American Declaration on the Rights of Indigenous Peoples: A Consensus Regional Human Rights Instrument

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In June 2016, the *American Declaration on the Rights of Indigenous Peoples*[1] ("*American Declaration*") was **adopted by consensus** pursuant to a resolution of the General Assembly of the Organization of American States.[2] At the time of the adoption of the *American Declaration*, three States –United States, Canada, and Colombia – made statements that they requested be included as footnotes.[3]

Article 81 of the OAS Rules of Procedure of the General Assembly enables member States to make a statement and have it recorded in the minutes for such session.[4] Apparently, it has become a regular practice that States also request that their statements be added in footnotes to the operative text.

All three statements include some positive and supportive content in relation to Indigenous Peoples.[5] At the same time, there are other aspects worth examining. It is important to determine if such statements enable the States concerned to avoid or lessen, in some way, the standards affirmed in the *American Declaration*.

The right of OAS States to include statements in footnotes in the *American Declaration* does not mean that whatever any State may declare in its statement is legally valid. The legal implications of the statements by **United States, Canada and Colombia** will each be examined below. The analysis concludes that nothing in the statements of these three States can be validly invoked to avoid or reduce the standards in the *American Declaration*, *United Nations Declaration on the Rights of Indigenous Peoples*[6] or other international law.

These three States were among the co-sponsors of a UN Human Rights Council resolution on "Human rights and indigenous peoples" that was adopted by consensus in September 2016.[7] The

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[1] *American Declaration on the Rights of Indigenous Peoples*, AG/RES. 2888 (XLVI-O/16), adopted without vote by Organization of American States, General Assembly, 46th sess., Santo Domingo, Dominican Republic, 15 June 2016
[2] See also "Plan of Action on the American Declaration on the Rights of Indigenous Peoples (2017-2021)", AG/RES. 2913 (XLVII-O/17), OAS General Assembly, Cancún, Mexico, adopted June 20, 2017.
[3] In regard to such statements in the *American Declaration*, see footnote 1 (United States of America); footnote 2 (Canada), and footnotes 3, 4 and 5 (Colombia).
[4] "Rules of Procedure of the General Assembly", in *Amendments to the Rules of Procedure of the General Assembly*, OEA/Ser.P, AG/RES. 1737, 5 June 2000, Annex, Article 81 (Reservations and statements).
[5] In regard to the current capitalization of "Indigenous Peoples", see, *e.g.*, XVI. FOLLOW-UP ON THE IMPLEMENTATION OF THE AMERICAN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES AND THE PLAN OF ACTION ON THE AMERICAN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (2022-2026), https://www.oas.org/en/council/AG/ResDec/.
[6] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295 (Annex), UN GAOR, 61st Sess., Supp. No. 49, Vol. III, UN Doc. A/61/49 (2008) 15.
[7] Human Rights Council, *Human rights and indigenous peoples*, UN Doc. A/HRC/RES/33/13 (29 September 2016) (adopted without a vote).

preamble reaffirms support for the *UN Declaration* and **recognizes "current efforts towards the promotion, protection and fulfilment of the rights of indigenous peoples, including the adoption of the American Declaration on the Rights of Indigenous Peoples"**.[8]

The Human Rights Council has repeatedly reaffirmed that "regional arrangements play an important role in promoting and protecting human rights and *should reinforce universal human rights standards, as contained in international human rights instruments*".[9]

In 2008, shortly before being named as UN Special Rapporteur on the rights of Indigenous peoples, James Anaya emphasized to the OAS Working Group: "The American declaration should build on the body of norms provided in the UN [Declaration] and certainly not articulate a lower standard. … To do so would render the American declaration juridically and politically flawed".[10]

1. United States

In **Footnote 1** of the *American Declaration*, the United States reiterates its support for the *UN Declaration*. Yet the U.S. position becomes highly problematic when the footnote adds:

> The United States has, however, **persistently objected** to the text of this American Declaration, which is not itself legally binding and therefore does not create new law, and is not a statement of Organization of American States (OAS) Member States' obligations under treaty or customary international law.[11]

Such "persistent objection" appears to have been initiated in April 2007, when the United States issued the following "general reservation":

> The United States Government noted at the beginning of this session that it took a **general reservation** to all of the text under discussion during the 10th Meeting of the Working Group, and that it would not join in any text that might be approved or otherwise appear in the Record of the Current Status of the Draft American Declaration on the Rights of Indigenous Peoples arising from the Tenth Meeting of the Working Group and in the Report of the Chair."[12]

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[8] Emphasis added.

[9] See, *e.g.*, Human Rights Council, *Regional arrangements for the promotion and protection of human rights*, UN Doc. A/HRC/RES/30/3 (1 October 2015) (without a vote), preamble (emphasis added).

[10] S. James Anaya, Presentation, April 14, 2008, in Organization of American States (Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples), "Report of the Chair on the Eleventh Meeting of Negotiations in the Quest for Points of Consensus (United States, Washington, D.C., April 14 to 18, 2008)", OEA/Ser.K/XVI, GT/DADIN/doc. 339/08, 14 May 2008, Appendix III, 23 at 26.

[11] Emphasis added. The **United States position on persistent objection is inaccurate**. A number of provisions in the *American Declaration* are the same or similar to those in the *UN Declaration* – which instrument the U.S. has repeatedly endorsed. See also Antonio Cassese, *International Law*, 2nd ed. (Oxford/N.Y.: Oxford University Press, 2005), at 163: "… there is no firm support in State practice and international case law for a rule on the 'persistent objector'."

[12] Emphasis added. Organization of American States (Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples), *Record of the Current Status of the Draft American Declaration on the Rights of*

However, the OAS Rules of Procedure of the General Assembly limit “reservations” to treaties or conventions and solely allows “statements” to be made to “declarations”**.** As indicated in article 81: “Any delegation that wishes to make a *reservation or statement with respect to a treaty* or convention, or *a statement regarding a resolution of the General Assembly*, shall communicate the text thereof to the Secretariat, so that the latter may distribute it to the delegations no later than at the plenary session at which the instrument in question is to be voted upon. Such reservations and statements shall appear along with the treaty or convention or, in the case of a resolution, in the corresponding minutes.”[13]

The “persistent objection” of the United States has been based on a “general reservation” since 2007 – and the *rules are clear that such reservations solely apply to conventions, not declarations*. Therefore, the U.S. claim of being a “persistent objector” to the *American Declaration* is illegal and cannot be relied upon.

It is also worth noting that a number of provisions in the *American Declaration* are identical to those in the *UN Declaration on the Rights of Indigenous Peoples*. The United States endorsed the *UN Declaration* in December 2010.

Therefore, in “Follow-up on the American Declaration on the Rights of Indigenous Peoples and on the Plan of Action of the American Declaration on the Rights of Indigenous Peoples (2017-2021)”, it is a serious and inaccurate contradiction for the United States to state in a footnote: “The United States does not join consensus on this section of the resolution, consistent with our persistent objections to the American Declaration on the Rights of Indigenous Peoples …”[14]

Further, at the Inter-American Meeting on the Implementation of the American Declaration on the Rights of Indigenous Peoples in Antigua, Guatemala, March 22, 2023, States agreed on the “CONSENSUS DOCUMENT ON THE WORKING GROUP TO FOLLOW UP ON THE IMPLEMENTATION OF THE AMERICAN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES”.[15]

2. Canada

In its statement in **footnote 2** in the *American Declaration*, the government of Canada positively reiterated its “commitment to a renewed relationship with its Indigenous peoples, based on recognition of rights, respect, co-operation and partnership.”

Further, Canada indicated: “As Canada has not participated substantively in recent years in

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Indigenous Peoples (Outcomes of the Ten Meetings of Negotiations in the Quest for Points of Consensus, held by the Working Group), OEA/Ser.K/XVI, GT/DADIN/doc.301/07 (27 April 2007), at 23 (Statement of the United States).

[13] Emphasis added. The above limitation is consistent with the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 U.N.T.S. 331 (entered into force 27 January 1980), article 2(1): “1. For the purposes of the present Convention: … *(d)* "Reservation" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State”.

[14] See also footnote 9, *supra*.

[15] Capitals used in original text.

negotiations on the American Declaration on the Rights of Indigenous Peoples, it is not able at this time to take a position on the proposed text of this Declaration. Canada is committed to continue working with our partners in the OAS on advancing Indigenous issues across the Americas."

This statement does not diminish in any way the consensus relating to the *American Declaration*. If Canada or the United States had wished to vote against the *American Declaration*, it would have had to call for a vote and then vote against the adoption of the *Declaration* by the OAS General Assembly. Since no vote was requested by any member State, **the *American Declaration* was adopted by the OAS by consensus.**

Global Affairs Canada (GAC) was mandated to address the *American Declaration* well prior to its adoption by the OAS. However, during the years of negotiations, GAC repeatedly failed to substantively engage with Indigenous Peoples from Canada in any fair and honourable manner. Further, it is deeply disturbing that **Global Affairs Canada has continued to stall for the past seven years** since the OAS adopted the *American Declaration*. In my respectful view, such ongoing failure and refusal to implement Canada's human rights responsibilities can only be described as bad faith.[16]

Yet on its website, GAC affirms a more principled approach:

> Global Affairs Canada's Action Plan on Reconciliation with Indigenous Peoples provides a framework to guide the department's efforts to advance the rights, perspectives and prosperity of Indigenous peoples in Canada and around the world, from 2021 to 2025. It aims to assist our officials to deliver upon these commitments, both in Canada and abroad. Progress will be assessed on an annual basis.
>
> Walking on the path of reconciliation means enhancing Global Affairs Canada's engagement with Indigenous peoples in Canada and globally. It involves listening to, learning from, and working in partnership with First Nations, Inuit and Métis peoples in Canada, as well as with Indigenous peoples around the world. It requires us to strengthen our understanding of, and respect for, the rights, histories, traditions, cultures, languages and perspectives of Indigenous peoples. And it demands a commitment to address the unique challenges and systemic racism that Indigenous peoples continue to face, including in Canada and in our workplace."[17]

[16] See also *First Nations Child and Family Caring Society of Canada* v. *Canada (Attorney General)*, 2012 FC 445, para. 246. It is important to emphasize here that human rights legislation has been described as "...the final refuge of the disadvantaged and the disenfranchised": *Zurich Insurance Co. v. Ontario (Human Rights Commission)* [1992] 2 S.C.R. 321, at para. 18. The Supreme Court of Canada has repeatedly warned of the dangers of strict or legalistic interpretative approaches that would restrict or defeat the purpose of such a quasi-constitutional document: see, *e.g. Canada (A.G.) v. Mossop*, [1993] 1 S.C.R. 554 at 613, per Justice L'Heureux-Dubé J., dissenting (but not on this point). Rather, the task of the Court is to "breathe life, and generously so, into the particular statutory provisions [in issue]": *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571 at para. 7.

[17] See Global Affairs Canada, Global Affairs Canada's Action Plan on Reconciliation with Indigenous Peoples – 2021-2025, https://www.international.gc.ca/transparency-transparence/indigenous-reconciliation-autochtones/index.aspx?lang=eng.

As affirmed in *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*: "respect for human rights, the rule of law and democracy are **underlying principles of the Constitution of Canada** which are interrelated, interdependent and mutually reinforcing and are also recognized in international law".[18] A significant part of the rule of law is the *American Declaration on the Rights of Indigenous Peoples*. Canada cannot continue to evade its legal responsibilities to implement this consensus human rights instrument.

Canada must now take concrete steps, in consultation and cooperation with Indigenous Peoples in Canada, to fully implement this regional human rights instrument. This is especially urgent, since **the *American Declaration* and the *UN Declaration* must now be read together**. In this regard, Article XLI of the *American Declaration* provides:

> The rights recognized in this Declaration and the United Nations Declaration on the Rights of Indigenous Peoples constitute the minimum standards for the survival, dignity, and well-being of the indigenous peoples of the Americas."

Further, it is important to highlight here that human rights legislation in Canada – including the federal *Act respecting the United Nations Declaration on the Rights of Indigenous Peoples* cited above – has a "quasi-constitutional" status. As elaborated in Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed.:

> ***Special status of human rights legislation.*** Since the Supreme Court of Canada's decision in *Insurance Corporation of British Columbia* v. *Heerspink*,[19] legislation enacted to protect human rights has been **recognized as having a quasi-constitutional status**. This has several implications.
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> (1) Human rights legislation is given a **liberal and purposive interpretation**. Protected rights receive a broad interpretation, while **exceptions and defences are narrowly construed**.
>
> (2) In responding to general terms and concepts, the approach is organic and flexible. The key provisions of the legislation are adopted **not only to changing social conditions but also to evolving conceptions of human rights**.
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> (3) In cases of conflict or inconsistency with other types of legislation, the human rights legislation **prevails regardless of which is more specific and which was enacted first**.[20]

This quasi-constitutional status of human rights legislation in Canada is further reinforced,

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[18] *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*, S.C. 2021, c. 14, preamble. [Emphasis added]

[19] *Insurance Corporation of British Columbia* v. *Heerspink et al.*, [1982] 2 S.C.R. 145, at 157-158: "… **short of that legislature speaking to the contrary in express and unequivocal language in the Code or in some other enactment, it is intended that the Code supersede all other laws when conflict arises**." Emphasis added.

[20] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ontario: LexisNexis Canada, 2014), at 597, §19.1. Emphasis added.

when addressing the Aboriginal and Treaty rights of Indigenous Peoples. As enshrined in section 35(1) of the *Constitution Act, 1982*[21]: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

3. Colombia

In regard to the *American Declaration*, Colombia's statements in two of its three footnotes addresses provisions that include "free, prior and informed consent" (FPIC) or "consent" of Indigenous Peoples. While each of Colombia's three footnotes indicate that "Colombia breaks with consensus", such statements have no legal effect. It is important to underline here that Colombia did not choose to call for a vote on the *American Declaration* as elaborated in the OAS Rules of Procedure of the General Assembly.

Contrary to Colombia's statements, FPIC or "consent' is not the same as a veto. "Veto" implies complete and arbitrary power, regardless of the facts and law in any given case. The term "veto" is not used in the *American Declaration* or the *UN Declaration*. In the context of resource development on Indigenous Peoples' lands and territories, "consent" is an important safeguard against widespread abuses and is a human right.[22]

While Colombia relies on the Colombia Constitutional Court for its position against FPIC, the same Court has also made statements in favour of consent:

> The CCC [Colombia Constitutional Court] has held that, in view of particularly adverse effects on the collective territory of Indigenous Peoples, the **duty to ensure their participation is not exhausted by consultation. Rather, their free, informed, and express consent must be obtained as a precondition** for the measure (CCC Judgment T-376 of 2012; and Judgment T-704 of 2016).[23]

In addition, to date, the UN General Assembly has reaffirmed by consensus at least six (6) times the "importance of free, prior and informed consent, as outlined in the United Nations Declaration on the Rights of Indigenous Peoples".[24]

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[21] Schedule B to the *Canada Act, 1982*, (U.K.), 1982, c. 11.

[22] At that time, see, *e.g.*, Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Addendum: The situation of indigenous peoples in Canada*, UN Doc. A/HRC/27/52/Add.2 (4 July 2014), Annex, para. 98 (Conclusions): "In accordance with the Canadian constitution and relevant international human rights standards, *as a general rule* resource extraction should not occur on lands subject to aboriginal claims without adequate consultations with and the free, prior and informed consent of the indigenous peoples concerned." [emphasis added]. Such processes of consultations and consent are markedly different from an arbitrary veto.

[23] José Alwyn & Pablo Policzer, "No Going Back: Impact of ILO Convention 169 on Latin America in Comparative Perspective", Faculty of Arts, Latin American Research Centre, University of Calgary, April 2020, https://www.policyschool.ca/wp-content/uploads/2020/04/final_No-Going-Back-Aylwin-Policzer.pdf, at 6 (Colombia).

[24] See General Assembly, *Rights of Indigenous Peoples*, UN Doc. A/RES/77/203 (16 December 2022) (adopted without vote), preamble; General Assembly, *Rights of indigenous peoples*, UN Doc. A/RES/76/148 (16 December 2021) (adopted without vote), preamble; General Assembly, *Rights of indigenous peoples*, UN Doc. A/RES/74/135 (18 December 2020) (adopted without vote), preamble; General Assembly, *Rights of indigenous peoples*, UN Doc. A/RES/74/135 (18 December 2019 (adopted without vote), preamble; General Assembly, *Rights of indigenous*

For further analysis of the statements made by United States, Canada and Colombia, see also Paul Joffe, "Advancing Indigenous Peoples' Human Rights: New Developments in the Americas", January 4, 2017, http://quakerservice.ca/wp-content/uploads/2017/03/Advancing-IPs-Human-Rts-New-Devts-in-the-Americas-Joffe-FINAL-Jan-4-17.pdf

Annex: Statements of United States of America, Canada and Colombia

The following statements were included as footnotes to the text of the *American Declaration on the Rights of Indigenous Peoples*.

Further, Colombia added an Annex 1 (*infra*), which includes three Notes of Interpretation.

1. Government of United States of America

Footnote 1. The United States remains committed to addressing the urgent issues of concern to indigenous peoples across the Americas, including combating societal discrimination against indigenous peoples and individuals, increasing indigenous participation in national political processes, addressing lack of infrastructure and poor living conditions in indigenous areas,

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peoples, UN Doc. A/RES/73/156 (17 December 2018) (adopted without vote), preamble; General Assembly, *Rights of indigenous peoples*, UN Doc. A/RES/72/155 (19 December 2017) (adopted without vote), preamble [emphasis added].

See also *American Declaration on the Rights of Indigenous Peoples*, Article XIII Right to cultural identity and integrity:

> 1. Indigenous peoples have the right to their own cultural identity and integrity and to their cultural heritage, both tangible and intangible, including historic and ancestral heritage; and to the protection, preservation, maintenance, and development of that cultural heritage for their collective continuity and that of their members and so as to transmit that heritage to future generations.
>
> 2.States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual **property taken without their free, prior and informed consent** or in violation of their laws, traditions and customs.

And at Article XXIII, Contributions of the indigenous legal and organizational systems:

> 1. Indigenous peoples have the right to full and effective participation in decision-making, through representatives chosen by themselves in accordance with their own institutions, in matters which affect their rights, and which are related to the development and execution of laws, public policies, programs, plans, and actions related to indigenous matters.
>
> 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions **in order to obtain their free, prior and informed consent** before adopting and implementing legislative or administrative measures that may affect them.[24/]

combating violence against indigenous women and girls, promoting the repatriation of ancestral remains and ceremonial objects, and collaborating on issues of land rights and self-governance, among many other issues. The multitude of ongoing initiatives with respect to these topics provide avenues for addressing some of the consequences of past actions. The United States has, however, persistently objected to the text of this American Declaration, which is not itself legally binding and therefore does not create new law, and is not a statement of Organization of American States (OAS) Member States' obligations under treaty or customary international law.

The United States reiterates its longstanding belief that implementation of the United Nations Declaration on the Rights of Indigenous Peoples ("UN Declaration") should remain the focus of the OAS and its Member States. OAS Member States joined other UN Member States in renewing their political commitments with respect to the UN Declaration at the World Conference on Indigenous Peoples in September 2014. The important and challenging initiatives underway at the global level to realize the respective commitments in the UN Declaration and the outcome document of the World Conference are appropriately the focus of the attention and resources of States, indigenous peoples, civil society, and international organizations, including in the Americas. In this regard, the United States intends to continue its diligent and proactive efforts, which it has undertaken in close collaboration with indigenous peoples in the United States and many of its fellow OAS Member States, to promote achievement of the ends of the UN Declaration, and to promote fulfillment of the commitments in the World Conference outcome document. Of final note, the United States reiterates its solidarity with the concerns expressed by indigenous peoples concerning their lack of full and effective participation in these negotiations.

2. Government of Canada

Footnote 2. Canada reiterates its commitment to a renewed relationship with its Indigenous peoples, based on recognition of rights, respect, co-operation and partnership. Canada is now fully engaged, in full partnership with Indigenous peoples in Canada, to move forward with the implementation of the UN Declaration on the Rights of Indigenous Peoples in accordance with Canada's Constitution. As Canada has not participated substantively in recent years in negotiations on the American Declaration on the Rights of Indigenous Peoples, **it is not able at this time to take a position on the proposed text of this Declaration**. Canada is committed to continue working with our partners in the OAS on advancing Indigenous issues across the Americas.

3. Government of Colombia

Footnote 3. The State of Colombia **breaks with consensus** as regards Article XXIII, paragraph 2, of the OAS Declaration on Indigenous Peoples, which deals with consultations for obtaining indigenous communities' prior, free, and informed consent before adopting and enforcing legislative or administrative measures that could affect them, in order to secure their free, prior, and informed consent.

This is because Colombian law defines such communities' right of prior consultation in accordance with ILO Convention No. 169. Thus, the Colombian Constitutional Court has ruled that the consultation process must be pursued "with the aim of reaching an agreement or securing the consent of the indigenous communities regarding the proposed legislative measures." It must be noted that this does not translate into the ethnic communities having the power of veto over measures affecting them directly whereby such measures cannot proceed without their consent; instead, it means that following a disagreement "formulas for consensus-building or agreement with the community" must be presented.

Moreover, the Committee of Experts of the International Labour Organization (ILO) has established that prior consultation does not imply the right to veto state decisions, but is rather a suitable mechanism for indigenous and tribal peoples to enjoy the right of expression and of influencing the decision-making process.

Accordingly, and in the understanding that this Declaration's approach to prior consent is different and could amount to a possible veto, in the absence of an agreement, which could bring processes of general interest to a halt, the contents of this article are unacceptable to Colombia.

Footnote 4. The State of Colombia **breaks with consensus** as regards Article XXIX, paragraph 4, of the OAS Declaration on Indigenous Peoples, which deals with consultations for obtaining indigenous communities' prior, free, and informed consent before approving projects that could affect their lands or territories and other resources.

This is because although the Colombian State has included in its legal order a wide range of rights intended to recognize, guarantee, and uphold the constitutional rights and principles of pluralism and ethnic and cultural diversity in the nation within the framework of the Constitution, the recognition of the collective rights of indigenous peoples is regulated by legal and administrative provisions, in line with the objectives of the State and with principles such as the social and ecological function of property and the state ownership of the subsoil and nonrenewable natural resources.

Accordingly, in those territories indigenous peoples exercise their own political, social, and judicial organization. By constitutional mandate, their authorities are recognized as public state authorities with special status and, as regards judicial matters, recognition is given to the special indigenous jurisdiction, which represents notable progress compared to other countries of the region.

In the international context, Colombia has been a leader in enforcing the rules governing prior consultation set out in Convention No. 169 of the International Labour Organization (ILO), to which our State is a party.

In the understanding that this Declaration's approach to prior consent is different and could amount to a possible veto on the exploitation of natural resources found in indigenous territories, in the absence of an agreement, which could bring processes of general interest to a halt, the contents of this article are unacceptable to Colombia.

In addition, it is important to note that the constitutions of many states, including Colombia, stipulate that the subsoil and nonrenewable natural resources are the property of the State to preserve and ensure their public usefulness to the benefit of the entire nation. For that reason, the provisions contained in this article are contrary to the domestic legal order of Colombia, based on the national interest.

Footnote 5. The State of Colombia **breaks with consensus** as regards Article XXX, paragraph 5, of the OAS Declaration on Indigenous Peoples, since according to the mandate contained in the Constitution of Colombia, the security forces are obliged to be present in any part of the nation's territory to provide and uphold protection and respect for all inhabitants' lives, honor, and property, both individually and collectively. The protection of the rights and integrity of indigenous communities depends largely on the security of their territories.

Thus, in Colombia the security forces have been given instructions to observe the obligation of protecting indigenous peoples. Accordingly, the provision of the OAS Declaration on Indigenous Peoples under examination would be in breach of the principle of need and effectiveness of the security forces, hindering the performance of their institutional mission, which renders it unacceptable to Colombia.

ANNEX I

NOTES OF INTERPRETATION FROM THE DELEGATION OF COLOMBIA

INTERPRETATIVE NOTE No. 1
OF THE STATE OF COLOMBIA WITH RESPECT TO ARTICLE VIII OF THE OAS DECLARATION ON INDIGENOUS PEOPLES:

As regards Article VIII, on the right to belong to indigenous peoples, Colombia expressly declares that the right to belong to one or more indigenous peoples is to be governed by the autonomy of each indigenous people.

This is pursuant to Article 8.2 of ILO Convention 169: "These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle."

It is important to specify that when a person shares different indigenous origins—in other words, when his or her mother belongs to one ethnic group and his or her father belongs to another (to give just one example)—his or her belonging to one or another of those indigenous peoples may only be defined according to the traditions involved. In other words, to determine an individual's belonging to a given indigenous people, the cultural patterns that determine family ties, authority, and ethnic attachment must be examined on a case-by-case basis.

A case of contact between two matrilineal traditions is not the same as a contact between a matrilineal tradition and a patrilineal one. Similarly, the jurisdiction within which the individual lives, the obligations arising from the regime of rights contained in that jurisdiction, and the socio-geographical context in which he or she specifically carries out his or her everyday cultural and political activities must be established.

The paragraph to which this note refers is transcribed below:

ARTICLE VIII
RIGHT TO BELONG TO THE INDIGENOUS PEOPLES

"Indigenous persons and communities have the right to belong to one or more indigenous peoples, in accordance with the identity, traditions, customs, and systems of belonging of each people. No discrimination of any kind may arise from the exercise of such a right."

INTERPRETATIVE NOTE No. 2

OF THE STATE OF COLOMBIA WITH RESPECT TO ARTICLE XIII, PARAGRAPH 2, ARTICLE XVI, PARAGRAPH 3, ARTICLE XX, PARAGRAPH 2, AND ARTICLE XXXI, PARAGRAPH 1, OF THE OAS DECLARATION ON INDIGENOUS PEOPLES.

As regards the idea of sacred sites and objects referred to in Article XIII, paragraph 2, Article XVI, paragraph 3, Article XX, paragraph 2, and Article XXXI, paragraph 1, of the OAS Declaration on Indigenous Peoples, the Colombian State expressly declares that the determination and regulation of indigenous peoples' sacred sites and objects is to be governed by the developments attained at the national level. This is because there is no internationally accepted definition and since neither Convention 169 of the International Labour Organization (ILO) nor the United Nations Declaration on the Rights of Indigenous Peoples make reference to or define those terms.

On this matter, Colombia has been making progress with the regulation of that issue, and that progress has involved and will continue to involve the participation of the indigenous peoples and it will continue to advance toward that goal in accordance with the Colombian legal order and, when appropriate, with the applicable international instruments.

The paragraphs to which this note refers are transcribed below:

ARTICLE XIII
RIGHT TO CULTURAL IDENTITY AND INTEGRITY

2. "States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs."

ARTICLE XVI
INDIGENOUS SPIRITUALITY

3. "Indigenous Peoples have the right to preserve, protect, and access their sacred sites, including their burial grounds; to use and control their sacred objects relics, and to recover their human remains." (Approved on April 24, 2015 – Seventeenth Meeting of Negotiations in the Quest for Points of Consensus.)

ARTICLE XX
RIGHTS OF ASSOCIATION, ASSEMBLY, AND FREEDOM OF EXPRESSION AND THOUGHT

2. "Indigenous peoples have the right to assemble on their sacred and ceremonial sites and areas. For this purpose they shall have free access and use to these sites and areas." (Approved on January 18, 2011 – Thirteenth Meeting of Negotiations in the Quest for Points of Consensus.)

ARTICLE XXXI

1. “The states shall ensure the full enjoyment of the civil, political, economic, social, and cultural rights of indigenous peoples, as well as their right to maintain their cultural identity, spiritual and religious traditions, worldview, values and the protection of their religious and cultural sites, and human rights contained in this Declaration.”

INTERPRETATIVE NOTE No. 3
OF THE STATE OF COLOMBIA WITH RESPECT TO ARTICLE XIII, PARAGRAPH 2, OF THE OAS DECLARATION ON INDIGENOUS PEOPLES:

The State of Colombia expressly declares that of indigenous peoples’ right to promote and develop all their communication systems and media is subject to the requirements and procedures established in the current domestic regulations.

The paragraph to which this note refers is transcribed below:

ARTICLE XIV
SYSTEMS OF KNOWLEDGE, LANGUAGE AND COMMUNICATION

3. “Indigenous peoples have the right to promote and develop all their systems and media of communication, including their own radio and television programs, and to have equal access to all other means of communication and information. The states shall take measures to promote the broadcast of radio and television programs in indigenous languages, particularly in areas with an indigenous presence. The states shall support and facilitate the creation of indigenous radio and television stations, as well as other means of information and communication.”