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de los Pueblos Indígenas

REUNIÓN INICIAL DE NEGOCIACIONES PARA LA BÚSQUEDA DE CONSENSOS

(Salón Libertador Simón Bolívar – Del 10 al 12 de noviembre de 2003)

INTERVENCIONES DE LOS ESTADOS MIEMBROS

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I. DELEGACION DE ARGENTINA

ARTICULOS III Y IV DEL TEXTO CONSOLIDADO

A criterio de la delegación argentina, las cuestiones a tener en cuenta en el artículo III giran en torno de los pueblos indígenas y del derecho a la autodeterminación. Respecto de lo primero, el texto ahora propuesto omite la explicación que se brindaba respecto de los acotados alcances de la expresión "pueblos" en este contexto y que satisfacía una propuesta argentina formulada en 2001. Ello así y a la luz del artículo IV siguiente, cabría entender que no hay espacio en las normas para la autodeterminación en el sentido tradicional del término en el contexto de las resoluciones de la Asamblea General de las Naciones Unidas, sustancialmente de las A/RES/1514 (XV), 1541 (XV), y 2625 (XXV), y que la norma que nos convoca sólo apunta a lo que puede entenderse como la autodeterminación en el ámbito interno, óptica ésta en la que la terminología pone énfasis.

En este sentido, cabría considerar que la propuesta argentina de 2001 sintetiza los alcances del actual artículo III a la luz del actual artículo IV, esto es, que por libre determinación se entiende la capacidad de los pueblos indígenas de desarrollar libremente y ejercer sus formas de organización política, económica, social y cultural, y de garantizar el acceso a la jurisdicción del Estado, en un marco de autonomía y autogobierno, compatible con la unidad nacional, la integridad territorial y la estructura organizativa de cada Estado.

En sentido análogo, cabe entender que el derecho a la libre determinación en el ámbito interno es lo que la doctrina ha dado en denominar "the emerging right to democratic governance" (cf. Thomas Franck, 86 Am. J. Int. L. 46). Por otra parte, la misma doctrina entiende que la consagración internacional de la unidad nacional y la integridad territorial suponen que ambos elementos son superiores a la libre determinación y por ello mismo, implican que no existe un derecho a la secesión (cf. Hurst Hannum, "Rethinking Self-Determination", 34 Va. J. Int. L. 1, 19).

En cuanto al artículo IV propuesto, se ocupa de las cuestiones que quedaban cubiertas con la explicación de los alcances del término "pueblos" en el contexto de la Declaración. Las expresiones que se incluyen en esta propuesta se acomodan a las empleadas por la A/RES/2625 (XXV) más el agregado de los principios del derecho internacional americano.

Por los motivos expuestos, la delegación argentina considera que ambos textos conforman un plexo normativo indisoluble, una unidad. En ese sentido, la delegación argentina propicia que la hermenéutica general del texto se enderece en ese sentido. En consonancia con ello, aparece, asimismo, el artículo XX "Derecho al autogobierno". Todo ello es consistente con los conceptos consagrados en la Constitución Nacional.

II. DELEGATION OF CANADA

Article III

Canada is of the opinion that very substantial progress has been made on this Declaration with the inclusion of Article II in the Chair's proposed text.

Canada is of the view that the source of a right to self-determination that would be included in this Declaration and the United Nations Draft Declaration is common Article I of the International Covenants on Civil and Political Rights and on Economics, Social and Cultural Rights.

We therefore support the proposal of the Indigenous Caucus, as follows:

Indigenous peoples have the right of self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development.

In addition, the inclusion of the concepts contained in Article IV of the Chair's text is necessary to our understanding of the right to self-determination.

As well, Canada believes that Article III must include language on how indigenous peoples and States can work together to enable indigenous peoples to achieve self-determination.

We offer two possible approaches to include this concept in Article III:

Option 1:

States and indigenous peoples shall work together towards the realization of this right, recognizing the jurisdictions and responsibilities of governments, the needs, circumstances, aspirations and identity of the indigenous peoples concerned, and the importance of achieving harmonious relations.

or:

Option 2:

Implementation of the right is a matter for resolution between the state and indigenous peoples, respecting the jurisdiction and competence of governments and the needs, circumstances and aspirations of the indigenous peoples involved.

We are willing to consider including this concept either within the current Article III or within a separate Article or paragraph.

Article VIII

Canada appreciates the proposal of the Indigenous Caucus, as well as that of the Haudenosaune, for Article VIII, and look forward to seeing these proposals in writing.

While Canada can support the Chair's proposed text, we would like to pose a question for the consideration of all parties here today.

Canada is not certain there is a "right to belong" at international law. If there is such a right, what is the consequent obligation of States in this regard?

A "right to belong" would appear to require States to ensure that indigenous peoples and communities are not improperly excluded from membership in indigenous peoples.

Canada does not wish to interfere in such internal matters, and therefore proposes the following formulation for Article VIII:

Indigenous persons and communities are free to belong to a given indigenous people in accordance with the traditions and customs of that people.

Article XII

These comments are based on the Chair's consolidated text.

Canada can accept paragraph 1 without change, as per the Chair's text.

In paragraph 2, Canada has concerns regarding the potential problems with such a broad categorization. After domestic consultation regarding how such issues are currently being managed on the ground, it is clear to us that the priority for Canadian indigenous peoples is the return of and/or access to sacred materials and human remains. Many indigenous peoples do not wish the State to be involved in such processes, preferring instead to deal with the museums or other institutions which hold such materials directly.

In paragraph 3, it is difficult for a State to "guarantee respect" with regard to such issues.

Canada therefore proposes the following language for Article XII:

1. Indigenous peoples have the right to their cultural integrity and to their historical and ancestral heritage, which are important for their collective continuity, and for their identity and that of their members and their states.
2. **Indigenous peoples have the right to pursue the return of, or negotiate access to, sacred and ceremonial heritage material which has been illicitly appropriated, and to seek the return of ancestral human remains.**
3. States **shall respect, and protect indigenous peoples from discrimination in relation to**, the indigenous ways of life, **including** world views, usages and customs, traditions, forms of social organization, institutions, practices, beliefs, values, dress and languages.

III. DELEGACIÓN DE COLOMBIA

Artículo XII

En relación con el artículo XII, la Delegación de Colombia informó que la Constitución Política de ese país establece que el Patrimonio Cultural es propiedad de la Nación, se encuentra bajo protección del Estado y es inalienable, inembargable e imprescriptible. Explico, así mismo, que la Constitución Política adoptada en 1991 elevó al rango de mandato constitucional la tarea que adelanta exitosamente el Estado Colombiano desde hace algo más de sesenta años consistente en readquirir los bienes del patrimonio cultural que se encuentra en manos de particulares. Lo que ha permitido impedir la destrucción o expatriación de miles de valiosos objetos que guardan los conocimientos y cosmovisiones de sus pueblos indígenas.

En tal sentido, explicó, esa Delegación ha venido solicitando en ocasiones anteriores y de manera consistente eliminación del párrafo 2. Sin embargo, expresó, estaría en condiciones de modificar su posición si el texto que se apruebe contiene una cláusula especial relativa a los países en los que el patrimonio cultural es propiedad de la Nación y se encuentra bajo la protección del Estado.

IV. UNITED STATES DELEGATION

SECTION ONE: SCOPE OF APPLICATION

Article I

Mr. Chairman, the United States views the current draft language as a good step towards reaching consensus language. We have several suggestions.

We propose that we delete paragraph 1 entirely.

Paragraph 2 would now become paragraph 1. In sentence one of the new paragraph 1 (currently para 2) we propose that the word “applies” be replaced with the word “pertains”. In our domestic meetings several tribal government representatives expressed concern that a declaration which will ultimately be adopted by Member States, and not indigenous peoples, would somehow be “applied” to the latter. The United States feels this is a valid concern and proposes the word “pertains” as an alternative that does not have the same connotation. We propose that the second sentence of this paragraph be deleted.

Mr. Chairman, the U.S. believes that the section “Scope of Application” should also include, in addition to the fundamentally important provision for self-identification, provisions for: a state recognition process of indigenous peoples; state recognition of indigenous peoples authority to determine its own membership in accordance with its laws, customs and traditions; and state recognition of individuals’ membership in the tribe. With that in mind, we propose the following additional paragraphs:

As a new paragraph 2, we propose:

2.) “Each State will recognize indigenous peoples within its territory through a transparent and deliberative process. Such recognition should afford appropriate weight to a variety of factors, such as:

[And then we suggest the following illustrative but not exhaustive list:]

- whether the group self-identifies as indigenous;
- whether the group has been identified as indigenous by historians, anthropologists, other indigenous groups, or other knowledgeable sources;
- whether the group is comprised of descendants of persons who inhabited a geographic area prior to the establishment of a political and geographical State;
- whether the group historically had governed itself;
- whether the group has aboriginal status;
- whether the group maintains a distinct community and aspects of governance;
- whether the group has a cultural affinity with a particular area of land or territories;
- whether the group has distinct objective characteristics such as language, religion, culture;
- whether the group has been historically regarded and treated as indigenous by the State.

2nd intervention: While we can accept what the latest formulation of Article 1.1, as the 1st para has been revised by the indigenous caucus, we cannot accept the word “the” before “fundamental criterion”, but only “a”. That is because in our view self-identification is “a” criterion. From our perspective, another criterion is state-recognition. That is what our new proposal is intended to address – the criterion of state recognition.

Article II

The US has difficulty with characterizing its society as “multilingual”. We are not sure what is meant by adding the word “respect” in addition to “recognize.”

Articles III and XX (1)

Mr. Chairman, the United States very much appreciates the new Chair’s proposed language for Article III. In particular, we feel that the inclusion of the language “within the nation state”, similar to our proposed “internal”, is a real effort to address a concern expressed by our delegation in the past.

We would also like to note, with appreciation, those interesting proposals put forth by Canada and other delegations. We believe that all of these reflect an effort to make progress on this contentious issue, and we will study each proposal carefully.

Mr. Chairman, the United States recognizes the significance of these paragraphs, particularly for the indigenous peoples to which they refer. For that reason we are committed to having an open dialogue on these issues.

In the past the U.S. has expressed concerns regarding some of the language contained in these paragraphs, specifically the reference to the “right of self-determination”. We must once again reiterate those concerns, Mr. Chairman.

The United States continues to believe that its proposal for the right of internal self determination is one that best addresses the concept that we are speaking of – in a way that is clear. Our proposal has been and still is, covering the concepts in Article 3 and in Article XX:

“Indigenous peoples have the right of internal self-determination. By virtue of that right, they may negotiate their political status within the framework of the existing nation-state and are free to pursue their economic, social and cultural development. Indigenous peoples, in exercising their right of internal self-determination, have the internal right to autonomy or self-government in matters relating to their local affairs, including determination of membership, culture, language, religion, education, information, media, health, housing, employment, social welfare, maintenance of community safety, family relations, economics activities, lands and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.”

Article IV

Mr. Chairman, the United States agrees with the language in, and idea behind, the current Article IV. Nonetheless, we are not sure that this satisfies our concerns with respect to the matter of self-determination. More specifically, we are not sure that this language is sufficient for us to drop the “internal” from internal self-determination.

SECTION TWO: HUMAN RIGHTS

TITLE

The United States supports the proposal of the indigenous caucus to retitle this section as “human rights and collective rights”. The United States believes this makes it clear that collective rights are separate from individual human rights and that they do not change or erode individual human rights.

Article V

With respect to the current Article 5, paragraph 1, we would prefer to retain the earlier U.S. proposal on this paragraph. While our proposal is not significantly different from that of the Chair, we feel that there are important substantive differences. In particular is our concern, as we mentioned in February, of not mixing concepts of human rights that flow to the individual with rights that flow by virtue of the status of an indigenous community as an indigenous peoples. It is important to note, for example, that the American Convention on Human Rights was negotiated with individual rights in mind. Many of those rights can not and do not flow to groups, for example, the right to marry. Our proposed language is as follows:

“Indigenous ~~peoples~~ and individuals ~~have the right~~ are entitled to the full and effective enjoyment of the human rights and fundamental freedoms recognized in the Charter of the OAS, the American Declaration of the Rights and Duties of Man, and ~~where applicable~~ where duly ratified, other international human rights instruments, including the American Convention on Human Rights. Nothing in this Declaration shall be construed as in any way limiting, restricting, or denying those rights or authorizing any action not in accordance with the relevant instruments of international law, including international human rights law.”

2nd intervention: US opposes the insertion of the phrase “principles and standards” in the proposal of the indigenous caucus for the first and second sentences of Article V. We do not know what principles and standards are being referred to, nor do we accept the deletion of the phrase “where applicable” or “where duly ratified” before “instruments.” The only treaties that apply to a state are those that have been ratified by a state.

Article VI. Collective rights

We oppose the latter part of the 1st paragraph because we do not believe that an indigenous individual's rights can possibly be conditioned on the recognition of indigenous collective rights. Individuals have human rights, irrespective of whether they have collective rights. It would be dangerous to state that the collective rights are indispensable for the enjoyment of individual human rights.

As to the 2nd part of the paragraph, our difficulty is that this excerpts from other articles in this Declaration and we do not yet know how the other articles are going to turn out – how the rights in those articles are going to be phrased.

2nd intervention: The United States reserves the right to return to this paragraph after the rest of the Declaration is formulated, so that this paragraph corresponds with the remainder of the Declaration's text and is an accurate reflection of what ends up in the remainder of the Declaration's text. We believe it is premature to finalize this article.

Article VII

The United States can accept the Chair's formulation. As to the proposal from the Indigenous Caucus, the United States can also accept that, except for the word 'must', which may be a mis-translation. The verb in this paragraph should be worded consistently with other paragraphs in the Declaration.

Article VIII

The United States cannot agree with a "right to belong", either as the title of this text or as its substance. Rather it is the tribe's right to determine its own membership that this article should be addressing. This article should also be addressing the state's duty not to interfere with an individual's choice of tribal membership.

Included in our proposal for Article 1, were 2 paragraphs to be included either in Article 1 or here:

3) "States shall recognize the authority of an indigenous peoples to determine its own membership in accordance with its laws, customs and traditions."

And finally, Mr. Chairman, a new paragraph 4:

4) "States shall not interfere with an indigenous individual's ability to exercise membership in an indigenous peoples."

Mr. Chairman we would like to suggest that the new paragraphs 3 and 4 for Article 1 would cover and replace the current paragraph 8, which would then be deleted.

2nd US intervention: US is willing to withdraw this proposal and study the proposal of the Navajo/Haudanasaune. We believe that it is intended to address several of our concerns.

Article IX

We do not know what it means to speak of indigenous communities in this article. We interpret the first phrase as saying that a state's legal system should take cognizance of a tribal government's ability to enter into arrangements on behalf of its tribe. As to the latter part of the proposed article, we believe it needs to be reformulated, so that it says that recognition of legal personality of indigenous peoples results in promoting the full exercise of the rights recognized in this Declaration. The phrase referring to promotion of indigenous rights should not be a stand-alone phrase, imposing a separate commitment on states. Rather, the primary commitment in this article should be recognition of the legal personality of indigenous tribes. Carrying out that commitment results in promoting indigenous rights.

Article X

Rejection of assimilation

Mr. Chairman, the United States understands and appreciates the importance of Article X. It is clear that the focus of this Article is on the prevention of assimilation. We wholeheartedly agree with this concept. One concern we have is if or when the maintenance, expression or development of indigenous cultural identity violates laws to protect public health and welfare. Our second concern is the possibly broad meaning that could be given to the term assimilation in both paragraphs 1 and 2. But, we understand that all in this room appear to be saying that this term means "forced" assimilation; it is not addressing requirements incumbent on all citizens of a country which may have the indirect effect of assimilating, for example, education. Therefore, we can accept the term assimilation with the understanding that it is referring to measures that are intended to have the effect of forcibly assimilating a group.

With respect to the first paragraph, the U.S. believes it could be reworded to say:

1. "Indigenous peoples are free to maintain, express, and freely develop their cultural identity, free from any external attempts at assimilation."

We are, however, open to suggestion as to how to address the issue of potential conflicts with other laws that are not intended to infringe on the rights of indigenous peoples, but may do so indirectly. We may be able to remove our objections to the Chair's language for paragraph 1 of this Article, if this tension is adequately resolved in another article, for example, in a general provision in Section 6.

2nd intervention: We will acquiesce in this paragraph being marked as accepted, with the understanding that the United States reserves its position on this article, until we have a new article in Section 6 that addresses our concerns.

Article X, bis, genocide

The United States reads the latter part of this paragraph on genocide as being a component of the term genocide, as genocide is defined in the Genocide Convention. While we do not believe it is necessary to pull out one of the several components of the term genocide from the Genocide Convention, we will accept this paragraph with the understanding that it is referring to the term genocide and its components as set forth in the Genocide Convention.

Article XI

The United States believes it is imperative for states to prohibit racial discrimination against indigenous people. We have difficulty, however, wording the right as one of a right to be protected against racism, racial discrimination, xenophobia and related forms of intolerance. How do you protect someone from racist thoughts? It is simply not possible. We, therefore, propose:

States shall eliminate racial discrimination in all its forms. In this regard, States shall adopt measures, when necessary, for the full enjoyment of all human rights and fundamental freedoms, as well as for the rights recognized in this Declaration.

2nd intervention: Having listened to other proposals, another possibility is for this paragraph to state:

States shall take prompt, decisive and appropriate measures with a view to eliminating all forms of racism, racial discrimination, xenophobia and related intolerance.

SECTION THREE: CULTURAL IDENTITY

Article XII. Right to cultural identity

On paragraph 1, we continue to question the use of the phrase “right to their cultural integrity”, which is not a recognized right in international law. We do not know what obligation flows from a right to cultural integrity.

We believe that a right to “cultural integrity is not a right in and of itself, but it is an objective, that other rights addressed within the proposed declaration are intended to promote, for example, rights relating to language, religion. Each of these are rights which have the objective of promoting the cultural integrity of a group.

On paragraph 2, as do many other delegations, we also have difficulty with the Chair’s proposed text. We believe the Canadian proposal may be a good way forward on this paragraph.

On paragraph 3, we believe it is over-broad. To the extent that it is referring to discrimination, the concepts should be incorporated into Article XI. We do not believe that this paragraph is necessary to this article and, therefore, urge its deletion.

V. DELEGACIÓN DE VENEZUELA

Artículo I

Un aspecto que fue objeto de discusión en este artículo fue lo relativo al “criterio fundamental para determinar a quienes se aplica la Declaración”. Al respecto, la delegación de Venezuela se pronunció a favor de “un criterio”.

La delegación de Venezuela apoyó la propuesta formulada el CPI para este artículo y propuso la inclusión de la palabra “comunidades”, después de “pueblos”, así como también la inclusión de la frase “o personas” después de “pueblos”. Igualmente, sugirió la inclusión de la frase “de los Estados”, antes de la frase “de las Américas”.

En el segundo párrafo, la delegación de Venezuela propuso dividir el párrafo en dos y colocar después de “Los Estados”, la frase “en el marco constitucional y su marco jurídico”. Otra propuesta venezolana fue la supresión de la segunda oración del numeral 2.

Artículo II

La delegación de Venezuela apoyó la propuesta indígena para este artículo y sugirió la inclusión de la palabra “intercultural”, después de la palabra “multilingüe”, indicando que una cuestión es lo multicultural y otra es lo intercultural, que tiene que ver con el intercambio cultural y comunicación entre pueblos indígenas.

Artículo III

La delegación de Venezuela sugirió la inclusión de la palabra “sustentable”, después de “desarrollo”.

Artículo V

La delegación de Venezuela apoyó la propuesta indígena y sugirió la inclusión del Convenio 169 de la OIT”, después de la “Convención Americana sobre Derechos Humanos”, lo cual fue apoyado por Colombia y fue incluido en el texto entre corchetes, pro tratarse de un elemento nuevo.

Artículo VI

La delegación de Venezuela apoyó la propuesta del Caucus de los Pueblos Indígenas y propuso cambios al numeral 2 de la citada propuesta:

“En este sentido, los Estados reconocen, entre otros, el derecho de los pueblos y comunidades indígenas sobre sus tierras y hábitat a su actuar colectivo; a su organización social, política y económica; a sus propias culturas; a profesar y practicar sus religiones y a usar sus idiomas.”

Artículo VII

El Caucus de los Pueblos Indígenas formuló una propuesta sobre este artículo, cuya primera parte fue apoyada por la delegación de Venezuela, la cual solicitó incluir a los “niños, niñas y adolescentes”. Esta propuesta contó con el apoyo de México.

Artículo VIII

La delegación de Venezuela apoyó la propuesta indígena, con la aclaratoria de que se apliquen los sistemas jurídicos propios. Según lo expresado, de acuerdo con el artículo 160 de la Constitución Bolivariana, las autoridades legítimas de los pueblos indígenas podrán aplicar en su hábitat, instancias de justicia con base en sus tradiciones ancestrales y que solo afecten a sus integrantes, según sus normas y procedimientos, siempre que no sean contrarios a la Constitución, la ley y el orden público.

Artículo IX

La delegación de Venezuela pidió agregar al final de este artículo la frase siguiente: “En vista del carácter multiétnico, pluricultural, plurilingüe e intercultural”.

Artículo X

La delegación de Venezuela se adhirió a la propuesta formulada por el Caucus de los Pueblos Indígenas y solo sugirió colocar al final del numeral 2 la frase “e idiomas”.

Artículo XI

La delegación de Venezuela apoyó la propuesta indígena, a la cual solicitó incluir el derecho religioso al final del numeral 1, antes de la palabra “espirituales”, así como lo relativo al idioma, ya que los idiomas indígenas son patrimonio de la humanidad, al igual que lo religioso.

Artículo XII

La delegación venezolana apoyó la propuesta del texto consolidado, con algunos agregados que tienen que ver con los términos de lo que establece la Constitución Bolivariana y realizó la siguiente intervención: “En cuanto al artículo XII, sobre el Derecho de la identidad cultural, la Constitución de la República Bolivariana de Venezuela, en atención a los Derechos y Garantías, establece que los Pueblos Indígenas tienen derecho a mantener y desarrollar su identidad étnica y cultural, cosmovisión, valores, espiritualidad y sus lugares sagrados y de culto”. Igualmente, apoyó la propuesta argentina. Los cambios propuestos por Venezuela fueron los siguientes: numeral 2: agregar después de “patrimonio”, las palabras “histórico y ancestrales”, así como colocar en todo el texto en lugar de “lenguas”, la palabra “idiomas”.