The U’wa Struggle To Protect Their Cultural Lands: A Framework for Reviewing Questions of Sovereignty and the Right to Environmental Integrity for Indigenous Peoples

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I. INTRODUCTION—HISTORY OF THE SAMORE BLOCK

The U’wa are an indigenous people in Colombia, South America who number just under 5,000 and claim tribal authority over a block of land they call Resguardo Unico. This area, located in the foothills of the Andes in northeastern Colombia, has been subjected to exploratory drilling by oil tycoons, Royal Dutch Shell Oil and Gas and Occidental Petroleum Company. Because the U’wa people consider the oil under their land to be the “blood of Mother Earth,” the threat of oil extraction is not only a threat to the integrity of their natural environment, but also to the integrity of their spiritual well-being. The U’wa consider oil extraction to be such a severe violation of the earth that they have threatened mass suicide if Occidental continues with its plans to drill.

In 1992, the Colombian government granted Occidental the right to drill in the Samore Block, an area known to be replete with oil. It was not until 1995 that the Colombian government carried out the mandate under its laws that Occidental meet with the indigenous people to inform them of such grants. Despite objections from the U’wa leaders, the government gave Occidental a license to begin operations in the U’wa sacred territory. A legal battle ensued in Colombia, with resulting dissention between the administrative and judicial high courts. The Constitutional Court of

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* J.D. 2001, University of Georgia.
1 See Andrew Preston, The U’wa Struggle for Resguardo Unico, CULTURAL SURVIVAL Q., Summer 1998, at 60.
2 See id.
4 See id. (reporting that the entire tribe vowed to jump off a 1400 foot cliff if extraction continues).
6 See id.
7 See id.
8 See Colombia: Two High Courts Issue Contradictory Rulings on Environmental Viability
Columbia, held that the U’wa were not properly consulted about the oil project, which “threatened its ethnic, cultural, social, and economic identity” and did not afford the appropriate respect for the absolute minority rights of indigenous “autonomous republics.”9 The Council of State, on the other hand, found that there had been public meetings to discuss plans for oil exploration, and although the U’wa leaders were not present, their tribal rights are “conditioned by the state’s right to regulate the subsoil and natural resources.”10 The U’wa lost the legal battle in the Colombian courts but initiated another protest by way of internationally respected organizations.

Of the original area designated for oil drilling, 29 percent was located in the Natural National Parks of Cocuy and Tama, and 20 percent encroached upon the areas thought to be reserved to the Cobaria, Tegria, Bokota and Rinconanda families, and the native reservation of Tauretes-Aguablanca.11 Colombia’s Law 21 of 1991, which adopted Covenant 169 of the International Labor Organization on Indigenous People and Tribes (OIT), required the Colombian Department of the Medium Environment (Minambiente) to consult with the U’wa about licensing the oil drilling.12 The U’wa claimed that the consultation process was inadequate and did not address the needs of their people.13 Although they could not get relief from the dominant Council of State in their own country, they gained support from the Interamerican Commission of Human Rights of the Organization of American States (OAS).14

The OAS visited the Samore Block and commissioned a study in conjunction with Harvard University to determine the best solution to this conflict.15 The resulting recommendation was that Colombia enlarge the government-protected areas, the “Resguardo.”16 On August 6, 1999, the government agreed to extend protection to an additional 2.202 square kilometers in the Samore Block.17 However, the compromise included an enlargement of the drilling

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10 See id.
11 See id.
12 See id.
13 See id.
15 See id.
16 Id.
17 Id.

zone in another area called the Gibraltar Block by an additional 21.3 square kilometers. The Colombian government boasts of its dedication to the rights of indigenous groups in Colombia much as the United States boasts of the quasi-sovereignty it bestowed upon the First Nations peoples. However, when it comes to allowing the indigenous people of either of these nations to exert influence over the fate of the natural resources that are supposedly preserved for their use and enjoyment, the cries for indigenous rights fall on deaf ears.

Article 330 of the Colombian Political Constitution, which was revised in 1991, expressly guarantees that the natural resources of indigenous people will not be exploited in a way that damages the culture, economy or society of the people. Yet, it is clear that the supreme decision-maker in Colombia, the Council of State, did not feel bound by those mandates. Exploratory drilling began before any consultation whatsoever. When it came time for real resource extraction, the government asked the U’wa for their input and then ignored it. Members of the Colombian Council of State simply looked to the consultation requirement set out in Article 330 and decided that since the Minambiente had gone through the motions of consultation, a license could validly be issued, disregarding the U’wa objections to that action. While the issue has been decided favorably for the U’wa, it is surely only a matter of time before the same scenario reappears. The U’wa territory covers oil rich lands and when the companies have exhausted the supplies in their substituted reserves, it is certain they will try once again to tap into the resources that the U’wa claim as their own.

The actions of the Colombian Council of State parallel the actions of many United States (U.S.) governmental agencies when complying with the National Environmental Policy Act’s (NEPA’s) requirements of consultation. NEPA mandates that a federal agency that engages in a “major federal action

18 See id.
19 Department of the Medium Environment, Algunas Consideraciones Sobre la Consulta con La Comunidad Indígena U’wa (Some Considerations Regarding Consultation with the Indigenous U’wa Community) (visited October 8, 1999) <http://www.minambiente.gov.co/uwa/consi.htm>.
20 Evidence of Occidental’s modus operandi in other countries begs the question of whether drilling would have occurred without the U’was’ consent, or even possibly without the government’s consent, if the situation had not garnished so much international attention. In Ecuador, Occidental has successfully manipulated landowners by threatening to come onto the land and drill without giving them any compensation in order to convince the landowners to rent the land to them. Although this is obviously an illegal practice, it is also common for such behavior to go unpunished. See Judith Kimerling, Rights, Responsibilities, and Realities: Environmental Protection Law in Ecuador’s Amazon Oil Fields, 2 Sw. J.L. & TRADE AM. 293, 360 (1995).
significantly affecting the quality of the human environment” must consult with the Administrator of the Environmental Protection Agency (EPA) or other appropriately interested federal agencies before carrying out the proposed action. After these agencies issue opinions, however, the agency proposing to act is under no obligation to follow their advice. Copies of the opinions, whether favorable or not, “shall be made available to the President, the Council on Environmental Quality and to the public . . . and shall accompany the proposal through the existing agency review processes.” However, this procedural requirement is not buttressed by any substantive standards. In Strycker’s Bay Neighborhood Council v. Karlen, the U.S. Supreme Court chose not to review those agency decisions on the merits, but emphasized that the agency action pursuant to NEPA is “essentially procedural” and that the court could only “insure that the agency has considered the environmental consequences.”

Any possible solution to the problem of the Colombian government’s inconsiderate response to the concerns of the U’wa about the continued environmental integrity of their land does not lie in relying upon mere consultation in a NEPA-like regime. Rather, the government must afford the U’wa increased respect for their sovereign status within the larger state of Colombia. In order to evaluate the meaning of indigenous sovereignty and to propose techniques for harmonizing the interactions between indigenous and national governments, this note will first give an overview of the development of international law concerning indigenous peoples and their right to environmental and land use self-determination. Next, it will dissect attempts by international organizations to advance such causes of the indigenous peoples. Finally, it will suggest additional avenues for implementation and enforcement of indigenous governmental decisions.

22 Id.
23 Strycker’s Bay Neighborhood Council v. Karlen, 444 U.S. 223, 227 (1980) (emphasis added) (upholding a decision by the United States Department of Housing and Urban Development (HUD) to move forward with a housing project after merely considering other alternatives, regardless of whether a court would have made a different decision on the merits).
II. HISTORICAL DEVELOPMENT OF INTERNATIONAL LAW CONCERNING INDIGENOUS PEOPLES

The inflow of the white race cannot be stopped where there is land to cultivate, ore to be mined, commerce to be developed, sport to enjoy, curiosity to be satisfied. If any fanaticable admirer of savage life argued that the whites ought to be kept out, he would only be driven to the same conclusion by another route, for a government on the spot would be necessary to keep them out. Accordingly, international law has to treat such natives as uncivilized.24

This 1864 statement by British publicist, John Westlake, indicates the distance the indigenous people were destined to travel toward a recognition of their sophisticated governments and cultures in international society. The evolution of human rights for indigenous peoples as groups followed from fifteenth century thinkers proposing natural law justifications for accepting some aspects of tribal governance as legitimate.25 The development of human rights is now entering a stage of indigenous peoples’ struggle for self-determination.26 The Westlake quotation is an example of positivist thinking, the idea that only nations or states possess the ability to make international law.27 From the European perspective, no group of indigenous peoples could be considered to have achieved the status of a state or nation in order for their input regarding international law to be heeded.28

25 See ANAYA, supra note 24, at 10.
27 See ANAYA, supra note 24, at 19.
28 See id. at 19-21 (explaining that indigenous tribes cannot be considered states and that any attempt by them to influence the international legal community would be ineffective since they were not recognized as being in existence by what one author termed the “Family of Nations”) (citing 1 LASSA OPPENHEIM, INTERNATIONAL LAW 11 (7th ed. 1948)).
The idea of natural law ushered in some tolerance and the idea that other cultures were, perhaps, politically mature. Theories in natural law and its repercussions for colonizing nations were promoted most notably by two Dominican clerics. Bartolomé De las Casas originally criticized the way the Spanish were using the concept of “encomienda” to justify submission of native peoples. The encomienda system not only divided up all of the native land and doled it out to the colonists, but it also purported to give those colonists the right essentially to enslave the Indians and use their labor for the benefit of the Spanish. Francisco de Vitoria, another contemporary Dominican cleric and champion of the somewhat native-empowering natural law, asserted that the Europeans were under an obligation to respect the natural autonomy of the Indians and their right to the lands they originally occupied.

Instead of being able to accept such a broad grant of authority that might flow incidentally from the concepts of natural law to the indigenous peoples whom these colonizing European nations had conquered, most nations tended to embrace the idea of trusteeship. The concept of the new nation as a guardian of the native wards gained a strong hold particularly in U.S. history, which affords a detailed example of the results of treating the indigenous peoples as wards of the dominant state.

Before trusteeship was incorporated into the U.S. model of interaction with indigenous peoples, some doctrines were intermingled to allow colonial ownership of land even while the native peoples still occupied it, and the colonizing nations paid lip service to the autonomy of the native governments. For example, the Discovery Doctrine was in vogue and many issues concerning American Indians today are still derived from the early application of this doctrine, “upon which, all claim to, and acquisition of, Indian lands in North America is ultimately founded.” Under the Discovery

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29 See ANAYA, supra note 24, at 10.
30 See id.
31 See id. at 25. Many governments established regimes of total national authority over indigenous peoples and their lands. Canada did so by implementing the Indian Act of 1876. Brazil incorporated governmental programs to assimilate the indigenous peoples. Venezuela utilized the power of the Catholic Church through the Mission Act of 1915, which purported to help the indigenous people by assimilating them into the Venezuelan culture and dominant faith. Argentina went so far as to adopt a constitutional amendment promoting indigenous assimilation into the Catholic faith. See id.
33 JACK UTTER, AMERICAN INDIANS 6 (1993).
Doctrine, officially adopted by the United States in 1823, title to land simply was secured in toto by whomever discovered it.\textsuperscript{34} In \textit{Johnson v. M'Intosh}, the U.S. Supreme Court held that the discovering country obtained absolute title to land.\textsuperscript{35} The title acquired by the U.S. government through discovery assured the settler superior rights over those of the Indians, who held occupancy rights only.\textsuperscript{36} However, this doctrine did not stand alone. Early European policy, which had recognized Indian tribes as valid governments holding entitlements such as full sovereign immunity, could not be ignored.\textsuperscript{37}

The leading court decision establishing tribal sovereignty is Chief Justice Marshall's 1832 opinion in \textit{Worcester v. Georgia}.\textsuperscript{38} The Marshall Court decided that the State of Georgia could not impose its laws within an Indian reservation, claiming that:

\begin{quote}
Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial... which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress.\textsuperscript{39}
\end{quote}

Yet, even with these well-precedented ideals, tribes in the United States actually have been relegated to existing only under the ward-guardian and trust relationships. The Supreme Court, in \textit{Seminole Nations v. United States}, stated that the U.S. government, in so doing, "has charged itself with moral obligations of the highest responsibility and trust..."\textsuperscript{40} This trust relationship has been described by Professor William Canby, who states that:

\begin{quote}
Much of American Indian Law revolves around the special [trust] relationship between the federal government and the tribes. Yet it is very difficult to mark the boundaries of this
\end{quote}

\textsuperscript{34} See id. at 7.
\textsuperscript{35} See Johnson v. M'Intosh, 21 U.S. 543 (1832).
\textsuperscript{36} See GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 50, 54 (1993).
\textsuperscript{37} See VINCE LOVETT ET AL., AMERICAN INDIANS 7 (1984).
\textsuperscript{38} See Worcester v. Georgia, 31 U.S. 515 (1832).
\textsuperscript{39} Id. at 559-61.
\textsuperscript{40} Seminole Nation v. United States, 316 U.S. 286, 297 (1946).
relationship, and even more difficult to assess its legal consequences. At its broadest, the relationship includes the mixture of legal duties, moral obligations, understandings and expectancies that have arisen from the entire course of dealing between the federal government and the tribes. In its narrowest and more concrete sense, the relationship approximates that of trustee and beneficiary, with the trustee (the United States) subject in some degree to legally enforceable responsibilities.  

This trust established a legal and moral obligation for the United States to protect and enhance the property and resources of the tribes.  

However, W. Ron Allen, Chairman of the Jamestown S’Kallan Tribe and President of the National Congress of American Indians (“NCAI”) noted:

There is inadequate understanding . . . that an Indian tribe is a form of government recognized in the U.S. Constitution and hundreds of treaties, court decisions and federal laws. There is inadequate understanding that tribal governments provide the basic governmental functions such as law enforcement, justice, and education on Indian lands . . . . There is inadequate understanding that the vast majority of tribal governments are modern, democratic, fair and as deserving of respect as any other form of government.  

Reservation of lands for First Nations use in the United States has also proven hollow. Although inherent tribal sovereign immunity was recognized as early as 1832 with Justice Marshall’s famous decision in Worcester v. Georgia, little heed was given to those ideals in practice. For example, the United States largely ignored the issue of ownership and rights on native lands of Alaskan tribes until 1971, when Congress finally passed the Alaska Native Claims Settlement Act (ANCSA).  

The passage of ANCSA, in fact, was largely facilitated by oil companies that wanted to avoid lengthy adjudication

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41 UTTER, supra note 33, at 151.
42 See LOVETT, supra note 37, at 7.
of native land claims in areas they claimed for drilling. Many Alaskan natives contend that ANCSA treated them unfairly because government distribution of the land forced them to abandon some of their traditional ways and conform to American ideas and ways of living.

Although land rights were swiftly determined with ANCSA, U.S. law recognizes that any original power belonging to a tribal government can only be ceded via treaty with the U.S. government or by direct action on the part of Congress to regulate tribal affairs. Therefore, even under the trusteeship regime, native rights to environmental self-determination in the United States may be retained by the tribes. The Supreme Court affirmed this proposition in Montana v. United States, asserting a test for tribal regulation of nontribal members. The Court's “direct effects test,” made more stringent in Brendale v. Yakima Indian Nation, indicated that a tribe could regulate the use of lands that are not their own upon a showing of “a demonstrably serious impact by the challenged uses that imperils tribal political integrity, economic security, or health and welfare.” Essentially, under these decisions, the tribes have a license recognized by the Court to protect their lands from harmful interference by others.

This jurisprudence has translated into a battery of weapons for the indigenous people to use against environmental harms on native lands. The EPA has indicated that tribes may adopt their own Water Quality Standards (WQS) under the Clean Water Act (CWA), which mandates that upstream uses do not impair the waters flowing into tribal lands below the standards the tribes have set.

III. CURRENT INTERNATIONAL EFFORTS TO PROMOTE INDIGENOUS SOVEREIGNTY AND SELF-DETERMINATION

A. Land Rights

Despite these strides in the United States to enhance the First Nations influence over the land they now call their own, serious flaws remain. Property rights can always be preempted by the government if the government

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45 See id. at 485-86.
46 See id. at 489.
50 See Royster, supra note 47, at 469.
decides to condemn the land for a public use, and the owner is only guaranteed monetary compensation if the governmental use or regulation of the property is deemed intrusive enough. 51 In the constitutions and codes of other countries as well, the idea of property encompasses a specific social attribute such that the broad public interest trumps many private interests in land. 52 Thus, it is difficult for a minority group to ever successfully assert a claim for private and untouchable land rights.

The United States first purported to provide property rights for Indians with the Dawes Act of 1887. 53 The Dawes Act ostensibly divided land into parcels for ownership by individual Indians, but the impetus for this was to "civilize and Christianize the Indians and . . . break up the authority of the tribe." 54 This plan for land division was largely unsuccessful. 55 However, the Indians did not fare any better when they attempted to embrace assimilation. 56 The Cherokee claimed over 124,000 square miles of territory before 1721. 57 After vast voluntary assignments of land to the United States, the Cherokee penned a constitution in 1827, officially claiming sovereignty over a dramatically smaller area as a concession to settlers. 58 However, many of those settlers viewed the Cherokee land claim as a direct challenge to states' rights. 59 In 1830, a mere three years later, the Indian Removal Act, masqueraded as a mutually agreed upon land exchange, resulted in the infamous Trail of Tears episode with a huge loss of life and total loss of the original tribal lands for the Cherokee. 60

52 See Paulo Leme Machado, Comparative Law and Environmental Law Relating to the Brazilian Amazon, in AMAZONIA AND SIBERIA: LEGAL ASPECTS OF THE PRESERVATION OF THE ENVIRONMENT AND DEVELOPMENT IN THE LAST OPEN SPACES 130, 133-34 (Michale Bothe et al. eds., 1993). Brazil's Federal Constitution specifies the need for property to be socially useful; Germany's Basic Law requires that private property also be utilized for the public good; and, Venezuela's environmental law allows public intervention into private ownership without requiring compensation at all. See id.
54 Id. at 23.
55 See id.
56 See id.
58 See id. at xi.
59 See id.
60 See Russell Thornton, The Demography of the Trail of Tears Period: A New Estimate of
Even today, there are battles over title to lands that Native Americans contend are ancestral lands. In a recent Texas case, for example, the Pueblo Tribe’s claim to their native land appeared to be signed, sealed and delivered.\textsuperscript{61} The tribe’s assertion of their acquisition of their tribal lands over time was undisputed, showing that “[n]either its legal title nor aboriginal right to the Property was ever terminated by the Kingdom of Spain, the Republic of Mexico, or the Republic of Texas, the successive governments claiming sovereignty over the area including the Property prior to the United States.”\textsuperscript{62} Yet, the land is currently occupied by the state of Texas, and an action cannot lie against a state claiming sovereign immunity.\textsuperscript{63} Thus, the court dismissed the case.\textsuperscript{64}

More success has been had in Australia, where a judgment recently redefined the requirements for indigenous claims to native lands at common law. A groundbreaking case and subsequent legislation have made Aboriginal title to native lands the superior title unless Aboriginal claims to the land were explicitly extinguished upon colonization by the Crown or by subsequent legislative or executive order.\textsuperscript{65} In the leading case, a Torres Strait Islander was able to show that his ancestors originally possessed the land and that there had been no legal usurpation of their rights to occupy it.\textsuperscript{66} With this decision, the Australian court also showed the influence of the International Court of Justice (ICJ) in its rejection of a long-held principle of terra nullius.\textsuperscript{67}

\textit{Terra nullius} is the theory that indigenous people never had legal title to any land and the root of such title was held by the first European settlers to colonize a given area.\textsuperscript{68} The ICJ’s decision to refuse application of \textit{terra nullius} was founded on the separation of sovereignty issues from property issues because the Court could not go so far as to question Australia’s sovereignty over the lands.\textsuperscript{69} Therefore, although the decision in fact promotes


\textsuperscript{61} Ysleta Del Sur Pueblo v. Laney, 199 F.3d 281, 284 (5th Cir. 2000).

\textsuperscript{62} Id.

\textsuperscript{63} See id. at 285.

\textsuperscript{64} See id.


\textsuperscript{67} See Magallanes, supra note 26, at 249.

\textsuperscript{68} See ANAYA, supra note 24, at 139.

\textsuperscript{69} See id.
the return of illegally usurped lands to indigenous peoples who originally inhabited them, it does not recognize those land rights from a perspective of tribal sovereignty. In fact, the protections afforded to governmental units of indigenous peoples, especially in the realm of rights to environmental self-determination under international laws, are scant. Although documents like the International Covenant on Civil and Political Rights (ICCPR) purport to demand political self-determination for indigenous peoples, a closer reading reveals the ICCPR's true allegiance to the idea of leaving resource development in the hands of the nation and allowing only subsistence rights to the indigenous peoples.⁷⁰

B. Rights to Environmental Integrity

Yet, subsistence rights themselves may include the concept of environmental integrity of the land. Many scholars now recognize that environmental rights rise to the level of human rights and that indigenous populations are uniquely affected by the health of the land on which they live due to their direct connection with it.⁷¹ The United Nations Human Rights Committee has incorporated this knowledge into recent juridical decisions, recognizing that prevention of environmental abuses is a human right.⁷²


⁷² See Katarina Tomasevski, Environmental Rights, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK 257, 261 (Asbjorn Eide et al. eds., 1995); see also Decision on Admissibility, Communication No. 429/1990, E.W. v. Neth., 1 INT'L HUM. RTS. RPTS. 67 (Apr. 8, 1993). Citizens of the Netherlands brought a claim against their government in response to a governmental decision to deploy nuclear weapons on their own territory. Id. at para. 1. The Committee declared the communication inadmissible, however, because the complainants were not sufficiently victimized such that their "right to life was then violated or under imminent prospect of violation." See id. at 72, para. 6.4.
Some countries have followed suit and have taken steps to make information accessible to the public regarding environmental harms and resource availability.\(^3\) One glaring environmental effect that is often overlooked when the focus is on hot topics like deforestation is the health effects that damage to the environment causes, especially to indigenous peoples. Environmental degradation from drilling procedures yields wide ranging health effects for indigenous populations that are more immediately noticed than some of the effects of ecosystem damage. For example, one summary of the effects follows:

Despite the reassurances of the oil industry, however, oil exploration, exploitation and transportation entail severe risks and hazards for both the environment and the Huaorani [of the Ecuadorian Amazon]. . . . [T]housands of kilometers of trails and hundreds of heliports and detonation holes for seismic investigations will scar and disrupt the fragile systems of the forest leading to erosion, pollution and wildlife dispersion. . . . Drilling itself produces toxic, acidic, and alkaline wastes like petroleum, natural gas, drilling muds, and formation water which are discharged into surrounding streams or burned within the forests. . . . Meanwhile, both colonists and oil workers spread deadly disease among indigenous communities. In Brazil between 1974 and 1976, twenty-two percent of the Yanomami Indians in thirteen villages along an oil road in the Amazonian basin died as a result of disease introduced by construction workers.\(^4\)

C. Human Right to Health and Its Connection With the Environment

Many scholars are beginning to recognize the right to a healthy environment as a fundamental human right, and if this idea becomes widely accepted,

\(^3\) See Machado, supra note 52, at 130. The United Nations General Assembly adopted language promoting care for the environment at all stages of new developments and policies worldwide. Brazil responded with its own constitutional requirement of an annual report focusing on the state of the environment. See id.

the indigenous people may enjoy a more enforceable protection from potentially destructive invasions of their territories such as oil drilling. This follows from the way rights traditionally viewed as fundamental have been elevated to an importance which begs the one recognized exception to ideas of noninterference with other nations’ laws. This international legal principle, *jus cogens*, strictly prohibits a government from engaging in certain activities that are inherently egregious in nature, such as slavery and genocide. The argument for the right to a healthy environment is advancing as a *jus cogens* because a healthy environment is so integral to the sustainability of life, especially for those living indigenous lifestyles. Similarly, the movement toward consideration of environmental rights as part of the human rights package is gaining strength. Indigenous people maintain a special connection with their land that colors and shapes their identity. When cultural land attains a place of paramount importance, the rights of the indigenous peoples to possess, control and protect that land become protectible at international law.

Apart from promoting affirmative actions against nations that violate *jus cogens*, the United Nations (U.N.) has also attempted to issue documents to promote sound, environmentally protective measures for actions of multinational corporations in foreign nations. The United Nations Code of Conduct, for example, encourages corporations to obey the laws of the nations in which they do business. It also encourages environmental protection. Yet, if the

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75 *See generally American Convention on Human Rights, OAS/SER.A/16 (1969), reprinted in* BASIC DOCUMENTS ON INTERNATIONAL PROTECTION OF HUMAN RIGHTS 209 (Louis B. Sohn et al. eds., 1973) (codifying fundamental human rights such as freedom from slavery (Art. 6) and the right to property (Art. 21)). The Organization of American States signed this agreement, in which “[t]he States Parties undertake to adopt measures, both internally and through international cooperation . . . with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter. . . .” *See id.* at Ch. III, Art. 26 (emphasis added). This forward-thinking resolution would allow for the expanding definition of fundamental human rights to include the right to a healthy environment, especially in light of the cultural importance of the environment to many indigenous peoples.


79 *See Eaton, supra* note 74, at 272.

80 *Id.*
particular nation does not have a strong system of environmental protection, the Corporations are not held to a more scrutinizing standard.\textsuperscript{81}

A country in which a multinational corporation is based, however, may have obligations to the international community above and beyond those regularly recognized. The United Nations clearly opened the door for increased responsibility by nations acting in the international realm. Principle 21 of the Declaration of the U.N. Conference on the Human Environment stated that not only do nations have the responsibility of insuring that those activities that occur physically within their jurisdiction do not cause environmental damage, but also that if activities are “within their ... control” and may damage the environment, the nations are responsible, even if the activities themselves occur outside of their boundaries.\textsuperscript{82} This statement fortifies the idea that U.S.-based multinational corporations should be held to the same standard of environmental protection in their dealings in foreign countries as they would if they were acting on U.S. soil.

In 1979, President Carter issued Executive Order 12114 to encourage federal agencies to take environmental considerations into effect when acting abroad “to further the purpose of the National Environmental Policy Act (NEPA), with respect to the environment outside the United States, its territories and possessions.”\textsuperscript{83} The Order essentially requires an analysis like a NEPA Environmental Assessment, after which the agency is allowed to determine whether the federal action will have a “significant effect” on the environment.\textsuperscript{84} The fact that President Carter chose substantially the same words to describe the requirements of the Order as Congress used in NEPA is significant. Agency discretion is still broadly accepted, but a detailed consideration of all consequences of an action is required of the agency wherever it acts.\textsuperscript{85} However, if federal legislation does not include an express

\textsuperscript{81} Id. at 273.


\textsuperscript{84} Id. at § 2-5(a)(i); see also NEPA, 42 U.S.C.A. § 4332(2)(C) (1969).

grant of authority over acts that occur outside of the United States, a presumption against the extraterritorial application of that statute prevails. Legislation enacted for the benefit of the United States’ environment, such as NEPA, is therefore inapplicable to U.S. multinationals acting abroad unless Congress states a clear an intention that the law have global application.

At the Earth Summit, the drafters of Agenda 21 decided that extraterritorial application of strong environmental laws would be welcome. In an attempt to promote environmental safety, Agenda 21 suggested that transnational corporations adhere to the rules of the country in which they are based. If followed, that practice could result in far superior levels of environmental protection extended to oil drilling activities in lesser developed countries since many multinational oil corporations are based in the United States. Agenda 21 also suggests that transnational corporations be “full participants in the implementation and evaluation of activities related to Agenda 21.” On its face, that suggestion is quite broad and may leave presidents of transnational corporations without any tangible directives for action. Activities related to

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agency] on its merits, under Section 101, unless it be shown that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values.

Id. at 1115.

See Equal Employment Opportunity Commission v. Arabian American Oil Company, 499 U.S. 244 (1991) [hereinafter “Aramco”] (where an employee hired in the United States and working in Saudi Arabia was not allowed to bring a Title VII discrimination claim against the Delaware-based corporation when he was discharged because of his race, religion and national origin).

But see the very narrow holding in Environmental Defense Fund v. Massey, 986 F.2d 528, 529 (D.C. Cir. 1993) (concluding that “... the presumption against extraterritorial application of statutes described in Aramco does not apply where the conduct regulated by the statute occurs primarily, if not exclusively, in the United States, and the alleged extraterritorial effect of the statute will be felt in Antarctica—a continent without a sovereign, and an area over which the United States has a great measure of legislative control.”) Id.


It is no coincidence, for example, that Nigerian arms of the Shell corporation allowed 1.6 million gallons of oil to spill in the Niger Delta region over a ten year period, constituting over 40 percent of Shell’s spills worldwide during that time. See Eaton, supra note 74, at 268. Statistics like these indicate that corporations like Shell have the ability to prevent environmental damage, but will only do so when precautionary measures are mandated by the laws of the country in which they are acting.

Agenda 21, supra note 88.
Agenda 21 include combating poverty,91 promoting human health,92 protecting the atmosphere,93 conserving biological diversity94 and recognizing the roles of indigenous people,95 to name a few.

However, Agenda 21 is not merely a document full of noble ideals. It provides within each section of each chapter specific means by which to accomplish its goals, and it estimates cost and identifies potential sources of funding for each program. Particularly interesting in the context of environmental protection and indigenous rights to their tribal lands are chapters 26 and 30. Chapter 30 of Agenda 21 states that “[b]usiness and industry, including transnational corporations, should recognize environmental management as among the highest corporate priorities. . .”96 One of the means that this may be accomplished is through an implementation of laws that promote cleaner production.97

Agenda 21 pinpoints governments, in consultation with industry and transnational corporations, as the leaders of that movement.98 Therefore, it would simply be a matter of a government negotiating for a transnational corporation based in the United States to act according to the standards of U.S. environmental laws. If every country were to adopt such a strategy, the baseline of environmental protection worldwide would be raised dramatically. However, despite the political weight of Agenda 21, there is no enforcement mechanism, and in the long run, the drive to reduce costs of production in order to draw business to less developed countries wins out over the desire to enhance environmentally conscious business practices.99

Chapter 26 of Agenda 21 emphatically states that “[i]ndigenous people and their communities shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination.”100 It recognizes the need for governments to work in “full partnership” with indigenous people.101 In order to achieve that goal, Agenda 21 suggests:

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91 See Agenda 21, supra note 88, Pt. I, Ch. 3, at 21.
92 See id. Pt. I, Ch. 6, at 45.
93 See id. Pt. II, Ch. 9, at 3.
94 See id. Pt. II, Ch. 15, at 107.
95 See id. Pt. III, Ch. 26, at 15.
96 Id. Pt. III, ch. 30.3, at 29.
97 See Agenda 21, supra note 88, Pt. III, Ch. 30.8, at 30.
98 See id.
99 See Eaton, supra note 74, at 275.
101 Id. ch. 26.3, p. 15.
(a) Consider the ratification and application of existing international conventions relevant to indigenous people and their communities (where not yet done) and provide support for the adoption by the General Assembly of a declaration on indigenous rights;
(b) Adopt or strengthen appropriate policies and/or legal instruments that will protect indigenous intellectual and cultural property and the right to preserve customary and administrative systems and practices.\(^\text{102}\)

These references to the incorporation of existing international law guidelines for indigenous rights are indicative of a general theme of the empowerment of indigenous people that has been prevalent in international discussion, especially since the advent of the International Year for the World’s Indigenous People in 1993.\(^\text{103}\) The implication is that schemes such as perfunctory tribal consultation and the relegation of tribal governments to merely quasi-sovereign beneficiary status are insufficient for the protection of indigenous peoples’ rights.

D. Interactions Between Governments

Considering the difficulties between indigenous populations and national governments purporting to exercise control over them and their lands, it is easy to see how the equation becomes even more complex in a situation like the U’wa faced, where another player, a multinational corporation, comes into the picture. With which government does the corporation deal? Which environmental laws apply to the corporation? Does the corporation have an obligation, moral or legal, to use the stricter standards for environmental protection?

International legal precepts include a general requirement reminiscent of the NEPA scheme that a proposed action by a foreign actor must be scrutinized to determine its effects on the environment of the host country. However, like NEPA, there are no mechanisms to enforce wise response to anything that is discovered about potentially harmful environmental effects. All that is required is consideration.\(^\text{104}\) It is well established that transnational corporations must conduct environmental audits in foreign countries.\(^\text{105}\) However, the

\(^{102}\) Id. ch. 26.4, p. 16-17.
\(^{103}\) See id. ch. 26.2, p. 15.
\(^{104}\) See supra text accompanying notes 21-23.
\(^{105}\) See Carole Klein-Chesivoir, Note, Avoiding Environmental Injury: The Case for
information gathered from those audits does not compel any action on the part of the corporation. In fact, since the adoption of agreements such as the General Agreement on Tariffs and Trade ("GATT"), competition between nations has become stiff and any one nation's imposition of environmental regulations on its companies could have a devastating effect on its ability to compete in the international marketplace. One scholar fears this situation creates an incentive for nations to "race to the bottom" in environmental regulatory standards, but notes that fundamental principles espoused by the United States in the Tenth Amendment should not be ignored; sovereign self-determination should be treated with the same respect whether the issue is between two foreign nations or whether it is between our federal and state governments.

IV. MODELS FOR PROGRESS

A. The Tenth Amendment

In fact, the Tenth Amendment may provide a useful framework for etching out the realms in which indigenous and national governments could act in harmony just as the state and the federal governments do in the United States. The Australian High Court in Mabo No. 2 essentially applied the reasoning that a lack of action on the part of the national government in claiming territory left that land available for its original owner to claim, incorporating the same principles as the Tenth Amendment. The application of these principles could prove quite useful for indigenous peoples like the U'wa if the national governments were to accept the idea in good faith and not react with sweeping legislation claiming national title to all tribal lands.

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See id. at 27, 3.

See U.S. CONST. amend. X. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

B. Governmental Recognition: Sovereignty

Another possibility for ensuring that indigenous peoples can protect the environmental integrity of their lands is through an international recognition of their established governments. Under the principles of the constitutive theory of statehood, a government may only exist and act at an international level if other established states recognize its legitimacy. The task of convincing other nations to recognize indigenous peoples as states is a nearly impossible one. The U.N. definition of statehood requires several things that people like the U’wa may lack: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with other states.

C. Indigenous Tribes as Stakeholders in Mediation Efforts

Short of utilizing more drastic measures such as international recognition of indigenous governments as states separate from the national governments with which they coexist, and somewhat reminiscent of U.S. Constitution’s Tenth Amendment principles, there are other ways in which national and indigenous governing bodies may be satisfied. Applying standard mechanisms of alternative dispute resolution where the national government and the indigenous representatives come to the table as equal stakeholders may yield creative compromise.

Although indigenous peoples are striving for sovereignty in a more meaningful context, the basic idea of gaining more power in dealings with the dominant nation and multinational corporations must be a tantalizing one. Bringing indigenous peoples, governments and corporations together in mediation may be a fruitful way to insure that all of the stakeholders are participating in a process to determine which activities will be allowed on lands claimed by all three. However, mediation requires that each party have an open mind and be prepared to be flexible in reaching solutions. The decision-making process is designed to allow the parties alone to be responsible for the final outcome. Four key components must always be present in

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111 See ANAYA, supra note 24, at 21.
order to have a successful mediation: “The neutrality or impartiality of the mediator (both perceived and actual), [t]he voluntariness of the process, [t]he confidentiality of the relationship between the mediator and the parties, and [t]he procedural flexibility available to the mediator.” It is equally important that none of the parties bring into the process or develop over the course of mediation an air of dominance.

Due to the rising popularity of mediation processes in the United States, a joint meeting of the American Bar Association and the American Arbitration Association yielded the Model Standards of Conduct for Mediators. The Standards propose that mediations are only functioning appropriately when all parties are physically and mentally capable of sharing information and relating to one another at the same level, so that there is no perceived power imbalance from the start. If gross disparity of any sort should be present, it is the mediator’s responsibility to recognize that an imbalance is occurring and to take appropriate action.

The Inter-American Commission on Human Rights, a branch of the Organization of American States, has taken on the role of mediator in many situations. However, this Commission is constrained to the application of duties stemming from a nation’s accession to the terms of the American Declaration of the Rights and Duties of Man. Colombia has previously been targeted by the Commission when the international community learned of its mistreatment of the Guahibo tribe. The Cuiva, as they are internationally known, are a semi-nomadic people who have been relegated by many settlers to the classification of animals to be hunted. Recognizing the inevitability

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117 See id. at 478-84 (reproducing the Standards).
118 See id. at 463.
119 See id. Appropriate action my include retaining counsel or seeking alternative ways to gain access to research if one party is more financially capable than the other. See Donald T. Weckstein, In Praise of Party Empowerment—and of Mediator Activism, 33 WILLAMETTE L. REV. 501, 539 (1997). See also, Phil Harter, Remarks in Environmental Dispute Resolution Class Discussion at Vermont Law School (Jan. 16, 1998). However, these suggestions are couched within a purely U.S. based context, and it is important to explore mediation in the international context.
120 See ANAYA, supra note 24, at 166-67.
121 See id. at 167.
122 See id.
123 See Bernard Arcand, The Urgent Situation of the Cuiva Indians of Colombia, in 7 IWGIA DOCUMENT 10 (Peter S. Aaby et al. eds., 1972).
of the settler influx into their traditional cultural region and the limitations imposed on their ability to hunt and forage for many of their food staples, the Cuiva tried to build villages of their own while maintaining some qualities of their nomadic lifestyle.\textsuperscript{124} This experiment failed miserably. As the population of settlers increased, the land available for the Cuiva decreased, and they were being driven to the point of starvation.\textsuperscript{125} Although the Colombian government passed a law making it illegal to settle in land claimed by the Cuiva, this merely served as an incentive to move in and wipe out the existing Cuiva population in that area.\textsuperscript{126} The only solution that seemed viable in the report to the International Work Group for Indigenous Affairs was to provide funding for the Cuiva to purchase back some of their land and to give in to their assimilation into Colombian ranch culture.\textsuperscript{127} Apparently, an equitable solution in the courts to enforce the unlawful taking of the Cuiva lands by settlers was not a reasonable option considering the political climate in Colombia.\textsuperscript{128}

Due to these failures of process, negotiation by the Inter-American Commission on Human Rights was a logical next step. The negotiation process heralded by the OAS has had some measure of success even when governments protest and appear uncooperative in the beginning.\textsuperscript{129} For example, the Nicaraguan government, having reacted violently against efforts by the Miskito people to secure land rights, eventually participated in negotiations with the Miskito.\textsuperscript{130} The resulting exchange of information in the context of a negotiation between equals did not provide a direct solution but transformed into a series of further consultations, which yielded important policy changes in the Nicaraguan government.\textsuperscript{131}

\section*{D. Adjudication in the United States}

There are also mechanisms in the U.S. courts which, if utilized, may be able to provide remedies for aggrieved tribes. When the actor in a foreign country is a U.S. based multinational corporation such as Occidental,
jurisdictional rules would allow a U.S. federal court to hear the case. Occidental’s connections with the United States are enough to fulfill the requirements of the long-arm statute.\textsuperscript{132}

The Alien Tort Claims Act expressly provides for original jurisdiction in U.S. district court for an alien bringing a civil suit and claiming a violation of a law of nations or a treaty to which the United States is a party.\textsuperscript{133} The doctrine of \textit{forum non conveniens} has prompted some courts to reject jurisdiction over cases that involve multinational action overseas.\textsuperscript{134} However, the Second Circuit recently rejected a lower court’s claim of \textit{forum non conveniens} when there was no mandate that the claim be heard in the foreign country.\textsuperscript{135} Another court found that the Alien Tort Claims Act imposed international standards of conduct on U.S. based corporations acting abroad.\textsuperscript{136}

\textbf{E. Mechanisms at International Law}

As it currently stands, there are several avenues at the international level for the assertion of indigenous peoples’ claims against nations that infringe on their rights. Although non-interference is preferred at the international level, there are times when nations act so contrary to the acceptable international norm that other nations are compelled at least to speak out against them.\textsuperscript{137} Therefore, the moral force of the international community proves an effective weapon for the indigenous peoples to wield against oppressive nations.

The United Nations has several mechanisms in place to help further indigenous causes. For instance, the U.N. Working Group on Indigenous Populations receives formal reports from all interested parties regarding progress or difficulties in the quest for securing indigenous rights.\textsuperscript{138} While

\begin{itemize}
  \item \textsuperscript{132} See, e.g., International Shoe Co. v. Washington, 326 U.S. 310 (1945) (describing sufficient contacts between a corporation and a state required to warrant personal jurisdiction).
  \item \textsuperscript{133} See Alien Tort Claims Act, 28 U.S.C.A. § 1350 (1948).
  \item \textsuperscript{134} See, e.g., Dickson Marine, Inc. v. Panalpina, Inc., 179 F.3d 331 (5th Cir. 1999).
  \item \textsuperscript{135} See Jota v. Texaco, Inc., 157 F.3d 153 (2nd Cir. 1998).
  \item \textsuperscript{136} See Doe v. Unocal Corp., 963 F. Supp. 880, 891 (C.D. Cal. 1997) (conferring subject matter jurisdiction under the Alien Tort Claims Act on a private U.S. company acting in concert with two other corporations in Burma that were committing human rights abuses in Burma). The case was later dismissed, however, due to a lack of standing, as the court determined that the injuries of the plaintiffs were not redressible. See John Doe I v. Unocal Corp., 67 F. Supp. 2d 1140, 1147 (C.D. Cal. 1999); see also Lucien J. Dhooge, \textit{A Close Shave in Burma: Unocal Corporation and Private Enterprise Liability for International Human Rights Violations}, 24 N.C. J. INT’L L. & COM. REG. 1, 27-42 (1998).
  \item \textsuperscript{137} See ANAYA, supra note 24, at 151.
  \item \textsuperscript{138} See id. at 153-54.
\end{itemize}
these reports are not mandated and can instigate no formal proceedings against delinquent governments, they nonetheless function as a deterrent for bad behavior since each report is entered into the public record. Complaints issued by legitimate organizations against a nation are almost always met with positive responses from that nation.

The International Labour Organisation (ILO) has also been a consistent proponent of indigenous peoples' rights, and Convention No. 169 on Indigenous and Tribal Peoples requires that states that are parties to the Convention report on progress for indigenous rights. As a result of those reports, oversight committees may be formed to supervise implementation of pro-indigenous programs or legislation. These mechanisms have proven effective, most notably in the case of the Yanomami people in Brazil. Pursuant to Convention No. 107, the predecessor of Convention No. 169, a committee brought to light the transgressions of the Brazilian government with regard to the treatment of the Yanomami, including nonrecognition of land rights and cultural integrity of the Yanomami tribe. The ILO does focus on employment issues, however, and, as a result, the complaint procedures are limited to governmental, union or other labor organization access. No single indigenous person or governmental representative may make these complaints.

V. CONCLUSION

There are several unique factors that might influence the way in which the Colombian government decides to handle the U'wa situation and other cases like it in the future. First, Colombia is a signatory of the treaties of the Organization of American States. Therefore, the strides the OAS is making in negotiation and promotion of indigenous rights may influence Colombia

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139 See id. at 154. The United Nations Commission on Human Rights and its Subcommission also monitor state—indigenous population interactions, and while this organization may not be an expert on the matter as the U.N. Working Group on Indigenous Populations, it serves as a real political force in the promotion of indigenous rights, although all political factors do play a role in its recommendations. Id.

140 See id. at 159.

141 See id. at 155.

142 See id.

143 See ANAYA, supra note 24, at 155.

144 See id. at 161.

145 See id.

politically. Additionally, Colombia's government has been involved in a decentralization movement, which is infusing the government with political leaders who have varied ideals and represent more subgroups of the nations' peoples. However, as pressures mount on an international level for the utilization of natural resources, those areas of untapped wealth will be targeted for development. The U'wa have been fortunate in their ability to convince the Colombian government to designate some of their cultural lands as part of the nationally protected parks, but a government that can create protections can also remove them. It is simply a matter of time before the U'wa and indigenous peoples like them will have to deal with these issues again. Therefore, it is of the utmost importance that mechanisms be established to insure the recognition of cultural land interests that cannot be usurped by a tyrannical majority or government.

The success of such mechanisms is contingent upon a more meaningful definition of tribal sovereignty that transcends the stale versions of guardian-ward hierarchies, which heretofore have been the prevailing scheme. With the recognized sovereignty of indigenous peoples, Tenth Amendment principles fall into place. Tribes in the United States would be able to make legislation regarding matters of direct concern to them that may not currently affect the public at large, but that may eventually make the difference between the plundering of natural resources and their protection. With respected sovereignty, tribes are better able to participate as equals in mediation efforts in hard cases where many interests are pitted against each other. Rather than having a government make sweeping decisions on its own about the fate of land claimed by indigenous peoples, the tribes could have a voice in the matter and make compromises they could live with.

In addition to promoting better relations between sovereigns themselves, it is necessary to encourage responsibility on the part of those sovereigns incorporating multinationals that act abroad. Both an unwillingness to prevent foreign degradation that would also be prohibited within their own borders and the need to recognize environmental integrity as a fundamental human right enforceable at international law are essential for global maintenance. It should not take a threat of mass suicide to prevent drilling on cultural lands. It should not take the despoiling of an entire region to develop cleaner and more efficient business practices. If civilization is the god to which these offerings

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of resources are being made, then the appropriate way to go about the acquisition and development of these resources is a diplomatic, respectful and civilized one.