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A REASON TO REVISIT MAINE'S INDIAN CLAIMS SETTLEMENT ACTS: THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

Nicole Friederichs*

I. Introduction

In April 2008, seven months after the United Nations adopted the Declaration on the Rights of Indigenous Peoples (UNDRIP), Maine's state legislature passed a Joint Resolution in "support" of the landmark document.¹ In the wake of the United States' original vote against its adoption, Maine thereupon became the only state in the union to mark its support of the UNDRIP.² In the year prior to the Joint Resolution, however, each of Maine's four federally recognized Indian tribes³ were involved in lawsuits against the State of Maine. The lawsuits challenged the tribes' authority to self-govern, and thereby threatened their cultural and spiritual life.⁴ The tribes ultimately lost, and the decisions issued by the First Circuit Court of Appeals amounted to a limitation on the tribes' ability to self-govern.

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1. See H.P. 1681, 123rd Leg., 1st Spec. Sess. (Me. 2008) [hereinafter Joint Resolution].

2. The United States recently reversed its position on the Declaration, announcing its support for the U.N. Declaration on the Rights of Indigenous Peoples on December 16, 2010. See *Remarks by the President at the White House Tribal Nations Conference*, THE WHITE HOUSE (Dec. 16, 2010, 9:39 AM), <http://www.whitehouse.gov/the-press-office/2010/12/16/remarks-president-white-house-tribal-nations-conference>.

3. The four tribes are the Houlton Band of Maliseet Indians, Aroostook Band of Micmacs, Penobscot Indian Nation, and the Passamaquoddy Tribe. The Passamaquoddy Tribe has two locations (Indian Township and Pleasant Point), each with separate tribal councils but also represented by a joint tribal council. 75 Fed. Reg. 60,810 (Oct. 1, 2010); *About the Passamaquoddy Tribe*, PASSAMAQUODDY.COM, <http://www.passamaquoddy.com/splashpage.html> (last visited Feb. 26, 2011) ("The Passamaquoddy Tribe, having two locations, is represented by the Joint Tribal Council of the Passamaquoddy Tribe, each tribe with separate councils in Indian Township and at Pleasant Point Reservation.").

4. See *Maine v. Johnson*, 498 F.3d 37, 41 (1st Cir. 2007); *Aroostook Band of Micmacs v. Ryan*, 484 F.3d 41, 43 (1st Cir. 2007); *Houlton Band of Maliseet Indians v. Ryan*, 484 F.3d 73, 74 (1st Cir. 2007).

The Maine tribes, along with many of the other New England tribes, find themselves in a class separate from the majority of the more than five hundred federally recognized Indian tribes in the United States.⁵ State and federal legislation settling Indian land claims and creating unique jurisdictional relationships between the State of Maine and the tribes is at the core of what makes the Maine tribes different. Although the federal settlement legislation contains language supporting the sovereignty of the tribes, Maine's and the courts' narrow interpretation of those statutes makes it difficult for tribal governments to serve and protect their peoples, lands, and culture.

By highlighting the 2007 First Circuit decisions, this article examines the current status of Maine tribes under two provisions of the UNDRIP. The first provision pertains to the right to self-determination⁶ – a right that encompasses self-government. The second provision concerns the duty of governments to consult with indigenous peoples on all decisions “that may affect them,” with the goal of gaining their consent.⁷ Part II of this article reviews the development of indigenous peoples' rights within international human rights law. It examines the adoption of the UNDRIP and discusses its current legal status. Part III addresses the right to self-determination, reviewing its applicability to indigenous peoples, as well as whether this right is respected and protected in Maine. Focusing on two almost identical cases, *Aroostook Band of Micmacs v. Ryan* and *Houlton Band of Maliseet Indians v. Ryan*, Part III examines whether the Micmac and Maliseet Indian tribes are able to exercise their right to self-determination under the courts' interpretation of the settlement acts. Part IV addresses the duty to consult and free, prior, and informed consent by highlighting a case involving the Penobscot and Passamaquoddy tribes: *Maine v. Johnson*. This section discusses whether the State of Maine is fulfilling its obligations to consult with the tribes on matters that may affect them, and examines when consent is required prior to action. In Part V, this article concludes that Maine's treatment and the courts' interpretation of the settlement acts do not meet international human rights standards – or, for that matter, federal Indian law principles and federal government policies.

5. 75 Fed. Reg. 60,810 (Oct. 1, 2010) (“This notice publishes the current list of 564 tribal entities recognized and eligible for funding and services from the Bureau of Indian affairs by virtue of their status as Indian tribes.”); 75 Fed. Reg. 66,124 (Oct. 27, 2010) (adding the Shinnecock Indian Nation to the list of federally recognized tribes, bringing the total number to 565).

6. United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, art. 3, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) [hereinafter UNDRIP].

7. *Id.* art. 19.

Although this article argues for the customary international law status of the right to self-determination and the duty to consult (thereby placing legally binding obligations on States),⁸ the intent is not to conduct a thorough analysis of whether the UNDRIP, as a whole or through its individual provisions, amounts to customary international law. Instead, the primary purpose of this article is to juxtapose Maine's and the United States' support of the UNDRIP with Maine's treatment of its tribes. Given the incongruity of this treatment, coupled with the failure of the settlement acts to ensure the recognition and protection of rights afforded to the tribes under international human rights law and federal Indian law, the UNDRIP provides an opportunity to revisit the settlements with Maine's Indian tribes to ensure that the tribes rights are respected. As the United States announced in its recent statement reversing its position on the UNDRIP, the UNDRIP "expresses [the] aspirations of the United States . . . to improve our laws and policies."⁹ The laws settling the Maine Indian land claims are examples of where improvements are needed to meet international legal obligations.

II. The United Nations Declaration on the Rights of Indigenous Peoples

The UNDRIP passed on September 13, 2007, by an overwhelming majority of the United Nations General Assembly.¹⁰ One hundred and forty-four member States voted in favor of the UNDRIP, only eleven abstained, and only four (Australia, Canada, New Zealand, and the United States) voted against it. Two States that originally abstained have since announced their support of the UNDRIP,¹¹ and with the December 2010 announcement of support by the

8. The use of the term "States" refers to nations, and not to individual states of the United States of America. Under the Supremacy Clause of the United States Constitution, treaties and customary international law are binding not only on the federal government, but also on state and local governments. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 (1987). The Joint Resolution characterizes the UNDRIP as "nonbinding" and "express[es] support" for the UNDRIP by the Legislature. Joint Resolution, *supra* note 1. Whether the resolution has the force of Maine state law seems to be answered in the negative. *City of Bangor v. Inhabitants of Etna*, 34 A.2d 205, 208 (Me. 1943) ("A joint resolution or resolve, is often merely a rule or order for the guidance of the agents and servants of the government."); see also *Moulton v. Scully*, 89 A. 944, 952-53 (Me. 1917).

9. Press Release, U.S. Dep't of State, Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples 1 (Dec. 16, 2010), available at <http://www.state.gov/documents/organization/153223.pdf> [hereinafter U.S. 2010 Statement].

10. UNDRIP, *supra* note 6, pmbl.

11. See Special Rapporteur, *Report of the Special Rapporteur on the Situation of Human*

United States, all of the States that initially voted against the UNDRIP now officially endorse it.¹²

Although Australia, Canada, New Zealand, and the United States now support the UNDRIP, they nonetheless remain firm in their stance that it is legally nonbinding.¹³ While Canada and the United States assert that the UNDRIP is not part of customary international law,¹⁴ Australia and New Zealand instead aver that parts of the UNDRIP represent fundamental human rights of indigenous peoples already recognized under international law, while other parts “express[] new, and non-binding, aspirations.”¹⁵ It is this latter perspective that is shared by legal scholars: the UNDRIP is technically nonbinding on States, but some of its provisions reflect existing and binding

Rights and Fundamental Freedoms of Indigenous People, Addendum, ¶ 7, U.N. Doc. No. A/HRC/15/37/Add.3 (May 25, 2010); UN Permanent Forum on Indigenous Issues, *United Nations Declaration on the Rights of Indigenous People*, <http://www.un.org/esa/socdev/unpfii/en/declaration.html> (last visited Jan. 23, 2011) (noting that both Columbia and Samoa reversed their position).

12. See Jenny Macklin, *Statement on the U.N. Declaration on the Rights of Indigenous Peoples*, 2 (Apr. 3, 2009), http://www.un.org/esa/socdev/unpfii/documents/Australia_official_statement_endorsement_UNDRIP.pdf [hereinafter *Australia Statement*]; Press Release, Dr. Pita Sharples, *Announcement of New Zealand's Support for the Declaration on the Rights of Indigenous Peoples* (Apr. 20, 2010), available at <http://www.beehive.govt.nz/release/supporting+un+declaration+restores+nz039s+mana> [hereinafter *New Zealand Statement*]; *Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples*, INDIAN & N. AFFAIRS CANADA (Nov. 12, 2010), available at <http://www.ainc-inac.gc.ca/ap/ia/dcl/stmt-eng.asp> [hereinafter *Canada Statement*]; U.S. 2010 Statement, *supra* note 9, at 1.

13. In addition to these four States, several other States expressed their opinion that the UNDRIP represents a nonbinding document. See, e.g., U.N. GAOR, 61st Sess., 107th plen. mtg. at 22, U.N. Doc. A/61/PV.107, (Sept. 13, 2007) (statement of the United Kingdom) (emphasizing the nonbinding nature of the UNDRIP); *id.* at 26 (statement of Guyana) (noting that the UNDRIP is “political in character, as opposed to being a legally binding document”); U.N. GAOR, 61st Sess., 108th plen. mtg. at 3, U.N. Doc. A/61/PV.108 (Sept. 13, 2007) (statement of Nepal) (explaining their understanding of the UNDRIP as not creating any legally binding obligations).

14. *Canada Statement*, *supra* note 12 (“Although the Declaration is a non-legally binding document that does not reflect customary international law nor change Canadian laws, our endorsement gives us the opportunity to reiterate our commitment to continue working in partnership with Aboriginal peoples in creating a better Canada.”); U.S. 2010 Statement, *supra* note 9, at 1 (“The United States supports the Declaration, which — while not legally binding or a statement of current international law — has both moral and political force.”).

15. *New Zealand Statement*, *supra* note 12 (“The Declaration is an affirmation of accepted international human rights and also expresses new, and non-binding, aspirations.”); see also *Australia Statement*, *supra* note 12, at 3 (“Australia’s existing obligations under international human rights treaties are mirrored in the Declaration’s fundamental principles.”).

customary international law.¹⁶ As chronicled below, this is in part because the UNDRIP is but one chapter in a long history of international legal development of indigenous peoples' issues and rights.

Even before the UNDRIP was adopted, several international and regional human rights bodies addressed the rights of indigenous peoples, thereby contributing to the development of international norms on indigenous peoples' rights. For example, the U.N. Committee on the Elimination of Racial Discrimination (CERD), the monitoring body for the International Convention on the Elimination of All Forms of Racial Discrimination (Convention), released a General Recommendation on indigenous peoples in 1997. It called on States to "combat and eliminate [] discrimination" against indigenous peoples by "[p]rovid[ing] [them] with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics [and] [e]nsur[ing] that [they] have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent."¹⁷ During the periodic review process, at which States report to the Convention on their implementation efforts, CERD has increasingly sought information on indigenous peoples, and, in its concluding observations, commented on their status.¹⁸

16. In its recent report on the UNDRIP, the International Law Association (ILA) explained that, in addition to customary international law, the UNDRIP also "represents an essential prerequisite in order for States to comply with some of the obligations provided for by the UN Charter." INT'L LAW ASS'N, THE HAGUE CONFERENCE: RIGHTS OF INDIGENOUS PEOPLES 5 (2010), available at <http://www.ila-hq.org/en/committees/draft-committee-reports-the-hague-2010.cfm> (follow "Rights of Indigenous Peoples" hyperlink) [hereinafter ILA REPORT]. In making this statement, the ILA quoted an interpretation from the Office of Legal Affairs of the United Nations, which clarified that "in United Nations practice, a 'declaration' is a solemn instrument resorted to only in very rare cases relating to matters of major and lasting importance where maximum compliance is expected." *Id.* The ILA also noted that "in adopting [the UNDRIP], the General Assembly was '[g]uided by the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter.'" *Id.*

17. CERD, General Recommendation 23, on the Rights of Indigenous Peoples, Annex V, at 122, U.N. GAOR, 51st Sess., U.N. Doc. A/52/18 (Aug. 18, 1997).

18. See, e.g., CERD, Concluding Observations of the Comm. on the Elimination of Racial Discrimination, Republic of Congo, U.N. Doc. CERD/C/COG/CO/9 (Mar. 23, 2009); CERD, Concluding Observations of the Comm. on the Elimination of Racial Discrimination, Ecuador, U.N. Doc. CERD/C/EQU/CO/19 (Aug. 15, 2008); Rep. of the Comm. on the Elimination of Racial Discrimination, United States of America, U.N. Doc. A/56/18, GAOR 56th Sess., Supp. No. 18, at 64 ¶¶ 380-82 (2001); CERD, Concluding Observations of the Comm. on the Elimination of Racial Discrimination, Australia, U.N. Doc. CERD/C/304/ADD.101 (Apr. 19,

The Organization of American States' human rights regime also has contributed to the jurisprudence of indigenous peoples' rights in a significant manner. Both the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have reported on or adjudicated complaints from indigenous communities. For example, in 2002, the Inter-American Commission released a report on a land claims petition from the Western Shoshone Nation, an indigenous community located in Nevada. Citing CERD's General Recommendation, the Draft American Declaration on the Rights of Indigenous Peoples, and the jurisprudence of the U.N. Human Rights Committee, the Inter-American Commission examined the "developing norms and principles governing the human rights of indigenous peoples."¹⁹ Of particular relevance to that case, the Inter-American Commission discussed the general international legal principle that recognizes the collective ownership rights of indigenous peoples.²⁰

In the year prior, the Inter-American Court issued its landmark decision, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*.²¹ In this seminal case, the Inter-American Court held that the right to property under the American Convention on Human Rights included the communal land rights of indigenous communities, and, as a result, the rights must be recognized and protected by the State.²² Since the decision, the court has continued to develop its body of jurisprudence on indigenous peoples rights,²³ and is cited as legal support by international and regional human rights bodies faced with indigenous rights cases.²⁴

2000).

19. *Dann v. United States*, Case 11.140, Inter-Am. Comm'n H.R., Report No. 75/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 ¶ 124 (2002).

20. *Id.* ¶ 130.

21. *Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79* (August 31, 2001).

22. *Id.* ¶ 122.

23. *See Saramaka People v. Suriname, Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 185* (Aug. 12, 2008); *Sawhoyamaxa Indigenous Community v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146* (Mar. 29, 2006); *Yakye Axa Indigenous Community v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125* (June 17, 2005); *Moiwana Community v. Suriname, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124* (June 15, 2005).

24. *See, e.g., Centre for Minority Rights Dev.(Kenya) and Minority Rights Group Int'l on behalf of Endorois Welfare Council v. Kenya, 276/2003 African Commission on Human and Peoples' Rights passim* (Feb. 2010), available at http://www.unhcr.org/refworld/category_LEGAL_ACHPR_CASELAW_4b8275a120.html. CERD also relied on the Inter-American

Finally, the International Labour Organization's Convention No. 169 Concerning the Rights of Indigenous and Tribal Peoples (ILO No. 169)²⁵ is another example of international practice of recognizing indigenous peoples' rights. Adopted in 1989 by members of the ILO, twenty-two States have since signed on to the binding treaty.²⁶ ILO No. 169 provides rights similar to the UNDRIP, such as consultation,²⁷ control of lands and natural resources, and access to health and education.²⁸ The role of ILO No. 169 "as a powerful catalyst for the consolidation at the international level of the common normative understanding regarding the rights of indigenous peoples" was recently recognized by the U.N. Special Rapporteur on the rights of indigenous peoples.²⁹

It is these decisions and treaties, as well as the internal practices of States, on which professors James Anaya and Siegfried Wiessner rely to argue for the "customary international law character of individual key parts of the [UNDRIP] or of principles embedded in it."³⁰ Anaya and Wiessner are not alone in this conclusion. In addition to the statements made by States such as New Zealand,³¹ Australia,³² Ecuador,³³ and Namibia,³⁴ the International Law

Commission's *Dann Report* in its decision on the Western Shoshone. See Decision 1(68) (United States of America), U.N. ESCOR, CERD, 68th Sess., U.N. Doc. CERD/C/USA/DEC/1 (Apr. 11, 2006).

25. Convention Concerning Indigenous and Tribal Peoples in Independent Countries, I.L.O. Conv. 169, I.L.O., 76th Sess., reprinted in 28 I.L.M. 1382 (1989) [hereinafter ILO 169].

26. *Convention No. 169*, ILOLEX, <http://www.ilo.org/ilolex/cgi-lex/ratific.pl?C169> (last visited Feb. 26, 2011).

27. ILO 169, *supra* note 25, art. 6.

28. *Id.* art. 7.

29. Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, S. James Anaya, ¶ 33, U.N. Doc. A/HRC/9/9 (Aug. 11, 2008).

30. S. James Anaya & Siegfried Wiessner, *The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment*, JURIST (Oct. 3, 2007), <http://jurist.law.pitt.edu/forumy/2007/10/un-declaration-on-rights-of-indigenous.php>. Professor Anaya, who has written extensively in this area of law, is the current U.N. Special Rapporteur on the rights of indigenous peoples. Professor Wiessner is chair of the International Law Association's Committee on the Rights of Indigenous Peoples.

31. See generally New Zealand Statement, *supra* note 12.

32. See generally Australia Statement, *supra* note 12.

33. See U.N. GAOR, 61st Sess., 108th plen. mtg. at 10, U.N. Doc. A/61/PV.108 (Sept. 13, 2007) (statement of Ecuador) (stating that Ecuador "congratulates the General Assembly on having met the historic challenge of incorporating into international human rights law a fundamental instrument for ending the exclusion, marginalization and obscurity of millions of human beings who for centuries have been traditionally exploited and humiliated and who

Association, a global organization whose mission is “the study, clarification and development of international law,”³⁵ recently stated that “[i]mportant norms expressed in [the UNDRIP] can also be found in the other traditional source of international law: customary international law.”³⁶

Assessing the accuracy of this conclusion and determining which provisions of the UNDRIP amount to customary international law is beyond the scope of this article. But establishing the “customary international law character” of the right to self-determination and a State’s duty to consult with indigenous peoples supports this article’s proposition that the Maine settlement acts should be amended to reflect those international human rights norms. Worth addressing, briefly, is whether, under the persistent objector rule, the United States is immune from the application of the UNDRIP’s provisions that are customary in nature.

Under the persistent objector rule, “if a [S]tate objects to the establishment of a norm while it is becoming law and persistently objects up to the present, it is exempt from that norm.”³⁷ As a result, the timing of the objection is relevant, because if a norm “has *already* crystallized into customary [international] law,” the persistent objector rule does not apply.³⁸ Though determining the date when a norm becomes part of binding international law is difficult due to “the amorphous nature of customary lawmaking,”³⁹ it seems clear that some of the norms articulated in the UNDRIP crystallized into customary international law prior to the United States’ first objection in 2007. According to Professor Wiessner, writing in 1999, “the requisite *opinio juris*

expected from our Governments a decisive recognition of their collective rights”).

34. See *id.* at 3 (statement of Namibia) (stating that “[t]he argument that the Declaration is not binding did not appeal to us”).

35. INT’L LAW ASS’N, CONSTITUTION OF THE ASSOCIATION art. 3.1 (2010), available at http://www.ila-hq.org/en/about_us/index.cfm (follow “ILA Constitution (English)” hyperlink).

36. See ILA REPORT, *supra* note 16, at 6.

37. Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT’L L. 529, 538 (1993). There is some uncertainty surrounding the rule. Some scholars question whether the rule remains valid because it is “rarely invoked.” *Id.* Others regard the rule as “logically incoherent.” Patrick Dumberry, *Incoherent and Ineffective: The Concept of the Persistent Objector Doctrine Revisited*, 59 INT’L & COMP. L.Q. 779, 780 (2010). The United States and other legal commentators regard the rule as part of international law. See Curtis A. Bradley, *The Juvenile Death Penalty and International Law*, 52 DUKE L.J. 485, 516-17 (2002) (citing to the jurisprudence of the International Court of Justice, the Inter-American Commission on Human Rights, major treatises on international law, and the *Restatement (Third) of Foreign Relations Law*).

38. Dumberry, *supra* note 37, at 780.

39. Charney, *supra* note 37, at 538.

[exists] for the identification of . . . the right to political, economic and social self-determination” of indigenous peoples.⁴⁰ Additionally, after surveying the practice of States and decisions primarily from the Inter-American human rights system, professors Anaya and Williams concluded in 2001 that States were obligated to consult with indigenous peoples on matters that may affect them and to identify and secure indigenous peoples’ communal lands.⁴¹ At least with regards to these rights and obligations, the United States’ objection is not timely.

Moreover, the United States’ long history and practice of recognizing indigenous peoples’ rights is difficult to reconcile with its objection to the customary nature of the UNDRIP. As highlighted below, the United States has maintained a policy of self-determination for Native American tribes since 1970,⁴² and has called governmental departments and agencies to consult with Native Americans since at least 1994.⁴³ In fact, as Anaya and Wiessner noted in 2007, just after the adoption of the UNDRIP, “[t]he internal practice of the four opposing [S]tates, as well as their consent to accord a special status and rights to indigenous peoples in principle, *makes them part of the world consensus on customary international law.*”⁴⁴ Given the United States’ record and its relatively recent objection to the customary character of indigenous peoples’ rights found in the UNDRIP, relying on the persistent objector rule to immunize itself from international legal obligations fails.

40. Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 127 (1999). This echoes Anaya’s 1996 treatise. S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 112-13 (2d ed. 2004).

41. S. James Anaya & Robert A. Williams, Jr., *The Protection of Indigenous Peoples’ Rights over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33, 76-79 (2001).

42. 116 CONG. REC. 23,132 (1970) (message of President Nixon to Congress).

43. Memorandum on Government-to-Government Relations with Native American Tribal Governments, 30 WEEKLY COMP. PRES. DOC. 936 (Apr. 28, 1994) (memorandum from President Clinton for the heads of executive departments and agencies).

44. Anaya & Wiessner, *supra* note 30 (emphasis added). Anaya and Wiessner also add that [a]t most, [Australia, Canada, New Zealand, and the United States] can be considered persistent objectors to certain contents of the Declaration. This status appears to be very much in doubt, however, at least for Canada, as it counted itself through many years amongst the staunchest supporters of the Declaration and indigenous peoples’ rights – until its government changed in February 2006.

Id. They do not define “certain contents of the Declaration,” but given the United States’ practice with regards to self-determination, consultation, and the timing of the objection, it seems unlikely that they are referring to those provisions.

Each of the UNDRIP's rights and duties are relevant to the Maine tribes. As highlighted in the Joint Resolution, the UNDRIP ensures that indigenous peoples' rights to cultural integrity, education, health, and political participation are protected.⁴⁵ The UNDRIP also provides for the recognition of indigenous peoples' rights to their lands and natural resources, and the observation of their treaty rights,⁴⁶ all of which are also extremely important to the four Maine tribes. It is the UNDRIP's right to self-determination and the duty of States to consult with indigenous peoples and to gain their consent, however, that warrant immediate attention in Maine.

III. The Right to Self-Determination

The inclusion of the right to self-determination in the UNDRIP was controversial, prolonging its final adoption by the General Assembly and cited as the reason for several States' rejection or abstention.⁴⁷ The primary concern over its application to indigenous peoples was the ability to maintain the integrity of States' territorial boundaries.⁴⁸ Because the right to self-determination was asserted by States under colonial control to gain their independence,⁴⁹ States did not want to face the prospect of indigenous peoples

45. Joint Resolution, *supra* note 1.

46. UNDRIP, *supra* note 6, art. 26.

47. See U.N. GAOR, 61st Sess., 108th plen. mtg. at 6, U.N. Doc. A/61/PV.108 (Sept. 13, 2007) (statement of Nigeria) (expressing concern over articles 3 and 4 addressing self-determination); see also U.N. GAOR, 61st Sess., 107th plen. mtg. at 11, U.N. Doc A/61/PV.107 (Sept. 13, 2007) ("The Australian Government has long expressed its dissatisfaction with the references to self-determination in the declaration. Self-determination applies to situations of decolonization and the break-up of States into smaller States with clearly defined population groups. It also applies where a particular group within a defined territory is disenfranchised and is denied political or civil rights. It is not a right that attaches to an undefined subgroup of a population seeking to obtain political independence."); Press Release, Robert Hagen, Explanation of Vote by Robert Hagen, U.S. Advisor, on the Declaration on the Rights of Indigenous Peoples, to the U.N. General Assembly, United States Mission to the U.N. (Sept. 13, 2007) [hereinafter U.S. 2007 Statement] (arguing that "the declaration should have used clear and understandable language" to articulate a right of self-determination, which is different from the right to self-determination found in Article 1 of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights). The United States offered a new interpretation of the right to self-determination in its statement reversing its position. It now regards the UNDRIP's right to self-determination as "a new and distinct international concept of self-determination specific to indigenous peoples, . . . different from the existing right of self-determination in international law." U.S. 2010 Statement, *supra* note 9, at 3.

48. See *supra* note 47 and accompanying text.

49. See generally Dr. Saby Ghoshray, *Revisiting the Challenging Landscape of Self-*

asserting the right to self-determination in an effort to create a separate State. The concern was alleviated with the inclusion of article 46, which provides in part that “[n]othing in this Declaration may be . . . construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.”⁵⁰

Almost without exception, indigenous peoples have not asserted this aspect of the right to self-determination.⁵¹ Instead, indigenous communities rely on the right in an effort “to be full and equal participants in the creation of the institutions of government under which they live and, further, to live within a governing institutional order in which they are perpetually in control of their own destinies.”⁵² As aptly noted by former Working Group on Indigenous Peoples Chairperson, Dr. Erica-Irene A. Daes, the right to self-determination for indigenous peoples is about feeling that “they have choices about their way of life” and are able to “live well and humanly in their own ways.”⁵³ It is this

Determination Within the Context of Nation's Right to Sovereignty, 11 ILSA J. INT'L & COMP. L. 443, 448-50 (2005).

50. UNDRIP, *supra* note 6, art. 46(1), at 9; *see also* U.S. 2010 Statement, *supra* note 9, at 3 (explaining that the United States views the UNDRIP's right to self-determination as “a new and distinct international concept of self-determination specific to indigenous peoples, . . . different from the existing right of self-determination in international law”).

51. *See* Siegfried Wiessner, *Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples*, 41 VAND. J. TRANSNAT'L L. 1141, 1160 (2008) (noting that indigenous peoples have not sought to create separate and new States); ANAYA, *supra* note 40, at 60 (“[I]ndigenous peoples generally have invoked ‘a right of self-determination’ as an expression of their desire to continue as distinct communities free from oppression, while in virtually all instances denying aspirations to independent statehood.”). This aspect of self-determination is sometimes referred to as “external self-determination.” *See* Wiessner, *supra*, at 1165-66. Professor Anaya, on the other hand, describes the right to self-determination as consisting of both “constitutive” and “ongoing” aspects. *See* ANAYA, *supra* note 40, at 104-05. *But see* ILA REPORT, *supra* note 16, at 11 (arguing that the interpretation of the right to self-determination in this manner should be seen as an “added prerogative to the ones usually recognized by international law . . . [and] therefore does not preclude indigenous peoples from being beneficiaries of the general right to self-determination as granted to all peoples by general international law and common Article 1 of the U.N. human rights covenants of 1966, to be operationalized through the provisions of UNDRIP”).

52. ANAYA, *supra* note 40, at 113.

53. *See* Dr. Erica-Irene A. Daes, *The Concepts of Self-Determination and Autonomy of Indigenous Peoples in the Draft United Nations Declaration on the Rights of Indigenous Peoples*, 14 ST. THOMAS L. REV. 259, 264 (2001) (Susan J. Ferrell keynote address).

understanding of the right as it is applied to indigenous peoples that is recognized under customary international law.⁵⁴

Articles 3 and 4 of the UNDRIP explicitly address the right to self-determination. Article 3 provides that “[i]ndigenous peoples have the right to self-determination [and] [b]y virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”⁵⁵ In article 4, the UNDRIP adds that, “in exercising their right to self-determination, [indigenous peoples] have the *right to autonomy or self-government in matters relating to their internal and local affairs*, as well as ways and means for financing their autonomous functions.”⁵⁶

Of particular relevance to the Maine tribes is article 4’s provision for autonomy or self-government over internal affairs. As clarified by the International Law Association, the terms autonomy and self-government share the same meaning: autonomy means the right or condition of self-government.⁵⁷ Within the context of indigenous peoples and under international law, these terms “consist[] of the devolution of a range of powers”⁵⁸ from the State to an indigenous community, whereby indigenous peoples can “control the development of their distinctive cultures, including their use of land and resources,” through their own governance structures.⁵⁹

Although an earlier draft of the UNDRIP listed examples of areas over which indigenous peoples may exercise the right to self-govern, the adopted

54. See ANAYA, *supra* note 40, at 127 n.101 (citing generally to Comm’n on Human Rights, Sub-Comm’n on Prevention of Discrimination of Discrimination and Prot. of Minorities, Rep. of the Working Group on Indigenous Populations on Its Eleventh Session, 22-23, U.N. Doc E/CN.4/Sub.2/1993/29 (Aug. 23, 1993)); Wiessner, *supra* note 40, at 127 (finding that widespread State practice and *opinio juris* recognizes indigenous peoples’ rights to “maintain and develop their distinct cultural identity, their spirituality, their language, and their traditional ways of life . . . [and] the right to political, economic and social self-determination, including a wide range of autonomy and the maintenance and strengthening of their own system of justice”); Federico Lenzerini, *Sovereignty Revisited: International Law and Parallel Sovereignty of Indigenous Peoples*, 42 TEX. INT’L L.J. 155, 186 (2006); ILA Report, *supra* note 16, at 51 (“These rules of customary law correspond to the following provisions: indigenous peoples have the right to self-determination, that secures to indigenous peoples have the right to decide, within the territory of the State in which they live, what their future will be.”).

55. UNDRIP, *supra* note 6, art. 3.

56. *Id.* art. 4 (emphasis added).

57. ILA REPORT, *supra* note 16, at 13.

58. Stefania Errico, *The Draft UN Declaration on the Rights of Indigenous Peoples: An Overview*, 7 HUM. RTS. L. REV. 741, 750 (2007) (focusing on the term autonomy).

59. ANAYA, *supra* note 40, at 152; see also Lenzerini, *supra* note 54, at 186 (“[T]he recent evolution of international law concerning indigenous peoples demonstrates that a principle has emerged requiring States to recognize a given degree of sovereignty in favor of such peoples.”).

text does not. As explained by Stefania Errico, however, other provisions of the UNDRIP “shed light on the content” of the right to autonomy/self-government and the right to self-determination generally.⁶⁰ Each of the UNDRIP’s collective rights articulates an aspect of the right to self-determination. The UNDRIP uses language such as “control,” “maintain,” “develop,” and “determine” when describing indigenous peoples’ rights over their cultural, spiritual, educational, political, economic and social institutions, health and housing programs, and over the development and use of their lands and natural resources.

The United States already recognizes the right to self-determination. It noted in its explanation of its 2007 General Assembly vote – ironically against the UNDRIP – that “[u]nder United States domestic law, the United States government recognizes Indian tribes as political entities with inherent powers of self-government as first peoples.”⁶¹ The United States added that this principle of tribal sovereignty

means promoting tribal *self-government* over a broad range of internal and local affairs, including determination of membership, culture, language, religion, education, information, social welfare, maintenance of community safety, family relations, [e]conomic activities, lands and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.⁶²

This statement, which the U.S. government reiterated in its 2010 statement reversing its position on the UNDRIP,⁶³ stems from two centuries of United

60. Errico, *supra* note 58, at 750.

61. U.S. 2007 Statement, *supra* note 47. In fact, many of the rights contained in the UNDRIP are already recognized under federal Indian law or are part of federal policy, such as treaty rights and the protection of indigenous cultural and religious practices.

62. *Id.* (emphasis added).

63. U.S. 2010 Statement, *supra* note 9, at 3 (“For the United States, the Declaration’s concept of self-determination is consistent with the United States’ existing recognition of, and relationship with, federally recognized tribes as political entities that have inherent sovereign powers of self-governance. This recognition is the basis for the special legal and political relationship, including the government-to-government relationship, established between the United States and federally recognized tribes, pursuant to which the United States supports, protects, and *promotes tribal governmental authority over a broad range of internal and territorial affairs, including membership, culture, language, religion, education, information, social welfare, community and public safety, family relations, economic activities, lands and resource management, environment and entry by non-members, as well as ways and means for financing these autonomous governmental functions.*”) (emphasis added).

States jurisprudence on tribal sovereignty and self-government. In *Cherokee Nation v. Georgia*⁶⁴ and *Worcester v. Georgia*,⁶⁵ two of the earliest cases addressing Indian tribes, the Supreme Court declared tribes to be distinct, independent political communities “capable of managing [their] own affairs and governing [themselves].”⁶⁶ More recently, the Court recognized that tribes retain “rights in matters of local self-government.”⁶⁷

Although the principle of tribal sovereignty remains part of federal law, the courts have steadily weakened its scope.⁶⁸ This is particularly evident in Maine where tribes do not fully enjoy their right to self-determination and the federal Indian law principle of tribal sovereignty. As mentioned above, Indian tribes in Maine do not retain the same authority over their lands and people because of the legislation enacted by Congress and Maine settling the tribes’ land claims in 1980 and 1991. The courts, which have addressed the sovereign powers of the Maine tribes, essentially adopted the arguments of the State of Maine.⁶⁹ The courts and Maine favored language found in the settlement acts providing for the application of state law to the tribes over other language recognizing these tribes as sovereign governments, arguably in contravention of federal Indian law principles and canons.⁷⁰

64. 30 U.S. (5 Pet.) 1 (1831).

65. 31 U.S. (6 Pet.) 515 (1832).

66. *Cherokee Nation*, 30 U.S. (5 Pet.) at 12.

67. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978) (citing *Worcester*, 31 U.S. (6 Pet.) at 559) (internal quotation marks omitted); see also *United States v. Lara*, 541 U.S. 193, 204 (2004) (affirming “our traditional understanding of the tribes’ status as ‘domestic dependent nations’”); *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 425 (1989) (“Thus, an Indian tribe generally retains sovereignty by way of tribal self-government and control over other aspects of its internal affairs.”).

68. One of federal Indian law’s foundational doctrines is the doctrine of discovery. First cited and relied upon in *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543 (1823), the doctrine provides that the discovery of the New World by the European powers gave those nations “an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest.” *Id.* at 587. Some international human rights bodies have criticized the United States’ continued reliance on the doctrine of discovery. See e.g. Special Rapporteur, *Preliminary Study of the Impact on Indigenous Peoples of the International Legal Construct Known as the Doctrine of Discovery*, U.N. Doc. No. E/C.19/2010/13 (Feb. 4, 2010); Commission on Human Rights, *Indigenous Peoples and Their Relationship to the Land*, Erica-Irene A. Daes, ¶¶ 31, 89, U.N. Doc. No. E/CN.4/Sub.2/2001/21 (June 11, 2001).

69. See generally *Aroostook Band of Micmacs v. Ryan*, 484 F.3d 41 (1st Cir. 2007); *Houlton Band of Maliseet Indians v. Ryan*, 484 F.3d 73 (1st Cir. 2007).

70. Despite being the focus of much litigation, the treatment by the courts of these settlement acts and the negotiations surrounding their enactments have received little, but much needed, academic attention and analysis.

The two cases that exemplify the continued infringement on the right to self-determination, especially with regards to the Micmac and Maliseet tribes, are *Aroostook Band of Micmacs v. Ryan* and *Houlton Band of Maliseet Indians v. Ryan* (hereinafter collectively referred to as the Ryan cases).⁷¹ Before reviewing that infringement, however, any analysis or discussion of the tribes' rights is impossible without a brief examination of the federal and state settlement acts. The Penobscot and Passamaquoddy tribes received almost the exact same treatment under the Maine Indian Claims Settlement Act (MICSA)⁷² – the federal settlement act, and the Maine Implementing Act (MIA)⁷³ – the state settlement act. The Maliseets and Micmacs received different treatment from that of the Penobscot and Passamaquoddy tribes, but received similar treatment to each other under the above-mentioned acts, as well as separate federal and state settlement acts.⁷⁴

The late 1970s negotiations between the Penobscot Indian Nation, the Passamaquoddy Tribe, and Maine resulted in what is commonly referred to as the Maine Implementing Act.⁷⁵ The MIA addresses a variety of issues, including jurisdiction,⁷⁶ defining which lands will be acquired for the benefit of the tribes,⁷⁷ sovereign immunity,⁷⁸ regulation of fish and wildlife,⁷⁹ taxation,⁸⁰ and the creation of a Maine Indian tribal-state commission.⁸¹ Of significance, the MIA includes a specific provision for the Passamaquoddy and

71. Because of the similarity of the issues in these two cases, the appeals court heard the cases jointly and decided these cases on the same day. The court applied the same analysis and reasoning to both cases.

72. 25 U.S.C. §§ 1721-1735 (2006).

73. Act to Implement the Maine Indian Claims Settlement, ME. REV. STAT. ANN. tit. 30, §§ 6201-6214 (2009).

74. See COMM. ON INTERIOR & INSULAR AFFAIRS, EMPOWERING INDIAN TRIBES TO EXERCISE MISDEMEANOR CRIMINAL JURISDICTIONS OVER INDIANS, H.R. REP. NO. 102-229, at 1 (1991); Aroostook Band of Micmacs Settlement Act, Pub. L. No. 102-171, 105 Stat. 1143 (1991); Micmac Settlement Act, ME. REV. STAT. ANN. tit. 30, §§ 7201-7207 (2009).

75. ME. REV. STAT. ANN. tit. 30, §§ 6201-6214 (2009).

76. *Id.* § 6204 (asserting that state law applies to Indian lands); see also *id.* § 6206(1) (outlining the jurisdiction of Penobscot and Passamaquoddy tribes); *id.* § 6206-A (delineating the authority of the Maliseets); *id.* § 6209-A (outlining the jurisdiction of the Passamaquoddy Tribal Court); *id.* § 6209-B (outlining the jurisdiction of the Penobscot Nation Tribal Court); *id.* § 6210 (prescribing rules for law enforcement).

77. See *id.* §§ 6205, 6205-A.

78. *Id.* § 6206(2) (noting that Passamaquoddy and Penobscot tribes may be sued in state courts).

79. *Id.* § 6207.

80. *Id.* §§ 6208, 6208-A.

81. *Id.* § 6212.

Penobscot tribes, treating them similarly to municipalities but recognizing their authority and jurisdiction over “internal tribal matters.”⁸² In accordance with federal law, the Maine legislature subsequently submitted the MIA to Congress for approval. Congress’s approval took its form in MICSA, signed by President Carter in October 1980.⁸³ MICSA extinguished aboriginal Indian title for all Indian tribes in Maine.⁸⁴ In return, Congress recognized the Penobscot Indian Nation and the Passamaquoddy Tribe, and compensated them in settlement of their land claims.⁸⁵

The Houlton Band of Maliseet Indians, unlike the Penobscot and Passamaquoddy, “had not been previously recognized as a discrete Indian tribe by . . . the State of Maine,” but had a “potential claim”⁸⁶ and was included in the 1980 settlement.⁸⁷ At the state level, the Maliseets were eventually included in the MIA despite that the State of Maine initially did not regard them as a tribe and therefore unworthy of federal recognition and benefits.⁸⁸ They did not participate in the negotiations between Maine and the Penobscot and Passamaquoddy tribes, but were later included in both the MIA and MICSA, receiving federal recognition and a small portion of the financial settlement.⁸⁹ The MIA did not include the Maliseets in the “internal tribal matters” and municipality provisions applicable to the Penobscot and Passamaquoddy, but instead provided that the Maliseets “shall not exercise nor

82. *Id.* § 6206(1). The term “internal tribal matters” is not fully defined in the MIA except that section 6206(1) states that it “includ[es] membership in the respective tribe or nation, the right to reside within the respective Indian territories, tribal organization, tribal government, tribal elections and the use or disposition of settlement fund income shall not be subject to regulation by the State.” *Id.* The First Circuit developed a unique test to determine whether something is an “internal tribal matter.” See *Akins v. Penobscot Nation*, 130 F.3d 482, 486-88 (1st Cir. 1997).

83. 25 U.S.C. §§ 1721-1735 (2006).

84. See *id.* § 1723(c).

85. See *id.* § 1724.

86. DANIEL K. INOUE, SELECT COMM. ON INDIAN AFFAIRS, SETTLING ALL CLAIMS OF THE AROOSTOOK BAND OF MICMACS RESULTING FROM THE BAND’S OMISSION FROM THE MAINE INDIAN CLAIMS SETTLEMENT ACT OF 1980, AND FOR OTHER PURPOSES, S. REP. NO. 102-136, at 2 (1991).

87. See 25 U.S.C. § 1721(a)(1)-(2).

88. See *Proposed Settlement of Maine Indian Land Claims: Hearings on S. 2829 Before the Select Comm. on Indian Affairs*, 96th Cong. 37, 163 (1980) (statement of Richard Cohen, Att’y Gen. of Maine) (stating that Maine viewed the “claim of the so-called Maliseet Band of Indians” as being “not meritorious” because “[t]he Maliseet do not now exist as a tribe of Indians, nor have they existed as a tribe for many years”) (emphasis added).

89. See *Houlton Band of Maliseet Indians Supplementary Claims Settlement Act of 1986*, Pub. L. No. 99-566, 100 Stat. 3184 (1986).

enjoy the powers, privileges and immunities of a municipality nor exercise civil or criminal jurisdiction within their lands prior to the enactment of additional legislation specifically authorizing the exercise of those governmental powers.”⁹⁰

Congress, on the other hand, federally recognized the Maliseets through “a formal political act confirming the tribe’s existence as a distinct political society, and institutionalizing the government-to-government relationship between the tribe and the federal government.”⁹¹ MICSA also recognized the Maliseets’ right to “organize for its common welfare and adopt an appropriate instrument in writing to govern the affairs of the . . . band when each is acting in its governmental capacity,”⁹² though it simultaneously provided that the appropriate instrument “must be consistent with the terms of this [act] and the [MIA].”⁹³ Moreover, under MICSA, Maine and the Maliseets were “authorized to execute agreements regarding the jurisdiction of the State of Maine over lands owned by or held in trust for the benefit of the band or its members.”⁹⁴ But MICSA nonetheless made state laws applicable to “all Indians, Indian nations, or tribes or bands of Indians in the State of Maine, other than the Passamaquoddy Tribe, the Penobscot Nation, and their members.”⁹⁵

The Aroostook Band of Micmacs was not part of the 1980 settlement. By 1986, however, the Band managed to compile documentation to prove it was a tribe and pursued relief through MICSA. In response, Maine enacted the Micmac Settlement Act (MSA).⁹⁶ In 1991, Congress acted to redress the inequity caused by MICSA by passing the Aroostook Band of Micmacs Settlement Act (ABMSA), which provided the Band with federal recognition and compensation for the extinguishment of its aboriginal title to lands in

90. ME. REV. STAT. ANN. tit. 30, § 6206-A (2009).

91. COHEN’S HANDBOOK OF FEDERAL INDIAN LAW 138 (Nell Jessup Newton et. al. eds., LexisNexis 2005); *see also* 25 C.F.R. § 83.2 (2011) (explaining that federal recognition “mean[s] that the tribe is entitled to the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States as well as the responsibilities, powers, limitations and obligations of such tribes”).

92. 25 U.S.C. § 1726(a). In the Ryan cases, the Micmacs and Maliseets highlighted that this is the same language found in the Indian Reorganization Act of 1934 (IRA), Pub. L. No. 73-383, 48 Stat. 987 (1934) (codified at 25 U.S.C. § 476(a) (2006)) (a federal law which sought to place greater control in the hands of Indian tribes as opposed to government agents).

93. 25 U.S.C. § 1726(a).

94. *Id.* § 1725(e)(2).

95. *Id.* § 1725(a).

96. ME. REV. STAT. ANN. tit. 30, §§ 7201-7207 (2009).

Maine.⁹⁷ The MSA mirrored the language of the MIA addressing the Maliseets' treatment under the MIA with regards to jurisdiction and sovereignty.⁹⁸ ABMSA, on the other hand, federally recognized the Band,⁹⁹ and provided that they "may organize for its common welfare and adopt an appropriate instrument in writing to govern the affairs of the Band when acting in its governmental capacity."¹⁰⁰

Returning to the Ryan cases, the lawsuits were brought by Maine's Human Rights Commission and concerned the authority of the Maliseets and Micmacs to manage employment relations with their government employees.¹⁰¹ The two tribes argued that although the settlement acts allow for the application of state law, those same laws did not expressly abrogate the Micmacs and Maliseets' own inherent sovereign authority over matters such as government-employment relations.¹⁰² Specifically, the Micmacs and Maliseets argued that, because the settlement acts address the rights of Indian tribes, they must be interpreted using federal Indian law principles.¹⁰³ Because the two federal settlement acts affirmed the sovereignty of the two tribes when providing for their federal recognition and authority to organize as government, the Micmacs and Maliseets argued that they should retain their authority to manage the employment relationships within their own governments.¹⁰⁴

Maine simply argued that both tribal governments were subject to Maine's employment discrimination laws by virtue of the express language of the settlement acts providing for the application of state laws. The Court of Appeals for the First Circuit agreed with Maine and specifically noted that "the question in this case is resolved by these two federal statutes – both of which are settlement acts – and not by Indian *common law*."¹⁰⁵

97. Aroostook Band of Micmacs Settlement Act, Pub. L. No. 102-171, 105 Stat. 1143 (1991).

98. ME. REV. STAT. ANN. tit. 30, § 7205 ("Micmacs shall not exercise nor enjoy the powers, privileges and immunities of a municipality nor exercise civil or criminal jurisdiction within their lands prior to the enactment of additional legislation specifically authorizing the exercise of those governmental powers.").

99. Aroostook Band of Micmacs Settlement Act, § 6(a), 105 Stat. at 1148.

100. *Id.* § 7(a), 105 Stat. at 1148.

101. Aroostook Band of Micmacs v. Ryan, 484 F.3d 41, 43 (1st Cir. 2007); Houlton Band of Maliseet Indians v. Ryan, 484 F.3d 73, 74 (1st Cir. 2007).

102. *Aroostook Band*, 484 F.3d at 49-50.

103. *Id.* at 64.

104. The two tribes also argued that their tribal sovereign immunity prevented the state enforcement of those laws against the tribal government. *See id.*; *Houlton Band*, 484 F.3d at 74.

105. *Aroostook Band*, 484 F.3d at 44 (emphasis added).

On the surface, the Ryan cases may seem relatively harmless: the two tribes are subject to Maine's employment laws. Practically, however, the Ryan cases leave these two tribes with essentially no sovereign authority over their lands and peoples. They are subject to Maine law with only a few exceptions.¹⁰⁶ As characterized by the First Circuit, the federal recognition of the Micmacs and Maliseets was "merely an acknowledgment that [they] are eligible for particular federal tax treatment and benefits,"¹⁰⁷ as opposed to the recognition of their sovereign authority, or – to draw on the terminology of international human rights law – their right to self-government. Not only does this make the Maliseets and Micmacs atypical among federally recognized tribes, but it also infringes upon their right to self-determination.

Returning to the plain language of the UNDRIP, the Micmacs and Maliseets do not enjoy their "right to autonomy or self-government in matters relating to their *internal* and local affairs."¹⁰⁸ Although the two tribes are able to elect tribal leaders, those leaders have little authority to make decisions based on their laws or customs because they are subject almost completely to the laws of Maine. Government-employee relations is an internal affair,¹⁰⁹ as is managing the use of natural resources and determining economic development activities. Without greater autonomy to "control the lands, territories and resources that they possess"¹¹⁰ and "maintain and develop their own indigenous decision-making institutions,"¹¹¹ the Micmacs and Maliseets are unable to "control . . . their own destinies,"¹¹² and are therefore unable to fully enjoy their right to self-determination. Even under the federal principle of tribal sovereignty, the treatment of the Micmacs and Maliseets falls remarkably short.

106. *Id.* at 49 n.6 ("The State's acknowledgment is only that ABMSA § 7(a) may give the Aroostook Band independence over aspects of its own governmental and electoral structures."); see also *Houlton Band of Maliseet Indians v. Boyce*, 688 A.2d 908, 910 (Me. 1997) (upholding an injunction against tribal members from interfering in tribal business but not examining the legitimacy of a tribal election). More recently, Maine and the Maliseets agreed to recognize the jurisdiction of a tribal court to hear minor criminal offenses committed by tribal members and civil lawsuits between tribal members. ME. REV. STAT. ANN. tit. 30, § 6209-C (2009). The Penobscot and Passamaquoddy tribes have greater authority under the settlement acts.

107. *Aroostook Band*, 484 F.3d at 57.

108. UNDRIP, *supra* note 6, art. 4 (emphasis added).

109. The First Circuit acknowledged this in *Penobscot Nation v. Fellecer*, 164 F.3d 706, 712 (1999), relying on the "internal tribal matters" language found in the MIA.

110. UNDRIP, *supra* note 6, art. 26(2).

111. *Id.* art. 18.

112. ANAYA, *supra* note 40, at 113.

The Penobscot and Passamaquoddy tribes also retain limited self-government, despite receiving better treatment under the settlement acts. These two tribes benefit from language found in the state settlement act recognizing their authority over “internal tribal matters.”¹¹³ But relative to the UNDRIP’s “right to self-government in internal and local matters,” the courts and the State of Maine interpret “internal tribal matters” more narrowly. For example, in the *Johnson* case discussed below, the First Circuit held that “internal tribal matters” does not include the authority of the two tribes to regulate pollutant discharges into their waters within their own territory.¹¹⁴ This narrow reading, however, ignores the importance that water and other natural resources play in these two tribes’ culture, as well as the subsistence it provides to their members.

As acknowledged by the United States in its statement, the scope of self-determination includes “authority over . . . lands and resources management [and] environment.”¹¹⁵ The UNDRIP supports this interpretation in article 26(2), which provides that “[i]ndigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess.”¹¹⁶ The UNDRIP expressly recognizes the importance of land control to self-determination. It notes that “control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs.”¹¹⁷

The work of the Harvard Project on American Indian Economic Development also shows the importance of the right to self-determination for indigenous peoples. Its decades of research found that the greater the autonomy that an Indian tribe retains over its decision-making, the greater the opportunity it has for the economic development of its tribe and its members.¹¹⁸ The Micmacs and Maliseets live in the poorest regions of Maine,

113. See ME. REV. STAT. ANN. tit. 30, § 6206(1) (2009).

114. *Maine v. Johnson*, 498 F.3d 37, 45 (1st Cir. 2007).

115. U.S. 2010 Statement, *supra* note 9, at 3.

116. UNDRIP, *supra* note 6, art. 26(2); see also *id.* art. 25 (“Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.”); *id.* art. 32(1) (“Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.”).

117. *Id.* pmbl.

118. See Stephen Cornell & Joseph P. Kalt, *Sovereignty and Nation-Building: The Development Challenge in Indian Country Today*, 22 AM. INDIAN CULTURE & RES. J. 187, 209

and their members, along with other Native Americans living in Maine, earn less than the general population, with more of them living below the poverty level.¹¹⁹ Tribal members living in Maine would benefit if their governments enjoyed more robust self-government powers. Moreover, in addition to being out of step with federal Indian law, the decisions and the interpretation of the settlement acts by Maine and the courts highlight why change is needed to ensure that the Micmac, Maliseet, Penobscot, and Passamaquoddy tribes' right to self-determination is respected.

IV. A State's Duty to Consult and Free, Prior, and Informed Consent

Related to the right to self-determination is the right to participate in the larger political governing structure. As indigenous peoples have a right "to maintain and develop their own indigenous decision-making institutions,"¹²⁰ they also "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 procedure[s]."¹²¹ By fostering the active participation of indigenous peoples, the expectation is that their rights will be protected and their cultural and physical survival ensured. Maine's Indian tribes enjoy and exercise their right to participation in public affairs. The Penobscot, Passamaquoddy, and Maliseet tribes may send representatives to Maine's House of Representatives,¹²² participate in the Maine Indian Tribal-

(1998) (reprinted in 2003 by the Native Nations Institute and the Harvard Project on American Indian Economic Development as No. 2003-03 in the "Joint Occasional Papers on Native Affairs" series) ("To date, however, only one federal policy orientation has been associated with sustained economic development on at least those Indian reservations that have exercised de facto sovereignty through their own institutions: the self-determination policy that emerged in the 1970s. In other words, not only does tribal sovereignty work, but the evidence indicates that a federal policy of supporting the freedom of Indian nations to govern their own affairs, control their own resources, and determine their own futures is the *only* policy orientation that works. Everything else has failed."); see also HARVARD PROJECT ON AM. INDIAN ECON. DEV., *THE STATE OF THE NATIVE NATIONS* 10 (2008).

119. Stephen Brimley, *Native American Sovereignty in Maine*, ME. POL'Y REV., Fall/Winter 2004, at 12, 20, available at http://www.mitsc.org/documents/42_nativeamericansovereignty.pdf.

120. UNDRIP, *supra* note 6, art. 18.

121. *Id.*; see also *id.* art. 5 ("Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.").

122. ME. REV. STAT. ANN. tit. 3, § 1 (2009).

State Commission,¹²³ and have assisted with the drafting of legislation that affects them.¹²⁴

A corollary to the right to participation is the UNDRIP's requirement that States consult with their indigenous peoples. Article 19 provides that "States shall consult and cooperate in good faith with the 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."¹²⁵ The duty to consult is "a generally accepted principle in international law."¹²⁶ As with the right to self-determination, the United States government recognizes this duty by requiring federal departments and agencies to consult with Indian tribes.¹²⁷ Recently, the ILA included among the rules of customary law the right of indigenous peoples "to be consulted with respect to any project that may affect them."¹²⁸

The normative content of the duty to consult requires that consultations be made "in good faith,"¹²⁹ meaning that the mere holding of a meeting with an indigenous community does not meet the requirement of consultation. Instead, the goal of any consultation must be to obtain the free, prior, and informed consent of an indigenous community before any action is taken.¹³⁰

123. ME. REV. STAT. ANN. tit. 30, § 6212 (2009).

124. See e.g., Act To Amend the 1980 Maine Implementing Act To Authorize the Establishment of a Tribal Court for the Houlton Band of Maliseet Indians and Related Matters, ch. 384, sec. F-1, F-3, F-4, 2009 Me. Laws 1159-60 (codified at ME. REV. STAT. ANN. tit. 30, § 6212). The Aroostook Band of Micmacs unfortunately have not been afforded the same treatment as the other three tribes. See *id.*

125. UNDRIP, *supra* note 6, art. 19.

126. See generally James Anaya, *Indigenous Peoples' Participatory Rights in Relation to Decisions About Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources*, 22 ARIZ. J. INT'L & COMP. L. 7 (2005) (citing ILO No. 169, cases of the U.N. Human Rights Committee, the Inter-American Court of Human Rights, and the then-draft U.N. Declaration as international legal precedent).

127. See e.g., Consultation and Coordination With Indian Tribal Governments, Exec. Order No. 13175, 3 C.F.R. 304 (2000); Memorandum on Tribal Consultation, 2009 DAILY COMP. PRES. DOC. 887 (Nov. 5, 2009) (calling for "meaningful consultation and collaboration with tribal officials"). In its statement reversing its position on the UNDRIP, the United States recognized "the significance of the Declaration's provisions on free, prior and informed consent." U.S. 2010 Statement, *supra* note 9, at 5.

128. ILA Report, *supra* note 16, at 51.

129. UNDRIP, *supra* note 6, art. 19; see also ILO 169, *supra* note 25, art. 6(2); *Saramaka People v. Suriname*, Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 185, ¶ 17 (Aug. 12, 2008).

130. See, e.g., ILO 169, *supra* note 25, art. 6(2) ("The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to

Additionally, “[t]he duty to consult is not limited to circumstances in which a proposed measure will or may affect an already recognized right or legal entitlement.”¹³¹ This means that consultations are required even when the proposed decision or activity will impact the *interests* of indigenous peoples, such as their ability to practice and enjoy their cultural and spiritual customs.

Whether consent is required is disputed, and its inclusion in the UNDRIP concerned some States.¹³² The dispute and concern centers on whether article 19 grants a veto power to indigenous peoples over projects that may impact them. The ILA acknowledged the dispute in its 2010 report on the UNDRIP, and concluded that given “the recognition of collective rights of indigenous peoples, . . . the existence of the right of veto in favour of indigenous peoples seems to be confirmed by the object and purpose of UNDRIP, as shown by other provisions included in its text, as well as by pertinent international practice.”¹³³ The Inter-American Court, on the other hand, has held that States may take action without the consent of an indigenous community, but only when certain conditions are met. These conditions include benefit-sharing and conducting an environmental and social-impact assessment. Moreover, States rarely may take action without consent when the action would impact indigenous peoples’ lands and natural resources in a manner that threatens their survival.¹³⁴ Similarly, Professor Anaya has explained that the level of consultation and consent “is a function of the nature of the substantive rights

the circumstances, with the objective of achieving agreement or consent to the proposed measures.”); UNDRIP, *supra* note 6, art. 19; *Saramaka People v. Suriname*, Interpretation of the Judgment of Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 185, ¶ 17 (Aug. 12, 2008) (“Accordingly, the State has a duty, from the onset of the proposed activity, to actively consult with the Saramaka people in good faith and with the objective of reaching an agreement, which in turn requires the State to both accept and disseminate information in an understandable and publicly accessible format.”).

131. Human Rights Council, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, S. James Anaya, ¶ 44, Human Rights Council, U.N. Doc. No. A/HRC/12/34 (July 15, 2009) [hereinafter Special Rapporteur 2009 Report].

132. *See e.g.*, U.N. GAOR, 61st sess., 107th plen. mtg. at 24, U.N. Doc. A/61/PV.107 (Sept. 13, 2007) (statement of Sweden) (stating that article 19 “does not entail a collective right to veto”); *id.* at 18 (statement of Columbia) (stating that “[b]oth the Constitutional Court and the ILO Committee of Experts have established that prior consultation does not imply a right to veto State decisions, but that it is an ideal mechanism for enabling indigenous and tribal peoples to exercise the right to express themselves and to influence the decision-making process”).

133. ILA Report, *supra* note 16, at 14-15 (citation omitted).

134. *See Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶¶ 125-143 (Nov. 18, 2007) (discussing restrictions on the right to property, including natural resources).

at stake.”¹³⁵ For example, although consultations must be conducted with the aim of obtaining consent, the relocation of indigenous peoples from their lands *requires* consent, whereas a decision that would not involve an indigenous community’s rights to lands and natural resources typically would not require consent.¹³⁶

The scope of this article does not include resolving this dispute, but it seems clear that, at a minimum, certain projects and decisions require the consent of indigenous peoples – especially those projects and decisions that will impact their physical and cultural survival. Every consultation, however, must consist of a “true dialogue” between the State and the indigenous community.¹³⁷

Examples exist of Maine respecting the tribes’ right to participation and fulfilling its duty to consult with Indian tribes. A recent executive order signed by the Governor of Maine emphasizes the opportunities for “collaborative partnership” and instructs state agencies to “[p]romote[] effective two-way communication between the state agency and Maine’s Native American Tribes.”¹³⁸ A 2007 case, however, highlights Maine’s perspective that it is not required to consult with the tribes on matters that would affect tribal natural resources and directly impact their ability to practice their cultural customs.

The background to *Maine v. Johnson* is as follows. In 1999, Maine submitted an application to the United States Environmental Protection Agency (EPA) to take over discharge permitting under the federal Clean Water Act.¹³⁹ After taking several years to evaluate Maine’s jurisdiction in Indian Country, the EPA issued its final decision in 2003, approving Maine’s

135. See Anaya, *supra* note 126, at 7; see also Special Rapporteur 2009 Report, *supra* note 131, ¶¶ 46-49 (“Necessarily, the strength or importance of the objective of achieving consent varies according to the circumstances and the indigenous interests involved.”).

136. Anaya, *supra* note 126, at 17. The current position of the United States on this issue falls on the side of no veto power. U.S. 2010 Statement, *supra* note 9, at 5 (“In this regard, the United States recognizes the significance of the Declaration’s provisions on free, prior and informed consent, which the United States understands to call for a process of meaningful consultation with tribal leaders, but not necessarily the agreement of those leaders, before the actions addressed in those consultations are taken.”).

137. Lee Swepston, *The ILO Indigenous and Tribal Peoples Convention (No. 169): Eight Years After Adoption*, in THE HUMAN RIGHTS OF INDIGENOUS PEOPLES 17, 23 (Cynthia Price Cohen ed., 1998) (describing the requirements under article 6 of ILO No. 169).

138. An Order to Promote Effective Communication Between the State of Maine and the Native American Tribes Located Within the State of Maine, Exec. Order No. 06 FY 10/11 (Feb. 24, 2010).

139. *Maine v. Johnson*, 498 F.3d 37, 39-40 (1st Cir. 2007).

program.¹⁴⁰ Specifically, the federal agency “concluded that Maine had authority to regulate nineteen discharge facilities owned by non-Indians located outside, but discharging to boundaries within, the territorial waters”¹⁴¹ of the Penobscot and Passamaquoddy tribes.¹⁴² But the EPA also concluded that Maine did not have authority over “two tribal-owned facilities located on tribal lands and discharging into navigable waters within the southern tribes’ territories but which thereafter pass other downstream communities.”¹⁴³ The EPA retained its permitting authority over the two tribal facilities, citing the settlement acts and concluding that regulation by the southern tribes over their water resources was an “internal tribal matter” under the language of the MIA.¹⁴⁴

With regards to the non-tribal discharge facilities, the EPA “expressed concern that Maine’s permitting program might not ensure water quality standards adequate to protect the southern tribes’ right to fish for individual sustenance.”¹⁴⁵ To deal with this concern, the EPA required “the state to address the tribes’ uses” and expected Maine to “consult[] with the southern tribes, and [to] work[] collaboratively with them.”¹⁴⁶

The State of Maine subsequently appealed the EPA’s decision regarding the two discharge facilities on tribal lands.¹⁴⁷ The Court of Appeals for the First Circuit affirmed the EPA’s decision regarding the off-reservation discharge points, but reversed as to the two source-points on tribal lands.¹⁴⁸ The First Circuit again looked *only* to the language of the settlement acts and held that regulation of discharges into navigable waters is not an “internal tribal matter.”¹⁴⁹ As a result, Maine had the authority to regulate discharges into

140. *Id.* at 40 (citing State Program Requirements, 68 Fed. Reg. 65,052 (Nov. 18, 2003) [hereinafter EPA Determination]).

141. *Id.* (citing EPA Determination, *supra* note 140, at 65,032). The term “southern tribes” refers to the Penobscot and Passamaquoddy. *Id.* at 39. The EPA did not address Maine’s application toward the “northern tribes,” the Maliseets and the Micmacs. EPA Determination, *supra* note 140, at 65,054.

142. *Johnson*, 498 F.3d at 40 (citing EPA Determination, *supra* note 140, at 65,066).

143. *Id.* (citing EPA Determination, *supra* note 140, at 65,066).

144. *Id.* (citing EPA Determination, *supra* note 140, at 65,066).

145. *Id.* at 41 (citing EPA Determination, *supra* note 140, at 65,067).

146. EPA Determination, *supra* note 140, at 65,068.

147. *Johnson*, 498 F.3d at 41. The Penobscot and Passamaquoddy tribes intervened in Maine’s case against the EPA. The two tribes also filed their own suit against the EPA regarding the non-tribal facilities discharging into tribal waters. The two cases were consolidated. *See id.* at 39.

148. *Id.* at 49.

149. *Id.* at 44-46 (relying on *Akins v. Penobscot Nation*, 130 F.3d 482, 488 (1st Cir. 1997))

navigable waters on Penobscot and Passamaquoddy tribal lands.¹⁵⁰ Noting that the status of the Penobscot and Passamaquoddy tribes “markedly contrasts with the status of Indian tribes in other states,”¹⁵¹ the appeals court concluded that the two tribes no longer retained their inherent authority over discharges into navigable waters.¹⁵²

Citing ripeness, the First Circuit did not resolve the issue of whether the EPA could review Maine’s permitting program based on the trust doctrine,¹⁵³ a cornerstone of federal Indian law that places responsibilities on the government to “insure the survival and welfare of Indian tribes and people.”¹⁵⁴ According to the EPA, it sought to fulfill its trust responsibility as an arm of the federal government by ensuring that Maine is protecting the tribes’ usage of the rivers. In particular, to protect how tribal members use the affected waters, it sought to ensure preservation of their right to fish for sustenance by maintaining “its authority to object to state-issued permits.”¹⁵⁵ Maine disagreed with the EPA, arguing that the EPA does not have “environmental trust responsibilities to the tribes.”¹⁵⁶

The First Circuit’s holding in *Johnson* is problematic when considering the preservation of tribal sovereignty and when examining the settlement acts from an international human rights perspective, especially in light of the right to self-determination. As with the Ryan cases, *Johnson* highlights the limited authority Maine tribes have over their lands and natural resources – a limited authority that prevents them from fully exercising their right to self-determination. But the case also highlights the necessity of consultation with the tribes, especially when it comes to decisions that may negatively impact their natural resources.

Maine argued against the existence of “environmental trust responsibilities [owed] to the tribes”¹⁵⁷ and also denied the existence of the subsistence-fishing rights of the Penobscot and Passamaquoddy tribes.¹⁵⁸ Instead, it argued that

and Penobscot Nation v. Fellencer, 164 F.3d 706, 710-11 (1st Cir. 1999)).

150. *Id.* at 45.

151. *Id.* at 42.

152. *Id.* at 45.

153. *Id.* at 47.

154. 1 AM. INDIAN POLICY REVIEW COMM’N, FINAL REPORT 130 (1977).

155. *Johnson*, 498 F.3d at 47..

156. *Id.*

157. *Id.*

158. The director of Maine’s Department of Environmental Protection stated, “When we’re looking at the way the law and the standards are established, that’s correct - there are no sustenance fishing rights or standards that are created that connect back to the manner or extent

a single water-quality standard exists for all, and, therefore, there is presumably no need to consult with the tribes or to seek their consent prior to implementing a permitting program under the Clean Water Act.¹⁵⁹ This perspective not only runs afoul of Maine's own support of the UNDRIP and the recent executive order signed by the Governor of Maine, but also fails to appreciate the primary reason why the duty to consult and free, prior, and informed consent exist in the first place – to ensure the cultural and physical survival of indigenous peoples.

The importance that indigenous peoples place on their lands and natural resources is one of their defining characteristics. Among the several articles providing for the protection of lands and natural resources, the UNDRIP recognizes the “distinctive” relationship indigenous peoples have with their “lands, territories, waters, [] coastal seas and other resources.”¹⁶⁰ The Inter-American Court eloquently states that

the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, [their relationship with] the land is not merely a matter of possession and production but a material and spiritual element, which they must fully enjoy [. . .] to preserve their cultural legacy and transmit it to future generations.¹⁶¹

The importance of protecting the tribes' lands and natural resources is no different. The Penobscot Nation is a tribe of over two thousand members, most of whom live near or on Indian Island in the middle of the Penobscot River in Maine.¹⁶² The Penobscot River watershed has been and continues to

to which the tribes use the river. There is a standard for fishing for every-body.” Gale Courey Toensing, *Maine Denies Tribe Has Sustenance Fishing Rights*, INDIAN COUNTRY TODAY (Sept. 10, 2007), available at <http://indiancountrytodaymedianetwork.com/2007/09/maine-denies-tribe-has-sustenance-fishing-rights/> (last visited Apr. 17, 2011).

159. See *supra* note 158 and accompanying text.

160. UNDRIP, *supra* note 6, art. 25.

161. *Saramaka People v. Suriname*, Interpretation of the Judgment on Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 185, ¶ 90 (Aug. 12, 2008) (alteration in original) (quoting *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 76, ¶ 149 (Aug. 31, 2001)).

162. PENOBSCOT NATION, PENOBSCOT TRIBAL BROCHURE 4 (2010), available at <http://www.penobscotculture.com/images/Penobscot-Tribal-Brochure-2010.pdf>.

be a hub of Penobscot tribal life, providing its members with sustenance.¹⁶³ The tribe operates its own Department of Natural Resources, the mission of which “is to manage, develop and protect the Penobscot Nation’s natural resources in a sustainable manner that protects and enhances the *cultural integrity* of the Tribe.”¹⁶⁴ The Penobscot tribe is actively involved in water-quality monitoring and shares its data of the Penobscot River with the state.¹⁶⁵

Similarly, the two communities of the Passamaquoddy tribe are located along and near the St. Croix River, which creates the border with Canada.¹⁶⁶ Both Passamaquoddy communities conduct environmental programs geared toward protecting water resources, and have enacted tribal laws addressing sustenance fishing and hunting by tribal members.¹⁶⁷ The EPA also recognized the importance of water quality to the two southern tribes in its decision on Maine’s National Pollutant Discharge Elimination System (NPDES) application.¹⁶⁸

Regulating discharge facilities that pollute tribal waters clearly affects the tribes, and gives rise not only to a duty to consult, but also to an obligation to obtain the tribes’ consent over regulations that are put into place. Pollutants discharged into tribal waters impact how tribal members use those natural resources. To ensure that those tribal resources are protected in a manner deemed appropriate by the tribes themselves, the tribes must be involved in the

163. *See id.* at 6-7.

164. *Department of Natural Resources*, PENOBSCOT INDIAN NATION, <http://www.penobscotnation.org/DNR/DNR1.htm> (last visited Feb. 6, 2011) (emphasis added).

165. Through this relationship with the state, emergency water-quality problems have been identified early. For example, as a result of the Penobscot’s monitoring to quantify the occurrence and severity of algae blooms in the river, the State of Maine better understands the frequency and severity of the blooms, has improved its river model, and developed instream criteria and discharge-permit levels for the algae-causing nutrients. U.S. ENVTL. PROT. AGENCY, FINAL GUIDANCE ON AWARDS OF GRANTS TO INDIAN TRIBES UNDER SECTION 106 OF THE CLEAN WATER ACT: FOR FISCAL YEARS 2007 AND BEYOND, at 5-23, 24, available at <http://www.epa.gov/owm/cwfinance/final-tribal-guidance.pdf> (last visited Feb. 7, 2011); *see also Penobscot Indian Nation Fact Sheet*, U.S. EPA (Sept. 2007), <http://www.epa.gov/region1/govt/tribes/penobscotindiannation.html>.

166. *About the Passamaquoddy Tribe*, PASSAMAQUODDY.COM, <http://www.passamaquoddy.com/splashpage.html> (last visited Feb. 26, 2011).

167. *Passamaquoddy Indian Township*, U.S. EPA (Nov. 15, 2010) <http://www.epa.gov/region1/govt/tribes/passamaquoddyindiantownship.html>; *Passamaquoddy Tribe-Pleasant Point*, U.S. EPA (Nov. 15, 2010) <http://www.epa.gov/region1/govt/tribes/passamaquoddypleasantpoint.html>; *see e.g.*, PASSAMAQUODDY TRIBAL ORDINANCES REGULATING HUNTING, FISHING AND TRAPPING IN THE PASSAMAQUODDY INDIAN TERRITORY §§ 100(6), (12)-(13) (2007), available at http://www.wabanaki.com/fish_&_game_law2.htm.

168. EPA Determination, *supra* note 140, at 65,056.

decision-making process. Maine's refusal to consider the impact its water-quality standards would have on tribal uses is a breach of its duties to consult and to obtain the consent of the tribes. As noted above, the purpose of the duty to consult is to ensure that indigenous peoples' rights are protected. Like much of the UNDRIP, the duty to consult and to obtain free, prior, and informed consent seeks to prevent disregard of indigenous peoples' rights to their lands and natural resources, and indifference to the continuation of their culture.

V. The U.N. Declaration Provides Reasons Why the Settlement Acts Should Be Revisited and Renegotiated

United States federal Indian law provides Congress with almost absolute power to legislate over Indian affairs in a manner it sees fit.¹⁶⁹ This doctrine of congressional plenary power explains the centuries of Indian policy flip-flopping from allotments and assimilation, to Indian reorganization, to termination, and, finally, to self-determination.¹⁷⁰ The doctrine also explains, in part, why the Maine tribes could be treated differently from other Indian tribes through the passage of the settlement acts, which, as interpreted by the courts and the State of Maine, severely limit the tribes' ability to self-govern. Since the enactment of the first settlement acts thirty years ago, the State of Maine and the tribes have regularly and aggressively litigated the acts' meaning, resulting in strained relationships between them. Although Congress is free to amend the federal settlement acts in a manner that would more thoughtfully reflect the current federal policy of self-determination, it is not required to do so. What the UNDRIP offers is the legal and moral incentive to examine the inequities of this treatment by providing a normative and legal framework for how the settlements acts must change.

The settlement acts should be amended to ensure that each of the four Maine Indian tribes' rights to self-government are fully recognized. This means that the Micmacs and Maliseets would retain the authority to manage their governmental-employee relationships, that each tribe would be able to regulate on-reservation activities impacting their lands and natural resources, and that Maine would be required to consult and seek the consent of the tribes for off-reservation activities that may impact their lands and natural resources.

169. See generally Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195 (1984).

170. See generally Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 7-20 (1995).

But it primarily means that the tribes would have the authority to control their own destinies, under their own laws and customs.

The history of the Maine tribes and the settlements they received unfortunately contrast with that of other tribes across the United States. The Maine tribes, however, are federally recognized and deserve not only the application and protection of federal Indian law principles in interpreting laws specific to them, but also the protection of their international human rights as articulated in the UNDRIP. As demonstrated above, the right to self-determination and the duty to consult reiterate rights that already exist in United States law. The settlement acts, as interpreted by Maine and the courts, infringe upon these rights, preventing the tribes from fully taking ownership of their own destinies. Given Maine's and the United States' support for the UNDRIP, the two governments, along with the tribal governments, should revisit and improve the settlement acts to ensure that the Maine tribes' rights are respected and upheld.