

IN THE SUPREME COURT OF BELIZE, A.D. 2007

CONSOLIDATED CLAIMS

CLAIM NO. 171 OF 2007

BETWEEN:

AURELIO CAL in his own behalf and on behalf of the MAYA VILLAGE OF SANTA CRUZ
and
BASILIO TEUL, HIGINIO TEUL, MARCELINA CAL TEUL
and SUSANO CANTI

Claimants

AND

THE ATTORNEY GENERAL OF BELIZE
and
THE MINISTER OF NATURAL RESOURCES AND ENVIRONMENT

Defendants

CLAIM NO. 172 OF 2007

BETWEEN:

MANUEL COY in his own behalf and on behalf of the MAYA VILLAGE OF CONEJO
and
MANUEL CAAL, PERFECTO MAKIN
and MELINA MAKIN

Claimants

AND

THE ATTORNEY GENERAL OF BELIZE
and
THE MINISTER OF NATURAL RESOURCES AND ENVIRONMENT

Defendants

—

BEFORE the Honourable Abdulai Conteh, Chief Justice.

Ms. Antoinette Moore for the claimants.

Ms. Nichola Cho with Mrs. Andrea McSweeney McKoy for the defendants.

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JUDGMENT

1. ***The Claimants and the Nature of their case***

This judgment relates to consolidated claims which raise essentially the same issue. All the claimants have in common the fact that they are members of Maya communities in Southern Belize. The first set of claimants in Claim No. 171 of 2007, live in the Maya village of Santa Cruz; and the first-named claimant Aurelio Cal is the elected Alcalde of the said village of Santa Cruz and he brings this claim on his own behalf and that of the claimant village. The other co-claimants are all members of the said village of Santa Cruz.

The second set of claimants in Claim No. 172 of 2007 live in the Maya village of Conejo, and the first-named claimant, Manuel Coy, is the elected Alcalde of Conejo Village and he has brought this claim on his own behalf and that of the said Conejo Village. The other co-claimants are as well members of Conejo Village.

2. The claimants have brought the present proceedings seeking redress for alleged violations of sections 3, 3(a); 3(d); 4; 16 and 17 of the Belize Constitution. These violations, they claim, arise from the failure of the Government of Belize to recognize, protect and respect their customary land rights, which they claim are based on the traditional land use and

occupation of the Maya people, including the people of Santa Cruz and Conejo Villages. Maya customary land rights, they claim, constitute property, which like other property interests in Belize, are or should be protected by the Constitution. They claim that the proprietary nature of these rights are affirmed by Maya customary law, international human rights law and the common law. In particular, they claim that the customary land rights of the Maya people of Belize, including the claimants, have been recognized and affirmed as property by the Inter-American Commission on Human Rights in the case of the Maya Indigenous Communities of the Toledo District v Belize. (More on this later).

3. The claimants allege as well that the Government of Belize has consistently failed to recognize and protect their property rights in the lands they and their ancestors have traditionally used and occupied; and that this failure to accord the same legal recognition and protection to Maya customary property rights unlike that extended to other forms of property is discriminatory and a violation of sections 3 and 16 of the Belize Constitution.
4. The claimants in respect of Conejo Village further say that on May 5, 2006, a written request was submitted to the Government of Belize asking for demarcation and recognition of Conejo Village lands. This request they aver, was presented to the Prime Minister of Belize, together with a map of Conejo Village and the written agreements with neighbouring villages affirming the boundaries of Conejo Village represented on the map. The claimants allege that there has been no response from the Government of Belize.
5. In respect to the Village of Santa Cruz, the claimants say that on 22nd February 2007, a letter was submitted to the government asking it to

immediately issue a public statement recognizing that Santa Cruz enjoys rights to the land and resources its members have traditionally used and occupied and to immediately issue a directive to all government ministries and departments requiring them to carry out their duties in a manner consistent with those rights. The claimants aver that there has been no acknowledgment or response to their request.

6. All the claimants further claim that the government, in particular, the Ministry of Natural Resources and Environment, have issued or threaten to issue leases, grants and concessions to these lands without respecting the traditional land tenure of Santa Cruz and Conejo.
7. These acts and omissions the claimants say violate the rights to property affirmed in sections 3(d) and 17 of the Belize Constitution, as well as the rights to life, liberty, security of the person and protection of the law affirmed in sections 3(a) and 4 of the Belize Constitution.
8. Finally the claimants claim that the Maya people live, farm, hunt and fish; collect medicinal plants, construction materials and other forest resources; and engage in ceremonies and other activities on land within and around their communities; and that these practices have evolved over centuries from patterns of land use and occupancy of the Maya people. They claim that the property rights that arise from these customary practices are critical to their physical and cultural survival.
9. The claimants therefore now seek the following relief by these proceedings, from this court:
 - a) *A declaration that the claimants Villages of Santa Cruz and Conejo and their members hold, respectively, collective and individual rights in the lands and resources that they have used and occupied according to Maya customary*

practices and that these rights constitute “property” within the meaning of sections 3(d) and 17 of the Belize Constitution.

- b) *A declaration that the Maya Villages of Santa Cruz and Conejo hold collective title to the lands its members have traditionally used and occupied within the boundaries established through Maya customary practices; and that this collective title includes the derivative individual rights and interests of Village members which are in accordance with and subject to Santa Cruz and Conejo and Maya customary law.*
- c) *An order that the government determine, demarcate and provide official documentation of Santa Cruz’s and Conejo’s title and rights in accordance with Maya customary law and practices, without prejudice to the rights of neighboring Villages.*
- d) *An order that the defendant cease and abstain from any acts that might lead the agents of the government itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographic area occupied and used by the Maya people of Santa Cruz and Conejo unless such acts are pursuant to their informed consent and in compliance with the safeguards of the Belize Constitution. This order should include, but not be limited to, directing the government to abstain from:*
 - i. *issuing any lease or grants to lands or resources under the National Lands Act or any other Act;*
 - ii. *registering any interest in land;*
 - iii. *issuing any regulations concerning land or resources use; and*
 - iv. *issuing any concessions for resource exploitation and harvesting, including concessions, permits or contracts authorizing logging, prospecting or exploration, mining or similar activity under the Forest Act, the Mines and Minerals Act, the Petroleum Act, or any other Act.*

10. **The Defendants and their Defence**

The defendants in the two consolidated claims are nominally the Attorney General of Belize and the Minister of Natural Resources and the

Environment. However, it is unarguable that the claims are, in fact, against the Government of Belize, for it is the actions and policies of the latter that the claimants complain about in these proceedings.

11. It must be said that the Defence originally filed on 4th June 2007 in these proceedings was, to say the least, terse and laconic and was almost an admission of the claimants' case. It was lacking in particulars that would enable the claimants to know why their claims were being resisted. I pointed this out several times during the course of the hearing to Ms. Nicola Cho, the learned attorney for the defendants. Eventually, on the last day of the hearing on 21st June 2006 with the leave of the court, and no objection from Ms. Antoinette Moore, the attorney for the claimants, a more substantial defence was filed. I granted leave for this in the interest of justice, but more so in the light of the fact that the parties had agreed upon issues to be addressed in these proceedings. More on the Defence later.

12. Issues Agreed upon by the Parties

1. Whether there exists, in Southern Belize, Maya customary land tenure.
2. Whether the members of the villages of Conejo and Santa Cruz have interests in land based on Maya customary land tenure and, if so, the nature of such interests.
3. If the members of the villages of Conejo and Santa Cruz have any interests in lands based on Maya customary land tenure:
 - a) Whether such interests constitute "property" that is protected by sections 3(d) and 17 of the Constitution.

- b) Whether any government acts and omissions violate the claimants' rights to property in sections 3(d) and 17 of the Belize Constitution.
- c) Whether any government acts and omissions violate the claimants' right to equality guaranteed by sections 3 and 16 of the Constitution.
- d) Whether any government acts and omissions violate the claimants' rights to life, liberty, security of the person and the protection of the law guaranteed under sections 3(a) and 4 of the Constitution.

13. The Evidence

Each side filed extensive affidavits and voluminous exhibits, thirteen by the claimants, in addition to five expert reports in affidavits, again with exhibits; while the defendants filed in total nine affidavits together with exhibits. The claimants called as well nine witnesses who in addition to their affidavits gave viva voce testimony and were all, save for Elizabeth Gage who tendered a video shot by herself and George Gage, cross-examined by Ms. Cho for the defendants.

14. From the evidence in this case, it is manifest that the Maya communities in the Toledo District, which include the present claimants, have not been exactly quiescent over their claims to rights to occupy, hunt, fish and otherwise use areas within the Toledo District traditionally held by the Maya in accordance with their customary land tenure and the common law and relevant international law.

15. In fact, on 3rd December 1996, The Toledo Maya Cultural Council (TMCC) and the Toledo Alcaldes Association filed a motion in this court for constitutional redress, very much akin in substance, to the present claim. But for some inexplicable reason that action was never fully heard or concluded – see Action No. 510 of 1996 – **Toledo Maya Cultural Council v The Attorney General of Belize**.
16. Regrettably, the fate of that action seems unfathomable. It seems to have simply and inexplicably dropped out of sight.
17. Undaunted, and not getting a satisfactory response to their claims from the Courts in Belize, the Toledo Maya Cultural Council on behalf of the Maya Indigenous Communities of the Toledo District, launched on 7th August 1998, a Petition to the Inter-American Commission on Human Rights.
18. It must be said that from the evidence, both the Supreme Court Action No. 510 of 1996 and the Petition to the Inter-American Commission on Human Rights were prompted by logging concessions and oil exploration licences the Government of Belize had granted in the mid-1990s over parts of Toledo District: see generally the joint affidavit of Gregorio Choc, Cristina Coc and Martin Chen of 3rd April 2007, to which is annexed, among other things, the Petition to the Inter-American Commission and the Report of the Commission in the case of the **Maya Indigenous Communities of the Toledo District v Belize**, dated 12th October 2004.
19. The Inter-American Commission on Human Rights delivered its Report No. 40/04 in case 12.053, on the merits, on 12th October 2004.
20. The defendants have, however, in the written submissions of their learned attorney, taken exception to this Report in her words:

“The court cannot merely adopt any findings of facts and law made in another case unrelated to any alleged breach of the provisions of the Constitution. The petition to the Commission related to alleged violations of Articles I, II, III, VI, XI, XVIII, XX and XXIII of the American Declaration of the Rights and Duties of Man, which is an international treaty. If the court were to simply adopt the findings of the Commission without nothing more (sic) that would result in the court enforcing an international treaty and would clearly fall within the bounds of non-justiciability (sic)”.

21. Of course, the present proceedings are not a claim to enforce the findings of the Inter-American Commission on Human Rights in that case. The present proceedings rather concern claims relating to alleged breaches of some human rights provisions of the Belize Constitution and for certain declaratory relief and orders. However, the Inter-American Commission on Human Rights is the regional body charged with promoting and advancing human rights in the region and monitoring states compliance with their legal commitments under the Charter of the Organization of American States (OAS). Belize, as a member of the OAS, is therefore a party to the American Declaration of the Rights and Duties of Man, which as Ms. Cho correctly noted, is an international treaty. And this treaty is within the proper remit of the Commission.

22. I am therefore of the considered view that much as the findings, conclusions and pronouncements of the Commission may not bind this court, I can hardly be oblivious to them: and may even find these, where appropriate and cogent, to be persuasive. It is therefore, in this light, that I am, with respect, inclined to view the Report of the Commission in the **Maya Indigenous Communities of the Toledo District v Belize – Report No. 40/04 of October 12, 2004**, in determining the issues

agitated by the present proceedings. I now turn to a consideration of these issues.

23. 1. Is there in existence in Southern Belize, Maya customary land tenure?

The main thrust of the claimants' case is their contention that there is in existence in the Toledo District, in Southern Belize, Maya customary land tenure system according to which, they, as members of the villages of Santa Cruz and Conejo respectively, are entitled to the lands they occupy and use as their ancestors before them had, and that this form of tenure is or should be a form of property cognizable at law, and like any other form of property, is deserving of the constitutional protection afforded by the Belize Constitution to property.

24. The defendants on the other hand resolutely deny that the claimants have any customary title to the lands they claim because they (that is, the claimants) are: a) *“unable to prove the common law requirements for proofs of aboriginal/native/indigenous title to land, that is, that their forebears were in exclusive, continuous occupation of Southern Belize, including Conejo and Santa Cruz, at the time of British sovereignty”*; and that b) *“the claimants are unable to prove that they possess any title to land under a traditional law and custom acknowledge by Maya people – that is the Alcalde system”*.

25. In my view, I think it is salutary to bear in mind in determining the existence vel non of customary tenure or title to land, the caution sounded by Viscount Haldane in the Privy Council in the case of Amodu Tijani v The Secretary, Southern Nigeria (1921) 2 AC 399:

“... in interpreting the native title to land, not only in Southern Nigeria, but other parts of the British Empire, much caution is essential. There is a

tendency, operating at time unconsciously, to render title conceptually in terms only to systems which have grown up under English law. But this tendency has to be held in check closely” at pp. 402 to 403.

Their Lordships in the Tijani case went on to state that:

“In India, as in Southern Nigeria, there is yet another feature of the fundamental nature of the title to land which must be borne in mind. The title, such as it is, may not be that of the individual ... it nearly always is in some form, but may be that of a community. Such a community may have the possessory title to the common enjoyment of a usufruct, with customs under which its individual members are admitted to enjoyment, and even to a right of transmitting the individual enjoyment as members by assignment inter vivos or succession. To ascertain how far this latter development of right has progressed involves the study of the history of the particular community and its usages in each case. Abstract principles fashioned a priori are of but little assistance, and are as often as not misleading” pp. 403 to 404. (Emphasis added).

26. The study of the history of a particular community and its usages, which the Privy Council adumbrated in the Tijani case supra as being necessary to ascertain the development and progress of native or indigenous customary rights in land, I find of especial relevance in this case. In addition to the testimonies of witnesses who are members of the Maya communities in Southern Belize, the claimants have as well put in evidence the affidavits and reports of non-Maya witnesses who are eminently qualified in the broad field of Maya studies. These witnesses are familiar with the history, ethnography, customs and usages of the Maya. That is to say, they are expert witnesses.

27. The defendants for their part, relied only on the affidavits of public officials, none of whom, with respect, could claim any expertise in Maya history, culture, sociology or land usage and custom. While there is some grudging recognition of *“the right of persons to land they have occupied for years undisturbed (in the case of national lands, for a period of 30 years), and that persons of Mayan descent in the Toledo District may qualify as such”* (paragraph 9 of Mr. Ismael Fabro’s first Affidavit), the defendants, however, resolutely deny the claimants’ entitlement, as Mr. Fabro continues in the same paragraph as follows:

“... the Government does not agree that the entire Mayan population of southern Belize living in the communities shown in the Maya Atlas or any other community qualify as such. Most importantly, the Government does not agree that the Mayan population or any part thereof of southern Belize has “native title” to the lands being claimed in the Maya Atlas as the Maya Homeland”.

Mr. Fabro then exhibited to his affidavit copies of various history books on the ancient Maya and the Maya people of today, including those living in Belize.

I find however, that nowhere in the texts relied upon, any statement or assertion of the non-existence of Maya customary land tenure in southern Belize.

28. The burden of proof of the existence of customary land tenure in southern Belize is, of course, on the claimants who so aver that there is one. It is the case of the applicants that Maya land use patterns are governed by a system of unwritten customary rules that form part of the social, cultural and political organization of their communities.

29. In order to ground their case, the claimants have put an impressive body of evidence before the Court in the form of both affidavit testimonies and expert reports: see for example, the first affidavit of Aurelio Cal and Manuel Coy filed on 3rd April 2007; and also the joint affidavit of Gregorio Choc, Cristina Coc and Martin Chen. All these affidavits describe how Maya land use patterns stemming from their customary practices enable the members of the Maya communities to engage in their principal occupation – farming. I reproduce here paragraphs 19 to 28 of the joint affidavit of Choc, Coc and Chen giving the background on the Maya people in Toledo District and their customary practices relating to land:

“Background on the Maya People in Toledo District and our Customary Practices Related to Land

19. *The Maya people have inhabited a vast area, which includes the Toledo District of southern Belize, since time immemorial. The Maya people inhabited southern Belize and surrounding regions long before the arrival of the Spanish, and well before British settlement in the area in 1850. The Mopan Maya subgroup were the principal inhabitants of the area now known as Toledo District between the sixteenth and eighteenth centuries, and the Q’eqchi-Q’eqchi/Chol Maya subgroup have been moving in and out of the area long before the well-known migrations from Guatemala during the late nineteenth century.*
20. *Santa Cruz Village is one of some thirty-eight Maya communities that currently occupy lands in the Toledo District. These communities are part of the larger indigenous Maya people of Mesoamerica.*
21. *Maya traditional governance institutions have evolved over the centuries. We have always had an elected village leader in each village who oversees community affairs in coordination with other leaders. While the central values that underlie our relationships with each other and with the land have been maintained, our Maya governance systems have adapted over time, both willingly and as a result of coercive imposition, to accommodate co-existence with the European cultures that have settled in the area. Currently, the alcaldes of the*

some thirty-eight Maya villages in Toledo District are organized into the Toledo Alcaldes Association, which is a member group of MLA.

22. *Our land use patterns are governed by a system of mostly unwritten customary rules and values that form part of the social, cultural, and political organization of our communities. Our patterns of use and occupancy of lands and natural resources are shaped by this system of customary rules. Within this traditional land tenure system, Maya villages hold land collectively, while individuals and families enjoy derivative, subsidiary rights of use and occupancy.*
23. *We believe these Maya customary rights have the same moral and legal claim to respect as property rights recognized by the British common law and the Belizean statutory regime. The patterns of Maya land use are described more fully in the claimant, witness, and expert affidavits submitted with this claim.*
24. *Concentric zones of land use surround each of the Maya villages that are scattered throughout the inland parts of the Toledo District. The village zone is that area where dwellings are clustered and where villagers raise fruit and other trees and graze livestock; it typically extends up to two square kilometers.*
25. *Beyond the village zone is the main agricultural zone where crops are planted within a rotational system. Our agricultural practices are based on traditional management techniques that have developed from a reservoir of knowledge of the forest and its soils. We employ a long-fallow rotation system that requires extensive forested areas to remain undisturbed for years at a time. While some fertile spots are permanently under cultivation, most fields are cleared only every eight to fifteen years, cultivated with rotational crops and then allowed to lie fallow and regenerate until the next clearing. The agricultural zone of each village can extend up to ten kilometers from the village center.*
26. *The next zone includes large expanses of forest lands used for hunting and gathering. These activities provide us additional sustenance. Forest products gathered for food and medicinal purposes include numerous wild plant species. We also rely on the forest for building materials for our homes and other structures.*

27. *Different villages also often share use of certain areas for hunting, fishing, and gathering. Some areas of such shared usage may be regarded by Maya custom as belonging predominantly to a particular village, and hence that village ultimately controls who can farm and settle in the area.*
28. *Within Maya villages, communities regulate population growth and maintain social and cultural cohesion through collective decision-making regarding the settlement of new families. Use of village lands by individuals and families is regulated by custom under the authority of the elected alcalde, the village chairman, and the villagers collectively.”*
30. The claimants also rely on the affidavits and reports of persons who are undoubtedly experts in Maya history, ethnography, culture and land tenure and land use patterns. These witnesses have, from various field work, researches and study of archival materials and published books, acquired extensive knowledge of the Maya people such that they could be regarded as expert witnesses.
31. First there is Professor Richard R. Wilk, a full professor of anthropology at Indiana University in Bloomington, Indiana, U.S.A. He states in paragraphs 2 and 3 of his first affidavit of 3rd April, 2007 as follows:
- “2. *My work has focused particularly on land use and subsistence among the Kekchi (also known as Q’eqchi’, K’ekchi’, and Ketchi) native Americans of southern Belize. I have conducted archaeological and ethnographic field research in Toledo District in 1976, 1979 – 1981, 1984, and 1990, and have also done a good deal of historical archival research on land use and settlement in Toledo during the intervening years and in 2001 and 2002. While working for the United States Agency for International Development in Belize I studied land use, road development, and forest resources in southern Belize (including the Toledo District), as part of the Rural Road Rehabilitation Project carried out by the Ministry of Public Works of the Government of Belize.*

3. *I am familiar with almost every published source on Toledo District's history, economy, and ethnography, including work on the Kekchi, Mopan (also called Maya), Garifuna (also called Garinagu, Caribs, and Black Caribs), East Indian, and Creole population of the area. This affidavit is based on published and unpublished sources, most of which are cited in my 1991 book and my doctoral dissertation (1981); more recent sources are cited directly in this affidavit."*

32. Specifically on land use and Maya land tenure system, Professor Wilk deposes as follows:

"Land Use and the Maya Land Tenure System

48. *At the time of the Spanish conquest the Kekchi were intensive agriculturalists who farmed using an infield-outfield system, which combined permanently cropped infields (heavily manured, often irrigated, and sometimes terraced) with a series of outfields that were fallowed from four to 10 years depending on local population density. The shift from this system to more extensive shifting cultivation probably took place during the drastic depopulation caused by Spanish-introduced diseases in the 16th century, which destroyed the economic fabric and household labor system which were essential to the infield-outfield system. When the growing Kekchi population of the 19th century began once again to intensify their agriculture by growing orchard crops and cash crops like coffee and cacao, they were once again forced back into shifting cultivation by the expropriation of village land and the disruption of community labor organization through forced labor and enserfdom on coffee plantations (Wilk 1991). Information on pre-Hispanic Mopan farming is lacking; though given common crops and demography, it is likely that they used systems very similar to those of the Kekchi. Even less is known of the Manche Chol pre-Hispanic farming system, which eventually merged into that used by the Mopan and Kekchi.*

49. *Today some Kekchi and Mopan land use in the Toledo district is related to their production of food and the hunting and gathering of other resources for their own subsistence. The entire forested region of Toledo District including rivers and streams have been intensively used for hunting, fishing, and gathering of forest resources by Mopan and*

Kekchi people since the Cramer estates were closed down in 1914 and their population dispersed to form new villages, and probably much longer. Smaller areas have been used for agriculture for an equal period of time. As the Maya population of the district has grown during this century, the area used for farming has expanded dramatically. Those areas not used for farming have been used for fishing, hunting, and gathering (as detailed below).

50. *Both Kekchi and Mopan people are subsistence-oriented farmers who use a long-fallow rotation system (also known as the milpa system, or “slash-and-burn”) to grow corn and rice during the wet season. During the dry season they cultivate permanent fields located in fertile damp soils located in valleys and on riverbanks. They also grow permanent tree crops (mainly fruits, cocoa and coffee), vegetables, plantains, root crops, beans, and a large variety of other plants for home use. Rice, beans, cocoa, and a few other crops are grown for cash sale. People also raise small livestock and poultry; pigs are the major source of domestic meat though some people also graze small herds of cattle in forest clearings.*

51. *Any disputes about the demarcation of farmland or other rights to land will be brought before the village Alcalde and/or a meeting of the community as a whole for resolution. In fact, very few disputes arise under the customary land management system. Those that do arise are generally resolved within the village. This is not only impressive in terms of civic participation, but it also saves the Belizean government financial investments in the state court system.*

52. *The pattern of land use described here has been documented by ethnographers among Kekchi (Wilk 1991, 1981), Mopan (Osborn 1982), and mixed Kekchi Mopan (Howard 1973, 1974, 1975, 1977) during the 1970s and 1980s. Its continued use and authority was confirmed through an extensive survey by Bernard Neitschmann (1999) in the late 1990s. It extends back in time to at least 1914, but probably much earlier. We do know that at the time of the Spanish conquest the Kekchi lived in settlements ruled by local leaders who were responsible for allocating land for farming as well as for political leadership. These hereditary offices may have functioned very much like the modern institution of the village Alcalde with his council of elder advisors. More detailed knowledge on the pre-Hispanic system of land tenure and political organization is lacking.*

53. *The basis for the Kekchi and Mopan customary system of land management is the concept of usufruct rights, meaning the land is for those who use it. In Belize, it is typical for Maya farmers to have relatively permanent rights to a field for dry-season crops in comparison to long-term rights to return to fallowed areas for wet-season crops. Each village has an elaborate set of rules and regulations, some written and some customary, for regulating land use rights and tenure within community territory. These rules respond to population pressure on resources; the general rule is that individuals are allowed to claim ownership of farmland by right of first use, but they must continue to use a piece of land or a resource, or those rights will lapse and the property will then return to the community for redistribution (such tenure systems are common in areas of low population density that practice shifting cultivation, see Netting 1993). In villages with very high population density, almost every acre is claimed as personal property.*
60. *Thus, families can claim and retain plots over long periods of time in an arrangement that resembles private property. However, the village government would intervene if someone outside the village tried to buy one of these plots. Within the customary land management system of the Kekchi and Mopan Maya, the usufruct rights of households do not permit individual farmers to sell single plots of land. As demonstrated by Neitschmann (1999:9), this norm against commodification of land remains extremely strong. The Alcalde alone could not give permission to transfer land to outsiders, because in the Kekchi and Mopan vision of community leadership, a good Alcalde does not dictate his own decisions, but rather acts as a spokesperson of the general will of the village families. In other words, the customary Maya system of land management combines a mixture of quasi-private use rights within collective decision-making.*
66. *Even within the forest zone, customary Kekchi and Mopan land use rules recognize a variety of rights to different kinds of property. As already noted, groves of Pom (copal, *Procium copao*) trees in primary forest are regularly tapped to produce a fragrant resin that is in great demand for religious services. These groves of trees are owned by the individuals who first found them, or their descendants through inheritance. In some cases, rights to tap these trees can be loaned or rented, though they usually remain within a family. Pom (copal resin incense) is probably the most valuable material gathered in primary*

forest, contributing thousands of pounds in annual production, some of which is exported to Guatemala. In the forest there are also ancient groves of Nutmeg, Cinnamon, Rubber, Cocoa, and Pataxte (a variety of cocoa, *Theobroma bicolor*), which are considered the property of the families whose ancestors planted them. Sometimes these groves are rented and sold between village members, but any cases of disputed ownership are settled informally, or by the village Alcalde in consultation with elders.

70. In addition to economically important uses, within patches of forest in the agricultural and forest zones there are many places, usually caves, steep hills, and sinkholes, which are considered sacred by the Kekchi. These are often considered to be the dwellings of deities who watch over nearby villages and forests. Mopan people feel more generally that forest and land are sacred to god (Osborn 1982). Whenever Kekchi or Mopan people clear forests for their farming, they first ask permission from deities, who are considered the true owners of forest and animals. In general, Kekchi and Mopan people treat the forest with reverence and respect; they have intimate and detailed knowledge of many hundreds of its plants and animals.
71. For example, in addition to marking a field so that the boundary lines are visible to the public, a Kekchi farmer will usually ask gods and the lords of the Hill and Valley (known as the Tzuultaq'a in Kekchi) for permission to farm a plot of land. This request for spiritual permission may be made at either a family ceremony or, better still, at a ceremony involving the entire village. Such a multi-day village ceremony includes night-time vigils where sacred harp music is played, sexual abstinence is practiced, special foods are eaten and a pilgrimage is made to a sacred cave where the lords of the Hill and the Valley are thought to reside. There is sometimes a church ceremony in place of or in addition to a sacred cave pilgrimage. What is significant about all of these rituals is that they underscore the deeply held belief of the Kekchi Maya that land belongs to their Tzuultaq'a gods and therefore cannot be owned by any one person. To ensure their survival, families must ask for and obtain spiritual permission to use (as opposed to own) land. Because they see themselves as borrowing land from the lords of the Hill and the Valley, Kekchi farmers feel a duty to protect that land through careful environmental stewardship. In this sense, they protect their collective lands as much, if not more, than

private landowners would, (Grandia, cite; Neitschmann 1997:11-12).

72. *It is important to emphasize that few outsiders or government officials have documented or understood this complex traditional set of land tenure regulations. Government has made few efforts to survey or regularize land tenure in any area south of the Mobo River, allowing the villages to continue to regulate themselves according to their customs. In San Antonio, San Pedro Columbia, San Miguel, Big Falls, Silver Creek, and Indian Creek some sections that were once reservation land, and other areas of Crown Land or Forest Preserve have been formally surveyed and distributed to individuals as leaseholds, though these villages have informally continued many aspects of the traditional land regulation practices.*
73. *In practice, all attempts to divide up the customary village land into arbitrary-sized parcels are doomed to fail to establish a stable land-tenure regime. This is because each Maya farm family in Toledo requires access to a variety of land types in order to grow and gather all the crops and resources they need to survive in any given year. Each family needs several acres of dry-season cornfield land in a wet spot or along a riverbank, several acres of upland wet-season land for corn, and slightly and slightly wetter upland fields for rice. They also need access to secondary and primary forest for wild foods, hunting, and construction materials, access to common grazing for livestock within the village, and access to rivers for potable water, bathing, laundry, food processing and fishing. No single 40- or 50-acre plot of land can contain an adequate amount of each of the necessary kinds of resource. The variety of resources available is therefore often more important than the total amount. It is hard to envision any other system of land tenure, besides that already in use, which would allow a similar number of people to survive as relatively independent and self-sufficient farmers in Toledo District. Evidence of this can easily be found in the newer villages along the Southern Highway, where private land tenure has led to the breakdown of the complex self-sufficient farming system still practiced in more remote areas.*
33. Professor Wilk rounds off his affidavit with a brief history of official (presumably non-customary) land tenure in Toledo in paras. 74 – 77:

“History of Official Land Tenure in Toledo

74. *Most of the grants and leases of land in Toledo in the 19th century were in fact no more than logging concessions; there was no permanent possession or settlement by people of European descent, and no attempt at improving the land or cultivation outside of very small areas. At one time in the late 19th Century, almost all the land in Toledo District was claimed by a single land concern – the Young, Toledo Company, which was mainly engaged in land speculation after the most accessible mahogany trees were removed. When this company went bankrupt in 1880, some of their claim was conveyed to other companies, but most reverted to the Crown, which had never sanctioned the original claims.*

75. *A reservation system to accommodate and encourage Maya settlement and agriculture was proposed as early as 1868, and provision for their creation was included in the Crown Lands Ordinance of 1872. However, it does not appear that any were formally created in Toledo until 1893. In addition, beginning about 1905 the District Commissioner in Punta Gorda began to issue leases on land along the Moho, Columbia, and Temax Rivers to individual Kekchi and Mopan farmers. Other reserves were established for some of the existing villages in 1924, and these reservations were amended in 1933 to include some communities that had been missed in the first surveys. In this process of allocation, some villages were missed and received no reservations. Other reservations were granted to villages that did not exist or were subsequently abandoned.*

76. *After the 1930s and through to the 1960s, the District commissioners and officers recognized that the reservation boundaries had little relationship to the actual settlements and land needs in the District, and they made many ad hoc adjustments and emendations to expand reservations to accommodate increasing population, many of which were often never formally surveyed or enacted by legislation or administrative act. Often, the reservations were in practice were not defined clearly, because of the prohibitive costs of monitoring or surveying land use and boundaries. The result is that today the reservation boundaries bear little relationship to long-established customary territories around villages. Many villages have no formal reservations, though they have used their territories for more than fifty*

years with explicit government approval through the appointment of their Alcaldes.

34. Professor Wilk also gave oral testimony in Court and he struck me as very knowledgeable and competent to speak on the issue of Maya customary land tenure and practices.
35. Then there is also the testimony of Dr. Elizabeth Mara Grandia, assistant professor of anthropology in the Department of International Development, Community and Environment at Clark University of the City of Worcester in Massachusetts, U.S.A. Her doctoral dissertation is entitled **Unsettling: Land Dispossession and Enduring Inequity for the Q'eqchi' Maya in the Guatemalan and Belizean Frontier Colonization Process** filed with the University of California-Berkeley in May 2006 and soon to be published. Dr. Grandia deposes to having done six years of anthropological field work with indigenous peoples in different areas of Mesoamerica since 1991, primarily in Guatemala and Belize and some introductory research in Honduras. She in fact filed a second affidavit in which she refutes some of the claims made in the affidavits filed on behalf of the defendants.
36. Now this is what Dr. Grandia had to say on customary Maya Land Management in Conejo Village:

“Customary Maya Land Management in Conejo Village

24. *Many researchers have documented the customary land management system of the Q'eqchi' Maya. I provide a detailed description of this system in The Wealth Report (attached hereto as Exhibit “B”) and in chapters five and six of my dissertation. I have read the first affidavits of the Claimants from Conejo village in the district of Toledo, Belize. Being farmers themselves, the Claimants have accurately described the customary Maya system of land stewardship. I also affirm the description of Maya land tenure outlined by Richard*

Wilk in his affidavit. Building on their accounts, in this part of my affidavit, I will described now this applies to land use management in Conejo village, and discuss some of its socio-economic and environmental advantages. I will refer throughout this section to the affidavits of the claimants from Conejo village, to place their testimonies in the broader context of Maya land management.

25. *The customary Maya system of land management combines a mixture of quasi-private use rights with collective decision-making. It is not a monochrome system in which every community continues to observe the same timeless indigenous practices. According to variations in geography and village leadership, each community may manage their land in a slightly different manner. Far from being anarchic, this system is characterized by profound ecological, social, intellectual, spiritual, and economic logic.*

26. *Families can claim and retain agricultural plots over long periods of time. Each family is responsible for its own agricultural work and reaps its own harvests. Other farmers may provide assistance, especially for the tasks of burning and planting, but the family or household is usually the central organizing unit within the Maya land management system. The collective aspect of this system is the community decision making regarding how land is distributed among households. Maya communities strive to distribute farmland equitably. They also seek to ensure that all members of a village have access to communal or shared forest areas that are used for hunting, fishing, collecting water and gathering various resources.*

37. **And Dr. Grandia concludes her affidavit on the subject of customary land tenure and management as follows in paragraph 79:**

“79. From my own academic and field research and from the evidence provided by members of Conejo village, including the claimants, it is clear that the Maya villagers in Conejo continue to use and occupy their land in accordance with long-standing customs, traditions and norms concerning land management. These norms include collective control over land use; equitable distribution of individual use rights based on need and family labour capacity; ecologically sound rotating and permanent agriculture, animal husbandry, hunting, and gathering; and reciprocal obligations of land and community stewardship. These land tenure norms are central to the cultural

worldview and social cohesion of the Maya people and Conejo village. The resulting system manifests in flexible but consistent land-use patterns involving residential areas, wet-season milpas and dry-season saqiwaj or matahambre areas, long fallow areas and high forest areas. Maya land tenure practices are sufficiently hegemonic and stable that people living in Maya communities in Toledo, including Conejo, have been able to make long-term economic investments in the form of annual and permanent crops, yet flexible enough to allow Maya farmers to respond to market opportunities to the extent that, through the history of Belize, Toledo has often been the primary source of national foodstuffs.

38. Dr. Grant D. Jones, former Chair of the Department of Anthropology and Sociology and former Charles A. Dana Professor of Anthropology at Davidson College, North Carolina, U.S.A., in his affidavit makes much the same point about Maya customary land tenure and management in Toledo District. In his conclusion in his affidavit he states at paras. 63 to 65 as follows:

“Conclusion

63. *The available historical evidence, then indicates that the first Europeans to hear of and enter the Toledo District and its surrounding areas in 1568 and later found already longstanding Maya populations inhabiting the Toledo District of Belize. These populations were primarily Mopan speakers, who were politically and economically affiliated with the Itza, and Chol speakers. Like the rest of the native population of the Americas, this existing population was probably severely disrupted and reduced by illnesses introduced by the Europeans. During the process of Spanish invasions and colonization, in the 17th century the Toledo area became a frontier zone of refuge, and prior political and cultural distinctions became blurred as intermixing took place, particularly between the Chol/Kekchi, and Kekchi/Mopan groups. Some Maya populations in the Toledo District and throughout Belize were again dislocated in the 17th and 18th century; and additional Maya populations migrated to Toledo in the 17th century due to the Spanish conquest of the Itza Mayas of Peten, Guatemala. Throughout these periods, Maya people*

from different linguistic groups intermarried and moved back and forth for centuries between territories that only later became distinct with the creation of national boundaries. Consequently, many people in the Toledo District who call themselves Kekchi are more accurately Kekchi-Chols or Kekchi-Mopan.

64. *As much as can be discerned, all of the groups who lived in the area over these centuries of dislocation and relocation shared similar land tenure norms and patterns, practicing well-known forms of lowland tropical forest agriculture under a fundamentally communal land tenure system that allocated property in particular active cultivations or tended orchards in the forests to the cultivator, while locating control and ownership of these lands in the community as a whole.*

65. *In all, there is sufficient evidence to support my conclusion that the present Mopan and Kekchi-speaking inhabitants of the Maya communities of Toledo have a historical and cultural relationship with the lands on which they currently live and work, and with the populations that have historically inhabited them. The relationship grounds their identity as an indigenous people of the region.”*

39. Again, much the same points are made by Dr. Joel D. Wainwright, assistant professor in the Department of Geography, Ohio State University, U.S.A., regarding Maya customary land tenure and management, this time as regards Santa Cruz Village, in paragraphs 27 to 39 of his first affidavit in this case. He testified that he has been conducting research on land use and the history of southern Belize since 1993, and that he has visited Santa Cruz Village several times since. He deposes to a summary of the main findings of his research as follows in paragraphs 48 to 50 of his affidavit:

“48. *Santa Cruz has been continuously occupied and used by Maya people since precolonial times. The present-day residents of the village are aware of the long-standing cultural-geographical continuity of this place.*

49. *With respect to its size, composition, geography, history, and livelihoods, Santa Cruz is a typical rural Maya community, like others in the Toledo District. Santa Cruz exemplifies the customary Maya land tenure system found in Toledo as described by academics who have studied the Maya people.*

50. *The villagers of Santa Cruz have occupied their land according to their customary norms throughout their occupation. The maps by Thomas Caal accurately represent these lands—the territory in which the Maya people of Santa Cruz live in accordance with their customary land use practices.”*

40. On the state of the evidence in this case, I am, therefore, ineluctably bound to conclude that there does exist in the Toledo District Maya customary land tenure. This conclusion, I must say, is supported by the overwhelming evidence of persons with relevant knowledge and expertise of the area and the regime of land tenure there. I have at some length tried to state this evidence in this judgment.

41. I am therefore satisfied that on the evidence, the claimants have established that there is in existence in Southern Belize in the Toledo District, particularly in the villages of Santa Cruz and Conejo, Maya customary land tenure.

42. I am fortified in this conclusion by the finding of the Inter-American Commission on Human Rights in the **Maya Indigenous Communities case supra** when it stated at paragraph 127 of its Report:

“127. Based upon the arguments and evidence before it, the Commission is satisfied that the Mopan and Ke’kchi Maya people have demonstrated a communal property right to the lands that they currently inhabit in the Toledo District. These rights have arisen from the longstanding use and occupancy of the territory by the Maya people, which the

parties have agreed pre-dated European colonization, and have extended to the use of the land and its resources for purposes relating to the physical and cultural survival of the Maya communities.”

43. Like the Commission in that case, I am satisfied that the defendants in the present proceedings, have not presented any credible argument or evidence to refute the claimants’ argument and evidence concerning the land use patterns practiced by the Maya People in the Toledo District or the customary land tenure system that seems to have been developed by them – see para. 128 of the **Commission’s Report** *ibid*.
44. Accordingly, I find and hold that there is in existence, in Southern Belize, in particular, in the Toledo District, Maya customary land tenure.
45. Importantly also, I find from the evidence in this case, that the Government of Belize, had given its **imprimatur** and explicit recognition of the rights of the Maya people to lands and resources in southern Belize based on their long-standing use and occupancy. This significant development was arrived at on 12th October, 2000 in an Agreement between the Government of Belize and the Toledo Maya Cultural Council, the Toledo Alcaldes’ Association, the Kekchi Council of Belize, the Toledo Maya Women’s Council and the Association of Village Council Chairpersons. All the latter organizations are collectively described in the Agreement as the Maya Leaders representing the Maya peoples of southern Belize. The Agreement was signed by Prime Minister for and on behalf of the Government of Belize.
46. Clause 6 of this Ten-Point Agreement, I find, is a clear and unequivocal governmental endorsement of the existence of the Maya people’s rights to land and resources in southern Belize based on their long-standing use

and occupancy. This, I find is a clear affirmation of the existence of Maya customary land tenure in southern Belize.

47. A copy of the Ten-Point Agreement is annexed as Exhibit GC 5 to the joint affidavit of Gregorio Choc, Cristina Coc and Martin Chen. Clause 6 of this Ten-Point Agreement expressly states:

“That the GOB (Government of Belize) recognises that the Maya People have rights to land and resources in Southern Belize based on their longstanding use and occupancy.”

48. This point is, in my view, an important admission by the defendants sufficient to dispose of this aspect of the case in the claimants’ favour. However, it is manifest that notwithstanding the recognition of the property rights of the Maya people in their traditional lands based on their longstanding use and occupancy, the defendants as representing the Government of Belize, have not delimited, demarcated or titled or otherwise established any clear or legal mechanisms that may be necessary to clarify and protect the claimants’ rights so recognized. Hence this litigation. But it is important to state that this Ten-Point Agreement, and in particular its paragraph 6, has never been questioned, disputed or refuted by the defendants in these proceedings. Indeed, Ms. Antoinette Moore the learned attorney for the claimants urged on their behalf, with I dare say some cogency, that in the light of the admission contained in para. 6 of the Ten-Point Agreement, the defendants should be estopped from denying the claimants’ customary land tenure in Southern Belize. I must say there is some force in this line of argument.
49. From the evidence in this case however, (see in particular the joint Affidavit of Choc, Coc and Chen and Exhibit GC 5, the affidavit

testimony of Dr. Richard Wilk, Dr. Joel Wainwright and Dr. Elizabeth Grandia), I am satisfied that there is in the Toledo District Maya customary land tenure.

50. I now turn to the second issue agreed upon by the parties for the purposes of this trial:

2. Whether the members of the villages of Conejo and Santa Cruz have interests in land based on Maya customary land tenure and, if so, the nature of such interests

Santa Cruz and Conejo villages are two of the villages in the Toledo District on behalf of whom these consolidated applications have been brought in addition to several individuals together named as claimants. These two villages along with 35 other Maya villages of Southern Belize, are featured in the Maya Atlas, which is a volume of sketches of village maps and narratives produced by Maya organizations with the assistance of professional cartographers. This volume is attached to the affidavit of Deborah Schaaf and was put in evidence as Exhibit DS 1.

51. The Maya Atlas: The Struggle to Preserve Maya Land in Southern Belize, to give Exhibit DS 1 its full title, I find to be a remarkable account of the history, people and place, land-use, culture, community services and some of the problems faced by the Maya Community in Southern Belize. What makes this work all the more remarkable is that it was compiled by some Maya People of Southern Belize in conjunction with the Toledo Maya Cultural Council and the Toledo Alcaldes Association, albeit with the assistance of the Indian Law Resource Center, Geo Map Group of The University College, Berkeley and the Society for the Preservation of Education and Research (SPEAR).

52. In addition to the five Maya villages of Maya Center, Red Bank, Maya Mopan, Santa Rosa and San Roman in the Stann Creek District, the Maya Atlas contains brief portraits of the thirty-six Maya villages in the Toledo District, including the villages of Santa Cruz and Conejo: the two villages that are featured in the second issue here under consideration.
53. In the case of Conejo Village, the Maya Atlas at p. 85 states as follows:
“The village of Conejo is approximately 90 years old. It was founded in 1907 by Jose Makin. He did his farming in the area prior to its settlement. The village is comprised of Ke’kchi Maya who engage in the production of pigs, corn, and rice to earn their living. IN 1950 the village sprang from one household family to twenty-two household families.”
54. The claimants in respect of Conejo Village filed affidavits in support of their claim. A read through these several affidavits clearly shows that all these applicants live in Conejo Village and occupy lands in the village in accordance with the Maya customs and traditions of the village on which they hunt, fish and farm (see for example, paras. 6, 7, 11, 12, 13 of the first affidavit of Manuel Coy; paras. 3, 4, 6, 9, 10, 11, 13, 15, 16, 17, 19, 20 and 25 of the first affidavit of Manuel Caal). I have already set out at paragraphs 36 and 37 above what Dr. Elizabeth Grandia had to say in her affidavits in these proceedings about customary Maya land management in Conejo Village.
55. From the totality of the evidence in this case, I am persuaded and satisfied that members of Conejo Village have interests in lands in that village based on Maya customary land tenure.
56. In relation to the village of Santa Cruz, first, this is how it is described in the Maya Atlas at p. 47:

“Santa Cruz village was first an alkilo, meaning that people lived in the forest far from each other in no particular order. In 1950, Santiago Canti, Benito Canti, Susano Canti, Lazaro Pop and Thomas Sho encouraged people to begin a village. As people were associated with the Catholic religion, they named the village Holy Cross or Santa Cruz.

Santa Cruz is a typical Maya village. It is situated next to the Maya ruin of Uch Ben Cah, giving it the appeal and aura of the ancient Maya civilization.”

57. The claimants in respect of Santa Cruz village also filed affidavits in which they describe how they live in the village, occupy their lands, farm, hunt and fish. It is evident from their several affidavits that these claimants regard the lands in Santa Cruz as belonging to them as they did to their ancestors according to their Maya custom. In fact Mr. Aurelio Cal, the alcalde of Santa Cruz says in paragraph 22 of his affidavit that:

“On February 22, 2007, Santa Cruz Village submitted a written request to the government of Belize (a copy of which is annexed to his affidavit as AC 1) asking that it release a public statement stating that Santa Cruz enjoys rights to land and resources in the territory that we traditionally occupy. However, the government so far has failed to acknowledge or respond to this request.”

58. There is also the affidavit evidence of Dr. Joel Wainwright in which he recounts the history of Santa Cruz village (see paras. 13 to 23) and in paras. 27 – 39 gives an account of the land use practices and social relations of land tenure. He gave a summary of his main findings as follows:

“48. Santa Cruz has been continuously occupied and used by Maya people since pre colonial times. The present-day residents of the village are aware of the long-standing cultural-geographic continuity of this place.

49. With respect to its size, composition, geography, history and livelihoods, Santa Cruz is a typical Maya Community, like others in the Toledo District. Santa Cruz exemplifies the customary Maya land tenure system found in Toledo as described by academics who have studied the Maya people.

50. The villagers of Santa Cruz have occupied their land according to their customary norms throughout their occupation ...”

59. Again, from the totality of the evidence, I am bound to find and conclude that the members of Santa Cruz Village have interests in the lands in that village based on Maya customary land tenure.
60. I must say that the defendants did not put forward any countervailing evidence on this score, save to aver that some of these Maya villages are of recent origins and their inhabitants could not have acquired interests in land according to customary tenure: see para. 7 of the first affidavit of Andre Cho and that of the first affidavit of Armin Cansino and paras. 9 and 10 of the first affidavit of Roy Cayetano respectively on behalf of the defendants.
61. I do not, in any event, think that the dates of establishment of particular villages are necessarily determinative of or fatal to the existence of customary land tenure or interests in land. I am satisfied by the overwhelming evidence that the Maya people had occupied land in what is today Toledo District and still continue to occupy these lands, including the

members of the Conejo and Santa Cruz villages, based on Maya customary land tenure. – para. 30 of the Inter-American Commission Report in the case of the Maya Indigenous Communities of the Toledo District v Belize supra.

62. Moreover, from the facts in this case, I am satisfied that extensive documentary evidence, expert reports and Maya oral tradition, establish that the Maya communities presently in Southern Belize exist in areas that had formed part of the ancestral and historic territory of the Maya people since time immemorial, and certainly since prior to Spanish and later British assertions of sovereignty: see in particular, the first affidavit of Grant Jones, paras. 7 – 38; the first affidavit of Richard Wilk, paras. 4 – 40, and generally, Grant Jones, Maya Resistance to Spanish Rule: Time and History on a Colonial Frontier.

Also, archeological sites, burial grounds and artifacts found in their lands demonstrate a long-standing, if not ancient, historical relationship of the Maya to this area. Therefore, it is eminently reasonable to conclude that the founding of Maya villages in Southern Belize in modern times clearly represents a continuity of cultural and land use patterns by the Maya people that spans centuries and certainly predates the arrival of the first Europeans: see in particular, paras. 5 – 14 of Wilk’s first affidavit and paras. 18 – 67.

63. From the available evidence, it is manifest that there was and always had been a Maya presence in what is today Southern Belize. Therefore, I find and hold that claimed recent establishment of some Maya villages in Southern Belize, does not undermine the existence of Maya customary land tenure and interests in the Toledo District.

64. The Nature of the Claimants' interests in land based on Maya Customary Land Tenure

I now turn to the subsidiary but equally important question articulated in the second issue agreed upon, namely, the nature of the claimants' interests in land based on Maya customary land tenure.

65. In my considered view, I think the position regarding the determination or interpretation of customary title or interests in land was helpfully and, I dare say, authoritatively adumbrated by the Privy Council in the **Amodu Tijani** case supra when Viscount Haldane delivering the judgment of the Board stated:

“Their Lordships make the preliminary observation that in interpreting the native title to land, not only in Southern Nigeria, but other parts of the British Empire, much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely. As a rule, in the various systems of native jurisprudence throughout the Empire, there is no such full division between property and possession as English lawyers are familiar with. A very usual form of native title is that of a usufructuary right, which is a mere qualification of or burden on the radical or final title of the Sovereign where that exists. In such cases the title of the Sovereign is a pure legal estate, to which beneficial rights may or may not be attached. But this estate is qualified by a right of beneficial user which may not assume definite forms analogous to estates, or may, where it has assumed these, have derived them from the intrusion of the mere analogy of English jurisprudence ... In India, as in Southern Nigeria, there is yet another feature of the fundamental nature

of the title to land which must be borne in mind. The title, such as it is, may not be that of the individual as in this country it nearly always is in some form, but may be that of a community. Such a community may have the possessory title to the common enjoyment of a usufruct, with customs under which its individual members are admitted to enjoyment, and even to a right of transmitting the individual enjoyment as members by assignment inter vivos or by succession. To ascertain how far this latter development of right has progressed involves the study of the history of the particular community and its usages in each case. Abstract principles fashioned a priori are of but little assistance, and are as often as not misleading” at pp. 402 – 404 (emphasis added).

66. This statement of the law has been recognized judicially as the “*the definitive position at common law*” by the Court of Appeal in Malaysia in **Kerajaan Negeri Selangor and others v Sagong Bin Tasi and others** (2005) MLJ 289. Gopal Sri Ram J.C.A. on the issue of indigenous or customary title to land viz a viz sovereignty or the radical title drawing support from the Privy Council’s statement on this point in the **Amodu Tijani** case supra said that:

“... the fact that the radical title to land is vested in the Sovereign or the State (as in this case) is not an ipse dixit answer to a claim of customary title. There can be cases where the radical tile is burdened by native or customary title. The precise nature of such a customary title depends on the practices and usages of each individual community ... What the individual practices and usages in regard to the acquisition of customary title is a matter of evidence as to the history of each particular community ... it is a question of fact to be

decided ... by the primary trier of fact based on his or her belief of where on the totality of the evidence, the truth of the claim made lies.”

67. I entirely accept this statement with respect. From the evidence, I am satisfied that the claimants have, by the Maya customary land tenure extant in the Toledo District, individual and communal rights to the lands in Conejo and Santa Cruz Villages. These rights, I find, are of a usufructuary nature. That is to say, the right to occupy the land, farm, hunt and fish thereon, and to take for their own use and benefit the fruits and resources thereof. The fact that, as disclosed by the evidence, the claimants can enjoy a communal title by Maya customary land tenure was recognized by the Privy Council in the Amodu Tijani case and the existence of such title in other jurisdictions. This customary title, its nature and incidents were recently re-affirmed by the South African Constitutional Court in 2003 in Alexkor Ltd. v Richtersveld Community (2003) 12 BCLR, 130, where Chaskalson CJ, speaking for that Court stated:

“In the light of the evidence and of the findings by the SCA (Supreme Court of Appeal) and by the LCC (Land Claims Court), we are of the view that the real character of the title that the Richtersveld Community possessed in the subject land was a right of communal ownership under indigenous law. The content of that right included the right to exclusive occupation and use of the subject land by members of the Community. The Community had the right to use its waters, to use its land for grazing and hunting and to exploit its natural resources above and beneath the surface.” (emphasis added)

68. I am therefore of the considered view, that on the evidence in this case, the communal title to lands in Conejo and Santa Cruz Villages in the Toledo District, inheres in the claimants in accordance with Maya

customary land tenure. The nature of this title is communal, entitling the members of the community to occupy, use the lands for farming, hunting, fishing and utilizing the resources thereon as well as for other cultural and spiritual purposes, in accordance with Maya customary law and usage.

69. *The core and nature of the Defence*

Although the parties agreed on issues the determination of which would strictly be the remit of this judgment, in fairness to the defendants I must state the heart of their case as far as I understand it. From the amended Defence, which as I have already remarked, was done under prompting from the Court and rather late, the testimony from the defence witnesses' (all by affidavits), the only oral testimony for the defendants was by Mr. Munoz of the Government Press Office who put in evidence a silent video of some Maya Villages not including the two villages in the Toledo District in this case, and the submission, both oral and written, by Ms. Nichola Cho, the learned attorney for the defendants, they seemed to have pitched their tent against the claimants on the principal ground of British sovereignty over British Honduras. This historical fact forms the central plank of the defence. By this historical fact, the argument runs, any claim or title to land the claimants might have had was extinguished by virtue of British sovereignty over the territory. Belize became independent, of course, on 21st September 1981 and its independent governments succeeded to the sovereignty that had belonged to the British Crown. This sovereignty, the argument further runs, was evidenced and consolidated by, as far land and title thereto was concerned, by the series of Crown Lands Ordinances. The defendants put in evidence copies of some of these Ordinances. The Crown Lands Ordinance 1886 was eventually repealed and replaced by the National Lands Act in 1992 – Chapter 191 of 2000, Revised Edition of the Laws of Belize.

70. Grants of land and leases were made under the Crown Lands Ordinance during the Colonial administration of British Honduras and these were continued to be made under the subsequent National Land Act of 1992.
71. Therefore it was submitted for the defendants, the claimants' title or any right to land had been extinguished, so they cannot now claim any right or title to land based on Maya customary land tenure. The territorial sovereignty that was acquired, first by the Crown, to which the independent government of Belize succeeded, had extinguished any right or interests in land not granted by the latter (that is, the defendants), so the argument ran.
72. There are many excellent accounts of the origins, development and progress of the Honduras Bay Settlement from which the present-day nation state of Belize evolved. This development saw the maturation of the country from its early origins as a settlement of English wood loggers from about 1759, to its formal declaration as a British Crown Colony in May 1862 and later to its proclamation of independence on 21st September 1981 – see the judgment of the Privy Council in Attorney General of British Honduras v Bristowe (1880) 6 App. Cas. 143 (P.C.) at pp. 146 – 148, for a judicial account of the country's historical development up to its Crown colony status. More on this case later.
73. For the purposes of this judgment however, I have principally borne in mind the information contained in paragraph 9 and following of the second affidavit of Richard Wilk.

Professor Wilk relies on written and archival sources and makes extensive references to the authoritative collection edited by Sir John Alder Burdon between 1931 and 1934 entitled Archives of British Honduras: Being

Extracts and Précis Taken by a Committee from such Records as Exist on the Colony.

74. What is today Toledo District, where the lands in issue in this case are situated, became part of the Honduras Bay Settlement in 1859, when the southern boundaries of the settlement were formally agreed by the 1859 Convention between Her Majesty and the Republic of Guatemala relative to the Boundary of British Honduras as extending to the Sarstoon River in the south as far as Gracias a Dios Falls
75. On 12th May 1862, the British Crown by Letters Patent created the Colony of British Honduras. The Crown therefore acquired sovereignty over the territory of the whole of British Honduras.
76. Did change in or acquisition of territorial sovereignty extinguish pre-existing rights and interests in the land?

Did the acquisition of sovereignty over the territory of what is today the independent state of Belize, first by the Crown and later by the successive independent governments (including the defendants) overwhelm or eradicate any interests in or rights to land that the Maya people might have had? As I have found in paras. 61 to 63 above, there was long-standing Maya presence in Southern Belize well before and after the acquisition of sovereignty over the area by the Crown and later by the independent state of Belize.

77. I have given deep and anxious consideration to this aspect of this case. I am, however, convinced and fortified by authorities that the acquisition of sovereignty over Belize, first by the Crown and later, by independent governments, did not displace, discharge or extinguish pre-existing interests in and rights to land. The mere acquisition or change of

sovereignty did not in and of itself extinguish pre-existing title to or interests in the land.

78. In particular, I do not think it is logical, reasonable or fair to hold that the 1859 treaty with Guatemala, by extending the southern borders of British Honduras (today's Belize) to the Sarstoon River, necessarily extinguished the pre-existing rights of or interests of the Maya inhabitants of the area in their lands. The Crown by a combination of the various treaties with Spain and later with Guatemala, first acquired interests in British Honduras and by effective occupation and administration together with the passage of time, gained sovereignty over the territory which it legally passed on to independent Belize on 21st September 1981. This sovereignty did not without more however, affect or alter or extinguish the pre-existing rights of the Maya people to their lands.
79. From the evidence, it is manifest that throughout the unfolding drama regarding the territory, first, between Spain and later Guatemala on the one hand, and the British authorities on the other, the Maya people were all the while living on their land. There was some forced removal of some of the Maya people by Spanish authorities from some parts of the land; but the fact remains that they were never wholly removed so as to make the land terra nullius rendering it ownerless or unoccupied. The Maya, who are the indigenes of the land, remained with fluctuating numbers. And from the evidence, some of those whose ancestors had been removed, came back to their ancestral lands. There was much fluidity in the colonial borders with Guatemala. (see para. 19 of the joint affidavit of Choc and others; para. 48 of Wilk's first affidavit; paras. 63 to 65 of Jones' first affidavit and paras. 48 to 50 of the first affidavit of Wainwright) and para. 62 above.

80. There is no evidence in any event, to warrant me to find that the Maya of southern Belize as the indigenous inhabitants, ceded their lands or suffered them to be taken as spoils of conquest when the borders of British Honduras were extended south of the Sibun River in 1859, to include what is today Toledo District. There is no evidence even of any consultation with the indigenous Maya, or that they even knew what was happening to their lands. In the dark recesses of their forests they did not, I think it is fair to surmise, know about borders or of the extension of the borders such as they were, southwards of the Sibun River to the Sarstoon River which came to be regarded as vesting legal and proprietary title to their lands in the British Crown (and later the defendants as the Government of Belize, the successor to the Crown), as it is now contended for the defendants.
81. Indeed, how could they have? But the defendants did acquire territorial sovereignty over the area. Did this fact, as argued for the defendants, extinguish the pre-existing rights to and interests in the land after the assumption of territorial sovereignty? As I have already said at paragraph 77 above, it is my considered view that it did not, I endorse with respect, the statement of principle on this point by Brennan J. in the High Court of Australia in Mabo and others v Queensland (No. 2) 145 CFR IFC 92/04 where he stated at paragraph 61:

“The preferable rule, supported by the authorities cited (the learned Justice having earlier referred to a number of authorities on this point), is that a mere change in sovereignty does not extinguish native title to land (the term ‘native title’ conveniently describes the interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants) the preferable rule equates the indigenous

inhabitants of a settled colony with the inhabitants of a conquered colony in respect of their rights and interests in land and recognizes in the indigenous inhabitants of a settled colony the rights and interests recognized by the Privy Council in re Southern Rhodesia as surviving to the benefits of the residents of a conquered colony.”

82. The whole of Belize, including the Toledo District, was, of course, acquired by the British Crown **not** by conquest but by **settlement**. This, of course, is not to overlook the historic routing of the Spanish forces in September 1798 by the settlers in the Battle of St. George’s Caye. An event which is popularly commemorated on 10th September each year. It is however, logical, rational and fair to conclude that if the inhabitants of a **conquered** colony did not **ipso facto** lose their pre-conquest interests and rights in land, **a fortiori** therefore, the **indigenous** inhabitants of a **settled** colony could not have lost theirs without more, by the mere act of settlement or even by cession of their land to another or new sovereign. As Viscount Haldane stated in **Amodu Tijani supra** at p. 407 speaking of the 1861 treaty of cession by which King Docemo of Lagos ceded to the British Crown the port and island of Lagos with all the rights, profits, territories and appurtenances thereto:

“No doubt there was a cession to the British Crown, along with sovereignty, of the radical or ultimate title to the land, in the new colony, but this cession appears to have been made on the footing that the rights of property of the inhabitants were to be fully respected. This principle is a usual one under British policy and law when such occupations take place ... A mere change in sovereignty is not to be presumed as meant to disturb rights of private owners; and the general terms of a cession are prima facie to be construed accordingly.”

(Emphasis added).

83. Importantly also, as to the effect of Crown grants which were first introduced in Belize by the Crown Lands Ordinance 1872, Viscount Haldane stated in Amodu Tijani at pp. 407 – 408:

“The introduction of the system of Crown grants which was made subsequently must be regarded as having been brought about mainly, if not exclusively, for conveyancing purposes, and not with a view to altering substantive titles already existing.”

84. In my respectful opinion, this principle is equally applicable to the Crown’s rights in the then British Honduras flowing from the treaties with Spain and later Guatemala. I am of the view therefore that regardless of when territorial sovereignty was established over Belize, on the authorities, that legal and historical fact did not by itself, ordinarily, without more, extinguish pre-existing rights or to interest in land that the indigenous people enjoyed.
85. Therefore, even if the 1859 treaty with Guatemala which extended the southern boundaries of British Honduras (now Belize) to the Sarstoon River, thereby incorporating Toledo District, could, at the highest, be taken to have effected a cession, it could not have operated so as to have overridden the pre-existing rights and interests of the Maya people of southern Belize in their land.
86. I find as well that the introduction of grants of lands by the various Crown Lands Ordinances, culminating in the National Lands Act – Chapter 191 of the Laws of Belize, R.E. 2000, did not operate so as to extinguish the pre-existing Maya people’s interests in and rights to their land. I conclude therefore that neither the several Crown Lands Ordinances nor the succeeding National Lands Act 1992, expressly or by implication overrode

or extinguished the already existing Maya people's rights and interests in their lands. As Lord Denning stated in Adeyinka Oyekan and others v Musendiku Adele (1957) 1 WLR 876 at p. 880:

“The courts will assume that the British Crown (and I may add in the context of this case, the Government of Belize no less), intends that the rights of property of the inhabitants are to be fully respected. Whilst therefore, the British Crown, as sovereign, can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to everyone of the inhabitants who has by native law an interest in it: and the courts will declare the inhabitants entitled to compensation according to their interests ...”

87. Finally on the question of the status and force of pre-existing rights to and interests in land on the change of territorial sovereignty, I find, with respect, the decision of the Privy Council in Attorney General of British Honduras (1880) 6 App. Cas. 143, instructive in the circumstances of this case. The facts briefly were that Mr. James Grant, one of the settlers in the British Honduras settlement had acquired property called “Grant’s Work” by “location” pursuant to “Burnaby’s Code”, which contained, among other things, rules regulating the allocation of plots of land among the settlers which came to acquire the name of “locations”. In 1777, Mr. Grant made a will bequeathing this property to his manumitted slaves. The will was duly probated and the devisees of Mr. Grant went into possession. The last of the surviving devisees, Mary Grant, who had married and moved from “Grant’s Work” located in Corozal to Sittee to live with her husband, sold “Grant’s Work” in 1870, first to Mr. Bristowe, who in turn in 1878 re-sold it to the second respondent, Hunter. The appellant, the Attorney General for British Honduras, then brought an action for

trespass against the respondents and claimed the property in the name of the Crown pursuant to the Crown Lands Ordinance of 1872.

The Privy Council decided that Mr. Grant's devisees had passed on valid title to the respondents unaffected by the Crown's assumption of territorial sovereignty in 1817 over the territory which it had even before the formal declaration of the territory's colonial status in 1862. This was so, the Board reasoned, because *"... in the interval which elapsed between the retirement of the Spaniards in 1798 (as their Lordships euphemistically chose to describe the routing of the Spanish at the Battle of St. George's Caye of that year!), and the assumption of territorial sovereignty by the British Crown, full possession of the land had been taken by the devisees, and that such possession had been continued by them and their assigns ..."*

Although the customary land tenure in issue in that case was that of the white settlers based on Burnaby's Code, it was evident that this was not displaced or extinguished either on the assumption by the Crown of territorial sovereignty over the territory, certainly by and after 1798 or by the formal declaration of the territory as a Crown colony in 1862 and the promulgation of the Crown Lands Ordinance in 1872. Such laws relating to possession of land were in fact expressly continued in force by section 62 of this Ordinance.

88. By the same token, therefore, I think it is eminently fair and logical to hold that, notwithstanding or despite the extension of the southern borders of the territory by the 1859 Treaty with Guatemala and the extension or assumption of the Crown's territorial sovereignty thereto, the pre-existing rights of the indigenous Maya to their rights to and interests in their lands, were and remain, in my view, unaffected and continued in force.

89. I accordingly find the defendants' argument that the claimants' rights to and interests in their lands have been extinguished, to be unavailing in the light and circumstances of this case. Extinguishment of rights to or interests in land is not to be lightly inferred. There must, I think, be clear and plain legislative intent and action to effect it. I can find no evidence of this in this case, as I can find no authority for this in any of the several Crown Lands Ordinances put before me in this case. In fact, in section 62 of the Crown Lands Ordinance 1872, the first in a series of Crown Lands Ordinances in the colony of British Honduras until the enactment of the National Lands Act in 1992, it was expressly provided that "*All existing laws relating to the possession of lands within the colony and to their survey, are continued in force in so far only as they may not be inconsistent with or repugnant to the provisions of this Ordinance.*" Surely this could not be taken to exclude Maya customary land tenure, which from the evidence had been existing in the territory even before contact with Europeans. And I can find nothing in Maya customary land tenure that could be said to be inconsistent with or repugnant to the Crown Lands Ordinance. So it is difficult to hold that this system of law relating to the possession of land had been extinguished: more clear and direct intention to do so would have been necessary. This rationale perhaps would support the judgments of both Chief Justice Parker of the Supreme Court of then British Honduras, and the Privy Council which vindicated the location system by which the defendant/respondent had acquired "Grant's Works" in the Attorney General of British Honduras case supra.
90. Again, I adopt with respect, the statement in Mabo of Brennan J. in his analysis of extinguishment and indigenous title to land, when he stated, at para. 75:

“... the exercise of a power to extinguish native title must reveal a clear and plain intention to do so, whether the action be taken by the Legislature or the Executive. This requirement, which flows from the seriousness of the consequences to indigenous inhabitants of extinguishing their traditional rights and interests in land, has been repeatedly emphasized by courts dealing with the extinguishing of the native title of Indian lands in North America ...”

91. On the issue of reservations which has figured in the affidavits in this case, and as provided for in both the Crown Lands Acts and section 6 of the National Lands Act, I am inclined to agree with Brennan J. when he stated at para. 76:

“A fortiori, a law which reserves or authorizes the reservation of land from sale for the purpose of permitting indigenous inhabitants and their descendants to enjoy their native title works no extinguishment.”

92. It is for all these reasons that I find and hold that the acquisition of territorial sovereignty by the defendants, as the Government of Belize, the linear successor to the Crown, and the system of reservation introduced over some parts of the land, by the Crown Lands Ordinances and the National Lands Act, did not extinguish the claimants' right to and interests in the land of the indigenes. The defendants became vested with the radical or ultimate title to the land as it no doubt possesses over all lands in Belize, when territorial sovereignty vested in first the Crown and then the Government of Belize, but this title is burdened by the pre-existing rights to and interest of the claimants in the land, and these survived the defendants' acquisition of sovereignty; as a mere change of sovereignty is not to be presumed as meant to disturb rights of private owners. The preferable rule as Brennan J stated in Mabo supra at para. 61, a view in which I respectfully concur, is that a mere change in sovereignty does not

extinguish native title to land. That is, the rights and interests of the indigenous inhabitants in the land before acquisition or change of sovereignty.

93. I therefore conclude that the villagers of Conejo and Santa Cruz, as part of the indigenous Maya people of Toledo District, have interests in land based on Maya customary land tenure that still survive and are extant.

94. **The Constitutional implications of the claimants' interests in land based on Maya customary land tenure**

I now turn to a consideration of the Constitutional implications of the recognition that the claimants have interests in land based on Maya customary land tenure. These form the third issue agreed upon by the parties in this case. They have, however, sub-divided this issue into four sub-heads, all touching and concerning the Constitution of Belize, in particular certain of its provisions dealing with the protection of fundamental human rights in its Part II.

95. I should at the outset state that under the constitutional law of Belize, the legality and hence the validity of an exercise of a sovereign power or any power in the public law domain, depends on the authority vested in the organ of government purporting to exercise it. The Constitution of Belize, declared by its section 2 to be the supreme law, determines the scope of authority to exercise any power over matters governed by municipal law including rights and interests in land – Mabo supra at para. 73.

96. (a) Do the interests of the claimants in lands based on Maya customary land tenure constitute “property” protected by sections 3(d) and 17 of the Constitution?

The starting point here, I think, is the preamble of the Belize Constitution which by an amendment introduced by Act No. 2 of 2001, now makes explicit reference to the collective group to which the claimants undoubtedly belong, namely, the **indigenous peoples of Belize**. The preamble states, among other things:

*“WHEREAS the people of Belize ... (a) affirm that the Nation of Belize shall be founded upon principles which acknowledge ... faith in human rights and fundamental freedoms ... and the equal and inalienable rights with which all members of the human family are endowed ... (e) **require policies of state which protect ... the identity, dignity and social and cultural values of Belizeans, including Belize’s indigenous peoples** ... with respect for international law and treaty obligations in the dealings among nations.”* (Emphasis added).

97. The Constitution’s normative prescription regarding property are contained in sections 3(d) and 17.

Section 3(d) provides:

“(d) protection from arbitrary deprivation of property.”

And section 17 provides:

“17.(1) No property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired except by or under a law that –

(a) prescribes the principles on which and the manner in which reasonable compensation therefore is to be determined and given within a reasonable time; and

(b) secures to any person claiming an interest in or right over the property a right of access to the courts for the purpose of – “
(Emphasis added)

And subsection (2) contains exceptions to the taking of property under any law that might not offend the constitution’s proscription on compulsory acquisition of property. None of this is applicable in this case.

98. Although there is no definition of what is “property” in the Constitution even after providing for its protection, a useful definition is however appropriately provided in section 2 of the Law of Property Act – Chapter 190 of Laws of Belize 2000, Revised Edition. This is along the lines that “property includes any thing in action and any interest in real and personal property.” (Emphasis added)

99. In the light of the conclusions I have reached in this case regarding the first and second issues agreed by the parties for the determination of this case, I am of the considered view that the interests of the claimants in land based on Maya customary land tenure are clearly deserving of the protection afforded by the Belize Constitution to property. That is to say, these rights and interest of the claimants according to Maya customary land tenure constitute under the Constitution “property” and should be so readily cognizable.

100. I am fortified in this conclusion by the finding in the Report of the Inter-American Commission in the Maya Communities case supra when in

considering the applicants' case in the light of the provisions of Article XXIII of the American Declaration on the Rights and Duties of Man, which is an integral part of the Charter of the Organization of American States of which Belize is a member. This Article provides in a not dissimilar fashion like the Belize Constitution, for the protection of property. The Commission stated in paras. 127 and 131 of its Report:

“(T)he Mopan and Ke’kchi Maya people have demonstrated a communal property right to the lands that they currently inhabit in the Toledo District. These rights have arisen from the longstanding use and occupancy of the territory by the Maya people, which ... predated European colonization and have extended to the use of the land and its resources for purposes relating to the physical and cultural survival of the Maya communities ... this communal property right of the Maya people is the subject of protection under Article XXIII of the American Declaration ...” (Emphasis added).

101. Even though ascertaining the nature and incidents of indigenous title may not be easy; and as Viscount Haldane admonished in **Amodu Tijani supra**, the urge to characterize it along the familiar English law concepts should be held in check, indigenous title or interests have their origins in and are given their contents by the traditional law acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of indigenous title must be ascertained as a matter of fact by reference to those laws and customs – **Mabo supra** at para. 64. Indigenous title is now correctly regarded as **sui generis** – **Delgamuukw v British Columbia (1997) 3 SCR 1010**.

It is now also accepted that indigenous title extends to all rights of indigenous inhabitants in land, whether community, group or individual,

possessed under traditional laws and customs: see generally The Reception of England Law Abroad, B. H. McPherson (2007 Supreme Court of Queensland publication) at pp. 50 – 58 and cases there cited.

102. I therefore conclude that the claimants' rights and interests in lands based on Maya customary land tenure are not outwith the protection afforded by the Belize Constitution, but rather, constitute "property" within the meaning and protection afforded to property generally, especial here of the real type, touching and concerning land - "communitarian property", perhaps, but property nonetheless, protected by the Constitution's prescriptions regarding this institution in its protective catalogue of fundamental human rights – see generally Property and the Constitution, edited by Janet McLean (Hart Publishing (1999)), especially Chapter 4 at pp. 81 – 82.

Moreover, adopting the guidelines of the Privy Council in The Queen v Reyes (2002) A.C. that a generous and purpose interpretation is to be given to constitutional provisions protecting humans and that a court is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a mature society, I have no doubt that the claimants' rights to and interests in their lands in accordance with Maya customary land tenure, form a kind or species of property that is deserving of the protection the Belize Constitution accords to property in general. There is no doubt this form of property, from the evidence, nurtures and sustains the claimants and their very way of life and existence.

103. (b) Do the Government's acts and omissions violate the claimants' rights to property in sections 3(d) and 17 of the Belize Constitution?

This issue relates to a broad-gauged complaint by the claimants against the defendants. They claim that the Government of Belize violates their property rights by failing effectively to recognize their customary land tenure or to secure their communal lands, by issuing to third parties (presumably non-Maya) concessions to extract natural resources from their villages, and by purporting or threatening to grant property rights within these lands that are not consistent with Maya customary land tenure. The claimants say that these actions and omissions by the Government of Belize are part of a broad pattern of complete disregard for Maya customary property rights throughout the Toledo District,

104. The claimants complain as well that instead of extending legal and administrative protection to their property rights, government officials have told them and other residents in their villages that they have no secure rights in their lands unless they obtain government-issued leases to those lands. The claimants further complain that the government (the defendants) has also issued a concession to conduct oil exploration over the whole of Toledo District to US Capitol Energy Ltd. and that seismic testing and oil exploration has begun within Conejo Village and neighbouring village lands without adequately consulting the affected Maya communities and they claim that this is in disregard of the Petroleum Act.
105. The claimants further complain that despite the Ten-Point Agreement of October 2000 in which among other things, there was acknowledgment by the Government of Belize of Maya rights to land and resources, the defendants have behaved as if Maya customary property rights do not

exist and that even in the Defence in this case, the defendants argue that the Maya people have no customary land rights.

106. The claimants filed several affidavits in which they aver these several acts and omissions by the defendants which they claim violate their right to property as protected by the Belize Constitution – see first joint affidavit of Gregorio Choc and others at paras. 7 – 8, 12, 18, 32 – 43, paras. 17, 18 – 22 of Manuel Coy’s first affidavit; paras. 19 and 31 of Manuel Caal’s first affidavit; paras. 53 – 58, and 7.6 of the first and second affidavits respectively of Elizabeth Grandia; paras. 5 and 7 of Andre Cho’s first affidavit; paras. 71 – 75 of Richard Wilk’s second affidavit and the first affidavit of John Makin, paras.
107. I am satisfied that the claimants have put a plethora of evidence before this Court attesting to the non-observance or disregard by the defendants of the claimants rights to and interests in their property. That these rights and interests in their property are anchored in Maya customary land tenure system, does not in my view, make them any less deserving of the Constitution’s protection afforded to other forms or species of property. As Brennan J. observed with respect correctly, in my view, in Mabo supra at para. 69:

“... where an indigenous people (including a clan or group) as a community, are in possession of land under a proprietary native title, their possession may be protected or their entitlement to possession may be enforced by a representative action brought on behalf of the people or by a sub-group or individual who sues to protect or enforce rights or interests which are dependent on the communal native title ... A communal native title enures for the benefit of the community as a whole and for the sub-groups and individuals within it who have particular rights and interests in the community lands.”

108. Moreover, I cannot help but note that despite the explicit recognition of the property rights of the Maya people in their traditional lands in the Ten-Point Agreement of 2000 in its clause 6, the defendants have not taken any meaningful steps, according to the evidence, to delimit, demarcate or otherwise establish the necessary framework to clarify and protect the lands on which these rights exist. And this is so despite the efforts of the villagers of Conejo in 2005 to have a map of their village and its boundaries affirmed. They later presented this map to the Prime Minister; but nothing has happened.
109. I have given anxious consideration as well to this aspect of the claimants' claim. I am satisfied that on the evidence, the acts and omissions of the defendants regarding the claimants' rights to and interests in their lands, do not accord with the protective regime of the constitution regarding property. Yes, the Constitution's protection of property is to clad a protective shield against any arbitrary deprivation around that property (section 3(d) and to insulate that property from any compulsory taking or the compulsory acquisition of any interest in that property, save and except under a law that provides for reasonable compensation to be determined and given within a reasonable time, and secures access to the courts to the person affected to establish his interests, and to determine whether the taking of possession or acquisition of interest was for a public purpose, and to determine the amount of compensation to which the person affected may be entitled and to enforce the right to such compensation (section 17).
110. Although the evidence discloses substantial impairment and infringement of the claimants' rights to and interests in their lands by the non-observance of these rights and interests. I am not however, satisfied that this impairment reaches the level of arbitrary deprivation or compulsory

acquisition of the kind contemplated and provided for by the Constitution. But the impairment nonetheless violates the protection the Constitution affords to property in that they have granted concessions to third parties to utilize the property and resources located on lands belonging to the claimants.

111. (c) Do the defendants' acts and omissions violate the claimants' right to equality guaranteed by sections 3 and 16 of the Constitution?

The claimants say that the acts and omissions deposed to in the several affidavits filed in this case and attributable to the defendants (see paras. 103 - 106 above) are, as well, violative of their right to equality guaranteed by sections 3 and 16 of the Constitution. This complaint is premised on the failure by the defendants to provide legal protection to their Maya customary land tenure.

112. Section 3 of the Belize Constitution guarantees fundamental rights and freedoms to *“every person in Belize ... whatever his race”*; and section 16 provides that *“no law shall make any provision that is discriminatory either of itself or in its effect and no person shall be treated in a discriminatory manner by any person or authority.”* Treatment is discriminatory in the sight of the Constitution *“when it afford(s) different treatment to different persons attributable wholly or mainly to their respective description by ... race ... (or) place or origin ... whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description”* – section 16(3) of the Constitution.

113. Whether any treatment is in fact discriminatory is a matter for appreciation in the light of the circumstances of the particular case. In some instances, the discriminatory treatment would be so self-evident that it is easily

perceivable as such. On the facts of this case I am satisfied that the treatment accorded to the claimants' rights and interests in their land, in particular the defendants' failure to provide them with the necessary mechanism or protection necessary to exercise their rights to property fully and equally with other Belizeans is, in my view, discriminatory and does not accord with the right to equality guaranteed by sections 3 and 16 of the Belize Constitution. I find that this discriminatory treatment stems largely from the fact that the claimants are Maya and practice the customary land tenure system of their people. The failure of the defendants to recognize and validate this system falls short of the Constitution's guarantee of equality and non-discrimination and is not justifiable under any of the exceptions contained in sub-sections (6), (7) and (8) of section 16.

114. I agree with the submission of the claimants that because of their communal aspect and unique source, Maya customary rights to lands and resources are by nature, different from the type of property rights routinely respected by government offices and ministries. Therefore, by failing to accommodate this difference by, for example, treating individualized leases as an adequate substitute for a Maya farmer's customary interest in his village lands (as deposed to in several affidavits), and by treating lands used collectively by Conejo and Santa Cruz Villages as vacant national lands, government officials, as agents of the defendants, are acting discriminatorily against the claimants.
115. (d) Do the defendants' acts and omissions violate the claimants' right to life, liberty, security of the person and the protection of the law guaranteed under sections 3(a) and 4 of the Constitution?

The Constitution of Belize guarantees in section 3(a) that *“every person in Belize is entitled to ... life, liberty, security of the person, and the protection of the*

law” and in section 4 that “*A person shall not be deprived of his life intentionally ...*”

116. From the evidence in this case, it is evident that the Maya claimants rely on agriculture, hunting, fishing and gathering for their physical survival. It is also clear that the land they traditionally use and occupy plays a central role in their physical, cultural and spiritual existence and vitality. The claimants have complained as well in these proceedings that the actions and omissions of the defendants by disregarding their rights to and interests in their traditional lands violate the security of their being and deny them the protection of the law.

117. I am inclined to agree with the claimants in this respect because, without the legal protection of their rights to and interests in their customary land, the enjoyment of their right to life and their very lifestyle and well-being would be seriously compromised and be in jeopardy. This, I find, will not be in conformity with the Constitution’s guarantees.

118. **International law obligations of the defendants regarding the claimants**

I cannot part with this judgment without adverting to some of the obligations of the defendants, as representing the State of Belize, in international law. Of course, these are domestic proceedings; but undoubtedly in the light of the issues raised they engage in my view, some of the obligations of the State in international law. I find that some of these obligations resonate with certain provisions of the Belize Constitution itself which I have adverted to earlier.

119. The claimants in the arguments and submissions of their learned attorney, adverted to some of these obligations. Belize, of course, is a member of the international community and has subscribed to commitments in some international humanitarian treaties that impact on this case. A part of this

commitment is to recognize and protect indigenous people's rights to land resources. The claimants in these proceedings are members of the Maya community, an indigenous group that has lived in Belize since time immemorial.

120. **Treaty obligations**

In contemporary international law, the right to property is regarded as including the rights of indigenous peoples to their traditional lands and natural resources. Belize is a party to several international treaties such as the International Covenant on Civil and Political Rights (ICCPR) 999 U.N.T.S. 171; the Convention on the Elimination of All Forms of Racial Discrimination (CERD), 660 UNTS 195; and The Charter of the Organization of American States (OAS) 119 UNTS 3; all of which have been interpreted as requiring states to respect the rights of indigenous peoples over their land and resources.

121. For example, in the case of Mayagna (Sumo) Awas Tingni Community v Nicaragua 79 Inter-Am. Ct.H.R. (Ser C) (2001) that Court held that:

“Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community. Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of

possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations” at para. 149.

122. In the **Maya Indigenous Communities case** *supra*, before the Inter-American Commission on Human Rights (an organ of the Organization of American States of which Belize is a member) found that the rights to property protected by the OAS Charter through Article XXIII of the American Declaration of the Rights and Duties of Man, “*are not limited to those property interests that are already recognized by States or that are defined by domestic law, but rather that the right to property has an autonomous meaning in international human rights law. In this sense, the jurisprudence of the system had acknowledged that the property rights of indigenous peoples are not defined exclusively by entitlements within a state’s formal regime, but also include that indigenous communal property that arises from and is grounded in indigenous custom and tradition”* at para. 171.

123. As a party to CERD, I believe it cannot seriously be argued that Belize is under an obligation to recognize and protect the claimants’ Maya customary land tenure rights, as an indigenous group. The United Nations Committee on the Elimination of All Forms of Racial Discrimination (which is mandated to monitor states’ compliance with CERD) has confirmed that the failure of states to recognize and respect indigenous customary land tenure is a form of racial discrimination that is not compatible with CERD. The Committee therefore in 1997, issued a call upon states:

“to recognize and protect the rights of indigenous peoples to own, develop, control and use communal lands, territories and resources and where they have been deprived of their lands and territories traditionally owned or otherwise

inhabited or used without their free and informed consent, to take steps to return these lands and territories.” **General Recommendation XXIII: Rights of Indigenous Peoples** para. 5 UN Doc A/52/18 Annex V. (Aug. 18, 1997).

124. The Committee in a letter dated 9th March 2007 to the defendants through Belize’s Ambassador to the United Nations stated that it *“is preoccupied by reports regarding privatization and leasing of land without the prior consultation or consent of the Maya people, as well as the granting of concessions for oil development, logging and the production of hydro-electricity.”* (Correspondence from Chairperson of CERD to Belize’s Permanent Representative to the UN).
125. In my view, given Belize’s commitment under CERD, the defendants should take this communication seriously and respond accordingly.
126. These considerations, engaging as they do Belize’s international obligation towards indigenous peoples, therefore weighed heavily with me in this case in interpreting the fundamental human rights provisions of the Constitution agitated by the cluster of issues raised, particularly, the rights to property, life, security of the person, the protection of the law and the right not to be discriminated against. I draw particular support and inspiration from the preamble of the Belize Constitution which requires policies of the state to *“protect the identity, dignity and social and cultural values of Belizeans ... including Belize’s indigenous peoples.”*
127. *Belize’s obligations under customary international law and general principles of international law*

Treaty obligations aside, it is my considered view that both customary international law and general principles of international law would require that Belize respect the rights of its indigenous people to their lands and

resources. Both are, including treaties, the principal sources of international law: see Article 38 of the International Court of Justice. Customary international law evolves from the practice of States in matters of international concern and “general principles” are those commonly accepted by States and reflected in their international relations or domestic legal systems – See Ian Brownlie, **Principles of Public International Law** (6th Ed.) pp. 15 – 19. It is the position that both customary international law and the general principles of international law are separate and apart from treaty obligations, binding on States as well.

128. Both sources of international law are discernible from international instruments, reports and decisions by authoritative international bodies, such as UN Commissions/Committees and those of regional human rights commissions and courts; states assertions and communications at the international and national levels and the actions of states internationally and domestically – see generally S. James Anaya, **Indigenous Peoples in International Law** (Oxford Univ. 2nd ed. 2004) pp. 16 – 26.
129. In the **Mary and Carrie Dann v United States**, Case 11.40, Report No. 75/02 of the Inter-American Commission of Human Rights dated 27th December 2002, a case concerning claims by members of the Western Shoshone indigenous people to lands in the State of Nevada, U.S.A. , the Commission stated that the general international legal principles in the context of indigenous human rights include the following:
 - *“the right to indigenous peoples to legal recognition of their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property”;*

- *“the recognition of their property and ownership rights with respect to lands, territories and resources that they have historically occupied; and*
- *“where property and user rights of indigenous peoples arise from rights existing prior to the creation of a state, recognition by that state of the permanent and inalienable title of indigenous peoples relative thereto and recognition that such title may only be changed by mutual consent between the state and respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property. This also implies the right to fair compensation in the event that such property and user rights are irrevocably lost”* at para. 130.

130. Moreover, although Belize has yet to ratify Convention No. 169 of the International Labour Organization concerning **Indigenous and Tribal Peoples in Independent Countries** (ILO No. 169) of 7th June 1989, it is not in doubt that Article 14 of this instrument contains provisions concerning indigenous peoples right to land that resonate with the general principles of international law regarding indigenous peoples.
131. Also, importantly in this regard is the recent **Declaration on the Rights of Indigenous Peoples** adopted by the General Assembly of the United Nations on 13 September 2007. Of course, unlike resolutions of the Security Council, General Assembly resolutions are not ordinarily binding on member states. But where these resolutions or Declarations contain principles of general international law, states are not expected to disregard them.

This Declaration – GA Res 61/295, was adopted by an overwhelming number of 143 states in favour with only four States against with eleven

abstentions. It is of some signal importance, in my view, that Belize voted in favour of this Declaration. And I find its Article 26 of especial resonance and relevance in the context of this case, reflecting, as I think it does, the growing consensus and the general principles of international law on indigenous peoples and their lands and resources. Article 26 states:

“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.”

132. I am therefore, of the view that this Declaration, embodying as it does, general principles of international law relating to indigenous peoples and their lands and resources, is of such force that the defendants, representing the Government of Belize, will not disregard it. Belize, it should be remembered, voted for it. In Article 42 of the Declaration, the United Nations, its bodies and specialized agencies including at the country level, and states, are enjoined to promote respect for and full application of the Declaration’s provision and to follow up its effectiveness.

133. I therefore venture to think that the defendants would be unwilling, or even loath to take any action that would detract from the provisions of this Declaration importing as it does, in my view, significant obligations for the State of Belize in so far as the indigenous Maya rights to their land and resources are concerned. Finally, Article 46 of the Declaration requires that its provisions shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

134. I conclude therefore, that the defendants are bound, in both domestic law in virtue of the Constitutional provisions that have been canvassed in this case, and international law, arising from Belize's obligation thereunder, to respect the rights to and interests of the claimants as members of the indigenous Maya community, to their lands and resources which are the subject of this case.

135. Conclusion

Although from my analysis of the claim relating to the deprivation of property and or its compulsory taking or acquisition, I am unable to so find in relation to the claimants' property in their lands, the impairment caused thereto however by the defendants by issuing permits to explore and exploit resources thereon are, in my view, of such significance that it is meet and proper to enjoin the defendants from so doing without adequate consultation and agreement with the claimants. This will be reflected in my order.

136. Accordingly, I order and grant as follows:

a) *A declaration that the claimants Villages of Santa Cruz and Conejo and their members hold, respectively, collective and individual rights in the lands and resources that they have used and occupied according to Maya customary*

practices and that these rights constitute “property” within the meaning of sections 3(d) and 17 of the Belize Constitution.

- b) *A declaration that the Maya Villages of Santa Cruz and Conejo hold collective title to the lands their members have traditionally used and occupied within the boundaries established through Maya customary practices; and that this collective title includes the derivative individual rights and interests of Village members which are in accordance with and subject to Santa Cruz and Conejo and Maya customary law.*

- c) *An order that the government determine, demarcate and provide official documentation of Santa Cruz’s and Conejo’s title and rights in accordance with Maya customary law and practices, without prejudice to the rights of neighboring Villages.*

- d) *An order that the defendants cease and abstain from any acts that might lead the agents of the government itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographic area occupied and used by the Maya people of Santa Cruz and Conejo unless such acts are pursuant to their informed consent and in compliance with the safeguards of the Belize Constitution. This order include, but not be limited to, directing the government to abstain from:*
 - i. *issuing any lease or grants to lands or resources under the National Lands Act or any other Act;*

 - ii. *registering any such interest in land;*

 - iii. *issuing any regulations concerning land or resources use; and*

- iv. issuing any concessions for resource exploitation and harvesting, including concessions, permits or contracts authorizing logging, prospecting or exploration, mining or similar activity under the Forest Act, the Mines and Minerals Act, the Petroleum Act, or any other Act.*

A. O. CONTEH
Chief Justice

DATED: 18th October 2007.