At the intersection of indigenous and international treaties, (DRAFT 8)

By Tony Penikett

1. Emerging Arctic realities include rapid climate change, accelerating energy exploration, newly emerging shipping routes, new agreements with indigenous peoples and new forms of indigenous governance.

Storms of political change have buffeted the Arctic landscape over the last four decades: the end of the Cold War, the Alaska Native Claims Settlement, Greenland home rule and self-government, the Finnmark Law, the negotiation across northern Canada of nineteen indigenous treaties[1] and, of course, dramatic climate change. Participants at the Arctic Governance Workshop at Tromsø in January 2010 will consider various dimensions of Arctic governance, including flexibility and adaptability; implementation challenges; the necessity and complexities of multi-level (international, national, regional and indigenous) governance, and, possibly, dispute resolution rules or norms.

By the end of the 19th century, the negotiation of Indian treaties and the creation of reservations was a closed chapter in American history. But then the energy industry found oil in Alaska in 1968 and the U.S. government rushed to buy out indigenous land rights. In 1971, Congress passed the *Alaska Native Claims Settlement Act*, which gave Alaskan natives almost a billion dollars and 178,000 square kilometres of land but imposed a system of corporate, rather than tribal, government. The scale of the settlement excited Canadian First Nations; Congress's insistence on corporate as opposed to tribal governance did not.

Unlike the earlier treaties that consigned First Nations to reserves on marginal land and almost permanent poverty, the treaties Canada negotiated with the First Nations, the Inuit and the Métis of the Arctic and sub-Arctic in the years following the Alaska settlement recognize title to tens of thousands of square kilometers of resource-rich land and firmly

[1] See Land Claims Agreement Coalition
http://www.landclaimscoalition.ca/pdf/Schedule%20of%20Land%20Claims%20Agreements%20090505.pdf

establish indigenous governance of those lands, while embedding the principles of sustainability and stewardship. With their privileging of conservation and subsistence harvesting over recreational and commercial fishing and hunting, plus the creation of wildlife co-management boards, these northern treaties embed the principle of sustainability -- the only elements of Canada's constitutional order to do so.

The Yukon "third-order" self-government agreements recognize both local and quasi-provincial powers for that territory's First Nations. The Nisga'a Nation treaty on British Columbia's northwest coast includes constitutional protection for the Nisga'a's self-government powers. The Nunavut Agreement -- which ended the colonial policy that denied this Eastern Arctic region governmental powers until it had achieved a settler majority -- created the Nunavut Territory, a public government for a huge area whose population is 85% Inuit. Sustainability through co-management of wildlife resources is a common feature of these modern treaties, casting the indigenous signatories as central players. Climate change has put traditional hunting and fishing grounds at risk and shifted wildlife populations off their familiar habits. As always, those following traditional pursuits have had to adapt. One strategic adaptation, in the Yukon treaties, was the establishment of wildlife co-management boards that unified indigenous and non-indigenous management regimes.

In 2003, the Government of Norway introduced the *Finnmark Act* to manage lands and resources in Finnmark County, the ancestral home of Saami fishers, farmers and reindeer herders. "The Finnmark Act of 2005 is an historic law that recognizes the Saami as an indigenous people with substantive rights,"[2] writes Saami scholar Else Grete Broderstad. Section 5 of the Finnmark Act's also honors indigenous peoples' customary rights to land and water. The new law transfers 96% of a northern area about the size of Denmark to a new institution run by three representatives each from the Saami Parliament and the Finnmark county council -- a Nordic version of Canadian co-management regimes.

[2] Else Grete Broderstad, "The political development of the Saamis and the issue of self-determination," Centre for Sami Studies, University of Tromsø, Norway, 2010

Over the last century, Greenland has been under Danish colonial rule, German occupation and American protection, as well as integration into the Kingdom of Denmark. A 1979 referendum led to home rule and parliamentary governance of education, health, housing and welfare, as well as fishing, hunting and agriculture. Greenland had gone into the European Union in 1973 but withdrew in 1985. On June 21, 2009, the country achieved self-government.

Greenlandic will now become the only official language and Danish legislation affecting Greenland's interests will require prior consultation. There will be no abrupt end to the historic relationship between Denmark and Greenland. A new resource-revenue sharing regime will gradually replace Danish state subsidies but Greenland may now establish bilateral and multilateral relationships with other states. Of all of the Arctic's indigenous peoples, the Inuit of Greenland might be closest to achieving the status of a sovereign nation state.[3]

All these agreements involving indigenous peoples contain tools to manage resource development and mitigate climate change and. Sadly, no nation state has made full use of these tools – tools which the Inuit believe shield people and their communities from the impacts of climate change.[4] Nunavut Tunngavik Inc. has even had to sue Ottawa for the implementation of some their land claims settlement's provisions.[5]

2. Although enshrined in the laws or constitutions of nation states, key provisions of these indigenous treaties and governance agreements remain unimplemented.

In 2003, indigenous signatories to Canada's new northern treaties from British Columbia, Yukon, the Northwest Territories, Nunavut, Nunavik, northern Quebec and Labrador

[3] At Arctic Council meetings both Greenland and the Faroe Islands have members on the Danish delegation and three flags rather than one identify the delegation.
[4] Luis Millan "Climate change intersects with Inuit land claims agreements," Lawyers Weekly, April 23 2010

[5] Stephanie Irlbacher-Fox and Stephen j. Mills, "Living Up to the Spirit of Modern Treaties> Implementation and Institutional Development," in Northern Exposure: Peoples, Powers and Prospects in Canada's North (The Art of the State IV), Institute for Research on Public Policy, Frances, Thomas J. Courchene, F. Leslie Seidle and France St-Hilaire, editors, 2009

formed the Land Claims Agreements Coalition to lobby the federal government for faithful fulfillment of its obligations. Canada had resolved in 1982 to append these modern treaties to the Canadian constitution, and as written they are remarkable nation-building achievements. However, most of these agreements have generated serious unresolved disputes about implementation.[6] To cite but one example, sixteen years after signing the Nunavut Land Claims Agreement, Canada seems to have shelved provisions for ecosystemic and socioeconomic monitoring and for the Nunavut Marine Council, which could give Inuit a window on safety regimes for ships navigating the Northwest Passage.[7] The Nunavut agreement also requires Ottawa to create a Nunavut Wildlife Management Board to oversee ecosystemic and social changes but that has not happened. Other implementation failures include under-funding institutions with statutory functions under the agreement.[8] These implementation failures stem from bureaucratic inertia and language too open to interpretation, as well as active breaches of treaty provisions. Whatever the reason, these failures undermine citizen respect for the rule of law.

3. Nor do the treaties' dispute resolution procedures work.

Most of Canada's modern treaties with indigenous nations include chapters containing standard, off-the-shelf alternative dispute resolution (ADR) tools, including mediation. A minority of indigenous groups, notably the Inuvialuit, the Nisga'a and the Inuit of Nunavut, were successful in negotiating arbitration provisions.

The English legal tradition offers a continuum of options in dispute resolution, including: negotiation; mediation and other forms of ADR; adjudication (informal and non-binding arbitration); leading to informal but binding arbitration; and litigation (formal and binding court rulings). Any or all of these processes may be employed in both rights-based and interest-based negotiations. Together, they should allow for fast, effective and

[6] From "Canada's North and Tomorrow's Federalism" by Bernard W. Funston, 2004.
[7] See Nunavut Land Claims Agreement, Section 15.4.1.
[8] Luis Millan, "Climate change intersects with Inuit land claims agreements," Lawyers Weekly, April 23 2010 issue

fair conflict resolution.

Unfortunately, however, these tools have not worked well in practice. Although the Inuit have tried seventeen times to invoke the arbitration clauses in the Nunavut treaty, Canada has refused to participate. Worse, because federal policy forbids indigenous parties engaged in treaty negotiations to simultaneously litigate contentious issues -- a complete anomaly in national public policy -- dispute resolution measures are rarely tested during the negotiation process. Therefore, Canadian treaty making severely limits opportunities for dispute resolution experimentation or self-design.

One hopeful sign was the introduction to the Canadian parliament in 2007 of legislation developed jointly with the Assembly of First Nations to create an independent tribunal to expedite the resolution of specific claims disputes, arising largely from 19th century treaties. The judgments of Specific Claims Tribunal of Canada are binding. However, disputes arising from the northern treaties, which are normally of much greater magnitude and complexity, cannot be referred to this tribunal.

4. Intergovernmental cooperation and respect for the rule of law are essential to good environmental stewardship and successful climate change strategies, especially on an international scale.

Indigenous peoples in the Arctic and sub-Arctic have well-defined interests in international issues such as climate change; wildlife, fisheries and land management; and environmental sustainability and stewardship. Several Canadian treaties speak directly to indigenous interests in what are usually considered foreign policy matters.

In the Tlicho Agreement with the Dogrib, who inhabit the lands between Great Slave and Great Bear lakes, Canada assumes significant procedural and consultation obligations regarding international treaties: “Prior to consenting to be bound by an international treaty that may affect a right of the Tlicho Government, the Tlicho First Nation, or a Tlicho Citizen, flowing from the Agreement, the Government of Canada shall provide an

opportunity for the Tlicho Government to make its views known with respect to the international treaty either separately or through a forum."[9] The Canada-U.S. boundary dispute in the Beaufort Sea, which hinges on differing interpretations of the 1825 Treaty of Saint Petersburg between Britain and Russia, affects the 1984 Inuvialuit land claims settlement. "The Government of Canada is obliged to talk with modern treaty organizations when international negotiations might affect modern treaty rights," although as Udlu Hanson has observed. "I don't think many people in the Department of Foreign Affairs and International Trade are aware of these obligations."[10]

Three international issues worried Yukon First Nation treaty negotiators: the Migratory Birds Convention between Canada, Mexico and the United States, which prohibits spring hunting; the Pacific Salmon Treaty; and international agreements about caribou. By invoking the Supreme Court of Canada's 1990 ruling in the *Sparrow* case, on the constitutionality of aboriginal subsistence harvests, Yukon First Nations worked around these challenges, but they never agreed that international treaties should automatically take precedence over their own.[11]

In 1989, the International Labour Organization (ILO) produced Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries. Few nation states ratified it, and some Canadian indigenous groups believed the convention fell short of existing national standards. However, the Saami were early supporters of the Convention, and Norway became the first country to sign it. For the Saami, enshrining the ILO standard in the Finnmark Law represented a major breakthrough. To assist in debate, the Storting (Norwegian National Assembly) had asked for independent advice on international law,[12] and the resulting legislation was seen as "a realization of the purpose and concretization of the articles of ILO 169."[13] University of Lapland professor Timo Koivurova's believes that, by ratifying ILO 169 and implementing the Finnmark act,

[9] From "Land Claims and Self-government Agreement Among the Tlicho and the Government of Canada".
[10] Udlu Hanson comment, Arctic 2030 National Planning Conference, Ottawa, June 3, 2009.
[11] Dave Joe comment, Claiming Our Future: Implementing Land Claims Agreements for Social and Economic Prosperity Conference, Ottawa, May 14, 2009.
[12] See Facts and Myths Regarding the Finnmark Act http://www.galdu.org/web/index.php?artihkkal=35&giella1=eng
[13] Else Grete Broderstad e-mail to Tony Penikett, June 9, 2009.

Norway has become the leader among the Nordic states in Saami relations.[14] By contrast, the Swedish government has traditionally identified the Saami as a "national minority," rather than as an "indigenous people."

Few North Americans, Russians or Scandinavians appreciate how long indigenous people have been players in the international arena or how conscious indigenous leaders have become of global questions. The Inuit Circumpolar Council (formerly "Conference") was formed in 1977, although their Russian cousins did not join until after the Cold War had ended. Inuit diplomacy helped fashion the Stockholm Convention of 2001, which curbs the production of persistent organic pollutants (POPs), and Inuit leaders have been extremely active on climate change issues.

In 2008, the Alaskan Inupiat village of Kivalina filed a suit in federal court against Exxon Mobil, eight other oil companies, fourteen power utilities and a coal giant for damages arising from climate change. The suit alleges "[g]lobal warming is destroying Kivalina through the melting of Arctic sea ice that formerly protected the village from winter storms… [and] the village thus must be relocated soon or be abandoned and cease to exist."[15] Citing U.S. government reports, Kivalina also seeks damages from ExxonMobil and others for engaging in a civil conspiracy to perpetuate global warming.

The Saami Council, formed at Karasjokk, Norway, in 1956, functions as a coordinating body for Saami organizations in Norway, Sweden, Finland and Russia. Since 1964, the governments of Finland, Norway and Sweden have been cooperating on Saami matters, and, in 2001, a Nordic civil service body that includes representatives from the Saami parliaments, took on this role. The Saami Parliamentary Council, composed of members from the three Saami Parliaments in Finland, Norway and Sweden, along with Russian Saami observers, seeks to safeguard the common Saami interests across the state borders and is another example of Nordic cooperation on Saami matters. Saami parliaments want

[14] Timo Koivurova, e-mail to Tony Penikett, 21 November, 2009,
[15] Native village of Kivalina and City of Kivalina v. Exxon Mobil Corporation; and others, United States District Court, Northern District of California, San Francisco Division. (The case was dismissed for non-justiciability of a political question.)

this Council to be active on the international stage, in implementation of the UN Declaration on the Rights of Indigenous Peoples, and in the workings of the Arctic Council. Ministers responsible for Saami affairs in all three countries also meet regularly with their counterparts in the Saami parliaments for preparatory work on a draft Nordic Saami Convention.

Between January 2003 and October 2007, an expert committee met 15 times to draft the text of the convention. The Nordic states negotiated no treaties with the Saami but, in 1751, two states signed the Lapp Codicil. The Saami parliaments see the Draft Convention ". . . as a renewal and development of Saami rights, established through historical use of land, that were codified in the Lapp Codicil."[16] Timo Koivurova notes that the draft convention, however, is much more comprehensive. For example, it "quite uniquely, enables the Saami to participate in an international treaty on an almost equal footing with the Nordic states."[17] Article 3 of the draft convention declares: "As a people the Saami have the right of self-determination in accordance with the rules and provisions of internal law and of this Convention. In so far as it follows from these rules and provisions, the Saami people have the right to determine their own economic, social and cultural development and to dispose, to their own benefit, over their own natural resources." Article 19 adds: "The Saami parliaments shall represent the Saami in intergovernmental matters. The states shall promote Saami representation in international institutions and Saami participation in international meetings."[18] Koivurova views the draft Nordic Saami Convention as an inspiring document but one that may get watered down in ongoing negotiations.[19]

In 1987, Mikhail Gorbachev proposed a new era of peace and cooperation for the Arctic. The Arctic Environmental Protection Strategy (AEPS), also known as "the Finnish Initiative," a non-binding agreement to protect the Arctic environment through

[16] Preface, the Draft Nordic Saami Convention
[17] Timo Koivurova, "The Draft Nordic Saami Convention: Nations Working Together," International Community Law Review 10 (2008) 279–293, International Community Law Review www.brill.nl/iclr
[18] Draft Nordic Saami Convention
[19] See Footnote 11,

monitoring, assessment and conservation, followed shortly thereafter. AEPS led to the formation in 1996 by Canada, Denmark, Finland, Iceland, Norway, the Russian Federation, Sweden and the United States of the Arctic Council, conceived as a "high level forum."

Except at biennial ministerial meetings, senior Arctic officials (SAOs) normally lead Arctic Council discussions, which include representatives from the Aleut International Association (from Russia and the United States), the Arctic Athabaskan Council and the Gwich'In Council International (from Canada and the USA), the Inuit Circumpolar Council (of Canada, Greenland, Russia and he United States), the Russian Association of Indigenous Peoples of the North (RAIPON) and the Saami Council (in Finland, Norway, Russia and Sweden) as "permanent participants" (PPs). Observer states and observer organizations also attend Council meetings.

The Gwich'in of Alaska, the Northwest Territories and the Yukon work together in the Arctic Council and on the Porcupine Caribou Herd Management Board, an international, multi-level (indigenous, regional and national government) co-management body. All over the world, the borders of nation states bisect tribal homelands. Both the Inuit and the Saami homelands bestride four states. The Arctic Council exists, in part, to reconnect these peoples. Nowhere else is there a forum where nation states and international indigenous groups can meet. Yet even these nation states never hesitate to assert their sovereignty – sovereignty based, in part, on continuous indigenous occupancy. Canada cited the Inuit subsistence harvest as a reason to refuse Norwegians commercial access to the natural resources of the Sverdrup Islands in 1930.[20] In 1953, Canada responded to Arctic sovereignty challenges by Denmark and the United States by relocating seventeen Inuit families from their homelands in Northern Quebec to an almost inhabitable desert in the High Arctic.[21] In 1976, land use studies proved continuous Inuit utilization of eastern Lancaster Sound in the Northwest Passage -- an area the United States considers "an

[20] Letter, British Chargé d'Affaires, Oslo, to the Norwegian Minister for Foreign Affairs, Oslo, November 5, 1930. From "The Development and Decline of Northern Conservation Reserves" by Constance Hunt, 1976, Volume 8 Number 4, pgs. 30-75.
[21] McGrath, Melanie, "The Long Exile: A Tale of Inuit Betrayal and Survival in the High Arctic," 2006

international strait."[22] Based on historic Inuit occupancy, in 1985 Canada's foreign minister drew "straight baselines"[23] around the High Arctic Islands Archipelago to define the country's boundaries. And the 1993 Nunavut Land Claims Agreement clearly states: "Canada's sovereignty over the waters of the arctic archipelago is supported by Inuit use and occupancy."[24]

But sovereignty isn't what it used to be. As the Inuit said in their 2009 Declaration on Sovereignty, they are an indigenous people of the Arctic and, simultaneously, citizens of indigenous nations, Arctic states, and their political subunits. According to the declaration "For Inuit living within the states of Russia, Canada, the USA and Denmark/Greenland, issues of sovereignty and sovereign rights must be examined and assessed in the context of our long history of struggle to gain recognition and respect as an Arctic indigenous people having the right to exercise self-determination over our lives, territories, cultures and languages." With the emergence of a territorial government controlled by a permanent Inuit majority, self-governing First Nations, and the European Union, the concept of sovereignty is now layered and overlapping.

Today, indigenous peoples hold legal title to vast stretches of North America. The 1971 Alaska land claim was the richest in American history. Yukon First Nations now have legal title to more land than exists in all the reserves across southern Canada. The four land treaties that operate as the foundation of Canadian Inuit rights make the Inuit the largest private landowners in the world. Good environment governance or stewardship requires the close coordination of regional, indigenous and national government operations. Canada's Nunavut treaty sets out rules for governing the territory's environment, and, although the Inuit have title to only 20% of the landmass, they are partners in all institutions of land, water and wildlife management. In this way, subsistence harvests, sustainability and stewardship are all linked to evolved notions of

[22] See Inuit battle to shut US air base http://www.thewe.cc/weplanet/news/inuit_battle_to_shut_us_air_base.htm
[22] From "Inuit and the Nunavut Land Claims Agreement: Supporting Canada's Arctic Sovereignty" by Terry Fenge, 2007, Policy Options.
[23] Joe Clark to the House of Commons, Ottawa, September 10, 1985. (OiC - SOR 8S 872~ PC 1985-2739; (1985) 1 19 Can. Gaz. 11' p. 3996)
[24] Section (15.1.1(c))

sovereignty.[25] Environmental lawyer and chair of the Canadian Arctic resources Committee, Charles Burchill goes further to suggest that the principles of sustainability and stewardship can and will evolve through processes of mediation, accommodation and consensus-building. "Put differently, the benefits of these processes are not limited to the resolution of differences between parties."[26]

5. In the interest of sound environmental stewardship, social peace, the rule of law and good governance, how might present and potential conflicts among indigenous and international treaty signatories be addressed?

In 1993, Canada signed both the Yukon land-claim and self-government agreements and the North American Free Trade Agreement (NAFTA). With respect to subsistence harvesting rights, these two treaties are founded on quite different principles. The Yukon treaty protects the Aboriginal subsistence economy. According to Mayan protesters, the NAFTA outlaws exactly this kind of "protectionism," and this infringement of an ancient right triggered the violent 1994 Zapatista uprising in Chiapas.

Given the historic failures of colonizing states to respect their treaty promises, could rights won in an indigenous treaty be subordinated to those framed in new international agreements? Canada's general intentions on this score could not be clearer. For example, the final agreement for Yukon's Carcross-Tagish First Nation reads: "Where there is a conflict between this chapter and the 1987 Canada-USA Agreement on the Conservation of the Porcupine Caribou Herd, the 1985 Porcupine Caribou Management Agreement, or the Treaty between the Government of Canada and the Government of the United States of America concerning Pacific Salmon, those agreements and the Treaty shall prevail to the extent of the conflict." [27] As international law expert Michael Byers noted, "this approach is the opposite of that taken by the Privy Council in the *Labour Conventions*

[25] Franklyn Griffiths comment, Arctic 2030 National Planning Conference, Ottawa, June 3, 2009.
[26] Chuck Burchill e-mail to Tony Penikett, Wednesday, January 20, 2010
[27] Carcross-Tagish First Nation Final Agreement, 16.3.11
http://www.cyfn.ca/uploads/xy/qp/xyqpsa2WYclywzkluT81DA/ctf_e1.pdf

Case, which has protected provincial jurisdiction across Canada ever since 1937."[28] Constitutionalist John Whyte adds "There is lots of domestic law evidence …that sovereignty has been reconstructed into a notion of regime multiplicity; the ideas of honour of the Crown and duty to consult suggest that we have found doctrines that condition the claims of national sovereignty."[29]

Lawyers for the Inuit find it curious that Canada would elevate trade treaties while systematically dismissing the less convenient aspects of other international instruments: for example, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) adopted by the UN General Assembly on September 13, 2007. Article 36 of the UNDRIP states that contemporary political realities of the ICC, the Saami Council and the Arctic Council: "Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across the borders. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right."

The Nordic countries supported the UNDRIP, although Sweden was one of several countries expressing concerns about the concept of collective human rights. The Russian Federation abstained, arguing that it could not accept the provisions on lands and resources. Yet, following a visit to Russia In October 2009, James Anaya, the United Nations Special Rapporteur on the situation of indigenous peoples, noted, "the Government of the Russian Federation has stated its support for most of the provisions of the Declaration."[30]

[28] Michael Byers e-mail to Tony Penikett, March 9, 2009; *A.G. Can.* v. *A.G. Ont. et al.* (Labour Conventions Case), [1937] 1 D.L.R. 673.
[29] John Whyte e-mail to Tony Penikett, July 21, 2009
[30] "United Nations Expert On Indigenous People Concludes Visit To The Russian Federation," Wednesday, 21 October 2009
05:26)http://www.unhchr.ch/huricane/huricane.nsf/0/7847C99256608064C1257651004FBB67?opendocument

Canada and the United States joined a minority of four countries (Australia, Canada, New Zealand[31] and the United States) in voting against the UNDRIP.[32] In Canada, both Conservative and Liberal administrations thought that the declaration was not "feasible"[33] because adoption would be inconsistent with Canadian law and treaty-making policy. In the words of Inuit organization lawyer and negotiator John Merritt, this leaves the Canadian Government in the peculiar position of arguing, "that the reach of international human rights instruments (UNDRIP qualifies) can be confined to those countries that vote for them."[34] It might also be successfully argued that rights under domestic treaties have status set out in international human rights law without equating or conflating domestic and international treaties.

Inevitably, pessimists may insist that, if liberal nations such as Canada do not live up to their legal commitments in the Kyoto accords or indigenous treaties, there is little hope of achieving environmental justice or inter-societal reconciliation. The pessimist may also conclude that, despite the innovative arrangements benefiting indigenous peoples and, not incidentally, the environment in Alaska, Canada, Finnmark and Greenland, nation states still rule, treaties are made to be broken, and Arctic lands and waters are destined for despoliation. As one example, despite the commitment in the Nunavut Agreement requiring Inuit involvement in negotiations of international wildlife agreements[35] that may affect their harvesting rights, the recent Canada/USA

[31] Danika Littlechild danikabillie@yahoo.ca
Tuesday, April 20, 2010 3:29 PM
"New Zealand ratifies UN Declaration on the Rights of Indigenous Peoples"

Danika B. Littlechild, B.A.(Hons.), L.L.B.

[32] The new Labour government has since reversed Australia's position.
[33] John J. Noble comment, 2030 North Conference: Beyond Our Borders: Modern Treaties in the International Arena Ottawa, June 3, 2009.
[34] John Merritt e-mail to Tony Penikett, July 7, 2009: Michael Byers adds: "Which is correct -- if the treaty or declaration is not a codification of customary international law."
[35] NLCA: "PART 9: INTERNATIONAL AND DOMESTIC INTERJURISDICTIONAL AGREEMENTS
5.9.2 The Government of Canada shall include Inuit representation in discussions leading to the formulation of government positions in relation to an international agreement relating to Inuit wildlife harvesting rights in the Nunavut Settlement Area, which discussions shall extend beyond those discussions generally available to non-governmental organizations."

Memorandum of Agreement on was "negotiated without any input" from the Inuit signatories.[36]

The optimist might nonetheless counter that, while most environmental laws and treaties remain unimplemented or ignored, public debate and the evolution of law over the last fifty years should raise hope that states may accept new forms of governance. The agreements made with indigenous peoples in Canada, the United States, Norway and Denmark can contribute to sound stewardship. Given this recent history, are Arctic policy makers ready to lift their eyes to horizons fifty years out and beyond?

Four of the Arctic Eight have taken positive steps in advancing indigenous rights and protecting the environment. All of the eight, while coveting Arctic resources, have shown some consideration for the Arctic environment. Might these countries also consider the opening up of Arctic Council debates, the writing of new Arctic accords or the crafting of new multi-level agreements between Arctic states, Arctic indigenous peoples and regional governments from around the Circumpolar North?

6. To reduce the potential for conflict and increase the possibility of resolving disputes at the intersection of indigenous and international treaties, three principles or rules of multilevel governance might operate: indigenous representation; self-designed mediation; and independent adjudication.

a. Indigenous Representation

In compliance with the obligations outlined in the UNDRIP, and consistent with American, Canadian and European legal norms, the first principle, rule or norm could be that of indigenous representation. When the negotiation of a new international agreement may affect the rights of indigenous treaty holders (or other legitimate stakeholders, such as county, regional or territorial governments,) those stakeholders shall be represented on the negotiating team of each nation state engaged in those negotiations.

[36] Terry Fenge e-mail to Tony Penikett, July 8, 2009.

Some, but not all, of Canada's indigenous treaties contain clauses on the nation state's international obligations regarding cooperative conservation.[37] The Yukon Final Agreement calls for Canada to make reasonable efforts to ensure that Yukon First Nation interests are represented when issues involving fish and wildlife management arise in international negotiations. The Labrador Inuit Final Agreement includes similar language in relation to aquatic plants, fish habitat, management and stocks. Agreements with Yukon First Nations and the Sahtu Dene and Métis affirm that amendments to international treaties should not diminish indigenous peoples' rights. Three recent Canadian treaties contain provisions about dispute resolution, arbitration, and an "obligation to consult with First Nations in respect of the development of positions which Canada will take before an International Tribunal where an FN Government Law has given rise to an issue concerning the performance of an International Legal Obligation of Canada."[38]

In May 2008, representatives of the five coastal nations bordering the Arctic Ocean met in Greenland to draft the Illulissat Declaration. The five nation states declared the 1982 United Nations Convention on the Law of the Sea (UNCLOS) as the basis for the resolution of all outstanding arctic maritime issues. UNCLOS may be an important instrument for resolving competing sovereignty claims on the continental shelf but it is far from the only tool in the kit of Arctic policy makers. They made no reference to international law on the rights of indigenous peoples. Canada, for its part, did not invite any Inuit representative to join its Illulissat delegation. Nor were any of the Canadian-based Permanent Participants invited to the follow-up meeting of the Arctic Five at Chelsea, Quebec. This marked a sharp demotion from their status in the Arctic Council and led inevitably to questions about that body's future. With a pointed reminder that the Arctic Athabaskan Council and five other Arctic Indigenous Peoples organizations are permanent participants to the eight-nation Arctic Council, Bill Erasmus observed, "It

[37] See Gwich'in Final Agreement, 12.6, Management of Migratory Species

makes no sense for us to be included in the Arctic Council but excluded in meetings of the five Arctic Ocean states."[39]

It was to protest their exclusion from the Illulissat gathering, that the Inuit of Canada, Alaska, Russia and Greenland issued their Circumpolar Sovereignty Declaration, which builds on modern treaties and serves notice to all nation states that the Arctic is the Inuit homeland. Section 4.2 reads: "The conduct of international relations in the Arctic and the resolution of international disputes in the Arctic are not the sole preserve of the Arctic states or other states, they are also within the purview of the Arctic's indigenous peoples." The Inuit declaration cites the UN Declaration on the Rights of Indigenous Peoples and the Inuit's rights as a people. Some lawyers think that argument "overreaches" because the UN Declaration is neither a binding treaty nor customary law and is opposed by three of the four Arctic states in which the Inuit live.[40]

Others believe that the Declaration is now an instrument of international law and Canadian courts are free to make appropriate use of it in rendering judgments; John Merritt says, "Some or all of it may, especially over time, come to be accepted as an accurate summary of evolving customary international law. The Law of the Sea convention has matured in that fashion, even in the absence of universal active endorsement."[41] Michael Byers agrees that it's an instrument but not a binding instrument. "Courts can certainly refer to it as 'soft law'." How a can Canada insist that the UN Declaration has "no legal effect," having on other occasions expressed support for such customary rules "or acquiesced in their development for too long a time? Byers wonders"[42] Like the United States and Canadian Governments, Arctic expert Oran Young remains a skeptic as to the Declaration's legal weight. "It's hard to know how the Declaration will evolve in terms of legal status," he says. "Right now, I would be

[38] See Footnote 28
[39] Bill Erasmus, "Indigenous Representatives Excluded from A-5 Meeting," Arctic Council Indigenous Peoples Secretariat press release, Thursday, 18 February, 2010
[40] See Michael Byers "Who Owns the Arctic? Understanding Sovereignty in the North", 2009, p. 113.
[41] John Merritt e-mail to Tony Penikett, July 8, 2009.
[42] Michael Byers e-mail to Tony Penikett, November 16, 2009

reluctant even to call it soft law. In any case, the comparison with UNCLOS does not seem apt."[43]

Although the Inuit are no longer prepared to accept international relations as the exclusive preserve of nation states, they do not seek conflict. Just as cooperation and adaptation were necessary for Inuit survival in the Arctic, they would like the Arctic states to demonstrate similar qualities. According to the declaration of sovereignty, the Inuit see themselves as "partners in the conduct of international relations in the Arctic" and appeal for coordinated response to the climate change challenge and the pursuit of "global environmental security."[44]

The Dene, Inuit and Saami have all expressed ongoing concerns about trans-boundary bird, caribou, reindeer, fish and whaling issues, as well as land rights negotiation and implementation. All of these issues suggest the need for new kinds of Arctic governance, which could include accords between regional governments from around the arctic region, international agreements between indigenous treaty holders. Could the Arctic Council act as a forum for discussion of contentious issues between indigenous and state parties, or perhaps even a "soft" agreement on "principles for dispute resolution for the mediation and adjudication of "international" disputes, including those that may emerge between indigenous treaty holders and state signatories of international agreements?

b. Self-designed mediation

The second principle, rule or norm could be that *self-designed mediation,* expressed as follows: the parties to a dispute may select tools or shape procedures to address a specific problem. Ideally, the process should fit the problem. The process will then be evaluated in response to the actual experience and, if necessary, redesigned. The parties will control the process, its costs and its outcomes. Agreements for such processes should build in

[43] Oran Young e-mail to Tony Penikett, August 12, 2009.
[44] From 3.3.9 A Circumpolar Inuit Declaration on Sovereignty in the Arctic: The Evolving Nature of Sovereignty in the Arctic.

consultation at all stages, creating "loop-backs" to negotiations and, ideally, providing low-cost and timely determinations.[45]

In disputes between indigenous rights holders and the signatories of international treaties all parties should participate in designing models of mediation best suited to the problems. The Alaskan Tlingit scholar William Demmert suggested that disputes between indigenous rights-holders from two nations might lend themselves to customary or traditional indigenous practices such as healing circles, the talking stick and consensus building. In any event, the self-design principle could still operate.

In self-design's simplest form, states and indigenous parties in dispute might agree to the appointment of a neutral, single-issue fact-finder. This kind of process can make a timely, cost-efficient contribution to reconciliation between parties.[46]

Mediation allows the parties involved to choose their own neutral experts, conciliators, arbitrators or judges, and to set their own schedules. When mediation works, it renders resolutions tailored to the parties' needs, which increases the likelihood of coherence with a cultural community's values. Mediation and other non-binding processes do not require any legislative framework. They can be structured solely by agreement between the parties or on a contractual basis. Even while formal court proceedings are underway, parties can reach informal settlements, which may then be filed in court and enforced by judges.

Burchill wonders if these three principles or rules of multilevel governance (indigenous representation, self-designed mediation and independent adjudication) should be given equal weight or value because independent adjudication applies only if mediation has been tried and proven unsuccessful. He agrees that mediation deserves recognition as a principle underpinning multilevel governance. "Unfortunately, it is only gaining

[45] From "First Nations Treaty Negotiations/Litigation: Discussion of Dispute Resolution Processes" by Stan Lanyon Q.C. and Tony Penikett, 2003, Treaty Negotiations: Key Questions. , 16 April 2003, at Vancouver, B.C, Available from http://www.sfu.cadialog/publications/Treaty_Key_Questions.pdf

[46] See Tony Penikett "*Reconciliation: First Nations Treaty Making in British Columbia,"* 2006, chapter 17

acceptance slowly in environmental circles. For example, while the Canadian Environmental Assessment Act makes provision for mediation, I am not aware of any instance to date where it has been utilized."[47]

c. Independent adjudication

The third principle, rule or norm that of *independent adjudication* might be expressed as follows: When disputes between indigenous and international treaty signatories defy mediation, then the parties may agree to submit the dispute to independent third-party adjudication.

Since 1982, when the Canadian constitution recognized "existing aboriginal and treaty rights" in a new *section 35*, the Supreme Court of Canada has busied itself interpreting the language and meaning of the amendment. In a series of decisions from *Sparrow* to *Haida*, the court has enlarged Canadians' understanding of aboriginal rights and title. However, some indigenous parties might rightly be reluctant to endure the expense and uncertainty of lengthy judicial processes in respect to their fundamental rights.

Why might the failure to honor indigenous treaty commitments or meet international legal standards be anything but domestic in nature? There are at least two reasons. First, a failure to respect the rule of law is surely a sign of bad governance. In 1999, Miguel Alfonso Martinez, the United Nations Special Rapporteur on indigenous treaties found that for five hundred years the colonial powers had consistently failed to honourably implement the provisions of agreements they had made with indigenous nations.[48] How then could it be in the interests of any Arctic state to perpetuate this historic injustice?

The second reason is that indigenous treaties are still, in some respects, "international." Article 40 of the UN Declaration on the Rights of Indigenous Peoples reads: "Indigenous peoples have the right to access to and prompt decision through just and fair procedures

[47] See Footnote 23

[48] See "Study on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations" in United Nations Commission on Human Rights Sub-commission on Prevention of Discrimination and Protection of Minorities

for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights." Diplomats may argue that Article 40 contemplates only access to impartial tribunals operating under domestic law but since the adoption of the UN Declaration, some lawyers think it may be argued that treaty rights have status under international human rights law without the treaties themselves having, as of yet, the status of international treaties.[49] Indeed, as noted, Inuit leaders from four Arctic States have asserted rights and responsibilities as a people under international law.

Colonial era treaties between European states and indigenous nations were undoubtedly international but over time they were "domesticated" by settler governments.[50] Canada's Supreme Court has decided that indigenous treaties are *sui generis*, -- meaning they no longer have the status of international treaties -- a view fiercely disputed by indigenous groups who signed treaties during the colonial period.[51] And, as lawyer Shelley Wright points out this debate is far from over.[52] If one holds to the idea that indigenous treaties have the character of "international" agreements, the court may not be seen as truly "independent" because all nine of Canada's Supreme Court justices are appointed by the federal government, one of the parties to the treaties. An arbitration panel or tribunal, by contrast, would normally have both indigenous and government representatives, with a neutral chair chosen both parties. This structure would help guarantee the panel's independence. In his 1999 report to the United Nations, Martinez recommended that all colonial states create bipartite courts to address treaty implementation issues.

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[49] John Merritt in private conversation with Tony Penikett, 2030 North Conference, Ottawa, June 2, 2009.
[50] See Pablo Gutiérrez Vega, "The Municipalization of the Legal Status of Indigenous Nations by Modern (European) International Law" in Law & Anthropology, Volume 12, pp. 17–54 (special editors Kuppe, R. and Potz R.). Martinus Nijhoff Publishers, 2005. © Koninklijke Brill NV, Leiden, 2008 DOI: 10.1163/187197308X346814
[51] See Cherokee v. Georgia, United States Supreme Court, (1831)
[52] Shelly Wright e-mail to Tony Penikett, Tuesday, December 22, 2009. "Professor Sakej Henderson of the Native Law Centre in Saskatoon has argued for many years on the international and constitutional basis of existing treaties: Henderson 'Treaty Governance" in Belanger, Yale D. ABORIGINAL SELF-GOVERNMENT IN CANADA: CURRENT TRENDS AND ISSUES (3d edition) Purich Publishing, Saskatoon, 2008'."

As far back as 1704, the British Privy Council, in a treaty interpretation case, *Mohegan Indians v. Connecticut,*[53] declared that independent third-party tribunals should decide such cases. In 1975, New Zealand established the Treaty of Waitangi Tribunal, a bi-national and bilingual court to adjudicate treaty disputes. The tribunal is independent but its judgments are not final. The principle of independent and final adjudication of treaty disputes still has merit, though no such tribunal operates in any of the Arctic states.

In 1923, the Cayuga chief Deskaheh journeyed to Geneva to lobby the League of Nations for recognition, based on the Haldimand Treaty of 1784, of the Six Nations Iroquois Confederacy as an independent state. Holland and Persia supported the petition; Britain and Canada opposed it. Representations by other indigenous leaders to the United Nations led to the creation of the Permanent Forum on Indigenous Issues in 2002 but, to date, no indigenous people has been recognized as a nation state and given a seat at the United Nations General Assembly. This means they have only limited access to international tribunals.

The International Court of Justice at The Hague would turn away indigenous petitioners because only nation-states can litigate in the ICJ. In 2005, Inuit leaders from Canada and Alaska filed a petition with the Inter-American Commission on Human Rights in Washington, D.C. alleging that climate change violated Inuit rights but they were turned down on the basis that they had not first exhausted domestic remedies. If there exists no such forum for Arctic indigenous peoples, might not they need to invent one? As Burchill argues, "the forum need not be a court or a tribunal. It could be an independent, knowledgeable commission or panel established only for the purpose of dealing with the issue of whether or the extent to which climate change violates Inuit rights."[54]

7. An Arctic Indigenous Treaty

Debating Arctic environmental regimes on March 26, 2009, members of the European

[53] See Bruce Clark, "Justice in Paradise", 1999, pgs. 89-98.
[54] See Footnote 23

Parliament suggested that an Arctic Treaty might prevent social discontent by amplifying indigenous and other northern voices. Michael Byers suggests that the Arctic's indigenous peoples might instead negotiate a "treaty" among themselves -- one that incorporates principled norms of dispute resolution and invite nation states to sign on. The idea is not without precedent. When the Dene in Canada and Alaska united for the purposes of becoming Permanent Participants on the Arctic Council, their agreement was styled "The Arctic Athabaskan Treaty." The draft Nordic Saami Convention, a work in progress, might develop a similar character.

One possibility is that the Arctic Council's Permanent Participants, their constituent governments or political organizations could craft an Arctic Indigenous Treaty articulating their "international" interests. The accord could commit the signatories to the three principles, rules or norms outlined here of representation, mediation and adjudication. Later endorsement by any of the Arctic states could perhaps improve the agreement's status as a legal instrument. Koivurova, who likes the indigenous treaty idea, is not sure how state endorsement would elevate it to the status of an international treaty. He points out that the draft Nordic Saami Convention raised the possibility that Saami parliaments could be formal parties to the treaty, "but this was dismissed since it was seen as creating a hybrid convention with no clear legal status."[55] In any event, the negotiation of such a treaty would be expensive and time-consuming, but with the support of private or public sector funders, it might be a worthy initiative. And the project could begin with the signatures of any two of the six Permanent Participants.

In the interest of protecting the Arctic environment and its peoples, communities involved in Arctic governance debates in the circumpolar regions may want to consider some new rules for reconciling intersocietal conflicts, particularly those between indigenous and international treaties, and indigenous and national governments. If so, an Arctic Indigenous Treaty may be an idea whose time has come.

8. Conclusion

[55] See Footnote 11

Among the new Arctic realities are numerous treaties and other agreements with the region's indigenous peoples, including new forms of indigenous governance, key provisions of which remain unimplemented, although enshrined in the laws of nation states, Worse, the dispute resolution provisions of these agreements appear to be largely inoperable, which might undermine respect for the governments involved and for the rule of law, both of which are essential to good environmental stewardship and successful climate change strategies, especially on an international scale. To reduce the potential for conflict and increase the possibility of resolving disputes at the intersection of indigenous and international treaties, three principles or rules of multilevel governance might operate in the Arctic: guarantees of indigenous representation; self-designed mediation by parties to disputes; and, finally, independent adjudication. If no other instruments become available, these three principles or rules might be embedded in a new Arctic Indigenous Treaty negotiated between the Arctic Council's Permanent Participants or other indigenous parties.
(6,662)

Tony Penikett, Vancouver, May 20, 2010
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