SPECIAL MEETING OF THE WORKING GROUP
TO PREPARE THE DRAFT AMERICAN DECLARATION
ON THE RIGHTS OF INDIGENOUS PEOPLES

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# INTERVENTIONS BY
# THE DELEGATION OF THE UNITED STATES

**Intervention No. 1**

On behalf of the United States Government, I would like to welcome the indigenous representatives here today, who, I understand, number over 120 representatives. This is more than twice the number who participated last year. The interest of the U.S. government is reflected by the fact that we have 22 members on our delegation this week from 7 different USG agencies. We have been pleased to contribute financially for the second year to support the work of this working group and the participation of many of the indigenous representatives here today.

The United States Government believes it very important to adopt an American Declaration on the Rights of Indigenous Peoples. We believe a strong statement of principles for the Hemisphere can help guide states to improve not only the condition of indigenous peoples, but also the relationship between states and indigenous peoples. That is why, in drafting this declaration, that it is so important to "get it right." When the United States Government presents alternative text this week, we hope you will understand that it is with this objective in mind – to "get it right."

Some worry about what they see as a delay in adopting this declaration. My delegation believes there is another equally important objective for all of us in this working group – that of participation of indigenous peoples in matters at the OAS that affect them.

First, negotiating this declaration without consultation with those affected would have been senseless. The increase in participation by indigenous peoples here is an excellent sign.
Second, there is a need for greater understanding of the issues to reach agreement on the meaning of concepts and words, as well as on what important elements to include. As the first lady of Peru said, we have a "new dynamic of working together."

Third, this growing awareness and understanding of the issues on the part of states has led to improved legislation and improved conditions for indigenous peoples in the Hemisphere.

Admittedly, there is a long way to go in the Hemisphere. The United States learned from experience how not to deal with Native American issues. But we need to keep learning, and meetings like this, as well as our own domestic consultations, are important to this process. We look forward, therefore, to the discussion this week in the spirit of open consultation, and to determination by the working group in the near future of next steps towards negotiating and adopting a declaration.

Finally, I would like to distribute a copy of a resolution No. 2003:062 adopted by the United South and Eastern Tribes, Inc. an organization of Native American tribes, on February 6, 2003. The resolution supports the efforts of the OAS, the U.S. Department of State and other participating U.S. federal agencies, tribal governments, and other representatives of indigenous peoples that advances the interests of indigenous peoples, and indigenous peoples rights, lands life ways, and ecosystems in the United States and throughout the Americas. They are appointing a tribal leader to consult with the people and entities participating in the development of the American Declaration of the Rights of Indigenous Peoples.

http://scm.oas.org/pdfs/2003/cp10861.pdf

http://scm.oas.org/pdfs/2003/cp10861_II.pdf

**Intervention No. 2**

Article XVIII. Traditional forms of property ownership and cultural survival. The rights to land and territories

Thank you Mr. Chairman. Thank you indigenous peoples, in our listening to your concerns and comments, you reaffirm our earlier statement, "let's get it right." The United States wishes to begin by appreciating the strong connection between indigenous peoples and the land and territories that they live on and use. It is important to both indigenous peoples and States to have a clear understanding of the rights and benefits that indigenous peoples have, vis-a-vis these lands and territories. These ideas are clearly expressed in the first 2 paragraphs of this article.

The United States has examined and continues to examine carefully this article. We believe that the general intent of the first part of article 18 is to ensure that indigenous peoples have the right to legal procedures and consultations that will:

* permit them to assert their various interests in the land and territories,
* include the State's meaningful consideration of their interests,
* and allow for effective enforcement of the decisions reached through these processes.

We believe that the rule of law must be the first and necessary requirement if the aspirations of this article, indeed this declaration, are to be uplifted and realized, for the OAS member states, and for the indigenous peoples in the Americas. The rule of law must be manifested by legal systems which allow fair access to: 1) an open and transparent process, 2) meaningful consideration of claims, 3) appropriate redress for legitimate claims, and 4) effective enforcement of legal decisions.

The United States is willing to work collaboratively with our fellow OAS nations to promote the rule of law in ways that we hope earn the faith of indigenous peoples in our respective national legal systems. We believe this particular article, which affirms the rights of indigenous peoples to meaningful national legal procedures regarding their interests in lands and territories, may be an appropriate issue from which to begin such collaborative efforts.

**Intervention No. 3**

Article XIX. Workers rights

The U.S. supports the inclusion of an employment-related provision in this Declaration. While we appreciate the Chair's efforts to develop a compromise text, we would note some potential difficulties with the Chair's proposed text, particularly in terms of tribal sovereignty. For example, currently, U.S. labor laws of general applicability do not apply uniformly to tribal employers, and therefore, the U.S. would not be able to meet the demands seemingly imposed by the language in the Chair's text. For example, U.S. Title VII expressly exempts tribes from coverage as employers. If it did not, tribal employers probably could not even extend an employment preference to members of their own tribe, which undercuts tribal sovereignty and self-sufficiency. In addition, we are concerned that the length and degree of detail in the Chair's proposed text will make it very difficult to arrive at a final consensus text.

It is our strong view that the most effective way to deal with employment-related issues in this context would be through a text that is short and to the point. For that reason, we would propose as an alternative to amending the Chair's text, the following language, which reflects much of our original 1999 proposal, but also incorporates elements relating to the worst forms of child labor:

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 measures, where appropriate, to correct, redress, and prevent the discrimination to which they may have been subject.

3. States should take immediate and effective measures to ensure that indigenous children are protected from the worst forms of child labor.

**Intervention No. 4**

Article XX. Intellectual property rights

- The United States is a strong supporter of the access of everyone, including indigenous individuals and communities, to the intellectual property system. The United States grants patents, registers trademarks, and recognizes copyrights of nationals of all countries in the hemisphere who have met the appropriate standards for protection.

- Intellectual property, including patents, copyright and related rights, trademarks, geographical indications, designs, undisclosed information (trade secrets) are harmonized to a large extent under the WTO's Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs).

- Each of these forms of intellectual property may be owned and/or exercised by individuals and groups. For example, a tribe may own a patent for a new, non-obvious and useful process of extracting the active ingredient from a plant or the registrant of a trademark for the mark identifying the source of origin of a tea made from a traditional recipe or the copyright owner of a film it produced about the traditions behind its dances and music.

- In addition, the United States provides certain special measures for Native American Tribes. For example, the U.S. Patent and Trademark Office maintains the Database of Official Insignia of Native American Tribes, available to the public at the USPTO's website at www.uspto.gov/main/trademarks.htm, which is included for informational purposes within the USPTO's database of material that is searched to make determinations regarding the registrability of marks.

- Inclusion of official insignia in this Database ensures that an examining attorney, who is searching a mark that is confusingly similar to an official insignia, will find and consider the official insignia before making a determination of registrability.

- The USPTO uses recorded official insignia as evidence of what a federally or state-recognized tribe considers to be its official insignia. In addition to this new Database, all

trademark applications containing tribal names, recognizable likenesses of Native Americans, symbols perceived as being Native American in origin, and any other application the USPTO believes suggests an association with Native Americans are examined by an attorney who has developed expertise and familiarity in this area. Of course, this new Database of Official Insignia does not supercede or otherwise affect the Indian Arts and Crafts Act, established in 1935, administered by the Department of the Interior's Bureau of Indian Affairs.

- This Act, amended in 1990, provides for the Indian Arts and Crafts Board, a separate agency of the Department of the Interior, to protect Indian cultural heritage and to assist the efforts of Indian tribes and their members to achieve economic self-reliance.

- To achieve these goals, the top priority of the Board is the enforcement and implementation of the Indian Arts and Crafts Act of 1990 (an outgrowth of the 1935 Act) that expanded the powers of the Board to respond to growing sales of arts and crafts products misrepresented as being made by Indians. The Act is a truth-in-advertising law that prohibits the marketing of products as Indian made when such products are not made by Indians, as defined by the Act. It is intended to protect Indian artists and craftspeople, Indian tribes, Indian-owned businesses and consumers and is complete with civil penalties up to a $250,000 fine or criminal penalties up to a 5-year prison term, or both. If a business violates the Act, it can face civil penalties or can be prosecuted and fined up to $1,000,000.

- Additionally, the Act empowers the Board to register, without charge, government trademarks of genuineness and quality on behalf of individual Indians and Indian tribes, building market visibility and promoting genuine Indian arts and crafts.

- All of these rights, as well as rights provided under laws accessible to all nationals, are established under national legislation and are in accordance with international standards, such as those under the TRIPs Agreement. Accordingly, we regret that we are unable to support the 2001 Chair's Proposal, which establishes new rights.

- Nonetheless, the United States is willing to advance beyond its 1999 proposal with the following language for Article XX:

  **Indigenous individuals and peoples should have non-discriminatory access to legal protection for their intellectual property, subject to national legislation**.

- We intend for this text to express the idea that intellectual property laws are, and should continue to be, available to indigenous individuals and peoples who meet the appropriate set of criteria for receiving such legal protection.

- The United States will continue to participate actively in discussions on these issues in the World Intellectual Property Organization, the specialized agency of the United Nations charged with promoting the worldwide protection of intellectual property rights. WIPO has established a special Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore that is exploring practices in these areas and what improvements might be warranted. The United States supports the continuation of this

work in WIPO, particularly since that organization has the necessary expertise to tackle these highly complex and technical issues.

**Intervention No. 5**

*Article XXI.* *The right to development*

This article is about issues that are important to the economic development of indigenous people. Therefore, we would propose that the article be renamed "economic development", or as Canada suggested, "development opportunities." We cannot support an article entitled "Right to development".

Indeed, as noted by the distinguished Ambassador from Guatemala, that is a phrase that has no agreed meaning, despite years of discussions in relevant UN fora. While some international declarations use the phrase "right to development", along side a listing of a number of concepts, such as good governance, democracy, rule of law and non-corruption, there is no consensus document in recent years on what precisely is embodied by a "right to development".

Nor is this article about a "right to economic development".

All resolutions and other documents that have attempted to elaborate upon "right to development" failed to achieve consensus. The Inter-American Democratic Charter, which was cited by some speakers, refers to development, but it does not refer to a "right to development".

We've examined with interest the Chair's compromise text on this paragraph, which we believe is an improvement over the original text. Nonetheless, the language used by the Chair's text still leaves too much ambiguity. In our view, rights and entitlements must be specific and founded in law, and any aspirational language should not be termed as rights.

As to paragraph 1, we could support the following principles in this paragraph:

-The recognition that indigenous peoples should be able to guide, subject to domestic law, their economic development
-Indigenous peoples should be entitled to be free from discrimination in the acquisition of appropriate means for their own development

We are uncertain about what it means for indigenous peoples "to contribute in their own ways to international cooperation."

Also, what does it mean precisely to "contribute their own ways to national development"? As we understand the phrase, it would not seem to belong in this paragraph. If it is as described by Canada, then perhaps it should be in a separate paragraph.

As to paragraph 2, we are, in general, supportive of the concepts embodied in the paragraph, but continue to wonder whether language on consulting and coordination should actually be in this paragraph or in a separate paragraph, as some, such as Mr. Littlechild and Canada, have suggested.

In any event, leaving to a later time the precise question of placement, the United States could support a paragraph with the following concepts:

1. That recognizes the fundamental importance of effective participation by indigenous peoples and their members in decisions that effect their rights or living conditions.
2. That provides that states should adopt procedures, subject to domestic law, to provide for consultation and coordination with respect to plans, programs and proposals that might have a substantial and direct effect on indigenous peoples, so that their preferences are taken into account.

At this stage, however, we wish to flag that we also have difficulty with the phrase contained in paragraph 2, sentence 1, "so that … no provision which might have negative effects on those peoples is adopted".

We believe that this phrase is ambiguous because negative effects are not defined and no provision is made for the balancing between positive and negative effects that is necessary in all development.

As to paragraph 3, while we appreciate the Chair's efforts to arrive at compromise text, we believe the proposed text is overly broad and somewhat confusing in its location. In order for paragraph 3 to make sense it should clearly modify only paragraph 2 (or be in a stand-alone paragraph on consultation and coordination).

This is because paragraph 3 addresses redress for negative impacts from development. As a result, it should be clear that the development that this paragraph addresses is that of the State, as opposed to indigenous peoples' development, as discussed in paragraph 1.

Having said that, we agree with the Ambassador from Guatemala – that the concept of an absolute right to restitution or compensation will be impossible to achieve. Therefore, we believe the focus of this paragraph – whether eventually located in this article or elsewhere, should be non-discrimination. In particular, we would wish this paragraph to focus on non-discriminatory access by indigenous peoples to any mechanisms established under domestic law: (i) to redress claims for loss caused them by execution of plans, programs and proposals, and (ii) to mitigate adverse effects.

## **Intervention No. 6**

*Articles XXII through XXVIII.*

In regard to Article XXII, the U.S. believes the Chair's text is an improvement over the original, and we prefer to work with that as a basis. We believe, however, that it can be further simplified. Instead of a "right to recognition", we prefer speaking of states' implementing their respective obligations to indigenous people under treaties and other agreements. Also, "spirit and intent" would be difficult to apply across the board in all circumstances. It depends on the wording of a document on its face. We therefore retain our 1999 proposal:

States should take all necessary steps under domestic law to implement obligations to indigenous peoples 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.

In regard to Article XXIII, we feel that the use of "future rights" in the Chair's text is an odd formulation. We are unclear as to what that would mean.

On Article XXIV, we feel it is premature to address this article. Our position on Article XXIV is dependent on the final wording of the Declaration as a whole.

In regard to Article XXV, the U.S. believes this concept is embodied in what may be Article XXVI, and therefore would delete it. If the concept in Article XXV is still considered to need further treatment after we finalize Article XXVI, we would propose the following language:

Nothing in this Declaration would be interpreted as affecting the boundaries between states.

As far as Article XXVI is concerned, the US is still reflecting on this article and looks forward to considering the various formulations that have been and will be proposed.

In regard to Articles XXVII and XXVIII, we would like to see comments and proposals of others in writing in order to further reflect on these Articles. We would like to express our support for working from the Chair's proposal for these Articles. Nonetheless, we still believe that it needs further refinement. In particular, the wording of XXVIII appears to us like treaty language, speaking of "compliance and measures to comply". Again, we would like to see different formulations before solidifying our position on these Articles.

**Intervention No. 7**

*SECTION TWO.* *HUMAN RIGHTS*

On Article 2, paragraph 1, we prefer to retain the earlier U.S. proposal on this paragraph. We believe that our formulation, although close to that of the Chair, is more precise and would more adequately address our concerns of not mixing concepts of human rights that flow to the individual with rights that flow by virtue of the status of an indigenous community as an indigenous peoples. The U.S. proposal is only slightly different from the Chair's text, but the differences are important:

"Indigenous individuals 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, 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, restricting, or denying those rights or authorizing any action not in accordance with the relevant instruments of international law, including those which pertain to human rights."

Most of the concepts currently in Article 2, paragraph 2, are picked up by the proposal of the U.S. on internal self-determination, made in 2001, and reflected in Article 2, paragraph 4. We believe that many of the concepts in this sub-paragraph are better place in the section on self-governance as these are rights or concepts that flow by virtue of tribal autonomy, in other words, they flow by virtue of what the U.S. calls the right of internal self-determination. We believe that it would be better to

address those concepts together as a package – what has been referred to in the UN negotiations in December as clustering. In other words, we should talk about the rights that are human rights in this section of the Declaration, and talk about the concepts, rights, or freedoms that flow by virtue of the internal right to self-determination in another section.

On Article 2, paragraph 3, we believe the paragraph should not set forth an obligation since this is a declaration, an expression of aspirations, and not a convention.

With respect to Article 3, the U.S. delegation has reflected at length on the concepts embodied in this important article. Our difficulty is that on the one hand, indigenous individuals should be free to identify themselves as indigenous and states should not be able to interfere with that identification. On the other hand, indigenous peoples should have the authority to exercise autonomy in determining their own membership. Therefore, there are competing interests that this article is trying to reflect and that it must balance. It may be that the American Indian Law Alliance's idea of separating self-identification from self-membership in an indigenous community may present a way forward. We will want to study this further.

With respect to Article 4, we believe the Chair's formulation is far better than the original formulation and are prepared to work from that text as we negotiate further. We believe that a State should provide the necessary mechanism to recognize the legal status of indigenous peoples, and that an open and transparent process is critical for determining those to whom this declaration would apply. We note that section one contains definitions and look forward to discussing those ideas further.

On Article 5, as to the first paragraph, we believe that the maintenance and development of one's cultural identity is important no only to indigenous peoples, but also important to indigenous individuals. The paragraph should cover both aspects. We also believe that the first paragraph must be subject to state law. For example, certain traditional cultural practices, for example the use of a certain drug during ceremonies, may run afoul of other important interests of a country. There must be some acknowledgement in this paragraph that state laws are generally applicable and can outweigh a long-standing cultural practice. As to the second paragraph, we are concerned that the phrase "destruction of their culture" is too broad.

As to Article 6, while we appreciate the Chair's rewording of this paragraph, we still find ourselves strongly preferring the formulation we tabled a few years ago. We have difficulty in viewing the right of non-discrimination as a right of protection from discrimination. We believe the wording of the paragraph must accord with the wording of the International Covenant on Civil and Political Rights, a treaty to which all of our countries are party. Therefore, we strongly prefer to retain our earlier proposal, although we are also willing to add a stronger statement on the principle of non-discrimination and its application to indigenous individuals. We also have difficulty with a requirement that states shall adopt special measures against discrimination; we prefer a formulation which encourages states to take measures aimed at immediate, effective and continuing improvement of indigenous economic and social conditions.