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The Ties That Bind: Indigenous Peoples and Environmental Governance


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Abstract: Canvassing practices in many countries, this chapter analyses the relationships between Indigenous peoples and environmental governance. It examines the environmental values and practices of Indigenous peoples, primarily in order to assess their implications for the Indigenous stake in environmental governance. It identifies at least six major theories or perspectives concerning Indigenous environmental values and practices. Secondly, the chapter reviews the legal norms and governance tools that structure Indigenous involvement in environmental management, in order to assess their relative value for Indigenous stakeholders and implications for sustainable utilisation of natural resources.

Keywords: Environmental law, Indigenous peoples, Indigenous resource rights, legal pluralism, traditional environmental knowledge.

JEL classification: K39

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THE TIES THAT BIND: INDIGENOUS PEOPLES AND ENVIRONMENTAL GOVERNANCE

Benjamin J. Richardson*

I. THE ISSUES

A. HEADING 2

1. HEADING 3

Indigenous peoples, at least traditionally, have often been regarded as exemplars of environmentally sustainable living. The impact of their subsistence livelihoods was apparently kept in check by customary laws to ensure they lived by the laws of nature.1 Today, some people see answers to our environmental crisis in these traditions. The United Nations’ pioneering report, Our Common Future, proclaimed that: ‘these communities are the repositories of vast accumulations of traditional knowledge and experience, [and] larger society … could learn a great deal from their traditional skills in sustainably managing very complex ecological systems’.2 Could it thus be assumed that upholding Indigenous rights and conserving the environment go hand-in-hand? So, while states have often been hostile to Indigenous interests, in times of grave

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environmental threats there will presumably be peaceful collaboration and the voices of Indigenous peoples will be respected.

Yet, for many reasons, the Aboriginal and environmental agendas often do not coincide. Putting aside the contrary historical record - when European colonisers plundered Indigenous lands, exterminating the herds of buffalo, damming the rivers, and felling the forests - the supposedly heightened environmental-consciousness of modern Western societies has not necessarily assuaged Indigenous peoples. The history of nature conservation in Africa provided one of the first hints that a vast chasm can arise between Western environmental policies and the interests of local communities. When colonial authorities in Africa set aside large territories as game reserves and parks, they evicted the native inhabitants to make way for places that would primarily serve the recreational and scientific interests of outsiders. When colonial authorities in Africa set aside large territories as game reserves and parks, they evicted the native inhabitants to make way for places that would primarily serve the recreational and scientific interests of outsiders. Areas occupied by subsistence hunters and farmers for thousands of years suddenly were relabelled as ‘wildernesses’. These callous policies set precedents that continue today, such as the evictions of the Bushmen of the Kalahari by the Botswana government.

Likewise, modern environmental policy in the West can be the context for bitter disputes between Indigenous and non-Indigenous interests. They arise for many reasons. Sometimes governments’ lofty environmental policies are sacrificed to short-term development interests, where the seeming riches of a new mine or logging concession trump any rival values Indigenous peoples or other environmentally-minded communities may attach to such lands. Conflicts may also arise in reconciling Indigenous traditional knowledge with the supposed hard ‘objectivity’ of Western science in environmental decision-making. Also, because of the prevalent belief that nature conservation depends on separating nature from humankind, the presence of Indigenous peoples can be seen as incompatible with the protection of endangered species and their habitats.

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This chapter explores the relationships between Indigenous peoples and environmental governance. ‘Governance’, defined broadly, means the norms and decision-making processes by which society and its organisations are controlled and coordinated. While governance is habitually associated with official regulation by states, scholars in the field of legal pluralism are advancing more nuanced understandings that also emphasise the roles of non-state institutions in the market and civil society in policy-making, norm-setting, implementation, and other aspects of governance. Indigenous scholars such as John Borrows also stress the role of Indigenous communities and their legal traditions as a critical source of social ordering. For this chapter, therefore, environmental governance covers a range of values, norms, institutions and processes, both state- and non-state-based, that shape entitlements to use or benefit from natural resources, and to control their exploitation or protection.

Nominally, the importance of Indigenous involvement in environmental governance is now affirmed in many laws and policies. It is commonplace, for instance, to find references to Indigenous peoples in international environmental declarations, resolutions and policies.  

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7 OECD, Reforming Environmental Regulation in OECD Countries (OECD, 1996).


10 See BJ Richardson, ‘Indigenous Peoples, International Law and Sustainability’ (2001) 10(1) RECIEL 1; RK Hitchcock, ‘International Human Rights, the
Notably, the Rio Declaration on Environment and Development of 1992 declared:

indigenous people … have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.11

Given the attention this topic has acquired, this chapter has two specific aims. First, it examines the environmental values and practices of Indigenous peoples, primarily in order to assess their implications for the Indigenous stake in environmental governance. As these peoples seek greater involvement in environmental decision-making, it is worthwhile to understand the values that they bring to these processes. For instance, in establishing a national park or conducting an environmental impact assessment of a proposed mine, we should ask what values and knowledge are brought to decision-making when Indigenous peoples are involved. In what ways might resulting land use decisions differ?

Another reason to examine Indigenous environmental values and practices is because the push for Indigenous participation in environmental governance is often not merely grounded in Indigenous rights to natural resources, but also in the societal perceptions of the sustainability of Indigenous livelihoods. They are sometimes said to be more environmentally sustainable than Western lifestyles, thereby justifying giving Indigenous peoples more say in environmental management. Yet, as this chapter shows, in the scholarly and policy literature, a wide variety of theories and perspectives regarding Indigenous environmental values and practices can be found, not all of which see Indigenous cultures as consistently environmentally benign. We need to be aware of these theories and perspectives, because their legitimacy can influence the voice Indigenous peoples may have in environmental decision-making.


The second aim of the chapter is to review the legal norms and governance tools that structure Indigenous involvement in environmental management, in order to assess their relative value for Indigenous stakeholders and implications for environmental care. The chapter focuses on examples in Australia, Canada, New Zealand and the United States (US), where some of the most substantial reforms for Indigenous participation in environmental governance have arisen. Some governance techniques emphasise access to natural resources, yet fail to provide a framework for the management of those resources. Some institutional mechanisms for resource management promote Indigenous self-governance, yet fail to resolve how Indigenous peoples can govern environmental impacts that emanate far beyond areas under tribal authority. In other words, governance frameworks based on Indigenous rights and other legal interests may not always be isomorphic with the dynamic properties of ecosystems and the disturbances they face.

The next section addresses the first stated aim of this chapter, namely to canvass the literature and evidence concerning the environmental knowledge and practices of Indigenous peoples and their contributions to sustainability. At least six major theories or perspectives are present. While the labels given to these perspectives are my own, they reasonably capture the gist of the various arguments and ideas in the scholarship and policy literature. As we review the material, the seminal question that should be borne in mind is this: what are the implications of such perspectives for Indigenous peoples’ role in environmental governance?

II. ENVIRONMENTAL - INDIGENOUS PEOPLES RELATIONSHIPS

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A. ECOLOGICAL GUARDIANS

A common perspective in the literature portrays Indigenous peoples as prototypical environmentalists, living harmoniously with nature without indulging in the profligacy associated with Western culture. The close attachment to the land and the environment is described by some commentators as the ‘defining characteristic of indigenous peoples’. A study by a task force of the International Union for the Conservation of Nature (IUCN) trumpeted that Indigenous peoples ‘are the sole guardian of vast habitats critical to modern societies … [and] their ecological knowledge is an asset of incalculable value’. Other commentators contend that ‘commercial consumption, exploitation of natural resources, and notions of enrichment are not part of indigenous cultures’. Thus, they should provide a salutary model for the rest of humanity. This perspective also strongly implies that protecting Indigenous rights should dovetail with those forms of modern environmental governance that stress sustainability. Indeed, the environmental movement often touts Aboriginal peoples as unfailing allies.

Posey highlights several features of Indigenous livelihoods relevant to environmental sustainability, including: high levels of social co-operation, local-scale self-sufficiency and concern for the well-being of posterity. One example of the latter outlook in a Canadian Indigenous

17 Eg, AT Durning, Guardians of the Land: Indigenous Peoples and the Health of the Earth (Worldwatch Institute, 1992) 6-7.
18 Eg, S Schwartzman and B Zimmerman ‘Conservation Alliances with Indigenous Peoples of the Amazon’ (2005) 19 Conservation Biology 721.
19 DA Posey, ‘Culture and Nature: The Inextricable Link’ in UNEP Cultural and Spiritual Values of Biodiversity (UNEP, 2000) 1, 4; see also Berkes, above n 13, 4; RE Johannes (ed), Traditional Ecological Knowledge: A Collection of Essays (IUCN, 1989).
community is the Haudenosaunee’s ‘seven generations’ principle.\textsuperscript{20} It has similarities to the modern international environmental principle known as ‘intergenerational equity’, requiring nations to ensure that their economic development does not compromise posterity’s ability to enjoy a healthy environment.\textsuperscript{21}

Another factor cited as contributing to the sustainability of Indigenous cultures is their spiritual veneration of the natural world. Nature is often the wellspring of ancestral and creation stories, such as in the Dreamtime of Australia’s Aborigines\textsuperscript{22} and the cosmologies of North American Indians.\textsuperscript{23} These spiritual values can underpin specific environmental norms. Indigenous communities may protect natural sites that are dedicated to ancestral spirits or deities.\textsuperscript{24} In New Zealand, the Māori treat many mountains as ‘intensely sacred’.\textsuperscript{25} Kenya’s Bukusu protect wetlands for their function in holding cultural rites such as male circumcision ceremonies.\textsuperscript{26} Wildlife harvesting practices may be controlled by animal totems and the recognition of taboo species.\textsuperscript{27}

The ecological guardianship thesis also cites the traditional environmental knowledge (TEK) of Indigenous peoples.\textsuperscript{28} They are active

\textsuperscript{20} The principle requires that one consider the effects of decisions on the seventh generation yet to be born. Similar concepts inform many Indigenous legal orders worldwide. See e.g. Indigenous Environmental Network, ‘Bemidji statement on Seventh Generation Guardianship’ (2006) at www.sehn.org/bemidji.html.
\textsuperscript{22} A Voigt and N Drury, \textit{Wisdom of the Earth: The Living Legacy of the Aboriginal Dreamtime} (Simon and Schuster, 1997).
\textsuperscript{23} JD Hughes, \textit{American Indian Ecology} (Texas Western Press, 1987) 81-85.
\textsuperscript{28} See MA Altieri and LC Merrick, ‘In Situ Conservation of Crop Genetic Resources through Maintenance of Traditional Farming Systems’ (1987) 41(1) Economic Botany 98; GM Morin-Labatut and S Akhtar, ‘Traditional
environmental managers guided by eons of accumulated wisdom and expertise. Berkes defines TEK as ‘experience acquired over thousands of years of direct human contact with the environment’. McGregor catalogues three sources of TEK: ‘traditional knowledge’ (passed from generation through elders, rituals, initiation and storytelling); ‘empirical knowledge’ (gained from observation); and ‘revealed knowledge’ (acquired through spiritual origins and recognised as a gift). Traditional knowledge of plants, animals and ecosystems informs specific management practices such as resource rotation to ensure that one favoured species is not unsustainably harvested. In Canada, the James Bay Cree use this method for managing beaver and fish populations. Countless other examples could be given.

The notion of ‘traditional’, however, can be a mixed blessing for Indigenous peoples, for it can be used as an excuse to deny their involvement in contemporary environmental management to address new threats and issues such as climate change. TEK’s relevance to contemporary environmental practice is thus a significant area of research, including its relationship to Western science in environmental decisions.

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See F Berkes, Sacred Ecology: Traditional Ecological Knowledge and Resource Management (Taylor and Francis, 1999).

Berkes above n 13, 1.


Berkes, above n 29, 61.

B. ENVIRONMENTAL ARCHITECTS

Putting an even stronger gloss on the ecological guardianship thesis, related literature portrays Indigenous peoples as architects of benign environmental change through active landscape management over millennia.35 Durning notes that ‘animal and planet populations in most of the world reflect not just the blind logic of natural selection; they also reflect human selection’.36 This position therefore rejects Western conservation concepts such as ‘wilderness’, as wrongly implying natural terrain never inhabited by humankind. Indigenous peoples have moulded and shaped the environment through fire burning, selective hunting and gathering, and other forms of husbandry.

In Australia, for instance, repeated seasonal burnings of woodlands and scrub contributed to a mosaic of vegetation that enhanced biological diversity.37 The forcible removal of Aborigines from the land by colonial authorities led to the loss of these fire management regimes, and precipitated a catastrophic loss of species that had become dependent on these seared landscapes.38 Worldwide, many Indigenous peoples continue to deploy fire as a way to manipulate environmental conditions, such as is practised by the Krahô in the savannas of Brazil.39 A UN report on the subject thus reasoned that there is ‘a direct relation between cultural diversity, linguistic diversity and biological diversity and that the quickening pace of loss of traditional knowledge was having a corresponding devastating impact on all biological diversity’.40

Another manifestation of the environmental architect thesis is the phenomenon of ‘cultural landscapes’. These are natural areas that have acquired special cultural significance from thousands of years of human use, representing the permanent interaction between humans and their

36 Durning, above n 17, 18.
40 This was noted in the Workshop on Traditional Knowledge and Biological Diversity Report of the Workshop (UNEP, 1997) 2.
environment. The concept of cultural landscapes has been recognised under the World Heritage Convention.\textsuperscript{41} New Zealand’s Tongariro National Park, a sacred region to Māori, was the first cultural landscape listed under the Convention for international protection.\textsuperscript{42} Protected areas management in this country and others, including Canada and the US, is being transformed by the philosophy that in many landscapes the natural and cultural heritage are inextricably bound together and that conservation can benefit from more integration between the two.\textsuperscript{43} One governance consequence of this approach is that ongoing management of such sites should involve the people who are most culturally associated with them.\textsuperscript{44}

\section*{C. MISGUIDED ENVIRONMENTALISTS}

Some environmental historians and scientists dispute views that Indigenous peoples generally lived in blissful harmony with nature.\textsuperscript{45} They indict some communities for environmental degradation, citing historical evidence in areas under Indigenous occupation. While such findings may seem irrelevant to contemporary environmental debates about Indigenous peoples, some of the evidence involves more recent transformations such as in South Pacific,\textsuperscript{46} and the research can provide ammunition for those seeking excuses to limit Indigenous environmental rights today.

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\begin{footnotes}
\item[\textsuperscript{41}] 1972, 27 UST 37, 11 ILM 1358.
\item[\textsuperscript{42}] S Forbes, ‘Tongariro National Park World Heritage Cultural List “He Koha Tapu - A Sacred Gift”’ (Government of New Zealand, 1993).
\item[\textsuperscript{44}] Ibid, 43.
\end{footnotes}
Several reasons for associating Indigenous peoples with environmental decline are advanced. Firstly, when Indigenous peoples moved into an area unaccustomed to human beings for the first time, such as in the arrival of the first people in North America estimated at some 11,000 years ago or the Māori in New Zealand 1000 years ago, animal species were naive to the hunting threat posed by the newcomers. Indigenous settlers may have lacked awareness of the relative scarcity of unfamiliar natural resources and had not evolved quickly enough the requisite social norms to limit exploitation. Tim Flannery, a scientist who has documented such ecological changes, describes the arrival of Māori hunters as precipitating a ‘blitzkrieg extinction’ in which some 12 species of moa (giant birds, most larger than ostriches) were exterminated within a few centuries. In North America, the influx of Clovis hunters is cited as an seminal factor in the demise of some 35 primarily large mammals, including mammoths. However, the evidence of such impacts is disputed.

Another factor linking environmental wastefulness to Indigenous peoples relates to the impact of their spiritual systems. Ironically, their deep spiritual attachment to nature may have blinded them to evidence of their real ecological impacts. The great reverence some Indigenous peoples have had for their environment may have fed beliefs that nature, nourished by mystical forces, provided an unlimited bounty. North American historian Dan Flores quotes a 19th century report regarding bison hunting:

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47 These dates are the most widely cited in the literature, but are disputed by many including by Indigenous peoples.


49 Flannery, Future Eaters, above n 48, 195.


Every Plains Indian family firmly believed that the buffalo were produced in countless numbers in a country under the ground, that every spring the surplus swarmed like bees from a hive, out of great cave-like openings…52

Alternatively, some research on other communities doubts that spiritual beliefs were sufficiently potent to cause Indigenous peoples’ to moderate their behaviour in response to environmental depletion. Colchester suggests that ‘many studies show little correlation between beliefs prescribing certain practices and actual behaviour’.53 With regard to Amazonia Indians, Colchester notes that many ‘have an opportunist rather than conservationist attitude to the environment, and achieve ecological balance because their traditional political systems and settlement patterns encourage mobility’.54 Low population densities and technological restraints are other factors cited that might have kept the environmental burden of Indigenous peoples unintentionally relatively low.55

In sum, these arguments essentially claim that Indigenous peoples, like other human cultures, do not possess some innate ecological wisdom etched in their genes; rather, their environmental relationships and impacts are contingent, depending on the particular customs, values and social practices of a given community. For contemporary environmental governance, the past, however, is not necessarily a guide to the present. While we should be mindful that no human culture is infallible, the contribution of Indigenous communities to environmental care should be assessed on a case-by-case basis and not crudely inferred on the basis of distant, historical evidence.

D. FORESAKEN ENVIRONMENTALISTS

A fourth argument in some scholarship holds that, whatever the merit of claims that Indigenous peoples were ecological stewards or architects, the

54 Ibid.
cold reality is that Indigenous livelihoods have often changed irreparably.\(^{56}\) Urban living, displacement and migration, technological changes and the influence of the market economy, are among the miscellany of factors transforming Indigenous culture. These social and economic changes have removed many Indigenous peoples from the traditional hunter-gatherer lifestyle, thereby weakening the traditional customary laws and norms to control inappropriate environmental behaviour in other contexts.\(^{57}\) The integrity and relevance of Indigenous communities’ environmental values is questioned when their members live increasingly in urban areas outside tribal structures and the traditional, subsistence economy. While it would be grossly naïve to contend that Indigenous cultures have remained untainted by centuries of colonialism, we should be careful about implying that they have been ill-fated and lack the will to adapt successfully to changing circumstances, as another scholarly perspective examined later in this chapter contends.

Nonetheless, some cultural changes, with environmental consequences, have been documented even for Indigenous peoples continuing to subsist on the land. For example, Alaskan natives have been implicated in destructive forestry practices.\(^{58}\) Even in relatively remote places, such as in the highlands of Papua New Guinea, Flannery found resource depletion pressures from population growth and access to more efficient hunting technologies.\(^{59}\) These trends may imply that Indigenous people have not yet evolved the necessary new norms to control the pressures posed by increased numbers and new technologies.


\(^{57}\) Redford and Stearman, above n 48, 252; Colchester, above n 53, 26.


These changes to Indigenous livelihoods have sometimes led Aboriginal peoples to tolerate or welcome commercial developments that mainstream environmental groups oppose. For example, a 1991 public inquiry into mining on Aboriginal lands in a conservation zone in northern Australia found that:

\[t\]he Jawoyn do not oppose mining per se. … A number of Jawoyn people are in favour of mining … They do not consider [the affected lands] as significant culturally or religiously, although they express concerns about disturbance to certain sites outside the Zone. These pro-mining Jawoyn people appear to be motivated by a desire for personal and community advancement in a context of limited alternative employment opportunities and welfare dependency.\(^{60}\)

The nature of contemporary Indigenous environmental practices is also being questioned in other contexts. One example is the resumption of whaling. Animal welfare and environmental groups have criticised the International Whaling Commission’s rules permitting subsistence hunting by some Aboriginal groups. The stated concerns are the threats to endangered cetaceans and that harvested whale meat is being traded commercially.\(^{61}\) Another concern is the ‘bush meat’ crisis in Africa, where civil strife and the breakdown of traditional community institutions has fueled rampant, unsustainable hunting of wildlife.\(^{62}\) The primary factors in this crisis however are probably not dysfunctional Indigenous management practices per se, but rather the growing intrusion of outside


economic and social factors associated with commercial forestry and oil exploration, as well as military conflicts.\textsuperscript{63}

Whatever the veracity of its claims, the foresaken environmentalist thesis should not be an excuse to deny Indigenous involvement in modern environmental governance. Indigenous environmental rights should not be reduced to a crude calculation of their functional value to wider society. If this standard were adopted, it would also be a reason to rebuff mining companies, fishing businesses and many other economic interests with appalling environmental records. Rather, we need to find ways to allow Indigenous communities to rebuild their ties to the land and, to the extent that there are limitations to Indigenous knowledge, expertise and capacity, to look to cross-cultural approaches to resource management that combine Indigenous and non-Indigenous stakeholders’ strengths.

E. ENVIRONMENTAL VICTIMS

A fifth perspective in the literature stresses that Indigenous peoples are primarily victims, not perpetrators of, environmental harm.\textsuperscript{64} Scholars such as Westra and Howitt highlight the conscription of Indigenous resources into the cash economy through dams, mines and other projects that have had ruinous consequences for native lands and communities.\textsuperscript{65} These projects have undermined the economic foundations of Indigenous communities, spawned various public health problems, and fuelled a host

\begin{footnotesize}
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\item\textsuperscript{63} M Thibault and S Blaney, ‘The Oil Industry as an Underlying Factor in the Bushmeat Crisis in Central Africa’ (2003) 17 Conservation Biology 1807.
\item\textsuperscript{65} R Howitt, Rethinking Resource Management: Justice, Sustainability and Indigenous Peoples (Taylor and Francis, 2001); L Westra, Environmental Justice and the Rights of Indigenous Peoples - International and Domestic Law Perspectives (Earthscan Publishers, 2007).
\end{enumerate}
\end{footnotesize}
of collateral cultural impacts. To the extent that Indigenous communities are complicit in any of these activities, this perspective implies that it would be a context not of their making. Robbed of their lands and denied a viable economic resource base, Indigenous peoples sometimes partake in environmentally problematic developments only as a result of limited options.

Indigenous peoples, of course, have not necessarily been hapless bystanders to the juggernaut of the market economy. They have often fiercely resisted forestry and extractive industry projects on their lands. Open-cut mines undertaken by transnational corporate behemoths at Ok Tedi (Papua New Guinea), Freeport (Indonesia) and Jabiluka (Australia) have engendered some titanic conflicts. Big dams have also ignited clashes, such as Quebec’s damming of the James Bay River and India’s Narmada River dam. The flooding of traditional hunting grounds and the physical displacement of whole communities were a high price to pay in the name of national economic development in both cases. According to the World Dams Commission, large dams in India displaced between 16

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and 38 million people from 1950 to 1990, and about 40 per cent of those displaced were tribal people.\footnote{World Dams Commission (WDC), Dams and Development (WDC, 2000) 104, 110.}

Recently, the long-range environmental impacts of ‘dominant’ societies upon Indigenous peoples have become a cause for possibly greater concern.\footnote{DL Brown, ‘Toxic-tainted Arctic Animals Passing Poisons on to Inuit’ (May 22, 2001) Seattle Times.} These impacts include toxic contamination in the Arctic food chain and global warming. Such problems illustrate the cruel irony of Indigenous peoples’ situation: not only are those closest to nature the worst impacted by environmental degradation, but Western societies often impose environmental harms on Indigenous societies from afar.

Even seemingly environmentally benign policies can hurt. Most notably, the creation of nature conservation parks can displace Indigenous peoples, removing them from their traditional hunting and foraging grounds.\footnote{See examples detailed in World Rainforest Movement (WRM) ‘Protected Areas: Protected Against Whom?’ (WEM January, 2004); E Kemf (ed), Indigenous Peoples and Protected Areas. The Law of Mother Earth (Earthscan, 1993).} Bernard Grzimek, one of the colonial-era architects of East Africa’s extensive network of protected areas, once said: ‘[a] National Park … must remain a primordial wilderness to be effective. No men, not even native ones, should live inside its borders’.\footnote{Cited in JS Adams and TO McShane, The Myth of Wild Africa: Conservation Without Illusion (WW Norton and Co, 1992) xvi.} This philosophy continues to permeate nature conservation policies in some countries.

The environmental victims thesis has various implications for environmental governance. The two most significant are the need for compensation and other remedies for displaced and injured Indigenous communities and, to address future threats, to ensure much greater Indigenous voice in environmental decision-making. The emerging international principle of an Indigenous right to ‘free, prior and informed consent’ is an obvious legal standard to prevent creating more Indigenous

\footnote{R Poirier and D Ostergren, ‘Evicting People from Nature: Indigenous Land Rights and National Parks in Australia, Russia, and the United States’ (2002) 42 Natural Resources Journal 331.}
victims by allowing communities to veto inappropriate development projects. 78

F. ENVIRONMENTAL INNOVATORS

We should also be aware that some Indigenous communities have successfully adapted to demographic, economic and technological changes, maintaining and innovating robust systems of environmental management that can address contemporary challenges. 79 In this sixth scholarly perspective, Indigenous knowledge is not simply a relic of ancient hunter-gatherer societies, but continues to be relevant and adaptable to modern resource management situations. 80 Through greater Indigenous self-governance, Aboriginal peoples seek a framework to apply their skill and wisdom to natural resources management. 81

One World Bank report summarised several examples of the contemporary relevance of TEK and social practices, noting that

[t]he the pastoral peoples of eastern Africa -- who for so long have been identified by Western livestock specialists as a major cause of arid and semi-arid land problems -- are today recognized as possessing sophisticated knowledge about range and animal management, including strategies

for adapting to periodic drought and other natural calamities.\textsuperscript{82}

In developed countries, where Indigenous minorities often have endured even greater cultural and economic pressures, there is similarly evidence of a growing appreciation of Indigenous environmental practices. For example, Aborigines’ traditional fire management techniques have been reintroduced in some outback national parks in Australia to restore biological diversity that co-evolved in response to periodic burning of the savanna.\textsuperscript{83} In Canada, the National Aboriginal Forestry Association (NAFA) drafted the \textit{Aboriginal Forest Land Management Guidelines}, setting ‘out a broad and flexible framework for Aboriginal peoples to develop and implement community- and ecosystem-based forest management planning that takes into account multiple forest values’.\textsuperscript{84} Countless other encouraging examples could be given.

One worth commenting on is the Centre for Indigenous Environmental Resources (CIER), in Canada. Established in 1994, CIER illustrates the new generation of Indigenous organisations fashioning environmental governance. Using grass-roots approaches, it advises and facilitates communities’ involvement in the environmental planning and management. For instance, CIER has initiated projects for ‘identifying economic, environmental, social, and cultural solutions and options for First Nations to better adapt to climate change’.\textsuperscript{85} It is also supporting the Assembly of First Nations to launch a Plan of Action for Drinking Water in First Nations Communities.\textsuperscript{86} Its work on legal aspects of sustainability includes a research report on \textit{First Nations Governance Success Stories} and an \textit{Indigenous Laws} project to document the contribution of TEK and customary laws to environmental protection.\textsuperscript{87}

\textsuperscript{82} Davis, above n 14, x
\textsuperscript{83} R Kimber, ‘Black Lightning: Aborigines and Fire in Central Australia and the Western Desert’ (1983) 18 \textit{Archaeology in Oceania} 38.
\textsuperscript{84} NAFA, \textit{Aboriginal Forest Land Management Guidelines: A Community Approach} (NAFA, 1995).
\textsuperscript{85} Centre for Indigenous Environmental Resources: www.cier.ca/taking-action-on-climate-change.
\textsuperscript{87} See www.cier.ca/building%2Dsustainable%2Dcommunities.
The environmental innovation thesis presents one of the most forceful arguments for bolstering the Indigenous voice in the governance of their lands and resources. It coincides with a plethora of scholarship that calls for democratising and decentralising environmental decision-making to community-levels.88

G. OTHER PERSPECTIVES

While none of the foregoing perspectives in the scholarly literature alone provide a sufficiently plausible account of all Indigenous peoples’ relationships to the environment, each appears to hold some truth in some situations, depending on the time, place and community. Indigenous peoples are multi-cultural, with a diversity of values, customs and social practices. Their relationships with the environment therefore vary. Historically, some tribes were hunter-gatherers, while others were partial-agriculturalists; some were nomadic while others more settled, depending on available natural resources. Today, some communities have successfully adapted to new environmental threats and conditions, while others have struggled.

A few further arguments about this topic should be noted, before examining Indigenous participation in environmental governance. First, regardless of their environmental impacts, we should be careful of implying that Indigenous peoples should be held to a higher environmental standard. Industrial societies, with their vastly greater environmental burden, are hardly qualified to pass judgement on Indigenous livelihoods. Nuclear weapons, toxic chemicals and urban sprawl are some of the appalling legacies of modern society that dwarf even the most damning environmental evidence against Indigenous peoples.

Conversely, we also should be wary of arguments that romanticise Indigenous people as ecological guardians. They can foster harmful stereotypes, implying expectations of Indigenous peoples that are

unrealistic in an environmentally depleted world.\textsuperscript{89} Stereotyping them as ecological guardians can hurt and hinder Indigenous cultural evolution. Likewise, when we contrast Indigenous environmental values with those of non-indigenous cultures, we should also avoid stereotyping the latter. In fact, within Western environmental traditions there are diverse philosophies and practices, including deep ecologism and animal liberationism.\textsuperscript{90}

The following sections canvass the legal standards and rights developed in international and domestic law pertaining to Indigenous peoples and their environments.\textsuperscript{91} Legal rights and institutions are critical, because most commentators agree that Indigenous communities are more likely to continue environmentally sustainable practices and to maintain their cultural integrity when they enjoy territorial security and autonomy.\textsuperscript{92} Where ownership of the land is in the hands of the traditional owners, they are in a much stronger position to control its environmental management.\textsuperscript{93} Yet, because Indigenous self-determination and environmental protection may not always be mutually reinforcing, others institutions are needed to reconcile Indigenous livelihoods (as with all lifestyles) with overarching collective responsibilities to safeguard the planet.


\textsuperscript{92} JB Alcorn, ‘Noble Savage or Noble State? Northern Myths and Southern Realities in Biodiversity Conservation’ (1994) 2(3) Ethnoecologica 7; Posey, above n 19.

III. INDIGENOUS ENVIRONMENTAL GOVERNANCE: A TYPOLOGY OF APPROACHES

A. LEGAL PLURALISM AND INDIGENOUS LEGAL TRADITIONS

Before canvassing environmental governance approaches, it is worth noting that they all reflect in some ways a shift toward more pluralistic and eclectic legal regimes, as evident in modern governance generally. Legal pluralism essentially refers to ‘a situation in which two or more legal systems coexists in the same social field’. Virtually all societies blend official state-based and informal non-state methods of social ordering. Often legal pluralism is associated with reforms to formally acknowledge a separate space in state law for an alternate legal order derived from other legal traditions. Sack has emphasised that authentic legal pluralism ‘is more than the acceptance of a plurality of law; it sees this plurality as a positive force to be utilised-and controlled-rather than eliminated’. Such arrangements are found in Great Britain and Canada (accommodating civil legal systems in Scotland and Quebec respectively), for example.

States are also accommodating Indigenous legal traditions, although rarely to the extent of treating them as of equal status. Discrete areas such as family law and criminal justice are being opened up to Indigenous laws and decision-making customs. A few states have tinkered with more substantial accommodations, including constitutional-level recognition of the distinct status of their Indigenous peoples. In Scandinavia, each country has established a Sámi parliament comprising individuals elected by and among the Sámi. These are advisory bodies

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99 See DL Van Cott, Indigenous Peoples and Democracy in Latin America (St Martin’s Press, 1984).
primarily responsible for the review of policies and proposed legislation of concern to Sámi. Norway’s Sámi Act 1987 obliges ‘state authorities to create the conditions necessary for the Sámi to protect and develop their language, their culture and their society’.100

As we shall later see, environmental law in some countries is also being infused with Aboriginal values, customs and practices. Sometimes, it appears that Indigenous peoples are offered more control over land and natural resources only on condition that, in the interests of environmental sustainability, they assume responsibility for conserving the few forests or other environmental resources left, and limit their economic aspirations accordingly. Thus, we should be aware that legal pluralism may largely perpetuate 'legal centrism', reinforcing the existing hierarchy of normative ordering, with state-based regulation at the apex.101

While Indigenous peoples’ assertion of their legal traditions has been tied largely to their conflicts with specific nation-states, some of their initiatives transcend the dominant state-based framework of national and international law. For example, the Inuit Circumpolar Conference brings together Indigenous peoples from across the Arctic regions of several jurisdictions.102 Indigenous groups are expressing their own environmental agenda in other ways. These include international statements such as the Kari-Oca Declaration103 adopted at the tribal forum parallel to the 1992 Earth Summit, and the Charter of the Indigenous and Tribal Peoples of the Tropical Forests adopted at an international meeting in Malaysia.104

Not only may Indigenous peoples seek to by-pass the state, the state itself is off-loading or losing some of its regulatory responsibilities to the market. In turn, therefore, Indigenous groups must reckon with the power of markets to influence states’ law-making activities or to generate their own, rival legal orders. The movement for corporate social

101 W Tie, Legal Pluralism: Toward a Multicultural Conception of Law (Ashgate, 1999) 162, 167.
responsibility has spawned various codes of conduct and market-based standards for business behaviour. For example, the Equator Principles, a voluntary code of conduct devised by the banking sector for socially and environmentally responsible financing, includes provisions regarding consultation with affected Indigenous communities. The strategies needed to influence private banks are not necessarily the same as those that will sway public governments.

B. HISTORICAL PERSPECTIVES

Historically, Indigenous peoples secured toe-hold acknowledgement of their hunting and other subsistence activities in treaties imposed by colonial authorities - though at the terrible price of ceding vast swathes of their traditional territories. In North America, the eighteenth century treaties were negotiated to maintain peace, trade, alliance and military support. The Canadian Supreme Court in the Marshall case interpreted a 1760 treaty between the Mi'kmaq people and the British Crown as guaranteeing their rights to fish for a moderate livelihood in return for their allegiance to the Crown in its war against France.

As European colonisers became more numerous and powerful during the nineteenth century, treaties served essentially to confiscate and plunder Indigenous lands. The better organised communities that were able to mount armed resistance, such as New Zealand’s Māori, usually were best placed to negotiate fairer terms. The Treaty of Waitangi of 1840 provided that the Crown guarantees to the Chiefs and Tribes of New Zealand … the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which

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108 See S Carter, Aboriginal People and Colonizers of Western Canada to 1900 (University of Toronto Press, 1999).
they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession.\textsuperscript{109}

Yet, differences in cultural understandings, intentions and assumptions underpinning such treaties often greatly reduced their significance. Notoriously, for instance, in the \textit{Wi Parata} judgement of 1877 the New Zealand Supreme Court dismissed the Treaty of Waitangi as a simple nullity. No body politic existed capable of making a cession of sovereignty … So far as the proprietary rights of the natives are concerned, the so-called treaty merely affirms the rights and obligations which, \textit{jure gentium}, vested in and devolved upon the Crown.\textsuperscript{110}

Consequently, many disputes about the failure to honour treaty obligations linger. Modern treaty negotiations, such as those for comprehensive land claims agreements in Canada, have been pursued with heightened expectations of greater equity and a guaranteed land and natural resources base for Indigenous participants.\textsuperscript{111}

In the modern era, a notable trend, particularly in Latin America, is the constitutionalising of Indigenous rights. Constitutional law enunciations have often explicitly acknowledged Indigenous environmental-related rights and interests. The Paraguayan Constitution recognises the right of Indigenous peoples to preserve and develop their ethnic identity; the right to freely apply their system of political, social, economic, cultural and religious organisation; and their right to enforce customary law.\textsuperscript{112} The Constitution of Peru, inter alia, allows Indigenous institutions to exercise judicial functions pursuant to their customary law within their territory.\textsuperscript{113} The Bolivian Constitution guarantees Indigenous peoples’ use and sustainable exploitation of their traditional natural

\textsuperscript{109} Art 2.
\textsuperscript{110} \textit{Wi Parata v Bishop of Wellington} (1877) 3 NZ Jur (OS) SC 72, 78.
\textsuperscript{111} BJ Richardson, D Craig and B Boer, \textit{Regional Agreements for Indigenous Lands and Cultures in Canada} (Australia National University, 1995).
\textsuperscript{112} Constitución de la República de Paraguay, 1992, art 63.
\textsuperscript{113} Constitución Política del Perú de 1993, art 149.
resources. Such provisions, however, sometimes masquerade continuing human rights abuses. Constitutional law precepts can be too vague and nonjusticiable to meaningfully accommodate Indigenous legal traditions. Furthermore, enforcement of such provisions has tended to lag considerably in a region where the rule of law often has a fragile status.

Since the 1980s some international legal instruments have also recognised Indigenous legal traditions, which should help to nurture more pluralist environmental law regimes locally. Both the ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries of 1989 and the UN Declaration on the Rights of Indigenous Peoples of 2007 address rights to territory and natural resources, as detailed further in Claire Charters’ chapter in this book. The Declaration proclaims Indigenous peoples’ rights to own, develop and control the use of their traditional lands, as well as the need for Indigenous consent for the approval of any development project affecting native lands. The ILO Convention contains similar standards, including an obligation on states parties to ‘respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories’. To secure these rights and values, the Convention declares that Indigenous peoples have the right to ‘participate in the use, management and conservation’ of their natural resources. Yet, the effectiveness of such lofty standards is debatable. Few states have ratified the ILO Convention, and Australia, Canada, New Zealand and the US have so far shunned it. Although the UN Declaration fares better, with over 140 signatories, it is a softer law standard than the ILO Convention.

International environmental conventions containing provisions on Indigenous peoples may be more useful, given that many of these treaties

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114 República de Bolivia Constitución Política con Texto Acordado en 1995, art 171.
115 See J Méndez, G O’Donnell and P Pinheiro (eds), The Rule of Law and the Underprivileged in Latin America (University of Notre Dame Press, 1998).
119 Ibid, art 30.
120 ILO Convention 169, above n 116, art 13.
enjoy extensive ratifications. The Convention on Biological Diversity of 1992,\textsuperscript{121} ratified by some 190 states, obliges state parties to:

\begin{quote}
respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of benefits arising from the utilization of such knowledge, innovations and practices.\textsuperscript{122}
\end{quote}

Still, the protection offered attaches only to ‘traditional lifestyles’ (reflective of the ecological guardians perspective) and the article dilutes the obligations by relying, in the opening clause (not quoted above), on such dubious qualifications as ‘as far as possible and appropriate’ and ‘subject to its national legislation’. Still, as the following sections show, some national legislation and other legal sources do respect Indigenous traditional hunting and fishing rights.

\textbf{C. TERRITORIAL-BASED ENVIRONMENTAL RIGHTS}

Indigenous peoples should enjoy the most extensive opportunities to participate in environmental decisions in relation to those territories that they own and occupy. Whether they hold the land under freehold or Aboriginal title, Indigenous landowners in theory can determine how the land is used or protected.\textsuperscript{123}

Yet, for any private property owner, Indigenous or non-Indigenous, in most jurisdictions the Blackstonian notion of absolute, unfettered control over land use is a myth. Modern systems of planning law and environmental regulation have long effectively nationalised rights to development, allowing governments to control even the most seemingly

\textsuperscript{121} 1992, 31 ILM 818.
\textsuperscript{122} Art 8(j).
\textsuperscript{123} Curran and M’Gonigle, above n 5, 716.
trivial activities such as erecting a shed or pruning a tree. Property rights in Western legal traditions are conceptualised as a bundle of rights, in which development and environmental rights are increasingly the prerogative of governmental authorities. Indigenous property can be similarly regulated. Thus, in Scandinavia, Indigenous territories have been opened to mining, logging and other uses without the consent of, and sometimes even consultation with, the Sámi people. Usually only where tribal landowners also enjoy a measure of self-governance can they exercise such prerogatives, as occurs to some extent in tribal reservations in the US, as discussed later in this chapter.

Even constitutionally-protected Aboriginal and treaty-based resource rights in Canada are susceptible to land use regulation by the Crown. The Canadian Supreme Court has held that federal regulations\(^\text{126}\) and provincial regulations\(^\text{127}\) may restrict Aboriginal hunting and fishing activities so long as the regulation rests on ‘valid legislative objectives’ that are compelling and substantial, and the limitation itself is compatible with the Crown’s fiduciary duty to First Nations.\(^\text{128}\) In Delgamuukw,\(^\text{129}\) Lamer CJ explained what this could mean in relation to developments on lands under full Aboriginal title:

the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to

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126 R v Sparrow (1990) 1 SCR 1075.

127 R v Côté (1996) 3 SCR 139.


129 Delgamuukw v British Columbia (1997) 3 SCR 1010.
support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title.\textsuperscript{130}

However, the 2007 case of \textit{Tsilhqot’in Nation} reviewed the test for justification of the infringement of Aboriginal rights.\textsuperscript{131} The Supreme Court of British Columbia held that the province had failed in its obligations to consult with the Tsilhqot’in and that actions taken by the province under its forestry legislation were unjustified infringements of Tsilhqot’in aboriginal rights.

Even more extensive land use control is exercisable by the Crown where such constitutional protections are absent. In Australia, traditional and non-commercial hunting and food-gathering by Indigenous persons are protected under several laws such as the Native Title Act 1993 (incorporating the \textit{Mabo} judgement of 1992),\textsuperscript{132} and some state- and territory-based land rights legislation such as the Aboriginal Land Rights (Northern Territory) Act 1976.\textsuperscript{133} However, in the wake of the \textit{Wik} case,\textsuperscript{134} the former Howard government watered down some of the statutory protections to make it easier for governments or companies to use Aboriginal lands for various uses contrary to the wishes of the title-holders.\textsuperscript{135} The Native Title Act does not allow native title owners to veto mining projects on their land; rather, it merely concedes rights to be consulted and to negotiate with the government and mining company.\textsuperscript{136}

In some developing countries, such as Papua New Guinea and the Philippines, Indigenous land tenures are widely recognised.\textsuperscript{137} For instance, the Philippines Indigenous Peoples’ Rights Act 1997 establishes procedures for confirmation of communal ownership of ancestral land, and some 3 million hectares are now held by Indigenous groups under these

\textsuperscript{130} Ibid, para 165.
\textsuperscript{131} [2007] BCSC 1700.
\textsuperscript{132} \textit{Mabo and Others v Queensland (No 2)} (1992) 175 CLR 1.
\textsuperscript{133} See RH Bartlett, \textit{Native Title in Australia} (2nd edn, Lexis Nexis Butterworths, 2004).
\textsuperscript{134} \textit{Wik Peoples v Queensland} (1996) 187 CLR 1.
\textsuperscript{135} Native Title Amendment Act 1998 (Cth).
\textsuperscript{136} Subdivision P.
\textsuperscript{137} RG Crocombe (ed), \textit{Land Tenure in the Pacific}. (University of the South Pacific, 1994); T van Meijl and F von Benda-Beckmann (eds), \textit{Property Rights and Economic Development: Land and Natural Resources in Southeast Asia and Oceania} (Kegan Paul, 1999).
provisions. The ‘rights of ownership’ recognised under the Philippine law include the right ‘to negotiate the terms and conditions for the exploration of natural resources in the areas for the purpose of ensuring ecological, environmental protection and conservation measures, pursuant to national and customary laws’. Similarly, in Latin America, some nations have made progress in demarcation and titling of Indigenous lands. The Amazon’s Huaorani people received from the Ecuadorian government some 676,000 hectares of Amazon land in 1990, dedicated as a Huaorani ethnic reserve. Government agencies and environmental scientists in the region are starting to acknowledge that Indigenous-held land can dovetail with nature conservation goals.

D. RESOURCE HARVESTING RIGHTS

Indigenous environmental rights are not necessarily tied to ownership of the land. They may involve usufruct-type rights associated with areas traditionally fished or hunted. For example, ‘immemorial’ rights of the Sámi people to reindeer herding, hunting and fishing have been recognised by the Norwegian and Swedish courts. In the US and Canada, where the following discussion concentrates, such rights have been recognised on the basis of treaties and custom. While harvesting rights are culturally and economically significant to their holders, they do not alone provide a basis for comprehensive environmental management.

139 Section 7.b.
144 Taxed Mountain Case (‘Skattefja Ilsma’), NJA 1981 s 1 (1981); see further Nettheim, Meyers and Craig, above n 125, 209-35.
In the US, treaties signed by Native American tribes not only affirmed tribal members’ rights to hunt and fish on reservation lands, they also sometimes guaranteed them such rights in their traditional harvesting grounds located outside the reservations. These off-reservation rights have led to intense opposition from state governments and non-Indian hunters and fishers who have sought to make Native Americans subject to state game regulations. The US courts, however, have mostly upheld the off-reservation hunting and fishing rights of Native Americans. In the 1905 case of *United States v Winans*, even such rights over privately owned land were upheld.

The most intense conflicts over off-reservation harvesting rights have flared in the state of Washington, leading to several judicial rulings on the ambit of tribal fishing rights. In a 1942 case, *Tulee v Washington*, the court ruled that tribal members could not be forced to purchase fishing licenses because the treaties that their ancestors had signed already reserved the right to fish in the ‘usual and accustomed places’. In *Puyallup I*, the court ruled that state authorities have the right, pursuant to conservation policy goals, to regulate tribal fishing activities, so long as they do ‘not discriminate against the Indians’. Disputes have also arisen over the apportionment of fish resources between tribal and non-Indian interests; in *United States v Washington*, the court determined that the treaty rights guaranteed the Native Americans the right to a certain percentage of the harvestable catch, up to 50 percent.

In Canada, off-reservation hunting and fishing are also recognised. While such entitlements may be based on customary rights independent of a treaty, and have enjoyed constitutional protection since 1982, governments may still regulate such rights in a manner that achieves

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145 Even when hunting and fishing rights were not specifically recognised in treaties, the reserved-rights doctrine holds that tribes retain any rights that are not explicitly abrogated by treaty or statute: JV Royster, *Native American Natural Resources Law: Cases and Materials* (2nd edn, Carolina Academic Press, 2008).

146 198 US 371, S Ct 662, 49 L Ed 2d 1089 (1905).

147 315 US 681, 62 S Ct 862, 86 L Ed 1115 (1942).


149 384 F Supp 312 (WD Wash 1974).

150 This decision was affirmed by the US Supreme Court in a collateral case: *Washington v Washington State Commercial Passenger Fishing Vessel Ass’n* 443 US 658, 99 S Ct 3055, 61 L Ed 2d 823 (1979).
similar arrangements as found in the US. In the seminal Sparrow case of 1990, the Canadian Supreme Court held Aboriginal fishing rights cannot be infringed without justification on account of the government’s fiduciary duty to the Aboriginal peoples. In Van der Peet, in denying that the Aboriginal people in question have fishing rights that extend to commercial sale of fish, the Court ruled that the practices, customs and traditions must have been an integral part of the distinctiveness of their culture prior to colonial contact. In the Powley case of 2003, the courts also found that the Métis peoples (of mixed Aboriginal and European ancestry) also enjoyed customary rights to hunt wildlife for food. On the other hand, in 2005 the Canadian Supreme Court, in the cases of Marshall and Bernard, denied that the Mi’kmaq people held Aboriginal or historic treaty rights to log Crown forests without a permit for commercial gain. 

A limitation of Aboriginal harvesting rights in both the US and Canada is that they have not always been interpreted by courts as implying environmental protection of the habitat that supports the wildlife. In order to enjoy Aboriginal harvesting rights there surely must be edible and abundant fish and wildlife populations to support harvesting. Occasionally, courts have recognised implied environmental rights. The British Columbia Court of Appeal in Claxton ruled that environmental degradation posed by a government-licensed marina would impermissibly infringe a treaty right to fish. The Canadian Supreme Court in Mikisew Cree First Nation recognised that the Aboriginal treaty right to trap and hunt is geographically limited, and it would lose its value without the preservation of the enabling wildlife habitat. US law also recognises some implied water protection rights for the maintenance of on-reservation

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152 (1996) 2 SCR 507. Compare to R v Gladstone (1996) 2 SCR 723, where the court held that Aboriginal defendants have an Aboriginal right to take and sell certain fish species in commercial quantities.


155 Saanichton Marina Ltd v Claxton (1989) 57 DLR (4th) 161, 36 BCLR (2d) 79 (CA) (eC).

156 Mikisew Cree First Nation v Canada (Minister of Canadian Heritage) [2005] SCC 69, paras 2, 45. The Mikisew treaty right to hunt in the national park was threatened by the Crown decision to build a road through the area.
fishing, based on the *United States v Adair* and *Kittitas Reclamation District v Sunnyside Valley Irrigation District* cases.\(^{157}\)

However, in all of these cases, the traditional harvesting territory of the tribal group was near the environmental damage. For Aboriginal peoples who harvest migratory species, a much larger habitat area used by the animal would need safeguarding. In many other cases, given the interconnectedness of the natural environment, activities occurring afar may indirectly affect fish and wildlife populations within traditional hunting areas. Adequate proof that a proposed activity would cause harm to wildlife and therefore infringe harvesting rights would be a barrier for some Aboriginal groups in such situations.

One solution, as taken in New Zealand, is to insert into general environmental legislation specific provisions to guard Indigenous interests. The Resource Management Act 1991 – the country’s principal environmental and land use planning statute – affirms as a matter of ‘national importance’ the ‘relationship of Māori and their culture and traditions with their ancestral lands, waters, sites’,\(^{158}\) as well as the Māori environmental stewardship principle of ‘Kaitiakitanga’,\(^{159}\) to which government decision-makers must have regard when administering the legislation.\(^{160}\) The Act has led to municipal planning authorities usually consulting with Māori iwi when considering resource development applications.\(^{161}\)

Indigenous harvesting rights are also affirmed in some international environmental conventions, which signatory states must respect. Under the International Convention for the Regulation of Whaling,\(^{162}\) in 1989 the International Whaling Commission approved a small Aboriginal subsistence whaling quota.\(^{163}\) The prohibition on hunting

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157 *United States v Adair*, 478 F Supp 336 (D Or 1979); *United States v Adair*, 187 F Supp 2d 1273 (D Or 2002); *Kittitas Reclamation District v Sunnyside Valley Irrigation District*, 763 F 2d 1032 (9th Cir 1985).

158 Ibid, s 6(e).

159 Ibid, s 7(a).


161 Ministry for the Environment (MfE), *Case Law on Tangata Whenua Consultation* (MfE, 1999).

162 1946, 161 UNTS 72.

163 The Commission has established a sub-committee to deal with aboriginal subsistence whaling: see NC Doubleday, ‘Aboriginal Subsistence Whaling: The
polar bears imposed by the Agreement on Polar Bears of 1973 does not apply in relation to hunting ‘by local people when using traditional methods in the exercise of their traditional rights’. The Convention on Conservation of North Pacific Fur Seals of 1976 exempts Indigenous groups inhabiting certain coastal areas from the ban on sealing when not using specified modern technologies. Limiting the exercise of such rights to traditional hunting methods presumably aims to limit the size of the harvest. Such restrictions, however, overlook that the most important mechanism to limit harvesting is the purpose (ie, subsistence living) rather its means (eg, modern weaponry).

In the future, intellectual property (IP) law appears likely to provide another basis for some Indigenous environmental rights. This trend is best illustrated by the far-reaching claim filed by Māori groups to the Waitangi Tribunal seeking control of knowledge-based uses of New Zealand’s entire panoply of native flora and fauna. Reliance on IP law, in addition to territorial-based rights, to protect Indigenous interests in the environment has arisen principally because of the growing commercial pressures to exploit Indigenous knowledge and culture in the fields of biotechnology, agriculture and tourism.

Indigenous peoples remain vigilant about such uses without their consent. The UN Declaration on the Rights of Indigenous Peoples also affirmed their right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences.

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166 Indigenous Peoples and Sustainability, above n 15, 64-65.
technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, … ¹⁷⁰

However, to implement such standards within mainstream IP law is difficult, as copyrights, trademarks and patents are not easily adapted to Indigenous knowledge. ¹⁷¹ They are designed to promote innovation and commercialisation of knowledge, whereas Indigenous communities tend to be more interested in preserving the integrity of existing traditional knowledge. The IP law requirements of authorship and novelty also pose difficulties where traditional knowledge has evolved gradually from generation to generation and is owned collectively. Currently, there are few international or national legal instruments that create specific IP standards tailored to Indigenous knowledge or cultural practices.

E. INDIGENOUS LAND USE GOVERNANCE

Logically, environmental governance should coincide with Indigenous interests most closely in those areas over which Indigenous communities exercise self-governance. Their quest for self-governance, as discussed in Shin Imai’s chapter in this book, has often centred on resource management. In this context, self-governance could mean an Indigenous group asserting jurisdiction over wildlife harvesting, mining, forestry, water extraction and other conceivable land uses in a manner compatible with community preferences. The quality of self-governance depends on many factors, including whether Indigenous authorities have community support, adequate financial resources and technical expertise, as well as the size of the land mass governed, and the extent of jurisdiction over the activities of non-Aboriginal actors.

In the US, with some of the most comprehensive systems of tribal governance such as on the Navaho reservation, courts have long recognised Native American tribes as independent, distinct political entities retaining inherent sovereign powers to the extent these have not

¹⁷⁰ Art 31(1).
been ceded to or taken away by Congress.\textsuperscript{172} Thus, tribes enjoy full equitable ownership of timber and mineral resources located on tribal reservations, and can regulate hunting and fishing on their reservations. Importantly, in 2003 the US court ruled that the Sokaogon Chippewa in Wisconsin have the right to regulate water quality on their reservation and to set water quality standards higher than those promulgated by state authorities.\textsuperscript{173} While tribes may also possess off-reservation fishing and hunting rights, as noted earlier, these rights would not ordinarily carry concomitant governance authority.\textsuperscript{174}

Apart from self-governance powers derived from their inherent sovereignty, tribes may also hold delegated legislative powers. In 1984 the US Environmental Protection Agency (EPA) adopted a Federal Indian Policy which recognised tribal governments as the appropriate sovereign for setting environmental standards, issuing permits and managing environmental programs within reservation boundaries.\textsuperscript{175} Since then, numerous federal environmental statutes have authorised delegation of regulatory authority to tribes, including: the Clean Water Act, the Clean Air Act, and the Surface Mining Control and Reclamation Act, among many examples. Few tribes have been able to take advantage of such powers without additional federal funds and technical support.\textsuperscript{176}

A setback for tribal governance has arisen from some US court decisions denying tribes the authority to regulate hunting and fishing on non-Indian fee simple lands within reservation boundaries,\textsuperscript{177} or to regulate non-Indian resource use within reservations.\textsuperscript{178} These limitations can severely undermine tribes’ ability to provide comprehensive land management schemes in reservations containing substantial non-Indian parcels, as many do.

\textsuperscript{172} See \textit{Johnson v M'Intosh}, 21 US (8 Wheat) 543, 572-88 (1823).
\textsuperscript{173} \textit{State of Wisconsin v Environmental Protection Agency, et al}, 266 F3d 741 (7th Cir 2001).
\textsuperscript{174} Nettheim, Meyers and Craig, above n 125, 40.
\textsuperscript{175} WD Ruckelshaus, \textit{EPA Policy for the Administration of Environmental Programs on Indian Reservations} (American Indian Environmental Office, 1984).
\textsuperscript{178} \textit{United States v Anderson}, 736 F 2d 1358, 1366 (9th Cir 1984).
These jurisdictional lacunae are curious omissions, for even under Canada’s much-loathed Indian Act 1876, bands’ by-law powers apply to everyone within the reservation. On the other hand, the Indian Act gives bands only rudimentary land use powers, such as management of stray dogs and removal of weeds. First Nations and the Canadian government negotiated a Framework Agreement in 1996 to provide an alternative land management regime on reservations. The resulting First Nations Land Management Act 1999 gives bands the choice to opt into a different self-governance regime over their reserve land. As of July 2008, at least 35 First Nations had committed to this process, which involves the drafting of a new land management code for each community and negotiation of an individual agreement with Indian Affairs and Northern Development. The land management codes drafted to date, such as the Scugog Island First Nation Land Management Code, tend to resemble municipal planning codes setting out procedural standards rather than substantive environmental or land use policy goals.

Although Indigenous communities may enjoy significant control over natural resources on designated reserves, the small size of many reserves make long-term, sustainable management approaches impractical. According to the 1996 report of the Royal Commission on Aboriginal Peoples, nearly 80 per cent of the some 600 First Nations reservations in Canada are less than 500 hectares in size. These reservations are probably not viable for comprehensive ecosystem-wide management. For example, in forestry management, many reservations have been found to be too small to allow for traditional rotation methods of logging. A further problem is that natural resources on First Nation lands may be harmed by third party pollution, emanating from distant places beyond Indigenous control. In the case involving ICI Canada, the First Nation was unable to prevent the company from discharging pollutants into a river that ultimately flowed through their reservation.

179 See ss 18, 57, 58, 73.
181 See www.fafnlm.com/content/en/LandCodes.html.
183 Curran and M’Gonigle, above n 5.
184 Walpole Island First Nation v Ontario [1997] OJ No 3768, 35 OR (3d) 113 (Ct J (Gen Div)).
The 2000 Nisga’a Final Agreement in British Columbia is a rare example of a framework for an Aboriginal Nation to exercise substantial environmental self-governance over a large area. Covering some 2,000 km² of Nisga’a lands, as well as some adjacent Crown lands, the treaty gave the Nisga’a Lisims Government a primary role in the environmental assessment and protection of project proposals on Nisga’a lands. While federal or provincial law will prevail whenever there is a conflict with Nisga’a environmental laws, the Nisga’a Agreement also provides a key safeguard: ‘[n]o Party should relax its environmental standards in the Nass Area for the purpose of providing an encouragement to the establishment, acquisition, expansion, or retention of an investment’.

By contrast, the other comprehensive land settlements negotiated in Canada in recent years have tended to provide for resource management institutions jointly controlled by Indigenous and non-Indigenous interests, rather than Aboriginal self-governance, as the following section explains.

F. JOINT RESOURCE MANAGEMENT

Indigenous communities may also participate in environmental decision-making through cross-cultural institutions that allow Aboriginal and non-Aboriginal stakeholders to work collaboratively in managing wildlife, forests, water and other natural resources.

Perhaps the leading example is Canada’s Comprehensive Land Claims Process (CLCP), which has led to nearly twenty major settlements since it began in the mid-1970s. First Nations and the federal and other governments have negotiated complex agreements for financial compensation, co-management of Aboriginal lands, wildlife management and regional development. Most have involved areas in northern Canada where Aboriginal or Inuit lands were never historically ceded to

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187 Ibid, para 18.
188 See Nettheim, Meyers and Craig, above n 125; Richardson, Craig and Boer, above n 111. The Canadian CLCP, however, was inspired by the earlier Alaska Native Claims Settlement Act, Pub L No 92-203, 85 Stat 339 (1971).
189 Indian and Northern Affairs Canada (INAC), Comprehensive Claims Policy and Status of Claims (INAC, 2003).
the Crown. Negotiation of the CLCP agreements has often been precipitated by development pressures; the Inuvialuit Agreement of 1984 was negotiated against the back-drop of the discovery of oil and gas deposits in the region.\textsuperscript{190} The Nisga’a Agreement was also shaped partly by disputes over deforestation and control of British Columbia’s lucrative salmon fishery.\textsuperscript{191}

Each CLCP agreement creates specific institutions for environmental governance that are typically managed jointly by Indigenous and governmental representatives. The Nunavut Agreement of 1993 contains perhaps the most extensive array of governance institutions, including: a Nunavut Wildlife Management Board; a Nunavut Impact Review Board to screen project proposals and to monitor projects that do proceed; a Nunavut Planning Commission to oversee general land use planning; a Nunavut Water Board; and a Surface Rights Tribunal.\textsuperscript{192} In each institution, the federal or territorial government representatives have an overriding obligation to ensure sustainable utilisation and resource conservation, but they must also act in accordance with basic constitutional principles on Aboriginal rights.\textsuperscript{193} Thus, in \textit{Kadlak v Nunavut} the court considered the legality of a Minister’s decision to overrule a recommendation of the Nunavut Wildlife Management Board to allow traditional hunting of polar bears.\textsuperscript{194} The court viewed the decision of the Minister as a prima facie infringement on an Aboriginal right that could not be justified under the \textit{Sparrow} test, and the matter was referred to the Minister for reconsideration.\textsuperscript{195}

While the Canadian examples of cross-cultural resource management may be faulted for often assigning Indigenous parties only a minority voice, they compare favourably to models in other jurisdictions.

\textsuperscript{193} Canada Department of Indian Affairs and Northern Development, \textit{Federal Policy for the Settlement of Native Claims} (March 1993) 10.
\textsuperscript{194} \textit{Kadlak v Nunavut (Minister of Sustainable Development)} [2001] NUCJ 1.
\textsuperscript{195} \textit{Ibid}, para 170.
In Australia, by contrast, governments have tended to limit the Aboriginal voice to various advisory committees and consultation mechanisms.\footnote{Nettheim, Meyers and Craig, above n 125, 393.} Such arrangements have been introduced under the Torres Strait Fisheries Act 1984 and the Environment Protection and Biodiversity Conservation Act 1999, for instance.\footnote{D Craig, \textit{Aboriginal and Torres Strait Islander Involvement in Bioregional Planning: Requirements and Opportunities under International and National Law and Policy} (Department of Environment, Sport and Territories, 1996).}

The joint management of protected areas in Australia provides a more genuine example of cross-cultural resource management.\footnote{S Woenne-Green, \textit{et al, Competing Interests: Aboriginal Participation in National Parks and Conservation Reserves in Australia} (Australian Conservation Foundation, 1994).} The Kakadu and Uluru national parks in the Northern Territory are among the most comprehensive and successful examples of joint management.\footnote{T DeLacy and B Lawson, ‘The Uluru-Kakadu Model: Joint Management of Aboriginal-Owned National Parks in Australia’ in S Stevens (ed), \textit{Conservation through Cultural Survival: Indigenous Peoples and Protected Areas} (Island Press, 1997).} They each provide for Aboriginal ownership and lease-back of the land to the government conservation agency, an Aboriginal majority on the board of park management, and financial payments to the traditional owners. Jointly managed national parks have also led to advances in cross-cultural education, training and employment for local Indigenous communities to share in the economic benefits of parks. There are also numerous examples of less formal partnerships for environmental management in Australia. These include the Kowanyama community strategy for joint management of fisheries resources in Queensland’s Mitchell River, and the natural and cultural resource management undertaken by the Dhimurru Land Management Aboriginal Corporation in Arnhem Land.\footnote{Nettheim, Meyers and Craig, above n 125, 384-85.}

Another distinctive feature of the Australian approach to Indigenous participation in environmental governance is the extensive use of contractual arrangements between Aboriginal organisations, public agencies and developers relating to land and cultural heritage management.\footnote{See E Young \textit{et al, Caring for Country: Aborigines and land management} (Australian National Parks and Wildlife Service, 1991); H Jarieth and D Craig,}
pursuant to the Indigenous Protected Areas (IPAs) program under the Natural Heritage Trust of Australia Act 1997, providing for co-operative management of terrestrial and marine areas as protected sites. Another example is the Indigenous Land Use Agreements (ILUAs) negotiated under the Native Title Act, allowing native title claimants to enter into resource management arrangements, such as for biodiversity conservation, in territories under claim. 202

Negotiated agreements have also been used in New Zealand for joint resource management. The most important settlement is the 1989 and 1992 ‘Sealords’ agreements by which the Crown agreed to transfer a large proportion of the nation’s commercial fisheries quota to the newly created Treaty of Waitangi Fisheries Commission to manage on behalf of all Māori, and to provide funding to enable the Commission to purchase the Sealords fishing company. 203 In return, Māori agreed that the settlement would discharge and extinguish all of their commercial fishing rights and claims against the Crown. 204 There have been other negotiated settlements for the return of Māori tribal lands, financial compensation and co-management of natural resources, although not as comprehensive as the Canadian examples. 205

G. ENVIRONMENTAL GOVERNANCE BEYOND THE STATE

Another governance trend is the growing influence of the corporate sector, including in the areas of environmental policy and Indigenous peoples. Corporate influence in governance has mushroomed in the wake of policy shifts in many countries, particularly in the Anglo-American sphere, to

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204 The customary taking of seafood for subsistence needs is also recognised and preserved in government fisheries regulations: Fisheries (Amateur Fishing) Regulations, cl 27.
205 Eg. the Tainui and Ngai Tahu settlements: Nettheim, Meyers and Craig, above n 125, 144.
reduce the regulatory role of states while ceding greater responsibilities to markets and private sector institutions. The resulting growth of corporate self-regulation is reflected in the plethora of private sector codes of conduct and voluntary standards, which typically emphasise procedural rather than normative standards. Procedural standards, such as for public disclosure, consultation and reporting, may make stakeholders (e.g., nongovernmental organisations, local communities and Indigenous peoples) more informed of corporate behaviour, promote a dialogue with companies and enable stakeholders to apply pressure for change.

A paradigmatic example of such process standards is the Equator Principles, designed for the financial sector. Through the long-standing movement for socially responsible investment, the financial sector is under mounting pressure from many stakeholders to promote environmentally sustainable development and social justice. Socially responsible investors began to acknowledge Indigenous rights in the 1980s, following the lead set by the World Bank and other multilateral lenders that pioneered policies for the special treatment of tribal peoples in development projects. Investors were not principally driven by any ethical belief in the sanctity of Indigenous rights or interests. Rather, they saw a business case for respecting Indigenous interests; the World Resources Institute, for instance, argued that financiers and developers should seek the ‘free and informed consent’ of affected Indigenous and other local communities if they wish to avoid costly protests and resistance to their economic plans.

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210 S Herz, A Vina and A Sohn, Development without Conflict: The Business Case for Community Consent (World Resources Institute, 2007).
These considerations weighed on the international banking community when it formulated the Equator Principles (EPs). The Principles, which were drafted in 2003, provide a voluntary code of conduct for responsible project financing.\(^{211}\) The EPs are based on the World Bank’s International Finance Corporation (IFC) standards, the Bank’s private sector lending arm. Lenders that sign the EPs agree to implement measures to minimise the social and environmental harm of financed infrastructure projects (eg, dams, highways and mines), such as by following procedures for undertaking environmental and social impact studies before disbursing money, and consulting with affected local communities.\(^{212}\)

The EPs touch briefly on Indigenous peoples specifically. A bank must ensure that its borrower formulates an ‘Indigenous Peoples Development Plan’ in accordance with the IFC standards. They provide, in part:

[w]hen avoidance [of adverse impacts] is not feasible, the client will minimize, mitigate or compensate for these impacts in a culturally appropriate manner. The client’s proposed action will be developed with the informed participation of affected Indigenous Peoples and contained in a time-bound plan, such as an Indigenous Peoples Development Plan.\(^{213}\)

The EPs do not, however, require borrowers to obtain the free, prior and informed consent of affected Indigenous communities. The lesser standard of ‘consultation’ does not necessarily require developers to respond to and address their advice or concerns.

Of the approximately 60 banks that had signed the EPs as of mid-2008, few have drafted policies that explicitly address Indigenous peoples. JPMorganChase, with perhaps the most comprehensive policy, commits itself to finance projects only where: free, prior informed consultation using customary institutions results in support of the project by the affected Indigenous people; they have been fully informed about the

\(^{211}\) See www.equator-principles.com.
project; they have access to a grievance mechanism; and major Indigenous land claims have been appropriately addressed. While the policies of JPMorganChase fall short of best practice, they are comparable to governmental policies.

Apart from such procedural standards, occasionally the private sector commits to more substantial standards in its dealings with Indigenous and other local stakeholders. One example used in Canada is formal agreements negotiated between developers and communities. While the Supreme Court of Canada ruled in *Haida Nation v British Columbia (Minister of Forests)* that resource developers do not owe an independent duty to consult with First Nations, a duty of the Crown that cannot be delegated, some Canadian companies have been acting independently to consult with and reach accommodations with Indigenous resource owners. One mechanism is ‘impact and benefit’ agreements (IBAs).

Used particularly in Canada’s resource economy, IBAs are typically negotiated between resource-sector corporations, Indigenous communities and sometimes governments as well, to alleviate various adverse socio-economic and environmental impacts that can arise from resource development. IBAs operate on a project basis and include provisions covering employment, training, profit sharing, compensation, and cultural and environmental protection. Environmental provisions can include additional impact assessments and environmental monitoring. IBAs do not take the place of official regulation, but may supplement it with additional measures to accommodate the concerns of affected local communities. One limitation of IBAs as used in Canada is their confidentiality; this restricts public access, and therefore does not allow

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parties entering IBA negotiations to be aware of useful precedents and learn from previous negotiations.  

IV. CONCLUSIONS

Indigenous peoples’ ties to environmental governance have been shaped by specific legal rights, as well as academic and policy debates about the relative value of Indigenous knowledge and customs to modern environmental management. It is too simplistic, however, to conclude that more Indigenous control will resolve both their desires for self-determination and ensure sustainable use of the environment. Even where Indigenous institutions have remained relatively intact, evidence from the South Pacific, for instance, suggests that the maintenance of customary land tenure systems and tribal authorities has not prevented significant environmental decline.

The purpose of this chapter is not to provide answers to these challenges, but rather to illuminate more fully the complex discourse about Indigenous environmental values and practices, and the governance tools availed to give voice and authority to Indigenous peoples. Yet by understanding these two issues, we should be better placed to evaluate appropriate reforms.

We should be mindful not to assume that there is an inevitable path to reform. While the trend in most jurisdictions has been for more Indigenous voice and authority in environmental governance, setbacks have occurred. Some courts have become less receptive to or ambivalent about Indigenous claims. The US Supreme Court has been ‘backtracking on Indian sovereignty’, as evident in *Nevada v Hicks*. Tribal

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219 Kennett, above n 216, 2.
221 P McHugh, *Aboriginal Societies and the Common Law* (Oxford University Press, 2005) 330. Although there were exceptions to this trend, notably *California v Cabazon Band*, 480 US 202 (1987) (concerning the rights of Indian tribes to operate gaming facilities on Indian reservations), and *US v Lara*, 541 US 193 (2004) (affirming Congressional power under the constitution to recognise inherent criminal jurisdiction of tribal authorities over non-member Indians).
governments have seen their jurisdiction chipped away.223 In Canada, after
the ground-breaking Sparrow decision, the Supreme Court retreated
somewhat in its judgements in Van der Peet224 and Pamajewon.225 In
Australia, the euphoria of Mabo has abated, because of rulings like Yorta
Yorta226 that held native title claimants must prove continuous
acknowledgement and observance of traditional laws and customs in
relation to land. Even when courts favour Indigenous claims, such as when
the crucial decision of the New Zealand Court of Appeal on Māori rights to
the foreshore and seabed,227 governments have intervened to extinguish
Indigenous rights given sufficient economic and political stakes. The New
Zealand government did so with the Foreshore and Seabed Act 2004, as
explained further in Jacinta Ruru’s chapter.

Enduring measures to safeguard Indigenous environmental
practices – and thereby their distinctive cultures – are unlikely to be found
if the Aboriginal stake is defined narrowly in terms of mere usufruct rights
to harvest plants and animals. Even full territorial rights and Indigenous
self-government are likely to be insufficient where the land mass is small
and there are no rights to influence environmental decisions on a regional
or higher scale. Environmentally threatening processes from afar can
undermine even the most robust local resource management regimes. In a
global economy, the sustainability of Indigenous livelihoods will
increasingly be shaped by factors quite distant from Indigenous
homelands. Global warming is the gravest threat, while also being the
environmental challenge most beyond Indigenous control. Traditional
governance approaches that emphasise Indigenous autonomy and self-
control will not work very well in the face of such looming disasters.

What could help? The Inuit of the Arctic regions have submitted a
petition to the Inter-American Commission on Human Rights seeking

\[222\] 533 US 353 (2001). In this case the Supreme Court held that state officers could
enter an Indian reservation uninvited to investigate or prosecute an off-
reservation violation of state law. It further held that tribal courts are not
equipped to hear civil rights cases under federal law because they are not
courts of general jurisdiction.

\[223\] See D Luckerman, ‘Sovereignty, Jurisdiction, and Environmental Primacy on


\[225\] R v Pamajewon (1996) 2 SCR 821.

\[226\] Yorta Yorta Aboriginal Community v Victoria [2002] HCA 58.

remedies from the US for its contribution to global warming. While their petition may help to build recognition of an international human right to maintain cultural traditions, reform must also address mechanisms by which Indigenous communities can collaborate with management institutions at other levels of economic policy-making and development planning. If Indigenous livelihoods that respect the environment are to be sustained, an Indigenous voice in local environmental governance is not enough – it must also be heard in the institutions that shape the global economy, trade, finance and other fundamental causes of environmental pressure.

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228 Petition to the Inter American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States (December 7, 2005).