

PERMANENT COUNCIL OF THE
ORGANIZATION OF AMERICAN STATES
COMMITTEE ON JURIDICAL AND POLITICAL AFFAIRS

OAS/Ser.G
CP/CAJP-1293/98 add. 2
20 January 1998
Original: Spanish/English

OBSERVATIONS AND RECOMMENDATIONS OF THE GOVERNMENTS OF
MEMBER STATES ON THE DRAFT INTER-AMERICAN DECLARATION
ON THE RIGHTS OF INDIGENOUS PEOPLES
(CP/doc.2878/97)

(United States)



ORGANIZATION OF AMERICAN STATES
WASHINGTON, D.C. 20006 U.S.A.

December 30, 1997

Excellency:

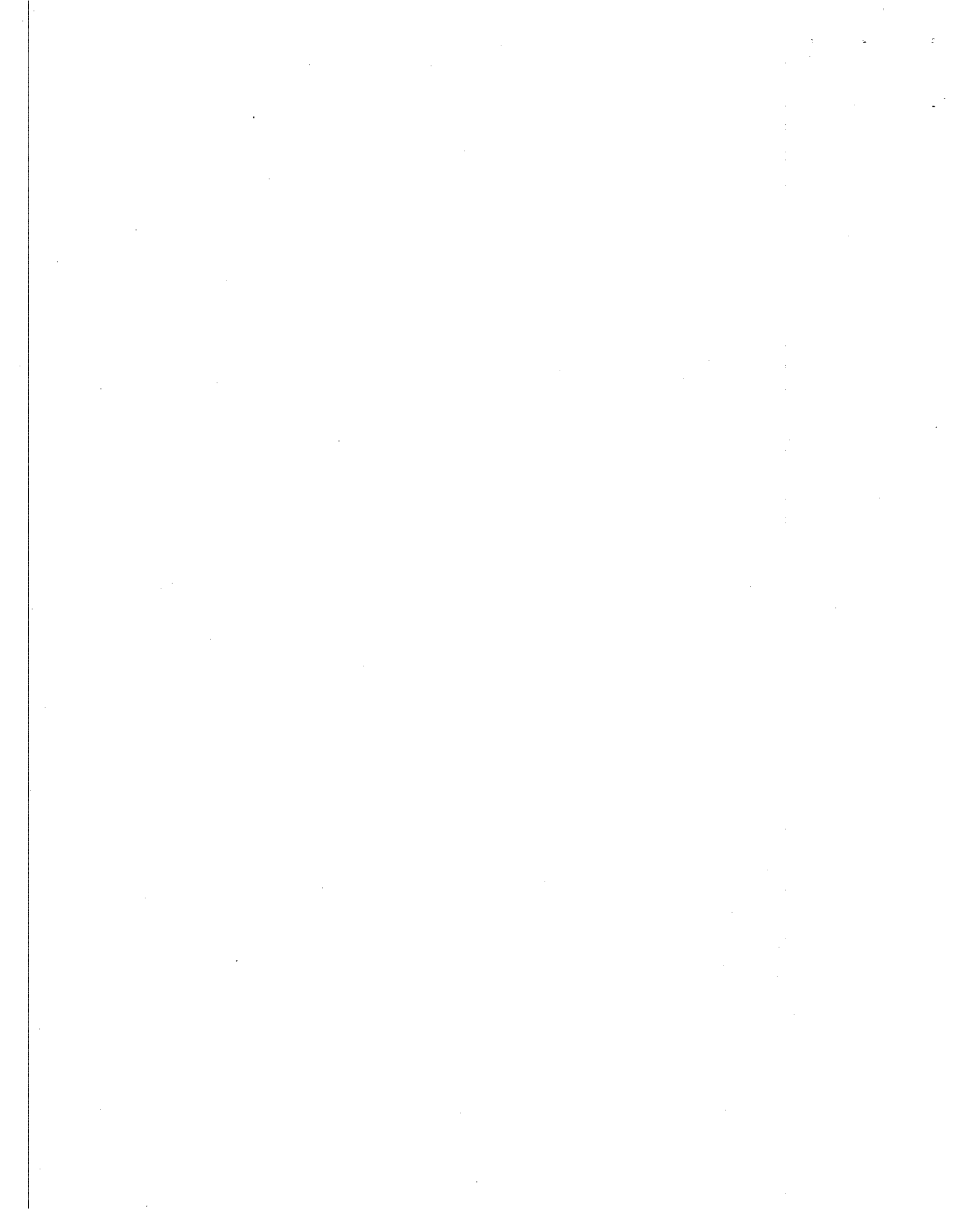
I have the honor to address Your Excellency on behalf of the Chair of the Inter-American Commission on Human Rights, Ambassador John S. Donaldson, pursuant to General Assembly resolution AG/RES. 1471 (XXVII-O/97), to transmit to you the response sent to us by the United States Government on the proposed American Declaration on the Rights of Indigenous Peoples.

Accept, Excellency, the renewed assurances of my highest consideration.

Jorge E. Taiana
Executive Secretary

Excellency
Ambassador Darío Espinal
Chair of the Committee on Juridical and Political Affairs
Mission of the Dominican Republic
1715 22nd Street, N.W.
Washington, D.C. 20008

Enclosure





United States Department of State

United States Permanent Mission to the
Organization of American States

Washington, D. C. 20520

December 19, 1996

Ambassador Jorge Taiana
Executive Secretary
Inter-American Commission on Human Rights
Organization of American States
Washington, D.C. 20006

Dear Ambassador Taiana:

Enclosed are the United States Government's commen
draft Inter-American Declaration on the Rights of Indigenous
Peoples.

RECEIVED
96 DEC 23 PM 13
SG/IAC/HR

Sincerely yours,

Harriet C. Babbitt
Ambassador

Enclosure

own religion, or to use their own language." By comparison, the declaration proposes a series of additional rights for indigenous groups not currently recognized by international law, including under draft Article XV, the right to freely determine their political status and freely pursue their economic, social, spiritual, and cultural development.*

In the United States more than 550 Indian tribes are recognized as possessing an inherent right of autonomy in their internal affairs, which derives from their original sovereignty. Thus, tribes, like domestic states, function as governments within the overall political framework of the United States." However, other groups in the United States have self-identified as "indigenous," including armed militia and "hate" groups that advocate racism as well as groups seeking to take advantage of the rights, services, and benefits accorded by the United States government to Indian tribes. We cannot accept the application of the draft declaration to such groups for both constitutional and practical reasons. Therefore, we will actively oppose inclusion of language such as that appearing in Articles I(1) and (2), which could be interpreted as according indigenous status to nonindigenous groups.

* Compare common Articles 1(1) of the International Covenants. The "peoples" entitled to freely determine their political status and freely pursue their economic, social, and cultural rights (i.e., exercise the right of self-determination) have been generally understood to be the entire peoples of a State or those who could constitute themselves as a State and not a particular minority or indigenous group within an existing State. See Inter-American Commission on Human Rights Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin (1984) (indigenous Indian populations were not peoples with a right of self-determination or political autonomy under international law); R. Higgins, Problems and Process, at 126.

" See United States v. Wheeler, 435 U.S. 313, 323 (1977) where the United States Supreme Court observed that: "The sovereignty that Indian tribes retain is of a unique and limited character. . . . In sum Indian tribes still possess those attributes of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status."



OK
RECEIVED
97 DEC 19 PM 5:09
SG/IACHR

United States Department of State

*United States Permanent Mission to the
Organization of American States*

Washington, D. C. 20520

December 16, 1997

Ambassador Jorge Taiana
Executive Secretary
Inter-American Commission on Human Rights
Organization of American States
Washington, D.C. 20005

Dear Ambassador Taiana:

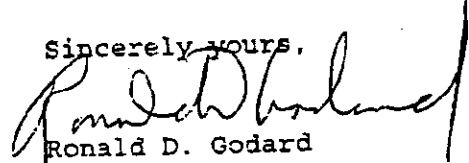
The Government of the United States of America notes that the IACHR made only minor revisions to the text in its most recent revision of the draft Inter-American Declaration on the Rights of Indigenous Peoples. We wish to reiterate the comments made in our December 19, 1996 submission.

In this letter we wish to focus on a major concern that has an impact on our position with respect to virtually all of the articles in the draft declaration. This is the lack of clarity with respect to the scope and application of the draft declaration. The current version of the draft text uses the term "indigenous peoples" throughout but does not contain a definition of the term "indigenous." The draft declaration instead states in Article I(1) that "the declaration applies to indigenous peoples as well as peoples whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws." Additionally, draft Article I(2) states that "self-identification as indigenous shall be regarded as a fundamental criteria for determining the peoples to which the provisions of this declaration apply."

This would not be a problem if the draft declaration merely restated existing principles of international law. For example, under Article 27 of the International Covenant on Civil and Political Rights, all persons belonging to ethnic, religious or linguistic minorities (which often will include the indigenous in particular states) are entitled to enjoy all human rights, including "the right, in community with other members of their group, to enjoy their own culture, to profess and practice their

declaration will hasten the day when such protections are a reality.

Sincerely yours,



Ronald D. Godard
Acting Representative

To delineate the proper scope of the declaration, the United States proposed including a substantive definition of the term "indigenous" in the draft declaration. The proposed definition, which derived from a United States Supreme Court case (*Montoya v. U.S.*, 180 U.S. 261, 266 (1901)), defining indigenous groups as:

those groups that (1) are composed of descendants of persons who inhabited a geographic area prior to the sovereignty of the present State or any direct predecessor to the present State; (2) historically exercised sovereignty or attributes of sovereignty; and (3) continue to maintain a distinct community with its own governing institutions.^{***}

A second option is for the draft declaration to incorporate a procedural definition. Such a definition would require States to establish a public and transparent process for determining which groups are indigenous. The United States looks forward to working with other governments with a goal of clarifying the scope of the term "indigenous."

The United States strongly supports adoption of a declaration that recognizes indigenous rights, promotes the elimination of discrimination based on indigenous origin, and fosters an appreciation for and understanding of the value of indigenous cultures and institutions. A clarification of the scope of the

^{***} This definition is similar to what is termed the "Cobo definition" after the UN Special Rapporteur who studied discrimination against indigenous groups. According to that definition:

Indigenous communities, peoples and nations are those which [1] having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, [2] consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. [3] They form at present non-dominant sectors of society and [4] are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as people, [5] in accordance with their own cultural patterns, social institutions and legal systems.

Convention on Human Rights "only guarantees individual rights." The Commission further noted (*id.*) that Article 27 of the ICCPR provides (hereinafter ICCPR, emphasis supplied) that "persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess, and practice their own religion, or to use their own language." See also, Lovelace v. Canada, Communication No. 24/1977, Report of the Human Rights Committee, UN GAOR, 36th Sess., Supp. No. 40 at 166, UN Doc. A/36/40, Annex XVIII (1977) views adopted July 30, 1981) holding that an indigenous individual's right to practice her culture must take priority over membership rules under Article 27 of the International Covenant on Civil and Political Rights.

Making clear the distinction between rights guaranteed to individuals and authorities accruing to social or political bodies prevents governments or groups from violating or interfering with basic human rights and fundamental freedoms in the name of the greater good of a group or state. While individuals may and often do exercise their rights in community with others, characterizing a right as belonging to a community, or collective, rather than an individual, can be and often is construed to limit the exercise of the right since only the group can invoke it. This does not mean, however, that the U.S. opposes the recognition in appropriate cases of the need for indigenous societies to establish representative institutions or governing bodies to act on behalf of the group and provide services to members. Rather, our concern is to ensure that indigenous people may exercise their individual human rights fully and freely.

Under the U.S. Constitution, American Indian and Alaska Native tribes are recognized as possessing an inherent right of self-governance deriving from their original sovereignty. As such, tribes are governments within the overall political framework of the United States and have a high degree of autonomy in their internal affairs. Few other American States have acknowledged or accorded indigenous institutions similar political status. See e.g. discussion of Article XV *infra*. In the Report on the Miskito Population, *supra* at 78-80, it was held that indigenous populations did not have a right to self-determination or political autonomy under international law. Moreover, indigenous groups should in general have authority to manage their local and internal affairs.

Applicable Law. In all negotiations of this kind, the United States seeks to ensure that the language is consistent with fundamental human rights and protections as guaranteed, for example, under its Constitution. The United States has proposed language in some provisions in order to bring them into accordance with such fundamental rights and protections in order that we may support inclusion of these concepts and principles in the inter-American instrument.

Comments of the United States on the draft
Inter-American Declaration on the Rights of Indigenous Peoples

General Comments

The United States is pleased to submit comments on the Draft Inter-American Declaration on the Rights of Indigenous Peoples. Before addressing specific issues of drafting, the United States would like to present some general concerns with regard to the draft approved by the Inter-American Commission on Human Rights at the session held on September 18, 1995 (OEA/SER/L/V/II.90, Doc. 9, Rev. 1).

Rights versus Goals. In drafting any international human rights instrument, the United States considers it highly preferable to use the term "rights" only with respect to those duties owed by a government to its people that give rise to legally enforceable remedies. Using this definition, a number of the "rights" set forth in the proposed inter-American declaration are more appropriately statements of aspiration. In such cases, the United States would be able to support their inclusion in the document only if they were recast in aspirational terms.

Collective versus Individual Rights. Since international law, with few exceptions, promotes and protects the rights of individuals, as opposed to groups, it is confusing to state that international law accords certain rights to indigenous "peoples" as such. The United States has no objection to using a plural -- whether it be "societies," "communities," or "populations" -- in certain contexts and subject to a specific definition, as discussed below. It notes that a wider variety of terms -- "pueblos," "poblaciones," and "personas," among others -- is proposed in the Spanish text than in English and that such distinctions are appropriate and lend greater specificity to the text. The United States also notes that under U.S. law indigenous groups are referred to as "peoples" but that under international law the term is understood to have a different meaning. See ILO Convention 169, Article 1(2).

We note that international instruments generally speak of individual, not collective rights. For example, the 1993 World Conference on Human Rights affirmed that "the human person is the central subject of human rights and fundamental freedoms." Moreover, the Commission in its Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin (1984), at 76 (hereinafter Report on the Miskito Population), specifically recognized that the American

Specific Comments

Preamble

Proposed Revision:

The Member States of the Organization of American States (hereinafter the "States"),

Recalling that throughout the Americas indigenous people constitute a distinctive element within society and have a special role to play in defining the national identity, strengthening the institutions of the State and achieving national unity based on democratic principles;

Recalling that the indigenous people of the Americas are equal in dignity and rights to all other citizens;

Further recalling that the presence of indigenous societies enriches the cultural heritage and national identities of the American States and contributes to the intellectual, artistic, social and economic vitality of the Americas;

Further recalling the important contributions indigenous societies have made to the development of many of the political concepts and democratic principles embraced by American States;

Recognizing that indigenous societies have a vital and continuing role to play in strengthening the institutions of American States and achieving national unity in accordance with democratic principles;

Further recognizing the importance for all humankind of preserving indigenous American cultures, which may include traditional collective forms of land ownership, social organization, and religious practices that are different from those followed by other members of the population;

Recognizing the severe poverty in which many indigenous people live in many parts of the Americas and the commitment made by the Heads of State and Government at the 1994 Summit of the Americas to focus their energies on improving the exercise of democratic rights and the access to social services by indigenous people and their societies;

Noting many American States have achieved advances in establishing national standards to protect indigenous rights and institutions consonant with the wide variety of situations within which indigenous people may live within their locale or nation;

Recognizing the applicability throughout the Americas of the American Declaration of the Rights and Duties of man and, were duly ratified, other international human rights instruments, including the American Convention on Human Rights;

In view of the upcoming meeting of experts at the Commission, which will revise the text based on comments received from both governments and indigenous groups, the United States has elected to present revised texts of each article with relatively short comments. Many of the changes have been made to simplify the language or improve the presentation in English. "Should" has been substituted for "shall" throughout the text to reflect its hortatory nature of the document. Brief explanations are provided of major substantive differences that the United States has with the text as prepared by the Commission. The United States would be pleased to discuss any of its comments or proposed revisions in more detail with other governments or members of the Commission or its staff.

vide indigenous groups. This is of utmost importance, as the United States is prohibited constitutionally from expanding special treatment to indigenous groups outside this definition.

The United States cannot agree with the proposition set out in proposed Article II(2) that self-identification should be a fundamental criterion for determining whether a person or group is indigenous and thereby entitled to the rights and protections contained in this declaration. Although the United States agrees that individuals should have the ability to self-identify as indigenous, we do not agree that an individual necessarily has the right to become a member of any particular indigenous group. One aspect of indigenous self-governance is the ability to determine membership. To give an unrestricted right of membership to an individual has the potential to undermine self-governance and would conflict with U.S. law.

The definition proposed in Article I(1) is derived from the U.S. Supreme Court's definition in Montoya v. U.S., 180 U.S. 261, 266 (1901). The form of the definition proposed is the one elaborated in a U.S. Court of Appeals case interpreting the Montoya standard. Native Village of Tyonek v. Puckett, 957 F.2d 631, 635 (9th Cir. 1992) ("group claiming tribal status [must] show that they are modern day successors to a historical sovereign entity that exercised at least minimal functions of a governing body").

Section Two (Human Rights)

Article II. Full observance of human rights.

Proposed Revision:

1. Indigenous individuals have the right 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 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 or denying those rights or authorizing any action not in accordance with the relevant instruments of international law including human rights law.
2. States should, in accordance with international law, take concerted positive steps to ensure respect for all human rights and fundamental freedoms of indigenous individuals, on the basis of equality and non-discrimination, and recognize the value and diversity of their distinct identities and culture.
3. Indigenous individuals may exercise their rights, including those as set forth in this Declaration, individually as well as in community with others, without discrimination. Indigenous individuals have a right to be free from discrimination based upon their asserted indigenous status or membership in an indigenous society.

Recognizing also that indigenous people and their societies have a vital role in environmental management and development because of their knowledge and traditional practices, and cultural affiliation with certain lands;

Encouraging states to recognize and duly support the identity, culture, interests of indigenous people and their communities and enable their effective participation in the achievement of sustainable development.

Comment: As presented by the Commission, the proposed preamble is more than introductory. It seeks to preview operative provisions of the Declaration, which is not typically the purpose of a preamble. A preamble should provide only general background for the specific provisions that follow. It should not introduce each article of the Declaration separately, nor should it attempt to acquire a mantle of universality through references to the UN and ILO since the scope of application of the proposed Declaration is limited to the Americas.

Section One (Indigenous Societies)

Article I. Definition.

Proposed Revision:

For purposes of this Declaration, "indigenous societies" are those groups that (1) are composed of descendants of persons who inhabited a geographic area prior to the sovereignty of the present State; (2) historically exercised sovereignty or attributes of sovereignty; and (3) comprise a distinct community with its own governing institutions.

Comment: The United States offers an alternative definition of "indigenous," derived from language articulated by the U.S. Supreme Court, in order to ensure that the intent of the declaration is fully served, while at the same time limiting the potential for non-indigenous groups to assert indigenous status. The United States takes seriously its obligations to indigenous groups. Where any such group satisfies the above definition, the U.S. federal government recognizes the existence of a government-to-government relationship and assumes certain obligations to the group under U.S. law. From time to time, groups of non-indigenous persons in the U.S., including individuals with neither a biological nor cultural nexus with U.S. indigenous groups, seek recognition as an indigenous group in order to take advantage of services, rights, and other benefits provided by the U.S. Government. The definition offered above attempts to ensure that the special rights, status, and protections accorded indigenous groups under the laws of the United States accrue only to bona

the maintenance of tribal culture, the welfare of tribal members, and as instrumental to the proper administration and delivery of tribal services.

Article V. No forced assimilation.

Proposed Revision:

1. Indigenous people have the right to maintain their distinct cultures, beliefs, religions, and languages, subject to reasonable regulation consistent with international standards.
2. States should take no action designed to force indigenous individuals or communities to assimilate or abandon their own customs in favor of different or more widespread customs or practices, or that results in the intentional destruction of a culture or the extermination of any ethnic group.

Comment: The United States views this article as one of the most critical provisions in the declaration. The United States is completely opposed to forced assimilation and believes that it is contrary to the provisions Article 27 of the International Covenant on Civil and Political Rights as well as other international human rights norms. We offer the revision to ensure clarity and precision.

Article VI. Special Measures against Discrimination.

Proposed Revision:

1. Where circumstances warrant, States should take measures to enable indigenous individuals to exercise fully and effectively all their human rights and fundamental freedoms without any discrimination. States are encouraged to take "special measures" aimed at the immediate, effective and continuing improvement of indigenous economic and social conditions.
2. All rights and freedoms herein are equally guaranteed to indigenous women and men. States recognize that gender-based violence impedes and undermines the exercise of those rights.

Comment: The United States recognizes that indigenous individuals have in many cases experienced discrimination in the exercise of their fundamental freedoms and is committed to eliminating all vestiges of such discrimination. On gender discrimination, the U.S. proposes language derived from Article 42 of the UN Draft Declaration on the Rights of Indigenous Peoples.

With regard to special measures, U.S. law as well as Articles 1(4) and 2(2) of the Convention on the Elimination of Racial Discrimination and Article 4(2) of the Convention on the

4. States are encouraged to remove any impediments to the free exercise and full enjoyment of these rights.

Comment:

In view of the fact that not all OAS Member States are parties to the American Convention on Human Rights, the reference here to the Convention in Article II(1) must be accompanied by some limiting phrase, such as "where duly ratified," to make it clear that acceptance of the Declaration does not imply acceptance of any obligations under the Convention. Proposed Article II(2) is vague and should be replaced with language taken from paragraph 20 of the Vienna Declaration adopted on June 25, 1993. Article II(3) goes beyond existing international law in recognizing the existence of collective rights. See discussion *supra* on collective vs. individual rights.

Article III. Membership in an indigenous society.

Proposed Revision:

States should recognize the authority of indigenous societies to exercise autonomy in determining membership, consistent with international human rights.

Comment: While indigenous societies, like all groups, are subject to certain overriding norms such as human rights and public safety, the ability to define membership is central to their existence as an entity. Under U.S. law, tribal governments possess broad powers of self-governance and autonomy over their lands, resources, and internal affairs, including the authority to determine membership. Given the centrality of this aspect, consideration should be given to presenting it as a mandatory requirement.

Article IV. Legal status of indigenous societies.

Proposed Revision:

States should provide appropriate mechanisms to extend legal status to indigenous entities enabling such societies to operate corporately, or in other comparable effective form, under State law.

Comment: The proposed revision utilizes terminology familiar to U.S. law in place of "legal personality," which has no established meaning in U.S. law. In the United States, tribal and native governments have the authority to act "corporately" on behalf of their members and to operate as a legal entity. They may hold real property, bring causes of action in U.S. courts, and represent the view of their membership in a variety of fora. We view this as important to

2. To encourage diversity of voices and viewpoints, States should take appropriate measures under their national systems wherever possible to facilitate radio and television broadcasts in indigenous languages in regions having large indigenous populations, and to encourage the development of indigenous radio stations and other media.

3. States should take measures to enable indigenous people to understand and to be understood when dealing with laws and administrative, legal and political procedures.

Comment: The United States supports the general thrust of the provisions of this Article, but takes the view that the language requires revision in order to maintain the core concepts in a manner more consistent with existing international law. For example, Article VIII(2) as proposed could be read to imply a legal responsibility to regulate media so as to provide access to a specific group, which would be inconsistent with general international agreements governing radio frequencies. With regard to indigenous languages, the U.S. recognizes that it is essential to the protection of the fundamental rights of indigenous people to communicate with them in a manner which they can understand and through which they can express their views and be understood in all official dealings and in courts of law (see, ICCPR Art. 14(3)(a) and (f); ILO Convention 169 Art. 12), but the U.S. cannot support the proposition that States should be required to establish official languages. The United States will discuss the use of languages in schools as part of the following article on education.

Article IX. Education.

Suggested Revision:

1. States should recognize the authority of indigenous societies to (a) establish and operate their own educational programs, institutions and facilities; (b) to prepare and apply their own educational plans, programs, curricula and materials; and (c) to train and accredit their own teachers and administrators, provided that indigenous educational programs meet generally applicable minimum State requirements in the field of education.

2. Non-discriminatory access to public education is a right that should be enjoyed by indigenous individuals in common with other citizens of the State. State-funded education should respect indigenous cultures.

3. States should take appropriate measures so that, wherever possible, indigenous individuals have adequate opportunities to learn their native indigenous language or to receive instruction in that language.

4. States should take appropriate measures to provide resources for these purposes.

Elimination of all Forms of Discrimination against Women, recognize that "special measures" may be appropriate for disadvantaged groups under some circumstances. The U.S. has many laws and programs instituting special measures to overcome the effects of past discrimination and to alleviate resulting disadvantages. The U.S. view, however, is that each State should retain the discretion to determine, pursuant to a fair and open process, whether special measures are appropriate under the particular circumstances existing in that State.

Section Three (Cultural Development)

Article VII. Culture.

Proposed Revision:

1. States should respect the cultural integrity of indigenous societies, their relationship with their own lands and environment, as well as their historical and archaeological heritage, which are important to the identity of the members of their groups and their ethnic survival.
2. States should provide an effective legal framework for the protection of indigenous culture, including, where appropriate, mechanisms for the repatriation of cultural property.
3. States should take appropriate measures to prevent discrimination based on indigenous lifestyles, customs, traditions, forms of social organization, use of dress, languages and dialects, and other cultural practices.

Comment: The United States strongly supports the concept of protection for indigenous culture but cannot accept an open-ended obligation for the restitution of all cultural property, as the Commission has proposed in Article VII(2). In its own relations with Indian tribes in the United States, the U.S. Government supports the repatriation of sacred objects and cultural items where such items have been acquired wrongfully or in disregard of the desires of the tribes. The U.S. Congress recently enacted legislation on the repatriation of Native American cultural items as well as the protection of historical and archeological sites within the United States. In May 1996, President Clinton signed an executive order directing U.S. agencies to protect sacred sites on federal lands.

Article VIII. Philosophy, Outlook and Language.

Proposed Revision:

1. States recognize that indigenous languages, philosophy and outlook are a component of national and universal culture, and as such States should respect them and where appropriate facilitate their dissemination.

law. These sections of Article X have been reformulated in terms of the rights of indigenous individuals. The rights at issue are fully protected as individual rights that can be exercised in community with others. The proposed revision also serves to protect the individual right to practice his or her religion from being derogated by the community. See discussion of Collective versus Individual Rights, SUPRA.

Article XI. Family Relations and Family Ties.

Proposed Revision:

1. The family in all its forms is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. Consistent with international human rights instruments, States should accord appropriate recognition to indigenous institutions, laws and traditions concerning the family and the integrity of family relations.

Comment: The United States recognizes the importance of the integrity of the family to the ethnic and cultural survival of indigenous people. The U.S. offers the above revisions to bring the language closer to that used in ICCPR Article 23(1) and Article 20 of the Convention on the Rights of the Child. We also noted that the language proposed in Article XI(2) anticipates that the State determines the child's best interest. In the U.S., child welfare is typically a matter within the jurisdiction of state and tribal court systems. The U.S., however, in national legislation, has articulated a legal framework designed to protect the authority of tribal court systems over child welfare matters. Not all U.S. indigenous people, such as Native Hawaiians, have access to a legal apparatus similar to tribal court systems. As this situation may exist in other States as well, the U.S. has proposed language to accommodate these differences.

Article XII. Health and Well-being.

Proposed Revision:

1. States should take appropriate measures to protect the freedom of indigenous individuals to use, maintain, develop and manage their own health services, provided such services meet the standards of generally applicable laws adopted in the interest of public health and welfare. In addition, indigenous individuals have the right to non-discriminatory access to health services available to the general public.
2. States should take reasonable measures to protect from endangerment or extinction medicinal plants and animals that are vital to indigenous medicine.

Comment: Access to education is among the most important rights of any American. Without such access, individuals cannot obtain the necessary knowledge and skills to participate in the political or economic life of a society, something that places individuals at a serious disadvantage in virtually every respect. For this reason, the U.S. does not agree that any State should waive its authority to establish minimum standards for the education of its citizenry. Indigenous societies also have an interest in the education of young people and may wish to establish and administer their own schools. These schools should be required to meet minimum State education standards. See, International Covenant on Economic, Social and Cultural Rights, Art. 13(3) and (4); Convention on the Rights of Child Art. 29(2); ILO Convention 169, Art. 17(3). Indigenous individuals should also have the right to non-discriminatory access to public education, in line with the Universal Declaration, Article 26, International Covenant on Economic and Social Rights, Article 13, and Convention on the Rights of the Child, Article 28.

With respect to Article VIII(4) as proposed by the Commission, the U.S. considers it impractical to direct States to conduct educational systems in indigenous languages in all circumstances. The United States supports reasonable measures to provide instruction in indigenous languages, where appropriate.

Article X. Spiritual and Religious Freedom.

Proposed Revision:

1. Indigenous individuals have the right to freedom of thought, conscience and religion.
2. This right shall include freedom to have or adopt a religion or belief of her or his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice, and teaching.
3. States should take appropriate measures, in consultation with the indigenous societies concerned, to preserve and protect sites that are sacred to them, including burial sites. States should provide an effective legal framework for the return of sacred objects, relics and human remains taken from graves or sacred sites.
4. States are encouraged to respect the use of sacred and ceremonial areas and to provide for indigenous access to and use of such sites as may be under the management or control of a State.

Comment: The revisions proposed to Article X(1) and (2) are based on the text of ICCPR Article 18(1) and are intended to harmonize the draft declaration and existing international

affecting indigenous as well as other individuals, it cannot agree that States should assume the role of environmental guarantor.

Section Four (Organizational and Political Rights)

Article XIV. Association.

Proposed Revision:

1. Indigenous individuals have the right to freedom of association, assembly, opinion and expression.
2. Indigenous individuals have the right to full contact and common activities with sectors and members of their ethnic groups living in the territory of neighboring states, subject to the non-discriminatory enforcement of customs and immigration laws.

Comment: Some of the language proposed in this Article is addressed elsewhere in the Declaration. The U.S. revisions eliminate duplicative language and concentrate on the right of association in the political context. The proposed revision is based on Article 20 of the Universal Declaration and Article 22 of the ICCPR.

Article XV. Management and Control of Internal Affairs.

Proposed Revision:

1. States should recognize, where appropriate and on the basis of a fair and open process, a broad range of autonomy for indigenous societies to manage their local and internal affairs, including social, economic and cultural matters. States are encouraged to utilize indigenous institutions to deliver social and economic services to indigenous societies.
2. Indigenous individuals have the right to participate on an equal basis with other citizens in all national fora, including local, provincial, and national elections. Where a State's policy, decision, or action will have a direct effect on indigenous property, rights, or other interests, States are encouraged to provide indigenous people or their representatives the opportunity to be heard on the subject.

Comment: As discussed on page 2 above, there is no international law obligation to accord autonomy to indigenous groups or societies. Under U.S. law, Indian tribes and Alaska Natives retain attributes of sovereignty over their internal affairs, consistent with the language being proposed here. Indigenous groups should in general have authority to manage their local and internal affairs.

3. Where circumstances so warrant, States, in consultation with indigenous societies, should take measures to improve health conditions in indigenous societies and assist them to maintain health conditions in accordance with nationally and internationally accepted standards.

Comment: The proposed revisions are generally of an editorial nature. However, the U.S. does not view it wise for States to assume responsibility for the dissemination of indigenous medical practices, as there may be any number of unintended consequences. The U.S. is further concerned that the Commission's language may be interpreted to proscribe the authority of States to regulate the practice of medicine as necessary to protect public health. While the U.S. agrees that indigenous people should be free to choose traditional or modern medical treatment or both, the U.S. also believes that it has a duty to ensure that doctors are adequately trained, qualified, and licensed and hospitals and other health care facilities meet or exceed minimum national standards.

Article XIII. Environmental Protection.

Proposed Revision:

1. States should take reasonable measures to ensure that regions inhabited by indigenous societies enjoy the same measure of protection under environmental legislation and through enforcement action as others within the national territory.
2. Indigenous individuals are entitled to nondiscriminatory access to information on environmental hazards and participation in the development of public policy with respect to the environment.
3. As part of the management of their own lands, indigenous societies may regulate environmental conditions consistent with applicable State standards and may participate in the formulation and implementation of governmental conservation programmes undertaken with respect to those lands.
4. States are encouraged to take measures to help indigenous societies preserve the environment and should provide them with nondiscriminatory access to generally available programs for purposes of environmental protection.

Comment: The United States recognizes environmental conditions to be of critical importance to indigenous individuals and societies and has added a new provision in Article XIII(1) to assure indigenous societies equal protection under national environmental legislation. While the United States supports the concept that States have certain responsibilities to address the environmental conditions

Section Five (Social, Economic and Property Rights).

Article XVIII. Traditional Forms of Ownership and Ethnic Survival. Rights to Land and Territories.

Proposed Revision:

1. States should respect the culture and values of indigenous societies and the special relationship between indigenous societies and their lands and interests in their lands, including traditional uses such as subsistence.
2. States should recognize forms of corporate ownership of land that reflect indigenous land tenure systems.
3. States should provide an effective legal framework for the protection of the rights of indigenous societies with respect to their natural resources on their lands, including the ability to use, manage, and conserve such resources, and with respect to traditional uses of their lands, interests in lands, and resources, such as subsistence.
4. In situations in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands held by indigenous societies, States should establish procedures to consult with them before undertaking or authorizing any program for exploiting such resources. Where possible, indigenous societies should benefit from these activities and receive just compensation for any damages sustained as a result.
5. States are encouraged to avoid relocation of indigenous societies. As a general matter, the free and informed consent of indigenous societies should be obtained before they are removed from their lands. Where such consent cannot be obtained, such removals should take place only in exceptional circumstances following appropriate procedures established by national laws and regulations. When indigenous societies have been removed from their lands, they should be given the opportunity to return should the reasons for their relocation cease to exist.
6. States should respect the physical security of indigenous societies. During periods of armed conflict, States may require the total or partial evacuation of indigenous people if the security of the population or imperative military reasons so demand.
7. States should protect the right of indigenous individuals to own, develop and enjoy land, and interests in land, to the same extent as other individuals.
8. States should protect indigenous individuals and societies in the use and occupancy of their land. If their

Article XVI. Indigenous Law.

Proposed Revision:

1. Indigenous law should be recognized as an integral part of State legal systems and the framework for social and economic development of indigenous societies.

2. States, where appropriate, should take measures to enhance the capacity of indigenous societies to maintain and strengthen their own legal systems with respect to internal matters, including control of real property and natural resources, resolution of disputes within and between indigenous societies, law enforcement, and maintenance of internal peace and harmony.

Comment: Although this article as proposed by the Commission generally reflects U.S. domestic law with regard to federally recognized tribes, not all States recognize a separate body of law for indigenous people. As with the previous article, U.S. support for this language is contingent upon acceptance of the definition of "indigenous societies" contained in Article I.

Article XVII. National Incorporation of Indigenous Legal and Organizational Systems.

Proposed Revision:

1. The States should facilitate inclusion within their national organizational structures, wherever appropriate, of institutions and traditional practices of indigenous societies.

2. States are encouraged in predominantly indigenous areas to facilitate the design and establishment of institutions that reflect and reinforce the identity, culture and organization of those populations, to promote indigenous participation.

Comment: The United States proposes only minor editing here to remove the presumption, which will not be appropriate in all circumstances, that existing State governing structures should necessarily be changed to incorporate indigenous institutions. Tribal governments, for example, are already incorporated in the political framework by the U.S. Constitution, and many offices in the Executive Branch, as well as committees in both the U.S. Senate and the House of Representatives, are charged with handling Indian issues.

Article XX. Intellectual property rights.

Proposed Revision

Indigenous individuals are entitled to apply for and receive, on a non-discriminatory basis, legal protection for their intellectual property through trademarks, patents, copyright and other such procedures as established under domestic law.

Comment: The U.S. agrees that States must accord indigenous individuals the same rights as other citizens to the protection of laws governing intellectual property. However, States should retain the authority to determine whether and under what circumstances additional protections are appropriate.

Article XXI. Economic development.

Proposed Revision

1. States should take reasonable measures to consult with indigenous societies when considering public policies for the economic development of indigenous lands or regions, or programs that will affect the living conditions or other legitimate interests of such societies.

2. Indigenous societies should have access on a nondiscriminatory basis to mechanisms established under domestic law to redress claims regarding damage arising from government action.

Comment: As a general matter, the United States accepts the notion of a "right to development" in the international context only for individuals, and not for states or groups, as contemplated by the 1986 UN Declaration on the Right to Development. Thus, the United States could not accept any suggestion of a collective "right" of the nature proposed by the Commission.

The United States would reiterate that the overall context within which the development of indigenous people should be assumed to be taking place is one of democratic processes and broad participation. As not all indigenous people live in communities separate from other members of society, it does not seem practical to recognize in all indigenous people a right to steer a course of development independent of others or the national government. Nor does it seem possible or desirable for any State to assume the very broad responsibilities to indigenous people proposed in Article XXI(2). The proposed revision confirms the right of indigenous people to participate in public decisions without granting a right of veto.

land is taken by the State, it should be for a public purpose and just compensation should be provided. States should consider the possibility of negotiated settlements, including the return of land as appropriate, when not otherwise required by law.

9. States should establish penalties and enforcement mechanisms to protect the lands of indigenous individuals and societies from unauthorized intrusions and uses.

Comment: Article XVIII, as drafted by the Commission, contains imprecise language in an attempt to address a wide variety of situations involving land ownership and use. As a result, the provision goes significantly beyond existing international law and conflicts with U.S. domestic law in important respects. While the U.S. supports the principle that States should recognize and protect indigenous land rights, restitution is simply not always a viable means for resolving land title disputes. We also feel that the Declaration must be more open-ended and allow for creative solutions to be worked out among the parties involved.

We have also proposed a new Article XVIII(6) concerning forced relocation of indigenous people in times of armed conflict. We note that Article 49 of the Fourth Geneva Convention authorizes total or partial evacuation of a given area "if the security of the population or imperative military reasons so demand." Moreover, pursuant to Article 58(a) of the 1977 Geneva Protocol I, belligerents have a legal duty to remove civilians if they are in the "vicinity of military objectives." The declaration should not derogate from the Geneva Convention rules.

Article XIX. Workers' Rights.

Proposed Revision:

1. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labor, employment, salary, or other related benefits.
2. Indigenous individuals should have the right to special measures, where circumstances so warrant, to correct, redress and prevent the discrimination to which they may have been subject historically.

Comment: The United States addressed the issue of "special measures" in Article VI. We would like to take this opportunity to re-emphasize our view that the issue of "special measures" to correct past discrimination is sensitive and difficult to prescribe in the broad, general terms of a declaration. The proposed revision would allow each State to decide whether or when to accord preferential treatment in employment matters.

SECTION SIX. GENERAL PROVISIONS.

Article XXII. Treaties, agreements and implied arrangements.

Proposed Revision:

States should take all necessary steps under domestic law to implement obligations to indigenous societies under treaties and other agreements negotiated with them and where appropriate to establish procedures for resolving grievances arising under such treaties and agreements in accordance with principles of equity and justice.

Comment: This provision is of deep significance to indigenous people, and we begin with the proposition that States should honor their treaty obligations. The proposed revision focuses on the implementation of treaties under domestic law. The suggestion that conflicts be submitted to competent international bodies seems inappropriate in view of the fact that most agreements of this kind do not give rise to rights under international law and should not be adjudicated in international tribunals. However, the United States believes that domestic forums should be available to fairly adjudicate such claims.

Article XXIII.

Proposed Revision:

Nothing in this declaration should be construed as diminishing or extinguishing rights of indigenous individuals or societies.

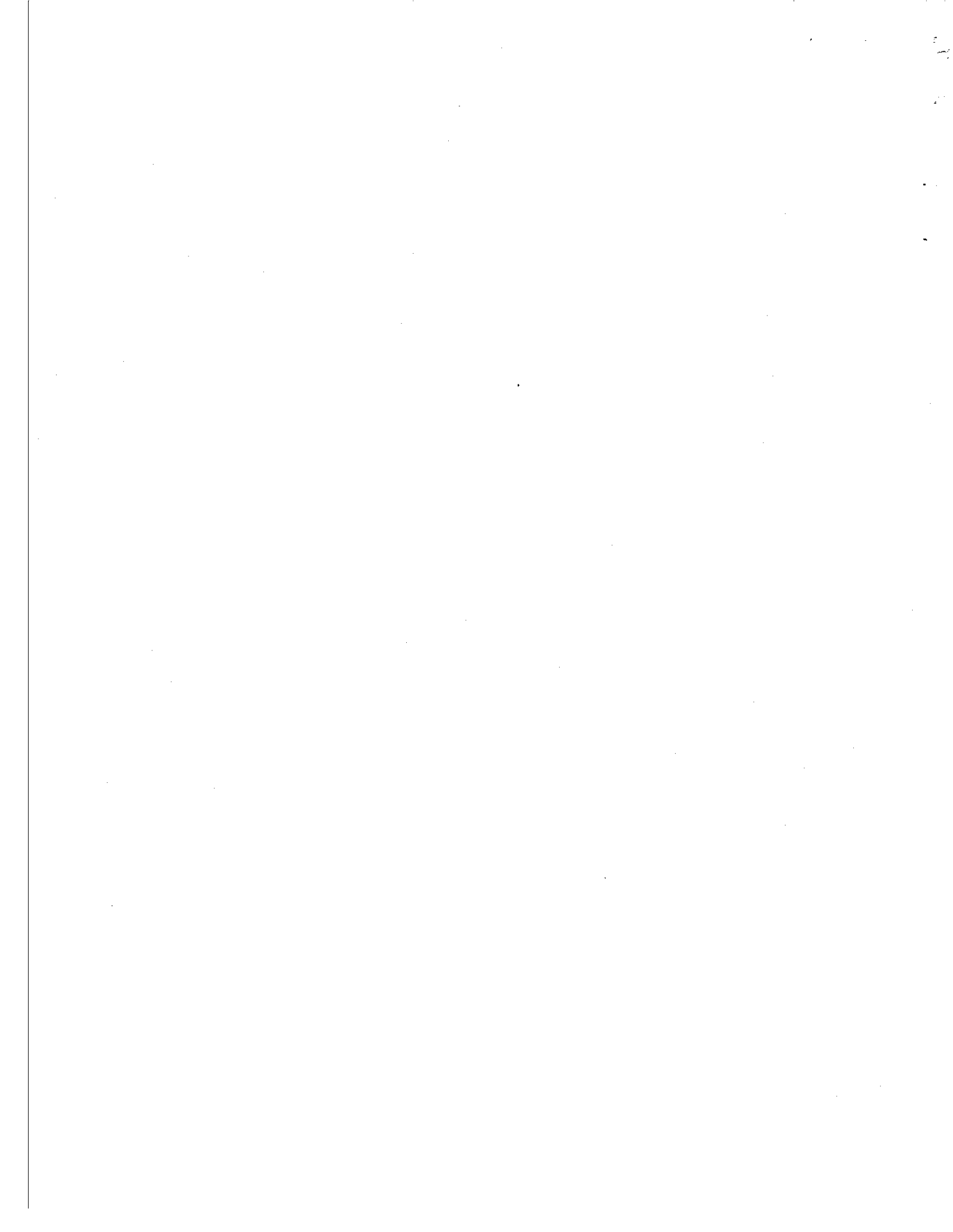
Comment: The United States finds the reference to future rights confusing and proposes its deletion.

Article XXIV.

Proposed Revision:

Nothing in the present Declaration may be construed as permitting any activity contrary to the purposes and principles of the United Nations, including sovereign equality, territorial integrity and political independence of States

Comment: The United States prefers the approach taken in Article 8(4) of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.



PERMANENT COUNCIL OF THE
ORGANIZATION OF AMERICAN STATES
COMMITTEE ON JURIDICAL AND POLITICAL AFFAIRS

OAS/Ser.G
CP/CAJP-1293/98 add.3 corr.1
2 February 1998
Original: English

OBSERVATIONS AND COMMENTS ON THE DRAFT INTER-AMERICAN DECLARATION
ON THE RIGHTS OF INDIGENOUS PEOPLES

(Canada)

Permanent Mission of Canada
to the Organization of American States

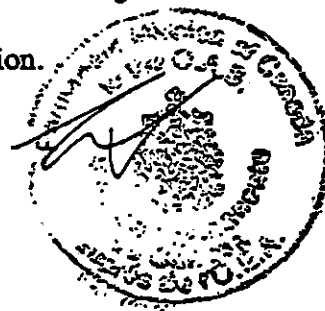


Mission permanente du Canada
auprès de l'Organisation des États américains

NO-OAS-0021

The Permanent Mission of Canada to the Organization of American States (OAS) presents its compliments to the Inter-American Commission on Human Rights and to the Secretariat for Legal Affairs, and has the honour to enclose the Comments of the Government of Canada on the Proposed American Declaration on the Rights of Indigenous Peoples (February 1997).

The Permanent Mission of Canada to the Organization of American States avails itself of this opportunity to renew to the Inter-American Commission on Human Rights and to the Secretariat for Legal Affairs, the assurances of its highest consideration.



Washington, D.C.
January 15, 1998

term "indigenous peoples" in the draft OAS instrument on the same basis.

With respect to specific provisions contained in the Draft Declaration, Canada notes that several appear to be more consistent with a convention rather than a declaration. In this context, we should ensure that the Draft Declaration: distinguishes "rights" from policy objectives; avoids language more appropriate to a legally binding convention than a non-binding declaration; and, allows for flexible implementation of the rights referred to in the Draft Declaration, taking into account the particular circumstances of each state (consistent with Article 34 of the International Labour Organization *Convention 169 on Indigenous and Tribal Peoples* and Article 2 of *International Covenant on Economic, Social and Cultural Rights*.)

In general, when referring to particular rights or instruments, the Draft Declaration should make reference to those instruments which are of universal application or which are universally applied in the Americas. Canada notes, in this context, that the *American Convention on Human Rights* is not of universal application in the Americas and it is only binding on those states which have ratified it. It should be made clear, when referring to the Convention, that the provisions are only binding on those states which are party to it.

SPECIFIC COMMENTS

Canada has the following comments on the second version of the *American Draft Declaration on the Rights of Indigenous Peoples* for the OAS. We will provide additional comments on the issues arising out of the Draft Declaration, as well as proposed wording changes, at the proposed Working Group of Experts. We look forward to receiving the comments of other states.

PREAMBLE

1. *Indigenous institutions and the strengthening of nations*

The member states of the OAS (hereafter the states),

Recalling that the indigenous peoples of the Americas constitute an organized, distinctive and integral segment of their population and are entitled to be part of the national identities of the countries of the Americas, and have a special role to play in strengthening the institutions of the state and in establishing national unity based on democratic principles; and,

Further recalling that some of the democratic institutions and concepts embodied in the constitutions of American states originate from institutions of the indigenous peoples, and that in many instances their present participatory systems for decision-making and for authority contribute to improving democracies in the Americas.

Recalling the need to develop their national juridical systems to consolidate the pluricultural nature of our societies.

2. *Eradication of poverty and the right to development*

Concerned about the frequent deprivation afflicting indigenous peoples of their human rights and fundamental freedoms; within and outside their communities, as well as the dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own traditions, needs and interests.

Proposed American Declaration on the
Rights of Indigenous Peoples (February, 1997)

Comments of the Government of Canada

The government of Canada has reviewed the second version of the *Proposed American Declaration on the Rights of Indigenous Peoples ("Draft Declaration")* and has prepared the following comments. We note that some of the provisions contained in the second version of the Draft Declaration raise many of the same concerns as were raised in the first version, thus, we have reiterated some of our previous comments which we feel remain relevant to the development of this instrument.

GENERAL COMMENTS

Canada has spoken in favour of an international instrument on the rights of indigenous peoples both within the context of the Organization of American States (OAS) and within the United Nations. Canada continues to support the development of such instruments which are developed in consideration of the freely expressed views of indigenous groups and considers their participation in the process of developing such instruments to be of great importance.

As noted in our comments on the first version of the Draft Declaration, Canada believes that the OAS Draft Declaration should: reflect the unique place of indigenous people in the Americas; be universal in application; promote reconciliation and the protection of indigenous rights; work effectively against discrimination; and, provide clear and practical guidance for the development of effective and harmonious relationships between indigenous people and states.

Canada believes this Draft Declaration should underline that indigenous peoples are entitled to the full enjoyment of all human rights and fundamental freedoms on the same basis as all other citizens and peoples. Where the rights of indigenous peoples are already protected in international law, we should make reference to these standards in the Draft Declaration. Where there are no standards, or where the standards inadequately address the special needs or problems of indigenous peoples, we must decide whether special protection for indigenous peoples would be warranted, ensuring that there is both a clear need and rationale for doing so.

Canada is concerned that confusion may result from the use of the term "indigenous peoples" throughout the Draft Declaration. As affirmed at the Vienna Conference on Human Rights, individuals are the primary object of international human rights law. Nevertheless, we recognize the importance of collective rights to indigenous cultures and support the inclusion in the Draft Declaration of principles directed towards indigenous "peoples". We must, therefore, consider when the use of the term "indigenous individuals" or "indigenous peoples" would be most appropriate. If we are to refer only to "indigenous peoples", we may wish to consider including in the Draft Declaration a provision to the effect that the use of the term "indigenous peoples" may include, where appropriate, a reference to indigenous individuals.

In this context, Canada wishes to clarify that it has accepted the use of the term "indigenous peoples" in the context of the UN Working Group on the *Draft Declaration on the Rights of Indigenous Peoples*, on the understanding that the exercise of any associated rights must respect political, constitutional and territorial integrity of democratic states. We are willing to accept the use of the

exercised collectively.

9. Advances in the provisions of national instruments
Noting the constitutional, legislative and jurisprudential advances achieved in the Americas in guaranteeing the rights and institutions of indigenous peoples.

DECLARE:

It is Canada's view that the Preamble should be considered after the operative portion of the Draft Declaration has been completed. This would ensure that the principles upon which the Draft Declaration is to be founded can be reflected in an appropriate manner in the Preamble. This will support the use of the Preamble as a tool in interpreting the operative portion of the declaration. In accordance with this view, Canada is offering only general comments on the Preamble at this time.

Canada notes that some of the statements in the preamble are somewhat categorical or overly broad and would benefit from further examination. It should be clarified whether the reference to "national juridical systems" in the first preambular paragraph refers to the state juridical systems or to indigenous institutions, and if the latter, how indigenous juridical systems may be incorporated into existing legal system. Further discussion will be required on the right to development, contained in preambular paragraph 2 and the link made with the dispossession of lands, territories and resources, contained in preambular paragraphs 2 and 5. Some of the preambular paragraphs, such as the references to "control" over lands and territories, may not accurately reflect historical conditions, i.e., while the indigenous peoples may have used the land and territories on an exclusive or shared basis, they may not necessarily have had "control" of those lands and territories.

As the preamble is to contain statements of general principles, Canada suggests that any preambular articles which raise substantive issues be considered in the context of the operative portion of the declaration.

With respect to preambular paragraph 7, we note again that the *American Convention on Human Rights* is not of universal application in the Americas and is only binding on those states which have ratified it. We must ensure that the provisions of the Draft Declaration are consistent with this principle.

Canada has some concerns regarding the statement in preambular paragraph 7 that recognizes that "indigenous peoples are a subject of international law". In the traditional understanding of this term in international law, states were the sole subjects of international law and thus had the capacity to enter into legal relations and to create consequent rights and duties. This understanding is evolving to include international organizations and, in some cases, individuals, but these new "subjects" do not have the same rights and duties as states.

SECTION ONE: INDIGENOUS PEOPLES

Article I: Scope and definitions

1. *This Declaration applies to indigenous peoples as well as peoples whose*

Recognizing the severe impoverishment afflicting indigenous peoples in several regions of the Hemisphere and that their living conditions are generally deplorable.

And recalling that in the Declaration of Principles issued by the Summit of the Americas in December 1994, the heads of state and governments declared that in observance of the International Decade of the World's Indigenous People, they will focus their energies on improving the exercise of democratic rights and the access to social services by indigenous peoples and their communities.

3. *Indigenous culture and ecology*

Recognizing the respect for the environment accorded by the cultures of indigenous peoples of the Americas, and considering the special relationship between the indigenous peoples and the environment, lands, resources and territories on which they live and their natural resources.

4. *Harmonious Relations, Respect and the Absence of Discrimination*

Reaffirming the responsibility of all states and peoples of the Americas to end racism and racial discrimination, with a view to establishing harmonious relations and respect among all peoples.

5. *Territories and Indigenous Survival*

Recognizing that in many indigenous cultures, traditional collective systems for control and use of land, territory and resources, including bodies of water and coastal areas, are a necessary condition for their survival, social organization, development and their individual and collective well-being; and that the form of such control and ownership is varied and distinctive and does not necessarily coincide with the systems protected by the domestic laws of the states in which they live.

6. *Security and indigenous areas*

Reaffirming that the armed forces in indigenous areas shall restrict themselves to the performance of their functions and shall not be the cause of abuses or violations of the rights of indigenous peoples.

7. *Human Rights instruments and other advances in international law*

Recognizing the ~~paramouny~~ paramountcy and applicability to the states and peoples of the Americas of the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights and other human rights instruments of inter-American and international law; and

Recognizing that indigenous peoples are a subject of international law, and mindful of the progress achieved by the states and indigenous organizations, especially in the sphere of the United Nations and the International Labour Organization, in several international instruments, particularly in the ILO Convention 169.

Affirming the principle of the universality and indivisibility of human rights, and the application of international human rights to all individuals.

8. *Enjoyment of Collective Rights*

Recalling the international recognition of rights that can only be enjoyed when

3. *The states shall ensure for indigenous peoples the full exercise of all rights, and shall adopt in accordance with their constitutional processes such legislative or other measures as may be necessary to give effect to the rights recognized in this Declaration.*

Paragraph 1

Canada fully supports the principles included in paragraph 1. Again, we note that the *American Convention on Human Rights* has not been ratified by all of the OAS states and is not of universal application in the Americas. We should not attempt to extend its application to indigenous peoples from states not party to the Convention, which would not be consistent with the practice of international law.

Paragraph 2

The Canadian Constitution recognizes and affirms aboriginal and treaty rights, which are acknowledged by the Canadian Government as primarily collective rights exercised individually. Canada believes that recognition of certain rights of indigenous people as collective rights, such as land rights, should be reflected in the document. Further consideration must be given as to which rights should properly defined or characterized as collective.

Canada suggests that clarification is required with respect to the phrase "collective rights that are indispensable to the enjoyment of the individual human rights of their members" and the term "collective action".

Paragraph 3

While Canada supports the development of a declaration which sets out the rights of indigenous peoples, we must bear in mind that this document is an aspiration one and is not a convention. We have some concerns that paragraph 3 would require a state to take legislative or regulatory measures pursuant to the Draft Declaration. In keeping with our earlier general comments, we must ensure that the declaration allows for flexible and progressive implementation by states, in keeping with the hortatory nature of the instrument.

Article III: Right to belong to indigenous peoples

Indigenous peoples and communities have the right to belong to indigenous peoples, in accordance with the traditions and customs of the peoples or nation concerned.

Canada recognizes that a critical element of the indigenous identity is membership in an indigenous community, in accordance with the traditions and customs of that community. We question, however, whether this need to be expressed in terms of a "right". Further, we note that a lack of clarity results from the use of several terms which are not necessarily synonymous, for example, the paragraph uses the terms "indigenous peoples/communities/nations", but not "indigenous individuals". What does it mean for an "indigenous peoples" have the right to belong to an "indigenous peoples"?

Recognizing that the traditions and customs of indigenous communities and nations may vary

social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations.

2. *Self identification as indigenous shall be regarded as a fundamental criterion for determining the peoples to which the provisions of this Declaration apply.*

3. *The use of the term "peoples" in this Instrument shall not be construed as having any implication with respect to any other rights that might be attached to that term in international law.*

In previous comments, Canada suggested that there might not be a need for a definition of "indigenous peoples" in view of the principles of self-identification by indigenous individuals, and the corresponding concept of community acceptance, both of which principles Canada supports. In this context, Canada would understand that the term "indigenous" would include the Aboriginal peoples of Canada as defined in the *Constitution Act, 1982*, that is, the Indians, Inuit and Métis peoples. Where government policies and programs apply to indigenous peoples as indigenous, governments must have the authority to determine their application.

Canada notes, however, that the scope of application of the Draft Declaration in paragraph 1 would also extend also to "peoples whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations." As we noted last year, this is stated very broadly and the application of the declaration would not be limited to groups which lead a traditional lifestyle similar to those of indigenous communities. For example, the proposed definition could include communities that emigrated from Europe and Asia which continue to follow traditional farming lifestyles that may reflect special religious principles, but which do not consider themselves to be indigenous. We would not support extending the scope of application of this Draft Declaration to such groups and would recommend that the latter part of paragraph 1 be deleted.

SECTION TWO: HUMAN RIGHTS

Article II: Full observance of human rights

1. *Indigenous peoples have the right 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, the American Convention on Human Rights, and other international human rights law; and nothing in this Declaration shall be construed as in any way limiting or denying those rights or authorizing any action not in accordance with the instruments of international law including human rights law.*

2. *Indigenous peoples have the collective rights that are indispensable to the enjoyment of the individual human rights of their members. Accordingly the states recognize inter alia the right of the indigenous peoples to collective action, to their cultures, to profess and practice their spiritual beliefs, and to use their languages.*

indigenous individuals or people, such as affirmative action programs, or whether this would include other types of measures.

Canada strongly supports the principle that women, men and children are entitled to exercise the rights accorded to them under international law, without discrimination, consistent with other instruments of international law. Some clarity may be required as to the meaning and content of "spiritual" rights, referred to in paragraph 1.

Paragraph 2

Canada recognizes that many indigenous groups have not achieved the same standard of social or economic progress as have other sectors of society. With a view to addressing such historic or systemic discrimination, states may need to institute special measures for the purpose of improving the situation of indigenous individuals or people, in consultation with such groups.

Article VII: Right to cultural integrity

1. *Indigenous peoples have the right to their cultural integrity, and their historical and archeological heritage, which are important both for their survival as well as for the identity of their members.*

2. *Indigenous peoples are entitled to restitution in respect of the property of which they have been dispossessed, and where that is not possible, compensation on a basis not less favorable than the standard of international law.*

3. *The states shall recognize and respect indigenous ways of life, customs, traditions, forms of social, economic and political organization, institutions, practices, beliefs and values, use of dress, and languages.*

Paragraph 1

Canada recognizes the importance to indigenous peoples of their cultural traditions and customs and we support the principles contained in this paragraph.

Some clarification is required with regard to the scope of some of the terms used in the paragraph, including "cultural integrity" and "archaeological heritage".

Paragraph 2

Canada understands this reference to "property" to be to "cultural property", in accordance with paragraph 1. Canada would therefore suggest that the reference be prospective in nature, rather than historical, and reference be made to the establishment of adequate domestic processes to address compensation. With respect to past acts, Canada believes that states should make best efforts, in accordance with applicable international and domestic law, to facilitate the return to indigenous people of their cultural property.

considerably, the declaration should be flexible enough to allow for varied membership criteria. Nevertheless, these membership criteria must be consistent with existing human rights standards and concepts of natural justice, such as procedural fairness.

Article IV: Legal status of communities

Indigenous peoples have the right to have their legal personality fully recognized by the states within their systems.

Canada recognizes the importance to indigenous peoples or communities of having a proper legal status or personality. We wonder, however, if it is necessary that this principle be expressed in terms of a right?

Article V: No forced assimilation

1. *Indigenous peoples have the right to freely preserve, express and develop their cultural identity in all its aspects, free of any attempt at assimilation.*

2. *The states shall not undertake, support or favour any policy of artificial or enforced assimilation of indigenous peoples, destruction of a culture or the possibility of the extermination of any indigenous peoples.*

Canada supports the principle in this article regarding the preservation, expression and development of the culture of indigenous peoples and the prohibition against forced assimilation by the state. In this context, as we noted last year, we believe that this paragraph should prohibit state actions that are aimed at discrimination against a people, the destruction of its culture or its extermination. With respect to the wording used in paragraph 2, we have some concerns regarding the exact meaning of, and difference between, "artificial" and "enforced" assimilation.

Article VI: Special guarantees against discrimination

1. *Indigenous peoples have the right to special guarantees against discrimination that may have to be instituted to fully enjoy internationally and nationally-recognized human rights; as well as measures necessary to enable indigenous women, men and children to exercise, without any discrimination, civil, political, economic, social, cultural and spiritual rights. The states recognize that violence exerted against persons because of their gender and age prevents and nullifies the exercise of those rights.*

2. *Indigenous peoples have the right to fully participate in the prescription of such guarantees.*

Paragraph 1

Canada agrees that states should take measures to eradicate discrimination against indigenous peoples so that they may fully enjoy their human rights. We will need to clarify whether these "special guarantees" are meant to refer to measures taken for the purpose of improving the situation of

Paragraph 3

Canada supports the principle that indigenous individuals may rely on the use of interpretation, or other appropriate means, to enable them to understand and be understood in political, legal and administrative procedures. Further, we note that Article 14 of the *International Covenant on Civil and Political Rights* obliges states to provide interpretation to individuals for criminal proceedings.

With respect to the obligation on states to endeavour to establish indigenous languages as official languages in places where such languages are predominate, Canada would like to point out again that such an obligation would pose serious problems for states which have numerous indigenous languages. Further, there may be a number of legal consequences of an indigenous language acquiring the status of an official language which could have a significant consequences, such as requirements for labelling or translation.

Paragraph 4

Canada supports the use of indigenous names by indigenous peoples. Clarification is required with respect to what is required for a state to "recognize" such names.

Article IX: Education

1. *Indigenous peoples shall be entitled: a) to establish and set in motion their own educational programs, institutions and facilities; b) to prepare and implement their own educational plans, programs, curricula and materials; c) to train, educate and accredit their teachers and administrators. The states shall endeavor to ensure that such systems guarantee equal educational and teaching opportunities for the entire population and complementarity with national educational systems.*

2. *When indigenous peoples so decide, educational systems shall be conducted in the indigenous languages and incorporate indigenous content, and they shall also be provided with the necessary training and means for complete mastery of the official language or languages.*

3. *The states shall ensure that those educational systems are equal in quality, efficiency, accessibility and in all other ways to that provided to the general population.*

4. *The states shall take measures to guarantee to the members of indigenous peoples the possibility to obtain education at all levels, at least of equal quality with the general population.*

5. *The states shall include in their general educational systems, content reflecting the pluricultural nature of their societies.*

6. *The states shall provide financial and any other type of assistance needed for the implementation of the provisions of this article.*

Paragraph 3

Canada believes that some clarification of the terms "recognize" and "respect" is required in the context of this article. What would such recognition or respect entail in practice? As with other provisions of the Draft Declaration, Canada understands that this provision is subject to applicable international human rights standards.

Article VIII: Philosophy, outlook and language

1. *Indigenous peoples have the right to indigenous languages, philosophy and outlook as a component of national and universal culture, and as such, shall respect them and facilitate their dissemination.*

2. *The states shall take measures and ensure that broadcast radio and television programs are broadcast in the indigenous languages in the regions where there is a strong indigenous presence, and to support the creation of indigenous radio stations and other media.*

3. *The states shall take effective measures to enable indigenous peoples to understand administrative, legal and political rules and procedures, and to be understood in relation to these matters. In areas where indigenous languages are predominant, states shall endeavor to establish the pertinent languages as official languages and to give them the same status that is given to non-indigenous official languages.*

4. *Indigenous peoples have the right to use their indigenous names, and to have the states recognize them as such.*

Paragraph 1

Canada recognizes the importance of indigenous languages, philosophy and outlook to indigenous cultures. The obligation to "respect" and "facilitate the dissemination of" indigenous languages (presumably incumbent on states though the Draft Declaration does not state this) needs some clarification. If this obligation is broadly interpreted, states may have difficulties in implementing it, particularly in states where there are many indigenous languages. Canada, for example, has in excess of 52 indigenous languages.

Paragraph 2

Canada believes that it is important for indigenous culture and languages to be reflected in public media, including television and radio programs. However, an obligation on states to broadcast radio and television programs in indigenous languages, even where numbers warrant, and to "support" the creation of indigenous radio stations and other media could place a substantial burden on states, particularly where there are many indigenous languages, if "financial support" is intended. In addition, in most states, access to airwaves is subject to government regulation. In Canada's view, it is, therefore, important to underline the principle that indigenous individuals and groups should have access to the media on the same basis as non-indigenous people.

Paragraph 4

Canada supports the principle that indigenous individuals should have access to education at all levels, on at least the same basis as the other members of the general population. The paragraph, currently worded as a state guarantee to provide to indigenous peoples "the opportunity to obtain education at all levels", is broadly stated. Such a formulation might be interpreted as obliging the state to provide indigenous individuals with access to all levels of education, notwithstanding entry requirements and funding limitations.

Paragraph 5

Canada agrees that educational material should reflect the pluricultural (or multicultural) nature of a state, nevertheless, we wonder whether such a statement appropriately stated in terms of a binding obligation ("shall") or indeed is relevant in the discussion of the Draft Declaration.

Paragraph 6

Canada believes that funding and support for indigenous educational systems should be on a comparable basis as funding provided in appropriate public systems.

Article X: Spiritual and religious freedom

1. *Indigenous peoples have the right to freedom of conscience, freedom of religion and spiritual practice, and to exercise them both publicly and privately.*
2. *The states shall take necessary measures to prohibit attempts to forcibly convert indigenous peoples or to impose on them beliefs against their will.*
3. *In collaboration with the indigenous peoples concerned, the states shall adopt effective measures to ensure that their sacred sites, including burial sites, are preserved, respected and protected. When sacred graves and relics have been appropriated by state institutions, they shall be returned.*
4. *The states shall encourage respect by all people for the integrity of indigenous spiritual symbols, practices, sacred ceremonies, expressions and protocols.*

Paragraph 3

Canada believes that this provision should be phrased in terms of states "making best efforts" or "endeavouring to ensure" that the sacred sites are preserved and protected. Some clarification may be required regarding the obligation to "respect" the sacred sites. Canada supports the principle that these efforts should be in collaboration with the indigenous peoples concerned.

The obligation to "return sacred graves and relics" should be in accordance with appropriate national and international law, and may involve the consideration of the rights of third parties.

Canada supports the right of everyone to education, reflected in Article 13 of the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* and the *American Declaration on the Rights and Duties of Man*. These instruments set out objectives which states endeavour to meet, thus we must ensure that provisions on education contained in the Draft Declaration are consistent with these instruments.

Paragraph 1

Canada supports the principle of indigenous-established education systems which provide education appropriate to indigenous culture and which meet minimum educational standards. We note, however, that where there are a large number of indigenous languages and cultures in a state, the number of children in particular areas and the variety of demands on resources are factors which should be taken into account when establishing reasonable limits.

Canada supports the principle of indigenous-trained teachers and administrators; however, Canada also recognizes that the matter of accreditation may be subject to national or regional standards in accordance with Article 13 of the ICESCR.

Canada understands that the reference to "equal education and teaching opportunities for the entire population" is intended to ensure that the indigenous educational systems are comparable with, and complementary to, the national or general education systems. Canada notes, however, that this sentence could be interpreted as meaning that non-indigenous individuals would have access to the indigenous educational systems, both as students and teachers, on the same basis as indigenous individuals. The meaning of this sentence should, therefore, be clarified.

Finally, we note that under the Canadian constitution, education comes within the jurisdiction of the provinces, thus a reference to "national education systems" would refer to provincial education systems.

Paragraph 2

Canada supports the principle that indigenous peoples should have the ability to conduct their education systems in their own languages and incorporate indigenous content. Nevertheless, the situation of indigenous individuals living outside their communities presents a different problem, as noted above. It is Canada's view that such individuals should have appropriate opportunities to education in their own culture and language, subject to such reasonable limits as referred to in paragraph 1.

Paragraph 3

One way in which the equality of the indigenous and non-indigenous education systems can be ensured is through the establishment of national minimum standards developed by appropriate educational authorities of the state. In developing such standards, authorities should be encouraged to take into account those standards developed by indigenous organizations.

Some clarification is required as to the meaning of "legal recognition" of the traditional medicines, i.e. whether this would include protection under intellectual property regimes or the requirement for special legislation.

Paragraph 2

It is Canada's view that this paragraph, which states that indigenous peoples have the "right to protection of vital medicinal plants, animal and mineral" is potentially very broad. We would suggest that it reflect a more reasonable standard on states, such as "States shall endeavour to protect ...", which would be in keeping with other instruments of international law which do not recognize such a "right of protection".

As this article touches on matters related to the rights of indigenous peoples vis-à-vis their traditional territories, it should be considered again in the context of the discussion on lands and territories in Article 18. In some cases, indigenous peoples may have only restricted rights with respect to "traditional territories" if they do not own or have the exclusive use of such areas. In these cases, a "right to protection" of plants, animals and minerals might be beyond the scope of such rights, which might only include subsistence rights.

Paragraph 3

Canada supports the principle that indigenous communities should have increased control over delivery of health care services to their members, where domestic standards are maintained. Where government health policies and programs apply to indigenous peoples as indigenous, governments must have the authority to determine their application.

Canada also supports the principle that indigenous individuals should have access to health services on the same basis as the other members of the general population.

Paragraph 4

Canada supports the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, consistent with Article 12 of the ICESCR, to be achieved in a flexible and progressive manner. It is our view that we may only be able to ask the "best efforts" of a state in eliminating health conditions which fall below internationally accepted minimum standards, not an absolute obligation.

Article XIII: Right to environmental protection

1. *Indigenous peoples have the right to a safe and healthy environment, which is an essential condition for the enjoyment of the right to life and collective well-being.*

2. *Indigenous peoples have the right to be informed of measures which will affect their environment, including information that ensures their effective participation in actions and policies that might affect it.*

Article XI: Family relations and family ties

1. *The family is the natural and basic unit of societies and must be respected and protected by the state. Consequently the state shall recognize and respect the various forms of indigenous family, marriage, family name and filiation.*

2. *In determining the child's best interest in matters relating to the protection and adoption of children of members of indigenous peoples, and in matters of breaking of ties and other similar circumstances, consideration shall be given by courts and other relevant institutions to the views of the peoples, including individual, family and community views.*

Paragraph 1

Canada supports the statement on the important role played by the family in indigenous societies. We consider, however, that the scope of this paragraph may require some clarification, in particular, the content of the state obligation to "recognize" and "respect" indigenous family structures, marriages, family names and filiation.

Paragraph 2

Canada recognizes the importance of determining the best-interests of the child when considering the question of adoption and agrees that in this context, consideration should be given to the views of the community and family of the child.

Article XII: Health and well-being

1. *Indigenous peoples have the right to legal recognition and practice of their traditional medicine, treatment, pharmacology, health practices and promotion, including preventive and rehabilitative practices.*

2. *Indigenous peoples have the right to the protection of vital medicinal plants, animal(s) and mineral(s) in their traditional territories.*

3. *Indigenous peoples shall be entitled to use, maintain, develop and manage their own health services, and they shall also have access, on an equal basis, to all health institutions and services and medical care accessible to the general population.*

4. *The states shall provide the necessary means to enable the indigenous peoples to eliminate such health conditions in their communities which fall below international accepted standards for the general population.*

Paragraph 1

Canada supports the recognition of the importance of traditional health practices and believes that this must be subject to the public interest and to the protection of the best interests of the child and other vulnerable persons.

do not have exclusive use of, but where they may conduct their traditional life-style, in accordance with domestic law. This interpretation would apply to all of the articles in the Draft Declaration where these terms appear.

In general, states, rather than individuals, have the duty to protect the environment, nevertheless, states cannot be considered as environmental guarantors. Indigenous peoples are entitled to take measures to conserve, restore and protect their environment and the productive capacity of their lands and resources thereon, consistent with international law and subject to applicable national and international standards. In using territories, they may act in a manner consistent with the goals of conservation, restoration and protection. Article 18(3) covers similar subject-matter and should be considered with this article.

Paragraph 4

In Canada's view, the statement that indigenous peoples have the "right to participate fully in formulating, planning, managing and applying governmental programmes" is broadly stated. Canada supports the objective of enabling indigenous peoples to have the opportunity to be consulted in the development of government policies and programs specifically directed at the conservation of their lands, and to participate in the delivery of those policies and programs.

Canada agrees that indigenous peoples should be consulted in formulating those government policies and programs and supports the involvement of indigenous peoples in implementing governmental policies and programs relating to the conservation of their lands and resources.

Paragraph 5

Canada agrees that indigenous peoples should be entitled to appropriate and available assistance from states for environmental protection, on the same basis as other citizens.

Paragraph 6

Canada agree that the storage or disposal of radioactive or other hazardous materials in contravention of legislation or regulation, or without the prior and informed consent of the indigenous peoples affected should be prohibited. We must keep in mind, however, that there may be cases in which some groups may be willing to accept these materials as a means, for example, of generating economic activity.

Some clarity is required with respect to the meaning of "indigenous areas".

Paragraph 7

Canada supports, in general, the principle of this paragraph that conservation areas over which indigenous peoples have title shall not be subject to any natural resource development without the appropriate participation of the peoples concerned. Nevertheless, we have some concerns regarding its exact scope, particularly since the definitions of some of these terms (i.e. "indigenous territory", "conservation area" and "protected areas") are not known. As currently worded, the paragraph is too

3. *Indigenous peoples shall have the right to conserve, restore and protect their environment, and the productive capacity of their lands, territories and resources.*
4. *Indigenous peoples have the right to participate fully in formulating, planning, managing and applying governmental programmes of conservation of their lands, territories and resources.*
5. *Indigenous peoples have the right to assistance from their states for purposes of environmental protection, and may receive assistance from international organizations.*
6. *The states shall prohibit and punish, and shall impede jointly with the indigenous peoples, the introduction, abandonment, or deposit of radioactive materials or residues, toxic substances and garbage in contravention of legal provisions; as well as the production, introduction, transportation, possession or use of chemical, biological and nuclear weapons in indigenous areas.*
7. *When a State declares an indigenous territory as protected area, any lands, territories and resources under potential or actual claim by indigenous peoples, conservation areas shall not be subject to any natural resource development without the informed consent and participation of the peoples concerned.*

Paragraph 1

In Canada's view, a "right to a healthy environment" has not been accepted in international law as more than an aspirational right, and that those international instruments which establish a right to preserve or protect the environment do so in the context of individuals, not groups. Therefore, rather than speaking of rights, this paragraph should adopt a more hortatory approach and underline that indigenous peoples should be able to live in a healthy environment. Some clarity is required with respect to the meaning of "safe".

Paragraph 2

Canada believes that in discussing environmental protection the declaration should help ensure consistency with international instruments. That is, the declaration should extend to indigenous peoples and individuals the same rights extended to all peoples and individuals, without discrimination. Thus, indigenous individuals should have access, equal to that of other individuals, to information about the environment to facilitate their effective participation in actions and policies affecting their environment. Canada understands the term "participate" in this context to mean participation in the democratic process, influencing actions, policies and programs through that means of participation.

Paragraph 3

Canada would recognize, in the context of the Draft Declaration, that the term "lands" would refer to those areas which indigenous people may own, or have exclusive use of, and the rights to resources thereon. The term "territories" would refer to those areas which indigenous people do not own and

In commenting on this article, Canada notes that self-government for indigenous peoples need not be territorially-based and its implementation will be the subject of negotiation between indigenous peoples and states, which respects the political, constitutional and territorial integrity of democratic states. The outcome will depend on the particular needs and circumstances of the indigenous groups concerned.

As mentioned in connection with Article XIII, Canada understands that the term "lands" would refer to those lands and resources which indigenous people may own, or have exclusive use of, and the term "territories" would refer to those areas which indigenous people do not own and do not have exclusive use of, but where they may conduct their traditional life-style, in accordance with domestic law.

Paragraph 1

Canada supports the purpose of this paragraph. It is Canada's view that there may need to be progressive implementation of this paragraph, and that federal financing of these functions may be modified in relation to the increased financial independence of indigenous governments. Canada also suggests that there be some consideration in the paragraph of available state resources.

Canada would prefer the use of the term "self-government" but understands that term "autonomous" is an equivalent term. The reference to lands is understood to mean "their lands" and Canada suggests this be reflected in the document.

Canada notes that the exercise of self-government must be harmonized with the exercise of jurisdiction by other levels of government within that state. In certain areas, for example, environmental standards, the harmonization of these policies and practices is especially important, and access to radio or television media may be subject to national legislation or regulation. As well, certain rights, such as the right to restrict entry by non-members, may be subject to rights of entry or access, for example, to railways, public roads, or access to lands or waterways.

Paragraph 2

This paragraph concerns two issues; participation in the general political process, and establishment of indigenous decision-making institutions to implement self-government on their lands.

Canada supports the principle that indigenous individuals have the right to participate in the general political processes of the states in which they live without discrimination, consistent with international standards. As well, there may be special measures to allow participation in decisions of the state which directly affect certain areas of particular concern to indigenous people. Such an approach need not preclude indigenous people from selecting representatives through traditional methods.

Indigenous peoples have the right to develop and maintain their own decision-making institutions as a means of implementing their right of self-government. This will also enable them to participate more effectively in the political processes of the state.

broadly stated, effectively allowing indigenous peoples a veto over development in areas in which they have claimed an interest (and in which presumably a decision has not been taken) or those areas in which they might potentially claim an interest.

SECTION FOUR: ORGANIZATIONAL AND POLITICAL RIGHTS

Article XIV: Rights of Association, assembly, freedom of expression and freedom of thought

1. *Indigenous peoples have the right of association, assembly and expression in accordance with their values, usages, customs, ancestral traditions, beliefs and religions.*

2. *Indigenous peoples have the right of assembly and to the use of their sacred and ceremonial areas, as well as the right to full contact and common activities with their members living in the territory of neighboring states.*

Paragraph 1

Canada supports the principle that indigenous peoples have the right to association, assembly and expression, in keeping with well-accepted principles of international law.

Paragraph 2

Canada supports the right of assembly of indigenous peoples though the right to use sacred sites and ceremonial areas will need to be exercised in consideration of existing third party rights.

Canada supports the principle that indigenous peoples, in particular those divided by international borders, are entitled to maintain and develop contacts, relations, and undertake activities with other indigenous peoples across borders. Cross-border travel may be subject to non-discriminatory enforcement of customs and immigration laws.

Article XV: Right to self-government

1. *Indigenous peoples have the right to freely determine their political status and freely pursue their economic, social, spiritual and cultural development, and accordingly, they have the right to autonomy or self-government with regard to inter alia culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resource management, the environment and entry by nonmembers; and to determine ways and means for financing these autonomous functions.*

2. *Indigenous peoples have the right to participate without discrimination, if they so decide, in all decision-making, at all levels, with regard to matters that might affect their rights, lives and destiny. They may do so directly or through representatives chosen by them in accordance with their own procedures. They shall also have the right to maintain and develop their own indigenous decision-making institutions, as well as equal opportunities to access and participate in all state institutions and fora.*

Article XVII: National incorporation of indigenous legal and organizational systems

1. *The states shall facilitate the inclusion in their organizational structures, the institutions and traditional practices of indigenous peoples, and in consultation and with consent of the peoples concerned.*

2. *State institutions relevant to and serving indigenous peoples shall be designed in consultation and with the participation of the peoples concerned so as to reinforce and promote the identity, cultures, traditions, organization and values of those peoples.*

Paragraph 1

Canada supports the objective that indigenous values be reflected, with the values of other citizens of the state, in the development of national organizational structures. Where there are diverse indigenous languages and cultures within one state, however, incorporation of the institutions and traditional practices of any or all of them could prove problematic.

Paragraph 2

Canada agrees that states should endeavour to reflect and reinforce the indigenous identity, culture and organization in state institutions that operate in areas or in communities that are predominantly indigenous, but the paragraph should acknowledge that this obligation does not need to be undertaken at once or in all circumstances.

SECTION V: SOCIAL, ECONOMIC AND PROPERTY RIGHTS

Article XVIII: Traditional forms of ownership, cultural survival, rights to land, territories and resources

1. *Indigenous peoples have the right to the legal recognition of their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property.*

2. *Indigenous peoples have the right to the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied, as well as to the use of those to which they have historically had access for their traditional activities and livelihood.*

3.i) *Subject to 3.ii), where property and user rights of indigenous peoples arise from rights existing prior to the creation of those states, the states shall recognize the titles of indigenous peoples relative thereto as permanent, exclusive, inalienable, imprescriptible and indefeasible.*

ii) *Such titles may only be changed by mutual consent between the state and respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property.*

Article XVI: Indigenous Law

1. *Indigenous law shall be recognized as a part of the states' legal system and of the framework in which the social and economic development of the states takes place.*
2. *Indigenous peoples have the right to maintain and reinforce their indigenous legal systems and also to apply them to matters within their communities, including systems related to such matters as conflict resolution, crime prevention and maintenance of peace and harmony.*
3. *In the jurisdiction of any state, procedures concerning indigenous peoples or their interests shall be conducted in such a way as to ensure the right of indigenous peoples to full representation with dignity and equality before the law. This shall include observance of indigenous law and custom and, where necessary, use of their language.*

Paragraphs 1 & 2

Canada supports systems for the administration of justice in indigenous communities and greater sensitivity in the legal system in general to indigenous culture and values but does not support the concept of a separate legal system for indigenous peoples. Within the context of self-government negotiations, Canada supports the negotiation of the administration and enforcement of indigenous laws, including the establishment of indigenous courts or tribunals and the creation of offences of the type normally created by local governments. However, Canada is concerned that a separate legal system for indigenous peoples would be contrary to the right of all peoples to be equal before the courts and tribunals, as set out in Article 14 of the ICCPR and the Canadian constitution, particularly in areas such as criminal law.

Paragraph 3

Canada believes that indigenous peoples should benefit from the protections offered under international human rights law including, *inter alia*, the right to a fair trial, the right to equality before the law, etc, without discrimination.

As worded, this paragraph could be interpreted very broadly. For example, pursuant to this paragraph, the parliament of a state which serves the interests of indigenous communities would need to be redesigned in accordance with the customs and traditions of those communities.

Canada supports the principle that institutions which implement policies and programs designed for indigenous people, as indigenous, should reflect and support, to the extent possible, their culture, organization and identity and should be designed to facilitate their participation in the institution and its programs. Clearly, implementation of this principle will need to take into consideration those instances where an institution affects people from a number of indigenous cultures, or from indigenous and non-indigenous cultures, or which addresses matters that are not uniquely integral to the indigenous culture.

Paragraph 1

Canada supports the principle that indigenous peoples have the right to own, control, use and/or enjoy their property. However, we must ensure that the full exercise of such rights apply to the lands of indigenous peoples rather than territories over which they may only have restricted rights. This right to control and enjoy lands or territories may also be subject to certain state and international regulation, for example, those which relate to environmental protection. It is Canada's understanding that "property" refers to real property, that is, land, and does not include personal property (such as debts, stocks and bonds, furniture, etc.).

Paragraphs 2 & 3

These paragraphs, as currently drafted, are very broad and would appear to apply to all lands and territories in Canada that were occupied by indigenous peoples in the past and does not take account of historical treaties or agreements. Canada believes that, in general, these provisions should set out general principles that will guide future action, but be flexible enough to allow for negotiated agreements between states and indigenous peoples. Canada is committed to resolving outstanding land claims issues through an effective negotiation process.

Canada supports the principle that indigenous peoples have a right to recognition of their property and ownership rights in relation to lands they own or occupy to the exclusion of others and which have been set aside for their exclusive use. As well, Canada recognizes that indigenous peoples may have rights to use territories, to which they have historically had access for their traditional activities, and livelihood, in accordance with domestic laws. With respect to the determination of such rights, Canada notes that access to or occupation of an area of land may be only one of the criteria used for determining those rights.

It is Canada's view that these paragraphs should refer to lands over which indigenous peoples now have property and user rights recognized under the domestic law, which rights arise from rights existing prior to the creation of the state. It is Canada's view that such lands are subject to expropriation in accordance with domestic law, on the same basis as the lands of other landowners. In Canada, lands owned by an Indian band, or an indigenous community, may be alienated in accordance with certain procedures established under domestic law. Canada notes that under domestic Canadian law, sub-surface mineral rights may not vest in the landowner.

We note that, with other provisions of this Draft Declaration, the attribution of ownership of property in accordance with their customs, traditions, uses and traditional practices may be subject to international human rights standards.

Paragraph 4

Canada supports the principle that, subject to domestic laws, indigenous communities have the right to use, manage and conserve the surface resources on the lands which they own, or which have been set aside for their exclusive use, and to regulation of the development, management and harvesting of certain other resources. This may not, however, include the establishment of a separate "legal framework", apart from the national judicial system which would be used to protect such rights.

iii) *Nothing in 3.i) shall be construed as limiting the right of indigenous peoples to attribute ownership within the community in accordance with their customs, traditions, uses and traditional practices, nor shall it affect any collective community rights over them.*

4. *Indigenous peoples have the right to an effective legal framework for the protection of their rights with respect to the natural resources on their lands, including the ability to use, manage, and conserve such resources; and with respect to traditional uses of their lands, interests in lands, and resources, such as subsistence.*

5. *In the event that ownership of the minerals or resources of the subsoil pertains to the state or that the state has rights over other resources on the lands, the governments must establish or maintain procedures for the participation of the peoples concerned in determining whether the interests of these people would be adversely affected and to what extent, before undertaking or authorizing any program for planning, prospecting or exploiting existing resources on their lands. The peoples concerned shall participate in the benefits of such activities, and shall receive compensation, on a basis not less favorable than the standard of international law for any loss which they may sustain as a result of such activities.*

6. *Unless exceptional and justified circumstances so warrant in the public interest, the states shall not transfer or relocate indigenous peoples without the free, genuine, public and informed consent of those peoples, but in all cases with prior compensation and prompt replacement of lands taken, which must be of similar or better quality and which must have the same legal status; and with guarantee of the right to return if the causes that gave rise to the displacement cease to exist.*

7. *Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged, or when restitution is not possible, the right to compensation on a basis not less favorable than the standard of international law .*

8. *The states shall take all measures, including the use of law enforcement mechanisms, to avert, prevent and punish, if applicable, any intrusion or use of those lands by unauthorized persons to take possession or make use of them. The states shall give maximum priority to the demarcation and recognition of properties and areas of indigenous use.*

As mentioned in connection with Articles XIII and XV, Canada understands that the term "lands" would refer to those lands and resources which indigenous people may own, or have exclusive use of, and the term "territories" would refer to those areas which indigenous people do not own and do not have exclusive use of, but where they may conduct their traditional life-style, in accordance with domestic law.

We note that other articles in this Draft Declaration touch on matters related to lands and territories and should be considered in conjunction with this article.

Article XIX: Workers rights

1. *Indigenous peoples shall have the right to full enjoyment of the rights and guarantees recognized under international labour law and domestic labour law; they shall also have the right to special measures to correct, redress and prevent the discrimination to which they have historically been subject.*

2. *To the extent that they are not effectively protected by laws applicable to workers in general, the states shall take such special measures as may be necessary to:*

- a. *effectively protect the workers and employees who are members of indigenous communities in respect of fair and equal hiring and terms of employment;*
- b. *to improve the labour inspection and enforcement service in regions, companies or paid activities involving indigenous workers or employees;*
- c. *ensure that indigenous workers:*
 - i) *enjoy equal opportunity and treatment as regards all conditions of employment, job promotion and advancement; and other conditions as stipulated under international law;*
 - ii) *enjoy the right to association and freedom for all lawful trade union activities, and the right to conclude collective agreements with employers or employers' organizations;*
 - iii) *are not subjected to racial, sexual or other forms of harassment;*
 - iv) *are not subjected to coercive hiring practices, including servitude for debts or any other form of servitude, even if they have their origin in law, custom or a personal or collective arrangement, which shall be deemed absolutely null and void in each instance;*
 - v) *are not subjected to working conditions that endanger their health and safety;*
 - vi) *receive special protection when they serve as seasonal, casual or migrant workers and also when they are hired by labour contractors in order that they benefit from national legislation and practice which must itself be in accordance with established international human rights standards in respect of this type of workers, and,*
 - vii) *as well as their employers are made fully aware of the rights of indigenous workers, under such national legislation and international standards, and of the recourses available to them in order to protect those rights.*

Further, and as noted previously, under Canadian domestic law, sub-surface mineral rights may not vest in the landowner. There may also be domestic laws governing riparian rights.

Paragraph 5

Canada suggests that where states retain ownership of minerals or subsurface resources on lands owned by indigenous communities or set aside for their exclusive use, there should be a fair process established to consider whether exploiting those resources would adversely impact on their lands or traditional activities. Indigenous communities should be consulted in this assessment, and where it is determined there will be a negative impact, they should receive just compensation, in accordance with the applicable domestic laws.

Canada suggests that states and developers should make best efforts to ensure that indigenous communities have the opportunity to participate in the benefits of such exploitation, such as employment opportunities. Special programmes may be designed for this purpose.

Paragraph 6

Canada supports the principle expressed in this paragraph but suggests that the wording of Article 16 of *ILO Convention 169 on Indigenous and Tribal Peoples* should be considered as it relates to appropriate procedures, and the possibility of compensation other than land, at the request of the indigenous community. As well, flexibility in the nature of the legal status of the land, if so requested by the indigenous community, would be appropriate.

Paragraph 7

Canada does not support the general principle of "restitution" for land or territories which indigenous peoples may have "traditionally owned or otherwise occupied or used". Rather, Canada is committed to fair resolution of land claims through a process of modern day treaty-making, in order to reach negotiated settlements that will clarify the future legal rights of indigenous people and other Canadians, in the area subject to claim. However, with respect to lands or territories which the indigenous peoples currently own or over which they have exclusive control, Canada agrees that where these land are confiscated, occupied, used or damaged without their free and informed consent, indigenous peoples should receive restitution or fair and just compensation as may be appropriate, on at least the same basis as other members of the population.

Paragraph 8

Canada supports the access, without discrimination, by indigenous people to remedies available under domestic laws relating to trespass and unauthorized use of lands. Canada suggests that the onus should not be on the state to take such measures as are proposed here, but that access to domestic mechanisms for resolution of the matter should suffice. Finally, in many states, demarcation of indigenous lands may not be a matter that is considered, by indigenous people or the state, to be a matter of priority in view of resource constraints thus a strict obligation to give maximum priority to the demarcation and recognition of the properties and areas would be inappropriate.

This article raises issues related to intellectual property which would have an impact on the many existing international agreements on this subject to which Canada and many other states are party. Canada believes that the issues raised by this article are ones requiring further consideration by the international community; such consideration would benefit from collaboration amongst indigenous peoples and organizations, states, intergovernmental organizations and non-governmental organizations with expertise in the area of intellectual property rights. Discussion of this sort is beginning, in both domestic and international fora, such as the World Intellectual Property Organization (WIPO). We must ensure that whatever provision is ultimately included in the Draft Declaration does not attempt to change unilaterally the intellectual property regimes established by those agreements or violate our other international obligations for intellectual property, as contained in our multilateral trade agreements. The Draft Declaration must also take into account the developments which are beginning to occur, domestically and internationally and avoids prescriptive measures which would not be appropriate at this time.

Paragraph 1

Canada supports the principle that indigenous people should have legal protection for their intellectual property through trademarks, patents, copyright and other such procedures established under domestic law, on the same basis as other members of the national community.

In relation to the "right to recognition and full ownership, control and protection of their cultural, artistic and spiritual, technological and scientific heritage", this is a very broad statement raising a number of issues that need to be addressed by indigenous peoples and governments together to find workable solutions for those issues. For example, ownership by collectivities of cultural heritage and the relationship with the existing legal systems, particularly the existing legal system for the protection of intellectual property cannot be addressed in the absence of consideration of the worldwide intellectual property regime, nor can it be done without consideration of third party rights existing under current law. The inclusion of a "right to recognition, ownership, control and protection" needs to be better understood; it entails obligations that also need to be understood. What does the reference to "heritage" imply for existing third party rights under existing property regimes? What is entailed by "technological and scientific heritage"?

We have concerns regarding the statement that indigenous peoples are entitled to "special measures" to ensure them legal status and institutional capacity to develop, use, share, market and bequeath that heritage to future generations. This principle raises complex issues related to the collective ownership of the very broadly described "cultural, artistic, spiritual, technological and scientific heritage". Further clarification is required on the scope of special measures contemplated. For example, incorporation may address this issue, but may raise other issues for indigenous communities. Finally, knowledge and heritage may vary from community to community, raising the question of which is the proper collectivity to be recognized. Prescriptive measures may cause problems in this regard, as well as violate our North American Free Trade Agreement (NAFTA) obligation not to expropriate existing intellectual property rights.

Paragraph 2

This paragraph is very broadly stated and requires considerable clarification regarding its scope and

Canada supports the objective of this paragraph. As mentioned previously, it would be inappropriate for the Draft Declaration to attempt to impose upon states obligations arising out of agreements to which they are not party or which do not form part of customary law, thus we would suggest that the statement refer to "applicable" international labour law. Although Canada is firmly supportive of the establishment and promotion of affirmative-action programs or other forms of "special measures", the reference to "redress" for historic discrimination is unclear and potentially very open-ended thus Canada would recommend that it be deleted unless its scope is clarified.

Paragraph 2

Canada believes that indigenous workers should have full and equal access, without discrimination, to all rights established under applicable international labour law and domestic labour law, as stated in paragraph 1. A general formulation along these lines would permit the document to clearly incorporate future developments in these areas without necessitating an amendment to the Declaration.

Nevertheless, Canada supports the principles specifically mentioned in this paragraph, though we consider that many issues remain to be clarified. For example, would the "special measures" referred to in paragraph 2 go beyond affirmative action programs? What does the phrase "other conditions as stipulated under international law" mean? Why would indigenous seasonal, casual or migrant workers be entitled to special protection over other indigenous workers? Does the reference to the "rights of indigenous workers" in paragraph 2(c)(vii) include only the labour rights, or is it intended to include all the other rights contained in the Draft Declaration?

The OAS may wish to consider including a reference to rights of indigenous children in the workplace as there are many children, including indigenous children, who are subject to economic exploitation. We suggest that, consistent with the *Convention on the Rights of the Child*, a provision should be included on the protection of indigenous children from economic exploitation or performance of work harmful to the child's health, education or development.

Article XX: Intellectual property rights

1. *Indigenous peoples have the right to the recognition and the full ownership, control and protection of their cultural, artistic, spiritual, technological and scientific heritage, and legal protection for their intellectual property through trademarks, patents, copyright and other such procedures as established under domestic law; as well as to special measures to ensure them legal status and institutional capacity to develop, use, share, market and bequeath that heritage to future generations.*

2. *Indigenous peoples have the right to control, develop and protect their sciences sciences and technologies, including their human and genetic resources in general, seed, medicine, knowledge of plant and animal life, original designs and procedure.*

3. *The states shall take appropriate measures to ensure participation of the indigenous peoples in the determination of the conditions for the utilization, both public and private, of the rights listed in the previous paragraphs 1. and 2.*

those peoples is adopted.

3. *Indigenous peoples have the right to restitution or compensation no less favorable than the standards of international law, for any loss which, despite the foregoing precautions, the execution of those plans or proposals may have caused them; and measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.*

Paragraph 1

Canada supports the intent of this paragraph, on the right of indigenous peoples to determine their own course of development. We understand that this would be subject to international human rights standards, domestic laws, and the availability of state resources. Nevertheless, we have some questions regarding what would be entailed for indigenous peoples to "contribute by their own means, as distinct societies, to national development and international cooperation."

Paragraph 2

Canada supports the principle that indigenous peoples have the right to participate in decisions regarding any plan, program or proposal which directly affects their rights or living conditions, on at least the same basis as other members of the population. However, this paragraph as currently worded goes much further than this and should be clarified.

Paragraph 3

Canada believes that the wording of this paragraph should reflect the wording which has been accepted with respect to the right to development, in particular, Article 2(3) of the *Declaration on the Right to Development*. The wording in this paragraph goes further than what has been accepted internationally and is overly broad, in particular with respect to the issue of restitution and compensation. Further, the latter part of the paragraph, obliging states to take measures to "mitigate adverse environmental, economic, social, cultural or spiritual impact" of plans or proposals affecting their rights or living conditions is too broad and could potentially cover almost all government decisions.

SECTION SIX: GENERAL PROVISIONS

Article XXII: Treaties, Acts, agreements and constructive arrangements

Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and constructive arrangements, that may have been concluded with states or their successors, as well as historical Acts in that respect, according to their spirit and intent, and to have states honor and respect such treaties, agreements and constructive arrangements as well as the rights emanating from those historical instruments. Conflicts and disputes which cannot otherwise be settled should be submitted to competent bodies.

Canada believes that existing obligations arising under recognized treaties, agreements and other implied arrangements should be honoured. With respect to the term "spirit and intent", Canada acknowledges that this is an issue in treaty interpretation. However, it must be made clear in this

the full implications of recognizing the rights contained therein. The main question which arises is how the right of indigenous peoples to protect their sciences and technologies referred to in this paragraph, would mesh with existing intellectual property regimes. Further, it is not clear what is meant by references to "human and genetic resources", "knowledge of plant or animal life" or "procedure". This is an area in which further discussion is required. International instruments, such as the *Convention on Biological Diversity*, and the *UNESCO Declaration on the Protection of the Human Genome and Human Rights*, already address these matters to some extent and the Draft Declaration must consider these instruments as well. However, care must be taken not to derogate from our existing international obligations with respect to intellectual property rights under NAFTA and the World Trade Organization (WTO) Agreement. WIPO is also considering how best to address these issues internationally.

Paragraph 3

Canada agrees that states should allow indigenous communities and organizations to participate in the consideration of appropriate conditions (mechanisms) for the utilization, both public and private, of the rights finally contained in paragraphs 1 and 2, above. These paragraphs should not be too prescriptive, as states, in consultation with indigenous communities and organizations, should be able to develop systems that address the concerns of the indigenous people, while operating within the national framework, and which take into account developing international instruments.

Canada notes that, in the context of preservation of *in situ* biological diversity, the *Convention on Biological Diversity* in Article 8(j) essentially calls for respect for the principle of supporting the wider application of traditional environmental knowledge with the approval and involvement of the holders of such knowledge, while encouraging the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices. These principles of consent and equitable sharing in the benefits arising from the use are perhaps the critical principles to be considered in developing mechanisms to address concerns of indigenous people in relation to access to and use of proprietary interests in traditional knowledge, while taking into consideration international and national systems developed to protect property and intellectual property.

Article XXI: Right to development

1. *The states recognize the right of indigenous peoples to decide democratically what values, objectives, priorities and strategies will govern and steer their development course, even where they are different from those adopted by the national government or by other segments of society. Indigenous peoples shall be entitled to obtain on a non-discriminatory basis appropriate means for their own development according to their preferences and values, and to contribute by their own means, as distinct societies, to national development and international cooperation.*

2. *Unless exceptional circumstances so warrant in the public interest, the states shall take necessary measures to ensure that decisions regarding any plan, program or proposal affecting the rights or living conditions of indigenous peoples are not made without the free and informed consent and participation of those peoples, that their preferences are recognized and that no such plan, program or proposal that could have harmful effects on*

aspirational and sets out goals which may not be attainable immediately in all circumstances. There should be some recognition in the Draft Declaration of the flexible and progressive nature of the implementation taking into account the particular jurisdictional and constitutional natures of states.

Article XXV

Nothing in this instrument shall be construed as granting any rights to ignore boundaries between states.

Canada supports the principle contained in this article.

Article XXVI

Nothing in this Declaration may be construed as permitting any activity contrary to the purposes and principles of the OAS, including sovereign equality, territorial integrity and political independence of states.

Canada supports the principle contained in this article.

Article XXVII: Implementation

The Organization of American States and its organs, organisms and entities, in particular the Inter-American Indian Institute, the Inter-American Commission of Human Rights shall promote respect for and full application of the provisions in this Declaration.

Canada supports the principle contained in this article.

paragraph that it is only one of a number of factors that may need to be considered when dealing with treaties between states and indigenous peoples.

Canadian jurisprudence has consistently emphasized the unique historical and legal context in which the historical treaties were negotiated and concluded. Thus while they are agreements which find their support in Canadian law, they are at the same time unique. Analogies with other areas of law may be made but will not be pre-determining. With this in mind, the following principles have, among others, been applied to the interpretation of the historical treaties.

In the absence of ambiguity, the words of an historical treaty will be most frequently interpreted by the courts in their ordinary sense without resort to extraneous evidence. At the same time, Canadian cases have stressed that the courts will seek to interpret treaties liberally, flexibly, and in a manner consistent with what they deem to be the honour of the Crown. The principle rests, in the case of the historical treaties upon the unique vulnerability of the Aboriginal parties given that the treaties would have been documented in languages other than their own.

When the terms of an historical treaty are ambiguous or unclear in any sense, the judicial tendency is to interpret in favour of the indigenous people. In the circumstances of these historical treaties the courts will rely on a variety of tools including historical evidence such as indigenous oral history and the contemporaneous records of government officials which demonstrate the original intention of the parties and the situation prevailing at the time the document was signed. In order to discern the intention of the signatories, courts have relied on oral discussions prior to treaty signing as well as post-treaty conduct.

Resolution of disputes, arising in relation to the implementation of such treaties, agreements and other implied arrangements, are matters for domestic tribunals or procedures established pursuant to domestic law, as these are able to take into account the particular circumstances of the States and indigenous peoples concerned. This does not preclude indigenous peoples from having access to other remedies under international law or international instruments, to the extent they are applicable.

Article XXIII

Nothing in this instrument shall be construed as diminishing or extinguishing existing or future rights indigenous peoples may have or acquire.

Canada supports this article. It is our understanding that the rights referred to in this article would be those that arise out of international and domestic law, and would not preclude the ability of indigenous peoples to reach agreement on matters that concern their rights, for example, modern day treaties or land claim settlements.

Article XXIV

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the Americas.

Canada supports the principle contained in this article, subject to successful agreement on all of the various provisions of the Draft Declaration. We must point out again, however, that a declaration is

FINAL REPORT OF THE MEETING OF GOVERNMENT EXPERTS
TO ANALYZE THE PROPOSED AMERICAN DECLARATION
ON THE RIGHTS OF INDIGENOUS POPULATIONS

I. INTRODUCTION

A. Background

The OAS General Assembly, at its nineteenth regular session, held at the headquarters of the Organization in November 1989, approved resolution AG/RES. 1022 (XIX-O/89), "Reports of the Inter-American Commission on Human Rights," by means of which it requested that the Inter-American Commission on Human Rights prepare a legal instrument pertaining to the rights of indigenous populations, with a view to its adoption in 1992. The Inter-American Commission on Human Rights submitted a proposed American declaration on the rights of indigenous populations, which was received by the Permanent Council on April 10, 1997.

At its twenty-seventh regular session held in Lima, Peru, in June 1997, the General Assembly adopted resolution AG/RES. 1479 (XXVII-O/97) "Proposed American Declaration on the Rights of Indigenous Peoples," by means of which it took note of the aforementioned proposed declaration. Moreover, the General Assembly urged member states to present to the Permanent Council, prior to December 31, 1997, their observations and recommendations on this proposed declaration, and requested the Inter-American Juridical Committee and the Inter-American Indian Institute to transmit their respective comments to the Permanent Council, taking into account these observations and recommendations. In that resolution, the General Assembly entrusted the Permanent Council with the task of convening a meeting of government experts on the subject once it had received the above-mentioned observations and comments and had taken the other actions that it deemed pertinent, with a view to the possible adoption of the proposed American declaration.

The Permanent Council referred the matter to its Committee on Juridical and Political Affairs at its August 20, 1997 meeting, so that it could be addressed by this entity. As of December 31, 1997, the Committee had received the comments of Argentina (CP/CAJP-1293/98 add. 4), Brazil (CP/CAJP-1293/98 add. 5), Canada (CP/CAJP-1293/98 add. 3), Colombia (CP/CAJP-1293/98 add. 1), the United States (CP/CAJP-1293/98 add. 2), and Mexico (CP/CAJP-1293/98). In light of these comments, the Inter-American Juridical Committee, through resolution CJI/RES.1/LII/98 approved the document "Comments of the Inter-American Juridical Committee on the Proposed American Declaration on the Rights of Indigenous Populations" (CP/CAJP-1293/98 add. 7), which it transmitted to the Permanent Council. The Inter-American Indian Institute also submitted its observations and recommendations, which are contained in the document CP/CAJP-1293/98 add. 6.

At its session held on May 7, 1998, the Committee on Juridical and Political Affairs took note of the fact that both the Inter-American Juridical Committee and the Inter-American Indian Institute had already submitted their observations pertaining to the proposal.

At its twenty-eighth regular session held in Caracas, Venezuela, in June 1998, the General Assembly adopted resolution AG/RES. 1549 (XXVIII-O/98), "Proposed American Declaration on the Rights of Indigenous Populations," by means of which it acknowledged the progress made in the

MEETING OF GOVERNMENT EXPERTS
TO ANALYZE THE PROPOSED
AMERICAN DECLARATION ON THE
RIGHTS OF INDIGENOUS POPULATIONS
February 10, 11, and 12, 1999
Washington, D.C.

OEA/Ser.K/XVI
RECIDIN/doc.10/99
26 March 1999
Original: Spanish

FINAL REPORT

Various representatives of indigenous populations and organizations also addressed the meeting at the invitation of its Chairman, among them, the Indigenous Committee; the Elders of the Samson Cree Nation from Alberta, Canada; the Indian Law Resource Center; the National Congress of American Indians; the Navajo Nations; the Assembly of First Nations; the Mapuche Nation; the Six Nations of the Iroquis Confederacy; the METIS National Council of Canada; the IOIRD; a representative of the Mayan nation of Guatemala; the Cherokee Nation; the Chicasaw Nation of the United States; and the Native Hawaiian.

B. Agenda

The agenda of the Meeting of Government Experts came from the document RECIDIN/doc.2/99, whose sole item is: the "Analysis of the Proposed American Declaration on the Rights of Indigenous Populations, pursuant to the mandate of the General Assembly, established in resolution AG/RES. 1549 (XXVIII-O/98)."

C. Working Sessions

The Meeting of Government Experts held five working sessions on February 10, 11, and 12. On the first day, a consensus was reached on the work methodology and following this, the meeting focused on the analysis of the proposed declaration, adopting ad-referendum amendments to various paragraphs of this proposed declaration which appear in Section III of this Report. Also, on two occasions, working groups were formed to address specific articles.

During the February 12 session, more comments were made by the representatives of indigenous groups over a 45-minute period, which were general in nature and pertained to the progress of the work. Among the persons taking the floor were Phil Fontaine, Grand Chief of the Assembly of First Nations (Canada); Magarito Ruiz, representative of the National Indigenous Plural Assembly for Autonomy, AMPA (Chiapas, Mexico); Darwin Hill, from the Six Nations of the Iroquois Confederacy (United States); June Lorenzo, from the Indian Law Resource Center (Navajo, Pueblo, United States); Luis Copmagua, a Mayan (Guatemala); Merte Pete of the Navajo Nation (United States); and Willie Wittechild, Q.C., of the International Organization of Indigenous Resource Development.

D. Closing Session

On February 12, 1999, at 2 p.m., the closing session of the Meeting of Government Experts to Analyze the Proposed American Declaration on the Rights of Indigenous Populations was held. On that occasion, several delegations in attendance presented their conclusions and recommendations.

III. RECOMMENDATIONS

The Meeting of Government Experts to Analyze the Proposed American Declaration on the Rights of Indigenous Populations made the following recommendations:

study of the subject and charged the Permanent Council with the task of continuing consideration of the proposed declaration, and, taking into account the observations of member states and the opinions of the Inter-American Indian Institute and the Inter-American Juridical Committee, that it convene a meeting of government experts on the subject and take whatever actions it deemed pertinent, with a view to the adoption of a Declaration at the twenty-ninth regular session of the General Assembly.

At its session of August 19, 1998, the Permanent Council referred the topic to its Committee on Juridical and Political Affairs so that it could be addressed by this entity. The Committee addressed this matter at its sessions of September 24 and October 9, 1998. At the latter session, the Committee decided to recommend February 10, 11, and 12, 1999, as the dates for the meeting of government experts at the headquarters of the Organization.

The Permanent Council, by means of resolution CP/RES. 738 (1178/98), "Meeting of Government Experts to Analyze the Proposed American Declaration on the Rights of Indigenous Populations," of November 19, 1998, resolved to convene this meeting of government experts and to fix February 10, 11, and 12, 1999, as the dates that it will be held. Moreover, by means of resolution CP/RES. 743 (1181/99), "Agenda of the Meeting of Government Experts to Analyze the Proposed American Declaration on the Rights of Indigenous Populations" of February 3, 1999, the Permanent Council resolved to approve the agenda for this meeting.

The written comments of the Inter-American Juridical Committee, the Inter-American Indian Institute, as well as Argentina, Bolivia, Brazil, Canada, Colombia, Costa Rica, the United States, Guatemala, Mexico, Paraguay, and Venezuela were available for the Meeting of Government Experts.

B. Secretariat of the Meeting

The General Secretariat of the Organization of American States was represented by Dr. Enrique Lagos, the Assistant Secretary for Legal Affairs, and by Dr. Jean-Michel Arrighi, Director of the Department of International Law.

II. PROGRESS OF WORK

A. Opening Session

On February 10, 1999, the Meeting of Government Experts to Analyze the Proposed American Declaration on the Rights of Indigenous Populations was opened at 9:30 a.m. It was chaired by Ambassador Mauricio Granillo Barrera, Permanent Representative of El Salvador to the OAS and Chair of the Committee on Juridical and Political Affairs. Alternate Representative of the Permanent Mission of Venezuela to the OAS and Vice chair of the Committee on Juridical and Political Affairs, Mr. Ricardo Mario Rodríguez Jiménez, served as Vice Chair of this meeting.

Mr. José del Val, Director of the Inter-American Indian Institute, Dr. Carlos Ayala Corao, Chairman of the Inter-American Commission on Human Rights, and Dr. Osvaldo Kreimer, an attorney of the Executive Secretariat of this Commission addressed those present.

PROPOSED AMERICAN DECLARATION ON THE RIGHTS
OF INDIGENOUS POPULATIONS^v

1. The member states of the Organization of American States (hereafter the states),
 - 1.a. [RECOGNIZING that the rights of indigenous [peoples/populations] constitute a fundamental and profoundly significant issue in the present and future history of the Americas (Guatemala)]
2. 1. Indigenous institutions and the strengthening of nations
3. This paragraph is now paragraph 1.
4. [Recognizing that indigenous [peoples/populations] form an integral part of the population of the Americas and that their values and cultures are inextricably linked to the identity both of the countries they live in and of the region as a whole (Mexico) R/I.9/99]. Recalling that throughout the Americas the indigenous [peoples/populations] constitute a distinctive element within society, and have a special role to play in defining the national identity, strengthening the institutions of the State and achieving national unity based on democratic principles (United States R./I.7/99)] [Recalling that the indigenous [peoples/populations] of the Americas are pre-existing, distinctive, and integral societies and that they have a right to constitute part of the national identity of the countries they inhabit (Antigua and Barbuda)]
 - 4.a [Recognizing the immense contribution of indigenous [peoples/populations] to the development and multi-cultural composition of our societies and reiterating our commitment to their economic and social well-being, as well as to the obligation to respect their rights and cultural identity. (Mexico)]
 - 4.b [Recalling that that the indigenous [peoples/populations] of the Americas are equal in dignity and rights to all other citizens; (United States) [R/I.7/99]
 - 4.c Further recalling that the presence of indigenous societies enriches the cultural heritage and national identities of the American States and contributes to the intellectual, artistic, social and economic vitality of the Americas; [R/I.7 pp 2]
5. Further recalling that some of the democratic institutions and concepts embodied in the constitutions of the American states stem from institutions of the indigenous [peoples/populations], and many of their present participatory systems for decision-making and for authority contribute to improving democracies in the Americas.
 - 5.a [Further recalling the important contributions [indigenous societies] [peoples/populations] have made to the development of many of the political concepts and democratic principles embraced by American States; (United States) [R/I.7/99]

1. This document was previously public as RECIDIN/doc.4/99 rev. 4 corr. 1, "Proposed American Declaration on the Rights of Indigenous Populations."

- A. To propose to the Permanent Council, within the framework of the Committee on Juridical and Political Affairs, a review of the Proposed American Declaration based on the results of the Meeting of Government Experts.
- B. To request that the Committee on Juridical and Political Affairs, in the course of its work, seek the advice that may be necessary from national institutions and entities of the inter-American system, as well as nongovernmental organizations that represent indigenous populations.
- C. To request the Chair of the Meeting of Government Experts to transmit these recommendations as well as the results of the work of this Meeting to the Permanent Council of the Organization.

IV. ANNEXES

- A. Proposed Declaration on the Rights of Indigenous Populations with the amendments made at the Meeting of Government Experts, held at the headquarters of the Organization on February 10, 11, 12, 1999
- B. List of Participants
- C. List of Documents

15.	5.	<u>[Territory] [cultural territory] [habitat] and indigenous survival</u>
(There is a proposal by Brazil to eliminate the subtitle or eliminate or replace the word territory)		
16.	Recognizing that in many indigenous cultures, traditional collective systems for the control and use of land, territories, resources, bodies of water and coastal areas are a necessary condition for their survival, social organization, development and their individual and collective well-being; [that they differ from those practiced by other members of the population] [and that those forms of control [and ownership] [may] vary and differ, and do not necessarily coincide with the systems protected by the common laws of the states in which they reside.]	
16.a	Recognizing that for many indigenous peoples/populations, their various traditional systems for the use and control of their lands and other resources are necessary conditions for their development and individual and collective well-being. [AGREED ad referendum]	
16.b	Further recognizing the importance for all humankind of preserving indigenous American cultures, which may include traditional collective forms of land ownership, social organization, and religious practices different from those followed by other members of the population; (United States R/1.7/99)	
(This section will move to operative part)		

17. ELIMINATED

18. ELIMINATED

19. 7. Human rights instruments and other advances in international law

20. Recognizing the paramountcy of the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights and other human rights instruments of inter-American and international law; and

20.a Recognizing the [applicability/relevance] throughout the Americas of the American Declaration of the Rights and Duties of Man, and, where duly [ratified/appropriated], other international human rights instruments, including the American Convention on Human Rights; (United States R/1.7/99)

21. ELIMINATED

22. Reiterating the universal, indivisible, and interdependent nature of the human rights and fundamental freedoms recognized by the international community. [AGREED ad referendum]

23. ELIMINATED

24. ELIMINATED

- 5.b** [Recognizing that [indigenous societies] [peoples/populations] have a vital and continuing role to play in strengthening the institutions of American States and achieving national unity in accordance with democratic principles; (United States) [R/I.7/99]
- 5.c** [Asserting that indigenous [peoples/populations] are equal in dignity and rights to all other [peoples/populations], while recognizing their right to be different, to be considered different, and to be respected as such (Antigua and Barbuda).]
- [6.** Mindful of the need to [develop] [strengthen] national juridical systems [and policies] in order to consolidate the multiplicity of cultures [, ethnic groups, and languages] in our societies.

7.	2. <u>The Eradication of poverty and the right to development</u>
8.	Concerned over the frequency with which indigenous [peoples/populations] are deprived of their human rights and fundamental freedoms, both within and outside their communities, as well as despoiled of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own traditions, needs and interests;
9.	Recognizing the severe poverty afflicting indigenous [peoples/populations] in several regions of the Hemisphere and the deplorable worsening of their living conditions in many instances; and
10.	Recalling that in the Declaration of Principles issued at the Summit of the Americas in December 1994, the Heads of State and Government proclaimed that in observance of the International Decade of the World's Indigenous People, they will focus their efforts on improving the exercise of democratic rights and providing indigenous [peoples/populations] and their communities with access to social services;
11.	3. <u>Indigenous culture and ecology</u>
12.	Recognizing the respect for the environment accorded by the cultures of indigenous [peoples/populations] of the Americas, and considering the special relationship between those [peoples/populations] and the environment, the lands, the resources, and the territories in which they live; [One proposal is to transfer these paragraphs 7-12 to the operative part]

- 13.** **4.** Harmonious relations, respect, and the absence of discrimination
- 14.** Reiterating the responsibility incumbent upon all States to combat racism and all forms of racial discrimination with a view to eliminating them [AGREED ad referendum]

27. DECLARE:

28. SECTION ONE. INDIGENOUS [PEOPLES/POPULATIONS]

29. Article I. Scope and definitions

30. 1. This Declaration applies to indigenous [peoples/populations] as well as to [peoples/populations] whose social, cultural and economic conditions distinguish them from other sectors of the national community, and whose status is regulated wholly or in part by their own customs or traditions or by special laws or regulations.

31. 2. Self-identification as indigenous shall be regarded as a fundamental criterion for determining the [peoples/populations] to which the provisions of this Declaration apply.

32. 3. Use of the term "[peoples/populations]" in this Declaration shall not be construed as having any implication concerning other rights that might be associated with that term in international law.

33. SECTION TWO. HUMAN RIGHTS

34. Article II. Full observance of human rights

35. 1. Indigenous [peoples/populations] are entitled to the full and effective enjoyment of the human rights and fundamental freedoms recognized in the OAS Charter, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, and other international human rights instruments; and 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 principles of international law including that of human rights.

36. 2. Indigenous [peoples/populations] have the collective rights that are indispensable for full enjoyment of the individual human rights of their members. Accordingly, the states recognize *inter alia* the right of indigenous [peoples/populations] to collective action, to their cultures, to profess and practice their spiritual beliefs, and to use their languages.

37. 3. The states shall ensure all indigenous [peoples/populations] the full exercise of their rights, and shall adopt—in accordance with their constitutional processes—such legislative or other measures as may be necessary to give effect to the rights recognized in this Declaration.

38. Article III. Right to belong to indigenous [peoples/populations]

39. Indigenous persons and communities have the right to belong to indigenous [peoples/populations], in accordance with the traditions and customs of the [peoples/populations] or nation concerned.

25. 9. Advances in the provisions of national instruments and different national situations

26. [Bearing in mind the diversity of circumstances in different countries and the varying degrees of impact of indigenous communities in the different states, as well as the constitutional, legislative and jurisprudential progress made in the Americas in securing the rights and institutions of indigenous [peoples/populations], in order to consolidate the multiplicity of cultures, ethnic groups, and languages in our societies [APPROVED ad referendum]

26.a ELIMINATED

26.b 10. The situation of indigenous [peoples/populations] and specific circumstances in each country

26.c Bearing in mind the foregoing paragraph, this Declaration should be interpreted and applied in harmony and in keeping with current legal systems in the member states and their international commitments (Argentina and Guatemala).

26.c.i Bearing in mind that this Declaration must be consonant with the legal provisions in force in member states and with their international commitments. (Mexico)

*Note: The following proposals do not belong under subheading No. 10

26.d Recognizing that indigenous [peoples/populations] and their societies have a vital role in [sustainable development and that their know-how and traditional practices must be respected] (United States)

26.e Encouraging states to recognize the identity, culture, interests of indigenous [peoples/populations] and their communities and enable their effective participation in the achievement of sustainable development (United States R/I-7/99) [AGREED ad referendum]

26.f Recalling the commitment undertaken by the Heads of State and Government in the Declaration of Principles of the First Summit of the Americas held in December 1994 in Miami, the Summit of the Americas on Sustainable Development held in Santa Cruz de la Sierra in December 1996, and reaffirmed in the Plan of Action of the Second Summit of the Americas held in April 1998 in Santiago, Chile. (Paraguay)

26.g Desiring to promote and strengthen international cooperation with respect to the economic, cultural, and social development of indigenous peoples/populations. (Brazil/United States) [AGREED ad referendum]

26.h ELIMINATED

26.i Recognizing the severe poverty in which many indigenous people live in many parts of the Americas and the commitment made by the Heads of State and Government at the 1994 Summit of the Americas to focus their energies on improving the exercise of democratic rights and the access to social services by indigenous people and their societies. (United States R/I-7/99)

53. Article VIII. Concepts and language

54. 1. Indigenous [peoples/populations] have the right to their own languages, philosophy, and concepts as a component of national and universal culture, and as such, shall respect them and facilitate their dissemination thereof in consultation with the [peoples/populations] involved.

55. 2. The states shall take measures to promote and ensure that radio and television programs are broadcast in the indigenous languages in areas having a strong indigenous presence, and to support the creation of indigenous radio stations and other means of indigenous communications.

56. 3. The states shall take effective measures to enable indigenous [peoples/populations] to understand administrative, legal and political rules and procedures, and to be understood in relation to these matters. In areas where indigenous languages predominate, states shall expend the necessary efforts to have them established as official languages and to grant them the same status that is accorded to non-indigenous official languages.

57. 4. Indigenous [peoples/populations] have the right to use their indigenous names, and to have the states recognize them as such.

58. Article IX. Education

59. 1. Indigenous [peoples/populations] shall be entitled: a) to establish and set in motion their own educational programs, institutions and facilities; b) to prepare and implement their own educational plans, programs, curricula and teaching materials; and c) to train, educate and accredit their teachers and administrators. The states shall take steps to ensure that such systems guarantee equal educational and teaching opportunities for the general population as well as complementarity with the national educational systems.

60. 2. When indigenous [peoples/populations] so desire, educational systems shall be conducted in the indigenous languages and shall incorporate indigenous content, and they shall also be given the necessary training and means for complete mastery of the official language or languages.

61. 3. The states shall ensure that those educational systems are equal in quality, efficiency, accessibility and in all other respects to that provided to the general population.

62. 4. The states shall include in national general educational systems content reflecting the pluricultural nature of their societies.

63. 5. The states shall provide financial and any other type of assistance needed to implement the provisions of this article.

64. Article X. Spiritual and religious freedom

65. 1. Indigenous [peoples/populations] have the right to freedom of conscience, freedom of religion and spiritual practice, and to exercise them both publicly and privately.

40. Article IV. Legal status

41. Indigenous [peoples/populations] have the right to have their legal status fully recognized by the states within their systems.

42. Article V. Rejection of forced assimilation

43. 1. Indigenous [peoples/populations] shall have the right to freely preserve, express and develop all aspects of their cultural identity, untrammelled by any attempt at assimilation.

44. 2. The states shall not undertake, support or favor any policy of artificial or forced assimilation of indigenous [peoples/populations], destruction of a culture or possibly of the extermination of an indigenous people.

45. Article VI. Special guarantees against discrimination

46. 1. Indigenous [peoples/populations] have the right to such special guarantees against discrimination as may be required for full enjoyment of internationally and nationally recognized human rights, and as to any measures necessary to enable indigenous women, men and children to exercise their, civil, political, economic, social, cultural and spiritual rights without any discrimination. The states recognize that violence used against persons because of their gender and age obstructs and nullifies the exercise of those rights.

47. 2. Indigenous [peoples/populations] have the right to full participation in the prescription of such guarantees.

48. SECTION THREE. CULTURAL DEVELOPMENT

49. Article VII. Right to cultural integrity

50. 1. Indigenous [peoples/populations] have the right to their cultural integrity and their historical and archeological heritage, which are important both for their survival and for the identity of their members.

51. 2. Indigenous [peoples/populations] are entitled to the restitution of property of which they have been dispossessed, and when that is not possible, to compensation on a basis no less favorable than the standard recognized by international law.

52. 3. The states shall recognize and respect indigenous lifestyles, customs, traditions, forms of social, economic and political organization, institutions, practices, beliefs, values, clothing, and languages.

79. 2. Indigenous [peoples/populations] have the right to be informed of measures which could affect their environment, including information ensuring their effective participation in acts and policies which might affect it.
80. 3. Indigenous [peoples/populations] shall have the right to conserve, restore and protect their environment and the productive capacity of their lands, territories and resources.
81. 4. Indigenous [peoples/populations] have the right to full participation in formulating, planning, managing and applying governmental programs for the conservation of their lands, territories, and resources.
82. 5. Indigenous [peoples/populations] shall have the right to assistance from their states for purposes of environmental protection, and shall be allowed to receive assistance from international organizations.
83. 6. The states shall prohibit and punish, and in conjunction with the indigenous [peoples/populations], shall impede the introduction, abandonment, or deposit of radioactive materials or residues, toxic substances and waste material in contravention of legal provisions; as well as the production, introduction, transportation, possession or use of chemical, biological and nuclear weapons in indigenous areas.
84. 7. When a State declares an indigenous territory to be a protected area, and in the case of any lands, territories and resources under potential or actual claim by indigenous [peoples/populations], as well as locales used as natural biopreserves, conservation areas shall not be subject to any natural resource development without the informed consent and participation of the [peoples/populations] concerned.

85. **SECTION FOUR. ORGANIZATIONAL AND POLITICAL RIGHTS**

86. Article XIV. The rights of association, assembly, freedom of expression and freedom of thought

87. 1. Indigenous [peoples/populations] have the right of association, assembly and expression pursuant to their values, usages, customs, ancestral traditions, beliefs and religions.
88. 2. Indigenous [peoples/populations] have the right of assembly and to the use of their sacred and ceremonial areas, as well as the right to full contact and common activities with their members living in the territory of neighboring states.

89. Article XV. The right to self government

90. 1. Indigenous [peoples/populations] have the right to freely determine their political status and freely pursue their economic, social, spiritual and cultural development, and are therefore, entitled to autonomy or self-government with regard to *inter alia* culture, religion, education, information, media, health, housing, employment, social welfare, economic

66. 2. The states shall take the necessary measures to prohibit attempts to forcibly convert indigenous [peoples/populations] or to impose on them beliefs against their will.
67. 3. In collaboration with the indigenous [peoples/populations] concerned, the states shall adopt effective measures to ensure that their sacred places, including burial sites, are preserved, respected and protected. When sacred graves and relics have been appropriated by state institutions, they shall be returned.
68. 4. The states shall ensure respect from society as a whole for the integrity of indigenous spiritual symbols, practices, sacred ceremonies, expressions and protocols.
69. Article XI. Family relations and family ties
70. 1. The family is the natural and basic unit of societies and must be respected and protected by the state. Consequently, the state shall recognize and respect the various forms of the indigenous family, marriage, family name and filiation.
71. 2. In determining the child's best interests in matters relating to the protection and adoption of children of members of indigenous [peoples/populations], and in the severance of ties and other similar circumstances, consideration shall be given by courts and other relevant institutions to the views of the [peoples/populations], including individual, family and community views.
72. Article XII. Health and well-being
73. 1. Indigenous [peoples/populations] have the right to legal recognition and practice of their traditional medicine, treatment, pharmacology, health practices and promotion, including preventive measures and rehabilitative.
74. 2. Indigenous [peoples/populations] have the right to protection of vital medicinal plants, animals, and minerals in their traditional territories.
75. 3. Indigenous [peoples/populations] shall be entitled to use, maintain, develop and manage their own health services, and they shall also have access, on an equal footing, to all health institutions and services and medical care accessible to the general population.
76. 4. The states shall provide the necessary means for indigenous [peoples/populations] to eliminate any health conditions in their communities which fall below the standards accepted for the general population.
77. Article XIII. The right to environmental protection
78. 1. Indigenous [peoples/populations] have the right to a safe and healthy environment, which is an essential condition for enjoyment of the right to life and collective well-being.

and to the use of those to which they historically have had access for their traditional activities and livelihood.

103. 3. i. Subject to the contents of 3.ii., when property and user rights of indigenous [peoples/populations] arise from rights existing prior to the creation of those states, the states shall recognize the titles of indigenous [peoples/populations] relative thereto as permanent, exclusive, inalienable, imprescriptible and indefeasible.
104. ii. Such titles may be changed only by mutual consent between the state and the respective indigenous [peoples/populations] when they have full knowledge and understanding of the nature or attributes of such property.
105. iii. Nothing in 3.i. shall be construed as limiting the right of indigenous [peoples/populations] to attribute ownership within the community in accordance with their customs, traditions, uses and traditional practices, nor shall it affect any collective community rights thereto.
106. 4. Indigenous [peoples/populations] have the right to an effective legal framework for the protection of their rights with respect to the natural resources on their lands, including the ability to use, manage, and conserve such resources, and with respect to traditional uses of their lands and their interest in lands and resources, such as subsistence items.
107. 5. In the event that the subsoil minerals or resources of the subsoil belong to the state, or the state has rights over other resources on the lands, the governments shall establish or maintain procedures for the participation of the [peoples/populations] concerned in determining whether the interests of such [peoples/populations] would be adversely affected and to what extent, before undertaking or authorizing any program for planning, prospecting, or exploiting the resources existing on their lands. The [peoples/populations] concerned shall participate in the benefits of such activities, and shall receive compensation, on a basis no less favorable than the standard international law sum for any loss which they may sustain as a result of such activities.
108. 6. Unless exceptional and justified circumstances so warrant in the public interest, the states shall not transfer or relocate indigenous [peoples/populations] without the free, genuine, public and informed consent of those [peoples/populations], and in all cases with prior compensation and prompt replacement of lands appropriated, which must be of similar or better quality and which must have the same legal status; and guaranteeing the right to its return if the causes that gave rise to the displacement cease to exist.
109. 7. Indigenous [peoples/populations] have the right to restitution of the lands, territories, and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged; or when restitution is not possible, the right to compensation on a basis no less favorable than the standard set by international law .
110. 8. The states shall take all possible measures, including the use of law enforcement mechanisms, to avert, prevent and punish, when applicable, any intrusion on or use of those

lands by unauthorized persons in order to take possession or make use thereof. The states shall place maximum priority on the demarcation and recognition of properties and areas of indigenous use.

111. Article XIX. Workers rights

- 112.** 1. Indigenous [peoples/populations] shall be entitled to full enjoyment of the rights and guarantees recognized under international labor law and domestic labor law; and to special measures to correct, redress and prevent the discrimination to which they have historically been subject.
- 113.** 2. To the extent to which they are not effectively protected by laws applicable to workers in general, the states shall take such special measures as may be necessary to:
- 114.** a. effectively protect workers and employees who are members of indigenous communities in regard to fair and equal hiring and terms of employment;
- 115.** b. to improve the labor inspection and enforcement service in regions, companies or paid activities involving indigenous workers or employees;
- 116.** c. ensure that indigenous workers:
- 117.** i. enjoy equal opportunity and treatment as regards all conditions of employment, job promotion and advancement; and other conditions as stipulated under international law;
- 118.** ii. enjoy the right to association and freedom for all lawful trade union activities, and the right to conclude collective agreements with employers or employers' organizations;
- 119.** iii. are not subjected to racial, sexual or other forms of harassment;
- 120.** iv. are not subjected to coercive hiring practices, including servitude for debts or any other form of servitude, even if they are based on law, custom, or an individual or collective arrangement, which shall be deemed absolutely null and void in each instance;
- 121.** v. are not subjected to working conditions that endanger their health and personal safety;
- 122.** vi. receive special protection when they serve as seasonal, casual or migrant workers and also when they are hired by labor contractors in order to benefit from national legislation and practice which must itself be in accordance with established international human rights standards for this type of workers; and,

123. vii. that their employers are also made fully aware of the rights of indigenous workers, pursuant to national legislation and international standards, and of the resources available to them for the protection of those rights.

124. Article XX. Intellectual property rights

125. 1. Indigenous [peoples/populations] have the right to the recognition and full ownership, control, and protection of their cultural, artistic, spiritual, technological and scientific heritage, and legal protection of their intellectual property through patents, trademarks, copyright, and other such procedures as established under domestic law; as well as to special measures which ensure them legal status and institutional capacity to develop, use, share, market and bequeath that heritage to future generations.

126. 2. Indigenous [peoples/populations] have the right to control, develop and protect their sciences and technologies, including their human and genetic resources in general, seeds, medicine, knowledge of plant and animal life, original designs and procedures.

127. 3. The states shall take appropriate measures to ensure the participation of indigenous [peoples/populations] in determining the conditions for both public and private utilization, of the rights cited in the preceding two paragraphs.

128. Article XXI. The right to development

129. 1. The states recognize the right of indigenous [peoples/populations] to decide democratically what values, objectives, priorities and strategies will govern and steer their development course, even when they differ from those adopted by the national government or by other segments of society. Indigenous [peoples/populations] shall be entitled to obtain on a non-discriminatory basis appropriate means for their own development according to their preferences and values; and to contribute by their own means, as distinct societies, to national development and international cooperation.

130. 2. Unless exceptional circumstances so warrant in the public interest, the states shall take the necessary measures to ensure that decisions regarding any plan, program, or proposal affecting the rights or living conditions of indigenous [peoples/populations] are not made without the free and informed consent and participation of those [peoples/populations]; that their preferences are recognized; and that no plan, program or proposal which might have harmful effects on those [peoples/populations] is adopted.

131. 3. Indigenous [peoples/populations] have the right to restitution or compensation no less favorable than set by the standards of international law, for any loss which—despite the foregoing precautions, the execution of those plans or proposals may have caused them; and to the adoption of measures to mitigate adverse environmental, economic, social, cultural or spiritual effect.

132. SECTION SIX. GENERAL PROVISIONS

133. Article XXII. Treaties, acts, agreements and constructive arrangements

134. Indigenous [peoples/populations] have the right to the recognition, observance and enforcement of treaties, agreements and other arrangements that may have been concluded with states or their successors, as well as historical Acts, according to their spirit and intent; and to have states honor and respect such treaties, agreements, and constructive arrangements as well as the historical rights emanating from those instruments. Conflicts and disputes which cannot otherwise be settled shall be submitted to the competent bodies.

135. Article XXIII.

136. Nothing in this instrument shall be construed as excluding or limiting existing or future rights which indigenous [peoples/populations] may have or acquire.

137. Article XXIV.

138. The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous [peoples/populations] of the Americas.

139. Article XXV.

140. Nothing in this instrument shall be construed as granting any rights to ignore boundaries between states.

141. Article XXVI.

142. Nothing in this Declaration implies or may be construed as permitting any activity contrary to the purposes and principles of the Organization of American States, including sovereign equality, territorial integrity and political independence of states.

143. Article XXVII. Implementation

144. The Organization of American States and its organs, agencies, and entities—in particular the Inter-American Indian Institute, the Inter-American Commission of Human Rights—shall promote respect for, and full application of, the provisions of this Declaration.

