



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 comments on the draft Inter-American Declaration on the Rights of Indtenous Peoples.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Harriet C. Babbitt".

Harriet C. Babbitt  
Ambassador

Enclosure

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

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 theirr 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.

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.

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;

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

fide 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 11(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 Tvonek 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.

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 11(2) is vague and should be replaced with language taken from paragraph 20 of the Vienna Declaration adopted on June 25, 1993. Article 11(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



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

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.

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.

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

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.

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

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.

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.



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

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.

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.

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.