

A Voice At the Table

Strengthening Collaboration in the Governance of Environmental Agreements

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ABSTRACT

A variety of Inter-State Agreements (ISA) have been developed to establish policies and expectations regarding environmental policy and management. However, governance mechanisms have not been developed to provide for the substantive involvement of Indigenous Nations within States to participate in the development and implementation of these policies.

Indigenous knowledge systems, rights, and interests are critical to the development of practical and effective approaches to address complex socio-economic-political issues involved in the sustainable management of effects on the environment.

Obstacles and challenges that inhibit the effective engagement of Indigenous Nations are symptomatic of the wider and substantial power imbalances and asymmetries that underlie the relationship with States. Governance of the relationship between Indigenous Nations and States over environmental matters can be improved by: adopting guiding principles to re-invigorate the modalities of collaboration between the Nations and States in mobilizing ISAs; and by establishing a new, permanent governance body, an Intergovernmental Relations Council for the Environment (IRCE) to facilitate and promote formal collaboration in Intra and Inter State-Nation working relationships involving cross-jurisdictional environmental issues involving shared resources.

Keywords: Indigenous nations, environmental governance, Inter-State Agreements (ISA), environmental rights

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Introduction

Several agreements between States contain provisions that affect the environment, biodiversity, human rights, health, and the rights of Indigenous Nations and their citizens. A meaningful and comprehensive governance framework is needed to enable Indigenous Nations to participate in their implementation substantively.

The intergenerational wisdom and place-based insights that Indigenous Nations provide are especially crucial to understanding relationships between human communities and their environments. Indigenous community cultures are marked by holistic world views based on principles of interconnectedness, respect, and reciprocity that have enabled Indigenous Peoples to adapt and survive socio-economic-political-environmental changes. This experience can significantly contribute to the understanding and discourse needed to chart a path to a sustainable and resilient future.

Despite the existence of Inter-State Agreements (ISA), major obstacles to substantive participation of Indigenous Nations in their implementation include:

- (a) the lack of mechanisms to resolve differences between Indigenous Nations and States;
- (b) The lack of effective governance frameworks that support collaborative relationships between Indigenous Nations and States; and

- (c) Institutionalized societal norms that fail to recognize, value, respect, and support contributions of alternative knowledge systems to environmental issues.

Two proposals are offered to overcome these obstacles: a) a set of guiding principles to re-invigorate the modalities of collaboration between the two parties in mobilizing Inter-State Agreements on the environment (ISAs); and b) a new, formally constituted, and permanent institutional body for the governance of environmental issues, an Intergovernmental Relations Council for the Environment (IRCE), with a comprehensive remit and responsibilities to facilitate and promote formal collaboration in State-Nation working relationships, policies and actions on environmental matters, and to reconcile differences.

Embracing the Environmental Knowledge and Wisdom of Indigenous Nations

The territories occupied by States encompass Indigenous Nations whose cultures, traditions, religions/spirituality, health, livelihoods, and prosperity are inextricably intertwined with their relationships to the land, water, air, plants, animals, sun, moon, and stars. These relationships are under increasing pressure from, among other things, economic development, population growth, climate change, resource extraction, commoditization-based scarcity, and pollution. These processes are depleting the quality and stock of environmental resources and diminishing the quality, availability, abundance, and productivity of the environmental heritage of all humanity.

By their nature, environmental matters are complex and wicked because they involve interactions between social, economic, legal, and political considerations that are nuanced by local circumstances. The ability to find common ground to address these matters is further complicated by legacies of colonialist institutional and educational processes that have displaced the decision-making, worldviews, and traditional knowledge systems of Indigenous Nations.

There is growing recognition of the value of and need for consideration of traditional science and indigenous knowledge systems when addressing matters affecting the environment and the need to respect relationships with non-humans, such as the increasing interest in recognizing rights of nature. Indigenous Nations have acted as stewards of the environment for millennia and have accumulated science and wisdom over generations. Their local, place-based information is vital to developing sustainable solutions to complex environmental problems and difficult resource use and sustainability decisions based on long-term stewardship. This knowledge base is critical to developing practical, effective approaches to address complex environmental challenges. Moreover, at a practical level, Indigenous Nations still have the major responsibility to manage 38 million square miles of land in 87 States, including about 36% of intact forest landscapes that are vital for maintaining biological diversity and resilience in a rapidly changing environment (Garnett, et al., 2018).

Indigenous Nations and States have a shared responsibility for stewardship of the public trust

for future generations, which comes with a duty to develop and advance mutually beneficial solutions to the plethora of environmental challenges they must confront at various scales ranging from local to regional and international.

At some local and regional levels involving matters within the territorial jurisdiction of an individual State, environmental issues can be addressed by engagement between Indigenous Nations. For some environmental issues, such as those involving cross-boundary matters such as air, water, fish, and wildlife, multiple States and Indigenous Nations within their territorial boundaries must be involved. At whatever scale, there is a critical need for formal mechanisms that provide substantive engagement between States and the knowledge, wisdom, knowledge, and interests of Indigenous Nations.

The Inadequacy of Current Governance Frameworks for Indigenous Nations

In several ways, current governance frameworks inadequately embrace the interests of Indigenous Nations.

The language and wording of various ISAs which pertain to matters involving economic, cultural, spiritual, and physical relationships between human communities and their environments leave room for ambiguity and flexibility in interpretation. Adoption practices involve a variety of provisions and reservations, and the mechanisms to enforce these provisions are rare. ISA implementation is left to domestic processes effected through domestic law, policies, and administrative rules and regulations administered by various entities.

The policies and principles embodied in these ISAs can critically affect the rights and interests of both States and the Indigenous Nations within overlapping or shared boundaries. Individual ISAs have been deliberated and approved by domestic governmental processes of States without substantive involvement of Indigenous Nations. Indigenous Nations within States are sovereigns with cultural norms, expressed in various forms, such as written laws, rules, and regulations, or practiced through traditions, customs, languages, and practices appropriate for their communities.

Formal mechanisms exist to solicit the perspectives and secure the concurrence of Indigenous Nations prior to adoption or implementation by States, but these mechanisms are problematic. The authors⁷ surveyed Indigenous Nations' representatives to solicit views on the most significant challenges they faced in protecting the environment and their interests. Over half of the 60 responses⁸ identified issues involving the need for mechanisms to provide substantive participation of Nations in the development and implementation of ISAs. "Lack of consultation with and/or participation of Nations impacted by relevant international agreements in the drafting of said agreements" was noted as one of the critical barriers to the implementation of ISAs.

Not only are there substantial impediments to meaningful participation in drafting the agreements, the majority of participants also noted that Nations were not consulted in implementing the ISAs. In this respect, respondents noted, *inter alia*: the lack of

organizational, administrative, and governance infrastructure to implement agreements – given the reality that Indigenous Nations rarely have sufficient resources for these functions compared to States; the weakness of environmental protection agreements to recognize rights, combined with the lack of conflict resolution mechanisms and processes to pursue recourse to damage compensation or to mitigate security threats against those pursuing their rights under relevant agreements; varying interpretations of rights and obligations under relevant international agreements; the over-generality of agreements which, thereby, are not adaptable to local conditions or, worse still, fail to address contextual aspects of specific local or regional issues.

These extensive limitations and challenges to the participation of Indigenous Nations in the negotiation, development, and implementation of ISAs are symptomatic of the wider and substantial power imbalances that underlie the relationship between Nations and States. They reinforce the limitations of recognized jurisdictional authority that Indigenous Nations have over their territories, the disadvantageous distribution of rights and obligations between Indigenous Nations and States, and the deferential assumption of responsibility and authority of States towards environmental protection.

⁷ This survey was undertaken by the authors, in their role as Environmental Commissioners, as preparatory work for their recommendations to the 2022 Congress of Nations and States.

⁸ Approximately half from the Middle East and North Africa and half from Africa and Asia.

Re-envisioning the Governance of Nation and State Environmental Interests

Given the current limitations of ISAs to effectively represent and protect the environmental heritage and interests of Indigenous Nations, we now argue for a re-envisioning of the governance of the relationship between Indigenous Nations and States over environmental matters, comprised of two elements: guiding principles to enhance current processes for collaboration, and proposals for new institutional development. The first is a call to re-invigorate the modalities of collaboration between States and Nations in mobilizing ISAs; the second is a new, permanent institutional body for the governance of environmental issues, an Intergovernmental Relations Council for the Environment (IRCE), with a comprehensive remit and responsibilities to facilitate and promote formal collaboration in State-Nation working relationships, policies and actions on environmental matters, and to reconcile differences that arise.

Guiding Principles for Improving Collaboration Between Nations and States in Mobilizing ISAs

There is a need for an effective and practical collaborative framework to mediate conflicts between Indigenous Nations and States. We contend that a commitment to a more collaborative process is needed to forge mutual development and understanding of the mechanisms, policies, and programs to implement the principles and tenets set out in ISAs. A more collaborative process should include:

- a) Respectful deliberation between States and Indigenous Nations to identify and share perspectives on the development and interpretation and effective mechanisms, systems, policies, and programs for implementing ISAs (for example, Free, Prior, and Informed Consent, benefit sharing);
- b) Development and support of formal agreements between Indigenous Nations and States that include institutional practices and mechanisms to build and sustain working relationships based on shared visions and objectives and that provide financial support, training, communication, and information sharing needed for coordinated, collective action through the exercise of joint responsibilities and authority of participating actors;
- c) Effective and efficient mechanisms for the resolution of specific disputes and disagreements between sovereigns that arise on a site or project-specific basis; and
- d) Undertake restorative justice to heal relations between Nations, States, and the Environment by disclosing all pertinent facts, empathic understanding, reaching agreement on truths and providing for acknowledgment, appropriate public mourning, and forgiveness.

Successful examples of types of collaborative processes that align with our intentions and on which we have drawn exist.⁹ It is anticipated that mutually acceptable values and standards for representation, procedures, and processes would be developed that better accord with cultural and legal norms. Committing States and

the Indigenous Nations within their territorial boundaries to develop and agree upon these procedures and mechanisms collaboratively would strengthen intergovernmental deliberation and actions to implement ISAs.

An Intergovernmental Relations Council for the Environment (IRCE)

To address environmental issues that transcend the boundaries of individual States, a new institutional initiative is proposed to consolidate and better harmonize States' and Indigenous Nations' governance over environmental issues. To this end, the feasibility and utility of establishing a permanent, formally constituted, Intergovernmental Relations Council for the Environment (IRCE) should be investigated. The IRCE would be mandated to facilitate and promote formal collaboration in State-Nation working relationships, policies, and actions on environmental matters and to reconcile differences that arise in matters pertaining to conflicts over environmental issues. The IRCE mechanism would provide a neutral and independent governance forum with a wide-ranging remit and responsibilities to facilitate the development of a comprehensive knowledge

base and agreement on tools, policies, priorities, and approaches for sustaining relationships with the environment that are culturally sensitive, equitable, and environmentally responsible.

The details for the form and substance of the IRCE are important, and considerable deliberation for its design and operation will be required. We propose a framework for a structure, objectives, and modalities consisting of, inter alia, the following tasks:

- Provide technical support and assistance to develop a mutually agreed factual basis for decision-making and policy development, including monitoring, evaluation, and reporting systems; commissioning open and transparent reviews by experts, Nations' and State governments' representatives to identify and prioritize research;
- Support capacity-building and awareness-raising initiatives on environmental matters of common interest;

In due course, as participants determine,

- Facilitate problem-solving and resolution of differences;

⁹ Include the following:

- Centennial Accord between the Federally Recognized Indian Tribes in Washington State and the State of Washington, 1989 and Centennial Accord Millennium Agreement.
- The 1985 Compact of Free Association (CFA) between the US, Marshall Islands, and Micronesia. The CFA is broad, encompassing 472 sections in 4 Titles - Governmental Relations (7 articles - see especially Article vi on Environmental Protection), Economic Relations (5 articles), Security and Defense (4 articles), and General Provisions (7 articles). As an over-arching agreement of relations between sovereign States and Nations, it contains many of the elements that the EC has been thinking would be developed under Resolution 1. This complex agreement represents a modern analog to the 19th Century treaties between the United States and Indian Nations.
- Indigenous Protected and Conserved Areas (IPCAs) provide examples of Indigenous Laws in the Context of Conservation
- Natural Resource Co-management Agreement-e.g., between the State of Oregon and the Coquille Indian Tribe
- Master Stewardship Agreements
- Step into the River - a framework for economic reconciliation being developed in the area known as Canada

- Develop governance systems and processes that monitor, arbitrate, and ensure compliance on environmental issues and standards pertaining to the interests of Nations and States. We recommend that these governance functions encompass the capacity to:

- Promote the implementation, monitoring, and reporting of ISAs, conventions, and treaties as they relate to the joint interests of Indigenous Nations and States.
- Undertake or promote, where necessary or as appropriate, country/regional studies, monitoring, fact-finding, or investigative missions to further examine environmental impacts or in response to a particular situation.
- Promote the establishment of temporary non-judicial Commissions to establish facts and develop recommendations regarding compliance with agreements and commitments (e.g., mapping violations, taking testimonies).
- Product public reports on the IRCE findings to provide impartial records of the events examined with conclusions on accountability and recommendations on reconciliation and reparations.
- Promote the establishment of dispute resolution mechanisms for environmental disagreements between Indigenous Nations and States.

The remit of the global IRCE could be strengthened, in time, by extending its capacity to regional councils based on regional groupings

of common interest and priorities and with a strong representation of Indigenous Nations. Regional councils would tailor the governance of environmental policies and strategies to the interests of Indigenous Nations and member States, better capturing the divergent and evolving perspectives on these matters and further helping to redress the current power imbalances. The modalities for such groupings could draw on pre-existing models and templates of multilateral groupings (See e.g. Balsiger and Prys 2016). Furthermore, additional modalities could be developed for types of environmental issues that are amenable to regional approaches such as biological diversity and threatened species, climate change; ocean acidification, hypoxia, harmful algal blooms; air and water quality; forestry resources (forest (deforestation, wildfire, insects, disease, illegal logging, supply chain verification, tariffs/taxation); pollution and waste; and overfishing (depletion of ocean fish stocks).

Properly constituted, we contend that the IRCE and its regional bodies could provide a more effective governance process for designing and implementing environmental policies and programs, including ISAs, in several respects. It would ensure more equitable treatment of Indigenous Nations. Moreover, by establishing a formal platform that would enable Indigenous Nations to articulate their interests at both global and regional levels, the IRCE would help to redress the current imbalance between States and Nations in environmental decision-making. Further, by reducing conflicting and competing claims, the IRCE would ensure better cooperation, trust, and reciprocity between the

parties. Finally, by establishing a mechanism that draws more effectively on under-represented environmental discourses and value systems of Indigenous Nations, the IRCE would enable States to enhance longer-term sustainability agendas that reflect the interconnected needs of all human and non-human communities.

In Sum, the Value Added by the IRCE is Threefold

First, it provides a means to deploy the extensive knowledge and expertise of Indigenous Nations in development and resource usage policies, strategies, and decisions in ways that respects their beliefs regarding relationships with and stewardship of their environments. Currently, this wisdom, expertise, and the underpinning value systems of adaptability are insufficiently deployed in such decision-making. The lack of such contributions results in the excessive depletion of environmental resources, availability, and quality. In addition, such a body would help to highlight human rights and environmental justice concerns and give a stronger voice to socio-economic-cultural dimensions of environmental issues.

Second, the ICRE would seek to overcome structural barriers to Indigenous Nations' participation by providing a process and formal institutional entity to identify and reconcile divergent perspectives, priorities, values, and knowledge systems regarding relationships and responsibilities toward the environment.

Third, by establishing a formal platform for Indigenous Peoples to articulate their interests at both global and regional levels, the IRCE will

help to redress the current imbalance between States and Indigenous Nations in environmental decision-making, thereby reducing conflicting and competing claims and building collaboration, cooperation and trust between the parties. The IRCE would establish a mechanism that draws more effectively on under-represented environmental discourses and value systems of Indigenous Nations, enabling States to enhance longer-term sustainability agendas that reflect the interconnected needs of communities of humans and non-humans.

Conclusion

Holistic world views, based on principles of interconnectedness, respect, and reciprocity that have enabled Indigenous Nations to adapt and survive socio-economic-political-environmental changes, can contribute significantly to the dialogue needed to chart a path for a sustainable environment. Our proposals – guiding principles to enhance collaborative efforts between Indigenous Nations and States and new intra- and inter-organizations would establish a more formal and comprehensive framework for the governance of environmental interests. Collaborative, respectful, cooperative relationships at multiple levels with political sovereigns are needed to care for the environment. A new schema of problem solving, governance and decision-making that gives Indigenous Nations a substantive voice in decision-making would help identify and reconcile differences, effectuate the principles and objectives espoused in ISAs and enhance the implementation of sustainable environmental policies.

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Roger Zetter is Emeritus Professor of Refugee Studies at the University of Oxford and former Director of the Refugee Studies Centre at the University. In an academic career spanning over 40 years his research, publications, teaching and consultancy on forced displacement, refugee and humanitarian affairs includes all stages of the 'refugee cycle', focusing on institutional and policy dimensions of the refugee and humanitarian 'regime', and the impacts on forcibly displaced people. Amongst his 150 publications, his seminal 1991 paper on 'Labelling Refugees: Forming and Transforming a Bureaucratic Identity' is one of the most widely cited papers in refugee literature. From 1988-2001, he was Founding Editor of the Journal of Refugee Studies (published by OUP).

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