4. POLICY RECOMMENDATIONS

4.1 Government responsibility

Given the differences between the Canadian and Taiwanese examples, their unique historical foundations and the different cultural, legal and developmental state of affairs, the wholesale adoption of the Canadian system would neither be realistic nor prudent. However, the Canadian example holds many lessons, both in what had worked in the past and what has not worked. Moreover, the Canadian mechanism is designed to accommodate a certain degree of flexibility due to the heterogeneity of the players involved. ROC policymakers would do well to turn their eyes to the Canadian government's Federal Policy Guide on the issue of aboriginal self-government, not for a blueprint, but for an understanding of why certain negotiation objectives and methods of power-transfer were successful.

The ROC government must, first and foremost, recognize the inalienable right of the Formosan aborigines to self-government. There should be no question on this matter, and indeed it should be enshrined in no uncertain terms in the Constitution. International law provides as a fundamental element the concept of self-determination. This began as an understanding vis-à-vis the right of a nation to self-determination in regards to other nations in the world (for example, in response to concerns about colonialism) but has come, over time, to include the rights of

aboriginal groups to have a say in their own fate. However, this concept remains a vague one and its terms are relatively undefined. Certain concepts, such as what groups qualify for consideration, and what form and extent the mechanism of self-rule takes, remain open to interpretation.

In the modern era of globalization and multilateralism, the world has, for the most part, moved beyond the Westphalian model and towards what proponents of the international system hope will be a more equitable, responsible pattern of international interaction and governance for the betterment of humankind. Even today, international law has taken on more prominence in issues of accountable governance, and one of the basic tenets of international law is that governments shall demonstrate a respect for the human rights of the governed. There is precedent for the inclusion of ethnic and linguistic minorities in this equation.

Article 27 of the International Covenant on Civil and Political Rights states:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

This, in conjunction with Article 1, would seem, on the surface of it, to provide a legislative mandate for aboriginal self-government in the highest tiers of international law. Article 1 states:

> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
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> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
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> 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

There is a precedent for aboriginal peoples using the right of individual petition to obtain a ruling from the Human Rights Committee on perceived violations of Article 27. Moreover, Article 14 of the International Labour Organization (ILO) Convention No. 169 concerning indigenous and tribal peoples in independent countries states the following:

1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.

2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.

3. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned.

Clearly there is more than token attention paid in the international system to the issue. The question remains, however, whether the current state of international law concerning human rights can be used as anything more than a blunt instrument to protect the rights of indigenous peoples, and whether individual governments unwilling to comply can be effectively coerced by the international community, providing there is sufficient political currency for such efforts. In addition, Taiwan's unprecedented political situation vis-à-vis the international community presents a host of unique problems that further call into question the applicability of international law. Suffice it to say that the rights of self-rule of indigenous peoples around the world are recognized in principle.

Though provided for in international law, this concept must be enshrined in the ROC Constitution. Unfortunately, constitutional change is not so simple in Taiwan, especially in the current political climate, but it is imperative that this right to self determination be enumerated among the rights delineated in the nation's prime law. Moreover, the Constitution must reflect the fact that this right is properly to be expressed in the form of duly negotiated treaties between authorized aboriginal community groups and the central government. Once these basic conceptions are expressed in the nation's constitution—the very codification of a nation's identity—it will be accepted by mainstream opinion that the indigenous persons of the island have the right to chart their own political course as regards matters of their own internal administration, and in ways that are consistent with their own cultures, languages and unique identities, and above all, with their special relationship to their lands.

Moreover, the government must be committed to the principle that these rights are enforceable though the nation's judicial system, meaning it must be more than mere lip service. Indeed, the courts system in Taiwan is particularly weak. The Chinese culture that is prevalent in Taiwan tends to promote harmony over equity, and unfortunately the courts system reflects this. However, it is slowly improving, and there will doubtless come a day when the judicial system and the people of the island are no longer afraid of costly, time consuming litigation on the

matter of rights provided that it returns valuable results, for only then will the courts take their place as a pillar of government equal in importance and responsibility to the legislative and executive, which today are vying for effective control over the island. As with any right, there will be differing opinions on the nature and scope of aboriginal rights to self-governance, and the responsibility of settling these matters rests with the judicial system in cases where the parties involved reach impasse.

Naturally, litigation must be understood to be the last course of action when other techniques have failed, such as negotiation. The treaty process, which would involve good-faith negotiation between aboriginal groups and government, must naturally take precedence, which is why constitutional protections of the right to self-government are so important.

It must also be accepted that aboriginal governments, once implemented, will have to work closely with other levels of government in Taiwan, both laterally and from within the hierarchy of government. Genuine effort must be made to ensure the proper and efficient functioning of such relationships geared toward the success of the nation and its experiment in aboriginal self-rule, with a priority on cooperation over competition.

Not just the central governments, but county and city governments as well must be committed to the success of the process, as their participation in the negotiation process will be

of equal importance. Many of the matters under negotiation will fall within the jurisdictional boundaries of these sub-central governance units, and the outcome of talks will necessarily impact them as well. For that reason, they must have representation in appropriate talks and be signatory to the result thereof.

It is important the persons entering into treaty negotiations with the central government on behalf of a group or groups be authorized by the group they profess to represent, and that a continuity of support extend throughout the process—a process, it should be noted, that could take years, if not decades, in each individual case. It is therefore incumbent upon the aboriginal organizations involved that prior to entering into negotiations, all affected individuals are satisfied that they are being duly represented. This calls for a degree of intra-tribal unity that, to date, has been rare in Taiwan. This is an issue that rests solely with the groups themselves, and the central government cannot become involved in hand picking representatives with which to enter into negotiations, lest the entire process lose legitimacy.

As in the Canadian example, it must be understood that the right of autonomy does not imply the right of succession, or to the creation of sovereign independent states. Quite the opposite, in fact: the creation of self-governing aboriginal jurisdictions will help ensure that the

island's aboriginal population work in concert with, and not in isolation from, the rest of Taiwan, and that they contribute their unique history, traditions and viewpoints to the polity.

Perhaps one of the best lessons Canada has to teach falls only peripherally within the realm of aboriginal self-government, but is related to constitutional law, and that is the Canadian Charter of Rights and Freedoms. This document binds all levels of government and supercedes all legislation in the nation, applying equally to all individuals, aboriginal and non-aboriginal. As with all treaties, those realizing self-government agreements must adopt the Charter to govern their operation. Indeed, the Charter itself includes a clause guaranteeing its applicability in cases of aboriginal rights and self-government treaties.

The adoption in Taiwan of a Charter similar to Canada's would be unprecedented for such a young Asian democracy, but it is not outside the realm of possibility. The ROC Constitution has gone through several amendments since the democratization movement began in the late 1980s, and the DPP government has recently completed a round of groundbreaking constitutional amendments that effectively did away with the anachronistic National Assembly and put the onus on further constitutional amendments directly in the hands of the people of Taiwan. This achievement must not be belittled. Moreover, the administration of President Chen Shui-bian has signaled its intention to continue with another phase of constitutional

re-engineering, this time focusing on human rights. This latest round of constitutional amendments would be the perfect opportunity for the nation to adopt its own version of the Canadian Charter of Rights and Freedoms.

Which is not to imply that the process would be a quick or painless one: even in Canada, it was only through a difficult period of nearly three decades of constitutional mayhem marked by failed drafts, and a series of referenda, that the current state of affairs was arrived at, with the central primacy of the Charter. One of the most important aspects of the Charter is its directive of having a review by the judiciary overrule the actions of parliament. Likewise, the adoption of such a model in Taiwan would help temper the power of the legislature and empower the currently toothless judiciary as an organ to ensure that the individual rights of all Taiwanese are held supreme. In Canada, the adoption of the Charter created something of an activist supreme court. This development, if duplicated in Taiwan, would not be amiss. However, since the last round of constitutional re-engineering essentially kept the issue of aboriginal rights off the agenda, and made further constitutional revision subject to ratification by the Legislature and the people of the island, this created a situation where any further changes to the constitution to include sections on the rights to self-determination of indigenous peoples would be even harder to realize.

Given the fact that Taiwan's sub-ethnic groups each have their own unique cultures, languages, and circumstances, it must be understood that no single self-government model can be imposed on each. For that reason, extensive negotiations for each case are paramount in order to ensure that an equitable form of government is arrived at for each group that takes into account its unique political, legal, historical, and social state of affairs.

Moreover, the government must realize that self-governing units must be given wide discretion and the appropriate authority to exercise their right of autonomy. The purposes of the negotiations therefore are not to be bogged down in semantic or legal arguments over the meaning of the term self-government, but must cover the nuts and bolts of how administrative mandate is to be exercised. To that end, government negotiators must relinquish certain rights to the governmental unit being negotiated, such as the right to define certain elements that are integral to the aboriginal group in question. These elements may include issues of adoption and child welfare, marriage laws, definitions of group membership, protection of the group's language and culture, education within the jurisdiction, and the provision of health and social services. They must also, by definition, include the makeup of the governance mechanisms, such as the selection of leaders, so long as these follow democratic principles of universal suffrage—a defining element of the national identity as a democratic country.

As sub-central governmental units, the new jurisdictions to be created must have the mandate to enact certain laws and define certain offenses, such as the type normally covered by the nation's other, non-aboriginal sub-central government units. Moreover, it is absolutely essential that aboriginal tribunals or courts be empowered to adjudicate such offenses, and policing units be set up to enforce the jurisdiction's laws. Internal issues such as the delineation of property rights, the handling of estates, land-use and zoning issues and management of natural resources must be squarely in the hands of the aboriginal governments. Only in this way can traditional activities and customs, which may or may not involve agriculture, hunting, fishing and trapping, be protected as aspects of the way of life, and therefore the very identity, of the people in question.

The negotiation process must include the provision of detailed arrangements with respect to issues that may overlap with central-government purview, such as taxation, especially property taxes, management of group assets and the operation of public works and infrastructure projects. Issues such as public transportation, housing, and business licensing for enterprises on aboriginal lands should be recognized aboriginal responsibilities, although they may overlap with and therefore must be consistent with adjacent administrative units.

Just as there are a number of areas in which aboriginal self-governmental units should hold jurisdiction, and others where detailed delineation of responsibilities must be negotiated, so too are there areas that would naturally remain within the purview of the central government. These issues tend to have an impact on the national level and go beyond influencing only the indigenous inhabitants of the sub-central administrative unit. Issues in this category may include, but are not restricted to, the enforcement of national criminal laws and punishment for federal crimes, the operation of penitentiaries and emergency preparedness. In these cases, the primary responsibility should rest with the central or applicable county governments, and these laws would prevail in cases of overlap.

In the Canadian example, these issues also include such things as environmental protection initiatives, pollution prevention, and fisheries and migratory birds conservation, however it is understood that many of these issues have proven in the Taiwanese context to be thorny, and have the potential to be abused in an effort to create roadblocks to progress. This is especially true of the appropriation of the environmental impact assessment mechanism, which is all too easily abused for partisan political obstruction. Therefore, good-faith negotiation and cooperation is absolutely essential in such matters, and an equitable dispute-resolution

mechanism should be considered, (prior to the recourse of the courts) to ensure appropriate administration in such areas.

In addition, there are a number of administrative areas where there exist no convincing arguments for power-sharing. In these areas, it is important for the central government to remain the primary legislative authority. These normally include issues such as national sovereignty, national defense and international relations. In practical terms, these have impacts in areas such as military service, foreign policy, national security (especially the administration of armed-forces bases), negotiation of international treaties, and issues related to immigration, refugees and naturalization.

Moreover, the government cannot relinquish its mandate to oversee such aspects of governance as the active management of and regulatory authority over the economy, fiscal policy, currency controls, administration of the banking system, trade policy including negotiation of free-trade agreements, and protection of intellectual property rights. Lawmaking authority in areas such as the national health system, administration of the post, operation of national-level transportation systems and broadcasting shall likewise not be open to negotiation and should rest within the exclusive purview of the central government.

On the issue of implementing the results of successful negotiations, there are several mechanisms that, following the Canadian example, could be employed in Taiwan as well. The most common of these of course is the treaty system. The ROC government must be prepared to confer constitutional protection to treaties negotiated and completed between its negotiators and those of the claimant aboriginal associations. As discussed earlier, a constitutional amendment would be necessary before this can become a feasible reality. By their very nature, treaties produce compulsory responsibilities on the part of both parties, and must therefore have the force of constitutional mandate behind them. Since this carries implications for future generations, it is imperative therefore that matters under the protection of the constitution include the clear definition of aboriginal jurisdictional responsibilities and those that fall within the purview of the central and appropriate county governments, an unambiguous description of the persons to be subject to the treaty and the geographical area to which it applies, and the force of constitutional protection to the laws created by the aboriginal self-governance unit and its accountability to the people it serves.

Other issues of a provisional nature, including such things as funding provisions and welfare service implementation details, do not require the full force of constitutional protection, so a clear definition of what is and is not designed to be flexible and subject to changing

circumstances must be made. These issues, important as they are, are not treaty rights per se, but can be considered interim arrangements in the provision of such rights.

Other mechanisms for self-government can be implemented, such as through the passage of legislation, the signing of contracts or the agreement on memorandums of understanding. For example, legislation could give the force of law to signed contracts on technical or provisional issues toward the establishment of final self-governing units. Non-binding memorandums of understanding, though they do not have the legal protection of contracts, can be employed to signal a commitment to the power-sharing process, and are therefore also important mechanisms toward that end.

In geographical terms, it must be understood that the aboriginal self-governmental units will, in all likelihood, include jurisdiction over non-indigenous members of the population, and the matter of whose authority they fall under should be clearly addressed. In some cases, the aboriginal self-government will want to exercise territorial powers over the negotiated area, as discussed earlier, while in other situations it may the case that an asymmetrical mechanism is adopted in which aboriginal governmental units are restricted to administration of the group's members exclusively. This issue is more difficult than it may at first seem, and serious

consideration must be given to solving jurisdictional problems before they arise. For example, in the former case, a way must be provided for non-members to have some measure of input.

In many ways, the successful negotiation of a treaty or other legally binding agreement is just the beginning of the process, as the self-government stipulation contained therein must be applied. Therefore, it is important that these issues of transition be dealt with adequately, in some cases to the extent of being part of the negotiating process itself. In order to ensure that execution of the new governmental unit does not become obstructed by legal ambiguity, these changeover measures should be clearly laid out. For example, some aboriginal groups may want to gradually phase-in administrative responsibility over a period of time, not only to ensure a smooth transfer of power but also to train personnel and solve logistical problems. To what degree is possible, these needs should be anticipated and accounted for during the process of negotiation.

Part of this gradual transfer of authority will be the fiduciary obligations that the ROC government has to the island's aboriginal peoples. As negotiated power-sharing agreements take effect and aboriginal councils gradually assume a greater administrative role, it is important that this be cushioned by ongoing central government provision as per its responsibilities, only reduced gradually as its responsibilities are taken over by the created governmental unit. The process must not be conceived of as one in which the ROC government is abdicating its

responsibilities to the island's aboriginal peoples, but as one in which those responsibilities are being redefined and expressed in less paternalistic ways. There will be cases in which the created governments and the central government have concurrent obligations in the same areas, but in situations where the central government has given over control to self-governmental units, it is important that those units likewise assume the funding responsibilities.

For this reason, it is imperative that the same accountability mechanisms that are in place to ensure existing local-level governments fulfill their responsibilities to their constituents be instituted to protect the rights and livelihoods of the aboriginal constituents of new, negotiated self-governmental units. Moreover, the operation of the aboriginal government must be accountable for political actions, and its operation must be subject to its own internal basic law, one that is transparent and freely available not only to its constituent members but to other governments and parties that will realistically interact with that government.

Naturally, the new governments' financial record-keeping practices must be consistent with central-government laws and regulations, and should be similar to those mechanisms in place for other sub-central governments. This is especially important in such areas as public audits and transparency of public spending. Just as in the case of county and municipal governments around the island, aboriginal governments would be made accountable to the

legislature for spending monies provided by the central government, and the legislature must be satisfied that the public funds were utilized in the proper manner. It will be the responsibility of the aboriginal governments to eventually assume the responsibility of providing for its constituents the level of minimum basic services enjoyed by the population at large. This is not to say that such services will be identical—the situation will vary from are to area, and from group to group, however, a minimum of welfare provision and basic services must be made available, and to this end, the aboriginal governments must eventually assume the responsibility for raising funds, through taxation and other methods, to be disbursed in this manner.

Finally, any agreements, contracts or treaties successfully negotiated must be properly ratified. Following the Canadian example where the executive branch is the ratifying body, the ROC Executive Yuan could be the body to ratify cases of memoranda of understanding, whereas with treaties and other contracts involving legislation, the Legislative Yuan would be responsible for providing the governmental stamp of approval. On the claimants' side, the aboriginal group committee must have a mechanism to ratify the agreement and the government should be provided with evidence that the indigenous group involved has consented to the negotiated agreement and that each member to whom the treaty will apply has had a chance to participate in

the ratification process, thereby solidifying the applicability of the deal reached and leaving little question of its binding authority.