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KA WERA HOKI I TE AHI, E MANA ANA ANŌ:[†] MULTI-JURISDICTIONAL APPROACHES TO BIODIVERSITY AND CLIMATE CHANGE IN AOTEAROA NEW ZEALAND

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[*] He uri ahau nō Ngāti Porou, Te Arawa me Inia hoki. I te taha o tōku māmā ko Te Whānau a Ruataupare tōku hapū. I te taha o tōku pāpā ko Tapuika raua ko Gurajati tōku hapū. E mihi ana ki a Bjørn-Oliver Magsig rātou ko Carwyn Jones ko Maria Bargh. Aku mihi ki a Ngā Rangahautira rātou ko Sam Taylor ko Hinemoana Markham-Nicklin ko Toni Wharehoka.

[†] "Ka wera hoki i te ahi, e mana ana anō — While the fire burns, the mana is effective." Richard Benton, Alex Frame and Paul Meredith describe this whakataukī as emphasising the link between mana and an active relationship to the land. See 'Mana Whenua" in Richard Benton, Alex Frame and Paul Meredith (eds) *Te Mātāpunenga: A Compendium of References to the Concepts and Institutions of Māori Customary Law* (Victoria University Press, Wellington, 2013) at 180. Hirini Moko Mead describes this whakataukī as from that relationship to the land, the person or group referred to derives mana. See Hirini Moko Mead and Neil Grove (eds) *Ngā pēpeha a ngā tīpuna: The sayings of the ancestors* (Victoria University Press, Wellington, 2001) at 197.

Abstract

This paper addresses the monolithic exercise of exclusive state sovereignty within the domestic and international framework for biodiversity. There is a significant lacuna between the protection and use of indigenous traditional knowledge and the ability of indigenous peoples to exercise jurisdiction over lands and natural resources. This paper is focused on Aotearoa New Zealand and the relationship between Māori and the Crown. I argue that indigenous relationality with the environment disrupts the notion of exclusive state sovereignty in responding to the effects of climate change on biodiversity. I consider this for several reasons.

First, Māori jurisdiction is recognised in both domestic and international contexts. The protection and use of indigenous traditional knowledge and customary rights and interests requires the continuation of indigenous legal traditions. Despite this, multi-jurisdictional approaches to lands and natural resources are reduced to the incorporation of Māori rights and interests within the prevailing State legal system. Secondly, the compartmentalisation of these rights and interests divorces distinctly Māori concepts from the cultural context in which they derive. The irony is that the concept of self-determination recognises that it is the State legal system which displaces indigenous peoples from their territories therefore suppressing their ability to exercise meaningful jurisdictional autonomy within a state. Thirdly, the shortcomings of the current framework are demonstrated by the prevalence of jurisdictional challenges because of non-compliance with consultation and consent-based safeguards for the protection and use of indigenous traditional knowledge, the lack of recognition for Māori legal traditions in co-governance models, and independent expressions of self-determination through the practice of tikanga Māori.

Finally, where indigenous legal traditions are recognised as equal and legitimate systems of law, Māori law provides a new way of conceptualising ecosystem-based management, diverse economies and sustainable use and development within a unique legal, political and constitutional context.

Key words: Climate change; Biodiversity; Indigenous; Māori; Sovereignty; Self-determination.

Contents

I Introduction

This paper addresses the complex interactions between indigenous and State legal traditions in responding to the effects of climate change on biodiversity. Part II describes environmental governance as a type of network governance between state and non-state actors. There are key sites of power within this governance framework that indigenous peoples are displaced from. These key sites of power include prevailing political and legal systems, ecosystem-based management and sustainable development. I argue that indigenous relationality with the environment disrupts the notion of exclusive state sovereignty over Aotearoa New Zealand's biodiversity framework. I consider this for several reasons outlined below.

Part III examines how environmental network governance is shaped by legislation, policy, treaties and conventions in domestic and international law. I consider indigenous self-determination to be a scaled and dynamic concept. I identify that states reject the jurisdictional dimension of self-determination and instead endorse a rights-based approach within the prevailing State legal system. I examine the compartmentalisation of indigenous rights and interests in biodiversity governance to illustrate why a multi-jurisdictional approach to biodiversity is needed. Part IV identifies ecosystem-based management as a method of recognising the intersecting drivers of biodiversity loss and climate change. I position ecosystem-based management within the context of Māori legal traditions as a way of managing environmental risks within a unique legal, political, and constitutional context.

One of the challenges for implementing ecosystem-based management is economic development. Part V outlines the relationship between indigenous peoples, extractive industries and climate financing. I identify the following safeguards for indigenous peoples participation: recognition and respect for traditional knowledge; consultation; and free and informed prior consent. I examine how these safeguards are violated by states and business actors. I argue that giving preference to indigenous peoples for resource extraction or climate mitigation and adaptation projects maximises the protection and utility of traditional knowledge. One of the concerns for indigenous peoples is whether prevailing modes of neoliberal development are contrary to indigenous relationality with the environment. Part VI identifies how indigenous enterprises produce diverse forms of economic and political recognition distinct from other actors. I discuss the reimagining of economic models by applying the Māori legal concepts of mana, utu, kaitiakitanga, whakapapa and whanaungatanga. I demonstrate how positioning economic development

within Māori legal traditions ensures the sustainable use and management of land and biological resources.

Nevertheless, indigenous jurisdiction is not supported by the current constitutional arrangements. Part VII considers the concept of self-determination within the context of proposed models for constitutional change in Aotearoa New Zealand. I suggest self-determination confers two types of authority: independent authority exercised according to distinct legal traditions; and authority to participate in the prevailing domestic and international legal systems. I suggest the interaction between these two types of authority has the potential to produce a hybrid-system between indigenous and State legal traditions. However, one of the challenges is that indigenous legal traditions are not recognised as an equal or legitimate system of law. I focus primarily on the independent exercise of authority outside of the State legal system. I argue that indigenous jurisdiction is often superceded by State law where competing jurisdictional claims arise. Part VII examines the practice of rāhui as an example of a multi-jurisdictional approach to climate change and biodiversity. I argue that the legitimacy of the current constitutional arrangements are challenged by dynamic expressions of indigenous autonomy outside of the prevailing State legal system.

I conclude a hybrid-system requires indigenous jurisdictional autonomy to be equalised and respected, as well as providing for indigenous participation in the State legal system. It is clear that multi-jurisdictional approaches already exist, yet the recognition of indigenous jurisdiction outside of the State legal system is not supported by the current constitutional arrangements.

II Environmental Governance and Jurisdiction

A Governance

Environmental governance is a form of network governance which occurs through a series of interactions between state and non-state actors engaged in at different stages of negotiations, processes, and traditions.[1] These interactions shape how power is exercised

[1] Maureen G. Reed and Shannon Bruyneel "Rescaling environmental governance, rethinking the state: A three-dimensional review" (2010) 34(5) Progress in Human Geography 464 at 647; Robert Joseph and others *Stemming the Colonial Environmental Tide: Shared Māori Governance Jurisdiction and Ecosystem-Based Management over the Marine and Coastal Seascape in Aotearoa New Zealand - Possible Ways Forward* (Paper prepared for the National Science Challenge Sustainable Seas, University of Waikato, 2020) at 24-26.

and who gains legitimacy and authority in the biodiversity regime.[2] As issues of governance become more complex, the limitations of governments (domestically) and states (internationally) are more apparent.[3] Internationally, a transnational governance regime is required to reduce global emissions and meet temperature goals agreed to by states.[4] Despite this, the principle of sovereign equality poses significant barriers to implementing these targets domestically through nationally determined contributions.[5] Domestic governance becomes increasingly complex given its cultural and contextual specificity.[6] For indigenous peoples, colonialism imposes an additional layer of complexity. Colonialism has displaced indigenous peoples from key sites of power which include prevailing political systems and governments, jurisdiction over land and natural resources, economic development, as well as ecosystem-based and sustainable environmental management.[7] Good governance therefore requires greater authority for indigenous peoples to govern different key sites of power according to their own legal systems. However, terms such as co-management or joint management refer to a decision-making process comprising indigenous peoples and the state *within* the administration of conservation policy.[8] Co-management arrangements operate within the prevailing State legal system and indigenous peoples are only permitted to express themselves in ways that conform to the institutions and practices of state management.[9] I argue the recognition of

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2 Tyler McCreary and Jerome Turner "The contested scales of indigenous and settler jurisdiction: Unist'ot'en struggles with Canadian pipeline governance" (2018) 99(3) Studies in Political Economy 223 at 234.

3 Robert Joseph and others, above n 1, at 42.

4 See Emily Webster and Laura Mai "Transnational environment law in the Anthropocene" (2020) 11 Transnational Legal Theory 1 at 5-6.

5 UN Special Rapporteur on the Rights of Indigenous Peoples *The Impacts of Climate Change and Climate Finance on Indigenous peoples' rights* A/HRC/36/46 (1 November 2017) at 78-81; Klaus Bosselmann "Environmental trusteeship and state sovereignty: can they be reconciled?" (2020) 11 Transnational Legal Theory 47 at 49.

6 Robert Joseph and others, above n 1, at 26.

7 Robert Joseph and others, above n 1, at 4 and 15.

8 Catherine Iorns Magallanes "Māori Co-governance and/or Co-management of Nature and Environmental Resources" in Robert Joseph and Richard Benton (Eds) *Waking the Taniwha: Māori Governance in the 21st Century* (Thomson Reuters, Wellington, 2021) 301 at 305.

9 Māori governance has increased dramatically with new entities arising out of the historical claims Treaty of Waitangi settlement process known as post-settlement governance entities. Nonetheless, entities engaged in co-governance/co-management arrangements are subject to legislation and policy which impose limitations on the exercise of jurisdiction or tino rangatiratanga. See Carwyn Jones *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (Victoria University Press, Wellington, 2016) 52-53; Maria Bargh and Carwyn Jones "Māori Interests and Rights: Four Sites at the Frontier" in Evan Berman and Girol Karacaoglu (Eds) *Public Policy and Governance Frontiers in New Zealand: Public*

multiple jurisdictional approaches is an integral aspect of good governance, challenging the exclusive authority of the state in responding to the effects of climate change on biodiversity.[10]

B Jurisdiction

One of the consequences of territorial sovereignty being the dominant mode of jurisdiction is that it denies the existence of other jurisdictions, particularly those of indigenous peoples.[11] Conceptualising jurisdiction as territorial sovereignty reduces the need to think about where indigenous legal traditions meet State legal traditions. Therefore, exercises of indigenous jurisdiction are considered extralegal and subsequently assimilated within the prevailing State legal system as something less than law, such as custom or culture.[12] Despite this, the common law was one of a plurality of jurisdictions. Each common law system operates within its own state and is applied according to the local circumstances of that colony.[13] Each jurisdiction is an autonomous body of law, with its own court system and procedures.[14] However, the common law tradition has shown itself incapable of engaging meaningfully with the meeting of indigenous and State legal traditions.[15] I argue that challenges to jurisdictional authority only go as far as incorporating indigenous legal concepts as part of the values of the common law, rather than its own independent system of law for responding to issues such as climate change. Nevertheless, the plurality of the common law jurisdictions demonstrates that multi-jurisdictional approaches can be brought into relation with one another, particularly to sustain a relationship between the development of law and a particular territory.[16]

Policy and Governance, Volume 32 (Emerald Publishing Limited, Bingley, 2020) 71 at 78-83; and Catherine Iorns Magallanes, above n 8, at 320.

10 Tyler McCreary and Jerome Turner, above n 2, at 225-230.

11 Shaunnagh Dorsett and Shaun McVeigh *Jurisdiction: Critical Approaches to Law Series* (Taylor & Francis, Oxford, 2012) at 103.

12 At 104.

13 *Ngāti Apa v Attorney-General* [2003] 3 NZLR 643 concerned whether Māori had customary rights in the foreshore and seabed. Elias CJ states "...the common law of New Zealand as applied in the courts differed from the common law of England because it reflected local circumstances" at [17]. She goes on further to say "Any prerogative of the Crown as to property in foreshore and seabed as a matter of English common law in 1840 cannot apply in New Zealand if displaced by local circumstances" at [49].

14 Shaunnagh Dorsett and Shaun McVeigh, above n 11, 37-38.

15 At 114.

16 At 113-114.

C Indigenous Peoples and Jurisdiction

Inherent jurisdiction is the legal and political authority over an area by virtue of connection with the land — of being indigenous peoples.[17] Authority is embedded in whakapapa to indigenous culture, place and political systems.[18] Internationally, the concept of lands, waterways and seas as part of whakapapa creates and maintains relationships, and responsibilities of indigenous peoples globally to the environment.[19] It follows that indigenous relationality with the land implies jurisdictional authority, therefore disrupting notions of exclusive sovereignty in responding to climate change and its effects on biodiversity.[20]

Despite this, competing jurisdictional claims over key sites of power remain unresolved. In Aotearoa New Zealand, Māori jurisdiction is specifically recognised in He Whakaputanga o Te Rangatiratanga o Niu Tireni | the Declaration of Independence of the United Tribes of New Zealand 1835 and Te Tiriti o Waitangi 1840. Although declarations and treaties are not strictly binding unless incorporated into domestic law, both are constitutional covenants which are renewed over time, influencing how the Crown recognises indigenous rights codified internationally.[21] The Waitangi Tribunal in *The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* found that He Whakaputanga was entered into to protect Māori jurisdictional authority.[22] It follows that article II of Te Tiriti o Waitangi 1840 preserves Māori jurisdictional authority through the guarantee of tino rangatiratanga (authority or self-determination).[23] The recognition of Māori jurisdiction therefore implied the continuation of Māori legal traditions and dispute resolution

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17 Robert Joseph and others, above n 1, at 46.

18 Edward Taihakurei Durie *Custom Law* (Research Paper in Treaty of Waitangi Research Unit, Victoria University of Wellington, 1994); Hirini Moko Mead *Tikanga Māori (Revised Edition): Living by Māori Values* (3rd ed, Huia, Wellington, 2019) at 303-317.

19 Robert Joseph and others, above n 1, at 46.

20 *Land Back: A Yellowhead Institute Red Paper* considers the recognition of different indigenous peoples jurisdiction over natural and physical resources in Canada. It categories jurisdiction by recognition (by State law) and resurgence and reclamation (independent of State law) and concludes that Indigenous jurisdiction can indeed help mitigate the loss of biodiversity and climate crisis. See Yellowhead Institute "Land Back: A Yellowhead Institute Red Paper" (October 2014) <www.redpaper.yellowheadinstitute.org> at 12.

21 Robert A. Williams Jr *Linking Arms Together: American Treaty Visions of Law and Peace, 1600– 1800* (Routledge, New York, 1999) at 61; Claire Charters "Māori and the United Nations" in Maria Bargh (Ed) *Resistance: An Indigenous Response to Neoliberalism* (Huia Publishers, Wellington, 2007) 147 at 151.

22 Waitangi Tribunal *He Whakaputanga me te Tiriti: The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 14 October 2014) at 520-521.

23 At 526-527.

processes.[24] Hence, ownership, management and governance of the environment requires identifying the *source* of jurisdictional authority. Competing jurisdictional claims are fundamental to the constitutional relationship between indigenous peoples and the state. Internationally, the concept of self-determination is concerned with the legitimacy of exclusive jurisdictional authority. I will discuss this below at Part VII.

I consider tikanga Māori as an independent jurisdiction with an established legal order that is capable of governing areas currently governed by the State legal order. Recognising tikanga Māori as its own jurisdiction foregrounds and normalises Te Tiriti o Waitangi as having established a framework for governing different exercises of authority and the power relations between the Crown and Māori. The exclusivity of State law jurisdiction over biodiversity has required hapū and iwi to become more dynamic in the ways in which they exercise diverse forms of rangatiratanga both within and outside the State legal system.[25] A degree of rangatiratanga may be achieved through participation in the existing biodiversity regime. This reinforces the position of hapū and iwi as mana whenua in their respective areas. However, where conflicts arise, the problem is that Māori are required to seek validation from State law in order to reaffirm their own jurisdiction.

III Aotearoa New Zealand Biodiversity Regime

*A **Domestically**[*]*

1 Te Mana o te Taiao – Aotearoa New Zealand Biodiversity Strategy 2020

In 2000, the New Zealand government launched its Biodiversity Strategy to implement its international obligations under the Convention on Biological Diversity (discussed below).[26] The strategy identifies biodiversity loss as one of the enduring environmental

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[24] Robert Joseph and others, above n 1, at 91.

[25] Maria Bargh "Tino Rangatiratanga: Water under the Bridge?"(2007) 8(2) He Pukenga Kōrero 10 at 10-15.

[*] For the purposes of this paper, I will discuss the following legislation: Resource Management Act 1991; Exclusive Economic Zone and Continental Shelf (Environment Effects) Act 2012 and the Climate Change Response Act 2002. I briefly discuss issues relating to the Conservation Act 1987, Marine and Coastal Area (Takutai Moana) Act 2011, and the Treaty of Waitangi Fisheries settlement. Although beyond the scope of this paper, other legislation relating to biodiversity are as follows: Biosecurity Act 1993; Crown Minerals Act 1991; Fisheries Act 1996; Forests Act 1949; Hauraki Gulf Marine Park Act 2000; Hazardous Substances and New Organisms Act 1996; Marine Mammals Protection Act 1978; Local Government Act 2002; Māori Fisheries Act 2004; Marine Reserves Act 1971; National Parks Act 1980; Native Plants Protection Act 1937; Queen Elizabeth II National Trust Act 1977; Reserves Act 1977; Trade

impacts of colonisation. It acknowledges that the loss of mātauranga in relation to those species has caused disruption to relationships between whānau, hapū and iwi within their traditional territories.[27] The strategy identifies mātauranga Māori as a source of knowledge intimately connected with areas over which mana whenua exercise jurisdiction and recognises the importance of the diversity among different iwi, hapū and whānau.[28] By 2025, the strategy aims to embed te ao Māori perspectives throughout the biodiversity system and recognises the need for sufficient resourcing of Māori to practice their responsibilities as rangatira (leaders) and kaitiaki (guardians).[29]

However, the strategy is a high-level policy instrument and therefore does not identify specific mechanisms, such as co-governance structures, necessary for a genuine partnership model between Māori and the Crown. Nevertheless, the policy supports indigenous jurisdictional authority by recognising New Zealand's international obligations to respect and support the restoration of indigenous traditional knowledge over biodiversity.

2 Resource Management Act 1991

The Resource Management Act 1991 ('RMA') is the main piece of legislation for environmental management in Aotearoa New Zealand. The Act is guided by the principle of sustainable management and governs all activities on the coastal marine area up until 200 nautical miles. The principle of sustainable management requires decision-makers to consider the effects of activities on the environment through various processes, including resource consents, local government management plans and national policy statements.[30]

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in Endangered Species Act 1989; Wild Animal Control Act 1977; Wildlife Act 1953; and various Treaty Settlement legislation.

26 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Taumata Tuarua* (Wai 262, Volume 1, 2011) at 330; See Department of Conservation "Te Mana o te Taiao – the Aotearoa New Zealand Biodiversity Strategy 2020" (August 2020) <www.doc.govt.nz>.

27 Department of Conservation at 33.

28 See also Waitangi Tribunal, above n 26, at 331.

29 Department of Conservation, above n 26, at 48.

30 Section 5 of the Resource Management Act 1992 defines sustainable management:

> In this Act, sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—
> (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
> (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
> (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

The RMA provides a range of provisions to protect Māori rights and interests, as well as participation for Māori in decision-making processes. Section 6 requires decision-makers to "recognise and provide" for protected customary rights and the relationship of Māori and their *traditions* with ancestral lands, water sites, waahi tapu, and other taonga as a matter of national importance. Section 8 requires decision-makers to "take into account" the principles of the Treaty of Waitangi and "particular regard" is given to kaitiakitanga in accordance with s 7(a). The relationship between these provisions requires decision-makers to engage with the environmental effects of any consent application on Māori rights and interests in resource consent processes, local government plans and the issuing of national policy statements.

However, I argue these provisions merely incorporate indigenous rights and interests into the prevailing State legal system. Obligations to "take account of" or "have regard to" fail to recognise indigenous legal traditions as capable of providing the governing framework for environmental management. The lack of Māori jurisdictional authority over consent processes may result in the balancing out of adverse effects on mātauranga and biodiversity in favour of competing priorities.[31] To address this lacuna, the RMA gives local authorities the discretion to transfer decision-making powers to Māori.

a. Transfer of powers and joint-management agreements

Section 33 gives local authorities the power to transfer any of their functions, powers, or duties to a range of public authorities, including to an iwi authority. Moreover, s 188 allows for iwi authorities to apply for the issuing of heritage orders over places of cultural and spiritual significance. Further, s 36B provides for joint management agreements to be entered into between a local authority and iwi. Agreements may provide for the joint performance of any local authority's functions in relation to natural and physical

[31] In *New Directions for Resource Management in New Zealand*, most of the 46 submitters considered changes were required to the Treaty of Waitangi clause. The most popular solution was to change the weighting to 'give effect to'. Iwi and hapū submitters frequently cited section 4 of the Conservation Act 1987, which has a 'give effect to' weighting, as an example of how to address the issue. See Resource Management Review Panel "New Directions for Resource Management in New Zealand" (June 2020) <www.environment.govt.nz> at 100. For further commentary on the balancing out of Māori interests, see Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Wai L Rev 1 at 18; Jacinta Ruru "The failing modern jurisprudence of the Treaty of Waitangi" in Carwyn Jones and Mark Hickford (eds) *Indigenous Peoples and the State: International perspectives on the Treaty of Waitangi* (Routledge, New York, 2019) 111 at 114-121.

resources.[32] Although decision-making powers would remain subject to the RMA, I suggest that the transfer of powers gives greater prominence to concepts such as kaitiakitanga in considering adverse effects.

Despite these mechanisms for enabling Māori authority, these provisions are initiated at the discretion of local authorities, and, in turn, such powers have been used sparingly.[33] The Waitangi Tribunal has found these "significant" powers have failed to deliver partnership outcomes, despite attempts by iwi to invoke them.[34] The lack of power-sharing arrangements has continued to position Māori on the margins as objectors to consent applications.[35] To address this issue, Mana Whakahono ā Rohe was established to improve partnership mechanisms through written agreements between iwi authorities and local government to govern the review of policy statements and local management plans.[36] Unlike the above provisions, iwi can proactively initiate these agreements therefore providing more certainty of participation in decision-making processes.[37] Although these agreements maximise participation, they do not situate *jurisdictional* authority with Māori according to Māori legal traditions.[38] Iwi management plans, for example, do not empower iwi and hapū to exercise authority over matters governed by the Act. This challenge was one of the key issues discussed in the recent RMA review and it was subsequently recommended that new legislation should reflect a greater focus on the relationship between climate change adaptation and tikanga Māori.[39]

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32 Resource Management Act 1990, ss 30 and 31.

33 Catherine Iorns Magallanes identifies that after nearly 30 years since the RMA was passed, the first s 33 transfer of powers to an iwi which took effect in September 2020. Iorns Magallanes acknowledges that it is limited to water quality monitoring, however argues it is an important start and recognises Ngāti Tūwharetoa as kaitiaki and the Tūwharetoa Trust Board as owner of the lake-bed. Likewise, under s 36B there are only two joint management agreements was entered into under the RMA (Ngāti Tūwharetoa and Taupō District Council, and Gisborne District Council and Te Runanga o Ngāti Porou). Iorns Magallanes acknowledges that other joint management agreements have been entered into pursuant to Treaty settlement legislation. See Catherine Iorns Magallanes, above n 8, at 305-306.

34 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Taumata Tuatahi* (Wai 262, 2011) at 113-114.

35 Joseph Williams, above n 31, at 22.

36 Ministry for the Environment "Mana Whakahono ā Rohe guidance" (April 2018) <www.environment.govt.nz>.

37 Resource Management Act 1991, s 58O.

38 Catherine Iorns Magallanes, above n 8, at 308.

39 Resource Management Review Panel, above n 31, at 67.

b. National Policy Statement for Indigenous Biodiversity

Section 52 confers a range of powers relating to the issuing and approval of national policy statements ('NPS'). The purpose of an NPS is to set out the objectives and policies aimed at achieving sustainable management.[40] In relation to biodiversity, the Government has consulted on proposals for a National Policy Statement for Indigenous Biodiversity (NPS-IB) since 2010.[41] The NPS-IB will set out the objectives, policies and implementation requirements for managing natural and physical resources in order to maintain indigenous biodiversity under the RMA.[42]

In 2019, the Government released a draft NPS-IB for public consultation. During the consultation phase, one of the key themes raised by iwi and Māori was that the NPS-IB does not adequately recognise partnership mechanisms and decision-making roles for tangata whenua.[43] Despite the proposal of various governance roles, including on the Biodiversity Collaborative Group, iwi and Māori sought more direct engagement with their authority as mana whenua.[44] Moreover, iwi and Māori referred to the existing inadequacies of RMA as a failure to recognise their jurisdictional authority when considering the language used in the NPS-IB, including "involving", "consultation", "taking all reasonable steps" and "providing opportunities".[45] In contrast, s 4 of the Conservation Act 1987 requires that decision-makers "give effect" to the Treaty principles. Although it is unclear how these provisions work in practice, the Supreme Court in *Ngāi Tai ki Tāmaki* suggested that the words "give effect to" impose a stronger obligation on decision-makers. This obligation may require a degree of preference to be given to mana whenua when granting concessions over conservation estate.[46] Therefore, a "reasonable" Treaty partner may be obliged to consider whether iwi and hapū authority expressed through rangatiratanga

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40 Resource Management Act 1991, s 45.

41 David Hall and Sam Lindsay *Scaling Climate Finance: Biodiversity Instruments* (Mōhio Research, Auckland, 2021) at 15-16.

42 Ministry for the Environment "Draft National Policy Statement on Indigenous Biodiversity" (November 2019) <www.environment.govt.nz>.

43 Ministry for the Environment "He Kura Koiora i hokia: A proposed National Policy Statement on Indigenous Biodiversity - Summary of Submissions" (August 2020) <www.environment.govt.nz> at 44.

44 At 44.

45 At 44.

46 The Supreme Court rejected that priority given to Ngāi Tai ki Tāmaki's interests would constitute a right of veto on the basis that they exercised jurisdiction over the land as mana whenua. See *Ngāi Tai ki Tāmaki Tribal Trust v Minister of Conservation* [2018] NZSC 122, [2019] 1 NZLR 368 at [79]. This approach is consistent with the reasonable degree of preference given to Ngāi Tahu in *Ngāi Tahu Māori Trust Board v Director General of Conservation* [1995] 3 NZLR 553 at 15.

requires their interests to be prioritised over other interests held by those without this corresponding authority.[47]

This approach is consistent with iwi and Māori concerns about the failure to clarify the jurisdictional boundaries between the kaitiaki responsibilities of private landowners and communities, and mana whenua in the NPS-IB.[48] This demonstrates a misunderstanding of kaitiakitanga as a distinctly Māori legal concept which animates the relationships between mana whenua and the natural world.[49] I argue that indigenous relationality cannot be accounted for in any exercise of State law jurisdiction that purports to divorce Māori legal concepts from their cultural context.[50] Despite reference to Māori rights and interests within the indigenous biodiversity framework, the above concerns expressed by Māori on the proposed NPS-IB illustrate that competing jurisdictional claims over biodiversity management continue to remain unresolved.[51]

3 The Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012

The Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 ('EEZ Act') is an effects-based regime which governs the marine space from 12 to 200 nautical miles from the coast to the outer edge of the continental margin.[52] The EEZ Act regulates activities relating to the disturbance and exploitation of the seabed, including

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47 I have argued elsewhere the proper legal framework for decision-makers under s 4 of the Conservation Act 1987 requires the mutual recognition of tikanga as a legal system. This recognises that mana whenua rights and interests should not be "balanced" against others, and that preference be given to those who exercise rangatiratanga. See Rhianna Morar "Ngāi Tai ki Tāmaki and beyond the balancing exercise" (2020) February Māori LR.

48 Ministry for the Environment, above n 43, at 35-36.

49 Maria Bargh and Carwyn Jones, above n 9, at 78.

50 Carwyn Jones, above n 9, at 42; Edward Taihakurei Durie "Justice, Biculturalism and the Politics of Law" in Margaret Wilson and Anna Yeatman (Eds) *Justice & Identity: Antipodean Practices* (Bridget Williams Books, Wellington, 1995) 33 at 34-35. See generally Rhianna Morar "Kia Whakatōmuri te Haere Whakamua: Implementing Tikanga as the Jurisdictional Framework for Overlapping Claims Disputes" (2021) 52(1) VUWLR 197.

51 Ministry for the Environment, above n 43, at 45.

52 Section 10 of the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 defines sustainable management in relation to adverse effects:

> In this Act, sustainable management means managing the use, development, and protection of natural resources in a way, or at a rate, that enables people to provide for their economic well-being while—
> (a) sustaining the potential of natural resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
> (b) safeguarding the life-supporting capacity of the environment; and
> (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment.

mineral and petroleum exploration.[53] The Act is administered by the Environmental Protection Authority ('EPA'), formerly known as the Environmental Risk Management Authority ('ERMA'). The Environmental Protection Authority Act 2011 established an independent decision-making committee ('DMC') to issue resource consent applications.[54] Section 12 of the EEZ Act provides the DMC with specific mandatory requirements that they must comply with to "give effect" to the Treaty principles:

> In order to recognise and respect the Crown's responsibility to give effect to the principles of the Treaty of Waitangi for the purposes of this Act,—
> (a) section 18 (which relates to the function of the Māori Advisory Committee) provides for the Māori Advisory Committee to advise marine consent authorities so that decisions made under this Act may be informed by a Māori perspective; and
> (b) section 32 requires the Minister to establish and use a process that gives iwi adequate time and opportunity to comment on the subject matter of proposed regulations; and
> (c) sections 33 and 59, respectively, require the Minister and a marine consent authority to take into account the effects of activities on existing interests; and
> (d) section 46 requires the Environmental Protection Authority to notify iwi authorities, customary marine title groups, and protected customary rights groups directly of consent applications that may affect them.

The *Trans-Tasman Resources Ltd v Taranaki-Whānganui Conservation Board* litigation has considered whether the prescriptive nature of s 12 constrains the effect of the Treaty principles in decision-making processes under the EEZ Act.[55] Sections 32 and 46 confer procedural requirements on decision-makers to ensure that iwi are notified and given adequate time to consider any effects of proposed activities on their "existing interests". Sections 33 and 59 impose substantive obligations on decision-makers to "take into account" these effects. The High Court held that to give effect to Treaty principles beyond these prescriptive requirements would "overstate" the Crown's obligations.[56] Conversely, the Court of Appeal held that s 12 appears to be a "non-exhaustive" list of the specific ways in which the EEZ Act seeks to implement the Crown's obligations under the Treaty

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53 Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, pt 2.

54 Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, s 52.

55 See *The Taranaki-Whānganui Conservation Board, and other Appellants v The Environmental Protection Authority* [2018] NZHC 2217, [2019] NZRMA 64; *Trans-Tasman Resources Ltd v Taranaki-Whānganui Conservation Board* [2020] NZCA 86, [2020] NZRMA 248; *Trans-Tasman Resources Ltd v Taranaki-Whānganui Conservation Board* [2021] NZSC 127.

56 *The Taranaki-Whānganui Conservation Board, and other Appellants v The Environmental Protection Authority* [2018] NZHC 2217, [2019] NZRMA 64 at [215].

principles.[57] However, the Court considered that whether s 12 is "exhaustive" is more apparent than real so long as the provisions in s 12 are interpreted and applied in a manner that gives effect to the Treaty principles.[58] Nevertheless, the Supreme Court has confirmed that a broad and generous construction of such prescriptive Treaty clauses is required and that an intention to constrain the ability of decision-makers to give effect to Treaty principles through specific drafting should not be ascribed unless such an intention is expressly provided for by Parliament.[59] Despite the Treaty principles being limiting in and of themselves, I have argued elsewhere that the interpretation of s 12 endorsed by the Supreme Court is more conducive to recognising tikanga Māori as a source of law within the State legal system.[60] I will discuss the other provisions relating to the Māori Advisory Committee and definition of "existing interests" below.

a. Ngā Kaihautū Tikanga Taiao | Māori Advisory Committee

The Māori Advisory Committee — Ngā Kaihautū Tikanga Taiao ('Ngā Kaihautū') — was established to advise and assist the EPA on matters relating to the policy, process and decisions of the EPA.[61] However, Ngā Kaihautū do not represent the views of Māori affected by specific activities.[62] For substantive matters, its advice to the DMC contextualises submissions by Māori affected by the proposed activity. In terms of process, Ngā Kaihautū also ensures that Māori have adequate opportunity to participate in the decision-making processes.[63] Despite this, there has been no instance in which concerns expressed by Māori have been enough to prevent an application from being approved

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57 *Trans-Tasman Resources Ltd v Taranaki-Whānganui Conservation Board* [2020] NZCA 86, [2020] NZRMA 248 at [162].

58 At [162].

59 *Trans-Tasman Resources Ltd v Taranaki-Whāngnaui Conservation Board* [2021] NZSC 127 at [8]. Reasons are given at [150]–[151] per William Young and Ellen France JJ, [237] per Glazebrook J, [296] per Williams J and [332] per Winkelmann CJ.

60 See Catherine Iorns Magallanes and Rhianna Morar "Māori Governance and the Exclusivec Economic Zone" in Richard Benton and Robert Joseph (Eds) *Waking the Taniwha: Māori Governance in the 21st Century* (Thomson Reuters, Wellington, 2021) 661.

61 Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, s 18 (which refers to Environmental Protection Authority Act 2011, ss 18 and 19).

62 David Pickens *How the Environmental Protection Authority incorporates the principles of the Treaty of Waitangi into its regulatory practice* (Report for the New Zealand Productivity Commission, February 2014) at [32]-[35].

63 See generally Catherine Iorns Magallanes and Rhianna Morar, above n 60.

unless accompanied by some other form of objection capable of empirical measurement.[64] In particular, Ngā Kaihautū has raised concerns about the lack of engagement with Māori and the uncertainty of information provided by applicants which prevents Māori from being able to assess the effects on their existing interests.[65] The Waitangi Tribunal has also identified that effects on mātauranga Māori are not treated equally as those measurable by other scientific methods.[66] It is therefore concerning that, as an effects-based regime, applications continue to be approved without sufficient consideration of the effects on existing interests held by Māori.

b. Existing Interests

Defining an "existing interest" is of most relevance to biodiversity.[67] Existing interests include, but are not limited to, customary rights or marine title recognised under the Marine and Coastal Area (Takutai Moana) Act 2011 and any rights included in the settlement of historical claims under the Treaty of Waitangi Act 1975.[68] As an effects-based regime, the EEZ Act requires decision-makers to take a precautionary approach in considering whether activities will adversely affect existing interests.

The Court of Appeal in *Trans-Tasman Resources Ltd v Taranaki-Whānganui Conservation Board* held that the DMC should consider the nature and significance of the kaitiaki relationship, and the effects of the proposed activity on an iwi's ability to exercise kaitiakitanga as part of their analysis of "existing interests".[69] The Court found that resources should be considered as entities in their own right — as ancestors, gods, whānau — that iwi have an obligation to care for and protect.[70] Most significantly, the Court considered it was "axiomatic" that tikanga Māori would define and govern the interests of tangata whenua in taonga protected by the Treaty as an integral strand of the common law of New Zealand.[71] The Court held that the continued existence of those rights and interests

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64 Waitangi Tribunal, above n 26, at 167. However, the Supreme Court has recently upheld the High Court's decision to quash the EPA's decision to grant consent for seabed mining in the South Taranaki Bight. See *Trans-Tasman Resources Ltd v Taranaki-Whānganui Conservation Board,* above n 59, at [12].

65 See for example the Ngā Kaihautū Report prepared for the Trans-Tasman Resources application for seabed mining in the South Taranaki Bight: James Whetu "Ngā Kaihautū Tikanga Taiao Report - EEZ000011" (13 January 2017) <www.epa.govt.nz> at 17-18.

66 Waitangi Tribunal, above n 26, at 167.

67 Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, s 59(2)(a).

68 Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, s 4.

69 *Trans-Tasman Resources Ltd v Taranaki-Whānganui Conservation Board*, above n 57, at [175].

70 At [174].

71 At [177].

necessarily implied the continued recognition of tikanga Māori in defining their nature and extent.[72] More recently, the Supreme Court has unanimously affirmed that tikanga as law must be taken into account as "other applicable law" under s 59(1)(2) of the EEZ Act where its recognition and application is appropriate to the particular consent application.[73] As a result, the Court considered that customary rights and interests sourced in tikanga Māori constitute "existing interests" under s 59(2)(a) whether or not those interests are yet to be granted under the Marine and Coastal Area (Takutai Moana) Act 2011.[74] This supports the view that tikanga Māori is an independent jurisdiction capable of governing interests currently within the State legal system.

4 Climate Change Response Act 2002

The legislative framework for the Crown's response to climate change is located in the Climate Change Response (CCR) Act 2002. The Crown has considered and implemented a range of regulatory measures to address climate change including setting targets for carbon dioxide emissions;[75] proposals to tax emissions;[76] encouraging the use of renewable energy;[77] and the introduction of a scheme through which emissions can be priced as units and traded.[78] Under the CCR Act, the Minister must ensure the emissions reduction plan includes a strategy to recognise and mitigate the impacts of reducing emissions on iwi and Māori and ensure that iwi and Māori have been adequately consulted.[79] Moreover, the Minister must "take into account" the economic, social, health, environmental, ecological, and cultural effects of climate change on iwi and Māori in preparing a national adaptation

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72 At [177].

73 *Trans-Tasman Resources Ltd v Taranaki-Whānganui Conservation Board*, above n 59, at [9]. Reasons are given at [169] per William Young and Ellen France JJ, [237] per Glazebrook J, [296]–[297] per Williams J and [332] per Winkelmann CJ. Williams J at [297] (with whom Glazebrook J agreed at n 371) wished to make explicit that these questions must be considered not only through a Pākehā lens.

74 This includes kaitiakitanga and rights claimed, but not yet granted, under the Marine and Coastal Area (Takutai Moana) Act 2011. See *Trans-Tasman Resources Ltd v Taranaki Whānganui Conservation Board*, above n 59, at [8]. Reasons given at [154]–[155] per William Young and Ellen France JJ, [237] per Glazebrook J, [296]–[297] per Williams J and [332] per Winkelmann CJ.

75 Vernon Rive "New Zealand Climate Change Regulation" in Alastair Cameron (ed) *Climate Change Law and Policy in New Zealand* (LexisNexis, Wellington, 2011) 165 at 177.

76 At 171.

77 At 191-199.

78 For further commentary on New Zealand's emissions trading scheme see Alistair Cameron and Vernon Rive "Emissions Trading: Setting the Scene" in Alastair Cameron (ed) *Climate Change Law and Policy in New Zealand* (LexisNexis, Wellington, 2011) 215.

79 Climate Change Response (Zero Carbon) Amendment Act 2019, s 3A(ad).

plan.[80] Further, the Minister must ensure iwi and Māori who are likely to have interests in areas governed by the Act, such as the price of carbon and forestry classifications, are consulted on proposed amendments to the regulatory framework.[81]

The Crown has established agencies tasked with working in these areas, including more recently the independent Climate Change Commission.[82] Under the CCR Act, the Commission is required to consider the Crown-Māori relationship, te ao Māori and specific effects on iwi and Māori.[83] The Commission's framework includes the following values to help the Commission consider the impact of its recommendations on collective wellbeing: manaakitanga; tikanga; whanaungatanga; and kotahitanga.[84] Drawing on the Treasury's policy tool for understanding Māori perspectives on wellbeing — *He Ara Waiora: A Pathway towards Wellbeing* — the Commission has recognised that an integrated ecosystem approach requires that aspects of the climate change response framework should not be considered in isolation of interrelated parts.[85] One of the key issues raised by iwi and Māori during consultation with the Commission was that tikanga and mātauranga Māori offer insights and solutions to climate change issues which reflect an integrated worldview.[86] The recognition of tikanga and mātauranga Māori in climate change policy is therefore dependent on partnership-based leadership models between Māori and the Crown based on tikanga values such as whakapapa and rangatiratanga.[87]

In summary, the domestic regulatory framework for Aotearoa New Zealand's biodiversity management and climate change response continues to compartmentalise Māori legal concepts in the form of rights and interests to be considered and weighed according to State legal traditions. However, I argue it is impossible to separate indigenous relationality with the environment, and the subsequent responsibility to care and provide for the environment, from the expression of authority or self-determination. Therefore, recognising the status of mana whenua over a particular territory requires that mana whenua be empowered to exercise their own authority over biodiversity in accordance with tikanga Māori.

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80 Climate Change Response (Zero Carbon) Amendment Act 2019, s 3A(ae).

81 Climate Change Response (Zero Carbon) Amendment Act 2019, s 3A(b).

82 See Climate Change Response (Zero Carbon) Amendment Act 2019, pt 1(A).

83 Climate Change Response (Zero Carbon) Amendment Act 2019, s 5M.

84 He Pou a Rangi | Climate Change Commission *Ināia Tonu Nei: a low emissions future for Aotearoa — Advice to the New Zealand Government on its first three emmissions budgetsand direction for its emmissions reduction plan 2022-2025* (31 May 2021) <www.climatecommission.govt.nz> at 44.

85 At 211.

86 At 328.

87 At 328.

B Internationally

International instruments regulate the relationships between sovereign states. In most cases, they must be incorporated into domestic law to have effect. However, non-binding instruments carry political and moral force, which in turn creates internationally accepted standards influencing state behaviour.[88] I will outline the key international instruments below.

1 UNFCCC and the Paris Agreement

The United Nations Framework Convention on Climate Change ('UNFCCC') established a multilateral regime for addressing anthropogenic climate change.[89] In 2016, the Conference of the Parties ('COP') adopted the Paris Agreement which aims to limit the global temperature rise this century to well below 2 degree Celsius compared to pre-industrial levels (preferably to 1.5 degrees Celsius).[90] The agreement is binding on state signatories and uses nationally determined contributions to achieve this temperature goal.[91] Article 7(5) of the Paris Agreement acknowledges that adaptation should be based on and guided by traditional knowledge of indigenous peoples and local communities, with a view to integrating adaptation into relevant socioeconomic and environmental policies and actions. Furthermore, the COP decision specifically recognises the need to strengthen knowledge, practices, traditions, and technologies of indigenous peoples in responding to climate change, and to establish a platform for the sharing of information on mitigation and adaptation in a holistic and integrated manner.[92]

Ultimately, New Zealand's obligations under the UNFCCC reaffirm that mitigation and adaptation measures must consider indigenous knowledge systems in efforts to stabilize greenhouse gas concentrations at a level preventing dangerous anthropogenic climate change.[93]

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88 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Taumata Tuarua* (Wai 262, Volume 2, 2011) at 669.

89 United Nations Framework Convention on Climate Change 1771 UNTS 107 (opened for signature 16 March 1982, entered into force 21 March 1994).

90 Paris Agreement (opened for signature 22 April 2016, entered into force 4 November 2016), art 2(a).

91 Paris Agreement (opened for signature 22 April 2016, entered into force 4 November 2016), art 4.

92 *Decisions Adopted by the Conference of the Parties: Adoption of the Paris Agreement* FCCC/CP/2015/10/Add.1 (2016) at [135].

93 UN Special Rapporteur on the Rights of Indigenous Peoples, above n 5, at [36]-[37].

2 *Convention on Biological Diversity*

New Zealand became a party to the Convention on Biological Diversity ('CBD') in 1993.[94] The CBD establishes an international framework for conservation and use of the world's genetic and biological resources. Article 10(c) states that each contracting party shall:

> as far as possible and as appropriate … protect and encourage customary use of biological resources in accordance with traditional culture practices that are compatible with conservation or sustainable use requirements.

Article 8(j) addresses the specific concerns of indigenous peoples and traditional knowledge in the conservation of biodiversity. It provides that state parties shall:

> respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices.

Article 8(j) is linked to the access and benefit-sharing mechanisms in art 15. Article 15 provides access to biodiversity for exploitation, subject to benefit-sharing arrangements where activities use indigenous traditional knowledge or practices. In Aotearoa New Zealand, Māori are concerned with the dual effect of articles 8(j) and 10(c) under which the Crown must encourage, respect, maintain and preserve mātauranga Māori relating to the conservation and sustainable use of biological diversity.[95]

The COP convenes biennially to review the implementation of the CBD and make decisions to promote its effectiveness.[96] In 2002, the COP unanimously adopted the *Bonn Guidelines* on art 15.[97] Although the guidelines are voluntary, they are intended to assist

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[94] New Zealand ratified the convention on 16 September 1993. See Convention on Biological Diversity 1760 UNTS 79 (opened for signature 12 June 1992, entered into force 29 December 1993); Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims concerning New Zealand Law and Policy Affecting Māori Culture and Identity, Taumata Tuatahi* (Wai 262, 2011) at 75.

[95] Waitangi Tribunal, above n 34, at 234.

[96] "Conference of the Parties to the Convention on Biological Diversity" <www.cbd.int>.

[97] *Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization* COP 6 VI/24 (2002).

the parties in developing their domestic access and benefit-sharing regimes.[98] The guidelines contemplate that free and informed prior consent of traditional knowledge holders must be given for access to biodiversity, and benefits should be received where that knowledge is used for commercial or other research purposes.[99] In Aotearoa New Zealand, the guidelines would require that those seeking access to biodiversity should obtain the free and informed prior consent of kaitiaki and provide beneficial entitlements where mātauranga Māori is used.[100] In 2004, COP endorsed the *Akwé: Kon Guidelines* on art 8(j) which provide that benefit-sharing should be considered in the early stages of environmental impact assessments.[101] The use of traditional knowledge in impact assessments provides an opportunity for alternative proposals for development. In 2018, COP adopted the *Rutzolijirisaxik Guidelines* on art 8(j) which focus on the repatriation of traditional knowledge over biodiversity, including efforts to respect, recognise and restore indigenous peoples' *governance* over traditional knowledge.[102]

As discussed above, New Zealand's biodiversity strategy seeks to implement its international obligation to restore and protect mātauranga Māori as indigenous traditional knowledge.[103] However, the current regime does not go as far as recognising Māori governance and legal traditions as an equal system of law comparable to State law.

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98 Waitangi Tribunal, above n 26, at 149.

99 *Bonn Guidelines*, above n 97, pt 2(C).

100 Waitangi Tribunal, above n 26, at 149. However, these access and benefit sharing agreements are undermined by the Agreement on Trade-Related Aspects of Intellectual Property Rights ('TRIPS'). The TRIPS Agreement expands considerably on the Paris Convention protection of patents, requiring that members of the World Trade Organization ('WTO') make patents available for inventions in all fields of technology without requiring that those national laws respect the provisions of the convention in relation to free and informed prior consent and benefit sharing. Nor does the TRIPS Agreement expressly require that national laws require patent applicants to disclose in their applications whether traditional knowledge or genetic resources have contributed in any way to the invention. See Waitangi Tribunal, above n 34, at 76; Waitangi Tribunal, above n 26, at 151.

101 *Akwé: Kon Guidelines — Voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities* COP 7 VII/16 (2004) at [19], [34], [40], [46] and [56].

102 *The Rutzolijirisaxik Voluntary Guidelines for the Repatriation of Traditional Knowledge Relevant for the Conservation and Sustainable Use of Biological Diversity* COP 14 14/12 (2018), pt IV.

103 Department of Conservation, above n 26, at 33.

3 *United Nations Declaration on the Rights of Indigenous Peoples*

In 2007, the United Nations General Assembly adopted the Declaration on the Rights of Indigenous Peoples ('UNDRIP') by a majority vote of 143 in favour to four against (New Zealand, Australia, the United States and Canada), with 11 countries abstaining.[104] New Zealand was concerned with articles pertaining to self-determination and territorial integrity for indigenous peoples, including claims to privately owned land.[105] After New Zealand reversed its position in 2010, the Prime Minister stated that:[106]

> [I]t is important to understand that the Declaration on the Rights of Indigenous Peoples is just that — it is a declaration. It is not a treaty, it is not a covenant, and one does not actually sign up to it. It is an expression of aspiration; it will have no impact on New Zealand law and no impact on the constitutional framework.

In Wai 262, the Waitangi Tribunal considered art 31(1) which acknowledges the right of indigenous peoples to maintain, control, protect and develop their intellectual property over traditional knowledge, science, technologies, and culture, including knowledge of the properties of fauna and flora.[107] However, there is a plethora of rights which constitute the broader "self-determination framework",[108] including the right to self-government,[109] historical redress,[110] the right to free and informed prior consent,[111] and the right to the recognition, observance and enforcement of treaties.[112]

The concept of jurisdictional autonomy or shared jurisdiction continues to be a highly contested aspect of self-determination for indigenous peoples within states.[113] However, states reject the idea of self-determination being capable of conferring jurisdiction comparable to sovereignty in law and instead endorse rights-based approaches within the prevailing State legal systems.[114] Despite this, self-determination implies that indigeneity

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[104] *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295 (2007).

[105] Waitangi Tribunal, above n 88, at 673.

[106] (20 April 2010) 662 NZPD 10238 as cited by the Waitangi Tribunal at 674.

[107] At 673.

[108] See Robert Joseph and others, above n 1, at 157.

[109] *United Nations Declaration on the Rights of Indigenous Peoples*, above n 104, art 4.

[110] Article 5.

[111] Articles 10, 19 and 32.

[112] Articles 31.

[113] Maureen G. Reed and Shannon Bruyneel, above n 1, at 647.

[114] One example of this is the doctrine of native title. Although native title presupposes indigenous legal and political traditions to bring customary rights into existence, it only confers a right cognisable by State law through evidence and proof of an interest. In Canada, for example, the content of aboriginal title must be

confers a distinct constitutional status based on relationality with the land.[115] Therefore, indigenous knowledge as being intimately connected with the land further supports self-determination as encompassing jurisdictional authority.

C The Making of International Instruments

One key aspect of the Wai 262 claim was the exclusion of Māori from participation in the development of New Zealand's positions on international instruments affecting Māori interests.[116] The claimants' argued the Crown pre-determined which international instruments were of relevance to Māori before engagement.[117] The Ministry for Foreign Affairs and Trade ('MFAT') stated that prior to 1990 engagement had been limited to certain individuals with an interest in international issues and "occasional" discussions with iwi or iwi organisations.[118] In 1990, MFAT established the Kaupapa Māori Division to build relationships with key Māori organisations, iwi and individuals to provide advice on the Ministry's business regarding cultural and policy issues.[119] In 2006, this was replaced by a Māori Policy Unit which aimed to build relationships with Māori stakeholders to provide advice on consultation with Māori in a broader context.[120] More importantly, the Māori Engagement Strategy acknowledged that in maintaining a unified New Zealand position in negotiations with other states required Māori interests to be balanced alongside other competing priorities.[121] Engagement was confined to consultation on "formal international agreements" defined as those which are legally binding under international law.[122] However, the claimants urged MFAT to include Māori as part of the official delegations to international forums as well as allowing independent representation.[123] Ultimately, permission from Māori to enter into international instruments or bring them into force domestically was neither sought nor given. The degree of participation given to

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determined by Indigenous law and custom: *R v Van der Peet* [1996] 2 SCR 507; *Delgamuukw v Attorney General of British Columbia* [1997] 3 SCR 1010; and *Tsilhqot'in Nation v British Columbia* [2014] 2 SCR 256. Similiarly in Australia and New Zealand, the nature and scope of native title is defined by Indigenous law and custom: *Mabo v State of Queensland* (No 2) (1992) 175 CLR 1; and *Ngāti Apa v Attorney-General* [2003] 3 NZLR 643. See also Robert Joseph and others, above n 1, at 158.

115 Carwyn Jones, above n 9, at 50-53; Edward Taihakurei Durie, above n 50, at 34.

116 Waitangi Tribunal, above n 88, at 669.

117 At 678-679.

118 At 675.

119 At 676.

120 At 676.

121 At 676-677 and 679.

122 At 677.

123 At 679.

Māori was therefore incidental to the exercise of the national interests of sovereignty by the Crown.[124]

The Waitangi Tribunal concluded that the right to represent New Zealand in international negotiations was acquired subject to the protection of Māori authority over their own affairs (or tino rangatiratanga).[125] Māori therefore retain the authority to identify their interests, and how those might best be protected through amendment, or execution of international agreements.[126] It describes the Crown's duty of active protection as "ever more urgent" in light of the vast implications and rapid evolution of international instruments.[127] More importantly, the Tribunal considered Māori interests may be so overwhelming that the Crown should contemplate the transfer of its decision-making powers in international negotiations to Māori.[128] Limiting engagement with Māori to consultation therefore cannot always guarantee tino rangatiratanga, or self-determination, in the international sphere.[129] Multi-jurisdictional approaches to global issues of climate change and biodiversity may require the Crown to resile power in some areas, whilst maintaining participation in others.[130]

IV Ecosystem-based Management: Biodiversity and Climate Change

Climate change contributes to biodiversity loss through the disruption of ecosystems. Dangerous climatic conditions result in habitat conversion which risks the survival of certain species.[131] Land use and over-exploitation of natural resources are also dominant drivers of habitat disturbance and ecosystem degradation.[132] The protection of indigenous biodiversity contributes to climate mitigation through carbon sequestration and climate adaptation by supporting ecosystem resilience.[133] Ecosystem-based management has

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[124] At 679.

[125] At 680-81.

[126] At 681.

[127] At 681.

[128] At 682.

[129] At 683.

[130] Claire Charters and others *He Puapua: Report of the Working Group on a Plan to Realise the UN Declaration on the Rights of Indigenous Peoples in Aotearoa/ New Zealand* (1 November 2019) at 27.

[131] Robert T. Watson and Peter Costigan "What are the Drivers Causing Loss of Biodiversity and Changes in Ecosystem Services?" in Ahmed Djoghlaf and Felix Dodds (Eds) *Biodiversity and Ecosystem Insecurity* (Earthscan, London, 2011) 3 at 10.

[132] Luc Gnacadja "Land Degradation and Exploitation and Its Impact on Biodiversity and Ecosystems" in Ahmed Djoghlaf and Felix Dodds (Eds) *Biodiversity and Ecosystem Insecurity* (Earthscan, London, 2011) 110 at 113-115.

[133] David Hall and Sam Lindsay, above n 41, at 7.

therefore gained prominence in environmental governance as a method of recognising the multiple intersecting drivers of biodiversity loss and climate change.[134] A siloed approach to managing biological and climatic risks reduces the ability to effectively respond to ecosystem interdependencies.[135] Aotearoa New Zealand and Australia are commonly recognised as reflecting a broader and more integrated definition and framework for biosecurity.[136] In particular, ecosystem-based management in Aotearoa New Zealand requires the restoration of indigenous knowledge and customary practices over biodiversity. As a result, a more holistic and integrated approach raises questions about the effect of indigenous displacement from key sites of power and how those sites interact with our response to managing climatic risks and biodiversity loss.

Robert Joseph points out that one of the challenges of implementing ecosystem-based management is striking the balance between economic interests and environmental sustainability goals.[137] One of the problems with territorial sovereignty as the dominant mode of jurisdiction is the sovereign right to exploitation.[138] Development has characterised the human relationship with the environment as one of solely extraction — it is anthropocentric.[139] Ecosystem-based management is therefore perceived as a strain on economic interests. This is the crux of why a multi-jurisdictional approach is needed. I argue that indigenous knowledge systems create and regulate economic opportunities in a way that ensures the longevity of ecosystems.[140]

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[134] Opi Outhwaite "Preventing and mitigating the impacts of climate change and biodiversity loss through biosecurity" in Frank Maes, An Cliquet, Willemien du Plessis and Heather McLeod-Kilmurray (Eds) *Biodiversity and Climate Change: Linkages at International, National and Local Levels* (Edward Elgar Publishing, Cheltenham, 2013) 401 at 425.

[135] At 408-414.

[136] At 415-419.

[137] Robert Joseph and others, above n 1, at 22.

[138] See for example Principle 21 of the *United Nations Declaration of the United Nations Conference on the Human Environment ('Stockholm Declaration')* (1972) UN Doc A/CONF 48/14 (signed on 16 June 1972) and Principle 2 of the *United Nations Declaration on Environment and Development ('Rio de Janeiro Declaration')* (1992) UN Doc A/CONF 151/26 (signed on 12 August 1992).

[139] Luc Gnacadja "Land Degradation and Exploitation and Its Impact on Biodiversity and Ecosystems" in Ahmed Djoghlaf and Felix Dodds (Eds) *Biodiversity and Ecosystem Insecurity* (Earthscan, London, 2011) 110 at 115-116.

[140] Refer to Part VI of my paper on diverse economies. See also Robert Joseph and others, above n 1, at 22.

A Ecosystem-based Management and Māori Legal Traditions

Indigenous traditional knowledge refers to the legal concepts, customary and spiritual practices comprising a framework where knowledge is created, tested and passed on.[141] Bodies of traditional knowledge produce place-based specific genealogies of land and biodiversity in relation to indigenous communities.[142] Māori traditional knowledge (or mātauranga Māori) underpins the evolution and practice of tikanga Māori (the right way of doing things). Māori legal traditions are underpinned by conceptual regulators grounded in the practice of tikanga Māori. Eddie Taihakurei Durie and Joseph Williams identify the following principles which form the basis of the Māori legal order: whanaungatanga (relationships); whakapapa (genealogy); mana (spiritually sanctioned authority); utu (reciprocity); kaitiakitanga (stewardship); and tapu and noa (complimentary opposites that operate on a spiritual and natural level to restore balance).[143] Māori have social, cultural and economic interests in responses to climate change and biodiversity loss. These interests are governed by conceptual regulators, sourced in distinctly Māori legal traditions.

However, I argue that customary practices are recognised and then divorced from these knowledge systems. The State legal system reduces indigenous peoples to land and resource managers entitled to a degree of participation within a project determined by state and business actors. Despite being incorporated into legislation, kaitiakitanga only makes sense in the context of Māori legal traditions.[144] Māori are often referred to as kaitiaki of the environment and therefore are entitled to a degree of participation in managing a particular resource.[145] However, the exercise of kaitiakitanga stems from the rights and obligations of those iwi and hapū who hold mana in a particular area (otherwise known as mana whenua).[146] Mana necessarily implies jurisdictional authority and therefore it is Māori legal traditions which should provide the governing framework over biodiversity.

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[141] John Scott "Traditional Knowledge in Global Policy-making: Conservation and Sustainable Use of Biological Diversity" in Ahmed Djoghlaf and Felix Dodds (Eds) *Biodiversity and Ecosystem Insecurity* (Earthscan, London, 2011) 179 at 181.

[142] At 181.

[143] Edward Taihakurei Durie, above n 18, at 4-5; Joseph Williams, above n 31, at 3.

[144] See also the discussion of 'tupuna title' in Carwyn Jones, above n 9, at 41.

[145] See for example 'kaitiakitanga' in the Resource Management Act 1991 and other rights and interests as part of the broader list of considerations for decision-makers under the Exclusive Economic Zone and Continental Shelf (Environment Effects) Act 2012.

[146] Carwyn Jones, above n 9, at 41.

I argue that ecosystem-based management and Māori legal traditions provide a new way of conceptualising our responses to climate change and biodiversity loss.[147] Adopting ecosystem-based management within a Māori jurisdictional framework creates an opportunity for Aotearoa New Zealand to recognise humans as part of an interconnected ecosystem within a unique legal, political and constitutional context.[148]

V Indigenous peoples and extractive industries by third-parties

In the Wai 262 claim, the Crown rejected any general claim to Māori ownership rights in biological resources in Aotearoa New Zealand.[149] Rather, Māori customary interests form part of the list of factors considered in assessing the environmental effects of a proposed activity.[150] The Crown argued that only the Crown or private title holders have the right to exploit biological resources and extract genetic material.[151] Bioprospecting, for example, is the exploration of biological material or its molecular, biochemical, or genetic content for developing commercially viable products for a variety of purposes, including bioremediation, pharamaceuticals, cosmetics, nanotechnology, agriculture and aquaculture.[152] Indigenous traditional knowledge (or mātauranga Māori) provides researchers with valuable information about the biological characteristics of an organism and customary practices associated with sustainable use and management.[153] The claimants argued that bioprospectors used mātauranga Māori in exploiting indigenous biodiversity for commercial purposes.[154] In response, the Crown acknowledged there were no recognisable guidelines or regulations on the use of traditional knowledge by bioprospectors, despite the CBD.[155] The system instead encouraged exploitation of New Zealand's biodiversity, with "maximum sustainable access" to biological resources and "minimum compliance and transaction costs".[156]

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147 Robert Joseph and others, above n 1, at 23.

148 At 24.

149 Waitangi Tribunal, above n 26, at 145.

150 At 145-146.

151 At 145.

152 Waitangi Tribunal, above n 34, at 72.

153 At 72; John Scott, above n 141, at 181-185.

154 Waitangi Tribunal, above n 26, at 144-145.

155 At 145.

156 At 145-146.

In a series of reports, the United Nations Special Rapporteur has been concerned with the violation of indigenous rights through extractive activities.[157] It should be acknowledged that indigenous peoples' use and protection of traditional knowledge is not always at odds with extractive industries, particularly those which are both economically and ecologically beneficial.[158] However, the domestic regulation of these industries suggests resource extraction by third parties often usurps indigenous aspirations and priorities for development.[159] Given the mutually dependent relationship between mātauranga and biodiversity, no meaningful status can be attributed to indigenous knowledge where its operation through indigenous jurisdictional autonomy is denied.[160] Globally, the Special Rapporteur has observed that the current regulatory framework and business models for extractive industries are not fully conducive to indigenous peoples' rights to self-determination, particularly proprietary and cultural rights in relation to the affected lands and resources.[161]

The Special Rapporteur points out that giving preference to indigenous peoples for resource extraction maximises the possibility of extraction being pursued in a manner that is respectful of indigenous knowledge.[162] Currently, the international regime lacks compliance with rights-based approaches focused on free and informed prior consent of indigenous peoples.[163] The Special Rapporteur identified that consultation was perceived as a mere formality to provide information about measures or projects previously designed or approved by state and business actors.[164] Moreover, the scope of consultation is limited to projects deemed to have a "direct impact" on indigenous peoples.[165] Consultation

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[157] See for example UN Special Rapporteur on the Rights of Indigenous Peoples *Extractive industries and indigenous peoples* A/HRC/24/41 (1 July 2013); UN Special Rapporteur on the Rights of Indigenous Peoples *Conservation and Indigenous Peoples' Rights* A/71/229 (29 July 2016); UN Special Rapporteur on the Rights of Indigenous Peoples *The Impacts of Climate Change and Climate Finance on Indigenous peoples' rights* A/HRC/36/46 (1 November 2017); UN Special Rapporteur on the Rights of Indigenous Peoples *Report of the Special Rapporteur on the rights of indigenous peoples* A/HRC/45/34 (18 June 2020).

[158] UN Special Rapporteur on the Rights of Indigenous Peoples *Extractive industries and indigenous peoples* A/HRC/24/41 (1 July 2013) at [2].

[159] At [3].

[160] John Scott, above n 141, at 182-183.

[161] UN Special Rapporteur on the Rights of Indigenous Peoples, above n 158, at [4].

[162] At [17].

[163] At [26]; UN Special Rapporteur on the Rights of Indigenous Peoples *Report of the Special Rapporteur on the rights of indigenous peoples* A/HRC/45/34 (18 June 2020) at [49].

[164] At [51].

[165] At [57].

processes are not based on indigenous forms of organisation or representation nor are other knowledge systems seen as an effective governing jurisdictional framework for which projects are subject to.[166] Ultimately, the Special Rapporteur observed that these inadequacies now require indigenous peoples to develop their own autonomous consultation protocols.[167] However, free and informed prior consent requires more than consultation and considers indigenous peoples have the right to oppose or refuse extractive industries within their jurisdiction.[168] Although this is largely ignored because states and business actors consider this amounts to a veto power,[169] the Special Rapporteur reported that indigenous peoples' opposition to extraction can have determinative consequences.[170] More importantly, whether officially titled or not, indigenous peoples exercise a form of jurisdiction over lands and resources of cultural significance.[171]

Given the inadequacy of state regulation, the *United Nations Guiding Principles on Business Enterprise and Human Rights* impose a responsibility on business actors to respect internationally recognised human rights independent of state obligations.[172] The Special Rapporteur considers that business actors are required to undertake due diligence as State law compliance with international standards on indigenous rights cannot assumed.[173] Extractive companies should refuse permits or concessions from states where free and informed prior consent has not been met.[174] However, it is more conducive to consider the possibile models for indigenous sustainable economic development using traditional knowledge.

A Indigenous peoples' Right to Development

As part of the right to self-determination, indigenous peoples have the right to determine priorities and strategies for the development or use of their lands and territories.[175] Indigenous peoples' economic development cannot be separated from ecological efforts

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166 At [53]-[55].

167 At [65].

168 UN Special Rapporteur on the Rights of Indigenous Peoples, above n 158, at [19].

169 UN Special Rapporteur on the Rights of Indigenous Peoples, above n 163, at [59].

170 UN Special Rapporteur on the Rights of Indigenous Peoples, above n 158, at [26].

171 At [27].

172 *United Nations Guiding Principles on Business Enterprise and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* HR/PUB/11/04 (2011); UN Special Rapporteur on the Rights of Indigenous Peoples, above n 158, at [52].

173 At [53].

174 At [55].

175 At [9].

towards sustainable management and use of biological resources. The United Nations Sustainable Development Goals also seek to link objectives related to economic growth, sutainable development, access to justice and climate change.[176] Climate change projects, as well as extractive industries, may create barriers to indigenous jurisdiction where financing, permits or concessions are given without respect of the knowledge systems or free and informed prior consent of indigenous peoples.[177] Therefore, it is pertinent to assess the development of extractive industries and financing for climate mitigation and adapation projects together.

B Financing Indigenous Peoples

Biodiversity finance is defined as "the practice of raising and managing capital and using financial incentives to support sustainable biodiversity management".[178] This type of finance is a subset of sustainable finance, aligned with the United Nations Sustainable Development goals, and climate finance, which is focused on supporting climate mitigation and adaptation outcomes.[179] The financing gap between achieving mitigation and adaptation outcomes and the resourcing provided to do so remains a global challenge. Hall and Lindsay report the global financing gap for biodiversity is between US$598–824 billion per year.[180] As a result, indigenous peoples face ongoing funding challenges in their pursuit of sustainable development.[181]

Climate finance, for example, is channelled through global mechanisms or funds to ensure allocations are more equally distributed between adaptation and mitigation.[182] The Global Environmental Facility was established in 1991 under the United Nations Framework Convention on Climate Change ('UNFCCC'). Between 15 and 20 per cent of the Facility's projects involve indigenous peoples and indigenous executing agencies.[183] However, it is unclear what percentage of these funds went directly to indigenous communities.[184] The Clean Development Mechanism has been widely criticised for financing projects which

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[176] UN General Assembly *Transforming our world: the 2030 Agenda for Sustainable Development* A/RES/70/1 (21 October 2015).

[177] UN Special Rapporteur on the Rights of Indigenous Peoples, above n 5, at [50]; UN Special Rapporteur on the Rights of Indigenous Peoples, above n 158, at [4].

[178] David Hall and Sam Lindsay, above n 41, at 11.

[179] At 11.

[180] At 11-12.

[181] At 13-15.

[182] UN Special Rapporteur on the Rights of Indigenous Peoples, above n 5, at [88].

[183] At [90].

[184] At [91].

result in the displacement of indigenous communities from their ecosystems.[185] In 2010, the Conference of the Parties to the UNFCCC adopted safeguards for reducing emmissions from deforestation and forest degradation ('REDD-plus') which includes respect for the knowledge and rights of indigenous peoples and members of local communities by taking into account relevant international obligations, national circumstances and laws.[186] Similiarly, the Adaptation Fund requires that all projects comply with international instruments relating to indigenous peoples' rights and each project must describe compliance with UNDRIP through design, implementation and outcomes.[187] The Green Climate Fund has developed a policy to support the recognition of indigenous peoples' rights, particularly in relation to the protection of cultural heritage.[188] Despite this, access to funds is limited where indigenous peoples' organisations remain unaccredited and therefore cannot execute projects.[189]

The procedural safeguards for the protection of traditional knowledge is only necessary to the extent that funding of these projects is more likely to be given to non-indigenous peoples. Indigenous peoples' are severely under-financed to be able to develop the infrastructure necessary to lead mitigation and adaptation projects. Inadequate funding of indigenous peoples' and their organisations undermines the ability to effectively use traditional knowledge in managing biodiversity and exercise jurisdiction over lands and natural resources.

C Benefit-sharing agreements in extractive industries

If Indigenous peoples are insufficiently resourced to initiate resource extraction, benefit-sharing entitles them to participate in decision-making and share in the profits of these activities through agreements with third-parties. However, the need for state regulation of benefit-sharing is an under-recognised dimension of international biodiversity law. Part III

[185] At [92]-[93]. Although beyond the scope of this paper, the Mechanism further perpetuates climate injustice by allowing developed countries, who are the biggest emitters, to buy carbon credits from developing countries so that they can emit more but still meet international targets. See [94].

[186] At [96]. See *Decision adopted by the Conference of the Parties to the UNFCCC: The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention* 1/CP.16 (2010) at [68]-[79]. However, the Special Rapporteur notes Indigenous peoples and local communities are often not recognised as owners of forests by states in national laws which raises concerns about whether or not equitable benefits are being distributed from REDD-plus projects, and that forest and climate schemes risk driving a global "green land grab". See UN Special Rapporteur on the Rights of Indigenous Peoples, above n 5, at [97].

[187] At [100].

[188] At [103]-[105].

[189] At [104].

outlines the relationship between benefit-sharing and the obligation to protect indigenous and local communities' customary sustainable use of biological resources under the Convention on Biological Diversity ('CBD').[190] Benefit-sharing is a necessary implication of recognising indigenous peoples traditional knowledge over the management of biological resources.[191] Elisa Morgera suggests that free and informed prior consent should no longer be considered a mere procedural safeguard, as benefit-sharing can be used as a proactive means of realising indigenous peoples' rights over lands and natural resources.[192] The types of benefits may include profit-sharing, job creation for communities, payments for ecosystem services and the diversification of income-generating opportunities, and access to markets for indigenous enterprises.[193]

In *Kaliña and Lokono*, the Inter-American Court recognised that the right to dispose of natural resources must be understood in the context of the rights of indigenous peoples to maintain their cultural identity in relation to the protection of natural resources in their territories.[194] Further, the African Commission on Human and Peoples' Rights in *Endorois* held that benefit-sharing is vital to indigenous peoples' right to development resulting in increased economic capabilities in relation to their property rights over territories.[195] Therefore, benefit-sharing agreements encompass both economic and political dimensions of self-determination through the recognition of indigenous jurisdictional authority over resource management and conservation.

VI Diverse Economies and Sustainable Development

One of the concerns for indigenous peoples is whether the current economic models used in these projects are capable of recognising traditional knowledge as the governing jurisdictional framework for mitigation and adaptation.[196] Indigenous values, for example, may be added to existing structures but this does not address how those values connect

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[190] See Convention on Biological Diversity, above n 94, arts 8(j), 10(c) and 15.

[191] Elisa Morgera *Under the radar: The Role of Fair and Equitable Benefit-sharing in Protecting and Realizing Human Rights connected to Natural Resources* (BENELEX Working Paper No. 10, University of Strathclyde, 2018) at 10.

[192] At 17-19.

[193] At 10.

[194] *Kaliña and Lokono* (*Kaliña and Lokono v Suriname) (Merits)* (2015) IACHR (series C) No 309 at [181].

[195] *Endorois (Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behald of Endorois Welfare Council v Kenya) (Merits)* (2009) ACmHPR No 276/2003 at [294].

[196] UN Special Rapporteur on the Rights of Indigenous Peoples, above n 158, at [13]-[16].

with the key sites of power indigenous peoples have been displaced from.[197] It is therefore necessary to consider how indigenous enterpises produce diverse forms of economic and political recognition distinct from other executing actors.[198]

In Aotearoa New Zealand, many local economies are based upon either the confiscation, cheap acquisition or theft of Māori land and other resources.[199] The severance of whakapapa from land consequentially enables governments to exploit Māori resources without recognising the source of jurisdictional authority over those lands.[200] The Climate Change Commission has identified that moving to a more "circular economy" which recognises relationships across the whole system aligns with existing tikanga practices by iwi and Māori enterprises.[201] The concept of whakapapa recognises that the orgins of those sites produce a diverse economic landscape connected to local communities.[202] These diverse economies occupy a distinct status from other business models by locating indigenous aspirations and priorities for development in the specificities and genealogies of particular places.[203]

The phenomena of diverse economies is part of a broader resurgence of gaining economic power in producing other forms of political and legal recognition for indigenous peoples to govern their own affairs.[204] Maria Bargh argues diverse economies provide a new way of conceptualising indigenous development which is useful for gaining recognition of Māori jurisdictional autonomy over biodiversity.[205] Bargh proposes a set of "ethical coordinates" for reimagining traditional economic models based on the conceptual

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[197] Maria Bargh "Rethinking and re-shaping indigenous economies: Māori geothermal energy enterprises" (2012) 6(3) Journal of Enterprising Communities: People and Places in the Global Economy 271 at 277.

[198] Maria Bargh and Jacob Otter "Progressive spaces of neoliberalism in Aotearoa: A genealogy and critique" (2009) 50(2) Asia Pacific Viewpoint 154 at 155-158; Maria Bargh "Māori political and economic recognition in a diverse economy" in Deirdre Howard-Wagner, Maria Bargh and Isabel Altamirano-Jiménez (Eds) *The Neoliberal State, Recognition and Indigenous Rights: New paternalism to new imaginings* (ANU Press, Acton, 2018) 293 at 297.

[199] Maria Bargh and Jacob Otter, above n 198, at 159.

[200] At 160.

[201] The Commission has also recommended the development of a bioeconomy strategy in partnership with iwi and Māori drawing on tikanga-based values. See He Pou a Rangi | Climate Change Commission, above n 84, at 251-253.

[202] Maria Bargh and Jacob Otter, above n 198, at 158.

[203] At 157.

[204] Maria Bargh, above n 198, at 298.

[205] Maria Bargh, above n 197, at 276.

regulators of Māori law, including: mana, utu, kaitiakitanga and whakapapa.[206] The application of these conceptual regulators are diverse and may vary across different iwi and hapū.

A Mana

Carwyn Jones describes mana as spritually and democratically sanctioned authority.[207] Mana is delegated authority from the gods and therefore exercises of authority through human agency encompass spiritual dimensions which animate the relationship with the natural world.[208] Authority is also democratically sanctioned as its exercise is connected to producing benefits for the wider community.[209] There are many different types of mana.[210] Of relevance to the environment is mana tupuna (sourced from one's whakapapa and passed down from one's ancestors), mana whenua and mana moana (sourced from one's connection to the land or ocean implying rights and obligations over the respective area).[211]

Connection to lands and resources based on shared genealogies confer the mana to exercise jurisdictional autonomy in accordance with tikanga Māori.[212] It is not possible to separate mana from rangatiratanga.[213] Maria Bargh therefore considers whether an enterprise enhances the mana of those (human and non-human) who interact with the enterprise.[214] Are the benefits, for example, distributed in a way that fosters the mana of whānau and hapū and their relationship with the land and other resources? Moreover, does the location of decision-making authority in the enterpise enhance the mana of whānau and hapū?[215]

B Utu and Katiakitanga

The concept of utu broadly relates to reciprocal actions in a relationship aimed at maintaining balance between parties.[216] Climate change and biodiversity loss, for example, disrupt the balance between humans and the environment. Hence, kaitiakitanga and utu are

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[206] At 277.

[207] Carwyn Jones, above n 9, at 69-70.

[208] At 69.

[209] At 71.

[210] Mana atua is the authority that derives from the gods and mana tangata is the status, power, and authority that one achieves through one's own actions that demonstrate expertise, wisdom, or other leadership qualities. See Carwyn Jones, above n 9, at 69.

[211] At 69.

[212] At 56.

[213] At 55.

[214] Maria Bargh, above n 197, at 279.

[215] At 277.

[216] Carwyn Jones, above n 9, at 75-77.

interwoven. ‘Kaitiaki’ refers to being a guardian and is capable of extending to humans and non-humans.[217] More broadly, however, it is concerned with the importance of nurturing those relationships and the responsibility of looking after those in your care.[218] Applying both of these concepts, it is necessary to respect mana whenua and spiritual beings as the kaitiaki of particular lands and resources. Currently, our relationship with the environment is no longer reciprocal and therefore humans should take actions aimed at restoring the balance.[219]

As an example, Maria Bargh identifies geothermal energy as directing human consumption away from fossil fuels toward sustainable sources which have a lesser impact on the environment.[220] Bargh asks how we might balance the needs of the environment with guardianship of resources, particularly in relation to extractive industries.[221] How might enterprises distribute the surplus of an operation in a way that recognises the contribution of the environment to human needs?[222] Indigenous peoples nevertheless require economic independence to take such action and therefore we should consider how economics contributes to the resurgence of mātauranga Māori and tino rangatiratanga generally. Maria Bargh considers how enterprises balance economic benefits generated from land and other resources with the need to redistribute economic, social and cultural benefits.[223]

C Whanaungatanga and Whakapapa

The concept of whanaungatanga encompasses the centrality of relationships within Māori legal traditions.[224] Whakapapa refers to kinship relationships among peoples and the environment.[225] However, whanaungatanga is broader than whakapapa and extends to both kinship and non-kinship relations.[226] Different aspects of the environment are commonly

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[217] At 72.

[218] At 71.

[219] Hirini Moko Mead suggests a basic three-stage framework (“take-utu-ea”) that illustrates the motivating factors underpinning Māori legal traditions. A *take* is the reason for action, something that has taken place and which, according to Māori legal traditions, requires a response. It can be thought of as an issue or cause of action. *Utu* then determines what action is necessary to restore the balance and the relationships involved. Once the appropriate action has been completed, a state of resolution is reached and balance is restored. This state of resolution is called *ea*. See Carwyn Jones, above n 9, at 75.

[220] Maria Bargh, above n 197, at 278.

[221] At 279.

[222] At 278.

[223] At 279.

[224] Carwyn Jones, above n 9, at 68.

[225] Maria Bargh, above n 197, at 278.

[226] Carwyn Jones, above n 9, at 68.

viewed as ancestors within the whakapapa matrix of different whānau, hapū and iwi.[227] Hence, Māori share unique genealogies with the environment which implies certain rights and obligations to care and provide for it as an ancestor.[228] Maria Bargh considers how enterprises recognise and foster those connections.[229] How does the sustainable use of a resource, for example, use and respect local mātauranga? Does the enterprise properly enable mana whenua to exercise their authority and recognise their unique genealogical connection to the land and resources? How do the benefits of mitigation and adaptation projects enhance the restoration of mātauranga over a particular area or resource? The creation and maintanence of relationships under whanaungatanga may imply responsibilities on the state and business actors to consider how their contribution is respectful of mana whenua as decision-makers.

D The Risk of Fragmentation

One of the challenges that needs to be addressed in the post-settlement era is the risk of fragmentation between different levels of jurisdiction between Māori and the Crown, as well as among diverse iwi and hapū groups. Carwyn Jones addresses the challenges of recognising Māori jurisdiction within post-settlement governance entities. Although there is potential to incorporate aspects of Māori legal traditions, these entities are primarily concerned with economic self-determination divorced from its political dimensions.[230] In the *Waka Umanga Report*, the Law Commission proposed a set of principles to consider in the development of an appropriate governance entity for Māori organisations.[231] The principles of autonomy and diversity will be discussed here.[232]

The principle of autonomy suggests that governance entities are more likely to be effective if the community can meaningfully exercise control and ownership of the entity.[233] In the post-settlement era, this necessarily implies authority over the lands and natural resources

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[227] Joseph Williams, above n 31, at 19.

[228] Maria Bargh, above n 197, at 279.

[229] At 278.

[230] Carwyn Jones identifies that the only incporation of tikanga is referenced in dispute resolution processes in the Waikato-Tainui and Ngāi Tahu post-settlement governance entities. See Carwyn Jones, above n 9, at 117.

[231] The other principles are as follows: cultural match and mandated vision; community empowerment and participatory democracy; consensus and assisted dispute resolution; fair process, protection of minorities and access to law; choice; economies of scale; rationalisation; early entity development; recognition; and good governance. See Te Aka Matua o te Ture | Law Commission *Waka Umanga: A Proposed Law for Māori Governance Entities* (NZLC R92, 2006) at 67.

[232] See the principle of autonomy at 67 and the principle of diversity at 72.

[233] Carwyn Jones, above n 9, at 121.

governed by a particular entity. The principle of diversity recognises that a 'one size fits all' approach is not appropriate in the context of diverse iwi and hapū who comprise post-settlement governance entities.[234] The Crown's policy on the settlement of historical Treaty of Waitangi claims identifies twenty questions for determining whether proposed governance structures are acceptable for use as a post-settlement governance entity.[235] These questions illustrate the challenge of reconciling two cultural governance worldviews.[236] Robert Joseph identifies that only one of the twenty questions refers to whether the entity was developed in accordance with tikanga Māori.[237] It is unclear how the remaining nineteen questions seek to reconcile modes of corporate governance with Māori legal traditions, particularly where there is diverse application of Māori law among different iwi and hapū within a single entity. For example, Te Ohu Kaimoana Trustee Limited (the Māori commercial fisheries corporation) has faced similiar challenges where the distribution of the settlement assets favourably to iwi and their accompanying mandated iwi organisations has resulted in the fragmentation of various corporate and political dimensions of the Treaty of Waitangi Fisheries Settlement.[238]

Despite this, the above ethical coordinates sourced in Māori legal traditions provide an alternative governance model for reconciling the economic and political dimensions of self-determination. Economic independence therefore does not require Māori to co-opt business models that do not recognise their jurisdictional autonomy.

VIIConstitutional Change

A Indigenous peoples as unjustly excluded sovereigns

The concept of self-determination provides legal recognition of the fact that colonialism has rejected the status of indigenous peoples as sovereign entities with their own governance structures and jurisdiction over their lands, territories and resources.[239] As a

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[234] Te Aka Matua o te Ture | Law Commissio, above n 231, at 72.

[235] Te Arawhiti | Office for Māori-Crown Relations *Ka tika ā muri, ka tika ā mua: Healing the past, building a future – A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (2018) at 70-72.

[236] Robert Joseph "Unsettling Treaty Settlements: Contemporary Māori Identity and Representation Challenges" in Nicola R Wheen and Janine Hayward (eds) *Treaty of Waitangi Settlements* (Bridget Williams Books, Wellington, 2012) 151 at 155.

[237] At 155.

[238] At 159-160. See generally Te Ohu Kaimoana "Māori Fisheries Strategy" (27 February 2017) <www.teohu.maori.nz> at 21-26.

[239] Claire Charters "A Self-Determination Approach to Justifying Indigenous Peoples' Participation in International Law and Policy Making" (2020) 17 International Journal on Minority and Group Rights 215

result, self-determination is based on the denial of sovereignty and therefore indigenous peoples nevertheless remain unjustifiably excluded sovereigns.[240] Nevertheless, the principle of sovereign equality is axiomatic to the international legal order. States must respect the territorial integrity of other states and the sovereign right to exploit their own resources.[241] I argue that the assertion of Crown sovereignty requires careful scrutiny where the recognition of indigenous jurisdictional authority is harmonised within a legal order premised on the displacement of indigenous peoples from their territory.[242]

Indigenous peoples occupy a distinguishable status from other minority groups because of their ancestral connections to certain territories.[243] The right to self-determination persists despite the imposition of Crown sovereignty over these territories. In *Re Secession of Quebec*, the Canadian Supreme Court considered that the right to self-determination has acquired a status beyond convention and is now a general principle of international law.[244] The emergence of self-determination as a rule of international law is premised on developing friendly relations among nations and strengthening universal peace.[245] External

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at 228; Claire Charters "The Sweet Spot between Formalisation and Fairness: Indigenous Peoples' Contribution to International Law" (2021) 115 AJIL 123 at 125 at 126.

[240] Claire Charters "A Self-Determination Approach to Justifying Indigenous Peoples' Participation in International Law and Policy Making", above n 239, at 230.

[241] See Principle 21 of the *United Nations Declaration of the United Nations Conference on the Human Environment ('Stockholm Declaration')* (1972) UN Doc A/CONF 48/14 (signed on 16 June 1972) and Principle 2 of the *United Nations Declaration on Environment and Development ('Rio de Janeiro Declaration')* (1992) UN Doc A/CONF 151/26 (signed on 12 August 1992).

[242] John Borrows "Sovereignty's Alchemy: An Analysis of Delgamuukw v. British Columbia" (1999) 37 Osgoode Hall L J 537 at 576.

[243] Article 27 of the International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 19 December 1966, entered into force 23 March 1976) provides:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

In Aotearoa New Zealand, the rights of minorities are enshrined in the New Zealand Bill of Rights Act 1990, s 20. The Human Rights Committee has cautioned that the rights of minorities to culture should not be conflated with peoples' rights to self-determination. See Human Rights Committee *General Comment Adopted by the Human Rights Committee under Article 4, Paragraph 4, of the International Covenant on Civil and Political Rights: Addendum: General comment No. 23(50) (art.27)* CCPR/C/21/Rev.1/Add.5 (1994) at [2].

[244] *Re Secession of Quebec* [1998] 2 SCR 217 at 278.

[245] See *Declaration on the granting of independence to colonial countries and peoples* GA Res 1514 (XV) (1960); Charter of the United Nations 1 UNTS XVI (opened for signature on 26 June 1945, entered into force on 24 October 1945), arts 1(2) and 55; *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*

self-determination helps resolve disputes by giving peoples subject to colonial domination the right to choose their external form, including the right to independence from the colonial state.[246] More perplexingly, however, the right to self-determination has developed within a framework of respect for the territorial integrity of existing states. Therefore, the exercise of self-determination must be sufficiently limited to prevent threats to an existing states territory or the stability of relations between sovereign states.[247]

The right to external self-determination only arises in the most extreme cases under defined circumstances.[248] The Canadian Supreme Court has suggested that a state whose government respects self-determination within its own internal arrangements is entitled to the protection of its territorial integrity.[249] Internal self-determination creates power-sharing arrangements and gives peoples within a state the right to determine their own form of government.[250] However, the Court considers the right of indigenous peoples to secede from the imperial power is now "undisputed" where those peoples cannot meaningfully exercise self-determination internally.[251] This raises questions about whether the current recognition (or lack of) indigenous jurisdiction within domestic legal systems gives effect to the meaningful exercise of internal self-determination.

In *Delgamuukw v British Columbia*, the Canadian Supreme Court considered the Gitksan and Wet'suwet'en peoples' claim to Aboriginal title and self-government over lands in British Columbia. The Court held the Crown's radical title was burdened by the existence of aboriginal title and such title was defined according to Aboriginal traditions.[252] Despite this, the Court does not specifically affirm Gitksan and Wet'suwet'en ownership or jurisdiction over their territories.[253] John Borrows challenges the recognition of Aboriginal title without the subsequent recognition of indigenous jurisdiction on the basis that it subjects Aboriginal legal traditions to the supremacy of State law[254]. Borrows rejects the notion that the aboriginal right to self-government cannot be framed in "excessively general

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GA Res 2625, XXV (1970) at 123; *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries* [2001] vol II, pt 2 YILC 30 at 113.

246 *Re Secession of Quebec*, above n 244, at 282. See generally Robert Joseph and others, above n 1, at 161.

247 *Re Secession of Quebec*, above n 244, at 282.

248 At 282.

249 At 284.

250 At 282. See generally Robert Joseph and others, above n 1, at 161.

251 *Re Secession of Quebec*, above n 244, at 285.

252 *Delgamuukw v British Columbia* [1997] 3 SCR 1010 at 1017.

253 At 1036.

254 John Borrows, above n 242, at 562.

terms", yet the Crown's mere assertion of sovereignty is sufficient to displace previous indigenous titles by making them subject to, and a burden on, the underlying title of the Crown.[255] The reconciliation of aboriginal prior occupation with the mere assertion of sovereignty displaces the fuller pre-existent rights of indigenous peoples according to their own distinct legal traditions.[256]

The failure of domestic legal systems to recognise indigenous jurisdiction therefore raises questions about whether sovereignty and self-determination are truly compatible where indigenous peoples must reconcile their own legal traditions with the notion that they are conquered by the State legal system.[257] I argue that the right to self-determination implies an independent status as peoples with distinct legal traditions in both external and internal forms.[258] However, the problem of narrowly construed notions of self-determination reduces indigenous peoples to participatory actors within a state-dominated governance framework without inquiring into the source of jurisdictional authority.

B Spheres of Influence: Participation and Jurisdictional Autonomy

Indigenous peoples have used the international sphere to assist each other in advancing both local and shared global objectives.[259] These interactions create an opportunity to reconceptualise where authority is located and provide more recognition of diverse polities and their influence over key sites of power.[260] Modes of participation in the United Nations system create a means for realising self-determination in a jurisdictional sense.[261]

Claire Charters uses the example of the Foreshore and Seabed Bill which later became an Act extinguishing Māori customary rights to the foreshore and seabed.[262] Domestically, the Court of Appeal recognised the continuance of Māori customary rights according to tikanga Māori as part of the values of the common law,[263] and subsequently the Waitangi Tribunal concluded that the Crown's foreshore and seabed policy had breached the Treaty

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255 At 574-575.

256 At 564-565.

257 At 566.

258 Claire Charters "A Self-Determination Approach to Justifying Indigenous Peoples' Participation in International Law and Policy Making", above n 239, at 231.

259 Claire Charters, above n 21, at 147.

260 Maria Bargh, above n 25, at 13.

261 Claire Charters "A Self-Determination Approach to Justifying Indigenous Peoples' Participation in International Law and Policy Making", above n 239, at 230-231.

262 Claire Charters, above n 21, at 151.

263 *Ngāti Apa v Attorney-General* [2003] 3 NZLR 643 at [49] per Elias CJ.

principles.[264] Internationally, Māori intervened and criticised the policy in a range of international forums including the Working Group on Indigenous Populations, the Permanent Forum on Indigenous Issues and during negotiations of the United Nations Declaration on the Rights of Indigenous Peoples ('UNDRIP').[265] The United Nations Committee on the Elimination of Racial Discrimination ('CERD') found that New Zealand had breached the right to be free from racial discrimination.[266] Māori therefore participated in the international sphere to further their own tino rangatiratanga movement domestically through its expression as self-determination.[267] For indigenous peoples globally, the CERD decision set a precedent for legal recognition of indigenous peoples rights to land and any abrogation of those rights by states would result in a breach of international human rights law.[268]

The recognition of land rights through participation in the international sphere creates opportunities for defining the nature and extent of those rights according to indigenous legal traditions. Therefore, I argue that issues associated with ownership, management and governance of lands and natural resources should not be separated from forms of political and legal recognition required to exercise indigenous jurisdictional autonomy.[269]

C Models for constitutional transformation in Aotearoa New Zealand

Multi-jurisdictional approaches to climate change and biodiversity require reconceptualising authority by examining different spheres of influence. The Waitangi Tribunal has referred to two spheres of authority, one of tino rangatiratanga (Māori authority and control) and one of kāwanatanga (the Crown's authority and control).[270] Each sphere is characterised by unique legal traditions. Joseph Williams describes these as the first law (Māori legal traditions) and the second law (British legal traditions). Williams conceptualises the first law as tikanga Māori, which is primarily values-based focused on kinship.[271] Conversely, the second law distinguishes relationships from culture as being contractual and proprietary in nature.[272] However, Williams refers to the meeting point of these distinct legal traditions as establishing a third law — drawing on sources of Māori

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[264] Waitangi Tribunal *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 2004) at 138.

[265] Claire Charters, above n 21, at 152.

[266] At 151.

[267] At 152.

[268] At 154.

[269] Carwyn Jones, above n 9, at 56.

[270] Waitangi Tribunal, above n 22, at 527.

[271] Joseph Williams, above n 31, at 5.

[272] At 6.

and British law.[273] Similarly, contemporary models for constitutional change propose a third relational sphere (regulating the interactions between tino rangatiratanga and kāwanatanga).[274] The interaction between these two spheres has the potential to produce a hybrid-system sourced in both indigenous and State legal traditions. However, this requires indigenous legal traditions to be recognised as an equal and legitimate source of law.[275]

The common theme across all these sources is the call for the two spheres of tino rangatiratanga and kāwanatanga to be legitimised as equal jurisdictions. More recently, *He Puapua: Report of the Working Group on a Plan to Realise the UN Declaration on the Rights of Indigenous Peoples in Aotearoa/ New Zealand* has proposed an expansion of the tino rangatiratanga sphere.[276] However, this requires the Crown to resile power in some areas of law and instead recognise the exercise of Māori jurisdictional autonomy.[277] This implies a shifting nature of governance where, as Māori political institutions and economic independence are strengthened, certain governance functions may shift from the kāwanatanga to the tino rangatiratanga sphere.[278] Issues of mutual concern, such as climate change and biodiversity, would be governed by the relational sphere respecting the independent exercise of tino rangatiratanga, while maintaining participatory mechanisms for Māori in areas where the Crown continues to exercise power.

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[273] At 11.

[274] See Moana Jackson and Margaret Mutu *He Whakaaro Here Whakaumu Mō Aotearoa: The Report of Matike Mai Aotearoa – the Independent Working Group on Constitutional Transformation* (25 January 2016); Claire Charters and others above n 130.

[275] China is one example of where a "two systems, one country" approach has positioned one law as inferior to another. Article 31 of the People's Republic of China (PRC) Constitution provides for the establishment of special administrative regions when necessary. The systems in special administrative regions are prescribed by law enacted by the National People's Congress (NPC) in the light of the specific conditions. However, the NPC law is treated as "inferior" to the PRC Constitution. Miguel Angelo Loureiro Manero de Lemos describes this as "two systems, subordinate to one country" as opposed to a geuninely "two systems, one country" approach. See Miguel Angelo Loureiro Manero de Lemos "The Basic Laws of Hong Kong and Macau as Internationally Shaped Constitutions of China and the Fall off of One Country, Two Systems" (2019) 27(2) Tul J Int'l & Comp L 277 at 303. This presents a similiar challenge in comparison to Aotearoa New Zealand where Māori jurisdiction is superceded by State law, despite the fetter of tino rangatiratanga | Māori authority on the exercise of kāwanatanga | Crown authority. See Te Tiriti o Waitangi 1840, arts I and II. However, Miguel Angelo Loureiro Manero de Lemos argues that conflicts between PRC Constitution and Basic Laws are only apparent because "their jurisdictional scope does not overlap". See Miguel Angelo Loureiro Manero de Lemos at 312.

[276] Claire Charters and others, above n 130, at vi.

[277] At 27.

[278] At 11.

It should be acknowledged that co-management/ governance arrangements already attempt to do this. However, in most of these arrangements Māori are often the subservient partner in areas where they do not have ownership or where Māori law is not supported by the regulatory framework. The case studies identified by the Office of the Auditor-General in *Principles for Effectively Co-Governing Natural Resources* demonstrate that Māori 'ownership' of resources does not provide the authority to govern according to Māori law.[279] Māori ownership, as opposed to private ownership, is qualified by shared 'governance' and/or 'management' of resources.[280] Shared authority over resources is subject to legislation, policy and local government management plans which incorporate Māori rights and interests within this governance regime. The Crown's role is significant because the different 'faces' of the state are evident at various levels of the governance regime.[281] The processes for interaction between the Crown and Māori are therefore exclusively determined by the state, and the degree of autonomy exercised by Māori is limited.[282]

One exception to this is the Te Urewera Act 2014.[283] This Act provides that Te Urewera owns itself and ceases to be a national park.[284] The Te Urewera Board is responsible for acting "on behalf of, and in the name of Te Urewera".[285] The Board is comprised of six members appointed by Tūhoe and three members appointed by the Crown.[286] In contrast

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[279] Office of the Auditor-General "Principles for effecitvely co-governing natural resources" (February 2016) <www.oag.parliament.nz>.

[280] For example, the Tūpuna Maunga o Tāmaki Makaurau Authority case study shows that 'ownership' of the 14 Tūpunga Maunga was transferred to Ngā Mana Whenua o Tāmaki Makaurau. However, the maunga are held on trust for the common benefit of the iwi/ hapū of Ngā Mana Whenua o Tāmaki Makaurau and for other Aucklanders. Ownership is further qualified by co-management and co-governance arrangements. Maungauika/ North Head is administered by the Department of Conservation and Rarotonga/ Mount Smart is managed by the Auckland Council. The Tūpunga Maunga o Tāmaki Makaurau Authority co-governs the Tūpuna Maunga as the administering body under the Reserves Act 1977. The Authority is comprised of six members, representing 13 iwi/ hapū of Ngā Mana Whenua o Tāmaki Makaurau, six members appointed by Auckland Council, and one non-voting representative of the Crown. See Office of the Auditor-General above n 279.

[281] Maureen G. Reed and Shannon Bruyneel, above n 1, at 648-649.

[282] At 649.

[283] See generally Jacinta Ruru and others "Reversing the Decline in New Zealand's Biodiversity: empowering Māori within reformed conservation law" (2017) 13(2) Policy Quarterly 65.

[284] Te Urewera Act 2014, ss 11 and 12.

[285] Te Urewera Act 2014, s 17.

[286] Te Urewera Act 2014, s 21(2). The Minister for Treaty of Waitangi Negotiations and Minister of Conservation appoint the inaugural Crown representatives, as agreed by Tūhoe. Following the three year rotation, the Crown representatives are selected by the Minister of Conservation solely. The inaugural

to many other co-governance/ management arrangements, the Act encourages the Board to "consider and give expression to Tūhoetanga and Tūhoe concepts of management such as: rāhui; tapu me noa; mana me mauri; and tohu".[287] These tikanga concepts are defined in the Act in accordance with the understanding of Tūhoe specifically.[288] The Tūhoe whakapapa of Te Urewera forms part of the governance framework as a majority of the Board is Tūhoe and the reference to Māori law and Tūhoetanga specifically provides State law recognition of the conceptual regulators which govern the resource in accordance with tikanga Māori. Ultimately, the Board must "consider and provide for the relationship of iwi and hapū and their culture and traditions with Te Urewera" in exercising its decision-making powers in accordance with Tūhoetanga and the Crown's responsibility under the Treaty of Waitangi.[289]

Maria Bargh points out that interactions within all spheres of authority are dynamic acts of tino rangatiratanga which have evolved to take account of the colonising power.[290] However, where competing claims to authority arise, I argue that Māori jurisdiction is superseded by State law and therefore the tino rangatiratanga sphere is not supported by the current constitutional arrangements. Independent exercises of authority, such as land occupations or rāhui, challenge the exclusivity of Crown jurisdiction over a particular area. Expressions of self-government in areas such as Parihaka and Ōrākei continue to bear some resemblance to contemporary occupations at Ihūmatao, Shelly Bay, and Pūtiki Bay.[291] The legitimacy of the constitutional order is therefore challenged by dynamic expressions of

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Tūhoe representatives are chosen by the Te Uru Taumata Board (governance board). However, the Tūhoe Tribal Authorities (Ruatāhuna, Rūātoki, Te Waimana, and Waikaremoana) appoints all future representatives. See "Governance of Te Urewera" <www.ngaituhoe.iwi.nz>.

287 Te Urewera Act 2014, s 18(2).

288 Te Urewera Act 2014, s 18(3).

289 Te Urewera Act 2014, s 20.

290 Maria Bargh, above n 25, at 10.

291 See Heather Devere, Kelli Te Maihāroa, Maui Solomon and Maata Wharehoka "Regeneration of Indigenous Peace Traditions in Aotearoa New Zealand" in Heather Devere, Kelli Te Maihāroa and John P. Synott (Eds) *Peacebuilding and the Rights of Indigenous Peoples: Experiences and Strategies for the 21st Century* (Springer, Cham, 2016) 53 at 60; See Radio New Zealand "Ihumātao campaigners seek to avoid repeat of Ōrākei/ Bastion point occupation" (12 June 2019) <www.rnz.co.nz>; Harry Lock "'We can wait': Mau whenua will occupy Shelly Bay until dispute is resolved" Radio New Zealand (21 January 2021) <www.rnz.org.nz>; and Charlotte Mutu-Lanning "The occupation at Pūtiki Bay, Waiheke – explained" The Spinoff (23 June 2021) <www.thespinoff.co.nz>; Don Rowe "Unstoppable movement: how New Zealand's Māori are reclaiming land with occupations" The Guardian (31 August 2021) <www.theguardian.com>.

autonomy outside of the encompassing legal and political framework of the state.[292] This paper uses the rāhui imposed over the Waitākere Ranges to prevent Kauri Dieback Disease as a case study to illustrate the different ways in which authority and jurisdiction over biodiversity is located and recognised within the current regime.

VIII Rāhui: Case Study

A Anthropogenic Kauri Dieback Disease

Kauri Dieback Disease is caused by Phytophthora agathidicida – a microscopic water mould.[293] In soil form, the mould is known as 'oospores'. These oospores survive in dried soil, on boots, and on equipment for up to 8 years. It only takes a pinhead of soil to transfer these oospores to a new site where germination occurs and produces the mould's water form called 'zoospores'. Although this form does not survive as long as oospores, zoospores can swim through the water film in soil. The natural spread of the disease has been estimated at up to 3 meters per year.[294] The disease is spread almost exclusively by soil disturbance. Melanie Mark-Shadbolt and others have identified that human activities, including the transfer of contaminated soils, directly correlate to the spread of kauri dieback disease.[295] In the Waitākere Ranges, 70 per cent of the infected Kauri trees are within 50 meters of a walking track which provides evidence that humans are causing the spread of the disease.[296]

B Mātauranga Māori and Biodiversity Governance

Currently, Valance Smith and Melanie Mark-Shadbolt are co-leading a suite of kaupapa Māori projects that use mātauranga-led research to restore the collective health of trees,

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[292] Katherine Sanders "Parihaka and the Rule of Law" (2005) 11 Auckland U L Rev 174 at 187.

[293] Auckland Council *Kauri Dieback Report 2017: An investigation into the distribution of kauri dieback, and implications for its future management, within the Waitakere Ranges Regional Park* (June 2017) at 5.

[294] Te Kawerau ā Maki, Forest and Bird, The Tree Council, Waitakere Raynes Protection Society and Friends of Regional Parks "Kauri Dieback Diease" (2018) <www.waitakererahui.org.nz>.

[295] Simon Lambert, Nick Waipara, Amanda Black, Melanie Mark-Shadbolt and Waitangi Wood "Indigenous Biosecurity: Māori Responses to Kauri Dieback and Myrtle Rust in Aotearoa New Zealand" in Julie Urquhart, Mariella Marzano and Clive Potter (Eds) *The Human Dimensions of Forest and Tree Health* (Palgrave Macmillan, Cham, 2018) 109 at 115.

[296] Te Kawerau ā Maki, Forest and Bird, The Tree Council, Waitakere Raynes Protection Society and Friends of Regional Parks, above n 294. See also Susana Lei'ataua "The Waitakere rāhui is kaitiakitanga in action – so where's the support from government?" E-Tangata (18 February 2018) <www.e-tangata.co.nz>; Otago Daily Times Online News "Researchers say it's time to close every kauri forest" (17 August 2018) <www.odt.co.nz>.

forests and people as part of the Bioheritage National Science Challenge — *Te mauri o te rakau, te mauri o te ngahere, te mauri o te tangata: Mātauranga Māori based solutions for kauri dieback and myrtle rust*.[297] In 2018, Melanie Mark-Shadbolt and others noted that there is a lack of Māori knowledge in forest conservation research and policy. As a result, the use of Māori knowledge is often limited to scattered Māori representation in governance roles.[298] In 2015, Te Tira Whakamātaki | the Māori Biosecurity Network was established through funding from the Ministry of Business Innovation and Employment.[299] Despite support from research organisations such as the Bioheritage National Science Challenge, there has been limited engagement with two key government agencies — the Ministry for Primary Industries and the Department of Conservation. Accordingly, Te Tira Whakamātaki has developed and implemented its own strategies over biodiversity issues including Myrtle Rust.[300]

This is concerning given that the World Bank has estimated that around 60 million indigenous peoples are heavily dependent upon forests for their social and economic livelihood.[301] In 2021, the Climate Change Commission reported that the Māori economy (comprised of iwi and hapū post-settlement governance entities, Māori trusts and incorporations, and Māori Authorities) represents $69 billion or more in assets with projected growth.[302] Approximately 50 per cent of the Māori business economy is invested in "climate-sensitive" primary industries (forestry, agriculture, fishing and tourism).[303] According to tikanga Māori, kauri trees are intrinsically linked to the mauri (life force) and mana of their communities.[304] It is impossible to situate concepts such as mauri and mana

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[297] New Zealand's Biological Heritage National Science Challenge "Oranga (wellbeing): Mātauranga Māori based solutions for kauri dieback and myrtle rust" (April 2020) <www.bioheritage.nz>.

[298] Simon Lambert and others, above n 295, at 113.

[299] "Te Tira Whakamātaki | Māori Biosecurity Network" <www.ttw.nz>.

[300] Te Tira Whakamātaki does not receive direct funding but instead leverages off existing research programmes. The leadership made a decision not to accept money or contracts unless it was very clear about the purpose of that funding. See Simon Lambert and others, above n 295, at 127-128:

> Their argument has been that by accepting money from the government results in government assuming the right to dictate or control the conversations, results, data generation and measures of success; at least two government agencies were accused of claiming Te Tira Whakamātaki events (community meetings) as their own achievements.

[301] At 112.

[302] He Pou a Rangi | Climate Change Commission, above n 84, at 157.

[303] At 158.

[304] For example, Tāne Mahuta in the Waipoua Forest, within Te Roroa tribal lands, is often referred to in speeches, cultural performances and proverbs: "Ko te kauri ko au, Ko te au ko kauri – I am the kauri, the kauri is me". See Simon Lambert and others, above n 295, at 116-118.

within the current regime exclusively governed by State law jurisdiction. This divorces tikanga Māori from the cultural system in which it operates.[305] Indigenous peoples across the world, including Māori, have vested interests in the protection and health of forests according to their own jurisdiction.[306]

C Te Kawerau ā Maki and the Waitākere Ranges

In December 2017, Te Kawerau ā Maki, mana whenua of Waitākere, imposed a rāhui over the Waitākere forest to quarantine the kauri trees and prevent human access.[307] The Waitākere Ranges Heritage Area Act 2008 requires the Auckland Council to uphold local significance and promote the protection and enhancement of the Waitākere Ranges Heritage Area.[308] However, the Auckland Council initially rejected the request to recognise the rāhui and only began officially closing off "high-risk" tracks and issuing controlled area notices in May 2018.[309] It is concerning that the Auckland Council initially rejected the request to recognise the rāhui despite recommending an independent review of closing off public access to the Waitākere Ranges in June 2017.[310] In Te Kawerau ā Maki's view, "the science and the tikanga align".[311]

Māmari Stephens identifies the uniqueness of rāhui as an exercise of tikanga Māori that is often respected by Māori and non-Māori alike.[312] Prior to the closure, non-governmental organisations including Forest and Bird, the Tree Council, the Waitākere Ranges Protection Society and Friends of Regional Parks publicly supported the rāhui and its surrounding rules set by Te Kawerau ā Maki.[313] For example, the organisers of The Hillary 2018 trail run cancelled the national event despite receiving consent from the Council. In their view,

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[305] See Edward Taihakurei Durie, above n 50, at 34-35; Carwyn Jones, above n 9, at 42.

[306] Simon Lambert and others, above n 295, at 118-120.

[307] See Te Kawerau ā Maki, Forest and Bird, The Tree Council, Waitakere Raynes Protection Society and Friends of Regional Parks "Rāhui" (2018) <www.waitakererahui.org.nz>; Torika Tokalau "Kauri dieback: Nearly three years since Waitākere Ranges rāhui, what's changed?" Stuff NZ (13 September 2020) <www.stuff.co.nz>; Susana Lei'ataua above n 296.

[308] Waitakere Ranges Heritage Area Act 2008, s 3.

[309] See Te Kawerau ā Maki, Forest and Bird, The Tree Council, Waitakere Raynes Protection Society and Friends of Regional Parks "Waitākere Ranges Closed!" (4 June 2020) <www.waitakererahui.org.nz>

[310] Auckland Council, above n 293, at 24.

[311] Susana Lei'ataua above n 296.

[312] Māmari Stephens "Rāhui, mana, and Peter Ellis" E-Tangata (26 July 2020) <www.e-tangata.co.nz>.

[313] The Waitākere Rāhui website is a collaboration between Te Kawerau ā Maki, Forest and Bird, The Tree Council, Waitākere Ranges Protection Society and Friends of Regional Parks. See: Te Kawerau ā Maki, Forest and Bird, The Tree Council, Waitakere Raynes Protection Society and Friends of Regional Parks "Rāhui" (2018) <www.waitakererahui.org.nz>.

contravening the rāhui would add further confusion to the fact that the rāhui was laid over the whole forest and that Te Kawerau ā Maki had the authority to do so.[314] Stephens considers rāhui as an example of the diverse ways in which Māori law intersects with State law.[315] Importantly, Stephens recognises that occasionally local authorities will promote the awareness of rāhui, yet in other instances may fail to support rāhui.[316]

The closure includes all forested areas of the Regional Park except for a limited number of kauri safe tracks.[317] Open tracks are subject to a joint audit by Te Kawerau ā Maki, Auckland Council Biosecurity and Parks staff.[318] Additionally, any open tracks must meet the standard of the Controlled Area Notice of "no soil on footwear".[319] However, access is not restricted to: beaches or land adjacent to beaches, the Arataki Visitors Centre, public roads, private property or upgraded and reopening tracks.[320] Private property within the boundary or property that is ecologically inseparable from the forest is covered by the closure. In any case, Te Kawerau ā Maki has signalled they want to work in partnership and collaboration with property owners to ensure the closure is respected and managed within individual properties.[321] Further, Te Kawerau ā Maki has established a warrant system to authorise a selected number of partner organisations to continue operations in compliance with minimum kauri dieback standards.[322]

I consider there is an important distinction between the 'closure', established by the Auckland Council in partnership with Te Kawerau ā Maki, and the rāhui, established by Te Kawerau ā Maki exercising their own jurisdiction as mana whenua. This distinction is discussed further below.

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[314] See Susana Lei'ataua above n 296.

[315] Māmari Stephens above n 312.

[316] Māmari Stephens above n 312.

[317] See Auckland Council "Waitākere Ranges Regional Park – Open tracks map" <www.aucklandcouncil.govt.nz>.

[318] There is currently work underway to finalise a track re-opening plan, see: Auckland Council "Waitākere Ranges track re-opening plan" <www.aucklandcouncil.govt.nz>.

[319] See Te Kawerau ā Maki, Forest and Bird, The Tree Council, Waitakere Raynes Protection Society and Friends of Regional Parks above n 309.

[320] Te Kawerau ā Maki, Forest and Bird, The Tree Council, Waitakere Raynes Protection Society and Friends of Regional Parks above n 307.

[321] Te Kawerau ā Maki, Forest and Bird, The Tree Council, Waitakere Raynes Protection Society and Friends of Regional Parks above n 307.

[322] Te Kawerau ā Maki, Forest and Bird, The Tree Council, Waitakere Raynes Protection Society and Friends of Regional Parks above n 307.

D Challenges to the recognition of Māori Jurisdiction

This paper has identified the ways in which Māori seek direct engagement with their exercise of rangatiratanga. To properly recognise Māori jurisdiction over biodiversity, the rāhui imposed by Te Kawerau ā Maki should have legal effect at the date on which it was established in December 2017. However, it was not until May 2018 the Auckland Council's 'closure' superseded this jurisdiction. In essence, local authorities do not actually support rāhui within the cultural context from which it derives. This is an example of competing jurisdictional claims.

As tangata whenua, Māori have a constitutional status arising from prior occupancy and indigeneity. Eddie Taihakurei Durie identifies that Māori law is "the original *lex situs*; it springs from the earth".[323] Other peoples therefore depend upon recognition of their law by other jurisdictions. However, as explained in Part II, tikanga Māori is its own independent jurisdiction with an established legal order. Exercises of jurisdictional authority, such as rāhui, do not depend upon recognition by State law to have legal effect. Rāhui derives its legal characteristics from the mana of the person or group imposing it.[324] It follows that rāhui can only exist within tikanga Māori, which identifies mana whenua as those with authority to exercise power in accordance with conceptual regulators. Mana is exercised for the purpose of giving effect to kaitiakitanga until such time that balance is reached, or risks have been mitigated.[325] Any transgression of rāhui, or tikanga generally, has the effect of upsetting balance.[326] The enforceability of rāhui is not focused on sanctions in a strict sense. The power of rāhui derives from its tapu nature and the fear of upsetting the balance between the natural and spiritual worlds. Applying this to Kauri Dieback Disease, transgressing the rāhui would lead to an increased spread of the disease and therefore risk damaging the mauri essential to maintaining the reciprocal relationship between humans and the environment, as well as the spiritual and cultural connections between mana whenua and their rohe.[327]

Recognising rāhui through State law mechanisms such as significant natural areas, conservation protected areas or closure of 'high-risk' tracks does not adequately recognise

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[323] Edward Taihakurei Durie, above n 50, at 34.

[324] Melanie Mark-Shadbolt, Waitangi Wood and James Ataria "Why aren't people listening? Māori scientists on why rāhui are important" The Spinoff (2 February 2018) <www.spinoff.co.nz>.

[325] Hirini Moko Mead, above n 18, at 209-210.

[326] Moana Jackson "Justice and Political Power: Reasserting Māori Legal Processes" in Kayleen Hazlehurst (ed) *Legal Pluralism and the Colonial Legacy* (Avebury, Aldershot, 1995) 243 at 247-248.

[327] Simon Lambert and others, above n 295, at 116-118.

the conceptual regulators which govern rāhui according to Māori jurisdiction.[328] Iwi and Māori submissions to the Climate Change Commission identified that these practices undermine the restoration of traditional practices over lands threatening cultural vitality and sustainability.[329] Tikanga Māori determines that authority is situated with mana whenua — reinforcing the position of iwi and hapū as capable of exercising their own jurisdiction which, in turn, respects the diverse application of tikanga. This case study demonstrates that there are increasing jurisdictional challenges to state authority over indigenous biodiversity. Currently, participation is provided for through scattered governance roles and the consideration (or compartmentalisation) of customary rights and interests. Māori therefore continue to use participation as a platform for identifying jurisdictional issues. This case study illustrates that multi-jurisdictional approaches to biodiversity already exist without formal recognition. However, independent forms of rangatiratanga are superseded by State law.

IX Conclusion

Ultimately, dynamic expressions of indigenous autonomy outside and within the prevailing State legal system continue to challenge the legitimacy of the current constitutional arrangements. The increasing complexity of climate change governance as a series of interactions between indigenous peoples and the state illustrate the shortcomings of the current international regime. The mutliple intersecting factors of climate change and its effects on biodiversity show that an ecosystem-based management approach to governance is required. For Aotearoa New Zealand, there is an opportunity to position ecosystem-based management within Māori legal traditions as the science and tikanga align. However, the exclusive and monolithic power of the state in responding to climate change continues to suppress indigenous claims for jurisdictional autonomy over lands and natural resources.

The current legal and policy framework for considering the effects of climate change on biodiversity compartmentalises indigenous rights and interests within a state-dominated framework. However, these rights and interests are sourced in distinctly indigenous legal traditions and their incorporation into State legal traditions divorces them from the cultural context in which they derive. Indigenous peoples challenge the exclusive authority of the state to determine the effect on their rights through participation in the domestic and

[328] For example, Iwi/ Māori submitters on the proposed National Policy Statement on Indigenous Biodiversity noted that the role for iwi/ hapū to identify significant natural areas in accordance with their customary interests in particular areas (such as wāhi tapu) is not provided for. See Ministry for the Environment, above n 43, at 51-61.

[329] He Pou a Rangi | Climate Change Commission, above n 84, at 330.

international sphere. The rights and interests recognised within State legal traditions do not satisfy the requirements for free and informed prior consent, and respect for traditional knowledge. Instead, these requirements have divorced rights and interests from other forms of economic, political and legal recognition necessary for exercising authority and control over extractive industries and mitigation and adaptation projects. However, indigenous legal traditions provide a new way of conceptualising diverse economies and sustainable development.

In Aotearoa New Zealand, there are two sources of law: Māori legal traditions and British legal traditions. The meeting of these laws establishes a third law — drawing on both sources of Māori and British law. The existing models proposed for constitutional change similiarly recognise two spheres of authority: the tino rangatiratanga sphere and kāwanatanga sphere. The meeting of these spheres establishes a third relational sphere — governing the interaction between tino rangatiratanga and kāwanatanga. Indigenous peoples exercise authority both outside and within the State legal system. The challenge addressed in this paper is the need for indigenous legal traditions to be recognised as an equal and legitimate system of law independent of State legal traditions. The rāhui case study illustrates that indigenous jurisdiction can be respected by non-state actors, despite opposition from states. However, the current constitutional arrangements allow states to amalgamate exercises of indigenous jurisdiction within the prevailing State legal system. Neither a third law or a relational sphere can operate without achieving the equality of two distinct systems of law.

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Appendix 1: Glossary of Māori terms

Ea	state of equilibrium
Hapū	section of extended kin group
Iwi	extended Māori kin group
Kaitiaki	guardian/steward
Kaitiakitanga	guardianship/ stewardship
Kaupapa	principle/foundation
Kāwanatanga	government
Kotahitanga	unity
Mana	spiritually sanctioned authority
Manaakitanga	nurturing relationships
Mana moana	sourced from one's connection to the ocean implying rights and obligations over the respective area
Mana whenua	authority in relation to land
Mana tupuna	sourced from one's whakapapa and passed down from one's ancestors
Mātauranga	knowledge, wisdom, understanding, skill
Mauri	life force
Noa	profane/ ordinary/ complimentary opposite of tapu
Pākehā	New Zealanders of European descent
Rāhui	to put in place a temporary ritual prohibition, closed season, ban, reserve - traditionally a rāhui was placed on an area, resource or stretch of water as a conservation measure or as a means of social and political control for a variety of reasons which can be grouped into three main categories: pollution by tapu, conservation and politics
Rangatira	chief/leader
Rangatiratanga	Māori self-determination/ chiefly authority
Rohe	defined area/ territory
Taiao	world, Earth, natural world, environment, nature, country
Take	ancestral right/ cause of action
Tangata whenua	Indigenous/ 'people of the land'
Taonga	treasured possession
Tapu	spiritual character of all things
Te Ao Māori	Māori world/ worldview

Tikanga Māori	system that encompasses Māori law
Tohu	connotes the metaphysical or symbolic depiction of things
Utu	reciprocity
Waahi tapu	sacred place, sacred site
Whakapapa	genealogy
Whānau	extended family
Whanaungatanga	relationships