CHAPTER TEN

NORMS OF CONSULTATION WITH INDIGENOUS PEOPLES:
DECENTRALIZATION OF INTERNATIONAL LAW FORMATION OR
REINFORCEMENT OF STATES’ ROLES?

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I. Introduction

In July 2008, a global Indigenous Peoples Summit in Ainu Mosir (in Hokkaido, Japan) culminated in the Nibutani Declaration.¹ This came one month after the historic recognition by the Japanese government of the Ainu of Japan as Indigenous peoples.² The transnational network of Indigenous peoples who met in Ainu Mosir called, in part, for Canada, the United States, New Zealand, and Australia to move toward adoption in some form of the United Nations Declaration on the Rights of Indigenous Peoples (‘DRIP’),³ which these four States had voted against in the United Nations General Assembly in late 2007. These four States, acting in transnational unison, had been the only four States to vote against the Declaration at that final vote and had done so partly on account of some of its provisions on consultation with Indigenous peoples,⁴ although all of them have since moved to indicate support for the Declaration.⁵ Japan, as

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⁵ Australia commenced such moves in April 2009, New Zealand in May 2009, Canada in November 2010, and the United States in December 2010, with each offering interpretive statements to limit the effect of their new subscription to the Declaration.
one of forty countries offering explanatory comments on its vote, and one now recognising that it has obligations under the Declaration, had included explanations also bearing on those provisions. The legal positions of the five States encompassed within the Four Societies Conference at the origin of this volume would in themselves provide strong reason for seeking to better understand the emerging international law norm of consultation with Indigenous peoples.

An international law norm of consultation with Indigenous peoples is, in itself, an intellectually fascinating norm. Such a norm amounts to a requirement at international law that States engage in consultation with non-State actors, most specifically enunciated in the context of a new globalised instrument on Indigenous rights. In other words, the duty to consult with them now gives an international law standing of sorts to communities denied membership in the State system at the Westphalian moment and subsequently, albeit communities with which some colonial powers considered that they had to engage in treaty relationships even from early contact. A similar point would apply, of course, to some other norms in the minority rights and Indigenous rights context, particularly so with any norm of Indigenous self-determination. However, the norm of consultation provides a particular focus of study removed from some of the more complex and controversial dimensions of self-determination. In the process, it provides a useful lens with which to examine some of the broader theoretical issues arising. Notably, a norm like consultation with Indigenous peoples raises fundamental questions about legitimate modes of international law formation.

As with the traditional formation of customary international law more generally, one might frame a case for norms of consultation with Indigenous peoples in terms of State practice and opinio juris, and some have done so in at least partial ways. Such an account would naturally

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7 For a rich tracing of the history, see generally Paul McHugh, Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination (Oxford University Press, 2005); see also Paul McHugh, Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights (Oxford University Press, 2011).