May 16, 2012

Mr. James Anaya
Special Rapporteur on the Rights of Indigenous Peoples
c/o OHCHR-UNOG
Office of the High Commissioner for Human Rights
Palais Wilson
1211 Geneva 10, Switzerland

Dear Mr. Anaya:

We are writing this letter on behalf of the Maine Indian Tribal-State Commission, or MITSC. The Tribal-State Commission was formed under the Maine Indian Claims Settlement Act or MICSA (25 USCS § 1721) and Maine Implementing Act or MIA (30 MRSA §6201) and is an intergovernmental body charged to "continually review the effectiveness of this Act and the social, economic and legal relationship between the Houlton Band of Maliseet Indians, the Passamaquoddy Tribe and the Penobscot Nation and the State."

MITSC requests an investigation into the impact of the implementation of the aforementioned MICSA and MIA. These Acts are in serious nonconformance with the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) both in the process leading up to their enactment and in how they have been implemented. The Acts have created structural inequities that have resulted in conditions that have risen to the level of human rights violations. We ask you to raise this structural violation of Maine Wabanaki Tribes' collective rights during your upcoming meetings with the US government. While the current administration of Maine Governor Paul LePage has consistently demonstrated a high interest and responsiveness to Wabanaki governmental concerns, these structural inequities have become entrenched over the past 30 years.

The Maine Indian Claims Settlement was intended to prevent the acculturation and to safeguard the sovereignty of the Maine Wabanaki Tribes: the Houlton Band of Maliseet Indians, the Passamaquoddy Tribe, and the Penobscot Indian Nation, hereinafter referred to as the Wabanaki. Later the Aroostook Band of Micmacs was recognized with a distinct agreement in 1991, the Aroostook Band of Micmacs Settlement Act (25 USC 1721 (1991 Amendment)). As Reuben Phillips, one of the Penobscot Nation's negotiators of the settlement agreement, told the Tribal-State Work Group on November 19, 2007, "**…** the most important part of the negotiated settlement as far as the Tribes are concerned was that we would exercise self-government without interference of the State of Maine as they had controlled our lives for the last 160 years."

Despite some small gains due to federal recognition and accompanying funding from the federal government, the four Tribes continue to experience extreme poverty, high unemployment, markedly shorter life expectancy, much poorer health, limited educational opportunities, and thwarted economic development. MITSC has determined that the entrenchment of these social and economic factors is a direct result of the framework created by the MICSA and MIA.

The expectation that the Maliseet, Passamaquoddy, and Penobscot Peoples' quality of life would significantly improve with passage of MIA and MICSA has not been realized. No Tribe enters into an agreement with a state to remain impoverished. The Maine Wabanaki Tribes' understanding of the agreement is very clear and is articulated in the many court cases brought on their behalf. Since the adoption of MICSA and MIA, the State of Maine has utilized the full range of its powers, including its judicial and legislative branches, to promote an interpretation of the Settlement Acts without regard to the equally valid Wabanaki interpretation. Largely as a result of court decisions, the Maine Indian Claims Settlement has changed from a collectively negotiated agreement between co-equals to a unilateral determination by one signatory.

The subjugation of Wabanaki people under the framework of these laws severely impacts the capacity of the Wabanaki in economic self-development, cultural preservation and the protection of natural resources in Tribal territory. Life expectancy for the four Maine Wabanaki Tribes averages approximately 25 years less than that of the Maine population as a whole. Only one percent of the Houlton Band of Maliseets' population exceeds 55 years of age. Unemployment rates within Wabanaki communities range up to 70%, many times higher than the surrounding Maine communities. Many traditional Wabanaki food sources are no longer safe to eat due to toxic contamination by the paper mills that discharge pollutants into Wabanaki waters. At this time, the incarceration rate of Passamaquoddy people in state prisons is six times that of the general population. When the Maine Wabanaki Tribes attempt to address the causes of many of these problems, they consistently encounter structural roadblocks due to MICSA and MIA.

Location and context:

The Passamaquoddy Tribe and Penobscot Indian Nation filed a lawsuit compelling the US Department of Justice to sue the State of Maine in 1972 in order for the two Tribes to recover approximately 12.5 million acres of land taken from them. Later the Houlton Band of Maliseet Indians became a party to the proceeding. Key court decisions decided after the filing of the land claims affirmed Passamaquoddy and Penobscot inherent sovereignty, including Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975), Bottomly v. Passamaquoddy Tribe, 599 F.2d 106 (1st Cir. 1979), and State v. Dana, 404 A.2d 551 (Me. 1979).

The land claim was settled in two phases. The State of Maine enacted the Maine Implementing Act (MIA) in April 1980 that primarily addresses jurisdictional issues and the government-to-government relationship between the State and the Houlton Band of Maliseet Indians, Passamaquoddy Tribe, and the Penobscot Indian Nation. On October 10, 1980, President Carter signed the Maine Indian Claims Settlement Act (MICSA) that ratifies the Maine Implementing Act and determines the settlement among the US, the State of Maine, and the Tribes.

Evidence exists that Tribal members were not made aware of important changes made to the MICSA during the final stages of its consideration. First, the Maine Legislature enacted and Governor Joseph Brennan signed the Maine Implementing Act in April 1980. Second, the Passamaquoddy and Penobscot Peoples gave preliminary approval to the settlement agreement contingent upon any changes coming back to them for their approval in the same month. Third, Congress actively worked on the Maine Indian Claims Settlement Act from July to September 1980 with significant changes made to the proposal during the legislative deliberations. There is no record of these changes ever returning to the Passamaquoddy and Penobscot Tribes for approval. Clearly, this action conflicts with the UN Declaration on the Rights of Indigenous Peoples Article 19 that specifies:

> "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."

Affected Indigenous Peoples:

All of the Maine Wabanaki Tribes were affected by the MICSA and MIA in that the MICSA stipulates that all other Maine Tribes that would be recognized by the Federal Government in the future would be subject to state law in the same way as the Passamaquoddy Tribe, Penobscot Indian Nation, and the Houlton Band of Maliseet Indians. Recent court decisions regarding the Aroostook Band of Micmacs' settlement agreement have borne out that truth. We list the Wabanaki Tribes of Maine:

1. Aroostook Band of Micmacs, 7 Northern Road, Presque Isle, Maine 04769 (Though not a party to MICSA and MIA, provisions of the two Acts affect the Tribe.)
2. Houlton Band of Maliseet Indians, 88 Bell Road, Littleton, ME 04730
3. The Passamaquoddy Tribe consists of one people with two communities in Maine.
    a. Passamaquoddy Tribe at Motahkmikuk, Box 301, Princeton, ME 04668
    b. Passamaquoddy Tribe at Sipayik, 9 Sakom Road, Perry, ME 04667
4. Penobscot Indian Nation, 12 Wabanaki Way, Indian Island, ME 04468

Factual Background:

Two provisions of the federal and state agreements especially illustrate the compromised rights of the Tribal governments under MICSA and MIA. Section 1735(b) of MICSA states:

> The provisions of any Federal law enacted after the date of enactment of this Act [enacted Oct.10, 1980] for the benefit of Indians, Indian nations, or tribes or bands of Indians, which would affect or preempt the application of the laws of the State of Maine, including application of the laws of the State to lands owned by or held in trust for Indians, or Indian nations, tribes, or bands of Indians, as provided in this Act and the Maine Implementing Act, shall not apply within the State of Maine, unless such provision of such subsequently enacted Federal law is specifically made applicable within the State of Maine.

MIA section 6204 states:

> Except as otherwise provided in this Act, all Indians, Indian nations, and tribes and bands of Indians in the State and any lands or other natural resources owned by them, held in trust for them by the United States or by any other person or entity shall be subject to the laws of the State and to the civil and criminal jurisdiction of the courts of the State to the same extent as any other person or lands or other natural resources therein.

These two sections of law conflict with multiple articles of UNDRIP, including Articles 3, 4, 5, 19, 23, 27, 29, 32, 34, and 40. The imposed diminishment of Maine Wabanaki Tribes' inherent rights of self-determination as compared to hundreds of other federally recognized tribes has caused severe negative impacts within Wabanaki communities. As a result of section 1735(b) of MICSA, Maine Wabanaki Tribes have not been able to utilize the Indian Gaming Regulatory Act (25 USC §2701 et. seq.) as a possible means of economic development. This same section blocks Wabanaki utilization of "Treatment As a State" status under the Clean Air Act (40 CFR Part 49 Tribal Clean Air Authority) and Clean Water Act (40 CFR 123.31 – 123.34) to assume regulatory authority over polluters contaminating the air and water of Wabanaki territory. In addition, the non-applicability of post-1980 laws limits the impact of pre-1980 laws that supported tribal self-determination, such as the Indian Civil Rights Act, passed by Congress in 1968. Economic and legal tools available to hundreds of other federally recognized tribes are not available to the Wabanaki due to the legal limitations imposed by MICSA and MIA.

Responsible Parties:

The principal actors have been the governments and courts of the State of Maine and the United States federal government.

Despite executing its first foreign treaty (Treaty of Watertown July 19, 1776) with some of the Wabanaki Peoples, the Míkmaq and St. John's Tribes (Maliseet and Passamaquoddy), the US abdicated its responsibility for acting as the primary manager for the relationship between the American people and the Wabanaki, allowing initially Massachusetts and then Maine to determine the relationship. The State of Maine did not recognize Indigenous sovereignty until compelled to do so by Passamaquoddy v. Morton decided January 20, 1975. Until that Federal District Court decision, the State of Maine's disposition toward the Wabanaki is reflected in a portion of the decision Murch v. Tomer, 21 Me. 535; 1842 Me. Lexis 141. "Imbecility on their part [Indians], and the dictates of humanity on ours, have necessarily prescribed to them their subjection to our paternal control; in disregard of some, at least, of abstract principles of the rights of man."

Passamaquoddy v. Morton provided a brief period in which the State of Maine had no control over the Passamaquoddy Tribe and Penobscot Indian Nation. Following the Passamaquoddy v. Morton decision and during the intensive negotiations leading up to the settlement of the Maliseet, Passamaquoddy, and Penobscot land claims, the State of Maine insisted that state laws

apply to the Tribes except in narrow instances (30 MRSA §6204). Maine's insistence on its continued control over the Wabanaki except in certain instances has resulted in the crisis experienced by Wabanaki peoples and threatens their ability to function as distinct, independent governments, something MICSA was supposed to guarantee.

At the time MICSA was signed, all the parties agreed that, though it was a significant diplomatic accomplishment, it was also one that would necessitate continuous review and adjustments to reflect the changing relationship between the Tribes and the State. Despite Congress' clear intent to provide for these periodic adjustments (25 USCS §1725(e)(1)), a conviction among State and Federal officials emerged sometime after enactment of MICSA that the agreement should never be adjusted despite Congressional authorization to do so. The State of Maine reaction to the Wabanaki contention that MICSA should be viewed as a living, dynamic document and adjusted as changed conditions and circumstances dictated, was to align increasingly with powerful private economic interests in opposition to Tribal rights. Key State of Maine and corporate decision makers claimed the Tribes were attempting to renege on a fundamental aspect of the agreement.

During the 2006 – 2008 deliberations of the Tribal-State Work Group, an initiative that emerged from the May 2006 Assembly of Governors and Chiefs intended to address problems with the MIA, the principal negotiators of the Settlement Act for the State of Maine and federal government verified by their testimony the Wabanaki understanding that MIA should be viewed as a dynamic document and periodically adjusted. Tim Woodcock, staff person to the Senate Select Committee on Indian Affairs during the period that the US Senate deliberated about the settlement, told the Tribal-State Work Group on November 19, 2007:

> It [referring to MICSA] also ratified and approved and sanctioned agreements prospectively that the State and Tribes might make respecting jurisdiction and other important issues that otherwise you might have to go to Congress to get approval for so you have that authority in advance… And I recognized that the MICSA and the MIA might well just be the beginning of an ongoing relationship that might well have a considerable amount of dynamism in it and it might well be revisited from time to time to be adjusted. There was a mechanism for that to happen and I have to say in retrospect it's been a surprise to me that it really hasn't been amended at some point but I also recognize certainly that these are knotty issues.

Though the negotiators understood that MICSA and MIA would need periodic adjustments and created a provision within the agreement for the signatories to take such action, actual structural change has never occurred. The Wabanaki have become increasingly frustrated with the failure of the State of Maine to agree to any substantial changes to the settlement. Litigation has arisen. As a result, instead of the signatories negotiating changes to the Settlement Agreement, state and federal judges have consistently interpreted in favor of state and private interests, further diminishing Wabanaki self-determination and violating UNDRIP Article 19.

The Maine Supreme Judicial Court has expressed an extremely narrow interpretation of "internal tribal matters" under the Maine Indian Claims Settlement. The court has disregarded the rules of

federal Indian common law and statutory interpretation that evolved from almost two centuries of Indian law jurisprudence. The trend began in 1983 with *Penobscot Nation v. Stilphen* 461 A.2d 478 (Me. 1983), the case in which the court held that the Tribe could not operate gaming operations without state licensing.

Not only have Maine courts adopted an extremely narrow interpretation of "internal tribal matters," but also certain Maine regulatory bodies have as well. Despite MITSC offering a contrary opinion on three separate occasions, the Land Use Regulation Commission (LURC), a body with planning and regulatory responsibility over areas of Maine without local governments, has asserted jurisdiction over Tribal projects on Wabanaki trust land. As a result, the Maine courts and executive branch have impeded the efforts of the Tribal communities to economically self-develop in order to preserve their cultures, protect their natural environments, and improve living conditions for Native people.

The federal courts have also been unfriendly to the Maine Tribes. By narrowly interpreting Tribal rights under the settlements, the federal courts have dealt some devastating blows to the Tribes, including the cases of *Houlton Band of Maliseet Indians v. Ryan*, 484 F.3d 73 (1st Cir. 2007) and *Aroostook Band of Micmacs v. Ryan* 484 F.3d 41 (1st Cir.2007). The immediate impact of the court decisions subjects tribal employment disputes to state employment laws. But the full impact is much greater. After the *Ryan* decision, from the viewpoint of the First Circuit Court of Appeals, the historical Tribal sovereignty of the Houlton Band of Maliseet Indians and the Aroostook Band of Micmacs is severely constricted because, in contrast to the Passamaquoddy Tribe and Penobscot Nation, their internal tribal matters are not protected under MICSA. Neither the Maliseet nor the Micmac have accepted the First Circuit Court of Appeals' interpretation of their inherent right to self-determine their governmental affairs, including their relationships with their employees.

In 2007, the First Circuit Court of Appeals decided *State of Maine v. Johnson*, 498 F.3d 37 (1st Cir. 2007). That case involved a decision by the Environmental Protection Agency (EPA) which gave the State of Maine permitting authority, under the Clean Water Act and MICSA, with regard to discharge of pollutants into territorial waters of the Penobscot Nation and Passamaquoddy Tribe, but exempted two Tribal-owned facilities from the State's permitting program. Despite a detailed Opinion Letter from the U.S. Department of the Interior supporting the Tribe's claims, the court upheld the State's authority to regulate all of the disputed sites, including the two tribal-owned sites located on tribal lands which the EPA had found to have insignificant consequences for non-members of the tribes. With respect to the "internal tribal matters" exemption from state regulatory power in the MIA, and in keeping with the restrictive *Stilphen* rationale, the court stated that discharging pollutants into navigable waters is not of the same character as the list of Tribal powers which were intended to be shielded from state control, such as tribal elections, tribal membership or other exemplars that relate to the structure of Indian government or the distribution of Tribal property. Significantly, the court held that the issue at hand was not even a close call and therefore did not require consideration of the balancing tests and factors that the First Circuit had previously applied in cases involving MICSA.

Understandably content with the strong advantage they have enjoyed in state and federal courts, the State of Maine has resisted Wabanaki efforts to have the parties agree to structural changes to MICSA and MIA that would address provisions that limit Wabanaki rights of self-determination and jurisdiction on their lands. By way of example, the State of Maine chose to join litigation initiated by three private paper corporations to diminish Passamaquoddy and Penobscot authority under the MIA's internal tribal matters provision (30 MRSA §6206). (See *Great Northern Paper v. Penobscot Nation*, 770 A.2d 574 (Me. 2001).

Action taken by government authorities:

The Maine Tribes' longstanding concerns with these Acts predate the current administrations in Washington, DC and Augusta, Maine. The initiatives undertaken by the administrations of President Barack Obama and Governor Paul LePage to recognize and strengthen the government-to-government relationship between their governments and Maine Tribes are appreciated.

State Government:

Governor LePage issued Executive Order 21 FY 11/12 An Order Recognizing the Special Relationship Between the State of Maine and the Sovereign Native American Tribes Located Within the State of Maine.

The last two administrations (Baldacci and Le Page) have appointed distinguished Indigenous People to important positions, with Governor LePage nominating Penobscot citizen Bonnie Newsom to the University of Maine System Board of Trustees and Passamaquoddy citizen Dr. Gail Dana-Sacco to a State seat on the Maine Indian Tribal-State Commission.

In addition, Governor LePage has been a strong supporter of the Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission to address what happened to Wabanaki children and families who have had involvement with the Maine child welfare system. On May 24, 2011, Governor LePage joined representatives from all five Tribal governments to sign a Declaration of Intent committing the parties to undertake a Truth and Reconciliation Commission (TRC). In March 2012, Governor LePage stated his support for the next step in the TRC process by committing to signing the Mandate document specifying how the Truth and Reconciliation Commission would be seated, its charge, and time allowed to conduct its work. Though all these actions have been positive, they do not address the deep-seated structural flaws of the Maine Indian Claims Settlement Act (MICSA) and Maine Implementing Act (MIA).

Pertinent to this discussion, on April 15, 2008, the Maine Legislature passed a joint resolution "to express support for the United Nations Declaration on the Rights of Indigenous Peoples."

MITSC:

MITSC, as an intergovernmental body, has focused its energy during the last decade on attempting to persuade the State of Maine to listen to Wabanaki grievances concerning the

content, interpretation, and implementation of MICSA and MIA and the need to amend the Acts. In 2002 – 2003, MITSC worked on crafting possible amendments to the MIA that would have been presented to Wabanaki governments and the State of Maine for legislative action. That process ended when the Wabanaki signatories withdrew from MITSC for a period of 14 months to protest the results of a statewide vote on a Wabanaki gaming initiative and other longstanding grievances. At the Assembly of Governors and Chiefs in 2006, a seeming diplomatic breakthrough occurred when Maine Governor John Baldacci agreed to create a work group comprised of Tribal and State representatives to examine specific aspects of MIA and report back to the signatories with recommended changes.

The Tribal-State Work Group made eight unanimous recommendations in its January 2008 report. In the second session of 123rd Legislative Session, the Maine Legislature's Judiciary Committee substantially altered the recommendations, resulting in the Wabanaki withdrawing their support for the final bill and causing extreme ill will between the parties, with Wabanaki accusations that the State had acted in bad faith.

Despite these major diplomatic initiatives by MITSC, Tribal leaders and State legislators, the fundamental differences between the Wabanaki and the State of Maine remain. Over the years, some minor changes have been made to MIA but never any amendments that address the core of Wabanaki concerns and which have been the direct cause of the disparate living conditions for Tribal peoples.

Federal Government:

President Obama issued his Presidential Memorandum on November 5, 2009 directing implementation of Executive Order 13175 on Consultation and Coordination with Indian Tribal Governments.

On December 16, 2010, the US issued its "Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples."

With regard to the Wabanaki specifically, the Federal Government that holds ultimate responsibility for the relationship with the Indigenous Peoples living within the borders of the US has been completely absent from any initiative to address the framework of the MICSA and MIA. The Federal Government has the responsibility to fix what was promoted in 1980 as a model settlement because it has not only failed to end the stark disparities in Wabanaki living conditions, but it continues to restrict the Houlton Band of Maliseets', Passamaquoddy Tribe's, and Penobscot Nation's capacity to self-determine solutions to these issues.

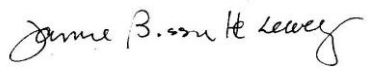
In closing, MITSC raises these concerns to you with the hope that your office can engage the US to address the human rights concerns of the Maine Tribes and the flawed MICSA and MIA that conflict with UNDRIP. **There are also other Tribes located in the Eastern US that entered into similar settlement agreements that restrict their inherent rights to self-determination.**

Ideally, all of these flawed agreements should be reviewed with the aim to restructure them to conform with UNDRIP and other international agreements and covenants applicable to Indigenous peoples.

Sincerely,

John Dieffenbacher-Krall
Executive Director

Matt Dana
Passamaquoddy Representative to MITSC

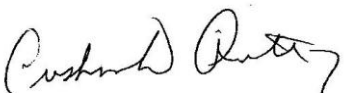


Jamie Bissonette Lewey
Chair

Gail Dana-Sacco
State Representative to MITSC

Denise Altvater
Passamaquoddy Representative to MITSC

Bonnie Newsom
Penobscot Representative to MITSC



Cushman Anthony
State Representative to MITSC

Roy Partridge
State Representative to MITSC

John Banks
Penobscot Representative to MITSC

Linda Raymond
Maliseet Representative to MITSC

John Boland
State Representative to MITSC

Brian Reynolds
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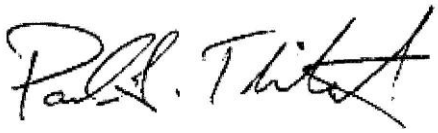
Harold Clossey
State Representative to MITSC



Paul Thibeault
State Representative to MITSC