be linked to a wider “heightened social and cultural awareness” among Maya groups.³³⁵ Some of this support may have come from pan-Maya cultural movements.³³⁶

Even with improvements in social awareness, the residents of Rabinal lack necessary resources. For example, *Rabileños* face financial, geo-

326. *Id.*

327. Often called *maquilas*, such factories also exist in Mexico and other parts of Central America. See John Sargent & Linda Matthews, *China Versus Mexico in the Global EPZ Industry: Maquiladoras, FDI Quality, and Plant Mortality*, 37 *WORLD DEV.* 1069, 1069 (2009).

328. DEL VALLE CÓBAR, *supra* note 319, at 50.

329. *Id.*

330. *Id.* at 152.

331. MICHAEL RICHARDS, *ATLAS LINGÜÍSTICO DE GUATEMALA* [Linguistic Map of Guatemala] 95 (2003) (“en . . . Rabinal existe una relativa estabilidad en al habla del idioma indígena.”) [in . . . Rabinal there exists a relative stability in the speech of the indigenous language.] [hereinafter RICHARDS].

332. *Id.*

333. *Id.* at 96.

334. *Id.* at 93.

335. *Id.* at 94 (“elevada conciencia social y cultural”).

336. See EDWARD F. FISCHER, *CULTURAL LOGICS AND GLOBAL ECONOMIES: MAYA IDENTITY IN THOUGHT AND PRACTICE* 4–6 (2001). Navarrete Pellicer, writing in 2005, suggests that in Guatemala most Maya women spoke only their native Maya language while most Maya men spoke both their native Maya language and Spanish. NAVARRETTE PELLICER, *supra* note 301, at 232 n.40. Whenever Maya men and women moved to urban areas, there may have been a trend toward Spanish monolingualism after a generation. FRENCH, *supra* note 302, at 117–24.

graphic, cultural, and linguistic barriers in accessing medical care.³³⁷ There are few doctors in the municipality.³³⁸ Ambulances are usually unable to get to the villages, so rural *Rabileños* must often walk for hours to get medical attention, even in emergency situations.³³⁹ Many Maya Achi claim that health professionals intentionally discriminate against indigenous persons.³⁴⁰ Feelings of discrimination, coupled with a general fear and mistrust of authorities in the wake of *la Violencia*,³⁴¹ have led many Maya Achi to avoid health centers whenever possible.³⁴² Women face additional barriers to health care. Maya Achi women often feel uncomfortable being examined by a male doctor, and a woman would not normally see a male doctor unless her husband was present.³⁴³ Women are also less likely than men to speak Spanish, and thus could have difficulty understanding the instructions of a monolingual Spanish-speaking doctor.³⁴⁴

The high cost and small supply of medical services in Rabinal contributed to the substantial use of traditional medicines.³⁴⁵ For example, some people seek medical help from “spiritual guides, medicine men, [and] Maya priests.”³⁴⁶ Many women strongly prefer local midwives over other health professionals when they give birth or seek pregnancy-related medical attention.³⁴⁷ In one study, seventy percent of those interviewed stated that at least some young people in the community used some forms of traditional Maya medicine.³⁴⁸

Many *Rabileños* mentioned a “collective pain”³⁴⁹ or “great sickness”³⁵⁰ caused by *La Violencia* and the building of the Chixoy Dam. Effects of the great sickness included “sadness, a feeling of injustice, fear, terror, horror,

337. Hautecoeur et al., *supra* note 321, at 86.

338. *Id.* at 88. In Rabinal, there was one doctor for every 10,000 people. *Id.*

339. *Id.* at 89–90.

340. *Id.* at 91.

341. The Inter-American Court of Human Rights characterized *La Violencia* as follows: “Between 1962 and 1996 an internal armed conflict took place in Guatemala that resulted in enormous human, material, institutional and moral costs. The Historical Clarification Commission (hereinafter ‘CEH’) estimated that ‘more than 200,000 persons died or disappeared during the internal armed conflict,’ and that the State’s armed forces together with paramilitary groups were responsible for 93% of the human rights violations committed, including 92% of the forced disappearances.” *Rio Negro Masacres v. Guatemala*, Official Summary Issued by the Inter-American Court, Inter-Am. Ct. H.R. ¶ 56 (Sept. 4, 2012), available at http://corteidh.or.cr/docs/casos/articulos/seriec_250_ing.pdf [<https://perma.cc/DA3A-S55L>].

342. Hautecoeur et al., *supra* note 321, at 92.

343. *Id.* at 90–91. The absence of a husband may be a common problem, given the high incidence of periodic male migration for work.

344. *Id.* at 91.

345. *Id.* at 92.

346. DEL VALLE CÓBAR, *supra* note 319, at 182 (“los guías espirituales, los curanderos, los sacerdotes mayas”).

347. Hautecoeur et al., *supra* note 321, at 92.

348. OTTO RICARDO RIVERA ALVAREZ, ORGANIZACIÓN SOCIAL MAYA ACHI: UNA APROXIMACIÓN A SAN JOSÉ RABINAL EN LOS ALBORES DEL SIGLO XXI [Social Organization of the Maya Achi: A Look at San José Rabinal at the Dawn of the 21st Century] 16 (2002) [hereinafter RIVERA ALVAREZ].

349. Hautecoeur et al., *supra* note 321, at 91 (“un dolor colectivo”).

350. DEL VALLE CÓBAR, *supra* note 319, at 183 (“la gran enfermedad”).

dreaming of those who were massacred, psychological torture, anguish, suffering, pain, impotence, anger, frustrated and unresolved mourning, psychosomatic problems, loneliness, traumatic memories, nightmares, extreme distrust, rash behavior, panic attacks, nervousness, anxiety, depression, lack of concentration, lack of personal autonomy, among others.”³⁵¹

One can grasp changes in local power structures since the 1970s by examining the *cofradías*. A *cofradía*—a word translatable as “brotherhood” or “association”—was once a group of important, financially powerful men known as *mayordomos*.³⁵² The *cofradías*, along with the Roman Catholic Church, were one of the main pillars of Rabinal society.³⁵³ These brotherhoods were a link between the Catholic Church and indigenous communities and facilitated the adaptation of pre-Columbian traditions into Catholic practices.³⁵⁴ The *cofradías* seemed to gain their respect and status by organizing and funding religious rituals and community festivities.³⁵⁵

A non-Guatemalan interviewee familiar with community developments in Rabinal summed up nicely the political and social power the *cofradías* had before *La Violencia* and the construction of the dam: “the *kajawxeles* here had spiritual power before; they organized the entire ritual life, marriages, the memory of ancestors, the dead . . . they had political power too because the *mayordomos* of the *cofradía* would choose the indigenous mayor, who was a counterpart to the municipal mayor.”³⁵⁶ The indigenous mayor, who was also the general administrator of all the local *cofradías*, had significant judicial power.³⁵⁷ The same foreign interviewee stated that “the indigenous mayor was the judge, he was the one who administered justice [by the principles of traditional law]. And if the indigenous mayor did not reach a just outcome or resolve the dispute, then he would get together with the municipal mayor [who had the official title of Justice of the Peace].”³⁵⁸ Moreover, the members of the *cofradías* usually consulted the municipal mayor about decisions to be taken by the

351. *Id.* (“tristeza, sensación de injusticia, miedo, terror, horror, soñar a los masacrados, tortura psicológica, tormento, sufrimiento, dolor, impotencia, cólera, duelo alterado, problemas psicósomáticos, soledad, recuerdos traumáticos, pesadillas, desconfianza extrema, desorganización de la conducta, ataques de pánico, nerviosismo, ansiedad, depresión, falta de concentración, falta de autonomía personal”).

352. *Id.* at 142. *Mayordomos* are also known as *kajawxeles* in the Achi language. *Id.* at 143.

353. *Id.* at 142.

354. *Id.* at 141–42.

355. *Id.* at 142.

356. *Id.* at 143 (“Aquí antes los *kajawxeles* tenían un poder espiritual, organizaban toda la vida ritual, los matrimonios, el recuerdo de los antepasados, los muertos . . . tenían un poder político también porque los *mayordomos* de las *cofradías* nombraban al alcalde indígena, que era una estructura paralela a la del alcalde municipal.”).

357. *Id.* at 87.

358. *Id.* (“el alcalde indígena era el juez, era el que practicaba la justicia [a través del los principios de derecho consuetudinario]. Y si el alcalde indígena no lograba la justicia o resolver el conflicto, se iba con el alcalde municipal [que tenía el nombramiento oficial como Juez de Paz]”).

municipality.³⁵⁹

Yet, by the early twenty-first century, the *cofradías* lost much of their power and relevance. In one study, thirty percent of those interviewed said that they feared the *cofradías* were likely to disappear entirely.³⁶⁰ A major cause of the *cofradías*' decline was the general poverty that afflicted Rabinal: in tough economic times, nobody wanted to be a *mayordomo* and expend scarce resources organizing and funding celebrations.³⁶¹ In Pacux, for instance, the former residents of Rio Negro reorganized their *cofradía*, but, because of the scarcity of basic foods like corn and beans, nobody had enough food to organize a gathering.³⁶² As one social activist and victim of the civil war put it, "the *cofradía* is nothing but a symbol."³⁶³ Still others in the community blamed the growing presence of Protestant groups for the decreasing importance of the *cofradías* in Rabinal society.³⁶⁴ Lastly, the *cofradía* lost some support in the community because some *Rabileños* believed that many of the members of the *cofradías* had aligned themselves with the military during the massacres.³⁶⁵

Regardless of the causes, the decline of the *cofradías* meant that local political power was now more solidly in the hands of regional and national politicians, rather than in those of indigenous community leaders.³⁶⁶ The *mayordomos* no longer played an important role as advisors to the municipal mayor, and the mayor lost his function as a judicial official.³⁶⁷ The waning of the *cofradías* also presaged a loss of cultural knowledge. Before a man could become a *mayordomo*, he would spend seven years studying the rituals and cultural events Rabinal's *cofradías* organized.³⁶⁸ If the *cofradías* were once the "center of community life"³⁶⁹ in Rabinal, it was not difficult to see that at least some of Rabinal's traditions had disappeared during the decline of the organization.

As time passed, some elements of the material culture in Rabinal dwindled. Of those women interviewed who wove clothing and home decorations, seventy percent said they learned how to weave from their mothers and ten percent from their mothers-in-law.³⁷⁰ Only sixty percent of those interviewed said they have children who knew how to weave.³⁷¹ Though the decrease was modest, it suggested a loss of cultural knowledge over

359. *Id.*

360. RIVERA ALVAREZ, *supra* note 348, at 13.

361. DEL VALLE CÓBAR, *supra* note 319, at 146.

362. *Id.* at 145.

363. *Id.* ("la *cofradía* es como un símbolo nada más").

364. RIVERA ALVAREZ, *supra* note 348, at 13. There was a sense among some in the community that evangelical Christianity in Rabinal had divided the *Rabileños* and that evangelical Christianity's stress on the individual undermined the traditional Maya focus on the community. See DEL VALLE CÓBAR, *supra* note 319, at 136-37.

365. DEL VALLE CÓBAR, *supra* note 319, at 144-45.

366. *Id.* at 81.

367. *Id.* at 85.

368. *Id.* at 143.

369. *Id.* at 143 ("el centro de la vida de las comunidades").

370. RIVERA ALVAREZ, *supra* note 348, at 22.

371. *Id.* at 23.

time. Further, among those women who could weave, many had forgotten the meaning of the symbols with which they adorned their clothes and decorations.³⁷² Even more pronounced was a loss of knowledge in the traditional ceramic arts. Of those interviewed who could create ceramic art works (seventy-seven percent of whom had learned techniques from one of their parents), ninety percent said that their children had not developed the necessary skill to make ceramic pieces and that the younger generation was simply not interested in producing ceramics.³⁷³

At the same time, other traditional expressions of Maya culture seemed to ascend. For instance, it became more common for members in the community to organize rituals with Maya priests.³⁷⁴ This “resurgence,” as one scholar described it, was linked to the use of traditional medicines before visiting a health clinic.³⁷⁵

Lastly, two groups relatively new to Rabinal started to have an effect on the community: nongovernmental organizations (“NGOs”) and *maras* (gangs). As to NGOs in Rabinal, some *Rabileños* claimed that people became accustomed to asking for goods and services, and that the sometimes paternalistic help offered by international NGOs led to less social organization among the inhabitants of Rabinal.³⁷⁶ *Rabileños* also complained that, owing to a decline in their earlier social values and to the inaction of local military officials, Rabinal was suffering from crime and terror at the hands of local gangs of teenagers.³⁷⁷

2. *Pacux: A Resettlement Village*

After the survivors of the Rio Negro massacres spent two or three years hiding from the military in the mountainous areas around Rio Negro, they began to trickle into the resettlement village of Pacux, where many still remain.³⁷⁸ As a report for the World Commission on Dams explained, “[t]he resettlement village was one of the ‘model villages’ that the Guatemalan army had built to control guerrilla movements. A military base was located at the entrance of the village and constantly controlled the population.”³⁷⁹ Former Rio Negro villagers met with even more violence when arriving at Pacux: “for some days, all men arriving at the village were seized, interrogated, mistreated and tortured by the army. Some of them were left without water and food for 12 days, after the hard life in the mountains, they did not survive the suffering and died.”³⁸⁰ Some, who refused to live in Pacux, left immediately for the coastal sugar cane planta-

372. *Id.*

373. *Id.* at 24–26.

374. DEL VALLE CÓBAR, *supra* note 319, at 173.

375. *Id.* at 174.

376. *Id.* at 177.

377. *Id.* at 184–85.

378. See generally Nathan Einbinder, *Rio Negro Survivors Rebuild and Face the State*, 47 NACLA REP. AMERICAS 14 (2014) [hereinafter Einbinder]. For a detailed account of life in Pacux, see 4 JOHNSTON, CHIXOY DAM LEGACIES, *supra* note 301, at 71–90.

379. Colajacomo, *supra* note 10, at 7.

380. *Id.*

tions or for work in Guatemala City.³⁸¹

The move to Pacux transformed the life situation of the Rio Negro villagers. They went from each having 22.5 *caballerías*³⁸² of land in Rio Negro to just seven *caballerías* in Pacux.³⁸³ Moreover, unlike the moist soil near Rio Negro, the land around Pacux lacked irrigation water, which led to a “loss of working hours for farming and difficulties in continuing traditional activities.”³⁸⁴ For example, residents lost access to the medicinal plants that once grew along the river.³⁸⁵ The land around Pacux, wrote one author, was “insufficient both in quantity and quality to feed the resettled population.”³⁸⁶ The poorly constructed homes in Pacux, which were in an “advanced state of decay,” made no room for livestock or open-air community areas.³⁸⁷ And there were only 150 homes for 170 families.³⁸⁸

Because of the lack of both agricultural lands and local work in Pacux, many residents searched for work in the capital, the coast, or even the United States.³⁸⁹ Many younger people worked in the *maquiladoras* found in other parts of the country.³⁹⁰ Another option for younger people was “three-year army service, where they [got] clothes, housing, food, and [were] paid \$60 a month.”³⁹¹ Women in Pacux often earned income from working as domestic helpers in the town of Rabinal or by selling artisanal goods.³⁹² Though both men and women migrated for work, women were more likely than men to return to Pacux and take care of children.³⁹³

Most families became one-parent units headed by the mother.³⁹⁴ The changed family structure resulted in part from males seeking work elsewhere. But because paramilitary groups murdered more men than women

381. Einbinder, *supra* note 378, at 17.

382. A *caballería* is a unit of land measuring approximately 3,863 square meters. *Caballería*, REAL ACADEMIA ESPAÑOLA, <http://dle.rae.es/?id=6OAc9vw&xo=h> (last visited Nov. 13, 2018).

383. Colajacomo, *supra* note 10, at 10.

384. *Id.*

385. *Id.* at 11.

386. Stewart, *supra* note 325, at 265.

387. Colajacomo, *supra* note 10, at 11.

388. *Id.* at 10.

389. See Horacio Martínez Paiz, *La Metamorfosis de una Comunidad Achi: El Caso de Río Negro-Pacux* (The Metamorphosis of an Achi Community: The Case of Río Negro-Pacux) 291 (Museo Nacional de Arqueología y Etnología, Guatemala, J.P. Laporte et al. eds., 2009) [hereinafter Martínez].

390. *Id.* at 291–92.

391. Colajacomo, *supra* note 10, at 12. Colajacomo writes that “by a twist of fate, the sons of those who died during the massacres of the early ‘80s are now becoming part of the military system.” *Id.*

392. Martínez, *supra* note 389, at 292.

393. Elisabeth Biesemans & Bert Janssens, *Anexo A: Resumen de las Entrevistas de la Investigación Cualitativa* [Attachment A: Summary of the Interviews from the Qualitative Investigation], ASOCIACIÓN PARA EL DESARROLLO INTEGRAL DE LAS VÍCTIMAS DE LA VIOLENCIA EN LAS VERAPACES, MAYA ACHÍ (ADIVIMA) [ASSOCIATION FOR THE FULL DEVELOPMENT OF THE VICTIMS OF *La Violencia* in the Verapaces, Maya Achí] 45 (2004), available at <http://www.derechos.net/adivima/documentos/informes/chixoyvol3.2espan.pdf> [https://perma.cc/2UXT-AJGF].

394. Martínez, *supra* note 389, at 292; Biesemans & Janssens, *supra* note 395, at 45.

during the civil war, widows and orphans became a visible portion of the population in the generation following the war.³⁹⁵ The dearth of age-appropriate males also led to men fathering children with more than one woman: “many of these women who lost their husbands often found themselves obligated to maintain some type of relationship with the few men who survived the massacres. This resulted in many of these men becoming fathers or heads of household for multiple families.”³⁹⁶

Because so many older people were killed during *La Violencia*, survivors struggled to remember and rebuild their traditions, such as marimba music, traditional dances, or religious syncretism.³⁹⁷ Moreover, the geographical change made certain traditions obsolete or impossible to continue. For example, one resident of Pacux recounted that it did not make any sense to teach his children the old hunting techniques because the animals he hunted in Rio Negro could not be found around Pacux.³⁹⁸ The same man said that he had not taught his children how to weave rugs because the trees which provide necessary materials did not grow in Pacux.³⁹⁹ One scholar described the move to Pacux as a disintegration of the Rio Negro people’s “complex and delicate system of internal regulation (loss of traditional law, of the role of the chief and of access to places of symbolic and religious importance).”⁴⁰⁰

As in the rest of Rabinal, the residents of Pacux suffered from the presence of *maras*. Interviewees told stories of robbery, violence, rape, and intimidation at the hands of young gang members.⁴⁰¹ Many inhabitants believed that the army refused to do anything to control violence and crime.⁴⁰² And many of the older members of the community believed that young people had lost the respect for communal life that was once common in Rio Negro.⁴⁰³

3. *The Village of Rio Negro*

In the early 1990s, some families, driven mostly by economic and social pressures, built homes on the steep slopes above what was once the village of Rio Negro.⁴⁰⁴ Approximately 100 people came to live in the

395. Colajacomo, *supra* note 10, at 7.

396. Martínez, *supra* note 389, at 292 (“muchas de estas mujeres que perdieron a sus esposos, se vieron frecuentemente obligadas a mantener algún relación de pareja con los pocos hombres que sobrevivieron a las massacres. Esto llevó a que muchos de estos hombres fueran padres o cabezas de hogar de varias familias.”).

397. See Colajacomo, *supra* note 10, at 11; see Biesemans & Janssens, *supra* note 395, at 47–48.

398. Biesemans & Janssens, *supra* note 393, at 47–48.

399. *Id.*

400. *Id.* at 42–43; Colajacomo, *supra* note 10, at 12.

401. Biesemans & Janssens, *supra* note 393, at 42–44.

402. *Id.* at 42.

403. *Id.* at 45.

404. See Felix A. Kupprat, *Memorar la Cultura: Modos de Mantener y Formar las Identidades Mayas Modernas* [Remembering Culture: Ways of Maintaining and Forming Modern Maya Identities], 38 ESTUDIOS DE CULTURA MAYA 145, 154 (2011).

area.⁴⁰⁵ They dedicated themselves mostly to subsistence agriculture, and supplemented their incomes with fishing and making artisanal goods like textiles and *metates* (stones for grinding corn).⁴⁰⁶ Because some traditional commercial routes were now under water, travel to and from Rio Negro was more difficult than before the Chixoy Dam was built.⁴⁰⁷ Moreover, the most fertile land was now submerged in water; one resident of Rio Negro commented that:

It's not like it used to be The best land was at the river's edge. We had fruit trees—mango, peanut [sic], citrus, jocote, papaya, among others—and we caught many species of fish. Now it's much harder, but it's still better than life in Pacux. Here we have space for our milpas, and are free to develop our community as we wish.⁴⁰⁸

With money donated by a German development group, the villagers of Rio Negro created a cultural center that served as a hotel and tourist destination for foreign travelers.⁴⁰⁹ The center provided food and accommodation for up to 30 people, and offered commemorative tours of the principal massacre sites around Rio Negro.⁴¹⁰ The English-language advertisement for the center read: “In Rio Negro, where the brightest and darkest aspects of life come together, you can appreciate how the community of Rio Negro has transformed suffering into new life.”⁴¹¹ Rio Negro eventually had a school that offered bilingual education and classes that touched on themes of violence in Rio Negro's history.⁴¹²

One scholar noted that the villagers of Rio Negro differed from other *Rabiñenos* because of their shared experiences of massacres and displacement: “[I]n this way there emerges a local ethnic identity based on rituals and places of remembering that gain meaning within a very limited community.”⁴¹³ Every year on March 13, the community began to gather to commemorate the massacres.⁴¹⁴ The service involved a nighttime Maya ceremony of prayers and offerings and a Catholic Mass on the following day.⁴¹⁵ Visitors came to the ceremony from Pacux and other communities.⁴¹⁶ Remembering the massacres was a way for the community to unify, but Rio Negro villagers judged the building of the dam and the ensu-

405. See Einbinder, *supra* note 378, at 18.

406. See Kupprat, *supra* note 404, at 154.

407. See *id.*

408. Einbinder, *supra* note 378, at 18. *Milpas* are small fields for growing crops, especially corn.

409. See *id.*

410. *El Centro Histórico y Educativo “Riij Ib’ooy,”* CENTRO HISTÓRICO Y EDUCATIVO RIO NEGRO, <http://rio-negro.info/che/centro.html> [<https://perma.cc/E6DP-XBL7>] (last visited Nov. 13, 2018).

411. *Id.*

412. See Kupprat, *supra* note 404, at 161.

413. See *id.* at 159. “Así surge una identidad étnica local basada en rituales y sitios de memoria que obtienen un significado dentro de una comunidad muy restringida.” *Id.*

414. *Id.* at 156.

415. *Id.*

416. *Id.*

ing massacres to be the cause of their current economic plight.⁴¹⁷

C. Migration Patterns

1. *Indigenous Peoples in Guatemala City*

Displacement weighed heavily on Maya Achi, and the need for work added to the burden. Disappointed by the low wages from agricultural and plantation labor, many indigenous people tried their luck in the capital. Two notable spaces in Guatemala City where indigenous migrants sought work to provide for their families are *La Terminal* and *La Brigada*. For the most part, the available sources do not distinguish Maya Achi from other indigenous populations.

a. *La Terminal*

La Terminal is a large urban market in which indigenous migrants often made their first entry into urban life in the capital.⁴¹⁸ The migrants lived mostly in substandard housing around the market or in the very market stalls from which they sold their food and wares.⁴¹⁹ These housing options offered little space and no running water, and the necessary reliance on public restrooms exposed the residents to even more of the crime that surrounded the market.⁴²⁰ The average residence housed 6.3 persons, with 4.2 persons per residence doing some type of remunerative work.⁴²¹

High levels of illiteracy existed among residents.⁴²² Most indigenous migrants at *La Terminal* were K'iche', but there were also other indigenous groups.⁴²³ Indigenous migrants spoke their mother tongues, and most women wore traditional Maya clothes, though both of these characteristics were less common among younger family members.⁴²⁴ The families living in *La Terminal* frequently visited their places of origin, and the men who had not brought their families to the capital often had a "*doble residencia*" and made frequent visits to see their families in their hometown.⁴²⁵ For many migrants, the move to *La Terminal* had a temporary or partial quality, as migrants often worked there with an eye towards funding their lives back home.

As one would expect, migrants who frequently visited their place of origin maintained stronger links with their community and were less likely to lose observable aspects of culture such as clothing and language.⁴²⁶

417. *See id.*

418. MANUELA CAMUS, SER INDÍGENA EN CIUDAD DE GUATEMALA [BEING INDIGENOUS IN GUATEMALA CITY] 94 (2002) [hereinafter CAMUS].

419. *Id.* at 104.

420. *Id.* at 105.

421. *Id.* at 109.

422. *Id.*

423. *Id.* The K'iche'-speaking community was mostly from the departments of Quiché, Quetzaltenango, Totonicapaán, Sololá, Retalhuleu, and the northern region of Suchitepéquez. RICHARDS, *supra* note 331, at 62.

424. CAMUS, *supra* note 418, at 109.

425. *Id.*

426. *Id.* at 147.

They were also more likely to limit their life in the capital to the area surrounding *La Terminal*.⁴²⁷ In contrast, among those migrants who viewed the capital as their home (especially young indigenous persons), there was less use of indigenous languages, less wearing of traditional Maya clothing, and a broader life in other areas of the capital.⁴²⁸

b. *La Brigada*

La Brigada is an area on the outskirts of the capital with a high concentration of indigenous people from different areas of the country.⁴²⁹ Many of the recent arrivals came from Las Verapaces (Baja Verapaz and Alta Verapaz).⁴³⁰ About half of all male heads of household worked in construction—an activity that employed up to twenty-five percent of all workers in *La Brigada*.⁴³¹ Women tended to make money by selling inexpensive goods or making tortillas.⁴³² Younger workers often labored in nearby *maquiladoras*.⁴³³ *La Brigada* had a reputation for danger and suffered from murders, rapes, muggings, and drug trafficking.⁴³⁴ To avoid the *maras*, residents made sure to be home early.⁴³⁵ Yet even within the family-home problems existed, including alcoholism and domestic violence.⁴³⁶

Family predominated in *La Brigada*.⁴³⁷ The average dwelling was a room with five inhabitants, and two-thirds of *La Brigada*'s residents lived with their siblings, aunts and uncles, or parents.⁴³⁸ As in *La Terminal*, the children in *La Brigada* had alarmingly low levels of education.⁴³⁹ Most did not complete primary school, and a quarter of the children over five years old were not in school.⁴⁴⁰ Still, unlike in *La Terminal*, it appeared that many young dependents in *La Brigada* did not join the work force.⁴⁴¹

Many younger indigenous persons living in *La Brigada* linked being indigenous to being poor and subordinated.⁴⁴² They tried to avoid the labor of their parents, such as construction and domestic work, in hopes of finding so-called “clean” jobs.⁴⁴³ The prospect of “clean” jobs perhaps explained the attraction of *maquiladora* work among younger people.

A good example of these patterns can be found in Nicolás Sic, a resident of *La Brigada* originally from a Maya Achi village in Rabinal, who was

427. *Id.*

428. *Id.*

429. *Id.* at 153.

430. *Id.* at 163.

431. *Id.* at 166-67.

432. *Id.* at 166.

433. *Id.*

434. *Id.* at 161.

435. *Id.* at 162.

436. *Id.*

437. *Id.* at 165 (“absoluta predominancia de la familia nuclear”).

438. *Id.* at 164-65.

439. *Id.* at 168.

440. *Id.*

441. *Id.*

442. *Id.* at 196.

443. *Id.* (“empleos limpios”).

about twenty years old in 2002.⁴⁴⁴ He came to *La Brigada* with his family at the age of seven to do better financially and to escape *La Violencia*.⁴⁴⁵ His father worked in construction, and his mother, along with her oldest daughter, her sister, and her niece, had a *tortillería*⁴⁴⁶ that supplied tortillas for food stalls at a *maquiladora*.⁴⁴⁷ Nicolás left his studies before finishing primary school and eventually worked as a salaried painter for a company.⁴⁴⁸ Nicolás's oldest sister and his mother still wore traditional Maya clothing, and they, along with Nicolás's father, still spoke Achi.⁴⁴⁹ But Nicolás and his other siblings were unable to speak Achi, and none of them wore traditional clothing.⁴⁵⁰ Moreover, "Nicolás' new wife [was] from the capital, and Nicolás [did] not assign to her any ethnicity."⁴⁵¹ Nicolás expressed having no strong ties to Rabinal and, though his family had land there which his father still farmed, Nicolás had no desire to go back.⁴⁵² When asked about the possible ethnicity of his future children, Nicolás said that they will be not indigenous, but "mixed."⁴⁵³ According to Camus, Nicolás sought "to avoid references to his life prior to his arrival in the capital."⁴⁵⁴

La Brigada offered its undereducated youth few options, including the consumption and trafficking of drugs.⁴⁵⁵ Many young workers tried work in construction, commerce, and various trades; others sought their fortune in the United States.⁴⁵⁶

2. *Maquiladora Workers throughout Guatemala*

Maquiladoras are an important source of jobs for poor Guatemalans. One scholar, Liliana R. Goldín, defines the *maquiladoras* of Guatemala as "export-processing, labor intensive plants that produce goods for international capital."⁴⁵⁷ The workers surveyed in her research worked in the industries of textile and apparel production, which in 2011 employed around 75,000 people in some 195 factories throughout Guatemala.⁴⁵⁸ Approximately seventy percent of *maquiladora* workers were young women,

444. *Id.* at 197.

445. *Id.*

446. Camus says that the *tortillerías* are "key areas of employment" for female indigenous migrants. *Id.* at 322 ("espacio laboral clave").

447. *Id.*

448. *Id.*

449. *Id.* at 197.

450. *Id.*

451. *Id.* ("La mujer de Nicolás es capitalina, él la libera de una adscripción étnica.").

452. *Id.* at 198–99, 203.

453. *Id.* at 203 ("mezclados").

454. *Id.* ("trata de evadir las referencias a su vida anterior a su llegada a la capital").

455. *Id.* at 348.

456. *Id.*

457. Liliana R. Goldín, *Labor Turnover Among Maquiladora Workers of Highland Guatemala: Resistance and Semiproletarianization in Global Capitalism*, 46 *LATIN AM. RES. REV.* 133, 134 (2011) [hereinafter Goldín, *Labor Turnover*].

458. *Id.* at 135.

who were preferred for supposedly being “docile” and “flexible.”⁴⁵⁹ Workers older than twenty-five were usually male and indigenous Maya.⁴⁶⁰ They saw working in a *maquiladora* as better than working on the coastal plantations, which was, according to Goldin, “characterized by semi-slave debt peonage work environments and minimal salaries.”⁴⁶¹

Maquiladora work was frequently part of a larger family diversification strategy. Large numbers of Guatemalans sent young sons and daughters to work in the factories while at the same time maintaining some type of agricultural production with the aid of younger family members or hired labor.⁴⁶² Ninety percent of *maquiladora* households surveyed in Goldin’s study were also involved in agricultural production.⁴⁶³ On average, “maquila workers [kept] approximately twenty percent of their wages and pool[ed] eighty percent for household use.”⁴⁶⁴ Goldin notes that this “access to cash mean[t] access to decision making [within the family unit].”⁴⁶⁵ The wages earned in *maquiladoras* also enabled families to buy consumer goods, including televisions, cell phones, and some kinds of clothes.⁴⁶⁶

And yet, workers reported ambivalence about their jobs.⁴⁶⁷ As negative aspects of the job, workers listed long hours, mandatory overtime, bad treatment (such as verbal and physical abuse, a lack of bathroom breaks, and intimidation), and working without food for many hours.⁴⁶⁸ As positive aspects of working in the factories, workers listed friendships and romantic relationships, new activities (like going out after work), avoiding agricultural labor, and access to consumer goods.⁴⁶⁹ Goldin believes that, for the *maquiladora* workers, “modernity represent[ed] a movement away from agriculture, as it provide[d] access to the consumption of goods and lifestyles available in urban centers and portrayed through the media.”⁴⁷⁰

Young workers viewed the “factory as a free zone where there [was] an instituted lingua franca, Spanish, and where workers share[d] a common experience that allow[ed] them to talk and legitimize their relationships.”⁴⁷¹ Class relations thus formed and sometimes superseded ethnic boundaries; “poor Indians and poor Ladinos [were] defined as factory workers and receive[d] the same wages.”⁴⁷² Moreover, because workers

459. Liliana R. Goldin, *Maquila Age Maya: Changing Households and Communities of the Central Highlands of Guatemala*, 6 J. LATIN AM. ANTHROPOLOGY 30, 33 (2001) [hereinafter Goldin, *Maquila*].

460. Goldin, *Labor Turnover*, *supra* note 457, at 135.

461. Goldin, *Maquila*, *supra* note 459, at 36.

462. *Id.* at 38.

463. *Id.* at 39.

464. Goldin, *Labor Turnover*, *supra* note 457, at 135-36.

465. *Id.* at 137.

466. *Id.*

467. *Id.*

468. *Id.* at 137, 146.

469. *Id.* at 137.

470. *Id.*

471. Goldin, *Maquila*, *supra* note 459, at 38.

472. *Id.*

came from different parts of Guatemala, many young adults found wives and husbands in the factory who were not from their ethnic group.⁴⁷³ “Factory-based marriages often require[d] accepting a woman from another town or permitting a daughter to leave town, as it [was] customary for women to move into their husband’s parents’ home until they establish[ed] their own.”⁴⁷⁴

Young adults’ decisions to work in the *maquiladoras* had profound effects on traditional agriculture in rural Guatemala. The shift to the *maquiladoras* meant that “these young men and women [were] not learning the skills required to work in the fields.”⁴⁷⁵ Some farmers said that because of the lack of help from their children, they were unable to grow the same amount of crops as they once could.⁴⁷⁶ Many young *maquiladora* workers viewed agricultural work as “our parents’ jobs” and regarded it as “too hard or tedious.”⁴⁷⁷ The fact that “land [was] too scarce and the returns of existing lots [were] diminishing”⁴⁷⁸ further contributed to a lack of interest in agriculture.

Perhaps because of the widespread ambivalence about the work, coupled with the semi-independent status of many young workers, the *maquiladora* industry reported high labor turnover.⁴⁷⁹ Turnover was “volitional in nature,” as most workers quit for “voluntary reasons related to the conditions of employment.”⁴⁸⁰ When young people were asked why they quit, thirty percent blamed inadequate pay, thirteen percent said they had gotten married or had a child, and another thirteen percent were tired of the hard work and forced overtime; eighteen percent said they had been fired or fallen ill.⁴⁸¹ Because of high turnover, and family economic diversification, Goldin sees the workers “in transition, not fully proletarianized, but keeping a foot in agricultural practices.”⁴⁸²

Along with the *maquiladoras* came the *maras*. Young men (often co-workers at the *maquiladoras*) formed bands that were associated with petty crime and disruption of the peace.⁴⁸³ This sort of crime was sometimes “perceived as a direct consequence of migration due to the presence of the factories.”⁴⁸⁴ Nevertheless, at other times, Guatemalans said that *maras* were related generally to urban life and not specifically to the *maquiladoras*.⁴⁸⁵

473. Goldin, *Labor Turnover*, *supra* note 457, at 136.

474. *Id.*

475. Goldin, *Maquila*, *supra* note 459, at 46.

476. *Id.*

477. *Id.*

478. *Id.*

479. Goldin, *Labor Turnover*, *supra* note 457, at 139.

480. *Id.* at 139, 146.

481. *Id.* at 144–45.

482. *Id.* at 151.

483. See Goldin, *Maquila*, *supra* note 459, at 37.

484. *Id.*

485. See *id.*

3. Palm Oil Plantations in Sayaxché

Laura Hurtado Paz y Paz and Geiselle V. Sánchez Monge discuss the palm oil plantations in Sayaxché, Petén, Guatemala.⁴⁸⁶ At the end of the first decade of this century, fifty percent of those living in Sayaxché were from other municipalities and departments of Guatemala, including Baja Verapaz.⁴⁸⁷ The palm oil plantations of Sayaxché employed approximately 214,000 migrant workers annually, with many of these workers coming from Rabinal.⁴⁸⁸ Though a precise number of Maya Achi working on plantations was unavailable, over half of Rabinal's inhabitants periodically migrated to work in the capital or as temporary agricultural workers.⁴⁸⁹ There were both permanent and temporary migrant laborers in the municipality, with the latter usually working one-month stints on the plantations.⁴⁹⁰ The plantation companies, in order to avoid any liability or responsibility, did not hire the laborers themselves, but instead paid third-party contractors (*contratistas*) to find and hire the needed workers.⁴⁹¹ *Contratistas* often knew the laborers' community of origin well; being familiar with the language and agricultural cycles, they served as a contact between the plantation owners and rural indigenous laborers in other parts of the country.⁴⁹² It was often a full-time job held by older family members; a *contratista*, in addition to finding laborers for the palm oil industry, might work as an onsite manager for plantations that grew bananas, sugar cane, and watermelon.⁴⁹³

Through this arrangement, plantations avoided responsibility for the laborers because all responsibility was transferred to the *contratistas*.⁴⁹⁴ The *contratistas* hired the workers, transported the workers from their place of origin to the plantation, and had to solve any problems that arose during the trip or during work hours, such as accidents, illnesses, and complaints by the laborers.⁴⁹⁵ For example, in 2009, when thirty-four workers were buried under debris after a mine caved in, *contratistas* had to

486. See Laura Hurtado Paz y Paz & Geiselle Vanessa Sánchez Monge, *Precarización del Trabajo Agrícola en Plantaciones de Palma Africana en Sayaxché, Petén, Guatemala* [Insecurity of Agricultural Work in African Palm Plantations in Sayaxché, Petén, Guatemala], in *LA SUBCONTRATACIÓN EN AMÉRICA LATINA: MIRADAS MULTIDIMENSIONALES* [SUBCONTRACTING IN LATIN AMERICA: MULTIDIMENSIONAL VIEWS] 189, 191 (Juan Carlos Celis Ospina ed., 2012).

487. See *id.* at 192.

488. See *id.* at 206. The authors describe Rabinal as one of "the great reservoirs of labor for banana, African palm and sugar cane plantations." See generally *id.* ("los grandes reservorios de mano de obra para plantaciones de banana, palma africana, y caña de azúcar"). Most English-language sources speak of "palm oil plantations" whereas most Spanish-language sources speak of "plantaciones de palma africana." Even if the species of palm grown in Sayaxché was once native to Africa, it would invite confusion to title this section "African Palm Plantations in Sayaxché."

489. *Id.* at 190.

490. *Id.* at 194.

491. *Id.* at 197.

492. *Id.* at 198-99.

493. *Id.* at 200.

494. *Id.* at 203.

495. *Id.*

pay for funerals and pay damages to the family members of the deceased.⁴⁹⁶ In part due to this arrangement, companies had scant reason to better the working conditions of migrant laborers. Most companies in the palm oil industry failed to pay even the minimum wage as established by Guatemalan law.⁴⁹⁷ Workers who attempted to lodge complaints about working conditions faced being blacklisted.⁴⁹⁸

D. Congress, the Executive Branch, and the World Bank

It is impossible to give context to what has befallen Maya Achi without seeing the building of the Chixoy Dam in terms of international economic development and accordingly the role of the World Bank and the legislative and executive branches of the United States government. The U.S. Congress lacks direct authority over the World Bank.⁴⁹⁹ But, it tries to shape World Bank policy indirectly through legislated instructions to the U. S. Treasury Department.⁵⁰⁰ Some instructions offer protections for indigenous peoples in Guatemala, but it is unclear whether the law on the books will ultimately result in the protection of indigenous peoples in Guatemala. This section gives an overview of the World Bank, describes statutes that may protect indigenous peoples in Guatemala, and examines how these legislated instructions may be enforced on the ground.

1. *How the World Bank Works*

The World Bank Group consists of five legally distinct international institutions.⁵⁰¹ Two of these institutions form *the* World Bank: the International Bank for Reconstruction and Development (“IBRD”) and the International Development Association (“IDA”).⁵⁰² The IBRD extends loans to “middle-income and credit-worthy poor countries” for development purposes.⁵⁰³ It is self-sufficient and raises most of its funds in the world’s financial markets.⁵⁰⁴ In contrast, the IDA provides grants and loans to poor countries that are highly concessional in nature, which is why member states replenish the funds of the IDA on a regular basis.⁵⁰⁵ Guatemala

496. *Id.* at 204.

497. *Id.* at 205.

498. *Id.* at 225.

499. Daugirdas, *World Bank*, *supra* note 18, at 517. Malena Wilson’s research assistance on the World Bank helped me greatly.

500. *Id.* at 520.

501. *About the World Bank*, THE WORLD BANK, <http://www.worldbank.org/en/about> [<https://perma.cc/YZ5L-VHE9>] (last visited Mar. 1, 2019). [hereinafter *About the World Bank*]

502. *Id.* “Together, IBRD and IDA make up the World Bank.” *Id.*

503. *What is IDA?*, THE WORLD BANK, <http://ida.worldbank.org/about/what-is-ida> [<https://perma.cc/N8N8-QJAV>] (last visited Mar. 1, 2019) (noting that IDA loans have a zero or very low interest rate).

504. *International Bank for Reconstruction and Development*, THE WORLD BANK, <http://www.worldbank.org/en/about/what-we-do/brief/ibrd> [<https://perma.cc/WGH6-JCF9>] (last visited Mar. 1, 2019).

505. *What is IDA?*, *supra* note 505; Daugirdas, *World Bank*, *supra* note 18, at 524.

has received loans under the IDA.⁵⁰⁶

The IBRD and IDA are financially and legally distinct entities, but they share the same president, executive directors, governors, and office space.⁵⁰⁷ The World Bank consists of 189 shareholder member countries.⁵⁰⁸ Each member country is represented by one governor, who is usually the country's minister of finance or in a similar position. The United States governor is the Secretary of the Treasury.⁵⁰⁹ The governors constitute the Board of Governors and serve as the "ultimate policymakers at the World Bank" and convene once a year.⁵¹⁰ Each member's voting power is based on that member's capital contribution.⁵¹¹ The United States has the greatest overall voting power in the World Bank: it casts over fifteen percent of the total votes in the IBRD⁵¹² and over ten percent of the total votes in the IDA.⁵¹³

The World Bank has twenty-five executive directors, who make up the Board of Directors.⁵¹⁴ The five largest shareholders each appoint one executive director.⁵¹⁵ The United States executive director is nominated by the President and confirmed by the Senate.⁵¹⁶ The other member countries elect the remaining twenty executive directors.⁵¹⁷ The executive directors "meet at least twice a week to oversee the Bank's business, including approval of loans and guarantees, new policies, the administrative budget, country assistance strategies and borrowing and financial decisions."⁵¹⁸ The executive directors also select the president of the World Bank.⁵¹⁹ The governors can delegate almost all their duties to the executive directors,

506. Daugirdas, *World Bank*, *supra* note 18, at 524.

507. *Id.*

508. *Organization*, THE WORLD BANK, <http://www.worldbank.org/en/about/leadership> (last visited Mar. 1, 2019). [hereinafter *Organization*].

509. *Governors and Alternates*, THE WORLD BANK, <http://siteresources.worldbank.org/BODINT/Resources/278027-1215526322295/BankGovernors.pdf> [<https://perma.cc/S56F-HBV5>] (last visited Mar. 1, 2019).

510. *Organization*, *supra* note 508.

511. Daugirdas, *World Bank*, *supra* note 18, at 523. This voting structure differs from most other international organizations, where members cast their votes on a one-state, one-vote basis. *Id.*

512. *International Bank For Reconstruction And Development Subscriptions And Voting Power Of Member Countries*, THE WORLD BANK, <http://siteresources.worldbank.org/BODINT/Resources/278027-1215524804501/IBRDCountryVotingTable.pdf> [<https://perma.cc/8MDT-773P>] (last visited Mar. 1, 2019) (noting that the United States casts 15.75% of the total votes.).

513. *International Development Association Voting Power Of Member Countries*, THE WORLD BANK, <http://siteresources.worldbank.org/BODINT/Resources/278027-1215524804501/IDACountryVotingTable.pdf> [<https://perma.cc/3PRT-8XBH>] (last visited Mar. 1, 2019) (noting that the United States casts 10.36% of the total votes.).

514. *Organization*, *supra* note 508.

515. Daugirdas, *World Bank*, *supra* note 18, at 523.

516. *Id.* at 523. Matthew T. McGuire served as Executive Director until 2017. Erik Bethel has served as the Alternate Executive Director since April 2018. *Erik Bethel*, THE WORLD BANK, <http://www.worldbank.org/en/about/people/e/erik-bethel> [<https://perma.cc/5ZJW-6SQJ>] (last visited Feb. 20, 2019).

517. Daugirdas, *World Bank*, *supra* note 18, at 523.

518. *Organization*, *supra* note 508.

519. Daugirdas, *World Bank*, *supra* note 18, at 523.

and in practice the executive directors run the bank.⁵²⁰

2. *The Law-on-the-Books*

It is highly unusual for Congress to be *actively involved* in policymaking at the World Bank.⁵²¹ In the last forty years, Congress nevertheless passed many statutes to *influence* the policy of international financial institutions, including the World Bank.⁵²² This legislation instructs U.S. representatives at the financial institutions on how to vote and what policies to promote or oppose.⁵²³ Relevant provisions that could provide protections for indigenous peoples in Guatemala exist in the Foreign Assistance Act of 1961 (“FAA”), as amended, and the International Financial Institutions Act of 1977 (“IFIA”), as amended.⁵²⁴

To illustrate, Section 262p-4o of the IFIA addresses the protection of indigenous rights.⁵²⁵ It requires the Secretary of the Treasury to direct the United States executive director of the World Bank “to use the voice and vote of the United States to bring about the creation and full implementation of policies designed to promote respect for and full protection of the territorial rights, traditional economies, cultural integrity, traditional knowledge and human rights of indigenous peoples.”⁵²⁶

Other provisions exert pressure on foreign governments that commit human rights violations by withdrawing financial assistance. Section 2151n(a) of the FAA prohibits assisting any government that

engages in a consistent pattern of gross violations of internationally recognized human rights, including torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges, causing the disappearance of persons by the abduction and clandestine detention of those persons, or other flagrant denial of the right to life, liberty, and the security of person, unless such assistance will directly benefit the needy people in such country.⁵²⁷

Section 262d(e) of the IFIA contains similar language, but provides an instruction specifically to the executive.⁵²⁸ Under this section, the United States executive director is to oppose any loan or financial assistance to countries “whose governments engage in a pattern of gross violations of internationally recognized human rights, such as torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without

520. *Id.* at 523 n.35.

521. *Id.* at 555.

522. *Id.* at 519. (“Congress can and does protect its institutional prerogatives, and its active involvement in this especially important international organization has been ongoing—the rule rather than the exception.”).

523. *Id.*

524. Both the FAA and the IFIA are codified in scattered sections of 22 U.S.C. Key provisions include 22 U.S.C.A. §§ 262d, 262m, 262m-2, 262o-4, 262p-4o, 262r-2, 2151(a)(1), 2151n, 2169, 2271(b).

525. 22 U.S.C.A. § 262p-4o.

526. *Id.*

527. 22 U.S.C.A. § 2151n(a). Query whether U.S. administrations have always observed this section.

528. 22 U.S.C.A. § 262d(e).

charges, or other flagrant denial to life, liberty, and the security of person.”⁵²⁹ This instruction does not apply to assistance that “is directed specifically to programs which serve the basic human needs of the citizens of such country.”⁵³⁰ The adoption of section 262d followed Congress’s discovery that, though the United States reduced or eliminated financial aid to specific governments that committed human rights violations, other international financial institutions increased funding to those governments.⁵³¹ The section sought to prevent the executive branch from circumventing Congress’s policy preferences concerning the distribution of foreign aid.⁵³²

3. *The Law-on-the-Ground*

Congress often tries to do indirectly what it cannot do directly.⁵³³ Whether Congress is successful depends on the circumstances. First, Congress must try to motivate the executive branch to implement its legislated instructions as U.S. policy. Second, the executive branch must try to implement U.S. policy at the World Bank.

a. Congress and the Executive Branch

The constitutionality of Congress’s legislated instructions to the executive branch is unclear. Beginning in 1988, U.S. presidents have repeatedly issued signing statements that claim exclusive authority over the U.S. share-of-control over the World Bank and that reserve the right to decline to follow Congress’s instructions.⁵³⁴ But despite the constitutional objections of presidents, the Treasury Department continues to implement congressional instructions.⁵³⁵ The threat of Congress to cut funding can be an effective tool to achieve its policy goals for the World Bank.⁵³⁶ Because the United States contributes a disproportionate share of resources to the Bank, a threat to withhold these resources can sometimes move the U.S. executive director and the World Bank to implement Congress’s policy preferences.⁵³⁷ Congressional threats to cut funding, however, are generally ineffective. If the executive branch already plans to reduce financial aid to foreign countries, Congress typically has little leverage to restore it.⁵³⁸ Moreover, Congress is unlikely to wield its power of the purse in every instance.⁵³⁹

529. *Id.* Query whether U.S. executive directors have always opposed loans to such countries.

530. *Id.*

531. Daugridas, *World Bank*, *supra* note 18, at 530.

532. *Id.*

533. *Id.* at 517-19.

534. *Id.* at 542-49.

535. *Id.* at 547.

536. *Id.* at 533 (“Commentators have long acknowledged that Congress’s ability to cut off funding may well be its most important tool in shaping foreign policy—although it is hardly an all-powerful one and can be tricky to deploy effectively.”).

537. *Id.* at 534.

538. *Id.* at 540.

539. *Id.* at 533-34.

Aside from the movement of Latin Americans toward the southern border of the United States, the situation of indigenous peoples in Guatemala is not a visible issue in American politics. The relevant statutes that protect indigenous peoples in foreign countries are buried in the FAA and IFIA. The adoption of those provisions may have gone largely unnoticed, even by other legislators, because most congressional instructions to the executive branch are not the result of an open deliberative process, but are adopted as riders to appropriations bills.⁵⁴⁰ Which riders make it into an appropriations bill are often decided by a few members of Congress in leadership positions, not by a majority of both houses of Congress.⁵⁴¹

Nonetheless, the political will to protect indigenous rights in Guatemala is not entirely absent in Congress. An appropriations bill of 2014 addressed the parlous situation of indigenous communities affected by building the Chixoy Dam in Guatemala.⁵⁴² Specifically, Congress was concerned with Guatemala's implementation of a reparations plan that was finalized in 2010 and provided for the compensation of indigenous communities affected by the construction of the Chixoy Dam.⁵⁴³ After Congress finalized the reparations plan, Guatemala failed to honor its promise to compensate Maya Achi.⁵⁴⁴ In passing the annual budget of 2014, Congress included provisions in the appropriations bill that conditioned United States financial assistance to Guatemala on making meaningful progress towards the implementation of the reparations plan.⁵⁴⁵ It appears that Congress's measure contributed to the Guatemalan government's subsequent decision to act. In October 2014, in response to increasing international pressures, Guatemala's president made a legally binding commitment to implement the reparations plan.⁵⁴⁶

It is unclear to what extent Congress can motivate the U.S. World Bank executive director to further particular policies. If Congress and the executive branch share policy interests, the U.S. executive director is more likely to follow the letter and spirit of Congress's instructions. But if the executive branch does not share Congress's foreign policy preferences, Congress has limited means to ensure that the executive director actually implements

540. *Id.* at 521, 534.

541. *Id.* at 534.

542. See Barbara Rose Johnston, *Inside the Chixoy Dam Reparations Deal*, COUNTERPUNCH (Nov. 14, 2014), <http://www.counterpunch.org/2014/11/14/inside-the-chixoy-dam-reparations-deal> [<https://perma.cc/LV39-63RF>] [hereinafter Johnston, *Reparations Deal*].

543. *Id.*

544. *Id.*

545. Consolidated Appropriations Act of 2014, Pub. L. No. 113-76, 128 Stat. 5 (2014). Under § 7045(c)(1)(A), any financial assistance for the Guatemalan army requires the Secretary of State to certify "that the Government of Guatemala is taking credible steps to implement the [Reparations Plan]." *Id.* at 543. Under § 7029(f), Congress instructs the Secretary of Treasury to "direct the United States executive directors of the World Bank and the Inter-American Development Bank to report to the Committees on Appropriations not later than 30 days after enactment of this Act and every 90 days thereafter until September 30, 2014, on the steps being taken by such institutions to support implementation of the [Reparations Plan]." *Id.* at 508.

546. Johnston, *Reparations Deal*, *supra* note 542.

Congress's instructions.⁵⁴⁷ Although the World Bank has become more transparent over the years, Congress has limited access to information regarding the inner workings of the World Bank.⁵⁴⁸ In determining the integrity of the United States executive director, Congress relies mainly on public information, and the testimony and reports furnished by the Treasury, which can be self-serving.⁵⁴⁹ Even if Congress is certain that an executive director is implementing its instructions only on paper, Congress lacks access to measures which can enforce more genuine efforts.

Congress appears to be in a better position to control the vote of the U.S. executive director. There is generally less room for evasion in voting instructions, although sometimes the executive branch may interpret the voting instructions narrowly to circumvent congressional preferences.⁵⁵⁰ It is also easier to monitor the compliance with voting instructions. Under Section 262o-3 of the IFIA, the executive must make available online all negative votes and abstentions of its United States executive director.⁵⁵¹

b. The Executive Branch and the World Bank

Any attempt by the executive branch to implement a policy of protecting indigenous rights in Guatemala faces institutional hurdles. Officially, the Board of Governors possesses all powers of the World Bank. In practice, the Board delegates most of its powers to the executive directors, except for a specific list of broader powers.⁵⁵² The United States executive director has no veto powers over day-to-day decisions of the World Bank and shares the decision-making authority with other member countries.⁵⁵³ Therefore, opposition to a loan for building a dam by the U.S. executive director will not prevent the bank from approving the loan if a majority of executive directors of other member countries cast their votes in favor.⁵⁵⁴ To illustrate, shortly after Congress adopted Section 262d of the IFIA, the U.S. executive director opposed, or abstained on, 112 loan proposals based on human rights grounds.⁵⁵⁵ In spite of the resistance of the United States, the relevant international financial institution approved every single loan.⁵⁵⁶

547. Daugirdas, *World Bank*, *supra* note 18, at 553.

548. *Id.* at 551-52.

549. *Id.*

550. *Id.* at 541.

551. 22 U.S.C.A. § 262o-3.

552. *Boards of Governors*, THE WORLD BANK, <http://www.worldbank.org/en/about/leadership/governors> [<https://perma.cc/6NZ8-US53>] (last visited Mar. 1, 2019). The Board of Governors retained the powers concerning whether to “[a]dmit and suspend members; [i]ncrease or decrease the authorized capital stock; [d]etermine the distribution of the net income of the [World Bank]; [d]ecide appeals from interpretations of the Articles of Agreement by the Executive Directors; [m]ake formal comprehensive arrangements to cooperate with other international organizations; [s]uspend permanently the operations of the Bank; [i]ncrease the number of elected Executive Directors; and [a]pprove amendments to the Articles of Agreement.” *Id.*

553. Daugirdas, *World Bank*, *supra* note 18, at 532.

554. *Id.* at 526.

555. *Id.* at 531.

556. *Id.*

Perhaps Congress and the executive can shape World Bank policy more readily based on the prominent position the U.S. holds in the World Bank. After all, the U.S. was the leading force in the World Bank's creation in 1944.⁵⁵⁷ All twelve of the World Bank presidents have been American citizens.⁵⁵⁸ The Bank is based in Washington D.C.⁵⁵⁹ And the United States is the largest shareholder, and as such, the only member that retains veto power over changes in the World Bank's structure.⁵⁶⁰ So in light of the special status of the United States, actors at the World Bank might cater to U.S. foreign policy goals. But there is no guarantee that they will do so. Especially in cases where the executive director has no genuine interest in implementing Congress's policy, other member countries are unlikely to defer to congressional foreign policy.

Even if the United States could be a force for good at the World Bank, skeptics may doubt that it will actually be such a force in a way that helps indigenous peoples in Guatemala. The historical context out of which the Chixoy Dam emerged includes U.S. efforts during the Eisenhower administration to destabilize the Guatemalan government in 1953, unseat President Jacobo Arbenz in 1954, and install the military leader Castillo Armas as president that same year.⁵⁶¹ President Castillo Armas halted agrarian reform and broke up peasant unions, which adversely affected indigenous Maya.⁵⁶² There followed a series of military governments and a civil war.⁵⁶³

The development record so far is mixed. The Guatemala overview supplied by the World Bank in April 2018 said:

Thanks to prudent macroeconomic management, Guatemala has been one of the strongest economic performers in Latin America in recent years, with at GDP growth rate of 3.0% since 2012 and 4.1% in 2015. In 2017, the country's economy grew by 2.8%, according to the latest estimates, and is expected to grow by 2.6% in 2018.⁵⁶⁴

Even so, grinding poverty remains a huge problem. Guatemala "has one of the highest inequality rates in Latin America," said the World Bank, "with some of the worst poverty, malnutrition and maternal-child mortality rates in the region, especially in rural and indigenous areas."⁵⁶⁵ Poor per-

557. *The World Bank in the United States, Overview*, THE WORLD BANK, <http://www.worldbank.org/en/country/unitedstates/overview#3> [<https://perma.cc/H4WZ-4MWS>] (last visited Mar. 1, 2019). [hereinafter *United States, Overview*]

558. *Id.*

559. *About the World Bank*, *supra* note 501.

560. *United States, Overview*, *supra* note 557.

561. *See supra* text accompanying notes 281-90.

562. *See supra* text accompanying note 290.

563. *See supra* note text accompanying note 290. *See also* Moye, *supra* note 285 (discussing U.S. intervention in Guatemala).

564. *The World Bank in Guatemala: Overview*, THE WORLD BANK, <https://www.worldbank.org/en/country/guatemala/overview> [<https://perma.cc/U666-252>] (last updated Oct. 4, 2018).

565. *Id.* This dismal record dates back to at least 2009. *See generally* THE WORLD BANK, GUATEMALA POVERTY ASSESSMENT: GOOD PERFORMANCE AT LOW LEVELS (Mar. 18, 2009).

formance in these areas raises a question of whether GDP growth comes at the expense of the least well off in Guatemalan society. If the Guatemalan government decides that the World Bank and the IADB are not adequately serving the needs of its people, it can approach the Development Bank of Latin America (“CAF”) and the Central American Bank for Economic Integration (“CABEI”).⁵⁶⁶

c. Human Rights, Politics, and Corruption in Guatemala

Congressional instruction to the executive branch or the World Bank to protect the rights of indigenous peoples would be beneficial. One ray of hope lies in changes in Guatemalan politics. In 2015, President Otto Pérez Molina resigned because of a corruption scandal that was followed by a wave of protests.⁵⁶⁷ The Guatemalan people rejected candidates from the old power establishment and voted into office the political outsider and former television comedian Jimmy Morales.⁵⁶⁸ Whether President Morales would make significant changes, in particular with respect to indigenous rights, was uncertain in 2015.⁵⁶⁹

However, sources soon linked President Morales to retired military officers, who were part of a military dictatorship that existed during the civil war, and are themselves linked to human rights violations.⁵⁷⁰ The military was partly responsible for the violence inflicted on indigenous peoples during the civil war.⁵⁷¹ Early in 2016, the police arrested eighteen retired military officials who were allegedly involved in war-time massacres.⁵⁷² According to Amnesty International, “Human rights defenders, in particular those working on land, territorial and environmental issues, were at great risk.”⁵⁷³ Criminal proceedings against military officials, including those charged with crimes during the period 1960–1996, contin-

566. Guatemala is a member of the CABEI but not the CAF. In 2017, the CABEI loaned Guatemala USD 137 million to support infrastructure and other projects. *Republic of Guatemala*, CENT. AM. BANK ECON. INTEGRATION, <https://bcie.org/en/member-countries/funders/guatemala/> (last visited Mar. 1, 2019).

567. Elisabeth Malkin, *Guatemalans Ousted the President. Now What?*, N.Y. TIMES (Sept. 6, 2015), <https://www.nytimes.com/2015/09/06/world/americas/guatemalans-ousted-the-president-now-what.html> [https://perma.cc/R8GN-JSZA].

568. Anna-Cat Brigida & Deborah Bonello, *Former TV Comedian Elected in Guatemala*, L.A. TIMES, Oct. 26, 2015, at A3.

569. Anita Isaacs, Op-Ed, *A Wrong Turn for Guatemalan Democracy*, N.Y. TIMES (Nov. 5, 2015), <https://www.nytimes.com/2015/11/06/opinion/a-wrong-turn-for-guatemalan-democracy.html> [https://perma.cc/7JXQ-74RF] (noting that corrupt power structures appear to be deeply engrained in the system and that Morales lacks the support of Congress necessary to achieve significant political changes).

570. *Id.*

571. See Johnston, *Reparations Deal*, *supra* note 542.

572. Elisabeth Malkin, *Guatemala Arrests Former Military Officers in Connection With Massacres*, N.Y. TIMES (Jan. 6, 2016), <https://www.nytimes.com/2016/01/07/world/americas/guatemala-arrests-former-military-officers-in-connection-with-massacres.html> [https://perma.cc/G78E-5KWU].

573. *Guatemala 2017/2018*, AMNESTY INT’L, <https://www.amnesty.org/en/countries/americas/guatemala/report-guatemala/> [https://perma.cc/XYR6-C9YP] (last visited Mar. 1, 2019).

ued at a snail's pace and occasionally stalled.⁵⁷⁴ Judges and prosecutors had to work in the face of intimidation.⁵⁷⁵ "In January [2017], Sebastián Alonso Juan was killed during a peaceful protest against the construction of hydroelectric projects in the Ixquisis region of San Mateo Ixtatán."⁵⁷⁶

Recall Abouharb and Cingranelli's claim that honoring human rights increases economic development.⁵⁷⁷ Although there seem to have been some gains in GDP in the period 2015–2018,⁵⁷⁸ perhaps there would have been higher gains in GDP had human rights been respected. It is doubtful that Guatemala has learned much from the Chixoy Dam massacres,⁵⁷⁹ and whether the World Bank has put enough pressure on the country.

Under President Morales, corruption in Guatemalan politics has continued. On August 25, 2017, Guatemala attorney general Thelma Aldano and the head of an anti-corruption commission, Ivan Velásquez,⁵⁸⁰ asked Guatemala's "Supreme Court to remove the president's immunity from prosecution for alleged electoral crimes."⁵⁸¹ Morales responded on August 27th by expelling Velásquez and "declaring him 'persona non grata.'⁵⁸² Guatemala's Constitutional Court then temporarily blocked Morales's expulsion order.⁵⁸³

Some worry whether "an innovative hybrid international-national experiment will be able to continue to serve as a model for combating corruption and impunity," not only in Guatemala, but "in other countries."⁵⁸⁴ In Guatemala as well as other Latin American countries, the executive branch of government dominates the legislature and the courts,⁵⁸⁵ which makes it harder to pass anti-corruption laws that have any bite. Evidence exists that the poor bear a heavier burden than others under corrupt prac-

574. *Id.*

575. *Id.*

576. *Id.*

577. See *supra* text accompanying note 42 and accompanying text.

578. See *supra* text accompanying note 558 and accompanying text.

579. See *supra* notes 86–89, 559 and accompanying text.

580. Under a 1996 peace pact following civil war violence, the United Nations created the International Commission Against Impunity in Guatemala ("CICIG"). See Dudley Althaus, *Commission Has Powers, Popularity*, WALL ST. J., Aug. 28, 2017, at A7. The CICIG appointed Mr. Velásquez, a Colombian prosecutor, to head the Commission in Guatemala. Dudley Althaus, *Guatemala Faces Political Crisis Over U.N. Probe*, WALL ST. J., Aug. 28, 2017, at A7 [hereinafter Althaus, *Guatemala Crisis*].

581. Althaus, *Guatemala Crisis*, *supra* note 580, at A7.

582. *Id.*

583. Elisabeth Malkin, *Guatemala's Top Court Blocks President's Expulsion of Anticorruption Chief*, N.Y. TIMES, Aug. 29, 2017, at A8.

584. Charles T. Call, *What Guatemala's Political Crisis Means for Anti-Corruption Efforts Everywhere*, BROOKINGS (Sept. 7, 2017), <http://brook.gs/2vP66fz> [<https://perma.cc/MF7J-ZLXX>]. The international-national experiment is the CICIG mentioned in *supra* note 582. See also Witte, *Guatemala*, *supra* note 99 (pushing against corruption in Guatemala).

585. See ROSE-ACKERMAN, *supra* note 97, at 151–59 (discussing the difficulty in Latin America of creating a judiciary that refuses bribes and a legislature that passes sound, enforceable laws).

tices.⁵⁸⁶ And yet, journalist Brook Larmer sees hope.⁵⁸⁷ Larmer writes that “[a] central driver of the anti-corruption movement [in Latin America] is a young generation of judges and prosecutors armed with greater independence and, in some cases, tough new transparency laws.”⁵⁸⁸

E. Ethics of Development

The tale of the Chixoy Dam is a story of human rights abuse and rampant corruption. It is insightful, then, to tie development ethics and the ethics of dam development to the Chixoy Dam in Guatemala. Sired by U.S. involvement in Guatemala since at least the middle of the twentieth century,⁵⁸⁹ the World Bank and the Inter-American Development Bank loaned Guatemala \$177 million to build the dam.⁵⁹⁰ The Guatemalan government obtained no consent from Maya Achi and to some extent withheld information that the Rio Negro valley, where they lived, was even inhabited.⁵⁹¹ Only under strong insistence from Guatemala’s lenders did the country generate a compensation and resettlement plan.⁵⁹² Guatemala paid little heed to the plan, reneged on its promises to Maya Achi, and was complicit in the moral atrocities of kidnapping, rape, and murder of Maya Achi carried out by paramilitary groups.⁵⁹³ Even if sometimes, in a circumstance of moral evil, good arises occasionally from the ashes, often it does not. The literature on resilience indicates that post-traumatic growth can grow out of horrific conditions,⁵⁹⁴ and that has sometimes occurred in Latin America.⁵⁹⁵

Many harms from dam-induced development are foreseeable. Their foreseeability suggests that those who set such dam-building in motion have to reckon with these harms, unless development of some kind is necessary or highly desirable, and unless all other alternatives have even greater foreseeable harms. It makes sense for development lending institutions, such as the World Bank and the IADB, to evaluate the risks inherent

586. See, e.g., Brian J. Fried, *Corruption and Inequality at the Crossroad: A Multimethod Study of Bribery and Discrimination in Latin America*, 45 *LATIN AM. RES. REV.* 76 (2010) (finding that in traffic stops police “officers are more likely to target lower class individuals and let more affluent drivers off with a warning”). As the saying goes, “Dependiendo del sapo,/ Así es la pedrada,” or “The stone you throw depends on the size of the toad.” *Id.*

587. Brook Larmer, *Corruption Scandals Are Taking Down Leaders around the World— and It’s a Hopeful Sign for the Future of Developing Economies*, *N.Y. TIMES MAG.*, May 6, 2018, at 24, 26 (“Corruption is being exposed, denounced and prosecuted more vigorously, and at higher levels, than ever. And in Latin America, at least, these . . . seem to be the rumblings of a historic shift.”)

588. *Id.* at 27.

589. See *supra* text accompanying notes 287–90 and accompanying text.

590. See *supra* note 302 and accompanying text.

591. See *supra* note 303 and accompanying text.

592. See *supra* text 305 and accompanying text.

593. See *supra* text 308–13 and accompanying text.

594. See *supra* text 272–75 and accompanying text.

595. See, e.g., Berger & Weiss, *supra* note 272, at 55.

to displacement—risks that are well-summarized by Michael Cernea.⁵⁹⁶ Officials in a country that seeks to build a dam would do well to appraise the risks to their inhabitants—indigenous and nonindigenous. These officials would likewise do well to appraise the transition costs borne by those who will be displaced, and to take steps to reduce corruption that sometimes occurs whenever large sums of money from institutional lenders come into banks in the recipient country.

Conclusion

The idea of indigeneity merits careful attention and revision. Under traditional definitions of indigenous peoples, Maya Achi in Guatemala clearly qualify as indigenous. They are a distinctive trans-temporal cultural group who consider themselves different from other sectors of society and who are historically connected to a pre-invasion and pre-colonial society.⁵⁹⁷ The 55 recognized ethnic minorities in China do not qualify. They have no historical narrative of colonialism, and self-identification is irrelevant under Chinese government policy.⁵⁹⁸

Nevertheless, under the concept of indigeneity elucidated in Part I, ethnic minorities in China are indisputably indigenous because they have lived on what is now Chinese territory for hundreds if not thousands of years. Also, they suffer from oppression, discrimination, and political and cultural marginalization at the hands of the Han Chinese super-majority.⁵⁹⁹ In the Chinese context, the absence of a historical narrative of outsider conquest and colonization does not matter. Insider Han domination suffices. Ethnic minorities in China should be treated in basically the same way as indigenous peoples in other parts of the world should be treated.

The adverse effects of dam construction and operation can be limited by rooting out corruption, compensating promptly those affected, and continuing to pay the costs of resettlement until displaced persons are securely lodged in their new locations. Moreover, entities such as the World Bank that loan money to foreign governments for power dams should demand that sufficient funds be carved out for compensation and resettlement. They should also demand that an audit verify that carve-out money actually goes to compensation and resettlement.

596. See *supra* text accompanying note 263 (citing Cernea, *Economic Analysis*, *supra* note 271, at 17–18).

597. This sentence draws on a mix of the Martínez Cobo Study, *supra* note 2, and Munzer & Raustiala, *supra* note 1.

598. See *supra* text accompanying notes 58–63, 78 and accompanying text.

599. See *supra* text accompanying notes 48–85 and accompanying text.

