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“El Agua No Se Vende: Water is Not For Sale!” The Latin American Water Tribunal as a Model for Advancing Access to Water

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I. INTRODUCTION

Nestled in the mountains of central Mexico, the tight-knit community of indigenous Mazahua people had remained relatively unaltered by the changes taking place in the rest of the world. The Mazahua Indians remained this way until the Mexican government created the oppressive water regime known as the Cutzamala System, which shipped water from Mazahua lands to the capital, Mexico City.¹ Now, the Mazahua people are in constant conflict with the Mexican government and in constant struggle to survive.² Mexico City needs water for the booming metropolis. The Mazahua people live in a region with copious natural water resources.³ The powerful Mexican government commandeers the water from the Mazahua

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1. See Diego Cevallos, *Mazahuas Choose Jail over Going Without Water*, TIERRAAMÉRICA, Dec. 26, 2006, available at <http://www.tierramerica.net/english/2006/1223/idiialogos.shtml> [hereinafter Cevallos, *Mazahuas Choose Jail*].

2. *Id.*

3. See John Ross, *Indigenous Peoples of Mexico Resist Commodification of Water*, FUNDACION SOLON, May 25, 2006, http://funsolon.civiblog.org/blog/English/_archives/2006/4/3/1857719.html.

land.⁴ The Mazahua people are relegated to destitution. This is an age-old conflict: limited resources, unfettered need, and powerful players.

Like the Mazahua, many indigenous groups have been able to prolong the full invasion of Western culture and have been able to maintain their daily customs and practices. Latin American countries in Central and South America often have large populations of indigenous people. Throughout the history of Latin American conquistadors and rulers, the indigenous people have been subjugated. First, the Indians were forced into slave labor at haciendas. When Latin American colonies finally gained independence from Spain, the impoverished indigenous people slowly gained certain freedoms. Still, many indigenous people remain marginalized in rural communities where they are segregated from mainstream society, stripped of their resources, and often ignored all together.⁵ Despite the seclusion of indigenous groups, the traditional way of life is vulnerable.⁶ Today, social and technological development increasingly threatens the rights of indigenous people.⁷ Often, indigenous people are not consulted when companies or governments decide to implement development projects that might affect their communities; thus, the fundamental freedoms of indigenous people are being violated when consent is not secured.⁸ Violations of this nature occur across the globe and continue to threaten the fate of indigenous people.⁹

4. See Cevallos, *Mazahuas Choose Jail*, *supra* note 1.

5. See Indigenous and Tribal Peoples Convention, June 27, 1989, ILO No. 169 (C169), available at <http://www.un.kiev.ua/en/HRconv/doc/convention%20concerning%20indigenous%20and%20tribal%20people%20in%20independent%20countries.pdf> [hereinafter Indigenous People Convention].

6. *Id.* Not only have the laws, values, customs, and perspectives of the indigenous people eroded, but “in many parts of the world these peoples are unable to enjoy their fundamental human rights to the same degree as the rest of the population of the States within which they live.” *Id.*

7. See Robert Gaudet et al., *Human Rights*, 43 INT’L LAW. 861, 897 (2009).

8. See *id.* (citing Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, U.N. Doc. A/HRC/15 (Feb. 22, 2010) (by James Anaya) [hereinafter *Promotion and Protection*], available at <http://www2.ohchr.org/english/issues/indigenous/rapporteur/docs/ReportVisitBotswana.pdf>). Communities or organizations can submit a letter to the Special Rapporteur detailing government activities that infringe on the rights of indigenous people. See *Promotion and Protection*, *supra*, at 2-3. The Special Rapporteur then sends an information request to the nation in hopes that the government will investigate the situation and substantively respond to the accusations. *Id.*

9. See Gaudet et al., *supra* note 7, at 897-98. The U.N. Special Rapporteur continues to monitor various infrastructure projects and mining and hydropower projects implemented by the People’s Republic of China that threaten the Tibetan traditional way of life. *Id.* The Special Rapporteur also reminded Mexico of their promise (enumerated in the International Labour Organization Convention) to consult indigenous communities when governmental developmental

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In the fight for achieving indigenous rights, issues involving water rights and access to water are paramount.¹⁰ In November 2002, access to safe and potable water officially became a “basic human right.”¹¹ The millennium development goals seek to “[h]alve, by 2015, the proportion of the population without sustainable access to safe drinking water and basic sanitation.”¹² Although water is now recognized by *some* as a human right, numerous obstacles prevent this right from being realized. Access to the water supply is constantly threatened by the corporate thrust toward privatization.¹³ Likewise, the existence of dams—now totaling around 45,000—has a severe impact on human rights and access to water.¹⁴ Even when water is available, pollution from industrial plants or mining venues often jeopardize the purity of the water.

projects affect them in light of recent concerns about the Hydroelectric Project La Parota in Mexico. *Id.*

10. See generally LIQUID RELATIONS: CONTESTED WATER RIGHTS AND LEGAL COMPLEXITY (Dik Roth, Rutgerd Boelens & Margreet Zqarteveen eds., 2005) (discussing the dynamic relationship of water rights, power, and legal complexity in the context of indigenous and minority groups).

11. See THÉODORE H. MACDONALD, THE GLOBAL HUMAN RIGHT TO HEALTH: DREAM OR POSSIBILITY? 35 (2007). In the International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 11 “The Right to Adequate Standard of Living” and Article 12 “The Right to Health” were amended to include the right to water. *Id.* These changes were made as a result of Comment 15 which stated that “[t]he human right to water entitles every person to sufficient, affordable, physically accessible, safe and acceptable water for personal and domestic uses.” *Id.* See also Indigenous People Convention, *supra* note 5 (considering the development of indigenous and tribal peoples in all regions of the world since the inception of international instruments such as the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the Indigenous and Tribal Populations Convention and Recommendations of 1957).

12. Press Release, United Nations, Road Map of Millennium Summit Goals Sets Out Blueprint, Timetable for Future Implementation, U.N. Press Release PI/1380 (Sept. 19, 2001), available at <http://www.un.org/News/Press/docs/2001/pi1380.doc.htm>. The millennium development goals (MDG) recognize that women shoulder the largest burden in collecting water. *Id.* Women are typically saddled with the burden of providing water for the family; thus, women must find and carry water to meet the family’s needs. See *Activists Demand Gender Equality in Water Management*, NAT’L CATH. REP., Apr. 14, 2006, at 11 [hereinafter *Activists Demand Gender Equality*]. Director of the Geneva-based council, Robert Lenton, recognizes that women must be involved in the process in fighting for the MDG to promote gender equality. *Id.*

13. See Diego Cevallos, *Activists, Global Forum Do Not See Eye to Eye*, INTER PRESS NEWS AGENCY, Mar. 17, 2006, available at <http://ipsnews.net/news.asp?idnews=32547>.

14. See MACDONALD, *supra* note 11, at 46 (citing Agnes C. Rola, *Rivers at Risk: Towards a Sustainable Surface Water Resource Management* (paper presented to the Sanggunian Panlalawigan ng Bukidnon, Sept. 11, 2001), available at http://pdf.usaid.gov/pdf_docs/Pnade440.pdf). As of July 2006, there were 45,000 large operating dams and 1,500 dams under construction. *Id.*

Despite the various concerns about water, action to address these concerns has not been successful. For various reasons, “social participation in water management have not been very effective in Latin America[]”; thus, dissatisfied from the lack of public participation space, people turn to public protests to voice their problems.¹⁵ Protests do little to solve the issue because they are a reactive measure instead of a proactive measure.¹⁶ Moreover, protests are organized by radicals who ultimately diminish the likelihood that the public will accept such movements.¹⁷ When a protest is chosen as the *modus operandi* for exposing a problem, the movement is hurt more than the protest helps.¹⁸ The alternative is to utilize the court system. However, maneuvering through legal channels is often very expensive and can take decades. In court, although racism is illegal, underlying bias makes it very difficult for indigenous groups to express their grievances and receive a fair trial. Moreover, the lack of involvement by indigenous people in the political sphere practically guarantees that indigenous people will not have a voice.¹⁹ Without court serving as a viable option, the Latin American Water Tribunal (LAWT) has emerged recently as an alternative method to resolve water conflicts, offering indigenous people a venue to voice their grievances and complaints.

At the international level, water is now understood to be a basic human right.²⁰ However, conflict continues to intensify surrounding indigenous people’s access to water as the resource becomes scarcer. In particular, this paper will examine the struggle of indigenous people in Latin America and the creation of the LAWT as a solution. Section II will describe the LAWT,

15. Carmen Maganda, *The Latin American Water Tribunal and the Need for Public Spaces for Social Participation in Water Governance*, in *WATER AND URBAN DEVELOPMENT PARADIGMS: TOWARDS AN INTEGRATION OF ENGINEERING, DESIGN AND MANAGEMENT APPROACHES* 688 (Jan Feyen, Kelly Shannon & Matthew Neville eds., 2009). Water has been a problem in Latin America “due to complex stakeholder scenarios and a general weakness of democratic performance”; thus, competition for the resource has increased due to “social inequities, technical problems with structural networks, short term policy solutions, vertical decision-making regarding hydraulic infrastructure, [and] economic problems because poor people lack the means to pay for water services . . .” *Id.*

16. *See id.*

17. *See id.*

18. *See id.* *See generally* SIDNEY G. TARROW, *POWER IN MOVEMENT: SOCIAL MOVEMENTS AND CONTENTIOUS POLITICS* (2d ed. 1998) (describing social movement cycles).

19. *See* John Ross, *Mexico’s Supreme Court Upholds Flawed Rights Law, Slams Door Shut on Indian’s Aspirations for Justice*, ORGANIC CONSUMERS ASS’N, Sept. 17, 2002, http://www.organicconsumers.org/chiapas/0915_chiapas.cfm. In Mexico, there are no current Indian members on the federal judiciary; moreover, one hundred fifty years ago, Benito Juarez was “[t]he first and last Indian to sit on the nation’s highest tribunal.” *Id.*

20. *See* THE LATIN AMERICAN WATER TRIBUNAL, http://www.tragua.com/index_english.html (last visited Mar. 21, 2011).

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including the formation of the tribunal, case selection, and the structure of the public hearing.²¹ Section III will discuss both how the LAWT overcomes problems with the current legal system and the success of the tribunal as an ethical tribunal and public forum.²² Section IV is a case study, analyzing the conflict surrounding the Cutzamala System in Mexico and the subsequent public hearing²³ held by the LAWT.²⁴ Section V will discuss the future impact of the LAWT on the field of alternate dispute resolution.²⁵ Although the tribunal is young, the LAWT combines various dispute resolution approaches in such a way that the disadvantages and drawbacks of traditional mediation and arbitration are eliminated; consequently, the LAWT provides a forum for indigenous communities to resolve water disputes based on the ethical and public nature of the hearings.

II. THE LATIN AMERICAN WATER TRIBUNAL

The LAWT provides a forum for communities to expose environmental problems in a semi-legal context. First, the tribunal developed out of a rich tradition of arbitral bodies.²⁶ Secondly, the tribunal selects cases based on an evaluation of the scientific research conducted.²⁷ Finally, the structure of the actual forum is similar to that of a typical legal matter.²⁸

A. *The Formation of the Tribunal*

The tribunal is “standing on the shoulder of giants” in that it has been educated and inspired by previous tribunals in Europe and South America.²⁹

21. See *infra* notes 26-70 and accompanying text.

22. See *infra* notes 71-101 and accompanying text.

23. Mazahua Movement v. Rep. of Mex., Latin Am. Water Trib., Transfer of water to Mexico City using the Cutzamala System (Mar. 2006) [Spanish] [hereinafter Mazahua Movement], available at http://www.tragua.com/audiencias/2006/veredictos_2006/CutzamalaEcomunidades.pdf.

24. See *infra* notes 102-51 and accompanying text.

25. See *infra* notes 152-63 and accompanying text.

26. See *A River Made Up in a Long Journey to Istanbul*, THE LATIN AMERICAN WATER TRIBUNAL, http://www.tragua.com/english/virtual_library/official_notices/river_to_istanbul.html (last visited Apr. 18, 2011) [hereinafter *River to Istanbul*].

27. See *History*, THE LATIN AMERICAN WATER TRIBUNAL, <http://www.tragua.com/english/history.html> (last visited Apr. 18, 2011).

28. See *id.*

29. See *The Fundamentals*, THE LATIN AMERICAN WATER TRIBUNAL, http://www.tragua.com/english/the_fundamentals.html (last visited Mar. 21, 2011).

In 1983, people gathered in Rotterdam, Netherlands, to hear cases regarding damage to the Rhine's river basin.³⁰ This gathering was the first ever public hearing performed by an environmental tribunal. The hearing allowed the media and the community to engage in interactive policy development experiments³¹ that helped enforce environmental policies and strengthen contamination safeguards.³² In 1992, a public hearing occurred in Amsterdam that heard cases from Asia, Africa, America, and Oceania regarding severe water contamination disputes; subsequently, the trials held governments and international corporations accountable.³³ The Brazil Water Tribunal, an NGO-run water court, had its first public hearing in Florianopolis to review environmental disputes arising from a hydroelectric generation project, agrochemical contamination, mining, and radioactive contamination.³⁴ These tribunals pursued justice by promoting solutions to severe contamination that threatened water systems and access to water.³⁵ Tribunals such as these laid the groundwork for the Central American Water Tribunal (CAWT) and the subsequent LAWT.

The CAWT was created in 1998 "with the purpose of contributing to the resolution of conflicts related to water ecosystems in Central America."³⁶ At the turn of the twenty-first century, Central America had a population of forty million people, and fifteen million people had no access to potable water.³⁷ While the majority of people get their drinking water from nature (usually untreated springs), the amount of water available per capita is dropping and scientists predict that by 2025 individuals will only have twenty-one percent of the amount of water available in the 1940s.³⁸ The founders of the tribunal were responding to the "democratic deficit in water

30. *Id.* See also DANTE A. CAPONERA, THE LAW OF INTERNATIONAL WATER RESOURCES 217-63 (1980) (providing select history of water disputes and resulting decisions from international tribunals, national tribunals, and arbitral awards).

31. See BERT ENSERINK, DILLE KAMPS & ERIK MOSTERT, PUBLIC PARTICIPATION IN RIVER BASIN MANAGEMENT IN THE NETHERLANDS: (NOT) EVERYBODY'S CONCERN 19 (2003).

32. *History*, *supra* note 27.

33. See *River to Istanbul*, *supra* note 26.

34. *The Fundamentals*, *supra* note 29.

35. See *id.*

36. Maganda, *supra* note 15, at 688.

37. *Water and Resources*, WATERUNC.COM, <http://www.waternunc.com/gb/CAWT.htm> (last visited Mar. 21, 2011).

38. *Id.* These projections for the twenty-first century are by Population Action International, and the statistics are based on demographic growth alone. *Id.* Essentially, the projections do not factor in water loss due to "contamination of water tables, deforestation, industrial growth, the increase of lands used for agricultural, and other destructive processes which seriously affect the quality and quantity of water available." *Id.*

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management” and the “environmental impunity situation.”³⁹ The tribunal created a new justice setting that could resolve water disputes, promote cleaner technologies, and promote adequate water resource management.⁴⁰ The CAWT also created an outlet for democratic participation; thus, the marginalized groups that do not typically have access to traditional avenues for justice have a forum to voice their complaints when the degradation of water affects them.⁴¹ After two years and five public hearings, the CAWT transitioned into the LAWT.⁴²

The LAWT is unique. Instead of being a judicial tribunal, the LAWT issues nonbinding decisions and operates as an ethical tribunal.⁴³ The tribunal is an “autonomous, independent, and international organization of environmental justice created to contribute in the solution of water related conflicts in Latin America.”⁴⁴ The LAWT functions under the assumption that humans and nature should coexist in a balanced way; moreover, human dignity and preservation of water systems are both equal objectives.⁴⁵ The tribunal also has an ethical goal to preserve water—a human right—for future generations.⁴⁶ The authority of the court appeals to “the moral nature of its resolutions and the juridical fundamentals they are based on.”⁴⁷ The LAWT refers to declarations and international treaties that protect the environment and are essential to the functioning of the tribunal.⁴⁸ The LAWT is guided by the following principles: “justice alternative to the prevailing crisis of legality, ecological security, education[al] . . . awareness for . . . water systems protection, [and] water security and fair government . . . water [policies].”⁴⁹

39. Maganda, *supra* note 15, at 688.

40. *See id.*

41. *See id.*

42. *See History, supra* note 27.

43. *See* Adam Davidson-Harden, *Latin American Water Tribunal: Using National and International Law to Form a Basis of Water Ethics*, in LOCAL CONTROL AND MANAGEMENT OF OUR WATER COMMONS—STORIES OF RISING TO THE CHALLENGE (2008).

44. *See* THE LATIN AMERICAN WATER TRIBUNAL, *supra* note 20.

45. *Id.*

46. *Id.*

47. *Id.*

48. *See id.* The court defers to international law enumerated in treaties such as the Universal Declaration of Human Rights, ISECR, and the U.N. Convention of the Law of the Seas. *Water Declarations*, THE LATIN AMERICAN WATER TRIBUNAL, http://www.tragua.com/english/water_declaration.html.

49. THE LATIN AMERICAN WATER TRIBUNAL, *supra* note 20.

B. Case Selection

The LAWT has held six hearings, received fifty-eight cases, and handled more than 250 consultations since its inception in 1998.⁵⁰ Any individual, community, or organization that is aware of a threat to water (mismanagement or misuse) may file an action with the tribunal; additionally, any individual or community who suffers a consequence of water misuse may file a denunciation before the tribunal.⁵¹ Acts or omissions from public institutions, individuals, or industries that contaminate, misuse, or threaten the water resources may be accused.⁵² Each allegation must be supported by scientific and technical evidence that demonstrates a negative impact on the environment as cases are selected by the LAWT Technical Commission.⁵³ This committee is composed of professionals and technicians who conduct a thorough study of each case and select the cases for public hearing that are the most representative and best supported causes in terms of content and coherence.⁵⁴ Often the members of the Technical Commission make site visits to evaluate the case or link several complaints into one case.⁵⁵ In what can be considered utilitarian, the LAWT Technical Commission selects cases that pose the greatest hazard to the largest population.⁵⁶ When a case is not worthy of a public hearing, technical guidance is still provided to the plaintiffs to help them resolve their conflict because the committee has already performed extensive technical analysis.⁵⁷ When a case is worthy of a public hearing, LAWT formally notifies the opposing party accused of environmental degradation so that it may respond to the allegations at the public hearing.⁵⁸

50. *Id.* Five hearings were held in Latin America: San Jose, Costa Rica in August 2000 and March 2004; Mexico City, Mexico, in March 2006; Guadalajara, Mexico, in October 2007; and Antigua, Guatemala, in September 2008. *Id.* The court also supported a hearing in Istanbul in March 2009 with the help of the Heinrich Böll Foundation to address the potential dams in the basin of the Tigris and Euphrates—an issue with great geopolitical importance. *Id.*

51. *See id.*

52. *See Procedures, THE LATIN AMERICAN WATER TRIBUNAL*, <http://www.tragua.com/english/procedure.html> (last visited Apr. 18, 2011).

53. *See id.*

54. *See id.*

55. *See* Silke Helfrich, *Essential Reasons for the Support of the Latin American Water Tribunal*, Apr. 5, 2006, http://www.boell-latinoamerica.org/download_en/2006-04-05artikel2TLA-silke-ingles_corr.pdf.

56. *Id.*

57. *See Procedures, supra* note 52.

58. *See Denounce, THE LATIN AMERICAN WATER TRIBUNAL*, <http://www.tragua.com/english/denounce.html>.

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C. *The Structure of the Public Hearing*

The public hearing itself is a high-profile event where civic organizations in Latin America expose and allege water mismanagement, the accused have the opportunity to respond, and the jury evaluates the situation.⁵⁹ Once a case is accepted by the LAWT Technical Commission, the protocol and structure is much like any other case.⁶⁰ First, plaintiffs present their case for thirty minutes, and the accused present their defense in thirty minutes; then, testimony from witnesses is given, and cross examination occurs for twenty minutes.⁶¹ The plaintiffs and the accused then have ten minutes to present a summary of their case and a conclusion.⁶² Jurors then have the opportunity to examine the evidence and question the witnesses before they deliberate.⁶³ The verdict is then announced publicly.

The dispute is heard by jurors mostly from Latin American countries, although some jurors are from other continents.⁶⁴ The jury is composed of members from various professional backgrounds with expertise in the public, educational, or scientific fields; however, all jurors share ethical integrity—the most important factor.⁶⁵ The jurors must attend the hearing, analyze the denunciation, issue the verdicts, and formulate recommendations.⁶⁶ While the jurors have unlimited time to deliberate, the

59. *See Procedures, supra* note 52.

60. *See Maganda, supra* note 15, at 690. Each party has legal counsel as “allegations are forwarded by civic organizations.” *Id.*

61. *See id.* at 690. From an American perspective, this short amount of time may seem outrageous; however, in many countries a typical trial only lasts a few hours or a day. For example, in China an entire case may be resolved within a few months, and the actual trial itself lasts only a few hours because cross-examination is limited and the judges takes an inquisitorial approach. *See* Sally A. Harpole, Lecture on Law and Arbitration in the People’s Republic of China at Novotel Peace Conference Room in Hong Kong (July 5, 2010). In Germany, hearings typically last between ten minutes and a day while the standard trial in France is between ten minutes and a half-day. *See* Maxi Scherer, *Part II: Procedural Law, in* INTRODUCTION TO COMPARATIVE LAW (2010). These differences can often be attributed to the general differences between civil law countries and common law countries. *See* Julian D. M. Lewis & Lawrence Shore, *Common Law Versus Civil Law: International Commercial Arbitration: Harmonizing Cultural Differences, in* AAA HANDBOOK ON INTERNATIONAL ARBITRATION AND ADR (Thomas E. Carbonneau & Jeanette A. Jaeggi eds., 2010) (highlighting the differences between civil and common law legal systems as they “collide” in international commercial arbitration tribunals).

62. *See Maganda, supra* note 15, at 690.

63. *See id.*

64. *See Procedures, supra* note 52.

65. *See id.*

66. *See id.*

verdict does not in fact assign guilt or designate responsibility; instead, the verdict contains detailed recommendations for each side and offers a list of responsibilities of each party to resolve the water conflict and to achieve environmental justice.⁶⁷ The verdict itself has no judicial power, and the verdict is not binding on the parties; however, it becomes a baseline for future negotiations between involved parties.⁶⁸ Because the judgment is not based on legal fault, the LAWT cannot apply sanctions: financial, penal, or administrative penalties.⁶⁹ However, the tribunal can propose a “moral sentence” or encourage a social refusal by Latin-American citizens against those who harm the water resources of the community.⁷⁰

III. DISPUTE RESOLUTION APPROACHES AND THE LATIN AMERICAN WATER TRIBUNAL

Alternative dispute resolution (ADR) methods attempt to settle disputes between parties outside of the courtroom. ADR includes settlement proceedings between two parties who are preparing for stages of litigation. Negotiation is another method to resolve disputes outside of court where two parties attempt to reach an agreement without a third party present.⁷¹ Mediation is another type of ADR where “a neutral person helps people reach [an] agreement.”⁷² Unlike negotiation and settlement conferences, mediation adds a third party to the table. Arbitration involves a third party also; however, the arbitrator is like the judge in litigation, except the setting in arbitration is less formal, and the rules are more relaxed. Arbitration is the “resolution of disputes between [two parties] by mutually acceptable third parties.”⁷³ Although arbitration has thrived in the private sector for

67. See Maganda, *supra* note 15, at 690.

68. THE LATIN AMERICAN WATER TRIBUNAL, *supra* note 20.

69. *The Fundamentals*, *supra* note 29. The tribunal “brings into practice an alternative research method enhancing the application of jurisprudence that is constructed on the basis of systems analysis, eco-centric principles, indicator based evidence, inversed evidence load, and the precautionary principle.” *Id.*

70. See *Procedures*, *supra* note 52. See also *River to Istanbul*, *supra* note 26 (“Although it is certain that the verdicts and resolutions of a consciousness tribunal are not obligatory for compliance by the authorities of any one country, the international diffusion of the sentences and the censorship from the international community will impel a moral sentence, encouraging the search for alternatives in the solution of hydrological conflicts.”).

71. See LEIGH THOMPSON, *THE MIND AND HEART OF THE NEGOTIATOR* 107 (4th ed. 2009). Negotiation is “an interpersonal decision making process necessary whenever we cannot achieve our objective single-handedly.” *Id.* at 2.

72. DWIGHT GOLANN & JAY FOLBERG, *MEDIATION: THE ROLE OF ADVOCATE AND NEUTRAL* 95 (2006).

73. Theodore J. St. Antoine, *Arbitration and the Law*, in *ARBITRATION IN PRACTICE* 9 (Arnold M. Zack ed. 1984).

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more than fifty years, arbitration is just recently beginning to gain popularity in the public sector; thus, arbitration is being adapted to resolve disputes in various fields.⁷⁴ Parties arrive at arbitration in a variety of ways: parties can agree to arbitrate, courts can order arbitration, or contracts may include arbitration clauses requiring parties to proceed with arbitration.⁷⁵

One of the purposes of the LAWT is to produce recommendations and moral sanctions that can be used later in negotiations;⁷⁶ thus, the result of the arbitration ideally furthers the negotiation process. In contrast, in collective bargaining situations, arbitration tends to weaken the parties' negotiations because parties often defer to the arbitrator instead of trying to resolve the issues between themselves.⁷⁷ Because the LAWT is not binding, there is no likelihood that the parties will defer to the decision of the tribunal, thereby allowing arbitration to become a tool in prior negotiations. The outcome of the tribunal becomes a tool in the future negotiations instead of the converse.

A. How the Latin American Water Tribunal Overcomes the Flaws of the Current Legal System

Justice is simply not available to everyone. Going to court takes both time and money. Some countries like India have court backlogs of 350 years while other countries suffer from the lack of legal representatives.⁷⁸ Litigation is also very expensive. For small communities, the possibility of retaining legal representation and assembling a case with the necessary

74. See ARNOLD M. ZACK, *ARBITRATION IN PRACTICE* v (Arnold M. Zack ed. 1984). Arbitration in the labor-dispute context has become widely accepted as part of the nationwide labor policy as a "viable, voluntary procedure for conflict resolution." *Id.* In the 1930s, only ten percent of collective bargaining agreements provided for arbitration; however, World War II provided an increase in industry, and the National War Labor Board, in determining the terms of the contracts, inserted arbitration clauses in the event that the parties did not settle the case outside of court. St. Antoine, *supra* note 73, at 9. Today, ninety-five percent of collective bargaining agreements include arbitration clauses. *Id.*

75. See STEVEN C. BENNETT, *ARBITRATION: ESSENTIAL CONCEPTS* 3 (2002).

76. See THE LATIN AMERICAN WATER TRIBUNAL, *supra* note 20.

77. See St. Antoine, *supra* note 73, at 11. In negotiations, the parties come to an impasse. Instead of trying to negotiate or mediate, the parties too quickly defer to the arbitrator. *Id.* Most likely, "any form of compulsory arbitration will probably have some tendency to dilute the collective bargaining process." *Id.*

78. Gary Haugen & Victor Boutros, *And Justice for All: Enforcing Human Rights for the World's Poor*, 89 FOREIGN AFF. 3, 53 (2010). "In the United States, there is approximately one lawyer for every 749 people. In Zambia, by contrast, there is only one lawyer for every 25,667 people; in Cambodia, there is one for every 22,402 people." *Id.*

scientific and technological analysis required is unlikely; however, action is required because many communities depend on water sources that are being destroyed or polluted. To address these concerns, the LAWT created a parallel legal system.⁷⁹ The tribunal uniquely confronts the “crisis of legality and the diminished effectiveness of laws on issues related to water resources” by offering recommendations and guidelines for the resolution of water disputes.⁸⁰ People with concerns can now report environmental destruction to the LAWT.⁸¹ However, communities still face obstacles when filing an action with the LAWT. The LAWT Technical Commission only accepts cases if there is sufficient scientific evidence establishing causation between the accused and the environmental degradation.⁸² Although the compilation of scientific evidence is expensive, fortunately, NGOs and other civic organizations typically sponsor some of the research given the public nature of the tribunal and many of the disputes.⁸³

In the second half of the twentieth century, nations became more concerned with equitable sharing and the adoption of a “new and just international economic order.”⁸⁴ The international scene shifted so that equitable distribution of resources became an issue of “institutionalized justice” instead of mere charity and grace bestowed on needy countries when it was convenient.⁸⁵ However, with an international policy focused on the equitable distribution of resources, the nations with resources are pitted against nations without resources; thus, national sovereignty is often threatened.⁸⁶ When multiple nations share a water source, the water dispute

79. *Water and Resources*, *supra* note 37.

80. *The Latin American Water Tribunal Puts “Water Polluters on Trial”*, LATIN AMERICA WEEK, Apr. 15, 2007, at 16 [hereinafter *Water Polluters on Trial*].

81. *Water and Resources*, *supra* note 37. The LAWT allows “diverse sectors of civil society to use their organizational skills, and to prosecute those responsible for damaging or otherwise abusing water resources and aquatic environments in the region.” *Id.*

82. *See Procedures*, *supra* note 52.

83. Helfrich, *supra* note 55, at 2-3.

84. OSCAR SCHACHTER, *SHARING THE WORLD’S RESOURCES* vii (1977) (providing an empirical analysis based on evaluative statements and behaviors of governments and international organizations of how governments and institutions are resolving disputes concerning resource allocation).

85. *Id.* at 9. When resources are given under the guise of charity, the gift corresponds with the sense of inequality; however, with a shift toward justice, sharing resources becomes institutionalized. *Id.*

86. Not only must nations determine what they want to equitably distribute between themselves, but nations must also determine what they want to equitably distribute between present and future generations. *See* SCHACHTER, *supra* note 84, at 11. This age old problem is such that “[s]ocieties have always had to determine how much of their current consumption should be given up for investment and, therefore, for future generations.” *Id.* Global needs, national needs, and individual needs coexist accompanied by the following attitudes: “(1) the apprehension over

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itself threatens national sovereignty.⁸⁷ States and individuals in the state can become embroiled in constant conflict over shared water sources.⁸⁸ Currently, the LAWT hears grievances brought by individuals against governments or private companies. However, the LAWT has the possibility of expanding to help resolve disputes where individual groups and *multiple* nations are parties to a dispute.⁸⁹ Resolving a conflict by filing a claim against a sovereign state can also be complicated.⁹⁰ The LAWT may be a

ecological and resource depletion; (2) the awareness of linkages and mutual interactions, summed up by the term ‘global interdependence’; (3) the interest in systems theory and systems approaches as methodologies for dealing with international problems.” *Id.* at 13.

87. See JOSHUA GETZLER, A HISTORY OF WATER RIGHTS AT COMMON LAW 3 (2004) (discussing the application of old legal principles such as *sic utere tuo ut alienum non laedas*—“use your own property as not to harm that of another”—as the basis and foundation for modern common law of water rights).

88. Within a nation, the citizens may fight over the negative impact one region faces when its water supply is utilized to serve other regions within the state. Nations are also often in conflict with one another. The very water that is used to draw borders between countries often becomes the very water that creates subsequent conflicts. See CAPONERA, *supra* note 30, at 3. Nations that share rivers or bodies of water must deal with the natural shifting of “borders” due to erosion, avulsion, or the human-made building of dams (for flood control, irrigation, or hydroelectric purposes); moreover, conflicts also arise with over-usage or pollution of shared groundwater sources. *Id.* Riparian doctrine attempts to define the difficult situation where “flowing water is a thing in constant state of change which may be diverted, abstracted, or polluted by competing users, and hence destroyed”; thus, “a running stream cannot be appropriated or possessed in the way that land as a stable, immutable object of property is capable of possession.” GETZLER, *supra* note 87, at 43.

89. For example, perhaps country A has a factory that discharges waste and pollutes the river. The now-polluted river flows from country A to country B. A small group of citizens in country B heavily rely on the water supply that is now polluted. The small group of individuals files a claim against country A and country B for the pollution they are now exposed to. The community bringing the claim against country A is more likely to have a fair trial in an international tribunal rather than filing a claim in country A’s own court. Filing a case in the opposing party’s court system should be avoided at all cost due to the risk of prejudice.

90. When states are in conflict with one another, very few bodies have the ability to bring claims against sovereign nations. See *generally* RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW (2008). The International Centre for Settlement of Investment Dispute (ICSID) is one arbitration tribunal that provides services for government and private investors. With the purpose of increasing international trade, ICSID was created as an autonomous international institution providing facilities for arbitration and conciliation of international investment disputes. INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTE, <http://www.worldbank.org/icsid> (last visited Apr. 3, 2011). The scope of ICSID is limited to member nation states who are part of the ICSID Convention and private parties who have given consent through bilateral treaties. *Id.* The ICSID tribunal’s ultimate goal was to create an independent arbitration system so comprehensive that national courts were no longer necessary; consequently, the fear that an international investment would be expropriated unjustly would no longer exist because ICSID would provide a remedy.

creative alternative for resolving conflicts between multiple nations instead of using alternative international judicial bodies.

B. The Success of the Tribunal as an Ethical Tribunal and Public Forum

The tribunal is young. The LAWT has heard relatively few cases.⁹¹ Moreover, it is difficult to gauge the effect that the verdicts and recommendations have had given the relatively short life of the tribunal. Development projects tend to have a long time frame from the initial inception of the ideas to their final completion; thus, when the tribunal issues its recommendations to halt or continue a project with various amendments, it is often difficult to determine whether the tribunal is effective.⁹²

The purpose of the tribunal is *not* to place blame for injustices on water authorities, political actors, or economic stakeholders; instead, the goal is to bring both parties to the table to resolve grievances.⁹³ The tribunal is not binding, but its verdict and recommendations call upon the inherent ethical sense of an individual and persuade states and companies to become accountable for their actions.⁹⁴ Moreover, “[t]heir verdicts might have moral force only, but [they] are intended to raise awareness of the unjust water management by governments and transnational companies.”⁹⁵ The LAWT creates “equity in affecting the nature of systems rather than winning battles within them” and helps “institutionalize social participation through its quasi-legal approach.”⁹⁶ Compared to other grassroots actions and radical

91. See THE LATIN AMERICAN WATER TRIBUNAL, *supra* note 20 (explaining that it has heard fifty-eight cases as of April 2011).

92. For example, the La Parota dam project will cause flooding to 17,000 hectares of land, which would displace 25,000 people—in effect, destroying the lives of indigenous people and their farming communities. U.N. Comm. on Econ. Soc. & Cultural Rights, Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, May 1-19, 2006, ¶ 10, U.N. Doc. E/C.12/MEX/CO/4, 36th Sess. (June 9, 2006), available at <http://www2.ohchr.org/english/bodies/cescr/docs/E.C.12.MEX.CO.4.pdf>. The LAWT determined that the project violated communal land rights and the economic social and cultural rights of the affected communities. *Id.* Although the LAWT recommended immobilizing the La Parota dam construction plans in 2006, officials refused to bring the project to a halt.

93. See Maganda, *supra* note 15, at 680. The tribunal goal is “to bring parties together in order to resolve grievances” whereby the public verdict is announced to ensure impartial monitoring—“the tribunal’s Achilles heel.” *Id.*

94. See Adam Davidson-Harden et al., *Latin American Water Tribunal: Using National and International Law to Form a Basis of Water Ethics*, in LOCAL CONTROL AND MANAGEMENT OF OUR WATER COMMONS—STORIES OF RISING TO THE CHALLENGE (2008), available at <http://www.ourwatercommons.org/sites/default/files/Local-Control-and-Management-of-Our-Water-Commons.pdf>.

95. *Water Polluters on Trial*, *supra* note 80, at 16.

96. Maganda, *supra* note 15, at 691.

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protests, the tribunal has the unique ability to endure beyond the typical social movement.⁹⁷ Furthermore, the tribunal may be particularly effective in Latin American cultures where the focus is on the community, not the individual.⁹⁸

The LAWt creates a “public space” for democratic debate of water issues because it invites participants, such as governments, NGOs, and stakeholders, to the table.⁹⁹ Additionally, verdicts are publicly announced so that both parties can be held accountable while impartial monitoring is guaranteed.¹⁰⁰ Mass media plays a role in spreading the tribunal resolution to various parts of the world to induce action from the international realm.¹⁰¹ Within the international arbitration community, more and more parties consent to having public hearings and posting their awards. Although the confidential nature of arbitration is typically an advantage because it removes the matter from the public eye and shields both parties’ international reputation, many parties agree to public arbitrations for the sake of transparency and public diplomacy.¹⁰² There are benefits to public

97. See Carmen Maganda, *Water Management Practices on Trial: The Tribunal Latinoamericano del Agua and the Creation of Public Space for Social Participation in Water Politics*, in *SOCIAL PARTICIPATION IN WATER GOVERNANCE AND MANAGEMENT: CRITICAL AND GLOBAL 271* (Kate A. Berry & Eric Mollard eds., 2010). Sidney Tarrow argues that “movements begin when radicals call for social mobilization. However, once the mainstream gets involved in the political issue, these radicals actually hurt the movement more than they help because their ideological inflexibility and sometimes violent behavior causes the movement to lose mainstream support.” *Id.* at 285.

98. Unlike individualistic cultures that look after their own interests, collectivist cultures have a strong identification with the in-groups such as family and community and have an ultimate desire to compromise to preserve friendships. Cristina Gabrielidis et al., *Preferred Styles of Conflict Resolution: Mexico and the United States*, 28 *J. CROSS-CULTURAL PSYCHOL.* 661, 664-65 (1997). As part of a collectivist culture, individuals view their own outcomes as being tightly intertwined with the outcomes of others; consequently, collectivist cultures “emphasize a concern for other people and relationships, whereas individualism emphasizes self-concern.” *Id.* at 663. When indigenous communities with more collectivist mentality confront corporations or government entities with more individualist mentality, the clash is inevitable. However, the public opinion of the corporation is derived from the collectivist community; consequently, the corporation must shift its thinking from itself to the community in order to gain public support.

99. Maganda, *supra* note 15, at 691.

100. See *id.* at 688.

101. See *THE LATIN AMERICAN WATER TRIBUNAL*, *supra* note 20.

102. A recent example is the Abyei Arbitration. See *Government of Sudan v. Sudan People’s Liberation Movement/Army*, Abyei Arb. (Perm. Ct. Arb. 2009), available at <http://www.pca-cpa.org/upload/files/Abyei%20Final%20Award.pdf> [hereinafter *Abyei Arbitration*]. This case was an intra-state dispute between two parties in Sudan regarding the implementation of the 2005 Comprehensive Peace Agreement—in particular, the boundaries and demarcation for the Abyei land

arbitration, but these options are not yet fully explored. Transparent arbitrations have the potential to create national healing after diplomacy and negotiations have failed. Transparent arbitrations can also be used to put moral, political, and public pressure on certain entities. When the accused defendants refuse to follow the recommendation of the LAWT, the verdict becomes a tool that public institutions, NGOs, and individuals can use to put pressure on the polluters to resolve the dispute. Furthermore, the public nature of the tribunal ensures dissemination of information to the public regarding the water management problems in Latin America.¹⁰³

The arbitral format of the LAWT allows plaintiffs to hold the defendants accountable to existing environmental laws. The non-binding nature of the LAWT means that a different kind of justice is served—a kind of justice that feeds the moral outrage and the public’s need to speak out against injustice. The LAWT empowers the communities that bring grievances because, through the tribunal’s resolution, individuals can make positive change to protect precious water resources. Furthermore, both parties are strengthened if they can come together and resolve the dispute.

IV. CASE ANALYSIS

Mexico City has a population of more than nineteen million and is one of the ten largest cities in the world.¹⁰⁴ Consequently, the management of water resources for the Mexico City Metropolitan Area (MCMA) is complex and problematic.¹⁰⁵ Because Mexico City struggles with relatively dry

territory. *Id.* Negotiations and diplomacy had failed, and neither party wanted to rely on the country’s constitutional court to interpret and apply the constitutional settlement agreement. The decision to publicize the Abyei arbitration was somewhat rare. The parties chose to broadcast the Abyei arbitration live on the web, which allowed the public to follow the details of the arbitration, including the expert testimony and the contribution of the five-panel tribunal. *See* Videotape: Rendering of Final Award (Abyei Arbitration, 2008) (on file with the Permanent Court of Arbitration), available at http://www.wx4all.net/pca/22-07-2009_1.6.html. By observing the trial, the individuals in Sudan could better understand the outcome and believe that it was a just decision arrived at fairly. Furthermore, neither party had to lose face politically because neither party was seen as “giving in” or “settling” since the decision was still handed-down from the tribunal. Additionally, as a safeguard, the public could put pressure on the government to accept the decision as final and binding if it failed to implement the final decision.

103. *See* Maganda, *supra* note 15, at 691.

104. ZONA METROPOLITANA DEL VALLA DE MEXICO, <http://www.edomex.gob.mx/poblacion/docs/2009/PDF/ZMVM.pdf>.

105. *See* NATIONAL RESEARCH COUNCIL, MEXICO CITY’S WATER SUPPLY: IMPROVING THE OUTLOOK FOR SUSTAINABILITY 19 (1995). Both the Federal District and the State of Mexico share the management of water for the MCMA and are each responsible for providing water to the land within its jurisdiction. *Id.* The 1990 census found that “[ninety-four] percent of the 15.1 million residents of the MCMA are serviced with a water connection either directly to the house or from a common distribution faucet in the neighborhood.” *Id.* at 20.

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aquifers, the city has had to ship in water from surrounding regions after it exploited its minimal groundwater reserves.¹⁰⁶ In 1982, the Mexican government worked with the Inter-American and World Bank to reroute water supplies to the capital from the Lerma River Basin and the Cutzamala River Basin.¹⁰⁷ The Cutzamala System became the most “imposing hydraulic infrastructure in Latin America.”¹⁰⁸ The system provides MCMA with approximately twenty-six percent of its water supply.¹⁰⁹

The Cutzamala System has become a point of contention. Water resources are closely monitored so communities that once had access to water are denied the precious resource—the source of life.¹¹⁰ The Mazahua people¹¹¹ are one of the ethnic groups that are severely affected. Although the Cutzamala water system passes through many Mazahua communities, the one hundred thousand Mazahuas living in the state of Mexico in highly impoverished conditions are denied access to the water.¹¹² The Cutzamala

106. *Id.* at 21-22 (providing tables showing water usage and raw water sources). Approximately seventy-two percent of the water used to serve the MCMA is “drawn from various well fields that tap the aquifer throughout the Basin of Mexico.” *Id.* at 21. The Basin of Mexico provides 44.4 cubic meters per seconds (cms) by using water from well fields, the Magdalena River, the Madin Dam, and other springs and streams. *Id.* at 28. The unique geology of the Basin in the State of Mexico has supplied water for human civilizations since the Aztec capital of Tenochtitlán. *See id.* at 8-18. Imported sources provide the remaining 15.9 cms with the Lerma well fields providing 5.3 cms and the Cutzamala River providing 10.6 cms; consequently, the total water supply between the basin of Mexico and the imported sources total 60.3 cms. *Id.* at 22-23 (depicting a visual map of the water sources feeding the MCMA).

107. *Id.* at 23 (utilizing the Cutzamala System to deliver water from the Lerma Basin and the Cutzamala River Basin, a distance of 127 kilometers with a 1,200 meter net rise in elevation, to provide water for the capital). *See also* WATER DISCOURSE (Les Productions L’Envers 2007), available at <http://www.youtube.com/watch?v=uJdtJO5O90o&feature=related>.

108. WATER DISCOURSE, *supra* note 107. The Cutzamala system utilizes a pumping network and artificial reservoir to supply the mass quantity of water to the metropolis. *Id.*

109. NATIONAL RESEARCH COUNCIL, *supra* note 105, at 23-24.

110. WATER DISCOURSE, *supra* note 107.

111. The identity of the Mazahua people lies neither solely in their language nor in their race; rather, to be Mazahua is to adhere to the traditions and the laws within the community in a way that benefits the whole community. Mikita Weaver, Mazahua Ethical Structure and Beliefs: An Insight into the Difference Between Western and Non-Western Philosophical Thought 7 (May 5, 2007) (unpublished manuscript, on file with Berea College Library) (citing Interview with Norberto Cortes, Founder and Director, Misión Mazahua, in San Felipe, Mexico (Aug. 2, 2006)). The Mazahua embrace the concept of justice where “justice then is harmony for the whole built upon fairness for each of the members, whether groups or persons,” and fairness means the entire community benefits as a whole. *Id.* (citing RUSSELL B. CONNORS, JR. & PATRICK T. MCCORMICK, CHARACTER, CHOICES & COMMUNITY: THE THREE FACES OF CHRISTIAN ETHICS 66 (1998)).

112. *See* Cevallos, *Mazahuas Choose Jail*, *supra* note 1.

System removes water from the Mazahua communities to provide a water supply to the twenty million inhabitants of the urban metropolis, Mexico City.¹¹³ The absence of an aqueduct system prevents the Mazahua people from participating in their domestic chores, daily agriculture, and breeding of livestock; moreover, the rivers are drying up.¹¹⁴ Destitute and outraged, the Mazahua people have reacted to the Cutzamala system in various ways.

The Mazahua people formed the Mazahua Movement for the Defense of Natural Resources.¹¹⁵ Eventually, the Mazahuas brought an action to the LAWT against the Mexican government for the Cutzamala System.¹¹⁶ Other groups of Mazahua people, led predominantly by women, began protesting.¹¹⁷ In late 2005 and early 2006, Mazahua women staged a protest. To demonstrate that the women were serious about gaining access to water, the women carried guns and barricaded the entrance to fences at the Cutzamala headquarters.¹¹⁸ Similar protests have been staged.¹¹⁹

Eventually, the Mazahua people decided to protest at the Fourth World Water Forum held in Mexico in 2006.¹²⁰ The 2006 Mexico LAWT was held parallel to the World Water Forum.¹²¹ Although many countries who attended the Fourth World Water Forum recognize that water is a fundamental human right for indigenous people, the Ministerial Declaration

113. See *Activists Demand Gender Equality*, *supra* note 12. One Mazahua said, “while they take the water to the cities, we don’t have any”; consequently, the Mazahua people are left destitute. *Id.*

114. See WATER DISCOURSE, *supra* note 107. Not only do the Mazahua people rely on fish as a food supply, but the drying of the river will likely have a disastrous affect on the ecosystem. *Id.*

115. See *id.*; *Activists Demand Gender Equality*, *supra* note 12.

116. See WATER DISCOURSE, *supra* note 107.

117. *Id.*

118. See *id.*

119. See Cevallos, *Mazahuas Choose Jail*, *supra* note 1. Mazahua Indians broke into the “Los Berros” water purification plant and shut off a water valve. *Id.* Although the water valve was turned back on, a group of fifty to seventy women of the “General Command of the Mazahua Women’s Army in Defense of Water” staged a protest and vigil to maintain a continual encampment outside the plant. *Id.* Even though the women knew shutting off the valve was a serious federal crime, the women were unafraid of taking radical action, stating, “We prefer jail over continuing without water.” *Id.* The same group also staged similar protests in September 2004, blocking chlorine deliveries instead of turning off the water valves. See *300 Mazahua Indians Seize Mexican Plant*, FOXNEWS.COM, Dec. 14, 2006, available at <http://www.foxnews.com/wires/2006Dec14/0,4670,MexicoWaterProtest,00.html>. As a result of the 2004 protests, and in exchange for crop damage from reservoir overflow, the Mexican Government gave the Mazahuas almost \$120,000 and promised to build water systems and provide grants. *Id.*

120. Xinhua, *Water Meet to Kick Off in Mexico*, THE HINDU, Mar. 17, 2006, available at <http://www.thehindu.com/2006/03/17/stories/2006031702111400.htm>.

121. See *Activists Demand Gender Equality*, *supra* note 12. The public hearing in Mexico in 2006 was the first tribunal under the name Latin American Water Tribunal (formerly known as CAWT). *Id.*

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did not include such a bold declaration.¹²² In contrast to the Fourth World Water Forum, the Mazahua people were more successful at the LAWT which expressly recognized that water is a human right.¹²³ Although the verdict and recommendations of the public hearing favored the Mazahua people, the actual outcome is yet to be determined.

Multiple hearings took place in Mexico City, Mexico, from March 13-20, 2006.¹²⁴ In the matter regarding “Transfer of water to Mexico City using the Cutzamala System,” the Mazahua Movement for the Defense of Water and Human Rights asserted the following claims.¹²⁵ First, Mexico City has expanded into a booming metropolis with growing urban and industrial demands that necessitated the overexploitation of groundwater and surface water sources; consequently, Mexico City now must find ways to transfer water to the city.¹²⁶ Second, the Mexican government utilized a hydraulic system to transfer water from the Lerma and Cutzamala river basins.¹²⁷ Third, implemented in the 1980s, the Cutzamala System itself involves the construction of eight dams and expensive high-energy pumping equipment that transfers water 130 kilometers through an uneven landscape.¹²⁸ Fourth, because Mexico City continues to expand and demand more water, the authorities plan on implementing the fourth stage of the Cutzamala System that requires more controversial projects likely to cause more social and environmental damage to the rural regions.¹²⁹ Fifth, the transfer of water out of the region where the indigenous people reside negatively impacts the environmental, social, cultural, and economic aspirations of the indigenous people; moreover, the peasants are becoming increasingly resistant.¹³⁰ Sixth, the chemicals used in the purification process contaminate the flora and fauna and water resources of the Mazahua people while the dams and

122. See FINAL REPORT OF FOURTH WORLD WATER FORUM 219 (2006), available at <http://www.worldwaterforum4.org.mx/files/report/FinalReport.pdf>. Countries like Bolivia, Uruguay, Venezuela, and Cuba signed a supplementary declaration stating that water is a fundamental human right despite the Ministerial Declaration which failed to include expressly state that water was a human right. *Id.* at 221.

123. See *Activists Demand Gender Equality*, *supra* note 12.

124. Mazahua Movement, *supra* note 23, at 4.

125. See *id.* at 1-2.

126. *Id.* at 1.

127. *Id.* at 1-2.

128. *Id.* at 2.

129. *Id.*

130. *Id.*

hydraulic systems increase soil erosion, deforestation, and crop damage.¹³¹ Seventh, the fight over water and land expropriation by the government forces individuals to relocate and eliminates indigenous cultural sites.¹³² Eighth, although the Mazahua people have attempted to promote a vision of sustainability, the government has not upheld their pledge to supply water to the communities and to adequately compensate the Mazahua for the damages incurred.¹³³

The LAWT recognizes the following “recitals.”¹³⁴ Humans have a universal right to water in adequate quantity and quality as a fundamental human right, and states should fully protect the exercise of this right.¹³⁵ To respect human dignity and promote the exercise of citizenship, all humans should be guaranteed the basic amenity of water in adequate quantity and quality.¹³⁶ Transferring water causes damage to the land, the culture, and the livelihood of the indigenous population.¹³⁷ The authorities have acted with ignorance in regard to the indigenous people’s rights to develop their traditions, culture, and way of life; moreover, the authorities have failed to respond to the needs and demands of surrounding communities affected by the Cutzamala system—including the Mazahua people.¹³⁸

After reviewing the submission, hearing the statements of each party, and weighing the testimony, the LAWT reached the following conclusion and offered the following recommendations.¹³⁹ The tribunal concluded that it was not feasible to transfer water to Mexico City from other basins.¹⁴⁰ Particularly, transferring water is not a solution to the city’s exploding water demands because it infringes on the Mazahua people’s right to control its own territory and natural resources.¹⁴¹ The tribunal recommended that the Mexican government cancel the implementation of the fourth stage of the Cutzamala system.¹⁴² The government should also compensate the Mazahua people for the benefit Mexico derived from the use of Mazahua land and compensate the Mazahua for the harm the Cutzamala system caused—the

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 2-3.

135. *Id.* at 2.

136. *Id.* at 2-3.

137. *Id.* at 3.

138. *See generally id.* at 2-3.

139. *Id.* at 3.

140. *Id.*

141. *Id.*

142. *Id.*

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socio-environmental deterioration.¹⁴³ The government should implement a drinking water program in Mazahua regions to help solve supply problems in the community.¹⁴⁴ The Cutzamala System should also limit the exploitation of various rivers to ensure that the wells and aquifers can recover ecologically.¹⁴⁵ The government should also return to its rightful owner any expropriated land not currently being used by the Cutzamala System and compensate for any damages to the land.¹⁴⁶ The Cutzamala System must be redeveloped to prevent sludge and pollutants from contaminating surface currents, and the water treatment systems should be redesigned to prevent discharge from going directly into other bodies of water.¹⁴⁷ The government should also protect archeological sites and decrease expansion to protect areas that have high ecological and hydrological importance.¹⁴⁸

Mexico City's water problems will continue to be a topic of concern. In December 2006, nine months after the public hearing, the situation remained much the same.¹⁴⁹ Local newspapers cited the results of the LAWT hearing, but the Mazahua Indians continued protesting instead of using the information in negotiations.¹⁵⁰ In March 2009, Mexico City was experiencing water service cut-offs, and local newspapers reported that the water problem would only get worse by the beginning of 2010.¹⁵¹ Mexico has attempted to find more water sources by trucking it in, channeling the water, and tapping into aquifers; additionally, the city has attempted to reduce water intake by repairing leaky pipes that can account for the loss of nearly forty percent of tap water.¹⁵² Despite criticism from Mazahua

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *See 300 Mazahua Indians, supra* note 119 (discussing the December protests).

150. *See Cevallos, Mazahuas Choose Jail, supra* note 1 (“[T]he Cutzamala system led to a decline in the environmental, social, cultural and economic conditions of the Mazahua peoples in Mexico, and prompted numerous problems and increasingly organized peasant protests.”).

151. Nacha Cattán, *Mexico City's Water Woes May Get Worse, Officials Say*, THE NEWS (MEXICO CITY), Mar. 22, 2009. Senior Conagua official Jorge Efren Villalón said, “We cannot keep sending water that we no longer have.” *Id.*

152. *See id.* According to David Barkin, a water expert with Autonomous Metropolitan University in Xochimilco, “Not all water experts agree that large-scale projects outside the city are the answer. The capital must become self-sufficient with small reservoirs and treatment plants.” *Id.* Furthermore, “Water authorities see inter-state cooperation as essential to long-term fix-it plans.” *Id.*

farmers, officials state that “Mexico’s water is federally owned and must be distributed where it is needed. . . . Smaller projects just won’t be enough for the growing metropolis of [twenty] million people.”¹⁵³ The situation remains much the same because the water is federally owned, so the government will continue to take what they need from the Mazahua people. Ideally, the Mazahua people can use the LAWT recommendations in the future as negotiation terms. If the LAWT recommendations are implemented properly, the Cutzamala System can serve the needs of Mexico City without the detrimental consequence on the Mazahua People. The needs of both parties can be met if the parties are willing to resolve the problem with creative, integrative agreements.

V. IMPACT OF THE LAWT IN THE ALTERNATIVE DISPUTE RESOLUTION FIELD

Approaching a water dispute solely from a legal perspective will limit the number of solutions.¹⁵⁴ Like many other practice fields, a lawyer must consider various techniques for resolving a water resource dispute, including cooperation by negotiated resolution, facilitation by a third party,¹⁵⁵ decision by a non-judicial third party,¹⁵⁶ or reframing the issue to accommodate both

153. *Id.* In fact, Juan Carlos Guasch, a consultant with the Metropolitan Water and Drainage System, has said, “If you look at the costs, building small reservoirs would be more expensive than bringing water all the way from the Gulf of Mexico, desalinizing it and adding it to the tap system.” *Id.* Mexico City must consider various options to implement a water management system that can meet the city’s needs. See LUIS V. CUNHA ET AL., MANAGEMENT AND LAW FOR WATER RESOURCES 245-60 (1977) (discussing the principles, characteristics, financing, and actions required of a suitable and effective water management policy).

154. See BEYOND LITIGATION: CASE STUDIES IN WATER RIGHTS DISPUTES 12 (Craig Anthony Arnold & Leigh A. Jewell eds., 2002) (examining the fairness, efficiency, and sufficiency of using litigation to resolve water disputes in five United States water disputes). Four lessons can be learned from the litigation approach in water conflicts: first, framing water disputes as legal disputes misses the long-term, multifaceted, and beyond-legal aspects of water conflicts; second, water disputes involve a series of iterations before resolution is reached (if it is reached), such as courts, negotiation sessions, legislatures, and public opinion; third, litigation is just one strategy that can be used to resolve water resource conflicts; and fourth, a dispute over water resources includes the juxtaposition of conflict and cooperation. *Id.* at 12-14.

155. *Id.* at 14. Facilitated resolution by a third party can occur through the use of a mediator, a government agency, or through public opinion. *Id.*

156. Decision by a non-judicial third party can be issued by an arbitrator, administrative agency, or legislative body. *Id.* Mini-trials or senior executive appraisals are other types of third-party assisted settlement options. See JULIAN D. M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 183-84 (2003). Dispute resolution boards or dispute resolution advisors are also becoming popular because they allow parties in conflict to expeditiously make a decision during the contractual relationship; the decision can later be reviewed by an arbitral tribunal after the main contract is concluded. *Id.* at 184.

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conflict and cooperation. The lawyers and parties of a conflict must “think creatively about possible solutions, identify areas of common ground and areas of competition, understand all sides’ interests and goals, [and] attend to public relations and political activity,” which will ensure that the resolution of the dispute “continues to remain effective.”¹⁵⁷ The LAWT provides small communities and indigenous groups with an outlet to express their voice in a relatively inexpensive manner. Moreover, LAWT offers recommendations in a public hearing that can be used in future negotiations that do not bar the parties from taking subsequent legal action.

Although ADR increases access to justice by offering inexpensive and creative methods to resolve conflicts outside the courtroom, it could become a “tool for diminishing the judicial development of legal rights for the disadvantaged.”¹⁵⁸ Despite the rising popularity of ADR, scholars and academics have asserted various concerns about whether negotiation, mediation, and arbitration are appropriate alternatives in areas such as family law,¹⁵⁹ labor law,¹⁶⁰ civil rights,¹⁶¹ and environmental law.¹⁶² With the LAWT, environmental disputes between weaker communities and big

157. BEYOND LITIGATION, *supra* note 154, at 14.

158. Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 679 (1986). If all civil rights cases had been mediated in the 1960s and 1970s, civil rights law would have been “impoverished.” *Id.* Furthermore, “[t]he wholesale diversion of cases involving the legal rights of the poor may result in the definition of these rights by the powerful in our society rather than by the application of fundamental societal values reflected in the rule of law.” *Id.*

159. See Andre R. Imbrogno, *Using ADR to Address Issues of Public Concern: Can ADR Become an Instrument for Social Oppression?*, 14 OHIO ST. J. ON DISP. RESOL. 855 (1999) (asserting that society is threatened when familial matters such as child abuse and domestic violence are resolved using private dispute resolution instead of public adjudication; suggesting private dispute resolution may further victimize and isolate already vulnerable victims).

160. See Betty D. Robinson, *Considering Grievance Mediation*, 5 EMP. RESP. & RTS. J. 143 (1992) (suggesting that the shift from formal arbitration towards grievance mediation in labor law fails to recognize the uniqueness of individual labor-management and the necessity of formality).

161. See Wayne D. Brazil, *Should Court-Sponsored ADR Survive?*, 21 OHIO ST. J. ON DISP. RESOL. 241, 276-77 (2006) (advocating for court ADR programs generally; suggesting *different* standards for civil rights cases and cases with a party proceeding *in forma pauperis*).

162. Judge Patricia Wald suggests that the nation’s toxic waste disputes can only be resolved through negotiations rather than litigation. The sheer size, expense, and amount of these cases require an alternative outside of litigation. See Edwards, *supra* note 158, at 677. However, private environmental negotiations that bypass federal and state agencies may not serve the public interest if the negotiations result in weaker standards that compromise strict government standards. See *id.* at 677-78. A community with little resources—often the case in toxic waste cases—will have relatively little bargaining power. See Amber McKinney, *The ACLU and the Propriety of Dispute Resolution in Civil Rights Controversies*, 6 PEPP. DISP. RESOL. L.J. 109, 121-22 (2006).

business or big government are being resolved outside of court. Critics of ADR raise various concerns when repeat-players attempt to resolve conflicts in arbitration.¹⁶³

The confidential nature of arbitration is a big concern. Precedent cannot be created when the result of arbitration is confidential.¹⁶⁴ Originally, a company that created a product dangerous to the public would be held accountable through multiple lawsuits from injured plaintiffs; now, however, the company can quietly resolve each dispute in arbitration. The accountability factor slowly vanishes. Likewise, the company that continues to pollute can quietly pay off the local farmers or fishers without the threat of multiple lawsuits which might otherwise provide a real reason to stop polluting. These allegations against ADR would be severe except the LAWT is not confidential.¹⁶⁵ Instead, it is a public forum for individuals to voice their concerns and challenge the companies and governments to clean up their act. While there is no legal precedent, the public nature of the dispute allows people to rely on the results.

The binding nature of arbitration is also a great concern. Typically, arbitration is binding, and there are few ways to appeal the dispute.¹⁶⁶ The finality of arbitration is one of the many advantages of arbitration, depending on the vantage point. In many fields, arbitration is also less formal, so the rules of evidence and other formal aspects of discovery and litigation—that typically protect individual due process—are absent.¹⁶⁷ These problems with ADR would pose a threat to the soundness of the LAWT except the LAWT is non-binding. The fact that the LAWT is non-binding ensures that the parties still have a litigation alternative. Moreover, the company will not substitute arbitration for litigation because litigation is still possible according to the parameters of the tribunal. Although the format of the public hearing is much more informal than a court setting, the parties can still take their issue to court if they so choose.

163. See JAY FOLBERG ET AL., *RESOLVING DISPUTES: THEORY, PRACTICE, AND LAW* 707 (2010).

164. Cf. *supra* note 102 (referring to the Abyei arbitration where the decision was made to publicize the arbitration proceedings live on the web).

165. THE LATIN AMERICAN WATER TRIBUNAL, *supra* note 20.

166. See FOLBERG ET AL., *supra* note 163, at 537.

167. Arbitration, especially in an international context, varies depending on where the parties originate. In arbitrations that occur between parties from both civil and common law backgrounds, the discovery and court proceedings may vary. See Lewis & Shore, *supra* note 61, at 37. For example, parties may share experts or rely on a tribunal-appointee. *Id.* at 41. Often, examination of witnesses is less inquisitorial and may involve more direct and pointed questioning (such as “why did you do that?”) because the tribunal assumes that a witness is party-generated and will be of less value. *Id.* at 38-39. As parties from different legal backgrounds “collide” in international arbitrations, due process rights typically associated with the civil law system are lessened.

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However, because the LAWT is not binding, its success might be hindered. In reality, the parties are given an opportunity to resolve their dispute, and the verdict becomes a tool in negotiations as well as a tool for the community to exert pressure and raise concerns around the globe using mass media. This type of social pressure might work well when the government is polluting or when the legislative branches are creating policies that have a detrimental effect on water resources. However, given their near infinite resources, big corporations can easily ignore the social pressure.¹⁶⁸ In fact, a glaring error of the tribunal is how difficult it is to persuade both parties to submit to the tribunal.¹⁶⁹ Although the power is in the defendant's hand whether or not to adhere to the tribunal's recommendation, it is the *right* thing to do—or at least that is the underlying vibe the tribunal hopes to achieve. To be successful, the tribunal must appeal to each individual's sense of ethics.

The tribunal is unique. Although arbitration raises many red flags, the LAWT was uniquely crafted to avoid these obstacles. The tribunal is public in nature, so it is accessible and available to everyone; moreover, the LAWT is nonbinding, so litigation is still possible if the misuse of water still continues. Instead of legal sanctions or penalties, the accused is discouraged from continuing negative behavior through moral persuasion, social pressure, and tactical maneuvering. This approach is sound.

VI. CONCLUSION

Water is becoming scarcer.¹⁷⁰ An old proverb states, “Water that has been begged for does not quench the thirst.”¹⁷¹ More and more people at an

168. However, this is not always true. Starbucks recently adjusted farmers' wages in some countries like Ethiopia. Kim Fellner, *Starbucks v. Ethiopia*, ETH. REV., Sept. 16, 2008, <http://www.ethiopianreview.com/content/6939>. In doing so, Starbucks's policy shifted toward including more fair trade products. *Id.* Not only did NGOs and organizations like Oxfam exert significant pressure, but consumers also exerted pressure. *Id.* Now, the corporation of Starbucks appeals to a new crowd. *Id.* It is often difficult to control the behavior of corporations; however, corporations are more motivated to change when consumer rapport is considered a factor.

169. The LAWT still continues whether or not the defendant “shows up” to defend their side of the case; however, the hearings are less productive when only the plaintiffs are able to put their case on. The defendant has the power in this situation—it can refuse to attend the hearing, and the defendant can refuse to follow the recommendations of the tribunal. Needing both parties to consent to the tribunal is a drawback of various alternative dispute resolution approaches.

170. United States Representative, Jim Wright, said, “The crisis of our diminishing water resources is just as severe (if less obviously immediate) as any wartime crisis we have ever faced.

international level are beginning to acknowledge the importance of recognizing water rights. Achieving water rights is especially important for improving the lives of indigenous people. Slowly but surely, the right to a drinking supply is gaining recognition as a human right.¹⁷² Because water disputes inevitably arise, a community or group of individuals must determine what course of action they want to take to resolve their conflict. Justice in the courtroom is unlikely: courts have enormous backlogs, litigation is costly, and indigenous communities often face an uphill battle of discrimination in the political arena. ADR methods provide a wide variety of methods more suited to resolve conflict.

The LAWT is a creative approach. First, the hearing is much cheaper than litigation; moreover, nongovernmental organizations provide assistance to communities in need. Second, the hearing is public to ensure that the parties are held accountable through impartial monitoring and social pressure. Third, the verdict is nonbinding, so the right to pursue future litigation is not waived; moreover, the recommendations of the tribunal can be used in subsequent negotiations. Fourth, the tribunal's unique approach helps the parties maintain a relationship that is extremely important when the water issues are complex and the very nature of the dispute involves ongoing conflict. Fifth, the tribunal verdict carries a moral force in the community that raises awareness of injustice around the globe.¹⁷³

The tribunal provides indigenous communities and groups with a means to achieve justice when the legal system cannot. Although a legal framework and relevant laws exist, water disputes are not being successfully resolved in the legal realm. Since the 1980s, the Cutzamala System has threatened the lifestyle of the Mazahua people. The Mazahua community brought the Mexican government to the LAWT, and the tribunal issued recommendations. Although the conflict over the Cutzamala persists, the public hearing laid a foundation for future negotiations and conflict resolution. The Mazahua communities continue to struggle, but the tribunal "got the wheels turning," and the tribunal validated the community's concerns regarding their rights. The tribunal also offered recommendations to the Mexican government to more effectively operate the Cutzamala System without causing harm to the Mazahua community. The

Our survival is just as much at stake as it was at the time of Pearl Harbor, or the Argonne, or Gettysburg, or Saratoga." *Water Polluters on Trial*, *supra* note 80, at 21.

171. *Id.* at 5.

172. *See Water Declarations*, *supra* note 48.

173. Moral force plays a role, and the tribunal must "placate the sense of injustice aroused by each case." Diego Cevallos, *Latin America: Water Polluters "On Trial"*, INTER PRESS NEWS AGENCY, Mar. 15, 2006, available at <http://ipsnews.net/news.asp?idnews=32515>.

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recommendations will hopefully help the Mazahua people take productive steps in the future that will lead toward resolution.

The LAW—standing for “vigilance, coordination and agreement for the protection of the water resources in Latin America”—helps resolve water disputes even without binding verdicts.¹⁷⁴ In light of the legal system failing to successfully resolve ongoing water disputes, the LAW offers a new dispute resolution approach that avoids the disadvantages and drawbacks of the more traditional mediation and arbitration approach. Consequently, the young LAW provides a forum for indigenous communities to resolve water disputes utilizing an ethical tribunal to put public pressure on polluters.

174. *Water Polluters on Trial*, *supra* note 80, at 16.