

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

OEA/Ser.K/XVI  
GT/DADIN/doc.138/03  
5 May 2003  
Original: Spanish

Hall of the Americas  
February 24 to 28, 2003  
Washington, D.C.

REPORT OF THE RAPPORTEUR OF THE SPECIAL SESSION  
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**Introduction:**

The Working Group of the Committee on Juridical and Political Affairs of the Permanent Council of the OAS held a four-day special session from February 24 to 27, 2003, with broad participation by representatives of indigenous peoples,<sup>1/</sup> to complete the reading and analysis of the Articles and preamble of the proposed Declaration. This work in fact began in 1998, and was pursued in three special sessions in 2000, 2001, and 2002.<sup>2/</sup> While the proposal approved by the IACHR in 1997 was used as the basic working document, an informal and not-negotiated informal text produced by the Chair in July 2002 was also considered, to facilitate the analysis. Two of the central issues for the special session had been considered previously at technical sessions with special experts and indigenous representation: those issues were "Lands, Territories and Natural Resources," considered on November 7 and 8, 2002, and "Intellectual Property", considered in December 2002.

The Special Session of the OAS Working Group in fact served as a point of encounter not only for indigenous leaders of the Americas, experts and government representatives, but also for institutions based in Washington and other centers that are interested in their activities and their demands. Thus, the indigenous leaders who were convened in Washington by the Working Group had the opportunity to participate, as well, in:

- The prior meeting of the Indigenous Caucus organized by eight indigenous organizations of Canada and the USA, sponsored by CIDA (Canada);
- Meetings with technical teams of the World Bank to review its policy with respect to indigenous peoples;
- Special hearing before the Inter-American Commission on Human Rights of the OAS, where a report was presented on the situation of the rights of indigenous peoples in the Hemisphere;
- An academic seminar at Washington College of Law, American University, on issues of international law as they relate to indigenous rights;
- A meeting at the Inter-American Development Bank for presentation of its database on Indigenous Legislation of the Americas.

A further sign of the interest that this special session evoked could be seen in the quantitative and qualitative significance of indigenous representation and in the wealth of concrete proposals for

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1. The Specific Fund to facilitate participation by indigenous representatives in the Working Group, created in 2002, with contributions from various countries, made it possible to finance participation by 54 leaders elected by a Selection Board with an indigenous majority, most of those members in turn had been selected by indigenous representatives of South, North, and Central America and the Caribbean. Another 50 or so indigenous leaders participated on the basis of their own funds or those of other organizations.
  2. The documents for those sessions can be consulted at the OAS web site ([www.oas.org](http://www.oas.org)) under the topic "indigenous peoples."

amendments of various articles submitted by governments and by indigenous organizations, and which appear in the summary document (GT/DADIN/doc.122/03).

Yet another indicator of the importance of this work is the official agreement that was reached between the Government of Ecuador, with participation by its President, the Foreign Ministry and various other ministries, and Ecuadorian indigenous organizations, in which the parties committed themselves to support future progress with the American Declaration, in accordance with the following parameters and principles:

- That the Andean Charter for the Protection of Human Rights, the Declaration of Machu Picchu and the work of the United Nations should be taken as the basis for the future American Declaration.
- That the Declaration should recognize the concept of self-determination, and that it should offer guidelines for its exercise, which, once adopted by the OAS, will serve as the basis for negotiating the future Declaration in the United Nations.
- That it should recognize the full capacity of indigenous peoples to pursue their own destiny and protect their collective interest, recognizing that the existence of nationalities and the exercise of their collective rights, in Ecuadorian experience, far from dividing the country, has served to consolidate its democratic institutions and governance.
- The agreement includes a commitment to speed up discussions for completing the work in the next year.

The Government of Colombia has also indicated officially that the issuance of an American Declaration is an objective of its policy.

The importance of this hemispheric meeting among government representatives and indigenous peoples was underscored by the visits and presentations made by the President of Nicaragua, Enrique Bolaños, the First Lady of Peru, Eliane Karp de Toledo, and the Secretary of State for Human Rights of Brazil, Mr. Nilmario Miranda, as well as presentations by the Secretary General and the Assistant Secretary General of the OAS, César Gaviria and Luigi Einaudi.

This document attempts to synthesize the key elements from the discussion and analysis, and to identify aspects on which there is general consensus, as well as those that still pose difficulties, and the proposals put forth for resolving them.

### **Opening session**

Following opening remarks by the Chair,<sup>3/</sup> the Secretary General of the OAS observed that in his view "we now have the conditions and the cooperative environment to complete this first stage and to move on to the negotiation stage itself, which would bring us to a final version that could be submitted for approval at next year's General Assembly (2004)," recalling the support that successive Summits of Presidents and Heads of State and the Inter-American Democratic Charter have given to

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3. See Report of the Chair, document GT/DADIN/doc.137/03.

this process and to the rights of indigenous peoples. He noted that "we have already dealt successfully with many points of contention in the text of the Declaration, such as the agreement by members of the Working Group to use the term "peoples," or to speak of internal autonomy and self-government. Although we do not yet have specific agreements on the wording, there has been a shift of attitude on the part of many national delegations in terms of accepting the concept of internal self-determination. Essential themes such as individual and collective human rights, the right to culture, organizational and political rights, free determination, customary law, have been examined in the course of debating the draft Declaration."

The Working Group heard from the Director of the National Commission of Indigenous Peoples (CONAPA) and the First Lady of Peru, Eliane Karp de Toledo, who stressed the importance of this process for defending and deepening democracy, and recalled the significance of this cultural capital as a comparative advantage of member states for joining the globalization process. Modernity, she said, means respecting the pluralism and multiculturalism of nations, and she announced the agreement between Peru and Ecuador to create a School of Governance, Politics, and Leadership for indigenous peoples.

In the ensuing informal dialogue the following points emerged:

- Member countries and this forum are achieving the necessary harmonization of this new body of law and State sovereignty.
- Indigenous peoples want to enjoy all the rights that international law gives to other peoples, and they want to be respected, with special guarantees for preserving their culture.
- The legitimacy of this exercise for preparing this inter-American instrument, while it may be based on aspirations, will serve to fill a vacuum in international and inter-American rules, and will be used by congresses and judicial institutions to develop further legislation and additional guarantees.
- Prompt adoption, based on consensus, will constitute a fundamental contribution to the dignity of indigenous peoples and to national and international efforts in this respect, improving the work of existing institutions and fostering mechanisms of political détente.
- The concept of self-determination is relational and not confrontational in nature, and its importance permeates and gives meaning to the entire Declaration.
- As stressed by several government and indigenous delegations, many Latin American countries have made significant progress in terms of indigenous territorial rights.
- This Declaration should adopt firm principles to guide states in improving relations with indigenous peoples in terms of their rights and guarantees: it must therefore be clear and technically correct in its drafting.

Indigenous representatives declared repeatedly that their rights are inalienable, interdependent, interrelated and indivisible as such, and that free determination is central to them and cannot be separated from them. As well, the enjoyment of socioeconomic and cultural rights is essential for achieving and enjoying political and civil rights.

They also stressed that indigenous peoples do not want paternalism, but are seeking to build strategic partnerships with States so that they can act more effectively in a globalized world.

They also stressed that an eventual American Declaration must set a minimum standard to guarantee the survival, dignity and well-being of indigenous peoples in the Americas, a standard that builds upon and goes beyond existing instruments and reinforces the principles accepted in international law.

With respect to this process, they drew attention to the need for transparency, which includes timely information on the positions maintained by governments in the negotiation. Without the informed participation of indigenous peoples in key meetings, they said, acceptability would be jeopardized.

## **ANALYSIS OF SECTION FIVE**

### **SOCIAL, ECONOMIC AND PROPERTY RIGHTS**

#### **Article XVIII. Traditional forms of ownership and cultural survival. Rights to lands and territories**

The history of seizures and appropriations of lands, territories, and natural resources that were traditionally owned and used by indigenous peoples was recalled and denounced by delegations with numerous examples. They voiced many complaints about current difficulties in obtaining such recognition, in avoiding invasions and appropriations, the weaknesses of the restitution and compensation process, and the need to guarantee those rights through demarcation, granting of title, and special guarantees, *de jure* and *de facto*, by states.

Several indigenous and government delegations also remarked on the social and spiritual bonds between indigenous peoples and the lands and territories in which they live in, which goes beyond the restricted economic concept of property under ordinary law. This special character means that these territorial areas and resources are the environmental basis for exercising the free determination that gives them their nature as a people.

Consequently, and as thoroughly discussed at the technical meeting,<sup>4/</sup> it was proposed that indigenous lands should be defined as those permanently inhabited and used for their productive activities, essential to the preservation of the natural resources necessary for their welfare, and for their physical and cultural reproduction in accordance with their uses, customs and conditions; and for the exercise of their institutions and self-government.

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4. See "Meeting on Section Five of the Proposed Declaration with emphasis on Article XVIII", Rapporteur's Report, GT/DADIN/doc.113/03 rev. 1.

Several government and indigenous delegations proposed amendments to the original wording of the Article,<sup>5/</sup> as described below. One group of indigenous delegations proposed a new Article which, while based in general on the same principles as the original of the IACHR, expanded and specified its scope. Their proposal, which includes many of the ideas of other indigenous delegations, recommends essentially:

- Add the term "resources" to the title.
- In the first paragraph, add recognition of their institutions devoted to the development, management and conservation of resources, and to effective measures for preventing intrusions into those resources.
- Declare that states, together with indigenous peoples, will give priority to measures for demarcating areas of indigenous ownership and use.
- Declare that indigenous peoples have rights to the total environment of lands, air, waters, coastlines and sea, ice, flora, fauna, and other resources over which they have exerted ancestral domain, occupancy, and/or use.
- That they must not be deprived of an adequate habitat for guaranteeing to current and future generations their integrity and well-being as a distinctive people; nor of their collective means of subsistence, the dimensions of which are economic, social, cultural, spiritual, and political.
- That titles and rights must be recognized as permanent, exclusive, inalienable, imprescriptible and indefeasible, although, with their informed and free consent, and on the basis of decisions adopted according to their uses and conditions, they may share these with the state or third parties.
- Paragraph 5, referring to cases where mineral or subsoil resources belong to the state, should be removed completely. (Another group of delegations proposed an alternative to the elimination of paragraph 5, suggesting that the state must obtain free, prior, genuine, public and informed, and substantiated consent, given in accordance with their uses and customs, before beginning any project affecting those resources; and that indigenous peoples also have the right to participate in the benefits and, if possible, co-management, compensation for existing damages, and measures of mitigation and compensation for social and environmental impacts).
- With respect to the possibility of relocation (paragraph 6), this must in all cases require free and informed consent, with guarantees and special processes.
- Remove the possibility of relocation without consent, even in exceptional circumstances warranted by the public interest. (Another indigenous delegation

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5. See the text in GT/DADIN/doc.122 rev. 1, from various North American delegations, page 5, and from the indigenous delegations of Brazil, page 14.

proposed the exceptional possibility of relocation without consent, only in cases of disaster, emergencies, or grave epidemics).<sup>6/</sup>

- In the case of paragraph 7, and on the possibility of compensation in lieu of restitution for lands, territories or resources, when restitution is not possible, this is not acceptable. Instead, compensation must be in the form of the land, territories or similar resources, and it can only be financial with the free and informed agreement of the interested people.
- With respect to state measures to prevent intrusions into indigenous habitat, such measures must be taken at the request of the interested people.

Indigenous representatives also proposed that:

- Instead of speaking of "a suitable juridical framework for guaranteeing rights", this wording should be replaced by the concept of "effective juridical remedies and a claims process for resolving violations of the rights of indigenous peoples to their lands, territories and natural resources".
- Priority and egalitarian attention must be paid to economic, social, cultural and spiritual rights as much as to civil and political rights, given the indivisible, interrelated and interdependent nature of human rights.
- Include the obligation of the State to prevent and punish intrusions not only by third parties but also by agents and agencies of the state.
- Make clear that the legal framework for guaranteeing these rights includes all necessary judicial, legislative, administrative and other measures.
- The need for procedures for free and informed participation by interested peoples in determining whether their interests and rights would be adversely affected, before undertaking or authorizing any program for planning, prospecting or exploiting existing resources on their lands.
- Subparagraph 3 (iii) on the internal rights of members of the community with respect to the possession and use of partial areas, should be retracted as follows: "Nothing in 3.1 shall be construed as limiting the right of indigenous peoples to determine the rights of ownership and use within the community...".

One indigenous delegation argued that the transfer of ownership is incompatible with the nature of lands which are constitutionally nontransferable under civil law, even in the case where this is done with the free consent of indigenous people.

Several indigenous delegations from South America called attention to the situation and rights of peoples who have no outside contact or who are said more accurately to be "voluntarily

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6. On this point, it noted that the Supreme Court of Canada considered that the standard of "public interest" is so vague as to provide no significant guidance for justifying any limitation on constitutional right (R. v. Sparrow, 1990, ISCR 1075, at page 1113).

isolated", and proposed including the following paragraph: "States shall not force contact upon isolated peoples and shall take juridical measures to protect their territories, their environment and their cultures."<sup>7/</sup>

Water resources, whether in watercourses, coastal areas, permanent ice fields, or aquifers located in indigenous areas, were considered by indigenous delegations to be of vital importance for the survival and reproduction of their peoples, as well as for ecological sustainability.

With respect to the relocation of populations, several indigenous delegations supported, in general terms, the requirements indicated in the IACHR proposal, but said that the standard must be raised. Several government delegations agreed that mere public interest as defined by the State is not sufficient, recalling that the Constitutional Court of Colombia has rejected it, ruling that the "public interest" standard is so vague and broad as to be an inoperable test for justifying limitations on constitutional rights.

Delegations also agreed that the interest of indigenous peoples must be considered an integral part of what is regarded as the "public interest."

Several indigenous delegations said that, bearing in mind the decision of the Inter-American Court of Human Rights in the Awas Tingni case, the duty of States to recognize, demarcate and provide title to indigenous areas must be stated more clearly. They insisted that it was important for indigenous peoples to have the right to consultation and judicial procedures that would allow them to obtain and exercise fully their interests over lands and territories, and that States must grant significant consideration to those interests; and when a decision is reached on those lands and territories, the necessary application and implementation measures must be taken immediately and decisively.

Indigenous residents of islands of the San Andreas Archipelago (Colombia) called attention to the fact that lack of demarcation encourages invasion by third parties into indigenous areas, and is holding up the establishment and application of policies to avoid such migrations.

Some government delegations questioned the absolute nature that some would give to indigenous territorial rights, saying that those rights, like any other rights, have their limitations, in light of the need to make them compatible with constitutional precepts and with those of international law.

Several states also maintained that the Declaration must take into account differing national circumstances and juridical systems, in particular the differences that exist between the principles of common law and those of civil law.

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7. On this point they noted the inadequacy of the provisions of Article XVIII, paragraph 5 and paragraph 6, with respect to the obligations of states to consult indigenous peoples and obtain their consent for government activities on indigenous territories: "While consultations and participation by indigenous people, and their free, genuine, public and informed consent are important for our peoples, those indigenous peoples that have decided to live voluntarily in isolation, according to their age-old traditions and their way of life, are not interested in being contacted or consulted."



Several delegations indicated that the conclusions of the technical meeting that was held on this Article by the Working Group in November 2002, as reflected in the Rapporteur's report,<sup>8/</sup> provided a solid basis for revising this Article.

During discussions, the terms "lands and territories" were widely used without arriving at an explicit agreement. While there was consensus that those terms referred in general to all areas that an indigenous people has traditionally owned and used, there are different nuances and meanings that various delegations had noted and that must be clarified when it comes to the definitive text. The rapporteur calls attention to the discussion and the elements contributed for clarifying that definition at the Working Group's technical meeting of November 2002.

In summary, the rapporteur believes that there is consensus on the general principles of the article and on the general meaning of most of the specific points. At the same time, he notes that there are still difficulties in achieving agreement on the need for full consent of the indigenous peoples for projects, plans, and activities by government or third parties that affect indigenous interests, particularly those relating to the exploitation of mineral and other nonrenewable subsoil resources.

There is general agreement, with respect to the relocation of indigenous communities, on the need for prior consultation, and on forms of adequate compensation, both for replacing the habitat that they must abandon, and in terms of compensation and the right of return. Nevertheless, there are problems in reaching agreement on the possibility of resettlement or relocation of indigenous communities without their full consent, and what should be the necessary rule of exception that would allow such resettlement without consent.

#### **Article XIX. Workers' rights**

In general, the text was accepted as proposed, with the following changes:

- Improve the text to include explicit reference to indigenous boys and girls.
- Replace "international labor law" by "international labor instruments."
- Make clear that these rights must be guaranteed both in the formal labor market and in the informal labor market, where the great majority of indigenous workers provide their services.
- Government and indigenous delegations alike proposed recognizing the possibility of bilaterally agreed codes of ethics and collective labor agreements between the interested people, as a body, and the contracting firms, with State participation. They also proposed that such agreements should include aspects relating to training of their members.

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8. See Rapporteur's Report on this meeting, GT/DADIN/doc.113/03 rev. 1, of February 20, 2003.

- On this point it was noted that these rights are by nature both collective (i.e. they refer to the people or community as such and to their enjoyment, exercise and capacity for enforcement) as well as individual, with respect to members of indigenous peoples.
- Indigenous delegations, with the support of several government delegations, also proposed that special measures to defend indigenous workers' rights should be taken in consultation and with direct participation by the indigenous peoples affected.
- One government delegation proposed wording relating to the rights of migrant workers, in light of the Advisory Opinion that the Inter-American Court of Human Rights is about to issue. The delegation noted that many indigenous peoples migrate, sometimes as a group, and find themselves unprotected in light of the distance separating their culture from that of the land in which they have settled.
- One government delegation proposed wording to avoid the problem found in its country, where because of the autonomy of indigenous peoples the State cannot interfere in the labor practices of tribes as employers, since this would constitute an attack on indigenous sovereignty.
- It was suggested that there is a need for special guarantees so that indigenous workers and professionals will have at least the same guarantees as non-indigenous people to be hired for work relating to indigenous communities, and that special measures should be taken to ensure real equality of opportunity for indigenous people to seek occupational training, which training must have a profile suitable for community exercise, in accordance with the respective indigenous culture.

## **Article XX. Intellectual property rights**

On this complex topic, which was the subject in December 2002 of a technical session of the Working Group,<sup>9/</sup> delegations generally discussed the nature, scope and meaning of collective intellectual rights, and in particular what is known as "collective ancestral knowledge" or "accumulated ancestral knowledge."

There was general agreement on the need:

- To distinguish the concept of collective knowledge and its management from the commercial concept thereof, as enshrined in the current system of intellectual property rights. That concept should be replaced by systems that will guarantee the promotion, diversity, development and survival of collective knowledge, preserving it for collective use and the benefit of future generations.

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9. At that session of Professors Peter Jaszi and Christine Fairley of Washington College of Law, American University, who are experts on the issue, examined the advantages and drawbacks of general regimes of intellectual property applied to collective ancestral knowledge. In general, they proposed the development of *sui generis* systems for its protection, and for guaranteeing its collective use, as well as avoiding improper appropriation.

- To this end, reference was made to work underway in other institutions, in particular in WIPO, where an intergovernmental committee of experts on genetic, traditional and folklore resources is actively engaged in developing a legal definition of "ancestral" or traditional knowledge, and ways of protecting it. Reference was also made to the 2002 UNESCO Declaration on Cultural Diversity.
- Indigenous and government delegations proposed the inclusion in paragraph 1 of protection arising from "international instruments."
- For paragraph XX.2, indigenous delegations proposed including wording to the effect that "the use of elements of indigenous cultural heritage requires their free and informed consent and their participation in the benefits."
- Some delegations insisted that the regime for recognizing collective rights must not affect the ability of members to win recognition for their individual creations, as provided under national legislation.
- It was also proposed that there should be systems for certifying the origin of indigenous products, based on recognition of collective ownership.
- It was proposed that paragraph XX.1 should include the words "oral traditions and products of visual and dramatic arts."

On this point, some states reported that they had taken special measures within the general regime, and in light of the TRIPS agreement, to protect indigenous property: the United States, for example, has a registry of indigenous symbols and names to avoid their illegal use or registration, and Indigenous Arts Boards have been created to guarantee the authenticity of indigenous products and to expose falsifications; Peru has established a three-tiered hierarchy of exclusivity (national, regional, and under direct community control).

It was noted that registry and guarantee systems must be organized in such a way as to ensure that, in practice, they do not make it easier for third parties to appropriate this knowledge. This will require participation by indigenous peoples in determining those guarantees.

Several states proposed separating cultural heritage (which appears in paragraph XX.1), since it is already covered by Article VII, the Right to Cultural Integrity, and limiting this Article XX.1 strictly to intellectual property issues.

In light of international progress on collective rights (for example, Article 8.j of the Convention on Biological Diversity), the question was raised as to whether this Article should be maintained as it stands in the IACHR proposal, which refers essentially to the traditional system of intellectual property rights. In terms of whether only *sui generis* protection regimes should be deemed appropriate, it was noted that many acts of piracy and appropriation of indigenous cultural heritage take place under cover of ordinary commercial law, and that there should be protection and guarantees in both legal spheres.

## **Article XXI. The right to development**

Some states expressed support for the Chair's proposal.

In response to the doubts expressed by some states about explicit recognition of this right in international law, indigenous representatives maintained that this was already clearly established, specifically in the Declaration on the Right to Development (United Nations 1986), the United Nations Millennium Declaration (specifically paragraph 24), the Rio Declaration (Principle 3) and the OAS Democratic Charter (Article 13), as well as in the appointment of a United Nations Special Rapporteur on this right. On this basis, an alternative drafting of Article XXI was proposed.

Debate on the value of different development models was wide-ranging and intense. The proposals put forth by indigenous representatives followed the general lines of the IACHR proposal, but with explicit emphasis on the right to development and its concrete expressions, several of which (education, health, language) are already covered in the previous articles.

One group of indigenous delegations asked that prior consent be included as a prerequisite for any project that would directly affect their interests or the resources of their habitat.

They asked that the article should be entitled "*Desarrollo propio con identidad*" [roughly, "Independent development with identity"]. On the other hand, one state proposed that this article be entitled "Opportunities for Development."

Government representatives said that, while they accepted the right to development as an individual and collective human right, the scope of that right was still under discussion in the respective Working Group of the United Nations and its human rights commission.

Several states indicated that they accepted the right of indigenous peoples to develop independently in terms of objectives and strategies, with full exercise of the right to free determination in their lands and territories.

One state also noted that in many cases Western-style development has had negative repercussions on indigenous resources, life and social organization, and pointed to the need to resolve conflicting priorities and objectives with a broad-based vision and with tolerance, in order to achieve forms of sustainable development for indigenous areas that are mutually acceptable.

An important difference arose with respect to Article XXI.2, regarding indigenous participation in decisions referring to any plan, program or project affecting them,<sup>10/</sup> as to whether: a) to adopt the position proposed by the IACHR, which establishes the requirement of prior, free and informed consent, and then establishes a standard of exceptions to consent when there are overwhelming public interest considerations; or b), as proposed by the Chair and some delegations, that "such decisions should be made through consultations conducted in good faith, with a view to achieving agreement or consent" (drafting along the lines of ILO Convention 169).

Indigenous delegations proposed complete wording based on the right to consent without exceptions. Other indigenous delegations agreed that there may be exceptions to the right to consent,

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10. One indigenous delegation proposed replacing it by "programs that could affect their lives or their cultures."

but they added the need for prior studies that would evaluate the social, spiritual, cultural, environmental, and economic impact, and the adoption of suitable measures and fair and effective remedies for prevention, mitigation, compensation, or reparations as appropriate.

It was also suggested that, instead of including the need for "serious, free, and informed consultation" in different articles of the eventual Declaration, there should be a general article in this respect, following the lead of the ILO Convention 169.

There was general consensus on including a paragraph to the effect that states must provide suitable means, without discrimination, for the self-development of indigenous peoples, as well as for the concept of effective participation by indigenous peoples in decisions affecting their development.

In summary, we may say that, with respect to this article, while there was some intense philosophical and historical debate, the issues to be settled with respect to the final text, apart from some important but relatively minor adjustments, are essentially these:

- a. Defining the scope of the right to development, and the final wording of the title of the article.
- b. The minimum standard necessary to justify exceptions to prior consent, in the case of activities that affect indigenous peoples.

#### **Section Six: General Provisions**

There were some differences between states with respect to the need to include these general provisions. While some states supported them in general, others raised doubts about the need to include them in a Declaration, since they referred to issues such as frontiers, sovereignty, and others that are fully covered in other instruments. Those states said that, as a Declaration, the important thing is the principal objective of inspiring countries to guarantee and implement a framework necessary for the identity and free development of indigenous peoples.

#### **Article XXII. Treaties, acts, agreements and constructive arrangements**

With respect to Article XXII, several indigenous representatives stressed its importance, since in many cases historic treaties are disregarded or not respected, and many current conflicts could be resolved if they were respected. They declared their interest in having the wording include several new elements:

- Good faith in compliance and interpretation.
- In judicial proceedings, the traditional indigenous interpretation should be given precedence.
- Those treaties belong to the international sphere and must be placed under the protection of impartial supra-national tribunals.
- The obligation of states to provide effective remedies against violations of the human rights of indigenous peoples.

- The possibility of establishing new treaties in the future between states and indigenous peoples for effective implementation of the rights recognized in this Declaration.

Some states raised concerns about any provision to the effect that treaties must be interpreted in accordance with their "spirit and intent," considering that it is up to the courts to decide the proper criteria for interpreting them.

One state proposed that instead of providing for recognition of historic treaties, states should commit themselves to implementing the obligations arising from them.

On this point, several states considered that the proposal of the Chair would improve the original, accepting the principle of good faith, and that, while domestic tribunals have primary jurisdiction, the respective international bodies would have complementary jurisdiction. Some states however raised difficulties with "recognizing treaties," and proposed that the text refer to implementing the obligations arising from them.

#### **Article XXIII.**

With respect to Article XXIII, to the effect that this Declaration does not diminish or extinguish existing or future indigenous rights, there was general agreement.

#### **Article XXIV.**

With respect to Article XXIV [sic], referring to respect for the boundaries of states, some indigenous delegations objected saying that this would establish a new border regime that would jeopardize free determination and the possibility of cross-border relations among indigenous peoples. Government delegations proposed, on the other hand, that it should be maintained, and that there should be a reference to internal borders (provincial, state, or departmental).

A change in order was proposed, placing Article XXIV before Article XXIII.

#### **Article XXVI.**

With respect to Article XXVI of the IACHR proposal, several government delegations and some indigenous delegations expressed their agreement. Other indigenous delegations indicated that this would impose a regime on the territorial integrity of states that would be discriminatory against indigenous peoples and their right to self-determination, and they proposed instead that this Article should refer in general to the principles of the United Nations Charter.

#### **Article XXVII.**

With respect to Article XXVII of the IACHR on implementation of the Declaration, several states raised problems with specifying mechanisms for monitoring the Declaration, and proposed instead wording to the effect that states should assume responsibility for giving effective application to the Declaration, and should develop policies and actions accordingly. Some states suggested that the IACHR proposal was more suitable to a treaty than to a declaration.

### **New Articles proposed in the Chair's text**

With respect to the new Article XXVII of the Chair, on respecting the constitutional principles of states, there was considerable controversy. Several states and indigenous delegations proposed eliminating it, while others delegations expressed their support for the wording in principle, but agreed that it needed improvement.

With respect to the new Article XXVIII of the Chair, on flexibility in ways of complying with the Declaration, in light of the particular conditions of each country, there were various positions. Some indigenous delegations declared their opposition to it, on the grounds that it would undermine the precepts of the Declaration. Several states stressed, on the other hand, the need for the Declaration to recognize the multiplicity of national realities and of indigenous realities, between countries and within countries.

There was general consensus to include a new article recognizing the importance of avoiding discrimination based on considerations of gender.

### **Section II. Human rights<sup>11/</sup>**

Several countries indicated that they were favorably disposed to the wording proposed by the Chair. Some of them requested mention of ILO Convention 169, and others agreed that the concept of self-determination should be included, on the basis of specific proposals that would clarify its scope and interpretation.

Several states, however, pointed to difficulties with the meaning of the term "free determination," arising from its relationship to the process of decolonization. Other states had no problem in accepting it, since they felt that the prevailing interpretation in international law is that it is within existing states that it is exercised, except in cases where states are not organized to respect human rights and the exercise of free determination.

In general, indigenous representatives stressed that these articles must be seen as key to the entire Declaration and that they must give preeminence and clear recognition to collective human rights in their various expressions, and that they arise from the right to free determination, which must be recognized without limit, as in common Article 1 of the Universal Human Rights Covenants.

With respect to collective rights, one state delegation proposed that reference be made to ILO Convention 169, to give them greater juridical support at the international level. Similarly, another state proposed that the title should read "fundamental human rights of indigenous peoples."

States and indigenous peoples agreed on eliminating the *caveat* of Article 1.3 with respect to the scope of the term "peoples."

Another issue raised refers to Article III on the right of individuals and communities to belong to an indigenous people. Several indigenous delegations insisted that the right of an individual or community to belong to an indigenous people must be based not only on self-identification with that people, but also on acceptance of such membership by that people, in

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11. The second section was examined during first reading in the First Special Session of the Working Group (2001). The Articles of this section were examined as a whole.

accordance with its customs and traditions. The Chair explained that both the Article proposed by IACHR and that revised by the Chair in fact specify those two requirements as necessary for the right to belong.

Several indigenous delegations requested elimination of the proposed Article IV on the legal status of communities, maintaining that their legal personality does not depend on the decisions of states, and that at the very least the reference to "within their systems" should be removed. On the other hand, some indigenous delegations proposed maintaining this reference, while making it clear that recognition of collective indigenous personality by the state is based on their historic reality and inherent rights.

With respect to Article VI, against discrimination, one government delegation proposed that existing international formulas should be applied.

Several states stressed the need to use internationally accepted formulas for basic concepts such as those dealt with in this section, with a constant view to facilitating harmonious relations between states and indigenous peoples.

### **Preamble**

There were a series of substantive proposals. One was to include definitions of the principal terms used in the preamble, while another was to include in it a statement to the effect that indigenous peoples enjoy the right to free determination.

Several indigenous peoples also requested retention of the original version of the paragraph referring to "Security and Indigenous Areas," as it relates to the activity of armed forces in those areas.

One country proposed that an effort should be made to avoid references to internal law for limiting its scope, and that the Declaration and its preamble should present fundamental principles for moving forward in providing recognition and guarantees to indigenous peoples.

### **Closing session**

Because of a heavy snowfall, the closing session was held on the evening of Thursday February 27. At the outset, two representatives selected by the indigenous leaders present, Lourdes Tiban for the indigenous peoples of South America and Danielle Lawson for those of North America, presented their conclusions and recommendations.

Ms. Lawson, speaking on behalf of the indigenous caucus, presented a series of conditions and methods considered necessary for future negotiation of the Declaration, with particular emphasis on the need for the consent of the peoples involved with respect to its outcomes; there must also be clear criteria for participation by indigenous representatives in the negotiations; there must be transparency and publicity for the exchanges, including video transmission by Internet. She also requested that more detailed summaries of the session should be published.



She also insisted that there should be national consultations between governments and indigenous peoples in member states, that each country should report to the Chair on those consultations, and that such a report should include indigenous proposals. She urged that all such material should be made available to indigenous delegations at the next special session.

She also said that the negotiations should not be conducted on the basis of isolated articles, but rather as a consistent whole. She stressed that it was important for States to send representatives to the negotiating sessions who had the authority to take decisions.

Lourdes Tiban referred to the progress achieved in the session and the hope that this participation would be maintained in the new negotiating stage. She also indicated that free determination is an essential human right of indigenous peoples, and indeed should be the very foundation of such a Declaration.

She also urged that there should be maximum publicity for the process, so that the grass-roots can understand the process and provide opinions and feedback to their representatives. She noted that in Ecuador, the political accord between the supreme State authorities and indigenous peoples with respect to this process made it possible to establish common parameters for the final stage

The rapporteur for the special session, Dr. Osvaldo Kreimer, offered a preliminary summary of the highlights of the discussions, which are presented and specified in this report.

The Assistant Secretary General, Luigi Einaudi, after stressing the full support of the General Secretariat for this process, recalled the principal points made during the debate, in particular the special character of the relationship of indigenous peoples to their lands and resources, and the importance of respecting and recognizing their choice of their own lifestyle and their own path to economic development. He also noted that this Declaration is part of the broader context of the OAS Charter and the Inter-American Democratic Charter.

He highlighted four ideas that had been expressed during the special session: the need for reciprocal consultations between States and indigenous peoples; the importance of rediscovering the true capital of our societies; the need to adapt education policies and policies for the administration of justice and government to the reality of indigenous peoples; and the fact that political democracy must be a reflection of the social makeup of our peoples, which is multicultural and multiethnic.

Finally, in closing the special session, the Chair of the Working Group and Head of the Permanent Mission of Peru to the OAS, Ambassador Eduardo Ferrero Costa, assured indigenous representatives that their proposals would be considered by the Working Group, since they reflected a healthy desire to continue working together to achieve recognition of the rights of the indigenous peoples of the Americas.

In this respect, he noted that for many members States of the OAS, this process does not necessarily have to depend on progress in the United Nations. We believe that there are common elements and that there must be similar concepts, but the realities are not exactly the same. We believe there are elements that relate more directly to the countries of the Americas and their peoples than to the international community as a whole.

He said that there are major points of consensus that need to be highlighted and that we are nearing the end of this stage of the process, which has been a very positive stage, with characteristics that we must recognize, very briefly, in this closing session: a dialogue of high quality, a frank, transparent, constructive, responsible dialogue, with specific proposals that will allow us to identify a series of aspects in which there is consensus in principle, as well as points of difference where further effort is needed to arrive in due course at consensus among States, with broad participation by the representatives of indigenous peoples.

He stressed the validity of this Declaration and its importance within the OAS context. He mentioned creation of the Specific Fund of voluntary support that allows for broad participation by representatives of indigenous peoples in the special sessions. He noted that we are completing one stage, and are beginning a new stage, in which we have the full political will of the OAS member states, as well as of indigenous representatives, and that in both cases they are acting with maturity, with seriousness, with good will, with good faith, and with transparency.

The Chair of the Working Group, in his personal capacity and without committing member states, briefly summarized some of the elements that would go into the initial structuring of the new stage of the process. In the first place, he was willing to prepare an informal and noncommittal document containing a new, unofficial text of the Chair, using as elements of judgment the important contributions made during the three special sessions by the representatives of indigenous peoples and states.

In the second place, he considered it very important to encourage national consultations, an objective that was already referred to in the resolution of the General Assembly meeting in Barbados. In the third place, he felt it was essential for the OAS General Assembly to adopt a new resolution in June, renewing and expanding that mandate and reiterating its political priority, and establishing the way ahead towards approval of the American Declaration on the Rights of Indigenous Peoples.

He insisted that the dialogue would have to be very frank, very simple, with no prior conditions, with mutual understanding and the search for consensus, relying on the political will and the good faith that all parties have demonstrated. As examples of substantive progress, he pointed to the treatment of basic concepts such as the principle of free determination of indigenous peoples, which today is much more advanced as a concept than it was only one, two or three years ago.

He insisted that there has been sufficient progress made that we can look ahead optimistically to the arduous and complex task ahead of us, with the assurance that we will be able to conclude that work within a reasonable time frame, without pressure to take premature or ill-advised decisions. He then thanked all the participants and collaborators, as well as the states that have contributed to the Specific Fund, the indigenous organizations based in Washington that have provided so much help, the leaders of the indigenous peoples, the interpreters, the support team, and of course the indigenous peoples and states themselves. In his closing words, he said: "We view the future with optimism and with the conviction that we shall achieve the objective of having a legitimate American Declaration on the Rights of Indigenous Peoples in the Americas."