

# Creating "Indian Country" in Taiwan?

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Ericsson investigates the currently debated proposal to create Indigenous Autonomous Areas (IAA) for Taiwan's aboriginal communities to increase their political and social empowerment and preserve their traditional cultures. He compares the IAA model to the system of Native American reservations in the United States, focusing on the legal implications of these separate yet equal regions, and analyzes a specific case on the ownership of natural resources in an aboriginal community.

Niclas Ericsson graduated Georgetown University's School of Foreign Service in 1996. After spending one year at the Hopkins-Nanjing Center, he worked at the Brookings Institution for two years as a research assistant on the Chinese economy. In 2002, he graduated Harvard Law School and spent 2002-2003 on a Fulbright Scholarship in Taiwan doing research on indigenous rights. He currently works as an attorney in Washington, D.C. The indigenous inhabitants of Taiwan have historically been treated as second-class citizens, deprived of their land, and forced by administrative authorities to "civilize." As the Taiwanese government has become democratic, the indigenous inhabitants have sought ways to obtain more authority for themselves. Taiwan's legislature is currently considering legislation that would carve out and create autonomous indigenous areas for the indigenous inhabitants of Taiwan. The legislation would create at least one Indigenous Autonomous Area (IAA) for each of the recognized tribes in Taiwan, and spell out how these IAAs would function. 1 At a news conference announcing the 12th official tribe in Taiwan, the Chen Shui-bian government stated that it would structure its relations with the indigenous tribes on a nation-to-nation (guo-yu-guo) basis, likening its model to the relationship the US government has with Native Americans. 2 It is therefore revealing to compare the proposed IAAs with "Indian Country," territory over which Native Americans in the US have special rights. Even though "Indian Country" in the US is closely associated with the troubled reservation system, Native Americans have territory that is uniquely "Indian," enabling them to maintain themselves both politically and culturally in a way that would otherwise be impossible. Similarly, the proposed IAA in Taiwan would go some way in establishing "Indian Country" in Taiwan to protect and promote the rights and interests of the indigenous population.

This article assesses the proposed IAAs and is comprised of six sections. The first section introduces the various indigenous tribes in Taiwan. The second section traces the history of interaction between the indigenous inhabitants and the colonizers and settlers in Taiwan, and provides the context for how IAAs have emerged as a central issue for the Taiwanese indigenous inhabitants. In the third section, the draft law on the proposed IAAs is analyzed with respect to the nature of the IAAs and their relevant strengths and shortcomings. The fourth and fifth sections discuss a recent court case in Taiwan, involving wild honey, that raised indigenous rights issues. The resolution of the case under current Taiwanese law is then assessed, followed by a comparison of the same fact pattern's resolution under US Federal Indian Law. In the final section, the article returns to the impact that an IAA may have on the set of circumstances raised in the wild honey case, relative to the resolution of the case under current law in Taiwan and US Federal Indian Law. Ultimately, even if the autonomous areas are clearly a step in protecting the rights of indigenous inhabitants, the draft fails to transfer elements of self-rule that Native Americans living on reservations possess to the indigenous inhabitants of Taiwan.

## Indigenous Inhabitants in Taiwan

The cultural make-up of Taiwan is exceedingly complex with significant overlapping and interconnected relationships: different groups of inhabitants have lived on the island for thousands of years, others for hundreds of years, and still others have arrived more recently. By substantially simplifying the picture, one can say four cultural groups comprise Taiwanese society today. These crude distinctions are drawn in order to emphasize the small minority that indigenous inhabitants Taiwan represent, compared with Chinese immigrants. In order of size, the four groups that comprise Taiwanese society are: the Taiwanese (ben-sheng ren) 3, descendants of Chinese settlers from the 1600s onward; the Mainlanders (wai-sheng ren), survivors or descendants of those who fled mainland China post-1949; the Hakka (ke-jia ren), descendants of the Hakka community who have migrated from mainland China since the 1600s; and the indigenous inhabitants of Taiwan (yuan-zhu min-zu), most likely descendants of Malayo-Polynesian settlers, who have resided in Taiwan since at least the beginning of the last millennium. Of these groups, the indigenous inhabitants make up about 1-2% of the total population.

The government of Taiwan officially recognizes 12 tribes among the indigenous community. 4 Differences among some tribes are extremely clear. A speaker of Atayal cannot communicate with someone speaking Tsou. In other circumstances, groups claiming separate tribal origins have been lumped together. The indigenous inhabitants who consider themselves members of the unrecognized Taroko/Truku tribe are treated as part of the Atayal. Finally, some tribes are simply constructs of the anthropological researchers grouping together those they thought should be together, even where the communities did not identify themselves as part of the same group. For example, researchers created the Atayal tribe by grouping together many individual villages of similar heritage in a contiguous geographic area.

## A Short History of Relations between the Indigenous Inhabitants and the Settlers

Only with the arrival of the Japanese in 1895 did the governing authorities on Taiwan begin to address the issues arising from the relatively lower development standard of the indigenous inhabitants systematically. Although the Dutch and Spanish imposed literacy and Christianity on the indigenous communities in the early 1600s, they did not stay in Taiwan long enough to impact their welfare to a substantial degree. By contrast, the Qing authorities preferred to have as little to do with the indigenous communities as possible. The Japanese interest in exploiting the resources in the areas inhabited by the indigenous communities caused the Japanese to take a more serious interest in the communities than any previous administration. When the KMT took over Taiwan in 1945, they continued the Japanese policies to protect and “modernize” the indigenous communities while at the same time extracting resources from their land. Real changes in the way the indigenous inhabitants were treated by the government only took place in the 1990s.

The influx of Chinese settlers during the 1600s radically changed the environment for indigenous inhabitants in Taiwan. When the Dutch arrived in Taiwan in the early 1600s, the indigenous inhabitants relied mainly on hunting and fishing, and had only rudimentary agricultural skills, activities that proved difficult to tax. The Dutch administration encouraged Chinese settlement from Mainland China to broaden the tax base.<sup>5</sup> As the Chinese arrived, indigenous communities along the western coast were either assimilated or pushed back into the interior.

While the Dutch and Spanish actively sought to “civilize” the indigenous population, the Chinese authorities in Taiwan adopted policies that isolated indigenous inhabitants.<sup>6</sup> After the Qing exerted sovereignty over Chinese parts of the island in the 1680s, authorities sought to limit encroachment of Chinese settlers into indigenous areas. The Qing government instituted a variety of measures to carry out this policy, such as controlling transactions between the Chinese and aborigines, prohibiting the sale of land by aborigines to Chinese, organizing a system of fortifications along the frontier to prevent settlement by Chinese and incursions by aborigines, and imposing onerous restrictions on emigration from China. Due to the lack of interest by the central government, the paucity of resources, and the pervasiveness of corruption, these measures were rarely effective.

The growing and unruly Chinese community on Taiwan forced the Qing government to deepen and expand its control over Taiwan. As the Chinese settlers moved towards central and northern Taiwan, the Qing government followed, moving the boundary for settlement eastward and erecting forts to protect Chinese settlers. The Qing accelerated the extension of its authority as the Japanese threatened to annex eastern portions of Taiwan in the 1860s. By 1895, when Taiwan was handed to Japan at the end of the Sino-Japanese War, even the most remote tribes had some sort of contact with the Qing government.<sup>7</sup>

The Japanese adopted a “civilizing” attitude toward the population of its colony.<sup>8</sup> As early as the Dutch, colonizers and settlers had noted the differences among the indigenous communities. Japanese anthropologists, however, elevated the study of these differences into systematic categorization.<sup>9</sup> Through their efforts, for example, the community grouping “tribe” began to be used to describe a collection of indigenous communities with generally acknowledged similar characteristics. The Japanese identified and named the individual groups, and by the late 1930s the Japanese stopped identifying the aborigines as “cooked” or “raw barbarians.”<sup>10</sup> By 1945, at the end of the period of Japanese occupation, nine of the now twelve tribes were officially “recognized.”

Whatever benefits Japanese colonization had for Taiwan, Japanese occupation was primarily self-serving and exploitative. To acquire resources, the Japanese government on Taiwan initially pursued a policy of pacifying the aborigines and forcing them to submit to Japanese authority. Indigenous land was nationalized under Japanese state ownership and organized as “mountain reservations.” Much like the Qing authorities before it, the Japanese government instituted a system of fortified villages along the frontier of less-developed areas to control the indigenous population. Japan also launched military raids deep into the central mountains and the east coast to force indigenous communities into submission.

The pacification and submission policies proved financially burdensome and achieved limited success. The annihilation of an entire aboriginal community by the Japanese army at Wushe in 1930 in response to attacks on Japanese in the area was evidence of this failure.<sup>11</sup> As a result, Japanese authorities began a mission to “Japanize” the indigenous population in order to extract resources more efficiently.<sup>12</sup> The Japanese forcibly moved many communities to lower-lying areas near Japanese military and police outposts in order to exert more effective influence over the aborigines. By killing those who resisted the Japanese, forcibly removing individuals to be Japanized from their homelands, and enforcing the use of Japanese language and names, the indigenous communities that had been relatively independent prior to Japanese colonization became indelibly, and detrimentally, tied to the society of the Chinese and Japanese settlers.

Sovereignty over Taiwan was transferred to the Nationalist Kuo-mintang (KMT) government in China after the defeat of Japan in 1945. Until the early 1950s, the KMT administered the indigenous communities in a similar manner as the Japanese had done. As the KMT solidified its control over Taiwan, it asserted its authority over the indigenous areas. All land in the mountain areas (shan di)<sup>13</sup> was nationalized; non-state ownership was extinguished, and the aborigines on the land were given limited use rights.<sup>14</sup> In the 1950s and 1960s, senior leaders in the indigenous communities were co-

opted by the KMT, and the welfare of the community was provided through the KMT representatives. 15 The KMT instituted a Mandarinization policy and indigenous given names were changed to Mandarin ones just as the Japanese had changed them to Japanese. 16 The KMT provided economic subsidies to the poorer areas, promoted health services to improve quality of life and change “backward” practices, and actively encouraged farming, a more sedentary life style. The KMT authorities initially described their policies as trying to “plainize the mountain people,” 17 which involved trying to help the “mountain people” catch-up and become a productive and assimilated part of society, a policy that continued up through the 1980s. 18

The manner in which the government gradually opened up the tribal areas is evidence of the impact of modernization and assimilation policies. 19 The 1948 regulations on managing the mountain-protected areas 20 safeguarded the Japanese state-owned land now owned by the KMT, and prevented the produce from that land from being sold to private entities or individuals. The idea was to encourage the indigenous inhabitants in these areas to become farmers and make productive contributions to their own communities. As early as the 1950s, the government became aware that land and produce were changing hands illegally, as settlers and companies from the plains sought access to the land and resources of the tribal areas. By 1966, the government openly acknowledged that its policy to “protect” the tribal areas had failed, and officially opened some of the regulated territory to private exploitation. At the same time, the government began a process of apportioning and registering territory in order to turn the control of state-owned land to the indigenous communities occupying the land, a process that continued up to the 1980s. The government hoped that turning more control over to the indigenous communities might better protect the land from encroachment, or, at the least, enrich the communities. In fact, the indigenous communities were in many cases cheated out of land; without resources or capital, areas under indigenous control decreased. In the early 1980s, the government finally recognized that opening up the tribal areas to private exploitation had not achieved the goals the government had sought for the indigenous communities. However it was only in the late 1980s and early 1990s, after pressure from indigenous rights activists, that the government passed legislation to rectify the problem of vanishing indigenous land.

Increasing demands for democracy and self-determination by Taiwanese in the early 1980s helped influence the indigenous rights community on issues like control over indigenous territory. The first non-governmental organization devoted to promoting issues of concern to the indigenous community, as distinct from the Chinese majority community, was the Alliance of Taiwan Aborigines (ATA) founded in 1984. Around the time martial law was lifted in Taiwan in 1987, the president of the ATA published an editorial demanding land rights, economic rights, and territorial autonomy. 21 The Presbyterian Church in Taiwan (PCT), an advocate of Taiwanese self-determination, started the first of three “Return Our Land” movements (huan wo tudi yun-dong) when it pushed for more rights over the indigenous territories the PCT occupied. 22 During the formative years of the indigenous rights movement, churches, particularly the PCT, provided substantial financial, logistical, and political support.

By the 1990s, the efforts of the indigenous rights activists started to show results. As part of the revision of the Republic of China (ROC) Constitution in 1994, the official designation of indigenous inhabitants in Taiwan was changed from “mountain compatriots” to “original inhabitants” (yuan-zhu-min). 23 In 1996, the government elevated to the Executive Yuan the department that had been responsible for indigenous affairs under the Ministry of Interior. 24 Aborigines have been given the right to use their indigenous names as official names reflected on identity cards assigned by the government. 25 Although individual tribes are not represented, seats are reserved in the legislature for representatives of the indigenous communities. The government subsidizes the higher-level education of students from indigenous communities, with a special focus on training teachers of indigenous languages to return to their home areas. Municipal governments now have departments dedicated to assisting the growing indigenous communities in their cities.

Nevertheless, the indigenous community in Taiwan faces many challenges. 26 High rates of unemployment persist among the indigenous communities. The migration of young and able to the cities has decimated many tribal areas. Alcoholism, lack of health care and the absence of educational opportunities remain pervasive. 27 Aboriginal girls are often sold into prostitution in the cities, sometimes with local government collusion. Until recently, the government forcibly relocated indigenous communities for the creation of national parks or for the exploitation of natural resources. 28

One example of the continuing grievances of the indigenous community is the Asia Cement project in the Taroko Gorge area. In 1973, the Asia Cement Company asked to lease land from the Taroko/Truku community near Hsiu-lin Township on Taiwan's mountainous east coast. 29 After the lease period expired in 1995 without the promised jobs or rental income materializing, the Taroko/Truku inhabitants moved to end the lease. When the Taroko/Truku attempted to do so, they discovered that Asia Cement had nearly succeeded in forging documents to extinguish indigenous use rights on the land. Asia Cement is still keeping the Taroko/Truku from their lands by corruption, violence, and intimidation despite a 2000 court order mandating Asia Cement to return the land. 30

Another contentious issue is the nuclear waste that remains on Orchid Island (Lan-yu dao). In 1977, the government proposed a factory and jobs on Orchid Island, home of the Tao/Yami and one of the least developed areas in Taiwan. Once TaiPower, the national energy company, finished construction in 1982, it was discovered that the “factory” was actually a nuclear waste storage site. The Tao/Yami inhabitants have campaigned long, and so far unsuccessfully, to have the waste removed. One of the election platforms of President Chen Shui-bian was that

this waste would be removed by 2002.<sup>31</sup> To this day, however, the waste remains on Orchid Island. Local officials and Tao/Yami community leaders have raised safety issues about the impact of leaking radioactive waste on the local inhabitants and the environment.

### Returning Land to the Indigenous Inhabitants

There are many ways the Taiwan government and the indigenous communities have sought to address the difficult challenges the indigenous community historically faced. Aside from efforts to improve the health, welfare, and education of individuals in indigenous communities, legal changes have also taken place. Proposals to enhance the status and protection of Taiwanese indigenous inhabitants include establishing a treaty system between the tribes and the government of Taiwan, giving each officially recognized tribe its own representative in the legislature,<sup>32</sup> and returning control over natural resources in indigenous areas to the indigenous communities. The proposed IAAs, however, are likely to have the most profound impact on indigenous issues in Taiwan. The legislation takes land from counties and townships and places it with the indigenous community to be run and organized according to the wishes of the indigenous community itself.

Although it might seem a political non-starter, returning land on a small crowded island like Taiwan that is 98% ethnic Chinese has found support. The presidential elections in 2000 placed the issue in public discourse. The 'pan-blue' (fan-lan) camp (pro-unification) and 'pan-green' (fan-lü) camp (pro-Taiwan) were fairly evenly matched, and the indigenous community, though small, became an important minority to help give either side the edge. Traditionally, the indigenous community has strongly supported the KMT. Wooing the indigenous voters, then candidate Chen Shui-bian of the opposition Democratic Progressive Party (DPP), proposed a 'New Partnership' with the indigenous community in Taiwan.

The 'New Partnership' seemed to promise the indigenous community what the indigenous rights campaigners sought most: autonomous areas and control over their own affairs. The ROC Constitution had been amended in 1997 to give more recognition to the special status of the indigenous inhabitants in Taiwan.<sup>33</sup> There was some hope that the 'New Partnership' would put something substantive behind the rather amorphous constitutional amendment. Among the lofty slogans that Chen Shui-bian raised were 'recognizing the natural sovereignty of the indigenous inhabitants of Taiwan' (cheng-ren tai-wan yuan-zhu min-zu zhi zi-ran zhu-quan) and 'pressing forward with indigenous autonomy' (tui-dong yuan-zhu min-zu zi-zhi).<sup>34</sup> More recently, the Chen Shui-bian government has expressed support for basing its relationship with the indigenous inhabitants on a nation-to-nation model.<sup>35</sup>

Progress has been made in some of the areas sought by the promoters of indigenous self-determination. For example, the government has promised the Tao/Yami on Orchid Island some degree of autonomy.<sup>36</sup> One of the main reasons for this progress on Orchid Island is that the Tao/Yami represent the differences between themselves as an indigenous minority against the Chinese settlers more starkly than any other tribe.<sup>37</sup> The island territory is geographically isolated and distinct, and the Tao/Yami did not have to compete with Chinese settlers until the middle of the 20<sup>th</sup> century. The population on the island is relatively homogenous, they have a clear ancestral connection to the Philippines, and the tribal leadership is cohesive. For these reasons, they are likely candidates for the first wave of tribes to be given autonomous area status and responsibility.<sup>38</sup>

A more ambitious step was the plan to use the national parks system, already governed by separate legislation and usually encompassing territory claimed by the indigenous community, to advance indigenous control over land and affairs. Although it seems to have been overtaken by the more far-reaching IAAs proposal (infra), the story of the Ma-kao National Park project demonstrates both the successes achieved and the challenges that remain for the indigenous autonomy movement in Taiwan.<sup>39</sup>

In 1999, Atayal communities who would be enveloped by the creation of a Qi-lan-shan National Park proposed by environmentalists, decided to fight its creation.<sup>40</sup> For the indigenous communities in Taiwan, the national park was a symbol of oppression. Areas converted into national parks wiped out local land use rights, set restrictions on the activities of the communities (such as hunting and logging within the park boundaries), and set up a different system of governance and administration from the relationship the indigenous community had previously established with the county and township governments.<sup>41</sup> Mounting opposition by the Atayal communities to a Qi-lan-shan National Park and the election of Chen Shui-bian to the presidency changed the approach from a park for environmental protection to an experiment in indigenous self-rule.

After failing to reach a compromise in August 2000, the government and environmental activists invited the Atayal community to be responsible for managing the national park and its resources as an intermediate step toward autonomy in a system known as 'co-management' (gong-guan). The Atayal leadership, the Council of Indigenous Peoples, and the environmentalists all seemed to be in agreement on the creation of a national park to be managed by the Atayal according to Atayal custom. The park would be known by the Atayal name for the area, Ma-kao. Chen Shui-bian's administration hoped that this would go some way to satisfying his pledge under the 'New Partnership' with Taiwan's indigenous communities.<sup>42</sup> This process was derailed when KMT aboriginal legislator

Kao-chin Su-mei rallied other Atayal to oppose the creation of a national park on the grounds that it would not provide enough autonomy.<sup>43</sup> The opposition was sufficient to thwart the funding of preparatory study of the co-management system.<sup>44</sup> By late summer 2003, the government had still not been able to get the preparatory study of the park funded.<sup>45</sup> Even if the Ma-kao project can be funded appropriately, the Ma-kao National Park is likely to be over-shadowed by the far more ambitious proposal in the legislature on creating actual autonomous areas, as the co-management system promises only limited autonomy.

Despite these setbacks, the Council of Indigenous Peoples has drafted legislation that would devolve substantive territory and power to the indigenous communities in the form of IAAs. Presently, land on which many of the indigenous communities reside is governed by regulations that, though amended, trace their origin to the “Taiwan Provincial Regulations With Respect to Every County on the Management of Mountain Protected Areas” (Taiwan Sheng ge Xian Shan di Bao-liu-di Guan-li Ban-fa), first passed in 1948.<sup>46</sup> To a significant degree, these regulations place control over the land in the hands of the government. By contrast, the “Draft Law on Indigenous Autonomous Areas” (Yuan-zhu Min-zu Zi-zhi-qu Fa Cao-an), approved by the Executive Yuan on in June of 2003, provides a structure for setting aside territory over which indigenous communities exercise authority.<sup>47</sup> Indigenous legislators Kao-chin Su-mei and Walis Pelin, however, have come out in opposition to the bill now being debated in the Legislative Yuan saying that it does not provide enough detail about the workings of the IAAs.

The draft law on the IAAs contains 15 articles.<sup>48</sup> The draft states that it was proposed to fulfill President Chen's promise in the “New Partnership,” and that self-rule is the best way to protect the rights and heritage of indigenous inhabitants. Key points include establishing one IAA for each of the tribes, and designating the IAA with the status of a government organ, although its level in relation to other local government organs remains unspecified. Although the Council of Indigenous Peoples will have a central role in approving much of the preparatory work of the various IAAs, the government is otherwise supposed to take a relatively hands-off approach. The draft law specifies that the territory of the IAA will be set in accordance with historical and cultural factors.

The draft law also sets out what role government institutions will play in relation to the IAA. The IAA will have authority to establish its own governing institutions, regulate the use of community land, and control its economic development. Furthermore, the government will still have an obligation to assist and subsidize the IAA in order to ensure equal development. The IAA may pass regulations governing local affairs, but the institutions of the IAA must be democratic and must not discriminate between the inhabitants of the IAA. Once the Council of Indigenous Peoples approves the preparatory work of the IAA, the Legislative Yuan subjects the IAA application to scrutiny and is authorized to approve its establishment. After the IAA is established, it remains subject to the regulations governing local government organs. The Legislative Yuan is authorized to settle any disputes between the IAA and the central government. The Executive Yuan will manage any disputes between the IAA and other IAAs, local governments, or other institutions.

The draft law attempts to be politically acceptable and at the same time to provide indigenous inhabitants with some measure of self-rule. Government officials stress that the vagueness is intentional in order to permit the indigenous communities to be as unencumbered as possible in setting up their own institutions. Even supporters of the draft, however, admit that it is vague partly in order to be politically palatable.<sup>49</sup>

The draft fails to address several issues. It does not discuss the power to tax and raise revenue or the power of the IAA to create a legal system for adjudicating and enforcing the regulations it is permitted to pass. The draft law also does not specify any deeper indigenous control of educational institutions or indigenous control over infrastructure within the IAA. Finally, the draft law leaves unexplained any approach to the politically traumatic task of carving the IAA(s) out of existing counties.

The draft law seems in some respect to be an improvement over previous drafts. When the idea of self-rule for indigenous inhabitants was raised, the initial drafts envisioned setting aside one area for all indigenous inhabitants to share.<sup>50</sup> Previous drafts included detailed requirements for the creation of the preparatory group, the election of the first governing bodies, and that the Council of Indigenous Peoples had the right to interfere with the IAA on a continuous basis if it felt the draft law was not implemented properly.<sup>51</sup>

The recent draft law nevertheless seems to have some weaknesses when compared with earlier drafts. Earlier drafts include the power of the IAA to issue debt and raise revenue. Earlier drafts set out requirements for holding office and the qualifications of the personnel who would be public servants of the IAA. The earlier drafts spelled out the types of regulations the IAA was permitted to enact and the manner in which those regulations interacted with government regulations. The resulting IAA agreements between the individual tribes and the government aspire to be similar to treaties between the Canadian and US governments and its tribes. Although the IAA would not be permitted to establish its own police, the IAA could issue fines for activities in violation of its regulations. Central-local relations were more clearly spelled out in that the central government would have the exclusive opportunity for a short period of time to intervene before other government organs if the IAA were in violation of the laws. By enumerating these issues clearly in legislation prior to the formation of the IAA, the government could have established a strong and stable position for the IAA within the government hierarchy.

In spite of the substantial advancement the IAA would be from an indigenous rights perspective, there remains much skepticism and indifference within the indigenous community. The older generation, having accepted assimilation, cannot understand why the younger generation wants to become “backward” again. In many cases, the government has failed to fulfill so many of its promises that the promise of “self-rule” is treated apathetically.<sup>52</sup> There is also indifference in many parts to the leadership of the indigenous communities, a feeling that those driving the policy changes in the cities are not closely identified with their communities in the rural areas.<sup>53</sup> In addition, whatever wrongs the government may have committed in the past, local inhabitants remain skeptical about the ability of institutions not intimately identified with the central government to provide funding and welfare to what is usually a poor and marginalized population. Finally, the reality that young and able-bodied individuals leave the indigenous communities for jobs in the cities does not auger well for the long-term sustainability of the IAA system.

### The Tsou Wild Honey Case

A recent court case involving indigenous rights portrays, in practical terms, the impact of the proposed IAAs. The specific facts of this case, the Tsou Wild Honey case, are set forth below. By comparison with an analysis of the same facts under US Federal Indian Law, the case makes clear that even if indigenous rights issues are more frequently addressed both by the tribes and by the government, Taiwan's legal system, even providing that the IAAs become reality, remains incapable of addressing conflicts regarding indigenous rights in a way that an American court could.

On the afternoon of February 20, 2003, Tsou tribal elder Wang Chuan-fa and his son Wang Jian-guang approached a man surnamed Chen sleeping in his vehicle.<sup>54</sup> Mr. Wang was curious about Mr. Chen's presence in what the Tsou consider tribal territory, located near A-li-shan in central Taiwan. The Tsou make part of their living off of wild honey plantations, and Mr. Wang, as a Tsou elder, had become increasingly vigilant regarding theft of wild honey by Taiwanese outsiders from areas the Tsou considered theirs. The honey occurs naturally, so it is not always easy to establish who is the rightful owner of the honey once it is harvested. On several previous occasions, Mr. Wang and other Tsou members had alerted police from the neighboring municipality when a theft of honey from tribal lands had occurred. The police reacted too slowly or not come at all, permitting those taking the honey to get away.

Mr. Wang and his son announced their presence to Mr. Chen. Mr. Wang stated that he was a Tsou elder, and asked Mr. Chen what he was doing with wild honey, worth about US\$1700, in his car. Mr. Chen stated that he was returning from his plantation to sell the honey. Mr. Wang felt that given where Mr. Chen stated the plantation was located, it was impossible for him to be in possession of the honey, and demanded that Mr. Chen return the honey, shouting, “This is our mountain, so therefore it is our honey!” When Mr. Chen refused, a scuffle ensued, and Mr. Wang forcibly took the honey from Mr. Chen and fled with his son. That evening the local police visited Mr. Wang and his son and charged them with robbery. The police confiscated the honey in Mr. Wang's possession and returned it to Mr. Chen. Mr. Wang and his son were then led to the police station and charged with robbery.

Mr. Wang maintained that although he did forcibly take the honey from Mr. Chen, he was only protecting traditional Tsou territory and property. As an elder in the Tsou tribe, Mr. Wang had a responsibility to ensure that the Tsou commonwealth was protected and that Tsou custom permitted him to act with force if other remedial measures were unavailable. Indigenous rights activists pointed out that the law in Taiwan permits an owner to defend the taking of his property. The police believed, however, that Mr. Chen was legally entitled to the honey given that Mr. Chen was on what was recognized state-owned land and therefore that Mr. Wang did not have any justification for taking it from Mr. Chen. They further pointed out that Mr. Wang failed to bring the honey to the police station and file a complaint against Mr. Chen for theft. Supporters of Mr. Wang countered that the police, in violation of their own regulations, had turned the main evidence of the crime, the honey, over to Mr. Chen to do with as he pleased.

Since Mr. Wang had been criminally indicted, the law dictated that the case was now in the hands of the prosecutor and the judge — private compromise was no longer possible. Some of Mr. Wang's supporters appealed to the court to make a decision that would respect tribal custom. Other supporters urged that Mr. Wang instead be penalized in a Tsou tribal institution that could mete out justice according to Tsou tradition. Still other supporters called for the acceleration of tribal law projects so that indigenous inhabitants engaging in activities like that of Mr. Wang would not have to be penalized in a system that did not have any place for indigenous rights.

On August 27, 2003, the Chia-yi District Court sentenced Mr. Wang to a 2-year suspended sentence for robbery.<sup>55</sup> Mr. Wang is on probation for the next 5 years, but is otherwise free to go. The court placed a heavy emphasis on the fact that Mr. Wang and his son failed to turn over the contraband to the police once they had taken the honey from Mr. Chen. This factor suggested to the court that Mr. Wang and his son were actually stealing from Mr. Chen rather than protecting property they felt was theirs. The decision noticeably fails to address whose property the honey was to begin with. The court simply ignored claims based on indigenous rights, a decision by all indications perfectly consistent with Taiwanese law. Mr. Wang has decided to appeal.<sup>56</sup>

### The Tsou Wild Honey Case and US Federal Indian Law 57

The result of the Tsou Wild Honey case contrasts with the way the same facts would be treated had the event happened

between a Native American and a non-Native American, in "Indian Country." To a much greater degree than Taiwan, the legal system of the United States has reckoned, however inadequately, with issues of native title and legal rights from the country's founding. After the 1823 decision *Johnson v. M'Intosh* in which Justice John Marshall ruled that chain of title to land from the United States government was superior to chain of title from Native Americans, 58 the US government used treaties and recognizing tribes as semi-independent actors to settle Native Americans' claims to their land. Even though the treaties identified the tribes as "nations," the US government proved in many cases incapable of performing its obligations under the treaties. However flawed, the treaty system did provide a bulkhead against complete assimilation and laid the groundwork for an uncomfortable autonomy for the Indian nations within the US federal system. 59 In many cases, the treaties required that the US government stand in the stead of the interests of the tribe, and from this originated the American contribution to indigenous rights, the trust relationship. Through the trust relationship, the US government has been obligated to protect the rights and interests of Native Americans in ways that, in theory, exceed its obligations to its non-Native American citizens. 60

By the early 1960s, after attempts at assimilation and termination had proved disastrous for Native Americans and unworkable for the US government, a policy encouraging self-determination was adopted. Tribes were permitted limited autonomy in decisions regarding resource allocation and reservation governance. 61 Eventually, tribes meeting Bureau of Indian Affairs and Congressionally mandated qualifications were permitted to establish tribal courts, with limited jurisdiction over claims arising from activities on the reservation among tribal members. 62 In addition, litigation and settlement have begun to address Native American claims to land. 63 Despite these advances, US courts have not yet given recognition to native title, and maintain that the US government under the doctrine of *terra nullius* and federal preemptive power could extinguish any land claims of the indigenous population of the North American continent.

The central concept in the US legal system when claims arise between indigenous inhabitants and more recent settlers as in the Tsou Wild Honey Case is whether the events occurred in "Indian Country." "Indian Country" is the territory that has been set aside by treaty or other agreement to be used by Native Americans and is relatively immune from state government interference. 64 In "Indian Country," tribes retain a limited amount of self-government, free from state government taxation, regulation, and law enforcement. 65 Large tribes, such as the Navajo, have their own tribal police and have even created their own court system with judges, an appellate system, and body of *sui generis* tribal law. 66

Given the facts in the Tsou Wild Honey case and assuming that Tsou territory is "Indian Country," the first inquiry for a court (federal, state, or tribal) in the US would be whether the events took place in "Indian Country." If the events did not take place in "Indian Country," then the venue for the Tsou elder and his son would be limited to a state court. If the events did take place in "Indian Country," however, the tribe would have some measure of jurisdiction over the defendants, 67 although the tribe's jurisdiction would be limited by the Indian Country Crimes Act 68 and the Major Crimes Act. 69 Where tribes have police, the tribal police could have arrested Mr. Wang. By comparison, the Tsou could only suggest in vain that the Tsou elder be tried by the tribe instead of a "foreign" legal system. 70

Even if the events of the Tsou Wild Honey case had taken place in "Indian Country," the jurisdiction of the tribe is limited. The tribe could have assumed jurisdiction over Mr. Wang as a defendant without problem. Had the tribe attempted to arrest Mr. Chen instead of Mr. Wang, however, the tribe would not have any legal authority over him. Federal courts have exclusive jurisdiction since tribal court systems do not have jurisdiction over "non-Indians" in criminal matters occurring in "Indian Country." 71

Although the applicability of "Indian Country" is limited in the US criminal context, it remains important to the tribes for civil and regulatory purposes. Tribes tax Native American and non-Native American business on reservations. Hunting and fishing on reservations are regulated by the tribe, at least among the larger tribes. Tribes can recognize special tribal customs regarding domestic and family law. 72 It is unlikely that these special rights would have been recognized in the absence of territory in which those rights could be exercised. Although "race" certainly plays a factor in decisions by the courts, it is plausible that had Native Americans not had separate territory, they would have been assimilated and treated the way Mr. Wang was in the Tsou Wild Honey case. It is not so much the different "racial" heritage of Native Americans that drives and infuses vitality into the different treatment and respect for Indian rights, but that there remains territory, however much diminished and infringed upon, that is uniquely "Indian."

"Indian Country" in Taiwan

The comparison between the Tsou Wild Honey case in Taiwan and the US raises several serious questions about the extensiveness of rights and protections offered under the IAA draft law for indigenous communities. One of the most significant differences between indigenous inhabitants in Taiwan and Native Americans in the US is that Native Americans have rights to land over which they can exercise some measure of autonomy. As a result, in comparison to Taiwan's treatment of indigenous issues, "Indian Country" in the US offers tangible autonomy and powerful protections, even though it has its own serious limitations. Even if the draft IAA law provides territory, it does not suggest changes to Taiwan's legal system that might compel the courts to respect, or at least inquire about, indigenous claims

when faced with circumstances like the Tsou Wild Honey case. Notwithstanding that earlier drafts of the IAA law more clearly articulated the rights and powers of the IAA, they also failed to address reforms to legal institutions to enable them to address issues that interactions with indigenous communities raise.<sup>73</sup> Though the IAA promises some autonomy, courts would still remain unable to recognize local custom in areas such as domestic relations, property, and succession.

There is one last weakness of the draft legislation that should be considered. By agreeing to this IAA system, the indigenous inhabitants of Taiwan in some sense give up their claim to sovereignty. The IAA system explicitly provides for the supremacy of the Taiwan government over the indigenous communities in return for granting them a measure of self-rule. Native American activists in the US have struggled with the same issue of legitimizing the deprivation of land and rights by the US government. Until now, this is not something the indigenous community in Taiwan has had to deal with directly.<sup>74</sup> While there are undoubtedly benefits to a formal system of autonomy, the experience of Native Americans with the US government imposing its authority through treaties and reservations suggest that this is not something to be ignored.

## Conclusion

Taiwan is not creating ‘Indian Country’ – at least not yet. The revolutionary changes in the treatment of the indigenous rights issue in Taiwan suggest that much remains unsettled. Although certainly more ‘equal’ than they were 20, or even 10, years ago, the indigenous inhabitants in Taiwan still remain on the lowest rungs of the legal and socioeconomic ladders. As indigenous areas become more accessible, the young leave to the cities, residents from the plains press further into tribal areas, and old customs and languages are forgotten. Recent draft legislation to create autonomous areas for the indigenous inhabitants will likely provide impetus for further protections to the indigenous communities, much as ‘Indian Country’ in the US has been used by Native Americans to protect their way of life. Without more devolution, however, recognition of the legitimacy of the indigenous claims, as with the Tsou Wild Honey case, is not likely to be changed by the proposed IAAs. The draft legislation is only a step, though an important one, in the direction of protecting Taiwan's indigenous inhabitants.

## Endnotes

1 The appropriate reference to the various groups of indigenous communities in Taiwan remains unsettled. For the purposes of clarity and simplicity, the traditional reference, ‘the tribe,’ will be used throughout this article.

2 See [news.yam.com/bcc/politics/news/200312/02003122\\_90177.html](http://news.yam.com/bcc/politics/news/200312/02003122_90177.html).

3 Unless there is a widely recognized Taiwanese transliteration of a Chinese term, modified pin yin will be used. With the exception of book titles, I have chosen to use hyphens in the transliteration of Chinese characters, in order to assist the reader in determining which transliteration belongs to which character.

4 In order of size, these are: Amis/Pangcah (A-mei), Atayal/Da-yen (Tai-ya), Paiwan, Bunun (Bu-nong), Puyuma (Beinan), Rukai (Lu-kai), Tsou, Saisiyat (Sai-xia), Tao/Yami (Da-wu / Ya-mei), Ita Thao (Shao), Kavalan (Ge-ma-lan), and the Taroko/Truku (Tai-lü-ge), recognized just recently. See [www.apc.gov.tw](http://www.apc.gov.tw), accessed on 17 Oct 2003. Ko Shu-ling, ‘Truku Delighted at Official Recognition,’ Taipei Times, 15 Jan 2004, available at: [www.taipeitimes.com/news/taiwan/archives/2004/01/15/2003087672](http://www.taipeitimes.com/news/taiwan/archives/2004/01/15/2003087672). Because some tribal names are in the process of changing, I have combined references to avoid confusion (e.g. Yami call themselves Tao, so I refer to the group as the Tao/Yami).

5 John Robert Shepherd, *Statecraft and Political Economy on the Taiwan Frontier, 1600-1800*, 32 (1995).

6 Shepherd, 6-21.

7 David Faure, ‘The Mountain Tribes Before the Japanese Occupation,’ in David Faure, ed., *In Search of the Hunters and Their Tribes: Studies in the History and Culture of the Taiwan Indigenous People*, 25 (Shung Ye Museum of Formosan Aborigines Monograph 4, 2001).

8 The Japanese colonizers industrialized Taiwan and are credited with providing the basis for Taiwan's modernization both in industry and institutions through the 1900s up to the present. Harry J. Lamley, ‘Taiwan Under Japanese Rule, 1895-1945: The Vicissitudes of Colonialism,’ in Murray A. Rubinstein, ed., *Taiwan: A New History*, 201-248 (1999).

9 Wu Mi-cha, ‘Ino Kanori, Japanese Ethnography and the Idea of the ‘Tribe’,’ in David Faure, ed., *In Search of the Hunters and Their Tribes: Studies in the History and Culture of the Taiwan Indigenous People*, 48 (Shung Ye Museum of Formosan Aborigines Monograph 4, 2001).

10 The Chinese referred to the indigenous inhabitants as either ‘raw barbarians’ (sheng fan) or

&ldquo;cooked barbarians&rdquo; (shu fan). &ldquo;Cooked&rdquo; aborigines were &ldquo;civilized,&rdquo; having adopted Chinese customs, dress, and names. Although perhaps not a great improvement, the Japanese referred to them as &lsquo;high mountain people' (gao sha zu).

11 Taiwan Yuanzhumin de Falü Diwei [The Legal Status of Indigenous Inhabitants of Taiwan], unpublished report prepared for the National Science Committee of the Executive Yuan, 105-111 (31 Oct 1997). On file with the author. For further discussion of uprisings by the aborigines against the Japanese, see Chan Shu-chuan, &ldquo;From Autonomy to Subjugation: Taiwan Aborigine Struggles During the Japanese Occupation,&rdquo; 5 Nov 2001. Available at: [etaiwannews.com/history/2001/11/05/1004927910.htm](http://etaiwannews.com/history/2001/11/05/1004927910.htm), accessed 26 Oct 2003.

12 Harry J. Lamley, &ldquo;Taiwan Under Japanese Rule, 1895-1945: The Vicissitudes of Colonialism,&rdquo; in Murray A. Rubinstein, ed., *Taiwan: A New History*, 228 (1999).

13 The geographic range of the indigenous communities was not co-extensive with territories designated as &ldquo;mountain areas&rdquo; although a sizeable share of the aboriginal population resided there. In many cases, administrative boundaries were drawn to divide communities and make them easier to govern. To the extent that the KMT had a policy on the land rights of the indigenous population in Taiwan up through the 1980s, it is reflected in these regulations regarding the &lsquo;mountain areas'. See Taiwan Yuanzhumin de Falü Diwei [The Legal Status of Indigenous Inhabitants of Taiwan], unpublished report prepared for the National Science Committee of the Executive Yuan, 288-294 (31 Oct 1997). On file with the author.

14 Taiwan Yuanzhumin de Falü Diwei [The Legal Status of Indigenous Inhabitants of Taiwan], unpublished report prepared for the National Science Committee of the Executive Yuan, 288-294 (31 Oct 1997). On file with the author.

15 This system shared many similarities with the now anachronistic Bureau of Indian Affairs representative through which the US government governed and provided for the welfare of Native Americans on reservations.

16 See e.g., May Bo Ching, &ldquo;Naming and Identity among the Atayal People in Miaoli County, Taiwan,&rdquo; in David Faure, ed., *In Search of the Hunters and Their Tribes: Studies in the History and Culture of the Taiwan Indigenous People*, 79-110 (Shung Ye Museum of Formosan Aborigines Monograph 4, 2001).

17 Derived from the Japanese designation, the KMT referred to the aborigines as &ldquo;high mountain people&rdquo; (gao shan ren/zu). As part of the Chinese nation-building exercise, the aborigines came to be referred as &ldquo;mountain compatriots&rdquo; (shan di tong bao or shan bao), a name that is today considered derogatory. Kung Wen-chi, *Indigenous Peoples and the Press: A Study of Taiwan*, 79 (2000).

18 Kung Wen-chi, *Indigenous Peoples and the Press: A Study of Taiwan*, 63 (2000).

19 This discussion draws substantially on the materials in Taiwan Yuanzhumin de Falü Diwei [The Legal Status of Indigenous Inhabitants of Taiwan], unpublished report prepared for the National Science Committee of the Executive Yuan, 307-324 (31 Oct 1997). On file with the author.

20 Taiwan Sheng ge Xian Shan di Bao-liu-di Guan-li Ban-fa . The legislation was originally passed to provide a framework for managing national lands that had been held by the Japanese government, usually in areas where the indigenous communities existed.

21 Michael Stainton, &ldquo;Aboriginal Self-Government: Taiwan's Uncompleted Agenda,&rdquo; in Murray A. Rubinstein, ed., *Taiwan: A New History*, 423 (1999).

22 Michael Rudolph, &ldquo;The Pan-Ethnic Movement of Taiwanese Aborigines and the Role of Elites in the Process of Ethnicity Formation,&rdquo; paper for Multiple and Diasporic Identities: National and Ethnic Belongings in East Asia and Europe, 15-16 Sep 2000 . Available at: [www.taiwanfirstnations.org/movement.html](http://www.taiwanfirstnations.org/movement.html), accessed on 13 Oct 2003.

23 Kung Wen-chi, *Indigenous Peoples and the Press: A Study of Taiwan*, 80 (2000). Indigenous rights activists pressed for &ldquo;yuan-zhu min-zu &rdquo; to be used to describe indigenous inhabitants in Taiwan. The political and academic establishment strongly resisted because it ran counter to China's nation-building myth that there is only one &ldquo;min-zu .&rdquo; A compromise resulted in &ldquo;yuan-zhu-min &rdquo; being the designation in the Constitution. Nevertheless, self-referentially, in recent legislation, and through other government institutions, the term &ldquo;yuan-zhu min-zu &rdquo; is used to describe indigenous inhabitants in Taiwan. See Michael Stainton, &ldquo;Aboriginal Self-Government: Taiwan's Uncompleted Agenda,&rdquo; in Murray A. Rubinstein, ed., *Taiwan: A New History*, 430 (1999). Even the Council of Indigenous Peoples is known as the &ldquo;Yuan-zhu Min-zu Wei-yuan-hui &rdquo;. See *infra* .

24 The Council of Indigenous Peoples (Yuan-zhu Min-zu Wei yuan hui) became a ministry-level organ. See [www.apc.gov.tw](http://www.apc.gov.tw). Prior to the creation of the cabinet level body, the Ministry of Interior had been responsible for

overseeing county and municipal organizations that dealt with the aboriginal communities. Taiwan Yuanzhumin de Falü Diwei [The Legal Status of Indigenous Inhabitants of Taiwan], unpublished report prepared for the National Science Committee of the Executive Yuan, 297 (31 Oct 1997). On file with the author.

25 Kung Wen-chi, *Indigenous Peoples and the Press: A Study of Taiwan*, 81 (2000).

26 Walissu Norkan, "Chen Should Keep His Promises," Taipei Times, 13 Apr 2000. Available at: [www.taipetimes.com/news/edit/archives/2000/04/13/32112](http://www.taipetimes.com/news/edit/archives/2000/04/13/32112), accessed 26 Oct 2003.

27 2002 Country Reports on Human Rights Practices, US Dept. of State. Available at: <http://www.state.gov/g/drl/rls/hrrpt/2002/18240.htm>, accessed 19 Oct 2003.

28 Report to the United Nations Working Group on Indigenous Populations (1993). Available at: [www.taiwanfirstnations.org/unreport.htm](http://www.taiwanfirstnations.org/unreport.htm), accessed 19 Oct 2003.

29 Report to the United Nations Working Group on Indigenous Populations (1997). Available at: [www.nativeweb.org/pages/legal/taroko.html](http://www.nativeweb.org/pages/legal/taroko.html), accessed 19 Oct 2003.

30 "Aboriginal land protest turns violent," Central New Agency, 12 Mar 2001. Available at: [www.taiwanheadlines.gov.tw/20010313/20010313s4.html](http://www.taiwanheadlines.gov.tw/20010313/20010313s4.html), accessed 19 Oct 2003.

31 "Premier Apologizes to Tao Tribe," Taipei Times, 24 May 2002. Available at: [taipetimes.com/News/Taiwan/archives/2002/05/24/1373381](http://taipetimes.com/News/Taiwan/archives/2002/05/24/1373381), accessed 19 Oct 2003.

32 Currently the make-up of indigenous representatives in the Legislative Yuan is evenly divided between those representing "plains-aborigines" (ping-pu zu) and "mountain aborigines" (shan-di zu).

33 Article 10 of the Revisions to the Constitution reads: "In accordance with the will of the ethnic groups, the State shall protect the position and political participation of the indigenous inhabitants, as well as protect and press forward the education and culture, infrastructure, health, land economy, and social welfare of the indigenous inhabitants." ("Guo-jia ying yi min-zu yi-yuan, bao-zhang yuan-zhu-min-zu zhi di-wei ji zheng-zhi can-yu, bing dui qi jiao-yu wen-hua, jiao-tong shui-li, wei-sheng yi-liao, jing-ji tu-di, ji she-hui fu-li shi-ye yu yi bao-zhang bing cu qi fa-zhan"). See also Michael Stainton, "Aboriginal Self-Government: Taiwan's Uncompleted Agenda," in Murray A. Rubinstein, ed., *Taiwan: A New History*, 428 (1999).

34 Chen Zong-tong Zheng-jian "Yuan-zhu-min-zu yu Tai-wan Zheng-fu Xin De Huo-ban Guan-xi" Wen-jian Nei-rong Zhi-xing Fen-gong ji Yu-ding Shi-cheng-biao. [The Contents, Work Allocation, and Estimated Time Table of President Chen's Platform Promise "The New Partnership Between the Indigenous Inhabitants and the Taiwan Government"]. Available at [www.apc.gov.tw](http://www.apc.gov.tw), accessed on 23 Feb 2003.

35 See [news.yam.com/bcc/politics/news/200312/0200312290177.html](http://news.yam.com/bcc/politics/news/200312/0200312290177.html). Referring to the tribes as "nations" rather than states more closely parallels the structure of relations between the US government and Native Americans with which the Chen Shui-bian government seems to be making analogies. See Stephen L. Pevar, *The Rights of Indians and Tribes*, 1-17, 46-53 (2002).

36 Shih Cheng-Feng, "Legal Status of the Indigenous Peoples in Taiwan," paper presented at the International Conference on the Rights of the Indigenous Peoples, 18-20 Jun 1999, Taipei, Taiwan. Available at: [mail/tku.edu.tw/cfshih/defatult2.htm](mailto:tku.edu.tw/cfshih/defatult2.htm), accessed on 17 Oct 2003.

37 "Autonomy for Orchid Island?" Taipei Journal, 28 Jul 2000. Available at: [www.taiwanheadlines.gov.tw/20000728/20000728fl.html](http://www.taiwanheadlines.gov.tw/20000728/20000728fl.html), accessed on 25 Oct 2003.

38 As part of modifying the "Indigenous Autonomous Area Draft Law," the Association for Taiwan Indigenous Peoples Policies (ATIPP) conducted a review of the tribes most likely to be immediately capable of handling responsibility over their own territory. The Tao/Yami are among the leading candidates. Other leading candidates included the Amis, the Atayal, and the Tsou. Interviews with ATIPP researchers and Ko Shu-ling, "Cabinet Wants Autonomy, Assistance for Aborigines," Taipei Times, 3 Jun 2003. Available at: [www.taipetimes.com/News/archives/2003/06/03/2003053761](http://www.taipetimes.com/News/archives/2003/06/03/2003053761), accessed 25 Oct 2003.

39 Also known as the Qi-lan-shan National Park.

40 The Ma-kao issue was initially an environmental issue. The ROC Veterans Affairs Commission had land use rights to the several centuries old cypress redwood forests in an area of northern Taiwan known as Qi-lan-shan. In 1991, as the Veterans Affairs Commission embarked on a new round of extensive logging, the nascent environmental community in Taiwan launched a protest. By 1998, the movement had developed the goal of turning the area into a national park, as it

had successfully done in several other areas in Taiwan to protect the environment from exploitation. Lin Yi-ren, &ldquo;Ma-gao Guo-jia Gong-yuan yu Sen-lin Yun-dong [The Ma-kao National Park and the Forest Movement], in Wen-hua Yan-jiu Yue-bao Di Shi-yi Qi [Cultural Research Monthly No. 11] . Available at: [www.ncu.edu.tw/~eng/csa/journal/journal\\_park76.htm](http://www.ncu.edu.tw/~eng/csa/journal/journal_park76.htm), accessed Jan 2003. Much of the background information that follows is drawn from this article.

41 Conference notes, &ldquo;Indigenous Inhabitants and the National Park System&rdquo;, Taipei, Taiwan, 18 Apr 2003.

42 Debby Wu, &ldquo;Aborigines Hold Up National Park,&rdquo; Taipei Times , 13 Aug 2003. Available at: [taipeitimes.com/News/Taiwan/archives/2003/08/13/2003063419](http://taipeitimes.com/News/Taiwan/archives/2003/08/13/2003063419), accessed 25 Oct 2003.

43 An odd mix of interests came together to oppose the creation of the Ma-kao National Park. Atayal demonstrators, comprised mostly of Atayal in urban areas who feared how the new structure might affect their land claims, were rallied by KMT legislator Kao-chin Su-mei. Local KMT legislators in the areas affected by the creation of a national park feared consequent loss of authority and joined with the Tribal Working Group (bu-luo gong-zuo dui), a group that supports Kao-chin Su-mei stance on indigenous rights issues, to oppose the creation of the Ma-kao National Park. See Li Gen-zheng, &ldquo;Gong-guan, zi-zhi de gong-tong ke-ti [The Common Task of Co-management and Autonomy].&rdquo; Available at: [evec.ksa.hk.edu/ma\\_kau/012.htm](http://evec.ksa.hk.edu/ma_kau/012.htm), accessed on 7 Jan 2003.

44 Crystal Hsu, &ldquo;2003 Budget Passes, other bills don't,&rdquo; Taipei Times , 11 Jan 2003. Available at: <http://taipeitimes.com/News/front/archives/2003/01/11/190534>, accessed 2 Nov 2003.

45 Debby Wu, &ldquo;Aborigines Hold Up National Park,&rdquo; Taipei Times , 13 Aug 2003. Available at: [taipeitimes.com/News/Taiwan/archives/2003/08/13/2003063419](http://taipeitimes.com/News/Taiwan/archives/2003/08/13/2003063419), accessed 25 Oct 2003. Kao-chin Su-Mei and other aboriginal legislators were holding out for changes to the National Parks Law which would provide additional welfare guarantees for the Atayal in Ma-kao. Legislator Kao-chin Su-mei also demanded that the government pass the Indigenous Autonomous Region Law (Yuan-zhu-min Zi-zhi-qu Fa). Other activists affiliated with the KMT have advocated the creation of &lsquo;autonomous regions' (zi-zhi-qu) modeled on those of the PRC (eg. Tibet and Xinjiang), on the principle that the government of Taiwan is incapable of providing the type of autonomy the tribes deserve.

46 See discussion supra . Taiwan Yuanzhu-min de Falü Diwei [The Legal Status of Indigenous Inhabitants of Taiwan], unpublished report prepared for the National Science Committee of the Executive Yuan, 305-319 (31 Oct 1997). On file with the author.

47 Translating &ldquo;Zi-zhi-qu &rdquo; as &ldquo;autonomous area&rdquo; as opposed to &ldquo;autonomous region&rdquo; is deliberate to avoid making any inadvertent connection between the areas proposed in the legislation in Taiwan and those autonomous regions (e.g. Tibet and Xinjiang) that exist in the PRC. Ko Shu-ling, &ldquo;Aboriginals Lukewarm to &lsquo;menu' for Change,&rdquo; Taipei Times , 4 Jun 2003, available at: [www.taipeitimes.com/News/Taiwan/archives/2003/06/04/2003053866](http://www.taipeitimes.com/News/Taiwan/archives/2003/06/04/2003053866), accessed 25 Oct 2003.

48 Yuan-zhu Min-zu Zi-zhi-qu Fa Cao-an [Draft Law on Indigenous Autonomous Areas]. On file with the author.

49 Debby Wu, &ldquo;Officials Defend Rights Draft Bill,&rdquo; Taipei Times , 31 Aug 2003. Available at: [www.taipeitimes.com/news/Taiwan/archives/2003/08/31/2003065933](http://www.taipeitimes.com/news/Taiwan/archives/2003/08/31/2003065933), accessed 25 Oct 2003.

50 Liu Shao-hua, &ldquo;Aboriginal autonomy law sees light,&rdquo; Taipei Times , 10 Jun 2003. Available at: [www.taipeitimes.com/news/local/archives/2000/06/10/39447](http://www.taipeitimes.com/news/local/archives/2000/06/10/39447), accessed 26 Oct 2003.

51 Yuan-zhu Min-zu Zi-zhi Fa Cao-an (Jia-ban) [Draft Law on Aboriginal Autonomy (Draft A)], and Yuan-zhu Min-zu Zi-zhi Fa Cao-an (Yi-ban) [Draft Law on Aboriginal Autonomy (Draft B)]. Both on file with the author.

52 See e.g. , Liu Shao-hua, &ldquo;Long March to Autonomy,&rdquo; Taipei Times , 7 Jun 2000. Available at: [www.taipeitimes.com/news/local/archives/2000/06/07/39054](http://www.taipeitimes.com/news/local/archives/2000/06/07/39054), accessed 26 Oct 2003.

53 Michael Rudolph, &ldquo;The Pan-Ethnic Movement of Taiwanese Aborigines and the Role of Elites in the Process of Ethnicity Formation,&rdquo; paper for Multiple and Diasporic Identities: National and Ethnic Belongings in East Asia and Europe, 15-16 Sep 2000 . Available at: [www.taiwanfirstnations.org/movement.html](http://www.taiwanfirstnations.org/movement.html), accessed on 13 Oct 2003.

54 The factual information is taken mainly from &ldquo;Zou-zu Tou-mu Fu-zi Qiang-qu Cai-mi-ren Feng-mi Bei Bu,&rdquo; [Elder Tsou Tribal Chief Is Arrested for Forcibly Taking Back Honey from Someone Trying to Remove Honey] Zi-you Shi-bao [Liberty Times] , 21 Feb 2003. Personal emails and conference materials that contributed to the author's understanding of the events are on file with the author.

55 Tai-wan Chia-yi Di-fang Fa-yuan- [Taiwan Chia-yi District Court], report of decision, 27 Aug 2003. On file with the

author.

56 The appeal has been rejected by the Chia-yi District Court. Tai-wan Chia-yi Di-fang Fa-yuan- Xing-shi Di Er Ting [Taiwan Chia-yi District Court, Second Criminal Division], report of decision, 12 Jan 2004. On file with the author. The court did note that indigenous inhabitants had constitutional protections, but concluded that the constitutional principles did not exempt indigenous inhabitants from legal prohibitions against robbery.

57 "Indian Country" is portrayed in positive terms in contrast with the way courts in Taiwan address indigenous issues. This is not meant to suggest that "Indian Country" or the reservation system in the US has been a positive experience for Native Americans. In fact, the opposite is more accurate. Nevertheless, the purpose of portraying "Indian Country" in these positive terms is to show the manner in which a legal system can offer some protection to the claims and rights of its indigenous population without unraveling.

58 *Johnson v. McIntosh*, 21 U.S. (8 Wheat) 543 (1823). Marshall asserted that deference was due to the United States government by the limits of domestic judicial competency. See S. James Anaya, *Indigenous Peoples in International Law*, 17 (2000).

59 Gavin Clarkson, *Recent Developments: Not Because They Are Brown, But Because of Ea*, 24 *Harvard Journal of Law and Public Policy* 921, 925-926 (2001).

60 In practice, these obligations have been honored more often in the breach. See S. James Anaya, *Indigenous Peoples in International Law*, 23-25 (2000). The origins of the trust relationship go back to European policy during exploration and the "civilizing" mission of the colonizers. At the outset, US government policy shared this "civilizing" mission, which has morphed into trusteeship. Recently, the US government has been forced to take its role as trustee seriously. In *Cobell v. Babbitt*, 52 F. Supp. 2d 11 (D.D.C. 1999), *aff'd sub nom Cobell v. Norton*, 240 F.3d 1081 (DC Cir. 2001), the D.C. District Court found a genuine trust relationship existed between the US government and several Native American tribes and accordingly ordered a proper accounting of the funds due the tribes by the government for use of tribal land. Despite improvements, the trust relationship still carries the legacy of the "civilizing" mission; in this case on trust funds, it presupposes Native American tribes are incapable of managing funds due to them under treaty obligations.

61 David H. Getches, Charles F. Wilkinson, and Robert A. Williams, Jr., *Cases and Materials on Federal Indian Law*, 230-231 (4th ed. 1998).

62 The jurisdiction of the tribe versus the federal and state governments is an issue subject to frequent litigation. For the latest round, see *Nevada v. Hicks*, 533 U.S. 353 (2001) in which the Supreme Court reiterated that tribal courts are not courts of general jurisdiction.

63 See, e.g., *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) (finding Oneida Nation right to cause of action based on County of Oneida's unlawful possession of Oneida territory, but on the basis of a federal, NOT sovereign, right). For the settlement of the property claims of the Maine Indians, see *Maine Indian Claims Settlement Act*, 25 U.S.C.A. §§1721-1735 (2002).

64 This definition is simplified. For the complete definition, please see: 18 U.S.C. §1151. See also *Williams v. Lee*, 358 U.S. 217 (1959).

65 See *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973).

66 See [www.navajo.org](http://www.navajo.org), accessed on 25 Oct 03; see also [www.lapahie.com/courts.cfm](http://www.lapahie.com/courts.cfm), accessed on 25 Oct 03.

67 The analysis is a little more subtle than outlined here. Different states have different obligations in dealing with jurisdiction over Native Americans. See David H. Getches, Charles F. Wilkinson, and Robert A. Williams, Jr., *Cases and Materials on Federal Indian Law*, 485 (4th ed. 1998). It is therefore difficult to set out a 'one-size-fits-all' analysis. The outline presented here presents the issue broadly and is intended to demonstrate the options that take into account the historical background of interaction between the indigenous inhabitants and the more recent settlers.

68 18 U.S.C. §1152 (2002).

69 18 U.S.C. §1153 (2002).

70 "Zou-zu Tou-mu Fu-zi Qiang-qu Cai-mi-ren Feng-mi Bei Bu," [Elder Tsou Tribal Chief Is Arrested for Forcibly Taking Back Honey from Someone Trying to Remove Honey] *Zi-you Shi-bao* [Liberty Times], 21 Feb 2003.

71 *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1973). The decision rests on federal jurisdiction over major crimes committed in Indian Country, Congressional intent to prevent tribes from imposing criminal penalties on non-Indians, as

well as a long tradition of concern that non-Indians should not be subjected to a court and legal system which is in many respects foreign to them. Furthermore, at the time *Oliphant* was decided, few tribes had developed legal procedures that would not raise due process concerns. Tribes continue to have jurisdiction over crimes committed by Indians (regardless of tribal origin) in "Indian Country". See 25 U.S.C. §1301(4) (2002).

72 David H. Getches, Charles F. Wilkinson, and Robert A. Williams, Jr., *Cases and Materials on Federal Indian Law*, 556-682 (4th ed. 1998). By contrast, courts in Taiwan are unable to address different familial customs in the indigenous communities. Discussion with Judge Huang Mei-yueh, President of the Miao-li District Court, 19 Nov 2002.

73 Indigenous law and custom is being seriously considered, but the work remains mostly academic.

74 For a discussion on legalizing the rights of the indigenous community when doing so would legitimize the authority of the Taiwan government and undermine the claims of the indigenous community to "natural sovereignty," see Chen Shunling, *Yuan-zhu Min-zu Yun-dong Zhong 'Quan-li Fa-zhi-hua' Jin-lu de Kun-ju* [The Challenges Facing the Indigenous Rights Movement on the Path Toward the 'Legalization of Rights'], Jun 2002, unpublished MA thesis. On file with the author.