

DECLARING INDIGENOUS: INTERNATIONAL ASPIRATIONS AND NATIONAL LAND
CLAIMS THROUGH THE LENS OF ANTHROPOLOGY

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In 2007, the United Nations adopted a landmark resolution for indigenous issues, the Declaration on the Rights of Indigenous Peoples. After twenty years of preparation, there were, however, still problems. Four countries with significant indigenous populations declined to sign: the United States of America, Canada, Australia, and New Zealand. All four refused to do so over the contentious issue of land claims and some uncertainty about the definition of 'indigenous'. Examining these national systems for land claims and national museums through an anthropological perspective will help identify central issues in indigenous relations. All four nations recognize a form of indigenous land rights, but their infrastructure for recognizing and redressing these rights is often problematic. The Declaration is an important step toward finding solutions to disputes with indigenous peoples, especially now when in a globalized world multiple threats confront these groups. These four nations have a significant influence on how indigenous issues are being dealt with internationally, and without their support this declaration will be unable to make a real difference. Understanding the differences in evidentiary standards among the four nations will help suggest ways in which anthropological research can better work to support indigenous rights and actualize the aspirations of the Declaration.

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1.0 INTRODUCTION

The idea and application of the term ‘indigenous’ has tremendous importance for the field of anthropology and for its political and social repercussions in the contemporary world. The ties between past and present culture groups have always been an area of interest to scientists and lay people alike, and the intersections of concepts of race, ethnicity, and language continue to be explored today. Beyond the spirit of scientific inquiry itself, these relationships inform public policy. A prime example is land claim legislation.

In 2007, the U.N. passed the Declaration on the Rights of Indigenous Peoples, a landmark political document for the recognition and treatment of culture groups that have often suffered at the hands of the political power that dominates them. But beyond the articles themselves, the Declaration brought up two important concerns. What does it really mean to be ‘indigenous’? And why did some nations refuse to sign? After more than 20 years of preparation, the vote for the passage of this document was close, mainly due to the strong political pressure of the CANZUS group (Canada, Australia, New Zealand, and the United States) who dissented (IWGIA 2008).

The CANZUS group members are not the only nations with substantial and vocal indigenous populations. They are, however, all examples to the rest of the world of first-world nations substantially advanced in technology, economy, and other fields. They are also known for their significant indigenous populations and the sometimes tumultuous history that accompanies this. The dissenting nations all had numerous issues with the Declaration, but a central issue for all four was over the treatment of land claims in the document. Land is

undeniably a precious and non-renewable commodity, and to really examine indigenous land rights a thorough overview of land claim policy in each of the four countries and an analysis of the application of anthropological research, both in specific legal cases and in broader understandings of indigenous culture, is instructive and revealing.

Archaeology holds a special place in studies of history and prehistory due to its scientific analysis of materials and methods of rigorous hypothesis testing that can be particularly useful to resolving land disputes. This scientific character is not under dispute, however, in the wake of poststructuralism, postmodernism, and postprocessualism the discipline is being rethought and revitalized in considering its subjective, interpretative nature and the importance of multivocality (Fawcett, Habu, & Matsunaga 2008). While these trends are crucial in understanding modern archaeological practice, the national infrastructures that deal with land claims are often outdated. The combination of archaeological research along with other lines of evidence also may be considered scientifically valid but still be unable to successfully support a claim depending on the standards for evidence of the infrastructure. The use of oral testimony and rise of indigenous archaeology has impacted the nature of archaeology, and the process of decolonizing the discipline is leading to changes in how connections between past and living cultures, like indigenous peoples, are conceptualized and presented, both to the wider public and to the national infrastructure that handles land claims. It will be important, however, to explore how archaeology can be used most effectively, how it is being used, and how it can be misused. Landmark case studies will be analyzed here in terms of the evidence presented and the factors influencing its successful or unsuccessful resolution.

National museums present a unique opportunity to examine how relationships between the state and its indigenous peoples are politically situated. Closely tied to anthropological

models of culture groups, national museums through their exhibits often display an anachronistic understanding of these peoples that can further entrench misconceptions about tradition and cultural change, but in any case they promote a particular view to the public. These national perceptions draw attention to the land claims process and are a crucial part of indigenous relations. By examining both land claims and museums through an anthropological lens, central features of the dynamic between the government and the indigenous peoples will become clear. Outlining areas where change is needed will then help identify how the spirit of the Declaration on the Rights of Indigenous Peoples may best be reconciled with the individual nations.

2.0 BACKGROUND OF THE U.N. DECLARATION

The United Nations Declaration on the Rights of Indigenous Peoples was formally adopted by General Resolution 61/295 on September 13, 2007 with 144 votes in favor, 4 votes against, and 11 abstentions (IWGIA 2008; Appendix A). This declaration draws upon concurrent movements during the Second International Decade of the World's Indigenous People (2005-2014), declared by the U.N. General Assembly in December 2004 after deciding to further strengthen initiatives of the first decade, and the work of U.N. Permanent Forum on Indigenous Issues, established in 2000 (Schnuttgen, Vacheron, & Martell 2007). It also builds upon the framework of the earlier Universal Declaration of Human Rights, adopted and proclaimed on December 10, 1948, and the two International Covenants of 1966 (Economic, Social, and Cultural Rights for the first and Civil and Political Rights for the second) (Bowen 2000, Silverman and Ruggles 2007).

The more specific application of the notion of universal human rights to the particular problems indigenous peoples face has produced both praise and problems. While clearly a positive motion in dealing with the many pressures faced by indigenous peoples the world over, the U.N. Declaration on the Rights of Indigenous Peoples is perhaps most interesting in its problems. Even after 20 years of preparation and multiple drafts, there are many issues that are still major sources of debate. As a non-legally binding document, like most U.N. Declarations, the application and legacy of this resolution will also be a source for further research (United Nations Permanent Forum on Indigenous Issues 2007). Its potential lies in how the various

nations, regardless of their vote on this adoption, will carry out the legacy of the work invested in this process and the work of so many activists and scholars.

There are currently 192 member states in the U.N., composed solely sovereign states (United Nations 2006). Though the concept of a 'nation-state' has its problems, I would categorize at least those members of the CANZUS group as possessing not only the political and territoriality identity of a 'state', but the cultural and ethnic identity of a 'nation' as well (Holton 1998, Meyer et al. 1997). In fact, their processing of various ethnic and cultural identities within a national character is incredibly important in considering the decisions they make when claiming their political sovereignty and territorial integrity. It is both their national identity and state sovereignty that are challenged by certain conceptions of indigenous rights, and the four nations have reacted accordingly.

2.1 Passage

The U.N. Declaration on the Rights of Indigenous Peoples has a lengthy history, due to a slow recognition of the particular circumstances of indigenous peoples. The U.N. first set out to develop human rights standards specifically for indigenous peoples in 1982 with the creation of the Working Group on Indigenous Populations (WGIP) by the United Nations Economic and Social Council. Inspired by José R. Martínez Cobo's report (reflecting work beginning in 1971) on discrimination against indigenous peoples, the WGIP began preparing a draft of the declaration in 1985. Cobo's definition of 'indigenous' was adapted by the WGIP. In 1993, they agreed on a final text and submitted it to the Sub-Commission on the Prevention of Discrimination and Protection of Minorities.

After it was approved in 1994, it was next sent to the U.N. Commission on Human Rights. The 2005 World Summit and 2006 Session of the United Nations Permanent Forum on Indigenous Issues (UNPFII) pushed for the adoption of the document, and the Human Rights Council (which replaced the Commission on Human Rights) finally adopted the Declaration in June 2006 (United Nations Permanent Forum on Indigenous Issues 2007, Errico 2007). It was then sent to the General Assembly, who resolved to conclude its consideration of the Declaration before the end of its sixty-first session, in 2007. Once submitted to the General Assembly, its proponents moved quickly to maintain momentum and supporters, fearing that political changes within the various countries could shift votes. The CANZUS group was opposed from the beginning, and supporters of the Declaration feared that they would influence other states (IWGIA 2008).

Interestingly, the Russian Federation is noted as also opposing the Declaration, yet unlike the CANZUS group they chose in the end merely to abstain from voting. The main swing-vote in the General Assembly was the Africa Group of States, which caused the vote to be pushed to the sixty first session and led to some revision (IWGIA 2008). Led by Namibia, a number of states pushed for the document to be amended (Errico 2007). At the eighth ordinary session of the Assembly of the African Union, the states expressed their concerns regarding the Declaration, noting that the African Union:

...**WELCOMES** the efforts by the international community to address the rights of indigenous peoples and **EXPRESSES** full support and solidarity with indigenous peoples of the world;

WELCOMES ALSO the decision of the United Nations General Assembly to defer consideration and action on the Declaration to allow for further consultations on the numerous matters of fundamental political and constitutional concern, amongst the most important of which are questions about:

- a) the definition of indigenous peoples;
- b) self-determination;

- c) ownership of land and resources;
- d) establishment of distinct political and economic institutions; and
- e) national and territorial integrity.

AFFIRMS that the vast majority of the peoples of Africa are indigenous to the African Continent;

DECIDES to maintain a united position in the negotiations on amending the Declaration and constructively work alongside other Member States of the United Nations in finding solutions to the concerns of African States;

MANDATES the African Group at the United Nations in New York to continue to ensure that Africa's interests in this matter are safeguarded...(Assembly of the African Union, 8th ordinary session).

This split with the African Union threatened to influence wary states from Eastern Europe and the Middle East, as well as many of the Small Island Developing States of the Caribbean and some of the less powerful Asian states. The Africa Group sent the President of the General Assembly suggested revisions with over thirty amendments on May 17, 2007, which were deemed unacceptable. This submission occurred during the sixth session of the Permanent Forum on Indigenous Issues, which tried additional measures to ensure support from the various African states.

These efforts did not seem to secure the Africa Group, but a week before the General Assembly's session closed supporters were advised that the Africa Group of States had agreed upon a new text with only nine changes. The majority was able to accept the revisions, and the Declaration was submitted to the floor of the General Assembly. As expected, the United States, Canada, Australia, and New Zealand voted against (IWGIA 2008). The abstentions from voting included Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine (Office of the United Nations High Commissioner for Human Rights 2008).

2.2 Text

The Declaration on the Rights of Indigenous Peoples is a fairly detailed document, covering a wide range of issues in 46 articles (see Appendix A). While the content of the text itself raises many important issues, it is also of note what has been left out. Definitions for several important concepts were not explicitly articulated, whereas in other areas there is too much description given for the comfort of certain nations.

The initial reservations of the Africa Group are notable, especially when it comes to the definition of ‘indigenous’. Racial and ethnic tensions throughout the African states have made defining indigenous groups there much more problematic and protracted than in countries like the United States, Canada, Australia, or New Zealand (Bowen 2000, Lerner 2002). Nowhere in the final text is the term ‘indigenous peoples’ defined. Only Article 33 makes a reference to indigenous identity by recognizing their right to determine “identity or membership in accordance to their customs and traditions”. This ambiguity follows the tendency of most international institutions to reject attempts at definition and focus on ‘self-identification’. Moreover, the Working Group of Experts on Indigenous Populations/Communities of the African Commission advised that a formal definition could lead to the exclusion of legitimate indigenous groups by governments searching for an excuse to disregard certain peoples (Errico 2007).

A major problem for the four dissenting states was related to land claims, addressed most explicitly in Articles 25-29. Article 25 first establishes the importance to some ethnic groups of maintaining spiritual connections with traditionally owned lands. The spiritual associations with landscape have been well-documented by anthropologists and scholars in related fields. It is encouraging to see this recognition of the different types of land importance, which I see as an

increased cultural sensitivity in keeping with modern anthropological conceptions that will hopefully characterize political relationships with these peoples. Recognizing the various forms of connection with a landscape will also be important in implementing any articles about land rights, as the nature of these connections can encompass more than a single group and there may be multiple, contesting claimants involved. The specific relationships between one group and the land and their histories, beyond settlers or the dominant majority, with other indigenous groups require a great degree of research and background knowledge in dealing with each particular case. Understanding these ties with specific detail but wider standards will be a major challenge.

Emphasizing the spirituality of the landscape also builds off earlier work by the U.N. that upheld the importance of religious freedom and other basic human rights. Article 25 addresses the diverse nature of spiritual connections with ‘place’ as well. These areas are not limited to land alone, but also waters and other resources. Land contains more than just the area itself, the resources, such as species of flora and fauna, and its broader ecosystems add substantially to its value, spiritual and otherwise. An important consideration is sub-surface resources, especially minerals. Existing legislation in several nations prior to the adoption of the Declaration suggest that ‘resources’ is meant to be interpreted fairly narrowly as surface resources only, however Article 32 later specifically addresses the right to consultation and redress on projects affecting mineral, water, and other resources (Errico 2007).

Article 26 speaks directly to the land rights of indigenous peoples, explicitly stating their right to “own, use, develop and control” these territories. Access alone is not viewed as sufficient or even mentioned. This is interesting when examining the system in the United States, where it is difficult to merely gain access to traditional lands or its resources. The usage

of land terms such as “traditionally owned, occupied or otherwise used or acquired” tries to include all conceivable cases, but the criteria for establishing these statuses is noticeably missing, here and in the rest of the document. This leaves room for individual states to establish their own criteria for appropriate evidentiary standards, and this open-endedness could prove very problematic for the indigenous peoples trying to support a claim. Archaeologists and historians will almost certainly be of great value in establishing ‘traditional’ lands, though the term itself suggests a host of theoretical issues to be later discussed. Beyond the necessity of the state defining its standards of ‘traditional ownership’, Article 26 also requires them to give legal recognition and protection to these lands.

Article 27 further explores the responsibilities of the nation in regards to its indigenous peoples and these lands. The process of recognizing and adjudicating these rights must be “a fair, independent, impartial, open and transparent process” that also gives the peoples the right to participate in the process. A respect for and awareness of their customs and land tenure systems is paramount as well. As land tenure systems of indigenous peoples often diverge from the common understanding of the dominant society, the task of providing this important context will again likely fall to anthropologists and archaeologists to delineate. The openness of the indigenous communities themselves will be necessary, both in fostering mutual efforts with scholars and in dealings with the general public and non-specialists through the recognition process.

Recognizing the connection of indigenous peoples to these lands is not sufficient in addressing historical mistreatment and modern dispossession, and Article 28 introduces the issue of redress. The ideal form of redress is given as “restitution”. Only when this is not possible may “just, fair and equitable compensation” be substituted. The ideal compensation then is

“lands, territories and resources equal in quality, size and legal status”. In considering the amount of territory originally held by indigenous peoples in nations like the United States, such compensation is obviously impossible. Monetary compensation or other appropriate measures are thus also permissible. The forms of redress must be freely consented to by the indigenous peoples and provisions for a deal with prior knowledge or consent is not permissible.

Article 29 and Article 30 begin to address more of the activities that are and are not permissible on indigenous lands, territories, or resources. Article 29 is the more interesting of the two in relation to land claims because of the focus on the conservation and protection of the environment. The productivity capacities are an important right, and the Declaration asks that the nation “establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination”. Indigenous peoples have an unfortunate history of being pushed to areas no longer deemed valuable by the state, including those without much of a productive capacity. Their traditional lands often then end up being heavily exploited for resources. Article 29 is important in establishing the responsibility of the state to ensure the productive capacity of the returned land and resources.

The articles dealing with indigenous land rights are bold and broad, although a few pitfalls can be noted. Even so, the rigor of the responsibilities the Declaration proposes for the nation and the restitution outlined was enough to upset the CANZUS group. Although, for instance, several nations already had systems in place for dealing with indigenous land claims, after my closer examination of them I think it is unlikely that most meet the full measure of intent presented in these articles. Land is an important step for self-determination. Land and resource-based self-determination, as opposed to merely cultural self-determination, has however raised concerns over the unity of the nation-state.

The Declaration is written in such a way as to support internal self-determination, with territorial integrity (Errico 2007). Article 46 was added at a later stage in the process to ensure this was clearly stated (“NZ” 2007). The article explicitly states that nothing in the Declaration should be implied as “authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States”. However, it will likely be a delicate task to find a true balance of self-determination and autonomy for the indigenous peoples while still maintaining national unity and cooperation.

2.3 Response

With such a long history, the vote and adoption was emotional for many groups. A large number of indigenous delegations were present, and after the vote passed in favor of adoption there was much excitement among them (IWGIA 2008). The spokesperson for Secretary-General Ban Ki-moon, Michele Montas, declared it a historic movement for reconciliation of “painful histories” between states and indigenous peoples and signals a move “forward together on the path of human rights, justice and development for all” (Associated Press 2007). Though not a legally-binding document, it is viewed by many as an important symbol. As the minimum standards for “the survival, dignity and well-being of the indigenous peoples of the world,” as stated in Article 43, it provides hope for further improvements on the national and international level.

2.3.1 *Opponents*

As such an important symbol, it is significant to examine the symbolic and concrete reasons proposed by the opponents. Although the dissenters and several of the countries that abstained emphasized their commitment to indigenous issues, their main area of concern was that

the Declaration gave indigenous peoples too many special rights and would “clash with existing national laws” (Associated Press 2007). They claimed that their legal traditions were based on collective and individual rights, and there was concern that the Declaration would pose an unfair advantage when compared to the rights of other citizens (Edwards “Native”, “Tories”).

Proponents view this issue as case of ensuring ‘equal rights,’ not providing ‘special rights’.

Many dissenters also suggested that the current text was unclear and confusing.

Benjamin Chang, a spokesman for the U.S. Mission to the U.N. expressed the support of the U.S. on the issue and desire to hold out for a text “universal in its scope and [that] can be implemented” (Associated Press 2007). The degree of interpretation possible on the Declaration due to its ambiguous language was also seen as open to a variety of interpretations and possible misuse. The lack of definitions and well-outlined measures for implementing and enforcing these rights was designed to make it applicable to all members of the international community, but this same characteristic can be viewed as a significant flaw.

There was a substantive amount of criticism directed at the drafting process itself and the interplay between the parties. Representatives from the U.S. and Australia were upset at not being consulted more during the drafting process, saying “sponsors excluded them from negotiations where agreement was reached on the amended text” (Associated Press 2007). Due to the uncertainties about the final votes of the Africa Group, few states were involved in the last alterations to the text and a narrow time-frame was imposed. Interestingly, before the vote took place there were accusations against the United States and Canada by many indigenous leaders, claiming that they were “pressuring economically weak and vulnerable nations to reject the calls for the Declaration's adoption” (Rizvi 2007).

While the views of the abstaining states are instructive in examining the perceived flaws of the Declaration, it is the outright dissenters that merit the most consideration. Accordingly, my attention will focus on the attitudes of the CANZUS group, both the reasons they provided for their vote and the ways in which their existing systems help and harm indigenous peoples. Understanding both how the nations perceive their relationships, both through land claims and through national museums, will be essential in analyzing the applicability of international standards for indigenous rights and identifying areas that call for improvement. In their official statements, each of the CANZUS group members emphasized their commitment to indigenous issues and discussed their well-developed infrastructures in dealing with indigenous issues, while the present realities may suggest that there is still a lot of work to be done, that might be assisted by international calls to action.

2.3.2 *Reactions of and within the dissenting nations*

The four dissenting nations each prepared a statement to the general assembly outlining the reasons for their vote. The text and the reactions to the statements themselves provoked in several interested parties within the nations merits a closer look. Already political repercussions can be seen in the news, and the longer term effects of their dissenting votes project possible successes and failures of the Declaration itself in the wider international community. The full text of each statement is provided in appendixes at the end of the paper. My treatment will again focus mainly on problems with definition and land rights, then turn to the display of such issues in national museums in each nation.

AUSTRALIA (see Appendix B)

The Honorable Robert Hill, as Ambassador and Permanent Representative to the U.N., delivered his statement the same day as the vote. He was firm in emphasizing Australia's

support of the spirit of the Declaration and their previous vote through the various versions, and he expressed displeasure at being left out of the negotiations of the final draft. Keeping in mind the uncertainty of the African Group of States and the rapid nature of the changes that occurred, it may not be particularly surprising that Australia was not included in the few parties attempting to finalize the text itself. The prevalent view that Australia would reject the Declaration even before the concerns of some of the African nations were addressed must be understood.

Ambassador Hill's statement divides Australia's concerns among several issues: self-determination; lands and resources; free, prior and informed consent; intellectual property; third party rights; customary law; and the status of the Declaration. Examining the lands and resources section, the issues Australia has with the Declaration's treatment of land claims are laid bare. This opposing view that the Declaration provides land rights to indigenous peoples over and without regard to other legal land rights is considered especially problematic. It is interesting to note, however, that Ambassador Hill acknowledged that this "could be read" in several ways. Ambassador Hill also worried that this expressed right trumps national laws, raising issues of enforcement and doubt about the legal status of other interests. In defending their views about the integrity of the state legal system, Ambassador Hill noted that "many national legal systems, including Australia's, also provide for lawful compulsory acquisition of interests in land". These legal notions about acquisition will prove important when examining the original basis used to justify the taking of indigenous land and how modern legal systems justify returning the lands or not.

The lands and resources section ends with a brief outline of Australia's plan for resolving land claims:

Australia will read the lands and resources provisions of the Declaration in line with its existing domestic laws, including the Native Title Act, which includes provision for compulsory acquisition of native title rights and interests with an entitlement to compensation.

I will later examine the infrastructure and efficacy of the Native Title Act. Concerns over land are raised again in Ambassador Hill's discussion of third party rights. With "exclusive rights over property" the Declaration gives to indigenous peoples, he claimed that "the Declaration fails to consider the different types of ownership and use that can be accorded to Indigenous people and fails to consider the rights of third parties to property". The "different types of ownership and use" calls immediately to mind situations in which indigenous peoples fight for basic access to resources on their traditional land, a situation also common in the United States. Again, an analysis of the Native Title Act and various case studies in Australia will prove instructive in examining exactly what scenarios the existing legislation allows.

The concluding remarks of Ambassador Hill's statement address the legal status and potential of the Declaration to support an actual application. Not only is the Declaration not legally binding, but the official Australian position is that it does not reflect international law:

- "does not describe current state practice or actions that states consider themselves obliged to take as a matter of law",
- "does not provide a proper basis for legal actions, complaints, or other claims in any international, domestic, or other proceedings", and
- "nor does it provide a basis for the elaboration of other international instruments, whether binding or non-binding"

The viewed ineffectiveness and non-representative nature of the Declaration prevents any serious usage, according to Australia. Ambassador Hill noted that throughout the long period in which the Declaration was drafted, Australia had worked for a document that "is meaningful, is

capable of implementation and enjoys wide support in the international community” and that because the current Declaration failed in all three areas, it cannot be supported. Since it is a non-legally binding document, Australia’s position is that it lacks true meaning and possibilities for implementation. However, the phrase “wide support in the international community” is interesting. The CANZUS group was consistent in their voting even though the final weight of the vote was rather uncertain for a period. An overall majority (143 nations) approved. The members of the CANZUS group alone presented a formidable front when the applicability of resolutions to indigenous issues is put into practice.

Australia’s position on the Declaration is related to their ongoing political developments as a nation. Since 1996, a conservative government, led most notably by John Howard, has been in power, and during this period forward momentum on indigenous issues was halted. In recent elections, indigenous relations have become a significant issue. The new labor government has promised to sign the Declaration, and even Howard changed his tune on the eve of the election to promise a “new Reconciliation”, but too late (IWGIA 2008:237). The election of the new Labor Prime Minister Kevin Rudd gives hope that Australia will join the international community in making real change on these issues.

This move would prevent in the future such events as the military invasion and suspension of Aboriginal civil rights in the Northern Territory (NT) on June 21, 2007, just a few short months before the Declaration vote was taken. The NT intervention, as it is called, was spurred by the high rates of child abuse in troubled Aboriginal communities in the region. The nature of the “shock and awe campaign”, as some called it was seen as akin to the 2003 U.S. invasion of Iraq- startling to many people, especially indigenous rights activists (IWGIA 2008:233-4). After such a clear disregard for Aboriginal rights, many hope that the new PM and

a real commitment to the Declaration will usher in a new period of progressive political movements in relation to indigenous issues and their urgency in Australia.

NEW ZEALAND (see Appendix C)

Ambassador Rosemary Banks also began her statement by expressing New Zealand's long-standing support of indigenous peoples and the formation of a declaration on their rights. She mentioned the unique nature of the Treaty of Waitangi and the resulting importance and activity among their indigenous population. She also stressed the unique nature of New Zealand's land claim cases, with claims to "over half of New Zealand's land area" being settled. The scale of these settlements will be an important facet of our later discussion of New Zealand. As such, Ambassador Banks stresses their long-standing commitment to addressing indigenous issues and to upholding many of the principles of the Declaration.

There were, however, four specific articles noted that prevented New Zealand from supporting the Declaration: Articles 19, 26, 28, and 32. Articles 26 and 28 have been addressed earlier, as 26 deals with land and resources and 28 deals with methods of redress. Articles 19 and 32 deal with "a right of veto over the State". The sentiments in these four articles echo Australia's concerns, that is, giving indigenous peoples 'special rights' and denying the sovereignty and territorial integrity of the state.

In Articles 26 and 28, a major difficulty was with the implied unrestricted territorial scope of land claims. As can be argued with any of the four CANZUS nations, the entire country could potentially be considered as traditionally owned, occupied, or used. This was understandably problematic, and Ambassador Banks expressed displeasure that Article 26:

appears to require recognition of rights to lands now lawfully owned by other citizens, both indigenous and non-indigenous, and does not take into account the customs, traditions, and land tenure systems of the indigenous peoples concerned.

Again, the ‘lawful’ basis of this ownership as tied into the original policies during colonization must be examined. The scope of Article 28 in redressing land rights was also troubling to New Zealand in terms of its possible scope and its failure to recognize modern ownership. This presents an opportunity for conflicting claims, even between different indigenous groups. Though New Zealand has a fairly extensive land claim settlement process, even they, as Ambassadors Banks stated, cannot possibly “uphold a right to redress and provide compensation for value for the entire country”.

Beyond the scope and practicality of the articles, Ambassador Banks also discussed the worry that the Declaration gave indigenous peoples rights that do not belong to other citizens. In their view, the spirit of equality as a democratic nation is denied by this document and goes against national integrity and policy. New Zealand’s concerns with Articles 19 and 32 are also primarily derived from this sentiment. They view certain wording as “impl[y]ing that indigenous peoples have a right of veto over a democratic legislature and national resource management” and justifying the creation of classes of citizens which cannot exist in a democratic nation. New Zealand is very firm on the importance of informed consent, but a “right of veto” is fundamentally at odds with their national policy. In examining the text of those articles New Zealand was concerned about in the Declaration, they stress the idea that informed consent take place before projects are approved or measures implemented. In my reading, it appears rather clear that the approval and implementation occurs through the state government, but the ambiguous nature of the text might support an interpretation that the final ‘approval’ rests in the hands of the indigenous peoples themselves.

There were other issues of lesser concern, but Ambassador Banks did not go into any great detail about them. Like Australia, she proposed that the Declaration in its current form

contained principles incompatible with the most basic elements of their government. She also claimed that even for the states voting for the adoption of the Declaration, many would have trouble actually implementing it. Though Ambassador Banks noted that the Declaration was not legally binding but was sentiment based, New Zealand's serious consideration of its contents led them to be unable to support even some of the proposed ideas. With regard to its legal effect and implementation, Ambassador Banks stated:

on record our firm view that the history of the negotiations on the Declaration and the divided manner in which it has been adopted demonstrate that this text, particularly in the Articles to which I have referred, does not state propositions which are reflected in State practice or which are or will be recognized as general principles of law.

She concluded with a statement claiming an awareness of the necessity for a constructive and harmonious partnership with indigenous populations to promote and protect indigenous rights. From the 'special rights' concerns expressed in her statements, the position of New Zealand is that the Declaration as it stands does not support a true partnership.

In New Zealand, some members of Maori Party immediately called the decision to dissent a vote against outlawing discrimination and other, stronger, words. Maori Party co-leader Pita Sharples claimed that Ambassador Bank's statements about how "individual and collective rights do not fit with Labour policy" demonstrated that the vote of New Zealand was against "justice, dignity, and fundamental freedoms for all" ("NZ" 2007). Maori party co-leader Tariana Turia went even further, calling September 13th a "red-letter day" and indicated that the New Zealand government still considers indigenous peoples "sub-human with only sub-human rights" (ibid). Maori Affairs Minister Parekura Horomia retaliated by calling Turia's comments ridiculous and offensive, noting that the Declaration had no legally-binding status and was fairly "toothless" for implementation. Horomia again raised the issues inherent in Article 26 and accused Maori Party members of having their heads in the clouds and supporting "pie-in-the-sky

talk which won't make a jot of difference in our peoples' lives" (Scoop Independent News 2007). It is clear that the New Zealand government remains focused on results and policy that can be put into practice, whereas certain Maori leaders responded positively to the spirit of the Declaration and desired unity within the international community in politically recognizing indigenous rights, even on just a sentimental level.

CANADA (see Appendix D)

Ambassador John McNee, as did previous representatives, opened with statements expressing Canada's commitment to indigenous issues and its long track record working with the U.N., at home and internationally. Interestingly, Ambassador McNee also stressed that Canada's issues with the Declaration stem back as far as the draft proposed at the Human Rights Council in June 2006, marking their long-term disappointment both with the text and with the process. As Australia had expressed dissatisfaction at not being included in the recent renegotiations on the text of the Declaration, so did Canada, reiterating the vote at the Human Rights Council Canada for "an open and transparent process with the effective involvement of indigenous peoples". He charged that the rapid modification of the text under the influence of the Africa Group was prepared by a limited number of delegations, and because of this these changes did not represent major issues for several states, including Canada.

Beyond the process, several problematic issues were identified in Ambassador McNee's statement, including:

the provisions on lands, territories and resources; free, prior and informed consent when used as a veto; self-government without recognition of the importance of negotiations; intellectual property; military issues; and the need to achieve an appropriate balance between the rights and obligations of indigenous peoples, member States and third parties.

For my interests, the expansion of land issues is most relevant. Treaty and Aboriginal rights are noted as important parts of Canada's constitution, and Ambassador McNee stated that Canada is equally proud of its current claim system, while working to make it even more effective. With such an infrastructure already in place and working, the relevant articles in the Declaration were viewed as problematic. Specifically, the articles are characterized as "overly broad, unclear, and capable of a wide variety of interpretations, discounting the need to recognize a range of rights over land and possibly putting into question matters that have been settled by treaty". Again, the underlying legal structure of the initial 'acquisition' of the land is called into question by the Declaration. The treaties that deny the validity of initial modes of 'acquisition' would prove problematic when honoring the legal agreements already in place.

Canada also expressed displeasure over the articles dealing with consent. A notable departure from the other two nations previously discussed is repeated in the phrasing, "nations with significant indigenous populations", bringing to mind questions of what percentage of the overall population or level of political activity/activism or recognition is necessary to be considered 'significant'. Nations like China do not view the many ethnic groups with long histories in particular areas as indigenous groups, so does China therefore not count as having a practical opinion equal to Canada or the other CANZUS members with 'significant' indigenous populations? The possible implications of this reasoning are problematic for building a solid international consensus of indigenous issues.

The reactions by indigenous peoples within Canada viewed this as another sign that the recently elected Conservative government was taking a "180-degree turn in relation to indigenous peoples" (IWGIA 2008:57). The vote against the Declaration also sent warning signals to those drafting the American Declaration on the Rights of Indigenous Peoples, which

has no planned completion date. In reaction to Canada's vote on the Declaration and in a sign of solidarity with other American indigenous peoples, the Assembly of First Nations began to discuss bringing Venezuelan President Hugo Chavez and Bolivian President Evo Morales to visit in an effort to put pressure on the Canadian government. They also called for Canada's resignation from the UN Human Rights Council (Ottawa Citizen 2008).

Indian Affairs Minister Chuck Strahl defended Canada's decision because he thought the Declaration went against the legal basis of their constitution and placed indigenous peoples above other citizens. Minister Strahl claimed that it was "unworkable in a Western democracy under a constitutional government," and noted that it was "significant" that the United States, Australia, and New Zealand also dissented, all of which are "advanced democracies with significant indigenous populations" (Edwards "Tories"). Those who supported the document then were mainly countries with few indigenous citizens, like Europe, or have a poor record of respect for indigenous rights, according to Strahl.

Strahl additionally cited the example of Article 26 and the notion of "traditional" ownership, saying:

In Canada ... you negotiate on this ... because (native rights) don't trump all other rights in the country. You need also to consider the people who have sometimes also lived on those lands for two or three hundred years, and have hunted and fished alongside the First Nations (Edwards "Native").

In response, Assembly of First Nations Chief Phil Fontaine argued that the Declaration was merely an aspirational document that would allow for the primacy of domestic law in any legal conflicts. Furthermore, Fontaine said that as far as giving indigenous peoples special rights, "the record of Canadian native groups is one of responsible partner" and of balanced rights, noting

that “we have never taken a decision that has resulted in the dispossession of land and property of others” or compromised the rights of others (ibid).

Other leaders in indigenous issues expressed varying levels of disappointment with Canada’s decision. Legislator Jean Crowder, a part of Canada’s left-leaning opposition New Democrats party called the dissenting vote disappointing, cowardly, and “very un-Canadian” (“NZ” 2007). The President of the Native Women’s Association of Canada, Beverley Jacobs, viewed Canada’s rejection after extensive lobbying from her organization for gender equality and non-discrimination as a “blatant disregard for all our struggles” and an issue of trust (Edwards “Native”). The National Chief of the Congress of Aboriginal Peoples, Patrick Brazeau, took a more philosophical position, recognizing that Canada already stands as a leader in the rights it affords to its indigenous peoples and that overall they are very well off compared to groups worldwide. While disappointed, he noted that “Aboriginal and treaty rights are recognized in the Canadian Constitution [,and] we also have self-government agreements that have been ratified” (ibid). This overall satisfaction with current legislation but disappointment on a more symbolic level in Canada will be interesting to examine further when analyzing their current land claim system.

UNITED STATES (see Appendix E)

The United States of America was represented by Delegate Robert Hagen. In a bit of a departure from the other presentations, Delegate Hagen began by criticizing the drafting process, claiming that the text that was accepted was prepared after negotiations were over, and there was no opportunity to discuss the new version collectively. Even the text adopted by the Human Rights Council was only passed in a “splintered vote”; the whole process setting a “poor precedent with respect to UN practice”. Like the other three members of the CANZUS group,

Delegate Hagen criticizes the confusing language and multiplicity of interpretations possible. In its official statement to the General Assembly, the U.S. position did not evaluate separate issues of major concern. Instead, they were attached in separate document. Delegate Hagen concluded the statement to the General Assembly with an exposition on the United States' history and future relations with their indigenous peoples. It is significant that Delegate Hagen addressed the Native American tribes as having a government-to-government relationship. This emphasized "inherent powers of self-government", which is interesting since one of the major areas of concern for the United States was self-determination.

In their "Observations" document, the United States expounded on their problems with the Declaration. Like the other four dissenting nations, the U.S. called into question the applicability of the proposals of the Declaration in relation to international law and national practice. The document suggested that the Declaration was an "aspirational declaration with political and moral, rather than legal, force". The main sections of dispute for the U.S. were given as self-determination; land, resources, and redress; collective rights; and general welfare. The main problem with the self-determination issue for the U.S. was more with language of the phrasing and replacement of previously existing and agreed upon definitions of what constituted self-determination. Previous international legal standards had already established that "indigenous peoples generally are not entitled to independence nor any right of self-government within the nation-state". The phrasing of Article 3 "retroactively modifies" that existing standard that "afford[s] indigenous peoples the right to independence or permanent sovereignty over resources". Other parts of the Declaration, however, supposedly made it clear that the "existing right of self-determination is automatically applicable to indigenous peoples per se or to indicate that indigenous peoples automatically qualify as 'peoples'".

The indefinite nature of the phrasing of the lands, resources, and redress topic was viewed as extremely problematic. As Canada also specifically addressed, the wording in Article 26 is open to the interpretation that indigenous land rights trumps all “other legal rights existing in land, either indigenous or non-indigenous”. As was questioned by New Zealand, the United States expressed disbelief that the framers of the Declaration were unaware that this could be extended to the entire country in some cases, such as the dissenting members of the CANZUS group, or that it intended to “ignore contemporary realities in most countries by announcing a standard of achievement that would be impossible to implement”. The language used in discussing redress is also cited as confusing and ineffective in encouraging the adoption of national policies that allow for effective mechanisms of “full legal recognition and protection”. These mechanisms, the United States noted, also must realize the “customs, traditions, and land tenure systems of the indigenous peoples concerned”. The importance of this understanding of previous cultural traditions cannot be overstated in creating a process of effective recognition and forward-moving policies of land management. Anthropology and related fields, working with the peoples themselves, will play a crucial role in providing this awareness.

One of the last noted issues in the Observations is about the absence of a definition of ‘indigenous peoples’. The U.S. described it as an “obvious shortcoming”, suggesting that its absence will allow for “endless debate, especially if entities not properly entitled to such status seek to enjoy the special benefits and rights contained in the declaration”. There are numerous ethnic minority group issues undergoing similar scrutiny, but indigenous peoples differ fundamentally in contextually assumed ways. As indigenous issues and rights takes a greater place on the international stage, this problem can only be expected to increase.

2.4 Significance

As noted in the preamble, the Declaration is a “standard of achievement to be pursued”. It is not a legally-binding document. As such, the dissenters are clearly positioned in opposition to the spirit and sentiments of at least some of the articles, since adopting the resolution can have no direct effect on its current infrastructure. As seen in the dissenters’ statements, it is an “aspirational declaration with political and moral, rather than legal, force”. It is likely though that the Declaration will have an impact on further actions and reception by the international community. It remains to be seen how great an impact it will have on the policies of individual nations. Already, for instance, Bolivia has turned the Declaration into national law, completely revising its political constitution. On the other hand, Thailand, another nation that voted for the adoption, has said it will not implement the Declaration unless clearly subordinate to existing laws and the national constitution (IWGIA 2008). Policy changes or entrenchment of pre-existing systems will most likely occur in several other countries, which will be followed closely by indigenous peoples and others worldwide. Anthropology can provide leadership both in academic and political arenas throughout this process and ideally lead a rise in international standards and cooperative scholarship in considering the unique position of indigenous peoples.

There are currently between 300 and 350 million indigenous people worldwide, as recognized by UNESCO, making up about 5% of the world population. Another recent estimate by Survival International gives a figure of 250 million, showing the difference in how ‘indigenous’ is defined (de la Cadena & Starn 2007). Identified groups are present in over 70 countries and speak over 5,000 different languages, and they represent a diverse swathe of humanity (UNESCO). They face problems ranging from displacement and unequal access to outright persecution. Their traditional natural resources are threatened by developments such as

urbanization, mining, logging, etc. Increased environmental movements present another concern, with the new creation of national parks, reserves, and related protected areas often at odds with the living areas and practices of these cultures (IWGIA 2008). Under such circumstances, international standards on indigenous issues is desperately needed and called for. We will have to see how each nation takes up the banner and if the international community can live up to the Declaration it has adopted.

3.0 THEORY

Before analyzing each of the dissenters individually, there are several common areas of concern that apply to all nations and must be addressed. While focusing on land claims and national perceptions displayed through national museums, these issues are informed by broader anthropological conceptions of resources, sovereignty, political power and propaganda, and the nature of scholarship and scientific reasoning. There are no easy answers, but each aspect is essential in recognizing the depth and the value inherent in the problems and possibilities embedded in indigenous issues. A brief exploration of these important theoretical concerns will then help to inform our discussion of each nation's unique situation with some common struggles.

3.1 Importance of Land

Land holdings are important because they generally are closely tied to the notion of culture, spirituality, and power and self-determination for indigenous peoples. Looking at land as a commodity, it contains access to natural resources such as minerals, trees, food, etc. It therefore allows for subsistence and economic support. In an indigenous mentality, however, land forms the basis of cultural existence. Though pieces of land themselves “are neutral items fixed in time and space”, associations and identification with land build up its value (Saltman 2002:3).

With this type of self-identification, land can become a place of residence, a nexus of homes and community. It naturally follows that the land contains significant memorial and

spiritual associations, which in some cases may be more precious than its natural resources. It is more than just its resources, but the codification and physicality of cultural ties. “Landscape encapsulates the spatial and temporal relationships between people, the biophysical environment, and is a powerful agent, expression and reflection of culture”(Meurk & Swaffield 2000:255).

The ancestral ties indigenous peoples have to the land can be seen in a number of ways but most directly in burials, one reason that repatriation of human remains and acts like NAGPRA in the United States are so important.

Just as these cultural relationships are diverse, so are the different types of land rights. This variety reflects the complexity and diversity of indigenous societies. In many nomadic societies, property rights as commonly understood in urbanized and industrialized nations do not exist. Enclosure of previously open territories and property rights go hand in hand and lead to scarcity, as control then rests in the hands of some as opposed to all, and often conflict (Saltman 2002). Of course, not all or even most indigenous peoples are nomadic, and it is important to avoid oversimplifications of indigenous cultures, suggesting that they are less complex and more primitive than “western civilization” (de la Cadena & Starn 2007).

Multiple other possibilities of indigenous land tenure systems exist, and ownership in some cases can not be claimed beyond the recognition of traditional use. The signs of land management practiced by indigenous peoples were not always noticed by the dominant power, though the human modifications of environment are still being recognized by anthropologists, cultural geographers, and more. These areas then become ‘cultural landscapes’, both products of the culture occupying and modifying it and expressions of “how people engage with their world, how they create explanations for and experiences of their surroundings” (Clarke 2003:ix). They reflect then not just material changes but also the attitudes and perceptions of their inhabitants.

Certain areas also may not be used for habitation but merely for food or other resources. Alternatively, governments may only grant rights of access to specific resources to indigenous peoples, allowing them some benefits but preventing full reclamation. Usage may also change over time as cultures change, and indigenous peoples, like all cultures, are not static but constantly evolving, reacting and acting. The ways in which a Native American person in 2009 interacts with a spiritual site may be different from that in 1709, yet it is still culturally relevant. Notions of what it means to a ‘traditional’ indigenous person must not curtail their identity and rights, and these out-dated modes of conception must change.

‘Traditional ownership’ can be difficult to determine. Land tenure systems at time of contact are not always clearly understood, and it may require quite substantial research to reach real recognition. Migrations, forced or not, also must be considered in examining traditional ownership. Demonstrating traditional cultural uses after being separated for long periods of time is difficult, especially as cultures easily change, even without the forced assimilation policies common to colonizing societies. Once removed from the landscape, how can these ties be proven? How long must you and your ancestors live on a place before it can be considered traditionally owned? How far back can you physically trace your ancestors? In some cases, it can be difficult even to prove to the nation that your group is a distinct indigenous population, especially within the guidelines of the American federal recognition document. If not recognized, the groups receive no benefits and cannot claim any rights to land or sovereignty. What if there has been a significant amount of intermarriage between indigenous peoples and members of the dominant society? Who then can claim indigenous identity and benefit from a successful land claim? Or can we recognize several types of participants in a landscape? Is a

spiritual or emotional connection enough? These are important questions that tap into our understandings of ethnicity, archaeological knowledge, human biology and genetics, and more.

For immediate practical purposes, we will recognize that it is not uncommon for indigenous peoples to have been separated from their lands and resources for a significant time. Even if not fully dispossessed, their individual trajectories will have been substantially impacted by the dominant majority group, often including economic, cultural, and religious influences. They may have lost some traditions associated with those places, but the Declaration recognizes it as their right to proceed to interact with these areas in their own ways, without further interruption by the state. This right does conflict with the current inhabitants of those contested areas, and it is especially problematic in cases where the current owners have themselves lived and worked in the same area for more than two hundred years. These cases have been encountered by members of the CANZUS group, and it is interesting to see how land claims cases are resolved when the disputed area is considered prime settlement territory compared to when it is an area not viewed as particularly valuable. In these cases, it often feels like the nation will be understanding and sympathetic to the indigenous rights of traditional ownership as long as it is not disruptive.

However, while indigenous land claims are based in the land itself, it is not so much about getting a prime spot or the real estate game of “location, location, location” but regaining a loss. Beyond just economic survival, these places are encoded with the desires of returning to self-determination and regaining cultural identity, dignity, and vitality (de la Cadena & Starn 2007). After long periods of discrimination, haphazard political decisions (often without consultation), and/or forced relocation, it is understandable how land claims have taken such a prominence in indigenous activism and form such a substantial part of the Declaration on the

Rights of Indigenous Peoples. As we go further into theory and the specifics of the CANZUS members' situations, we will see why land issues form a substantial part of criticism of the Declaration. Information that can be gained from archaeological recovery can be extremely useful in dealing with these concerns, though it has its own problems.

3.2 Archaeology and Land Legitimacy

The term 'traditional ownership' appeared several times, both in the text of the Declaration itself and in the statements of the dissenting nations. Without a clear definition in the document itself, what constitutes this 'traditional ownership' is left to each nation to decide. How this is conceptualized and turned into policy is critical for indigenous land rights, and archaeology is often an important line of evidence. Establishing the duration of occupation in an area and the territorial range of these peoples can be important in corroborating a treaty or in recognizing the existence of such a society if no written records exist. Moreover, there is a tendency to view prehistoric groups as 'traditional' and separate from modern indigenous groups, who often do not meet the defining characteristics based on the spread of past material cultures. Contact archaeology is especially important in recognizing the continuity of these peoples and clearing up misunderstandings about cultural and historical processes. Where the peoples themselves have often been marginalized in the colonial written record, archaeology may allow for more direct links of a more immediate and physical type. Both prehistoric archaeology and contact archaeology have provided important information, even though the use of archaeology in land claims depends greatly on the legal system of the nation.

All land rights claims eventually must conform to the law, and indigenous legal studies is a significant and growing field. My interest in indigenous legal studies is focused on the nature

of the evidence required for successful trials and how archaeology does and does not meet those requirements for each of the dissenting nations. Other lines of evidence obviously also come into play, especially historical records. Written records can often be the sole basis for a case, as some Native American tribes have come to recognize if their treaty has been lost over time and their claims are unrecognized. But who writes and whose needs are foremost? The need for ink and paper treaties over oral contracts is a colonial tradition. In relying so heavily on the efficacy of paper, do these systems deny the rights of indigenous cultures by forcing them to act solely in colonial terms?

What can be done in the cases where there is no written record? Archaeology relies on the material record to speak for those who did not write, which can be a form of empowerment when considering the past (Leone et al. 1995). But along with this materiality comes an equally important and intertwined aspect of context. Though archaeologically recovered artifacts can be objectively analyzed, interpretation can be said to start at the edge of the trowel (Hodder 1997). The first steps of archaeological research, deciding where to excavate and what are the central research questions, place a subjective interpretation on the process from the start. Even decisions regarding what scientific tests are performed back in the laboratory are directed by these interpretations (Tilley 1989, Richards 1995). The very nature of this interpretative process, however, allows for more voices and narratives to be constructed than what is provided by written records alone. Archaeology as such then does not produce a final, definitive account but rather a narrative, an understanding (Shanks & Hodder 1995, Hodder 2008, Wylie 2008). Arguably, all fields of science fit this characterization. After accumulating evidence in testing a hypothesis, a theory that best fits is developed. As new evidence arises these understandings can

be changed, or new theories that better fit existing evidence may be adopted, producing a paradigm shift and a new model (Kuhn 1962).

The physicality of the remains and use of scientific testing when placed with the interpretations and construction of archaeological narratives lead to an objective/subjective dichotomy that is not always well explored in the general public (Carman 1995, Hesse 1995, Smith 2006). The ‘scientific’ aspects give archaeology a unique position of authority and legitimacy in human resources, while this same property can also easily lead to pseudoscience in the wrong hands or agenda (Fagan 2006, Renfrew 2006). There has been much discussion in the archaeological community about the nature of ‘pseudoarchaeology’, defined as “the misinterpretation of the past misusing the material evidence of that past”, and how much influence interested parties and consequences have on the nature of scholarship (Renfrew 2006:xii). Beyond academia itself, the practical applications of archaeology are greatly affected by these concerns as well. Again, the nature of the system of proof required to establish land legitimacy raises some interesting questions. In these situations, academic researchers and their work are being judged not just by their peers, but by a political system and by the indigenous peoples themselves. Archaeology is a *social* science with many parties being affected by it, even if they have not been previously involved in the process but merely the aftermath (Shanks & Hodder 1995). It also must be driven by evidence, however, and not agendas.

Even if the scholarship is accepted by the academic community, is it accepted by the indigenous communities? Archaeology may well be accepted by the indigenous communities as a strategy, but is it considered as a truth? Are they forced by the system to speak the “white man’s” words but reject their validity beyond a means to the desired end (Deloria 1995)? Archaeological constructions of the past are not always accepted where they contradict religious

beliefs, especially creation myths. One might argue though that science has its nay-sayers in many religious groups, for example, Christianity and its rejection of evolution in favor of creationism or intelligent design. In any case, the validity of archaeology as evidence may be accepted by the system, but is it seen by its living descendents as the truth?

Similarly, oral histories and the words of chiefs may be considered by certain peoples as truths, but using such testimonies in court may not be a successful strategy (Monet and Skanu'u 1992, Kuper 2003). There is a growing push for the admission of oral histories in court, but it is not an easy path. And if oral testimony is not accepted as evidence, how is it to be considered? Does this suggest that each worldview is equally valid, an expression of cultural bigotry, or just a cynicism about human nature? Clearly, there is more at stake here than just the land itself. All cases are connected to political and academic relationships with indigenous peoples, each group judging the other and each judgment shaping future possibilities.

Within archaeology itself, relationships between indigenous peoples and archaeologists have historically been problematic, giving rise to 'indigenous archaeology' (Atalay 2006, *ibid* 2008, Smith & Wobst 2005). These interactions have also led to important reconceptualizations of what it means to be 'traditional' and will likely also influence 'territoriality', defined by Pratt as "a claim to territory by virtue of longstanding habitation" (2007:402). Changes within the discipline will surely impact the nature of its practical applications and its involvement with indigenous issues, and the future of 'indigenous' and 'applied' archaeologies will hopefully allow for real partnerships (Downum & Price 1999).

The rise of indigenous archaeology reflects a wider trend within the discipline towards a directed incorporation of multiple parties, producing a more collaborative approach and a process Hodder terms 'multivocality' (1999, 2008, Atalay 2008). Feminist, Marxist, and

minority interpretations of the past through archaeology are working towards dismantling the colonist and imperialist tendencies of the discipline. While on the whole these are positive and necessary trends, we still must be careful that the agenda does not override the evidence. For one example, mother goddess spirituality took feminist constructions beyond archaeology into problematic pseudoscience (Anthony 1995). Instead, something akin to Trigger's more moderate relativist position, striving for scientific constructions of the past while acknowledging the problematic aspects of objectivity and the importance of sociopolitical contexts, is much more helpful (1984, 2008).

In recognizing the importance archaeological research has for these different involved parties, it can be easy to become entangled in their causes. Looking at how archaeology can be used to support land claims, it is exciting that research can be applied as a form of social justice. What should be done, however, in situations where the evidence as it stands does not conclusively support the indigenous claimants? It may very well be that with more time, more research, or new technology those missing pieces would be found. The court system will not wait, though. As trained professionals we can not create theories that go beyond the archaeological evidence, even to support a just cause. If other, equally valid lines of evidence, like oral traditions, are not recognized then the problem lies in the unjust settlement infrastructure. The system is what must change, not academic standards. These problematic infrastructures and the struggles of archaeologists and claimant groups must be analyzed nation by nation before constructive changes can be accomplished.

3.3 Archaeology and Ethnicity: Misuse in the name of the ‘Nation’

Curiosity and pride in ethnic origins has always been closely tied to archaeology. Intentionally or not, archaeology cannot be divorced from political agendas where the use of research is for non-scientific purposes. Perhaps the most famous example is provided by the National Socialist (Nazi) ideology of the Aryan race and their use of archaeology and history to justify their invasions, as chronicled by Arnold, Harke, Veit, and others. The power of the Third Reich centered on the definition and pride in being ‘German’. Scholars of prehistory and ethnicity, knowingly or not, provided major fuel to this fire, with their research serving political and not scientific goals. Kossina’s work especially was utilized by the Third Reich, and his conceptualization of culture histories in some ways parallels Gordon Childe’s later research (Härke 2002). In broader social science, theories of the linkages between physical and cultural types, both obviously thought to be inferior when not of Germanic origin, led to the formation of specific organizations devoted to studying other groups for identifying markers, which in turn used as evidence on which later persecutions were undertaken (Schafft 2004).

Though the misuse of anthropological methods by the Nazis is staggering, it is by no means unique (Kane 2003, Kohl & Fawcett 1995). Archaeology deals with a past so distant there are usually no written records and no living witnesses. Dealing with fragments of material culture, archaeological data can not document completely all of the information of a cultural group, nor can we ever be completely certain that our interpretations of the remains are correct. These inherent ambiguities are part of what makes the research so exciting and rewarding, but it also strengthens the possibilities for abuse and calls for additional scrutiny on methods and results (Kohl & Fawcett 1995).

When considering archaeology and nationalism, this potential can easily be exploited when nationalistic aims come to the forefront. For these aims, past societies suddenly have important present consequences, informing “contemporary questions about origins, legitimacy, ownership, and ultimately, rights” (Meskell 2002:287). Both scientifically and ethically, using archaeological research for nationalist purposes poses severe problems. Of course, it is impossible to completely divorce archaeology from its social context or to prevent others from reinterpreting research for their own ends (Trigger 1984). However, at the very least “a responsible nationalist archaeology refuses to blur the distinctions between race, language, and culture and denies the purity or biological superiority of any culture over any another” (Kohl & Fawcett 1995:18). We must be cautious and thorough in defining our own work, because even the best intentions can fail when information is not regulated and held to a higher standard.

What can archaeology truly tell us about the origins of ethnic groups? Ethnicity does not imply a physical type language, though these three properties have been extrapolated and misused. However, ethnic identity was, is, and always will be a subjective, cultural construct. Since it is a self-assigned group identity, it may or may not connect with the archaeological attributes that often are our only record of peoples (Trigger 1995). The connections between archaeological culture, language, and race are not definite. Especially when it comes to prehistoric archaeology, it is especially difficult to apply “recognizable, named sociolinguistic entities” in a series of unbroken links to the material culture excavated on contested lands (Lilley 2000:3). The assignment of race to groups and the extension of these characteristics back in time provides us with a warped worldview that does not clarify any of the important research questions and can often obscure the findings (Echo-Hawk & Zimmerman 2006). ‘Racial’ typing such as ‘Caucasoid’ has led to publication of the ideas that the Kennewick Man was white and

that the Urumchi mummies in Xinjiang represent early Caucasians bringing ‘Western’ innovations to ancient China (Echo-Hawk & Zimmerman 2006, Mallory & Mair 2002). Traditional notions of ethnicity used in the framework of modern, living cultures will not suffice (Gladney 1998, Jones 1997). These out-dated conceptions of biology and race do not truly add to scientific discourse, but it remains to be seen how effectively they can be replaced and if the general populace will truly accept the change.

3.4 Defining Indigenous

The inability to recognize indigenous peoples has crippled legislation on indigenous rights. The term arises comfortably as a more neutral one in nations like the United States, Canada, Australia, New Zealand where there is a clearly defined separation between earlier occupants and their colonizers. In countries like the Scandinavian nations, the Saami people are now recognized as an indigenous minority compared to the indigenous majority (Sanders 1999). This variability in circumstance is especially problematic in Africa and Asia, where in some areas groups identify themselves as ‘indigenous’ but the governments instead use the terms ‘ethnic group’ or ‘ethnic minority’ (Secretariat of the Permanent Forum on Indigenous Issues 2004). Many governments in the Americas and Australasia distinguish between ‘indigenous peoples’ and other cultural minorities, but there are significant numbers of nations who do not make this distinction (Sanders 1999).

‘Indigenous’ is defined by the Oxford English Dictionary as “born or produced naturally in a land or region; native to [the soil or region]”, and the earliest use of the term was in 1646 (Cruikshank 2007:374). Another source gives the earliest use in a 1598 report, where ‘indigenes’ were used to distinguish Native Americans, then defined as “people bred upon that

very soyle”, from the African slaves brought by the Spaniards and Portuguese (de la Cadena & Starn 2007:4). It is often argued that ‘indigenous’ is a term arising solely from Conquest and thus closely links colonized and colonizer, defined by this contrast and its resulting submissive position and struggle (McIntosh 2002, Pratt 2007). ‘Indigenous’, ‘Aboriginal’, and ‘Indian’ were all terms given by their colonizers to the respective groups, with other common terms including ‘tribal’, ‘native’, and ‘primitive’ (de la Cadena & Starn 2007). These synonyms for ‘indigenous’ are sometimes given as a reason to reject the term altogether in favor of more nuanced concepts of marginalized groups that take into account modern anthropological understandings of cultural complexity and change (Kuper 2003).

Looking at modern conceptualizations in an international setting, we can return to the United Nations. As discussed earlier, a major issue the African Group of States and the United States had with the Declaration was with the absence of a clear definition of ‘indigenous’. There are three main definitions given by international organizations, the most prominent definition coming from the 1983 report by Special Rapporteur José R. Martínez Cobo to the U.N. Submission on Prevention of Discrimination of Minorities. Cobo’s rather lengthy definition is as follows:

379. 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 in 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 systems.

380. This historical continuity may consist of the continuation, for an extended period reaching into the present, of one or more of the following factors:

- (a) Occupation of ancestral lands, or at least of part of them;
- (b) Common ancestry with the original occupants of these lands;

- (c) Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, life-style, etc.);
- (d) Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual general or normal language);
- (e) Residence in certain parts of the country, or in certain regions of the world;
- (f) Other relevant factors.

381. On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group). (Cobo 1983 as quoted in Sanders 1999:6)

Cobo's definition is still the most widely used, and more recent U.N. scholars like Erica-Irene Daes agree that his definition still outlines the main criteria for 'indigenous' (2001). This definition in Paragraph 379 establishes that both ancestral lands and ethnic identity are essential for the continuation of an indigenous group, an emphasis that surely informed the articles on the importance of land in the Declaration. When read with archaeology in mind, Paragraph 380 outlines criteria for proving indigeneity. Though the nature of being 'indigenous' can involve one or more of these criterion, the emphasis on biological ancestry and language connects to previous problematic constructions of ethnicity. Determining the ethnicity of the original occupants and then a historical continuity can be fraught with problems, especially if 'original occupants' are hard to determine. In countries like China and India, could this ever be established (Karlsson 2003, Kingsbury 1998, Sanders 1999)?

The U.N. is also very vocal about inclusion, in order to reach out to those groups whose indigenous self-identity is not recognized by their own government. Their goal is to prevent alienation and to provide a political forum for those often silenced, but with the rise of recognition of the various ethnic, linguistic, and cultural minorities the definition of 'indigenous' must be re-examined. Self-definition seems full of circular reasoning, where your identity as 'indigenous' rests solely on you identifying yourself as 'indigenous'. Many national

governments refuse to accept such self-definition as valid, nor is this definition recognized in any real political capacity. Beyond rejection from the state itself, self-definition presents more opportunities for discrimination. Contrary to romanticized notions of ‘indigenous’ peoples, where their connections with nature and tradition will save Western ‘civilization’ from itself, indigenous peoples, like all groups, are not perfect or necessarily interested in inclusive policies. For instance, the conflict between the Cherokee and the Freedmen has led to accusations of racism, as the Cherokee are now going against their own treaty with their former slaves and denying tribe membership unless there is a direct Cherokee ancestor in the lineage (IWGIA 2008). How important really is self-definition, and how important is biology? When Principal Chief Smith insists “the Cherokee Nation simply wants to be an Indian tribe composed of Indians”, what is he really saying about what Indians consider to be ‘Indian’-ness (ibid:69)?

The International Labor Organization (ILO) Convention 107 of 1957 described indigenous peoples capable of being so categorized “on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization” (Sanders 1999:5). The later Convention 169 revised its statement in 1989 and included a new, independent definition of:

peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions (ibid).

Interestingly, only 14 countries have signed up to Convention 169, possibly due to their feelings about “self-defining peoples pursuing self-determination” (McIntosh 2002:23). Leaving aside how effective ILO’s definition really is, the changes in the two definitions are significant in terms of understanding how conceptualization evolved. Here indigenous peoples were no longer

defined solely by conquest or colonization, but the drawing of modern borders was recognized. The circumstances also must accompany the retention of some or all of their institutions, which could easily be interpreted as needing to proof that elements of the social, economic, cultural, and/or political systems of these peoples *have not changed*. Maintaining a distinct identity and some sort of self-decision is very different from needing to be static in order to maintain their ‘indigenous’ nature (Kenrick & Lewis 2004). ILO also regularly uses both terms ‘indigenous’ and ‘tribal’ in its documents, whereas the U.N. merely uses ‘indigenous’. The distinctions are not, however, very clear in practice.

Our third definition from an international organization comes from the World Bank.

Developed in 1991, Operational Directive 4.20 on “Indigenous Peoples” states:

The terms “indigenous peoples”, “indigenous ethnic minorities”, “tribal groups”, and “scheduled tribes” describe social groups with a social and cultural identity distinct from the dominant society that makes them vulnerable to being disadvantaged in the development process. For the purposes of this directive, “indigenous peoples” is the term that will be used to refer to these groups...

Because of the varied and changing contexts in which indigenous peoples are found, no single definition can capture their diversity. Indigenous people are commonly among the poorest segments of a population. They engage in economic activities that range from shifting agriculture in or near forests to wage labor or even small-scale market-oriented activities. Indigenous peoples can be identified in particular geographical areas by the presence in varying degrees of the following characteristics:

- (a) a close attachment to ancestral territories and to the natural resources in these areas;
- (b) self-identification and identification by others as members of a distinct cultural group;
- (c) an indigenous language, often different from the national language;
- (d) presence of customary social and political institutions; and
- (e) primarily subsistence-oriented production (Sanders 1999:7).

This is a loose category of all groups that are distinct from dominant society, including people not connected through biological lineages, temporal notions of ‘earlier’, or colonization/conquest. Instead, economic subsistence and lifestyle play a much more important role, with a stress on “subsistence-oriented production”. This stress on a particular lifestyle

makes many uncomfortable, since there are a significant number of indigenous peoples living in urban areas and this categorization does not fully express the diversity and complexity of these peoples. Too easily we return to notions of ‘indigenous’ peoples as ‘primitive’, and in international politics this can not be allowed to happen (Kuper 2003). For the World Bank, vulnerability becomes the key factor for dealing with these groups in a meaningful way for their organization. However, in all three attempts, ‘ancestral lands’ were the basis of the definition. Determining what constitutes them will surely fall to archaeological investigation, a point that must be addressed nation by nation.

Of course, in all attempts at definition, it is important to understand *who* is producing the definition and *why*. The discomfort with anthropologists or lawyers deciding the identity of another group of people is very likely a strong determinant in the trend toward self-determination. Nevertheless, there is still a substantial amount of scholarship on the issues of defining ‘indigenous’ and the feasibility of providing a universal set of criteria. However problematic the concept is, Kuper’s loaded rejection of the term met with numerous responses that argue for its value (Kuper 2003, Asch et al. 2004, Kenrick & Lewis 2004). The purpose is also of importance, for those definitions with actual legal acceptance and universal applicability are slightly different issues from those focused on an indigenous issue in a specific region (Bowen 2000).

The applicability of ‘indigenous’ beyond the Americas and Australasia has been disputed, since American tribes and Australian Aborigines served as the prototypes for ‘indigenous’ and there is a clear temporal separation between their early migrations to the respective continents and later European conquest (Bowen 2000). Beyond those situations, definition is quite muddled and some, like Miguel Alfonso Martinez, argue that the term should only apply to “situations in

which the indigenous peoples' category is already established beyond any doubt from a historical and modern day point of view" (1998 as cited in Sanders 1999). Indeed, attempts to go beyond such situations have often led to definitions so broad that they can not be practically applied.

What is considered to be the defining feature varies from scholar to scholar, although many focus on the temporal and territorial nature of recognized indigenous peoples. Others rely more on the relationships between the state and the groups themselves. Pratt's schema of indigeneity has five main elements: unsolicited encounter, dispossession, perdurance, proselytization, and unpayable debt (2007:401). Here indigenous group A is defined by the arrival of the dominating group B and the playing out of this relationship provides the core elements of the indigenous nature, though not overall identity or vitality, of B.

Kingsbury's definition focuses more on the concept of 'non-dominance', rejecting a strict historical continuity test in favor of a more 'flexible constructivist approach' (Kingsbury 1998, Sanders 1999, Bowen 2000). According to Kingsbury, 'indigenous' peoples can be categorized based on:

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

- non-dominance 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

— regarded as indigenous by the ambient population or treated as such in legal and administrative arrangements (Kingsbury 1998:455).

The importance of *indicia* may be helpful in providing a spectrum of recognition, but even this might not make political and legal matters simpler (McIntosh 2002). If we look at Kingsbury's attempt to produce a full-proof exclusive/inclusive definition, one must decide just how important the 'relevant *indicia*' is. It can be argued that the Quebecois meet all the required criteria, but not on the non-essentials, for instance (Sanders 1999).

Sanders himself returns to a definition based more on descent and ancestral lands, framed in 1995 as:

An indigenous people is a collectivity which has descent from the earliest surviving population in the part of the State where the people traditionally lived (whether still living in that area or, as a result of involuntary relocation, in another part of the State) and which has a distinct identity associated with its history (as quoted in Sanders 1999:9).

Though aware of new conceptualizations of the importance of the relationship between the indigenous group and its dominant nation, he returned to a definition based on biology, temporality, and territoriality. From its earliest use, 'indigenous' was associated with previous inhabitants of certain territories, but today we question the oversimplification and dangerous nature of such constructions of ethnicity. Kuper is correct in recognizing the problems this framework opens up, but his whole-sale rejection of the concept and proposal is problematic. There is more than just a definition at stake here; there is still a need to recognize the injustices suffered by these specific groups and their right to compensation.

A major problem with the wording of the Declaration in academia has been the notion of 'special rights' vs. 'equal rights'. Kuper claims that 'indigenous' rests on the assumption that the "descendants of the original inhabitants of a country should have privileged rights, perhaps even exclusive rights, to its resources. Conversely, immigrants are simply guests and should behave

accordingly” (2003:90). Errico’s analysis of the Declaration denies that this constitutes ‘special rights’, and many scholars in direct response to Kuper’s statement also vehemently disagreed (Asch et al. 2004). An imperfect but helpful parallel might be recent attempts at legislation at various levels in the American government to protect homosexuals, where opponents often claim that this provides them with special rights beyond others and proponents argue that these acts ensure equality, where the rest of the society does not need to explicitly state their right to non-discriminatory housing, work, etc.

International legal practice has come to recognize indigenous peoples as having *collective* rights, including those “to the ownership, control and management of their lands and territories; to the exercise of their customary laws; to represent themselves through their own representative institutions” (Colchester 2002:2). Unfortunately, it seems that this matter has not yet been settled to the satisfaction of everyone. Determining what rights ‘indigenous peoples’ have has become an active discussion, but the impact this debate will have on legal affairs within specific nations remains to be seen.

3.5 National Representations of Relationships in Museums

National museums can be a valuable source for examining the intersection among indigenous peoples, anthropological research, and politics (Pieterse 1997). The relationships outlined in displays and written text are designed for the general public, both citizens and foreign tourists. National museums thus play a unique role in defining the history that the dominant power wishes for all to see (Dean & Rider 2003, Macdonald 2003, Message 2006, Steiner 1995). This history provides a legacy, popularized through the museum “for the enrichment, education, and collective identity of the citizenry” (Kaplan 2004:1). They serve an important function in

outlining how they represent scholarship and what topics will be viewed. Their codification of objects and information also allows opportunities to 'legitimate' certain viewpoints, and museums serve as important sites of power (Pieterse 1997).

Mongolia is an interesting example of how this codification works to present a particular viewpoint. Heavily influenced by Soviet power and its own Communist political party, the transition to a democratic capitalist country in the early 1990s allowed Mongolia to reclaim its history and how Mongolians wanted to depict it. Most national museums were created under Soviet influence, and recent efforts to reorganize and create new displays has been instructive. Mongolia's contentious history with China, its pride in Chinggis (sometimes written Genghis) Khaan, and its identity as an independent and beautiful nation are all codified. All museums focus on Mongolia itself, even the National Museum of Natural History focuses its exhibits of flora and fauna on species with a primary range in Mongolia.

This singular focus is quite unlike natural history museums in the United States, but its audience and its purpose is correspondingly different. The visitors at these museums are primarily foreign tourists, a group with a limited stay and most likely with little idea of what constitutes Mongolian identity. For those visitors who are Mongolian, the museums serve as a reservoir of national pride, paralleling the rise in Mongolian nationalism and engagement since the transition. Emphasizing Mongolia's unique qualities and history legitimizes its status as a powerful nation, completely and totally separate from China and politically removed from Russia. In this case, archaeology has served to reinforce predominant views about Mongolian identity.

This is not a unique phenomenon, with most recently emerging nations also quickly realize the potential of their past in providing an identity, constructed and developed through

national museums (Schadla-Hall 2006). After the 1970s there was a rise in the number of national museums, though recently many museums with more specific purposes, such as community-based museums, native museums, and more have emerged (Gore 2002, Pieterse 1997). In America “the idea of the melting pot is now giving way to a new concept, as yet undefined, in which shared culture is enriched by the unique qualities of each of the ethnic groups that constitute American society” (Simpson 1996:74). Growing discourse about the self/other dichotomy in a globalized world has led to a parallel criticism of separating histories into ‘theirs’ and ‘ours’ (Pieterse 1997). National museums can add to public understandings of these issues by utilizing a nuanced anthropological framework when discussing culture groups and history.

This opportunity can also be a political one. Kaplan argues that museums are a unique public institution emerging in democratic states, playing the role of “purveyors of ideology and of a downward spread of knowledge to the public, thereby contributing to an historical process of democratization” (2004:3). If so, is perhaps the separation of ‘indigenous’ history into specialized museums as opposed to inclusion in national museums a subtle sign of cultural self-determination within these democracies? In a multicultural nation, it can be difficult to achieve the necessary level of depth for each group so separate institutions provide an opportunity to address areas of concern in a new way. This trend for national museums, however, could lead to fragmentary understandings of how these groups have interacted with and influenced one another.

Looking at national museums in the context of indigenous representation, the history of collecting plays an important role. Often in earlier formative periods, museums viewed indigenous peoples as dying races, doomed to extinction after contact with western civilization,

and thus all collecting was a form of salvage (Colchester 2002, Anderson & Reeve 1994). For some nations, this viewpoint spurred collection and research as a sort of salvage work, such as the creation in the U.S. of the Bureau of American Ethnology within the Smithsonian Institution in 1879 (Judd 1967). In Australia, in contrast, a national museum was not established until recently (Gore 2002). The history and modern status of national museums in each of the four dissenting nations will be addressed in greater depth in order to discover the viewpoints each wants to create.

4.0 THE FOUR DISSENTING NATIONS

The four dissenting nations have several common concerns about indigenous rights, especially concerning land. But each has its own unique trajectory, with a particular history and resulting infrastructure. While the paths of these nations have influenced each other and there is much overarching scholarship, the particulars of each nation and its own indigenous peoples must be examined before we can concretely discuss similarities and differences. Their policies and public conception of indigenous issues through national museums will be influential for the future of indigenous rights and for the application of anthropological principles. Each of the four nations is culturally diverse, yet hopefully the most important features of indigenous relations in each will become apparent here.

4.1 Australia

Australia is a large nation, but its aboriginal citizens make up a tiny fragment of its citizens at only 2.5% of the total population (IWGIA 2008). It can also be harsh nation, living with both its geography and politics. With an interior largely dominated by the Western and Central Deserts, water can be scarce and unpredictable. The south is much more temperate with a variety of water sources, and it supports the densest populations, both of modern Australians and historic Aboriginal groups (Clarke 2003). The north, above the Tropic of Capricorn, is monsoonal and has long-standing ties to the Torres Strait Islands, under Australian control since 1879, and to Papua New Guinea, which has only been separated from the continent for the past 10,000 years (ibid, Tickner 2001).

In terms of politics, the days of ethnocentric policies are not so far gone as might be wished. Presently, there are 460,000 indigenous residents of Australia, with 27% living in remote areas compared to the 2% of non-indigenous people and far greater rates of poverty, removal from their families as children, and incarceration (IWGIA 2008, Spencer 2006). Their average life expectancy is 20 years below the national average, and efforts toward reconciliation were hampered significantly by the election of a conservative government that took control in 1996 (IWGIA 2008). However, Australia and its scholars have been some of the most forward and vocal about indigenous land rights and the applications and implications of anthropological research. In Australia, this field is referred to as 'Native Title'.

Australia's indigenous peoples consist of two groups: the more well-known Aborigines and the Torres Strait Islanders. Torres Strait Islanders, a Melanesian people, have long-standing cultural connections with both the Australian Aborigines and Papuans and are located solely in the Northern Territories. The ancestors of the Aborigines have lived on the continent for at least 50,000 years, though there is still debate as to the exact timing and path of this settlement. Obviously, there can be no debate about the pre-existence of these peoples and their indigenous nature, but a real understanding of their lifestyles and occupation of the landscape has lagged behind. Aboriginal mythology and spirituality is based on the conception of the 'Dreaming', a worldview that encodes the Australian landscape with sacred properties influencing cultural and socioeconomic lifestyles (Clarke 2003, Edwards 1994). Land claims are thus integral to Aboriginal vitality, but there is a long history of dispossession and discrimination working against them (Bourke & Cox 1994, Tickner 2001).

4.1.1 *History of relations with its indigenous peoples*

All colonial to indigenous encounters have been unpredictable enterprises, but Australia was one such case where little common ground could seem to be found from the beginning. Aboriginal societies are not based on agriculture or sedentism; they have few belongings and a rich, complex oral tradition. Even at contact they were not numerous and were widely spaced, with distinctive languages and some overlapping traditions. Their mobile seasonal patterns exploit changing ecozones, nothing like what European settlers had previously encountered, and their lifestyles seemed quite ‘primitive’ indeed (Clarke 2003, Smith & Jackson 2006, Spencer 2006). The reactions to this difference have characterized a large part of Australian history.

European interests in Australia first began in 1770 with Captain James Cook, with the first permanent settlement established on January 26, 1788 by Governor Arthur Phillip at Sydney Cove in Port Jackson (Tickner 2001, Clarke 2003). To justify their settlement and further expansion into the continent, European colonists operated under the doctrine *terra nullius*, or land belonging to no one (Nettheim, Meyers, & Craig 2002, Scholtz 2006). It viewed the land as not “subject to the sovereign rights of any people” or otherwise uninhabited, therefore all that was required to gain title to these lands was “peaceful settlement” (Tickner 2001:2). This process of settlement, however, was often not peaceful.

The first recorded contact between an Aboriginal group and the British is on January 20, 1788, a peaceful encounter marked by puzzlement and wonder. After deciding that these white people were the spirits of dead kin, the colonists were often shunned. The introduction of European animals and plants and their ships were viewed as supernatural demons according to the Aboriginal mythology in the fabric of their worldview. The Aboriginal groups of the temperate south were the first to become disabused of the notion that these white ghosts were

relatives, as they were quickly being pushed out of their lands and away from vital subsistence resources. The south was much more similar to European climates than the deserts of the interior, and colonists focused their attentions there first. Since the south is the most likely environment to support high density populations, Europeans had a significant and deleterious impact on Aboriginal numbers in that region. Estimates for the total indigenous population at time of contact range from 250,000 to over a million people, with no particular number supported by a majority of scholars (Clarke 2003). These numbers were quickly impacted by both outright violence and by disease. Port Jackson saw its first epidemic, most likely smallpox, in 1789, just one year after settlement.

Stories of the changes in the south and trade objects often traveled ahead of colonists, changing cultures even before face-to-face contact. Some populations managed to stay isolated until the 1930s, but for many Aborigines life became a vicious cycle of dispossession, forced conversion (cultural and religious), and discrimination or death (Clarke 2003). Massacres went on well into the 20th century, and though Aboriginal people had not reacted passively to these intrusions on their lives and cultures, it was not until the 1960s that Aboriginal movements gained real traction (Tickner 2001, Scholtz 2006). On May 27, 1967, the Australian people voted 90.77% to allow Aborigines to be counted by the census and to give the government power to pass laws regarding them. The first land rights case was settled in 1971, though it found against the existence of native title rights based on a Canadian lower court decision. However, the Gove land rights case, known formally as *Milirrpum and Others v Nabalco Pty Ltd*, marked the beginning of recognition by the federal government that indigenous Australians needed more power over their own affairs (Tickner 2001).

In 1975 the Aboriginal Land Fund Commission was established, and in 1976 the Fraser government passed the *Aboriginal Land Rights (Northern Territory) Act* (ALRA). This marked the first legislation on land rights, and it encouraged some other regions to enact their own policies (Nettheim, Meyers, & Craig 2002). The ALRA set a benchmark for all later legislation, but tellingly it was only willing to deal with the Northern Territories, a region not well-settled by those Australians descended from European colonists and had thus retained a substantial measure of cultural autonomy and its pre-Contact traditions. However, it has been incredibly effective and has reclaimed over 40% of land in the NT (ibid:240). The ALRA has also proved successful at overruling the powerful lobbying of mining companies and in giving power to Aboriginal organizations, like the land councils (Tickner 2001).

However, the declaration of *terra nullius* was still viewed as valid, challenged but upheld, as early as 1889 in *Cooper v Stuart* 14 Appeal Case 286 (Bourke and Cox 1994). The Hawke labor government had tried to extend the success of the ALRA to other States, but this failed in the mid1980s (Scholtz 2006). Frustrated with the limited scope of the ALRA and the state of legislation on land rights, indigenous peoples continued to push. With the 1992 *Mabo* decision, *terra nullius* was finally overturned and the stage was set for a national negotiation policy. *Mabo v Queensland* is actually the second case brought to court by Eddie Mabo, but its success in the High Court established for the first time federal recognition of the rights of indigenous people to their native title. Eddie Mabo was a Torres Strait Islander, a slightly different case than the Aborigines in that the Islanders had not been displaced but were not recognized as the owners of the land they lived on. Proceedings began in 1982, with the case first struck down in 1988, continuing in the Supreme Court of Queensland before returning to the High Court and being accepted on June 3, 1992, just four months after Mabo's death (Tickner 2001).

The *Mabo* ruling is also significant because of the rights it retains for non-indigenous Australians. Where freehold title exists, native title has been extinguished and cannot be overruled. Pastoral leases were not covered, however, in the court decision, leaving a possibility for title claims over wide areas. Public confusion in the wake of the decision encouraged the 1993 passage of the *Native Title Act*, a limited national negotiation policy (Scholtz 2006). Significant revisions were made to it in 1998 and again in 2007, and it forms the base of the current infrastructure for dealing with land claims.

4.1.2 *Current Governance Structure for Dealing with Land Claims*

The Native Title Act is highly complex system used for:

determining which land is subject to native title according to non-Indigenous law, protecting native title, validating past acts which may have been invalid because of the hitherto unacknowledged existence of native title, and providing a regime for future acts which might affect native title (Nettheim, Meyers, & Craig 2002:362)

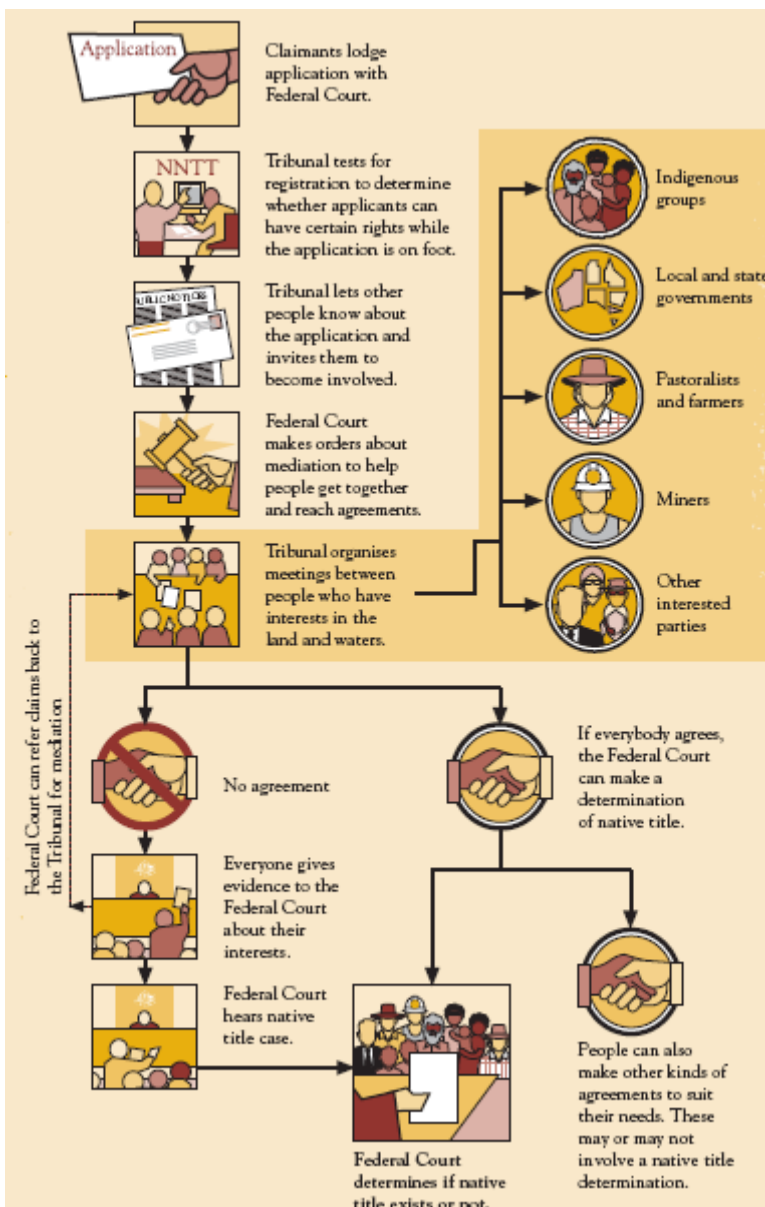
The 1993 NTA established the National Native Title Tribunal (NNTT) and established a process for the indigenous peoples of Australia to lodge claims to native title. In certain cases, it also provides for compensation for the extinguishment of native title (Sutton 2003). The main impact of the 1998 revisions included the introduction of the registration test and indigenous land use agreements, known as ILUAs (NNTT 2008 “Native”). The Amendment Act of 2007 introduces changes in the balance of the roles of the native title representative bodies and the court, with the NNTT playing a much greater role in mediation with accompanying new powers while the Court’s interactions with the NNTT and oversight of the exercise of federal power is lessened (Frith 2008). Calls for greater accountability on the parts of the native title representative bodies and for increased funding prompted the amendments, as well as the ever-present concern for greater efficiency and a quicker resolution of land claims. Since the NTA went into effect on

January 1, 1994, over 1240 claims have been dealt with. There are 513 current claims, with national rates estimating that all claims will not be determined until 2035 (NNTT 2009). The length of this period of consideration and the possibilities for discrimination under the new balance of power are of major concern.

Native title determinations cover about 11.7% of Australia, though the decisions range from exclusive rights over an area to limited rights to the determination that no native title exists. Indigenous land use agreements (ILUAs) are also a growing part of the process, with 342 currently registered and making up about 13% of Australia (NNTT 2008 “National”). Nationally, 117 determinations of native title have been registered since January 1, 1994 and concluded. Of those 117, 82 found that native title exists and 35 that did not exist. In examining the regional numbers, a pattern becomes clear. In the well-populated southern provinces like New South Wales and Victoria, the vast majority of native title determinations are found as not extant, compared to the other provinces where instead the vast majority or all of the cases are found as extant. This most likely follows from the NTA’s declaration that Native Title “can be extinguished (refused recognition) because of things the government has done, or allowed others to do, over a particular area that are inconsistent with native title” (NNTT 2008 “Native”:1A). The legislation requires proof “that particular Aboriginal groups occupied and used the country continuously from prior to European colonization until the present”, which can be difficult to come by in the southern regions where Aboriginal groups were dispossessed of their lands since the initial settlement and greatly affected by colonial policies and cultural assimilation (Lilley 2000:5, Scholtz 2006).

There are two types of governance structures under the NTA: Native Title Representative Bodies (NTRBs), also known as Representative Aboriginal/Torres Strait Islander Bodies, and

Prescribed Bodies Corporate (PBC). NTRBs help members make native title claims and facilitate the resolution of disputes between groups about the title, somewhat similar to the Land Councils under the ALRA (Nettheim, Meyers, & Craig 2002). The 2007 amendments would give greater power to these NTRBs, of which the NNTT is the ultimate body (Frith 2008). The Prescribed Bodies Corporate (PBC) are the agents of the Federal Court who act on behalf on the common law holders of native title, should it be determined by the Court that native title does



exist. The PBCs have either a trust or an agency arrangement with the indigenous claimant (Nettheim, Meyers, & Craig 2002).

For a basic overview of the native title application process, see figure 1 (NNTT 2000:1D). Since the 1998 revisions, the first step after lodging a claim with the Federal Court is the registration test. The registration test is applied by the NNTT's Registrar to determine whether the claim meets merit and procedural conditions of the

NTA, mainly identifying the area, claimants, and rights and interests claimed for easier understanding and establishing that there is “a sufficient factual basis for the rights and interests claimed” (NNTT 2007:3C). This factual basis relies on proving that the traditional laws and customs that give rise to native title rights actually exist, that there is a continuing association with the area under discussion, and that those traditional laws and customs that are the basis of native title still exist today. At least one member of the claimant group must also have had “traditional physical connection with any part of the land or waters claimed” (NNTT 2007:3D).

As for the rest of the process, based on the 2007 amendments there is a greater push for mediation outside of courts, as the majority of claimants are said to prefer mediation over litigation (Frith 2008, NNTT 2009). This will likely change the role of evidentiary standards to an earlier part of the process, registration, as opposed to a more objectively evaluated discussion in the court system. Throughout these revisions, the base concept of ‘native title’ has not changed. As given by the NNTT,

Native title is the recognition in Australian law that some Indigenous people continue to hold rights to their lands and waters, which come from their traditional laws and customs. Native title exists as a bundle of rights and interests in relation to land and waters where the following conditions are met:

- the rights and interests are possessed under the traditional laws currently acknowledged and the traditional customs currently observed by the relevant Indigenous people
- those Indigenous people have a ‘connection’ with the area in question by those traditional laws and customs and
- the rights and interests are recognised by the common law of Australia.

Native title has its source in the body of law and custom acknowledged and observed by the claimant’s ancestors when Australia was colonised by Europeans. Those laws and customs must have been acknowledged and observed in a ‘substantially uninterrupted’ way from the time of settlement until now (NNTT 2008 “Native”:1A).

This definition of ‘native title’ will rely heavily on expert evidence from scholars of history and prehistory, as well as testimony from the claimants themselves.

4.1.3 *Use of Archaeology and Anthropology*

In Australian archaeology, I would separate current research into two distinct, though not mutually exclusive, groups: academic archaeology and native title archaeology. Academic archaeology deals with the debate surrounding the arrival of the first Australians as well as other issues in prehistoric and historic archaeology (Murray 2004). Native title archaeology deals with those periods of greatest relevance to indigenous land claims: just before, during, and after contact (also known as post-sovereignty). Since there is some overlap in temporality between the two groups, it is common for academic archaeologists to be called as expert witnesses in native title cases.

There are three types of anthropologists involved in the native title process: NTRB, consultant, and academic anthropologists. NTRB anthropologists are employed directly by the system, but they tend to spend less time on actual anthropological research and more on connecting reports, tying legal and procedural considerations. Consultant anthropologists thus do more of the ‘anthropology’ and are often older and better-trained than NTRB anthropologists (Martin 2004). It would probably save a great deal of time, however, if NTRB anthropologists could be successfully trained to do preliminary ethnographic work and allow consultant and academic anthropologists to be much more focused during their time in the field. External timing pressures often require a limited scale of research yet expert testimony, which combined with serious shortages of all three types of anthropologists pose a significant problem in the efficacy and speed of land claims resolution. Many experts feel understandably uncomfortable with this situation, and many think that native title is not academically based and therefore not respected when considering future employment (Farrell, Catlin, & Bauman 2007).

Archaeology in native title considerations is often subsumed under the broader field of anthropology, with ethnographic and linguistic as well as historic evidence given the most weight. Archaeology is of lesser importance given the concern that it is not specific enough to be linked to the claimant group (Murray 2004, Sutton 2003, McCarron-Benson 2005). Used in conjunction with ethnography and oral testimonies, archaeological evidence can be useful, especially in those cases where the nature of occupation has been questioned (Lilley 2000, McCarron-Benson 2005). Archaeology is also ideally suited to help rewrite historical views of Aborigines as forced to change, instead recognizing the complexity of issues of continuity and transition (Veth 2000, Murray 2004, Harrison 2005).

The success of native title cases often rests on establishing the presence of traditional laws and customs *and* their continuity post-sovereignty. Unfortunately, this often seems to break down by region, where claims in the more remote regions of Australia are successful and those in ‘settled’ southern Australia are not (Fullagar & Head 2000, Godwin 2005). Two case studies from 1998 illustrate this point: the successful Miriwung-Gajerrong claim in remote northwestern Australia, or *Ben Ward & Others v State of Western Australia & Others*, and the unsuccessful Yorta Yorta claim in southeastern Australia, or *The Members of the Yorta Yorta Aboriginal Community v The State of Victoria & Others*, which was also appealed in 2002 unsuccessfully (Fullagar & Head 2000, Sutton 2003). The Yorta Yorta claim is listed by the NNTT as one of 6 landmark decisions, establishing an important precedent “that in order for native title to be recognized, the claim group must show that they have acknowledged and observed their traditional laws and customs in substantially the same way since Britain asserted sovereignty over the area” (NNTT 2008 “About”:5). The impact of this decision on the

evidentiary requirements for archaeology and the implications for legal models of Aboriginal cultures and continuity are problematic (Murray 2000, Sutton 2003).

As for the archaeological merits of both cases, we shall start with the Yorta Yorta claim. The disputed area included both land and water, touching parts of Victoria and New South Wales as well as the Owens, Goulbourn, and Murray Rivers. As the Murray River is “the most economically significant waterway of inland Australia”, this was never going to be a simple case (Murray 2000:73). The supporting archaeological evidence included previous surveys of the pre-contact period, maps of those sites from the Register, previous excavations of both pre-contact and post-sovereignty periods, absolute dating of pre-contact sites, relative dating of post-sovereignty sites, historical tools, and post-contact artifacts. Radiocarbon dating was used to verify pre-contact evidence, while relative dating (generally of post-contact artifacts) was used to provide occupational evidence (McCarron-Benson 2005).

Justice Olney, however, relied heavily on the 19th century historical account by a white settler, Edward Curr, over Aboriginal testimonies and archaeological evidence. Though he recognized that the witnesses had established oven mounds, shell middens, and scarred trees as sacred areas that were to be protected under heritage legislation, he did not believe that modern attachments to archaeological sites indicated that in the past they had held anything other than ‘utilitarian’ value for the original inhabitants (Murray 2000, Godwin 2005). As Edward Curr did not describe them in his account of Aboriginal culture, Justice Olney was unwilling to connect these archaeological features to traditional law or custom. The use of one historical, non-Aboriginal source to overturn or ignore outright other lines of evidence is a reason the claim was unsuccessful. Since Aboriginal testimonies and the archaeological evidence did not fit what Curr outlined as ‘traditional law or custom’, Justice Olney declared that whatever revitalization

attempts connected to the sites, “the tide of history has indeed washed away any real acknowledgment of their traditional laws and any real observance of their native customs” (Murray 2000:74).

Some archaeologists in reviewing the case have found merit in Justice Olney’s determination that the archaeological sites could not be tied to the claimants, arguing for more stringent approaches to ethnographic connections and separately detailing modern sentiments (Fullagar & Head 2000, Veth 2000, McCarron-Benson 2005). Others have viewed the decision as setting impossibly high standards for evidence, where it was already difficult to connect “oral history, Aboriginal history, anthropology, and archaeology into an enhanced account of tradition and transformation” (Murray 2000:75). Olney’s views of tradition and continuity are not in step with anthropological models, and his reliance on written (white) testimony ignores the value of archaeological evidence because it did not meet the standards of an undefined ‘objective’ test (Fullagar & Head 2000, Sutton 2003). This failure to recognize the reality of Aboriginal cultural transformation has left several proponents of native title despairing that the Yorta Yorta case is a sign of the future of claims in ‘settled’ areas, because it demands a “standard of proof that it will be impossible to achieve” (Sutton 2003:136). Others are more hopeful that broader archaeological and anthropological research holds potential to change static and unrealistic views of culture like that of Justice Olney (Harrison 2000, Murray 2000).

Not all judges are unwilling to see the merits of archaeological evidence, as seen with Justice Lee in the Miriwung-Gajerrong case. Rock art, stone tool production, ochre quarries, burial sites, and more provided to him irrefutable evidence that the claim area had been occupied by Aboriginal people for a long period of time (McDonald 2000, Veth 2000, Fullagar & Head 2000). In connection with historic, anthropological, linguistic, genealogical, and primary

evidence from the claimants themselves (oral testimonies), archaeology was also considered useful in demonstrating “continuities and changes in the uses of land over time” (McDonald 2000:57). However, a sticking point for the Yorta Yorta case had not been establishing evidence of pre-contact culture, but the inability to prove to Justice Olney that the claimants were continuations with that culture. Tying archaeological evidence to an ethnic group is problematic, especially as the Miriung and Gajerrong are linguistic groups (Fullagar & Head 2000, Sutton 2003). The determination of the court as quoted in Fullagar & Head states that:

Taking into account the short time that has elapsed since 1880 when European settlement commenced in the region, it was ‘reasonably likely’ that the archaeological material found in the Territory area could be ‘largely attributed to the Miriung Gajerrong people (2000:31).

Again, primacy was given to historical over archaeological evidence. Based on the merits of the archaeology alone, it is difficult to see why the Miriung Gajerrong claim succeeded over the Yorta Yorta case. However, the Miriung Gajerrong claim had much greater corroboration of contemporary ethnography and a judge with a much better understanding of occupation. It also had a much more substantial basis of pre-existing archaeological work done on the time scales of European contact, especially fortunate since rarely do native title cases permit time for experts to conduct new excavations (ibid).

Claims are lodged before anthropologists are called in to investigate, even though archaeology in heritage matters can provide a background of information that may be applicable to later native title cases (Sutton 2003, Godwin 2005). Additionally, there has been discussion of compiling regional surveys to cut down on inefficiency and to better target anthropological research (Farrell, Catlin, & Bauman 2007). Since archaeological evidence takes a back seat to historical and oral testimonies, it would be helpful to the native title process to conduct

archaeological surveys after ethnographic work to better corroborate that line of evidence (Murray 2004). A number of cases have been successful without using archaeological evidence, but when occupation is in doubt in pre- and immediately post-contact periods it can often be the only line of evidence available (McCarron-Benson 2005).

There is no end in sight for the native title process, as claims are increasing in number and the process is still very long. Even though not all archaeologists and anthropologists will be called on as expert witnesses, it is likely that their work will have important political and social consequences, whether later referred to in a claims case or brought to bear as public opinion changes about Aboriginal lifestyles and traditions. Aboriginal archaeologists are also providing great contributions to the field, which will continue to shape the ways in which these concepts are understood and applied (Million 2005, Smith & Jackson 2006). For all parties involved, communication often and early is an invaluable part of the process, both in ethnographic fieldwork and native title cases alike. Though it has its own unique history and land claims system, Australia is also not alone in confronting the impact of archaeology on living cultures and the growth of significance given to indigenous rights and voices. Interdisciplinary and international cooperation will be essential in reaching a more harmonious relationship, both between governments and peoples and between *mythos* and *logos* (Murray 2000).

4.1.4 *Popular Representations in a National Museum*

The development of a national museum has been a long process for Australia, closely tied to political and cultural attitudes toward its Aboriginal peoples. National museum projects had been suggested for more than 90 years, especially after Australia became an independent nation in 1901, but the long delay was caused by a consistent undervaluing of its indigenous peoples and a national identity built upon a militaristic legacy. This previous construction of Australian

identity “all but precluded the need for a general, nonmilitary history museum” (Anderson & Reeves 1994:80). As museums are based on the objects and graphics of cultural and natural heritage, this undervaluing of the indigenous populations greatly influenced attitudes towards collections and prevented the accumulation of a national storehouse of Aboriginal artifacts (Clarke 2003). For a long period there was not much interest in Aboriginal culture, as they were viewed as a tragic people doomed to extinction through their contacts with the far superior civilized European settlers. What collecting occurred was treated as salvage work and tended towards preserving physical remains and weapons as objects of curiosity as “lasting memorials of the former races inhabiting the lands, when they had ceased to exist” (Anderson & Reeves 1994:86).

There were several discussions about the creation of a national museum and many important regional museums were developed, but concrete action towards a national institution did not occur until the 1970s (Gore 2002). This period was marked an international increase in interest in the development of national museums, and in Australia there was starting to be significant pressure to resolve this issue of national identity with regard to its indigenous peoples (Gore 2002, Veracini & Muckle 2003). Proposals at this time would have attempted a “synthesis of Australia’s Aboriginal, post-settlement, and environmental history” (Anderson & Reeves 1994:103). These three themes were approved in the Pigott Report of 1975, which insisted on interaction between them and a retelling of past history through multiple perspectives. The Museum of Australia Bill was introduced in 1980 by R.J. Ellicot, who favored Pigott’s interpretation, and was unanimously supported by all parties. However, it quickly went into the political background and was mired in bureaucratic channels for many years (Gore 2002).

After the *Mabo* ruling in 1992, however, reconciliation efforts were pushed to the forefront and the construction of the national museum (now renamed National Museum of Australia or NMA) became of significant interest (Veracini & Muckle 2003). In 1993 the government finally established a budget for construction efforts, but there still was a lot of political maneuvering as some, most notably Prime Minister Keating, remained skeptical of the need to spend so much money on yet another museum. The government in 1994, in an effort to revitalize the enterprise, completely abandoned the three-themed concept and decided to focus entirely on Aboriginal Australia. This decision was met with widespread criticism, arguing that to do so would separate Aborigines from the rest of Australian society and ignore historical interactions and all attempts to provide an integrative identity for modern Australia. These sentiments turned the fate of the NMA into a critical issue of the 1996 election, and Keating was ousted in favor of Howard, who returned to a commitment to the three-themed museum. This is somewhat surprising, as Howard is not known for his sensitivity to Aboriginal interests and his conservative government is often criticized as halting many reconciliation initiatives. Nevertheless, construction started on the NMA in 1999 and was completed in 2001 (Gore 2002).

The NMA is now based around three themes: land, nation, and people. It has four permanent exhibitions, the largest of which is the “First Australians” gallery (Veracini & Muckle 2003). The “First Australians” gallery covers 40,000 years ago to after contact and has received praise, though some criticism as well, for its sensitive exploration of several politicized topics and not shying away from some of Australia’s darker history of relations with indigenous peoples (Gore 2002). This integration of indigenous voices and Australia settler interactions is not, however, carried out successfully through the rest of the museum. ‘Australian’ history, or history since the 1788 settlement onwards, is largely separated from “Aboriginal’ history in the

other permanent exhibitions, except for some discussion of frontier warfare, with armed conflict apparently ending in 1928. All discussions of co-existence are located in the “First Australians” gallery, relegating nation-wide issues of integration to a solely Aboriginal problem. Indeed, while indigenous history is acknowledged, it is contained as separate, yet parallel (Veracini & Muckle 2003). This distancing effect of Aboriginal culture and continuity from what is the real national history unfortunately seems to echo the Howard government treatment of indigenous issues, thrown conciliatory scraps of attention to keep things peaceful enough while ‘real’ Australians, the dominant white society, continue their progression and development.

4.1.5 *Conclusions*

In parallel with international developments in human rights, minority empowerment, and the recognition of land rights, Australia has addressed all of these issues. It has, however, reacted to them in its own fashion, one unfortunately marked by long-term developments and persisting intolerant attitudes towards indigenous tradition and culture change. Each step forward must undergo a trial by fire, where for many years any positive effects reside in limbo and are slowly pared down. Token recognition is not enough. In overcoming this, indigenous peoples, anthropologists, and every day citizens alike must continue to call for accurate, nuanced understandings of the interactions between the ‘First Australians’ and the descendants of settlers. They are all Australians and their destinies are closely and irrevocably intertwined, though members of both sides might not care to admit so. The sooner the Australian government fully admits its obligations to its indigenous peoples, both in compensation for historical mistreatment and in treating modern social, economic, and health issues, the better off everyone will be. Hopefully advances in cultural understandings (as supported by anthropological theory and research), indigenous empowerment (both in political and heritage matters), and international

attitudes will complement the newly elected government in making real progress and bringing Australia with its best foot forward into the 21st century.

4.2 New Zealand

New Zealand can be considered the youngest of the CANZUS group, both in terms of its indigenous people and its European colonists. The Austronesian Maori people have only lived in New Zealand a little over 1,000 years, most likely arriving around 800 CE and in successive waves until about 1200 CE from other Polynesian culture islands. European colonists began settling the area in the 1830s though different groups such as explorers, traders, missionaries, and government officials from nearby New South Wales, Australia had contact there from the late 18th century onward, (Nettheim, Meyers, & Craig 2002). As of the 2006 Census, 14.6% of New Zealand's population belonged to the Maori ethnic group, a 30% increase in population over the last 15 years. Maori refers to the indigenous peoples living on Aotearoa New Zealand at the time of contact, and Pakeha can refer to either those peoples descended from mixed marriages or strictly non-Maori Europeans.

4.2.1 *History of relations with its indigenous peoples*

The Maori tribes, or *iwis*, were well-settled with complex genealogies, or *whakapapa*. These *whakapapa* connected the Maori to their ancestors, their gods, and provided a base for their land rights, or *rangatiratanga* (O'Regan 1999). All land was controlled by a descent group and closely connected to blood relations, and occupation was a necessary pre-requisite for holding title to it. Unlike relations with indigenous Australians, from the beginning Europeans interacted with the Maori under the premise that the Maori held title to the land, an understanding that

would work in their favor as the settlers entered transactions with them for territory (Nettheim, Meyers, & Craig 2002).

The main basis for later understandings of these transactions is the *Te Tiriti O Waitangi* or the Treaty of Waitangi. It was first signed on February 6, 1840 by Captain William Hobson, representing the British Crown, and representatives of certain Maori *iwi* (Byrnes 2006). The Treaty was then signed at various different locations throughout New Zealand by various representatives of the Crown and various Maori parties, sometimes individuals and sometimes groups. Though not everyone agreed to sign, the Treaty of Waitangi is viewed as the central document to encode the distinct political rights and status of the Maori as indigenous peoples. This is important as New Zealand has no single document acting as a “constitution” and Maori rights are often implicit rather than explicit (Potaka 2004). By the end, over 500 chiefs had signed this one treaty (Scholtz 2006). The signing of the Treaty, however, did not guarantee a harmonious co-existence.

Some of the problem lies in the nature of the Treaty itself, which was written both in English and in the Maori language. The two versions are not direct translations of each other, and the English provisions conflict with the Maori understanding of what they were signing. Since the Crown recognized the Maori as holding title to the land, they had to persuade them to surrender this title and their sovereignty and independence. The British thus viewed the document as a treaty of cession. The Maori, on the other hand, were operating under the view that the Treaty affirmed their continued *rangatiratanga* while providing them with British protection, giving both parties sovereignty (Byrnes 2006).

Following the Treaty, the period of the 1860-1970s was marked by dispossession, both in the courts and by the legislature. Increasing land sales worried the Maori chiefs, and these

conflicts of interest over land naturally led to conflict, appropriately titled the Land Wars. Instead of a single war or rebellion, the 1860s saw a series of battles and the justification of the confiscation of large areas of Maori territory. The *Native Land Acts* of 1862 and 1865 created the Native Land Court and gave the Colonial Assembly power to pass laws regarding Maori land, enabling them to identify traditional owners, convert their rights into English title, and to “assist peaceful colonization” (Nettheim, Meyers, & Craig 2002:125). The Treaty of Waitangi was viewed as a ‘legal nullity’ and merely gave the Maori peoples permission to occupy land, refusing their customary law and setting a long and unfortunate precedent. Maori ownership continually eroded, with over 55 million acres taken in less than a century.

Political movements, both national protests and international human rights concerns, in the 1960s again spurred social change and empowered indigenous peoples. In 1975 the *Treaty of Waitangi Act* was passed, providing a forum for land claims arising from the Treaty of Waitangi. This was the first government policy to redress such issues, though the Waitangi Tribunal created in the 1975 act was viewed as a strictly advisory body and originally could only address claims arising from 1975 (Scholtz 2006). Though prevented from ‘investigating’ events before 1975, the Waitangi Tribunal was allowed to ‘consider’ historic events, and in 1985 an amendment was passed allowing full investigations back to 1840 (Nettheim, Meyers, & Craig 2002).

4.2.2 *Current Governance Structure for Dealing with Land Claims*

New Zealand adopted a formal negotiation policy in 1989, moving from a case by case reactionary approach to a proactive and established structure (Scholtz 2006). The Waitangi Tribunal remains the forum through which claims are addressed, though it only produces findings and not settlements. The Office of Treaty Settlements is responsible for all settlements

between the Crown and the claimant. Claims provide three forms of settlement: 1) a historical account, acknowledgements, and crown apology; 2) cultural redress; and 3) financial and commercial redress (OTS 2002). The 1975 *Treaty of Waitangi Act* was amended in 2006 to set September 1, 2008 as the closing date for submitting all historical claims to the Waitangi Tribunal. Historical claims are those relating to an action or inaction of the Crown occurring before September 21, 1992, which is when the general principles for settling claims were agreed to by the Cabinet (TPK 2006). The goal of this closing date is to have historical claims prepared by 2010 and all generic claims by 2012, though the Waitangi Tribunal will continue to operate on contemporary Treaty issues.

This closing date seems somewhat reminiscent of the earlier proposed cap of \$1 billion in settlements (since overturned), a clear attempt by the government to move past land issues. Though New Zealand does not have the glorious indigenous rights history it likes to claim, settlements since the 1990s over monetary compensation and control of natural resources have been impressively large. The first settlement in 1992 by commercial fisheries claimants netted \$170 million in redress, and all settlements through 2008 have cost the government just over a \$1 billion (OTS 2008). Claims fall under three categories: purchases of Maori land before 1865 (with those private purchases prior to 1840 requiring Crown validation), confiscation of Maori land by the Crown under the New Zealand Settlements Act of 1863, and alienations of land after 1865 (OTS 2002).

4.2.3 *Use of Archaeology and Anthropology*

Evidence for successful claims rests primarily on traditional historical reports and oral evidence and traditions, which are under the provenience of professional historians and Maori claimants (Philippon 1999). As all claims rest on historic purchases with well-established previous

recognition of Maori land entitlement, archaeology is not considered necessary in proving traditional occupation and not useful to the process. Arguably, the training of these professional historians has substantial anthropological frameworks and methodology, but New Zealand archaeology exists as a completely individual field.

Most archaeology focuses on prehistoric contexts. The dispersals of Pacific peoples, especially the Polynesian culture groups, have been of particular interest (Kirch 2002). Like many other regions, there is an archaeological preoccupation with firsts, with archaeologists drawing on palynology, genealogy, and even studies of the Pacific rat (Newnham et al. 1998, Irwin & Walrond 2008, Hogg et al. 2003). Though since the 1970s there has been a rise in interest in historic archaeology, few Maori sites dating later than 1769 have been examined. The reasons for this disconnect are numerous and complex, but the central features seem to be a prevailing and incorrect viewpoint that such sites are contaminated by European influence and are thus 'inauthentic' (Bedford 2004). With the rise in culture contact studies and post-contact history, recently there has been a parallel archaeological interest in sites dating to this period. Ideally, this expansion of research areas will dispel false and static ideas about the Maori culture and the relationship between European settlers and indigenous peoples.

As for the place of archaeology in the service of Maori interest, its exception from the land claims process leaves its public importance mainly centered on heritage sites. The New Zealand Historic Places Trust and archaeological site protection programs have provided useful grounds for cultural vitality and identification (O'Regan 1999). Though the current infrastructure seems content with the information available from professional historians, archaeology will have its own role to play in a greater understanding of the process of contact and the material culture diversity of prehistoric Maori tribes. Even though New Zealand has a

rich record of written documents and Maori oral traditions, there are still many questions of interest. The growing numbers of indigenous archaeologists will be of great value in decolonizing the studies and providing additional viewpoints (Kirch 2002, Smith & Jackson 2006). It would also be valuable to gain perspectives from New Zealand on the place of archaeology in indigenous issues, as currently there is a significant basis of scholarship comparing situations in the United States, Canada, and Australia to their mutual benefit. With so much overlap in indigenous legal issues among the four countries, it is past time for anthropology and archaeology to catch up.

4.2.4 *Popular Representations in a National Museum*

The Museum of New Zealand Te Papa Tongarewa opened in 1998, but New Zealand has had a national museum for a significant period, starting first with the Colonial Museum in 1865, then the Dominion Museum in 1907 before becoming the official National Museum in 1973. Its designation as the National Museum exacerbated funding, staff, and space shortages, a problem not addressed until several years later. Plans for a National Art Gallery in the 1980s were also hampered by government inaction. Though the 1980s like the 1970s were plagued by problems for the National Museum, in 1984 it completed a revamp of its Maori displays, 'Te Maori', in an attempt to recognize the peoples as a living, breathing culture. The success of this exhibit combined with government reports recommending a new center lead to serious talks about developing a national representation of New Zealand's biculturalism. In 1985 this new national museum was outlined, though the process of development took several years and construction did not start until 1993 (Gore 2002).

The Museum of New Zealand Te Papa Tongarewa (Te Papa for short) is based on three strands of past, present, and future, conceptualized as *Papatuanuku*, (earth and

environment), *Tangata Whenua* (the indigenous peoples, Maori art and culture), and *Tangata Tiriti* (those belonging to the land by Treaty, the European settlers) (Gore 2002, Veracini & Muckle 2003). The bicultural model of Te Papa was first modeled in the 1992 exhibit *Voices He Putahitanga: A Social History of New Zealand Aotearoa* at the previous national museum. This first attempt however was a resounding failure, with severe criticisms from numerous parties, including some Maori. The exhibit consisted of a rather muddled framework, with a confusing design and scrambled placement of objects, and it seemed that in its desire to be post-modern and move beyond the problems of conventional ‘archaic’ museums it was creating a new sort of unintelligibility. The exhibit was also marred by an unequal and disharmonious conception of Maori and Pakeha contributions, so pro-Maori that they ended up producing a negative Pakeha view (Gore 2002). Though the relationship between the Pakeha and Maori has not always been positive, neither has it been solely negative and exploitative. Though the painful parts of history cannot be forgotten, this national museum project encouraged destruction and not construction and togetherness.

Accordingly, Te Papa is arranged around the Treaty of Waitangi rather than merely European settlement, reflecting the importance of document giving both Pakeha and Maori important powers and a shared destiny (Veracini & Muckle 2003). The museum also does not separate history, art, Maori history and art, and natural history. The focus rests on explaining the “story of New Zealand” (Gore 2002:242). Te Papa is a committed partnership, and this biculturalism carries well throughout the museum. Modern New Zealand life is not covered in the exhibits of Te Papa, however, and the bicultural Pakeha Maori model does not current diversity, with significant populations who have immigrated from nearby Asian or Pacific Island countries. Pakeha can refer to all non-Maori people, yet the Pakeha seen at Te Papa are those of

European descent. In its treatment of the Pakeha, the museum has also received some critique for being belittling or confused (ibid).

Additionally, its reliance on new museum models, or non-museum models, and entertainment versus pure intellectualism or more rigorous scholarship has drawn criticism. Te Papa has succeeded, however, in drawing a large number of visitors and sparking greater debate about these issues. Though there are still areas to address, its depiction of Aotearoa New Zealand's indigenous peoples in relation to its European settlers is well-done and provides a solid foundation for further exploration of what it means to be a modern citizen. An important next step for Te Papa would be the inclusion of a new exhibit dealing with contemporary multicultural life.

4.2.5 *Conclusions*

New Zealand and its indigenous peoples are largely a success story, mainly in terms of its long-term recognition of Maori land rights and treatment of biculturalism. However, it is not the perfect human rights model it sometimes claims, and Maori peoples have suffered from dispossession and discrimination over the years, like so many indigenous groups. However, the Treaty of Waitangi has provided both Maori and Pakeha with a common ground to reach for shared future and true partnership. Historical claims are well-addressed through the Waitangi Tribunal, with numerous large settlements coming out of the Office of Treaty Settlements. However, the new closing date and lack of dialogue beyond professional historians, government officials, and the Maori people may prevent further exploration and progress in considering the nation's past. Many feel that it has already been dealt with, and it is past time to concentrate on the present and future. It will be interesting to see if New Zealand becomes a model of indigenous relations or further falls behind on human rights and cultural recognition.

4.3 Canada

Canada has a long history of contact with Europeans, extending as far back the brief Norse settlement of the eastern coast. Trade was the main focus of most of these interactions, until the British and French started establishing settlements in the early 17th century (Nettheim, Meyers, & Craig 2002). The indigenous groups of the Americas ranged across modern boundaries, and native groups in the United States and Canada still retain some cultural ties. However, Canada currently recognizes three groups of indigenous peoples, referred to “Aboriginal people” in the collective. These three are Indians (or First Nations), Inuit, and Métis.

The Indians include almost 700,000 people in roughly 52 nations and more than 60 languages, with 55% living on-reserve. The Inuit are smaller, consisting of just over 50,000 people and residing in 53 communities throughout four Land Claims regions in four provinces: Nunatsiavut (Labrador); Nunavik (Quebec); Nunavut; and the Inuvialuit Settlement Region (Northwest Territories). The Métis people are descended from Indian women and European men before Canada consolidated into the nation it is today, and they are not recognized world-over as indigenous. But in Canada they are considered as a “distinct Aboriginal nation” numbering roughly 390,000 people and mainly living in urban areas, primarily in western Canada (IWGIA 2008:56). Canada’s recognition of Aboriginal land rights and their recent claim settlements have led to significant self-governance in the four Land Claims regions, and many resource developments are joint ventures between the federal government and its indigenous peoples.

4.3.1 *History of Relations with its Indigenous Peoples*

Initial contacts between French and British settlers and indigenous peoples resulted in local small-scale peace treaties, and it was not until 1763 that a broader policy was established, once

the British were ceded New France in the Treaty of Paris. Unlike the French, the British were actively interested in acquiring land currently belonging to their Aboriginal neighbors and under the Royal Proclamation of 1763 set the tone for future relations. The Proclamation established two central principles: 1) “Aboriginal societies were generally recognized as autonomous ‘sovereigns’ capable of making treaties” and 2) “these Aboriginal nations were entitled to their territories, unless and until they were voluntarily surrendered to the Crown” (Nettheim, Meyers, & Craig 2002:80). Early colonists viewed Aboriginal Canadians as roughly equal, due to their superior numbers and possession of valued territories. The Proclamation is understood as a reaffirmation of Aboriginal title, rather than a grant of it. This recognition turns the document into not the source of indigenous land rights in Canada but the guarantor of federal obligations in its relationships with the peoples (ibid).

This consideration of the Royal Proclamation of 1763 is a more modern take, for the period after it, lasting until the 1970s, is marked by dispossession and discrimination. The 1867 framing of the constitution re-established the federal government’s jurisdiction over Aboriginal peoples and their land, and the late 1800s until 1921 saw a series of Crown representatives signing a series of land cession agreements, though they would not cover all of the land considered Canada. This is due to the substantial number of indigenous peoples who refused to sign treaties which claimed to extinguish Aboriginal title (Scholtz 2006). The *Indian Act* of 1876 (and subsequent amendments), however, was the most important document for the government’s treatment of Indian affairs and directly tied to a legacy of displacement, assimilation, and neglect. Its three major assimilative actions were:

1. Creation of vastly reduced “Reserve” lands which do not reflect the traditional tribal territories of the Indian nations

2. Creation of puppet “Band Councils” which replace and undermine the authority of traditional tribal governments.
3. Definition of who is an ‘Indian’ under the Indian Act (Monet and Skanu’u 1992:8)

It effectively ignored the diminished sovereignty and protection of their interests and cultures that had been promised to them (Nettheim, Meyers, & Craig 2002).

After 1921, when the treaty-signing period ended, some indigenous peoples tried to organize in order to demand government recognition of their title claims. The government reacted by shutting down such organizations before fully formed and completely dismissing the merit of title claims, with a 1927 prohibition of financial support for such claims. However, after World War II that part of the *Indian Act* was removed in some limited reforms (Scholtz 2006). The Canadian government remained committed to assimilation though, and while Indians could now pursue land claims in court it was not until the 1970s that real progress was made. The landmark decision was the 1973 *Calder v Attorney-General of British Columbia*, which recognized Aboriginal title as not granted by the 1763 Proclamation but as coming from their pre-existing occupancy of the land. The *Calder* case did, however, say that a conquering nation also had a right to extinguish that title (Nettheim, Meyers, & Craig 2002).

The *Calder* case left many details of Aboriginal title in modern Canada to be worked out, but its acknowledgement of Aboriginal title as a legal right was new and forced the government’s hand to seriously consider and then adopt a formal negotiation policy (Scholtz 2006). The later *Guerin v The Queen* (1984) established the government’s financial obligation to protect Aboriginal rights and interests and further clarified *Calder* in establishing that Aboriginal title is only extinguished when voluntarily surrendered or with appropriate legislation that includes compensation. The *Constitution Act* of 1982 was a recognition of the struggle in the courts and politics and affirmed “existing Aboriginal and treaty guaranteed rights” (Nettheim,

Meyers, & Craig 2002:87). This would be important for later court decisions, as deciding that treaties should always be read “broadly and in favour of Aboriginal people” (ibid:87). While significant victories were being won, during the period of the 1970s and 80s the claims process moved incredibly slowly, due government’s guidelines allowing only one case at a time in each province or territory (Culhane 1998).

With the 1990s came a fuller interpretation and resolution of Aboriginal land claims, with three key cases, *Sparrow*, *Nunavut*, and *Delgamuukw* (Culhane 1998; Légaré 1996; Nettheim, Meyers, & Craig 2002). *Sparrow* and *Delgamuukw* further established the criteria for Aboriginal title, and the *Nunavut* case was a major land claims settlement that resulted in the 1999 creation of the territory of Nunavut. Several cases on natural resources also occurred during this time in parallel with the additional definition and settlements on land rights. These decisions form the base for modern Aboriginal rights resolutions, still settled through the court system in a negotiation process. Current criteria for Aboriginal title will be discussed in the next section.

4.3.2 *Current Governance Structure for Dealing with Land Claims*

The 1990 *Sparrow* (*Ronald Edward Sparrow v Her Majesty The Queen*) case filled in the open section of the 1982 *Constitution Act* in establishing a test for interference with Aboriginal rights (including their right to land title). This four part test asks:

1. Does the legislation or regulation interfere with an existing Aboriginal right?
2. If there is interference, is there any compelling justification for that infringement upon the Aboriginal right?
3. Has the law or regulation been enacted without consideration of the trust relationship?

4. Has the government addressed other factors, such as minimizing the interference, fair compensation, and/or consulting?

Designed to resolve all conflicts over Aboriginal rights, this test and its definition of the *Constitution Act* effectively allows the government to regulate Aboriginal land rights without discrimination, but it “must take into account the appropriateness of regulation giving full consideration to the historical and cultural patterns of the exercise of Aboriginal rights” (Nettheim, Meyers, & Craig 2002:89). The decision also reaffirmed that the federal government must have explicitly shown their intention to extinguish Aboriginal title and that laws which ‘implicitly extinguish it’ are not valid (Culhane 1998).

The most definitive explanation of the content of Aboriginal title comes from the 1997 *Delgamuukw v British Columbia* case, also known as the Gitksan and Wet’sukwet’en sovereignty case. It failed in the British Columbia court (see Monet and Skanu’u 1992) and was retried in the Supreme Court, where it finally succeeded after a ten year long legal process. Chief Justice Lamer noted the failure of the first court to consider oral histories as having independent weight. Lamer asserted the value of oral history, giving it equal footing with more familiar types of historical documentation, and expressing that discounting oral histories as only useful as corroboration places an “insurmountable burden on Aboriginal plaintiffs asserting Aboriginal rights claims” (Nettheim, Meyers, and Craig 2002:94). This upholding of oral testimony is of great importance in the evidentiary standards and consideration given to similar testimony in later cases. It also emphasizes the federal government’s understanding of Aboriginal custom, which holds the testimony of its chiefs in such capacity as beyond doubt (Monet and Skanu’u 1992). This promotes greater equality within the process, recognizing Aboriginal evidence though still within a westernized system of justice.

Beyond its stance on oral histories, the *Delgamuukw* case is also important for its definition of a test for Aboriginal title. According to Chief Justice Lamer,

First, under each the test for Aboriginal title, the requirement that land be integral to a distinctive culture of the claimants is subsumed by the requirement of occupancy and, second, where the time for the identification of Aboriginal rights is the time of first contact, the time of identification of Aboriginal title is the time at which the Crown asserted sovereignty over the land. (Nettheim, Meyers, & Craig 2002:98)

Another important distinction the Chief Justice makes is that “if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation” (ibid:98). This ‘if’ is important, as it demonstrates that for Canada, continuous physical connection to the land is not, necessarily, required. The recognition of the value of oral histories and not requiring continuous physical connection greatly assists the consideration and success of Aboriginal title cases under the current system.

4.3.3 *Use of Archaeology and Anthropology*

With a resolution of the weight afforded oral testimonies, what role does anthropology play in Aboriginal title cases? To achieve recognition of oral history, anthropologists and ethnohistorians were fundamental in demonstrating it as concrete line of evidence that did not fall under the ‘Hearsay Rule’ (Culhane 1998). Daly, an anthropologist for the Gitksan and Wet’suwet’en, showed that an oral tradition does not rely on one speaker but that it is a “corpus of linked and overlapping records of events that have been reiterated down through generations” and that these viewpoints of Chiefs can be compared with one another and validated (ibid:121). Archaeological and geological evidence can also be used to corroborate oral tradition, providing further evidence. However, these efforts are only supporting and not basic evidence.

Anthropology and archaeology have also been essential in demonstrating that claimants possess a distinctive culture and are and were not just a primitive people who led “nasty, brutish,

and short” lives, as the original judge of the *Delgamuukw* case suggested (Monet and Skanu’u 1992, Klimko & Wright 2000). They have acted as expert witnesses for a significant period of time, even though there has been criticism of their use. Some anthropologists were considered to be too attached to the peoples they studied or guilty of romanticizing them. Some indigenous scholars and activists have questioned the validity of a western, scientific viewpoint. While today indigenous peoples in Canada have a central role in establishing their cultural viewpoint, anthropologists still play an important role in providing a coherent picture to all parties and in combating ethnocentrism (Culhane 1998).

Archaeological data in particular provides time depth in a specific area when documenting the presence of Aboriginal cultures, one of the criteria for establishing Aboriginal title (Klimko & Wright 2000). Archaeology has also been deeply implicated in cultural repatriation issues, in the rise of indigenous consulting in CRM work, and in the growing field of indigenous archaeology where the cultures themselves are lead to handle their own prehistoric past (Nicholas 2000, 2006). This is not a trend unique to Canada, but of course these changes will have a significant impact of the future of land claims and in indigenous affairs in the country.

4.3.4 *Popular Representations in a National Museum*

The Canadian Museum of Civilization is Canada’s national museum dealing with human history, located in Hull, Quebec and opened in its present condition in 1989. The National Museum of Canada was created in 1927 to cover cultural and natural histories and has since undergone a few changes. In the 1970s there was a push for a new national museum with greater attention to Aboriginal peoples, resulting in the 1989 CMC. During the planning process, it was decided to treat Aboriginal and non-Aboriginal peoples in separate depictions, leading to two different

teams with differing schedules and budgets (Dean & Rider 2003). From the beginning, Canada has acknowledged its multiculturalism but separated the European descendants as the dominant Canadian identity in relation to the native, indigenous voice. The CMC has thus been accused of using its Aboriginal peoples for nation-building without promoting real respect and autonomy (Mackey 1999).

It can be argued that even the museum's architecture and internal set-up codify views about Canianness, but we will focus here solely on the exhibition content through an anthropological focus (Kalant 2004). There are four permanent exhibitions: the Grand Hall, First Peoples Hall, Canada Hall (originally named the History Hall before criticism led to a change), and Face to Face: the Canadian Personalities Hall. The First Peoples Hall covers 20,000 years of Aboriginal history, while the Canada Hall starts at 1000 A.D and continues to the Victorian era. Continuing criticisms of the CMC's depiction of political history have led to 1999 revisions of the Canada Hall and a 2002 independent review by four professional historians. It is interesting that the two halls dealing with Aboriginal history and/or artifacts, the Grand Hall and the First Peoples Hall, are not nearly as popular or discussed as the Canada Hall. The Canada Hall has suffered criticism not just for its tendency to ignore or belittle aspects of Aboriginal presence in its determination for build national unity but also for its treatment of English-French issues, because it is located in Quebec (Dean & Rider 2003).

However, the CMC, within those two halls dealing primarily with Aboriginal peoples, has been praised for its refusal to give in to the museum tendency to portray native cultures as static and 'locked in the past'. And yet, the museums' policy of "cooperation and respectful engagement with Native communities" often prevents them from fully exploring the problems facing modern Indians (Kalant 2004:148). How the 'challenge' of the land has shaped the

country is a key theme of the museum, and it is especially interesting to see how land rights and claims are completely left out of the CMC's historiographic account (Mackey 1999). In their efforts to build a positive and popular vision of Canada, the CMC has unfortunately sacrificed most of its potential to promote real dialogue about the issues and to develop a partnership through its multiculturalism. As the 1989 development of the museum was a vast undertaking, going well over the original budget, it is unfortunately unlikely that these problems will be addressed on any large scale.

4.3.5 *Conclusions*

Canada, like New Zealand, has a long history of treaty-making and of prior recognition of Aboriginal land rights. However, they also have a similar practice of dispossession and discrimination, ignoring their obligations until the 1970s. Canada's history of court decisions since that period has given firm support to oral tradition with the added application of anthropological and archaeological evidence. It remains to be seen how seriously different judges understand oral tradition, but the *Delgamuukw* case is a big step in recognizing the validity of Aboriginal worldviews and testimony. Collaborative and indigenous archaeology will also hopefully lead to further empowerment in providing evidence through a still largely Eurocentric judicial system. The significant amount of unceded territory and the success of such large settlements and resulting self-governance, like Nunavut, are also promising when looking at the future of indigenous land claims. However, Canada still has an uncomfortable and unequal relationship with its Aboriginal peoples, as seen through national discourse. To maintain current positions and reach a more harmonious and actualized partnership will require a firm commitment by the federal government to Aboriginal rights as well as continued calls for

social justice and cultural and political recognition by indigenous peoples and by scholars involved with these issues.

4.4 United States of America

The United States of America is a large and extremely multicultural nation, with a dizzying range of practices and peoples. Alaska's indigenous peoples are governed differently than the Native American tribes in the lower 48, and will not be covered. More than 4 million people identify as Native American, with roughly over 2 million categorized as Native American only (de la Cadena & Starn 2007, IWGIA 2008). They then make up 1.4% and 0.75% of the total population, respectively. A significant number Native Americans still live on reservations, but more than half do not and many live in cities.

Of the four nations examined, the United States has the longest history of direct settlement and thus a long tradition of political development, some of which has influenced practices in the other three for better or for worse. The federal government acts a guardian to its ward, the Native Americans, and as a result has created several federal agencies to manage its trust responsibilities. However, political climates greatly affect these agencies and thus the status of the Native Americans is often in flux. Each tribe has its own particular situation, but in general Native Americans suffer from lower life expectancies and higher poverty than the average U.S. citizen. Recognition of sovereignty and land rights is still a central issue. There are currently 335 federally recognized tribes (not including Alaska), though many more are still fighting to achieve this status (IWGIA 2008). Each tribe has its own distinct culture and relationship with the federal government, and thus our treatment will focus on national trends and standards to avoid becoming overly cumbersome.

4.4.1 *History of Relations with its Indigenous Peoples*

Native Americans settled the continent at least 15,000 years ago, though there were likely several waves of migrations to the continent and significant shifting and culture change since that time. At contact all of the Americas were occupied by diverse linguistic and cultural groups with differing lifestyles and mythologies and complex (and not always peaceful) histories with one another. The discovery of the Americas in the late 15th century by Europeans prompted a wave of exploration and settlement, with numerous parties both native and non-native. The history of the Native Americans post contact is, as a result, also tumultuous and complex, with England, Spain, France, and later the United States proper dealing differently with different tribes at different times.

Though the other nations did impact Native American populations, we will focus solely on the British and the later United States. After contact, roughly six historical periods can be identified:

1. Discovery, conquest, and treaty-making (from Columbus to 1789)
2. Removal, relocation, and reservations (1789-1871)
3. Allotment and assimilation (1871-1928)
4. Reorganization and self-government (1928-43)
5. Termination (1943-61)
6. Self-determination (1961-?)

The British Crown originally adopted the stance of protector and guardian of the tribes from its colonists, and when the United States won its independence it had to decide how to proceed with its own Native American policy. Indian affairs were put under federal control in an attempt to closely regulate and separate the groups (Nettheim, Meyers, & Craig 2002). The United States

Constitution of 1787 treated Indian tribes as similar to foreign nations and thus dealt with Indians as non-American citizens (Scholtz 2006).

It was also during this early period that the first treaties were negotiated, with the tribes treated as a fellow sovereign government. This situation only lasted as long as the British presence, and with their expulsion after the loss of the War of 1812 Native Americans lost a powerful bargaining chip and often had treaties imposed upon them. Treaties to gain native lands while separating them from the colonists were not enough to keep the two groups apart, so instead the federal government changed its policy from strict isolation to removal. The settlers kept on coming, however, and the tribes were pushed further and further west. Though there were numerous attempts at resistance, none proved ultimately successful and tribes that stayed together were forced onto reservations (Nettheim, Meyers, & Craig 2002).

With nowhere else to move them to, it was then decided that the Native Americans had been granted too much land and were not using it successfully. The *General Allotment Act* or *Dawes Act* of 1887 put tribal lands into allotments, held in trust for the Native Americans and allowing the surplus to be purchased by settlers. The allotment process was not ideal, however, and over the 50 year period over 90 million acres were lost (about 60% of the tribal land base at the time), with the remaining reservation land carved up into pieces and often interspersed with land owned by new non-tribal settlers (Scholtz 2006). With such a bureaucratic mess, in 1934 the *Indian Reorganization Act* was passed, which encouraged land consolidation and tribal self-government. The 'Indian problem' was still present, however, so in the 1950s a decision was made to terminate the tribes and series of individual termination acts were passed, with the tribes handed a check in return for land, self-governance, and Indian identity. 109 tribes were terminated before President Nixon repudiated the policy in 1970 and ushered in the current

period of recognition of the special trust relationship between the government and the tribes and importance of tribal self-determination (Nettheim, Meyers, & Craig 2002). The 1970s also saw a further rise of Native American activism, which had started in the 1960s and was starting to lead to further empowerment (Scholtz 2006).

In considering the history of land rights, it is notable that the three central cases all occurred between 1823-32, known collectively as the Marshall Trilogy. Chief Justice John Marshall championed Native American rights under the presidency of Andrew Jackson, who opposed upholding federal obligations and favored removal. The first case, *Johnson v McIntosh* 1823, Marshall outlined the earliest version of native title, though it recognized Native Americans as first peoples having the rights only of use and occupancy. The discoverers gained legal ownership (Scholtz 2006). The next case, *Cherokee Nation v Georgia* 1831, Marshall concluded that tribes had the status of domestic dependent nations and established the ward-guardian relationship (Nettheim, Meyers, & Craig 2002). Native American tribes thus had political rights of their own, though limited in favor of the federal government, and this decision is often cited as the foundation of the trust responsibility (Scholtz 2006).

The final case, *Worcester v Georgia* 1832, emphasized the federal government's duty to protection of lands and resources and the measured separatism of between federal and tribal governance (Nettheim, Meyers, & Craig 2002). Tribes were thus free of state jurisdiction and under sole authority of the federal government, which could only extinguish title with the 'consent' of the tribe (Scholtz 2006). Marshall's last two decisions allow for two interpretations of the trust relationship: the guardian-ward model of *Cherokee Nation* which allows for nearly un-checked federal power over the tribes (even over their internal governments) and the *Worcester* model which presupposes native sovereignty and focuses the trust duties on

protection. There are also financial obligations of the federal government to protect these interests. Congress has not always followed the letter of these decisions, however, and the courts have often permitted this (Nettheim, Meyers, & Craig 2002). Early efforts by Native Americans to seek redress from Congressional actions through the court system were unsuccessful, and in 1863 land claims were barred from the federal court, though tribes could lobby for a special act from Congress to permit this (Scholtz 2006).

In 1924 the *Indian Citizenship Act* was passed, giving Native Americans not just the chance to vote but to sue in federal and state courts. This new judicial recourse led to further calls for land claims reform, and finally in 1946 the Indian Claims Commission was created. The ICC had court-based evidentiary standards and an independent arbitrator that could dismiss a case, effectively permanently. Accepting a settlement often did not afford the recognition and compensation hoped for and cost all rights at future retrial or recognition (Scholtz 2006). The court was dissolved in 1978, and unresolved cases were sent to the U.S. Court of Claims (Rosenthal 1990). Today, Indian land issues are dealt with through the Bureau of Indian Affairs (IWGIA 2008). Cases are dealt with individually through the court system (Scholtz 2006). Today 2% of land in the United States belongs to Native Americans (Gulliford 2000). One third of all land is public land and thus is regulated under federal laws with regard to indigenous issues, most notably CRM legislation such as the 1990 NAGPRA (Smith & McManamon 1988, Bray 2001)

4.4.2 *Current Governance Structure for Dealing with Land Claims*

Based on Marshall's decision, the United States does not recognize indigenous title as conferring special ownership. Instead, the discoverer has ownership while the indigenous peoples retain rights to use and occupancy. Accordingly, there are numerous federal agencies dealing with land

that interact with Native Americans (Smith & McManamon 1988). For our purposes, the Bureau of Indian Affairs is most important in its responsibilities for the upholding of the trust relationship. There are also historical treaty obligations (IWGIA 2008). Since the Indian Claims Commission disbanded, there has been no alternative to litigation, nor does the creation of a new system seem very likely (Scholtz 2006).

4.4.3 *Use of Archaeology and Anthropology*

Based on the United States' understanding of Native American land rights, archaeology is most useful in helping tribes gain access to resources or to sacred areas. Under the National Park Service, such arrangements are known as Traditional Cultural Properties, or TCPs (Parker 1993). Archaeology and anthropology can be of great value in establishing historical associations with a community and with its continued importance in spiritual beliefs (ibid, Gulliford 2000).

Anthropology has been integral in the National Park Service's dealings with Native Americans for several years (Keller & Turek 1998).

Anthropology and archaeology also continue to be useful to tribes pursuing land claims cases in court or for those attempting to become federally recognized, especially necessary for those tribes who were terminated. In 1978 the Bureau of Indian Affairs established a process for federal recognition that requires "exceptional anthropological, historical, and genealogical research and presentation of evidence" (NCAI 2006). The Indian Claims Commission also had a long history of using anthropology as well as historical research, leading eventually to the creation of the American Society for Ethnohistory (Shoemaker 2002). The use of archaeology in establishing the antiquity of occupation and the maximum distribution at the time the lands were lost is of great use in both situations (Downer 1997).

The value of archaeology with regards to Native Americans as historically practiced has not always been positive, and recent legal developments have led to important reconsiderations of the relationships between the two groups. Controversy over the Kennewick man was a lightning rod for scientific, and arguably colonial, values versus cultural and religious ones. The hotly debated court case also dealt with biological constructions of identity, particularly significant since in the U.S. Native Americans are identified as particular blood quantum (Thomas 2000). In the end, the great antiquity of the skeleton prevented any conclusive tribal identification and thus repatriation, but these issues have not died down. The passage of NAGPRA in 1990 was an important recognition of Native American cultural rights, but it is not appreciated by some archaeologists and tensions remain (Bray 2001).

Indeed, repatriation is still a major issue in regards to physical remains and cultural objects in the United States. Land repatriation has been side-lined, relegated to individual court battles. Archaeology most commonly interacts with Native American communities through cultural resource management, a growing sector of the discipline and a reflection of a shift in government policy. Though research conducted by archaeologists has been demonstrated to be of value to Native Americans in giving valuable evidence for federal recognition, establishing traditional cultural properties, gaining access to resources, and in land claims, there are a sizable number of Native Americans who think that archaeology does not work in their interests at all (Swidler et al. 1997, Bray 2001, Martinez 2006).

This critique of archaeology and rise of Native American archaeologists is changing the nature of research in the United States and how it is used for both academic and political purposes. Though the federal government seems unlikely to develop a special body to deal with land rights cases or to consider Aboriginal title as defined in Canada, New Zealand, or Australia,

archaeology can still develop its own internal standards of evidence. Additionally, the greater incorporation of the oral tradition is a necessity, as it is still largely ignored or disvalued (Anyon et al. 1997, Downer 1997, Hollowell & Nicholas 2008). A successful integration of ethnography, historical sources, and archaeological data to meet the needs of Native Americans and in consultation with their beliefs could come a long way in moving forward both collaborative anthropology and the American legal process in its treatment of indigenous issues. With so many developments in North American archaeology and in Native American legislation, it is not impossible that land rights will take on greater prominence.

4.4.4 *Popular Representations in National Museums*

There is a large body of scholarship on the development and capabilities of the National Museum of the American Indian (NMAI), established by a 1989 Act of Congress and opened in 2004 (Lonetree & Cobb 2008, Caro 2006, Kerr 2005, Rosoff 1998, West 1994, Chaat Smith 2007). But to truly look at the museum perspective, we must look beyond just the NMAI. My treatment is based upon personal visits and reactions to the national museums. The National Museums of the United States are housed under the Smithsonian Institution, with Native American remains and traditional cultural objects belonging to both the National Museum of Natural History (NMNH) and the more recent National Museum of the American Indian. The National Museum of American History (NMAH) recently reopened in 2008 after renovations. Through these museums, we see what it means to be American and Native American.

NMNH rightly focuses on natural and cultural history the world-over and leaves the definition of ‘American’ to the other two museums, though its vast collection of indigenous materials and its important position in NAGPRA and the repatriation of human remains must be mentioned. NMAI focuses not just on the United States but on the whole of America, reflecting

the long history before contact and its different geographical boundaries and movements. In some ways, it falls to NMAH to define what is to be ‘American’ and what role our Native Americans play. On my recent visit to the newly renovated NMAH, I was disappointed but not surprised to find that Native Americans are rarely mentioned or mentioned solely in terms of conflict. NMAH is divided into six broad sections with exhibitions within them, listed as Transportation and Technology; Science and Innovation; American Ideals; American Lives; American Wars and Politics; and Entertainment, Sports, and Music.

Reference to Native Americans occurred in two sections in two exhibits, American Lives with “Communities in a Changing Nation: The Promise of 19th Century America” and American Wars and Politics with “The Price of Freedom: America at War”. “Communities” starts out with a rather shaggy bison, an unusual sight for the NMAH that would be more at home in NMNH, and a panel outlines the bison as the “symbol of the promise of the West”. Native Americans are described as getting “food and hides” from bison and that the bison was “a central symbol in many Indian religions”. While discussing the near extinction of the bison, there is a curious absence of any explanation on what effect this had on the Native Americans. The rest of the exhibit contains a total of 4 references to the Native Americans, with tiny pictures of peace medals, muskets, a painting of Western life, and a portrait of Temcuseh. There is no sustained discussion of the Indian situation in the 19th century, instead the focus was on women and African Americans as those struggling for the equality and democracy promised them.

“The Price of Freedom: America at War” contains more substantial coverage of Native American issues, though of course it is focused on war topics. The beginning of the exhibit establishes that Spain, France, and Britain “laid claim to portions of North America already settled by Indians” and that all groups fought amongst each other. Maps in the early 1700s

outline the holdings of each of the four groups, with the Indian holdings further delineated by six ‘principal American Indian language groups’. We see the Native Americans briefly in the French & Indian War and again with the Louisiana Purchase. A notably strong section of the exhibit is a “recognition of a debate about liberty and citizenship” that started with the fight for independence and “continues today”. Depicting women, African-American slaves, and Native Americans, it outlines these debates from an early stage in American history. For Indians, the question is if their sovereignty should be recognized, with yes and no perspectives provided by 1787 historical documents. After this promising display, we are moved to the Wars of Expansion, 1812-1902, and see a series of artifacts and panels dealing with such events as the Trail of Tears and assimilation efforts. However, after 1902 there is no more about Native Americans.

Though the American Indian has its own museum, what does this rather paltry recording of Native American presence as part of American history and culture mean? A lack of recognition, as well as other factors, are what spurred the creation of the NMAI, but I wonder if making the museums separate has truly made them equal. And in divorcing the two groups so, what are we saying about the shared destiny of Native Americans and Americans. Is there no peaceful, culturally-relevant way for us to live together, work together for a United States of America? My perspective is admittedly biased, but I worry about the coming National Museum of African American History and Culture. When it has its own museum to fully explore its legacy and future, will the presence of African Americans be deleted from the NMAH? I do not disagree that there was and is a vital need for the NMAI and NMAAHC, but I am troubled by the NMAH’s treatment of America’s multiculturalism. It is difficult to provide the necessary thoroughness with so many peoples and topics to cover, but that doesn’t mean the effort should

not be made. Whatever level of cultural and governmental self-determination reached, we are all citizens of the United States and share a stake in its past, present, and future together.

4.4.5 *Conclusions*

The United States and its Native American peoples have a long and often contentious history, with an early recognition of a government-to-government relationship and federal trust responsibilities and a later and continuing history of ignoring those promises. The creation of the ICC provided a hope for real land claims settlement, but it was not to be. Today Native American interests are funneled through a series of federal agencies, as well as state governments and reservation leadership. There is no direct process for land claims and no evidentiary standard. The United States has however upheld its decision that indigenous land rights only consist of use and occupancy after the ‘discoverer’ arrives and takes legal ownership.

Recent changes in cultural resource management practice, especially with NHPA and NAGPRA, along with Native American critiques of archaeology and a growth in indigenous and collaborative archaeologies has suggested that we are in a new phase of anthropology and indigenous activism. However, as seen by the national museums, we must take care in that our efforts towards indigenous empowerment, which is necessary and long past due, that we are not losing our permanent shared identity, as that of American citizens with all of the rights and responsibilities therein. The federal government and those agencies dealing with Native American affairs, especially the Bureau of Indian Affairs, should take note of the situation. With the growing international recognition of indigenous rights and recent decisions in the other members of the CANZUS group, America cannot afford to be left behind. As a NMAI brochure proudly asserts, the Native Americans are “where America’s history begins”. We must work out together where it is going.

5.0 CONCLUSION

5.1 International Trends Prior to the Declaration

The decades after World War II and before the Declaration saw a rise in the recognition of human rights and minority rights. Social justice and political movements have led to increasing empowerment of minority and indigenous groups and discussions both of historical and present consequences. With such rises in awareness of multiculturalism, there has been a trend towards the nationalization and codification of identity. Boundaries of modern nation-states still remain under contention in several areas, but there has also been a growing focus on the international, in the new globalized world. Through a great oversimplification of the last 50 years of world history, developments have clearly paved the way for such a document and its adoption.

5.2 Comparing and Contrasting the CANZUS group

With momentum building, why did the CANZUS group dissent? We have already covered their individual responses, but let us reflect on their actions beyond their words. The CANZUS group is unique by comparison with other nation-states in its shared British colonial past and quick realization of their significant indigenous population. The four countries also have a long interplay between them, especially in indigenous issues. However, each nation has forged its own unique stance on indigenous land rights.

Australia took the longest to recognize native title and still has never made a formal apology or reconciliation to its indigenous peoples. The NTA has been a landmark in Australia's indigenous policy, but it has since been weakened both by amendments and by court decisions.

Its requirement of continuous ‘traditional laws and customs’ puts a burden of proof on the indigenous claimants and their expert witnesses that is unreasonable and extends a process that is already too lengthy. New Zealand, in contrast, has had a central document recognizing Aboriginal title, the Treaty of Waitangi, from almost the very beginning. Though New Zealand does not have a perfect track record and it took some time to develop a government infrastructure for addressing claims, it has been extraordinarily successful. Its evidentiary requirements from the professional historians and their usage of oral tradition have worked well for the parties involved. However, its recent end-date on historical claims and its dissention could be signaling a shift in New Zealand’s policy towards its significant Maori population.

Canada has recognized Aboriginal title from early in its history, though it took a long time to fully practice that recognition and to decide the content and standards for Aboriginal title. Of the three nations that do recognize indigenous land rights, I consider Canada as having the most well-defined and practical definition. The success of settlements has led to significant measure of self-determination, but there is still not a true partnership between Canada and its Indians. The momentum established by *Delgamuukw* could also easily fail if the judicial stance shifts on the value of oral tradition and changes its standards.

The United States is the only nation of the four without a real recognition of indigenous land rights and a true policy of negotiation. However, its early litigation on indigenous issues under John Marshall has created a legacy for America as a leader in these issues. Theoretical changes in anthropology and archaeology and resulting legislative policies like NAGPRA have spurred important national reconceptualizations. Hopefully, public pressures from concerned citizens, scholars, Native Americans, and the international community will convince the United States to further negotiate indigenous rights, especially those pertaining to land.

5.3 Indigenous Empowerment through Archaeology and Anthropology

It is now clear that archaeological evidence can no longer be separated from the living people whose heritage it explores and whose lifestyles and statuses it impacts. It can also not be divorced from the social and political consequences its data produces. With this recognition, it is time to consider how archaeology can be best applied in those situations outside of pure academia. In dealing with indigenous peoples, specific circumstances are especially important to establish. We have seen that oral tradition, ethnography, historical records, and archaeological evidence can combine to form the standard of proof needed in the legal system to support a land claim. The question now is, how can we train experts to incorporate all of those fields and maintain coherence to both indigenous claimants and a restrictive western legal system?

Our focus on the CANZUS group has prevented a wider exploration of the applications of archaeology to defining indigenous groups and supporting their interests, but several countries already have been affected by developments in archaeological critique and decolonization as well as the rise of indigenous archaeologists themselves. In this wider framework, however, it becomes especially important to decide what qualifies as being ‘indigenous’. Here I would qualify the term as a distinct cultural group with ties to ancestral lands that it occupied before being involuntarily displaced. It has its own problems, but most importantly it emphasizes the importance of ancestral lands. What makes indigenous peoples unique from other minority groups is that connection to land, and it is why indigenous land rights are so important. Indigenous peoples deserve to have this connection recognized and further acknowledged as a foundation for their unique cultural heritage and destiny.

Multivocality is an important and necessary process in archaeology, and interested parties deserve to be part of the research, not merely the end results. The involvement of amateurs or

completely untrained individuals can be problematic in constructing a narrative that still upholds scientific evidentiary standards. But just as there can be more than one interpretation of the evidence, there can be more than one outcome. As trained professionals, our theories and understandings must proceed from methodology and evidence, with an awareness of sociopolitical contexts. This does not prevent other involved parties from reaching their own understandings and placing their own values. In the end, I feel that we can benefit from a consideration, though not necessarily adoption, of alternative conclusions. Awareness and respect can lead to an understanding of the past that has meaning for all involved.

5.4 How will the Declaration change the situation?

Indigenous peoples are finally getting their spotlight on the international stage, but they are still incredibly vulnerable to political change at the national and more localized levels. Overextensions and grey areas allow for more people to be included, but the U.N.'s self-identification policy is trouble waiting to happen. Its heart is in the right place, but we also must be practical.

The U.N. Declaration of the Rights of Indigenous Peoples is not a legal, binding contract. The real value of archaeological research is often its effects and not its validity. What is the point then? I would answer: consequences. The U.N. Declaration cannot directly legislate on these issues, but just one year later we can see consequences when looking at international and national debates. The discussion and internal development on these issues will in time lead to or at least shape national practices and may create internationally binding standards.

The debate surrounding the scientific validity of archaeology and links between past and living cultures has not been truly answered for legal purposes. The results of archaeological

research may not always support what is truly just either. But information is never a loss. Though the evidence may not support the desired side, it is important and inevitable. It may come to be overturned as new evidence comes to light, or it may expose flaws in the system. Archaeologists should not have to choose between the effects of their work and the evidence itself. When these situations arise, there must be awareness and there must be consequences. Change is often necessary, but the scientific method is not where the real problems lie. Because it is not just consequences that makes ‘good’ archaeology or ‘bad’ archaeology, but it is the methodology, the science used. ‘Good’ archaeology will always be that which remains first and foremost committed to scientific enquiry in the human spirit. Unfortunately, time and time again politics has led to the triumph of pseudoscience or ‘bad archaeology’, archaeological work taken solely in light of its repercussions or effects and not based on its inherent rigor and qualifications. This kind of academia will not survive.

Information has value. And the consequences it has in some cases are the most interesting, especially in exposing world views and spurring change. Like the Declaration itself, archaeology may not have the intrinsic qualities that form legally binding action, but the spirit of true scholarship and leadership must eventually prevail. In that scholarship the importance of context is crucial. No solutions to the problems indigenous peoples faced can be divorced from specific local situations and all of the histories and beliefs inherent in their position. This level of detail requires a lot of work and time, but it is necessary for a ‘truth’ that we can *all* live with.

I am hopeful that the adoption of the Declaration signals a more global commitment to indigenous issues. As we have seen with the CANZUS group, however, words are not always enforced when it is more convenient for the federal government not to do so. The very existence of the Declaration reflects movements in human rights and indigenous activism in attempt to

reshape national politics. But indigenous peoples have a long legacy with words, and they want and deserve more. Promises are meaningless without action, and empowerment should not lead to exclusion. Indigenous peoples are largely characterized by their ties to land. In our modern world, indigenous and colonist alike are now tied to the same places, entangled historically and for the future.

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APPENDIX A

FULL-TEXT OF THE 2007 UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

Adopted by General Assembly Resolution 61/295 on 13 September 2007

The General Assembly,

Guided by the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter,

Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

Reaffirming that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,

Recognizing also the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States,

Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur,

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

Recognizing that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

Emphasizing the contribution of the demilitarization of the lands and territories of indigenous peoples to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,

Recognizing in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child,

Considering that the rights affirmed in treaties, agreements and other constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character,

Considering also that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States,

Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights (2) and the International Covenant on Civil and Political Rights,² as well as the Vienna Declaration and Programme of Action,⁽³⁾ affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

Bearing in mind that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law,

Convinced that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,

Encouraging States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned,

Emphasizing that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

Believing that this Declaration is a further important step forward for the recognition, promotion

and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples,

Recognizing that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration,

Solemnly proclaims the following United Nations Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect:

Article 1

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights(4) and international human rights law.

Article 2

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

Article 3

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 6

Every indigenous individual has the right to a nationality.

Article 7

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.

2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

Article 8

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
2. States shall provide effective mechanisms for prevention of, and redress for:
 - (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
 - (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
 - (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
 - (d) Any form of forced assimilation or integration;
 - (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Article 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

Article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.
2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.
2. States shall seek to enable the access and/or repatriation of ceremonial objects and human

remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 13

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.
2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

Article 14

1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.
2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.
3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

Article 15

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.
2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

Article 16

1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.
2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.

Article 17

1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.
2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their

special vulnerability and the importance of education for their empowerment.

3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 20

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Article 21

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.

2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

Article 22

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.

2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 24

1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.
2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 28

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 29

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and

implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 30

1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.

2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

Article 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 33

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 34

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

Article 35

Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

Article 36

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.

2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

Article 37

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

Article 38

States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Article 39

Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

Article 40

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

Article 41

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

Article 42

The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

Article 43

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

Article 44

All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

Article 45

Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

Article 46

1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

(2) See resolution 2200 A (XXI), annex.

(3) A/CONF.157/24 (Part I), chap. III.

(4) Resolution 217 A (III).

APPENDIX B

STATEMENT BY AMBASSADOR HILL (AUSTRALIA) TO THE GENERAL ASSEMBLY ON THE DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

Declaration on the Rights of Indigenous Peoples
General Assembly
13 September 2007

Explanation of vote by the Hon. Robert Hill Ambassador and Permanent Representative
of Australia to the United Nations

(As delivered)

Australia has actively worked to ensure the adoption of a meaningful Declaration. Australia has taken every opportunity within the Commission on Human Rights Working Group on the Draft Declaration on the Rights of Indigenous Peoples, the Human Rights Council and the further consultation process mandated by General Assembly Resolution A61/178 to engage constructively to elaborate the Declaration.

Australia and others repeatedly called for a chance to participate in negotiations on the current text of the Declaration and we are deeply disappointed that none were convened. Having had an opportunity to negotiate the text would have allowed us to work constructively with the entire UN membership to improve the Declaration and may have resulted in a text which enjoyed consensus.

Madam President, Australia has worked hard to ensure that any declaration can become a tangible and ongoing standard of achievement that would be universally accepted, observed and upheld. The text of the Declaration, in our view, fails to reach this high standard and Australia continues to have many concerns with the text.

Self-determination

The Australian Government has long expressed its dissatisfaction with the references to self-determination in the Declaration.

Self-determination applies to situations of de-colonisation and the break-up of states into smaller states with clearly defined population groups. It also applies where a particular group with a defined territory is disenfranchised and is denied political or civil rights. It is not a right which attaches to an undefined subgroup of a population seeking to obtain political independence. The Government of Australia supports and encourages the full and free engagement of Indigenous peoples in the democratic decision-making processes in their country, but it does not support a

concept that could be construed as encouraging action that would impair, even in part, the territorial and political integrity of a state with a system of democratic representative government.

Lands and resources

The Declaration's provisions on lands and resources could be read to require recognition of Indigenous rights to lands without regard to other legal rights existing in land, both indigenous and non-indigenous. It is important to stress that any right to traditional lands must be subject to national laws, otherwise the provisions would be both arbitrary and impossible to implement, with no recognition being given to the fact that ownership of land may lawfully vest in others, for example, through grants of freehold or leasehold interests in land. Many national legal systems, including Australia's, also provide for lawful compulsory acquisition of interests in land. Australia will read the lands and resources provisions of the Declaration in line with its existing domestic laws, including the Native Title Act, which includes provision for compulsory acquisition of native title rights and interests with an entitlement to compensation.

Free, prior and informed consent

Australia has concerns that the Declaration expands any right to free, prior and informed consent too far. For example, the Declaration provides that states shall obtain the free, prior and informed consent of Indigenous peoples before adopting or implementing certain measures that may affect them. The scope of this proposed right is too broad. It could mean that states are obliged to consult with Indigenous peoples about every aspect of law that might affect them. This would not only be unworkable, but would also apply a standard for Indigenous peoples that does not apply to others in the population. Australia cannot accept a right that allows a particular subgroup of the population to be able to veto legitimate decisions of a democratic and representative government.

The provisions relating to free, prior and informed consent are also potentially inconsistent with, and go well beyond, any concept of free and informed consent which may be developing in other international forums.

Intellectual property

Australia does not support the inclusion in the text of intellectual property rights for Indigenous peoples. Australia extends protection to Indigenous cultural heritage, traditional knowledge and traditional cultural expressions to the extent that it is consistent with Australian and international intellectual property law. However, Australia will not provide sui generis intellectual property rights for Indigenous communities as envisaged in this Declaration.

Third party rights

The Declaration, in seeking to give Indigenous people exclusive rights over property, both intellectual, real and cultural, does not acknowledge the rights of third parties, in particular the rights of third parties to access Indigenous land, heritage and cultural objects where appropriate under national law. The Declaration fails to consider the different types of ownership and use that can be accorded to Indigenous people and fails to consider the rights of third parties to property.

Customary law

Australia is also concerned that the Declaration places Indigenous customary law in a superior position to national law. Customary law is not 'law' in the sense that modern democracies use the term; it is based on culture and tradition. It should not override national laws and should not be used selectively to permit the exercise of practices by certain Indigenous communities which would be unacceptable in the rest of the community. Australia will read the whole of the Declaration in accordance with domestic laws as well as international human rights standards.

Status of the Declaration

With respect to the nature of the Declaration, it was the clear intention of all states that it be an aspirational declaration with political and moral force, but not legal force. This text contains recommendations regarding how states can promote the welfare of Indigenous peoples. It is not in itself legally binding nor reflective of international law.

As this Declaration does not describe current state practice or actions that states consider themselves obliged to take as a matter of law, it cannot be cited as evidence of the evolution of customary international law. This Declaration does not provide a proper basis for legal actions, complaints, or other claims in any international, domestic, or other proceedings. Nor does it provide a basis for the elaboration of other international instruments, whether binding or non-binding.

Madam President, while the Declaration will not be binding on Australia and other states as a matter of international law, we are aware that its aspirational contents will be relied on in setting standards by which states will be judged in their relations with Indigenous peoples. Accordingly, the Government of Australia has been concerned throughout the negotiations to ensure that the Declaration is meaningful, is capable of implementation and enjoys wide support in the international community. The Declaration fails in all these respects and Australia cannot support it.

APPENDIX C

STATEMENT BY AMBASSADOR BANKS (NEW ZEALAND) TO THE GENERAL ASSEMBLY ON THE DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

United Nations General Assembly
Declaration on the Rights of Indigenous Peoples
Explanation of Vote by New Zealand Permanent Representative H E Ms Rosemary Banks
13 September 2007

Madam President,

New Zealand is one of the few countries that from the start supported the elaboration of a declaration that promoted and protected the rights of indigenous peoples.

In New Zealand, indigenous rights are of profound importance. They are integral to our identity as a nation State and as a people. New Zealand is unique: a treaty concluded at Waitangi between the Crown and New Zealand's indigenous people in 1840 is a founding document of our country. Today, we have one of the largest and most dynamic indigenous minorities in the world, and the Treaty of Waitangi has acquired great significance in New Zealand's constitutional arrangements, law and government activity.

Madam President, the place of Maori in society, their grievances and the disparities affecting them, are central and enduring features of domestic debate and of government action. Furthermore, New Zealand has an unparalleled system for redress, accepted by both indigenous and non-indigenous citizens alike. Nearly 40% of the New Zealand fishing quota is owned by Maori as a result. Claims to over half of New Zealand's land area have been settled.

For these reasons, New Zealand fully supports the principles and aspirations of the Declaration on the Rights of Indigenous Peoples. New Zealand has been implementing most of the standards in this declaration for many years. We share the belief that a Declaration on the rights of indigenous peoples is long overdue, and the concern that, in many parts of the world, indigenous peoples continue to be deprived of basic human rights.

New Zealand is proud of our role in improving the text over the past three years, with the objective of turning the draft declaration text into one that States would be able to uphold, implement and promote. We worked hard to the very end to narrow our concerns and to be able to support this text. We appreciate the efforts made by others, not least the Africa Group.

It is therefore a matter of deep regret that we find ourselves unable to support the text before us today. Unfortunately, we have difficulties with a number of provisions in the text. In particular,

four provisions in the Declaration are fundamentally incompatible with New Zealand's constitutional and legal arrangements, the Treaty of Waitangi, and the principle of governing for the good of all our citizens. These are Article 26 on lands and resources, Article 28 on redress, and Articles 19 and 32 on a right of veto over the State.

Madame President, the provision on lands and resources cannot be implemented in New Zealand. Article 26 states that indigenous peoples have a right to own, use, develop or control lands and territories that they have traditionally owned, occupied or used. For New Zealand, the entire country is potentially caught within the scope of the Article. The Article appears to require recognition of rights to lands now lawfully owned by other citizens, both indigenous and non-indigenous, and does not take into account the customs, traditions, and land tenure systems of the indigenous peoples concerned. Furthermore, this Article implies that indigenous peoples have rights that others do not have.

In addition, the provisions on redress and compensation, in particular in Article 28, are unworkable in New Zealand, despite the unparalleled and extensive processes that exist under New Zealand law in this regard. Again, the entire country would appear to fall within the scope of the Article. The text generally takes no account of the fact that land may now be occupied or owned legitimately by others or subject to numerous different, or overlapping, indigenous claims. It is impossible for the State in New Zealand to uphold a right to redress and provide compensation for value for the entire country - and indeed financial compensation has generally not been the principal objective of most indigenous groups seeking settlements in New Zealand.

Finally, the Declaration implies that indigenous peoples have a right of veto over a democratic legislature and national resource management, in particular Articles 19 and 32(2). We strongly support the full and active engagement of indigenous peoples in democratic decision-making processes – 17% of our Parliament identifies as Maori, compared to 15% of the general population. We also have some of the most extensive consultation mechanisms in the world, where the principles of the Treaty of Waitangi, including the principle of informed consent, are enshrined in resource management law. But these Articles in the Declaration text imply different classes of citizenship, where indigenous have a right of veto that other groups or individuals do not have.

Unfortunately, these are not the only provisions that cause us difficulties; for example, we also have concerns about Article 31 concerning intellectual property. But I have focused today on the provisions of central concern to New Zealand.

Madam President, New Zealand takes international human rights and our international human rights obligations seriously. But we are unable to support a text that includes provisions that are so fundamentally incompatible with our democratic processes, our legislation and our constitutional arrangements. These provisions are all discriminatory in the New Zealand context. This text is also clearly unable to be implemented by many States, including most of those voting in favour of its adoption today.

This Declaration is explained by its supporters as being an aspirational document, intended to

inspire rather than to have legal effect. New Zealand does not, however, accept that a State can responsibly take such a stance towards a document that purports to declare the contents of the rights of indigenous people. We take the statements in the Declaration very seriously. For that reason we have felt compelled to take the position that we do.

Lest there be any doubt, we place on record our firm view that the history of the negotiations on the Declaration and the divided manner in which it has been adopted demonstrate that this text, particularly in the Articles to which I have referred, does not state propositions which are reflected in State practice or which are or will be recognized as general principles of law.

Madam President, in our experience, the promotion and protection of indigenous rights requires a partnership between the State and indigenous peoples that is constructive and harmonious. This is the foundation of New Zealand as a nation State. It is with genuine regret and disappointment, therefore, that New Zealand is unable to support the Declaration on the Rights of Indigenous Peoples and must disassociate itself from this text.

APPENDIX D

STATEMENT BY AMBASSADOR MCNEE (CANADA) TO THE GENERAL ASSEMBLY ON THE DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

Statement by Ambassador John McNee
Permanent Representative of Canada to the United Nations
to the 61st Session of the General Assembly
on the Declaration on the Rights of Indigenous Peoples

New York, September 13, 2007

Madam President,

Canada has long demonstrated our commitment to actively advancing indigenous rights at home and internationally. We recognize that the situation of indigenous peoples around the world warrants concerted and concrete international action. We have strongly supported the establishment and ongoing work of the Permanent Forum on Indigenous Issues and the Special Rapporteur on the situation of the fundamental freedoms and human rights of indigenous peoples and have promoted consideration of indigenous issues within a variety of international conferences. We have a constructive and far-reaching international development program, targeted specifically at improving the situation of indigenous peoples in many parts of the world. Canada continues to make further progress at home, working within our constitutional guarantees for Aboriginal and treaty rights, and with our negotiated self-government and land claims agreements with several Aboriginal groups in Canada. Canada also intends to continue our active international engagement, both multilaterally and bilaterally. It is therefore with disappointment that we find ourselves having to vote against the adoption of this Declaration as drafted.

Since 1985, when the United Nations expert Working Group on Indigenous Populations decided to produce a Declaration on indigenous rights, Canada has been an active participant in its development. Canada has long been a proponent of a strong and effective text that would promote and protect the human rights and fundamental freedoms of every indigenous person without discrimination and recognize the collective rights of indigenous peoples around the world. We have sought for many years, along with others, an aspirational document which would advance indigenous rights and promote harmonious arrangements between indigenous peoples and the States in which they live.

However, the text that was presented at the Human Rights Council in June 2006 did not meet such expectations and did not address some of our concerns. This is why we voted against it. We also expressed dissatisfaction with the process.

Canada's position has remained consistent and principled. We have stated publicly that we have significant concerns with respect to the wording of the current text, including the provisions on lands, territories and resources; free, prior and informed consent when used as a veto; self-government without recognition of the importance of negotiations; intellectual property; military issues; and the need to achieve an appropriate balance between the rights and obligations of indigenous peoples, member States and third parties.

For example, the recognition of indigenous rights to lands, territories and resources is important to Canada. Canada is proud of the fact that Aboriginal and treaty rights are given strong recognition and protection in its Constitution. We are equally proud of the processes that have been put in place to deal with Aboriginal claims respecting these rights and are working actively to improve these processes to address these claims even more effectively. Unfortunately, the provisions in the Declaration on lands, territories and resources are overly broad, unclear, and capable of a wide variety of interpretations, discounting the need to recognize a range of rights over land and possibly putting into question matters that have been settled by treaty.

Similarly, some of the provisions dealing with the concept of free, prior and informed consent are unduly restrictive. Provisions such as Article 19 provide that the State cannot act on any legislative or administrative matter that may affect indigenous peoples without obtaining their consent. While we in Canada have strong consultation processes in place, and while our courts have reinforced these as a matter of law, the establishment of a complete veto power over legislative and administrative action for a particular group would be fundamentally incompatible with Canada's parliamentary system.

In Geneva leading up to the Human Rights Council's adoption of the text, and here in New York throughout the 61st session of the General Assembly, Canada has been very clear in proposing that further negotiations take place in an open and transparent process with the effective involvement of indigenous peoples. Over the last year, had there been an appropriate process in place to address these concerns, and the concerns of other States, a stronger Declaration could have emerged, one acceptable to Canada and other countries with significant indigenous populations and which could have provided practical guidance to all States. Unfortunately, such a process has not taken place. The few modifications presented at the last minute to this Assembly, prepared by a limited number of delegations, do not arise from an open, inclusive or transparent process, and do not address key areas of concern of a number of delegations, including Canada.

We regard it as particularly unfortunate that a number of States, like Canada, with significant indigenous populations, cannot solidly support the adoption of this particular text as a meaningful and effective United Nations Declaration on the Rights of Indigenous Peoples.

Yet let me reiterate that regardless of the Declaration, Canada will continue to take effective action, at home and abroad, to promote and protect the rights of indigenous peoples based on our existing human rights obligations and commitments. Such effective action, we must be clear, would not be undertaken on the basis of the provisions of this Declaration.

By voting against the adoption of this text, Canada puts on record its disappointment with both the substance and process. For clarity, we also underline our understanding that this Declaration is not a legally binding instrument. It has no legal effect in Canada, and its provisions do not represent customary international law.

Madam President, Canada will vote against adoption of this text.

Thank you.

APPENDIX E

STATEMENT BY AMBASSADOR HAGEN (UNITED STATES OF AMERICA) TO THE GENERAL ASSEMBLY ON THE DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

US UN PRESS RELEASE # 204(07)
September 13, 2007
AS DELIVERED

Office of Press and Public Diplomacy
United States Mission to the United Nations
140 East 45th Street
New York, N.Y. 10017

*Explanation of vote by Robert Hagen, U.S. Advisor, on the Declaration on the Rights of
Indigenous Peoples, to the UN General Assembly, September 13, 2007*

Thank you Mr. President, we regret that we must vote against the adoption of the declaration on the rights of indigenous peoples. We worked hard for 11 years in Geneva for a consensus declaration, but the document before us is a text that was prepared and submitted after the negotiations had concluded. States were given no opportunity to discuss it collectively. It is disappointing that the Human Rights Council did not respond to calls we made, in partnership with Council members, for States to undertake further work to generate a consensus text. This declaration was adopted by the Human Rights Council in a splintered vote. This process was unfortunate and extraordinary in any multilateral negotiating exercise and sets a poor precedent with respect to UN practice.

The declaration on the rights of indigenous peoples, if it were to encourage harmonious and constructive relations, should have been written in terms that are transparent and capable of implementation. Unfortunately, the text that emerged from that failed process is confusing, and risks endless conflicting interpretations and debate about its application, as already evidenced by the numerous complex interpretive statements that were issued by States at its adoption at the Human Rights Council. We cannot lend our support to such a text.

Mr. President, our views with respect to the core provisions of the text can be found in a separate document entitled Observations of the United States with respect to the Declaration on the Rights of Indigenous Peoples, which will be available in the room, and posted on the website of the US Mission to the United Nations, and will be circulated as an official UN document. This document is incorporated by reference herein and discusses the core provisions of the declaration, including but not limited to self-determination, lands and resources, redress, and the nature of the declaration. Because the flaws in this text run through its most significant provisions, the text as a whole is rendered unacceptable.

Although we are voting against this flawed document, my government will continue its vigorous efforts to promote indigenous rights domestically. Under United States domestic law, the United States government recognizes Indian tribes as political entities with inherent powers of self-government as first peoples. In our legal system, the federal government has a government-to-government relationship with Indian tribes.

In this domestic context, this means promoting tribal self-government over a broad range of internal and local affairs, including determination of membership, culture, language, religion, education, information, social welfare, maintenance of community safety, family relations, Economic activities, lands and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.

At the same time, the United States will continue its work to promote indigenous rights internationally. In its annual human rights report, the United States Department of State reports on the situation of indigenous persons and communities throughout the world. In our diplomatic efforts, we will continue our opposition to racial discrimination against indigenous individuals and communities and continue to press for full indigenous participation in democratic electoral processes throughout the world. We will also continue with out international assistance programs involving indigenous peoples.

Mr. President, we are deeply disappointed that in seeking to make a practical difference in the lives of indigenous people around the globe, the international community has not been presented with a text that is clear, transparent or capable of implementation. These fundamental shortcomings, unfortunately, mean that this document cannot enjoy universal support to become a true standard of achievement.

Thank you.

OBSERVATIONS OF THE UNITED STATES WITH RESPECT TO THE DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

The United States was an active participant throughout the long history of the negotiations to draft a declaration on the rights of indigenous peoples. Many other countries did not, however, participate in these negotiations in Geneva and may not be fully aware of what participants intended in its drafting. We can, therefore, provide an understanding of the intent of participating States on the core issues:

Nature of the Declaration:

With respect to the nature of the declaration, it was the clear intention of all States that it be an aspirational declaration with political and moral, rather than legal, force. Its persuasiveness and usefulness to the international community therefore critically depends upon the extent to which it enjoys unqualified support among States. This text contains recommendations regarding how

States can promote the welfare of indigenous peoples. It is not in itself legally binding nor reflective of international law.

The United States rejects any possibility that this document is or can become customary international law. We have continually expressed our rejection of fundamental parts of the former Subcommission text, and of this text, as have numerous other States. As this declaration does not describe current State practice or actions that States feel obliged to take as a matter of legal obligation, it cannot be cited as evidence of the evolution of customary international law. This declaration does not provide a proper basis for legal actions, complaints, or other claims in any international, domestic, or other proceedings.

Self-Determination:

The right of self-determination is addressed in Article 1 of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. This common Article 1 right of self-determination is understood by some to include the right to full independence under certain circumstances. Under existing common Article 1 legal obligations, indigenous peoples generally are not entitled to independence nor any right of self-government within the nation-state. It was not the mandate of the Working Group (nor was it within its power) to qualify, limit, or expand the scope of the existing legal obligations set forth in common Article 1, and it was never the intent of States to do so.

Instead the mandate of the Working Group was to articulate a new concept, i.e., self-government within the nation-state. It is not the same concept as the right contained in common Article 1. It is therefore confusing that Article 3 of the declaration reproduces the language of common Article 1 when the intention of the States was (i) not to afford indigenous peoples the right to independence or permanent sovereignty over resources; and (ii) not to modify retroactively the scope of existing legal obligations in common Article 1 to include self-government within the nation-state. During the negotiations in the Working Group, many States therefore resisted reproducing the text of common Article 1 in Article 3 of the declaration.

Despite the provisions that limit the scope of Article 3 of the declaration (e.g., Article 4 and Article 46), we are unable to associate ourselves with this text because of the wholly inappropriate approach of reproducing common Article 1 in Article 3 of the text with no intention that Article 3 mean the same thing as common Article 1, nor that it be considered to explain or modify the scope of existing common Article 1 legal obligations. We find such an approach on a topic that involves the foundation of international relations and stability (i.e., the political unity and territorial integrity of nation-states) to be ill advised and likely to result in confusion and disputes.

Simply put, given that the clear intent of the States in the Working Group was to develop aspirational principles dealing with the concept of self-government within the framework of the nation-state, the declaration should have used clear and understandable language to express that goal and to avoid confusion with the common Article 1 right. We also note that preambular paragraphs 2 and 16 as well as Article 2 were not intended to imply that the existing right of self-

determination is automatically applicable to indigenous peoples per se or to indicate that indigenous peoples automatically qualify as "peoples" for purposes of common Article 1.

Lands, Resources, & Redress:

The provisions on lands and resources are phrased in a manner that is particularly unworkable. The language is overly broad and inconsistent. For example, Article 26 appears to require recognition of indigenous rights to lands without regard to other legal rights existing in land, either indigenous or non-indigenous. Clearly the intent of the Working Group was not to ignore contemporary realities in most countries by announcing a standard of achievement that would be impossible to implement.

The intention of States in the Working Group was to encourage the establishment of mechanisms at the national level for the full legal recognition and protection of the lands, territories and resources indigenous peoples possess by reason of traditional ownership, occupation, or use, as well those which they have otherwise acquired. Furthermore, it was intended that such recognition should take into account the customs, traditions, and land tenure systems of the indigenous peoples concerned. Similarly, many of the declaration's provisions involving redress are set forth in a confusing manner and are equally unacceptable. Again, the goal of the States in the Working Group was to encourage just, transparent and effective mechanisms for redress for actions taken by States after endorsing the declaration.

The text also could be misread to confer upon a sub-national group a power of veto over the laws of a democratic legislature by requiring indigenous peoples, free, prior and informed consent before passage of any law that "may" affect them (e.g., Article 19). We strongly support the full participation of indigenous peoples in democratic decision-making processes, but cannot accept the notion of a sub-national group having a "veto" power over the legislative process.

Collective Rights: There was discussion within the Working Group regarding whether or not the collective indigenous rights set forth in the declaration were collective human rights. The intent of States participating in the Working Group was clear that, as has always been the case, human rights are universal and apply in equal measure to all individuals. This principle is fundamental to international human rights, and means that one group cannot have human rights that are denied to other groups within the same nation-state.

Moreover, if a collective entity or group -- as opposed to individuals -- could hold and exercise human rights, individuals within those groups would be extremely vulnerable to potential violations of their human rights by the collective. In addition, if groups and individuals could each hold human rights, it would be difficult to reconcile disputes over which human rights should prevail. As preambular paragraph 22 makes clear, the rights set forth in this declaration are collective rights of indigenous peoples as first peoples and are in a distinct category from human rights, which are held by all individuals. Article 46 also makes clear that human rights are not to be violated in the exercise of collective rights.

General Welfare: The aspirational principles and collective rights described in the declaration are typically written in extremely general and absolute terms. It was recognized by the States in the Working Group that it would not be possible to implement such broadly expressed provisions and that debating the restrictions on the exercise of each provision was not feasible given time constraints. It was therefore decided that the ability of democratic States to govern for the good of all their citizens be recognized at the end of the declaration (Article 46) and that such a clause would apply to all the principles and collective rights set forth in this declaration. Article 46 provides individual States with the flexibility needed to design domestic programs to preserve the unique characteristics of indigenous culture, and to ensure the continued integrity of indigenous communities, without disenfranchising other citizens of the State.

There are other provisions in the declaration that are unacceptable, including the article on the repatriation of human remains. The provisions on this important right have been misconstrued by some countries as allowing them to maintain their holdings of indigenous remains and artifacts. Even more fundamental and debilitating to the effective application and implementation of the declaration is its failure to define the phrase “indigenous peoples.” This obvious shortcoming will subject application of the declaration to endless debate, especially if entities not properly entitled to such status seek to enjoy the special benefits and rights contained in the declaration.

The flaws in this text run through all of its most significant provisions. Because these provisions are fundamental to interpreting all of the provisions in text, the text as a whole is rendered unworkable and unacceptable. Our position on this declaration does not, however, mean that we shall in any way withdraw from continuing to pursue the recognition of rights of indigenous individuals and peoples, internationally or domestically.