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 super-majority 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.

Introduction ..................................................... 824
   I. Development and Indigeneity ..................................... 831
      A. Development .............................................. 831
      B. Indigeneity .............................................. 833

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51 CORNELL INT’L L.J. 823 (2019)
II. Dam Building in China: Problems of Resettlement and Compensation ............................................ 840
   A. Resettlement, Compensation, and the Law ................. 841
   B. The Three Gorges Dam Project in Hubei Province ............ 846
   C. Dam Projects in Yunnan Province .......................... 849
   D. Attempted Reforms ........................................ 854
   E. China’s Challenges ........................................ 856
      1. Problems of Law, Regulation, Policy, and Compensation ........................................ 856
      2. Problems of Dam Performance and Corruption ................. 857
   F. Addressing China’s Challenges ............................. 858
      1. Law, Regulation, Policy, and Compensation Methods .......... 858
      2. Solutions Relating to Dam Performance and Corruption ........................................ 860
   G. Displacement, Resilience, and the Ethics of Dam-Building ........................................ 863
III. The Chixoy Dam and the Fate of Maya Achi in Guatemala ............................................... 865
   A. Historical Context .......................................... 866
   B. Maya Achi Then and Now .................................... 870
      1. Rabinal and Its Surroundings ................................ 870
      2. Pacux: A Resettlement Village .............................. 875
      3. The Village of Rio Negro ................................... 877
   C. Migration Patterns .......................................... 879
      1. Indigenous Peoples in Guatemala City ....................... 879
         a. La Terminal ........................................ 879
         b. La Brigada ........................................... 880
      2. Maquiladora Workers throughout Guatemala ................. 881
      3. Palm Oil Plantations in Sayaxché .......................... 884
   D. Congress, the Executive Branch, and the World Bank ......... 885
      1. How the World Bank Works ................................ 885
      2. The Law-on-the-Books .................................... 887
      3. The Law-on-the-Ground .................................... 888
         a. Congress and the Executive Branch ..................... 888
         b. The Executive Branch and the World Bank ............. 890
         c. Human Rights, Politics, and Corruption in Guatemala ........................................ 892
   E. Ethics of Development ....................................... 894
Conclusion ...................................................... 895

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
2019  Dam(n) Displacement  

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.” That definition worked well for the purposes of our paper on intellectual property rights in traditional knowledge.

We and Martínez Cobo 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. 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.

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

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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).


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. 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. China is distinctive in that it has a sometimes-shifting economic system that combines its communist past and present with some capitalist features, and places significant restrictions on land-use rights. 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. The construction of that dam took a heavy toll on one indigenous group in particular—namely, the Maya Achi people 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.


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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{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.\textsuperscript{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

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\textsuperscript{11}See infra text accompanying notes 303–13.

\textsuperscript{12}See infra text accompanying notes 298–302, 314, 323–30, 564–94.

\textsuperscript{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. “Guzhou 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).

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

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. 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 disbursement funds to a foreign government or closely-related entity. The United States helps fund the World Bank, but Congress has no direct authority over it. By statute, however, the U.S. Secretary of the Treasury must protect the interests, and above all the human rights, of indigenous persons. 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.

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


17. WORLD BANK, WORLD BANK OPERATIONS MANUAL (2015), available at http://siterepos.worldbank.org/EXTOPMANUAL/Resources/EntireOMExternal/updatedJuly1-2015.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. at ¶ 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.


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. 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. 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. 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. 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. 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 development 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.
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. But frequently, the law-on-the-books and the law-on-the-ground differ. 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. 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. Worse, local militias tortured, raped, and murdered individuals, burned homes and businesses, and generally terrorized the Maya Achi population. Compensation was decades late and many dollars short. 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. 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.

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 indigene-

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).
32. See infra text accompanying note 314.
33. Id.
34. Id.
35. See infra text accompanying notes 89–100.
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. Here, I offer some nuance to the benefits and drawbacks of the World Bank, the International Monetary Fund (“IMF”), 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. 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.
39. ABOUHAR & 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 . . . .

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

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. They argue that, in fact, respecting human rights fosters economic development. Unlike some scholars, Abouharb and Cingranelli do not criticize the World Bank and the IMF on the grounds that SAAs disrupt democratic institutions and destabilize civil liberties. 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.” 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

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”).
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


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); WAL-TER 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

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53. See supra text accompanying notes 2–3.
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).
2019  Dam(n) Displacement

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

How does Kingsbury’s constructivist definition stack up against China’s position? China signed the U.N. Declaration on the Rights of Indigenous Peoples. But China maintains that it has no “indigenous peoples,” only “ethnic minorities” (shǎoshùmínzú, 少数民族). 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. 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. 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.

Suppose that, under the Martínez Cobo definition 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

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58. Id. (italics, bullet points, and enumeration in original).
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/G3TT-TK5W] (last visited Feb. 27, 2019).
63. Id.
64. See INDIGENOUS PEOPLES MANUAL, supra note 2, at 6.
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 indigeneous 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. Of his Essential Requirements, “historical experience” of “severe disruption, dislocation or exploitation” seems especially important. The Strong Indicia of “nondominance in the national” society and “close cultural affinity with a particular area of land or territories” also seem important. 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. The ethnic minorities which figure prominently in Part II are Tujia, Miao, Lisu, and Tibetan ethnicities along with Bai, Nu, Pumi, and Dulong.

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.
68. Id. at 455.
70. See infra text accompanying notes 161, 176, 178, 187, 191–92.
amongst the political, economic and social elites.”

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.” Curiously, “the dominant majority Han nationality . . . groups together a wide array of culturally diverse populations.” 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.

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. 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. 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. Han also dominate unofficial ethnic minorities, such as the Mosuo and Chuanqing, in part by refusing to recognize them. Under the Martinez Cobo Study, for example, self-identifica-


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”).


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.\textsuperscript{79} Also under Kingsbury’s constructivist definition, “self-identification as a distinct ethnic group”\textsuperscript{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.\textsuperscript{81}

Third, Gray Tuttle argues that the Chinese government is guilty not only of repressing ethnic minorities but also of embracing racism.\textsuperscript{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.\textsuperscript{83} Examples include “deep and broad hostility and discrimination toward Tibetans and other non-Han Chinese citizens;”\textsuperscript{84} treating Tibetans “as second-class citizens” and “depriv[ing them] of basic opportunities, rights, and legal protections that Han Chinese enjoy;”\textsuperscript{85} “ethnic profiling” of Tibetans by “[s]ecurity and law enforcement personnel” in the form of “extra attention and questioning;”\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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

\textsuperscript{79} \textit{INDIGENOUS PEOPLES MANUAL}, supra note 2, at 6 (“consider themselves distinct from other sectors” of society).
\textsuperscript{80} See \textit{supra} text accompanying note 58.
\textsuperscript{81} “[T]he Mosuo and Chuanqing peoples self-identify as ethnic minorities but are not recognized as such.” John E. Petrovic & Roxanne M. Mitchell, \textit{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, \textit{From Nu to Nu’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).
\textsuperscript{83} \textit{Id.} at 44.
\textsuperscript{84} \textit{Id.} at 39.
\textsuperscript{85} \textit{Id.} at 40.
\textsuperscript{86} \textit{Id.}
\textsuperscript{87} \textit{Id.} at 43.
\textsuperscript{88} \textit{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 huji, 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.
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,” 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

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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].


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

101. *See infra* text accompanying note 105.
Chinese policies and practices.\textsuperscript{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”),\textsuperscript{103} the Land Administration Law of the P.R.C. (“Land Administration Law”),\textsuperscript{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”).\textsuperscript{105} The Property Law makes no distinction between the real and personal property rights of ethnic minorities and those of Han Chinese.\textsuperscript{106}

Article 47 of the Land Administration Law provides for land expropriation and compensation.\textsuperscript{107} This provision does not mention ethnic minorities or migrants but does discuss expropriation, compensation, and resettlement.\textsuperscript{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.\textsuperscript{109} Land compensation ranges from six to ten times the average output value over the three preceding years.\textsuperscript{110} The resettlement fee for each “agricultural person” is four to six times the average output value.\textsuperscript{111} The sum of (1) and (2), which might be called the base compensation, ranges from ten to sixteen times the average output value.\textsuperscript{112} Article 47 recognizes that even the

\textsuperscript{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.


\textsuperscript{106} C.f. Property Law, supra note 103, art. 51 (implying that “cultural relics” (wénwǔ, 文物) belong to the state).

\textsuperscript{107} See Land Administration Law, supra note 104, art. 47.

\textsuperscript{108} See id.

\textsuperscript{109} See id.

\textsuperscript{110} See id.

\textsuperscript{111} See id.

\textsuperscript{112} See id.
upper end of this range might be insufficient.\textsuperscript{113} However, it makes clear that the base compensation may not exceed thirty times the average output value, save perhaps in special circumstances.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{117} But as explained shortly, under China’s Property Law, there is a “socialist market economic order,” “public ownership” plays “a dominant role,”\textsuperscript{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.\textsuperscript{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

\textsuperscript{113} See id.
\textsuperscript{114} Id.
\textsuperscript{115} See id.
\textsuperscript{116} Id. art. 51.
\textsuperscript{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).
\textsuperscript{118} Property Law, supra note 103, arts. 1, 3. “Public ownership” in Article 3 includes both collective ownership and state ownership. Id. art. 3.
low; giving migrants longer-term support—once these projects are complete and generate profits—can remedy this situation.\textsuperscript{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.\textsuperscript{121} Articles 20 to 25 of the Regulation address land compensation for large- and medium-sized power dam and water conservancy projects.\textsuperscript{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”\textsuperscript{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.\textsuperscript{124} But it is less generous than the maximum available for base compensation—namely, a factor of thirty under Article 47.\textsuperscript{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.\textsuperscript{126} Yet the state frequently chooses to build new dams in areas of China in which members of

\textsuperscript{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.”

\textsuperscript{121} See Regulation on Land Requisition, supra note 105, art. 1.

\textsuperscript{122} See id. arts. 20–25.

\textsuperscript{123} Id. art. 22.

\textsuperscript{124} Land Administration Law, supra note 104, art. 47.

\textsuperscript{125} Id.

\textsuperscript{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.”

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.” 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. 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. The plan is a condition of approval, and must be publicly announced and approved by the “province, autonomous region or municipality.” Some provisions, however, seem to hedge on the protections for migrants, and no recourse exists for persons who do not want to move.

A resettlement plan under the Regulation on Land Requisition must consider the value of all submerged land including standing structures,
green crops, forests, and vegetation. 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.” 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. 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.” 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. Farmers do not have title to the land in which they work. 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. Payment for a land-use contract is made

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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, infra note 105, art. 16.

135. Id. art. 11.

136. Id. art. 32.


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


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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{143} Further, farmers may use the land solely for agriculture, and they may not sell their contract to any party for any other use.\textsuperscript{144} By law, rural collectives must provide farmers with a certificate memorializing their land-use contract.\textsuperscript{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.\textsuperscript{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.\textsuperscript{147} Construction of the dam and its reservoir displaced over 1.13 million people in China’s Hubei Province.\textsuperscript{148} The reservoir inundated an estimated “20 counties or municipal districts, 227 townships . . . 680 villages . . . and 23,800 [hectares] of farmland.”\textsuperscript{149}

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

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\textsuperscript{141} Id.
\textsuperscript{142} See Alsén, supra note 139, at 58.
\textsuperscript{143} See Property Law, supra note 103, art. 128.
\textsuperscript{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.
\textsuperscript{145} See id. at 451, 471.
\textsuperscript{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 Bùdòngchánh Děngji Zhănxing Tiáoli (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).
\textsuperscript{147} The dams were completed in 2006 and fully operational by 2012. See Pu Wang et. al., supra note 98, at 6.
\textsuperscript{148} See id.
\textsuperscript{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).
\textsuperscript{151} Id. at 203.
2019 Dam(n) Displacement 847

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.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{154} Migrants from rural areas in particular faced discrimination in their new communities.\textsuperscript{155}

After the dam’s completion, news reports indicated that migrants forced to resettle did not receive adequate compensation.\textsuperscript{156} A government-led audit of the Three Gorges Dam project bore out reports that revealed that over 2 billion\textsuperscript{157} Yuan ($44.9 million USD) out of the 85 billion Yuan ($13.6 billion USD) resettlement fund had been mismanaged or fraudulently misappropriated.\textsuperscript{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.\textsuperscript{159} Moreover, a survey of over 1,000 migrants following resettle-

\begin{footnotesize}
\begin{enumerate}
\item[152.] Id.
\item[153.] Id. at 204.
\item[154.] Id. at 205–06.
\item[155.] See id. at 208–09.
\item[157.] Here and throughout “billion” means “1,000,000,000,” i.e., American billion rather than British billion.
\item[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, \textit{Relocation Stress, Coping, and Sense of Control Among Resettlers Resulting from China’s Three
\end{enumerate}
\end{footnotesize}
ment showed an overall increase in symptoms of depression across all age groups. 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.


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).

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 Dematte, 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.travelchinaguide.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 difference 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...
2019 Dam(n) Displacement

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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{167}

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

\begin{footnotesize}
\begin{enumerate}
  \item\textsuperscript{162} See Brown & Xu, \textit{supra} note 137, at 777.
  \item\textsuperscript{163} See id. at 778. In China, the Mekong is often called the Salween River. \textit{Id.} See also Tom Phillips, \textit{Joy as China Shelves Plans to Dam "Angry River"}, \textit{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, \textit{“Angry River”}]. In Thailand, the Nu is called the Salween River and in parts of Myanmar the Thanlwin River. \textit{See id.}
  \item\textsuperscript{164} See generally Brendan A. Galipeau, Mark Ingman & Bryan Tilt, \textit{Dam-Induced Displacement and Agricultural Livelihoods in China’s Mekong Basin}, 41 Hum. ECOLOGY 437 (2013).
  \item\textsuperscript{165} See Bryan Tilt, Yvonne Braun & Daming He, \textit{Social Impacts of Large Dam Projects: A Comparison of International Case Studies and Implications for Best Practice}, 30 J. ENVT. MGMT. 5254, 5254 (2008).
  \item\textsuperscript{166} See id.
  \item\textsuperscript{167} Inadequate and ill-maintained irrigation exacerbated this problem. \textit{See id.}
  \item\textsuperscript{169} Id.
\end{enumerate}
\end{footnotesize}
Dachaoshan Dam on the Mekong, downriver from the Manwan Dam.\textsuperscript{170} The government installed irrigation in the area to which the village was resettled.\textsuperscript{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.\textsuperscript{172} Moreover, the local government did not pay the migrants all the resettlement money they were due.\textsuperscript{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.\textsuperscript{174} Heightened awareness of this vulnerability combined with other factors may affect plans for future dams.\textsuperscript{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.”\textsuperscript{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”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{170} See Meng Si, The Fate of People Displaced by the Mekong Dams, in CHINADIALOGUE, 25, 25 (2013).
\textsuperscript{171} Id.
\textsuperscript{172} Id.
\textsuperscript{173} Id.
\textsuperscript{174} See Philip H. Brown, Darrin Magee & Yilin Xu, Socioeconomic Vulnerability in China’s Hydropower Development Programs, 19 CHINA ECON. REV. 614, 623 (2008).
\textsuperscript{175} Phillips, “Angry River,” supra note 163.
\textsuperscript{176} Id.
\textsuperscript{177} This pronouncement is the interpretation of Phillips, “Angry River,” supra note 163.
\textsuperscript{178} See id. (listing these reasons).
\textsuperscript{179} Id. at 624.
China.\textsuperscript{180} The eight previously proposed dams in Nujiang Prefecture would displace over 36,000 persons who belong to ethnic minorities.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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, Trung, 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 Trung, 32 Linguistics of the Tibeto-Burman Area 91, 92, 108 (2009).


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,
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 dàkāifá).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

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

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.

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.”

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. 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


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.\textsuperscript{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.\textsuperscript{215} Cernea proposes that resettlement costs be calculated ex ante and extracted from the economic rents generated by dam projects.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{220} Shi also proposes that resettlement planners craft detailed policies and procedures to mitigate the loss of significant cultural knowledge and practices.\textsuperscript{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.\textsuperscript{222} They emphasize that compensation rates have increased along with public awareness and concern over the life prospects of resettled persons.\textsuperscript{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

\begin{itemize}
  \item \textsuperscript{214} See id.
  \item \textsuperscript{215} Id. at 117.
  \item \textsuperscript{216} Id. at 95.
  \item \textsuperscript{217} Id.
  \item \textsuperscript{218} Id. at 105.
  \item \textsuperscript{220} See Shi, China’s Experiences, supra note 219, slide 34.
  \item \textsuperscript{221} See id. at slide 41.
  \item \textsuperscript{222} See, e.g., Pu Wang et al., supra note 98, at 6.
  \item \textsuperscript{223} See id. at 7–8.
\end{itemize}
and concern have risen. Nevertheless, though Chinese officials may disclose more information than they used to, 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. 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. 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” 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. 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).
228. Id.
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

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\(^{230}\) 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 pose “a major obstacle” to China).


\(^{232}\) 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-hydroelectric-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.”).


\(^{234}\) 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

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 landholding 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

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\(^{238}\) 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.


\(^{243}\) “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.” 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. But in 2011, the State Council announced a new Regulation on the Expropriation of Buildings on State-Owned Land and Compensation. Statutorily, roads, dams, national defense, health, education, and housing for low-income persons all qualify as being in the public interest. 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
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. Corruption, as understood generally in this Article, is an abuse of trust for personal, familial, or political gain. And by way of elaboration, trust is assured reliance based on moral, social, and legal rules. Many scholars employ the Transparency International’s Corruption Perceptions Index ("CPI") to measure corruption. But strictly speaking, the CPI measures perceptions of corruption rather than corruption itself. Wholly accurate measurements of corruption are elusive, for corrupt individuals typically do their own dirty work to avoid detection.

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

Corruption also has a negative impact on individuals because it is “a lived experience for real people.” 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.”

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. Second, collectively protest corruption. Protests of this sort by Chinese citizens can be risky but are increasing as China grows more transparent. Third, build institutions so as to prevent, or at least lessen, corruption—this step has seen success in Singapore and Hong Kong. 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. Sixth, transform the character of individuals. The idea here is to instill values and norms that prompt individuals to act in ways that are morally good.

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.


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”). The CCDI has pursued high-level officials and minor civil servants alike, though the former gets the most international press. However, the fairness of these investigations has come under question. 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.” 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-

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 Snare an Ex-General, N.Y. TIMES, July 1, 2014, at A6.


cess of moving from the former to the latter.\textsuperscript{270} transition costs nevertheless exist in moving from one to the other.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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


\textsuperscript{271} See David Eades, \textit{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).


\textsuperscript{273} Malgorzata Pecillo, \textit{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 policymakers 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 & J ULIAN 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.


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 \textit{campesino} leagues to advocate for their interests.\(^{288}\) Arbenz also supported agrarian reform, which consisted of the expropriaion of


\(^{280}\) Capitan General, Encyclopædia Britannica (Mar. 22, 2007); Guatemala Profile, supra note 279; United Provinces of Central America, Encyclopædia Britannica (Nov. 11, 2011); Guatemala, Encyclopædia Britannica (Oct. 31, 2018).

\(^{281}\) Guatemala, Encyclopædia Britannica supra note 280; Central America, supra note 280.

\(^{282}\) Guatemala, Encyclopædia Britannica supra note 280.

\(^{283}\) Id.; Jorge Ubico, Encyclopædia Britannica (Nov. 6, 2018).

\(^{284}\) Guatemala, Encyclopædia Britannica supra note 280; Jorge Ubico, supra note 283.


\(^{286}\) 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/J9J2-KPRM].

\(^{287}\) Guatemala, Encyclopædia 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.\(^ {301}\)


\(^{290}\). 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’, Achi, 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. 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. 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. 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.

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. 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. Maya Achi reiterated that they did not want to leave, and...
violence erupted.\textsuperscript{308} Across five massacres, paramilitary squads killed over 400 Maya Achi.\textsuperscript{309} In one particular massacre, 107 children were killed, and seventy-three women were raped and tortured before being murdered.\textsuperscript{310} Later in 1983 during the filling of the reservoir, additional Maya Achi were killed while attempting to flee or to resist forcible resettlement.\textsuperscript{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.\textsuperscript{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.\textsuperscript{313} The local population consisted predominantly of Maya Achi.\textsuperscript{314} The government and its allies removed some villagers by force, tortured others, and killed many.\textsuperscript{315} The treatment of Maya individuals during la Violencia amounted to genocide and crimes against humanity.\textsuperscript{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.\textsuperscript{317} Maya people generally make up nearly forty percent of Guatemala’s inhabitants.\textsuperscript{318}
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. Over eighty percent of the population identified itself as Maya Achi. Only twenty percent of the Maya Achi inhabitants of the municipality lived in the town of Rabinal. The rest lived in smaller villages in the surrounding areas. The economy of Rabinal depended mostly on agriculture, especially the subsistence farming of corn and beans. Roughly forty percent of the population was illiterate in the early twenty-first century. 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. 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.


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. Id. at 51.

324. Id. at 51.

or work in the capital.”326 Most migrants were younger people, who often chose to work in the maquiladoras327 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-

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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 Vallec Cobar, supra note 319, at 50.
329. Id.
330. Id. at 152.
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,  

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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.” Río Negro Massacres 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.
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.”

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*. The *cofradías*, along with the Roman Catholic Church, were one of the main pillars of Rabinal society. These brotherhoods were a link between the Catholic Church and indigenous communities and facilitated the adaptation of pre-Columbian traditions into Catholic practices. The *cofradías* seemed to gain their respect and status by organizing and funding religious rituals and community festivities.

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.” The indigenous mayor, who was also the general administrator of all the local *cofradías*, had significant judicial power. 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].” Moreover, the members of the *cofradía* usually consulted the municipal mayor about decisions to be taken by the

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351. Id. (“tristeza, sensación de injusticia, miedo, terror, horror, soñar a los masacrados, tortura psicológica, tormento, sufrimiento, dolor, impotencia, colera, duelo alterado, problemas psicosomáticos, 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{362} As one social activist and victim of the civil war put it, ”the cofradía is nothing but a symbol.”\textsuperscript{363} Still others in the community blamed the growing presence of Protestant groups for the decreasing importance of the cofradías in Rabinal society.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{368} If the cofradías were once the “center of community life”\textsuperscript{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.\textsuperscript{370} Only sixty percent of those interviewed said they have children who knew how to weave.\textsuperscript{371} Though the decrease was modest, it suggested a loss of cultural knowledge over

\textsuperscript{359} Id.

\textsuperscript{360} RIVERA ALVAREZ, supra note 348, at 13.

\textsuperscript{361} DEL VALLE CÓBAR, supra note 319, at 146.

\textsuperscript{362} Id. at 145.

\textsuperscript{363} Id. (“la cofradía es como un símbolo nada más”).

\textsuperscript{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.

\textsuperscript{365} DEL VALLE CÓBAR, supra note 319, at 144–45.

\textsuperscript{366} Id. at 81.

\textsuperscript{367} Id. at 85.

\textsuperscript{368} Id. at 143.

\textsuperscript{369} Id. at 143 (“el centro de la vida de las comunidades”).

\textsuperscript{370} RIVERA ALVAREZ, supra note 348, at 22.

\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{374} This “resurgence,” as one scholar described it, was linked to the use of traditional medicines before visiting a health clinic.\textsuperscript{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.\textsuperscript{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.\textsuperscript{377}

2. \textit{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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{380} Some, who refused to live in Pacux, left immediately for the coastal sugar cane planta-

\begin{itemize}
  \item \textsuperscript{372} Id.
  \item \textsuperscript{373} Id. at 24–26.
  \item \textsuperscript{374} \textit{Del Valle Cobar}, supra note 319, at 173.
  \item \textsuperscript{375} Id. at 174.
  \item \textsuperscript{376} Id. at 177.
  \item \textsuperscript{377} Id. at 184–85.
  \item \textsuperscript{379} Colajacomo, supra note 10, at 7.
  \item \textsuperscript{380} Id.
\end{itemize}
The move to Pacux transformed the life situation of the Rio Negro villagers. They went from each having 22.5 caballerías of land in Rio Negro to just seven caballerías in Pacux. 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.” For example, residents lost access to the medicinal plants that once grew along the river. The land around Pacux, wrote one author, was “insufficient both in quantity and quality to feed the resettled population.” The poorly constructed homes in Pacux, which were in an “advanced state of decay,” made no room for livestock or open-air community areas. And there were only 150 homes for 170 families.

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. Many younger people worked in the maquiladoras found in other parts of the country. Another option for younger people was “three-year army service, where they [got] clothes, housing, food, and [were] paid $60 a month.” Women in Pacux often earned income from working as domestic helpers in the town of Rabinal or by selling artisanal goods. Though both men and women migrated for work, women were more likely than men to return to Pacux and take care of children.

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

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381. Einbinder, supra note 378, at 17.
384. Id. at 11.
385. Id. at 10.
386. Stewart, supra note 325, at 265.
387. Colajacomo, supra note 10, at 11.
388. Id. at 10.
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.
394. Martínez, supra note 389, at 292; Biesemans & Janssens, supra note 395, at 45.
2019 Dam(n) Displacement 877
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

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 masacres. 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.
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.
area. 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). 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. 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.

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. The center provided food and accommodation for up to 30 people, and offered commemorative tours of the principal massacre sites around Rio Negro. 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.” Rio Negro eventually had a school that offered bilingual education and classes that touched on themes of violence in Rio Negro’s history.

One scholar noted that the villagers of Rio Negro differed from other Rabileños 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.” Every year on March 13, the community began to gather to commemorate the massacres. The service involved a nighttime Maya ceremony of prayers and offerings and a Catholic Mass on the following day. Visitors came to the ceremony from Pacux and other communities. Remembering the massacres was a way for the community to unify, but Rio Negro villagers judged the building of the dam and the ensuing...
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 INDIGENA 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, Totonicapán, 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. 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.

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. Many of the recent arrivals came from Las Verapaces (Baja Verapaz and Alta Verapaz). 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. Women tended to make money by selling inexpensive goods or making tortillas. Younger workers often labored in nearby maquiladoras. La Brigada had a reputation for danger and suffered from murders, rapes, muggings, and drug trafficking. To avoid the maras, residents made sure to be home early. Yet even within the family, home problems existed, including alcoholism and domestic violence.

Family predominated in La Brigada. 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. As in La Terminal, the children in La Brigada had alarmingly low levels of education. Most did not complete primary school, and a quarter of the children over five years old were not in school. Still, unlike in La Terminal, it appeared that many young dependents in La Brigada did not join the work force.

Many younger indigenous persons living in La Brigada linked being indigenous to being poor and subordinated. They tried to avoid the labor of their parents, such as construction and domestic work, in hopes of finding so-called “clean” jobs. 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...
about twenty years old in 2002. He came to La Brigada with his family at the age of seven to do better financially and to escape La Violencia. His father worked in construction, and his mother, along with her oldest daughter, her sister, and her niece, had a tortillería that supplied tortillas for food stalls at a maquiladora. Nicolás left his studies before finishing primary school and eventually worked as a salaried painter for a company. Nicolás’s oldest sister and his mother still wore traditional Maya clothing, and they, along with Nicolás’s father, still spoke Achi. But Nicolás and his other siblings were unable to speak Achi, and none of them wore traditional clothing. Moreover, “Nicolás’ new wife [was] from the capital, and Nicolás [did] not assign to her any ethnicity.” 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. When asked about the possible ethnicity of his future children, Nicolás said that they will be not indigenous, but “mixed.” According to Camus, Nicolás sought “to avoid references to his life prior to his arrival in the capital.”

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

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.” 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. Approximately seventy percent of maquiladora workers were young women.
who were preferred for supposedly being “docile” and “flexible.” Work-
ers older than twenty-five were usually male and indigenous Maya. They saw working in a maquiladora as better than working on the coastal planta-
tions, which was, according to Goldín, “characterized by semi-slave debt peonage work environments and minimal salaries.”

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 agri-
cultural production with the aid of younger family members or hired labor. Ninety percent of maquiladora households surveyed in Goldín’s study were also involved in agricultural production. On average, “maquila workers [kept] approximately twenty percent of their wages and pool[ed] eighty percent for household use.” Goldín notes that this “access to cash mean[tt] access to decision making [within the family unit].” The wages earned in maquiladoras also enabled families to buy consumer goods, including televisions, cell phones, and some kinds of clothes.

And yet, workers reported ambivalence about their jobs. 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. 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. Goldín 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.”

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 relations-
ships.” 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.” Moreover, because workers

462. *Id.* at 38.
463. *Id.* at 39.
465. *Id.* at 137.
466. *Id.*
467. *Id.*
468. *Id.* at 137, 146.
469. *Id.* at 137.
470. *Id.*
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.\footnote{Goldin, Labor Turnover, supra note 457, at 136.} “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.”\footnote{Id.}

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.”\footnote{Id., Maquila, supra note 459, at 46.} 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.\footnote{Id.} Many young maquiladora workers viewed agricultural work as “our parents’ jobs” and regarded it as “too hard or tedious.”\footnote{Id.} The fact that “land [was] too scarce and the returns of existing lots [were] diminishing” further contributed to a lack of interest in agriculture.\footnote{Id.}

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.\footnote{Goldin, Labor Turnover, supra note 457, at 139.} Turnover was “volitional in nature,” as most workers quit for “voluntary reasons related to the conditions of employment.”\footnote{Id. at 139, 146.} 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.\footnote{Id. at 144–45.} Because of high turnover, and family economic diversification, Goldin sees the workers “in transition, not fully proletarianized, but keeping a foot in agricultural practices.”\footnote{Id. at 151.}

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.\footnote{See Goldin, Maquila, supra note 459, at 37.} This sort of crime was sometimes “perceived as a direct consequence of migration due to the presence of the factories.”\footnote{Id.} Nevertheless, at other times, Guatemalans said that maras were related generally to urban life and not specifically to the maquiladoras.\footnote{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. 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. The palm oil plantations of Sayaxché employed approximately 214,000 migrant workers annually, with many of these workers coming from Rabinal. 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. There were both permanent and temporary migrant laborers in the municipality, with the latter usually working one-month stints on the plantations. 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.

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. 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.

Through this arrangement, plantations avoided responsibility for the laborers because all responsibility was transferred to the contratistas. 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. For example, in 2009, when thirty-four workers were buried under debris after a mine caved in, contratistas had to


\[487. \text{See id. at 192.}

\[488. \text{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. \text{id. at 190.}

\[490. \text{id. at 194.}

\[491. \text{id. at 197.}

\[492. \text{id. at 198–99.}

\[493. \text{id. at 200.}

\[494. \text{id. at 203.}

\[495. \text{id.} \]
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

496. Id. at 204.
497. Id. at 205.
498. Id. at 225.
500. Id. at 520.
502. Id. “Together, IBRD and IDA make up the World Bank.” Id.
505. What is IDA?, supra note 505; Daugirdas, World Bank, supra note 18, at 524.
has received loans under the IDA.\footnote{Daugirdas, World Bank, supra note 18, at 524.}

The IBRD and IDA are financially and legally distinct entities, but they share the same president, executive directors, governors, and office space.\footnote{Id.}

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.\footnote{Governors and Alternates, THE WORLD BANK, http://siteresources.worldbank.org/BODINT/Resources/278027-1215526322295/BankGovernors.pdf [https://perma.cc/56F-HBV5] (last visited Mar. 1, 2019).}
The governors constitute the Board of Governors and serve as the “ultimate policymakers at the World Bank” and convene once a year.\footnote{Organization, supra note 508.}

Each member’s voting power is based on that member’s capital contribution.\footnote{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.}
The governors can delegate almost all their duties to the executive directors,

\footnote{Organization, supra note 508.}


\footnote{Organization, supra note 508.}

\footnote{Daugirdas, World Bank, supra note 18, at 523.}


\footnote{Organization, supra note 508.}

\footnote{Daugirdas, World Bank, supra note 18, at 523.}

2019  *Dam(n) Displacement*  887

and in practice the executive directors run the bank.  

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

   It is highly unusual for Congress to be *actively involved* in policymaking at the World Bank. In the last forty years, Congress nevertheless passed many statutes to *influence* the policy of international financial institutions, including the World Bank. This legislation instructs U.S. representatives at the financial institutions on how to vote and what policies to promote or oppose. 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.

   To illustrate, Section 262p–4o of the IFIA addresses the protection of indigenous rights. 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." 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.

   Section 262d(e) of the IFIA contains similar language, but provides an instruction specifically to the executive. 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

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520. *Id.* at 523 n.35.
521. *Id.* at 535.
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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{531} The section sought to prevent the executive branch from circumventing Congress’s policy preferences concerning the distribution of foreign aid.\textsuperscript{532}

3. The Law-on-the-Ground

Congress often tries to do indirectly what it cannot do directly.\textsuperscript{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.\textsuperscript{534} But despite the constitutional objections of presidents, the Treasury Department continues to implement congressional instructions.\textsuperscript{535} The threat of Congress to cut funding can be an effective tool to achieve its policy goals for the World Bank.\textsuperscript{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.\textsuperscript{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.\textsuperscript{538} Moreover, Congress is unlikely to wield its power of the purse in every instance.\textsuperscript{539}

\textsuperscript{529} Id. Query whether U.S. executive directors have always opposed loans to such countries.
\textsuperscript{530} Id.
\textsuperscript{531} Daugridas, World Bank, supra note 18, at 530.
\textsuperscript{532} Id.
\textsuperscript{533} Id. at 517–19.
\textsuperscript{534} Id. at 542–49.
\textsuperscript{535} Id. at 547.
\textsuperscript{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.”).
\textsuperscript{537} Id. at 534.
\textsuperscript{538} Id. at 540.
\textsuperscript{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. 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.

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. 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. After Congress finalized the reparations plan, Guatemala failed to honor its promise to compensate Maya Achi. 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. 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.

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.
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. 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. 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. 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. 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.

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. 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. 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. 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. In spite of the resistance of the United States, the relevant international financial institution approved every single loan.

547. Daugirdas, World Bank, supra note 18, at 553.
548. Id. at 551–52.
549. Id.
550. Id. at 541.
552. Boards of Governors, The World Bank, http://www.worldbank.org/en/about/leadership/governors [https://perma.cc/6NZB-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]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. All twelve of the World Bank presidents have been American citizens. The Bank is based in Washington D.C. 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. 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. President Castillo Armas halted agrarian reform and broke up peasant unions, which adversely affected indigenous Maya. There followed a series of military governments and a civil war.

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.

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.” Poor per-
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”).

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. The Guatemalan people rejected candidates from the old power establishment and voted into office the political outsider and former television comedian Jimmy Morales. Whether President Morales would make significant changes, in particular with respect to indigenous rights, was uncertain in 2015.

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. The military was partly responsible for the violence inflicted on indigenous peoples during the civil war. Early in 2016, the police arrested eighteen retired military officials who were allegedly involved in war-time massacres. According to Amnesty International, “Human rights defenders, in particular those working on land, territorial and environmental issues, were at great risk.” Criminal proceedings against military officials, including those charged with crimes during the period 1960–1996, contin-

566. Guatemala is a member of the CAF but not the CABEI. In 2017, the CAF 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/founders/guatemala/ (last visited Mar. 1, 2019).


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.


ued at a snail’s pace and occasionally stalled. Judges and prosecutors had to work in the face of intimidation. 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.

Recall Abouharb and Cingranelli’s claim that honoring human rights increases economic development. Although there seem to have been some gains in GDP in the period 2015–2018, 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, and whether the World Bank has put enough pressure on the country.

Under President Morales, corruption in Guatemalan politics has continued. On August 23, 2017, Guatemala attorney general Thelma Aldano and the head of an anti-corruption commission, Ivan Velásquez, asked Guatemala’s “Supreme Court to remove the president’s immunity from prosecution for alleged electoral crimes.” Morales responded on August 27th by expelling Velásquez and “declaring him ‘persona non grata.'” Guatemala’s Constitutional Court then temporarily blocked Morales’s expulsion order.

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.” In Guatemala as well as other Latin American countries, the executive branch of government dominates the legislature and the courts, 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.
582. Id.
583. Elisabeth Malkin, Guatemala’s Top Court Blocks President’s Expulsion of Anticorruption Chief, N.Y. TIMES, Aug. 29, 2017, at A8.
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).
And yet, journalist Brook Larmer sees hope. 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.”

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, the World Bank and the Inter-American Development Bank loaned Guatemala $177 million to build the dam. 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. Only under strong insistence from Guatemala’s lenders did the country generate a compensation and resettlement plan. 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. 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, and that has sometimes occurred in Latin America.

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. 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. 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.

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. 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.

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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.