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REVIEW OF DEVELOPMENTS PERTAINING TO THE PROMOTION AND PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS OF INDIGENOUS POPULATIONS

STANDARD-SETTING ACTIVITIES:

EVOLUTION OF STANDARDS CONCERNING THE RIGHTS OF INDIGENOUS POPULATIONS

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EUROPEAN TREATIES WITH INDIGENOUS NORTH AMERICANS: A PRELIMINARY STUDY

1. Introduction.

When they first settled among indigenous nations and peoples in North America, European states were relatively weak minorities. France, the Netherlands, and Great Britain all negotiated treaties to secure peaceful trade relations and form alliances for mutual self-defence. Acquiring territory was a secondary consideration until well after the American Revolution, when the Euro-American population began to grow rapidly. From the 1820s to 1920s, the United States and Canada negotiated hundreds of cessions, covering roughly one-third of the continent's area. These later treaties often referred to "protection" and sometimes expressly acknowledged the superior sovereignty of the European party. While both American and Canadian courts regard these instruments as binding contracts and purport to construe them in Indians' favour, they nonetheless regard them as subject to state legislation.

2. Sources.

A definitive analysis of North American indigenous treaties is complicated by the fragmentary nature of the documentation prior to 1800, and by problems of definition. Any diplomatic conference with Indian leaders was called a "treaty" in 18th-century, while deeds and other instruments conveying land were negotiated and recorded separately--and rarely published. In the United States after 1800, all transactions with native governments were captioned "treaties" until 1871, after which virtually identical instruments were called "agreements." In Canada, "treaties" have long been confused with "surrenders," which are relinquishments of land previously reserved by a treaty. What is more confusing, the Canadian government has taken the position since the mid-1970s that an instrument is not a treaty unless it includes a land cession.

Most published 18th-century Indian "treaties" consist of the journals of periodic conciliation conferences rather than specific written instruments. Many of the records of this period have not yet been published, moreover, especially simple land transactions such as deeds. There are no published treaties with the tribes of coastal New York, for example, but the court records of the town of Oyster Bay alone contain no fewer than 57 Indian deeds. There are, unfortunately, no printed sources for the French or Dutch treaties, although the existence of formal alliances is often mentioned in 18th-century military documents.

3. The colonial period (1664-1776)

While there are records of occasional peace treaties and land cessions negotiated by British colonial governors with tribes of the mid-Atlantic seaboard as early as the 1620s, British diplomacy took a more serious turn after the seizure of New York from the Dutch in 1664. British settlements were now separated from their European enemies by three great Indian confederacies which, owing to their numbers and armed strength, temporarily held the balance of power on the continent. To the north, the Iroquois (Six Nations) and the Wabanaki confederacy (Micmac, Abenaki, Penobscot) controlled a 500-kilometre-wide corridor between British New England and New France (Quebec and Acadia), while to the south the Five Nations (Cherokee, Choctaw, Chickasaw, Catawba, Creek) separated Virginia from Spanish Florida. British colonial strategists quickly realized the value of forming military alliances with their indigenous neighbours, and the success of this policy was evident in the role Indians played in the definitive expulsion of French forces from Canada a century later.

At least 44 "treaties" with Indian nations were published in this period, more than half of them during the years of the final military conflict with France (1742-1758). Of these, 31 were with the Iroquois and their allies or dependents, such as the Delawares and Shawnees. Another 9 were negotiated with the Wabanaki, and 2 with the Five Nations in the south. With only 3 exceptions, there were no signed contracts, only extended conferences lasting several days or weeks, during which both sides made speeches and exchanged

gifts according to diplomatic practices which had developed among indigenous Americans themselves. The aim of Indian diplomacy was to mediate disputes, reconcile differences of opinion and renew the underlying political relationship between the parties, rather than reaching specific agreements. Nonetheless 12 of these conferences dealt with land disputes or boundary adjustments, 10 with military co-operation, and 2 with trade problems.

In one or two instances it is possible to identify an explicit initial agreement to establish a political relationship between the parties, but generally the relationship simply evolved, implicitly, over the course of years. The alliance with the Iroquois was often described as a "chain." The English and Indians called one another "brothers" and the British King their "father," but otherwise they remained entirely equal and independent like the states which today form the British Commonwealth of Nations. The British likewise re-referred to the Wabanaki as their "friend and Ally," and described their relationship as one of "amity and friendship." When, in 1763, the King issued a proclamation respecting the rights of indigenous North Americans, he referred to them, not as his subjects, but as the "Nations or Tribes of Indians with whom we are connected [i.e., by treaty] or who live under our protection."

The international nature of these alliances is also clear from the Treaty of Utrecht of 1713 between France and Great Britain, and the Treaty of Ghent of 1814 between Great Britain and the United States, in which the parties agreed not only to cease hostilities against one another, but also against one another's Indian allies.

4. The United States (1776-1871)

Within weeks of declaring its independence from Great Britain in 1776, the United States hastily negotiated defensive alliances with the indigenous nations on its northern and western frontiers. The U.S. subsequently extinguished competing European claims to its territory by war and treaty, then made separate treaties with the indigenous inhabitants by which they agreed to restrict or relocate their settlements. From 1776 to 1871, when Congress as an economy measure forbade the President from making any further treaties with

Indian tribes, the United States ratified 366 Indian treaties and entered into at least 22 that were never ratified, principally in California. Ratified treaties involve more than 95 distinct tribal groups, and form the basis for U.S. title to approximately 60 per cent of its contiguous continental territory.

These treaties also created political relationships, although the terms used varied greatly and display no clear historical trend. At the outset it bears noting that only three referred to a conquest or surrender. The rest recognized, in very general terms, exclusive U.S. authority to deal with the tribe and responsibility to protect it from encroachments by other tribes or American citizens. Before 1830, for example, most tribes "acknowledge[d] themselves to be under the protection of the United States and of no other sovereign whatsoever," or "admitted that they reside within the territorial limits of the United States, acknowledge their supremacy, and claim their protection." Only twice did these tribes agree to "conform to the laws of the United States" or recognize U.S. "jurisdiction," however.

Several treaties of the 1850s stipulated that Congress and the President would have authority to make "rules and regulations to protect the rights of persons and property among the Indians," or that the tribes will "observe all laws which may be prescribed by the United States for the[ir] government," but in others the tribes merely "acknowledge[d] themselves subject to the Government of the United States, and engage to live in amity with [its] citizens," or "acknowledge their dependence" on the United States. Most of the treaties made after the American Civil War were similar, although a few described the tribes as generally "subject to the laws of the United States." On the other hand it should be noted that at least 21 treaties guaranteed tribes' right to make their own laws, using terms such as "unrestricted right of self-government," "exclusive control," and "absolute and undisturbed use and occupation."

This contemplated a kind of federalism in which the tribes were to be subject solely to Congress, and even then to a limited extent. Individual treaties accordingly contained a wide variety of power-sharing formulae covering, inter alia, the removal of unauthorized

European settlers, the licensing of traders, taxes, extradition, and, in 56 treaties, jurisdiction over disputes between Indians and U.S. citizens. Only 38 treaties explicitly relinquished specified powers of Indian self-government, and they only involved aspects of international legal personality, such as the powers to make war, to conclude treaties with states other than the United States, to cede territory to anyone other than the United States, or to conduct trade with persons not licensed by the United States for that purpose.

Besides apportioning political authority, most treaties also imposed economic and social responsibilities on the United States, ordinarily as part of the compensation for ceded lands. Teachers and schools are to be provided under 69 treaties, physicians and hospitals under 31 treaties, and agricultural aid such as seeds, livestock, tools, mills, and technical advice under 106 treaties. After 1850 the U.S. persuaded a growing number of tribes to accept U.S.-supervised subdivision and agricultural development of their reserved lands, and 42 treaties include provisions of this nature. A great many other subjects were addressed, from the possibility of sending tribal delegates to Congress, to postal rates for mail crossing tribal frontiers.

American courts have generally held that this relationship--described as "guardianship" in the 19th century and "trusteeship" since the 1930s--gives Congress supreme or "plenary" legislative power over tribal affairs, but that this power should be exercised only in the tribes' own best interests. Likewise, tribes are said to retain "residual sovereignty" over subjects neither delegated to Congress expressly by treaty nor prohibited to them explicitly by Congressional legislation. It must be said that in practice the courts have never invalidated Congressional legislation on the basis of a violation of "trust responsibility," and have since 1978 begun to invalidate tribal legislation which, while not prohibited by any treaty or by Act of Congress, is "inconsistent with their status as Indian tribes." In other words, Indian tribes are viewed as being inherently incapable of enjoying certain aspects of self-government.

Canada before and after confederation (1783-1927)

From the American Revolution to 1867, when Canada was united as single and largely self-governing dominion, each of the provinces ırsued its own policy within the general framework established pre-iously by Great Britain. The two great Indian confederacies in the astern part of the country, the Six Nations and Wabanaki, already ere covered by 18th-century treaties, and no additional political rrangements were made with them. The provinces continued to seek ore of these tribes' reserved lands, but simply obtained deeds of ale ("surrenders") by which the tribes' relinquished their claims o the government. This pattern was extended to the Chippewas and rees of northern and western Ontario after 1850, beginning with two egional "treaties" acknowledging the tribes' relationship with the rown, ceding much of their territory, and reserving certain parts or themselves. All subsequent land transactions took the form of urrenders. From 1783 to 1867, then, while there were only two new anadian Indian treaties, there were some 116 surrenders by tribes lready covered by treaties.

The British legislation which united Canada in 1867 transferred the exclusive responsibility for Indian affairs to the new national parliament, together with responsibility for the future execution of treaties previously made. Parliament immediately launched an ambitious programme of obtaining initial treaties with the indigenous peoples of the western prairies. Seven of these "numbered" treaties were made between 1871 and 1877 and, through 28 adhesions, included most of the Chippewa, Cree, Blackfoot, Blood, Piegan and affiliated groups of the region. A second round of three "numbered" treaties in 1899-1906 and one more in 1921 extended Canadian influence into the northern sub-Arctic part of the continent. Two final treaties involving hunting and fishing rights were concluded with Ontario tribes in 1923. In the forty years following confederation there were also some 226 surrenders--three times the number for the previous forty years--reflecting an accelerated pace of settlement and industrialization in central and western Canada.

The "numbered" treaties were relatively uniform in terms. In addition to ceding and reserving land, the tribes agreed in Treaty

1 "to maintain perpetual peace between themselves and Her Majesty's white subjects, and not to interfere with the property or in any way molest the persons of Her Majesty's white or other subjects," and in Treaties 2 through 11, "to conduct and behave themselves as good and loyal subjects of Her Majesty the Queen."

> They promise and engage that they will in all respects obey and abide by the law; that they will maintain peace and good order between each other, and also between themselves and other tribes of Indians, and between themselves and others of Her Majesty's subjects, whether Indians or whites.

Provisions also were included for the establishment of schools, the control of liquor trade, regulation of hunting and fishing and, in at least one of the treaties, medical supplies.

Unlike the United States, which extinguished indigenous claims to Alaska unilaterally through legislation in 1971, Canada has since 1973 pursued a policy of negotiating "comprehensive claims settlements" with indigenous groups as a means of obtaining clear title to northern lands still occupied by the original peoples. As provided by section 35 of the Constitution Act, 1982, these settlements have the same force and effect as treaties, and can no longer be altered by Parliament without Indian consent. Three settlement agreements have thus far been concluded, and each of them includes provisions for indigenous participation in wildlife management, as well as some degree of more general self-government.

Canadian scholars largely agree that the numbered treaties do not accurately reflect the intentions or understanding of the Indian parties. As detailed by the historian Rene Fumoleau in the case of Treaty 8, the tribes were not familiar with British legal terms and believed they were merely allowing settlers into their country--not relinquishing their independence. Similar problems can be found in interpreting the 18th-century Wabanaki treaties, which were strictly political and military in nature and thus made no reference to land cessions or the adjustment of boundaries. The provinces take this to mean that no land was reserved; the tribes take it to mean that no land was ceded or lost. Although the Supreme Court of Canada has recently followed the American rule of construing Indian treaties in the tribes' favour, this does not readily resolve situations where

the written text is explicit and little direct historical evidence remains of the Indians' real intentions.

6. Contemporary enforcement of treaties

An adequate history of North American legal decisions on the interpretation and implementation of Indian treaties is beyond the scope of this preliminary study. Some general principles should be highlighted, however. Since Worcester v. Georgia [1832], the U.S. Supreme Court has viewed Indian treaties are "treaties" within the meaning of Article IV of the Constitution. This gives them the same force and effect as Congressional legislation but, like legislation, they can be altered or repealed by Congress, resulting at most in a claim for financial compensation (see Lone Wolf v. Hitchcock [1903]; United States v. Sioux Nation [1980]). Congressional legislation must be explicit to have this effect, however. Legislative power to supercede Indian treaties has also been recognized by the Supreme Court of Canada, which differs only in allowing for repeal by mere implication (Regina v. Sikyea [1964]), and maintaining that Indian treaties are not treaties in the international law sense (Simon v. The Queen [1985]).

These decisions may violate the principle, restated in Article 27 of the Vienna Convention on the Law of Treaties, that municipal laws do not supercede treaty obligations. They may also violate the principles that treaties recognize the international personality of the parties, and that no limitation on the parties' independence or sovereign equality should be implied. Further historical analysis should also give due regard to duress, and therefore the possibility that some of these treaties are voidable by the indigenous parties. While it is not pretended that underlying duress, or the failure of contemporary North American states to implement indigenous treaties fully, necssarily requires restoring indigenous peoples to their previous condition, i.e., full independence, it may be appropriate to consider suspending and renovating existing treaties as a means of clarifying indigenous peoples' legal status and achieving some degree of negotiated autonomy.

INDIAN COUNCIL OF SOUTH AMERICA (CISA)

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[The Indian Council of South America (CISA) has submitted a report entitled "The Human Rights Situation in Peru, 1986" which was prepared by the CISA International Commission for the Rights of the Indian Peoples (CICISAPI). Copies of this report, in Spanish and English, are available for consultation in Secretariat files.]