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Cultural Diversity, Human Rights, and the Emergence of Indigenous Peoples in International and Comparative Environmental Law

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CULTURAL DIVERSITY, HUMAN RIGHTS, AND THE EMERGENCE OF INDIGENOUS PEOPLES IN INTERNATIONAL AND COMPARATIVE ENVIRONMENTAL LAW

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INTRODUCTION

A fundamental change is occurring in the way indigenous peoples' rights, aspirations, and knowledge influence international environmental law. Whereas historically, international environmental law was state-centered and did not concern the rights and the role of indigenous communities regarding environmental issues, recently a number of debates have emerged touching on issues central to indigenous peoples. These debates begin with the principle of self-determination and include consideration of ancestral land tenure, cultural autonomy, traditional hunting and fishing practices, control over and management of natural resources, valuation of traditional knowledge, and the sharing of benefits from genetic resources. Often these discussions are framed within the wider context of human rights¹ or environmental justice,² which, although not solely

1. See Flavia Noejovich, *Indigenous Peoples in International Agreements and Organizations: A Review Focused on the Legal and Institutional Issues*, at 6-7, IUCN (2000) (on file with author) (contending that there is a visible connection between human rights and environmental rights).

restricted to indigenous peoples, can be applied to a number of indigenous issues.

This article traces the fundamental shift in international environmental law relating to the role of indigenous peoples at the global, regional, and state levels. This shift creates “a new set of shared expectations about the legal status and rights of indigenous people.”³ Part I of this article examines the new paradigm of indigenous peoples within a cultural context.⁴ Part II considers and defines the term “indigenous peoples” and the human rights and aspirations that flow from that concept, and compares and contrasts the term “indigenous peoples” to other terms such as “tribal,” “traditional,” and “aboriginal.”⁵ Part III unites the strands of international environmental policy and traces the development of indigenous peoples as a concept of substantive and normative content in international environmental law.⁶ Part IV considers case studies on four continents that highlight recent legal, political, and social developments at the state level.⁷ Part V reflects on developments in international and comparative environmental law and policy to shed light on the concept of indigenous peoples as an emerging norm in international environmental law.⁸

2. See Benjamin J. Richardson, *Indigenous Peoples, International Law and Sustainability*, 10(1) RECIEL 1 (2001) (stating that the concept of “environmental justice,” in terms of indigenous peoples, includes recognition of ownership of land and resources, effective participation in decision-making, and equitable benefit sharing).

3. See Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 109 (1999) (noting that this development has transformed and crystallized into customary international law).

4. See discussion *infra* Part I (examining the concept of “indigenous peoples” within a cultural realm).

5. See discussion *infra* Part II (exploring the definition of “indigenous peoples” within a human rights context and comparing and contrasting that term to others such as “tribal” and “traditional”).

6. See discussion *infra* Part III (focusing on the application of international environmental policy to “indigenous peoples” within a context of international environmental law).

7. See discussion *infra* Part IV (undertaking a comparative international analysis of case studies on four continents that focus on recent developments at the state level).

8. See discussion *infra* Reflections and Conclusions (arguing for indigenous

I. CULTURE AND INDIGENOUS INTERESTS

Culture functions to meet human needs, contributes to social stability, and is essential to human well-being.⁹ In 1871, the British anthropologist Sir Edward Burnett Tylor defined culture as “that complex whole which includes knowledge, belief, art, law, morals, custom and any other capabilities and habits acquired by man as a member of society.”¹⁰ The idea that culture is acquired or learned, as opposed to biologically inherited, continues to influence our view of how cultures are created and developed. Today, culture is predominantly seen as “a set of rules or standards that, when acted upon by the members of a society, produce behavior that falls within a range of variance that members consider proper and acceptable.”¹¹ Members of a given society then share these values, giving rise to varied interpretations of the world around them, and shaping the responses and behaviors that their society finds acceptable.¹²

When one culture is heavily outnumbered, marginalized, or subjugated by another (as can happen with indigenous cultures that are located within a dominant non-indigenous population), problems can arise even when the non-dominant culture exists within a democratic state. If the democracy is based on majority rule then the dominant culture possess the power to consistently overrule the

self-government and autonomy in matters of local affairs and discretion to participate in the decision-making process).

9. See SERENA NANDA, CULTURAL ANTHROPOLOGY 50 (Serina Beauparlant et al. eds., 5th ed. 1994) (affirming Malinowski's theory that culture satisfies “basic needs, derived needs, and integrative needs”).

10. See WILLIAM A. HAVILAND, CULTURAL ANTHROPOLOGY 12 (Andrew Askin et al. eds. 2d ed. 1978) (1975) (noting that modern definitions “tend to distinguish more clearly between actual behavior on the one hand and the abstract values, beliefs, and perceptions of the world that lie behind that behavior on the other”).

11. See *id.* at 30 (proposing that culture is not observable behavior but a system of embedded values and beliefs that it reflects).

12. See *id.* (stating that culture is learned behavior and derived from generations through nonhereditary means); see also *Alexkor Limited v. Richtersveld Community*, 2003 (12) BCLR 1301, ¶ 56 (CC) (finding that “the dangers of looking at indigenous law through a common law prism are obvious”), available at http://www.concourt.gov.za/summary.php?case_id=12632 (last visited Feb. 21, 2005). The Court proceeded to note that “the two systems of law developed in different situations, under different cultures and in response to different conditions.” *Id.*

wishes of the non-dominant culture. Although rule by a majority or dominant culture may be democratic, it is not always equitable. If indigenous peoples' interests consistently fall on deaf ears and the views of a differently-opinioned dominant culture consistently prevail, then their rights are "insecure."¹³ As one commentator notes, indigenous peoples "experience the obstructive influence of majoritarianism most acutely when they attempt to engage in ethnodevelopmental strategies that are either culturally incoherent to dominant societies or threatening to the legal sovereignty of the states in which they reside."¹⁴

II. "INDIGENOUS PEOPLES" AND INDIGENOUS PEOPLES' RIGHTS

Prior to examining indigenous rights and aspirations in the context of international environmental law, it is important to consider the following questions: (1) who are the beneficiaries and holders of these rights and aspirations and (2) what fundamental attributes may emerge from recognition of indigenous rights and aspirations? While there are no definitive answers to these questions—indeed, international organizations and fora have been struggling with these very questions for more than three decades without resolution—by sifting through global and regional agreements, and developments by United Nations ("UN") organizations and commissions, this article arrives at some tentative conclusions. At the very least, this article discounts contrary conclusions.

A. BENEFICIARIES

Perhaps the best place to start is with nomenclature. The international community is converging on the term "indigenous peoples" to describe beneficiaries, although it must be recognized that some international agreements and organizations use other terms

13. Cf. LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* 3 (1994) (citing John Madison's observation that in a heterogeneous community the assumption that the majority view is representative of the minority is "altogether fictitious").

14. William Bradford, *"Save the Whales" v. Save the Makah: Finding Negotiated Solutions to Ethnodevelopmental Disputes in the New International Economic Order*, 13 ST. THOMAS L. REV. 155, 169-70 (2000).

such as "aborigines"¹⁵ or "tribal"¹⁶ peoples. Indigenous peoples have been described as "First Peoples"¹⁷ as well. Moreover, individual nation-states use other terms such as "Native Americans" (United States), "First Nations" (Canada), and "Indian" (throughout much of the Americas).

So who does the term "indigenous peoples" include? José Martínez-Cobo made an early attempt to define the parameters of

15. See, e.g., International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72 [hereinafter ICRW] (mandating a system of international regulation for whale stocks in order to ensure effective conservation of whale stocks and an orderly whaling industry). The ICRW does not mention aborigines by name; rather the special provisions addressing aboriginal subsistence whaling are found in the "Schedule" which is akin to administrative rules. *Id.* See also *id.* at sched., ¶ 2 (providing that "it is forbidden to take or kill gray whales or right whales, except when the meat and products of such whales are to be used exclusively for local consumption by the aborigines").

16. See, e.g., Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (I.L.O. No. 107), June 26, 1957, 328 U.N.T.S. 247 and by Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 28 I.L.M. 1382, 82 (entered into force Sept. 5, 1991) [hereinafter ILO Convention 169] (providing that it will apply to both "tribal" and "indigenous" peoples); see also World Bank Operational Manual, Operational Directive 4.20, ¶ 3 (Sept. 1991) (noting that the terms "indigenous peoples" and "tribal groups" represent a cultural identity different from the dominant society), available at <http://wbln0018.worldbank.org/Institutional/Manuals/OpManual.nsf/ODirw/0F7D6F3F04DD70398525672C007D08ED?OpenDocument> (last visited Feb. 21, 2005); The World Bank Group, Draft Operational Policy 4.10, ¶ 4 (Mar. 23, 2001) (using the terms "indigenous peoples," "indigenous ethnic minorities," "tribal groups," and "scheduled tribes," but defining them with one unified definition), available at <http://lnweb18.worldbank.org/ESSD/sdvext.nsf/63ByDocName/PoliciesDraftOP410March232001> (last visited Feb. 21, 2005).

17. See Erica-Irene Daes, *Standard-Setting Activities: Evolution of Standards Concerning the Rights of Indigenous People – New Developments and General Discussion of Future Action*, U.N. ESCOR, SUB-COMM'N ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, U.N. Doc. E/CN.4/Sub.2/AC.4/1995/3, ¶ 13 (1995) [hereinafter 1995 Criteria] (stating that indigenous populations have a historical connection with pre-invasion societies), available at <http://www.cwis.org/fwdp/International/indigdef.txt> (last visited Feb. 21, 2005); see also Alexander Gillespie, *Aboriginal Subsistence Whaling: A Critique of the Inter-Relationship Between International Law and The International Whaling Commission*, 12 COLO. J. INT'L ENVTL. L. & POL'Y 77, 89-92 (2001) (contrasting aboriginal and indigenous peoples and arguing that the recognition of indigenous peoples is hindered by the lack of a universal definition of "indigenous").

this term in his seminal *Study of the Problem of Discrimination Against Indigenous Populations*. He states:

Indigenous communities, peoples and nations are those which, having a *historical continuity* with *pre-invasion and pre-colonial* societies that developed on their territories, *consider themselves distinct* from other sectors of the societies now prevailing in those territories, or parts of them. They form at present *non-dominant sectors* of society and are determined to preserve, develop and transmit to future generations their *ancestral territories*, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own *cultural patterns*, social institutions and legal systems.¹⁸

Martinez-Cobo emphasizes the element of distinctiveness (cultural and otherwise), which could be characteristic of “tribal” as well as “indigenous” peoples, and the element of invasion or colonialism,¹⁹ which international law and international law scholars use in part to distinguish “tribal” from “indigenous” peoples.²⁰ Martinez-Cobo

18. José R. Martinez-Cobo, *The Study of the Problem of Discrimination Against Indigenous Populations*, U.N. ESCOR, SUB-COMM’N ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, U.N. Doc. E/CN.4/Sub.2/1986/7/Add. 4, ¶ 379 (1986) (emphasis added), appended as Annex I to 1995 Criteria, *supra* note 17.

19. See ILO Convention 169, *supra* note 16; see also Miguel Alfonso Martínez, *Discrimination Against Indigenous Peoples: Study on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Populations*, U.N. ESCOR, SUB-COMM’N ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, U.N. Doc. E/CN.4/Sub.2/1995/27, ¶¶ 99-105 (1995) (distinguishing the more general phenomenon of territorial expansion from organized colonization of peoples of other continents), available at <http://www.unhchr.ch/huridocda/huridoca.nsf/0/3eed1279f1399264802566c1004d12dd?OpenDocument> (last visited Feb. 21, 2005).

20. See Erica-Irene Daes, *Standard-Setting Activities: Evolution of Standards Concerning the Rights of Indigenous People*, U.N. ESCOR, SUB-COMM’N ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, U.N. Doc. E/CN.4/Sub.2/AC.4/1996/2, ¶ 26 (1996), [hereinafter 1996 Concept of Indigenous Peoples] (articulating that it does not follow that a group “ceases to be ‘indigenous’ if, as a result of measures taken for the full realization of its rights, it were no longer non-dominant”), available at [http://www.unhchr.ch/huridocda/huridoca.nsf/AllSymbols/2B6E0FB1E9D7DB0FC1256B3A003EB999/\\$File/G9612980.pdf?OpenElement](http://www.unhchr.ch/huridocda/huridoca.nsf/AllSymbols/2B6E0FB1E9D7DB0FC1256B3A003EB999/$File/G9612980.pdf?OpenElement) (last visited Feb. 21, 2005). ILO Convention 169 broadens the definition of indigenous peoples from an earlier ILO Convention addressing indigenous peoples (No. 107) by defining indigenous peoples as inhabitants at the time of “establishment of present state boundaries” in addition to at the time of “conquest or colonization.” *Id.* See also ILO Convention 169, *supra*

considers historical continuity, non-dominance, traditional lands, and self-identification as important determinants as well.²¹

Individuals or cultures described as “indigenous” can be juxtaposed against communities referred to as “local” or “traditional.” Local or traditional communities may or may not be indigenous, but often, like indigenous communities, they have a connection with particular lands. Their use of those lands and their lifestyles are integrally tied to their cultural traditions, which distinguish them from the dominant societies within their states.²² The terms “local” and “traditional,” like “indigenous,” are not defined in international law despite the increasing frequency with which they are employed. Examples of their use in international environmental law include the Convention to Combat Desertification,²³ the Proposed American Declaration On The Rights Of Indigenous Peoples,²⁴ and perhaps most prominently, the

note 16, at art. 1 (identifying those to which the Convention applies). Thus, while ILO Convention 169 retains the distinction between tribal and indigenous peoples, with this addition, the two categories merge to some degree. *Id.* Moreover, because both Conventions provide tribal and indigenous peoples with identical rights, the distinction between tribal and indigenous peoples has no practical significance. *Id.* See also 1996 Concept of Indigenous Peoples, *supra* note 20, ¶ 72 (finding no satisfactory reason to distinguish between “indigenous and tribal peoples in the practice or precedents of the United Nations”).

21. See 1995 Criteria, *supra* note 17, ¶¶ 12-18 (outlining elements of indigenous peoples that “distinguish them from the prevailing society in which they live”).

22. See Michael Halewood, *Indigenous and Local Knowledge in International Law: A Preface to Sui Generis Intellectual Property Protection*, 44 MCGILL L. J. 953, 957 (1999) (arguing that “local” communities that live “traditional lifestyles” share, to an extent, characteristics with indigenous peoples that include lengthy territorial occupation and cultural and economic traditions that are tied to occupation and customary use of lands).

23. See United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, U.N. GAOR, 47th Sess., Supp. No. 49, U.N. Doc. A/47/49, vol. 1, 137, art. 16(g) (1994) (using the terms “local and traditional knowledge”).

24. See Proposed American Declaration On The Rights Of Indigenous Peoples, Inter-Am. C.H.R., 1333rd sess., OEA/Ser/L/V/II.95, art. 1(1) (1997) (noting that “this Declaration applies to indigenous peoples as well as peoples whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations”), available at <http://www.cidh.org/Indigenous.htm> (last visited Feb. 21, 2005).

Convention on Biological Diversity.²⁵

In the Asian context, Benedict Kingsbury suggests “local” communities as a focal point rather than favoring “indigenous” or “tribal” concepts. He contends that the latter term is difficult to define and its “implicit emphasis on social structure does not mesh well with the dynamic societies, cultures, and political forms of many of the groups in the internationally active indigenous peoples’ movement.”²⁶ Yet, expanding “indigenous” to include “local” communities within the ambit of international environmental law is not without controversy in some contexts. For example, some whaling preservation advocates have expressed concerns over the resumption of whaling by the Makah Indian tribe in the United States because they feared the implications of a precedent in favor of Makah whaling on Japan’s advocacy for small-type coastal whaling.²⁷

Contrasting the term “indigenous” with “minorities” allows for further insight. Jules Deschênes suggested that one define “minorities” as:

A group of citizens of a State, constituting a *numerical minority* and in a *non-dominant* position in that State, endowed with *ethnic, religious or linguistic characteristics which differ* from those of the majority of the population, having a sense of solidarity with one another, motivated, if only

25. See United Nations Conference on Environment and Development: Convention on Biological Diversity, 31 I.L.M. 818 (1992) (recognizing the “close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources”). In Article 8(j) the parties acknowledge the need to share the benefits of biological diversity with such communities given the “knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles.” *Id.* at art. 8(j).

26. See Benedict Kingsbury, “Indigenous Peoples” in *International Law: A Constructivist Approach to the Asian Controversy*, 92 AM. J. INT’L L. 414, 450 (1998) (noting that a broad alternative to focusing on “indigenous peoples” is a consideration of local communities).

27. See Alma Soongi Beck, Comment, *The Makah’s Decision to Reinstate Whaling: When Conservationists Clash with Native Americans Over an Ancient Hunting Tradition*, 11 J. ENVTL. L. & LITIG. 359, 394-98 (1996) (stating that local Japanese whaling is readily distinguishable from indigenous subsistence whaling in that it would not be undertaken by people who are indigenous to Japan, has a mere fifty-year history, and has an economic component).

implicitly, by a *collective will to survive and whose aim is to achieve equality with the majority in fact and in law*.²⁸

In light of disagreement over whether non-citizens should be included within the definition and the ambiguity of the phrase “a collective will to survive and whose aim is to achieve equality with the majority in fact and in law,”²⁹ there is no international consensus or agreement on the definition of “minorities.” Yet, it is the latter part of the definition, which addresses an objective of minorities—the “aim to achieve equality”—that may in large part distinguish minority aspirations from the aspirations of indigenous peoples.³⁰ One also can differentiate the concept of “minorities” from “indigenous” in that the former requires neither a community to have a relationship with particular lands nor priority in time.³¹

28. See Jules Deschênes, *Proposal Concerning a Definition of the Term “Minority,”* U.N. ESCOR, SUB-COMM’N ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, U.N. Doc. E/CN.4/Sub.2/1985/31, ¶ 181 (1985) (emphasis added), cited in Martínez, *Discrimination Against Indigenous Peoples*, *supra* note 19, ¶ 69. But see Francisco Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, U.N. Doc. E/CN.4/Sub.2/384/Rev. 1, ¶ 568 (1979) (defining a minority as:

a group numerically inferior to the rest of the population of a State, in a non dominant position, whose members being nationals of the State possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language).

29. Asbjorn Eide, *Citizenship and the Minority Rights of Non-Citizens* (Working Paper), U.N. ESCOR, SUB-COMM’N ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, U.N. Doc. E/CN.4/Sub.2/AC.5/1999/WP.3 (1999), available at [http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/7cb70009369c90af802568f90058fb58/\\$FILE/G9912189.pdf](http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/7cb70009369c90af802568f90058fb58/$FILE/G9912189.pdf) (last visited Feb. 21, 2005).

30. See Martínez, *Discrimination Against Indigenous Peoples*, *supra* note 19, ¶¶ 68-72 (noting that Deschênes’ definition, in contrast to Capotorti’s, distinguishes the categories of “indigenous peoples” and “minorities” while Capotorti’s emphasis is on numerical inferiority).

31. See 1996 Concept of Indigenous Peoples, *supra* note 20, ¶ 60 (stating, nonetheless, that these factors are not very helpful in distinguishing between the concepts of “indigenous” and of “peoples” since both tend to have historical claims to territory). The World Bank would presumably include minorities within the ambit of its indigenous policy given its explicit inclusion of “indigenous ethnic minorities” as well as its focus on non-dominance and the “vulnerability to being disadvantaged in the development process.” Draft Operational Policy 4.10, *supra* note 16, ¶ 4.

Returning to the core issue—the meaning of “indigenous”—Erica-Irene Daes conducted a comprehensive review of the literature and the practice of international institutions that inform the meaning of the term “indigenous” and identified four factors relevant to determining whether a people is indigenous:

- (a) Priority in time, with respect to the occupation and use of a specific territory;
- (b) The voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions;
- (c) Self-identification, as well as recognition by other groups, or by State authorities, as a distinct collectivity; and
- (d) An experience of subjugation, marginalization, dispossession, exclusion or discrimination, whether or not these conditions persist.³²

The weight and relevance assigned to any one factor depends on the relationship between colonizers and indigenous peoples as well as that among indigenous peoples.³³ Indeed, while members of the developing world tend to be more familiar with the settler/immigrant model adopted in colonies such as Australia and the United States (which has resulted in a particular configuration to the relationship between indigenous peoples and a given settler society), in much of Africa and Asia, colonists left indigenous social structures relatively intact.³⁴ The former communities, unlike the latter, also tended to define their relationship vis-à-vis the colonists in either treaties or treaty substitutes.³⁵ Perhaps most importantly, unlike the more

32. 1996 Concept of Indigenous Peoples, *supra* note 20, ¶ 69.

33. *See id.* ¶ 70 (indicating that factors are not inclusive or comprehensive, and may be present in different national and local contexts); *see also* Kingsbury, *supra* note 26, at 450 (discussing the concept of “indigenous peoples” in Asia).

34. *See* Rodolfo Stavenhagen, “The Indigenous Problematique” in IFDA DOSSIER (Nyon), 3-14, 10 (1985), *quoted in* Martínez, *supra* note 19, ¶ 106 (distinguishing among different types of colonial societies and the way in which they affect indigenous peoples).

35. *See id.* ¶ 128 (stating that the majority of communities that might be characterized as indigenous in Africa and Asia are not necessarily those communities that have a treaty relationship with a state). Many legal-political entities in Asia and Africa, which are parties to colonial-era treaties, now represent

familiar settler societies in the "west," in Africa and Asia, ethnic groups that govern states tend to be no less native to their states than those who have been identified as tribal or indigenous (compare the Buginese and the Bajo in Indonesia, which we discuss in Section IV).³⁶ Daes suggests, however, that any conceptual difficulty incorporating native peoples of Asia into the concept of indigenous peoples "disappears" if we consider that the term encompasses groups that are "native to their own specific ancestral territories within the borders of the existing State, rather than persons that are native generally to the region in which the State is located."³⁷ Indeed, to the extent such ethnic peoples are isolated and otherwise exist at the margins of society, it also may well be appropriate to consider such peoples as covered by the concept of "indigenous" peoples.³⁸

Professor Siegfried Wiessner provides a final formulation. Wiessner, drawing on both Daes and Kingsbury, presents a definition that he contends is "largely compatible" with Kingsbury's conception, but has the advantage of "appropriate inclusivity,

themselves as independent states. *Id.*

36. See 1996 Concept of Indigenous Peoples, *supra* note 20, ¶ 64.

37. *Id.* See also *infra* Part IV (noting the Bajo case study in Indonesia, which suggests that this formulation may be problematic as well).

38. See Study of the Problem of Discrimination Against Indigenous Populations: *Preliminary Report Submitted by the Special Rapporteur, Mr. Cobo, U.N. Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities*, 26th Sess., Provisional Agenda Item 10 P 379, U.N. Doc. E/CN.4/Sub.2/L.566, (1972) (explaining that:

Although they have not suffered conquest or colonization, isolated or marginal population groups existing in the country should also be regarded as covered by the notion of 'indigenous populations' for the following reasons: (a) they are descendants of groups which were in the territory of the country at the time when other groups of different cultures or ethnic origins arrived there; (b) precisely because of their isolation from other segments of the country's population they have preserved almost intact the customs and traditions of their ancestors which are similar to those characterized as indigenous; (c) they are, even if only formally, placed under a State structure which incorporates national, social and cultural characteristics alien to theirs.).

brevity, and precision.”³⁹ He contends that indigenous communities are “best conceived” as:

peoples traditionally regarded, and self-defined, as descendants of the original inhabitants of lands with which they share a strong, often spiritual bond. These peoples are, and desire to be, culturally, socially and/or economically distinct from the dominant groups in society, at the hands of which they have suffered, in past or present, a pervasive pattern of subjugation, marginalization, dispossession, exclusion and discrimination.⁴⁰

Wiessner prefers the phrase “traditionally regarded” to the phrase “priority in time” that Daes uses, because as a factual matter, it may turn out that a specific group of indigenous peoples who are regarded as indigenous does not have priority.⁴¹ In addition, Wiessner emphasizes the strong bond that indigenous peoples have to ancestral lands, while acknowledging that indigenous peoples may not presently reside on such lands.⁴²

39. Wiessner, *supra* note 3, at 115 n.398; *see also* Kingsbury, *supra* note 26, at 455 (adopting a more flexible approach to the definition of the indigenous peoples that recognizes the range of situations in which one might need to consider the concept and its evolving nature). While Kingsbury does identify certain “essential requirements,” he also considers relevant indicia, which he further divides into “strong indicia” and “other relevant indicia,” to be weighed in individual cases. *Id.* The “essential requirements” are “self-identification as a distinct ethnic group; historical experience of, or contingent vulnerability to, severe disruption, dislocation or exploitation; long connection with the region; [and] the wish to retain a distinct identity.” *Id.* “Strong indicia” are “nondominance in the national (or regional) society . . . ; close cultural affinity with a particular area of land or territories . . . ; [and] historical continuity with prior occupants of the land in the region,” the first two of which he notes are “ordinarily required.” *Id.* “Other relevant indicia” identified by Kingsbury are “socioeconomic and sociocultural differences from the ambient population; distinct objective characteristics such as language, race, and material or spiritual culture . . . ;” and that a group is “regarded as indigenous by the ambient population or treated as such in legal and administrative arrangements.” *Id.*

40. Wiessner, *supra* note 3, at 115.

41. *See id.* at 114-15 (describing the factual problems that occur with such a narrowly empirical definition). He notes that in 1996, a debate arose as to who were the first inhabitants of the New World when a 9000-year-old skeleton with a genetic makeup similar to Eurasians was found in Kennewick, Washington. *Id.* Wiessner argues that referring to “peoples that have traditionally been regarded as the original inhabitants of a particular territory” would properly designate the intended beneficiaries. *Id.* at 115.

42. *See id.* (emphasizing that indigenous communities are best characterized as

B. CORE RIGHTS, ATTRIBUTES, ISSUES, AND CONFLICTS⁴³

Armed with a better understanding of the debate over the intended beneficiaries of international indigenous policies, we can now examine the scope of indigenous rights. Here we briefly consider several core issues/conflicts: rights of self-identification, self-determination, and participation; collective rights; and land, culture, and resource rights.

In the previous section we examined the international law answer to the question: who are the beneficiaries of policies that are intended to support the aspirations of indigenous peoples? Now, we consider a related question. Who determines which entities and individuals are entitled to benefit from those laws and policies? Indigenous peoples claim that, rather than having definitions imposed on them, it is they who possess that right. Leading international soft and hard law instruments have taken this same stance.⁴⁴

The International Labour Organization ("ILO") is responsible for the only legally-binding, albeit not widely ratified, international agreements (ILO Conventions Nos. 107 and 169) that specifically address indigenous peoples.⁴⁵ ILO Convention 169 refers to self-

"peoples traditionally regarded, and self-defined, as descendants or the original inhabitants of lands with which they share a strong, often spiritual bond").

43. See Jeremy Firestone & Jonathan Lilley, *An Endangered Species: Aboriginal Whaling and the Right to Self-Determination and Cultural Heritage in a National and International Context*, 34 ENVTL. L. REP. NEWS & ANALYSIS 10763-87 (2004) (providing a basic overview of the ideas set forth in section II.B and in section III); see also Jeremy Firestone and Jonathan Lilley, *Aboriginal Subsistence Whaling and the Right to Practice and Revitalize Cultural Traditions and Customs*, J. INT'L WILDLIFE L. & POL'Y (forthcoming 2005) (expressing the same).

44. See Kingsbury, *supra* note 26, at 439-41 (stating that the historical experiences of many indigenous peoples of being "defined, disparaged or treated as nonexistent by others" strengthens the arguments by indigenous peoples for self-identification).

45. See ILO Convention 169, *supra* note 16, at 1387 (superseding ILO Convention 107). For those states that were parties to the earlier convention and that subsequently ratified the latter, the former is no longer open for signature. See International Labour Organization: Standards and Supervision, at <http://www.ilo.org/public/english/indigenous/standard/index.htm> (last visited Feb. 21, 2005). Neither convention has been widely ratified: ILO Convention 107 remains in force in only 18 states, while ILO Convention 169, which revised the earlier convention, has been ratified by only 17 states. *Id.* See also Wiessner, *supra* note 3, at 100 (noting that the earlier ILO convention "placed little value on

identification as a “fundamental criterion” and declares that peoples can be indigenous “irrespective of their [national] legal status.”⁴⁶ A similar posture is reflected in the 1994 Draft Declaration on the Rights of Indigenous Peoples (“Draft Declaration”).⁴⁷ The Draft Declaration provides indigenous peoples with the right to collectively and individually “identify themselves as indigenous and to be recognized as such,” the “collective right to determine their own citizenship in accordance with their customs and traditions,” and the “right to determine the structures and to select the membership of their institutions in accordance with their own procedures.”⁴⁸

In the debate over the Draft Declaration as well as in other contexts, there also has been considerable discussion over the use of the term “peoples” rather than “people” or “populations” to identify those indigenous groups entitled to the benefits of international policies.⁴⁹ Many believe that the term “peoples” implies greater recognition of group identity and an acknowledgement of collective

indigenous cultures as such, focusing instead on the goal of integration and assimilation rather than on the protection of the unique characteristics and lifestyles of indigenous populations”). For reasons of parsimony, the discussion herein will focus only on ILO Convention 169.

46. ILO Convention 169, *supra* note 16, at art. 1(1-2). See Proposed American Declaration on the Rights of Indigenous Peoples, Inter-Am. C.H.R., 1333rd Sess., 95th Reg. Sess., OEA/ser/L/V/II.95 Doc.6, at art. 1(2) (1997) [hereinafter Proposed American Declaration] (proposing likewise), available at <http://www.umn.edu/humanrts/instree/indigenousdecl.html> (last visited Feb. 21, 2005).

47. *Draft United Nations Declaration on the Rights of Indigenous Peoples*, U.N. ESCOR, SUB-COMM’N ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, U.N. Doc. E/CN.4/SUB.2/1994/2/Add.1 (1994) [hereinafter Draft Declaration].

48. *Id.* at arts. 8, 32; see *id.* at art. 9 (noting that “[i]ndigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No disadvantage of any kind may arise from the exercise of such a right.”).

49. See S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 64, n.63 (1996) (citing comments of the Indigenous Peoples’ Working Group of Canada, in International Labour Office, Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), Report 4(2A), International Labour Conference, 76th Sess. at 9, (1989) (stating that “[i]ndigenous and tribal peoples are distinct societies that must be referred to in a precise and acceptable manner. Continued use of the term ‘populations’ unfairly denies them true status and identity as indigenous peoples.”).

rights.⁵⁰ Some states, however, have resisted adopting the term “peoples,” because of its linkage to self-determination in the U.N. Charter, which provides *inter alia* respect among nations based on the “principle of equal rights and self-determination of peoples,”⁵¹ and which “in turn has been associated with a right of independent statehood.”⁵² Although most states realize that indigenous peoples are not seeking independent statehood, those states are still concerned with the conflict over indigenous peoples’ self-determination, which takes place within a wider human rights context that includes ethnic minorities (such as the Kurds) seeking greater autonomy.⁵³

A number of recent international instruments have addressed explicitly or can be viewed as touching implicitly on the right of indigenous peoples to self-determination. To begin with, the 1966 International Convention on Economic, Social and Cultural Rights states that “[a]ll peoples have the right to self-determination. By virtue of that right, they shall freely determine their political status and freely pursue their economic, social, and cultural development.”⁵⁴ In a similar vein, the 1966 International Convention on Civil and Political Rights provides that states shall not deny religious, ethnic, or linguistic minorities the “right, in community

50. See *id.* at 49 (describing how the “peoples/populations controversy” was resolved when drafters added a provision during the development of ILO Convention 169 which stated that the term “peoples” in the convention “shall not be construed as having any implications as regards the rights which may have attached to the term under international law”).

51. U.N. Charter, art. 1(2).

52. ANAYA, *supra* note 49, at 48.

53. See *id.* at 85 (describing how in most cases in the postcolonial world, “secession would most likely be a cure worse than the disease”); see also Wiessner, *supra* note 3, at 101-02 (stating that when the Working Group on Indigenous Populations went beyond their designated mandate by drafting a Declaration on the Rights of Indigenous “Peoples,” established nation-states did not support that term because of fears that their territorial integrity might be endangered by claims to external self-determination whose rightful claimants were designated as “peoples” under the U.N. Charter’s Articles 1, 2, 55, 56, and 73). Nation-states wanted to define terms in a manner that would prevent the “potential identification of legally protected claims of indigenous peoples with those of colonized communities.” *Id.*

54. International Covenant on Economic, Social and Cultural Rights, Part I, art. 1, 993 U.N.T.S. 3 (1966) [hereinafter ICESR].

with the other members of their group, to enjoy their own culture”⁵⁵

Turning to instruments concerned specifically with indigenous peoples, we begin with the 1994 Draft Declaration, which has been referred to as “perhaps the most representative document that the United Nations has ever produced, representative in the sense that its normative statements reflect in a more than token way, the experience, perspectives, and contributions of Indigenous peoples.”⁵⁶ As noted by other commentators, while the Draft Declaration is a monumental substantive achievement, the inclusive process by which it was created, involving indigenous peoples in addition to the usual “experts,” is perhaps even more significant.⁵⁷

The Draft Declaration addresses the issue of self-determination and the related notion of respect for indigenous cultures, as demonstrated by the following excerpts:

Indigenous people have the *right of self-determination*. By virtue of that right they freely determine their political status and freely *pursue their economic, social and cultural development*.⁵⁸

* * *

55. International Covenant on Civil and Political Rights, art. 27, 999 U.N.T.S. 171 (1966) [hereinafter ICCPR]; see Wiessner, *supra* note 3, at 99 (noting that while the ICESR and the ICCPR are far-reaching, neither mentions property rights nor provides any “specific protection of the distinctive cultural and group identity of indigenous peoples”).

56. Representative of the Grand Council of the Crees, Draft Declaration Open-ended Inter-Sessional Working Group, First Session, 20 November-1 December 1995, available at http://www.atsic.gov.au/issues/indigenous_rights/international/draft_declaration/draft_dec_two_d.asp#3 (last visited Feb. 21, 2005).

57. See Wiessner, *supra* note 3, at 103 (noting that the Working Group has continued this work, and “increasing numbers of indigenous people from different parts of the world attend its meetings”); see also Julian Burger, *The United Nations Draft Declaration on the Rights of Indigenous Peoples*, 9 ST. THOMAS L.REV. 209, 210 n.6 (1996) (discussing how the members of the Working Group on Indigenous Populations developed sympathy and commitment for the conditions of indigenous people from direct contact with indigenous communities during meetings and numerous field missions).

58. Draft Declaration, *supra* note 47, at art. 3 (emphasis added).

Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures . . .⁵⁹

* * *

Indigenous people have the right to maintain and develop their political, economic and social systems, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.⁶⁰

* * *

Indigenous peoples have the right to *maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas* and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard.⁶¹

Perhaps the Draft Declaration best encapsulates this right to self-determination in that it recognizes indigenous peoples' "*right to autonomy or self-government* in matters relating to their internal and local affairs."⁶² The Draft Declaration thus goes beyond the more narrowly framed ILO Conventions in recognizing political and cultural rights.

A recent development on the regional scale is also noteworthy. On February 26, 1997, the Inter-American Commission on Human Rights tabled the Proposed American Declaration on the Rights of Indigenous Peoples ("Proposed American Declaration").⁶³ This Proposed American Declaration, if adopted as written in 1997, would provide indigenous peoples (and not the states in which they reside)

59. *Id.* at art. 12.

60. *Id.* at art. 21.

61. *Id.* at art. 25 (emphasis added); see also ESCOR Res. 1995/32, U.N. ESCOR, Supp. No. 1, at 45 (1995) (establishing the open-ended inter-sessional Working Group on the Draft Declaration ("WGDD") in 1995 to elaborate a draft declaration), *available at* <http://daccessdds.un.org/doc/UNDOC/GEN/N96/148/51/IMG/N9614851.pdf?OpenElement> (last visited Feb. 21, 2005). The 9th session of the WGDD took place September 15-26, 2003. *Id.*

62. *Id.* at art. 31(emphasis added).

63. Proposed American Declaration, *supra* note 46.

the right to “freely determine their political status and freely pursue their economic, social, spiritual and cultural development” and to participate in the management and conservation of their lands.⁶⁴ As such, states would recognize that indigenous peoples have the right to “self-government” with regard to “culture . . . land and resource management, [and] the environment.”⁶⁵ Moreover, states would be required to recognize “indigenous law” as a part of their legal system.⁶⁶ The Proposed American Declaration also directs states to recognize the “varied and specific forms and modalities of their control, ownership, use, and enjoyment of territories and property,” indigenous peoples’ rights in lands and resources they historically had access to or occupied, and pre-statehood property and use rights as “permanent, exclusive, inalienable, imprescriptible and inalienable.”⁶⁷ With the Draft Declaration and the Proposed American Declaration as a backdrop, international law may be limiting indigenous peoples’ right to self-determination to a healthy respect for indigenous cultures, land, and resources and an effective indigenous voice in decision-making.⁶⁸ Yet, even this more limited notion of “self-determination” has caused consternation because recognition of indigenous rights means diminished state control over potentially valuable land, traditional hunting and fishing grounds, and mineral and genetic resources.

64. *Id.* at art. XV, ¶ 1. See generally Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples, Org. Am. States CAJP (detailing the developments of the Draft American Declaration on the Rights of Indigenous Peoples), available at [http://www.oas.org/consejo/cajp/working %20groups.asp#indigenous](http://www.oas.org/consejo/cajp/working_%20groups.asp#indigenous) (last visited Feb. 21, 2005).

65. See Proposed American Declaration, *supra* note 46, at art. XV, ¶ 1 (declaring that indigenous people would not only be afforded the right to autonomy of specific civil functions, but would also have the power to generate financing to cover operating functions).

66. *Id.* at art. XVI, ¶¶ 1-3 (recognizing that state procedures should be undertaken in a manner that ensures indigenous peoples “full representation with dignity and equality before the law”).

67. *Id.* at art. XVIII, ¶¶ 1-3.

68. See 1996 Concept of Indigenous Peoples, *supra* note 20, ¶ 19 (recognizing that the use of the term “peoples” in the two international covenants on human rights, coupled with the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States, necessarily implies a right of self-determination).

Both ILO Convention 169 and the Draft Declaration speak forcefully on the issue of participation. ILO Convention 169 provides that indigenous peoples are afforded the opportunity, "at least to the same extent as other sectors of the population" to "freely participate" in elective and administrative bodies whose charge includes policies and programs that affect indigenous peoples.⁶⁹ The Draft Declaration is more expansive, recognizing that "indigenous participation" in the dominant society's "political, economic, social and cultural life" and decision-making apparatus is at the discretion of indigenous peoples; indigenous peoples' representatives should be "chosen by themselves in accordance with their own procedures;" and participation is without prejudice to the right of indigenous peoples to "maintain and develop their own indigenous decision-making institutions" and "strengthen their distinct political, economic, social and cultural characteristics."⁷⁰

Finally, both ILO Convention 169 and the Draft Declaration address the issue of indigenous land and natural resources.⁷¹ Article 13 of ILO Convention 169 calls 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 . . . and in particular the collective aspects of this relationship."⁷² Article 14

69. ILO Convention 169, *supra* note 16, at art. 6(b); *see id.* at arts. 2(1), 5(c), 7(1-2) (requiring States Parties to provide for participation of indigenous peoples in the development of actions and policies designed to protect indigenous rights; to mitigate any difficulties they may face or to improve their health, education and work conditions as well as in those national or regional development programs that may affect them directly).

70. *See* Draft Declaration on Indigenous Peoples, *supra* note 47, at arts. 4, 19. *See also id.* at art. 20 (requiring that states obtain "free and informed consent" of indigenous peoples "before adopting and implementing" measures that will affect them); *infra*, Section III.B (indicating that perhaps the most tangible evidence of the implementation of the mandate of indigenous participation is within the organization of the Arctic Council).

71. *See* ILO Convention 169, *supra* note 16, at arts. 13-15 (outlining the responsibilities of each government to respect the importance of land occupied or "traditionally occupied" by indigenous and tribal peoples). ILO Convention 169 makes references to both tribal and indigenous peoples. *Id.* at art. 1. *See also* Draft Declaration, *supra* note 47, at arts. 26-28 (chronicling the rights of indigenous peoples to own, develop, control, and use lands and territories; receive restitution for traditionally held lands; and to have their environment and lands conserved, restored, and protected).

72. ILO Convention 169, *supra* note 16, at art. 13.

requires states to respect indigenous peoples' "rights of ownership and possession" of the lands "which they traditionally occupy," as well as those to "which they have traditionally had access for their subsistence and traditional activities."⁷³ In order to secure these rights, Article 14 further requires states to "guarantee effective protection [of indigenous peoples'] rights of ownership and possession," including the establishment of legal mechanisms to "resolve land claims by indigenous peoples."⁷⁴ Although the states' obligations under the ILO Convention 169 are potentially far-reaching, scholars have questioned the effectiveness of the Convention because only a small number of states have ratified it.⁷⁵

While ILO Convention 169 provides indigenous peoples with a right "to participate" in the use, management, and conservation of natural resources pertaining to their lands, the Draft Declaration goes further, acknowledging an indigenous right of ownership and control over the conservation, protection, use, and development of indigenous culture, intellectual property, lands, "air, waters, coastal seas, sea-ice, flora and fauna and other resources that they have traditionally owned or otherwise occupied or used."⁷⁶ The Draft Declaration further recognizes that states are obligated to obtain the "free and informed" prior consent of indigenous peoples' for projects that may affect indigenous lands and resources.⁷⁷

73. *Id.* at art. 14.

74. *Id.*

75. See John Woodliffe, *Biodiversity and Indigenous Peoples*, in INTERNATIONAL LAW AND THE CONSERVATION OF BIOLOGICAL DIVERSITY Ch. 13, 260-61, n.48 (Michael Bowman and Catherine Redgwell, eds., 1996) Other criticisms of ILO Convention 169 include claims that the ILO's institutional structure reflects a "preoccupation with the economic and social concerns of industrialized countries far removed from those of indigenous groups" and that "national legal orders" still determine the status and treatment of indigenous peoples. *Id.* at 261. See also A. Stuyt, *The UN Year of Indigenous Peoples 1993 - Some Latin American Perspectives*, 40 NETH. INT'L L. REV. 449, 467-68 (1993).

76. Compare ILO Convention 169, *supra* note 16, at arts. 14-15 (declaring that the rights of indigenous peoples pertaining to their lands "shall be specially safeguarded"), with Draft Declaration, *supra* note 47, at arts. 26, 29 (specifying that indigenous peoples' rights extend beyond use and maintenance, and cover "full ownership" rights to cultural and intellectual property).

77. Draft Declaration, *supra* note 47, at art. 30 (stating that indigenous peoples' "free and informed consent" is particularly needed in connection with "the development, utilization, or exploitation of mineral, water or other resources"); see

As noted previously, the concept of "indigenous peoples" and their rights and aspirations is illusive and somewhat ill defined. Given the implications of recognizing indigenous rights for the traditional conception of international law and the concomitant notion of state sovereignty, perhaps the struggle over their recognition should not be surprising. The legal instruments—both those that are legally binding and those that have been vetted in draft form—suggest movement toward the recognition of indigenous peoples' rights—which, given their evolutionary nature at present are perhaps best considered a "blurry boundary."⁷⁸ The question is not "whether" states, and the international legal regimes through which they speak, will more explicitly recognize indigenous peoples' rights at some point in time, but rather "when" such recognition will occur.

III. BEYOND BASIC HUMAN RIGHTS OF INDIGENOUS PEOPLES: SOFT-LAW INSTRUMENTS, BINDING INTERNATIONAL AGREEMENTS AND INTERNATIONAL ORGANIZATIONS

The shift in emphasis on indigenous peoples has not been restricted to recognition of their basic human rights. Rather, there has been a growing appreciation that indigenous groups should be involved in the construction of international agreements and in the management of their traditionally-owned resources. Prior to this shift in attitude, indigenous communities had little, if any, input in the management process. As one scholar noted:

Not only did indigenous people not participate in the development of international legal norms, but international law is reflective and constitutive of norms which were imposed, typically by force, upon them. . . .

id. at art. 27 (providing indigenous peoples with the right to restitution in connection with indigenous lands that the states' use or confiscate without "free and informed consent").

78. See David VanderZwaag, *Regionalism and Arctic Marine Environmental Protection: Drifting Between Blurry Boundaries and Hazy Horizons*, in ORDER FOR THE OCEANS AT THE TURN OF THE CENTURY 231 (David Vidas & Willy Ostreng ed., 1999) (inferring that the state of international agreements and arrangements addressing environmental threats to Arctic waters and coastal areas is akin to "blurry boundaries, slushy surges, chilling challenges, thin ice and hazy horizons").

International law is the product of states and as such reflects the core values and interests of states, rather than the indigenous peoples against whom it has been employed to effect their subordination.⁷⁹

In light of the growing awareness surrounding the role of indigenous peoples in the international arena, indigenous peoples are making their demand to be viewed as separate autonomous actors heard in international fora.⁸⁰ This can be exemplified by a simple comparison of the construction of international environmental treaties during the twentieth century. Older treaties such as the Fur Seals Convention of 1911,⁸¹ the 1931 Convention on the Regulation of Whaling ("CRW"),⁸² and the 1946 International Convention for the Regulation of Whaling ("ICRW")⁸³ treated indigenous peoples as the responsibility of the nation-state in which they were located.⁸⁴

79. Bradford, *supra* note 14, at 212 nn.232-35.

80. See Richardson, *supra* note 2, at 3.

81. Convention Between the United States, Great Britain, Russia and Japan for the Preservation and Protection of Fur Seals, July 7, 1911, 37 Stat. 1542 [hereinafter Convention for the Preservation and Protection of Fur Seals] (no longer in force), available at <http://fletcher.tufts.edu/multi/sealtreaty.html> (last visited Feb. 21, 2005).

82. Convention for the Regulation of Whaling, Sept. 24, 1931, I.N.T.S. CLU. No. 3586, available at <http://www.oceanlaw.net/texts/whales31.htm>. (last visited Feb. 21, 2005).

83. International Convention for the Regulation of Whaling, Dec. 2, 1946, 161 U.N.T.S. 72, 62 Stat. 716, available at <http://www.iwcoffice.org> (last visited Feb. 21, 2005).

84. See Convention for the Preservation and Protection of Fur Seals, *supra* note 81, at art. IV (outlining the parameters in which the Convention applies to Indians, Ainos, Aleuts or other aborigines); see also Convention for the Regulation of Whaling, *supra* note 82, at art. 3 (specifying the four limited circumstances in which aborigines dwelling on the coasts of the territories within the auspices of the whaling convention, do not have to comply with the mandated Convention provisions); International Convention for the Regulation of Whaling, 1946, Schedule *supra* note 83, ¶ 13(b)(2), amended by International Whaling Commission ("IWC"), June 16-19, 2003 (specifying an exception for aboriginal hunting of gray and right whales); Agreement on the Conservation of Polar Bears, Nov. 15, 1973, art. III(d), 13 ILM 13 (highlighting the fact that only "local people using traditional methods in the exercise of their traditional rights and in accordance with the laws of that Party" could take polar bears), available at <http://pbsg.npolar.no/convAgree/agreement.htm> (last visited Feb. 21, 2005); Convention on Conservation of North Pacific Fur Seals, May 7, 1976, art. VII, 27 U.S.T. 3371 (recognizing that although the Convention does not generally apply to Indians, Ainos, Aleuts, or Eskimos dwelling on the coast, there are exceptions such

Today, indigenous peoples are increasingly viewed as separate from the states they reside in, with their own voice in the decision-making process.

The UN Charter has largely stimulated the decolonization process as it relates to indigenous rights.⁸⁵ International hard and soft-law instruments and institutions at the global and regional levels are beginning to reflect the decolonization process, including: Agenda 21,⁸⁶ the Convention on Biological Diversity ("CBD"),⁸⁷ the 1995 FAO Code of Conduct for Responsible Fisheries,⁸⁸ the Arctic Council, the Convention to Combat Desertification and the Forest Principles; lending practices of development banks such as the World Bank; and more generally, in the UN system.⁸⁹ Here, we focus

as indigenous hunters who are under contract with other parties), *available at* <http://sedac.ciesin.org/entri/texts/acrc/fur.seals.1957.html> (last visited Feb. 21, 2005). *See generally* Alexander Gillespie, *Aboriginal Subsistence Whaling: A Critique of the Inter-Relationship Between International Law and the International Whaling Commission*, 12 COLO. J. INT'L ENVTL. L. & POL'Y 77 (2001) (providing a history of how Aboriginal Whaling has "traditionally been exempted from the stricter prohibitions on whaling imposed by the IWC").

85. *See* Richardson, *supra* note 2 at 5, nn.45-46 (concluding that the two most important concepts of the UN Charter with regard to indigenous rights are embodied in Articles 1(2) and 1(3), which address the notion of respecting equal rights and self-determination principles without discrimination as to race, sex, language, or religion).

86. *Agenda 21, adopted by*, United Nations Conference on Environment and Development, June 3-14, 1992, U.N. Dept. Econ. & Soc. Affairs, *available at* www.un.org/esa/sustdev/documents/agenda21/english/agenda21toc.htm (last visited Feb. 21, 2005).

87. United Nations Conference on Environment and Development, Convention on Biological Diversity, *concluded* June 5, 1992, 1760 U.N.T.S. 79, reprinted in 31 I.L.M. 818 (entered into force Dec. 29, 1993) [hereinafter CBD], *available at* <http://www.biodiv.org/convention/articles.asp> (last visited Feb. 21, 2005).

88. *See* Code of Conduct for Responsible Fisheries, Food and Agricultural Association, Oct. 31, 1995, ¶ 12.12 (recognizing that "[s]tates should investigate and document traditional fisheries knowledge and technologies, in particular those applied to small-scale fisheries, in order to assess their application to sustainable fisheries conservation, management and development."), *available at* <http://www.fao.org/DOCREP/005/v9878e/v9878e00.htm> (last visited Feb. 21, 2005).

89. *See* ANAYA, *supra* note 49, at 48 (stating "Convention No. 169 can be seen as a manifestation of the movement toward responsiveness to indigenous demands through international law, and, at the same time, the tension inherent in that movement."); *see also* Noejovich, *supra* note 1, at 6-7 (acknowledging that international organizations such as the United Nations Development Program and

on Agenda 21, the World Summit on Sustainable Development (“WSSD”), the Barbados Programme of Action for the Sustainable Development of Small Island Developing States (“Barbados Programme of Action” or “BPoA”), the CBD, the World Bank, the Permanent Forum on Indigenous Issues, and the Arctic Council.⁹⁰

The Rio Declaration states “[i]ndigenous people and their communities and other local communities 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.”⁹¹ Likewise, Agenda 21 calls for the empowerment of

the World Bank, have developed institutional policies on indigenous peoples); Kingsbury, *supra* note 26, at 441 (emphasizing that although indigenous peoples’ roles in international institutions such as the World Bank and ILO have grown, indigenous peoples are not as fully involved in the international processes as they want). *See generally* Mónica Castelo & Sabine Schielmann, Information on United Nations Conferences, Bodies, and Instruments Relating to Environmental Issues and Indigenous Peoples (WWF 2001) (reviewing numerous UN actions, including: the establishment of the Permanent Forum on Indigenous Issues, the Economic and Social Council’s establishment of the Working Group on Indigenous Peoples); *see also* José R. Martínez-Cobo, *Study on the Problem of Discrimination Against Indigenous Populations*, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4 (1987) (providing an historical perspective on discrimination against indigenous peoples throughout international institutions); Gonzalo T. Oviedo C., Maria F. Espinosa, & Rati Mehrota, Indigenous Peoples Issues in IUCN: An Internal Discussion Note, Draft (Apr. 21, 2003) (reviewing World Conservation Union (“IUCN”) policy on indigenous peoples and conservation), *available at* http://www.iucn.org/themes/spg/Files/IP_issues.doc (last visited Feb. 21, 2005).

90. *See Plan of Implementation*, World Summit on Sustainable Development, Sept. 4, 2002, at http://www.johannesburgsummit.org/html/documents/summit_docs/2309_planfinal.htm (last visited Feb. 21, 2005); *see also The Kimberly Declaration*, International Indigenous Peoples’ Summit on Sustainable Development, Aug. 20-23, 2002 (reaffirming the indigenous peoples of the world’s commitment to the Kari-Oca Declaration and the Indigenous Peoples’ Earth Charter), at <http://www.iwgia.org/sw217.asp> (last visited Feb. 21, 2005); *Indigenous Peoples’ Plan of Implementation on Sustainable Development*, International Indigenous Peoples’ Summit on Sustainable Development, Sept. 2, 2002 (acknowledging and defining the scope of a plan of implementation based on the Kimberly Declaration), at http://www.tebtebba.org/tebtebba_files/wssd/ipsummitplan.html (last visited Feb. 21, 2005).

91. *Rio Declaration on Environment and Development*, U.N. Conference on the Human Environment, June 5-16, 1992, Sales No. E.73.II.A.14, Principle 22, *available at* <http://habitat.igc.org/agenda21/rio-dec.html> (last visited Feb. 21, 2005). *See* Agenda 21, *supra* note 86, ch. 26, ¶ 26.2 (“Recognising and

"indigenous people and their communities" through, among other means, "[r]ecognition of their values, traditional knowledge and resource management practices" as well as "traditional and direct dependence on renewable resources and ecosystems;" capacity-building; strengthening their active participation in the national formulation of policies and laws; and involving them in "resource management and conservation strategies."⁹² Agenda 21 also notes that states "could" adopt or strengthen "indigenous intellectual and cultural property" protections and measures to "preserve customary and administrative systems and practices."⁹³ Finally, Chapter 40 of Agenda 21 addresses information for decision-making. The Chapter directs states, in cooperation with international organizations, to provide "local communities and resource users," including indigenous populations, with the "information and know-how they need to manage their environment and resources sustainably, applying traditional and indigenous knowledge and approaches when appropriate."⁹⁴

It is at the global level that Agenda 21's call to arms for indigenous peoples has borne the most fruit.⁹⁵ Agenda 21 calls for UN organizations and other international development and finance organizations to incorporate the "values, views and knowledge" of indigenous peoples, "including the unique contribution of indigenous women" in "resource management and other policies and programmes that may affect them;" appoint a "special focal point" within their organization; "organize annual interorganizational coordination meetings;" and develop a procedure "within and between operational agencies for assisting Governments in ensuring the coherent and coordinated incorporation of the views of

Strengthening the Role of Indigenous People and Their Communities").

92. *Id.* at ch. 26, ¶ 26.3. *See generally id.* at chs. 10, 15, 17, 40 (depicting the different aspects of the relationship between indigenous peoples and the global environmental agenda).

93. *Id.* at ch. 26, ¶ 26.4.

94. *Id.* ¶ 40.11.

95. *But see id.* ¶ 26.4 (noting—in particularly soft language that provides states with an extraordinary amount of discretion—that states "could" undertake the effort to "consider" the ratification and application of existing international conventions relevant to indigenous peoples).

indigenous people in the design and implementation of policies and programmes.”⁹⁶

Ten years later, the international community reaffirmed the commitments it made to indigenous peoples at the Earth Summit⁹⁷ and went beyond the Earth Summit blueprint for sustainable development in the WSSD Plan of Implementation (“Johannesburg Plan of Implementation” or “JPoI”).⁹⁸ The JPoI recognizes that respect for cultural diversity, indigenous peoples’ access to economic activities and natural resources, and indigenous peoples’ participation in developing resource management systems are fundamental prerequisites for poverty eradication and sustainable development.⁹⁹ Furthermore, the JPoI recommends the enactment, as appropriate, of measures that protect indigenous resource management systems and support the contribution of all appropriate stakeholders.¹⁰⁰ The JPoI also recognizes the paramount role that indigenous peoples’ rights play in the conservation and sustainable use of biodiversity.¹⁰¹ Although the JPoI is not legally-binding, the document as a whole suggests that indigenous peoples’ rights are gaining strength at the international level.

International adoption of the Barbados Programme of Action (“BPoA”) in 1994 was perhaps the first realization at the global level

96. *Id.* ¶ 26.5.

97. See *Report of the U.N. Conference on Environment and Development, Rio de Janeiro*, U.N. Dep’t of Economics & Social Affairs (UNDESA), at Annex 1, Principle 22, U.N. Doc. A/Conf.156/26 (Vol. I), U.N. Sales No. E.93.I.8 (1992) (asserting that indigenous peoples play a vital role in sustainable development and resolving that states have an affirmative duty to support indigenous identity, culture, and interests and to include indigenous peoples in the development process), available at <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm> (last visited Feb. 21, 2005).

98. *Report of the World Summit on Sustainable Development, Plan of Implementation*, UNDESA, at 2, U.N. Doc. A/CONF.199/20, U.N. Sales No. E.03.II.A.1 (2002), [hereinafter JPoI], available at <http://www.un.org/esa/sustdev/sdissues/finance/fin-doc.htm> (last visited Feb. 21, 2005).

99. *Id.* ¶ 7.

100. *Id.* ¶ 40(h).

101. See *id.* ¶ 44 (h, j, k-p) (advocating for the rights of indigenous communities through the use of financial and technical support in developing countries, national legislation concerning access and benefit sharing, and the participation of indigenous communities as key stakeholders in biological diversity decisions).

of a post-Agenda 21 vision of indigenous peoples' involvement in sustainable management.¹⁰² The BPoA and Declaration of Barbados are among the strongest global soft law instruments¹⁰³ that recognize indigenous peoples' needs, aspirations, and rights, through their call for the development of legal instruments and indigenous peoples' participation in resource management. The BPoA recognizes that inhabitants of small island developing states ("SIDS") depend greatly on natural resources, especially marine resources, for their livelihoods.¹⁰⁴ Another notable characteristic of SIDS is that indigenous peoples and traditional knowledge play a central and significant role in community management in such states. The BPoA also recognizes the importance of indigenous involvement, and states that "[t]he nature of traditional, often communal land and marine resource ownership in many island countries requires community support for the conservation effort."¹⁰⁵

The BPoA, as a whole, is concerned with the use of traditional knowledge and recognizes that such knowledge needs protection.¹⁰⁶ This is particularly relevant in Chapter 4 (Coastal and Marine Resources),¹⁰⁷ Chapter 9 (Biodiversity Resources),¹⁰⁸ Chapter 13

102. *Report of the Global Conference on Sustainable Development of Small Island Developing States*, Bridgetown, Barbados, 25 April -6 May 1994, U.N. Doc. A/CONF.167/9 (1994) [hereinafter Declaration of Barbados], available at <http://www.un.org/documents/ga/conf167/aconf167-9.htm> (last visited Feb. 21, 2005). The Declaration of Barbados is included as Chapter 1, Annex 1 to this Report. *Id.* The Programme of Action for the Sustainable Development of Small Island Developing States [hereinafter BPoA] is included as Chapter 2, Annex 2 (the BPoA not only endorsed Agenda 21, but molded the principles embodied therein into specific policies for small islands, and reaffirmed the Rio Declaration and 1992 Earth Summit's commitments to sustainable development). *Id.*

103. *But cf.* John Dernbach, *Sustainable Development as a Framework for National Governance*, 49 CASE W. RES. L. REV. 1, 86-88 (1998) (arguing that Agenda 21, and other "soft law" processes nonetheless "are unlikely, by themselves, to lead to substantial progress in achieving sustainable development").

104. *See* BPoA, *supra* note 102, ¶ 25 (noting that this dependence underscores the need for effective natural resource management systems).

105. *Id.* ¶ 43.

106. *See* Declaration of Barbados, *supra* note 102, Part 1, ¶ 1 (affirming that the survival of small island developing states is contingent on the involvement of human capital and cultural heritage, and the utilization of these assets in sustainable development).

107. *See* BPoA, *supra* note 102, ch. 4, ¶ 26 (claiming that development patterns

(Science and Technology),¹⁰⁹ and Chapter 25 (Implementation, Monitoring and Review) of the BPoA.¹¹⁰ In addition, states underscored the importance of traditional knowledge in the opening paragraph of the declaration, providing that the “survival of small island developing states is firmly rooted in their human resources and cultural heritage, which are their most significant assets; those assets are under severe stress and [states must take] all efforts . . . to ensure the central position of people in the process of sustainable development.”¹¹¹

Although the BPoA acknowledges indigenous peoples’ rights and emphasizes the protection of traditional knowledge and intellectual property rights, as in Agenda 21, there is no clear definition of these concepts within the BPoA.¹¹² The BPoA nevertheless stresses the need for the development of national legislation to achieve higher degrees of protection for indigenous peoples.¹¹³ The international

have negatively affected traditional management systems and proposing that nations document and apply traditional knowledge in coastal planning).

108. See *id.* at ch. 9 (advocating for national protection of traditional knowledge as intellectual property rights and for legislation mandating that indigenous people benefit from the use of their technology).

109. See *id.* at ch. 13 (recognizing that modern technology threatens traditional knowledge and promoting intellectual property rights at the national level for scientific research and development of traditional practices).

110. See *id.* at ch. 25 (encouraging the implementation of national legislation that develops and protects indigenous technology and providing that indigenous peoples’ are to share the benefits that arise from the use of traditional practices).

111. See Declaration of Barbados, *supra* note 102, Part 1, ¶ 1 (observing that full attention should be given to the needs of indigenous peoples as a major group, and to women and children).

112. See Graham Dutfield, *TRIPS-Related Aspects of Traditional Knowledge*, 33 CASE W. RES. J. INT’L L. 233, 240-42 (2001) (noting that it is difficult to define “traditional knowledge” and to distinguish it from other forms of knowledge); see also World Intellectual Property Organization, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore, *Traditional Knowledge – Operational Terms and Definitions*, 3rd Session, 8-10 (2002), WIPO/GRTKF/IC/3/9 (noting the diversity of terms for traditional knowledge in international debate, and that the choice of terms is highly relevant and reflects value judgments at the international, regional, and national level), available at http://www.wipo.int/documents/en/meetings/2002/igc/pdf/grtkfic3_9.pdf (last visited Feb. 21, 2005).

113. See BPoA, *supra* note 102, at ch. 15, ¶ 79 (proposing the development of national legislation that supports sustainable development and incorporates

community examined the implementation of the BPoA during a ten-year review ("BPoA+10") from January 10-14, 2005, convening in Port Luis, Mauritius.¹¹⁴ The Commission on Sustainable Development ("CSD") also is conducting new national assessments for the BPoA+10¹¹⁵ and updated country profiles,¹¹⁶ and both reports reflect greater awareness and concern regarding indigenous peoples' rights.

Due to the fact that indigenous peoples inhabit regions holding much of the world's remaining land-based biodiversity, the loss of such biodiversity can have particularly profound effects on indigenous cultures.¹¹⁷ Therefore, it has been asserted that, in relation to the management of biodiversity, the "most important claims of

traditional legal principles bolstered by training and adequate resources for enforcement).

114. See generally, UNDESA, *International Meeting for the 10-year Review of the Barbados Programme of Action for Sustainable Development of Small Island Developing States (Barbados+10)* (suggesting that the meeting holds big stakes for the forty-plus island nations expected to address the failure to fully implement the BPoA, due in part to a reduction in foreign aid), at <http://www.un.org/esa/sustdev/sids/sids.htm> (last visited Feb. 21, 2005); see also Jim Wurst, *Small States Want Expanded Agenda for Mauritius Meeting*, U.N. WIRE, Apr. 15, 2004 (reporting donor nation opposition to small island states' request to expand the ten-year review beyond the BPoA to include newly emerging issues such as the impact of HIV/AIDS, World Trade Organization policies on commodity prices, and costs to tourism caused by antiterrorism measures), available at http://www.unwire.org/unwire/20040415/449_22849.asp (last visited Feb. 21, 2005).

115. See UNDESA, Division of Sustainable Development, *National Information* (explaining that each country must submit national reports to the Commission on Sustainable Development regarding the status of implementing Agenda 21 as they relate to the themes of the current year's meeting), available at <http://www.un.org/esa/sustdev/natlinfo/natlinfo.htm> (last visited Feb. 21, 2005).

116. See UNDESA, Division of Sustainable Development, *National Implementation of Agenda 21 - 2002 Country Profiles* (declaring that the purpose of country profiles is to help countries monitor their progress, share experiences with other countries, and to record activities undertaken to implement Agenda 21), available at <http://www.un.org/esa/sustdev/natlinfo/cp2002.htm> (last visited Feb. 21, 2005).

117. See Richardson, *supra* note 2, at 7-8 (relaying that habitat modification, over-harvesting, and the introduction of alien species poses a serious threat to global biodiversity, and that the loss of biodiversity can be equated with the loss cultural diversity).

indigenous peoples are made in international law making.”¹¹⁸ The international community brought the CBD into force on December 29, 1993,¹¹⁹ and it has become the focal point of a world-wide effort to conserve biodiversity. Presently, the CBD has 188 member states and, as a result, is one of the most widely-ratified environmental conventions.¹²⁰ The objectives of the CBD are the “conservation of biological diversity,” the “sustainable use of its components,” and the “fair and equitable sharing” of benefits derived from the use of genetic resources.¹²¹

Although both the CBD Preamble and Article 8(j) refrain from using more specific language such as “rights” and “peoples” with regard to indigenous communities, the CBD does recognize the “close and traditional dependence of many indigenous local communities embodying traditional lifestyles on biological resources.”¹²² Perhaps more than any other binding international environmental agreement, the CBD seems, at least implicitly, to recognize indigenous peoples’ rights. Scholars attribute the ambiguous language in the CBD to the fact that the issue of indigenous rights is still controversial despite increasing recognition,¹²³ and it is unlikely that states would have so widely

118. See *id.* (asserting that global treaties have only recently focused on indigenous rights, with post-war treaties focusing primarily on references to particular species or particular areas).

119. CBD, *supra* note 87. See generally Convention on Biological Diversity, *About the Convention on Biological Diversity* (providing the historical background on the CBD), at <http://www.biodiv.org/programmes/outreach/press/convention.asp> (last visited Feb. 21, 2005).

120. See Convention on Biological Diversity, *Parties to the Convention on Biological Diversity/Cartagena Protocol on Biosafety* (providing the date of endorsement but distinguishing between ratification, accession, acceptance, and approval), at <http://www.biodiv.org/world/parties.asp> (last visited Feb. 21, 2005).

121. See *id.* at art. 1 (declaring that nations should support the equitable sharing of resources by appropriate access, transfer, and funding of relevant technologies).

122. *Id.* at pmbl. (expressing, additionally, the desirability of equitably sharing and sustaining benefits arising from the use of traditional knowledge in conservation efforts).

123. See PATRICIA BIRNIE & ALAN BOYLE, *INTERNATIONAL LAW AND THE ENVIRONMENT* 580 (2002) (arguing that the CBD’s failure to define indigenous communities and to cross-reference the definitions of other conventions is a sign that indigenous rights are still controversial).

ratified the CBD if it had it been more direct on the subject of indigenous rights.

The CBD's Conference of the Parties ("COP") established an Ad Hoc Working Group to investigate Article 8(j)'s implementation,¹²⁴ which reads:

Each Contracting Party shall, as far as possible and appropriate:

* * *

(j) Subject to its national legislation, 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 the benefits arising from the utilization of such knowledge, innovations and practices.¹²⁵

Article 8(j) is quite "soft" in that it leaves states tremendous discretion, using the phrases "as far as possible and appropriate" and "subject to its national legislation."¹²⁶ However, Article 8(j) breaks fertile ground by requiring the "approval and involvement" of traditional knowledge holders and encourages "equitable sharing of the benefits" arising from such knowledge.¹²⁷ Yet, Article 8(j) places the rights of indigenous peoples within a system that recognizes the sovereign rights of "states" over their biological diversity, and that neither requires their consent nor their participation in access to

124. See *id.* (arguing that the Ad Hoc Working Group may provide a forum for indigenous peoples to influence other parties, but will ultimately fail to clarify indigenous rights because parties' participation in the Group is not mandatory).

125. CBD, *supra* note 87, at art. 8, In-situ Conservation. This provision argues for the inclusion of indigenous peoples in a comprehensive conservation plan to create protected areas, regulate biological resources, rehabilitate ecosystems, assess the risk of modified organisms, eliminate alien species, and garner financial support. *Id.*

126. BIRNIE & BOYLE, *supra* note 123, at 580. These authors also note that the CBD fails to mention the importance of indigenous peoples' role in managing wildlife and protected areas. *Id.*

127. See Woodliffe, *supra* note 75, at 266 (arguing that the CBD leaves beneficiaries unspecified, as well as the methods of determining an "equitable share").

biological resources.¹²⁸ Although the CBD only “encourages” parties involved in the Working Group to include representatives of relevant indigenous communities, the Working Group nevertheless provides a forum for indigenous groups to participate in debate and provides a mechanism for such groups to influence policy formulation.¹²⁹

The global movement acknowledging the claims of indigenous peoples has spread to financial institutions as well. The World Bank is among the world’s largest sources of development assistance, through loans and human resources, aimed at reducing poverty and improving living standards in the developing world in areas such as agriculture, forestry, environment, transportation, and education.¹³⁰ The World Bank was the first multilateral institution to introduce a special policy for the treatment of indigenous or tribal peoples in development projects.¹³¹ In 1982, the World Bank implemented its first indigenous policy titled *Tribal People in Bank-Financed-Projects*.¹³² The purpose of the World Bank’s directive was twofold: to safeguard the interests of tribal people in World Bank-financed

128. See Richardson, *supra* note 2, at 9 (arguing the importance of indigenous peoples’ approval, consent, and agreement to biodiversity initiatives); see also Woodliffe, *supra* note 75, at 266 (contending that the CBD marginalizes the position of indigenous peoples by leaving questions of resource access, transfer, and the distribution of benefits to the national legislation of the contracting parties, and that future legal solutions must consider the nature of multilayered relationships and interests).

129. See BIRNIE & BOYLE, *supra* note 123, at 580 and accompanying text (contending that indigenous peoples’ can contribute unique perspectives and knowledge during biological diversity discussions).

130. See World Bank Group, *What is the World Bank?* (summarizing the goals and organization of the World Bank), at <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:20040558~menuPK:34559~pagePK:34542~piPK:36600,00.html> (last visited Feb. 21, 2005).

131. See *Review of Activities of the U.N. System Relating to Indigenous Peoples: An Interactive Discussion*, 2, U.N. ESCOR, SUB-COMM’N ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, E/CN.19/2002/2/Add.12 (proclaiming the World Bank’s commitment to eliminating indigenous marginalization by applying an indigenous policy to borrowers and stakeholders, financing projects that benefit indigenous peoples, strengthening indigenous organizations, and sharing the knowledge base concerning development issues with stakeholders), available at <http://www.unhchr.ch/indigenous/forum> (last visited Feb. 21, 2005).

132. See *id.* at 3 (remarking that the World Bank instituted its first indigenous policy initiative in order to deal with tribal group isolation).

projects affecting the environmental or the social situation of tribal communities and to protect land rights and health services.¹³³ In 1991, the World Bank adopted the Operational Directive 4.20 ("OD 4.20"), a policy that incorporated indigenous peoples' concerns into World Bank-financed projects and maintained the protective measures of the earlier directive, but specifically supported the rights of indigenous peoples to participate in and benefit from the development process.¹³⁴

Despite the World Bank's progressive development of policies recognizing indigenous peoples' rights, its classification of indigenous peoples and Involuntary Resettlement Policy remain controversial. OD 4.20 identifies indigenous peoples according to a set of criteria that excludes individuals who migrate and adopt a different lifestyle from their communities.¹³⁵ In addition, the World Bank's Involuntary Resettlement Policy ("OP 4.12")¹³⁶ denies indigenous peoples their right to prior informed consent before involuntary resettlement, even though this denial appears to contradict the broader safeguarding objectives of OD 4.20 and the policy objectives of OP 4.12.¹³⁷

133. See *id.* (indicating that the World Bank's first indigenous directive focused particularly on forest-dwelling groups involved in World Bank-financed projects in South America).

134. See *id.* (arguing that measures incorporating indigenous peoples' concerns about World Bank projects ensured that indigenous peoples would benefit from such initiatives).

135. See *id.* (identifying indigenous peoples as groups who "maintain social and cultural identities distinct from those of the national societies in which they live" and as groups that "have close attachments to ancestral lands").

136. See World Bank, *Operational Policies, Involuntary Resettlement*, ¶ 1 [hereinafter *Involuntary Resettlement Policy* or *O.P. 4.12*] (describing the severe economic, social, and environmental risks of involuntary resettlement projects and proclaiming that the Involuntary Resettlement Policy develops safeguards to mitigate the risks of resettlement), available at <http://wbln0018.worldbank.org/Institutional/Manuals/OpManual.nsf/tocall/CA2D01A4D1BDF58085256B19008197F6?OpenDocument> (revised Apr. 2004) (last visited Feb. 21, 2005). The document explains that "[f]or purposes of this policy, 'involuntary' means actions that may be taken without the displaced person's informed consent or power of choice." *Id.* ¶ 3(a), n.7.

137. See *id.* ¶ 2a (emphasizing that displaced persons should be consulted and able to participate in resettlement decisions).

The World Bank is currently revising its operational policies in an effort to ensure greater compliance and to better protect the rights of indigenous peoples.¹³⁸ The World Bank issued a draft Indigenous Peoples Operational Policy (“OP 4.10”)¹³⁹ and a draft Procedure on Indigenous Peoples (“BP 4.10”)¹⁴⁰ in March 2001 to jointly replace OD 4.20.¹⁴¹ The most relevant changes to the World Bank’s policy regarding indigenous peoples are as follows:

Rewording so that when a development project might affect an indigenous population, the situation is no longer seen as a “*controversial subject*” but instead, the World Bank acknowledges that such circumstances present a potential problem, which must be prevented or mitigated

Recognizing that “identities, cultures, lands and resources of indigenous peoples are uniquely intertwined” and a need exists to provide a “voice to potentially affected indigenous peoples in design and implementation of Bank-assisted projects”

138. See World Bank, *Approach Paper on Revision of OD 4.20 Indigenous Peoples Policy Consultation Strategy* (stating that the World Bank is consulting with Bank staff, as well as obtaining the views of the indigenous peoples and their organizations, government officials, responsible NGOs, and private sector entities in order to have a well-rounded perspective and to ensure that World Bank-financed projects do not have an adverse impact), at <http://lnweb18.worldbank.org/ESSD/sdext.nsf/63ByDocName/PoliciesApproachPaper-ConsultationStrategy> (last visited Feb. 21, 2005).

139. See World Bank, *Draft Operational Policy on Indigenous Peoples* [hereinafter *World Bank* or *OP 4.10*] (Mar. 23, 2001) (emphasizing that the World Bank is looking to further its mission of poverty reduction and sustainable development by implementing a policy that fosters full respect for the dignity, human rights and cultures of indigenous peoples), at <http://lnweb18.worldbank.org/ESSD/sdext.nsf/63ByDocName/PoliciesDraftOP410March232001> (last visited Feb. 21, 2005).

140. See World Bank, *Draft World Bank Procedure on Indigenous Peoples (BP 4.10)* (Mar. 23, 2001) (developing procedures to ensure that Bank objectives are met for Bank-assisted projects), at <http://lnweb18.worldbank.org/ESSD/sdext.nsf/63ByDocName/PoliciesDraftBP410March232001> (last visited Feb. 21, 2005).

141. See World Bank, *Indigenous Peoples (OD 4.20)* (Sept. 1991) (documenting that the new procedures will better serve indigenous peoples’ needs than the World Bank’s previous procedures for handling indigenous rights), at <http://wbln0018.worldbank.org/Institutional/Manuals/OpManual.nsf/ODirw/0F7D6F3F04DD70398525672C007D08ED?OpenDocument> (last visited Feb. 21, 2005).

Introducing a screening process for identifying indigenous groups and clarifying the need for consultation with and participation by the indigenous peoples

Requiring that proposed projects account for the specificities of an indigenous population's culture

Recognizing collective and individual rights over natural resources, including land

Requiring that indigenous peoples agree to the use of their traditional knowledge and culture resources and derive benefits therefrom.¹⁴²

Although they are only briefly mentioned in the new draft policy, the World Bank's Environmental Assessment ("EA") policy ("OP 4.01")¹⁴³ also may play a major role in safeguarding the rights of indigenous people. A properly-conducted EA will take into account social aspects of proposed development projects such as involuntary resettlement, indigenous peoples, and cultural property.¹⁴⁴ An EA, as well, will require the study of alternatives to select the best option, favoring preventive measures over mitigation.¹⁴⁵ As such, the World Bank views involuntary resettlement as an option only in those

142. *Comparison Matrix OD 4.20 and Draft OP/BP 4.10* (highlighting how the new proposals will profoundly affect how the World Bank incorporates indigenous peoples' needs into its new paradigm for development projects), at [http://lnweb18.worldbank.org/ESSD/sdvext.nsf/63ByDocName/ComparisonMatrixOD420andDraftOPBP410/\\$FILE/Comparison+matrix.pdf](http://lnweb18.worldbank.org/ESSD/sdvext.nsf/63ByDocName/ComparisonMatrixOD420andDraftOPBP410/$FILE/Comparison+matrix.pdf) (last visited Feb. 21, 2005).

143. See World Bank, *Operational Policies, Environmental Assessment (O.P. 4.01)* [hereinafter *World Bank OP 4.01*] (Jan. 15, 1999) (explaining that Environmental Assessments take into account the natural environment, human health and safety, social aspects such as involuntary resettlement, indigenous peoples, and cultural property; even though not specifically designed to consider indigenous peoples' rights, an EA should incorporate indigenous peoples' concerns and needs, thus providing another layer of protection), at <http://wbln0018.worldbank.org/Institutional/Manuals/OpManual.nsf/OPolw/9367A2A9D9DAEED38525672C007D0972?OpenDocument> (last visited Feb. 21, 2005).

144. See *id.* ¶ 3. (demonstrating that even though indigenous people are not the primary reason for the EA, their existence, and the environmental harm associated with their mistreatment, is factored into whether a proposal is environmentally friendly).

145. See *id.* (indicating that an EA considers natural and social aspects in an integrated way).

circumstances when it is otherwise unavoidable.¹⁴⁶ Furthermore, OP 4.01 indicates that the Bank will not finance project activities that could contravene a country's obligations, which include meeting international law requirements.¹⁴⁷

The World Bank's experience is that involuntary resettlement of indigenous peoples carries with it severe social, economic, and environmental risks, particularly when resettlement is not properly mitigated.¹⁴⁸ The most significant impacts relate to dismantling of production systems, impoverishment due to loss of income sources or production assets, and relocation of peoples to areas where they find it difficult to adapt their skills to the new surroundings.¹⁴⁹ As a result, the World Bank attempts to avoid involuntary resettlement and requires assessment of alternative solutions, including the so-called "without project" alternative.¹⁵⁰ Although the World Bank involves indigenous peoples in planning and implementing resettlement, projects can still result in the resettlement of indigenous peoples without their consent. As a consequence, the EA operational policy has the potential to play an important role in supporting a decision to avoid resettlement as well as to incorporate indigenous views into the process.

In its April 2004 revision of the Involuntary Resettlement Policy, the World Bank acknowledged the vulnerability of indigenous

146. See *id.* ¶ 2 (noting that "[t]he Bank favors preventive measures over mitigatory or compensatory measures, whenever feasible."). See also Involuntary Resettlement Policy, *supra* note 136, ¶ 2(a) (relating that "[i]nvoluntary resettlement should be avoided where feasible, or minimized, exploring all viable alternative project designs.").

147. See *World Bank OP 4.01*, *supra* note 143, ¶ 3 (indicating that the World Bank will work within the country's current international law obligations in order to further its mission of protecting indigenous peoples rights).

148. See Involuntary Resettlement Policy, *supra* note 136, ¶ 1 (noting that the World Bank is aware of this problem, and that the recent proposals, to the extent possible, seek to prevent or at least properly mitigate involuntary resettlement).

149. See *id.* (noting the potential risks and issues of impoverishment associated with involuntary resettlement).

150. See *World Bank OP 4.01*, *supra* note 143, ¶ 8(a) (requiring that Category A projects, those that are likely to have significant environmental impacts, include comparisons with feasible alternatives, including the "without project" situation, to determine the most effective way to limit the adverse impacts, including involuntary resettlement).

peoples to displacement¹⁵¹ and reinforced its position regarding resettlement and restriction of access to resources, which it only should consider as the last option.¹⁵² The World Bank also requires more stringent measures for the involuntary resettlement process, which is evidenced by its development and implementation of resettlement instruments (plans and frameworks)¹⁵³ that aim to maintain displaced persons' livelihoods.¹⁵⁴ Significantly for indigenous peoples, eligibility criteria for resettlement and/or compensation benefits encompass not only those who have formal legal rights to land, but also people who do not have a legal or recognizable claim to such land or assets.¹⁵⁵ Moreover, besides covering direct economic and social impacts that result from Bank-assisted investment projects, the World Bank may consider financing resettlement plans of projects or activities that it considers significantly related to the project.¹⁵⁶ Finally, the World Bank

151. See *Involuntary Resettlement Policy*, *supra* note 136, ¶ 8 (noting that indigenous peoples are one out of many groups, such as the elderly, women and children, and those below the poverty line, that the report emphasizes as needing particular attention).

152. See *id.* ¶ 2(a)-(b) (showing that when resettlement is the only option, the resettlement activities should be implemented as sustainable development programs, allowing those displaced to share in the project's benefits).

153. See *id.* ¶¶ 6, 7(d), 9, 11, 13(a), and 20 (stating that the most relevant measures include requiring the borrower to have exploited all viable alternative project designs to avoid physical displacement of indigenous peoples, and when not avoidable, giving preference to designs that are compatible with displaced peoples' livelihoods; mandatory identification, consultation and participation on resettlement planning of displaced persons; resolution of potential conflicts with persons whose livelihoods would be adversely affected by restrictions placed on their access to parks and protected areas; and inclusion of the resettlement costs in total project costs).

154. See *id.* ¶ 6(b)-(c) (showing the various means by which the World Bank proposes to help displaced persons maintain their livelihood opportunities); see also *id.* (expressing the sense that displaced persons should receive moving allowances, housing, support after their move, and development assistance, including being presented with job opportunities).

155. See *id.* ¶ 15 (noting the broad criteria for "displaced persons").

156. See *Involuntary Resettlement Policy*, *supra* note 136, ¶ 4. (stating that "[t]his policy . . . also applies to other activities resulting in involuntary resettlement, that in the judgment of the Bank, are (a) directly and significantly related to the Bank-assisted project, (b) necessary to achieve its objectives as set forth in the project documents; and (c) carried out, or planned to be carried out, contemporaneously with the project.").

requires participation of those peoples that will be affected by resettlement in the planning process.¹⁵⁷

The revised policy thus represents a step forward in protecting indigenous peoples' rights, with the World Bank more participatory and the resettlement process becoming increasingly more concerned with maintaining indigenous peoples' and other displaced persons' livelihoods. Yet, within the resettlement process, the eligibility criteria remain vague, and identifying people who do not formally hold legal rights is likely to result in difficulty and controversy over the policy's implementation.

In short, the World Bank's new draft policies strongly emphasize indigenous peoples' rights. The Bank will increase the indigenous groups' involvement in the decision-making process; it will incorporate indigenous peoples in the management of resources; and it will better protect the indigenous peoples' natural and cultural heritage. The Environmental Assessment policy OP 4.01 already embodies several of these aspects, and can be coordinated with OP 4.10¹⁵⁸ and OP 4.12.¹⁵⁹ However, two controversial aspects remain. First, the criteria for identifying indigenous peoples,¹⁶⁰ which, as proposed, are roughly the same as in existing policy OD 4.20, and second, the Involuntary Resettlement Policy, which threatens indigenous peoples' rights—not only through the World Bank's own actions, but also through the application of the same principles by individual nations and regional development banks.

Developments within the World Bank, the CBD, and the SIDS community evidence the increasing global movement towards recognizing indigenous peoples' role in sustainable management;

157. See *id.* ¶ 2(b) (recognizing the need for safeguards in protecting displaced persons when avoiding resettlement is not feasible).

158. See *World Bank OP 4.10*, *supra* note 139 (indicating that the EA, when combined with OP 4.10, provides broader and stronger protection of indigenous peoples' rights than either does alone).

159. See *Involuntary Resettlement Policy*, *supra* note 136 (highlighting the similarities between the Bank's OP 4.12, which expressly prescribes an involuntary resettlement policy, and the EA, which factors involuntary resettlement into an assessment of the possible environmental damage that a Bank-sponsored project might do).

160. See *supra* notes 15-42 and accompanying text (discussing the meaning of the term "indigenous peoples").

however, until very recently, indigenous peoples did not represent their own interests directly in any major body of the UN. The situation changed with the UN's establishment of the Permanent Forum on Indigenous Issues in 2000.¹⁶¹ The sixteen members who make up the Forum are not representatives as such; rather, they operate in their own capacities as independent experts.¹⁶² Under the resolution establishing the Forum, the President of the Economic and Social Council ("ECOSOC") appoints eight indigenous members, after consulting with regional groups and indigenous organizations.¹⁶³ Governments nominate the other eight members.¹⁶⁴

The Permanent Forum serves as an advisory body to the ECOSOC, with a broad mandate on indigenous issues relating to "economic and social development, culture, the environment, education, health and human rights."¹⁶⁵ The Permanent Forum's charge is to provide expert advice and recommendations on indigenous issues not only to the ECOSOC, but also to programs, funds, and agencies of the UN through the ECOSOC.¹⁶⁶ As such, the goal of establishing the Permanent Forum is to raise the level of

161. See *Establishment of a Permanent Forum on Indigenous Issues*, Res. E/RES/2000/22 [hereinafter *Resolution: Permanent Forum*] (July 28, 2000) (creating a Permanent Forum focused on indigenous issues, a concept that was officially introduced at the Vienna World Conference on Human Rights in 1993), at [http://www.unhchr.ch/huridocda/huridoca.nsf/\(symbol\)/E.RES.2000.22.En?Opendocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(symbol)/E.RES.2000.22.En?Opendocument) (last visited Feb. 21, 2005); see also *Mandate: Establishment of a Permanent Forum on Indigenous Issues and Establishment of a Voluntary Fund* [hereinafter *Mandate*] (establishing the Permanent Forum on Indigenous Issues, which became one of the major objectives on the International Decade of the World's Indigenous People (1995-2004)), at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/c73c918c74d6940e802566a200568fc4?Opendocument> (last visited on Feb. 21, 2005). Based on the efforts of an ad hoc working group it had established, the Commission on Human Rights ("CHR")—a subsidiary body of the UN Economic and Social Council, recommended at its fifty-sixth session that the Economic and Social Council set up a Permanent Forum on Indigenous Issues. *Id.* The Economic and Social Council in turn established such a Forum in July 2000. *Id.*

162. See *Resolution: Permanent Forum*, *supra* note 161, ¶ 2 (implying that the members will not be beholden to domestic concerns regarding indigenous peoples but will apply their expert opinion on relevant issues).

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

awareness regarding indigenous issues throughout the UN system; promote the coordination and eventual integration of activities that touch on indigenous issues within the UN system; and more generally, prepare and disseminate information on indigenous issues.¹⁶⁷ Because the Permanent Forum distributes its reports to the relevant UN organs, programs, and agencies as a way of furthering dialogue on indigenous issues within the UN system, its establishment marks the beginning of a new era and opens the door to new perspectives on indigenous peoples' self-determination and right to development.¹⁶⁸

Finally, indigenous peoples are gaining a stronger foothold at the regional level as well. The Arctic Council's establishment is a recent international development that allows for high-level input from indigenous groups.¹⁶⁹ The Arctic Council is comprised of eight "Arctic" states—Canada, Denmark (which includes Greenland and the Faroe Islands), Finland, Iceland, Norway, the Russian Federation, Sweden, and the United States—and six Permanent Participants.¹⁷⁰

167. See *id.* (contending that the current relationship between various UN organizations is not sufficient to meet the needs of indigenous peoples and that better communication will lead to better results).

168. See *Declaration on the Right to Development*, G.A. Res. 128, U.N. GAOR, 41st Sess., U.N. Doc. A/RES/41/128 (1987) (providing that "the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized"), available at <http://www.unhchr.ch/html/menu3/b/74.htm> (last visited Feb. 21, 2005). The right includes: full sovereignty over natural resources; self-determination; popular participation in development; equality of opportunity; and the creation of favorable conditions for the enjoyment of other civil, political, economic, social and cultural rights. *Id.* The human person is identified as the beneficiary of the right to development. *Id.* Both individuals and the peoples can invoke the right to development. *Id.*

169. See generally Arctic Council, *Declaration on the Establishment of the Arctic Council* (1996) [hereinafter Arctic Council Declaration] (establishing the Arctic Council on September 19, 1996 in Ottawa, Canada, and its assumption of the Arctic Environmental Protection Strategy activities), available at <http://www.arctic-council.org/en/main/infopage/190/> (last visited Feb. 21, 2005).

170. See Arctic Council, *Permanent Participants* [hereinafter Arctic Council Participants] (listing the six Permanent Participants as the Aleut International Association, the Arctic Athabaskan Council, the Gwich'in Council International, the Inuit Circumpolar Conference Saami Council, and the Russian Association of Indigenous Peoples of the North), at <http://www.arctic-council.org/en/main/>

The status of the Permanent Participants makes the Council a unique forum for cooperation between states and indigenous peoples. The six umbrella organizations that have Permanent Participant accreditation represent many Arctic communities.¹⁷¹ The Government of Denmark and the Greenland home rule office established the Indigenous Peoples Secretariat in Copenhagen in 1994 to facilitate the participation of and coordination among indigenous organizations.¹⁷²

The primary goal of the Arctic Council is to act as a regional forum for sustainable development, and its concerns include environmental, social, and economic issues.¹⁷³ To achieve its goals, the Arctic Council divides its scientific work among five working groups, each committed to one environmental issue.¹⁷⁴ These groups focus on issues such as monitoring, assessing, and preventing pollution in the Arctic, climate change, biodiversity conservation and sustainable use, emergency preparedness and prevention, and the living conditions of Arctic residents.¹⁷⁵ Inclusion of the Permanent

infopage/3/ (last visited Feb. 21, 2005).

171. See Arctic Council Declaration, *supra* note 169 (stating that the Arctic Council initially included only three indigenous organizations as Permanent Participants, with the proviso that "other Arctic organizations of indigenous peoples with majority Arctic constituency, representing: a) a single indigenous people resident in more than one [A]rctic State; or b) more than one Arctic indigenous people resident in a single Arctic State" could be added). However, the Declaration also states that the number of Permanent Participants should never exceed the number of member states. *Id.*

172. See David VanderZwaag et al., *The Arctic Environmental Protection Strategy, Arctic Council and Multilateral Environmental Initiatives: Tinkering While the Arctic Marine Environment Totters*, 30 DENV. J. INT'L L. & POL'Y 131, 146 (2002) (noting that indigenous peoples' participation prior to the Secretariat's establishment was minimal despite their status as permanent participants).

173. See Arctic Council Declaration, *supra* note 169 (proclaiming also that the Arctic Council intends to facilitate the promulgation of information and interest in Arctic issues).

174. See generally Arctic Council, *About* (maintaining that the scientific work conducted under the umbrella of the Council heavily influences its decision-making), at <http://www.arctic-council.org/en/main/infopage/1/> (last visited Feb. 21, 2005).

175. See *id.* (adding that the working-groups' successes have led to at least two special initiatives aimed at redressing environmental problems identified in the Arctic region). One such initiative, the Arctic Council Action Plan to Eliminate Pollution of the Arctic ("ACAP") is dedicated to reducing pollution in the Arctic

Participants allows the “active participation” by and “full consultation with” Arctic indigenous representatives within the Arctic Council.”¹⁷⁶ Moreover, Permanent Participants, like states, enjoy the right to present proposals for undertaking cooperative work.¹⁷⁷

One of the fundamental roles of the Arctic Council is to “provide a means for promoting cooperation, coordination and interaction among the Arctic States, with the involvement of the Arctic indigenous communities and other Arctic inhabitants on common Arctic issues, in particular issues of sustainable development and environmental protection in the Arctic.”¹⁷⁸ Although the Permanent Participants do not have the same level of authority as the member states because they cannot vote, they are fully consulted in the decision-making process, and certainly have more input than they might otherwise have had if the states in which they reside were their sole representatives. In addition, “[t]here is a general consensus among the participants that indigenous involvement in the AEPS [Arctic Environmental Protection Strategy] has made the process a different and more successful product.”¹⁷⁹ Finally, as one scholar has noted, the Arctic Council not only provides a forum in which indigenous peoples can present their views and seek Council support, but also “facilitates dialogue between indigenous populations of particular states and the governments of those states”—dialogue that at other times and in other contexts has proven difficult.¹⁸⁰

These international developments demonstrate the beginning of a paradigmatic shift with regard to the role of indigenous peoples in international environmental law and policy on the global and regional scales. This is evidenced by a growing tendency among

as a follow-up to a working group’s assessment and monitoring work of the Stockholm Convention on Persistent Organic Pollutants. *Id.*

176. Arctic Council Participants, *supra* note 170.

177. Evan T. Bloom, *Current Development: Establishment of the Arctic Council*, 93 AM. J. INT’L L. 712 (1999).

178. Arctic Council Declaration, *supra* note 169.

179. LINDA NOWLAN, ARCTIC LEGAL REGIME FOR ENVIRONMENTAL PROTECTION 11 (IUCN Environmental Law Programme 2001), available at <http://www.iucn.org/themes/law/pdfdocuments/EPLP44EN.pdf> (last visited Feb. 21, 2005).

180. Bloom, *supra* note 177, at 717.

indigenous peoples to represent themselves at the international level. The developments on the international stage also represent an increasing recognition and willingness among some nations to enhance indigenous peoples' participation in the management of natural resources, as well as to recognize and protect ownership and intellectual property rights. Consequently, although often worded in rather vague terms, these international developments should, in the long run, tend to diffuse into more concrete national practices.

IV. INDIGENOUS PEOPLES AT THE STATE LEVEL: DOMESTIC AND INTERNATIONAL PRACTICE

Changes are rapidly occurring at the state level as well. While we cannot do justice to the full scope and diversity of these changes, we seek to highlight emerging trends through the consideration of case studies in six states—Brazil, Canada, Indonesia, Nicaragua, South Africa, and the United States. These case studies involve legal developments in national (United States and South Africa) and international (Nicaragua) courts; territorial claims that the political system adjudicated (South Africa and Nicaragua) and accommodated (Canada); the influence of civil society on governmental policies (Brazil); co-management of natural resources (Indonesia); exercise of resource rights (United States); and benefit-sharing (Brazil).

A. CASE STUDIES

1. Restoration of Land Ownership by the Richtersveld Community (South Africa)

The first case we consider involves judicial recognition of long-ignored rights to land and minerals of an indigenous community in South Africa, and of the prominent and special role that indigenous law—those laws under which indigenous peoples govern themselves—plays within the South African constitutional system.

The Richtersveld Community's ancestral lands are situated in the northwestern section of the Northern Cape Province.¹⁸¹ The British

181. See Yvette Trahan, *The Richtersveld Community & Others v. Alexkor Ltd.: Declaration of a "Right in Land" Through a "Customary Law Interest" Sets Stage for Introduction of Aboriginal Title into South African Legal System*, 12 TUL. J. INT'L & COMP. L. 565, 565 (2004) (explaining that the Richtersveld community is

Crown annexed the Community's ancestral lands in 1847.¹⁸² In the 1920s, diamonds were discovered on a portion of those ancestral lands—on a strip of land along the country's west coast from the Gariep (Orange) River in the north, which forms the border with Namibia, to Port Nolloth in the south.¹⁸³ In a series of executive and legislative steps in the late 1920s and early 1930s, the state dispossessed the Community of the diamond-bearing lands and asserted sovereignty over those lands.¹⁸⁴ However, on October 14, 2003, the South African Constitutional Court found that the Richtersveld Community has a right of ownership in the land and its minerals, which the state-owned diamond company, Alexkor Limited, had held. It further found that the British Crown's annexation of the land did not extinguish those rights, and that the Community has a right of exclusive beneficial use and occupation of those lands.¹⁸⁵

Significantly, the Constitutional Court held that indigenous law, rather than South African common law, determined the nature and content of the Richtersveld Community's rights to the land.¹⁸⁶ The Constitutional Court noted that the South African Constitution "acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system."¹⁸⁷ Yet,

comprised of four villages that were formerly known as Little Namaqualand).

182. *See id.* (stating that the Richtersveld people and their ancestors inhabited the land long before British annexation and even prior to Dutch colonization of the area in the seventeenth century).

183. *See id.* at 566 (emphasizing that the Richtersveld people enjoyed "exclusive beneficial occupation" of the land until the discovery of diamonds in the 1920s).

184. *See id.* (reporting that the Republic of South Africa dispossessed the Richtersveld people of their land in small portions but in 1994 the government granted ownership of the entire area to Alexkor Ltd., which South Africa owns in its entirety).

185. *See Alexkor Limited v. The Richtersveld Community and Others*, 2003 (19) SA 48-51 (CC) (amending the lower court's ruling to expressly provide that indigenous law, rather than common law, established the Richtersveld Community's ownership rights in the contended land), *available at* <http://www.concourt.gov.za/files/alexkor/alexkor.pdf> (last visited Feb. 21, 2005).

186. *See id.* ¶ 50 *quoting* *Amodu Tijani v. The Secretary, Southern Nigeria*, 2 AC 399, 404 (Privy Council 1921) (noting that "[t]he determination of the real character of indigenous title to land therefore 'involves the study of the history of a particular community and its usages.'").

187. *Id.* ¶ 51.

as the Court explained, indigenous law is not freestanding—it must be interpreted within the milieu of South African legislative and Constitutional law:

The Constitution, while giving force to indigenous law, makes it clear that such law is *subject to the Constitution and has to be interpreted in light of its values*. Furthermore, like the common law, indigenous law is *subject to any legislation*, consistent with the Constitution, that specifically deals with it. In the result, indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law.¹⁸⁸

The Constitutional Court also recognized indigenous law as law despite the fact that it is not memorialized in writing and “evolves as the people who live by its norms change their patterns of life.”¹⁸⁹

More specifically, based on the facts presented, the Court held that under indigenous Nama law, the Community communally owned the land in question,¹⁹⁰ and the Community’s conduct and the history of its mineral prospecting was “consistent only with ownership of the minerals being vested in the Community.”¹⁹¹ Moreover, while owners of land whose ownership was recorded in the deeds office were permitted to keep their homes and share in the mineral wealth of their lands (such owners being predominately white), the laws of South Africa did not recognize ownership of land under indigenous law, where land ownership was not recorded (and was held by black communities).¹⁹² Therefore, the law was racially discriminatory and violated Section (2)(1) of the Restitution of Land Rights Act of 1994.¹⁹³

188. *Id.*

189. *Id.* ¶¶ 52-53.

190. *Id.* ¶ 58 (explaining that under Nama law, members of the community enjoyed occupation and use of the land to the exclusion of all other people). Interestingly, if a non-member used the land without the community’s permission they would be fined, sometimes in the form of cattle. *Id.*

191. *Id.* ¶ 60.

192. *See id.* ¶¶ 94-95 (noting that South Africa treated land subject to indigenous ownership as state land).

193. *See id.* ¶¶ 96-99 (holding that the Act’s primary purpose is to undo the damage of decades of spatial apartheid, that the Richtersveld Community’s experience falls within that objective and that reliance upon apartheid-era precedent cannot narrow its scope).

The way in which the Constitutional Court reached its holding is perhaps as important as the end result itself. As noted above, the Constitutional Court not only restored ownership of the land and mineral rights to the Richtersveld people, but, in sweeping language, elucidated the prominent role of indigenous law within the South African constitutional system and explained its relationship to the common law of South Africa.

2. Protection of Indigenous Peoples Rights to Natural Resources and the Duty to Demarcate and Title Indigenous Lands (Nicaragua)

In a seminal case, the Awas Tingni Community of the Mayanga,¹⁹⁴ an indigenous people, brought action against Nicaragua¹⁹⁵ in the Inter-American Court of Human Rights, challenging the legality of a thirty-year logging concession that Nicaragua granted to a foreign corporation on lands that the Awas Tingni Community claimed.¹⁹⁶ The Community is located in the North Atlantic Autonomous Region (“RAAN”) of the Atlantic Coast of Nicaragua and is comprised of more than 600 persons.¹⁹⁷ The members of the Community engage in subsistence farming, gathering, hunting, and fishing.¹⁹⁸

In this case, the Inter-American Court declared that the American Convention on Human Rights—to which Nicaragua is a party and which includes the human right to use and enjoy one’s property—

194. See S. James Anaya & Claudio Grossman, *The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples*, 19 ARIZ. J. INT’L & COMP. L. 1, 1 (2002) (noting that the Mayanga are also known as Sumo, but that the people of the Awas Tingni Community regard Sumo as a term imposed upon them).

195. See *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Case No. 79, Inter-Am. C.H.R. 79, available at <http://www1.umn.edu/humanrts/iachr/AwasTingnicase.html> (last visited Feb. 21, 2005).

196. See Richard J. Wilson & Jan Perlin, *The Inter-American Human Rights System: Activities During 1999 Through October 2000*, 16 AM. U. INT’L L. REV. 315, 331 (2001) (stating that the Awas Tingni people reside in the Autonomous Region of Nicaragua and that “[i]n 1995, the leadership of the Autonomous Region allegedly signed an agreement concerning forestry operations with Sol del Caribe S.A., a logging company,” upon which the leaders of the community filed a writ to have their land officially demarcated).

197. See *id.* (noting that the community is comprised of 142 families and that community members speak the native language, Mayagna).

198. See *Awas Tingni*, *supra* note 195, ¶ 83(a) (providing evidence that the Awas Tingni community lived and worked in the area for over 300 years).

guaranteed and protected indigenous peoples' rights in communal¹⁹⁹ land and the natural resources associated therewith.²⁰⁰ The Court stated that the right to communal land includes the right of indigenous peoples to have the state delimit, demarcate, and accord title to that land "in accordance with their customary law, values, customs and mores."²⁰¹ Because the Inter-American Court held that Nicaragua's laws were ineffective in addressing lands held communally²⁰² and its remedies were illusory given the delays in demarcating and titling the lands, the Court required Nicaragua to adopt "legislative, administrative and other measures . . . to create an effective mechanism" to carry out those activities within fifteen months "with full participation by the Community."²⁰³ To protect the rights of the Awas Tingni people in the interim, the Court ordered Nicaragua to abstain from affecting the "existence, value, use or enjoyment of the property" until these actions are carried out.²⁰⁴

The Inter-American Court reached its decision despite the fact that the Awas Tingni people had migrated within their larger ancestral

199. See *id.* ¶ 122 (holding that, based on the Nicaraguan Constitution, which recognizes the right of indigenous peoples to "self-determination; to [maintain] and [develop] their identity and culture, having their own forms of social organization and managing their local affairs;" to maintain "communal forms of land ownership;" to "[enjoy] . . . their natural resources;" and to "[preserve] . . . their cultures and languages, religions, and customs," (Const. Art. 5, 89 and 180), the Court found that the "existence of norms recognizing and protecting indigenous communal property in Nicaragua was evident").

200. See *id.* ¶ 156 (dismissing the claim that the actions of Nicaragua violated Articles 4 (Right to Life), 11 (Right to Privacy), 12 (Freedom of Movement and Residence), and 23 (Right to Participate in Government) of the American Convention on Human Rights because the grounds for relief under these articles were not stated in final briefs).

201. *Id.* ¶ 164.

202. See *id.* ¶¶ 126, 103(p)-(t) (noting that considerable legal proceedings transpired in Nicaraguan courts prior to the decision of the Inter-American court, ultimately resulting in the nullification of the logging concession, and yet the underlying status of the Awas Tingni's land claim remained unresolved); see also Anaya & Grossman, *supra* note 194, at 6 (stating that the Nicaraguan government formerly granted the logging concession despite a report and map prepared by the Awas Tingni in support of its land claim).

203. *Awas Tingni*, *supra* note 195, ¶ 164.

204. *Id.* See *id.* ¶ 167 (ordering, in addition, that the Nicaraguan government make monetary compensation to the community in light of the "lack of delimitation, demarcation, and titling of their communal property . . .").

lands, only had occupied their present village since the 1940s, did not have paper title to the lands, and, like many indigenous communities, held those lands communally.²⁰⁵ In regard to the second point, the tribunal, like the South African court in Richtersveld, took into account the customary law of indigenous peoples.²⁰⁶ As a result, it held that “possession of land” is sufficient for indigenous communities “lacking real title to the property” to obtain “official recognition” and consequent “registration” of that property.²⁰⁷ Finally, as to the last point, the tribunal held that the Community’s communal property right to the lands it currently inhabits could accommodate and was “without detriment” to whatever rights other indigenous communities might have in the lands in question.²⁰⁸

This case is far-reaching as it is the “first legally binding decision by an international tribunal to uphold the collective land and resource rights of indigenous peoples in the face of a state’s failure to do so.”²⁰⁹ Although the case interpreted a single international agreement,

205. See *id.* ¶¶ 140(h), 149 (noting that the Awas Tingi’s formal ancestral home was Tuburús and that the relationship between indigenous peoples and their lands is a fundamental aspect of their culture).

206. See *id.* ¶ 151 (declaring that customary law necessarily influences the analysis of title to land in relation to indigenous peoples).

207. See *id.* ¶¶ 151-52 (indicating that the Nicaraguan government recognizes communal property of indigenous peoples but does not have a specific procedure for granting that recognition).

208. See *id.* at ¶ 153 (highlighting the unique relationship among indigenous peoples, their culture and their land).

Indigenous groups, by fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities relations to the land are not merely a matter of possession and production, but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit to future generations.

Id. ¶ 149.

209. Anaya & Grossman, *supra* note 194, at 2. See INDIAN LAW RESOURCE CENTER, THE AWAS TINGNI CASE – FIFTEEN MONTHS LATER: THE CHALLENGES TO THE IMPLEMENTATION OF THE DECISION OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 1 (2003) (reporting that on January 13, 2003, the Awas Tingni Community filed an action in Nicaraguan Courts against the Nicaraguan President and various government officials for failure to comply with the decision), available at <http://www.law.arizona.edu/depts/iplp/>

the American Convention on Human Rights, the analytical foundation of the Inter-American Court's decision in the right to property—a right that is found in other international conventions on human rights as well—may have implications for indigenous peoples in other states and influence other tribunals as well.

3. *Exercising Resource Rights and Revitalizing Culture (United States)*²¹⁰

In 1855, the United States and the Makah Indian Tribe entered into the Treaty of Neah Bay, in which the Makah, in pertinent part, reserved a right to hunt whales at their usual and accustomed grounds.²¹¹ The rights reserved by the Makah Nation in the Treaty of Neah Bay raise the question of how indigenous peoples fit within the U.S. constitutional system. To a large extent, scholars found the answer in a series of opinions issued some 170 years ago, often referred to as the “Marshall Trilogy.”²¹² Felix Cohen, “the Blackstone of American Indian Law,”²¹³ aptly summarized these and other Supreme Court cases in 1942:

Perhaps the most basic principle of all Indian Law . . . is . . . that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.

advocacy_clinical/awas_tingni/documents/ATPressReleaseDetailsJan1603.pdf (last visited Feb. 21, 2005).

210. See Firestone & Lilley, *supra* note 43, at 10763-87 (expanding the discussion of the Makah Indian Case noted below).

211. See Treaty Between the United States of America and the Makah Tribe of Indians (“Treaty of Neah Bay”), Jan. 31, 1855, U.S.-Makah Tribe, art. IV, 12 Stat. 939, 939-40 (providing that the “right of taking fish and of whaling or sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all the citizens of the United States”).

212. See Johnson v. McIntosh, 21 U.S. 543, 588 (1823) (stating that Indians retain a right of occupancy but are incapable, absent the consent of the U.S. government, of transferring absolute title to land); see also Cherokee Nation v. Georgia, 30 U.S. 1 (1831) (dismissing a suit by the Cherokee Nation against the state of Georgia on the grounds that the Cherokee Nation was not in fact a foreign state and had no jurisdiction to sue in federal court under diversity jurisdiction); see also Worcester v. Georgia, 31 U.S. 515 (1832) (concluding that the laws of the state of Georgia have no force in Cherokee territory).

213. FELIX S. COHEN, FELIX S. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW viii (Rennard F. Strickland & Charles F. Wilkinson eds. 1982).

The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles. First, an Indian tribe possesses, in the first instance, all the powers of any sovereign state; second, conquest renders the tribe subject to the legislative power of the United States and, in substance, terminates the external powers of sovereignty of the tribe, e.g., its power to enter into treaties with foreign nations, but does by itself affect the internal sovereignty of the tribe, i.e., its powers of local self-government; and finally, these powers are subject to qualification by treaties and by express legislation by Congress, but save as thus expressly qualified, full powers of internal sovereignty are vested in the Indian tribes and in their duly constituted organs of a government.²¹⁴

In other words, indigenous peoples who are part of a federally-recognized tribe have a “measured separatism” from the U.S. government and the individual states that comprise the United States.²¹⁵

Despite the Makah’s treaty right to hunt whales, and the fact that whaling is central to the Makah culture, way of life, and social structures, the Makah ceased whaling in the 1920s.²¹⁶ The Makah stopped whaling principally due to the fact that the widespread commercial exploitation of whales had placed the gray whale on the brink of extinction.²¹⁷ In 1994, however, the U.S. government removed the eastern North Pacific stock of gray whales (also known as the “California gray whale”) from the endangered species list because it was no longer in danger of extinction, and was not likely to become endangered again in the foreseeable future.²¹⁸ Around that

214. FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW WITH REFERENCE TABLES AND INDEX* 122-23 (Dept. of the Interior ed., 1942).

215. CHARLES F. WILKINSON, *AMERICAN INDIANS, TIME AND THE LAW: NATIVE SOCIETIES IN A MODERN CONSTITUTIONAL DEMOCRACY* 14 (1987).

216. See JENNIFER SEPEZ, *POLITICAL AND SOCIAL ECOLOGY OF CONTEMPORARY MAKAH SUBSISTENCE HUNTING, FISHING AND SHELLFISH COLLECTING PRACTICES* 70 (2001) (detailing Makah subsistence hunting, fishing and shellfishing practices during 1997-1999) (unpublished Ph.D. dissertation, University of Washington) (on file with University of Washington and author).

217. See *Metcalf v. Daley*, 214 F.3d 1135, 1137-38 (9th Cir. 2000) (noting that the United States entered into the International Convention for the Regulation of Whaling in 1946 in order to help conserve the worldwide whale population and to provide for the orderly development of whaling).

218. See *id.* at 1138 (stating that by 1993 the National Marine Fisheries Service determined that the gray whale population had returned to a level near its original

time, the Makah tribe approached the U.S. government and requested that the U.S. seek on its behalf authorization from the International Whaling Commission ("IWC") of an aboriginal subsistence whale quota.²¹⁹ While the U.S. government has since advocated on behalf of the Makah, members of other states and segments of U.S. civil society object to Makah whaling.²²⁰ Thus, the recovery of the gray whale set in motion an international and domestic controversy that has manifest itself in deliberations of the IWC²²¹ (which while presently maintaining a global moratorium on the commercial harvest of great whales, also authorizes various indigenous peoples to engage in subsistence whaling), and in legal action in U.S. courts.²²² The Makah case highlights that even when a state seeks to advance the resource rights of its indigenous peoples, other persons in civil society may view indigenous peoples not as allies, but as impediments to the quest for the conservation of global biodiversity.²²³

The controversy has important implications for indigenous peoples because it places solemn treaty obligations,²²⁴ such as the right of the

population).

219. See *id.* (indicating that the Makah Tribe wished to harvest up to five whales for "ceremonial and subsistence purposes").

220. See *id.* at 1140-41 (listing the various organizations that filed suit against the U.S. government claiming that National Oceanic and Atmospheric Administration and other federal agencies violated several federal laws by pursuing the Makah whaling plan).

221. See International Convention for the Regulation of Whaling, Schedule, Dec. 2, 1946, § III, para. 13.b(2) (wherein the Schedule in pertinent part presently provides that:

The taking of gray whales from the Eastern stock in the North Pacific is permitted, but only by aborigines or a Contracting Government on behalf of aborigines, and then only when the meat and products of such whales are to be used exclusively for local consumption by the aborigines whose traditional aboriginal subsistence and cultural needs have been recognized),

available at http://www.iwcoffice.org/_documents/commission/schedule.pdf (last visited Feb. 21, 2005).

222. See, e.g., *Anderson v. Evans*, 371 F.3d 475, 483-84 (9th Cir. 2004).

223. See *id.* at 484-86 (detailing the public outcry that ensued from organizations such as the Fund for Animal and the Humane Society of the United States concerning the possible re-harvesting of grey whales by the Makah Indian Tribe).

224. See Felix S. Cohen, *The Erosion of Indian Rights, 1950-1953: A Case*

Makah Indian Tribe to self-determination; a devotion to cultural diversity; subsistence needs; and trust in the scientific community's judgment on the health of the gray whale population on the one hand, in opposition with, on the other hand, a whale's right not to suffer and right to life²²⁵ and concern over the effects of allowing whaling in this instance on the management of whaling globally.²²⁶ To date, the courts have placed both procedural and substantive hurdles in the way of Makah whaling. While the Makah can overcome the procedural hurdles placed in the way of its whaling tradition, to the extent that the United States has abrogated or modified the Makah's treaty rights (either *de jure* or *de facto*), the United States has compromised on the promise it made in 1855 to accord Makah (as well as to Indian tribes in the United States, more generally) a "measured separatism."²²⁷

4. *Settlement of Indigenous Lands Claims Through a Democratic and Participatory Process (Canada)*

The Nunavut Territory in the Circumpolar North is approximately two million square kilometers, encompasses about twenty percent of Canada's landmass, and includes two-thirds of Canada's coast and seven of its twelve largest islands.²²⁸ In the following case, we consider the recent creation of Nunavut Territory and the resolution of an indigenous land claim, not through the courts, but rather, as a result of protracted political negotiations between the Inuit people

Study in Bureaucracy, 62 YALE L.J. 348, 390 (1953) (noting that "like the miner's canary, the Indian marks the shift from fresh air to poison gas in our political atmosphere, and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall of our democratic faith").

225. See Anthony D'Amato & Sudhir K. Chopra, *Whales: Their Emerging Right to Life*, 85 AM. J. INT'L L. 21, 27 (1991) (explaining "to be sure, whales are not human, but are they 'less' than human?").

226. See, e.g., Matthew Dennis, *Makahs and Gray Whales: Not Black and White*, THE ECOTONE, at 4 (1999), available at <http://64.233.187.104/search?q=cache:ecC-6cgNxvsJ:darkwing.uoregon.edu/~ecostudy/resources/publications/ecotone/Web%2520PDF%2520Versions/Ecotone%2520Fall%2520%2799.pdf+Makahs+and+Gray+Whales:+Not+Black+and+White&hl=en> (last visited Feb. 21, 2005).

227. WILKINSON, *supra* note 215, at 14.

228. Nunavut Fast Facts, Indian and Northern Affairs Canada, available at http://www.ainc-inac.gc.ca/nu/nunavut/bkgrdr/facts_e.pdf (last visited Feb. 21, 2005).

and the Canadian government.²²⁹ Indeed, the creation of Nunavut and its government in the 1993 Nunavut Act is “inextricably bound up with, and indeed, is a direct consequence, the resolution of the Inuit land claim,” which is embodied in the 1993 Nunavut Land Claims Agreement (“NLCA”) and the Nunavut Land Claims Agreement Act, wherein the Canadian Parliament ratified the Agreement.²³⁰

The Canadian government and the Inuit people negotiated a settlement over a very protracted period of time—the negotiations ran for a decade and a half—and a central feature of the overall settlement was the creation of a public government rather than self-government by indigenous peoples.²³¹ Under the Nunavut model, all residents of the Territory have the right to vote, run for public office, and otherwise participate in the affairs of government, and the government’s jurisdiction extends to all residents.²³² In other words, Nunavut’s political status is akin to the then-existing Canadian Territories—the Northwest Territories (“NWT”) and the Yukon Territory.²³³ This is in contrast to a government such as the Makah

229. See Agreement Between The Inuit of the Nunavut Settlement Area and Her Majesty The Queen in Right of Canada, May 25, 1993 [hereinafter NLCA] (recognizing, among other things, the land claims of the Inuit people in the Nunavut area of Canada), available at http://www.aicn-inac.gc.ca/pr/agr/pdf/nunav_e.pdf (last visited Feb. 21, 2005).

230. See KIRK CAMERON & GRAHAM WHITE, NORTHERN GOVERNMENTS IN TRANSITION: POLITICAL AND CONSTITUTIONAL DEVELOPMENTS IN THE YUKON, NANAVUT, AND THE WESTERN NORTHWEST TERRITORIES 90 (1995) (explaining why the Inuit have been so much more successful in achieving their governmental aspirations than other Aboriginal groups).

231. See Jack Hicks, *The Nunavut Land Claim and the Nunavut Government: Political Structures of Self-Government in Canada's Eastern Arctic*, in DEPENDENCY, AUTONOMY, SUSTAINABILITY IN THE ARCTIC 21, 22 (Hanne Peterson & Birger Poppel eds., 1999) (noting the willingness of the Inuit people to accept such a term in their agreement with the Canadian government). See generally INT'L WORK GROUP FOR INDIGENOUS AFFAIRS, NUNAVUT: INUIT REGAIN CONTROL OF THEIR LANDS AND THEIR LIVES, IWGIA doc. no. 102 (Jens Dahl, Jack Hicks & Peter Jull eds., 2000) (detailing the struggle of the Inuit people to regain their ancestral lands and considering the implications of the Nunavut model for the Inuit and other indigenous peoples).

232. See Hicks, *The Nunavut Land Claim*, *supra* note 231, at 22 (noting that this “public” government model, which was advanced by the Inuit, was ultimately a key element that led to Canadian government acceptance of the settlement).

233. See *id.* at 30 (noting that territories resemble provinces in Canada, “except that control of lands and resources, and public prosecutions, rests with the federal

Indian Tribe's, whose power over non-Indians is circumscribed, particularly on non-Indian-owned land within the geographic boundaries of its reservation, but whose services and privileges (and those of the U.S. government on its behalf) are also limited to those individuals who are members of the Makah Tribe.²³⁴ Given the form of governance contemplated, the Inuit felt it was critical that they create a new Territory out of a portion of the then-existing NWT, as the Inuit only represented 38 percent of the residents of the NWT.²³⁵ In contrast, the Inuit presently control the affairs in Nunavut, as approximately eighty-five percent of the 25,000 residents of Nunavut are Inuit.²³⁶

In the negotiations, the Inuit sought a land claim settlement that would recognize and "enshrine Inuit use of their lands," provide financial compensation to them for past and future non-Inuit use of Inuit lands and natural resources, and establish a government with the "capacity to protect and foster Inuit language, culture and social well-being."²³⁷ As elucidated in the Preamble to the NLCA, the Inuit and the Canadian federal government met Inuit desires through four objectives: clarification of rights of ownership and use of lands and resources, including wildlife harvesting rights; the establishment of rights of participation in decision-making and management of natural resources; the provision of financial compensation; and the encouragement of self-reliance and social well-being.²³⁸ In pertinent

government").

234. Cf. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210 (1978) (recognizing that Indian tribes do not have criminal jurisdiction over non-Indians); see also *Montana v. United States*, 450 US 544, 565-66 (1981) (ruling that Indian Tribes may not regulate non-Indian hunting and fishing on non-Indian owned land within the boundaries of a reservation unless "conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe").

235. See Hicks, *supra* note 231, at 24 (elaborating further that the Northwest Territories' ("NWT") centers of economic and political power were both geographically and culturally too remote for the Inuit).

236. Nunavut Fast Facts, *supra* note 228.

237. See Hicks, *supra* note 231, at 22 (explaining how the Inuit never compromised on these principles throughout the entire time they negotiated with the Canadian government).

238. See NLCA, *supra* note 229, pmbl. (stating that the land claims agreement was negotiated based on and reflects those 4 objectives).

part, the NLCA provides the Inuit with:

- (1) Collective title to land (350,000 square kilometers, with subsurface rights to 36,000 of those square kilometers);
- (2) Priority wildlife harvesting rights;
- (3) C\$1.17 billion over 14 years;
- (4) Capacity-building (\$13 million in a training trust fund, training and support to achieve the objective of “representative” levels by occupation and grade within the government, and preference to Inuit businesses in government contracting);
- (5) Co-management of natural resources [wildlife resources, land-use planning, water resources, and environmental and socio-economic review through strong Inuit representation of four newly created institutions of public government: Nunavut Wildlife Management Board, Nunavut Planning Commission, Nunavut Water Board, and Nunavut Impact Review Board (environmental and socioeconomic impacts)].²³⁹

In essence, the Inuit “surrendered their rights to lands and resources at common law—known as ‘aboriginal title’—for the measures contained in the Nunavut Land Claims Agreement.”²⁴⁰ Although the co-management boards are technically “advisory,” they are expected to be “powerful institutions in practice.”²⁴¹ Indeed, many regard these co-management arrangements as an effective way in which to blend two systems of natural resource management in a manner that capitalizes on the advantages of each system and, at the same time, avoids the domination of one by the other.²⁴² Indeed, the

239. Hicks, *supra* note 231, at 26-27. The parties agreed to create the Nunavut Territory and Nunavut Government on April 1, 1999. *Id.*

240. See Jack Hicks & Graham White, *Nunavut: Inuit Self-determination Through a Land-Claim and Public Government?*, in Hicks, *supra* note 231, at 59 (clarifying that implementation of the Agreement did not involve the surrender of Inuit rights to self-government that existed at the time of the Agreement, or those rights that future constitutional amendments could define).

241. *Id.* at 60.

242. See *id.* (explaining that while the co-management bodies do not replace or supercede existing federal departments, those agencies must now share power).

co-management boards, in conjunction with the Nunavut government, ensure that individuals, who the Inuit have not elected and who are not accountable to them, no longer hold exclusive decision-making authority over natural resources (e.g., harvesting and mining).

Several factors contributed to the successful completion of the negotiations. Unlike some other indigenous peoples of Canada (and unlike indigenous peoples in the continental United States such as the Makah), the land claims of the Inuit people did not involve any treaties with either the British or Canadian governments.²⁴³ Additionally, as noted earlier, the high degree of social homogeneity among those individuals residing in the eastern Arctic portion of the NWT greatly simplified the political debate.²⁴⁴

The Nunavut case, based more on notions of democracy and participation than any other case we examine, provides a vision of a future committed to the “universality of human rights and dignity” and the “true spirit of democracy;” the Nunavut case also offers a lesson to the broader global community about the “resilience of the human spirit.”²⁴⁵

5. *Management of a Marine Protected Area (Indonesia)*²⁴⁶

Some scholars suggest that issues concerning indigenous peoples in Asia and Africa are very different from other parts of the world.²⁴⁷ Although the issues themselves might appear complex in most of the

243. See CAMERON & WHITE, *supra* note 230, at 90 (contrasting the situation posed here with that in western NWT).

244. See *id.* (describing the Inuit as “far less beset by divisions” than the Dene-Métis of the western NWT).

245. Jose Kusugak, *The Tide has Shifted: Nunavut Works For Us, and It Offers A Lesson to the Broader Global Community*, in Hicks, *supra* note 231, at 20, 28.

246. See Jonathan Lilley & Julian Clifton, *Identifying Institutional Barriers to Co-Management in Wakatobi Marine National Park, Indonesia* (Jan. 2, 2004, unpublished article, University of Delaware) (on file with author) (elaborating on the Indonesian case).

247. See Kingsbury, *supra* note 26, at 418 (noting that “several governments of Asian states argue that the concept of ‘indigenous peoples’ is so integrally a product of the common experience of European colonial settlement as to be fundamentally inapplicable to those parts of Asia that did not experience substantial European settlement”).

indigenous struggles that this article discusses, it is fairly easy to differentiate between the indigenous and the non-indigenous populations. This is not the case in the Indonesian example.²⁴⁸ However, simply because the usual concept of what constitutes an indigenous issue does not fit neatly here, it implies neither that the concept of “indigenous peoples” is irrelevant, nor that there are not important issues concerning cultural diversity that are worthy of consideration.

The following case study concerns the Wakatobi Marine National Park (“WMNP”). The park is one of the largest protected marine areas in Indonesia, and is located off the southeast coast of the island of Sulawesi.²⁴⁹ It spans 14,000 km² and approximately 80,000 people live within its borders.²⁵⁰ The majority (92%) of the local population is of Buginese origin, with the remainder from an ethnic group known as the Bajo.²⁵¹ Both groups fit the description of “indigenous,” and although the Bajo constitute a numerical minority, they represent a significant stakeholder in the local fishery, given

248. Although in the past, the Dutch ruled Indonesia (as did the Japanese briefly during World War II), the issue presented in this case concerns two groups of indigenous peoples. *Id.*

249. See Julian Clifton, *Prospects for Co-Management in Indonesia's Marine Protected Areas*, 27 MARINE POL'Y 389, 390 (2003) (stating that the Wakatobi Marine National Park (“WMNP”) is the newest area to receive designation in this category, receiving official recognition in 1996).

250. See generally Gina Elliott et. al., *Community Participation in Marine Protected Area Management: Wakatobi National Park, Sulawesi, Indonesia*, 29 COASTAL MANAGEMENT 295, 312 (2001) (discussing the monitoring and enforcement of park regulations and tourist development in the Wakatobi National Park); see also Clifton, *supra* note 249, at 390-94 (presenting evidence in support of enhanced efforts to promote co-management of Indonesia's marine park areas); Lilley & Clifton, *supra* note 246, at 1 (discussing the recently designated marine protected area in Indonesia to demonstrate the cultural obstacles that prevent effective resource management).

251. See Clifton, *supra* note 249, at 390 (noting the percentage of the indigenous population within the park); see also C. SATHER, *THE BAJAU LAUT: ADAPTATION, HISTORY AND FATE IN A MARITIME FISHING SOCIETY OF SOUTH-EASTERN SABAH* 6 (Oxford U. Press 1997) (discussing the variations of the spelling of “Bajo” found in the literature). According to Sather, the spellings Bajo, Bajau, Bajou, Badjo, Badjaw, and Bajao appear with regularity in English and Dutch ethnographic literature dating from the early eighteenth century. *Id.* In the national vernacular of Indonesia, “Bajo” and “Bajau” are both regularly used. *Id.*

their near-total dependence on marine resources.²⁵² When Indonesian state officials created the park in 1996, however, they gave a minimal amount of thought to the Bajo, who had little, if any, input into park planning.²⁵³ WMNP officials produced a revised plan (again without Bajo consultation) that has since gone some way towards reducing these restrictions, but due to financial constraints, officials have not yet implemented the newer plan.²⁵⁴

Certain traditional Bajo practices are now at odds with park management policies. The prime example of such a conflict is Bajo subsistence fishing.²⁵⁵ Although a number of Bajo fishermen sell part or all of their catch, many still simply live off what they bring home.²⁵⁶ When the management plan came into force, it classified many traditional fishing areas as core zones—a designation which prohibits all fishing.²⁵⁷ In addition to prohibiting fishing, the plan outlawed a number of other Bajo activities within the park. Traditionally, the Bajo used Mangrove wood for firewood and coral rocks as a useful building material.²⁵⁸ The plan bans both of these activities and makes illegal the removal of certain species, such as Napoleon wrasse, giant clams, and turtles.²⁵⁹

252. See *id.* at 390 (explaining that while the Bajo almost exclusively rely on marine resources for food, fuel, and building materials, they engaged in small scale trading of surplus fish catches within the Wakatobi).

253. See *id.* at 392 (citing information on “management themes” that resulted from interviews with a representative sample of Bajo stakeholders). According to this study, while 75% of the interviewees knew about the existence of the Park, only 30% could refer to any existing rules regarding the use of marine resources. *Id.*

254. See *id.* (predicting an increase in the long term enforcement costs due to the lack of knowledge of park rules and regulations).

255. See *id.* (reporting results from a study on the breach of rules regarding fishing activity which revealed that even though they are theoretically “out of bounds,” local fishermen still use wilderness and rehabilitation zones on a daily basis).

256. See *id.* at 390 (discussing the Bajo’s participation in small scale trading of surplus fish catches within the Wakotobi).

257. See generally Elliot, et al., *supra* note 250, at 312 (discussing the challenges of monitoring the zoning scheme and “ensuring local adherence” to the new regulations in the park).

258. See *id.* (predicting that demand for coral stone will remain high as population growth in the villages continues and requires new houses).

259. See Clifton, *supra* note 249, at 394 (stating that the study revealed that all

The problem lies not with the regulations *per se*—in themselves they reflect sound conservation measures—but rather with the lack of Bajo consultation in implementing them. As mentioned above, there was minimal, if any, contact with the Bajo prior to the park's creation and no effort to educate the Bajo about the importance of required conservation measures.²⁶⁰ As a result, activities which were lawful one day became illegal the next. This has led to a situation where park rangers can arrest, and on occasions have arrested the Bajo, for living in a way in which they have lived their entire lives.²⁶¹ There are no easy answers to the conservation issue. The use of alternative sources of fuel and different building materials is an option, but would require a level of financial investment that is presently unavailable. However, there are encouraging signs that the situation may change. In 2000, WMNP operators established a small trial no-fishing zone ("NFZ") off the island of Kaledupa—one of the four inhabited islands in the park—to see if certain fish stocks would recover.²⁶² WMNP operators established the NFZ with the cooperation of the Bajo, and there are early indications that the project has been successful.²⁶³ Therefore, it might be possible to extend this cooperation into other areas of WMNP planning.

Possibly the biggest threat to the health of the park is destructive fishing practices—the use of bombs and cyanide (by both outsiders and certain inhabitants of the park) and over-fishing by commercial vessels.²⁶⁴ One of the key factors contributing to this problem is the

of the fisherman had high levels of awareness for species protection and could correctly identify each of these species).

260. See *supra* notes 253-254 and accompanying text (discussing the Bajo's awareness of the regulations regarding the use of marine resources).

261. See *id.* (indicating that 95% of the fisherman admitted that park rangers had stopped them, mostly for offenses involving coral mining).

262. See Clifton, *supra* note 249, at 394 (describing the establishment of the small no-fishing zone ("NFZ") as an effort by a UK-based ecotour operator in the WMNP to support the involvement of the Bajo community); see generally Lilley & Clifton, *supra* note 246, at 1 (identifying financial barriers as one of several institutional barriers to co-management that exist within the WMNP).

263. See Clifton, *supra* note 249, at 394 (providing that the Bajau's management and enforcement of the NFZ resulted in a rapid reversal of a decline in fish catches and the "generation of widespread support amongst the Bajau").

264. See *id.* (stating that during the interviews, all fisherman cited bomb fishing and cyanide fishing as illegal).

lack of effective monitoring, given the park's size and the limited ability of park rangers to patrol the outer reefs.²⁶⁵ Because the Bajo are on the water daily, they could feasibly assist the rangers in pinpointing areas that are targeted by bomb and possibly even cyanide fishermen. Some scholars suggest that the Bajo could assist by working as park rangers.²⁶⁶ Despite the long-term benefits that would inure, it is likely that the Bajo would initially face a number of cultural obstacles.²⁶⁷ Perhaps in the short term, simply improving the communication and level of trust between the Bajo and the rangers could lead to an improvement in monitoring within the park. Not only would this help with the conservation effort, but it could improve the relationships between the different cultural groups.

The WMNP represents a case where two groups of indigenous peoples are involved in resource utilization—a situation far more ambiguous than when an indigenous group opposes involvement by a non-indigenous population. The situation is further complicated when one considers the rather unique history of the Bajo. Until the middle of the twentieth century, the Bajo were a seafaring nomadic people.²⁶⁸ Their traditional way of life revolved around the sea, and for centuries they lived either aboard their boats or in temporary shelters built in coves and bays.²⁶⁹ The Bajo fall within a larger ethnic group of Sama-Bajau speaking peoples who, for centuries, have inhabited the waters of Southeast Asia.²⁷⁰ It is only within the

265. See Elliot, et al., *supra* note 250, at 312 (informing that in 1998, the rangers had one boat at their disposal). See generally Lilley & Clifton, *supra* note 246 (suggesting that by 2000, this number had only doubled).

266. See Rili Hawari Djohani, *The Bajau: Future Marine Park Managers in Indonesia*, in ENVIRONMENTAL CHANGE IN SOUTH-EAST ASIA: PEOPLE, POLITICS AND SUSTAINABLE DEVELOPMENT (Michael Parnell & Raymond Bryant eds. 1996) (exploring the potential role of the sea-faring Bajau people to the management of the marine environment and discussing how their innate skills, experience, and knowledge can apply in conservation and development processes).

267. See Clifton, *supra* note 249, at 394 (stating that the history of enforced assimilation of the Bajo by the Indonesian government and the low social status of the Bajo might reduce their chances of employment as park rangers).

268. See SATHER, *supra* note 251 (describing characteristics and history of the Bajo population).

269. See *id.* (describing the pejorative connotations of the names for these sea-dwelling groups).

270. See *id.* (indicating that Sama-Bajau speakers are arguably the most

last fifty or sixty years that they have settled in and around coastal areas.²⁷¹ The Bajo built many of their houses on stilts over the water and in some cases they constructed their entire villages over the reef flats, completely separate from the land.²⁷² One could argue that as the Bajo have only lived in these settlements for a few decades, the Buginese represent the original indigenous population of the area encompassed by the WMNP by virtue of priority in time. This suggestion, however, ignores the unusual history and traditional lifestyle of the Bajo. Sather notes how the earliest written use of the term "Bajo" in the Sulawesi region dates from the seventeenth century, which creates the inference that these manuscripts are based on earlier palm-leaf documents from the fourteenth or fifteenth century.²⁷³ It seems apparent that although the Bajo do not have a long-standing connection with any particular land mass, they certainly have strong historical and cultural ties to the waters of the WMNP.

Although the Bajo did not experience colonial domination, without doubt they represent an indigenous population that depends on the resources of the WMNP for their survival.²⁷⁴ Like many developing countries, the managers of the WMNP have struggled to successfully manage resources and enforce conservation policies, and some suggest that involving the Bajo through a system of co-management would help with this issue.²⁷⁵ Additionally, recognizing the historical dependence of the Bajo on those resources would do justice to the indigenous rights of the Bajo.

geographically dispersed ethnolinguistic group indigenous to Southeast Asia).

271. Although not documented, it is highly likely that the Bajo settled close to land during this period due to the political upheaval within Indonesia at the time. Given the instability, it is quite logical for the Bajo of the 1950s to want recognition as legitimate inhabitants of a specific area, rather than as a nomadic people roaming through a larger region. *Id.*

272. See Djohani, *supra* note 266, at 260-61 (stating that the reef flats support possibly the "richest marine fauna in the world").

273. See *id.* (describing the different ways in which these texts qualify "Bajo").

274. See *supra* note 252 and accompanying text (discussing the Bajo's almost exclusive reliance on marine resources).

275. See generally Clifton, *supra* note 249, at 1 (advocating co-management as a means to address the destructive human practices which threaten the "integrity" of marine resources in Southeast Asia).

6. Ownership of Genetic Rights and Knowledge (Brazil)

Indigenous peoples in Brazil have a long history of rights recognition by the federal government. The present Brazilian Constitution (adopted in 1988) provides, in pertinent part, that indigenous peoples have a right to their own cultures and social organization, as well as rights to their traditionally occupied lands.²⁷⁶ The Constitution also states that indigenous peoples have the “exclusive usufruct of the riches of the soil, the rivers and the lakes” existing within their lands.²⁷⁷ It also permits the use of hydric and mineral resources contained within Indian lands only “with the authorization of the National Congress, after hearing [from] the communities involved, and the participation in the results of such mining shall be ensured to [the local communities], as set forth by law.”²⁷⁸

Given the emphasis placed on indigenous ownership of natural resources, one might assume that the Constitution also supports the proposition that indigenous peoples own and control the genetic products and related possible sources of revenues from their land. The Constitution, however, while acknowledging the general right to an “ecologically balanced environment,”²⁷⁹ provides that, to “ensure the effectiveness of that right”²⁸⁰ it falls to the federal government of Brazil to “preserve the diversity and integrity of the genetic patrimony of the country and to control entities engaged in research

276. See BRAZ. CONST., tit. Indians, ch. VIII, art. 231 (stating that “Indians shall have their social organization, customs, languages, creeds and traditions recognized, as well as their original rights to the lands they traditionally occupy, it being incumbent upon the Union to demarcate them, protect and ensure respect for all of their property.”). Art. 231 defines traditionally occupied lands as “[l]ands traditionally occupied by Indians are those on which they live on a permanent basis, those used for their productive activities, those indispensable to the preservation of the environmental resources necessary for their well-being and for their physical and cultural reproduction, according to their uses, customs and traditions.” *Id.* ¶ 1.

277. *Id.* ¶ 2.

278. *Id.* ¶ 3.

279. See BRAZ. CONST., tit. Environment, ch. VI, art. 225 (describing the right to an “ecologically balanced environment” as essential for a healthy life).

280. *Id.* ¶ 1. This provision outlines all of the government’s duties to ensure the effectiveness of the right to an “ecologically balanced environment.” *Id.*

and manipulation of genetic material.”²⁸¹ The declaration that the Brazilian Amazonian Forest is “part of the national wealth” underscores federal control.²⁸² This statement of federal control is consistent with the approach that the CBD adopted, where states—and not indigenous peoples—are the sovereign owners of genetic resources.²⁸³

Indeed, while on one hand the CBD provides an expanded role for indigenous populations concerning the use of genetic resources, on the other, it subjects this role to a state’s national legislation.²⁸⁴ Indeed, states have the “sovereign right to exploit their own resources pursuant to their own environmental policies.”²⁸⁵ Peña-Neira et al. note that with the adoption of the CBD, the question facing countries like Brazil is not whether to share the benefits of genetic resources, but how to share them.²⁸⁶ Essentially, states have three options when implementing the CBD: (1) they may take a private law approach, whereby the parties that negotiate the contract address the issue of benefit-sharing; (2) they may take a public approach, whereby a national agency retains overall control of genetic resources; or (3) they may take a mixed approach, which is an amalgamation of the two where public law restricts the private contracts.²⁸⁷

281. *Id.* ¶ 1.II.

282. *See id.* ¶ 4 (providing that the Amazon forest shall be used under conditions which “ensure preservation of the environment, including the use of natural resources”).

283. *See* CBD, *supra* note 87, art. 15, ¶ 1 (providing that “the authority to determine access to genetic resources rests with the national governments and is subject to national legislation”).

284. *See id.* at art. 8(j) (encouraging states, subject to their national legislation, to promote the wider use of traditional knowledge as it relates to the sustainable use of biodiversity and to equitably share the benefits that stem from the utilization of such knowledge, innovations and practices).

285. *Id.* at art. 3.

286. *See* S. Peña-Neira et al., *Equitably Sharing Benefits from the Utilization of Natural Genetic Resources: The Brazilian Interpretation of the Convention on Biological Diversity*, 6(3) ELECTRONIC J. COMP. L., at 17 (Oct. 2002) (explaining that “[a]ccording to the Convention, benefits are to be shared in a fair and equitable way.”), at <http://www.ejcl.org/> (last visited Feb. 21, 2005).

287. *See id.* at 2 (discussing the implementation of the three options available to countries in their application of the CBD).

The Brazilian government opted for a private law approach, and in March 1999, a Presidential Decree created the Brazilian Association for the Sustainable Use of Biodiversity in the Amazon ("Bioamazônia") to manage the genetic resources of the Amazon on behalf of the federal government.²⁸⁸ The decree mandated that Bioamazônia establish business contacts with companies interested in the commercial use of the genetic components of the Amazon's biodiversity to obtain both financial and non-financial resources to support itself.²⁸⁹ Subsequently, on May 29, 2000, Bioamazônia entered into a bio-prospecting agreement with the Swiss multinational Novartis Pharma.²⁹⁰

A number of scientists, legal scholars, non-governmental organizations ("NGOs"), and indigenous groups quickly and roundly criticized the agreement.²⁹¹ Author Robin Scott identified three aspects of the agreement that caused the most concern.²⁹² First, with

288. See *id.* at 3 (explaining Brazil's delegation of the management of its natural genetic resources to Bioamazônia).

289. See *id.* at 4 (explaining that Brazilian social organizations "seek to achieve public aims of collective interest with private law instruments").

290. See *id.* at 6-7 (breaking down and further analysing the contract). The agreement required Bioamazônia to collect 30,000 micro-organisms over a three-year period, screen them and pass the information on to Novartis. *Id.* It also required Bioamazônia to send 10,000 of the more promising micro-organisms to Novartis' Swiss laboratory for further research. *Id.* In return, Novartis agreed to pay two million Swiss Francs upfront and 250 Swiss Francs for each of the 10,000 organisms it received. *Id.* See also Federal Reserve Statistical Release, Foreign Exchange Rates (Weekly) (May 30, 2000) (identifying the exchange rate at that time was approximately 1.7 Swiss Francs to the U.S. Dollar), available at <http://www.federalreserve.gov/releases/h10/20000530/> (last visited Feb. 21, 2005); Peña-Neira et al., *supra* note 286, 6-7 (noting that should any of the organisms lead to marketable discoveries, the agreement also required Novartis to make additional payments). Additional payments due from Novartis in the event of making a marketable discovery would either amount to 4.1 million Swiss Francs or to 5.2 million Swiss Francs should Novartis decide to commercially market the discovery. *Id.* In the second scenario, Novartis also would pay 0.5% of the net annual sales of the product. *Id.*

291. See Peña-Neira et al., *supra* note 286, at 7-9 (examining the parties' complaints that they were not involved in the negotiations and the apparent inequity of the contract).

292. See Robin L. Scott, Note, *Bio-Conservation or Bio-Exploitation: An Analysis of the Active Ingredients Discovery Agreement Between the Brazilian Institution Bioamazônia and the Swiss Pharmaceutical Company Novartis*, 35 GEO. WASH. INT'L L. REV. 977, 989-93 (2003) (analyzing the Bioamazônia-

regard to the Brazilian Constitution, the agreement did not address those problems that Brazil was (and still is) facing, such as depletion and exploitation of its natural resources, nor did the agreement add to the development of Brazilian science and technology or improve the training of Brazilian scientists in new scientific methods.²⁹³ Second, environmentalists worried about the opportunity for bio-piracy, as it would be impossible to accurately monitor and enforce the number of species that companies like Novartis removed from the Amazon.²⁹⁴ The environmentalists also voiced concern over the seemingly small amount of input that the Brazilian Congress, NGOs, and indigenous peoples had in concluding the agreement, and over how the Provisional Measure bestowed too much authority upon the state. Peña-Neira et al. note that NGOs also were worried about private gain from public resources. The final area of criticism relates to indigenous peoples: Bioamazônia's "first error was its failure to obtain the permission of the indigenous Amazon people and its second error was its failure to provide them with direct compensation."²⁹⁵

In light of the above criticism, Brazil enacted Provisional Measure 2052, adopting a more public approach in an attempt to ensure that benefit-sharing would meet certain legal standards and could not be determined solely by private parties.²⁹⁶ In a further effort to rein in

Novartis agreement and its violations of Articles 218, 225, and 231 of the Brazilian Constitution).

293. See BRAZ. CONST., tit. The Social Order, ch. VIII, and tit. Science and Technology, ch. IV, art. 218, ¶¶ 2, 4 (stating that "[t]echnological research shall be addressed mainly towards the solution of Brazilian problems and to the development of the national and regional productive system. . . . The law supports and encourages companies which invest in research, in creation of technology appropriate for Brazil, and in training and improvement of their human resources.").

294. See Scott, *supra* note 292, at 992 (remarking on the effect of a multinational corporation's profit maximizing desire to export as much genetic material as possible combined with the lack of oversight over removal).

295. *Id.* at 993.

296. See Peña-Neira et al., *supra* note 286, at 13 (relating that under Brazilian law the president "has the right to enact a legal rule in cases of great importance and urgency"). Since its adoption, Brazil has revised Provisional Measure 2052 a number of times and now lists it as Provisional Measure 2186-16. *Id.* See also Provisional Measure (Brazil) 2052, available at http://www.dannemann.com.br/CD_Pharma/Legislation/PM_2186-16_2001.htm

Bioamazônia, the Provisional Measure established the Council for the Administration of Genetic Patrimony ("Council") to oversee the dealings of Bioamazônia.²⁹⁷ Following the Provisional Measure and its establishment of the Council, Bioamazônia and Novartis significantly altered their contract.²⁹⁸ They agreed that, if Novartis discovered an industrial application of a micro-organism taken from the Amazon, Novartis would place the organism into a dedicated Brazilian depository at its Swiss headquarters, and the organism would remain the property of Bioamazônia.²⁹⁹ Additionally, Novartis agreed to inject another 2.5 million Swiss francs into the project.³⁰⁰

Although the Provisional Measure did address a number of indigenous concerns—such as the protection of traditional knowledge,³⁰¹ the lack of limitations on the right of third parties to profit from development of that knowledge,³⁰² and the right to have indigenous views heard when access occurs in indigenous territory³⁰³—objections to the revised agreement remained.³⁰⁴ The Brazilian government did not invite indigenous groups and civil society members to sit on the Council, and they still have no say in the decisions that the Council makes regarding traditional

(last visited Feb. 21, 2005).

297. See Peña-Neira et al., *supra* note 286, at 14 (recounting the Council's three main rights to be: "1) the right to elaborate guidelines on benefit sharing for contracting parties; 2) the right to authorize commercial and non-commercial contracts . . . as well as any kind of research; [and] 3) the right to authorize all deliveries of elements of the genetic patrimony").

298. See *id.* at 14-15 (relaying the terms of the newly negotiated contract).

299. *Id.*

300. *Id.*

301. See Provisional Measure (Brazil), *supra* note 296, at art. 8 (stating the Provisional Measure "protects the traditional knowledge of indigenous and local communities . . .").

302. See *id.* at art. 9 (preventing "unauthorized third parties from: a) using, performing tests, studies or exploration related to the Traditionally Associated Knowledge; [and] b) divulging, transmitting or retransmitting data or information that carries or constitutes Traditionally Associated Knowledge . . .").

303. See *id.* at art. 16(9II) (stating that the "authorization of access and submission shall only be given after previous approval").

304. See Peña-Neira et al., *supra* note 286, at 14-15 (remarking on NGOs' and indigenous peoples' lingering suspicion at the privately negotiated new contract between Bioamazonia and Novartis).

knowledge, such as the creation of databases by which to record such traditional knowledge.³⁰⁵ Also, the Provisional Measure did not ensure that private companies like Novartis would undertake their efforts to gain access to genetic resources with “respect for traditional knowledge, with conservation of our biological heritage or with any kind of social control.”³⁰⁶

In December 2001, a meeting of Shamans from twenty indigenous tribes published sixteen suggestions regarding the protection of traditional knowledge.³⁰⁷ They suggested, *inter alia*, that the Brazilian Government include indigenous groups in the Council; create laws in cooperation with indigenous communities in order to control access to genetic resources and traditional knowledge; establish punitive mechanisms to prohibit theft of biodiversity; create an indigenous-managed, government-financed fund to support research carried out by members of indigenous communities; organize training courses by the government for indigenous professionals who deal with the issue of traditional knowledge rights; and establish an Indigenous Committee to help guide the use of traditional knowledge.³⁰⁸

Although many of the objections to the original agreement, such as those concerning benefit-sharing, traditional knowledge, and property rights, are germane to indigenous peoples, legal scholars grounded their most persuasive argument in issues of national sovereignty.³⁰⁹ This fact makes it difficult to ascertain how persuasive the indigenous argument would have been had the

305. See Scott, *supra* note 292, at 985 (noting that “the council, which is the sole body responsible for granting licenses, consists solely of members of the executive branch”).

306. Senator Marina Silva, 2002, Biodiversity: Opportunities and Dilemmas [sic], available at <http://www.amazonlink.org/gd/diversity/SenadoraMarinaING.doc> (last visited Feb. 21, 2005).

307. See Letter from São Luis, State of Maranhão, Brazil, to the Brazilian Government (Dec. 6, 2001), republished in Marina Silva, *supra* note 306 (recommending ways in which the Brazilian Government might improve protection of indigenous knowledge and prevent biopiracy).

308. See *id.* (recommending further that all nations approve the United Nations Declaration on Indigenous Rights, and that the Brazilian Government “adopt a policy to protect biological and social diversity aimed at promoting the sustainable development of indigenous peoples”).

309. See Peña-Neira et al., *supra* note 286, at 9-13 (evaluating the different legal arguments against the private law approach).

Brazilian Government considered the indigenous peoples' arguments in isolation. With the bundling together of a wide variety of different complaints, there is no way of knowing the exact extent to which indigenous concerns drove the quest for change, as opposed to issues of national sovereignty or those that the scientific community generated.

In short, the Provisional Measure and the revised agreement between Bioamazônia and Novartis better serves indigenous needs but, as shown above, there remain a number of issues that the Brazilian Government has not addressed. Although it might appear that Bioamazônia and Novartis revised their agreement solely in light of indigenous concerns, it is not possible to separate these from the other issues and objections that scientists, legal scholars, and NGOs raised. One can only speculate as to how indigenous concerns alone would have reshaped the agreement had there been fewer objections from other sectors.

B. CASE STUDY THREADS AND REFLECTIONS

The first conclusion that one can draw from these case studies is that a lack of paper title is not and should not be a barrier to indigenous peoples' ability to exert their rights. In both the South African example and the case from Nicaragua, neither of the two indigenous groups involved possessed paper title to the land, yet in both cases, the courts ruled that they were the rightful owners of the land and the resources it contained.³¹⁰

A second similarity between these two cases is that, in both situations, the courts placed emphasis on indigenous law.³¹¹ Linked

310. Compare *supra* notes 190-193 and accompanying text (discussing the Constitutional Court of South Africa's finding that the Richtersveld Community's behavior was consistent with ownership and recognizing such ownership despite the lack of paper title); with *supra* notes 206-208 and accompanying text (reviewing the Inter-American Court of Human Rights' ruling that the Awas Tingni Community's migration, relatively recent village and lack of paper title were not inconsistent with ownership).

311. Compare *supra* notes 186-188 and accompanying text (referring to the Constitutional Court of South Africa's inclusion of indigenous law within a South African constitutional framework); with *supra* notes 199-201 and accompanying text (discussing the Inter-American Court on Human Rights' inclusion of customary law in the delimitation of indigenous "communal" land).

intrinsically to the issue of paper title, reference to indigenous law helped determine the ownership of the land in question in both cases.

A third theme from the case studies relates to the question of migratory tribes. In both the Nicaraguan and Indonesian examples, the indigenous people in question had only recently settled at their present locations.³¹² Although the Bajo have not challenged the Indonesian government's ownership of the WMNP—and there are no signs to suggest they will do so in the foreseeable future—this fact would seem to place them on a similar legal footing as the *Awas Tingni* if the issue did come before a tribunal. Additionally, the related issue of potential claims by other indigenous groups that historically used the land in question (which also arose in the *Awas Tingni* case)³¹³ may be of relevance to the Bajo. Undoubtedly, other groups have utilized the resources within the WMNP and, although they are one of the main stakeholders in the region, by no means could the Bajo claim sole historical usage of the region.³¹⁴ However, as with the *Awas Tingni*, this may not preclude them from being granted ownership of the resources.

A fourth theme from the case studies relates to co-management. The Canadian government used this concept to involve the Inuit in the management of the resources found within the newly-formed Nunavut Territory, seemingly with a good measure of success, and commentators have discussed it as a potential solution to the issue of indigenous rights in Indonesia.³¹⁵ Additionally, one could propose co-management as a means of both involving the Amazonian

312. Compare *supra* note 205 and accompanying text (explaining that the *Awas Tingni* had occupied their present village beginning in the 1940s); with *supra* notes 270-273 and accompanying text (recounting the Bajo sea-faring nomadic history and recent establishment of settlements some fifty to sixty years ago).

313. See *supra* note 208 and accompanying text (observing that the Inter-American Court of Human Rights held that other indigenous peoples' potential claim to property rights did not affect the *Awas Tingni* claim).

314. See *supra* note 251 and accompanying text (explaining that 92% of the local population consisted of the Buginese, additional indigenous people to the area).

315. Compare *supra* notes 237-241 and accompanying text (explaining the political solution that the Canadian government and Inuit reached with regard to the Nunavut Territory); with *supra* notes 265-267 and accompanying text (relaying suggestions at incorporating the Bajo into the environmental regulation of the WMNP).

population in the management of the forest resources and allowing them to receive a fair share of the benefits derived from those resources.

Fifth, the characteristics of the Bajo further complicate Daes' suggestion that the term "indigenous peoples" should encompass groups that are "native to their own specific ancestral territories within the borders of the existing state, rather than persons that are native generally to the region in which the State is located."³¹⁶ One could argue that the Bajo fall into either or both of these categories, depending on whether one sees them as a distinct population or as part of the larger Sama-Bajau culture. The Bajo example suggests to us that Kingsbury's flexible approach is a better metric for determining whether to consider a people to be indigenous.³¹⁷ Indeed, the Bajo meet all of Kingsbury's essential requirements: "self-identification as a distinct ethnic group; historical experience of, or contingent vulnerability to, severe disruption, dislocation or exploitation; long connection with the region; and the wish to retain a distinct identity."³¹⁸ They also meet a number of Kingsbury's relevant indicia:

nondominance in the national (or regional) society (ordinarily required); close cultural affinity with a particular area of land [or in this case water] or territories (ordinarily required); historical continuity (especially by descent) with prior occupants of land [sea] in the region; . . . socioeconomic and sociocultural differences from the ambient population; and distinct objective characteristics such as language, race, and material or spiritual culture . . .³¹⁹

Lastly, a comparison of the Makah case with the Richtersveld and Mayagna cases highlights the uneven pace at which judicial systems have recognized the rights of indigenous peoples, and the discretion that exists at the state level.³²⁰ As seen in the Nunavut case, political

316. 1996 Concept of Indigenous Peoples, *supra* note 20, ¶ 64.

317. See Kingsbury, *supra* note 26, at 455 (suggesting essential requirements and relevant indicia to take into account when determining whether a group of people are indigenous).

318. *Id.*

319. *Id.*

320. Compare *supra* notes 211-215 and accompanying text (describing the roadblocks put in place of the Makah Indian Tribe's treaty right to whale by the U.S. judicial system); with *supra* notes 185-186 and accompanying text

negotiations can play a prominent role as well. Indeed, the Nunavut case underscores that the concept of "self-determination" and the resolution of land and related natural resource claims are not one-dimensional; rather, interested parties must adapt them to the particular circumstances and histories of the indigenous peoples.

REFLECTIONS AND CONCLUSIONS

Indigenous peoples' voices and concerns at the international level are on the rise. Indeed, an appreciation of the benefits of their voice for biodiversity conservation is growing, as is a sense that indigenous peoples' involvement in the development of policies that may affect them and in the management of their traditional lands and natural resources is a matter of justice. The increased participation of indigenous peoples within the UN system reflects these notions. Moreover, various international instruments now include some indigenous peoples' concerns, in particular those related to sustainable development.³²¹

Although states have begun to implement these international instruments and policies, indigenous peoples have not yet fully realized their rights. Indeed, there remains a need for international consensus on how best to proceed in order to ensure indigenous peoples' early involvement in the process of international law and policymaking and on implementation of indigenous rights at the state level (instead of relying so much on national discretion, as in the example of the BPoA).³²² As the case studies discussed in Part IV.A demonstrate, there exists a fundamental distinction between indigenous groups whose states have recognized their rights and those groups whose states have not. Furthermore, as we noted at the outset, the concept of indigenous peoples in international law remains somewhat ill-defined in light of the international community's inability to coalesce on a term, much less a definition.

(recounting the Constitutional Court of South Africa's recognition of the Richtersveld Community's right to its ancestral land in 2003); and *supra* notes 194-200 and accompanying text (relating the Inter-American Court of Human Rights' recognition of the Awas Tingni's rights in 2001).

321. See discussion *supra* Part III (examining soft-law instruments, binding international agreements and international organizations, including Agenda 21, BPoA, JPoI, and the World Bank).

322. See *supra* notes 112-116 and accompanying text.

In sum, given the existence of vague definitions and international instruments that are often non-binding and which provide substantial discretion to state actors, the norm that is emerging around indigenous peoples' rights, while bounded, is "blurry."³²³

Yet, given that indigenous peoples and their circumstances, cultures, histories, and aspirations are not one-dimensional, perhaps states, indigenous peoples, and other non-state actors should look at this "blurry boundary" as an opportunity, rather than an impediment. To be fully effective, this opportunity requires that indigenous peoples possess the necessary tools to participate in the global, regional, and national processes that are shaping, at least in part, the world around them.

The international community and international law itself have made progress as they have moved from a state-centric model—where dominant cultures impose their cultural norms and values on non-dominant cultures—to a model based on a shared understanding and treatment of indigenous peoples as separate. As such, indigenous peoples may be at the vanguard of an era of post-state sovereignty. For indigenous peoples, one can see hints of this new era in the judicial sphere (the respect granted indigenous law and the recognition of land and resource rights), in international organizations (most prominently, indigenous peoples representing themselves rather than nation-states representing them), within international conventions (the growing appreciation of the right of self-determination, the protection of intellectual property and ownership), and at the state level (the value of indigenous participation and co-management of natural resources). Two concepts best encapsulate a post-state, sovereign era for indigenous peoples: (1) an unquestioned right of self-government and autonomy in matters of local affairs; and (2) the discretion to have their unique voices heard in the wider decision-making process and their presence

323. See *supra* note 78 and accompanying text (discussing international legal instruments' move toward recognition of indigenous peoples' rights); see also Peter Jull, *The Politics of Sustainable Development in INDIGENOUS PEOPLES: RESOURCE MANAGEMENT AND GLOBAL RIGHTS* (Svein Jentoft, Henry Minde and Ragnar Nilsen, eds.) 21-44, 36 (2003) (arguing that "[w]hat we can say is that the political and policy frameworks required to replace colonialism, dispossession, and marginalization are now clearly visible, and are in various stages of negotiation or implementation. This is a process and as such takes some time; after all, discussion and mutual understanding are required.").

felt in the political, economic, and cultural life of dominant societies to the extent indigenous peoples desire. The notion of human rights suggests nothing less.