The UN Declaration on the Rights of Indigenous Peoples: A Flexible Approach to Addressing the Unique Needs of Varying Populations

Viniyanka Prasad
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Viniyanka Prasad*  

I. INTRODUCTION

In September of 2007, the United Nations General Assembly adopted the Declaration on the Rights of Indigenous Peoples ("Declaration"). The Declaration presents a comprehensive list of rights, unique to indigenous populations, which have often gone overlooked by national governments and international organizations. These rights touch nearly every aspect of indigenous groups' lives, including provisions addressing issues ranging from land rights to spiritual concerns to education and vocational needs. The terms of the Declaration include an enumeration of areas in which rights should be recognized along with details of potential remedies. Instead of establishing a rigid list of rules under which countries must manage indigenous affairs, the Declaration creates an adaptable set of standards that identify previously under-observed, yet significant, concerns of heterogeneous indigenous groups. The Declaration also mandates that nations expand discussion between governments and indigenous peoples to determine the adequacy of remedies for those concerns.

There were limited dissenters to the adoption, including New Zealand, Australia, and Canada. Among the foremost concerns of these countries was an article of the Declaration that awards restitution to indigenous groups for “land,
territories, and resources” taken by national governments. The dissenters’ apprehensions center on the sweeping language of the article; it could apply to an expansive portion of a nation’s land and resources, since it purports to guarantee such access to all lands and resources that were “traditionally owned or otherwise occupied or used” by indigenous groups. These concerns are particularly problematic because if nations fear that the provisions are too broad on issues as fundamental as property rights, then the Declaration is unlikely to result in lasting international customs.

These fears and others can be addressed by the Declaration’s greatest strength. The Declaration is a powerful tool chiefly because it mandates that national governments should provide remedies based on collaborative efforts with indigenous groups to unearth the specific needs of individual populations. Because indigenous groups are not homogenous, the text can be read to create an adjustable set of standards, rather than stagnant remedies, that are consistently re-evaluated for adequacy through conversations between national governments and indigenous groups and also through oversight by international bodies. This is apparent through various provisions, such as those mandating discussion between national governments and indigenous peoples. In addition, the Declaration calls for continuous assessments by international bodies, which promote compliance with the text, to ensure that the Declaration furthers its own goals. Though the issues raised in the Declaration enumerate paramount concerns of indigenous groups that should not be overlooked by national governments, the provisions for discussion and re-evaluation suggest that there is no single method for addressing these matters. Thus, while the Declaration recognizes restitution as the remedy most likely to address indigenous concerns, it allows national governments to cooperate with indigenous groups in order to determine the extent of a particular group’s land needs and the best-suited remedy for that population.

This Development discusses the varying needs of indigenous groups of different nations and how this variance should be considered in order to encourage adherence to the spirit of the Declaration. Section II outlines the concerns of the indigenous groups of the three dissenter countries named above. This brief synopsis of the state of affairs of a few indigenous groups provides a framework under which international law should be evaluated. For example, the material in this Section conveys a general failure by governments of
industrialized nations to appreciate fully the issues that indigenous groups face. Consequently, the drafters of the Declaration ensured that a central function of the text would be to serve as a meaningful list of topics that national governments are required to consider.

Section III.A assesses the evolution of international laws surrounding indigenous rights in order to show the need for flexibility in the application of the rules included in the Declaration. The ability of the United Nations Permanent Forum on Indigenous Issues ("UNPFII"), a group created by the UN to promote discussion of indigenous groups' concerns and to provide oversight in the implementation of the Declaration, is also discussed. This group is acknowledged in the text as an international body that is well situated to assess the success of the Declaration. The UN has deemed the current decade the Second Decade of the World's Indigenous People, which has resulted in heightened scrutiny of national management of indigenous affairs and leaves the UNPFII in a stronger position to ensure a consensus on interpretations of international law.

Section III.B analyzes the Declaration itself and highlights an important function of the text: giving voice to concerns that were previously unheard. This Section suggests that the Declaration is meant to be read as a whole. Thus, compliance by a national government is achieved when that government discovers the significant elements for preserving an individual group's culture and sufficiently provides for them. This implies that each right enumerated in the Declaration may not be equally pressing for all groups. Instead, the Declaration asserts that it is the duty of national governments to cooperate with indigenous groups to determine the relative significance of the rights and suggested remedies.

Section IV outlines suggestions for ways in which the UNPFII may counsel the countries implementing the Declaration in order to promote widespread acceptance of its provisions and, as a result, lasting international customs that uphold the goals of the Declaration. The UNPFII should encourage countries to entertain a holistic approach to remedying land and resource affairs by working with indigenous groups to uncover their distinct interests.
II. NATIONAL CONCERNS AND LEGAL REMEDIES

A. THE MAORI IN NEW ZEALAND

The government of New Zealand has attempted to be responsive to the needs of the Maori, the indigenous peoples of the land. Yet, the government and the Maori continue to disagree on the basic relationship between the majority population and the relatively large indigenous group. The group's political concerns are based mainly in a treaty known as the Waitangi Treaty, signed in the mid-nineteenth century by the Queen of England and the Maori people. The treaty was meant to establish, during the period of intense colonization, an agreement for coexistence between the Maori and the entering colonists. However, problems surrounding the treaty's translation leave unanswered questions about each group's sovereignty. The result is an environment in which the Maori continue to struggle to bring their concerns to the attention of the national government. Although the Maori seek to continue their traditional way of life and adapt their skills to a changing commercial and cultural environment, the government often fails to recognize the effects of policy decisions. Consequently, the Maori have continuing educational, occupational, property, and political concerns.

The Treaty of Waitangi was signed in 1840 by the Maori chiefs and a representative of Queen Victoria and was meant to set up boundaries for acceptable interactions between the Maori and English colonists. The Treaty is the founding document of New Zealand and establishes the commitment of the Maori and the colonists to establishing governance in the country. However, the document failed to adequately memorialize the terms of the agreement to coexist, as both parties translate the treaty differently. Thus, the level of sovereignty relinquished by the Maori remains an unanswered question. While the English text claims English sovereignty over the country, the Maori version guarantees that Maori retain "full authority" over their own affairs.

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7 For a discussion of the New Zealand government's stance on its work to promote indigenous rights, consider Rosemary Banks's (representative to the UN from New Zealand) statement in dissent from the adoption of the Declaration. See Declaration Press Release (cited in note 1).
11 History Group, The Treaty in Brief (cited in note 9).
Commentators have suggested that the country will continue to be divided until the situation is resolved.\textsuperscript{12} The large size of the Maori has ensured an enduring focus on issues of Maori governance. The Maori population has been steadily growing. At the outset of colonization in 1840, the Maori population is thought to have been between 200,000 and 250,000.\textsuperscript{13} Although in the early 1900s the population fell to as low as 42,000,\textsuperscript{14} a 1996 census showed that the Maori numbered 580,000, which constituted 17.3 percent of the country’s overall population.\textsuperscript{15} In 2000, the projected figures asserted that the Maori population would reach one million by 2050.\textsuperscript{16} This growing number has helped to facilitate attention for Maori concerns. For example, since the group has historically been plagued by unemployment\textsuperscript{17} and greater susceptibility to disease than the general population,\textsuperscript{18} their large numbers may present a significant threat to the nation’s resources if their situation is not improved. Yet, though Maori affairs are in the public eye, there has been no assurance that Maori concerns are understood or provided for adequately.

A group as large as this has heightened land requirements; the land retained by the Maori cannot be restricted to small portions of the country, as is often the case for other indigenous groups. The current system for settling Maori land claims is inadequate to address the concerns of the group. In 1994, the government created a policy regarding land claims made under the Treaty of Waitangi.\textsuperscript{19} The policy sets out a process, unilaterally enacted by the government, that allows a hearing body, the Waitangi Tribunal, through the Office of Treaty Settlement (“OTS”), to hear and to rule on land claims.\textsuperscript{20} Maori have “repeat[edly] and consistent[ly] reject[ed]”\textsuperscript{21} the policy, yet it is still used, as the

\begin{itemize}
\item \textsuperscript{12} Id.
\item \textsuperscript{13} Tamati Reedy, \textit{Te Reo Maori: The Past 20 Years and Looking Forward}, 39 Oceanic Linguistics 157, 157 (2000).
\item \textsuperscript{14} Id.
\item \textsuperscript{15} Id.
\item \textsuperscript{16} Id.
\item \textsuperscript{17} See John Pratt, \textit{Assimilation, Equality, and Sovereignty in New Zealand/Aotearoa: Maori and the Social Welfare and Criminal Justice Systems}, in Paul Havemann, ed, \textit{Indigenous Peoples’ Rights in Australia, Canada, and New Zealand} 316, 317 (Oxford 1999) (discussing the Maori’s “disadvantaged position” and the “profound ... economic ... alienation”).
\item \textsuperscript{18} Papaarangi Reid and Bridget Robson, \textit{The State of Maori Health}, in Mulholland, et al, eds, \textit{State of the Maori Nation} 17, 17 (cited in note 10).
\item \textsuperscript{19} Margaret Mutu, \textit{Recovering Fagin’s Ill-Gotten Gains: Setting Ngati Kahu’s Treaty of Waitangi Claims against the Crown}, in Belgrave, ed, \textit{Waitangi Revisited} 187, 199 (cited in note 8).
\item \textsuperscript{20} Id.
\item \textsuperscript{21} Id.
\end{itemize}
government has been unresponsive to Maori concerns. OTS reports that only about fifteen Deeds of Settlement have been agreed upon under the policy.\textsuperscript{22} The majority of financial aid, which has been awarded to encourage Maori land ownership, as an alternative to the system of land claims, has been given to individual claimants to buy small plots of their own land.\textsuperscript{23} This type of system fails to consider traditional Maori values of multiple ownership of land.\textsuperscript{24} It works against Maori interests, as the Maori rely on cooperative methods in their traditional work.\textsuperscript{25} Grants of small plots of land are likely to prevent landowners from maintaining community-based occupations, hence forcing them to enter fields of work which are foreign to most Maori.

Many policy determinations have failed to address Maori needs. An example is the resolution of Maori fishing claims. The fishing rights granted in the Treaty of Waitangi were not originally read to include the Maori in commercial fishing ventures; in fact, several laws were passed which specifically excluded the Maori.\textsuperscript{26} In the 1980s, the Maori petitioned the Waitangi Tribunal to recognize Maori fishing as extending beyond a subsistence-based enterprise.\textsuperscript{27} Several Maori tribes, known as iwi, compiled data to support an argument that Maori fishing should also play a role in commercial fishing.\textsuperscript{28} After the New Zealand Maori Council obtained an injunction against the development of a quota management system for the country's fisheries, the government created the Maori Fisheries Act to protect and to promote Maori commercial fishing.\textsuperscript{29} The manner in which these events unfolded reveals the disconnect between the government's understanding of Maori activities and the Maori's own recognition of their potential to participate in the larger society. Although the Maori obtained some protection, they continue to fight battles to protect their ability to play a part in the nation's economy. For example, the group currently faces rising regulatory costs and concerns from conservation groups that seek to close areas available for fishing.\textsuperscript{30} Although the government is complicit in creating the

\textsuperscript{22} Id.
\textsuperscript{23} Id.
\textsuperscript{24} See Ranginui Walker, \textit{The Treaty of Waitangi in the Postcolonial Era}, in Belgrave, ed, \textit{Waitangi Revisited} 56, 77 (cited in note 8). The Maori traditionally owned land in groups and used the land for the benefit of the entire iwi.
\textsuperscript{25} Harry Hawthorn, \textit{The Maori Looks to the Future}, 14 Far E Survey 44, 45 (1945).
\textsuperscript{27} Id at 238.
\textsuperscript{28} Id.
\textsuperscript{29} Id at 238--39.
\textsuperscript{30} Id at 244.
environment that restricts the Maori from engaging in their traditional work, their concerns are not addressed by any further government aid that would facilitate the Maori sustaining their current business or entering a new one.

Further, because of the ongoing debate over the Waitangi Treaty, the need for adequate political representation is essential to the Maori cause. The Maori are guaranteed representation, as the New Zealand Parliament retains specific Maori seats and uses a structure that has ensured the Maori proportional representation in the parliament since 1996. Yet, this system falsely aligns Maori claims because it fails to recognize the differences among iwi. Instead, the Maori are treated as a single group with a single agenda. Yet, the Maori were historically a diverse group of iwi and had no system of overarching governance. Further, Maori representation in local governance is not consistent and political processes are not necessarily taught at lower levels. Again, this is an example of the government failing to consider the asserted needs of the Maori. It is not enough to create seats in the national government if there is no method for assuring that claims are representative of traditional values or that sufficient numbers are educated to become active participants in the process.

Maori educational concerns are littered with similar issues. The Maori have been proclaimed to be the most entrepreneurial population in New Zealand, a country which itself is among the world’s most enterprising. Yet, the group has been plagued by unemployment and is largely constricted to small-scale agriculture and wage labor occupations. Much of this is due to government mismanagement of Maori affairs, as seen in the example of the Maori Fisheries Act. Another main obstacle has been a lack of qualified Maori applicants for professional jobs. The Maori need educational and occupational training that they have not received thus far in order to enter occupations that are more often practiced by the larger population. Yet, the Maori have resisted some so-called

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35 Id at 226.
38 Hawthorn, 14 Far E Survey at 44 (cited in note 25).
39 Id at 45.
educational improvements because they fail to recognize traditional Maori values. For example, there are allegations that science is currently taught with a singularly Western science focus, which results in low participation of Maori in science education. In order to enable the group to participate fully in its own advancement, the government will need to consider the Maori viewpoint and provide support that promotes greater Maori educational attainment without devaluing the group’s beliefs.

Clearly, the Maori are a motivated and capable group. They wish to retain their traditions but are willing to adapt to the world created by the English. Many of their traditional occupations translate into successful modern businesses; however, they cannot sustain their line of work without compensation for past wrongs and continuing support from the government. That support cannot take an assimilationist approach. The government will need to work with the Maori to understand how to best respond to the unique issues posed by the interaction of these two populations.

The representative to the UN from New Zealand argued that the Declaration fails to take into account the special needs of the country. The representative conveyed the fear that the articles concerning use of lands and resources redress would be impossible to implement. This is understandable, considering the size of the Maori population. Large amounts of land and resources fall into the category of lands and resources that were “traditionally owned, occupied or otherwise used or acquired.” Yet, based on the size of the population, it seems that a large amount of land should belong to the Maori, in order to maintain the group’s sovereignty. Further, the representative explained the government’s apprehension that adopting the Declaration might result in losing the input of other citizens’ voices. Considering these statements and the nature of the New Zealand government’s consistent awareness of indigenous affairs, it seems that both parties can benefit from the Declaration if it is read flexibly. The government may find suggestions for cooperation more readily acceptable, as it would still be able to rely on democratic processes in negotiations. Additionally, the Maori can benefit from the Declaration’s listing of rights and remedies, which may help shape the government’s comprehension of indigenous needs.

40 Pauline Harris and Ocean Mercier, Te Ara Putaiao o nga tupuna, o nga mokopuna: Science and Education Research, in Mulholland, et al, eds, State of the Maori Nation 141, 147 (cited in note 10).
41 Declaration Press Release (cited in note 1).
42 Declaration, art 26 (cited in note 1).
43 Declaration Press Release (discussing fear that veto power would belong exclusively to indigenous peoples) (cited in note 1).
Australian Aborigines and Torres Strait Islanders (“Aborigines”) have struggled to gain basic rights in Australia. After a long history of repression, the indigenous groups have recently gained small victories, the success of which is still undecided. The rights which have been created generally fail to muster any consensus among the majority population, and thus changes in these rights mirror changes in the composition of the national government. Yet, the Australian people have begun to appreciate the advantages of allowing indigenous groups to manage themselves. At this point, however, the Aborigines have not been prepared to self-manage and past government practices have left the indigenous groups internally weak.

The early history of contact between Europeans and indigenous Australians was riddled with violence and exploitation. Until the 1960s, indigenous workers were often compelled to work without pay. The white population chose to pursue segregation and hoped to establish white supremacy as a method to maintain, among other things, cheap labor. Violence was used as a form of control. Even as awareness grew of the need to improve treatment, the majority viewed assimilation as the obvious way to deal with indigenous populations. Indigenous groups gained some reprieve after partial control over aboriginal affairs was transferred from purely local control to the national government by a 1967 referendum, allowing the fight of indigenous groups to become more centralized. Yet, the rights created since have been subject to wide variation and often repudiation. Further, there has been little representation in the government for indigenous peoples. The lack of communication with indigenous groups regarding their needs has prevented the country from forming even a basic understanding of how to approach the wide variety of rights involved in maintaining indigenous culture.

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45 Id at 136.
46 Id at 136–37.
48 Christine Fletcher, *Living Together but Not Neighbors: Cultural Imperialism in Australia*, in Havemann, ed, *Indigenous Peoples’ Rights* 335, 335–36 (cited in note 17). Previously, the national government had been specifically prohibited from legislating regarding Aboriginal people. The 1967 constitutional referendum changed the Australian constitution and allowed legislation on both the local and national level. Id at 340.
49 See id at 337 (discussing national mood swings).
50 Id at 343.
Land rights have been the main focus of the indigenous group's struggle, perhaps because this concern is the most easily communicated to the national government since territorial concerns are shared even by industrialized nations. The group gained a major victory in 1992 with the *Mabo v Queensland (No 2)* decision. The High Court of Australia rejected the doctrine of *terra nullius*, which the European settlers had used to deny indigenous rights to land, and found that native title to lands is recognized by common law. Subsequently, the government passed the Native Title Act of 1993 ("1993 Act"), which created processes by which native title over land is recognized, created the National Native Title Tribunal ("Tribunal") to hear claims, and created subsidies to aid in land purchases for indigenous peoples whose claims fail. Another victory gained through the 1993 Act is a process by which indigenous peoples are allowed to participate in decisions regarding the use of lands in their possession, though the group retains no veto power. The success of the 1993 Act is unclear: for example, in 1998, a report was issued that found that the Tribunal had too many claims in front of it and was insufficiently staffed to address all claims adequately. However, there is some recognition by the Australian people that land rights alone are insufficient and that indigenous Australians must be considered in land and resource decisions.

A related concern is the indigenous group's control over environmental planning. Indigenous Australians are highly involved in the extraction of natural resources. Further, the government has recognized the group's traditional rights to minerals on indigenous lands and has determined that indigenous groups should receive royalties in the case of extraction by others. However, the royalties have failed to bring the level of wealth anticipated by indigenous Australians.

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52 Broome, *Aboriginal Australians* at 238 (cited in note 44).
55 Id at 239–40 (discussing indigenous rights to negotiate in the development of native lands). See also Native Title Act, Preamble, available online at <http://scaleplus.law.gov.au/html/pasteact/2/1142/pdf/NativeTitle1993.pdf> (visited Apr 5, 2008) ("[g]overnments should . . . facilitate negotiation . . . in relation to . . . claims to land, or aspirations to land by Aboriginal peoples and Torres Strait Islanders").
56 Broome, *Aboriginal Australians* at 240 (cited in note 44).
57 Id at 262.
59 Broome, *Aboriginal Australians* at 190 (cited in note 44).
Australians, and the group has continued to be highly involved in the mining business. Because of these and other concerns, indigenous peoples worry about environmental change and damage. Thus, the Aborigines have developed their own resource management and environmental conservation plans. Through continual involvement, indigenous Australians hope to show the need for sustained collaboration and to inspire education and training that will allow indigenous groups to contribute to future planning. Because of the low representation of indigenous voices politically, the Aborigines are hindered in their attempts to impact environmental and resource planning pursued by the government. Consequently, this group has found that it is important to assert itself through visible community involvement in an attempt to ensure that its needs are documented.

Another area in which indigenous Australians have chosen to pursue their interests, despite inadequate recognition from the larger society, is in seeking recourse for past assimilationist practices, especially child abductions. It has been recognized that some sixty thousand children were taken from their indigenous parents in order to force assimilation into the European-immigrant society. Previously, both the national and state governments refused to take responsibility for the action of earlier Australian governments and offered no compensation to victims. Recently, however, the South Australian Supreme Court, in Trevorrow v South Australia, awarded a victim monetary damages for false imprisonment by the separation from his indigenous family. Though this is not a national recognition of the need for compensation for wrongs committed, it breeds optimism that the country is moving towards a better framework for indigenous claims.

Australian law has a long road to travel in order to create a framework within which indigenous Australians can sustain their traditions. The government has already recognized the limitations of inadequately educating indigenous groups for “long term ‘self-management,’” an area which requires attention in order to enable this previously enslaved population to stand on their own feet. The indigenous peoples have shown that they wish to learn more about adapting their culture for survival in the larger environment.

60 See id at 145.
62 Id at 78–79.
63 Broome, *Aboriginal Australians* at 273 (cited in note 44).
64 Id.
65 See *Trevorrow v South Australia (No 5)*, Sup Ct S Australia 285 (2007).
understanding on both sides that greater recognition of cultural differences is appropriate may lead to more room to collaborate in search of sustainable policy measures.

Australia’s budding views on relations with indigenous groups seemed to prevent the country from adopting the Declaration. The major worry centered on the idea that the Declaration would not “enjoy wide support.” In dissenting, Australia’s representative suggested that the self-determination and resource ownership provisions would be problematic. Considering the country’s relatively recent identification of the failure of assimilation, it is not surprising that it would find a leap into such uncharted territory unmanageable. Since Australia has only formed a burgeoning consensus on the most basic rights of indigenous groups, the national government may be wary of attempting to introduce the far-reaching mandates of the Declaration. However, Australia seems willing to embark on the path toward more cooperative solutions and seems to recognize that ultimately indigenous management of its own affairs will be advantageous.

The Declaration may be more beneficial than Australia appreciates, though, because it provides a list of topics that Australians have not yet entertained. In addition, it can aid the country in structuring its approach to indigenous affairs by encouraging a broader set of rights, many of which may be more immediately realizable than those the country is currently struggling to establish. The Declaration also instills organization into the process of evaluating potential remedies by listing preferable redress to a variety of issues, an area in which the Australians have thus far lacked focus.

C. FIRST NATIONS IN CANADA

Indigenous Canadians are a diverse group. The variance between tribes in Canada acts as a hurdle to any effective articulation of the groups’ needs. Yet, the country’s chief problem regarding indigenous affairs is establishing an adequate line between isolation of these peoples and full integration into mainstream society. The government has struggled to determine this line, principally because the nation has not historically maintained sufficient communication with the indigenous groups. The government has, instead,
maintained very similar isolationist policies against all groups, regardless of the differing needs amongst tribes.

The indigenous peoples of Canada, known as the First Nations, were originally unaffiliated with each other and are culturally diverse. Some were largely nomadic while others were stationary. The groups relied on various resources and subsistence methods that ranged from fishing to farming to hunting. Estimates of the population number around 500,000 prior to colonization.

As colonists began to appear, they made various treaties with different indigenous groups to encapsulate indigenous peoples in certain parcels of land. The agreements included land reservations for the use of indigenous peoples, which would be retained in trust by the government. The indigenous populations most likely did not understand that instead of establishing equal rights, the treaties confined the First Nations to regulated use of a small portion of their land. Although the government offered educational, economic, and medical assistance, the policy motivation was an assumption that the First Nations would eventually choose to assimilate into mainstream society. Since the Europeans viewed the indigenous peoples as a dying race, the government chose to create a welfare state that would last until the groups faded. Further, the Indian Act proclaimed the indigenous groups to be under the government's ward. This allowed governments to claim administrative rights over indigenous communities. It is clear that the Canadian government originally struggled with understanding the construction and concerns of such foreign societies.

Slowly recognizing a need for change, the government began to appreciate that indigenous groups were not vanishing and that their affairs would need to be addressed. In 1973 the Canadian Supreme Court held in Calder v Attorney General for British Columbia that land rights of indigenous populations would be recognized. Even title that had been previously overlooked by the government

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71 Id.
72 Id.
73 Id.
74 Id at 148–54 (describing a series of different treaties as settlers colonized different areas).
75 Id at 146.
76 Id.
77 Id.
79 Coates, The 'Gentle' Occupation at 151 (cited in note 70).
80 Id.
81 Foster, Canada at 367 (cited in note 78).
The government followed the Court’s lead and amended the Constitution in 1982 to provide that “the existing Aboriginal and treaty rights of Canada’s Aboriginal peoples are . . . recognized and affirmed.” In 1996, the Supreme Court in Van der Peet expanded the rights of indigenous peoples to incorporate protections beyond those provided generally to all citizens. These special rights arise from the “fact that aboriginal peoples are aboriginal,” and “their scope and content must be determined on a case by case basis.” The Van der Peet decision was an early recognition that the government still lacks a complete comprehension of the specific requirements for preserving the culture of the First Nations, and so it mandated taking steps to begin discovering what constitutes those special needs.

Though special standing has been recognized, indigenous peoples in Canada still struggle to assert their rights. The variance in cultural and political concerns of the numerous indigenous groups stands as an obstacle to getting individual voices heard. Because the First Nations cannot present their claims as a single group, each tribe struggles to be heard at all. Further, the First Nations struggle with the line between assimilation and continued existence within the larger society. For instance, there is a growing trend of aboriginals moving into urban environments. Various theories surround this movement, including one that proposes that these populations are trapped in limbo and are unsure how to fit into the current Canadian social and political climate. This theory is illustrated in the example of indigenous participation in tourism. Exploitation haunts the aboriginals, whose societies are turned into commercial industries by a government that promises increased sovereignty in return for cooperation. Additionally, in exchange for participation in the tourism industry, the government offers the return of traditional sacred artifacts and traditional

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82 Id.
83 Id.
86 Id.
87 Id.
88 Coates, The ‘Gentle’ Occupation at 155 (cited in note 70).
89 Roy Todd, Aboriginal People in the City, in Martin Thornton and Roy Todd, eds, Aboriginal People and Other Canadians: Shaping New Relationships 93, 95 (Ottawa 2001).
90 Id at 106.
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lands. Thus, the groups feel trapped in a choice between a type of assimilation and even more severe losses to their ability to sustain their culture.

The continued disjunction between the concerns of the aboriginal people and the Canadian government's appreciation of those concerns has prevented the country from establishing policies that are mutually acceptable to both the First Nations and the majority population. Though Canada has not clearly established indigenous sovereignty and retention of cultures, the country seems to be willing to acknowledge the special needs of each indigenous group. The government attempts to keep working for continued cooperation and discovery of methods for greater sovereignty.

The principal concern of the Canadians in dissenting from adoption of the Declaration appears to be the overly broad language regarding land claims. As the country itself has been carving out procedures by which to settle indigenous land issues, it seems fair to worry that the Declaration's sweeping language will shift the focus too far from the workable relationship the country is attempting to build. Yet, the Canadians seem open to an analysis of the needs of indigenous groups and the possible responses that may be worked out collaboratively. Canada is likely to benefit from the Declaration's listing of indigenous concerns, particularly because the government has labored to recognize the unique interests of its populations.

III. PARTICIPATION AND CULTURAL RECOGNITION: THEMES OF CURRENT INTERNATIONAL LAW REGARDING INDIGENOUS PEOPLES

A. PREVIOUSLY EXISTING INTERNATIONAL REMEDIES FOR INDIGENOUS PEOPLES

International accords, which have developed relatively recently, have given rise to various monitoring programs that are moderately successful in amplifying the voices of indigenous populations. In particular, the International Labor Organization ("ILO") has adopted conventions which recognize some of the basic, shared concerns of indigenous groups across the world. Further, the UN's creation of the UNPFII will be integral to the implementation of the standards articulated in the Declaration. As the understanding of indigenous affairs has increased, international organizations have acknowledged that partnerships between nations and indigenous groups are the key to furthering indigenous rights. This realization is grounded in the reality that industrialized cultures often fail to grasp the unfamiliar cultural concerns that are held by distinct indigenous

\[92\text{ Id at 191, 194.}\]
groups; hence, national governments must take steps to acquaint themselves with pronouncements by indigenous groups of their needs.

1. ILO Conventions

The ILO Convention No. 169 ("C169"), a revision of earlier Convention No. 107 ("C107"), was observed to be "the most comprehensive instrument of international law for the protection of indigenous and tribal peoples" prior to the Declaration's adoption. Although C169 was not ratified by any of the dissenter countries to the Declaration, C169 represents an early step toward more widespread recognition of the needs of indigenous peoples. The ILO addressed many key concerns, including the definition of indigenous peoples, land rights, educational issues, and cultural preservation concerns. Notably, C169 revised the earlier position taken in C107 that suggested "possibilities of national integration" and instead promotes self-determination.

C169 includes strong guarantees of land rights. It recognizes that the stance taken in C107, which promoted individual rights to land title, was insensitive to cultural needs and weakened indigenous groups' overall rights to land. Thus, C169 recommends that communal rights defined by a people's tradition should be afforded to indigenous peoples. Procedural safeguards are implemented in order to protect "the principles of participation, consultation...and compensation." Further consultation is required regarding the "management and conservation" of the natural resources of their lands. Overall, the implementation of these rights should consider the "special importance...of indigenous peoples' relationship with the lands," and that general notions of

98 Id at 80.
99 Id at 80–81.
100 C169, art 15 (cited in note 94).
101 Xanthaki, Indigenous Rights at 81 (cited in note 93) (internal quotation marks omitted).
ownership may not coincide with indigenous peoples' beliefs regarding possession.\textsuperscript{102}

The employment rights recognized in C169 are equally important. Governments are required to adopt "special measures\textsuperscript{103}" to ensure recruitment of indigenous peoples. C169 promotes both vocational training for jobs traditionally available to other citizens and continued development of traditional indigenous activities.\textsuperscript{104} This new approach, focusing on broader concerns in addition to basic needs such as land rights, recognizes that maintenance of an indigenous group's cultural identity requires more than isolation and guarantees of self-governance. It encourages nations to approach indigenous affairs from a more holistic standpoint and to consider alternate needs which stem from varying aspects of indigenous life. In the case of education and employment, for example, countries should take into account which industries native populations rely on to maintain their societies. At the same time governments must consider those industries which indigenous groups are likely to expand into in order to retain their cultural traditions while simultaneously adapting to the altering conditions imposed by the evolution of the larger nation.

In sum, C169 seems to emphasize the special needs that come from individual traditions. Its central objective is to establish a dialogue between indigenous peoples and national governments in order to ensure that both parties can participate in decisions in order to reach compromise solutions. Land rights are not only a reflection of title over parcels of land, but a means through which indigenous peoples sustain their communities and traditional beliefs. Thus, C169 does not limit its focus, but instead recognizes various approaches to reaching this end goal, such as through expansion of employment and educational opportunities. Though C169 has not resulted in a consensus on the means for sustaining indigenous cultures, it lays the groundwork for a move towards greater cooperation between national governments and indigenous groups and a stronger recognition of rights. C169 also teaches that forcing stringent mandates on complex and established nations is unlikely to result in international custom, since strict rules are unlikely to take notice of the distinct needs of varying nations.

\begin{footnotes}
\item[102] Id at 83.
\item[103] C169, art 20 (cited in note 94).
\item[104] Xanthaki, Indigenous Rights at 89 (cited in note 93).
\end{footnotes}
2. The UN Permanent Forum on Indigenous Issues

The UNPFII acts in an advisory capacity to the UN Economic and Social Council ("ECOSOC"). It provides advice and prepares reports regarding indigenous affairs, which ECOSOC can discuss during its yearly meeting of officials of international institutions, and civil society and private sector representatives. ECOSOC initiates studies when concerns are raised. Thus, through ECOSOC, the UNPFII has the ability to publicize violations of indigenous rights to the international community. Countries committing such violations are subject to international embarrassment and ECOSOC may investigate them further if serious concerns are raised.

To strengthen the UN’s commitment to recognizing and supporting the rights of indigenous peoples, the period between 1995 until 2005 was declared the International Decade of the World’s Indigenous People and has since been extended into the Second Decade, which will run from 2005 to 2015. The theme of the Second Decade is “Partnership for Action and Dignity.” The Decade has five articulated goals, including “re-defining development policies that depart from a vision of equality and that are culturally appropriate.” Accordingly, policy improvements should focus on particular cultural needs, which will require industrialized nations to attempt to understand the needs and beliefs of societies very different from their own. Another goal is to “develop[] strong monitoring mechanisms and enhance accountability.” This pledge to increase accountability is likely to strengthen the UNPFII as a monitoring agency. Overall, the extension into a Second Decade reflects the international community’s recent consensus that assurances of indigenous rights should be bolstered and that collaborative efforts between indigenous groups and other organizations should guide policy.

Finally, the Declaration calls upon the UNPFII to “promote respect for and full application of the provisions of the Declaration and follow up on the effectiveness of [it].” One interpretation of this mandate suggests that the

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106 UN Economic and Social Council, Background Information, available online at <http://www.un.org/ecosoc/about/> (visited Apr 5, 2008).
107 Id.
108 Id.
109 Id.
110 Id.
111 Id.
112 Declaration, art 42 (cited in note 1).
organization monitor progress and make suggestions to improve compliance by national governments, while constantly evaluating the Declaration itself and its ability to achieve its objectives. Hence, the UNPFII will need to provide guidance on how provisions of the Declaration are interpreted in order to facilitate adherence to its overall design. Power to do so is strengthened by the articulated goals of the Second Decade, which suggest that above all, sensitivity to the needs of a particular culture should be the cornerstone of policy development. Further, the Second Decade's goals recognize the need for additional strength behind monitoring organizations, which implies that the UNPFII should play a highly active role. This is likely to lead nations to seek the guidance of the UNPFII in order to avoid embarrassment at a time of heightened scrutiny regarding indigenous matters.

The UNPFII will need to be cautious in its interpretation of the terms of the Declaration. Because the Declaration is not binding, the UNPFII is only able to ensure compliance if there is a continuing consensus at the international level on the rights ensured to indigenous groups.

B. DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

The Declaration stands as the most recent and comprehensive addition to the international protection of indigenous rights. It acknowledges many rights "already recognized in ILO [C169] but takes them further."113 Relying on the input of indigenous leaders,114 the Declaration addresses concerns which were previously overlooked or unvoiced. For instance, the essential interest of media access had not been recognized in previous international agreements, but is ensured attention by Article 16.115 Another such case considers the right to protections for native flora and fauna,116 which has been an important matter to many activist indigenous groups.117 In this manner, the Declaration plays a vital role in the definition of indigenous rights that earlier international agreements did not because it catalogues issues which the international community seeks to ensure national governments will address.

113 Xanthaki, Indigenous Rights at 117 (cited in note 93).
115 Declaration, art 16 (stating that indigenous groups "have the right to establish their own media" and "to have access to all non-indigenous media without discrimination") (cited in note 1).
116 Id, art 31 (cited in note 1).
117 Harris and Mercier, Te Ara Putaiao at 141-42 (cited in note 40). Many indigenous groups are concerned with proprietary rights over native plants that have medicinal and cultural uses.
While the Declaration covers issues regarding a wide range of aspects of indigenous peoples’ lives, among the dissenter countries’ chief concerns are the issues of land rights and repayment for resources wrongfully taken. The controversial land rights article, Article 28, reads:

Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

This clause raises obvious concerns, considering the history of most indigenous peoples. Groups that were historically nomadic or spread across large areas may be able to claim the majority of the land which comprises these countries. While the concerns of these countries are reasonable, since whole nations have been formed since the natives were forcefully displaced, the Declaration’s land mandate recognizes the inherent connection between land rights and the most basic requirements for sustaining indigenous cultures. Land rights may be essential to maintaining traditions based on spiritual connections to certain land.118 Further, land and resources are critical to development of indigenous community-based economies.119

Yet, while the recognition that indigenous peoples require certain protections of their rights to land and resources is crucial, the Declaration has larger goals. The Declaration seeks to create an open discussion between indigenous peoples and national governments considering the particular needs of the groups involved. The drafters did not intend to create a straitjacket under which remedies are mandated regardless of the needs or agreements of the parties involved. This becomes apparent when the Declaration is read as a whole.

First, the Declaration recognizes alternative areas in which compensation is desirable, recognizing that land rights are not the prime concern of all indigenous groups. Instead, countries should also seek to provide redress for “cultural, intellectual, religious and spiritual property taken”120 without the consent of indigenous groups. Both land and intellectual property appear to be important based on their relationship to an individual group’s cultural identity and maintenance of its customs. Thus, neither alone is either necessary nor sufficient. Instead, it seems that a group’s identity will define what property, land or otherwise, is of particular import.

119 See, for example, Section II.A (discussing Maori fishing rights).
120 Declaration, art 11, cl 2 (cited in note 1).
The UN Declaration on the Rights of Indigenous Peoples: A Flexible Approach

Second, the Declaration is filled with references to cooperative measures under which governments should work with individual groups to identify unique concerns and the availability of mechanisms for redress. The articulated goals of the preamble include “enhanc[ing] . . . cooperative relations between the State and indigenous peoples.”121 The rights put forth often require “free, prior and informed consent”122 on the part of indigenous peoples, suggesting that parties may agree to terms other than those referenced by the Declaration itself, so long as negotiations are based on open and honest discussion. Indigenous groups also retain the “right to participate in decision-making in matters which would affect their rights”123 and “[s]tates shall consult and cooperate with the indigenous peoples . . . through their own representative institutions.”124 Even the article concerning land rights suggests that compensation can take any form, so long as it is “freely agreed upon by the peoples concerned.”125 Further, Article 28’s reiteration that “[s]tates in consultation and cooperation with indigenous peoples, shall take the appropriate measures . . . to achieve the ends of [the] Declaration” emphasizes that the key goal is to establish an international norm of cooperation. Clearly, the Declaration seeks to open dialogue between national governments and indigenous groups in which the remedies best suited for the particular circumstances concerned may be discovered.

Third, the overarching need for cooperation is reasonably inferred since the Declaration recognizes that the concerns of all indigenous groups are not homogenous. It identifies the right “to be different”126 and states that the “situation of indigenous peoples varies from region to region . . . and that . . . regional particularities and various historical and cultural backgrounds should be taken into consideration.”127 This allows parties to determine where land concerns are not a major issue or where redress is most adequately achieved by alternative forms of compensation.

Finally, the Declaration’s mandate that the UNPFII “promote respect for and full application of the provisions of th[e] Declaration and follow up on the effectiveness of [it]”128 suggests that the text is meant to serve as an evolving articulation of standards. The Declaration sets out concerns that may have been overlooked in the past or may deserve particular attention, but it is not itself a

121 Id at Preamble, cl 18.
122 See, for example, id, art 10 & 11, cl 2.
123 Id, art 18.
124 Id, art 19.
125 Id, art 28, cl 2.
126 Id at Preamble, cl 2.
127 Id at Preamble, cl 23.
128 Id, art 42.
prescription for legislative enactments. Therefore, instead of focusing narrowly on the particular terms of the Declaration, countries should seek to realize its larger goals, which begin with an analysis of the particular needs of individual groups through cooperation and open discussion. Indigenous groups will be able to use the Declaration as a commanding tool in their arsenal because the provisions lay out remedies that are mutually considered ripe for consideration. While the Declaration recognizes that land rights will often be an important stepping stone towards sustaining indigenous cultures, it also permits an ongoing evaluation of how and when this type of concern needs to be addressed. National governments and indigenous peoples are called upon to begin this process of collaboration, and the UNPFII is solicited to provide guidance in shaping this work-in-progress.

Because indigenous voices have often gone unheard, the Declaration attempts to set out a list of basic needs that national governments frequently overlook. Yet, this list is not meant to be exhaustive and it does not necessarily reflect the unique needs of any particular group. The key for uncovering these needs is through the higher goal of continuing cooperation between indigenous groups and national governments. The remedies best suited for individual nations and their relationships with native peoples cannot be predetermined, and thus the suggestions articulated in the Declaration are meant to serve as starting points that should be re-evaluated as relationships progress.

IV. SUGGESTIONS FOR GUIDANCE

The Declaration offers the UNPFII an unparalleled opportunity to affect the implementation of the text. Because the UNPFII is called upon to “promote respect for . . . the provisions of th[e] Declaration and follow up on the effectiveness of [it],”129 the group has the ability to broadcast its determinations of what behavior constitutes compliance with the Declaration. Thus, the UNPFII may guide countries as they undertake policies in pursuit of the mandates in the text. If during this process the UNPFII can target some of the concerns the dissenter countries have raised, it is possible that those nations can be convinced that compliance with the Declaration is beneficial. Further, the UNPFII can suggest revisions where provisions of the text fail to further the goals of the Declaration. This gives the UNPFII further latitude to consider the issues raised by the dissenter countries and create guidelines that make the agreement more acceptable to all groups concerned—and thus more effective. As nations across the globe recognize that the provisions of the Declaration offer a workable framework for advancing relations between national

129 Id.
governments and indigenous people, its mandates are more likely to be viewed as an entrenched set of international standards.

After considering the situations that indigenous groups of the dissenter countries face, the UNPFII should focus on two main areas. First, these nations need direction in determining the land and resource needs of indigenous groups. Second, assistance in framing the issue of assessing remedies is crucial to creating workable standards for these nations.

A. METHODS FOR ASSESSING LAND AND RESOURCE NEEDS

A central goal of the Declaration is to promote recognition of the varying needs of different indigenous groups; this objective should be acknowledged in determinations of land and resource claims. Although the Declaration encompasses all “lands, territories, and resources ... traditionally owned or ... occupied or used” by indigenous groups, the drafters most likely did not mean to ignore the genuine concerns that many nations will face if asked to relinquish rights over potentially large portions of land. Thus, instead of requiring a release of lands wherever claims by indigenous groups can be made, the UNPFII should suggest that compliance is achieved when national governments and indigenous groups work together to assess the distinct land requirements that enable individual groups to maintain their cultures.

These parties may come to an agreement on which types or areas of land hold significant value for indigenous peoples. Here, the nations will need to consider many of the more detailed concerns raised in the provisions of the Declaration in order to ensure that all parties involved in these decisions are aware of the full range of links between territories and indigenous groups. For example, the type of land most needed by the indigenous group may depend on the major occupations held by members of that group currently or those into which the group hopes to expand. While the Maori may specifically wish to preserve access to fishing ports, the Aboriginal Australians may want to ensure access to mining territory. Yet, the Maori are also entrepreneurial and thus will have concerns about prospects for the future expansion of their people.

Because these concerns will vary from group to group, collaboration between national governments and indigenous peoples is crucial. This is highlighted in the case of the First Nations of Canada, where the question of how to establish the line between integration and isolation is yet to be answered; in this case the government will need to work closely with the various groups to determine what type of land they wish to maintain. The result may depend on other considerations, such as spiritual connections to certain areas or alternative

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130 Id, art 28, cl 1.
matters which are unfamiliar to industrialized cultures. The Declaration enumerates many of these issues, and thus while not every provision is directly applicable to all groups, it serves as an index of the areas that should be discussed in determining land and resource needs.

Further, the parties may consider what type of title is most useful for individual groups. While the Maori have traditionally relied on cooperation among members of their iwi, and thus are likely to prefer collective land titles, other indigenous groups may find individual land titles more suited toward their needs. It may be, for instance, that protections of the land and environment are more valuable than any title to the land. In the case of the Aboriginal Australians, a major concern is the ability to contribute to environmental planning that will prevent resource erosion. Neither individual nor group title over parcels of land can make this guarantee, and thus this group is likely to prefer alternative redress to grants of title. Again, it is clear that national governments will need to work with indigenous groups to determine how to best accommodate them.

Another important resource that most indigenous groups have been deprived of is access to decisionmaking bodies. For instance, in the case of the Maori, the Waitangi Treaty was thought to recognize the sovereignty of the Maori people and thus act as an agreement to work with the chiefs of Maori iwi. Yet, it is only recently that the Maori have had their voices heard in the national government. Others, such as the Aboriginal Australians, have no guaranteed access to representation and have been stripped of the ability to govern their own affairs. Even Australia has recognized that the country will be benefited in the long run if Aboriginals are able to manage themselves. Although the Declaration makes clear that consultation of indigenous groups regarding their rights is essential, it is important that this also be viewed by the international community as a resource, of which indigenous groups have been unjustly deprived. When framed this way, the Article 28 mandate that nations provide “redress” applies to the issue of representation, which is a stronger guarantee than the otherwise broad suggestion regarding cooperation.

Clearly, the UNPFII should encourage more discussion of the needs of indigenous peoples, and this discussion should be centered on indigenous groups’ own articulations of their concerns along with the provisions of the Declaration. While the land and resource provisions of Article 28 can play a large role in maintaining the culture and traditions of these groups, the Article will lack effectiveness if there is no consideration of what traditions are being preserved. Thus, nations should use the text of the Declaration and collaboration with indigenous groups to determine what the peculiar current and future needs regarding land and resources are for particular groups in order to fulfill the mandates of the Declaration.
B. METHODS OF DETERMINING APPROPRIATE REDRESS

The Declaration does not limit forms of redress to lands, resources, or monetary payments. Although at first glance the text seems to emphasize "restitution" and "lands, territories and resources equal in quality . . . or . . . monetary compensation," the text goes further. It also suggests "just, fair and equitable compensation" and considers the possibility of other agreements. Thus again, the most appropriate compensation or agreement will fluctuate from case to case.

The determinations regarding the use and connection to specific lands can aid in defining adequate redress for any deprivation of use. For example, in the case of the Aboriginal Australians, title to land or monetary compensation may not be sufficient to address the concerns of the group. Without environmental protection of the land and resources, title to some mining lands will have no value. In this case, then, an alternative agreement to guarantee ongoing environmental planning and insurance that the indigenous people will be included in that process may serve the group’s interests better than restitution claims. This is also seen in the case of the Maori, who currently face regulatory issues that may limit their ability to sustain their fishing trade. Accordingly, the indigenous group does not seek title to the coastal land, but instead views changes in regulation as more appropriate. Discussion between national governments and indigenous peoples will be necessary to make certain that the entire extent of current and future impacts on these indigenous peoples is assessed.

Further, the deprivation of certain lands, territories, or resources may create the need for a new resource altogether. In this case, compensation that simply replenishes the resource will not truly remedy the indigenous group’s situation. For instance, Maori land claims have required special attention from the New Zealand government. The population is relatively large, and thus the number of land claims is very high. There is also a lack of formal training regarding the use of political systems, which makes it difficult for the Maori to represent their own claims. The group was stripped of numerous resources, land, and the ability to resolve claims under their own system of laws. Thus, the Maori have required the guarantee of an additional resource—the Waitangi Tribunal, which assesses these land claims—in order to remedy the loss of land. This reliance on an additional group also exemplifies the need for collaboration,

\[131 \text{Id.}\]
\[132 \text{Id, art 28, cl 2.}\]
\[133 \text{Id, art 28, cl 1.}\]
\[134 \text{Id, art 28, cl 2.}\]
as the process used by the Waitangi Tribunal was created unilaterally by the national government and has been ineffective in addressing Maori needs, and thus the system could be improved by consultation with the indigenous group. The land situation of the First Nations of Canada is another example. The harm caused by awarding these groups rights over only isolated parcels of land cannot be remedied simply by supplying more land. The country will need to work with the groups to determine how to bring them into closer contact with the rest of the nation without eroding their traditions or culture.

V. CONCLUSION

When discussing remedies for ongoing indigenous issues, the larger aims of the indigenous groups should be kept in mind. The Declaration provides a framework of numerous concerns that are often associated with one another. The solution is not to take a piecemeal approach, which isolates problems such as those considered by Article 28's land guarantees, in an attempt to provide isolated remedies. Nations should instead be persuaded to consider the entire range of an indigenous group's concerns that have been caused by harms such as the deprivation of lands and resources and should also attempt to provide redress that takes into consideration the immediate and long-term needs of indigenous groups.

It should be noted that this reading of the Declaration does not weaken its guarantees for indigenous populations. Although this interpretation suggests that governments may not be obligated to provide the specific redress outlined in the text, nations are not exempt from considering the rights themselves. Further, the redress that is provided must be agreed to by the indigenous groups, pursuant to cooperation and discussions between the parties. The remedies described in the Declaration carry significant weight, as those remedies have been internationally recognized as the protections most likely to address indigenous concerns.

Most importantly, this reading of the Declaration ensures indigenous groups a voice in national decisionmaking. Aspects of indigenous affairs that the governments of industrialized nations have failed to understand are more likely to be brought into policy decisions when the Declaration is read partially as an enumeration of indigenous concerns. When used as a framework that structures discussion between the parties, the Declaration is most likely to be accepted as an international standard for relations between governments and indigenous peoples.