

Comment on the Right for Indigenous Peoples to Full and Effective Participation in United Nations Fora and Processes

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April 4, 2012

Under present U.N. policies and procedures, indigenous peoples are often relegated to applying for certification as Non-Governmental Organizations (“ngos”) or associating with other ngos if they wish to participate in United Nations (“UN”) fora and processes. Some indigenous peoples have chosen to form ngos—governed by a Board of Directors made up of indigenous leaders—to guide them in their work. That choice should always be available, but indigenous peoples should also have the option to participate through their respective representative governments.

Non-governmental organizations are precisely what Indigenous peoples are not. The UN Declaration on the Rights of Indigenous Peoples (“UNDRIP”) affirms that indigenous peoples have the right to self-determination, which clearly distinguishes them from NGOs. To require that indigenous peoples participate in UN fora and processes as ngos is an affront to the sovereignty of indigenous peoples worldwide, and disregards their rights under international law.

For example, Indian nations in the United States have a nation to nation relationship with the federal government¹, and this nationhood status should be recognized in the international arena as well.

Article 3 of the UNDRIP recognizes the right to self-determination of all indigenous peoples. It states: “Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” This language is directly imported from Article 1 of the ICCPR and the ICESCR, and is the same inherent right to self-determination secured for all peoples under international law. Thus, the right to self-determination in Article 3 of the UNDRIP secures the affirmative and inherent right for indigenous peoples to participate in UN fora and processes regardless of whether their rights are directly implicated by third party actions. Other provisions speak to their right to involvement when third-party actions may affect them, and make clear that they can speak through representatives chosen by them through their own procedures.

Article 18 of the UNDRIP states that “Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.” Article 19 of the UNDRIP provides that “States shall consult and cooperate in good faith with indigenous peoples concerned through their own representative institutions in order to obtain their free, prior, and informed consent before adopting and implementing legislative or administrative measures that may affect them.” Because UN decisions and governance invariably affect indigenous interests across a broad range of areas, indigenous peoples, through their duly chosen representatives, must be granted

¹ United States v. Lara, 541 U.S. 193, 202, 124 S. Ct. 1628, 1634, 158 L. Ed. 2d 420 (2004) (Congress “...now seeks greater tribal autonomy within the framework of a ‘government-to-government relationship’ with federal agencies.”)

effective participation in UN fora and processes as governments, not NGOs, to accord with the most basic interpretation of FPIC. See also ILO 169 which recognizes the need for FPIC “with the objective of achieving agreement or consent to the proposed measures.” Article 6(1)(c). Accordingly, meaningful good faith consultation requires that indigenous peoples actively participate in external decision making in order to achieve a consensual decision.

Article 42 of the UNDRIP provides that “The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.” Thus, the UN must ensure that the duly appointed representatives of indigenous peoples have full and effective participation in UN fora and processes both as a substantive right in the UNDRIP and as a means for fulfilling all other rights confirmed by the UNDRIP. To date, the UN has not lived up to its obligations in this regard. Simply acknowledging that indigenous peoples are not always organized as NGOs is not sufficient, participation at the UN must be grounded in the concept of self-determination and must allow for full and effective participation of indigenous peoples in a manner consistent with that of the Nation states.