NOTE ON EXISTING MECHANISMS FOR PARTICIPATION OF OBSERVERS IN THE WORK OF THE WIPO INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE

Prepared by the Secretariat of
the World Intellectual Property Organization

October 10, 2011

INTRODUCTION

The Member States of WIPO have repeatedly stressed the importance attached to facilitating and enhancing the participation of observers in the work of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC). Since its inception, the IGC has undertaken a number of steps addressing both direct participation of observers in its process and their capacity-building needs for meaningful engagement in the work of the IGC.

The WIPO General Assembly, at its Fortieth (20th Ordinary) Session, held from September 26 to October 5, 2011, agreed on the mandate for the IGC for the 2011-2013 biennium. The WIPO General Assembly further invited the IGC to review its procedures with a view to "enhancing the positive contribution of observers" to the IGC process. In order to facilitate this review, the Secretariat of WIPO was requested to prepare a study on the participation of observers in the work of the IGC. According to the decision of the General Assembly, the study should outline "current practices and potential options" in this regard.

The current Note is intended to assist IGC participants to provide inputs to the WIPO Secretariat in the preparation of the study. The Note outlines and provides background information on past or existing modalities that either facilitate the direct participation of observers in the work of the IGC or strengthen their capacity to contribute effectively, and suggests certain questions that IGC participants may wish to reflect on. This is not a questionnaire, however: It is simply intended to identify practices, issues and questions that IGC participants may wish to base their comments on, if they so wish.

EXISTING MECHANISMS AND PRACTICES TO FACILITATE DIRECT PARTICIPATION OF OBSERVERS IN THE WORK OF THE IGC AND STRENGTHEN THEIR CAPACITY TO CONTRIBUTE TO THE PROCESS

Participatory capacity

WIPO's General Rules of Procedure are applicable to the IGC, save as otherwise provided in the special Rules of Procedure adopted by the IGC at its first session in April 2001. [1] In accordance with Rule 24 of the WIPO General Rules of Procedure, observers may take part in debates at the invitation of the Chair, and they may not submit proposals, amendments or motions.[2]

Almost since the inception of the IGC, in practice the Chair has generally allowed observers to intervene during IGC sessions on any issue on the agenda and to make drafting proposals for consideration by Member States. Such drafting proposals are incorporated in the text under discussion if supported by at least one Member State; they are nonetheless reflected in the reports of the sessions in cases where reports of sessions do reflect drafting proposals.

Accreditation

The IGC decided, at its first session, to allow for the participation in its meetings of non-governmental and other organizations, which do not have permanent observer status at WIPO, as *ad hoc* observers.[3] In

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1 See document WIPO/GRTKF/IC/1/2 at *http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_1/wipo_grtkf_ic_1_2.doc*

2 See full text of the WIPO General Rules of Procedure (publication No. 399 Rev.3) at *http://www.wipo.int/freepublications/en/general/399/wipo_pub_399.html*

3 See document WIPO/GRTKF/IC/1/2 at *http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_1/wipo_grtkf_ic_1_2.doc*

accordance with the established procedure, decisions on accreditation are made by the Member States at the beginning of each session of the IGC based on the documentation containing biographical details of organizations requesting representation in the sessions of the IGC. Currently there are 268 organizations accredited to the IGC as *ad hoc* observers.

WIPO Voluntary Fund for Accredited Indigenous and Local Communities

In 2005, the WIPO General Assembly established the WIPO Voluntary Fund for Accredited Indigenous and Local Communities (the Fund) in order to enhance the participation in sessions of the IGC of representatives of indigenous peoples and local communities which are already accredited to the IGC.[4] The rules of the Fund were amended by the September 2010 WIPO General Assembly to include the IWGs in its scope.[5] Decisions on funding are made by the WIPO Director General based on recommendations of the Advisory Board which selects candidates to receive funding. The members of the Advisory Board are elected by the IGC plenary on the proposal of its Chair. They meet during the IGC session in which they are participating and are required to conclude their deliberations before the end of the session, when their mandate expires. The Advisory Board comprises nine members, including: (i) the Chair or one of the Vice-Chairs of the IGC appointed ex officio; (ii) five members from the delegations of WIPO Member States taking part in the IGC sessions, reflecting appropriate geographical balance; and (iii) three members from accredited observers representing indigenous or local communities.

Panel of representatives of indigenous and local communities

In November 2004, at the seventh session of the IGC, the Delegation of New Zealand proposed that the IGC consider some practical changes to the meeting procedure to enable the more effective participation of indigenous and local community observers. The proposed arrangements included, *inter alia*, the incorporation of panel presentations by members of indigenous and local communities as part of the IGC plenary.[6] Pursuant to this proposal, the IGC decided at the session that future sessions of the IGC should be preceded by panel presentations chaired by a representative of an indigenous people or local community.[7] The panels comprise participants from indigenous and local communities from different geo-cultural regions. These presentations are a rich source of information on the experiences, concerns and aspirations of indigenous and local communities concerning the protection, promotion and preservation of traditional knowledge, traditional cultural expressions and genetic resources. The panels do not form a formal part of the IGC sessions, but summary reports on their proceedings are included in the reports of the IGC sessions. Presentations by panel participants are made available on WIPO Traditional Knowledge, Traditional Cultural Expressions, Genetic Resources webpage.

Briefings and consultations

Specific briefings and consultations for representatives of indigenous and local communities are or have been undertaken within the framework of meetings of the IGC. For example, in the earlier years of the IGC, the Secretariat provided a briefing for observers during the lunch-break on the first day of each session. As attendance at such briefings waned, perhaps because observers became more familiar with the IGC process, these briefings were discontinued in 2009. Written guidance on the procedures of the Committee and on how to participate in Committee discussions are made available at sessions and on WIPO Traditional Knowledge, Traditional Cultural Expressions, Genetic Resources webpage.[8]

Upon invitation or on its own initiative, the Secretariat also provides briefings on the work of the IGC to representatives of NGOs and civil society in the margins of meetings of the United Nations Permanent Forum on Indigenous Issues (UNPFII), the United Nations Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), the Food and Agriculture Organization of the United Nations (FAO), the United Nations

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4 The decision of the WIPO General Assembly establishing the Fund is contained in document WIPO/GRTKF/IC/9/3 at *http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_9/wipo_grtkf_ic_9_3.doc*

5 See amended text of the Member States' decision establishing the Fund at *http://www.wipo.int/export/sites/www/tk/en/ngoparticipation/voluntary_fund/amended_rules.doc*

6 Full text of the proposal by the Delegation of New Zealand is contained in document WIPO/GRTKF/IC/7/14 at *http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_7/wipo_grtkf_ic_7_14.doc*

7 See the decisions of the seventh session of the Committee at *http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_7/wipo_grtkf_ic_7_www_34905.doc*

8 See *Practical Information for Delegates* at *http://www.wipo.int/export/sites/www/tk/en/igc/documentation/info_delegates.pdf* , *Facilities for Accredited Organizations Representing Indigenous and Local Communities* at *http://www.wipo.int/tk/en/igc/documentation/info_ngos.pdf* and *Making Your Intervention* at *http://www.wipo.int/tk/en/igc/documentation/intervention.pdf*

Convention on Biological Diversity (CBD) bodies and the United Nations Educational, Scientific and Cultural Organization (UNESCO).

Prior to the twelfth session of the IGC, in February 2008, the Swiss Federal Institute of Intellectual Property and the International Centre for Trade and Sustainable Development (ICTSD) held a two-day workshop entitled "Facilitating the Participation in the Intellectual Property and Traditional Knowledge Debate in WIPO's IGC". The workshop was attended by indigenous representatives funded by the WIPO Voluntary Fund to participate in IGC 12, representatives from national governments and from relevant international organizations, such as the World Trade Organization (WTO), FAO, WIPO and CBD Secretariat. The workshop aimed at assisting indigenous representatives to be more directly involved in the discussions of the IGC on intellectual property and traditional knowledge by introducing them to the topics addressed by the IGC and other international fora, collecting their needs, interests and expectations, clarifying relevant terminology, discussing and analysing possible approaches and proposals to resolve the issues discussed, and by allowing for new or improved contacts among the workshop participants. Besides presentations on various topics, ample time was foreseen for plenary and small group discussions that allowed for specific capacity-building, as well as free and informal exchange of views among the participants.[9]

Furthermore, each IGC session is preceded by a meeting of the Indigenous Peoples and Local Communities Consultative Forum which takes place at WIPO's premises where representatives of indigenous peoples and local communities, who chair the meeting, can prepare and meet with the WIPO Secretariat. The Consultative Forum takes place on the Sunday before a Committee session. The Committee has decided that meetings of the Forum are related to the IGC, so that funding from the Voluntary Fund extends to Forum meetings. The Secretariat facilitates the meeting and provides input on substantive and organizational issues, when required, during the meeting and throughout the sessions. On some occasions, the Forum has invited Member State delegates and the Chair of the IGC to participate. During Committee sessions themselves, observers have invited the Chair to meet with them and he has done so on several occasions.

Secretarial logistical and secretarial support

During IGC sessions, WIPO finances the logistical, secretarial and interpretation/translation support that is provided by the Indigenous Peoples' Center for Documentation, Research and Information (DoCip) for the meetings of the indigenous and local communities' representatives. DoCip is a non-profit service organization that provides documentation and information assistance to indigenous participants in United Nations meetings on indigenous issues.

Information tools and resources

All current drafts, drafting proposals, working documents, comments, papers, studies, databases, questionnaires, and other materials prepared for consideration by the IGC, as well as comprehensive reports of its sessions, are publicly available, in Arabic, Chinese, English, French, Russian and Spanish at the WIPO Traditional Knowledge, Traditional Cultural Expressions, Genetic Resources webpage. Updates concerning relevant developments and events are regularly communicated through e-mail notifications. A distinct webpage is devoted to proposals, submissions and papers of observers.[10]

SUGGESTED QUESTIONS

Is there any existing mechanism or practice to facilitate direct participation of observers in the work of the IGC or to strengthen their capacity to contribute to the process that has not been reflected above?

What are the options for enhancing the existing mechanisms and practices?

What draft recommendations should the twentieth session of the IGC consider with a view to enhancing the positive contribution of observers to the work of the IGC?

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[9] Information provided by the Swiss Federal Institute of Intellectual Property

[10] See *http://www.wipo.int/tk/en/igc/ngo/ngopapers.html*

Comments on mechanisms for participation of observers in the Twentieth Session of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore

Ministry of Foreign Relations - Republic of Colombia

The participation of indigenous peoples and local communities is of vital importance in the negotiations of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. Nevertheless, it is considered necessary and relevant to redefine the way in which such observers may speak at sessions of the Committee.

Guaranteeing the representation of indigenous peoples and local communities, as holders of traditional knowledge and cultural expressions, is fundamental. For that reason, the mechanisms for Member States to harmonize the positions of their own indigenous peoples and local communities prior to the Committee are fundamental. Only in this way would their concerns and aspirations be incorporated in the negotiation.

In Colombia for example, the mechanism of the Permanent Forum for Consultation with Indigenous Peoples is developing, as the highest consultative authority for agreeing the measures that may affect this population. Within this framework, Colombia is able to establish a mechanism to generate the effective participation of indigenous peoples in the work of the Committee or, failing that, to present proposals thereto.

It is considered that statements by observers during the plenary session do not allow a Member State to support those statements or otherwise, owing to a lack of internal debating procedure. The concerns of indigenous peoples are required to be known in advance so that they may be sufficiently assessed by countries and for them to make a constructive contribution to the discussions.

In that sense, recognizing the importance of the positions of indigenous peoples and local communities being included in WIPO discussions in an effective manner, it is recommended to create a forum or panel independent of the IGC plenary session, where the representatives of indigenous and local communities previously accredited by national governments are able to provide details of their experiences, concerns and aspirations.

The conclusions resulting from such a panel must be published before the Committee session in order for the Member States to be able to incorporate them in their internal consultations with their communities. Thus effective progress can continue to be achieved in these negotiations.

Libertad y Orden

Comentarios a los mecanismos de participación de los Observadores en la Vigésima sesión del Comité Intergubernamental sobre Recursos Genéticos, Conocimientos Tradicionales y Folclor de la Organización Mundial de la Propiedad Intelectual (OMPI)

Ministerio de Relaciones Exteriores – República de Colombia

La participación de los pueblos indígenas y comunidades locales es de vital importancia en las negociaciones del Comité Intergubernamental sobre Recursos Genéticos, Conocimientos Tradicionales y Folclor de la OMPI. No obstante, se considera necesario y pertinente redefinir la forma como estos observadores pueden intervenir en las sesiones de este Comité.

Es fundamental garantizar la representación de los pueblos indígenas y comunidades locales, como poseedores de conocimientos tradicionales y expresiones culturales. Por eso, los mecanismos de los Estados miembros para concertar las posiciones de sus propios indígenas y comunidades locales previas al Comité, son fundamentales. Solo así se lograría que sus preocupaciones y aspiraciones se vean integradas dentro de la negociación.

En Colombia por ejemplo, se desarrolla el mecanismo de la Mesa de Permanente de Concertación con los Pueblos Indígenas. La instancia más alta de consulta para concertar las medidas que puedan afectar a esta población. En este marco, Colombia puede establecer un mecanismo para que se genere la participación efectiva de los pueblos indígenas en el marco del Comité o su defecto, presente las propuestas al mismo.

Se considera que las intervenciones de los observadores durante la plenaria no permiten que un Estado Miembro pueda apoyar o no dichas intervenciones por carecer de un procedimiento interno de debate. Se requiere conocer con anterioridad las preocupaciones de los indígenas para poder ser valoradas suficientemente por los países y para que nutran los debates de manera constructiva.

En ese sentido, reconociendo la importancia de que las posiciones de los indígenas y comunidades locales integren el debate de la OMPI de manera efectiva, se recomienda crear un espacio o panel independiente de la plenaria del CIG donde, los representantes de las Comunidades indígenas y los comunidades locales previamente acreditados por las Cancillerías expresen las experiencias, preocupaciones y aspiraciones.

Las conclusiones que resulten de este panel, deberán ser publicadas con anterioridad al Comité a los Estados Miembros para que los mismos los integren dentro de sus consultas internas con sus comunidades. Así se podrá lograr que se continúe avanzando de manera eficiente en estas negociaciones.

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The Republican State Enterprise "National Institute of Intellectual Property" of the Committee on Intellectual Property Rights of the Ministry of Justice of the Republic of Kazakhstan expresses gratitude for provided information on "Note on existing mechanisms of participating observers in the work of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore".

In turn, we inform you that at the present time in the Republic of Kazakhstan only the concept of the project of the Republic of Kazakhstan on "Traditional Knowledge" is developed, so practice and existing mechanisms now are not available, because legislative permission is not received for issues of legal protection of traditional knowledge.

The draft legislation is developed for the purposes of legislative consolidation of legal protection of traditional knowledge, which accumulation and use connected with ancient traditions of the Kazakh people, as well as determination of the state policies in the field of traditional knowledge, which are national heritage of the country.

In this connection this draft bill provides for establishing the legal regime of protection of traditional knowledge in the Republic of Kazakhstan, consolidating the basic provisions of the state policies, and legal, economic and social guaranties in the field of traditional knowledge.

The draft bill provides for settlement of relations which concern the legal protection and use of traditional knowledge. Under the draft bill the legal protection covers traditional knowledge, which has practical application in one or another sphere of human activities and a positive result of their use.

The draft bill provides for registration of traditional knowledge and maintaining a register by the authorized body in this sphere, which is the part of legal regime, which aims to provide rights for traditional knowledge.

The slow steps in settling this question in our Republic and the grate importance of the role of intellectual property in saving, management, use of genetic

resources and traditional knowledge and distribution of profits which are got from using its, and necessity of further studying and development of institutional and legal framework for regulation of legal relations associated with this objects, must be recognized.

Director **S. Bekenov**

Exec.: D. Alimzhanova

Comments of the Government of Mexico on existing mechanisms for participation of observers in the work of the Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore (IGC).

1. Is there any existing mechanism or practice to facilitate direct participation of observers in the work of the IGC or to strengthen their capacity to contribute to the process that has not been reflected above?

For Mexico the existing mechanisms which regulate the direct participation of observers in the work of the IGC are adequate.

It is recommended, however, that the Member States which have accredited organizations carry out a review of such organizations and their work, in order to ascertain whether they are still relevant.

It should be mentioned that there are currently 268 organizations accredited to the IGC, but during the sessions of the Committee the full participation of such a number of organizations is not noted.

Consequently, in order to guarantee that the organizations participating in the IGC sessions are representative of the indigenous and local communities of the countries that accredit them and whether those communities are made aware of and consulted on the information and positions adopted in the Committee, it will be necessary for States to carry out a review of such organizations and ascertain whether they are still valid.

2. What are the options for enhancing the existing mechanisms and practices?

Based on the input provided by the Parties that accredited the observers:

(a) analyzing whether the organizations currently participating in IGC sessions are sufficiently representative of the indigenous and local communities in their countries.

(b) ascertaining whether these organizations make known to society and share the information produced at the IGC sessions with the representatives of indigenous communities.

(c) clarifying the relationship of accredited organizations.

It is suggested that each Member State includes in its delegation an indigenous representative lawfully elected for that purpose by the indigenous peoples and communities of that country.

For the purpose of including in its country positions the point of view of indigenous communities, Mexico has included in its delegation indigenous representatives. Similarly, it has incorporated in its positions the results of the indigenous consultations carried out for this purpose.

(d) To date, the Chair of the Committee has allowed observers to speak at IGC sessions on any agenda item and put forward drafting proposals, which may be incorporated in the text under consideration if it receives the support of at least one Member State. This practice contravenes the provisions of Article 24 of the WIPO General Rules of Procedure, since under that Article observers do not have the right to submit proposals, amendments or motions.

In the light of the above, it is considered appropriate for observers to be accredited by their respective countries in the delegations of those countries to IGC meetings, so that they may submit proposals, amendments or motions, through the respective delegates, on the understanding that the observers from indigenous and local communities may continue participating in the roundtables that precede IGC meetings; in seminars; in specific information and consultations meetings for observers in general, and also in the consultative forum for indigenous peoples and local communities.

3. What draft recommendations should the twentieth session of the IGC consider with a view to enhancing the positive contribution of observers to the work of the IGC?

(a) The IGC should revise the objectives and aims of the organizations accredited as *ad hoc* observers to ensure they comply with the spirit, tasks and principles of the IGC in order to ensure more effective participation of observers in the Committee's work. Such a revision will also allow in due course only for observers who are actually in a position to make constructive and substantive contributions to the deliberations of the IGC to be funded.

(b) It is suggested that the IGC examine its Rules of Procedure, since an analysis of those rules shows that the working documents of the Committee sessions are prepared only in three languages, i.e. French, English and Russian. The idea is that the IGC revise and, in all cases, amend its Rules of Procedure, so that it may be duly established that the working documents of the Committee sessions will be prepared in the six official languages of the United Nations, as in accordance with the language policy approved by the Assemblies of WIPO Member States at their Forty-Ninth Series of Meetings, held from September 26 to October 5, 2011, the coverage of IGC languages from 2010 onwards must include the six official languages of the United Nations.

Comentarios del Gobierno de México sobre los mecanismos existentes para la participación de observadores en la labor del Comité Intergubernamental sobre Propiedad Intelectual, Recursos Genéticos, Conocimientos Tradicionales y Folclore (CIG).

1.- ¿Hay algún mecanismo o práctica existente que facilite la participación directa de los observadores en la labor del CIG o que fortalezca su capacidad para contribuir a esa labor que no se haya reflejado en el presente documento?

Para México los mecanismos existentes que reglamentan la participación directa de los observadores en la labor del CIG son adecuados.

Sin embargo, se recomienda que los Estados miembros que tienen organizaciones acreditadas, realicen una revisión de estas organizaciones y de sus trabajos, a fin de conocer si aún están vigentes.

Se menciona que en la actualidad existen 268 organizaciones acreditadas ante el CIG, pero durante las sesiones de éste no se observa la participación plena de tal número de organizaciones.

Por lo tanto, a fin de garantizar que las organizaciones que participan en las sesiones del CIG sean representativas de las comunidades indígenas y locales de los países que las acreditan y si sociabilizan y consultan con éstas la información y posiciones que adopten en el Comité, será necesario que los Estados hagan una revisión de éstas y se percaten de la vigencia de las mismas.

2.- ¿Qué posibilidades hay de mejorar las disposiciones y prácticas existentes?

Con base en los insumos proporcionados por las Partes que acreditaron a los observadores:

a) Analizar si las organizaciones que actualmente participan en las sesiones del CIG cuentan con una representatividad suficiente de las comunidades indígenas y locales de su país.

b) Conocer si estas organizaciones sociabilizan y comparten la información derivada de las sesiones del CIG con los representantes de las comunidades indígenas.

c) Depurar la relación de organizaciones acreditadas.

Se sugiere que cada Estado miembro integre dentro de su delegación a un representante indígena legítimamente electo para dicho fin por los pueblos y comunidades indígenas de ese país.

México, con el propósito de incluir en sus posiciones de país el punto de vista de las comunidades indígenas, ha incorporado en su delegación a representantes indígenas. Asimismo, ha incorporado en sus posiciones los resultados de la consulta indígena que realizó con este fin.

d) A la fecha el Presidente del Comité ha permitido a los observadores que intervengan durante las sesiones del CIG respecto de cualquier punto del orden del día y que formulen propuestas de redacción, mismas que pueden ser incorporadas en el texto objeto de examen si reciben por lo menos, el apoyo de un Estado miembro. Esta práctica contraviene lo dispuesto por el artículo 24 del Reglamento General de la OMPI, toda vez que en términos del citado artículo los observadores no tienen derecho a presentar propuestas, enmiendas o mociones.

A la luz de lo anterior, se considera conveniente que los observadores sean acreditados por sus respectivos países en las delegaciones de dichos países ante las reuniones del CIG, a fin de que puedan presentar propuestas, enmiendas o mociones, a través de los respectivos delegados, bajo el entendido de que los observadores de las comunidades indígenas y locales podrán continuar participando en las mesas redondas que preceden las reuniones del CIG; en seminarios; en las reuniones de información y consultas específicas para los observadores en general, así como en el foro consultivo para los pueblos indígenas y las comunidades locales.

3.- ¿Que proyectos de recomendación debería examinar el CIG en su vigésima reunión con miras a intensificar la aportación positiva de los observadores a la labor del CIG?

a) Se considera conveniente que el CIG revise que los objetivos y propósitos de las organizaciones acreditadas como observadores *ad-hoc* estén acordes con el espíritu, las metas y los principios del CIG, a fin de asegurar una participación más eficaz de los observadores en los trabajos del Comité. Esta revisión permitirá también que en lo sucesivo se financien únicamente a los observadores que efectivamente estén capacitados para aportar contribuciones constructivas y sustantivas en las deliberaciones del CIG.

b) Se sugiere que el CIG examine su Reglamento Interno, ya que del análisis del mismo se desprende que los documentos de trabajo de las sesiones del Comité se prepararán sólo en tres idiomas, a saber: francés, inglés y ruso. La idea es que el CIG revise y en todo caso modifique su Reglamento Interno, a fin de que quede debidamente reglamentado que los documentos de trabajo de las sesiones del Comité se prepararán en los 6 idiomas oficiales de las Naciones Unidas, ya que de acuerdo con la política lingüística aprobada por las Asambleas de los Estados miembros de la OMPI en su Cuadragésima Novena Serie de Reuniones, celebrada del 26 de septiembre la 5 de octubre del 2011, la cobertura de idiomas del CIG desde el 2010 debe de ser en los 6 idiomas oficiales de las Naciones Unidas.

Respected Sir,

Please refer to the WIPO's Communication no. C. 8029 received on 10th November, 2011 on the above noted subject.

IPO-Pakistan fully support the proposals regarding direct participation of the observers in the work of IGC and strengthening their capacity to contribute to the process. The comments of IPO-Pakistan are given below;

(i) **Participation Capacity**: The participation of observers may be encouraged and their valuable inputs are kept in view while formulating future policies and strategies.

(ii) **Accreditation**: The proposal is supported.

(iii) **WIPO Voluntary fund**: The formulation of WIPO voluntary fund for accredited indigenous and local communities is a welcoming step. However, participation of indigenous and local communities from least developed and developing countries be encouraged. WIPO needs to strengthen the coordination with the national IP Offices in this regard.

(iv) **Panel of Representatives of Indigenous and Local communities**: IPO-Pakistan supports the proposal as it will go a long way in exchange of experiences , GR, TK and cultural heritage with the other participants.

(v) **Briefing and consultations:**

It is proposed that the practice of arranging technical workshops for the representatives of Indigenous and local Communities and National IP Offices be continued and it's scope be widened.

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Russian Federation

Re: Circular letter C.8029

The Russian Federation would like to express gratitude to the WIPO Secretariat for preparing the document «Note on Existing Mechanisms for Participation of Observers in the Work of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore» and to communicate the following.

The Russian Federation as well as other Member States of WIPO stresses the importance attached to facilitating and enhancing the participation of observers in the work of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC).

With regard to abovementioned document Rospatent would like to express strong support to all mechanisms for participation of observers (Accreditation, WIPO Voluntary Fund for Accredited Indigenous and Local Communities, Panel of representatives of indigenous and local communities, Briefings and consultations, Information tools and resources and so on). The delegation of the Russian Federation actively participated in the work of Advisory Board which selects candidates to receive funding for participation in the work of IGC.

In addition to existing mechanisms for participation of observers in the work of the IGC we would like to suggest to prepare for the twentieth and all subsequent sessions of the IGC a supplementary information document (/inf/) with the information concerning the materials placed on WIPO Traditional Knowledge, Traditional Cultural Expressions, Genetic Resources webpage (comments, papers, studies, databases, questionnaires, and other materials) and webpage for proposals, submissions and papers of observers.
This document should contain detailed links on webpages and executive summaries of the provided material as shown in document of 18 November 2011 entitled «A biannual bulletin for those with an interest in the work of WIPO on intellectual property and genetic resources, traditional knowledge and traditional cultural expressions/folklore».

We believe it will assist in raising of awareness among the observers and representatives of the IGC Member States, in promoting of an informed and balanced discussion about issues considered by the IGC and facilitate direct participation of the observers in the work of the IGC and strengthen their capacity to contribute to the process.

Comments of the United States Patent and Trademark Office on the Proposed Study on the Participation of Observers in the Work of the WIPO Intergovernmental Committee
on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore

The United States Patent and Trademark Office, as a member of the United States Delegation in the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), welcomes the opportunity to comment on the subject of the proposed study on the participation of observers in the work of the IGC. The WIPO General Assembly has directed that the study should outline "current practices and potential options" in the regard. The Secretariat has suggested the following questions to help identify practices, issues and questions upon which IGC participants may wish to base comments.

1. Is there any existing mechanism or practice to facilitate direct participation of observers in the work of the IGC or to strengthen their capacity to contribute to the process that has not been reflected [in the "Note on Existing Mechanisms for Participation of Observers"]?

The Chair has generally allowed observers to intervene during IGC sessions and to make drafting proposals for consideration by Member States and this is a practice that should be continued. It remains within the Chair's discretion, however, to limit observers' interventions by topic and time and to require that more extensive comments must be submitted in writing.

The panel presentations by indigenous and local communities are a critical resource for Member States. The presentations and summary reports are made publicly available to Member States and interested others on the IGC webpage. Nonetheless, there is no substitute for engagement between panelists, other observers and Member States during the presentations but unfortunately, many people often leave the room for most or all of these presentations. What can be done to ensure more participation in the panel presentations? For example, could Member States suggest questions, in advance of the IGC sessions, for discussion during the panel presentations?

2. What are the options for enhancing the existing mechanisms and practices?

Consideration could be given to the development of an authoritative credential presentation process for observers. There is no process for observers, as there is for members. This process need not be onerous or burdensome, but could be as simple and straightforward as asking observers to present a letter authorizing representation for each meeting.

Additionally, there may be indigenous and local community representatives that could be interested in participating in the IGC, but they are not sufficiently familiar with the issues (or the process). The reality is that the IGC and WIPO webpages provide a wealth of information, but only for those who already are participating in the process or

who have a mentor to assist them in navigating through the wealth of resources. Expansion of the Secretariat's efforts to provide briefings on the work of the IGC to include publicly-accessible podcasts, webinars, audio briefings and beginner's guides - in "plain English" - may help to bring in new voices and enrich already accredited observer participants' contributions.

3. What draft recommendations should the twentieth session of the IGC consider with a view to enhancing the positive contribution of observers to the work of the IGC?

As funding continues to be a barrier to full and effective participation by the range of indigenous and local community interests, remote participation should be explored in the study.

It also would be interesting to know what the findings were of the Swiss Federal Institute of Intellectual Property's workshop in February 2008, "Facilitating the Participation in the Intellectual Property and Traditional Knowledge Debate in WIPO's IGC. Is it time, perhaps, for another such workshop prior to the next IGC?

Albert Tramposch
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Nouméa, November 29, 2011

ASSOCIATION OF STUDENTS AND RESEARCHERS
ON THE GOVERNANCE OF ISLAND STATES (AECG)
New Caledonia

NOTE ON EXISTING MECHANISMS FOR THE PARTICIPATION OF OBSERVERS IN THE WIPO INTERGOVERNMENTAL COMMITTE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE

SUGGESTED QUESTIONS

1. Is there any existing mechanism or practice to facilitate direct participation of observers in the work of the IGC or to strengthen their capacity to contribute to the process that has not been reflected above?

We believe that direct participation would be where experts may be present during at least one session so that they can express an opinion on a subject of concern to their people.

The possibilities provided by Rule 24 of the WIPO General Rules of Procedure do not appear to provide equal treatment for experts and observers. States do not support projects which are contrary to their interests.

2. What are the options for enhancing the existing mechanisms and practices?

We note that the observers accredited to WIPO are very familiar with the concerns of indigenous peoples. It is therefore important for them to be given the possibility to speak during sessions or meetings and to inform us of the experiences of their people. We thank New Zealand for proposing the inclusion of subject-based presentations.

In our opinion, sharing experiences is an important source of enrichment for all our peoples, for example in relation to conciliation procedures, closer contacts with the authorities, and the sharing of the economic repercussions on projects on native lands.

3. What draft recommendations should the twentieth session of the IGC consider with a view to enhancing the positive contribution of observers to the work of the IGC?

We would like to ask the IGC to:

– provide equal treatment for all observers and experts in presenting reports on precise subjects on the situation of their peoples, tribes or clans;

– provide aid and assistance to observers and experts in continuing their work with indigenous populations.

Thank you.

Jean PIPITE
President, AECG.
Agency for Development of Kanak Culture – Tjibaou Cultural Center
New Caledonia
(signed)

Nouméa, le 29 novembre 2011

ASSOCIATION DES ETUDIANTS ET CHERCHEURS
SUR LA GOUVERNANCE DES ETATS INSULAIRES (AECG)
Nouvelle-Calédonie

NOTE SUR LES MÉCANISMES EXISTANTS POUR LA PARTICIPATION DES OBSERVATEURS AUX TRAVAUX DU COMITÉ INTERGOUVERNEMENTAL DE LA PROPRIÉTÉ INTELLECTUELLE RELATIVE AUX RESSOURCES GÉNÉTIQUES, AUX SAVOIRS TRADITIONNELS ET AU FOLKLORE DE L'OMPI

SUGGESTIONS DE QUESTIONS

1-Existe-t-il un mécanisme ou une pratique destiné à faciliter la participation directe des observateurs aux travaux de l'IGC ou à renforcer leur capacité de contribuer au processus qui n'aurait pas été évoqué plus haut?

Il nous semble que la participation directe serait que les experts puissent être présents durant au moins une session afin qu'ils puissent se prononcer sur un sujet qui concerne leur peuple.
Les possibilités offertes par l'article 24 des règles générales de procédure de l'OMPI ne nous semblent pas égalitaires envers les experts et observateurs. Les Etats ne soutiennent pas les projets contraires à leurs intérêts.

2-Quelles sont les solutions possibles pour améliorer les mécanismes et pratiques existants?

Nous constatons que les observateurs accrédités auprès de l'OPMI connaissent très bien les préoccupations des peuples autochtones. Il est donc important de leur donner la possibilité de prendre la parole durant les sessions ou les réunions et de nous informer sur les expériences de leur peuple. Nous remercions la Nouvelle-Zélande d'avoir proposé l'intégration des exposés thématiques.
Le partage de nos expériences constitue, à notre avis, une source importante d'enrichissement pour tous nos peuples par exemple sur les procédures de conciliation, le rapprochement avec les autorités, les partages des retombées économiques sur des projets sur les terres autochtones.

3-Quels projets de recommandations l'IGC devrait-il envisager à sa vingtième session en vue de renforcer la contribution des observateurs à ses travaux?

Nous souhaiterions demander à l'IGC de :

- donner l'égalité à tous les observateurs et experts pour présenter des rapports sur des sujets précis sur la situation de leurs peuples, tribus ou clans ;

- fournir aide et assistance aux observateurs et experts pour poursuivre leurs travaux auprès des populations autochtones ;

Merci à vous.

Jean PIPITE
Président de l'AECG.
Agence de Développement de la Culture Kanak- centre culturel Tjibaou
Nouvelle-Calédonie

FOUNDATION FOR ABORIGINAL AND ISLANDER RESEARCH ACTION [FAIRA]

SUBMISSION TO THE WIPO SECRETARIAT ON

INDIGENOUS PEOPLES EFFECTIVE PARTICIPATION IN WIPO IGC ON GRTKF

INTRODUCTION

The Foundation for Aboriginal and Islander Research Action (FAIRA) has been a regular participant in the WIPO IGC sessions on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore.

FAIRA is a community-controlled Aboriginal and Torres Strait Islander organization that was established in Australia in 1977. While the initial focus of FAIRA was the abolition of discriminatory laws in the Australian state of Queensland, the longer-term objective of FAIRA has become to promote and protect the rights of the Aboriginal and Torres Strait Islander peoples at the national level. A core interest of FAIRA has been the survival of the cultural identity of the people. From the outset FAIRA has lobbied for the protection of Aboriginal and Torres Strait Islander lands, territories and resources.

The primary concern of FAIRA in international affairs is the human rights and related rights of the Indigenous Peoples of the world.

FAIRA holds accreditation to the United Nations under the ECOSOC accreditation for Non-Government Organisations with Special Consultative Status. We have held that accreditation since 2004.

FAIRA is also accredited, through its role as coordinator of the Commonwealth Association of Indigenous Peoples (CAIP), as a non-government organization with the Commonwealth Heads of Government meetings. We have held that accreditation since 2000.

FAIRA is a registered organization with WIPO, accredited to participate in the sessions of the Inter-Governmental Committee (IGC) on Intellectual Property and GRTKF. As such, FAIRA has directly participated in the sessions of the IGC or otherwise been involved through the Aboriginal and Torres Strait Islander Commission (ATSIC). Our submission is based upon our experience from long-term association with the IGC of WIPO and other inter-governmental organisations. In particular we have a good understanding of the situations concerning accreditations of Indigenous Peoples delegations in international forums, including inter-governmental organisations.

Being aware that the United Nations acknowledges and respects the right of Indigenous Peoples to self-determination and affirms that Indigenous Peoples continue, after colonization, to hold rights and responsibilities to their lands, territories and resources, FAIRA has participated in the relevant forums of the World Intellectual Property Organisation (WIPO) and the Convention on the Biological Diversity (CBD) relating to genetic resources and Indigenous Knowledges.

INTERNATIONAL STATUS OF INDIGENOUS PEOPLES

In 2007, the United Nations General Assembly adopted the Declaration on the Rights of Indigenous Peoples. By virtue of the resolution the General Assembly affirmed a critical element in international law, that 'Indigenous Peoples' are 'peoples' equal to all other 'peoples' of the world.

In doing so the United Nations recognized that Indigenous Peoples hold the right to autonomy or self-government, including the freedom to determine our own political status and to decide whether and to what extent Indigenous Peoples participated in the political affairs of the State/s within which their territories lie.

This confirmation from the United Nations has presented to States a challenge to clarify the political status of the Indigenous Peoples where territories of the State and Indigenous Peoples are shared.

The adoption of the Declaration on the Rights of Indigenous Peoples in 2007 also gives cause to revisit the 1992 assumption, established under the Convention on Biological Diversity, that States hold sovereignty over the natural resources of the world. This 1992 assertion did not take account of the existence, identity and status of the world's Indigenous Peoples.

Since 2007 it is apparent that Indigenous Peoples hold sovereign rights over their natural resources, including genetic material, and have the right to freely use such natural resources for their subsistence and economic development.

THE PEER STATUS OF INDIGENOUS PEOPLES' DELEGATIONS

The recognition of Indigenous Peoples as 'peoples' does not mean that Indigenous Peoples hold the same identity, role or structure as States. However FAIRA contends that delegations to WIPO, authorised by Indigenous Peoples as the legitimate representatives of Indigenous Peoples, should be given higher status than 'non-government organisations' or 'local communities'.

Indigenous Peoples delegations should enjoy a status in the IGC which is closer to the status of States, by virtue of their (Indigenous Peoples') right to self-determination. WIPO and the IGC should have higher regard for the standing of Indigenous Peoples 'governmental' representatives and this should be reflected in the procedures of the IGC.

Simply put, Indigenous Peoples should be able to participate at a higher level in the negotiation of text for an international instrument, not by virtue of being a signatory to the instrument but by virtue of governing status, being holders of specific rights over genetic resources, and owners of targeted intellectual property.

Clearly States have been encouraged by the United Nations to identify and confirm the relationship that exists or might exist with Indigenous Peoples. This responsibility has been conveyed by the

United Nations through, inter alia, resolutions and programs of action connected to the First and Second Decades of the World's Indigenous Peoples and to the Durban Declaration.

Not all Indigenous delegates to international events are representative of Indigenous Peoples that hold the right of self-determination. Care needs to be taken that delegations holding peer status with States are discerned from those delegations that might are not representative of Indigenous Peoples. Such 'other' delegations might appear at the WIPO IGC as experts or as some other form of authority concerning Indigenous Peoples. FAIRA is concerned that State parties in the IGC might be unable to differentiate between proposals made from Indigenous delegations that are representative of their Indigenous Peoples and accountable to those that they represent, and the delegations that are ultimately present without responsibilities or obligations to any particular Indigenous Peoples.

FAIRA contends that Indigenous Peoples representatives must have peer status in the WIPO / IGC and that this can only be fairly achieved by the distinguishing the representative nature and capacity of the Indigenous delegations. While it may be impractical and unwarranted to require re-accreditation of existing Indigenous delegations, perhaps a review of the accredited delegations might seek to clarify those delegations that have standing as being representative of particular Indigenous Peoples. FAIRA expects that Indigenous Peoples delegations are determined to be responsible and accountable by the Indigenous Peoples they purport to represent.

In no circumstances should States unilaterally determine the standing of Indigenous delegations and any review of delegations should not interfere with the wider right of Indigenous Peoples to self-identify. By engaging representatives of Indigenous Peoples to participate in the review of accreditations due respect for protocol and a fair balance of interests can be achieved.

Indigenous Peoples delegations have already made representation to the last session (in 2011) of the UN Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) to review accredited organisations and nations for the purpose of identifying those delegations that might attain a higher level of accreditation, beyond NGO status, in sessions of EMRIP and other UN bodies.

FAIRA considers that a review by WIPO of accreditations to identify and promote Indigenous Peoples delegations in the proceedings of the IGC will assist the finalization of the international instruments under consideration, including stronger outcomes for Indigenous Peoples. FAIRA does not consider that a review of accreditations should reduce the existing accredited organisations and nations or that the ongoing participation of accredited NGO, industry or academic organisations be lessened. The objective is to raise the status of Indigenous Peoples representative bodies that are institutions of self-determining 'peoples'.

INDIGENOUS KNOWLEDGES

FAIRA appreciates WIPO has accepted that Indigenous Peoples hold intellectual property rights over their Knowledges. However FAIRA points out application of the term 'Traditional Knowledge' essentially limits the way Indigenous Knowledges are perceived. This in turn taints the way Indigenous Knowledges are regarded and addressed by WIPO and its member States. Indigenous Peoples should not be unfairly restricted or restrained in their right to control, revitalize, use, develop and transmit their knowledges.

Further, Indigenous Peoples' intellectual property rights should always be defined in accordance with the law and practices of the Indigenous Peoples and not be regulated, interpreted, extrapolated or constrained by intrusive laws of the State.

PARTICIPATION OF INDIGENOUS PEOPLES IN THE IGC

Since 2000 Indigenous Peoples delegations have progressively achieved greater participation in the IGC meetings. This has happened in both formal and informal proceedings of the IGC. Our delegations appreciate the opportunity to speak to the meetings during open discussions and to make submissions on draft text during drafting stages.

Whereas originally, in the proceedings of meetings, the input by Indigenous Peoples delegations was kept back until all State parties had concluded their presentations, more recent procedures invoked by the Chairperson of the IGC have ensured that Indigenous Peoples' participation was able to occur at any relevant time. In this aspect FAIRA appreciates the flexibility and generosity exercised by the IGC Chairperson/s to ensure that our voices are heard at the most appropriate times.

However FAIRA is concerned that, in the more recent sessions of the IGC when important drafting was being conducted, States mostly ignored, and in some cases were openly hostile towards, the Indigenous Peoples' comments. This loss of effective engagement is problematic for Indigenous Peoples, and ultimately weakens the credibility of WIPO and the IGC and their outcome documents.

FAIRA is cognizant that in certain situations Indigenous Peoples delegations must be recognized as authoritative representatives of Indigenous populations and deserving of peer status with States. The Chairperson should take time to identify and engage them effectively in the drafting stages.

FAIRA admits that the quality of comments by the Indigenous Peoples delegations should be of a high standard and the comments must be relevant to the matters under consideration. It is FAIRA's view that the Chairperson should look to exercise more discretion to prevent unwanted and irrelevant comments from interfering in the progress of the meetings, but at the same time take due care to keep a balance between States and Indigenous Peoples contributions.

ISSUES TO BE ADDRESSED

Is there any existing mechanism or practice to facilitate direct participation of observers in the work of the IGC or to strengthen their capacity to contribute to the process that has not been reflected above?

FAIRA considers that the voluntary fund established for the WIPO IGC has served to greatly assist the participation by Indigenous delegates in the sessions and the direction taken in the identification of ultimate outcomes for the IGC work. FAIRA has worked to ensure that States are contributing to that fund as a commitment to the principle that Indigenous Peoples should be engaged in the discussions on Traditional Knowledge and Genetic Resources.

In this matter FAIRA is pleased that the Government of Australia has made an important, perhaps vital, contribution of $100,000 to the fund at this critical stage in the work of the IGC. Other States should follow the lead taken by Australia to ensure that Indigenous Peoples are able to participate in these final stages of the work of the IGC.

The operation of this fund should be revised to ensure that quality applications from wider sources, and relevant sources, are received. The applications should also be assessed on a consistent basis from meeting to meeting. FAIRA proposes that the IGC establish a 'permanent' board for the fund rather than appoint a different board at each meeting. The members of this board should be appointed on the basis of relevant qualifications including ethics, understanding of the purpose of

the fund and capability to attract quality applicants.

What are the options for enhancing the existing mechanisms and practices?

FAIRA remains concerned that Indigenous Peoples are not adequately aware of the international interests and developments regarding their knowledges and the natural resources of their territories. The intent of WIPO to develop international legal instruments which will legally affect their inherent rights to their knowledges and resources, and the development of their knowledges and resources, is potentially a huge threat to the wellbeing of the Indigenous Peoples and may, in the wrong application of the utilization of the knowledges and resources, be seen by Indigenous Peoples as continuing exploitation.

While some effort has been made during the IGC sessions to increase Indigenous Peoples involvement the only reasonable solution is to hold workshops on the WIPO interests in Indigenous Knowledges and natural resources in the regions where Indigenous Peoples live. FAIRA recommends that WIPO convene regional workshops in the major regions of the Indigenous Peoples, guided by the UNPFII identification of seven regions of Indigenous Peoples around the world.

The workshops should be convened with appropriate involvement of Indigenous Peoples organisations and nations that are accredited to, and which have participated in the IGC sessions. It is equally important that the Indigenous Peoples have the opportunity to know their representatives and to provide them with their viewpoints and priorities. The workshops should be well advertised in each of the regions to ensure that the populations are aware of the events and the importance of the WIPO agendas.

What draft recommendations should the twentieth session of the IGC consider with a view to enhancing the positive contribution of observers to the work of the IGC?

FAIRA considers that Indigenous Peoples delegations should be engaged in the work of the IGC at all stages, including in the final stages of negotiations of text for international legal instruments on intellectual property, Indigenous Knowledges and genetic resources.

From other experiences FAIRA is concerned that the desire to complete negotiations will, in the final stages of the negotiation, lead to the creation of small drafting groups and that these drafting groups may be given wide powers to develop compromised text. In other experiences Indigenous Peoples delegations have been left out of these drafting groups and were unable to provide any further input into the final documents.

FAIRA recommends that the IGC decide to accept Indigenous Peoples delegations into drafting groups and that the identification of such delegations be based upon the status of the delegation in relation to the Indigenous Peoples that they represent. In determining the delegations the IGC should take into consideration the views and advice provided by the Indigenous Peoples delegations to the IGC.

ENDS

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Note on Existing Mechanisms for Participation of Observers in the Work of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore

Comments submitted by the Grand Council of the Crees (Eeyou Istchee)

November 30 2011

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Executive Summary

In its October 2011 Decision, the WIPO General Assembly invited the Intergovernmental Committee (IGC)[1] to review its procedures "with a view to enhancing the positive contribution of observers". The Secretariat issued a *Note on Existing Mechanisms for Participation of Observers* in response to the request to "prepare a study outlining current practices and potential options".

The enclosed Comments are a response to the *Note*.

The objective of the negotiations is to reach agreement on instrument(s) that will "ensure the effective protection" of genetic resources (GRs), traditional knowledge (TK) and traditional cultural expressions (TCEs).

In relation to Indigenous peoples and local communities, "effective protection" would require *inter alia* the following elements:

- respecting the legal status of Indigenous peoples as distinct "peoples", consistent with international law
- ensuring the "full and effective participation" of Indigenous peoples and local communities at all stages of the work
- accepting proposals, without pre-conditions, for inclusion in draft texts
- requiring proposals to be consistent with international human rights law, including the *UN Declaration on the Rights of Indigenous Peoples* (UNDRIP)
- rejecting terms or phrases to avoid compliance with their rights and related State or other third party obligations.

For an impressive precedent and best practice relating to Indigenous peoples' participation in international processes, WIPO should consider the approaches adopted in the negotiations on UNDRIP within the United Nations.

In crafting a new intellectual property regime, WIPO and member States should not import injustices from the *Nagoya Protocol* on access and benefit sharing. This is especially important, where provisions are discriminatory or are otherwise inconsistent with the *Charter of the United Nations*, *Convention on Biological Diversity* or international human rights law.

The IGC has a significant opportunity to enhance the positive contribution of observers in its work. In international processes, ensuring the full and effective participation of Indigenous peoples and local communities is an urgent issue. WIPO is encouraged to play a leadership role.

[1] The IGC is WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore.

Note on Existing Mechanisms for Participation of Observers in the Work of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore

Comments submitted by the Grand Council of the Crees (Eeyou Istchee)

I. Introduction

1. The WIPO General Assembly is to be commended for its Decision to invite the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) to review its procedures.[1]

2. This Decision includes the following key elements:

> With a view to enhancing the positive contribution of observers, the General Assembly invites the Committee to review its procedures in this regard. To facilitate this review, the General Assembly requests the secretariat to prepare a study outlining current practices and potential options.[2]

3. The Decision also includes the following requirement to "ensure the effective protection" of genetic resources (GRs), traditional knowledge (TK) and traditional cultural expressions (TCEs):

> The Committee will, during the next budgetary biennium (2012/2013), and without prejudice to the work pursued in other fora, expedite its work on text-based negotiations with the objective of reaching agreement on a text(s) of an international legal instrument(s) which will ensure the effective protection of GRs, TK and TCEs.[3]

4. The requirement in the Decision to "ensure the effective protection" of GRs, TK and TCEs is consistent with the *Convention Establishing the World Intellectual Property Organization*.[4] In order to attain its "objective" to "promote the protection of intellectual property throughout the world"[5], WIPO, through its appropriate organs:

> shall promote the development of measures designed to facilitate the efficient protection of intellectual property throughout the world and to harmonize national legislation in this field ...[6]

5. The protection of intellectual property "throughout the world" would necessarily include safeguarding such property relating to Indigenous peoples and local communities. In at least key respects, this would require a *sui generis* intellectual property regime[7] - consistent with the rights, customs, practices and worldviews of such peoples and communities.[8]

6. In order to ensure the "effective" or "efficient" protection of GRs, TK and TCEs, any new intellectual property regime would need to fully respect the legal status and international human rights of Indigenous peoples and local communities.

7. The requirement to "harmonize national legislation in this field" of intellectual property (IP) would suggest an international regime that is inclusive of, and beneficial to, Indigenous peoples and local communities. National legislation can play a positive role in advancing common objectives and providing some flexibility.

8. However, phrases such as "subject to national legislation" or "in accordance with domestic law" are not appropriate. As evident from the *Nagoya Protocol*[9] on access and benefit sharing, such phrases continue to be used to undermine Indigenous peoples' human rights and their inherent nature.[10]

9. The Grand Council of the Crees (Eeyou Istchee) is pleased to respond to the request for comments on the WIPO Secretariat's *Note on Existing Mechanisms for Participation of Observers in the Work of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* [hereinafter "*Note*" or "*Note on Existing Mechanisms for Participation*"].[11] At the same time, we welcome other concerns raised by Indigenous peoples and local communities.

10. The *Note on Existing Mechanisms for Participation* includes the following three questions:

> Is there any existing mechanism or practice to facilitate direct participation of observers in the work of the IGC or to strengthen their capacity to contribute to the process that has not been reflected [in the *Note*]?
>
> What are the options for enhancing the existing mechanisms and practices?
>
> What draft recommendations should the twentieth session of the IGC consider with a view to enhancing the positive contribution of observers to the work of the IGC?

11. Prior to replying to these central questions, it is necessary to place these questions in a broader context so as to allow a more comprehensive analysis of the challenges within WIPO.

12. A number of key issues related to WIPO's current consultation have been addressed in, or are linked to, our Joint Submission entitled “Nagoya Protocol on Access and Benefit Sharing: Substantive and Procedural Injustices relating to Indigenous Peoples’ Human Rights".[12] This Joint Submission is intended to an integral part of our present Comments and is submitted together.

II. Right to Full and Effective Participation

13. The right of Indigenous peoples to participate in international and domestic decision-making is itself a human right. As Special Rapporteur on the rights of indigenous peoples, James Anaya, underlines:

> The right of indigenous peoples to participate in decision-making is both rooted in other basic human rights and essential to the effective enjoyment of those rights. A number of basic human rights principles underpin the right to participate and inform its content. These include, among others, principles of self-determination, equality, cultural integrity and property.[13]

14. As affirmed by the United Nations Development Group, "full and effective participation" and free, prior and informed consent (FPIC) are important elements of Indigenous peoples' right of self-determination.[14] Such participation is also a crucial aspect of FPIC.[15]

15. In its study on Indigenous peoples and the right to participate in decision-making, the UN Expert Mechanism on the Rights of Indigenous Peoples links the collective human right to participation to the right to self-determination.

> The normative international human rights framework for the collective right to participation is the right to self-determination. Affirmed in Article 1 (2) of the Charter of the United Nations and other major international legal instruments, including common article 1 of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, self-determination is widely acknowledged to be a principle of customary international law and even a peremptory norm.[16]

16. The current review of IGC procedures is timely and crucial. While some positive steps have been taken, Indigenous peoples still do not enjoy the right to "full and effective participation" in WIPO. It is critical that such participation be ensured at all stages of the work within the Organization.[17]

17. Proposals by Indigenous peoples and local communities should be accepted without conditions for inclusion in draft texts.[18] At any stage of the negotiations, consensus should not be a requirement.[19] In no case should consensus undermine the rights of Indigenous peoples and local communities, and related State or third party obligations must not be diminished to their detriment. As concluded by the Expert Mechanism on the Rights of Indigenous Peoples:

> Respect for indigenous peoples' right to participate in decision making is essential for achieving international solidarity and harmonious and cooperative relations. Consensus is not a legitimate approach if its intention or effect is to undermine the human rights of indigenous peoples. Where beneficial or necessary, alternative negotiation frameworks should be

> considered, consistent with States' obligations in the Charter of the United Nations and other international human rights law.[20]

18. In international forums and processes, unfair procedures are undermining the principles of justice, democracy, non-discrimination, respect for human rights and rule of law. The UN Expert Mechanism on the Rights of Indigenous Peoples highlights in its *Final report of the study on indigenous peoples and the right to participate in decision-making*:

> Reform of international and regional processes involving indigenous peoples should be a major priority and concern.[21]

19. The UN Permanent Forum on Indigenous Issues urges WIPO and other international bodies and forums to facilitate Indigenous peoples' participation[22] and uses UNDRIP as the standard:

> The Permanent Forum recognizes the right to participate in decision-making and the importance of mechanisms and procedures for the full and effective participation of indigenous peoples in relation to article 18 of the United Nations Declaration on the Rights of Indigenous Peoples.[23]

20. UNDRIP includes a wide range of interrelated or mutually reinforcing provisions that, in their effect, require the full and effective participation of Indigenous peoples.[24]

21. The international community is widely supportive of this right and principle, including the General Assembly,[25] specialized agencies,[26] national human rights institutions[27] and Indigenous peoples.[28] As the African Commission on Human and Peoples' Rights has concluded:

> [UNDRIP] … prohibits discrimination against indigenous peoples and promotes their full and effective participation in all matters that concern them.[29]

22. Ensuring Indigenous peoples' right to full and effective participation is consistent with principles of democracy, as well as respect for human rights and the rule of law.[30] As indicated in the *2005 World Summit Outcome* adopted by consensus at the UN General Assembly, these principles are "interlinked and mutually reinforcing":

> We [Heads of State and Government] recommit ourselves to actively protecting and promoting all human rights, the rule of law and democracy and recognize that they are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations ...[31]

23. WIPO and States Parties have a responsibility to ensure a democratic and fair process. A major factor impeding the full and effective participation of Indigenous peoples is their

lack of financial and other support. Adequate numbers of representatives from each region should have funding to participate fully in the current negotiations at all levels.

24. Special Rapporteur James Anaya has emphasized the need for reforms and capacity-building:

> Potential reforms within international institutions and platforms of decision-making that affect indigenous peoples' lives should be closely examined ... Financial and administrative support should be maintained and expanded as necessary to ensure that indigenous peoples can participate effectively in international forums.[32]

III. Human Rights Obligations of States and WIPO

25. In addressing intellectual property, the central issues within the IGC are GR, TK and TCEs. All three issues involve human rights relating to Indigenous peoples and local communities.

26. In the international human rights Covenants, the right of self-determination - which includes the right to natural resources - has been repeatedly confirmed to apply to the world's Indigenous peoples.[33]

27. Intellectual property rights should not prevail over the human rights of Indigenous peoples. In regard to any future WIPO regime, the UN General Assembly by consensus called for adequate protections:

> The ongoing discussion of the World Intellectual Property Organization Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore should have as its clear objective the continued development of mechanisms, systems and tools that adequately protect the genetic resources, traditional knowledge and expressions of culture of indigenous peoples at the national, regional and international levels.[34]

28. The UN Committee on Economic, Social and Cultural Rights highlighted the significance of collective and individual human rights as compared with intellectual property regimes:

> Whereas the human right to benefit from the protection of the moral and material interests resulting from one's scientific, literary and artistic productions safeguards the personal link between authors and their creations and between peoples, communities, or other groups and their collective cultural heritage ... intellectual property regimes primarily protect business and corporate interests and investments.[35]

29. In its resolution on *Intellectual property rights and human rights*, the UN Sub-Commission on the Promotion and Protection of Human Rights: "Remind[ed] all Governments of the primacy of human rights obligations over economic policies and agreements".[36] The Sub-Commission requested:

> intergovernmental organizations to integrate into their policies, practices and operations, provisions, in accordance with international human rights obligations and principles, that protect the social function of intellectual property ...[37]

30. Whenever human rights are at issue, States are required to act in accordance with their human rights obligations. As required by the *Charter of the United Nations*, the UN and its member States have a duty to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction".[38]

31. Article 103 of the *Charter of the United Nations* provides for the paramountcy of the *Charter*, in the event of a conflict relating to State obligations:

> In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

32. Similarly, article 30(1) of the *Vienna Convention on the Law of Treaties*[39] provides:

> Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.[40]

33. Therefore, States could not circumvent or diminish their human rights obligations under the *Charter* through any new IP regime within WIPO.[41]

34. International organizations also have a wide range of obligations that include human rights. In the Advisory Opinion, the International Court of Justice rule in *Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt*:

> International organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.[42]

35. The UN Committee on Economic, Social and Cultural Rights has called upon UN organs and specialized agencies, such as WIPO, to take into account human rights principles and obligations in their work:

> United Nations organs, as well as specialized agencies, should, within their fields of competence and in accordance with articles 22 and 23 of the Covenant, take international measures likely to contribute to the effective implementation of article 15, paragraph 1 (c). In particular, WIPO, UNESCO, FAO, WHO and other relevant agencies, organs and mechanisms of the United Nations are called upon to intensify their efforts to take into account human rights principles and obligations in their work concerning the protection of the moral and material benefits resulting from one's scientific, literary and artistic productions, in cooperation with the Office of the High Commissioner for Human Rights.[43]

36. In the *2005 World Summit Outcome*, the Heads of State and Government emphasized: "We ... call upon all parts of the United Nations to promote human rights and fundamental freedoms in accordance with their mandates."[44] This would apply, *inter alia*, to WIPO and other UN specialized agencies. Yet States in the WIPO and Convention on Biological Diversity (CBD) processes appear resistant to respecting and protecting Indigenous peoples' human rights and fulfilling related State obligations.

37. Within the present IGC process, it is not the purpose to strengthen the existing IP regime in favour of States, multinational corporations and other entities. In diverse situations, the current IP system is seriously imbalanced and there is a great deal at stake for Indigenous peoples and local communities.[45] Chidi Oguamanam highlights:

> For a people whose relationship of dependence with their ecosystem is first nature and a basis for their knowledge and socioeconomic and cultural life ..., intellectual property's role in knowledge enclosure is a fundamental human rights issue bordering on life and survival.[46]

38. Clearly the primacy of human rights must apply to non-human rights aspects of intellectual property rights. Peter Yu affirms:

> ... international human rights treaties do not protect the remaining non-human rights attributes of intellectual property rights or those forms of intellectual property rights that have no human rights basis at all. ... [S]tates have duties to take into consideration their human rights obligations in the implementation of intellectual property policies and agreements and to subordinate those policies and agreements to human rights protection in the event of a conflict between the two.[47]

39. Addressing human rights issues in the context of an international IP regime can be complex. Some attributes of intellectual property are included in human rights instruments. Examples include the rights in article 27(2) of *Universal Declaration of Human Rights* and article 15(1)(c) of the *International Covenant on Economic, Social and Cultural Rights*.[48] Where "some attributes of intellectual property rights are

protected in international or regional human rights instruments ... a careful and nuanced analysis of the various attributes of intellectual property rights is in order".[49]

40. It is important to emphasize here that Indigenous peoples' collective rights are human rights. The UN Human Rights Council has permanently included the "rights of peoples" under the agenda item "Promotion and protection of all human rights".[50]

41. Based on the past thirty years, there is a well-established practice to address Indigenous peoples' collective rights within international and regional human rights systems.[51] Even where international human rights instruments affirm the human rights of individuals, such provisions are being interpreted to also include Indigenous peoples' collective human rights.

42. Such interpretations are fully consistent with international law.[52] Although some States refuse to affirm that Indigenous peoples' collective rights are human rights, WIPO has an obligation under the *Charter of the United Nations* to insist that the new proposed international IP regime adhere to international human rights law.

43. Where States constitute the decision-making bodies of international organizations, those States cannot neglect their international human rights obligations simply by acting through such organizations.[53] The International Law Commission provides:

> A State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation.[54]

44. The prohibition against racial discrimination is a peremptory norm.[55] Therefore, even if discriminatory provisions were adopted by consensus among Parties in an international organization, these provisions would have no legitimacy or validity.

IV. Significance of UNDRIP in the Human Rights Context

45. The *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) was overwhelmingly adopted by States at the General Assembly in September 2007. Since that time, each of the four opposing States – Australia, New Zealand, Canada and the United States – has reversed its position and endorsed UNDRIP.

46. The Office of the High Commissioner for Human Rights has highlighted the far-reaching significance of UNDRIP as a universal[56] human rights instrument which now has achieved global consensus:

> The Declaration is now among the most widely accepted UN human rights instruments. It is the most comprehensive statement addressing the human rights of indigenous peoples to date, establishing collective rights and minimum standards on survival, dignity, and wellbeing to a greater extent than any other international text.[57]

47. The African Commission on Human and Peoples' Rights has characterized UNDRIP as "a universal international human rights instrument that has attained consensus among UN Member States".[58] The Commission has applied UNDRIP to specialized agencies[59] and African States.[60]

48. UN treaty bodies are increasingly using UNDRIP to interpret Indigenous rights and State obligations in existing human rights treaties, as well as encouraging its implementation.[61]

49. States cannot avoid Indigenous peoples' human rights and related State obligations in UNDRIP by attempting to diminish or disregard the legal significance of the *Declaration* when addressing intellectual property, biodiversity, climate change and other international issues.

50. UNDRIP was adopted as an Annex to a General Assembly resolution, which is generally non-binding. However, under international and domestic law, the *Declaration* has diverse legal effects.[62] UN Special Rapporteur on the rights of indigenous peoples, James Anaya, describes UNDRIP as "a political, moral and legal imperative … within the framework of the human rights objectives of the Charter of the United Nations".[63] Anaya further concludes:

> … the Declaration builds upon fundamental human rights and principles, such as non-discrimination, self-determination and cultural integrity, which are incorporated into widely ratified human rights treaties. In addition, core principles of the Declaration can be seen to be generally accepted within international and State practice, and hence to that extent the Declaration reflects customary international law.[64]

51. Indigenous peoples' cultural rights are human rights.[65] As affirmed in the 2010 *Report of the independent expert in the field of cultural rights*, their existence is "a reality in international human rights law today, in particular in the United Nations Declaration on the Rights of Indigenous Peoples."[66] Such cultural rights are integral to WIPO's proposed international IP regime, *Convention on Biological Diversity* and *Nagoya Protocol* and their respective interpretations:

> ... cultural rights relate to a broad range of issues, such as ... language; identity ... the conduct of cultural practices and access to tangible and intangible cultural heritage. ... They may also be considered as *protecting access to cultural heritage and resources* that allow such identification and development processes to take place.[67]

52. In UNDRIP, article 31 is especially relevant and important. Article 31(1) affirms that Indigenous peoples have, *inter alia*, the "right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, … including … genetic resources ... They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.".

53. Article 31(2) provides: "In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights." When article 31 is read in the context of the whole *Declaration*, States have a duty to "respect, protect and fulfill" such rights as required by international law.[68]

54. Article 31 affirms an essential aspect of Indigenous cultural rights and related State obligations in the *Declaration*, which together constitute a right to cultural integrity.[69] These cultural rights, when read together with Indigenous peoples' "right to live in … peace and security as distinct peoples" (art. 7(2)), constitute a right to cultural security.

55. In its 2010 "Information Note" to the Permanent Forum on Indigenous Issues, WIPO acknowledges the importance of implementing article 31 of UNDRIP as follows:

> The scope and content of the work of the IGC could be seen as an important contribution to implementation of Article 31 of the UN Declaration on the Rights of Indigenous Peoples ... which provides, *inter alia*, that indigenous peoples "have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expression".[70]

56. The Permanent Forum on Indigenous Issues urges all UN specialized agencies, including WIPO, to adopt a human rights-based approach as follows:

> Given the importance of the full range of the human rights of indigenous peoples, including traditional knowledge ... the Permanent Forum calls on all United Nations agencies and intergovernmental agencies to implement policies, procedures and mechanisms that ensure the right of indigenous peoples to free, prior and informed consent consistent with their right to self-determination as reflected in common article 1 of the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights ...[71]

57. Article 42 of UNDRIP explicitly requires UN specialized agencies to promote respect and its full application and follow up its effectiveness:

> The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies ... and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

58. As elaborated in these Comments, States and specialized agencies - such as WIPO - have international responsibilities to respect, protect and fulfill human rights relating to Indigenous peoples and local communities.[72]

V. Relevant Problems and Challenges in *Nagoya Protocol*

59. The new intellectual property (IP) regime being negotiated within WIPO will address GR and TK of Indigenous peoples and local communities. In key respects, these two issues are addressed in a substandard manner in the *Nagoya Protocol*. Parties participating in WIPO are relying upon the terms of the *Protocol* in crafting a new IP regime.

60. WIPO should not simply import injustices from the *Protocol* into a new intellectual property regime. A number of important aspects lack validity or legitimacy, which are briefly summarized below.

61. The new *Protocol* implements a central objective of the 1992 *Convention on Biological Diversity*.[73] With respect to the objective of benefit sharing arising from genetic resources, the *Convention* requires that such sharing be "fair and equitable ... taking into account all rights".[74] States are required to exploit their own genetic resources "in accordance with the Charter of the United Nations and the principles of international law".[75]

62. Despite the obligation to take into account "all" rights to genetic resources, the *Protocol* does not take a rights-based approach. In the operative paragraphs, specific references are made to the "rights" of Indigenous peoples and local communities *solely* when the apparent intent is to severely limit or dispossess them of their rights to genetic resources.[76]

63. In regard to access and benefit sharing of genetic resources, only "established" rights – and not other rights based on customary use – appear to receive some protection under domestic legislation.[77] Such kinds of distinctions have been held to be discriminatory by the Committee on the Elimination of Racial Discrimination,[78] as underlined by the Permanent Forum on Indigenous Issues.[79]

64. Such "established" rights might only refer to situations where a particular Indigenous people or local community can demonstrate that its right to genetic resources is affirmed by domestic legislation, agreement or judicial ruling.[80] This would be a gross distortion of the original intent.[81] Massive dispossessions could result globally from such an arbitrary approach inconsistent with the *Convention*.[82]

65. Such dispossessions are beginning to occur. In regard to implementing the *Nagoya Protocol*, the government of Canada issued a draft domestic policy and related

documents in September 2011. Among the many injustices, the government indicated that "established" rights to genetic resources would only include those Aboriginal peoples with "completed comprehensive land-claim and self-government agreements".[83]

66. In a Joint Submission, First Nations across Canada responded that the "proposed policy perpetuates the discriminatory approach on genetic resource rights that the Canadian government insisted upon during the negotiations".[84] In light of this and other shortcomings, the Submission concluded:

> Canada has prepared a draft domestic policy and approach that - if implemented in relation to Indigenous peoples - would "defeat the object and purpose" of the treaty prior to ratification in many crucial ways. Canada's approach to signing the *Protocol* is not consistent with international law and cannot be supported.[85]

67. In regard to the *Nagoya Protocol*, other **substantive injustices** include *inter alia* the following:

> • Indigenous peoples' human rights concerns were largely disregarded, contrary to the Parties' obligations in the *Charter of the United Nations*, *Convention on Biological Diversity* and other international law;[86]
>
> • progressive international standards, such as the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) were not fully respected – despite the obligation in the *Protocol* that it be implemented "in a mutually supportive manner with other international instruments";[87]
>
> • repeated use of ambiguous and questionable phrases, such as "subject to national legislation" and "in accordance with national legislation" is not consistent with the requirement that national legislation be *supportive* of the "fair and equitable" objective of benefit sharing;[88]
>
> • excessive reliance on national legislation is likely to lead to serious abuses, in light of the history of violations and the *Protocol*'s lack of a balanced framework;
>
> • the phrase "indigenous and local communities" is used throughout the *Protocol*, even though "indigenous peoples" is the term now used for such peoples in the international human rights system. Such denial of status often leads to a denial of self-determination and other rights, which would be discriminatory;[89]
>
> • "prior and informed consent" of Indigenous peoples was included in the *Protocol*, but regretfully questionable and ambiguous terms were added that some States are likely to use to circumvent the obligation of consent.[90]

68. Unfair procedures often lead to discrimination and other violations of Indigenous peoples' substantive human rights. In regard to the *Protocol*, **procedural injustices** include *inter alia* the following:

> • The procedural dimensions of Indigenous peoples' right to "full and effective participation" were not respected during the negotiations of the *Protocol* and in its final text;[91]
>
> • in relation to the formulation and adoption of national legislation and other measures, the democratic requirement of "full and effective participation" of Indigenous peoples and local communities is virtually unaddressed;[92]
>
> • key provisions relating to UNDRIP and "established" rights to genetic resources were negotiated in closed meetings, where representatives of Indigenous peoples and local communities were explicitly excluded;[93] and
>
> • some States exploited the practice of seeking consensus among the Parties, with a view to diminishing or ignoring the rights of Indigenous peoples and local communities and applying the *lowest common denominator* among the Parties' positions.[94]

69. The above injustices exemplify what prejudicial actions are likely to result when there is a lack of an explicit and principled framework for treaty negotiations relating to the rights of Indigenous peoples and local communities. To ensure fair and honourable implementation, a legally-binding human rights-based approach should have been entrenched in the *Protocol*.

70. When addressing diverse State concerns, States Parties made efforts to carefully consider related international law in a fair and equitable manner and avoid discrimination. In contrast, a much different and lesser standard was applied to Indigenous peoples and local communities. Essential principles of democracy, respect for human rights and rule of law were too often denied or ignored.

71. In view of the above deficiencies, it would not be consistent with the obligations of WIPO and States Parties to simply indicate that the proposed new international IP regime will harmonize with the *Nagoya Protocol*.

VI. Response to Questions in Note on Existing Mechanisms for Participation

72. In responding to the three questions posed in the WIPO Secretariat's *Note*, it is important to fully take into account other crucial elements in the WIPO General Assembly's Decision.

> The Committee will, during the next budgetary biennium (2012/2013), and without prejudice to the work pursued in other fora, expedite its work on text-based negotiations with the objective of reaching agreement on a text(s) of an international legal instrument(s) which will ensure the effective protection of GRs, TK and TCEs.

Question 1:

> Is there any existing mechanism or practice to facilitate direct participation of observers in the work of the IGC or to strengthen their capacity to contribute to the process that has not been reflected [in the *Note*]?

73. In addition to those in the *Note*, there are existing mechanisms and practices to facilitate direct participation of Indigenous peoples and local communities in the work of the IGC. There are also mechanisms and practices to strengthen their capacity to contribute to the process.

Mechanisms and practices to facilitate direct participation

74. A major impediment faced by Indigenous peoples and local communities has been the rules of procedure in international processes and forums. In regard to the WIPO General Rules of Procedure, the rules were devised decades ago and are not reflective of the right of Indigenous peoples and local communities to "full and effective participation".[95]

75. An existing best practice at the international level relates to the former UN Commission on Human Rights' open-ended, intersessional working group that considered the draft UN Declaration on the Rights of Indigenous Peoples from 1995-2006. In order to avoid stringent rules of procedure and ensure full and effective participation by Indigenous peoples, the meetings of the working group were declared to be informal.

76. In this way, democratic Indigenous participation and discussion was consistently ensured. State and Indigenous representatives had equal rights to table proposals, without pre-conditions. When key decisions had to be taken, the formal meeting of the working group was resumed.

77. In relation to this standard-setting process on the *UN Declaration*, it was agreed that any consensus on the draft text would need to include both States and Indigenous peoples. Otherwise, it would not have been possible to reach a compromise and achieve a just and balanced human rights instrument.

78. The Chair of the working group on the *Declaration* made it clear that any consensus would include both States and Indigenous peoples. While achieving consensus was desirable, no strict requirement was imposed. State and Indigenous representatives had equal rights to make interventions and propose text.

79. When a draft text was sent by the working group Chair to the newly-created Human Rights Council in 2006, an overwhelming number of States supported the text. Subsequently, the African Group of States negotiated nine amendments to the text, and the Indigenous Caucus supported the revised text. State and Indigenous support continued up to and including the adoption of UNDRIP at the General Assembly in September 2007.

80. Thus, in regard to the negotiations on the *UN Declaration*, an inclusive and democratic process of participation[96] was established within the United Nations. It still constitutes today an impressive precedent and best practice.

Mechanisms and practices to strengthen capacity

81. In relation to Indigenous peoples and local communities, increased financial and administrative capacity is crucial. The WIPO Voluntary Fund for Accredited Indigenous and Local Communities is "voluntary", in that no State can be compelled to contribute funding. Some States may not have the capacity themselves.

82. However, in accordance with principles of democracy and respect for human rights, there are compelling reasons for States to ensure that Indigenous peoples and local communities participate in far greater numbers from all regions worldwide. Such action could enhance the legitimacy of a future, principled international IP regime.

83. In relation to Indigenous peoples and local communities, a further issue seriously affecting capacity relates to WIPO's rules of procedure. States do not have the authority to exceed WIPO's jurisdiction. Yet, in practice, there are no specific procedures to prevent States from approving proposals, if such proposals violate peremptory norms or otherwise exceed the legal authority of WIPO.

84. This ongoing situation seriously undermines the capacity of Indigenous peoples and local communities to safeguard their status and rights within WIPO. It also undermines the validity and legitimacy of any future international IP regime, when State proposals accepted for consideration - even if they are discriminatory or are inconsistent with WIPO's objectives and international human rights obligations.

85. In this regard, the IGC should adopt specific rules. This would serve to "expedite its work on text-based negotiations" and "ensure the effective protection of GRs, TK and TCEs", as required in the General Assembly Decision.

86. The capacity of Indigenous peoples and local communities is also profoundly affected, as long their status and rights may be undermined by States in the current negotiations process. This issue will be further addressed below under Question 2.

Question 2:

What are the options for enhancing the existing mechanisms and practices?

87. In the current negotiations on a proposed international IP regime, there appear to be virtually no specific rules relating to the responsibilities of WIPO and participating States.

88. For the reasons described in these Comments, the IGC should adopt specific rules. Such rules should also serve to "expedite its work on text-based negotiations" and "ensure the effective protection of GRs, TK and TCEs", as required in the General Assembly Decision.

89. In making proposals that may affect Indigenous peoples and local communities, the binding rules applicable to all participants within the IGC would include, *inter alia*, the following:

i) consistency with ensuring effective protection for GRs, TKs and TCEs;
ii) full respect for international human rights law, including UNDRIP;[97]
iii) concise disclosure of intent when making specific proposals;
iv) consistent use of the term "indigenous peoples" (*e.g.* "indigenous peoples and local communities");[98]
v) consistent use of the term "free, prior and informed consent"; and
vi) use of terms or phrases to avoid compliance not acceptable.[99]

90. Some of the above elements should be included in the "Objectives" or "Principles". In order to ensure compliance, the term "shall" should be used (not "should").

Question 3:

> What draft recommendations should the twentieth session of the IGC consider with a view to enhancing the positive contribution of observers to the work of the IGC?

91. The IGC has a significant opportunity to adopt draft recommendations so as to enhance the positive contribution of observers to the work of the IGC. Participation of Indigenous peoples and local communities is an urgent issue in international processes. We encourage WIPO to play a leadership role.

92. It is proposed that the IGC adopt special rules of procedure[100] in order to implement the following **draft recommendations**:

> 1. In accordance with the Decision of the WIPO General Assembly (October 2011),[101] all proposals by member States and observers shall be consistent with ensuring the effective protection of GRs, TK and TCEs relating to Indigenous peoples and local communities, including *inter alia*:
>
> i) respecting the legal status of Indigenous peoples as distinct "peoples", consistent with international law;
> ii) ensuring the "full and effective participation" of Indigenous peoples and local communities at all stages of the work;

iii) accepting proposals, without pre-conditions, for inclusion in draft texts;
iv) requiring proposals to be consistent with international human rights law, including the *UN Declaration on the Rights of Indigenous Peoples* (UNDRIP);
v) requiring consistent use of the term "free, prior and informed consent"; and
vi) rejecting terms or phrases to avoid compliance with their rights and related State or other third party obligations.

2. The Intergovernmental Committee shall recommend to the WIPO General Assembly to revise the WIPO General Rules of Procedure, so as to ensure in WIPO's work:

i) effective protection of GRs, TK and TCEs relating to Indigenous peoples and local communities;
ii) increased capacity-building measures; and
iii) in respect to matters that may affect their rights, their full and effective participation in WIPO bodies.

Endnotes

[1] Assemblies of Member States of WIPO, "Matters Concerning the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Agenda Item 31, DECISION", Fortieth (20th Ordinary) Session, September 26 to October 5, 2011:

> The Assemblies of the Member States of WIPO took note of the information contained in document WO/GA/40/7, and decided to renew the mandate of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) for the 2012-2013 biennium on the terms set out in paragraph 16 of the said document. [emphasis added]

[2] *Ibid.*, para. 16(f) of document WO/GA/40/7 (cited in the Decision). [emphasis added]

[3] *Ibid.*, para. 16(a) of document WO/GA/40/7. [emphasis added] Similarly, see para. 16(d) of the same document:

> The Committee is requested to submit to the 2012 General Assembly the text(s) of an international legal instrument(s) which will ensure the effective protection of GRs, TK and TCEs. The General Assembly in 2012 will take stock of and consider the text(s), progress made and decide on convening a Diplomatic Conference, and will consider the need for additional meetings, taking account of the budgetary process. [emphasis added]

[4] *Convention Establishing the World Intellectual Property Organization*, signed at Stockholm on July 14, 1967 and as amended on September 28, 1979.

[5] *Ibid.*, article 3.

[6] *Ibid.*, article 4. [emphasis added]

[7] See, *e.g.*, World Intellectual Property Organization (Secretariat), *Elements of a sui generis system for the protection of traditional knowledge*, Doc. WIPO/GRTKF/IC/4/8, September 30, 2002, tabled at the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Fourth sess., Geneva, Dec. 9-17, 2002, para. 13:

> The form of protection of TK, whether through existing IP mechanisms, through adapted or *sui generis* elements of existing forms of IP, or through a distinct *sui generis* system, will depend heavily on why the TK is being protected – what objective the protection of TK is intended to serve. Existing IP systems have been used for diverse forms of TK-related goals, for instance,
> - to safeguard against third party claims of IP rights over TK subject matter,
> - to protect TK subject matter against unauthorized disclosure or use, to protect distinctive TK-related commercial products,
> - to prevent culturally offensive or inappropriate use of TK material,
> - to license and control the use of TK-related cultural expressions, and
> - to license aspects of TK for use in third-party commercial products.

[8] See, e.g., "Fundamental Principles", in *Statement of Indigenous Peoples & Local Communities at WIPO IGC 19*, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Nineteenth sess., Geneva, July 18 to 22, 2011, which Principles include *inter alia*:

> 1. A primary objective of the international legal instrument(s) must be to protect Indigenous Peoples' rights and interests as the owners/holders of TK, TCEs, and GR.
>
> 2. The legal instruments must establish a new international regime that conforms to customary law and processes regarding the use, protection from misuse and misappropriation of the GR, TK, and TCEs belonging to Indigenous Peoples.
>
> 3. The legal instrument(s) must reaffirm and implement the universal protection of the rights of Indigenous Peoples and nothing in the instrument(s) can be construed as diminishing or extinguishing the rights Indigenous Peoples have now or may acquire in the future.
>
> 4. The international legal instrument(s) must comply with international norms by adopting the term "Indigenous Peoples" which respects our lawful status and recognized rights.
>
> 5. The international legal instrument(s) must recognize and fully implement the principle of free, prior and informed consent of Indigenous Peoples.
> ...
> 8. Indigenous Peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

[9] *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity*, adopted by the Conference of the Parties, Nagoya, Japan, 29 October 2010.

[10] See, *e.g.*, Grand Council of the Crees (Eeyou Istchee) *et al.*, "Nagoya Protocol on Access and Benefit Sharing: Substantive and Procedural Injustices relating to Indigenous Peoples' Human Rights", *infra* note 12, paras. 37-56.

[11] World Intellectual Property Organization (Secretariat), *Note on Existing Mechanisms for Participation of Observers in the Work of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, 10 October 2011, http://www.wipo.int/export/sites/www/tk/en/documents/pdf/note_igc_participation.pdf.

[12] Grand Council of the Crees (Eeyou Istchee) *et al.*, "Nagoya Protocol on Access and Benefit Sharing: Substantive and Procedural Injustices relating to Indigenous Peoples' Human Rights", Expert Mechanism on the Rights of Indigenous Peoples, 4th sess., Geneva (July 2011), http://quakerservice.ca/wp-content/uploads/2011/08/Expert-Mechanism-Study-re-IPs-Rt-to-Participate-Joint-Submission-on-Nagoya-Protocol-FINAL-GCC-et-al-July-6-11.pdf.

[13] General Assembly, *Situation of human rights and fundamental freedoms of indigenous people: Note by the Secretary-General*, Interim report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, UN Doc. A/65/264 (9 August 2010), para. 39. [emphasis added]

[14] United Nations Development Group (UNDG), "United Nations Development Group Guidelines on Indigenous Peoples' Issues", February 2008, http://www.un.org/esa/socdev/unpfii/documents/UNDG_Guidelines_indigenous_FINAL.pdfwww2.ohchr.org/english/issues/indigenous/docs/guidelines.pdf, at 13: "The right to self-determination may be expressed through: … Respect for the principle of free, prior and informed consent … Full and effective participation of indigenous peoples at every stage of any action that may affect them direct or indirectly."

The UNDG unites the 32 UN funds, programmes, agencies, departments, and offices that play a role in development.

[15] *Ibid.* at 28: "Consultation and participation are crucial components of a consent process."

[16] Human Rights Council, "Progress report on the study on indigenous peoples and the right to participate in decision-making: Report of the Expert Mechanism on the Rights of Indigenous Peoples", UN Doc. A/HRC/15/35 (23 August 2010), para. 30. [emphasis added]

[17] See, *e.g.*, *Statement of Indigenous Peoples & Local Communities at WIPO IGC 19*, *supra* note 8, where it is provided in regard to "Participation, Future Work and Processes", para. 1:

> Indigenous peoples and local communities require full and effective participation in all relevant negotiations and decision-making processes, including all regular and special sessions of the IGC, the General Assembly, diplomatic conferences and any other related meetings regarding the proposed instrument(s) on GR, TK and TCEs. The Indigenous Peoples, as peoples and Indigenous nations, participate in these forums in their own right.

[18] *Ibid.*, "Participation, Future Work and Processes", para. 2:

> In the spirit of cooperation in the development of an international instrument(s) that are relevant, practical, and fair, Indigenous Peoples' proposals must remain in the text without the qualification of immediate State support in the drafting process or reports. Indigenous Peoples proposals must be accepted on an equal footing as any State proposal. Indigenous Peoples should be consulted on all proposals, deletions and amendments of all text in a collaborative manner.

[19] See *WIPO General Rules of Procedure*, adopted September 28, 1970 and as amended, *http://www.wipo.int/freepublications/en/general/399/wipo_pub_399.html*, Rule 35: " Unless expressly provided otherwise in the applicable treaties or in the present General Rules of Procedure, all decisions shall be made by a simple majority."

[20] Human Rights Council, *Final report of the study on indigenous peoples and the right to participate in decision-making: Report of the Expert Mechanism on the Rights of Indigenous Peoples*, A/HRC/18/42 (17 August 2011), Annex (Expert Mechanism advice No. 2 (2011)), para. 27. [emphasis added]

[21] Human Rights Council, *Final report of the study on indigenous peoples and the right to participate in decision-making*, UN Doc. A/HRC/18/42 (17 August 2011), Annex (Expert Mechanism advice No. 2 (2011)), para. 26.

[22] Permanent Forum on Indigenous Issues, *Report on the tenth session (16 – 27 May 2011)*, Economic and Social Council, Official Records, Supplement No. 23, United Nations, New York, E/2011/43-E/C.19/2011/14, para. 31:

> The Forum reiterates that the United Nations Framework Convention on Climate Change, the Stockholm Convention on Persistent Organic Pollutants, the Convention on Biological Diversity, the World Intellectual Property Organization and the International Maritime Organization should facilitate indigenous peoples' participation in their processes.

[23] *Ibid.* [emphasis added]

[24] See *e.g.*, preambular para. 24 and arts. 3, 4, 5, 10, 18, 19, 22, 23, 26, 27, 29, 30, 31, 32, 34, 38, 41, 42, 43, 45 and 46.

[25] UN General Assembly, *Draft Programme of Action for the Second International Decade of the World's Indigenous People: Report of the Secretary-General*, UN Doc. A/60/270 (18 August 2005) (adopted without vote by General Assembly, 16 December 2005), at para. 9, where two of the five objectives of the Decade relate to "full and effective participation":

> (i) Promoting non-discrimination and inclusion of indigenous peoples in the design, implementation and evaluation of international, regional and national processes regarding laws, policies, resources, programmes and projects;
>
> (ii) Promoting *full and effective participation* of indigenous peoples in decisions which directly or indirectly affect their lifestyles, traditional lands and territories, their cultural integrity as indigenous peoples with collective rights or any other aspect of their lives, considering the principle of free, prior and informed consent … [emphasis added]

[26] IFAD (International Fund for Agricultural Development), *Engagement with Indigenous Peoples: Policy* (Rome: IFAD, November 2009), at 7: "The Declaration addresses both individual and collective rights. It outlaws discrimination against indigenous peoples and promotes their full and effective participation in all matters that concern them."

[27] New Zealand Human Rights Commission, "United Nations Declaration on the Rights of Indigenous Peoples", <http://www.hrc.co.nz/home/hrc/humanrightsandthetreatyofwaitangi/unitednationsdeclarationontherightsofindigenouspeoples.php>: "The Declaration … declares discrimination against indigenous peoples unlawful and promotes their full and effective participation in all matters that concern them."

[28] International Indigenous Peoples' Forum on Climate Change (IIPFCC), "Indigenous Groups Announce Grave Concern on Possible Cancun Outcome", Press release, 10 December 2010:

> As members of the IIPFCC, … we want to reiterate our determination to ensure protection of our rights, as laid out in the UN Declaration on the Rights of Indigenous Peoples, our right to free, prior, and informed, consent, the recognition and protection of our traditional knowledge, and ensure the *full and effective participation* of Indigenous Peoples in all climate change processes. [emphasis added]

[29] African Commission on Human and Peoples' Rights, "Communiqué on the United Nations Declaration on the Rights of Indigenous Peoples", Brazzaville, Republic of Congo, 28 November 2007.

[30] UN Commission on Human Rights, *Continuing dialogue on measures to promote and consolidate democracy: Report of the High Commissioner for Human Rights submitted in accordance with Commission resolution 2001/41*, UN Doc. E/CN.4/2003/59 (27 January 2003), (expert seminar on the interdependence between democracy and human rights, Office of the High Commissioner for Human Rights, 25-26 November 2002, Geneva), at 19 (Chair's final conclusions):

> In the current context of globalization, whereby decisions affecting people's lives are often taken outside the national context, the application of the principles of democracy to the international and regional levels has taken on added importance.

[31] General Assembly, *2005 World Summit Outcome*, UN Doc. A/RES/60/1 (16 September 2005) (adopted without vote), para. 119.

[32] General Assembly, *Situation of human rights and fundamental freedoms of indigenous people: Note by the Secretary-General*, Interim report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, *supra* note 13, para. 52.

[33] See, *e.g.*, Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada*, UN Doc. CCPR/C/79/Add.105 (7 April 1999), para. 8; Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada*, UN Doc. CCPR/C/CAN/CO/5 (20 April 2006) at paras. 8 and 9; Human Rights Committee, *Concluding observations of the Human Rights Committee: Panama*, UN Doc. CCPR/C/PAN/CO/3 (17 April 2008) at para. 21; Human Rights Committee, *Concluding observations of the Human Rights Committee: Norway*, UN Doc. CCPR/C/79/Add.112 (5 November 1999) at para. 17; Human Rights Committee, *Concluding observations of the Human Rights Committee: Brazil*, UN Doc. CCPR/C/BRA/CO/2 (1 December 2005), para. 6; Human Rights Committee, *Concluding observations of the Human Rights Committee: United States of America*, UN Doc. CCPR/C/USA/Q/3 (18 December 2006), para. 37; Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Morocco*, UN Doc. E/C.12/MAR/CO/3 (4 September 2006) at para. 35; Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Russian Federation*, UN Doc. E/C.12/1/Add.94 (12 December 2003) at para. 11.

[34] General Assembly, *Draft Programme of Action for the Second International Decade of the World's Indigenous People: Report of the Secretary-General*, UN Doc. A/60/270 (18 August 2005) (adopted without vote by General Assembly, 16 December 2005), para. 17. [emphasis added]

[35] Committee on Economic, Social and Cultural Rights, General Comment No. 17, *The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (article 15, paragraph 1 (c), of the Covenant)*, 35th sess., UN Doc. E/C.12/GC/17 (12 January 2006), para. 2.

[36] UN Sub-Commission on the Promotion and Protection of Human Rights, *Intellectual property rights and human rights*, resolution 2000/7, adopted without vote 17 August 2000, para. 3 [emphasis added].

[37] *Ibid.*, para. 6. [emphasis added] And at para. 7: "Calls upon States parties to the International Covenant on Economic, Social and Cultural Rights to fulfil the duty under article 2, paragraph 1, article 11, paragraph 2, and article 15, paragraph 4, to cooperate internationally in order to realize the legal obligations under the Covenant, including in the context of international intellectual property regimes".

[38] *Charter of the United Nations*, arts. 55c and 56. These articles reinforce the purposes of the *UN Charter*, which includes in art. 1(3): "To achieve international cooperation … in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."

Human Rights Council, *The role of prevention in the promotion and protection of human rights*, UN Doc. A/HRC/RES/18/13 (29 September 2011) (adopted without vote):

> *Reaffirming* the obligation of States under the Charter of the United Nations to promote universal respect for and observance of human rights and fundamental freedoms ... (preamble)
>
> *Affirms* the importance of effective preventive measures as a part of overall strategies for the promotion and protection of all human rights ... (para. 1)

Committee on Economic, Social and Cultural Rights, General Comment No. 17, *The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (article 15, paragraph 1 (c), of the Covenant)*, *supra* note 35, para. 37:

> The Committee recalls that, in accordance with Articles 55 and 56 of the Charter of the United Nations, well established principles of international law, and the provisions of the Covenant itself, international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States parties and, in particular, of States which are in a position to assist.

[39] *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).

[40] See also *Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations*, 21 March 1986, (not yet in force), preamble:

> *Having in mind* the principles of international law embodied in the Charter of the United Nations, such as the principles of the equal rights and self-determination of peoples ... and of universal respect for, and observance of, human rights and fundamental freedoms for all,
> ...
> *Affirming* also that disputes concerning treaties, like other international disputes, should be settled, in conformity with the Charter of the United Nations, by peaceful means and in conformity with the principles of justice and international law,
>
> *Affirming* also that the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention,

And at article 30(6): "The preceding paragraphs are without prejudice to the fact that, in the event of a conflict between obligations under the Charter of the United Nations and obligations under a treaty, the obligations under the Charter shall prevail. [emphasis added]

[41] See also *Vienna Convention on the Law of Treaties*, article 5: " The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization."

In regard to "international organizations", article 2 provides: "1. For the purposes of the present Convention: ... (i) 'international organization' means an intergovernmental organization." [emphasis added]

[42] *Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt, Advisory Opinion*, 1980 I.C.J. 73, at 89-90, para. 37.

Antonio Cassese, *International Law*, 2nd ed. (Oxford/N.Y.: Oxford University Press, 2005), at 64-65:

> ... [fundamental] principles [such as respect for human rights and self-determination] … do not address themselves to States solely, but are binding on other international legal subjects as well (in particular, insurgents, peoples represented by liberation movements**,** and international organizations). All the legal entities operating in the international community must abide by them. [emphasis added]

[43] Committee on Economic, Social and Cultural Rights, General Comment No. 17, *The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (article 15, paragraph 1 (c), of the Covenant)*, *supra* note 35, para. 57. [emphasis added]

[44] General Assembly, *2005 World Summit Outcome*, *supra* note 31, para. 119. [emphasis added]

[45] For example, see Chidi Oguamanam, *Intellectual Property in Global Governance: A Development Question* (London/New York: Routledge, 2012) at 82:

> The strengthening of intellectual property rights, especially the patents regime, in terms of their scope and enforcement under the TRIPS Agreement has been linked to the public health crisis, especially in regard to the cost of, and access to, essential drugs in indigenous and local communities globally, and in regard to indigenous and local peoples' contributions to the process of pharmaceutical innovation in some cases ...

See *Agreement on Trade-Related Aspects of Intellectual Property* (TRIPS), 15 April 1994, in *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, 15 April 1994, Annex 1B. TRIPS is reprinted in 32 I.L.M. 1197.

Peter K. Yu, "Ten Common Questions About Intellectual Property and Human Rights", (2007) 23 Ga. St. U.L. Rev. 709, at 718-719:

> ... access to medicines is not the only intellectual property issue implicating the protection of human rights. Other important issues include access to computer software, cultural and educational materials, patented seeds and food products as well as the protection of traditional knowledge and indigenous materials. Among the rights implicated in these situations are the right to food, the right to health, the right to education, the right to self-determination, the right to freedom of expression, the right to cultural participation and development, and the right to the benefits of scientific progress.

[46] *Ibid.* [Oguamanam], at 81.

[47] Peter K. Yu, "Ten Common Questions About Intellectual Property and Human Rights", *supra* note 45, at 739. [emphasis added]

[48] Peter K. Yu, "Reconceptualizing Intellectual Property Interests in a Human Rights Framework", (2007) 40 U.C. Davis L. Rev. 1039 at 1042:

> ... article 27(2) of the Universal Declaration of Human Rights ("UDHR" or "Declaration") states explicitly that "everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he [or she] is the author." Closely tracking the Declaration's language, article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights ("ICESCR" or "Covenant") requires each state party to the Covenant to "recognize the right of everyone ... to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he [or she] is the author."

[49] *Ibid*.

[50] Human Rights Council, *Institution-building of the United Nations Human Rights Council*, Res. 5/1 (18 June 2007) (adopted without vote), Annex (Agenda and Framework for the programme of work).

See also UNDRIP, article 1: "Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law."

[51] This includes the African Commission on Human and Peoples' Rights and the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights.

[52] For a similar conclusion, see Peter K. Yu, "Ten Common Questions About Intellectual Property and Human Rights", *supra* note , at 741-743. See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, Advisory Opinion, [1971] I.C.J. Rep. 16 at 31, para. 53: "... an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation."

Vienna Convention on the Law of Treaties, *supra* note 39, article 31(3):.

> There shall be taken into account, together with the context:
> ...
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> (c) any relevant rules of international law applicable in the relations between the parties.

[53] Sigrun I. Skogly, "The Position of the World Bank and the International Monetary Fund in the Human Rights Field" in Raija Hanski and Markku Suksi, eds., *An Introduction to the International Protection of Human Rights* (2004).

[54] International Law Commission, *Draft articles on the responsibility of international organizations, with commentaries*, adopted at its 63rd session, 2011, article 61. [emphasis added]

[55] Ian Brownlie, *Principles of Public International Law*, 5th ed. (Oxford: Clarendon Press, 1998) at 515: "[Peremptory norms or *jus cogens*] are rules of customary law which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of contrary effect. The least controversial examples of [peremptory norms] are the prohibition of the use of force, the law of genocide, the principle of racial non-discrimination, crimes against humanity, and the rules prohibiting trade in slaves and piracy." At 515 and 517, the author indicates that the principle of self-determination is also a peremptory norm.

Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. *Rwanda)*, Jurisdiction of the Court and Admissibility of the Application, 3 February 2006, at 89, para. 10 (Separate Opinion, *ad hoc* Judge John Dugard):

> Norms of *jus cogens* are a blend of principle and policy. On the one hand, they affirm the high principles of international law, which recognize the most important rights of the international order — such as the right to be free from aggression, genocide, torture and slavery and the right to self-determination ; while, on the other hand, they give legal form to the most fundamental policies or goals of the international community — the prohibitions on aggression, genocide, torture and slavery and the advancement of self-determination.

International Law Commission, *Draft articles on the responsibility of international organizations, with commentaries*, *supra* note 54, at 53: "peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination".

[56] Mauro Barelli, "The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples", (2009) 58 ICLQ 957, at 959: "... the Declaration is expected to fill a crucial gap, providing universal and comprehensive protection to the rights of the world's indigenous peoples."

IFAD (International Fund for Agricultural Development), *Engagement with Indigenous Peoples: Policy* (Rome: IFAD, November 2009), at 7-8:

> The Declaration establishes a <u>universal framework of minimum standards</u> for the survival, dignity, well-being and rights of the world's indigenous peoples. ... It outlaws discrimination against indigenous peoples and promotes their <u>full and effective participation in all matters</u> that concern them. [emphasis added]

[57] Office of the High Commissioner for Human Rights, "Indigenous rights declaration universally endorsed", 2010, online: http://www.ohchr.org/EN/NewsEvents/Pages/Indigenousrightsdeclarationendorsed.aspx.

Permanent Forum on Indigenous Issues, *Information on recent activities of the Office of the High Commissioner for Human Rights related to the rights of indigenous peoples: Contribution to the tenth session of the UN Permanent Forum on Indigenous Issues*, 8 April 2011, at 1:

> The UN Declaration on the Rights of Indigenous Peoples serves as OHCHR's framework for action to further the advancement and protection of indigenous peoples' rights. The main priority of the Office is to contribute to the promotion and implementation of this key instrument, along with relevant recommendations, comments and observations of UN human Rights treaty bodies, and Special Procedures.

[58] African Commission on Human and Peoples' Rights, "Resolution on the protection of indigenous peoples' rights in the context of the World Heritage Convention and the designation of Lake Bogoria as a World Heritage site", done in Banjul, The Gambia, 5 November 2011, preamble.

[59] *Ibid.*, para. 2.

[60] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council* v *Kenya*, African Commission on Human and Peoples' Rights, Communication No. 276/2003, Twenty-Seventh Activity Report, 2009, Annex 5, para. 204: "The African Commission notes that the UN Declaration on the Rights of Indigenous Peoples, officially sanctioned by the African Commission through its 2007 Advisory Opinion, deals extensively with land rights."

[61] See, *e.g.*, Committee on the Rights of the Child, *Concluding observations: Cameroon*, UN Doc. CRC/C/CMR/CO/2 (29 January 2010), para.83; Committee on the Rights of the Child, *Indigenous children and their rights under the Convention*, General Comment No. 11, UN Doc. CRC/C/GC/11 (30 January 2009), para. 82; Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Guatemala*, UN Doc. CERD/C/GTM/CO/12-13 (19 May 2010), para. 11; Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Japan*, UN Doc. CERD/C/JPN/CO/3-6 (6 April 2010), para. 20; Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Cameroon,* UN Doc. CERD/C/CMR/CO/15-18 (30 March 2010)**,** para. 15; Committee on the Elimination of Racial Discrimination (Chairperson), Letter to Lao People's Democratic Republic, 12 March 2010 (Early warning and urgent action procedure) at 1; Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Peru*, UN Doc. CERD/C/PER/CO/14-17 (3 September 2009), para. 11; Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Suriname*, UN Doc. CERD/C/SUR/CO/12 (13 March 2009), para. 17; Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Brazil*, UN Doc. E/C.12/BRA/CO/2 (12 June 2009), para. 9; Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Nicaragua*, UN Doc. E/C.12/NIC/CO/4 (28 November 2008), para. 35; and Committee on the Elimination of All Forms of Discrimination against Women, *Concluding observations of the Committee on the Elimination of Discrimination against Women: Australia*, UN Doc. CEDAW/C/AUS/CO/7 (30 July 2010) (advance unedited edition), para. 12.

[62] Paul Joffe, "Canada's Opposition to the *UN Declaration*: Legitimate Concerns or Ideological Bias?" in Jackie Hartley, Paul Joffe & Jennifer Preston (eds.), *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope, and Action* (Saskatoon: Purich Publishing, 2010) 70 at 87-89.

[63] General Assembly, *Situation of human rights and fundamental freedoms of indigenous people: Note by the Secretary-General*, Interim report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, UN Doc. A/65/264 (9 August 2010), para. 85 (Conclusions). In the same paragraph,

Anaya concludes: "The significance of the Declaration is not to be diminished by assertions of its technical status as a resolution that in itself has a non-legally binding character."

[64] *Ibid.*, para. 87 (Conclusions). [emphasis added]

[65] See, *e.g. International Covenant on Civil and Political Rights*, article 27:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture ...

Indigenous peoples may in diverse situations be minority in number, as compared to non-Indigenous populations in the particular States in which they live. However, Indigenous peoples are not simply minorities. Indigenous peoples have the legal status of "peoples" and have the right of self-determination under international law.

See also Asbjørn Eide, "Cultural Rights and Minorities: Essay in Honour of Erica-Irene Daes" in Gudmundur Alfredsson & Maria Stavropoulou, eds., *Justice Pending: Indigenous Peoples and Other Good Causes*, Essays in Honour of Erica-Irene A. Daes (The Hague: Kluwer Law International, 2002) 83, at 87:

> As so often is the case within the international normative system of human rights, there are close links between the cultural rights contained in Article 27 of the UDHR and the corresponding Article 15 of the CESCR with other rights contained in the International Bill of Human Rights. Most obvious are the links to the right to education, which can be seen as a cultural right in itself; the right to freedom of expression and information, which include a right also to cultural expression; the freedom of religion, since religions and cultures are closely interrelated; as well as freedoms of assembly and of association with others or depend for their meaning on interaction with others.
>
> One of the cultural rights mentioned, namely the right to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which the beneficiary is the author, is closely related to the right of property. That right … is contained in Article 17 of the UDHR. [emphasis added]

[66] Human Rights Council, *Report of the independent expert in the field of cultural rights, Ms. Farida Shaheed, submitted pursuant to resolution 10/23 of the Human Rights Council*, UN Doc. A /HRC/14/36 (22 March 2010), para. 10.

[67] *Ibid.*, para. 9. [emphasis added] As further elaborated in Human Rights Council, *Report of the independent expert in the field of cultural rights, Farida Shaheed*, UN Doc. A/HRC/17/38 (21 March 2011), para. 78 (Conclusions):

> The right of access to and enjoyment of cultural heritage forms part of international human rights law, finding its legal basis, in particular, in the right to take part in cultural life ... and the right of indigenous peoples to self-determination and to maintain, control, protect and develop cultural heritage.

[68] UNDRIP, especially arts. 38 (legislative and other measures), 40 (effective remedies) and 42 (full application and follow-up). See also Committee on Economic, Social and Cultural Rights, General Comment No. 17, *The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (article 15, paragraph 1 (c), of the Covenant)*, UN Doc. E/C.12/GC/17 (12 January 2006), para. 28: "The right of everyone to benefit from the protection of the moral and material benefits resulting from any scientific, literary or artistic production of which he or she is the author, like all human rights, imposes three types or levels of obligations on States parties: the obligations to respect, protect and fulfil."

Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria, African Commission on Human and Peoples' Rights, Comm. No. 155/96, 15th Activity Report 2001-02, 31 at para. 44:

> Internationally accepted ideas of the various obligations engendered by human rights indicate that all rights-both civil and political rights and social and economic-generate at least four levels of duties for a State that undertakes to adhere to a rights regime, namely the *duty to respect, protect, promote, and fulfil these rights*. These obligations universally apply to all rights ... [emphasis added]

[69] In regard to Indigenous cultural rights and related obligations, see UNDRIP, preambular paras. 2-4, 7, 9, 11 and arts. 3, 4, 8, 9, 11-16, 25, 31-34, 36, 37, 38, 40 and 41. See also General Assembly, *Second International Decade of the World's Indigenous People: Note by the Secretary-General*, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, in accordance with paragraph 1 of General Assembly resolution 63/161, UN Doc. A/64/338 (4 September 2009), para. 45: "…the Declaration affirms rights of a collective character in relation to ... cultural integrity".

Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, S. James Anaya,* UN Doc. A/HRC/9/9 (11 August 2008), para. 22: "The [Human Rights] Committee's general comment No. 23 (1994) on article 27 of ICCPR advances a broad interpretation of the international norm of cultural integrity in the context of indigenous peoples, understanding that norm to encompass all aspects of indigenous culture including rights to lands and resources."

[70] Permanent Forum on Indigenous Issues, *Information Note by the World Intellectual Property Organization (WIPO)*, Ninth Session of the Permanent Forum on Indigenous Issues (UNPFII), New York, April 19 to 30, 2010, para. 2 (new negotiating mandate). [emphasis added]

[71] Permanent Forum on Indigenous Issues, *Report on the tenth session*, *(16 - 27 May 2011)*, Economic and Social Council, Official Records, Supplement No. 23, United Nations, New York, E/2011/43, E/C.19/2011/14, para. 39. [emphasis added]

[72] Office of the High Commissioner for Human Rights, "International Human Rights Law", available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx:

> International human rights law lays down obligations which States are bound to respect. By becoming parties to international treaties, States assume obligations and duties under international law to respect, to protect and to fulfil human rights. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights.

Human Rights Council, *Report of the independent expert in the field of cultural rights, Ms. Farida Shaheed, submitted pursuant to resolution 10/23 of the Human Rights Council*, UN Doc. A /HRC/14/36 (22 March 2010), para. 30:

> It is the responsibility of States ... to create an environment favourable to cultural diversity and the enjoyment of cultural rights, by meeting their obligations to respect, protect and fulfil those rights. This entails taking a wide range of positive measures, including financial measures.

African Commission on Human and Peoples' Rights, *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*, Comm. No. 155/96, 15th Activity Report 2001-02, 31 ["Ogoni Case"] at para. 44:

> Internationally accepted ideas of the various obligations engendered by human rights indicate that all rights-both civil and political rights and social and economic-generate at least four levels of duties for a State that undertakes to adhere to a rights regime, namely the duty to respect, protect,

> promote, and fulfil these rights. These obligations universally apply to all rights and entail a combination of negative and positive duties. [emphasis added]

[73] *Convention on Biological Diversity*, concluded at Rio de Janeiro 5 June 1992, entered into force 29 December 1993.

[74] *Ibid.*, article 1.

[75] *Ibid.*, article 3.

[76] In regard to fair and equitable benefit sharing arising from the *use* of genetic resources, article 5(2) of the *Protocol* only provides for benefit sharing in regard to "established" rights of Indigenous and local communities:

> Each Party shall take legislative, administrative or policy measures, as appropriate, with the aim of ensuring that benefits arising from the utilization of genetic resources that are held by indigenous and local communities, in accordance with domestic legislation regarding the established rights of these indigenous and local communities over these genetic resources, are shared in a fair and equitable way with the communities concerned, based on mutually agreed terms.

Similarly, article 6(2) of the *Protocol* refers solely to situations where Indigenous peoples and local communities have the "established" right to *grant access* to genetic resources:

> In accordance with domestic law, each Party shall take measures, as appropriate, with the aim of ensuring that the prior informed consent or approval and involvement of indigenous and local communities is obtained for access to genetic resources where they have the established right to grant access to such resources.

[77] *Ibid.*, paras. 65-94. See also World Intellectual Property Organization, "Customary Law and Intellectual Property", http://www.wipo.int/tk/en/consultations/customary_law/index.html:

> Customary laws are central to the very identity of many indigenous, local and other traditional communities. ... customary law can relate to use of and access to natural resources, rights and obligations relating to land, inheritance and property, conduct of spiritual life, maintenance of cultural heritage and knowledge systems, and many other matters.
>
> Maintaining customary laws can be crucial for the continuing vitality of the intellectual, cultural and spiritual life and heritage of many communities. For instance, customary laws can define how traditional cultural heritage is shared and developed, and how TK systems are appropriately sustained and managed within a community.

[78] See Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Guyana*, UN Doc. CERD/C/GUY/CO/14 (4 April 2006), para. 15, where in regard to Guyana's legislation distinguishing "titled" and "untitled" lands, the Committee "urges the State party to remove the discriminatory distinction between titled and untitled communities from the 2006 Amerindian Act and from any other legislation." [emphasis added]

[79] Permanent Forum on Indigenous Issues, *Report on the tenth session (16 – 27 May 2011)*, Economic and Social Council, Official Records, Supplement No. 23, United Nations, New York, E/2011/43-E/C.19/2011/14, para. 27:

> Consistent with the objective of "fair and equitable" benefit sharing in the Convention and Protocol, all rights based on customary use must be safeguarded and not only "established" rights. The Committee on the Elimination of Racial Discrimination has concluded that such kinds of distinctions would be discriminatory.

[80] In Canada, see for example *Rio Tinto Alcan Inc.* v. *Carrier Sekani Tribal Council*, 2010 SCC 43, where the Supreme Court of Canada made the distinction between "established" rights and "unproven" rights. The Court indicated at para. 41that, in the face of proposed government action, both types of "existing" rights require prior consultation to protect such rights from harm:

> The claim or right must be one which actually exists and stands to be affected by the proposed government action. This flows from the fact that the purpose of consultation is to *protect unproven or established rights from irreversible harm* as the settlement negotiations proceed ... [emphasis added]

[81] Articles 5(2) and 6(2) of the *Protocol* run counter to article 10(c) of the *Convention on Biological Diversity* that requires States, as far as possible, to protect and encourage customary use of genetic resources "in accordance with traditional cultural practices". Article 10(c) does not include any reference to national legislation or domestic law. Nor is there any reference to "established" rights in the *Convention*.

[82] Grand Council of the Crees (Eeyou Istchee) *et al.*, "Nagoya Protocol on Access and Benefit Sharing: Substantive and Procedural Injustices relating to Indigenous Peoples' Human Rights", *supra* note 12, paras. 68-75.

Canada knew from its highest court that an "established" rights approach was "not honourable", but insisted on such an approach in the *Protocol*. See *Haida Nation* v. *British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para. 27:

> The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests ... It *must respect these potential, but yet unproven, interests*. ... To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable. [emphasis added]

[83] Most First Nations in Canada do not have such "completed" agreements. For an analysis of Canada's draft position, see Grand Council of the Crees (Eeyou Istchee) *et al.*, "*Nagoya Protocol*: Comments on Canada's Possible Signature and Draft Domestic Policy", Joint Submission to the government of Canada (October 2011), paras. 50-68.

[84] *Ibid.*, para. 15.

[85] *Ibid.*, para. 154.

[86] Grand Council of the Crees (Eeyou Istchee) *et al.*, "Nagoya Protocol on Access and Benefit Sharing: Substantive and Procedural Injustices relating to Indigenous Peoples' Human Rights", *supra* note 12, paras. 22-26, 108, 172-173, 189(b), 202-203 and 213.

[87] *Ibid.*, paras. 26-31.

[88] *Ibid.* paras. 37-56.

[89] *Ibid.*, paras. 112-120.

[90] *Ibid.*, paras. 126-136.

[91] *Ibid.*, paras. 149-153 and 155-171.

[92] *Ibid.*, paras. 5, 39, 166, 186, 199, 205-206, 210 and 228(x).

[93] *Ibid.*, paras. 78-79 and 99.

[94] *Ibid.*, paras. 99-103, 174-183 and 208-210. See also Joseph Henry Vogel, "Epilogue: Architecture by committee and the conceptual integrity of the Nagoya Protocol" in Manuel Ruiz and Ronnie Vernooy, eds., *The Custodians of Biodiversity: Sharing Access and Benefits to Genetic Resources* (New York: Earthscan, 2012) 181 at 181, http://idl-bnc.idrc.ca/dspace/bitstream/10625/47481/1/IDL-47481.pdf:

> Delegations in nine working groups labored for years to draft a protocol for the Tenth Conference of the Parties (COP 10) which was held in Nagoya, Japan, 18–29 October 2010. Unfortunately, the experts in the delegations did not constitute an independent authority immune to political pressure ... Whatever conceptual integrity may have existed was expunged as the bracketed text began to lose the brackets. Although policymaking by consensus seems democratic, it is anything but. Coherence is effectively denied everyone. [emphasis added]

[95] The international norm of "full and effective participation" is increasingly used in international processes and forums. However, in most instances, greater efforts are required to achieve this standard in practice. The special Rules of Procedure adopted by the IGC at its first session in April 2001 are not sufficient to attain this standard.

[96] General Assembly, UN GAOR, 61st Sess, 107th plen. mtg., UN Doc. A/61/PV.107 (2007) at 10 (Mr. Chávez (Peru), original in Spanish): "... in 1995, the draft was submitted for consideration to a working group of the Commission .... [F]or the first time in the history of the United Nations, representatives of indigenous peoples, who would enjoy the rights cited in the Declaration, actively participated in such a working group, lending unquestionable legitimacy to the document."

[97] According to the UN General Assembly, terms such as "noting" are *per se* "neutral terms that constitute neither approval nor disapproval: see Annex to General Assembly Decision 55/488 of 7 September 2001. Simply "noting" UNDRIP falls far short of the positive obligations of States in article 38 and 42 of the *UN Declaration*:

> States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration. (art. 38)
>
> ... States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration. (art. 42)

[98] In international law and practice, the term most widely used is "Indigenous peoples". The progressive development of international law is an accepted international principle. To deny it when it relates to Indigenous peoples would be discriminatory. No State maintained objection to use of this term in UNDRIP, which is now a consensus international human rights instrument.

[99] See, *e.g.*, Chidi Oguamanam, *Intellectual Property in Global Governance: A Development Question*, *supra* note 45 at 212: "In ... [the Convention on Biological Diversity], the loose language of its text, and that of the recent Nagoya Protocol on ABS, cast serious doubts on how seriously states may take their obligations under them."

[100] The general rules of procedure adopted for WIPO bodies, namely the WIPO General Rules of Procedure (publication No. 399 Rev.3), apply to the IGC, subject to any special rules of procedure that the Intergovernmental Committee may wish to adopt. See WIPO General Assembly, Matters Concerning *Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, Document prepared by the Secretariat, Geneva, Doc. WO/GA/26/6 (25 August 2000), para. 18.

[101] Assemblies of Member States of WIPO, "Matters Concerning the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Agenda Item 31, DECISION", *supra* note 1.

Expert Mechanism on the Rights of Indigenous Peoples
Fourth session, Geneva
11-15 July 2011
Agenda Item 4: Study on indigenous peoples and the right to participate in decision-making

Nagoya Protocol on Access and Benefit Sharing: Substantive and Procedural Injustices relating to Indigenous Peoples' Human Rights

Joint Submission of Grand Council of the Crees (Eeyou Istchee); Inuit Circumpolar Council; Gwich'in Council International; International Alliance of Indigenous and Tribal Peoples of Tropical Forests/Alianza Internacional de los Pueblos Indígenas y Tribales de los Bosques Tropicales: TARA-Ping Pu; International Indian Treaty Council (IITC); International Organization of Indigenous Resource Development (IOIRD); Assembly of First Nations; Inuit Tapiriit Kanatami; Union of British Columbia Indian Chiefs (UBCIC); First Nations Summit; Assembly of First Nations of Québec and Labrador/Assemblée des Premières Nations du Québec et du Labrador; Network of the Indigenous Peoples-Solomons (NIPS); Atlantic Policy Congress of First Nations Chiefs Secretariat; OGIEK WELFARE COUNCIL; Warã Instituto Indígena Brasileiro; Kus Kura S.C.; Unissons-nous pour la promotion des Batwa (UNIPROBA); Native Women's Association of Canada; Papora Indigenous Development Association (PIDA); Makatao Indigenous Takao Council (MITC); Nunavut Tunngavik Inc.; Innu Council of Nitassinan; Khan Kaneej Aur ADHIKAR (Mines minerals & RIGHTS); Genetic Resources, Traditional Knowledge and Folklore International (GRTKF Int.); Caribbean Antilles Indigenous Peoples Caucus & The Diaspora (CAIPCD); Na Koa Ikaika KaLahui Hawaii; Taiwan Indigenous Plains Aborigines National Association (TIPANA); Consejo Regional Otomi del Alto Lerma; First Peoples Human Rights Coalition; National Association of Friendship Centres; Servicios del Pueblo Mixe; Treaty 4 Chiefs; Taiwan Indigenous Knowledge Action Network (TIKAN); Tewa Women United, USA; Ontario Federation of Indian Friendship Centres (OFIFC); Association of Taiwan Indigenous Cultures (ATIC); Maya Institute of Belize - U'kuxtal Masewal; ALDET CENTRE-SAINT LUCIA; Miaoli Pazeh Culture Association (MPCA); Hul'qumi'num Treaty Group; Haudenosaunee of Kanehsatake; Self-governing Administrative Mechanism of the Indigenous People (Bethechilokono) of Saint Lucia (SAM-BGC); BC Assembly of First Nations; Samson Cree Nation; Ermineskin Cree Nation; Montana Cree Nation; Louis Bull Cree Nation; Institut Culturel Tshakapesh; Nantou Kahabu Culture and Education Association (NKCEA); Kanien'kehá:ka Onkwawén:na Raotitiohkwa Language and Cultural Center; Indigenous Peoples Council on Biocolonialism; Innu Takuaikan Uashat Mak Mani-utenam; Chiefs of Ontario; Caney de Orocovis; United Confederation of Taino People (UCTP); Indigenous World Association; Maritime Aboriginal Peoples Council; Saint Lucia Commission On Human Rights (SLCHR); IKANAWTIKET Environmental Incorporated; Conseil des Innus

d'Ekuanitshit; American Indian Law Alliance; Seventh Generation Fund for Indian Development; Dene Nation; Arctic Athabaskan Council (Canada); Chirapaq Centro de Culturas Indígenas del Perú /Chirapaq Center of Indigenous Cultures of Peru; Indigenous Peoples Law and Policy (IPLP) Program - University of Arizona Rogers College of Law; First Peoples Worldwide; International Institute for Environment and Development (UK); Canadian Friends Service Committee (Quakers); Center for World Indigenous Studies; Hawai'i Institute for Human Rights; KAIROS: Canadian Ecumenical Justice Initiatives; Orissa Development Action Forum (ODAF); Odisha Adivasi Adhikar Abhijan (OAAA); Netherlands Centre for Indigenous Peoples (NCIV).

In light of the fundamental rights and related issues at stake, this Joint Statement is being shared with the UN Secretary-General, High Commissioner for Human Rights, Human Rights Council – Special procedures, treaty bodies, UN specialized agencies, special rappporteurs, UN Permanent Forum on Indigenous Issues, Expert Mechanism on the Rights of Indigenous Peoples, UN Independent expert in the field of cultural rights, UN Framework Convention on Climate Change (Secretariat) and World Intellectual Property Organization. Regional organizations include: African Commission on Human and Peoples' Rights, Organization of American States, ASEAN Intergovernmental Commission for Human Rights (AICHR), European Council, European Parliament and European Union. It is also being shared with Indigenous peoples and civil society organizations in different regions of the world.

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Executive Summary

This Joint Submission examines the *Nagoya Protocol* on access and benefit sharing arising from the use of genetic resources. The new treaty was adopted in October 2010.

The central purpose of this Submission is to highlight substantive and procedural injustices in the *Protocol*, in relation to Indigenous peoples' human rights. These injustices detract from the legitimacy or validity of the *Protocol* and, therefore, merit serious attention and redress.

The importance of achieving an effective international regime on access and benefit sharing is beyond question. In relation to Indigenous peoples, such a regime must include a principled framework that fully safeguards their human rights and respects their right to full and effective participation.

Indigenous peoples and local communities continue to face dispossession and "biopiracy" in relation to their lands and resources. In the context of the *Protocol*, biopiracy refers to the unauthorized commercial or other use by third parties of genetic resources and traditional knowledge without sharing the benefits.

Indigenous peoples have an essential role in safeguarding biodiversity that benefits humankind. By respecting and protecting their rights, biodiversity objectives are strengthened.

The new *Protocol* implements a central objective of the 1992 *Convention on Biological Diversity*. In regard to the objective of benefit sharing, the *Convention* requires that such sharing be "fair and equitable ... taking into account all rights". States are required to exploit their own genetic resources "in accordance with the Charter of the United Nations and the principles of international law".

These essential obligations were not respected or fulfilled in the *Protocol*, when addressing the rights of Indigenous peoples and local communities.

In regard to the *Nagoya Protocol*, **substantive injustices** include *inter alia* the following:

• Indigenous peoples' human rights concerns were largely disregarded, contrary to the Parties' obligations in the *Charter of the United Nations*, *Convention* and other international law;

• progressive international standards, such as the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) were not fully respected – despite the obligation in the *Protocol* that it be implemented "in a mutually supportive manner with other international instruments";

• repeated use of ambiguous and questionable phrases, such as "subject to national legislation" and "in accordance with national legislation" is not consistent with the requirement that national legislation be *supportive* of the "fair and equitable" objective of benefit sharing;

• excessive reliance on national legislation is likely to lead to serious abuses, in light of the history of violations and the *Protocol*'s lack of a balanced framework;

• the phrase "indigenous and local communities" is used throughout the *Protocol*, even though "indigenous peoples" is the term now used for such peoples in the international human rights system.

Such denial of status often leads to a denial of self-determination and other rights, which would be discriminatory;

• in regard to access and benefit sharing of genetic resources, only "established" rights – and not other rights based on customary use – appear to receive some protection under domestic legislation. Such kinds of distinctions have been held to be discriminatory by the Committee on the Elimination of Racial Discrimination;

• "established" rights might only refer to situations where a particular Indigenous people or local community can demonstrate that its right to genetic resources is affirmed by domestic legislation, agreement or judicial ruling. This would be a gross distortion of the original intent. Massive dispossessions could result globally from such an arbitrary approach inconsistent with the *Convention*;

• "prior and informed consent" of Indigenous peoples was included in the *Protocol*, along with questionable and ambiguous terms that some States are likely to use to circumvent the obligation of consent;

• lack of Parties' commitment to ethical conduct is exemplified by the Tkarihwaié:ri Ethical Code of Conduct, adopted by the Conference of the Parties – which Code stipulates that it "should not be construed as altering or interpreting the obligations of Parties to the Convention ... or any other international instrument" or altering domestic laws and agreements.

In regard to the *Nagoya Protocol*, **procedural injustices** include *inter alia* the following:

• The procedural dimensions of Indigenous peoples' right to "full and effective participation" were not respected during the negotiations of the *Protocol* and in its final text;

• in relation to the formulation and adoption of national legislation and other measures, the democratic requirement of "full and effective participation" of Indigenous peoples and local communities is virtually unaddressed;

• key provisions relating to UNDRIP and "established" rights to genetic resources were negotiated in closed meetings, where representatives of Indigenous peoples and local communities were explicitly excluded; and

• some States exploited the practice of seeking consensus among the Parties, with a view to diminishing or ignoring the rights of Indigenous peoples and local communities and applying the *lowest common denominator* among the Parties' positions.

This Joint Submission makes specific recommendations for fair and equitable implementation of the *Protocol*, as well as possible revisions to its text. Discriminatory and unjust dimensions of the *Protocol* all require redress – with the full and effective participation of Indigenous peoples and local communities at all stages.

In relation to Indigenous peoples and local communities, the *Protocol* must be consistent with the principles of justice, democracy, equality, non-discrimination, respect for human rights and rule of law. The rights, security and well-being of present and future generations must be ensured.

Nagoya Protocol on Access and Benefit Sharing: Substantive and Procedural Injustices relating to Indigenous Peoples' Human Rights

We need more than the rhetoric of justice. We need justice. … It's not just what you stand for, it's what you stand up for.[1]

Hon. Rosalie Abella, Justice of the Supreme Court of Canada, 2010

I. Introduction

1. This Joint Submission examines the *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity*,[2] in relation to Indigenous peoples. The *Protocol* was adopted at the tenth Conference of the Parties (COP 10) on 29 October 2010, in Nagoya, Japan.

2. We reiterate our strong support for the central objective of both the *Convention on Biological Diversity*[3] (CBD) and the *Nagoya Protocol*, namely, "*fair and equitable* sharing of the benefits arising out of the utilization of genetic resources".[4] However, in relation to Indigenous peoples, the text of the *Protocol* exceeds the authority established under the *Convention* insofar as this new text may serve to undermine their human rights.

3. **The central purpose of this Joint Submission is to highlight substantive and procedural injustices in relation to Indigenous peoples' human rights in the *Nagoya Protocol* and related COP 10 Decisions.**[5] These injustices detract from the legitimacy or validity of the *Protocol* and, therefore, merit serious attention and redress. The Joint Submission does not preclude other concerns raised by Indigenous peoples and local communities.

4. We wish to thank those States that, at different times, spoke out in favour of Indigenous peoples' rights in the negotiations, recognizing that the text of the *Protocol* needed to be strengthened. As emphasized at the time of its adoption by Venezuela:

> The document should further recognize the inalienable right of peoples who have preserved their in-depth knowledge on medicine and other areas, despite the genocide, humiliation and exclusion to which they have been subjected. We should ask ourselves whether the document in front of us meets those demands.[6]

II. Urgent Need for an Effective International Regime

5. With respect to genetic resources (GR), the importance of achieving an effective international regime on access and benefit sharing is beyond question. In relation to Indigenous peoples, such a regime must include a principled framework that safeguards their human rights and respects their democratic right to full and effective participation.

6. Such key elements are not adequately included in the *Nagoya Protocol*. In the spring of 2010, the UN Permanent Forum on Indigenous Issues reiterated to the Parties to the *Convention on Biological Diversity* the importance of respecting and protecting Indigenous peoples' rights consistent with the *UN Declaration on the Rights of Indigenous Peoples* (UNDRIP)[7]:

> ... consistent with international human rights law, *States have an obligation to recognize and protect the rights of indigenous peoples* to control access to the genetic resources that originate in their lands and waters and any associated indigenous traditional knowledge. *Such recognition must be a key element of the proposed international regime on access and benefit-sharing*, consistent with the United Nations Declaration on the Rights of Indigenous Peoples.[8]

7. Indigenous peoples are among the most disadvantaged peoples in the world.[9] They increasingly face threats to their traditional knowledge (TK) and resource rights. Although States commiserate about the debilitating poverty suffered by such peoples, some States appear unwilling to safeguard Indigenous rights to resources.

8. A key problem that exacerbates the impoverishment of Indigenous peoples and local communities is "biopiracy".[10] This issue is not specifically referred to in the *Nagoya Protocol*. Biopiracy has been described as "the unauthorised commercial use of genetic resources and TK without sharing the benefits with the country or community of origin, and the patenting of spurious 'inventions' based on such knowledge and resources".[11]

9. In view of global biopiracy of genetic resources and traditional knowledge, Indigenous peoples urgently need international and domestic safeguards for their human rights. Piracy through patenting can pose formidable challenges.[12]

> *The United Nations [S]ubcommission on Prevention of Discrimination and Protection of Minorities reports ... The annual market value of pharmaceutical products derived from medicinal plants discovered by Indigenous peoples [world wide] exceeds US$43 billion ... Traditional Healers have employed most of the 7000 natural compounds used in natural medicine for centuries; 25 percent of American prescription drugs contain active ingredients derived from Indigenous knowledge of plants ...*[13]

10. Indigenous peoples and local communities have an essential role[14] in safeguarding biodiversity that benefits humankind.[15] By respecting and protecting their rights, biodiversity objectives are strengthened.

11. As underlined in the *Global Biodiversity Outlook 3*, the loss of biodiversity globally continues at an alarming rate:[16]

> There is a high risk of dramatic biodiversity loss and accompanying degradation of a broad range of ecosystem services if ecosystems are pushed beyond certain thresholds or tipping points. The poor would face the earliest and most severe impacts of such changes, but ultimately all societies and communities would suffer.[17]

12. The "Updated Global Strategy for Plant Conservation 2011-2020" underlines:

> *Of urgent concern is the fact that many plant species, communities, and their ecological interactions, including the many relationships between plant species and human communities and cultures, are in danger of extinction*, threatened by such human-induced factors as, *inter alia,* climate change, habitat loss and transformation, over-exploitation, alien invasive species, pollution, clearing for agriculture and other development.[18]

13. At a 2011 biodiversity workshop in Montreal for Québec-based companies, a presentation highlighted the rate of biodiversity loss in monetary terms:

> ... the total value of ecological services (if they are monetized) ... is seen as roughly $33 trillion and ... are being lost at a rate of more than $50 billion per year. ... the monetizing [of] ecosystem services *does not take into account the vital esthetic and socio-cultural aspects* that, if lost, will greatly diminish the quality of life for everyone.[19]

14. The ongoing loss of biodiversity "threatens to increase poverty and undermine development"[20] and can be devastating to Indigenous peoples and local communities:

> The cultural services provided by ecosystems have important mental health benefits for people. For indigenous and local communities whose cultures and ways of life are intricately linked to nature and natural places, the disruption of ecosystems and the *loss of components of biodiversity can be devastating, not only materially, but also psychologically and spiritually*.[21]

15. For Indigenous peoples the far-ranging importance of biodiversity has many dimensions. In December 2010 the General Assembly reaffirmed "the intrinsic value of biological diversity as well as the ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic values of biological diversity and its components".[22]

16. The urgency to safeguard biodiversity and the essential contributions of Indigenous peoples and local communities *should have* been reflected in the *Nagoya Protocol*, in a manner that provided a principled framework that respected their rights. The central objectives of the *Convention on Biological Diversity* support such a rights-based perspective.[23]

17. What was achieved in the *Protocol* is not adequate. Based on contemporary and past experiences, excessive reliance on State discretion is likely to be detrimental to Indigenous peoples' and local communities' well-being and their substantive and procedural rights.

III. *Nagoya Protocol* – Indigenous Rights Must Be Respected at All Stages

18. According to the *Convention*, the negotiations on the *Nagoya Protocol* required respect for the rights of Indigenous peoples and local communities. The same remains true for its implementation. Both the *Convention* and the *Protocol* have an identical objective – namely,

"fair and equitable sharing of the benefits arising from the utilization of genetic resources, including by appropriate access to genetic resources ... *taking into account all rights over those resources*".[24] This objective calls for a rights-based approach.[25]

19. Any dispossession[26] or diminution of the rights of Indigenous peoples and local communities would be inconsistent with the central objective of "fair and equitable" benefit sharing of genetic resources. Such actions would fail to take into account "all rights" over those resources. Moreover, the *Nagoya Protocol* confirms in its preamble:

> Affirming that nothing in this Protocol shall be construed as diminishing or extinguishing the existing rights of indigenous and local communities …

20. These objectives and criteria are further reinforced by the *Convention on Biological Diversity*. The *Convention* must be interpreted in the context of international law as a whole.

21. In international law, State sovereignty is not absolute and is especially limited by the obligations accepted by States in the *Charter of the United Nations* and specific treaties.

22. The *Convention on Biodiversity* itself affirms important limits, when it indicates: "States have, *in accordance with the Charter of the United Nations and the principles of international law*, the sovereign right to exploit *their own resources* pursuant to their own environmental policies" (art. 3). The resources rights of others must still be respected and protected.[27]

23. Whenever human rights are at issue, States are required to act in accordance with their human rights obligations. As required by the *Charter of the United Nations*, the UN and its member States have a duty to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction".[28] Such duty includes universal respect for the human rights of Indigenous peoples affirmed in UNDRIP.

24. Respect for the rule of law is critical for the validity and legitimacy of the *Nagoya Protocol*. As affirmed by the United Nations in April 2011, the rule of law requires laws that are "consistent with international human rights norms and standards":

> The rule of law is a concept at the very heart of the Organization's mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are *accountable to laws* that are publicly promulgated, equally enforced and independently adjudicated, and *which are consistent with international human rights norms and standards*.[29]

25. The term "principles of international law" in the *Convention* includes, *inter alia*, diverse principles affirmed in UNDRIP that underlie Indigenous peoples' rights and related State obligations.[30] Such principles include: "principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith".[31]

26. The intention of the *Convention* is not to undermine existing international instruments or the rights of Indigenous peoples. The explicit intention is "to *enhance and complement existing international arrangements* for the conservation of biological diversity and sustainable use of its components" (preamble). Such "international arrangements" include UNDRIP, which affirms

Indigenous peoples' rights to genetic resources, traditional knowledge, cultural diversity and biological diversity,[32] as well as environmental,[33] food[34] and human security.[35]

27. This complementary approach is reinforced in the *Protocol*:

> *This Protocol shall be implemented in a mutually supportive manner with other international instruments relevant to this Protocol.* Due regard should be paid to useful and relevant ongoing work or practices under such international instruments and relevant international organizations, provided that they are supportive of and do not run counter to the objectives of the Convention and this Protocol.[36]

28. The *Convention* and the *Nagoya Protocol* are characterized as international environmental agreements.[37] These two treaties cannot be interpreted so as to undermine the human rights obligations of any Contracting Party in relation to Indigenous peoples.

29. As affirmed in the *Convention* and *Protocol*, nothing in these instruments shall affect the obligations of Contracting Parties deriving from "any existing international agreement". Such obligations would necessarily include respect and protection of human rights in a wide range of international agreements.

> The provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity. (*Convention*, art. 22(1))

> The provisions of this Protocol shall not affect the rights and obligations of any Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity. (*Protocol*, art. 4(1))

30. During the negotiations of the *Nagoya Protocol*, a number of States took the view that the *Convention* and *Protocol* were not *per se* human rights instruments. States generally disregarded requests to carefully consider the human rights implications of proposed texts relating to Indigenous peoples.

31. The resulting shortcomings in the *Nagoya Protocol* are likely to be exploited by some States in the future. The substandard text opens the door to confusion, uncertainty and ambiguity that could serve to undermine Indigenous rights.

3.1 Indigenous peoples' cultural rights are human rights

32. Indigenous peoples' cultural rights are human rights. As affirmed in the 2010 *Report of the independent expert in the field of cultural rights*, their existence is "a reality in international human rights law today, in particular in the United Nations Declaration on the Rights of Indigenous Peoples."[38] Such cultural rights are integral to the *Convention* and the *Nagoya Protocol* and their interpretation:

> ... cultural rights relate to a broad range of issues, such as ... language; identity ... the conduct of cultural practices and access to tangible and intangible cultural heritage. ... They may also be considered as *protecting access to cultural heritage and resources* that allow such identification and development processes to take place.[39]

33. In UNDRIP, article 31 is especially relevant and important. Article 31(1) affirms that Indigenous peoples have, *inter alia*, the "right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, … including … genetic resources".

34. Article 31(2) provides: "In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights." When article 31 is read in the context of the whole *Declaration*, States have a duty to "respect, protect and fulfill" such rights as required by international law.[40]

35. Article 31 affirms an essential aspect of Indigenous cultural rights and related State obligations in the *Declaration*, which together constitute a right to cultural integrity.[41] These cultural rights, when read together with Indigenous peoples' "right to live in … peace and security as distinct peoples" (art. 7(2)), constitute a right to cultural security.

36. In applying the *Convention* and *Nagoya Protocol*, the Treaty rights of Indigenous peoples must be fully respected. Such rights elaborate on the cultural and other human rights of Indigenous peoples and individuals, including land and resource rights.[42] Treaties between States and Indigenous peoples are also of "international concern, ... responsibility and character".[43] State obligations under such international Treaties may not be adversely affected by the provisions of the *Convention* and *Protocol*.[44]

IV. National Legislation Must Be Consistent with *Convention*

37. The *Convention on Biological Diversity* and *Nagoya Protocol* do not empower States to undermine the human rights of Indigenous peoples or related State obligations. Indigenous peoples' rights are inherent[45] or pre-existing rights, which urgently require protection. Their existence is not dependent on national laws.[46]

38. It would be unconscionable for the *Convention* or the *Protocol* to attempt to convert Indigenous peoples' inherent rights to traditional knowledge or genetic resources into rights that only exist in accordance with national laws. Such an approach would run directly counter to international human rights law.[47]

39. In addition to courts, "States bear ultimate responsibility as the guarantors of democracy, human rights, and rule of law".[48] In the context of "fair and equitable" benefit sharing in the *Convention* and *Protocol*, States cannot adopt national laws that undermine such democratic rights as participation and consent or other human rights of Indigenous peoples. As international law expert Dinah Shelton has underlined:

> ... in a practical sense, democracy, rule of law and respect for human rights were indivisible and interdependent because democracy without human rights and the rule of law was oppression, human rights without democracy and rule of law was anarchy, and *rule of law without democracy and human rights was tyranny*.[49]

40. At the UN General Assembly, heads of State and government have recommitted themselves:

> to actively protecting and promoting all human rights, the rule of law and democracy and recognize that they are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations ...[50]

41. The *Protocol* relies excessively on national legislation to achieve fair and equitable benefit-sharing, without sufficient elaboration on the *supportive* role that such legislation must play. This imbalance is further exacerbated in the context of Indigenous peoples and local communities, since the *Protocol* fails to specify that State legislative, administrative and other measures shall be developed and implemented together with them.[51]

42. Both currently and in the past, States have adopted measures to the detriment of Indigenous and local communities. In some States, the existence of specific Indigenous peoples is not recognized[52] – and even if they are, States often refuse to affirm Indigenous peoples' resource rights in national legislation. As the UN Department of Economic and Social Affairs (DESA) has underlined:

> ... indigenous peoples continue to lobby governments for the full legal recognition of their traditional land rights. ... In fact, in many countries, indigenous peoples lack any legal title to their land, and in other instances, even if they count on a title, governments can revoke it at any time.[53]

43. In many regions of the world, States cannot be relied upon to safeguard the customary law and practices of Indigenous peoples through national legislation. For example, in Africa[54] and Asia,[55] customary law is often subjugated to national laws or is otherwise insufficiently protected. Such inadequacies occur, even in cases where there may be significant recognition of Indigenous legal systems.[56]

44. While significant progress is being made in international human rights law and international conservation policy, there continue to be severe abuses by States through unilateral national laws, policies and practices.[57] As described by the Forest Peoples Programme:

> While recognition of indigenous peoples' land rights has increased in international human rights law, in international conservation policy and in the internal guidelines of international conservation agencies, *national laws and policies and practice continue to disregard, undermine, limit and even extinguish such rights in many countries*.[58]

45. In both the *Convention* and *Protocol*, national legislation has a *supportive* role to play consistent with international law.[59] The preamble of the *Protocol* affirms that the Contracting Parties are: "*Determined* to further support the effective implementation of the access and benefit-sharing

provisions of the Convention". Thus, national laws should ensure that the rights of Indigenous peoples and local communities are respected and protected in realizing the objective of "fair and equitable" benefit-sharing.

4.1 Questionable phrases invite abuse and uncertainty

46. To achieve this central objective of fairness and equity, the *Convention* and *Protocol* should have stated clearly that States shall take positive measures in conjunction with Indigenous peoples and local communities, including *through* national legislation.

47. The *Protocol* repeatedly uses ambiguous and questionable phrases such as "subject to national legislation" and "in accordance with national legislation". In view of the history of State violations, these phrases are likely to lead to serious abuses.

48. Some States insisted on repeating such problematic phrases in the negotiations of the *Nagoya Protocol*. Little or no regard was given to new developments in international standards that limit such phrases in favour of the rights of Indigenous peoples and local communities.

49. The *Convention* includes no authority for any State to dispossess Indigenous peoples of their human rights. Otherwise, such extreme and discriminatory action could unilaterally eliminate the universal and inherent nature of Indigenous human rights and make their existence contingent on each State "recognizing" such rights.

50. To allow States to determine whether Indigenous peoples' ancestral rights to traditional knowledge or to resources should be recognized would be reminiscent of earlier eras of colonialism.[60] It would constitute the antithesis of "fair and equitable" benefit-sharing in the *Convention* and *Protocol*. As the UN General Assembly has declared:

> ... continuation of colonialism in all its forms and manifestations [is] a crime which constitutes a violation of the Charter of the United Nations ... and the principles of international law ... [61]

51. In the *Convention*, the phrase "subject to its legislation" is not used to enable States to determine whether Indigenous peoples' rights exist or to what extent. Rather, the phrase is used in the context where the Parties are obliged by the *Convention* to take maximum beneficial action. For example, article 8(j) requires beneficial measures in support of Indigenous peoples in the broad context of conservation and biodiversity:[62]

> Each Contracting Party shall, *as far as possible* and as appropriate:
>
> (j) *Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities* embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and *encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices ...*[63]

52. The phrase "subject to national legislation" in article 8(j) must be interpreted in a manner compatible with the customary use of biological resources by Indigenous peoples and communities in article 10(c) of the *Convention*. This view is affirmed by the Executive Secretary of the *Convention*:

> Article 10(c) provides for the protection and encouragement of customary uses of biological resources in accordance with traditional cultural practices and thus forms a critical link with Article 8 ...[64]

53. National legislation must serve to safeguard and not undermine Indigenous "knowledge, innovations and practices". These elements are crucial to cultural and biological diversity. They are also critical to Indigenous peoples' security and well-being, which include human, subsistence, cultural, environmental and territorial dimensions. The "rationale" for the "Strategic Plan for Biodiversity 2011-2020" emphasizes what is at stake:

> Biological diversity underpins ecosystem functioning and the provision of ecosystem services essential for human well-being. It provides for food security, human health, the provision of clean air and water; it contributes to local livelihoods, and economic development, and is essential for the achievement of the Millennium Development Goals, including poverty reduction.[65]

54. Phrases such as "subject to national legislation" or "in accordance with national law" must be interpreted in a manner that is consistent with the *Convention*. In regard to such law-making, the *Nagoya Protocol* requires States to address special considerations such as the special role of genetic resources for food security – a matter of critical importance to Indigenous and local communities.[66] Article 8(c) of the *Protocol* emphasizes:

> In the development and implementation of its access and benefit-sharing legislation or regulatory requirements, each Party shall: ... (c) Consider the importance of genetic resources for food and agriculture and their special role for food security.

55. The preamble of the *Protocol* speaks of "*Recognizing* the importance of providing legal certainty with respect to access to genetic resources and the fair and equitable sharing of benefits arising from their utilization". Yet this approach is not applied in a fair and equal manner to the rights of Indigenous peoples and local communities.[67]

56. While the *Protocol* elaborates in detail on the rights and roles of States, it fails to fully affirm and protect the substantive and procedural rights of Indigenous peoples and local communities. As a result, some States might adopt national legislation that attempts to undermine such rights – despite its inconsistency with the *Convention*, *Protocol* and international human rights law.

V. "Customary Use" of Genetic Resources Supported "As Far As Possible"

57. "Customary use" is a well-established basis for recognition of Indigenous peoples' land and resource rights in international and domestic legal systems.[68] In regard to Indigenous peoples and local communities, article 10(c) of the *Convention* affirms:

> The Contracting Parties shall *as far as possible* and as appropriate:
> ...
> (c) *Protect and encourage* customary use of biological resources *in accordance with traditional cultural practices* that are compatible with conservation or sustainable development ...[69]

58. In order for States to "protect and encourage" such customary use, the necessary conditions for Indigenous peoples and local communities are said to include: "security of tenure over traditional terrestrial and marine estates; control over and use of traditional natural resources; and respect for the heritage, languages and cultures".[70] Customary use entails customary laws, protocols and procedures. Yet the *Protocol* and COP Decisions do not address these conditions or implement article 10(c) in a manner that is "fair and equitable".

59. The phrase "customary use of biological resources *in accordance with traditional cultural practices*" signifies that States have a positive obligation to safeguard and promote these practices. As indicated by the Executive Secretary of the Convention on Biological Diversity, the traditional purposes related to these practices should remain "paramount":

> Customary use of biological resources ... may also entail restrictions in accordance with customary laws: such restrictions must be respected as a necessary function of cultural survival. ... *[I]t is the traditional purposes for such taking which should remain paramount in considering customary uses of biological resources* and traditional cultural practices.[71]

60. The traditional knowledge of Indigenous peoples and local communities has far-reaching significance for their economies and cultures and for the conservation of biological diversity. TK and GR are interrelated and "inseparable". The preamble of the *Protocol* highlights:

> ... the *interrelationship between genetic resources and traditional knowledge, their inseparable nature* for indigenous and local communities, the importance of the traditional knowledge for the conservation of biological diversity and the sustainable use of its components, and for the sustainable livelihoods of these communities ...[72]

61. The "customary use" of biological resources and "traditional practices" in article 10(c) of the *Convention* relate to TK as well as GR, particularly in view of their "inseparable" nature. As indicated in article 8(j), States are required to "*as far as possible ... respect, preserve and maintain* knowledge, innovations and *practices* ... relevant for the conservation and sustainable *use* of biological diversity".

62. In contrast, article 12(1) of the *Protocol* understates State obligations in the *Convention*, UNDRIP and *Indigenous and Tribal Peoples Convention, 1989*.[73] Article 12(1) requires States to "*take into consideration* ... customary laws, ... protocols and procedures" with regard to TK associated with GR:

> 1. In implementing their obligations under this Protocol, Parties shall *in accordance with domestic law take into consideration* indigenous and local communities' customary laws, community protocols and procedures, as applicable, with respect to traditional knowledge associated with genetic resources.

63. In regard to the customary use of biological resources (*Convention*, art. 10(c)), there is no such phrase as "subject to national legislation and relevant international obligations". Without authority, the Conference of the Parties added this phrase to Aichi Biodiversity Target 18 in the Strategic Plan rather than the *Convention* phrase "*in accordance with traditional cultural practices*":

> ***Target 18*:** By 2020, the traditional knowledge, innovations and practices of indigenous and local communities relevant for the conservation and sustainable use of biodiversity, and their customary use of biological resources, are respected, subject to national legislation and relevant international obligations, and fully integrated and reflected in the implementation of the Convention with the full and effective participation of indigenous and local communities, at all relevant levels.[74]

64. In the *Convention*, Indigenous peoples' human right to traditional knowledge is not "subject to ... relevant international obligations". If such obligations include those in trade and other international agreements that may undermine traditional knowledge, then COP has acted without legal authority and in a manner that is inconsistent with the provisions of the *Convention*.[75]

VI. Discriminatory Approach to Indigenous Rights to Genetic Resources

65. The *Convention*'s objective of fair and equitable sharing of benefits requires that "all rights" to genetic resources be taken into account. This requirement applies to both the "utilization" of and "access" to genetic resources. As Bolivia emphasized:

> Mother Earth contains our biological heritage, our greatest wealth, for which we demand transparent actions that guarantee fair and equitable distribution of benefits and that at long last recognize *the true guardians of these resources* and the associated traditional knowledge: ... indigenous peoples.[76]

66. Yet in regard to fair and equitable benefit sharing arising from the use of genetic resources, article 5(2) of the *Protocol* only provides for benefit sharing in regard to "established" rights of Indigenous and local communities:

> Each Party shall take legislative, administrative or policy measures, as appropriate, with the aim of ensuring that benefits arising from the utilization of genetic resources that are held by indigenous and local communities, in accordance with domestic legislation regarding the established rights of these indigenous and local communities over these genetic resources, are shared in a fair and equitable way with the communities concerned, based on mutually agreed terms.

67. Similarly, article 6(2) of the *Protocol* refers solely to situations where Indigenous peoples and local communities have the "established" right to grant access to genetic resources:

> In accordance with domestic law, each Party shall take measures, as appropriate, with the aim of ensuring that the prior informed consent or approval and involvement of indigenous and local communities is obtained for access to genetic resources where they have the established right to grant access to such resources.

68. In both articles 5(2) and 6(2), the reference to "established" rights could prove highly limiting. The term "established" might only refer to situations where a particular Indigenous people or local community can demonstrate that its right to genetic resources is affirmed by domestic legislation, agreement or judicial ruling.[77] If such rights are not so proved, they might not receive any protection under the *Nagoya Protocol* – regardless of how strong the evidence that such rights exist.[78]

69. Should the term "established" be interpreted in such a restrictive manner, most Indigenous peoples worldwide could be denied their rights to genetic resources. If so, widespread dispossession and impoverishment would result. In light of such prejudicial factors, articles 5(2) and 6(2) are incompatible with the overall objectives and duties of States in the *Convention* and *Protocol*.

70. The Secretariat of the Convention on Biological Diversity has indicated that Indigenous and local communities' rights to genetic resources have limited recognition and protection in the *Protocol*:

> The Protocol ... contains significant provisions relating to ... genetic resources held by indigenous and local communities *where the rights of these communities over these resources have been recognized*.[79]
>
> *... where they retain rights to genetic resources in accordance with domestic legislation*, prior and informed consent is ... required for access to genetic resources.[80]

71. Articles 5(2) and 6(2) of the *Protocol* run counter to article 10(c) of the *Convention* that requires States, as far as possible, to protect and encourage customary use of genetic resources "in accordance with traditional cultural practices". Article 10(c) does not include any reference to national legislation or domestic law. Nor is there any reference to "established" rights in the *Convention*.

72. This raises the concern that, in disregarding the provisions of the *Convention*, the *Nagoya Protocol* is discriminatory.[81] It attempts to deprive Indigenous peoples of their rights to self-determination, culture and resources contrary to principles of equality and non-discrimination.[82] The *Protocol* is not authorized to interpret the *Convention* in a manner that runs counter to its provisions.

73. State approaches of solely taking measures in relation to "established" rights, and not all rights, over genetic resources of Indigenous and local communities is incompatible with the jurisprudence of the Committee on the Elimination of Racial Discrimination. For example, in regard to Guyana's legislation distinguishing "titled" and "untitled" lands, the Committee "urges the State party to remove the *discriminatory distinction between titled and untitled communities* from the 2006 Amerindian Act and from any other legislation."[83]

74. States cannot unilaterally separate genetic resources from traditional knowledge and other cultural heritage, with a view to limiting Indigenous rights to such resources. The cultural heritage of Indigenous peoples, including genetic resources, must be addressed holistically.[84] As Special Rapporteur Erica-Irene Daes emphasized: "All of the aspects of heritage are interrelated and cannot be separated from the traditional territory of the people concerned."[85]

75. The prohibition against racial discrimination is a peremptory norm.[86] Therefore, even if articles 5(2) and 6(2) have been adopted by consensus among Contracting Parties, these articles have no legitimacy or validity.

6.1 Procedural injustices compound dishonourable approach

76. Canada played a lead role in seeking to limit fair and equitable sharing of benefits relating to genetic resources to situations of "established" rights. At home, the Canadian government has been unsuccessful[87] in its attempts to restrict its constitutional duty to consult Indigenous peoples to situations where their rights were already "established". In this regard, the Supreme Court of Canada discredited Canada's approach:

> The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests ... It *must respect these potential, but yet unproven, interests*. ... To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be *to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable*.[88]

77. Fair and equitable sharing of benefits is a means of promoting reconciliation among different rights-holders. However, attempts to limit Indigenous peoples and local communities to "established" rights to genetic resources are highly prejudicial. By the time such rights are proved, the genetic resources in question may have been exploited by others. The Supreme Court of Canada has generally characterized such approach to Indigenous peoples' land and resource rights as risking "unfortunate consequences" and dishonourable:

> To limit reconciliation to the *post-proof sphere* risks treating reconciliation as a distant legalistic goal, devoid of … "meaningful content" … It also risks unfortunate consequences. *When the distant goal of proof is finally reached, the*

> *Aboriginal peoples may find their land and resources changed and denuded*. This is not reconciliation. Nor is it honourable.[89]

78. In negotiating the provisions addressing "established" rights, Canada joined other States in a meeting where representatives of Indigenous peoples were excluded.[90] Prior to the closed meeting, Canadian government representatives refused to disclose what Canada was about to propose. Following the meeting, Canada and other States refused to indicate the legal intent and meaning of "established" rights in the *Protocol*.

79. When these provisions were brought back to the main negotiations meeting, a representative of Indigenous and local communities was offered by the Co-Chair "one minute to speak now, or two minutes later". In contrast, Contracting Parties were accorded as much time as necessary to address their concerns and negotiate revisions.[91]

80. Indigenous peoples' inherent[92] right to resources includes genetic resources. Such rights to genetic resources are an integral part of their cultures and cultural heritage.[93] Any dispossession of genetic resources undermines both cultural and biological diversity, since the two are "inextricably linked". As recognized in the *2010 Declaration on Bio-cultural Diversity*:

> ... biological and cultural diversity are intrinsically and inextricably linked and together hold the key to sustainable development and are critical for the achievement of the Millennium Development Goals ...[94]

81. Indigenous peoples and individuals have the right to "take part in cultural life", as affirmed in the *International Covenant on Economic, Social and Cultural Rights*.[95] This cultural right includes "protecting access to cultural heritage and resources".[96] According to the Committee on Economic, Social and Cultural Rights:

> States parties should take measures to *guarantee* ... the exercise of th[at] right ... States parties must therefore take measures to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources".[97]

82. The Committee on Economic, Social and Cultural Rights has elaborated on the interpretation of the right to "take part in cultural life". It has underlined that, "in accordance with the Covenant and other international instruments dealing with human rights and the protection of cultural diversity, ... article 15, paragraph 1 (a) ... of the Covenant ... includes the following *core obligations applicable with immediate effect*":

> To take legislative and any other necessary steps *to guarantee non-discrimination and gender equality* in the enjoyment of the right of everyone to take part in cultural life ...[98]

6.2 Disproportionate and prejudicial impacts must be avoided

83. By arbitrarily imposing the criterion of "established" rights on Indigenous peoples and local communities, the *Protocol* exposes them to a wide range of disproportionate and prejudicial

impacts.[99] These impacts affect present and future generations and potentially include, *inter alia*: dispossession[100] of genetic resources; loss of identity, culture and cultural heritage; forced assimilation;[101] deprivation of fair and equitable benefit-sharing and impoverishment.

84. The Committee on Economic, Social and Cultural Rights identifies "the necessary conditions for the full realization of the right of everyone to take part in cultural life on the basis of equality and non-discrimination".[102] These conditions include appropriate, relevant and respectful ways of implementation of this human right:

> *Appropriateness* refers to the realization of a specific human right in a way that is pertinent and suitable to a given cultural modality or context, that is, respectful of the culture and cultural rights of individuals and communities, including minorities and indigenous peoples.[103]

85. The Contracting Parties cannot selectively decide that they shall respect the "established" rights of Indigenous and local communities to genetic resources but not all such rights based on customary use. Such actions are based on narrow self-interest and are incompatible with the international law principles of non-selectivity, impartiality and objectivity. As reaffirmed by the UN General Assembly:

> … the promotion, protection and full realization of all human rights and fundamental freedoms, as a legitimate concern of the world community, should be guided by the principles of non-selectivity, impartiality and objectivity and should not be used for political ends.[104]

86. The Committee on the Elimination of Racial Discrimination has emphasized that "in many regions of the world *indigenous peoples have been, and are still being, discriminated against, deprived of their human rights* ... and in particular that they have lost their land and resources to colonists, commercial companies and State enterprises."[105] To address such discrimination, the Committee calls upon States parties to:

> ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity;[106]
>
> provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;[107]
>
> ensure that indigenous communities can exercise their rights to practice and revitalize their cultural traditions and customs, to preserve and to practice their languages;[108]
>
> ... recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources ...[109]

87. Where a State has asserted rights over natural resources in its constitution, the Committee on the Elimination of Racial Discrimination has indicated that such State must still respect the resource rights of Indigenous and tribal peoples:

> While noting the principle set forth in article 41 of the Constitution [of Suriname] that natural resources are the property of the nation and must be used to promote economic, social and cultural development, the Committee points out that *this principle must be exercised consistently with the rights of indigenous and tribal peoples*.[110]

88. It is unconscionable to run roughshod over Indigenous peoples' rights to genetic resources in situations where they do not meet the criterion of "established" rights. Such an approach serves to accelerate the commercialization of genetic resources at the expense of Indigenous rights.

89. Venezuela has indicated generally that the text of the *Protocol* "has suffered departures from its initial objectives and origins" and expressed the following concern:

> We are greatly concerned that the documents relating to the protocol show a marked tendency towards the commercialization of biological diversity and the conversion of nature into a market product, which hinders progress towards our common objectives and vision.[111]

90. Even in cases in which States legitimately retain the ownership of mineral or sub-surface resources or rights to other resources pertaining to Indigenous lands, such States cannot unilaterally proceed with benefit-sharing to the detriment of Indigenous rights.

91. According to the *Indigenous and Tribal Peoples Convention, 1989*, such States have at least a prior duty to consult Indigenous and tribal peoples to determine the extent of prejudice that may result from programmes of exploration and exploitation. The peoples concerned also have a right to *participate in benefit-sharing* and a right to *receive fair compensation* for any resulting damages.

> … governments shall establish or maintain procedures through which they shall consult these peoples, with a view to <u>ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation</u> of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.[112]

92. Such standards in the *Indigenous and Tribal Peoples Convention* may well need to be upgraded. At the time of the revision process that led to the adoption of the *Convention*, the issue of self-determination was said to be "outside the competence of the ILO" and "no position for or against self-determination was or could be expressed in the Convention".[113] The right of self-determination, as provided in the international human rights Covenants, has since been confirmed to apply to the world's Indigenous peoples.[114]

93. Thus, the right of self-determination and other human rights affirmed in UNDRIP should now be used to interpret the *Indigenous and Tribal Peoples Convention*.[115] This is especially important since the right of peoples to self-determination is a prerequisite for the enjoyment of all other human rights.[116]

94. In international law, sovereign States do not enjoy full ownership and control over all genetic resources within their national boundaries.[117] States are required to act in accordance with their human rights obligations. Thus, the resources rights of Indigenous peoples and local communities must still be respected and protected.

VII. Indigenous Peoples' Human Rights Must Be Safeguarded

95. The negotiations on the *Nagoya Protocol* included other double standards. When a Party indicated that their rights or obligations in an existing instrument would be undermined by a proposed text, such concerns were carefully considered. Revisions were generally made so that the text would complement and support existing instruments relevant to the *Protocol*.

96. In contrast, existing international standards in favour of Indigenous peoples were not fully respected in negotiating the *Nagoya* text – including those standards in the *Convention*.

97. Some States exploited the practice of seeking consensus among Contracting Parties, with a view to diminishing or ignoring the rights of Indigenous peoples and local communities.

7.1 *UN Declaration on the Rights of Indigenous Peoples* must be fully applied

98. During the final negotiations in Nagoya in October 2010, the Co-Chairs proposed the following wording to be added to the preamble of the *Protocol*: "*Taking into account* the significance of the United Nations Declaration on the Rights of Indigenous Peoples". Reneging on its previous commitment to similar wording,[118] Canada was the only country in the world to object and insist there be no reference whatsoever to UNDRIP in the preamble.

99. After widespread international criticism by Indigenous and civil society organizations,[119] Canada accepted to include in the preamble: "*Noting* the United Nations Declaration on the Rights of Indigenous Peoples". This minimal reference was discussed and agreed to in a meeting that expressly excluded representatives of Indigenous organizations in Nagoya.

100. It is deeply troubling that, in regard to UNDRIP, it took only one State to exploit the practice of consensus in the negotiations so as to lower standards in the *Protocol*. Such a process requires fundamental reform.[120] States that violate the rule of law at home and internationally must not be permitted to play such a determinative role.[121]

101. According to the UN General Assembly, terms such as "noting" are *per se* "neutral terms that constitute neither approval nor disapproval."[122] Canada's insistence on simply "noting" UNDRIP in the preamble falls far short of the positive obligations of States in article 38 and 42 of the *UN Declaration*:

> States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration. (art. 38)

> ... States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration. (art. 42)

102. In seeking to diminish the significance of UNDRIP in the *Nagoya Protocol*, Canada took unfair advantage of the practice of seeking consensus among the Parties by insisting on its "lowest-common-denominator" position. If other Parties did not agree to alter the existing proposal to "noting", there would be no reference to UNDRIP at all.

103. In regard to UNDRIP, the potential disadvantage of simply using the neutral term "noting" is not limited to the *Nagoya Protocol* and its implementation. It could set a precedent to try to minimize the significance and use of UNDRIP in other international negotiations and agreements. For example, a similar approach of "noting" was adopted at the climate change talks in December 2010 in Cancún, Mexico:

> *Taking note* of relevant provisions of the United Nations Declaration on the Rights of Indigenous Peoples ...[123]

104. In Nagoya, actions to potentially diminish the importance of the *Declaration* were not limited to the negotiations of the *Protocol*. The Conference of the Parties – whose decisions generally are not legally binding[124] – exceeded its authority and unilaterally added the following wording that could be construed as lessening the standard in UNDRIP for its full and effective implementation:

> *Invites* Parties to take note of the United Nations Declaration on the Rights of Indigenous Peoples in the implementation of the Strategic Plan for Biodiversity 2011-2020, <u>as appropriate, and in accordance with national legislation</u> ...[125]

105. Attempts by Parties to devalue UNDRIP in the *Protocol* should not prove successful. To interpret UNDRIP in a diminished manner contrary to its terms would run counter to the central objective of fair and equitable benefit sharing. Both the *Convention* and the *Protocol* require that their respective provisions "shall not affect the rights and obligations of any Party deriving from any existing international agreement ..."[126] The term "noting" cannot neutralize the legal effect of UNDRIP.

106. The *UN Declaration* was overwhelmingly adopted by States at the General Assembly in September 2007. Since that time, each of the four opposing States – Australia, New Zealand, Canada and the United States – has reversed its position and endorsed UNDRIP. The Office of the High Commissioner for Human Rights has highlighted the far-reaching significance of UNDRIP as a universal human rights instrument which now has achieved global consensus:

> The Declaration is now among the most widely accepted UN human rights instruments. It is the most comprehensive statement addressing the human rights of indigenous peoples to date, establishing collective rights and minimum standards on survival, dignity, and wellbeing to a greater extent than any other international text.[127]

107. UN treaty bodies are increasingly using UNDRIP to interpret Indigenous rights and State obligations in existing human rights treaties, as well as encouraging endorsement of the

Declaration and its implementation.[128] States cannot avoid Indigenous peoples' human rights and related State obligations in UNDRIP by attempting to disregard the legal significance of the *Declaration* when addressing biodiversity, climate change and other crucial international issues.

108. UNDRIP was adopted as an Annex to a General Assembly resolution, which is generally non-binding. However the *Declaration* has diverse legal effects.[129] UN Special Rapporteur on the rights of indigenous peoples, James Anaya, describes UNDRIP as "a political, moral and legal imperative … within the framework of the human rights objectives of the Charter of the United Nations".[130] Anaya further concludes:

> … the Declaration builds upon fundamental human rights and principles, such as non-discrimination, self-determination and cultural integrity, which are incorporated into widely ratified human rights treaties. In addition, core principles of the Declaration can be seen to be generally accepted within international and State practice, and hence to that extent the Declaration reflects customary international law.[131]

109. In 2008, the Permanent Forum on Indigenous Issues affirmed that the *Declaration* "will be its legal framework" and will therefore ensure that the *Declaration* is integrated in all aspects of its work.[132] The Food and Agricultural Organization (FAO) – which includes genetic resources and Indigenous knowledge as priority areas of work[133] – has indicated that it has a "responsibility to observe and implement UNDRIP".[134]

> FAO activities that affect indigenous peoples will be guided by the human rights-based approach to development, premised on the notion that everyone should live in dignity and attain the highest standards of humanity guaranteed by international human rights law. It will be guided in particular by the core principles expressed in this policy document and by the UN Declaration on the Rights of Indigenous Peoples.[135]

110. In February 2011, IFAD (International Fund for Agricultural Development) announced the establishment of an "indigenous peoples' forum". The new forum "will be guided by the principles of mutual respect, promoting complementarities, *adherence to UNDRIP*, inclusiveness, pluralism, reciprocity, accountability and solidarity."[136]

111. At the regional level, the African Commission on the Human and Peoples' Rights has officially sanctioned and used UNDRIP to interpret Indigenous peoples' rights.[137] Also, the Inter-American Commission on Human Rights (IACHR) has highlighted the legal "relevance and importance" of UNDRIP in construing Indigenous rights within the Inter-American system:

> The IACHR and the Inter-American Court, in their elaboration of the right to
>
> indigenous property, view as relevant and important the United Nations Declaration on the Rights of Indigenous Peoples. ... Its provisions, together with the System's jurisprudence, constitute a corpus iuris which is applicable in

> relation to indigenous peoples' rights ... The Inter-American Court has resorted to its provisions in order to construe specific rights.[138]

7.2 Failure to use term "peoples"

112. The *Convention on Biological Diversity* was adopted in 1992, with little participation of Indigenous peoples or local communities in its formulation. Since that time, numerous international standards have emerged that are relevant to the *Convention* and reinforce the interpretation of its provisions – particularly those relating to Indigenous peoples' rights and related State obligations.

113. During the negotiations of the *Nagoya Protocol*, the *Convention* was not consistently interpreted in accordance with contemporary standards. In regard to Indigenous peoples, some Parties refused to accept key changes in terminology based on new international developments. Some sought to minimize Indigenous peoples' status and human rights.[139]

114. The Protocol uses the term "indigenous and local communities", as this is the expression used in the *Convention on Biological Diversity*. Since 1992, significant advancements have occurred in international law and "indigenous peoples" is the term now used.

115. According to international law, the term "peoples" has a particular legal status and all "peoples" have the right of self-determination.[140] This same legal status and right are not recognized in regard to "minorities" or "communities" *per se*.

116. States that seek to restrict or deny Indigenous peoples their status as "peoples", in order to impair or deny their rights, are violating the *International Convention on the Elimination of All Forms of Racial Discrimination*.[141]

> In this Convention, the term 'racial discrimination' shall mean any distinction, *exclusion, restriction* or preference based on race, colour, descent, or national or ethnic origin which has the *purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing*, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[142]

117. Such action would also violate the principle of "equal rights and self-determination of peoples" under the *Charter of the United Nations*[143] and as affirmed in UNDRIP.[144] In its 2010 Report, the Permanent Forum on Indigenous Issues urged the Parties to the *Convention on Biological Diversity* to use the term "peoples" in relation to Indigenous peoples.[145] This recommendation was not followed in the *Nagoya Protocol* negotiations.

118. The term "indigenous peoples" is used in both the 2003 *Convention for the Safeguarding of the Intangible Cultural Heritage*[146]and the 2005 *Convention on the Protection and Promotion of*

the Diversity of Cultural Expressions.[147] Most recently, the term "Indigenous peoples and local communities" is used in the agreements reached on climate change in Cancún, Mexico.[148]

119. Indigenous peoples have strived for decades to be recognized as "peoples" under international law. With the historic adoption of the *UN Declaration on the Rights of Indigenous Peoples* in September 2007, the issue of "peoples" was resolved. Today, the term "indigenous peoples" is used consistently by the General Assembly, Office of the High Commissioner for Human Rights, Human Rights Council, treaty monitoring bodies, specialized agencies, special rapporteurs and other mechanisms within the international system.

120. Failure to use the term "Indigenous peoples" or "Indigenous peoples and local communities" in the *Nagoya Protocol* is not consistent with international practice.[149] It is disrespectful and diminishes respect for the *Protocol*. This issue is slated for discussion at the 7th meeting of the Working Group on article 8(j) and at COP 11 in October 2012.[150]

VIII. Special Measures Essential for Indigenous Peoples

121. Instead of increasing the vulnerability of Indigenous peoples through possible dispossessions, the *Protocol* should have required "special measures" to promote and safeguard their rights to genetic resources and other cultural heritage. Such special measures are crucial in international human rights law.[151]

122. In light of the key role of Indigenous peoples and local communities in conserving biodiversity, the imperative of ensuring special protections is reinforced. Special measures are required in general terms in the *Convention on Biological Diversity*, where necessary "to conserve biological diversity":

> Each Contracting Party shall, as far as possible and as appropriate:
>
> (a) Establish a system of protected areas or *areas where special measures need to be taken to conserve biological diversity* ...[152]

123. In the Americas, the Inter-American Court of Human Rights has ruled:

> ... as regards indigenous peoples, it is essential for the States to grant effective protection that takes into account their specificities, their economic and social characteristics, as well as their situation of special vulnerability, their customary law, values, and customs.[153]

124. In regard to Indigenous and tribal peoples, the Inter-American Court called for special measures to "guarantee the full exercise of their rights":

> ... members of indigenous and tribal communities require special measures that *guarantee the full exercise of their rights*, particularly with regards to their enjoyment of property rights, in order to safeguard their physical and cultural

> survival.[154] Other sources of international law have similarly declared that such special measures are necessary.[155]

125. The African Commission on Human and Peoples' Rights has relied significantly on the jurisprudence of the Inter-American Court in requiring special measures to safeguard the land and resource rights of "traditional African communities".

> The African Commission is of the view that the first step in the protection of traditional African communities is the acknowledgement that the rights, interests and benefits of such communities in their traditional lands constitute 'property' under the Charter and that special measures may have to be taken to secure such 'property rights'.[156]

IX. Challenges to "Free, Prior and Informed Consent" (FPIC)

126. In regard to Indigenous and local communities, article 8(j) is the sole provision in the *Convention on Biological Diversity* that includes reference to the terms "approval" and "involvement":

> Each Contracting Party shall, as far as possible and as appropriate:
> ...
> (j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application <u>with the approval and involvement of the holders</u> of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices ...

127. During the eighteen years following the adoption of the *Convention*, the meaning of the terms "approval" and "involvement" has been elaborated in international law. In the Indigenous context, "approval" is most widely understood as "free, prior and informed consent"; and "involvement" is more substantively described as "full and effective participation".

128. UNDRIP consistently uses the standard of FPIC.[157] This is the standard relating to Indigenous cultural heritage, including traditional knowledge and genetic resources[158] and is consistent with Indigenous peoples' right of self-determination.[159]

129. FPIC is further reinforced by Indigenous peoples' human right to development.[160] This right "implies the full realization of the right of peoples to self-determination".[161] As affirmed in UNDRIP, "Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development."[162]

130. In international law, Indigenous peoples have a right to sustainable and equitable development.[163] Such equitable development is consistent with the objective of "fair and equitable" benefit sharing in the *Convention* and *Protocol* and entails FPIC.[164]

131. FPIC is the standard required or supported by the UN General Assembly,[165] international treaty bodies,[166] regional human rights bodies,[167] UN special rapporteurs[168] and specialized agencies.[169]

132. In article 8(j) of the *Convention*, the phrase "approval and involvement" is less than satisfactory. Genuine "approval" constitutes a consensual process that includes such crucial elements as good faith consultation with Indigenous peoples and their full and effective participation.[170] The term "involvement" appears redundant and may have been added for emphasis.

9.1 Meaning of "prior and informed consent or approval and involvement"

133. In the *Nagoya Protocol*, the Parties retained the phrase "approval and involvement" used in article 8(j) of the *Convention* with an expanded formulation. In relation to Indigenous and local communities, the new phrase used repeatedly is "*prior and informed consent or approval and involvement*".[171]

134. In regard to the new phrase, the "or" between "prior and informed consent" (PIC) and "approval" suggests that the two terms are synonymous. This interpretation is reinforced by article 6(3)(f) of the *Protocol*.[172] Thus, the "involvement" of Indigenous peoples and local communities is required in addition to such consent or approval.

135. Some States, such as Canada, are claiming another interpretation – namely, that there are two different standards that could apply. One standard is "prior and informed consent"; the other is "approval and involvement". This could suggest that there would only be "involvement" in relation to situations of "approval" and not "PIC". Such an interpretation would not be coherent and would be inconsistent with international and domestic law.[173]

136. The Tkarihwaié:ri Code of Ethical Conduct (adopted by COP 10) refers to "prior informed consent and/or approval and involvement".[174] This wording derogates from the *Protocol*, which consistently uses the phrase "prior and informed consent or approval and involvement". Such action is detrimental to Indigenous peoples and communities. It has no place in a Code of Ethical Conduct – even if the Code cannot be used to interpret the *Protocol*.[175]

X. Indigenous Peoples' Decision-Making Processes Require Respect

137. In deciding whether to give or withhold their consent, Indigenous peoples have the right to freely determine their own criteria and decision-making processes consistent with the right of self-determination.

138. Paragraph (f) of article 6(3) of the *Nagoya Protocol* was initially approved at the Montreal meeting in July 2010– against the wishes of the International Indigenous Forum on Biological Diversity (IIFB). Article 6(3)(f) provides:

> 3. ... each Party requiring prior informed consent shall take the necessary legislative, administrative or policy measures, as appropriate, to:
> …
> (f) Where applicable, and subject to national legislation, set out criteria and/or processes for obtaining prior informed consent or approval and involvement of indigenous and local communities for access to genetic resources ...

139. According to article 6(2), the measures to be taken by States in article 6(3)(f) may only be for situations where Indigenous and local communities have "established" rights to grant access to genetic resources.[176] Such an arbitrary limitation would be discriminatory and invalid.[177]

140. Article 6(3)(f) calls on States to "set out criteria and/or processes for obtaining prior informed consent ... and involvement" of Indigenous and local communities. This broad and general phrasing invites invasive and excessive State actions.

141. Article 6(3)(f) includes three possible limitations – "as appropriate", "where applicable" and "subject to national legislation" – in addressing consent and involvement issues relating to Indigenous peoples and local communities. Such phrases serve to encourage State inaction or denial of rights.

142. In regard to access to genetic resources, article 6 of the *Protocol* should have required States to ensure the effective protection of the rights of Indigenous peoples and local communities and respect for their right relating to FPIC. Such duties are consistent with UNDRIP and other international human rights law. As indicated by the Committee on Economic, Social and Cultural Rights:

> States parties should adopt measures to *ensure the effective protection of the interests of indigenous peoples* relating to their productions, which are often expressions of their cultural heritage and traditional knowledge. ... In implementing these protection measures, States parties should *respect the principle of free, prior and informed consent* of the indigenous authors concerned ...[178]

143. In the drafting of article 6(3)(f), Canada, Australia and New Zealand jointly played a key role[179] demonstrating no flexibility to Indigenous representatives. At the Montreal meeting, a formal request made by the IIFB to allow more time for consultations was rejected by the Co-Chair. When no Party objected to paragraph (f) of article 6(3), it was declared officially approved.[180]

XI. "Mutually Agreed Terms" Reaffirms Indigenous "Consent"

144. Indigenous peoples and local communities have been and continue to be customary users of genetic resources. In this context, they have acquired critical knowledge and developed important innovations and practices. Aside from being "users" of GR and TK, they are also "providers" in relation to third parties that seek access and use.

145. In addition to prior and informed consent (PIC) in various provisions of the *Nagoya Protocol*, there are requirements for "mutually agreed terms" (MAT). As providers, Indigenous and local communities may require third party users to fulfill specific conditions or obligations.

146. In the *Nagoya Protocol*, the sharing of benefits arising from use of TK associated with GR is subject to mutually agreed terms, as is access to such TK.[181] MAT is also required for the sharing of benefits arising from the use of GR held by Indigenous and local communities, but only for so-called "established" rights.[182]

147. In its preamble, the *Nagoya Protocol* recognizes the "importance of promoting equity and fairness in negotiation of mutually agreed terms between providers and users of genetic resources". Such agreements underline the importance of Indigenous "consent", in regard to TK and GR.

148. A permit or its equivalent is only issued to third party users *after* prior and informed consent and MAT are obtained from Indigenous and local communities.[183] This process reinforces the need for free, prior and informed consent at every stage. If MAT is carried out fairly and in good faith, it would constitute another step in ensuring such prior and informed consent.

XII. "Full and Effective Participation" Must Be Respected

149. In regard to Indigenous peoples and local communities, the *Nagoya Protocol* fails to affirm their right to full and effective participation when Parties take legislative, administrative or other measures in relation to genetic resources and traditional knowledge. In the Indigenous and local community context, the only reference in the operative provisions to the term "participation" is in article 12(2):

> Parties, with the *effective participation* of the indigenous and local communities concerned, shall establish mechanisms to inform potential users of traditional knowledge associated with genetic resources about their obligations ...[184]

150. "Full and effective participation" and FPIC are important elements of Indigenous peoples' right of self-determination.[185] Such participation is also a crucial aspect of FPIC.[186] Yet the *Protocol* fails to affirm these key relationships. It uses repeatedly the term "involvement" from the 1992 *Convention*, without fair and equitable consideration as to what the term entails.[187]

151. The negotiations on the *Protocol* took place without acknowledging or ensuring the right to full and effective participation of Indigenous peoples – which must include "full and meaningful" participation under international law.[188] Involvement inconsistent with their right of self-determination often leads to severe injustices or other tragic results.

152. States generally viewed the negotiations as being among the Parties.[189] Interventions by Indigenous peoples or local communities were largely treated as a limited privilege.

153. The Parties were clearly aware of the importance of "full and effective participation", since this standard is included in some COP decisions relating to Indigenous peoples and local

communities.[190] These COP decisions generally are not legally binding. Yet such participation was still crafted in weak terms and with inappropriate qualifying language.[191]

154. Indigenous peoples and local communities continue to face dispossession, marginalization, biopiracy and other forms of exploitation.[192] Yet the COP Decision X42 that adopts the Tkarihwaié:ri Ethical Code of Conduct provides little or no incentive for the Parties to "ensure respect for the cultural and intellectual heritage of indigenous and local communities relevant to the conservation and sustainable use of biological diversity" (as stated in the Code's title). The Code stipulates:

> The following elements of a *code of ethical conduct are voluntary* ... They should *not be construed as altering or interpreting the obligations of Parties to the Convention of Biological Diversity or any other international instrument*. They should not be interpreted as altering domestic laws, treaties, agreements or other constructive arrangements that may already exist.[193]

155. In regard to cultural heritage, biodiversity and a wide range of other matters, the participation of Indigenous peoples in decision-making is of paramount significance in terms of both human rights and democracy.[194] In general terms, the UN Expert Mechanism on the Rights of Indigenous Peoples has emphasized:

> ... indigenous participation in decision-making on the full spectrum of matters that affect their lives *forms the fundamental basis for the enjoyment of the full range of human rights*. This principle is a corollary of a myriad of universally accepted human rights, and at its core enables indigenous peoples to be freely in control of their own destinies in conditions of equality. *Without this foundational right, the human rights of indigenous peoples, both collective and individual, cannot be fully enjoyed.*[195]

156. Without explicitly using the term, UNDRIP requires the "full and effective participation" of Indigenous peoples to realize all of its provisions.[196] UNDRIP contains "more than 20 provisions affirming indigenous peoples' right to participate in decision-making".[197]

157. The international community is widely supportive of this right and principle, including the General Assembly,[198] specialized agencies,[199] national human rights institutions[200] and Indigenous peoples.[201] As the African Commission on Human and Peoples' Rights has concluded: "

> The Declaration … prohibits discrimination against indigenous peoples and promotes their full and effective participation in all matters that concern them.[202]

158. In its preamble, UNDRIP is proclaimed "as a standard of achievement to be pursued in a spirit of partnership and mutual respect". This standard can only be attained if there are genuine partnerships – particularly between States and Indigenous peoples. Such relationships must be consistent with the principle of equal rights and self-determination of peoples[203] and must fully respect Indigenous peoples' right to participate in decision-making.

159. With regard to its *Indigenous and Tribal Peoples Convention, 1989*, the International Labour Organization (ILO) emphasizes: "The principles of participation and consultation are the cornerstone of the Convention."[204] In regard to implementation of this Convention, cooperation with Indigenous and tribal peoples is required at every stage:

> (a) the *planning, co-ordination, execution and evaluation, in co-operation with the peoples concerned*, of the measures provided for in this Convention;
>
> (b) the *proposing of legislative and other measures* to the competent authorities and supervision of the application of the measures taken, *in co-operation with the peoples concerned*.[205]

160. The duty to cooperate with Indigenous peoples necessarily entails both consultation and negotiation.[206] In the context of cultural heritage, genetic resources and biodiversity, the duty to consult – including consent – is a human rights and democratic imperative. As Special Rapporteur on the rights of Indigenous peoples, James Anaya explains:

> This duty is a corollary of a myriad of universally accepted human rights, including the right to cultural integrity, the right to equality and the right to property ... More fundamentally, it derives from the overarching right of indigenous peoples to self-determination and from related principles of democracy and popular sovereignty.[207]

XIII. Capacity-Building Crucial for Democratic Participation

161. In matters related to the *Nagoya Protocol*, a major factor impeding the full and effective participation of Indigenous peoples and local communities is their lack of financial and other support.[208] Such lack of capacity remains a concern both in terms of the past negotiations on the *Protocol* and its implementation.

162. According to the Secretariat, the *Convention on Biological Diversity* "remains the only Multilateral Environmental Treaty to have established a voluntary fund for indigenous and local community participation in meetings held under the Convention. ... The programme of work for article 8(j) and related provisions for the 2011-12 biennium has twenty-one projects" specific for Indigenous peoples and local communities.[209]

163. Negotiation of a new international treaty, such as the *Protocol*, can result in significant impacts on Indigenous peoples' rights. International institutions and Parties have a responsibility to ensure adequate funding for Indigenous representatives from each region.

164. The voluntary fund was insufficient to ensure that adequate numbers of Indigenous peoples had the capacity to prepare for and attend the negotiations on the *Protocol*. Unless Parties significantly increase their contributions, the voluntary fund will be unable to meet the participatory needs of Indigenous peoples and local communities during the implementation phase.

165. There was an inadequate number of representatives at the negotiations to ensure proper research and timely development of positions and discussions with the States and European Union. There was also an insufficient number of spokespersons at the negotiations table, with the necessary technical and legal expertise on a wide range of matters. It was virtually impossible to effectively participate in the large number of meetings that took place at the same time in Nagoya, Japan during the final stages.

166. Indigenous peoples are not simply stakeholders. They are rights-holders with the right of self-determination.[210] During the years of negotiating UNDRIP, Indigenous representatives from around the world were funded from various sources and democratically included in significant numbers that far exceeded what transpired with the *Protocol*.

167. Based on the specific provisions in the *Protocol*, there is little indication that the Parties are committed to ensuring the full and effective participation of Indigenous peoples and local communities in its implementation.

168. For example, in regard to developing States, the Parties "shall cooperate in the capacity-building, capacity development and strengthening of human resources and institutional capacities to effectively implement this Protocol" (article 21(1)). Yet in the same paragraph, there is no binding commitment in relation to Indigenous peoples and local communities:

> Parties should facilitate the involvement of indigenous and local communities and relevant stakeholders, including non-governmental organizations and the private sector.[211]

169. The ongoing lack of human and financial resources precludes full and effective participation of Indigenous peoples in decision-making processes at the international level.[212] It undermines the achievement of a democratic and fair process.

170. In regard to international processes relating to biodiversity and climate change, the Expert Mechanism's Progress Report emphasizes "full and direct participation … since [these negotiations] often *have a disproportionate impact on indigenous peoples and their territories*. However, consistent financial and administrative support is needed to ensure that indigenous peoples maintain appropriate participation in international bodies".[213]

171. It is essential to apply principles of democracy to international and regional processes and not solely to those in domestic contexts. As concluded in a 2003 expert seminar on the interdependence between democracy and human rights:

> In the current context of globalization, whereby decisions affecting people's lives are often taken outside the national context, the application of the principles of democracy to the international and regional levels has taken on added importance.[214]

XIV. "Consensus" Exploited in Undermining Indigenous Rights

172. In the negotiations on the *Nagoya Protocol*, there was no legal obligation to require consensus[215] among the Parties. Even if such a duty existed, it could not prevail over the obligations of States to respect the *Charter of the United Nations*, *Convention on Biological Diversity* and international human rights law.

173. The same was true for the Conference of the Parties. On matters of substance, there was no legal requirement to obtain consensus.[216] In any event, such a rule could not prevail over the Parties' international human rights obligations.

174. There are compelling reasons for not establishing rigid rules requiring consensus. Crucial measures on such global issues as biodiversity, climate change, environmental security and human rights are too important to be held back or paralyzed by a lack of consensus.[217]

175. In the negotiations on the *Protocol*, the Parties chose to proceed by way of consensus. The process proved especially onerous for Indigenous peoples, since the procedural rules were weighted in favour of States. Throughout the negotiations, Indigenous peoples remained vulnerable to State discretion.

176. Indigenous peoples were not permitted to table any proposed amendments to the *Protocol*. In order to add Indigenous proposals to the text, they had to be supported by at least one Party. Indigenous peoples were not part of any consensus on provisions relating to Indigenous rights and concerns.

177. In July 2010, one of the Co-chairs in the negotiations announced that, from now on, only Parties could propose and accept text. After the IIFB left the negotiations in protest, the decision was reversed.[218]

178. Since the final text was intended to reflect a consensus among the Parties, it was often the *lowest common denominator* among their positions that was reflected in the *Protocol*. Such a substandard dynamic did not serve to fulfill the key objectives of the *Convention on Biodiversity*.

179. The practice of seeking consensus solely among the Parties is especially unjust in relation to Indigenous peoples. States continue to be major violators of Indigenous peoples' human rights. They should not be accorded procedural advantages that enable them to further undermine Indigenous peoples' status and rights.

180. International human rights standards were largely disregarded by the Parties. Such conduct was facilitated by exploiting the "need" for consensus.

181. Positions were repeatedly taken to excessively reinforce State sovereignty, while attempting to circumscribe Indigenous peoples' rights through national legislation. If successful, such actions could perpetuate State domination. They could impair the universality of Indigenous peoples' human rights and undermine the international system.

182. Consensus can show a unity of purpose, but it loses its significance and validity if achieved at the expense of human rights. Even where a consensus "rule" exists, the UN Secretary-General has described consensus as a "privilege … [and] that this privilege comes with responsibility".[219] Concerns relating to consensus have also surfaced at the General Assembly.

> … unfortunately, consensus (often interpreted as requiring unanimity) has become an end in itself. … This has *not proved an effective way of reconciling the interests of Member States*. Rather, it prompts the Assembly to retreat into generalities, abandoning any serious effort to take action. Such real debates as there are tend to focus on process rather than substance and *many so-called decisions simply reflect the lowest common denominator of widely different opinions*.[220]

183. Similarly, James Anaya has commented on the problems generated by consensus when the lowest common denominator is a prevailing factor:

> In the process of negotiation, however, the goal of consensus should not be used to impede progress on a progressive text. *Consensus does not imply a veto power of every participant at every step* … Consensus does not mean perfect unanimity of opinion nor bowing to the lowest common denominator. It means coming together in a spirit [of] mutual understanding and common purpose to build and settle upon common ground.[221]

184. In relation to the standard-setting process on the *UN Declaration*, it was agreed that any consensus on the draft text would need to include both States and Indigenous peoples. Otherwise, it would not have been possible to reach a compromise and achieve a just and balanced human rights instrument.

185. The Chair of the working group on the *Declaration* made it clear that any consensus would include both States and Indigenous peoples. *While achieving consensus was desirable, no strict requirement was imposed.* State and Indigenous representatives had equal rights to make interventions and propose text.

186. Thus, in regard to the negotiations on the *UN Declaration*, an inclusive and democratic process of participation[222] was established within the United Nations. It still constitutes today an impressive precedent and best practice.

187. For the July and September 2010 meetings in Montreal, substantive and procedural objections relating to the negotiation of the draft Protocol were elaborated in advance by Indigenous and civil society organizations from different regions of the world.[223] There was no substantive response to these objections. Consensus among the Parties continued to be the dominant consideration, at the expense of Indigenous peoples' status and human rights.

188. In contrast, consensus was not a rigid requirement in the climate change talks in Cancún, Mexico in December 2010. When Bolivia objected and insisted that improvements be made to the text that had majority support, the Chair of the meeting indicated that consensus did not mean that a State had a right of veto and declared the text adopted.[224]

XV. Adverse Impacts of Consensus Approach

189. In relation to the negotiations of the *Protocol*, it is beneficial to identify some adverse impacts that arose from rigidly adopting a consensus approach. With regard to Indigenous peoples and local communities, these prejudicial impacts include, *inter alia*:

a) **Objective of *Convention* not attained.** The objective of "fair and equitable" benefit-sharing in the *Convention* was not achieved, since consensus appeared to be a main focus of the Parties, at the expense of Indigenous peoples' human rights. Little effort was made in the negotiations to include a rights-based approach.[225]

b) ***UN Charter* and UNDRIP not fairly considered.** Parties paid little attention to their human rights obligations under the *Charter of the United Nations* and principles of international law. In regard to UNDRIP, they failed to fairly reflect the principles, Indigenous rights and related State obligations affirmed in this human rights instrument.[226]

c) **Imbalance in use of national legislation.** Phrases – such as "subject to national legislation" and "in accordance with national legislation" – were repeatedly used that could give significant discretion to States to dominate Indigenous peoples and restrict their rights. Yet Indigenous peoples' inherent rights are not dependent on national legislation for their existence.[227] According to the *Convention*, these phrases are intended to be used in a *supportive* manner to achieve the objectives of the *Convention* and *Protocol*.[228]

d) **Discriminatory action to restrict Indigenous rights.** Consensus was also used to approve discriminatory proposals that contradicted the *Convention* and sought to solely address "established rights" to genetic resources.[229]

e) **Legal certainty not realized.** There are over 45 references to such phrases as "where appropriate", "as appropriate", "as applicable" and "where applicable" that make it unclear as to what are the obligations of the Parties.[230] "Appropriateness" is described by the Committee on Economic, Social and Cultural Rights so as to be "respectful of the culture and cultural rights of … Indigenous peoples".[231]

f) **Publicly available traditional knowledge unprotected.** In Nagoya, the Parties deleted the draft provision to protect traditional knowledge that was "publicly available",[232] but for which no Indigenous consent had been given for commercial use. The absence of safeguards in the *Protocol* may "significantly reduce the scope for benefit-sharing as much traditional knowledge has already been documented and is freely accessible".[233]

g) **No authority for COP decisions to derogate from treaties.** On key issues, COP 10 decisions derogated from the text of the *Convention* and *Protocol* to the possible detriment of Indigenous peoples and local communities. Such actions lack validity and legitimacy.[234]

h) **Parties unwilling to commit to ethical conduct.** The application of the Tkarihwaié:ri Ethical Code of Conduct was severely constrained by COP. It is stipulated that the Code "should not be construed as altering or interpreting the obligations of Parties to the

Convention of Biological Diversity or any other international instrument."[235] Similarly, domestic laws are also exempted from ethical scrutiny based on the Code of Conduct.

The above shortcomings resulted from the unbalanced consensus process. Thus, the rights, security and well-being of Indigenous peoples and local communities are not assured in the *Protocol*.

XVI. Conclusions and Recommendations

190. **Biodiversity must be protected globally.** There is an urgent need for effective measures to safeguard the world's biodiversity and natural environment. The severe and increasing loss of biodiversity must be reversed. In this context, Indigenous peoples and local communities play a key role. Their rights must be respected, protected and fulfilled.

191. **Need for a principled regime.** The central purpose of the *Nagoya Protocol* is to implement one of the three key objectives in the *Convention on Biological Diversity* – namely, "fair and equitable" sharing of benefits arising from the use of genetic resources. With respect to such resources, the importance of achieving a principled and effective international regime is beyond question.

192. **Respect for principles of international law.** The *Convention* requires consistency with *principles of international law*. These would include, *inter alia*, justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith. According to the *Convention*, principles of international law must be respected when States exercise their right to exploit their own resources.

193. These core international principles are an integral part of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).

194. **UNDRIP must be fully applied.** The *Convention* and *Protocol* are international environmental agreements. It is erroneous for States to argue that human rights issues should be addressed in other instruments and forums. The Parties – as well as the Conference of the Parties (COP) – have largely failed to "promote respect for and *full application* of the provisions of the Declaration and follow up [its] effectiveness".[236]

195. UNDRIP is a universal human rights instrument. According to its own terms, the *Protocol* "shall be implemented in a mutually supportive manner with other international instruments relevant to the Protocol".[237] The obligations of Parties under any existing international agreement – such as UNDRIP – cannot be undermined by the *Convention* or *Protocol*.[238]

196. In view of these legal requirements, the *Protocol* cannot be interpreted or implemented by solely considering its own provisions. *In relation to Indigenous peoples, their rights and related State obligations must be read together with UNDRIP and other international human rights instruments.* UNDRIP cannot be segregated from rule of law issues relating to Indigenous peoples' human rights.[239]

197. **UNDRIP interprets international treaties.** When Indigenous issues arise, UNDRIP is widely used to interpret international human rights conventions.[240] These conventions remain relevant to the *Protocol* and reinforce the significance of UNDRIP in the biodiversity context.

198. Any interpretation that undermines Indigenous rights would be inconsistent with "fair and equitable" benefit sharing. It would also be incompatible with the other legal requirements in the *Protocol*.[241]

199. **Need for "full and effective participation".** National legislative and other measures were included in the *Protocol* with little or no regard for the progressive development of international standards. In relation to the formulation and adoption of such measures, the democratic requirement of "full and effective participation" of Indigenous peoples and local communities was virtually unaddressed.[242]

200. **Domestic measures must support central objective.** In regard to its implementation, the *Protocol* does not permit national legislation or other measures by the Parties to derogate from the treaty's central objective of "fair and equitable" benefit sharing and other legal requirements. National legislation cannot mean arbitrary State power over Indigenous peoples and local communities. Consistent with the general rule in international law, international human rights standards take precedence over contradictory national law and standards.[243]

201. **Discriminatory limitation of "established" rights.** In regard to access and benefit sharing arising from the use of genetic resources, the *Protocol* only addresses "established"[244] rights of Indigenous and local communities. Other rights based on customary use of genetic resources appear to be excluded from benefit sharing.[245]

202. Failure to extend benefit sharing to such other rights is discriminatory.[246] Such discrimination violates the *Charter of the United Nations*, *Convention on Biological Diversity* and international human rights law, including UNDRIP.

203. Since the prohibition against racial discrimination is a peremptory norm, the articles that distinguish on the basis of "established" rights have no legitimacy or validity.[247] Such articles require urgent revision.

204. **Urgent need for capacity-building.** In matters related to the *Nagoya Protocol*, the full and effective participation of Indigenous peoples and local communities was severely impeded by their lack of capacity. This remains a concern both in terms of the past negotiations on the *Protocol* and its upcoming implementation.

205. **Democratic participation not yet achieved.** The negotiation of a new international treaty often has significant impacts on Indigenous peoples' rights. The relevant international institutions and Parties have a responsibility to ensure adequate funding for Indigenous representatives from each region. Failure to respect principles of democracy and human rights – as in the *Protocol* – severely detracts from the legitimacy of the negotiations and resulting treaty.

206. Indigenous peoples' rights and related State obligations are increasingly impacted in negotiations at the international level. It is imperative to ensure the full and effective

participation of Indigenous peoples in international forums, in accordance with democratic principles. This is especially urgent in respect to such global issues as biodiversity, climate change and intellectual property.[248]

207. **Repeated abuse of consensus.** In international negotiations, consensus can show a unity of purpose but it loses its significance and validity if achieved at the expense of human rights. Such a substandard approach repeatedly occurred during the negotiations of the *Protocol*. As a result, there have been numerous substantive and procedural injustices that are likely to affect present and future generations.

208. In relation to Indigenous peoples and local communities, inflexible consensus practices among the Parties are not an appropriate way to achieve uplifting and effective international standards. States continue to be major violators of Indigenous peoples' human rights and too often lack sufficient resolve to live up to their *UN Charter* and other international obligations. Experience shows that consensus in the biodiversity context has led to a "lowest-common-denominator" dynamic.[249]

209. It is deeply troubling that, in regard to UNDRIP, it took only a single State to exploit the practice of consensus in the negotiations so as to lower standards in the *Protocol*. Such a process requires fundamental change.[250]

210. In relation to the *Protocol*, the practice of seeking consensus solely among the Parties is prejudicial to Indigenous peoples and local communities.[251] It is not consistent with the status of Indigenous peoples as subjects of international law[252] or with international standards on democratic participation.

211. **Special protections required.** Instead of increasing the vulnerability of Indigenous peoples through possible dispossessions and other injustices, the *Protocol* should have required special measures to promote and safeguard their rights to genetic resources and other cultural heritage. Such special measures are crucial in international human rights law.

212. Biodiversity is critical to the health and well-being of Indigenous peoples and local communities.[253] Parties sought to consolidate their own discretionary powers in the *Protocol*, rather than ensure a principled, balanced and effective international regime.

213. **Regressive aspects of *Protocol*.** In relation to Indigenous peoples and local communities, the *Protocol* is regressive in key respects that need redress. In disregarding the *Charter of the United Nations* and principles of international law, such as in UNDRIP, the Parties are violating the rule of law. In ignoring the standards in UNDRIP and other human rights instruments, the progressive development of international law is being denied. The discriminatory aspects of the *Protocol* must be revised.

214. In December 2010, Member States in the General Assembly adopted by consensus a resolution on the rule of law. The resolution reiterates the following approach for the General Assembly, but it is not the standard that is applied to Indigenous peoples and local communities in the *Protocol*:

> *Reaffirms* the role of the General Assembly in encouraging the progressive development of international law and its codification, and reaffirms further that States shall abide by all their obligations under international law ...[254]

215. **Undermining confidence in the international system.** States made solemn commitments in endorsing UNDRIP that must be fully respected. They must be held accountable on Indigenous rights to traditional knowledge and genetic resources in the *Protocol*.[255] States must not renege on their commitments to Indigenous peoples in a human rights instrument that now enjoys global consensus.

216. For more than 20 years, UNDRIP was discussed and negotiated in a democratic process that included Indigenous peoples. It is imperative that States fully honour their commitments in good faith. Otherwise, confidence and trust in the international system and international negotiations may be severely eroded.

16.1 Specific recommendations

217. During the negotiations of the *Protocol*, Parties repeatedly indicated that the human rights concerns of Indigenous peoples would be more appropriately raised in other international forums.

218. Specific recommendations in this Submission respectfully include the following.

219. In relation to the rights of Indigenous peoples and local communities, the UN Secretary-General should review violations of the rule of law occurring in the context of the *Convention* and the *Nagoya Protocol*. Additional concerns include: abuse of consensus procedures to undermine human rights; and failure to apply international standards that have progressively developed since the adoption of the *Convention* in 1992.

220. With regard to its current "Study on indigenous peoples and the right to participate in decision-making", the Expert Mechanism on the Rights of Indigenous Peoples is including processes at the international and regional levels.[256] The Expert Mechanism should pay particular attention to the current challenges and shortcomings elaborated in this Joint Submission.

221. The Special Rapporteur on the rights of indigenous peoples, James Anaya, should review the broad range of concerns raised in this Joint Submission that are within his mandate. Such issues include, *inter alia*, Indigenous rights and related obligations pertaining to UNDRIP; self-determination; resource development; fair and equitable benefit-sharing; duty of States to consult and cooperate with Indigenous peoples; free, prior and informed consent; full and effective participation; and democracy.

222. The independent expert in the field of cultural rights, Ms. Farida Shaheed, should review the concerns raised in this Joint Submission relating to the cultural rights of Indigenous peoples and local communities. The right to participate in cultural life and related issues of non-discrimination and free, prior and informed consent would be of particular interest in the context of biodiversity and cultural heritage.

223. Widespread dispossession in different regions of the world may result from the discriminatory distinction based on "established" rights to genetic resources in the *Protocol*. Indigenous peoples and local communities should consider a request to the Committee on the Elimination of Racial Discrimination for early warning and urgent action procedures.[257]

224. In its 2010 report, the UN Permanent Forum on Indigenous Issues has addressed concerns relating to the *Convention* and the negotiations on the *Protocol*. The recommendations made by the Permanent Forum have not been fully implemented, especially in relation to genetic resources, UNDRIP and the use of the term "peoples". This Joint Submission is being submitted to the Permanent Forum for consideration and action.

225. The above steps should provide authoritative instruction and guidance for fair and equitable implementation of the *Protocol*, as well as possible revisions to its text. Regressive and other unjust dimensions of the *Protocol* should be addressed under article 31 of this treaty, among other ways:

> The Conference of the Parties serving as the meeting of the Parties to this Protocol shall undertake, four years after the entry into force of this Protocol ... an *evaluation of the effectiveness of this Protocol*.[258]

226. Some concerns should not wait for the evaluation in four years. For example, matters of discrimination, exceeding the authority of the *Convention* and other pressing or priority issues should be accommodated in the COP 11 meeting in India, in October 2012, with a view to amending the *Protocol*.

227. In preparation for the evaluation in four years and COP 11, representatives of Indigenous peoples and local communities should be ensured full and effective participation at all stages – including through advance meetings and written submissions.

228. In relation to Indigenous peoples and local communities, concerns that should be considered for further action include, *inter alia*, the following:

i) Take into account "all rights" through a rights-based approach, as required by the central objective of the *Convention* and *Protocol*;

ii) clarify unequivocally that national legislation must be *supportive* of the objective of "fair and equitable" benefit sharing, consistent with Indigenous peoples' human rights and related State obligations;

iii) eliminate discriminatory elements in the *Protocol*, particularly the refusal to refer to Indigenous peoples as "peoples" and the restriction of genetic resource rights to "established" rights;

iv) redress procedural injustices, including unfair restrictions on interventions and tabling of proposed amendments;[259] and exclusion of representatives of Indigenous peoples from negotiation meetings where their rights may be undermined;[260]

v) fully respect the *UN Declaration on the Rights of Indigenous Peoples*, in interpreting and implementing the *Convention* and *Protocol*;

vi) reiterate the importance of "prior and informed consent", eliminating questionable and ambiguous interpretations;

vii) include specific safeguards for "publicly available" traditional knowledge;

viii) ensure that provisions of the *Protocol* "shall not affect the … obligations of any Party deriving from any existing international agreement",[261] particularly those relating to human rights;

ix) ensure that Parties fully respect the rule of law, including their international human rights obligations;

x) enhance significantly the "full and effective participation" of Indigenous peoples and local communities in all aspects of the *Protocol*, through legal commitments to capacity-building and democratic, inclusive processes; and

xi) provide an effective process to hold Parties accountable in fulfilling their obligations in respect to the *Protocol*.

229. The Conference of the Parties should consider revising those decisions made in October 2010, where it altered the terms of the *Protocol* to the detriment of Indigenous peoples and local communities. Such actions exceed the authority of COP.

230. International solidarity with Indigenous peoples and local communities should also be reinforced, in a manner that fully implements UNDRIP. As concluded by the UN Independent expert on human rights and international solidarity:

> *International solidarity ... encompasses the values of social justice and equity* ... and integrity of the international community ... International ... solidarity ... includes ... *refraining from doing harm or posing obstacles to the greater well-being of others*, including ... to our common ecological habitat, for which all are responsible. ... *Special attention must be given to the human rights of vulnerable groups, including ... indigenous peoples ....*[262]

Endnotes

[1] Hon. Rosalie Silberman Abella, "International Law and Human Rights: The Power and the Pity", [2010] 55 McGill L.J. 871 at 886.

[2] *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity*, adopted by the Conference of the Parties, Nagoya, Japan, 29 October 2010.

[3] *Convention on Biological Diversity*, concluded at Rio de Janeiro 5 June 1992, entered into force 29 December 1993.

[4] *Convention on Biological Diversity*, article 1.

[5] The *Nagoya Protocol* and the 47 COP 10 Decisions are available at: http://www.cbd.int/cop10/doc/.

[6] Conference of the Parties to the Convention on Biological Diversity, *Report of the Tenth Meeting of the Conference of the Parties to the Convention on Biological Diversity*, Nagoya, Japan, 18-29 October 2010, UN Doc. UNEP/CBD/COP/10/27 (19 December 2010), at 26.

[7] GA Res. 61/295 (Annex), UN GAOR, 61st Sess., Supp. No. 49, Vol. III, UN Doc. A/61/49 (2008) 15.

[8] Permanent Forum on Indigenous Issues, *Report on the ninth session (16 – 30 April 2010)*, Economic and Social Council, Official Records, Supplement No. 23, United Nations, New York, E/2010/43-E/C.19/2010/15, para. 113. [emphasis added]

[9] Office of the High Commissioner for Human Rights, "Combating Discrimination against Indigenous Peoples", online: http://www.ohchr.org/EN/Issues/Discrimination/Pages/discrimination_indigenous.aspx:

> Indigenous peoples face many challenges and their human rights are frequently violated: they are denied control over their own development based on their own values, needs and priorities; they are politically under-represented and lack access to social and other services. They are often marginalized when it comes to projects affecting their lands and have been the victims of forced displacement as a result of ventures such as the exploitation of natural resources.

[10] See, *e.g.*, Valeria A. Gheorghiu, "Sailing The Seas of Treaties: Biopiracy in the Wake of the International Treaty on Plant Genetic Resources for Food and Agriculture", (2006) 7 Fourth World Journal 1 at 1:

> Rather than outright theft of physical property, neo-imperialists have "discovered" intellectual property, or indigenous knowledge of bioresources, such as medicinal plants or seed varieties. Instead of supporting the theft of indigenous knowledge using the doctrine of discovery to promote their view of progress as they had with indigenous lands, they use their patent systems to rationalize the theft of indigenous knowledge because of their "inventive" genetic advancements thereupon in a form of "intellectual colonization." Using their intellectual property regime, they *secure the profits of their genetic advancements based upon indigenous knowledge without compensating the original indigenous holders of that knowledge for their initial discoveries and developments*. [emphasis added]

[11] Krystyna Swiderska, *Banishing The Biopirates: A New Approach To Protecting Traditional Knowledge*, Gatekeeper Series 129, International Institute for Environment and Development (London: IIED, 2006) at 5. Biopiracy may also take place for non-commercial purposes, such as by researchers and universities, where no free, prior and informed consent has been obtained from the Indigenous peoples concerned.

See also Humberto Márquez, "Biopiracy leaves Venezuela's native groups out in the cold", *Caribbean 360* (17 February 2011), online http://www.caribbean360.com/index.php/news/venezuela_news/237847.html:

> Millions of cancer patients around the world benefit from a medication called Paclitaxel (Taxol), which may begin to be produced from a new source: fungi found at the summit of Venezuela's flat-topped mountains. But the indigenous communities who have lived in that area since time immemorial will receive no benefits, and were not even consulted on the matter.

Network of the Indigenous Peoples – Solomons (NIPS), "NIPS urges withdrawal of US patent application", Press Statement, Honiara, Solomon Islands, 11 March 2011, where it is said that Indigenous individuals who supplied genetic samples were not aware of the patent application and would not have consented to taking part had they known the research would be used in such manner. The application was subsequently withdrawn: see NIPS, "NIPS welcomes abandonment of patent application involving SI samples", Press Statement, 6 April 2011. However, "questions ... need

[to] be answered including whether any cell lines of the Solomon Islanders were immortalized, and if any samples were shared with other researchers or institutions in Taiwan and abroad."

[12] See, *e.g.*, African Centre for Biosafety, "Pirating African Heritage: The Pillaging Continues", Briefing paper, Johannesburg, South Africa, 2009 at 4:

> Although traditional knowledge is held by local and indigenous people and published in journals, databases, periodicals and so forth, patent examiners rarely consider this. ... [P]atent systems in Europe and the United States are being used to promote the misappropriation of traditional knowledge and biological resources from the South. It is also our contention that the illegality of a patent cannot be cured by the existence of prior informed consent, benefit sharing or so called fair trade agreements."

Indigenous peoples in Taiwan face widespread abuses of their rights in the commercialization of biotechnology: see, *e.g.*, Mark Munsterhjelm & Frederic Gilbert, "How do researcher duties conflict with Aboriginal rights?: Genetics research and biobank problems in Taiwan", DILEMATA, año 2 (2010), nº 4, 33. In regard to patent applications for human genetic samples, the authors describe at 42-44 how Indigenous rights are violated by researchers.

[13] Ad Hoc Open-Ended Inter-Sessional Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity, "Composite Report on the Status and Trends Regarding the Knowledge, Innovations and Practices of Indigenous and Local Communities – Regional report: North America: Note by the Executive Secretary", UN Doc. UNEP/CBD/WG8J/3/INF/8 (7 October 2003), at 12. [italics in original]

[14] See, *e.g.*, "Updated Global Strategy for Plant Conservation 2011-2020" in Conference of the Parties to the Convention on Biological Diversity, *Consolidated update of the Global Strategy for Plant Conservation 2011-2020*, Decision X/17, UN Doc. UNEP/CBD/COP/DEC/X/17 (29 October 2010), Annex, para. 9:

> … plant diversity is of special concern to indigenous and local communities, and these communities have a vital role to play in addressing the loss of plant diversity.

European Council, "Indigenous peoples within the framework of the development cooperation of the Community and the Member States", Resolution, 30 November 1998:

> … many indigenous peoples inhabit areas crucial for the conservation of biodiversity, and maintain social and cultural practices by way of which indigenous peoples have a special role in maintaining and enhancing biological diversity and in providing unique sustainable development models.

[15] Office of the High Commissioner for Human Rights, "It's not enough to support the Declaration on the Rights of Indigenous Peoples, says UN expert", statement issued by UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, on the occasion of the International Day of the World's Indigenous Peoples, Geneva, 9 August 2010: "[Indigenous peoples] have preserved, generation after generation, an extraordinary wealth of knowledge, culture, and spirituality in the common benefit of humankind, contributing significantly to the world's diversity and environmental sustainability".

[16] "Opening address by Mr. Ahmed Djoghlaf, Executive Secretary of the Convention on Biological Diversity" in Conference of the Parties to the Convention on Biological Diversity, *Report of the Tenth Meeting of the Conference of the Parties to the Convention on Biological Diversity*, Nagoya, Japan, 18-29 October 2010, UN Doc. UNEP/CBD/COP/10/27 (19 December 2010) at 10, para. 24:

> The current generation ... failed to meet the pledge made at the World Summit on Sustainable Development in Johannesburg in 2002 to reduce the loss of biodiversity by 2010. Indeed, according to the third edition of Global Biodiversity Outlook, the *rate of biodiversity loss was one thousand times higher tha[n] the background and historical rate of extinction*. If that loss rate was allowed to continue, it would soon lead to a tipping point with irreversible damage to the capacity of the planet to continue sustaining life. [emphasis added]

[17] Secretariat of the Convention on Biological Diversity, *Global Biodiversity Outlook 3*, (Montreal, 2010), at 10 (Executive Summary).

[18] "Updated Global Strategy for Plant Conservation 2011-2020", *supra* note 14 at 169, para. 9. [emphasis added]

[19] Secretariat of the Convention on Biodiversity, "Engaging the Canadian business community in support of the Nagoya biodiversity compact", Secretariat co-hosts biodiversity workshop for Quebec-based companies, *Communiqué*, Montreal, 22 March 2011. [emphasis added] The presentation on the risks and opportunities related to biodiversity and ecological services was given by Ms. Lorraine Rouisse Vice-President of Sustainable Development, Aluminum Association of Canada, and Mr. Benoît Limoges, Biologist, Quebec Ministry of Sustainable Development, Environment and Parks.

[20] Secretariat of the Convention on Biological Diversity, *Biodiversity, Development and Poverty Alleviation: Recognizing the Role of Biodiversity for Human Well-being* (Montreal: 2009), at 1 (Forward by Ahmed Djoghlaf, Executive Secretary, CBD).

[21] *Ibid.*, at 17-18. [emphasis added] See also *Nagoya Protocol*, preamble: "*Recognizing* the importance of genetic resources to food security, public health, biodiversity conservation, and the mitigation of and adaptation to climate change".

[22] General Assembly, *Convention on Biological Diversity*, UN Doc. A/RES/65/161 (11 March 2011) (res. adopted without vote 20 December 2010), para. 12.

[23] Forest Peoples Programme, "People, Poverty, Livelihoods, Ecosystems and Biodiversity: a rights based approach", 31 October 2003, http://www.swedbio.com/dokument/FPPreport%20to%20swedbio.pdf, at 1:

> Securing biodiversity conservation through the empowerment of local communities and indigenous peoples, *requires a rights-based approach* to ecosystem management and community development. Without secure rights and tangible benefits, local communities are inevitably marginalised by development and conservation impositions and are forced into opposition to such schemes. [emphasis added]

[24] Article 1 of the *Convention on Biological Diversity* and the *Nagoya Protocol* [emphasis added]. Indigenous peoples' human rights must be an integral part of any "fair and equitable" benefit sharing regime. See also Dalee Sambo Dorough, "Brief statement on human rights", Permanent Forum on Indigenous Issues, 10th session, (19 May 2011):

> Regardless of what issues may arise in any given situation - the human rights of Indigenous peoples are always relevant if such rights are at risk of being undermined. In this regard, it is difficult to remove from or segregate Indigenous human rights for any discussion. ... [O]ne of the fundamental elements of human rights is that they are indivisible, inter-dependent, and inter-related and are therefore, relevant in any context specifically concerning Indigenous peoples, from environment to development to peace and security and many other issues.

[25] United Nations Development Group, "United Nations Development Group Guidelines on Indigenous Peoples' Issues", February 2008, http://www.un.org/esa/socdev/unpfii/documents/UNDG_Guidelines_indigenous_FINAL.pdfwww2.ohchr.org/english/issues/indigenous/docs/guidelines.pdf, at 24:

> The human rights standards contained in, and principles derived from, the Universal Declaration of Human Rights, the United Nations Declaration on the Rights of Indigenous Peoples and other international human rights instruments, as well as the recognition of indigenous peoples' collective rights, provide the framework *for adopting a human rights-based and culturally sensitive approach* when addressing the specific situation of indigenous peoples. [emphasis added]

See also Commission on Human Rights, *Report of the United Nations High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights*, UN Doc. E/CN.4/2003/14 (26 February 2003), para. 53:

> *The rights-based approach must be the starting point for all our endeavours, whatever our spheres of operation: trade, finance, development, security, in both the public and private sectors.* In a sense, this is an approach that involves human rights strategies of governance, namely, that we take the basic human rights as the starting point for governmental programmes and the programmes of national, regional and international institutions. [emphasis added]

[26] In the context of access and benefit-sharing, dispossession of the rights of Indigenous peoples and local communities is precisely what the *Convention* and *Nagoya Protocol* is supposed to address. See, *e.g.*, Forest Peoples Programme, "Environmental Governance", online: http://www.forestpeoples.org/topics/environmental-governance:

> ... forest peoples do not have secure tenure over these areas [of high biodiversity] and are denied access and use of their territories because of inadequate government policies, extractive industries' activities, or conservation initiatives, such as protected areas. At the same time, many indigenous territories are increasingly threatened by unsustainable activities such as logging, mining, and plantations while the communities are not, or are only minimally, involved in official decision-making and management of these areas.

[27] UN Sub-Commission on the Promotion and Protection of Human Rights, *Indigenous peoples' permanent sovereignty over natural resources: Final report of the Special Rapporteur, Erica-Irene A. Daes*, UN Doc. E/CN.4/Sub.2/2004/30 (13 July 2004), para. 56 (Principal conclusions): "The right of indigenous peoples to permanent sovereignty over natural resources may be articulated as follows: it is a collective right by virtue of which States are obligated to respect, protect, and promote the governmental and property interests of indigenous peoples (as collectivities) in their natural resources."

A Circumpolar Inuit Declaration on Sovereignty in the Arctic, adopted by the Inuit Circumpolar Conference on behalf of Inuit in Greenland, Canada, Alaska, and Chukotka (April 2009), para. 2.1: "Sovereignties overlap and are frequently divided within federations in creative ways to recognize the right of peoples."

See also Neva Collings, "Environment" in United Nations (Department of Economic and Social Affairs), *State of the World's Indigenous Peoples* (New York: United Nations, 2009) 84, at 98: "… the Convention on Biological Diversity … reaffirms that "states have sovereign rights over their own biological resources". On the international and domestic stages, the challenge for indigenous peoples is to assert their sovereign rights as peoples to natural resources, decisions concerning resources, and the way in which states engage with them."

Haida Nation v. *British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 (Supreme Court of Canada), para. 20:

> Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims … Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty … sovereignty claims [are] reconciled through the process of honourable negotiation.

[28] *Charter of the United Nations*, arts. 55c and 56. These articles reinforce the purposes of the *UN Charter*, which includes in art. 1(3): "To achieve international cooperation … in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion."

Permanent Forum on Indigenous Issues, *Report on the tenth session, (16 - 27 May 2011)*, Economic and Social Council, Official Records, Supplement No. 23, United Nations, New York, E/2011/43, E/C.19/2011/14, para. 39:

> *Given the importance of the full range of the human rights of indigenous peoples, including traditional knowledge*, ... the Permanent Forum calls on all United Nations agencies and intergovernmental agencies to *implement policies, procedures and mechanisms that ensure the right of indigenous peoples to free, prior and informed consent consistent with their right to self-determination* as reflected in common article 1 of the International Covenants on Civil and

Political Rights and on Economic, Social and Cultural Rights, which makes reference to permanent sovereignty over natural resources. [emphasis added]

[29] United Nations, *New Voices: National Perspectives on Rule of Law Assistance*, 2011, http://www.unrol.org/files/FINAL%20National%20Perspectives%20Report.pdf at 8, where it is added: "[The rule of law] requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency."

[30] See, *e.g.*, *Cal et al. v. Attorney General of Belize* and *Minister of Natural Resources and Environment*, Claim No. 171, and *Coy et al. v. Attorney General of Belize* and *Minister of Natural Resources and Environment*, Claim No. 172, Consolidated Claims, Supreme Court of Belize, judgment rendered on 18 October 2007 by the Hon. Abdulai Conteh, Chief Justice, para. 131, where UNDRIP was cited and relied upon: "…where these … Declarations contain principles of general international law, states are not expected to disregard them."

[31] UNDRIP, article 46(3).

[32] In regard to Indigenous peoples' right to cultural diversity, see UNDRIP, preambular para. 2 (right to be different) and the many provisions relating to culture, including arts. 3, 4, 8, 9, 11–16, 25, 31–34, 36, 37, 38, 40 and 41. The provisions on lands, territories and resources are also of central importance.

In relation to Indigenous peoples' right to biological diversity, see UNDRIP, arts. 29(1) (right to conservation and protection of the environment and the productive capacity of their lands or territories and resources) and 31(1) (right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, etc.).

[33] UNDRIP, art. 7(2) (right to live in peace and security, as distinct peoples), read together with arts. 29(1) (right to conservation and protection of environment and the productive capacity of their lands, territories and resources); 32(1) (right to determine and develop priorities and strategies for development or use of their lands, territories and resources); 32(2) (State duty to consult and cooperate in good faith, in order to obtain free and informed consent); and 32(3) (State duty to mitigate adverse environmental, economic, social, cultural or spiritual impacts).

See also *African Charter of Human and Peoples' Rights*, art. 23(1): "All peoples shall have the right to national and international peace and security"; and art. 24: "All peoples shall have the right to a general satisfactory environment favorable to their development."

[34] UNDRIP, art. 7(2) (peace and security), read together with arts. 3 (right to self-determination); 20 (right to own means of subsistence and development); 24 (right to health and conservation of vital medicinal plants and animals); 26 (right to lands, territories and resources); 29 (right to conservation and protection of environment); 31 (right to cultural heritage, traditional knowledge and cultural expressions including genetic resources, seeds and medicines); and 32 (right to determine priorities and strategies for development). See also identical art. 1(2) in the two international human rights Covenants: "All peoples may, for their own ends, freely dispose of their natural wealth and resources … In no case may a people be deprived of its own means of subsistence."

See also *Convention on Biological Diversity*, preamble: "*Aware* that conservation and sustainable use of biological diversity is of *critical importance for meeting the food, health and other needs* of the growing world population, for which purpose *access to and sharing of both genetic resources and technologies* are essential". [emphasis added]

[35] See generally UNDRIP. John B. Henriksen, "Implementation of the Right of Self-Determination of Indigenous Peoples Within the Framework of Human Security", in M.C. van Walt van Praag & O. Seroo, eds., *The Implementation of the Right to Self-Determination as a Contribution to Conflict Prevention* (Barcelona: Centre UNESCO de Catalunya, 1999) 226, at 226: "'indigenous peoples human security' . . . encompasses many elements, inter alia physical, spiritual, health, religious, cultural, economic, environmental, social and political aspects."

[36] *Nagoya Protocol*, Art. 4(3). See also preamble: "Recognizing that international instruments related to access and benefit-sharing should be mutually supportive with a view to achieving the objectives of the Convention".

[37] See, generally, Ronald Mitchell, "International Environmental Agreements: A Survey of Their Features, Formation and Effects" in Charlotte Ku & Paul F. Diehl, eds., *International Law: Classic and Contemporary Readings*, 3rd ed. (Boulder, Colorado: Lynne Rienner Publishers, 2009) 341.

[38] Human Rights Council, *Report of the independent expert in the field of cultural rights, Ms. Farida Shaheed, submitted pursuant to resolution 10/23 of the Human Rights Council*, UN Doc. A /HRC/14/36 (22 March 2010), para. 10.

[39] *Ibid.*, para. 9. [emphasis added] As further elaborated in Human Rights Council, *Report of the independent expert in the field of cultural rights, Farida Shaheed*, UN Doc. A/HRC/17/38 (21 March 2011), para. 78 (Conclusions):

> The right of access to and enjoyment of cultural heritage forms part of international human rights law, finding its legal basis, in particular, in the right to take part in cultural life ... and the right of indigenous peoples to self-determination and to maintain, control, protect and develop cultural heritage.

[40] UNDRIP, especially arts. 38 (legislative and other measures), 40 (effective remedies) and 42 (full application and follow-up). See also Committee on Economic, Social and Cultural Rights, General Comment No. 17, *The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (article 15, paragraph 1 (c), of the Covenant)*, UN Doc. E/C.12/GC/17 (12 January 2006), para. 28: "The right of everyone to benefit from the protection of the moral and material benefits resulting from any scientific, literary or artistic production of which he or she is the author, like all human rights, imposes three types or levels of obligations on States parties: the obligations to respect, protect and fulfil."

Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria, African Commission on Human and Peoples' Rights, Comm. No. 155/96, 15th Activity Report 2001-02, 31 at para. 44:

> Internationally accepted ideas of the various obligations engendered by human rights indicate that all rights-both civil and political rights and social and economic-generate at least four levels of duties for a State that undertakes to adhere to a rights regime, namely the *duty to respect, protect, promote, and fulfil these rights*. These obligations universally apply to all rights ... [emphasis added]

[41] In regard to Indigenous cultural rights and related obligations, see UNDRIP, preambular paras. 2-4, 7, 9, 11 and arts. 3, 4, 8, 9, 11-16, 25, 31-34, 36, 37, 38, 40 and 41. See also General Assembly, *Second International Decade of the World's Indigenous People: Note by the Secretary-General*, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, in accordance with paragraph 1 of General Assembly resolution 63/161, UN Doc. A/64/338 (4 September 2009), para. 45: "…the Declaration affirms rights of a collective character in relation to ... cultural integrity".

Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, S. James Anaya,* UN Doc. A/HRC/9/9 (11 August 2008), para. 22: "The [Human Rights] Committee's general comment No. 23 (1994) on article 27 of ICCPR advances a broad interpretation of the international norm of cultural integrity in the context of indigenous peoples, understanding that norm to encompass all aspects of indigenous culture including rights to lands and resources."

[42] In regard to the Aboriginal and Treaty rights of the Western Shoshone, see, *e.g.*, *Mary and Carrie Dann v. United States*, I/A Comm. H.R., Case Nº 11.140, Report No. 75/02 (27 December 2002), at para. 124: "in determining the claims currently before it, the Commission considers that this broader corpus of international law includes the developing norms and principles governing the human rights of indigenous peoples. As the following analysis indicates, these norms and principles encompass distinct human rights considerations relating to the ownership, use and occupation by indigenous communities of their traditional lands. See also UNDRIP, preambular paras. 7 and 14; and art. 37.

Paul Joffe & Willie Littlechild, "Administration of Justice and How to Improve it: Applicability and Use of International Human Rights Norms" in Commission on First Nations and Métis Peoples and Justice Reform, *Submissions to the Commission*, Final Report, vol. 2 (Saskatchewan: 2004), Section 12 at p. 12-14: "Indigenous

peoples' … treaties often entail a wide range of human rights considerations. Whether in general or specific terms, Indigenous peoples' treaties constitute an elaboration of arrangements relating to the political, economic, social, cultural or spiritual rights and jurisdictions of the Indigenous peoples concerned."

[43] UNDRIP, preambular para. 14: "…the rights affirmed in treaties, agreements and other constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character".

The human rights content of Indigenous peoples' Treaties reinforces them as an international concern and responsibility. See, *e.g.*, *Vienna Declaration and Programme of Action*, World Conference on Human Rights, adopted 25 June 1993, reprinted in (1993) 32 I.L.M. 1661, Part I, para. 4: "the promotion and protection of all human rights is a legitimate concern of the international community".

[44] *Convention on Biological Diversity*, art. 22(1); *Nagoya Protocol*, art. 4(1).

[45] Louis Henkin, "Introduction" in L. Henkin, ed., *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981) 1 at 13: "International human rights are inherent". UNDRIP, preambular para. 7: "*Recognizing* the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources".

Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada*, UN Doc. CCPR/C/CAN/CO/5 (27-28 October 2005), para. 8: "The State party should re-examine its policy and practices to ensure they do not result in extinguishment of inherent aboriginal rights."

[46] United States, *Initial reports of States parties due in 1993: United States of America*, UN Doc. CCPR/C/81/Add.4 (24 August 1994) (State Party Report), para. 62: "Aboriginal Indian interest in land derives from the fact that the various tribes occupied and exercised sovereignty over lands at the time of occupation by white people. This interest does not depend upon formal recognition of the aboriginal title". In Canada, see *Calder* v. *A.G. British Columbia*, [1973] S.C.R. 313 (Supreme Court of Canada) at 390, per Hall J.: "The aboriginal Indian title does not depend on treaty, executive order or legislative enactment."

See also Permanent Forum on Indigenous Issues (Secretariat), "Presentation by Mattias Åhrén", International Expert Group Meeting, Indigenous Peoples and Forests, UN Doc. PFII/2011/EGM, New York, 12 - 14 January 2011 paras. 4.2 and 4.3, where it is described that, in the Norwegian cases of *Selbu*, Rt. 2001 side 769 and *Svartskogen*, Rt. 2001 side 1229, the Supreme Court has most recently confirmed that Saami property rights to land follows from traditional use and are not contingent upon formal recognition in national legislation. Similarly, the Swedish Supreme Court has determined in *Taxed Lapp Mountain Case*, NJA 1981 s 1, that the right to pursue reindeer husbandry follows from use since time immemorial and is not contingent on formal recognition in law.

[47] See also *Media Rights Agenda and Constitutional Rights Project v. Nigeria*, African Commission on Human and Peoples' Rights, Communications 105/93, 128/94, 130/94, 152/96, Twelfth Activity Report, 1998-1999, Annex V, 52 at 58, para. 66: "To allow national law to have precedent over the international law of the [African] Charter would defeat the purpose of the rights and freedoms enshrined in the Charter. International human rights standards must always prevail over contradictory national law."

[48] Commission on Human Rights, *Report of the second expert seminar "Democracy and the rule of law" (Geneva, 28 February-2 March 2005): Note by the secretariat*, UN Doc. E/CN.4/2005/58 (18 March 2005), para. 32 (Conclusions and Recommendations).

[49] UN Commission on Human Rights, *Report of the second expert seminar "Democracy and the rule of law" (Geneva, 28 February-2 March 2005): Note by the secretariat*, UN Doc. E/CN.4/2005/58 (18 March 2005), para. 8 [attributed to Professor Dinah Shelton, emphasis added]

[50] General Assembly, *2005 World Summit Outcome*, UN Doc. A/RES/60/1, 16 September 2005, adopted without vote, para. 119.

[51] In contrast, see, *e.g.*, *Indigenous and Tribal Peoples Convention, 1989*, art. 2(2): "1. Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity."

Human Rights Council, *Report of the independent expert in the field of cultural rights, Farida Shaheed*, *supra* note 39, para. 70: "A strong human rights-based approach to the preservation/safeguard of cultural heritage, both tangible and intangible, requires the establishment of procedures ensuring the full participation of concerned individuals and communities."

[52] General Assembly, *Midterm assessment of the progress made in the achievement of the goal and objectives of the Second International Decade of the World's Indigenous People: Report of the Secretary-General*, UN Doc. A/55/166 (23 July 2010), para. 20: "The Asian and Pacific region is home to about 70 per cent of the world's indigenous people, yet only a handful of States in that region have officially recognized the existence of indigenous peoples in their countries". See also Comité pour l'élimination de la discrimination raciale, *Observations finales du Comité pour l'élimination de la discrimination racial: Rwanda*, UN Doc. CERD/C/RWA/CO/13-17 (11 March 2011) (advanced unedited version), para. 11, where the Committee recommends Rwanda to revise its position and recognize the Batwa as an Indigenous people; and Comité des droits de l'homme, *Observations finales du Comité des droits de l'homme: Togo*, UN Doc. CCPR/C/TGO/CO/4 (28 March 2011) (advance unedited version), para. 21.

"Human chain formed across the country demanding constitutional recognition as indigenous peoples", Bangladesh, 19 March 2011, http://indigenouspeoplesissues.com/index.php?option=com_content&view=article&id=9490:bangladesh-human-chain-formed-across-the-country-demanding-constitutional-recognition-as-indigenous-peoples&catid=63:central-asia-indigenous-peoples&Itemid=85: "The leaders of the country's indigenous communities called upon the government to seriously consider the issue of constitutional recognition as indigenous instead of small ethnic group; otherwise, the process of amendment of constitution will remain incomplete."

United Nations (Department of Economic and Social Affairs), "Presentation by Grand Chief Edward John", International Expert Group Meeting on Indigenous Peoples and Forests, PFII/2011/EGM, New York, 12 - 14 January 2011, at 5, para. 10:

> In the courts [of Canada], government lawyers routinely deny the very existence of Indigenous Peoples and their rights, stating in their pleadings and legal arguments that, unless proven by Indigenous Peoples in the courts, neither Indigenous Peoples nor their rights exist. This means Indigenous Peoples must bring their elders, histories, cultures, ways of life and stories into a legal system foreign to them ...

[53] UN Department of Economic and Social Affairs (DESA), "Indigenous peoples participation vital to forest preservation", 17 January 2011, New York, http://www.un.org/en/development/desa/news/social/indigenous-peoples-participation-vital-for-forest-preservation.html.

See also Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Russian Federation*, UN Doc. E/C.12/RUS/CO/5 (20 May 2011) (advance unedited version), para. 7:

> The Committee is ... concerned that changes to federal legislation regulating the use of land, forests and water bodies ... deprive indigenous peoples of the right to their ancestral lands, fauna and biological as well as aquatic resources, on which they rely for their traditional economic activities, through granting of licenses to private companies for development of projects such as the extraction of subsoil resources ...

[54] George Mukundi Wachira, "Applying Indigenous Peoples' Customary Law in Order to Protect their Land Rights in Africa", *Indigenous Affairs*, IWGIA, 1-2/2010, 6 at 7: "... States' constitutions – which are the supreme laws – often subjugate African customary law to written laws." And at 9: "... Namibia's Constitution ... still subjugates African customary law to all other written laws."

Wilmien Wicomb, "The Emancipatory Potential of Customary Law for the Rights of Women to Access Land", *Indigenous Affairs*, IWGIA, 1-2/2010, 22 at 23: "In countries such as Ethiopia, where *customary law was entirely repealed*, rural communities are forced to regulate their lives outside the only legal system that can provide recognised and regulated protection through formal courts." [emphasis added]

[55] Raja Devasish Roy, *Traditional Customary Laws and Indigenous Peoples of Asia*, Minority Rights Group International, March 2005, at 5:

> Indigenous peoples' customary laws and institutions continue to suffer from de-recognition and policy neglect due to discriminatory or assimilationist state policies. Like indigenous peoples in other parts of the world, indigenous peoples in Asia have been subject to social, political and economic marginalization, especially through conquest and colonization. In only a few cases have Asian indigenous peoples been able to retain a substantive level of political and legal autonomy.

[56] See, *e.g.*, Jannie Lasimbang, "Indigenous Peoples and Customary Law in Sabah, Malaysia", *Indigenous Affairs*, IWGIA, 1-2/2010, 38 at 39: "... indigenous peoples' pursuit of the promotion of their distinct ways of life and social traditions is not well supported by either federal or state governments."

Raja Devasish Roy, *Traditional Customary Laws and Indigenous Peoples of Asia*, *supra* note 55, at 19:

> ... customary land-related practices are stronger in autonomous systems (Malaysian Borneo, Mizoram) or in systems with strong constitutional and legal safeguards (Cordilleras). Conversely, the erosion of autonomy, and the formalized de-recognition of land rights, such as in Jharkhand state in India, north-west Bangladesh or northern Thailand, is largely responsible for the erosion of customary land rights ...

[57] For example, in regard to water security, the Canadian government is currently exploiting the urgent need of First Nations for safe drinking water in their communities so as to undermine their human rights. National legislation has been proposed that would enable the government to adopt regulations to "abrogate or derogate" from constitutionally-protected Aboriginal and Treaty rights. See *Safe Drinking Water for First Nations Act*, 3rd Sess., 40th Parl. 2010 (Bill S-11). (second reading 14 December 2010), s. 4(1)(r):

> **4.** (1) The regulations may:
> ...
> (*r*) provide for the relationship between the regulations and aboriginal and treaty rights referred to in section 35 of the *Constitution Act, 1982*, including the extent to which the regulations may abrogate or derogate from those aboriginal and treaty rights ...

The Canadian government has not used national legislation or other domestic measures to effectively deal with climate change, although it is a major threat to biodiversity. See, *e.g.* Louis-Gilles Francoeur and Hélène Buzzetti, "Un plafond de GES serait «dangereux», selon Baird", *Le Devoir* (6 April 2011) A1 (According to the government, a ceiling on greenhouse gases would be "dangerous" and "un-Canadian"). See also Peggy Curran, "Our earth's a hot potato", *The [Montreal] Gazette* (16 April 2011) B1:

> 'Canada has played an embarrassing role in international climate discussions in the last five years,' says [Damon] Matthews, a professor at Concordia University and one of the authors of a major report on climate targets and projections published by the U.S. National Academy of Sciences. ... 'The Harper government has not wanted to take a stand on climate change and ... has acted as an obstructing force.'

[58] Forest Peoples Programme, "People, Poverty, Livelihoods, Ecosystems and Biodiversity: a rights based approach", 31 October 2003, http://www.swedbio.com/dokument/FPPreport%20to%20swedbio.pdf, at 5.

Chandra K. Roy, "Indigenous Peoples in Asia: Rights and Development Challenges", Claire Charters and Rodolfo Stavenhagen, eds., *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples*

(Copenhagen: IWGIA, 2009), 216 at 226: "Indigenous lands have long been threatened by colonialism, settlement, encroachment and exploitation ... and land dispossession continues to this day".

[59] See, for example, *Indigenous and Tribal Peoples Convention, 1989*, article 2:

> 1. Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.
>
> 2. Such action shall include measures for:
> …
> (b) promoting the *full realisation of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions*… [emphasis added]

And at article 33, it is added that government programmes in regard to the matters in the *Convention* shall include "the proposing of legislative and other measures to the competent authorities and supervision of the application of the measures taken, *in co-operation with the peoples concerned*." [emphasis added]

[60] Rodolfo Stavenhagen, *The Ethnic Question: Conflicts, Development, and Human Rights* (Tokyo: United Nations Univ. Press, 1990) at 118: "The *subordination* of indigenous peoples to the nation-state, their *discrimination* and *marginalization*, has historically, in most cases, been the *result of colonization and colonialism*." [emphasis added]

[61] General Assembly, *Programme of action for the full implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, Resolution 2621 (XXV), October 12, 1970, para. 1.

[62] Johanna von Braun and Kabir Bavikatte (Natural Justice), "No narrowing of the definition of TK", http://www.naturaljustice.org/images/naturaljustice/eco%20-%20abs3%202009%20-%20tk%20definition.pdf: "Art. 8j *protects all TK of indigenous people and local communities* within the mandate of the CBD. This includes TK associated with GR but much more, such as TK associated with biological resources relevant in the context of cosmetics or oils." [emphasis added]

Convention on Biological Diversity (Ad Hoc Working Group on Access and Benefit-sharing), *Report of the Meeting of the Group of Technical and Legal Experts on Traditional Knowledge associated with Genetic Resources in the Context of the International Regime on Access and Benefit-Sharing*, UN Doc. UNEP/CBD/WG-ABS/8/2 (15 July 2009), Annex (Outcome of the Meeting of the Group of Technical and Legal Experts on Traditional Knowledge associated with Genetic Resources in the Context of the International Regime on Access and Benefit-Sharing), at para. 18:

> Article 8(j) as a stand alone provision protects all traditional knowledge of indigenous and local communities, within the mandate of the Convention on Biological Diversity, including traditional knowledge associated with genetic resources. Furthermore associated traditional knowledge does not necessarily have to be associated with genetic resources, as it can also include the use of traditional knowledge associated with biological resources.

[63] Emphasis added. The phrase "subject to national legislation" is also used in relation to "access to genetic resources" in article 15(1): "Recognizing the sovereign rights of States over their natural resources, the authority to determine access to genetic resources rests with the national governments and is subject to national legislation." Article 15(2) requires States to adopt national legislation in a positive direction: "Each Contracting Party shall endeavour ... not to impose restrictions that run counter to the objectives of this Convention."

[64] Convention on Biological Diversity, *Traditional knowledge and Biological Diversity: Note by the Executive Secretary*, UN Doc. UNEP/CBD/TKBD/1/2 (18 October 1997), para. 76. This background document was prepared by the Executive Secretary of the Convention on Biological Diversity, at the request of COP, in Decision III/14, para. 10.

[65] "Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets", in Conference of the Parties to the Convention on Biological Diversity, *The Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets*, Decision X/2, UN Doc. UNEP/CBD/COP/DEC/X/2 (29 October 2010), Annex, para. 3.

See also *Nagoya Protocol*, preamble:

> Recognizing the importance of genetic resources to food security, public health, biodiversity conservation, and the mitigation of and adaptation to climate change,
> …
> Recognizing the interdependence of all countries with regard to genetic resources for food and agriculture as well as their special nature and importance for achieving food security worldwide and for sustainable development of agriculture in the context of poverty alleviation and climate change ...

[66] IFAD (International Fund for Agricultural Development), *Engagement with Indigenous Peoples: Policy* (Rome: IFAD, November 2009), at 12: "Indigenous peoples' knowledge, especially that of indigenous women, may hold the key to increased food security, adaptation capability, protection of natural resources, disaster prevention and other challenges related to climate change."

[67] In regard to the importance of ensuring fairness and legal certainty for Indigenous peoples' land and resource rights, see, *e.g.*, Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Addendum: Situation of indigenous peoples in the Russian Federation*, UN Doc. A/HRC/15/37/Add.5 (23 June 2010), para. 83:

> It is essential that the State urgently bring coherence, consistency and certainty to the various laws that concern the rights of indigenous peoples and particularly their access to land and resources. In accordance with international standards, guarantees for indigenous land and resource rights should be legally certain; implemented fully and fairly for all indigenous communities …

[68] At the international and national levels, Indigenous peoples' rights are most often determined on the basis of traditional occupation or other use of their traditional lands, territories and resources. See Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Addendum: Situation of indigenous peoples in Australia*, UN Doc. A/HRC/15/37/Add.4 (1 June 2010), para. 29:

> The strengthening of legislative and administrative protections for indigenous peoples' rights over lands and natural resources should involve aligning those protections with applicable international standards, in particular those articulated in the Declaration on the Rights of Indigenous Peoples. Of note is ... the Declaration ... affirming simply that rights exist by virtue of "traditional ownership or other traditional occupation or use" (art. 26).

Case of the Mayagna (Sumo) Awas Tingni Community, I/A Court H.R., Ser. C No. 79 (Judgment) 31 August 2001, para. 151: "As a result of customary practices, possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration."

Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v *Kenya*, African Commission on Human and Peoples' Rights, Communication No. 276/2003, Twenty-Seventh Activity Report, 2009, Annex 5, para. 196: "...the State still has a duty to recognise the right to property of members of the Endorois community, within the framework of a communal property system, and establish the mechanisms necessary to give domestic legal effect to such right recognised in the [African] Charter and international law."

[69] Emphasis added. For the purposes of the *Convention on Biological Diversity*, "biological resources" includes, *inter alia*, genetic resources (art. 2).

Indigenous peoples' cultural well-being is an integral part of sustainable development: see, *e.g.*, *Declaration on the Establishment of the Arctic Council*, Ottawa, 19 September 1996, (1996) 35 I.L.M. 1387, preamble: "Affirming our

commitment to sustainable development in the Arctic region, including economic and social development, improved health conditions and cultural well-being".

[70] Convention on Biological Diversity, *Traditional knowledge and Biological Diversity: Note by the Executive Secretary*, *supra* note 64, para. 99. At para. 101, it is added: "Customary use of biological resources must take into account the spiritual and ceremonial dimensions of such use in addition to the more strictly economic and subsistence functions."

[71] *Ibid.*, para. 101. [emphasis added]

[72] See also Convention on Biological Diversity (Ad-Hoc Working Group on Access and Benefit-sharing), *Report of the Meeting of the Group of Technical and Legal Experts on Traditional Knowledge*, *supra* note 62, para. 10: "In discussing the relationship between traditional knowledge and genetic resources, the history of co-evolution (of biological and cultural systems) reinforces the inseparability of traditional knowledge and genetic resources."

[73] See, *e.g.*, UNDRIP, arts. 31, 38 and 42; and *Indigenous and Tribal Peoples Convention, 1989*, arts. 2(2)(b) and 5.

[74] "Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets", *supra* note 65 at Annex, para. 13 (Target 18). [underline added]

[75] *Convention*, art. 3. In addition, art. 4(1) of the *Nagoya Protocol* indicates that there is no intention in para. 4(1) to create a "hierarchy" between this *Protocol* and other existing international instruments.

Human Rights Council, *Report of the independent expert in the field of cultural rights, Farida Shaheed*, *supra* note 39, para. 69: "While drafting international agreements, in particular on trade and development, States should take into account the right to access and enjoy cultural heritage and ensure it is respected."

[76] Conference of the Parties to the Convention on Biological Diversity, *Report of the Tenth Meeting of the Conference of the Parties to the Convention on Biological Diversity*, *supra* note 6 at 26. [emphasis added] See also "Statement by Ahmed Djoghlaf, Executive Secretary of the Convention on Biological Diversity *on the occasion of* World Day for Cultural Diversity for Dialogue and Development", 21 May 2011, http://www.cbd.int/doc/speech/2011/sp-2011-05-21-cdd-en.pdf:

> ... for the world's indigenous peoples, "Mother Earth" is a sacred place.
>
> ... Most indigenous and local communities are situated in areas where the vast majority of the world's plant genetic resources are found. Many such communities have cultivated and used biodiversity in a sustainable way for thousands of years. Knowledge about the use of specific plants and their healing and therapeutic attributes for treating diseases has mostly been passed down orally from generation to generation.

[77] In Canada, see for example *Rio Tinto Alcan Inc.* v. *Carrier Sekani Tribal Council*, 2010 SCC 43, where the Supreme Court of Canada made the distinction between "established" rights and "unproven" rights. The Court indicated at para. 41that, in the face of proposed government action, both types of "existing" rights require prior consultation to protect such rights from harm:

> The claim or right must be one which actually exists and stands to be affected by the proposed government action. This flows from the fact that the purpose of consultation is to *protect unproven or established rights from irreversible harm* as the settlement negotiations proceed ... [emphasis added]

[78] *Haida Nation* v. *British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para. 37: "The law is capable of differentiating between tenuous claims, claims possessing a strong prima facie case, and established claims."

[79] Permanent Forum on Indigenous Issues, *Information provided by the Secretariat of the Convention on Biological Diversity to the Tenth Session of the United Nations Permanent Forum on Indigenous Issues*, 2011, at 3. [emphasis added]

[80] *Ibid.*, at 19. [emphasis added]

[81] Human Rights Committee, *General Comment No. 18, Non-discrimination*, 37th sess., (1989), para. 1: "Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights."

Committee on the Elimination of Racial Discrimination, General Recommendation 32, *The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination* (adopted at the Committee's 75th session, August 2009), para. 7: "Discrimination under the Convention includes purposive or *intentional discrimination* and *discrimination in effect*. Discrimination is constituted ... by an unjustifiable 'distinction, exclusion or restriction' ..." [emphasis added]

See also *Withler* v. *Canada (Attorney General)*, 2011 SCC 12 (Supreme Court of Canada, preliminary version), para. 2, where the Court describes violations of substantive equality as follows: "To determine whether the law violates this norm [of substantive equality], the matter must be considered in the full context of the case, including the law's real impact on the claimants and members of the group to which they belong."

[82] See, *e.g.*, *Case of the Saramaka People v. Suriname*, *(Preliminary Objections, Merits, Reparations, and Costs)*, I/A Court H.R. Series C No. 172 (Judgment) 28 November 2007, para. 93, where the Inter-American Court interpreted the Indigenous peoples' right to property under:Article 21 of the *American Convention on Human Rights* in a manner consistent with international human rights law:

> ... by virtue of the right of indigenous peoples to self-determination recognized under said Article 1 [of the two international Covenants], they may "freely pursue their economic, social and cultural development", and may "freely dispose of their natural wealth and resources" so as not to be "deprived of [their] own means of subsistence". Pursuant to Article 29(b) of the American Convention, this Court may not interpret the provisions of Article 21 of the American Convention in a manner that restricts its enjoyment and exercise to a lesser degree than what is recognized in said covenants.

Case of the Mayagna (Sumo) Awas Tingni Community, supra note 68, para. 144: "'Property' can be defined as those material things which can be possessed, as well as any right which may be part of a person's patrimony; that concept includes all movables and immovables, corporeal and incorporeal elements and any other intangible object capable of having value."

[83] Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Guyana*, UN Doc. CERD/C/GUY/CO/14 (4 April 2006), para. 15. [emphasis added]

Concerns that the "established rights" approach in the *Protocol* is too limiting and discriminatory are highlighted in Permanent Forum on Indigenous Issues, *Report on the tenth session*, *supra* note 28, para. 27.

[84] Jannie Lasimbang, "Indigenous Peoples and Customary Law in Sabah, Malaysia", *Indigenous Affairs*, IWGIA, 1-2/2010, 38 at 39:

> For the indigenous peoples of Sabah, the indigenous legal system revolves around the *adat*, which encompasses customary laws, concepts, principles and practices, and the customary institution that implements and regulates the *adat*. In short, it can be called an holistic indigenous system of governance.

See also Convention on Biological Diversity (Ad Hoc Working Group on Access and Benefit-sharing), *Report of the Meeting of the Group of Technical and Legal Experts*, *supra* note 62, Annex, para. 37:

> Indigenous and local communities ... perceive traditional knowledge and genetic resources/biological resources in a holistic manner. Traditional knowledge is hence generally considered as cohesive and integral to genetic resources."

[85] Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study on the protection of the cultural and intellectual property of indigenous peoples, by Erica-Irene Daes, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and Chairperson of the Working Group on Indigenous Populations*, UN Doc. E/CN.4/Sub.2/1993/28 (28 July 1993), para. 164.

[86] Ian Brownlie, *Principles of Public International Law*, 5th ed. (Oxford: Clarendon Press, 1998) at 515: "[Peremptory norms or *jus cogens*] are rules of customary law which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of contrary effect." The least controversial examples of [peremptory norms] are the prohibition of the use of force, the law of genocide, the principle of racial non-discrimination, crimes against humanity, and the rules prohibiting trade in slaves and piracy."

[87] *Haida Nation*, *supra* note 78, para. 31: "The government's arguments do not withstand scrutiny. Neither the authorities nor practical considerations support the view that a duty to consult and, if appropriate, accommodate arises only upon final determination of the scope and content of the right."

[88] *Ibid.*, para. 27. [emphasis added]

[89] *Ibid.*, para. 33. [emphasis added]

[90] See, *e.g.*, Quebec Native Women, "Canada Accepts Reference to UN Declaration – And Continues to Undermine It", Press Release, 27 October 2010, Nagoya, Japan.

[91] See also text accompanying note 188 *infra.*

[92] UNDRIP, preambular para. 7; and *International Covenant on Economic, Social and Cultural Rights*, art. 1 (right of self-determination includes right to natural resources) and art. 25: "Nothing in the present Covenant shall be interpreted as impairing the *inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources*." [emphasis added] Similarly, see *International Covenant on Civil and Political Rights*, art. 1 (self-determination) and art. 47 (inherent right to natural resources).

See also Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada*, UN Doc. CCPR/C/79/Add.105 (7 April 1999), para. 8 : "… the Committee emphasizes that the right to self-determination requires, *inter alia,* that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence (art. 1, para. 2)."

[93] UNDRIP, art. 31. See also Jingsong Li and Yiching Song, *Use it or Lose it: Protecting the Traditional Knowledge, Genetic Resources and Customary Laws of Marginal Farmers in Southwest China*, Centre for Chinese Agricultural Policy (CCAP, China) (September 2010), online: http://pubs.iied.org/pdfs/G02787.pdf at 2:

> 'Collective Bio-Cultural Heritage' means "knowledge, innovations and practices of indigenous peoples and local communities which are often held collectively and are inextricably linked to traditional resources and territories; including the diversity of genes, varieties, species and ecosystems; cultural and spiritual values; and customary laws shaped within the socio-ecological context of communities".

[94] *2010 Declaration on Bio-cultural Diversity*, adopted at the International Conference on Cultural and Biological Diversity for Development, June 2010, Montreal, Canada, in Permanent Forum on Indigenous Issues, *Information provided by the Secretariat of the Convention on Biological Diversity to the Tenth Session of the United Nations Permanent Forum on Indigenous Issues*, 2011, Annex I at 20.

In regard to the "inextricable link between biological and cultural diversity", see Ana Persic and Gary Martin, eds., *Links between biological and cultural diversity-concepts, methods and experiences*, Report of an International Workshop (Paris: UNESCO, 2008), at 7 (Introduction). See also Klaus Töpfer, Executive Director, UNEP, "Forward" in United Nations Environment Programme (D.A. Posey and Oxford Centre for the Environment, eds.), *Cultural and Spiritual Values of Biodiversity* (Kenya: UNEP, 1999) at xi.

[95] *International Covenant on Economic, Social and Cultural Rights*, article 15, para 1 (a).

[96] Human Rights Council, *Report of the independent expert in the field of cultural rights, Ms. Farida Shaheed, submitted pursuant to resolution 10/23 of the Human Rights Council*, UN Doc. A /HRC/14/36 (22 March 2010), para. 9.

[97] Committee on Economic, Social and Cultural Rights, General Comment No. 21, *Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E/C.12/GC/21 (21 December 2009), para. 36. [emphasis added] And at 48:

> ... the obligation to fulfil requires States parties to take appropriate legislative, administrative, judicial, budgetary, promotional and other measures aimed at the full realization of the right enshrined in article 15, paragraph 1 (a), of the Covenant.

[98] *Ibid.*, para. 55 (core obligations). [emphasis added]

[99] Disproportionate restrictions of, and discriminatory actions against, Indigenous peoples' human rights are not permitted in international law. For example, the Inter-American Commission on Human Rights has interpreted the right to culture in Article XIII of the *American Declaration on the Rights and Duties of Man* in a manner consistent with international law.

See *Grand Chief Michael Mitchell v. Canada*, Inter-Am. Comm. H.R. Report No. 61/08, Merits, (25 July 2008), in *Annual Report of the Inter-American Commission on Human Rights 2008*, OEA/Ser.L/V/II.134/doc.5 rev.1 (25 February 2009) 160, para. 79: "Article XIII may be invoked not only in respect of culturally significant aspects of trade, but also with respect to trade restrictions that have the effect of *disproportionately restricting or discriminating against* a trade practice." [emphasis added]

[100] See, *e.g.*, George Mukundi Wachira, "Applying Indigenous Peoples' Customary Law in Order to Protect their Land Rights in Africa", *supra* note 54 at 12-13: "... due to the imposition of colonial and post-colonial land laws, most indigenous communities remain deprived of their lands. The destruction and exclusion of African customary law from the land law regime in various African states has had the effect of dispossessing indigenous peoples of their lands."

[101] UNDRIP, art. 8(1): "Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture." See also art. 8(2): "States shall provide effective mechanisms for prevention of, and redress for: (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities; (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources".

[102] Human Rights Committee, *General Comment No. 18, Non-discrimination*, para. 16.

[103] *Ibid.*, para. 16(e). [underline added]

[104] General Assembly, *Strengthening United Nations action in the field of human rights through the promotion of international cooperation and the importance of non-selectivity, impartiality and objectivity*, UN Doc. A/62/165 (18 December 2007), para. 5. See also *Vienna Declaration and Programme of Action*, *supra* note 43, Part I, para. 32: "The World Conference on Human Rights reaffirms the importance of ensuring the universality, objectivity and non-selectivity of the consideration of human rights issues."

Impartiality, objectivity and non-selectiveness are also a permanent part of the "Principles" for the Agenda and Framework for the Programme of Work for the Human Rights Council: see *Institution-building of the United Nations*

Human Rights Council, HRC Res. 5/1, UN GAOR, 62 Sess., Supp. No. 53, UN Doc. A/62/53 (2007) 48 at 60 (Annex, V(A)).

[105] Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII (51) concerning Indigenous Peoples*, UN Doc. A/52/18 Annex V (18 August 1997), para. 3. [emphasis added] In the same para., the Committee adds: "Consequently the preservation of their culture and their historical identity has been and still is jeopardized."

[106] *Ibid.*, para. 4b. See also UNDRIP, art. 2: "Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity."

[107] *Ibid.*, para. 4c. See also UNDRIP, art. 21: "1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions … 2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions".

[108] *Ibid.*, para. 4e. See also UNDRIP, art. 11(1): "Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures …"

[109] *Ibid.*, para. 5. See also UNDRIP, article 26(2): "Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired."

[110] Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Suriname*, CERD/C/64/CO/9 (12 March 2004), para. 11[emphasis added].

[111] Conference of the Parties to the Convention on Biological Diversity, *Report of the Tenth Meeting of the Conference of the Parties to the Convention on Biological Diversity*, *supra* note 6 at 26.

[112] *Indigenous and Tribal Peoples Convention, 1989*, article 15(2). [underline added]

[113] International Labour Organization, *Report of the Committee on Convention No. 107*, International Labour Conference, Provisional Record, 76th Session, Geneva, 1989, No. 25, para. 42.

[114] See, *e.g.*, Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada*, UN Doc. CCPR/C/79/Add.105 (7 April 1999), para. 8; Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada*, UN Doc. CCPR/C/CAN/CO/5 (20 April 2006) at paras. 8 and 9; Human Rights Committee, *Concluding observations of the Human Rights Committee: Panama*, UN Doc. CCPR/C/PAN/CO/3 (17 April 2008) at para. 21; Human Rights Committee, *Concluding observations of the Human Rights Committee: Norway*, UN Doc. CCPR/C/79/Add.112 (5 November 1999) at para. 17; Human Rights Committee, *Concluding observations of the Human Rights Committee: Brazil*, UN Doc. CCPR/C/BRA/CO/2 (1 December 2005), para. 6; Human Rights Committee, *Concluding observations of the Human Rights Committee: United States of America*, UN Doc. CCPR/C/USA/Q/3 (18 December 2006), para. 37; Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Morocco*, UN Doc. E/C.12/MAR/CO/3 (4 September 2006) at para. 35; Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Russian Federation*, UN Doc. E/C.12/1/Add.94 (12 December 2003) at para. 11.

[115] International Labour Organization, *Monitoring indigenous and tribal peoples' rights through ILO Conventions: A compilation of ILO supervisory bodies' comments 2009-2010* (Geneva: ILO, 2010), at 4: "The Convention and the UN Declaration on the Rights of Indigenous Peoples adopted in 2007 are mutually reinforcing instruments providing the framework for the universal protection of indigenous and tribal peoples' rights."

Manuela Tomei & Lee Swepston, "Indigenous and Tribal Peoples: A Guide to ILO Convention No. 169", International Labour Office, Geneva, 1996, at 7: "… there is nothing in Convention No. 169 which would be incompatible with any

international legal instrument which may establish or define the right of indigenous and tribal peoples to self-determination."

[116] UN General Assembly, *Universal realization of the right of peoples to self-determination*, Res. 63/163 (18 December 2008) (adopted without vote), para. 1: "*Reaffirms* that the universal realization of the right of all peoples, including those under colonial, foreign and alien domination, to self-determination is a fundamental condition for the effective guarantee and observance of human rights and for the preservation and promotion of such rights".

Human Rights Committee, *General Comment No. 12, Article 1*, 21st sess., A/39/40 (1984), para. 1: "The right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights."

[117] UNDRIP, arts. 3 (self-determination); 26(2) (use, develop and control natural resources); and 31 (cultural heritage, including genetic resources). Committee on Economic, Social and Cultural Rights, General Comment No. 21, *Right of everyone to take part in cultural life*, *supra* note 97, para. 37 affirms:

> Indigenous peoples have the right to act collectively to ensure respect for their right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions ...

[118] At an earlier meeting in Cali, Colombia in March 2010, Indigenous peoples had originally proposed: "Noting the significance of the United Nations Declaration on the Rights of Indigenous Peoples in this Protocol". At that time, the Canadian government confirmed to representatives of Indigenous organizations that it would not object to this wording.

[119] See, *e.g.*, Quebec Native Women, "Canada Accepts Reference to UN Declaration – And Continues to Undermine It", Press Release, 27 October 2010, Nagoya, Japan.

[120] See, generally, Avinash Gavai, "Canada 'part of the problem' when it comes to human rights: Amnesty", *Embassy*, Daily Update, 1 April 2011. Canada has continued to undermine UNDRIP, even after its endorsement in November 2010.

Grand Council of the Crees (Eeyou Istchee) *et al.*, "Implementation of the *UN Declaration on the Rights of Indigenous Peoples*: Positive Initiatives and Serious Concerns", Expert Mechanism on the Rights of Indigenous Peoples, 2nd sess., Geneva (joint global statement by Indigenous and human rights organizations delivered 12 August 2009), para. 36: "During its three-year term [on the Human Rights Council], Canada pursued the lowest standards of any Council member within the Western European group of States."

[121] See, *e.g.*, Ed John, Matthew Coon Come *et al.*, "UN Security Council – Did Canada Merit a Seat?", *Windspeaker*, Vol. 28, Issue 9, December 2010 at 12: "The Canadian government continues to opt for an ideological course that betrays core Canadian principles and values. This is especially evident in relation to the human rights of those most disadvantaged – the 370 million Indigenous people in over 70 countries. ... Canada's actions serve to undermine the international human rights system and the rule of law".

Paul Joffe, "*UN Declaration on the Rights of Indigenous Peoples*: Canadian Government Positions Incompatible with Genuine Reconciliation", (2010) 26 N.J.C.L. 121, online: http://www.cfsc.quaker.ca/pages/un.html:

> [The Canadian government] has … violated repeatedly the rule of law in Canada and internationally; misled Parliament and the Canadian public; and undermined the human rights of Indigenous peoples. Such conduct fails to uphold the honour of the Crown and is inconsistent with the constitutional objective of reconciliation with Indigenous peoples.

[122] Annex to General Assembly Decision 55/488 of 7 September 2001 provides: "The General Assembly ... reiterates that the terms 'takes note of' and 'notes' are neutral terms that constitute neither approval nor disapproval."

[123] Conference of the Parties, "Outcome of the work of the Ad Hoc Working Group on long-term Cooperative Action under the Convention", Draft decision -/CP.16, UN Climate Change Conference, Cancun, Mexico (Advance unedited version), preamble.

[124] The *Nagoya Protocol* affirms that COP serving as the meeting of the Parties has the power to: "Consider and adopt, as required, amendments to this Protocol". According to the *Convention*, article 29, any proposed amendment to the *Protocol* by COP is subject to a formal procedure that includes notice of such proposal to the Parties by the Secretariat "at least six months before the meeting at which it is proposed for adoption" (para. 2); and "ratification, acceptance or approval" by the Parties (paras. 3 and 4).

See also Foundation for International Environmental Law and Development (FIELD), "Treaties, protocols, and decisions by the Conference of the Parties (COP) of the UNFCCC and the Conference of the Parties serving as the Meeting of the Parties (CMP) of the Kyoto Protocol", Briefing Paper, October 2009: "As a general rule, COP ... decisions are not legally binding – they are political decisions. ... Exceptions exist in some treaties, where the decision making body (COP or equivalent body) has been granted the authority to take certain legally binding decisions".

CAN International, "COP Decisions: Binding or Not?", CAN Ad-Hoc Legal Working Group, 8 June 2009: "The binding nature of a COP decision eventually rests on the powers ascribed to the COP in the treaty text. There is some acceptance that the supreme treaty body has "substantive powers" of decision-making where these powers are delegated by the Parties and provided for in the treaty text."

[125] Conference of the Parties to the Convention on Biological Diversity, "The Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets", *supra* note 65, para. 4 [underline added].

[126] *Convention*, article 22(1); and *Protocol*, article 4(1), quoted in the paragraph accompanying note 37 *supra*.

[127] Office of the High Commissioner for Human Rights, "Indigenous rights declaration universally endorsed", 2010, online: http://www.ohchr.org/EN/NewsEvents/Pages/Indigenousrightsdeclarationendorsed.aspx. In October when COP 10 adopted Decision X/2, Canada and the United States had not yet reversed their opposing positions. However, Canada had already announced its intention to endorse UNDRIP and the U.S. was in the process of reviewing its position.

Permanent Forum on Indigenous Issues, *Information on recent activities of the Office of the High Commissioner for Human Rights related to the rights of indigenous peoples: Contribution to the tenth session of the UN Permanent Forum on Indigenous Issues*, 8 April 2011, at 1: "The UN Declaration on the Rights of Indigenous Peoples serves as OHCHR's framework for action to further the advancement and protection of indigenous peoples' rights. The main priority of the Office is to contribute to the promotion and implementation of this key instrument, along with relevant recommendations, comments and observations of UN human Rights treaty bodies, and Special Procedures."

[128] See, *e.g.*, Committee on the Rights of the Child, *Concluding observations: Cameroon*, UN Doc. CRC/C/CMR/CO/2 (29 January 2010) (advance unedited version), para.83; Committee on the Rights of the Child, *Indigenous children and their rights under the Convention*, General Comment No. 11, UN Doc. CRC/C/GC/11 (30 January 2009), para. 82; Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Guatemala*, UN Doc. CERD/C/GTM/CO/12-13 (19 May 2010), para. 11; Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Japan*, UN Doc. CERD/C/JPN/CO/3-6 (6 April 2010), para. 20; Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Cameroon,* UN Doc. CERD/C/CMR/CO/15-18 (30 March 2010), para. 15; Committee on the Elimination of Racial Discrimination (Chairperson), Letter to Lao People's Democratic Republic, 12 March 2010 (Early warning and urgent action procedure) at 1; Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Peru*, UN Doc. CERD/C/PER/CO/14-17 (3 September 2009), para. 11; Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Suriname*, UN Doc. CERD/C/SUR/CO/12 (13 March 2009), para. 17; Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Brazil*, UN Doc. E/C.12/BRA/CO/2 (12 June 2009), para. 9; Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Nicaragua*, UN Doc. E/C.12/NIC/CO/4 (28 November 2008), para. 35; and Committee on the Elimination of All Forms of Discrimination

against Women, *Concluding observations of the Committee on the Elimination of Discrimination against Women: Australia*, UN Doc. CEDAW/C/AUS/CO/7 (30 July 2010) (advance unedited edition), para. 12.

[129] Paul Joffe, "Canada's Opposition to the *UN Declaration*: Legitimate Concerns or Ideological Bias?" in Jackie Hartley, Paul Joffe & Jennifer Preston (eds.), *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope, and Action* (Saskatoon: Purich Publishing, 2010) 70 at 87-89.

[130] General Assembly, *Situation of human rights and fundamental freedoms of indigenous people: Note by the Secretary-General*, Interim report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, UN Doc. A/65/264 (9 August 2010), para. 85 (Conclusions). In the same paragraph, Anaya concludes: "The significance of the Declaration is not to be diminished by assertions of its technical status as a resolution that in itself has a non-legally binding character."

[131] *Ibid.*, para. 87 (Conclusions).

[132] Permanent Forum on Indigenous Issues, *Report on the seventh session (21 April - 2 May 2008)*, Economic and Social Council, Official Records, Supplement No. 23, United Nations, New York, E/2008/43, E/C.19/2008/13, para. 132.

[133] See, *e.g.*, Food and Agriculture Organization, *The Second Report on the State of the World's Plant Genetic Resources for Food and Agriculture* (Rome: FAO, 2010).

[134] Food and Agriculture Organization, "FAO Policy on Indigenous and Tribal Peoples" (Rome: FAO, 2010), at 2. FAO bases its responsibility on art. 41 of UNDRIP: "The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established."

[135] *Ibid.*, para. 13. The "core principles" in this policy document include: Self-determination; Development with identity; Free, prior and informed consent; Participation and inclusion; Rights over land and other natural resources; Cultural rights; Collective rights; and Gender equality.

[136] IFAD (International Fund for Agricultural Development), "Concluding Statement of the workshop establishing an indigenous peoples' forum at IFAD, 18 February 2011", http://www.ifad.org/events/ip/statement.pdf. [emphasis added]

[137] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council* v *Kenya*, *supra* note 68, para. 204: "The African Commission notes that the UN Declaration on the Rights of Indigenous Peoples, officially sanctioned by the African Commission through its 2007 Advisory Opinion, deals extensively with land rights."

[138] Inter-American Commission on Human Rights, "Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System", OEA/Ser.L/V/II. Doc. 56/09 (30 December 2009), para. 19. See *Case of the Saramaka People v. Suriname.* 2007, *supra* note 82, para. 131.

[139] For example, at the July 2010 negotiations on the draft Protocol in Montreal, the head of the delegation of one group of States indicated to the International Indigenous Forum on Biodiversity that it would have to reconsider its support on all Indigenous issues if the IIFB continued to raise such matters as "peoples", human rights or the right of self-determination.

[140] In regard to the right of self-determination, see identical article 1 of the *International Covenant on Civil and Political Rights*, G.A. Res 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) at 52, U.N. Doc. A/6316, Can. T.S. 1976 No. 47 (1966) (entered into force March 23, 1976); and *International Covenant on Economic, Social and Cultural Rights*, G.A. Res.

2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966); Can. T.S. 1976 No. 46 (entered into force 3 January 1976).

S. James Anaya, "The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era" in Claire Charters and Rodolfo Stavenhagen, eds., *Making the Declaration Work*, *supra* note 58, 184 at 185: "... indigenous peoples have the same right of self-determination enjoyed by other peoples. This follows from the principle of equality that runs throughout the text of the Declaration".

[141] *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 U.N.T.S. 195 at 216, 5 I.L.M. 352 (entered into force 4 January 1969).

[142] *Ibid.*, art. 1. [emphasis added] See also Human Rights Committee, General Comment No. 18, *Non-discrimination*, 37th sess., (1989), at para. 7:

> ... the term "*discrimination*" as used in the Covenant should be understood to imply *any distinction, exclusion, restriction or preference which is based on any ground such as race*, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and *which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms*. [emphasis added]

[143] See *Charter of the United Nations*, arts. 1(2) and 55c. R. Wolfrum, "Chapter 1. Purposes and Principles" in B. Simma, ed., *The Charter of the United Nations: A Commentary* (New York: Oxford University Press, 1994) 49 at 53:

> *The term "equality of peoples" [in Art. 1(2) of the U.N. Charter] was meant to underline that no hierarchy existed between the various peoples.* To this extent, the prohibition of racial discrimination was transferred from the national level to the international level of international relations. Apart from that, the principle of equality of peoples and the right to self-determination are united. With this, it is assured that no peoples can be denied the right to self-determination on the basis of any alleged inferiority. [emphasis added]

[144] UNDRIP, preambular paras. 1, 2 , 4, 5, 16, 17 and arts. 1-3 and 46.

[145] Permanent Forum on Indigenous Issues, *Report on the ninth session (16 – 30 April 2010)*, Economic and Social Council, Official Records, Supplement No. 23, United Nations, New York, E/2010/43-E/C.19/2010/15, para. 112: "The Permanent Forum calls upon the parties to the Convention on Biological Diversity to adopt the terminology "indigenous peoples and local communities" as an accurate reflection of the distinct identities developed by those entities since the adoption of the Convention almost 20 years ago."

[146] Adopted at the General Conference of UNESCO, 32nd sess., Paris, 17 October 2003, *entered into force* on 20 April 2006. The objectives include protecting and ensuring respect for intangible cultural heritage of Indigenous peoples. Such heritage includes "knowledge and practices concerning nature and the universe" (art. 2(2)(d)).

[147] Adopted at the General Conference of UNESCO, 33rd sess., Paris, 20 October 2005. The preamble recognizes the "importance of traditional knowledge as a source of intangible and material wealth, and in particular the knowledge systems of indigenous peoples, and its positive contribution to sustainable development, as well as the need for its adequate protection and promotion".

[148] Conference of the Parties, "Outcome of the work of the Ad Hoc Working Group on long-term Cooperative Action under the Convention", *supra* note 123, para. 72.

[149] See, *e.g.*, World Conference on Sustainable Development, *Johannesburg Declaration on Sustainable Development*, adopted 4 September 2003, Johannesburg, South Africa; *2005 World Summit Outcome*, GA Res. 60/1, UN GAOR, 60th Sess., Supp. No. 49, Vol. I, UN Doc. A/60/49 (2006) 3; and Human Rights Council, *Expert mechanism on the rights of indigenous peoples*, Res. 6/36 (14 December 2007). All of these instruments were adopted without a vote.

See also *Abuja Declaration*, adopted by Heads of State and Government of Africa and South America, First Africa-South America Summit (ASA) in Abuja, Nigeria, 30 November 2006, where the terms "indigenous peoples" and "indigenous peoples and communities" are used.

[150] Permanent Forum on Indigenous Issues, *Information provided by the Secretariat of the Convention on Biological Diversity to the Tenth Session of the United Nations Permanent Forum on Indigenous Issues*, 2011, at 18. The 7th meeting of the working group on article 8(j) is tentatively scheduled to be held on 14-18 November 2011.

[151] UNDRIP, art. 21(2), *supra* note 107; and arts. 38, 41 and 42 (positive measures required by the United Nations, its bodies and specialized agencies and States in regard to all the provisions of the *Declaration*). *Indigenous and Tribal Peoples Convention, 1989*, Art. 4: "1. Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned. 2. Such special measures shall not be contrary to the freely-expressed wishes of the peoples concerned."

See also Committee on the Elimination of Racial Discrimination, General Recommendation 32, *The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination*, *supra* note 81. Human Rights Committee, *General Comment No. 23, Article 27*, 50th sess., 6 April 1994, UN Doc. CCPR/C/21/Rev.1/Add.5. (1994), para. 7 (positive legal measures in regard to Indigenous peoples' way of life and traditional activities). Committee on Economic, Social and Cultural Rights, General Comment No. 20, *Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E/C.12/GC/20 (2 July 2009), para. 9 (special measures to attenuate or suppress conditions that perpetuate discrimination).

European Court of Human Rights, *Case of Connors v. United Kingdom*, Judgment of 27 May 2004, Application no. 66746/01, para. 84 (declaring that States have an obligation to take positive steps to provide for and protect the different lifestyles of minorities as a way to provide equality under the law).

[152] *Convention*, art. 8(a).

[153] *Case of the Indigenous Community Yakye Axa v. Paraguay (Merits, Reparations and Costs)* Series C No. 125(Judgment) 17 June 2005, para. 63.

[154] *Cf. Case of the Mayagna (Sumo) Awas Tingni Community, supra* note 68, paras. 148-149, and 151; *Case of the Indigenous Community Sawhoyamaxa v. Paraguay (Merits, Reparations and Costs)*, Series C No. 146 (Judgment) 29 March 2006. paras. 118-121, and 131, and *Case of the Indigenous Community Yakye Axa v. Paraguay (Merits, Reparations and Costs)*, *supra* note 153, paras. 124, 131, 135-137 and 154.

[155] *Case of the Saramaka People v. Suriname*. 2007, *supra* note 82, para. 85.

[156] *Centre for Minority Rights Development (Kenya)*, *supra* note 68, para. 187. And at para. 241: "The African Commission is of the view that protecting human rights goes beyond the duty not to destroy or deliberately weaken minority groups, but *requires respect for, and protection of, their religious and cultural heritage essential to their group identity*". [emphasis added]

[157] UNDRIP, arts. 10 (forced relocations); 11(2) (redress re cultural, intellectual and other property); 19 (legislative or administrative matters); 28(1) (redress re lands, territories and resources taken or damaged); 29(2) (storage or disposal of hazardous materials on Indigenous lands or territories); and 32(2) (approval of projects affecting Indigenous lands, territories or resources).

In regard to UNDRIP and FPIC, see Andrea Carmen, "The Right to Free, Prior and Informed Consent: A Framework for Harmonious Relations and New Processes for Redress" in Jackie Hartley, Paul Joffe & Jennifer Preston (eds.), *Realizing the UN Declaration on the Rights of Indigenous Peoples*, *supra* note 129 at 120.

[158] "Principles and Guidelines for the Protection of the Heritage of Indigenous People", in UN Sub-Commission on the Promotion and Protection of Human Rights, *Report of the seminar on the draft principles and guidelines for the*

protection of the heritage of indigenous people (Geneva, 28 February - 1 March 2000), UN Doc. E/CN.4/Sub.2/2000/26 (19 June 2000) (Chairperson-Rapporteur: Ms. Erica-Irene Daes), Annex I (Principles):

> 2. To be effective, the protection of indigenous peoples' heritage should be based broadly on the principle of self-determination, which includes the right of indigenous peoples to maintain and develop their own cultures and knowledge systems, and forms of social organization.

Permanent Forum on Indigenous Issues, *Information provided by the Secretariat of the Convention on Biological Diversity to the Tenth Session of the United Nations Permanent Forum on Indigenous Issues*, 2011, at 3: "Regarding article 8(j) and related provisions … An essential element of sui generis systems is prior and informed consent."

[159] United Nations Development Group, "United Nations Development Group Guidelines on Indigenous Peoples' Issues", *supra* note 25, at 13: "The right to self-determination may be expressed through: … *Respect for the principle of free, prior and informed consent*." [emphasis added]

Permanent Forum on Indigenous Issues, *Report on the tenth session*, *supra* note 28, para. 36: "As a crucial dimension of the right of self-determination, the right of indigenous peoples to free, prior and informed consent is ... relevant to a wide range of circumstances ... Such consent is vital for the full realization of the rights of indigenous peoples and must be interpreted and understood in accordance with contemporary international human rights law ..."

Human Rights Council, "Progress report on the study on indigenous peoples and the right to participate in decision-making: Report of the Expert Mechanism on the Rights of Indigenous Peoples", UN Doc. A/HRC/15/35 (23 August 2010), para. 34:

> Indigenous peoples identify the *right of free, prior and informed consent as a requirement, prerequisite and manifestation of the exercise of their right to self-determination as defined in international human rights law.* Moreover, the principle is of fundamental importance for indigenous peoples' participation in decision-making. This is because free, prior and informed consent establishes the *framework for all consultations relating to accepting of projects that affect them, and any related negotiations pertaining to benefit-sharing and mitigation measures*. [emphasis added]

[160] In regard to the right to development, see generally *Declaration on the Right to Development*, GA Res. 41/128, 41 UN GAOR, Supp. (No. 53) UN Doc. A/41/925 (1986); *African Charter of Human and Peoples' Rights*, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* 21 October 1986, art. 22; *United Nations Millennium Declaration*, UN Doc. A/RES/55/2, 8 September 2000, para. 24; and *Vienna Declaration and Programme of Action*, *supra* note 43, Part I, para. 10:

> The World Conference on Human Rights reaffirms the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights.

For various interrelated and mutually reinforcing dimensions of the Indigenous peoples' right to development that may be relevant in the context of the *Convention* and *Nagoya Protocol*, see UNDRIP, *inter alia*, preambular paragraphs 6, 9-12, 16 and 22 and Articles 3, 11-13, 18, 20, 23-29, 31, 32, 34, 36 and 37.

[161] *Declaration on the Right to Development*, article 1(2).

[162] UNDRIP, article 23. See also *Indigenous and Tribal Peoples Convention, 1989*, art. 7(1): "The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development."

[163] UNDRIP, preambular para. 11: "*Recognizing* that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment"; *Indigenous and Tribal Peoples Convention, 1989*, art. 23(2) ("importance of sustainable and equitable development"); *Rio*

Declaration on Environment and Development, UN Doc. A/Conf. 151/5/Rev. 1 (13 June 1992), Principle 3: "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations"; *Vienna Declaration and Programme of Action*, *supra* note 43, para. 11: "The right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations"; and *Inter-American Democratic Charter*, signed by the 34 countries of the Americas, 28th special session of the OAS General Assembly, Lima, Peru, 11 September 2001: "… economic growth and social development based on justice and equity, and democracy are interdependent and mutually reinforcing".

[164] Dalee Sambo Dorough, "The Indigenous Human Right to Development", *Indigenous Affairs*, IWGIA, 1-2/2010, 76 at 81: "…principles that should be included in the understanding of "equitable development" are: ... development must not be imposed on Indigenous peoples without their free, prior and informed consent and must fully accommodate Indigenous values and concerns".

Sub-Commission on the Promotion and Protection of Human Rights, *Indigenous peoples and their relationship to land: Final working paper prepared by the Special Rapporteur, Mrs. Erica-Irene A. Daes*, UN Doc. E/CN.4/Sub.2/2001/21 (11 June 2001), para. 144 (d): "All State and international actions and legal measures in regard to indigenous lands, territories and resources must assure that all indigenous peoples have lands, territories and resources sufficient to assure their well-being and equitable development as peoples …"

[165] General Assembly, *Draft Programme of Action for the Second International Decade of the World's Indigenous People: Report of the Secretary-General*, UN Doc. A/60/270 (18 August 2005) (adopted without vote by General Assembly, 16 December 2005). At para. 9, one of the five objectives of the Decade is:

> Promoting full and effective participation of indigenous peoples in decisions which directly or indirectly affect their lifestyles, traditional lands and territories, their cultural integrity as indigenous peoples with collective rights or any other aspect of their lives, considering the principle of free, prior and informed consent …

[166] See, *e.g.*, Committee on the Elimination of Racial Discrimination, *Concluding Observations on the Elimination of Racial Discrimination: Guatemala*, UN Doc. CERD/C/GTM/CO/12-13 (19 May 2010), para. 11: "In the light of its general recommendation No. 23 (para. 4 (d)), the Committee recommends that the State party consult the indigenous population groups concerned at each stage of the process and that it obtain their consent before executing projects involving the extraction of natural resources".

Comité des droits de l'homme, *Observations finales du Comité des droits de l'homme: Togo*, UN Doc. CCPR/C/TGO/CO/4 (28 March 2011) (advance unedited version), para. 21 (ensure Indigenous peoples can exercise their right to free, prior and informed consent); Human Rights Committee, *Poma v.Peru*, Case No. 1457/2006, *Report of the Human Rights Committee*, GAOR, 64th Sess., Supp. No. 40, Vol. I, UN Doc. A/64/40 (2008-09), para. 202: "Participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community."

Committee on Economic, Social and Cultural Rights, General Comment No. 21, *Right of everyone to take part in cultural life (art. 15, para. 1 (a), supra* note 97, para. 5, indicating that:a "core obligation applicable with immediate effect" includes the following: "States parties should obtain their free and informed prior consent when the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are at risk."

[167] See, *e.g.*, *Centre for Minority Rights Development (Kenya)*, *supra* note 68, para. 226: "In terms of consultation, the threshold is especially stringent in favour of indigenous peoples, as it also *requires that consent be accorded*. Failure to observe the obligations to consult and to seek consent – or to compensate - ultimately results in a violation of the right to property." [emphasis added]

Case of the Saramaka People v. Suriname. 2007, *supra* note 82, para. 134: "... the Court considers that, regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent, according to their customs and traditions."

[168] General Assembly, *Situation of human rights and fundamental freedoms of indigenous people: Note by the Secretary-General*, Interim report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, UN Doc. A/65/264 (9 August 2010), para. 27:

> ... article 32 of the Declaration, with its call for the free and informed consent of indigenous peoples prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources, provides an important template for avoiding these problems in the development context.

Human Rights Council, *Report of the Special Rapporteur on the right to food***,** *Olivier De Schutter - Crisis into opportunity: reinforcing multilateralism*, UN Doc. A/HRC/12/31 (21 July 2009), para. 21:

> These [core] principles are based on the right to food ... They also call for the respect of the right to self-determination of peoples and on the right to development. They may be summarized as follows:
> …
> (j): States shall consult and cooperate in good faith with the indigenous peoples concerned in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources …

[169] See, *e.g.*, Food and Agriculture Organization, "FAO Policy on Indigenous and Tribal Peoples", *supra* note 134, at 5: "The principle and right of 'free, prior and informed consent' demands that states and organizations of all kinds and at all levels obtain indigenous peoples' authorization before adopting and implementing projects, programmes or legislative and administrative measures that may affect them."

IFAD (International Fund for Agricultural Development), *Engagement with Indigenous Peoples: Policy*, *supra* note 66, at 13 (Principles of engagement): "When appraising such projects proposed by Member States, in particular those that may affect the land and resources of indigenous peoples, the Fund shall examine whether the borrower or grant recipient consulted with the indigenous peoples to obtain their free, prior and informed consent."

Permanent Forum on Indigenous Issues, *Information received from the United Nations system and other intergovernmental organizations: United Nations Children's Fund*, UN Doc. E/C.19/2011/7 (25 February 2011), para. 52: "While the free, prior and informed consent approach is considered by UNICEF to be inherent in its human rights-based approach to programming, it is also used as a specific methodology to conduct projects and studies."

International Finance Corporation (member of the World Bank Group), "IFC Updates Environmental and Social Standards, Strengthening Commitment to Sustainability and Transparency", 12 May 2011, http://www.ifc.org/ifcext/media.nsf/content/SelectedPressRelease?OpenDocument&UNID=0ADE5C1923DC4CF48525788E0071FAAA: "For projects with potential significant adverse impacts on indigenous peoples, IFC has adopted the principle of 'Free, Prior, and Informed Consent' informed by the 2007 United Nations Declaration on the Rights of Indigenous Peoples."

[170] Extractive Industries Review, *Striking a Better Balance: The Final Report of the Extractive Industries Review*, Vol. I (*The World Bank Group and Extractive Industries*), December 2003, at 21: "The EIR concludes that indigenous peoples and other affected parties do have the right to participate in decision-making and to give their free prior and informed consent throughout each phase of a project cycle."

United Nations Development Group, "United Nations Development Group Guidelines on Indigenous Peoples' Issues", *supra* note 25, at 28: "Consultation and participation are crucial components of a consent process. Consultation should be undertaken in good faith."

[171] Emphasis added. See articles 6(2), 3(f) (access to genetic resources); 7 (access to traditional knowledge associated with genetic resources); 13(1)(b) (National focal points and competent national authorities); and 16(1) (Compliance

with domestic legislation or regulatory requirements on access and benefit-sharing for traditional knowledge associated with genetic resources).

[172] Where each Party requires the "prior informed consent" of Indigenous and local communities for access to genetic resources, the Party shall take the necessary measures to "set out criteria and/or processes for obtaining prior informed consent or approval" Thus, "PIC" and "approval" are synonymous. In this regard, art. 6(3)(f) of the *Protocol* provides:

> 3. ... each Party requiring prior informed consent shall take the necessary legislative, administrative or policy measures, as appropriate, to:
>
> …
>
> (f) Where applicable, and subject to national legislation, set out criteria and/or processes for obtaining prior informed consent or approval and involvement of indigenous and local communities for access to genetic resources ... [emphasis added]

[173] Permanent Forum on Indigenous Issues, *Report on the tenth session*, *supra* note 28, para. 36, where in regard to FPIC, "the Forum affirms that the right of indigenous peoples to such consent can never be replaced by or undermined through the notion of 'consultation'."

See also *Black's Law Dictionary*, 9th ed. (St. Paul, Minn.: Thomson Reuters, 2009) at 346:

> Consent, *n.* ... Agreement, approval, or permission as to some act or purpose, esp. voluntarily by a competent person; legally effective assent.
> ...
> *informed consent*, ... A person's agreement to allow something to happen, made with full knowledge of the risks involved and the alternatives. [emphasis in original]

[174] "Tkarihwaié:ri Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities Relevant to the Conservation and Sustainable Use of Biological Diversity" in Conference of the Parties to the Convention on Biological Diversity, *The Tkarihwaié:ri Code of Ethical Conduct to Ensure Respect for the Cultural and Intellectual Heritage of Indigenous and Local Communities*, Decision X/42, UN Doc. UNEP/CBD/COP/DEC/X/42 (29 October 2010), Annex, para. 11:

> Any activities/interactions related to traditional knowledge associated with the conservation and sustainable use of biological diversity, occurring on or likely to impact on sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities and impacting upon specific groups, should be carried out with the prior informed consent and/or approval and involvement of indigenous and local communities. [underline added]

To suggest in para. 11 that both "prior and informed consent" and "approval" may be required in some situations does not make any sense. The Code is inconsistent and simply uses "approval" in para. 18. The term "and/or" is also inserted in Conference of the Parties to the Convention on Biological Diversity, *Global Taxonomy Initiative*, Decision X/39, UN Doc. UNEP/CBD/COP/DEC/X/39 (29 October 2010), para. 15:

> … *urges* Parties and *invites* other Governments and relevant organizations to support and implement, as appropriate, in accordance with all three objectives of the Convention on Biological Diversity and, where applicable, with prior informed consent and/or approval and involvement of indigenous and local communities, as well as relevant national legislation, the following recommendations for scaling up and sustaining taxonomy resulting from this Conference … [underline added]

[175] *Ibid.*, Annex, para. 1, quoted *infra* note 193.

[176] See text accompanying notes 77 *et seq. supra*.

[177] See text accompanying notes 78-83 *supra*.

[178] Committee on Economic, Social and Cultural Rights, General Comment No. 17, *The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (article 15, paragraph 1 (c), of the Covenant)*, UN Doc. E/C.12/GC/17 (12 January 2006), para. 32. [emphasis added]

[179] See, *e.g.*, IISD Reporting Services, "Summary of the Resumed Ninth Meeting of the Working Group on Access and Benefit-Sharing of the Convention on Biological Diversity: 10-16 July 2010", *Earth Negotiations Bulletin*, vol. 09, no. 527, 19 July 2010, at 7.

[180] Following increased objections from the IIFB, the co-Chairs opened up para. (f) for possible amendment at the next meeting in September 2010. However, no further discussions took place at the negotiations table and no revisions were made. Some representatives within the IIFB had proposed an alternative formulation of para. (f): "Provide national law to recognize and affirm the need to obtain the prior and informed consent of indigenous and local communities for access to their genetic resources and associated traditional knowledge".

[181] *Nagoya Protocol*, article 5(5) (sharing of benefits arising from use of TK); and 7 (access to TK).

[182] *Protocol*, article 5(2).

[183] See, *e.g.*, *Protocol*, articles 6(3)(e), 12(3)(b), 13(1)(b) and 17(2).

[184] In the preamble, the sole reference to "participation" pertains to women: "*Recognizing also* the vital role that women play in access and benefit-sharing and *affirming* the need for the full participation of women at all levels of policymaking and implementation for biodiversity conservation"

[185] United Nations Development Group, "United Nations Development Group Guidelines on Indigenous Peoples' Issues", *supra* note 25, at 13: "The right to self-determination may be expressed through: … Respect for the principle of free, prior and informed consent … Full and effective participation of indigenous peoples at every stage of any action that may affect them direct or indirectly."

[186] *Ibid.* at 28: "Consultation and participation are crucial components of a consent process."

[187] In relation to Indigenous and local communities, the *Protocol* uses the term "involvement" in articles 6(2) & 3(f), 7, 11, 13(1)(b), 16(1), 21(h) and 22(1).

[188] General Assembly, *Draft Programme of Action for the Second International Decade of the World's Indigenous People: Report of the Secretary-General*, UN Doc. A/60/270 (18 August 2005) (adopted by the General Assembly on 16 December 2005), para. 62. See also Permanent Forum on Indigenous Issues, *Report on the tenth session*, *supra* note 28, para. 31, where the importance of "full and effective participation" is reiterated for a wide range of international processes:

> The Permanent Forum recognizes the right to participate in decision-making and the *importance of mechanisms and procedures for the full and effective participation of indigenous peoples in relation to article 18 of the United Nations Declaration on the Rights of Indigenous Peoples*. The Forum reiterates that the United Nations Framework Convention on Climate Change, the Stockholm Convention on Persistent Organic Pollutants, the *Convention on Biological Diversity*, the World Intellectual Property Organization and the International Maritime Organization should facilitate indigenous peoples' participation in their processes. [emphasis added]

General Assembly, *Keeping the promise: a forward-looking review to promote an agreed action agenda to achieve the Millennium Development Goals by 2015: Report of the Secretary-General*, UN Doc. A/64/665 (12 February 2010), para. 99: "The norms and values embedded in the Millennium Declaration and international human rights instruments must continue to provide the foundation for engagement, in particular the *key human rights principles of non-discrimination, meaningful participation and accountability*." [emphasis added]

[189] Little or no consideration was given by the Parties to international rights and standards relating to democratic participation.

[190] See, *e.g.*, Tkarihwaié:ri Code of Ethical Conduct, *supra* note 174, Annex, para. 30. See also Conference of the Parties to the Convention on Biological Diversity, *Mechanisms to promote the effective participation of indigenous and local communities in the work of the Convention*, Decision X/40, UN Doc. UNEP/CBD/COP/DEC/X/40 (29 October 2010).

[191] See, *e.g.*, Conference of the Parties to the Convention on Biological Diversity, *Protected Areas*, Decision X/31, UN Doc. UNEP/CBD/COP/DEC/X/31 (29 October 2010), para. 31: *Invites* the Parties to: … (c) Establish effective processes for the full and effective participation of indigenous and local communities, in full respect of their rights and recognition of their responsibilities, in the governance of protected areas, consistent with national law and applicable international obligations".

As repeatedly demonstrated in the negotiations and final text of the *Nagoya Protocol*, Contracting Parties have attempted to exert national control over virtually all matters relating to access and benefit sharing.

[192] See, *e.g.*, S. Vedavathy, *Displaced and Marginalised: Protecting the Traditional Knowledge, Customary Laws and Forest Rights of the Yanadi Tribals of Andhra Pradesh*, Herbal Folklore Research Centre, Tirupati, Andhra Pradesh, India, (September 2010), online: http://pubs.iied.org/pdfs/G02788.pdf.

Africa: Declaration Of Indigenous Peoples At The Second International Forum Of Indigenous Peoples Of Central Africa (FIPAC 2), adopted by participants, Impfondo, 15 March 2011: "In conclusion, ... despite efforts and the progress already achieved, the status of [Indigenous peoples] continues to be that of marginalized and excluded peoples, which are unfairly treated and shamelessly exploited by our neighbors, traders and even development and conservation partners."

[193] Tkarihwaié:ri Code of Ethical Conduct, *supra* note 174, Annex, para. 1. [emphasis added] Concern about this restrictive paragraph of the Code is raised in Permanent Forum on Indigenous Issues, *Report on the tenth session*, *supra* note 28, para. 23.

[194] Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Russian Federation*, UN Doc. CERD/C/RUS/CO/19 (20 August 2008), para. 20:

> The Committee recommends that the State party … ensure that the small indigenous peoples of the North, Siberia and the Russian Far East are represented in the legislative bodies, as well as in the executive branch and in public service, at the regional and federal levels, and ensure their effective participation in any decision-making processes affecting their rights and legitimate interests.

[195] Human Rights Council, "Progress report", *supra* note 159, UN Doc. A/HRC/15/35 (23 August 2010), para. 2. [emphasis added]

See also Human Rights Council, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover*, UN Doc. A/HRC/17/25 (12 April 2011), para. 18: "The right to health framework complements current development approaches by underlining the importance of aspects such as participation, community empowerment and the need to focus on vulnerable populations."

[196] UNDRIP includes a wide range of interrelated or mutually reinforcing provisions that, in their effect, require the full and effective participation of Indigenous peoples: see, *e.g.*, preambular para. 24 and arts. 3, 4, 5, 10, 18, 19, 22, 23, 26, 27, 29, 30, 31, 32, 34, 38, 41, 42, 43, 45 and 46.

[197] Human Rights Council, *Progress Report*, *supra* note 159, where such provisions are said to be "articulated as, *inter alia*: (a) the right to self-determination; (b) the right to autonomy or self-government; (c) indigenous peoples' "right to participate"; (d) their "right to be actively involved"; (e) States' duty to "obtain their free, prior and informed consent"; (f) the duty to seek "free agreement" with indigenous peoples; (g) the duty to "consult and cooperate" with indigenous

peoples; (h) the duty to undertake measures "in conjunction" with indigenous peoples; and (i) the duty to pay due "respect to the customs" of indigenous peoples."

[198] General Assembly, *Draft Programme of Action for the Second International Decade of the World's Indigenous People: Report of the Secretary-General*, *supra* note 165, at para. 9, where two of the five objectives of the Decade relate to "full and effective participation":

> (i) Promoting non-discrimination and inclusion of indigenous peoples in the design, implementation and evaluation of international, regional and national processes regarding laws, policies, resources, programmes and projects;
>
> (ii) Promoting *full and effective participation* of indigenous peoples in decisions which directly or indirectly affect their lifestyles, traditional lands and territories, their cultural integrity as indigenous peoples with collective rights or any other aspect of their lives, considering the principle of free, prior and informed consent … [emphasis added]

[199] IFAD (International Fund for Agricultural Development), *Engagement with Indigenous Peoples: Policy*, *supra* note 66, at 7: "The Declaration addresses both individual and collective rights. It outlaws discrimination against indigenous peoples and promotes their full and effective participation in all matters that concern them."

[200] New Zealand Human Rights Commission, "United Nations Declaration on the Rights of Indigenous Peoples", <http://www.hrc.co.nz/home/hrc/humanrightsandthetreatyofwaitangi/unitednationsdeclarationontherightsofindigenouspeoples.php>: "The Declaration … declares discrimination against indigenous peoples unlawful and promotes their full and effective participation in all matters that concern them."

[201] International Indigenous Peoples' Forum on Climate Change (IIPFCC), "Indigenous Groups Announce Grave Concern on Possible Cancun Outcome", Press release, 10 December 2010:

> As members of the IIPFCC, … we want to reiterate our determination to ensure protection of our rights, as laid out in the UN Declaration on the Rights of Indigenous Peoples, our right to free, prior, and informed, consent, the recognition and protection of our traditional knowledge, and ensure the *full and effective participation* of Indigenous Peoples in all climate change processes. [emphasis added]

[202] African Commission on Human and Peoples' Rights, "Communiqué on the United Nations Declaration on the Rights of Indigenous Peoples", Brazzaville, Republic of Congo, 28 November 2007.

[203] All UN member States have a duty to respect the purposes and principles of the *Charter of the United Nations*. This requires actions "promoting and encouraging respect" for human rights (*UN Charter*, art. 1(3)). This duty is based on "respect for the principle of equal rights and self-determination of peoples" (*UN Charter*, art. 55 c).

The *UN Charter*'s purposes and principles are also highlighted in UNDRIP, preambular para. 1. The principle of equal rights of peoples is affirmed in UNDRIP, preambular para. 2 and art. 2. The right of self-determination is affirmed in art. 3.

[204] International Labour Organization, *Monitoring indigenous and tribal peoples' rights through ILO Conventions: A compilation of ILO supervisory bodies' comments 2009-2010* (Geneva: ILO, 2010), at 4. And at 46-47, para. 44: "consultation and participation are the cornerstone of the Convention and that such mechanisms are not merely a formal requirement but are intended to enable indigenous peoples to participate effectively in their own development."

[205] *Indigenous and Tribal Peoples Convention, 1989*, article 33(2).

[206] Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, UN Doc. A/HRC/12/34 (15 July 2009), para. 38.

[207] *Ibid.,* para. 41. At para. 40, Anaya adds: "The duty of States to effectively consult with indigenous peoples is also grounded in the core human rights treaties of the United Nations".

[208] Convention on Biological Diversity, *Traditional knowledge and Biological Diversity: Note by the Executive Secretary*, *supra* note 64, para. 93: "… special needs regarding participation … may include the need for capacity building (e.g., negotiation skills, understanding of the environmental management issues under review and of the reasons behind the outside interest in their knowledge, legal support) and mechanisms for compensating the real costs of participation". In regard to the efforts of the Secretariat, see also Conference of the Parties to the Convention on Biological Diversity, *Mechanisms to promote the effective participation of indigenous and local communities in the work of the Convention*, *supra* note 190.

[209] Permanent Forum on Indigenous Issues, *Information provided by the Secretariat of the Convention on Biological Diversity to the Tenth Session of the United Nations Permanent Forum on Indigenous Issues*, 2011, at 7-8. At 8, the Secretariat cautions against simply assessing the number of indigenous specific programmes being carried out: "Such an approach will not capture mainstreaming efforts and could potentially ghettoize indigenous issues."

[210] See, for example, Stefan Disko, "World Heritage Sites in Indigenous Peoples' Territories: Ways of Ensuring Respect for Indigenous Cultures, Values and Human Rights" in Dieter Offenhäußer, Walther Ch. Zimmerli & Marie-Theres Albert, eds., *World Heritage and Cultural Diversity* (German Commission for UNESCO, 2010) 167 at 174:

> The Committee should ensure that indigenous peoples are treated as rights-holders and key decision-makers, whose consent must be obtained, and not merely lumped together with a wide variety of "stakeholders" to be "consulted" in decision-making processes. The stakeholder approach negates indigenous peoples' status and rights under international law, including their right to self-determination and their collective rights to their lands, territories and resources.

[211] In relation to the funding mechanism in the *Protocol*, see also article 25(3).

[212] Convention on Biological Diversity, *Report of the International Expert Group Meeting on the International Regime on Access and Benefit-Sharing and Indigenous Peoples' Human Rights of the Convention on Biological Diversity: Note by the Executive Secretary*, UN Doc. UNEP/CBD/GTLE-ABS/3/INF/4 (25 May 2009), at para. 40 (Conclusions and recommendations):

> ... the lack of adequate resources for indigenous peoples to engage in effective participation in the international access and benefit-sharing process was an *obstacle to effective outcomes for indigenous peoples*. ... In addition, indigenous peoples often lack the technical skills to negotiate access and benefit-sharing arrangements with outside interests. [emphasis added]

[213] Human Rights Council, "Progress report", *supra* note 159, UN Doc. A/HRC/15/35 (23 August 2010), para. 2. [emphasis added], para. 97.

[214] UN Commission on Human Rights, *Continuing dialogue on measures to promote and consolidate democracy: Report of the High Commissioner for Human Rights submitted in accordance with Commission resolution 2001/41*, UN Doc. E/CN.4/2003/59 (27 January 2003), (expert seminar on the interdependence between democracy and human rights, Office of the High Commissioner for Human Rights, 25-26 November 2002, Geneva), at 19 (Chair's final conclusions). [bold in original]

[215] "Consensus", as understood within the United Nations, refers to acceptance of a proposal where no objection is formally raised.

[216] See Convention on Biodiversity, *Rules of Procedure for Meetings of the Conference of the Parties to the Convention on Biological Diversity*, http://www.cbd.int/doc/legal/cbd-rules-procedure.pdf, Rule 40, para. 1, where the brackets indicate there has been no agreement on the proposed text:

> **[**1. The Parties shall make every effort to reach agreement on all matters of substance by consensus. If all efforts to reach consensus have been exhausted and no agreement reached, the

> decision [, except a decision under paragraph 1 or 2 of article 21 of the Convention] shall, as a last resort, be taken by a two-thirds majority vote of the Parties present and voting, unless otherwise provided by the Convention, the financial rules referred to in paragraph 3 of article 23 of the Convention, or the present rules of procedure. [Decisions of the Parties under paragraphs 1 and 2 of article 21 of the Convention shall be taken by consensus.]]

[217] For an example of paralysis resulting from a consensus rule, see Paul Meyer, "A path to nuclear disarmament leadership", *Embassy*, Canada's Foreign Policy Newsweekly, 2 February 2011, at 8: "... the Conference on Disarmament has not been able to agree on a functioning program of work since 1998. ... A key feature and flaw of the conference is that it operates on a strict consensus basis, which means that no substantive or procedural decision can be taken if even a single member state opposes it."

[218] See IISD Reporting Services, "Resumed ABS 9 Highlights", *Earth Negotiations Bulletin*, vol. 09, no. 522 – 12 July 2010, online: http://www.iisd.ca/vol09/enb09522e.html.

[219] Secretary-General, "Secretary-General Calls on Delegates to End Stagnation in Disarmament Conference, Seize 'Collective Opportunity to Build a Safer World', at Headquarters Meeting", Opening statement to the High-level Meeting on Revitalizing the Work of the Conference on Disarmament and Taking Forward Multilateral Disarmament Negotiations, Dept. of Public Information, News and Media Division, New York, 24 September 2010.

[220] General Assembly, *In larger freedom: towards development, security and human rights for all*, *Report of the Secretary-General*, UN Doc. A/59/2005 (21 March 2005), para. 159 [emphasis added].

[221] 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 27. [emphasis added]

[222] General Assembly, UN GAOR, 61st Sess, 107th plen. mtg., UN Doc. A/61/PV.107 (2007) at 10 (Mr. Chávez (Peru), original in Spanish): "... in 1995, the draft was submitted for consideration to a working group of the Commission .... [F]or the first time in the history of the United Nations, representatives of indigenous peoples, who would enjoy the rights cited in the Declaration, actively participated in such a working group, lending unquestionable legitimacy to the document."

[223] Grand Council of the Crees (Eeyou Istchee) *et al.*, "Concerns relating to CBD Process, Revised Draft Protocol and Indigenous Peoples' Human Rights", Joint Statement of Indigenous and civil society organizations, Montreal meeting 10-16 July 2010, in Ad Hoc Open-ended Working Group on Access and Benefit-sharing, Ninth meeting (second resumed), Nagoya, Japan, 16 October 2010, UN Doc. UNEP/CBD/WG-ABS/9/INF/21 (22 September 2010).

Grand Council of the Crees (Eeyou Istchee) *et al.*, "Draft Protocol: Indigenous Peoples' Objections to the Current Text – A Call for Justice and Solidarity", Joint Statement of Indigenous and civil society organizations, Montreal meeting 18-21 September 2010, in *Ad Hoc* Open-ended Working Group on Access and Benefit-sharing, Ninth meeting (second resumed), Nagoya, Japan, 16 October 2010, UN Doc. UNEP/CBD/WG-ABS/9/INF/22 (22 September 2010).

[224] Daphné Cameron, « Accord modeste à Cancún », *La Presse* (13 December 2010), http://www.cyberpresse.ca/environnement/dossiers/changements-climatiques/201012/13/01-4351806-accord-modeste-a-cancun.php, at A12: « Après 12 jours d'intenses négociations, la … présidente de la conférence … a présenté un texte de compromis qui a recueilli le soutien de la majorité des pays représentés, à l'exception de la Bolivie, qui l'a jugé insuffisant. … Les décisions sont habituellement prises par consensus, mais le consensus 'ne signifie pas qu'un pays a le droit de veto', a déclaré la présidente. »

See also Phil Lee, "The betrayal at Cancun", Friends of the Earth International, 3 January 2011, http://www.foei.org/en/blog/the-betrayal-at-cancun/?searchterm=cancun.

[225] See text accompanying note 23 *et seq. supra*.

[226] In regard to the *Charter of the United Nations* and principles of international law, see texts accompanying notes 27 *et seq.*, 61 and 143.

In relation to Indigenous peoples, the *Protocol* and related negotiations do not uphold the *New Delhi Declaration on Principles of International Law relating to Sustainable Development*, Resolution 3/2002, adopted at the 70th Conference of the International Law Association, New Delhi, India, 6 April 2002, Annex. Principles that are not respected include, *inter alia*, those relating to non-discrimination, participation and other human rights, as well as democracy, rule of law and good governance.

[227] See text accompanying note 46 *et seq. supra*.

[228] See text accompanying note 51 *et seq. supra*.

[229] See text accompanying note 78 *et seq. supra*.

[230] In regard to Indigenous peoples and legal certainty, see *supra* note 67 and accompanying text.

[231] See text accompanying note 103 *supra*.

[232] Convention on Biological Diversity (Ad Hoc Working Group on Access and Benefit-sharing), *Report of the Meeting of the Group of Technical and Legal Experts on Traditional Knowledge associated with Genetic Resources in the Context of the International Regime on Access and Benefit-Sharing*, UN Doc. UNEP/CBD/WG-ABS/8/2 (15 July 2009), Annex (Outcome of the Meeting of the Group of Technical and Legal Experts on Traditional Knowledge associated with Genetic Resources in the Context of the International Regime on Access and Benefit-Sharing), at para. 122:

> ... experts recognized a critical distinction between traditional knowledge associated with genetic resources being in the "public domain" versus being "publically available". ... The common understanding of publicly available does not mean available for free. The common understanding of public availability could mean that there is a condition to impose *mutually agreed terms* such as paying for access. ... Within the concept of public availability, *prior informed consent* from a traditional knowledge holder that is identifiable, could still be required, as well as provisions of *benefit-sharing* made applicable ... [emphasis added]

[233] International Institute for Environment and Development (Krystyna Swiderska), "Equitable benefit-sharing or self-interest?", IIED Opinion, September 2010. The author indicates: "Inclusion of publicly available traditional knowledge in the protocol is opposed by industrialised countries."

[234] In relation to derogations by COP, see text accompanying notes 74 and 174 *supra*.

[235] See text accompanying note 193 *supra*.

[236] UNDRIP, article 42. [emphasis added]

[237] *Protocol*, article 4(3).

[238] The only exception is where the exercise of those obligations would cause a serious damage or threat to biological diversity: see *Convention*, article 22(1); and *Protocol*, article 4(1).

[239] In regard to "UN rule of law guidance and policy material", the United Nations Rule of Law Unit lists UNDRIP as one of the instruments that is relevant for the promotion and protection of human rights: see http://www.unrol.org/document_browse.aspx?xd=1&cat_id=26. The UN Rule of Law Unit is in the Executive Office of the Secretary-General.

[240] See note 128 *supra* and accompanying text.

[241] See text accompanying notes 237 and 238 *supra*. See also *Protocol*, preamble: "Affirming that nothing in this Protocol shall be construed as diminishing or extinguishing the existing rights of indigenous and local communities".

[242] There are over 60 references to "full and effective participation" of Indigenous and local communities in related decisions of the Conference of the Parties (COP), many of which address implementation of the *Protocol*. However, such decisions generally are not legally binding: see *supra* note 124.

See Secretary-General Ban Ki-moon, "Remarks to the opening of the Permanent Forum on Indigenous Issues", 16 May 2011, http://www.un.org/apps/news/infocus/sgspeeches/statments_full.asp?statID=1185:

> From the forests to the oceans, from the mountains to the deserts, around our world you are guardians of nature. We need you to help influence the decisions we make today on energy and the environment, decisions which will affect generations to come.
> ...
> We must end the oppression, and we must ensure that indigenous peoples are always heard. Raise your voices here at this Forum and beyond. I will urge the world to listen to your voices.

[243] See, *e.g.*, *supra* note 47.

[244] "Established" rights may only refer to those that are recognized or affirmed by domestic legislation, agreement or judicial ruling: see text accompanying note 77 *supra*.

[245] In regard to "established" rights relating to genetic resources, see *Protocol*, articles 5(2) and 6(2).

[246] See text accompanying notes 81-83 *supra*.

[247] See text accompanying note 86 *supra*.

[248] See, *e.g.*, *Anchorage Declaration*, agreed by consensus of the participants in the Indigenous Peoples' Global Summit on Climate Change, Anchorage, Alaska (24 April 2009), para. 4: "We call upon the UNFCCC's decision-making bodies to establish formal structures and mechanisms for and with the full and effective participation of Indigenous Peoples." The UNFCCC is the UN Framework Convention on Climate Change.

[249] See text accompanying notes 219 *et seq*. *supra*.

[250] In regard to Canada's actions, see text accompanying notes 118-120 *supra*.

[251] See also Grand Council of the Crees (Eeyou Istchee) *et al.*, "Indigenous Peoples' Right to Participate in Decision-Making: International and Regional Processes", Joint Statement of Indigenous and civil society organizations, Expert Mechanism on the Rights of Indigenous Peoples, 3nd sess., Geneva (13 July 2010), para. 77 ii): "While it can be positive for State and Indigenous parties to aspire towards consensus, such an objective should remain flexible. In no case should consensus be achieved at the expense of Indigenous peoples' human rights. As such, it is our recommendation that the consensus based framework be re-examined and alternative negotiation frameworks be considered as needed."

[252] Romeo Saganash and Paul Joffe, "The Significance of the UN Declaration to a Treaty Nation: A James Bay Cree Perspective" in Jackie Hartley, Paul Joffe & Jennifer Preston (eds.), *Realizing the UN Declaration on the Rights of Indigenous People*, *supra* note 129, 135 at 140-141.

[253] Convention on Biological Diversity, "Statement by Ahmed Djoghlaf Executive Secretary of the Convention on Biological Diversity on the occasion of World Health Day 2011", 6 April 2011: "You cannot have healthy societies without healthy ecosystems. Environmental risk factors for human health often act in concert and their effects are exacerbated by adverse social and economic conditions. The poorest and most marginalized, and particularly children, suffer first and most severely when the environment is degraded."

[254] General Assembly, *The rule of law at the national and international levels*, UN Doc. A/RES/65/32 (10 January 2011) (res. adopted without vote 6 December 2010), para. 2.

[255] General Assembly, *Midterm assessment of the progress made in the achievement of the goal and objectives of the Second International Decade of the World's Indigenous People, supra* note 52, para. 82 (Conclusions):

> At the intergovernmental level, the Declaration has played a crucial role as a reference for the application of other binding intergovernmental mechanisms. Thus, Governments are increasingly encouraged to be accountable on specific issues pertinent to indigenous peoples, as for example under the Convention on Biological Diversity.

See, *e.g.*, Francesca Thornberry and Frans Viljoen, *Overview report of the research project by the International Labour Organization and the African Commission on Human and Peoples' Rights on the constitutional and legislative protection of the rights of indigenous peoples in 24 African countries* (Geneva: International Labour Office, 2009) at 153 (Conclusions): "…major challenge lies in the lack of adequate measures for implementation of such provisions for the benefit of indigenous peoples, lack of capacity to address indigenous issues in an adequate and consultative/participatory manner, as well as in general attitudes towards indigenous peoples, among other things."

[256] The critical need for such a study is evident. See, *e.g.*, *Africa: Declaration Of Indigenous Peoples At The Second International Forum Of Indigenous Peoples Of Central Africa (FIPAC 2)*, adopted by participants, Impfondo, 15 March 2011, at para. 2:

> Given the low participation of indigenous peoples in national and international decision making, we ask States, projects and programs to develop various levels of effective mechanisms to ensure the presence and active participation of [Indigenous peoples in] ... decision-making bodies on issues and concerns affecting them.

[257] See Committee on the Elimination of Racial Discrimination, "Guidelines for the Early Warning and Urgent Action Procedures", 71st session, Annual report A/62/18, Annexes, Chapter III , August 2007. Of particular relevance are the following criteria: "Presence of a significant and persistent pattern of racial discrimination, as evidenced in social and economic indicators"; and "Encroachment on the traditional lands of indigenous peoples … in particular for the purpose of exploitation of natural resources".

[258] Emphasis added. Article 31 of the *Protocol* also provides that additional evaluations of its effectiveness can be set at intervals determined by the Conference of the Parties serving as the meeting of the Parties to this Protocol.

[259] See text accompanying notes 91 and 218 *supra*.

[260] See text accompanying notes 90 and 119 *supra*.

[261] *Convention*, article 22(1); and *Protocol*, article 4(1). The sole exception is "where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity".

[262] Human Rights Council, *Report of the independent expert on human rights and international solidarity, Rudi Muhammad Rizki*, UN Doc. A/HRC/15/32 (5 July 2010), para. 58 (Conclusions). [emphasis added]

Recommendations by accredited Indigenous Peoples' and Local Community Organizations

(1) Indigenous People (**Bethechilokono**) of Saint Lucia Governing Council (**BGC**)
(2) Genetic Resources, Traditional Knowledge and Folklore International (**GRTKF Int**.)

TO

NOTE ON EXISTING MECHANISMS FOR PARTICIPATION OF OBSERVERS IN THE WORK OF THE WIPO INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE requested by the Secretariat of the World Intellectual Property Organization on October 10, 2011.

SUGGESTED QUESTIONS
Is there any existing mechanism or practice to facilitate direct participation of observers in the work of the IGC or to strengthen their capacity to contribute to the process that has not been reflected above?

Answer:
None

What are the options for enhancing the existing mechanisms and practices?
Answer
See recommendations, below.

What draft recommendations should the twentieth session of the IGC consider with a view to enhancing the positive contribution of observers to the work of the IGC?

Answer
The following recommendations are only for Indigenous Peoples' Organizations that are accredited observers to the WIPO IGC GRTKF, based on their right of ownership to their genetic resources, traditional knowledge and traditional cultural expressions/expressions of folklore, as stipulated in the United Nations Declaration on the Rights of Indigenous Peoples.

In the implementation of the United Nations Declaration on the Rights of Indigenous Peoples, State parties and as well as United Nations Agencies are obligated to promote and respect the full application of the provisions of the Declaration.

In this regard, the twentieth session of WIPO IGC GRTKF consider:

(1) Allowing recognized experts of accredited observer umbrella Indigenous Peoples Organizations (in particular those experts who participated at the Intersessional Working Groups) to present texts and participate on an equal footing with State parties during the negotiating process;
(2) Allowing representatives of accredited observers of international umbrella indigenous Peoples Organizations* to present texts/collective positions on behalf of their organizations and participate on an equal footing with State parties during the negotiating process;

(3) Allowing representatives of accredited observers of international umbrella indigenous Peoples Organizations to participate in the work of committees appointed by the Chair during sessions of the WIPO IGC GRTKF.

**This recommendation is based on the standard practice of the Indigenous Peoples and Local Community accredited observer (The 'Genetic Resources, Traditional Knowledge and Folklore International (GRTKF Int.) in presenting texts as a grouping, that reflect the collective positions of the owners from various regions.*

It would be desirous for the Regional Groups of State Parties to invite representatives of Indigenous Peoples and Local Communities present to participate fully, at their regional meetings during the WIPO IGC GRTKF sessions.

Signed: 

Albert DeTERVILLE
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Email: bgc.indigenous@gmail.com grtkf.int@gmail.com

Comments Submitted by the
Indigenous Peoples Council on Biocolonialism
Re: WIPO Circular C. 8029
November 30, 2011

Secretariat,

The following comments are submitted in response to WIPO circular C. 8029 and the Note On Existing Mechanisms For Participation Of Observers dated October 10, 2011 prepared by the Secretariat, relating to the study on the participation of observers in the work of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore on behalf of the IPCB, and supported by Sharon Venne.

Indigenous Peoples are vested with the right of self-determination as affirmed in the Charter of the United Nations, and other international instruments. Indigenous Peoples, as peoples, must be able to represent our own interests in WIPO processes that affect us. Given that the subject matter under negotiation at the WIPO will directly affect the rights and interests of Indigenous in relation to our genetic resources, traditional knowledge, and traditional cultural expression, we have a right to full and equal participation. As such, the WIPO General Assembly and IGC and should insure Indigenous Peoples may exercise our right to full and equal participation, including implementation of the right of free, prior and informed consent, in the development of any international instrument(s) on GR, TK and TCEs in all WIPO processes including the General Assembly and proposed diplomatic conference.

As you are aware, the Indigenous Peoples participating in the IGC 18th and 19th Sessions unanimously expressed their dissatisfaction with their unequal participation in the deliberations of the international instruments(s) under negotiation in the IGC. The following collective and unified positions regarding participation of Indigenous Peoples were tabled by the Indigenous Caucus at IGC-18 and IGC-19, and remain to be addressed:

1. The Indigenous peoples require full and effective participation in all relevant negotiations and decision-making processes, including all regular and special sessions of the Committee, the General Assembly, diplomatic conference and any other related meetings regarding the proposed instrument(s) on GRs, TK and TCEs, in accordance with paragraphs 28, 31, 34 and 35 of the report of the tenth session of the UNPFII.
2. In the spirit of cooperation in the development of an international instrument(s) that ought to be relevant, practical, and fair, Indigenous peoples' proposals must remain in the drafting texts without the qualification of Member States' support in the drafting process or reports. Indigenous peoples' proposals must be accepted on an equal footing as any Member State proposal.
3. Indigenous peoples be consulted on all proposals, deletions and amendments of any text in a collaborative manner.

4. Indigenous peoples' right of self-determination and permanent sovereignty over natural resources must be recognized in the preamble and operative text(s) of the final instrument(s).
5. Indigenous peoples are distinct peoples and/or indigenous nations, that they had the collective right to their territories and biodiversity in all aspects of their economic, social and cultural development and that those principles should also be reflected in the final instrument(s).

With regard to the Voluntary Fund, the past several sessions have seen a dramatic decline in contributions to the Fund. The result has been decreased support to enable the effective participation of Indigenous Peoples at a time when the work of the IGC has moved beyond that of preliminary study and discussion to active negotiations of a legal instrument(s). The participation of Indigenous Peoples must be increased, rather than decreased, at such a critical time. This may necessitate the WIPO to increase contributions to the VF by its members, or by other means as necessary to insure broad based participation by Indigenous Peoples in the WIPO processes. Indigenous Peoples must be ensured by WIPO that their participation is not diminished or compromised due to a lack of funding support.

Many Indigenous peoples are not able to participate in Geneva-based meetings. The WIPO and IGC must actively seek the engagement and substantive input of Indigenous Peoples beyond the Geneva-based IGC meetings. This shouldn't be a one-time event, but a proactive process that secures the substantive input on the text proposals from Indigenous Peoples in all regions of the globe. The input of Indigenous Peoples must have standing in the IGC and WIPO processes and be fully reflected and considered in the texts and reports of the IGC on their own merits.

Respectfully submitted,
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Executive Director
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Comments Supported by
Sharon Venne

Recommendations by the accredited observer
Intangible Cultural Heritage Network (Ichnet)
Comitato per la promozione del patrimonio immateriale

NOTE ON EXISTING MECHANISMS FOR PARTICIPATION OF OBSERVERS IN THE WORK OF THE WIPO INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE

requested by the Secretariat of the World Intellectual Property Organization on October 10, 2011

Suggested question	*Is there any existing mechanism or practice to facilitate direct participation of observers in the work of the IGC or to strengthen their capacity to contribute to the process that has not been reflected above?*
Answer	The strengthening of the existing mechanisms for the participation of observers to the decisions of the IGC could be obtained through the establishment of a body with consultative status, encompassing registered civil society organizations (CSOs), to provide evidence-based advise, highlights and information based on the experience of the accredited NGOs or directly from the civil society. Such mechanism should be composed of a limited number of observers, selected on a rotation basis among those accredited with WIPO and coordinated by a spokesperson democratically appointed by the CSOs.

Suggested Question	*What are the options for enhancing the existing mechanisms and practices?*
Answer	In order to enhance observers capacity to contribute in the debate on intellectual property, genetic resources, traditional knowledge and folklore issues, it would be useful to encourage both the panel of representatives of indigenous and local communities and the accredited organizations to share with WIPO and the other observers documentation and information connected with their specific knowledge and expertise from the field or collected directly by the civil society in their countries of origin. To this purpose WIPO should promote and support the production of such literature and facilitate its circulation among observers also through the set up of *ad hoc* digital platforms.

Comitato per la promozione del patrimonio immateriale (ICHNet)
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Suggested question	*What draft recommendations should the twentieth session of the IGC consider with a view to enhancing the positive contribution of observers to the work of the IGC?*
Answer	Direct involvement of observers through the establishment of a consultative body whose contribution is based on evidence-based documentation and information deriving from the collection and dissemination of experiences and practices evidenced by the observers and the civil society as stakeholders.

Giuseppe Torre

Intangible Cultural Heritage Network

RECOMMENDATIONS BY ACCREDITED INDIGENOUS PEOPLES ORGANIZATION

ON THE

NOTE ON EXISTING MECHANISMS FOR PARTICIPATION OF OBSERVERS IN THE WORK OF THE WIPO INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE.

"Prepared by the Secretariat of the World Intellectual Property Organization on October 10, 2011"

Name of Accredited Organization: Kanuri Development Association

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SUGGESTED QUESTIONS AND ANSWERS:

1. **Is there any existing mechanism or practice to facilitate direct participation of observers in the work of the IGC or to strengthen their capacity to contribute to the process that has not been reflected above?**

   Answer: No

2. **What are the options for enhancing the existing mechanisms and practices?**

   Answer:

   i) The WIPO Secretariat should designed a feed back form for the representatives of indigenous peoples organizations funded to participate in the IGC or similar meetings by the WIPO Voluntary Fund for Accredited Indigenous and Local Communities so that they report back to the secretariat after they return to their communities/organizations.

   ii) Two months after each IGC session or related meetings each representative of an indigenous peoples and or local communities that participated in such meetings using the above mentioned feed back form should submit a report to the Secretariat of WIPO on the achievements recorded by his/her participation and possibly how the ideas gained from his/her participation in such meetings will be utilized for the benefits of his/her community.

3. **What draft recommendations should the twentieth session of the IGC consider with a view to enhancing the positive contribution of observers to the work of the IGC?**

   Answer: None.

Signed: Mr. B. ABUBAKAR
Email: kanuridevelopmentassociation@gmail.com

Tel: +2348062220179

From: Traditions for Tomorrow
By affirming their culture, peoples build their future
NGO with consultative status to UNESCO,
United Nations Economic and Social Council (ECOSOC) and
WIPO
Recognized as a public charity by ZEWO – Zurich
Member of the Development Research and
Information Center (CRID), Paris
Member of the Geneva Cooperation Federation (FGC)
Member of the Vaudois Cooperation Federation (FEDVACO)

Rolle, December 2, 2011

Observations of Traditions for Tomorrow concerning the study provided on the participation of observers in the work of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC).

Traditions for Tomorrow, an NGO accredited to the IGC, has since 1986 accompanied the processes of cultural affirmation of indigenous peoples and ethnic minorities in ten or so countries in Latin America. Its action consists in supporting initiatives chosen and conducted by the groups and communities concerned and which aim to give fresh momentum to their cultural expressions and traditional knowledge.

Traditions for Tomorrow is, moreover, active within UNESCO, of which it is an official partner, and the United Nations Economic and Social Council (ECOSOC) with which it has consultative status.

Traditions for Tomorrow readily accepts the invitation given to the IGC by the WIPO General Assembly at its twentieth ordinary session, to strengthen the contribution of observers to the work of the IGC. Strengthened by its experience in other different agencies in the United Nations system, or multilateral regional organizations, Traditions for Tomorrow considers that the IGC observation mechanisms must continue to be accessible and productive.

It would, however, be useful to complement them or to review them, in particular with a view to experiences gained from the last sessions of the IGC or meetings of the Intersessional Working Group.

In this regard, and without conducting a comprehensive study on the issue, mainly owing to lack of availability, Traditions for Tomorrow wishes to make the following four proposals:

1. Lunch meetings

Relaunch this option, by involving NGOs, perhaps in groups sharing common points of interest (IP institutes, indigenous peoples, etc.) on subjects that they themselves have identified.

2. Participation in plenary debates

(a) At the request of an observer which has obtained the agreement of a State to present its proposal at a meeting, but because the representative of this State is not in the room at the time a vote is taken on the decision, the decision would be postponed until the representative returns and after the representative has been able to express the observer's proposal;

(b) Specify that if observers envisage making statements or collective addresses, given by one of their representatives, they may enjoy an earlier slot in the order of speakers. This will help to avoid late statements which may appear out of place and repetitive;

(c) While their right to speak as observers relates at this stage only to "drafting", it would be important for them to make proposals on substantive issues at the initiative of a group of observers, and with the consent of a State.

3. Renewal of the IFPI workshop experience (Switzerland, 2008)

Repeat this experience, but if possible by adding the participation "of experts" appointed by States and observers.

4. Exchange sessions between States and observers

This type of exchange sessions between civil society and States is now held regularly at UNESCO, ahead of the Intergovernmental Committee on the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions. Subjects could include participation of civil society, arrangements for participation of observers in the process of devising a WIPO instrument, or also a substantive issue linked to civil society.

Contact person: Christiane Johannot-Gradis tradi@fgc.ch + 41 21 825 23 31

Traditions pour Demain
Tradiciones para el Mañana - Traditions for Tomorrow
En affirmant leur culture, les peuples construisent leur avenir

ONG avec statut consultatif
auprès de l'UNESCO,
de l'ECOSOC (ONU),
et de l'OMPI

Reconnue
d'utilité publique
par le ZEWO - Zürich

Membre
du Centre de recherche
et d'information
pour le développement
CRID - Paris

Membre
de la Fédération genevoise
de coopération - FGC

Membre
de la Fédération vaudoise
de coopération - FEDEVACO

Rolle, 2 décembre 2011

Observations de Traditions pour Demain concernant l'étude prévue sur la participation des observateurs aux travaux du Comité intergouvernemental de la propriété intellectuelle relative aux ressources génétiques, aux savoirs traditionnels et au folklore (CIG) à l'OMPI.

Traditions pour Demain, ONG accréditée auprès du CIG, accompagne depuis 1986 les processus d'affirmation culturelle de peuples autochtones et de minorités ethniques dans une dizaine de pays d'Amérique latine. Son action consiste à soutenir des initiatives choisies et conduites par les groupes et les communautés concernées et qui tendent à revitaliser leurs expressions culturelles et savoirs traditionnels.

Traditions pour Demain est par ailleurs active auprès de l'UNESCO dont elle est partenaire officiel, et de l'ECOSOC auprès duquel elle détient un statut consultatif.

Traditions pour Demain accueille très favorablement l'invitation faite au CIG par l'Assemblée générale de l'OMPI lors de sa 20ème session ordinaire, de renforcer la contribution des observateurs aux travaux du CIG. Forte de son expérience dans différentes autres agences du système des Nations Unies, ou d'organisations multilatérales au plan régional, Traditions pour Demain considère que les mécanismes d'observation au CIG doivent continuer à être accessibles et productifs.

Il serait cependant utile de les compléter ou les réviser, notamment au vu d'expériences vécues lors des dernières sessions du CIG ou des réunions du Groupe de travail intersessions.

A ce titre, et sans avoir procédé à une étude approfondie sur la question, principalement par manque de disponibilité, Traditions pour Demain émet les quatre propositions suivantes :

1. **Réunions du déjeuner**

Redynamiser cette formule, en impliquant les ONG, peut-être par groupe partageant des centres d'intérêt communs (les instituts de PI, les autochtones, etc.) sur des thèmes qu'ils auront eux-mêmes identifiés

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2. **Participation dans les débats en plénière**

a. a la demande d'un observateur qui a obtenu l'accord d'un Etat pour présenter sa proposition en séance, mais parce que le représentant de cet Etat n'est pas dans la salle au moment du vote sur la décision, on sursoirait à la décision jusqu'au retour du représentant et après que celui-ci ait pu exprimer la proposition de l'observateur

b. prévoir que si les observateurs envisagent de faire des déclarations ou interventions collectives, prononcées par un de leur représentant, elles puissent bénéficier d'une meilleure place dans l'ordre des intervenants. Ceci pourra contribuer à éviter leurs interventions tardives qui pourraient paraitre hors propos et répétitives.

c. alors que leur droit d'intervention des observateurs ne porte à ce stade que sur le "rédactionnel", il serait important qu'ils puissent faire des propositions sur des points de substance, à l'initiative d'un groupe d'observateurs, et avec l'aval d'un Etat

3. **Renouvellement de l'expérience atelier IFPI (Suisse, 2008)**

Renouveler cette expérience, mais si possible en y adjoignant la participation "d'experts" nommés par les Etats et des observateurs.

4. **Sessions d'échange Etats / Observateurs**

Ce type de sessions d'échanges entre société civile et Etats se fait maintenant régulièrement à l'UNESCO, en amont du Comité intergouvernemental de la Convention de 2005 sur la diversité des expressions culturelles. Les thèmes pourraient être: la participation de la société civile, les modalités de participation des observateurs au processus d'élaboration d'un instrument à l'OMPI, ou encore un thème de substance en lien avec la société civile.

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INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE

Note by the Secretariat of October 11, 2011

Revision of participation procedures

Prepared and submitted by the Tupaj Amaru Indigenous Movement (Bolivia)
on December 5, 2011

1. We welcome with satisfaction that at its fortieth session, which took place from September 26 to October 5, 2011, the WIPO General Assembly decided to recommend to the Intergovernmental Committee to re-examine its procedures with a view to strengthening the contributions of Observers, including indigenous peoples, to the negotiating process.

2. It is noted, in Article 24 of the WIPO General Rules of Procedure, that Observers may take part in discussions at the invitation of the President, but are not authorized to submit proposals, motions or amendments to the drafts being examined.

3. It should be clarified that the fundamental difference between indigenous peoples and observers consists of the fact that such peoples are owners and holders of traditional knowledge and cultural expressions, and the majority of observers are representatives of pharmaceutical companies, biotechnology industries and patent attorneys, anthropologists and powerful lobbies which defend interests alien to indigenous peoples.

4. Despite the fact that indigenous peoples are guardians of such knowledge and genetic resources, they are marginalized and reduced to silence. By contrast, States from the North and their NGOs (observers) continue in their inexorable willingness to subject traditional knowledge, traditional cultural expressions and genetic resources to the veracity of their powerful multinational firms.

5. Contrary to observers, indigenous peoples have contributed throughout the centuries with the diversity of their cultures, ancestral knowledge and forms of social organization to the progress and enrichment of world civilizations.

6. Indigenous peoples come to WIPO not simply to express gratitude to the Voluntary Fund for the subsidies provided nor to keep seats warm, but in order to defend their rights

and to be able to negotiate with States, to protect their cultural and spiritual heritage which is the subject of piracy, and to claim fair access to the benefits derived from the working of their traditional knowledge and cultural expressions.

7. Under Article 24 of the WIPO General Rules of Procedure, the Intergovernmental Committee consisting of WIPO Member States decided to reserve for indigenous peoples and local communities selective and discriminatory treatment together with double standards.

8. Pursuant to this provision, States refuse to recognize indigenous peoples as legal subjects, major players in history and depositories of the permanent sovereignty over their traditional knowledge, cultural expressions and genetic resources, and as a part of a process of negotiating international instruments.

9. Western States consider “Indians simply as subjects of anthropological study”. The protagonists in the cultural alienation process are endeavoring to reduce indigenous knowledge to simple folklore, their religions to mere superstitions and their languages to simple dialects.

10. As a result of such cultural alienation, States do not recognize indigenous peoples as equal parties between holders and users of traditional knowledge, traditional cultural expressions and genetic resources, and do not accept their contributions, observations and amendments as constructive input to the process of negotiating an instrument or instruments.

11. After 11 years of sterile debates on the participation of indigenous peoples and communities, we are today disappointed to note the selfishness and double standards of the rich countries and the lack of coherence in their policies to guarantee the right of free and effective participation within WIPO.

12. Nevertheless, many indigenous representatives satisfy the participation criteria: i.e. principles of representativeness, independence, moral integrity and recognized knowledge in the intellectual property sphere.

13. As regards participation of observers, the WIPO Intergovernmental Committee should comply with the same rules and procedures established by the United Nations system and its specialized agencies, and apply the principles of equity adopted by international conferences and instruments on human rights.

14. In its Vienna Program of Action adopted in 1993, the World Conference on Human Rights urges that "*States should ensure the full and free participation of indigenous peoples in all aspects of society, in particular in matters of concern to them*".

15. In the dialectic sense, the right to participate in the affairs of society means the full, free and effective participation of indigenous peoples as individuals and collectively, as players in history, legal subjects and depositories of permanent sovereignty over their natural resources.

16. Article 71 of the United Nations Charter states that: "The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence".

17. In that vein, Economic and Social Council (ECOSOC) Resolution 1996/31 establishes arrangements for participation of non-governmental organizations and civil society, both in the Human Rights Council and its subsidiary bodies, as well as in United Nations international conferences and regional fora.

18. Under ECOSOC Resolution 1996/31, States recognize NGOs as consultative entities in the sphere of human rights, right to development, economic and cultural, political and civil rights. Consultative entities are encouraged in their work and enjoy the possibility to submit written contributions as well as being authorized to speak in plenary sessions. NGOs may also present amendments to the Human Rights Council agenda and put forward candidates for vacant posts for subject-based rapporteurs.

19. Furthermore, WIPO should base its efforts on the work of the Open-Ended Working Group set up by Resolution 1995/32 of the Human Rights Commission, for the sole purpose of producing a draft declaration on the rights of indigenous peoples.

20. The effective and free participation of indigenous representatives on an equal footing with States in the process of negotiating the draft Declaration over a period of 11 years set a positive precedent. Their proposals, contributions and amendments to the operational paragraphs were widely discussed, published and distributed, and form an integral part of the Declaration.

21. The activities of organizations of indigenous peoples authorized to participate in the Working Group in accordance with the established procedures are governed by the provisions of Rules 75 and 76 of the Rules of Procedure of the Functional Commissions of the United Nations Economic and Social Council.

COMITÉ INTERGUBERNAMENTAL SOBRE PROPIEDA INTELECTUAL Y RECURSOS GENÉTICOS, CONOCIMIENTOS TRADICIONALES Y FOLCLORE
Nota de la Secretaria de 11 octubre 2011

Revisión de los procedimientos de participación

1.- Acogemos con satisfacción que la Asamblea general de la OMPI, en su 40 sesión que tuvo lugar del 26 de septiembre al 5 de octubre 2011, haya decidido de recomendar al Comité Intergubernamental a que reexamine sus procedimientos con miras de reforzar las contribuciones de los Observadores, incluidos los pueblos indígenas en el proceso de negociaciones.

2.- Conste que, en virtud del artículo 24 de las Reglas generales de procedimiento de la OMPI, los Observadores pueden tomar parte en los debates a invitación del Presidente, pero no están autorizados a presentar propuestas, moción, enmiendas a los proyectos en examen.

3.- Conviene aclarar que, la diferencia fundamental entre pueblos indígenas y observadores consiste en que, los primeros son poseedores y titulares de conocimientos tradicionales y expresiones culturales y los segundos, en su mayoría son representantes de las empresas farmacéuticas, industrias biotecnológicas y Consultorías de patentes, antropólogos y poderosos lobby que defienden intereses ajenos a los pueblos indígenas.

4.- A pesar que los pueblos indígenas son guardianes de dichos conocimientos y recursos genéticos, pero se ven marginalizados y reducidos al silencio. En cambio, los Estados del Norte y sus ONG (observadores) continúan en su implacable voluntad de entregar los CT, ECT y RG a la voracidad de sus poderosas empresas transnacionales.

5.- Contrariamente a los observadores, los pueblos indígenas han venido contribuyendo a lo largo de siglos con la diversidad de sus culturas, sabidurías ancestrales y sus formas de organización social al progreso y enriquecimiento de las civilizaciones del mundo.

6.- Los pueblos indígenas vienen a la OMPI, no simplemente para agradecer al Fondo Voluntario por la subvención ni para calentar la silla, sino vienen para defender sus derechos y poder negociar con los Estados, la protección de su patrimonio cultural y espiritual objeto de la piratería y vienen para reivindicar el acceso justo a los beneficios derivados de la explotación de sus conocimientos tradicionales y sus expresiones culturales.

7.- En virtud del artículo 24 de las Reglas Generales de procedimiento de la OMPI, el Comité intergubernamental compuesto de Estados Miembros de la OMPI decidió reservar a pueblos indígenas y comunidades locales un tratamiento selectivo, discriminatorio y dobles estándares

8.- En aplicación de dicha disposición, los Estados se niegan reconocer a los pueblos indígenas en tanto que sujetos de derecho, actores de la historia y depositarios de la soberanía permanente sobre sus conocimientos tradicionales, expresiones culturales y recursos genéticos y como Parte de un proceso de negociación de instrumentos internacionales.

9.- Los Estados occidentales consideran a los "Indios simplemente como objetos de estudio antropológico.". Los protagonistas del proceso de alineación cultural pretenden reducir las sabidurías indígenas a un simple folclore, sus religiones a puras supersticiones, sus lenguas a simples dialectos.

10.- A partir de esta alienación cultural, los Estados no reconocen a los pueblos indígenas como partes iguales entre poseedores y utilizadores de CCTT, ECT y RG y no admiten que sus contribuciones, observaciones y enmiendas fueran como aportes constructivos al proceso de negociación de un instrumento o instrumentos.

11.- Tras 11 años de debates estériles sobre la participación de pueblos y comunidades indígenas, hoy observamos con decepción el egoísmo y el doble rasero de los países ricos y la incoherencia de sus políticas para garantizar el derecho de participación libre y efectiva en el seno de la OMPI.

12.-No obstante, muchos representantes de origen indígena se conforman a los criterios de participación: a saber, los principios de representatividad, independencia, integridad moral y conocimientos reconocidos en la esfera de la propiedad intelectual.

13.- En materia de participación de los observadores, el Comité Intergubernamental de la OMPI debería conformarse a las mismas Reglas y procedimientos establecidos por el sistema de Naciones Unidas y sus Agencias especializadas y aplicar los principios de equidad adoptados por las Conferencias internacionales e instrumentos de derechos humanos.

14.- En su Programa de Acción de Viena adoptada en 1993, la Conferencia Mundial sobre los Derechos humanos insta a los *"Estados a que aseguren la participación plena, efectiva y libre de pueblos indígenas en todos los aspectos de la sociedad, en particular en los asuntos que les conciernen*".

15.- En el sentido dialéctico, se entiende por derecho a participar en los asuntos de la sociedad, la participación plena, libre y efectiva de pueblos indígenas en tanto que individuos y en forma colectiva, como actores de la historia, sujetos de derecho y depositarios de la soberanía permanente sobre sus recursos naturales.

16.- La Carta de Naciones Unidas, en su artículo 71) establece que:"el Consejo Económico y Social podrá hacer arreglos adecuados para celebrar consultas con organizaciones no gubernamentales que se ocupan de asuntos de la competencia del Consejo".

17.- En ese espíritu, la Resolución 1996/31 del Consejo Económico y Social establece modalidades de de participación de las ONGs y la Sociedad civil, tanto en el Consejo de derechos y sus Órganos subsidiarios, como en las Conferencias internacionales y foros regionales de la ONU.

18.- En virtud de la Resolución 1996/31 del ECOSC, los Estados reconocen a las ONGs como entidades consultivas en la esfera de derechos humanos, derecho al desarrollo, derechos económicos y culturales, políticos y civiles. Las entidades consultivas se ven alentadas en su labor y gozan de la potestad para presentar contribuciones escritas y son autorizadas a tomar la palabra en las plenarias. Incluso las ONGs pueden introducir enmiendas a la Agenda del Consejo de derechos humanos y presentar candidatos a los puestos vacantes para Relatores temáticos

19.- Por otra parte, la OMPI debería inspirarse en las labores del Grupo de Trabajo abierto, establecido por la resolución 1995/32 de la Comisión de Derechos Humanos, con el fin exclusivo de elaborar un proyecto de declaración sobre los de derechos de los pueblos Indígenas.

20.- La participación efectiva y libre de representantes indígenas y en pie de igualdad con los Estados en el proceso de negociación del proyecto de la Declaración a lo largo de 11 años sentó un precedente positivo. Sus propuestas, contribuciones y enmiendas a los párrafos dispositivos fueron ampliamente debatidos, publicados y distribuidos y forman parte integrante de la Declaración.

21.- Las actividades de las organizaciones de pueblos indígenas autorizadas a participar en el Grupo de Trabajo y conforme a los procedimientos establecidos, están gobernadas por lo dispuesto en los artículos 75 y 76 del reglamento de las Comisiones orgánicas del Consejo Económico y Social de las Naciones Unidas.

Preparado y sometido por el Movimiento Indígena Tupaj Amaru (Bolivia)
el 5 de diciembre 2011

Submission from the OHCHR to the World Intellectual Property Office secretariat to the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore

Participation of Observers

30 November 2011

This paper sets out the response of the UN Office of the High Commissioner for Human Rights (OHCHR) Indigenous Peoples and Minorities Section to the World Intellectual Property Office (WIPO) secretariat's invitation to submit comments on its study on the participation of observers in the work of the WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO Study on Observer Participation).

The WIPO General Assembly requested that the WIPO Study on Observer Participation outline "current practices and potential options" in relation to observer participation. In that light, the OHCHR provides information specifically in relation to UN accreditation practices that have facilitated non-state actors' participation in mechanisms associated with the Human Rights Council. It is the OHCHR's hope that such practices might inform WIPO's development of potential options to facilitate observer participation in its Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore.

In most cases, non-governmental organisations must obtain consultative status with the UN's Economic and Social Council (ECOSOC) before they participate in the Human Rights Council and its subsidiary and related bodies, as well as in the Council's predecessor body, the Commission on Human Rights and its subsidiary and related bodies. Nonetheless, the participation of indigenous peoples' organisations and other non-state actors without consultative status with the ECOSOC has been facilitated in certain bodies associated with the Human Rights Council, such as the Forum on Minority Issues, and the former Commission on Human Rights, including the following:

- the Working Group on Indigenous Populations (1982 – 2006);
- the Commission on Human Rights inter-sessional ad hoc working group on the draft declaration on the rights of indigenous peoples (1995 – 2006); and
- the Expert Mechanism on the Rights of Indigenous Peoples.

As has been recognised by the Human Rights Council in resolution 18/8, indigenous peoples do not necessarily organise themselves as non-governmental organisations. Indeed, many indigenous peoples have their own governing bodies meaning that they cannot be defined as non-governing.

In this respect, the Human Rights Council in resolution 18/8 requested the Secretary General to prepare, in cooperation with, inter alia, the OHCHR and the Office of Legal Affairs, a document on:

> the ways and means of promoting participation at the United Nations of recognised indigenous peoples' representatives on issues affecting them, as they are not always organized as non-governmental organisations, and how such participation might be structured, drawing from, inter alia, the rules governing participation in various United Nations bodies by non-governmental organizations (including Economic and Social Council resolution 1996/31) and by national human rights organisations (including Human Rights Council resolution 5/1 of 18 June 2007 and Commission on Human Rights resolution 2005/74 of 20 April 2005), and to present it to the Council at its twenty-first session

Indigenous peoples' participation in the Human Rights Council

Non-governmental organisations (NGOs) and indigenous peoples' organisations can participate in the sessions of Human Rights Council as observers only if they have consultative status with the ECOSOC. If such status is granted, observers can:

- attend all Council proceedings with the exception of the deliberations under the Council's Complaints Procedure;
- submit written statements to the Council;
- make oral interventions;
- participate in debates, interactive dialogues, panel discussions and informal meetings; and
- organise parallel events on issues relevant to the Council's work.

NGOs in consultative status with the ECOSOC do not participate in the same manner as Members of the Council or other Member States. For example, they have different limits on the time and number of interventions. More information is available here: http://www2.ohchr.org/english/bodies/hrcouncil/ngo.htm.

Panel

In resolution 18/8, the Human Rights Council decided to hold, on an annual basis, a half-day panel discussion on the rights of indigenous peoples. In the first half-day panel on the rights of indigenous peoples, in 2011 in relation to their rights to languages and culture, all of the

panellists were indigenous. As part of the panel proceedings, states engaged in an interactive dialogue with the panellists.

Expert Mechanism on the Rights of Indigenous Peoples

Accreditation

Participation in the Expert Mechanism on the Rights of Indigenous Peoples by organisations that are not accredited under the ECOSOC consultative status rules is permitted under Human Rights Council resolution 6/36, which also establishes the Expert Mechanism. It states:

> the annual meeting of the expert mechanism shall be open to the participation, as observers, of States, United Nations mechanisms, bodies and specialized agencies, funds and programmes, intergovernmental organizations, regional organizations and mechanisms in the field of human rights, national human rights institutions and other relevant national bodies, academics and experts on indigenous issues, non-governmental organizations in consultative status with the Economic and Social Council; the meeting shall also be open to indigenous peoples' organizations and non-governmental organizations, whose aims and purposes are in conformity with the spirit, purposes and principles of the Charter of the United Nations, based on arrangements, including Economic and Social Council resolution 1996/31 of 25 July 1996, and practices observed by the Commission on Human Rights, through an open and transparent accreditation procedure in accordance with the rules of procedure of the Human Rights Council, which will provide for the timely information on participation and consultation with States concerned;

The Expert Mechanism accreditation procedures generally follow those adopted in relation to the Working Group on Indigenous Populations and the Commission on Human Rights inter-sessional ad hoc working group on the draft declaration on the rights of indigenous peoples.

In practice, the OHCHR requests all non-state bodies intending to attend the Expert Mechanism annual session to fill out an accreditation form, outlined below, irrespective of whether they are entitled to accreditation under, for example, ECOSOC consultative status accreditation procedures. However, only those organisations that are not accredited under ECOSOC consultative status procedures or other such procedures, for example as national human rights institutions, must complete the forms to receive the security pass required to attend the Expert Mechanism's annual sessions.

Organisations requesting accreditation to the Expert Mechanism must submit a letter to the OHCHR and fill out a web-based form and submit it online. In accordance with the questions on the web-based form, they must:

- indicate whether they have ECOSOC accreditation;
- provide details about their organisation;

- answer the question: "The mandate of the Expert Mechanism is to provide the Human Rights Council with thematic expertise on the rights of indigenous peoples mainly through studies and research-based advice. How does your organisation, or yourself if you wish to participate as an academic or expert, want to contribute to the Expert Mechanism?"; and

- describe the organisation's work with regard to indigenous peoples' issues.

Participation

Except for the five members of the Expert Mechanism, all participants in the annual sessions of the Expert Mechanism take part in the sessions as observers, including states, national human rights institutions, indigenous peoples' organisations and other non-state actors, irrespective of how they are accredited to attend the annual session. All observers have the same opportunity to participate with interventions in the sessions of the Expert Mechanism.

Human rights justifications for indigenous peoples' participation in international processes that affect them

Participation of indigenous peoples in decision-making is one of key principles of the Declaration on the Rights of Indigenous Peoples. Relevant rights include indigenous peoples' right to self-determination (article 3) and the right to self-identify as indigenous. In addition, articles 18 and 19 are relevant.

> *Article 18* Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.
>
> *Article 19* 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.

The relevance of these standards for international organizations is stressed in article 41 of the Declaration, which states:

> The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

The Expert Mechanism on the Rights of Indigenous Peoples has also called upon the UN to "establish a permanent mechanism or system for consultations within indigenous peoples'

governance bodies … to ensure effective participation at all levels of the United Nations" ("Final report of the study on indigenous peoples and the right to participate in decision making" (17 August 2011) UN Doc A/HRC/18/42).

We hope that the above information is useful in the preparation of the WIPO Observer Participation Study. Please do not hesitate to contact Claire Charters at CCharters@ohchr.org should you require more information.

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Observations on the study concerning the participation of observers in the work of the IGC

Introduction

The many threats resulting from the failure to observe human rights, the fragility of ecosystems linked to adverse changes in the climate, globalization and the lack of fairness in trade constitute major obstacles in constructing sustainable mechanisms for the protection, promotion and preservation of traditional knowledge, traditional cultural expressions and genetic resources.

The practice of ancient traditional knowledge allows its holders to capitalize on endogenous and achieve sustainable less costly know-how in the face of extreme situations which solutions borrowed from elsewhere do not allow to be dealt with despite the considerable cost of using them.

In order to sustain the political will of United Nations institutions and WIPO in particular, it is important to provide a broader role for the opinions of indigenous organizations in debates to

discuss the protection and enhancement of ancient traditional knowledge from the different local communities. It is inconceivable that communities in Africa or Europe make use of know-how from other regions while equivalent know-how exists in those very areas. It is time to put a stop to policies which encourage added value for certain know-how from certain regions in order to harm the enhancement of know-how from other regions.

Participatory capacity

In order to achieve real participation of observers, it is important to solicit their opinions on the subjects included in the agenda 30 days prior to the session. These opinions should be analyzed for half a day by the observers present at the session and before the session is held. Observers' proposals must be inserted into the text for consideration even without the support of any State.

Accreditation

WIPO must continue the grant of subsidies to allow organizations that do not have observer status to participate in the sessions.

Two important criteria should be retained:

- the balance between geographical areas in terms of observer representation;
- cultural balance, the Committee should ensure that cultures and traditions are sufficiently represented.

WIPO Voluntary Contribution Fund for Accredited Indigenous and Local Communities

The principle of accreditation of indigenous and local organizations must continue and must be strengthened by the opening-up of subsidies to facilitate matters for other organizations that do not have the status of participants in sessions.

Panel of representatives of indigenous and local communities

The protection, promotion and preservation of traditional knowledge, traditional cultural expressions and genetic resources in certain regions are greatly compromised and certain ancient knowledge is threatened with disappearance subject to the combined effects of

globalization and climate change. The group of experts must be strengthened by subject-based workshops organized in high-risk regions before sessions are held.

Briefings and consultations

The Secretariat must be strengthened in its initiatives to organize information sessions for representatives of indigenous communities on the subjects dealt with by the different bodies of the United Nations. All these United Nations institutions are responsible for subjects which relate to sensitive issues concerning the intellectual property and genetic resources of indigenous peoples. The information mechanism must allow the representatives of indigenous organizations to monitor, according to a rotation principle, the subjects dealt with by United Nations institutions for at least two years, while arranging, at the end of this period, for the indigenous representatives to be replaced by others. Such a mechanism will allow, in the course of a decade or so, information and good knowledge of United Nations systems on indigenous issues to be disseminated on all continents and for the majority of indigenous organizations. This will avoid certain indigenous representatives having better mastery of the system than others in other regions of the world.

Secretarial logistical and secretarial support

The Indigenous Peoples' Center for Documentation, Research and Information (DOCIP) must receive support in order to be able to organize training sessions in languages spoken at the United Nations, for example French for English-speaking people, English for French, Russian and Arabic-speaking people etc. Communication transfer capacity is required for indigenous organizations in order to achieve a direct impact through their participation in the different international sessions and bodies and in order to disseminate throughout the world knowledge of the different mechanisms.

Information tools and resources

Not all indigenous communities have access to the Internet and to new communication technology tools. For this reason, particular attention should be paid to the participation of their organizations, even if they are not accredited, so that they may receive information on subjects and express their opinions. Subject-based regional workshops must be increased in number.

SUGGESTED QUESTIONS

1. The organization of sub-regional subject-based workshops to solicit the opinions of indigenous and local organizations. These workshops must be organized by United Nations specialized agencies or bodies such as DOCIP by granting active participation to local indigenous populations.
2. DOCIP must be strengthened to supervise the transfer of capacities (information, training and support) to indigenous organizations on all the subjects linked to their situations regarding rights and relations with United Nations institutional mechanisms.
3. Participation should continue in IGC sessions and other bodies for indigenous organizations, even if such organizations do not have accreditation status.

Timbuktu, November 27, 2011

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Observations concernant le sujet d'étude sur la participation des observateurs aux travaux de l'IGC

Introduction

Les multiples menaces consécutives au non respect des Droits de l'Homme, à la fragilité des écosystèmes liée au dérèglement climatique, à la mondialisation et à l'in équité des échanges commerciaux, constituent des obstacles majeurs pour construire des mécanismes durables pour la protection, la promotion et la préservation des savoirs traditionnels, des expressions culturelles traditionnelles et des ressources génétiques.

Or la pratiques des savoirs anciens traditionnels permet à leurs détenteurs de capitaliser des savoirs faire endogènes durables moins couteux face à des situations extrêmes que des solutions empruntées d'ailleurs ne permettent pas de circonscrire malgré leur coût considérable d'emprunt.

Pour soutenir la volonté politique des institutions onusiennes et de l'OMI en particulier, il est important de donner un plus grand rôle aux avis des organisations autochtones dans les débats de réflexion sur la protection et la revalorisation des savoirs anciens traditionnels des différentes communautés locales. Il est inconcevable que des communautés d'Afrique ou d'Europe consomment des savoirs faire d'autres régions pendant que sur place un savoir faire équivalent existe. Il est temps de mettre fin aux politiques qui encouragent la valeur ajoutée pour certains savoirs faire de certaines régions pour nuire à la valorisation des savoirs faire des autres régions.

Modalités de participation

Pour une réelle participation des observateurs il est important de recueillir leurs avis sur les sujets inscrits à l'ordre du jour 30 jours avant la session. Ces avis doivent faire l'objet d'une demi-journée d'analyse par les

observateurs présents à la session et avant sa tenue. Les propositions des observateurs doivent être insérées dans le texte d'examen même sans l'appui d'aucun Etat

Accréditation

L'OMI doit poursuivre l'octroi de subventions pour permettre aux organisations n'ayant pas le statut d'observateurs de participer aux sessions

Deux critères sont importants à retenir

- L'équilibre entre les zones géographiques en terme de représentation d'observateurs
- L'équilibre culturel, le comité doit s'assurer que les cultures et traditions sont suffisamment représentées

Fonds de contributions volontaires de l'OMPI pour les communautés autochtones et locales accréditées

Le principe d'accréditation des organisations autochtones et locales doit se poursuivre et doit être renforcé par l'ouverture des subventions pour faciliter à d'autres organisations n'ayant pas le statut de participer aux sessions

Groupe d'experts constitué de représentants des communautés autochtones et locales

La protection, la promotion et la préservation des savoirs traditionnels, des expressions culturelles traditionnelles et des ressources génétiques dans certaines régions est grandement compromise et certains savoirs anciens sont menacés de disparaitre sous les effets conjugués de la mondialisation et des changements climatiques. Le groupe d'experts doit être renforcé par des ateliers thématiques organisés dans les régions à haut risque avant la tenue des sessions.

Séances d'information et de consultation

Le Secrétariat doit être renforcé dans ses initiatives d'organisation des séances d'informations des représentants des autochtones sur les thématiques traitées par les différents organismes des Nations Unies. Toutes ces institutions onusiennes ont en charge des missions qui touchent aux questions sensibles de la propriété intellectuelle et aux ressources génétiques des peuples autochtones. Le dispositif d'information doit permettre aux représentants des organisations autochtones de suivre, selon un principe de rotation, les sujets traités par les institutions onusiennes pendant au moins 2 ans tout en organisant au terme de cette période le relais des représentants des autochtones. Un tel dispositif permettra au cours d'une bonne décennie de dissiper sur l'ensemble des continents et pour une majorité des organisations autochtones des informations et une bonne connaissance des systèmes onusiens sur les questions autochtones. Ceci évitera que certains représentants autochtones maîtrisent le système plus que d'autres dans d'autres régions du monde.

Appui logistique et services de secrétariat

Le centre doCip doit être appuyé pour être dans les conditions de pouvoir organiser des formations en langues parlées des Nations Unies par exemple le Français pour les anglophones, l'anglais pour les

francophones, les russophones, les arabophones, …. Un transfert de capacité aux organisations autochtones en communication est nécessaire pour un impact direct de leur participation aux différentes sessions et instances internationales et pour dissiper à travers le monde les connaissances sur les différents mécanismes

Outils et ressources d'information

Toutes les communautés autochtones n'ont pas accès à internet et aux outils de nouvelles technologies de communication. C'est pourquoi une attention particulière doit être accordée à la participation de leurs organisations même si elles ne sont pas accréditées pour qu'elles s'informent des sujets et qu'elles s'expriment. Des ateliers thématiques régionaux doivent être multipliés

SUGGESTIONS DE QUESTIONS

1. L'organisation d'ateliers thématiques sous-régionaux pour recueillir les avis des organisations autochtones et locales. Ces ateliers doivent être organisés par des agences spécialisées des Nations Unies ou des organismes comme le DOCIP en accordant une participative active des autochtones et populations locales.
2. Le DOCIP doit être renforcé pour encadrer le transfert de capacités (informations, formations, appuis..) aux organisations autochtones sur toutes les thématiques liées à leurs situations de droits et de relations avec les mécanismes des institutions onusiennes
3. Poursuivre la participation aux sessions de l'IGC et autres instances des organisations autochtones mêmes si elles ne sont pas dotées de statut d'accréditation.

Tombouctou, le 27 Novembre 2011

Hamadi Ag Mohamed Abba

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