

Permanent Forum on Indigenous Issues

Ninth Session

United Nations, New York

19-30 April 2010

Agenda item 6: Comprehensive dialogue with six United Nations agencies
and funds: Secretariat of the Convention on Biological Diversity

20 April 2010

Impacts of the CBD Revised Draft Protocol on the *UN Declaration on the Rights of Indigenous Peoples*: Human Rights Concerns

Joint Statement of Grand Council of the Crees (Eeyou Istchee); Indigenous Peoples of Africa Co-ordinating Committee (IPACC); Tebtebba; Saami Council; Assembly of First Nations; Inuit Circumpolar Council; First Nations Summit; International Indian Treaty Council; Québec Native Women/Femmes Autochtones du Québec; Na Koa Ikaika Kalahui Hawaii; Native Women's Association of Canada; National Association of Friendship Centres; Union of BC Indian Chiefs; Federation of Saskatchewan Indian Nations; International Organization of Indigenous Resource Development (IOIRD); Atlantic Policy Congress of First Nations Chiefs Secretariat; Assembly of First Nations of Québec and Labrador/Assemblée des Premières Nations du Québec et du Labrador; Innu Council of Nitassinan; Samson Cree Nation; Ermineskin Cree Nation; Montana Cree Nation; Louis Bull Cree Nation; Indigenous World Association; First Peoples Human Rights Coalition; Canadian Friends Service Committee (Quakers); ALMACIGA (Spain); KAIROS: Canadian Ecumenical Justice Initiatives.

Introduction

1. In regard to Agenda Item 6, we welcome this opportunity to address the Revised Draft Protocol¹ on access and benefit sharing that arose from the Convention on Biological Diversity (CBD) negotiations session in Cali, Colombia (March 22-28, 2010).
2. We are especially concerned about the effects this draft Protocol, if adopted, may have on Indigenous peoples' human rights, in the context of the *UN Declaration on the Rights of Indigenous Peoples*.
3. It is urgent to currently address these concerns, since the intention is to adopt a Protocol on access and benefit sharing at the Conference of the Parties to be held in Nagoya, Japan in October 2010.

Duty to respect Indigenous peoples' human rights

4. The *Convention on Biological Diversity*² and the Revised Draft Protocol are generally viewed as environmental instruments. However, they give rise to significant human rights considerations relating to Indigenous peoples in different regions of the world.
5. Whenever human rights are at issue, States are required to act in accordance with their human rights obligations. According to 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”.³
6. 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. The *CBD Convention* 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 objective in the *Convention* relating to access and benefit sharing of genetic resources requires “taking into account all rights over those resources” (art. 1).
7. The *Convention* also requires State parties “as far as possible and as appropriate ... [s]ubject to its national legislation, [to] respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities ... and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices” (art. 8(j)).
8. State parties are also required “as far as possible and as appropriate” to “[p]rotect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable development” (art. 10(c)).⁴
9. These and other duties, rights and principles in international law require States to respect the human rights of Indigenous peoples. This would necessarily include upholding Indigenous peoples’ rights in the *United Nations Declaration on the Rights of Indigenous Peoples*.⁵

Significance of the *UN Declaration* in the CBD context

10. The *UN Declaration* is the most comprehensive, universal international human rights instrument explicitly addressing the rights of Indigenous peoples. It elaborates on their economic, social, cultural, political, spiritual and environmental rights.
11. The *Declaration* does not create new rights.⁶ It elaborates on Indigenous peoples’ inherent rights, which throughout history have not been respected.⁷ As concluded by Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, the *Declaration* provides a principled framework and context for interpreting the rights of Indigenous peoples:

[The *Declaration*] represents an authoritative common understanding, at the global level, of the minimum content of the rights of indigenous peoples, upon a foundation of various sources of international human rights law.⁸

12. International treaty monitoring bodies are referring to the *Declaration* and using it to interpret the rights of Indigenous peoples and individuals and related State obligations.⁹ This practice underlines the significance of the *Declaration* and its implementation at all levels – international, regional and national. These bodies reinforce a human rights-based approach, when issues arise.

... the Committee [on the Rights of the Child] urges States parties to adopt a rights-based approach to indigenous children based on the Convention and other relevant international standards, such as ILO Convention No.169 and the United Nations Declaration on the Rights of Indigenous Peoples.¹⁰

13. Thirty-one UN specialized agencies, including the Secretariat of the CBD, are represented in the Inter-Agency Support Group on Indigenous Issues (IASG). The IASG has emphasized that the adoption of the *Declaration*

constitutes a crucial opportunity ... according to Article 42 of the Declaration, to promote respect for and full application of its provisions and follow-up its effectiveness. The IASG pledges to advance the spirit and letter of the Declaration within our agencies' mandates and to ensure that the Declaration becomes a living document throughout our work.¹¹

14. In regard to Indigenous peoples' rights and related State obligations, the *Declaration* provides a crucial context for interpreting the *Convention on Biological Diversity* and elaborating on such matters in the Revised Draft Protocol. The overall relevance of the *Declaration* has been highlighted in a March 2009 study prepared for the CBD process.¹²

15. Yet the Revised Draft Protocol makes no mention whatsoever to the *UN Declaration*. Article 31(1) of the *Declaration* 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”.

16. 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 of Indigenous peoples – as required by international law.¹³

17. 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.¹⁴ These cultural rights, when read together with Indigenous peoples' “right to live in ... security as distinct peoples” (art. 7(2)), constitute a right to cultural security.

Additional international commitments to safeguard Indigenous knowledge

18. According to the United Nations Educational, Scientific and Cultural Organization (UNESCO), the *UN Declaration* “echoes the principles of the UNESCO Universal Declaration on Cultural Diversity (2001) and related Conventions -- notably the 1972 World

Heritage Convention, the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage, and the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions.”¹⁵

19. UNESCO’s Director-General adds: “Each of these [instruments] recognizes the pivotal role of indigenous peoples as custodians of cultural diversity and biodiversity.”¹⁶
20. In the *Convention for the Safeguarding of the Intangible Cultural Heritage*,¹⁷ 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)).
21. In the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*,¹⁸ 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”.
22. Within the Organization of American States (OAS), the *UN Declaration* is being used as “the baseline for negotiations and ... a minimum standard” for the draft American Declaration on the Rights of Indigenous Peoples.¹⁹ It is in this context that provisions relating to traditional knowledge and other aspects of cultural heritage are being considered.
23. In its *Programme of Action for the Second International Decade of the World's Indigenous People*, the UN General Assembly emphasized the protection of traditional knowledge as an urgent priority – particularly when addressing benefit-sharing from use of genetic resources:

... indigenous-related elements of the programme of work of the Convention on Biological Diversity ..., especially on fair and equitable sharing of the benefits from the use of genetic resources, should be considered ... and in particular *sustainable development and the protection of traditional knowledge should remain urgent priorities regarding the world’s indigenous peoples.*²⁰
24. In the *UNESCO Universal Declaration on Cultural Diversity*,²¹ it is affirmed that the “defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, in particular the rights of ... indigenous peoples. (art. 4)”
25. In the Indigenous context, cultural diversity and biodiversity have crucial linkages that are inseparable.²² This reinforces the need to affirm the rights and central role of Indigenous peoples in the use, access and control of their traditional knowledge, innovations and practices, consistent with their right of self-determination.²³ Such rights also entail responsibilities to present and future generations.²⁴

Serious concerns with Revised Draft Protocol

26. As illustrated above, the *UN Declaration on the Rights of Indigenous Peoples*, together with relevant international treaties and other international instruments, provide a principled framework for addressing Indigenous rights and related State obligations in the CBD's Revised Draft Protocol. However, a review of the draft text indicates that key instruments and commitments in favour of Indigenous peoples have been virtually ignored.
27. With regard to Indigenous peoples, the relevant provisions of the 1993 *Convention on Biological Diversity* are being interpreted in a literal manner in virtual isolation. Little or no consideration is given to new international commitments and standards.
28. The problems affecting the CBD process are both of a substantive and procedural nature. These are briefly illustrated below. In the short time left for negotiating a draft Protocol, the concerns raised can be effectively addressed with State support.
29. **Lack of respect for *UN Declaration*.** Indigenous peoples have urged States to include the following paragraph in the preamble of the Revised Draft Protocol: "Noting the significance of the United Nations Declaration on the Rights of Indigenous Peoples in regard to this Protocol." In Cali, Colombia, no State would agree to table this proposal.²⁵
30. To not respect the minimum standards in the *Declaration* would undermine the international human rights system. States worldwide have overwhelmingly voted for or endorsed this international human rights instrument.²⁶ States in Latin America, Africa and Europe, as well as the European Union, played a key role in ensuring the successful adoption of the *Declaration*.
31. The African Commission on Human and Peoples' Rights has affirmed that the *Declaration* was "officially sanctioned by the African Commission through its 2007 Advisory Opinion".²⁷ Treaty monitoring bodies, specialized agencies and special rapporteurs are applying the *Declaration* in Asia, Latin America, Pacific and other regions of the world, regardless of whether a State may have voted against.²⁸
32. **Need for a safeguard provision on Indigenous rights.** In view of the problems and ambiguities currently found in the Revised Draft Proposal (see examples below), a further paragraph should be added to its preamble or operative provisions. The text would be similar to that provided in article 45 of the *UN Declaration*,²⁹ along the following lines: "Nothing in this Protocol may be construed as diminishing or extinguishing the rights of Indigenous Peoples and local communities have now or may acquire in the future." This type of safeguard is found in numerous international instruments.³⁰
33. **Limitation to "existing" rights.** The Revised Draft Protocol only takes into account the "existing rights of indigenous and local communities to genetic resources and associated traditional knowledge".³¹ The amendment to add "existing" was proposed by Australia.
34. The term "existing" could be interpreted to mean that any such Indigenous rights that were extinguished by illegitimate means would be precluded from being addressed according to the Protocol. We propose that "existing" be deleted. National and international legal systems

often provide a right to restitution or compensation when property has been illicitly obtained. There should be no double standard in relation to Indigenous peoples.

35. **No assurance of fair and equitable sharing of benefits.** The Revised Draft Protocol provides: “Parties shall take legislative, administrative or policy measures, as appropriate, with the aim of ensuring the fair and equitable sharing of benefits arising from the utilization of traditional knowledge associated with genetic resources with indigenous and local communities holding such knowledge ... ” (art. 4(4)).³² Canada proposed “with the aim of ensuring” to replace “to ensure” and this amendment was supported by some States.³³
36. Canada’s amendment could mean that virtually any positive measure taken by States, no matter how insignificant, could qualify as an action “with the aim” of ensuring fair and equitable benefits. No result need be achieved, where benefits are actually shared with Indigenous peoples. This standard would fall far below what is required in article 31(2) of the *Declaration*, where States are required to “take effective measures to recognize and protect the exercise” of Indigenous rights to traditional knowledge.
37. The argument made in support of Canada’s amendment was that States could not guarantee fair and equitable sharing of benefits. The verb used in art. 4(4) of the draft Protocol was “ensure” (not “guarantee”). In any event, numerous declarations, protocols, conventions and other international instruments use the term “guarantee”, particularly when human rights are at stake.³⁴
38. **Recognition of Indigenous rights is subject to national law.** The Revised Draft Protocol provides: “Parties shall take the necessary legislative, administrative or policy measures, as appropriate, to: ... (e) Where applicable national law recognizes and affirms existing rights of indigenous and local communities to genetic resources, set out criteria for the prior informed consent/approval and involvement of such communities for access to their genetic resources” (art. 5(2)(e)). This paragraph could have the effect of making Indigenous rights to genetic resources contingent on recognition by national law. Such law could subjectively determine what rights are still “existing”.
39. Should this interpretation prevail, Indigenous peoples’ rights to genetic resources would not be inherent but be dependent on national law for their existence. Indigenous peoples may have no legal recourse. This runs directly counter to the affirmation of Indigenous peoples’ inherent³⁵ rights to resources in the *UN Declaration* and the jurisprudence of the treaty monitoring bodies.³⁶
40. The approach of requiring the recognition of Indigenous rights to resources and other matters to be “subject to national law” had been proposed by some States in mid-May 2007, in relation to the *UN Declaration*. However, this approach was not supported by Indigenous peoples and many States. The African Group played a leadership role, by proposing a different approach that was accepted by an overwhelming majority of States.
41. The purpose and intent of the *Convention on Biological Diversity* is not to diminish or deny the inherent rights of Indigenous peoples to genetic resources. Such action would be

incompatible with one of the three key CBD objectives, namely, the “fair and equitable sharing of the benefits arising out of the utilization of genetic resources” (art. 1).

42. Failure to respect the human rights of Indigenous peoples can put at risk an eventual Protocol on access and benefit-sharing. An agreement that undermines or ignores such human rights may be deemed discriminatory and lack validity. The prohibition against racial discrimination is a peremptory norm.³⁷
43. In relation to Indigenous peoples, national legislation or other effective measures should “ensure” the fair and equitable sharing of benefits arising from the utilization of traditional knowledge associated with genetic resources. Such measures should be carried out in collaboration with Indigenous peoples, in a manner consistent with article 38 of the *UN Declaration*.³⁸
44. National legislation should not undermine the principle of universality, which applies to all human rights.³⁹ Nor should such legislation be determining whether Indigenous rights to resources even exist.
45. **“Free, prior and informed consent” not respected.** A further concern with article 5(2)(e) of the Revised Draft Protocol is that it does not maintain the standard of “free, prior and informed consent”. Whether the States agree to the term “prior, informed consent” or “approval and involvement”, in both instances it would be the national law that would “set out criteria” in this regard.
46. Such an approach could seriously undermine the consent of Indigenous peoples, as holders and custodians of traditional knowledge associated with genetic resources. Consent – whether freely given or withheld – must emanate from the Indigenous peoples concerned.⁴⁰ A similar approach is taken by the Committee on Economic, Social and Cultural Rights.⁴¹ Such consent of Indigenous peoples must be consistent with their right of self-determination.
47. Canada and New Zealand proposed “approval and involvement” as an alternative to “prior, informed consent”.⁴² Apparently, this former phrase is intended to allow for a lesser standard than the latter. As indicated by Canada in a meeting with Indigenous representatives, some provinces or territories are not in favour of recognizing “consent” of Indigenous peoples.
48. The Revised Draft Protocol indicates that “access to genetic resources shall be subject to the prior informed consent of the Party providing such resources” (art. 5(1)). No lesser standard should be used when the consent of Indigenous peoples is required.
49. **Term “Indigenous peoples” not used.** The Revised Draft Protocol uses the term “indigenous and local communities”, since this is the expression used in the *Convention on Biological Diversity*. However, since 1993, significant advancements have occurred in international law and “indigenous peoples” is the term generally used.

50. According to international law, the term “peoples” has a particular legal status and all “peoples” have the right of self-determination. This same legal status and right are not recognized in regard to “minorities” or “communities” *per se*.
51. Indigenous peoples have strived for more than 20 years 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 generally resolved. Today, the term “indigenous peoples” is used consistently by the General Assembly, Human Rights Council, treaty monitoring bodies, specialized agencies, special rapporteurs and other mechanisms within the international system.
52. States in Africa and Asia have indicated that most people in their regions qualify as “indigenous”, so there has been at times some hesitation to use the term “indigenous peoples” as the term is known in international law. Yet there are numerous international instruments that use the term “indigenous peoples” and were adopted with African and Asian State support.⁴³
53. The African Commission on Human and Peoples’ Rights has examined this issue and determined that “it has already accepted the existence of indigenous peoples in Africa through its WGIP⁴⁴ reports, and through the adoption of its Advisory Opinion on the UN Declaration on the Rights of Indigenous Peoples”.⁴⁵
54. In its 2007 Advisory Opinion on the UN Declaration on the Rights of Indigenous Peoples, the Commission concluded that “a definition is not necessary or useful as there is no universally agreed definition of the term and no single definition can capture the characteristics of indigenous populations.” Thus, the Commission indicated that “the major characteristics which allow the identification of Africa’s Indigenous Communities is the favored approach adopted and it is the same approach at the international level.”⁴⁶
55. In the 2006 *Abuja Declaration*,⁴⁷ African and South American States used the terms “indigenous peoples” and “indigenous peoples and communities” but not “indigenous and local communities”.⁴⁸ The term “local communities” appears so broad and general that it is difficult to determine what communities are included.
56. A denial of the status of Indigenous peoples as “peoples” under international law, which in effect denies them their right to self-determination or other human rights, would constitute racial discrimination.⁴⁹ It would violate the principle of “equal rights and self-determination of peoples”.⁵⁰

Human rights must prevail over consensus

57. Within the CBD process, Indigenous peoples have repeatedly expressed their appreciation to supportive States. It is only with such collaboration that standard-setting processes can effectively work.

58. The CBD process is especially challenging for Indigenous peoples since the rules are wholly weighted in favour of States. While Indigenous representatives are participating in these negotiations, Indigenous peoples remain highly vulnerable to State discretion and are not part of any consensus⁵¹ on provisions relating to Indigenous rights and concerns.
59. Since the final text is intended to reflect a consensus among State parties, it is often the *lowest common denominator* among their positions that is reflected in the Revised Draft Protocol. Such a substandard dynamic does not serve to fulfill the key objectives of the *Convention on Biodiversity*. In the Indigenous context, consensus is leading to unfair results.
60. International human rights standards are too often cast aside, in the interests of obtaining consensus. Such actions are not compatible with State obligations in the *Charter of the United Nations* and, more generally, international law. There is a tendency to excessively reinforce State sovereignty, while unjustly circumscribing Indigenous peoples' rights. Unjust actions by various States can severely impair the universality of Indigenous peoples' human rights.
61. Consensus can show a unity of purpose, but it loses its significance if achieved at the expense of human rights. A similar concern relating to consensus has surfaced at the General Assembly. As underlined by the UN Secretary-General:
- ... 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*.⁵²
62. 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.⁵³
63. All States in the current negotiations on the Revised Draft Protocol have a responsibility toward Indigenous peoples and the international human rights system. International cooperation can only be genuinely attained, if States promote and defend Indigenous peoples' human rights. To date, not a single State in the CBD process has consistently invoked the *UN Declaration* and emphasized the need to respect its standards.

64. If States are committed to working in partnership, Indigenous participation in the CBD process can lead to positive results. The principles of international cooperation and solidarity can have real meaning, if there is strong and consistent support among States for Indigenous peoples' human rights. As indicated in its preamble, the *UN Declaration* is proclaimed as "a standard of achievement to be pursued in a spirit of partnership and mutual respect".
65. Some States are highly supportive of Indigenous peoples. Regretfully, the same cannot be said about the self-proclaimed bloc known as JUSCANZ – Japan, United States, Canada, Australia and New Zealand. To date, the efforts of this bloc have been to lower human rights and other standards and show no regard for respecting the *UN Declaration*. While most States accept that Indigenous peoples' traditional knowledge is a cross-cutting issue in the Revised Draft Protocol, States in JUSCANZ have expressed a strong opposing view.

Safeguarding biodiversity and Indigenous human rights

66. We welcome endorsements of the *Declaration* by all States. Australia and New Zealand have reversed their opposition.⁵⁴ Sooner or later, Canada⁵⁵ and the United States⁵⁶ will likely join the world community in approving this human rights instrument.
67. Currently, a crucial test of their respective commitments is the positive contributions each of these States makes in current CBD negotiations. Their performance to date falls far short of the standards affirmed in the *UN Declaration*.
68. Indigenous peoples' traditional knowledge is of central importance to Indigenous societies and cultures, as well as to maintaining biological diversity worldwide. Such knowledge and related cultural and biological diversity must be safeguarded for present and future generations, in a manner consistent with Indigenous peoples' human rights.
69. As UN Secretary-General Ban Ki-moon emphasized at the opening of this year's session of the Permanent Forum:

Slowly but surely, people are coming to understand that the well-being and sustainability of indigenous peoples are matters that concern us all. ... Diversity is strength -- in cultures and in languages, just as it is in ecosystems.⁵⁷

Recommendations:

1. That the Permanent Forum include the following two paragraphs, as an integral part of its annual report for this ninth session:

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. Indigenous peoples have the right of self-determination, in

accordance with the two international human rights Covenants. An integral part of this right is the right to natural resources, including genetic resources. In any eventual Protocol on access and benefit-sharing, such human rights of Indigenous peoples must be respected. All member States have this obligation, as specified in the *UN Charter*. Failure to fulfill such obligations and to respect Indigenous peoples' human rights would lack validity and violate the peremptory norm that prohibits racial discrimination. Such illegal actions undermine the validity of any agreement. It is also essential to recognize Indigenous peoples as "peoples", in accordance with international law. To deny such legal status could have the effect of denying Indigenous peoples their human rights as "peoples". This would violate the principle of "equal rights and self-determination of peoples" and would be discriminatory.

The minimum standards affirmed in the *UN Declaration on the Rights of Indigenous Peoples* are universal in nature and must be an integral part of any Protocol on an access and benefit-sharing regime. The identities and cultures of Indigenous peoples are intimately linked to their lands, territories and resources and must be protected. In the current context of the CBD's draft Protocol, it must be recognized that cultural diversity and biodiversity have crucial linkages that are inseparable. National legislation or other effective measures can and should "ensure" the fair and equitable sharing of benefits arising from the utilization of traditional knowledge associated with genetic resources. Such measures must be carried out in collaboration with Indigenous peoples, in a manner consistent with article 38 of the *UN Declaration*. National legislation must not undermine the principle of universality, which applies to all human rights. The rights of Indigenous peoples to resources are inherent in nature and are not contingent on recognition by national law.

2. That the Permanent Forum urge the Contracting Parties of the *Convention on Biological Diversity* to carry out the following.

That, in order to fulfill their international and domestic obligations, the Contracting Parties of the *Convention on Biological Diversity*, work in partnership with Indigenous peoples towards the adoption of a Protocol on fair and equitable sharing of benefits from the utilization of genetic resources, in a manner that is fully consistent with the *United Nations Declaration on the Rights of Indigenous Peoples*. In order to ensure a fair and balanced Protocol, it is imperative that the Parties

- recognize the significance of the *UN Declaration* and its application to the Protocol;
- uphold the free, prior and informed consent of Indigenous peoples in relation to access of their genetic resources and associated traditional knowledge, respecting customary law, institutions and community procedures;

- ensure compliance with such consent and with mutually agreed terms (MAT) entered into with Indigenous peoples and local communities; and
- provide effective remedies and mechanisms for addressing grievances and access to justice for Indigenous peoples in the proposed Protocol.

Endnotes

¹ “Revised Draft Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising From Their Utilization to the Convention on Biological Diversity” in the report of the ninth meeting (first session) of the *Ad Hoc* Open-ended Working Group on Access and Benefit-sharing (UNEP/CBD/WG-ABS/9/3), Annex I.

An asterisk attached to the title of the Revised Draft Protocol provides: “This document, which was not negotiated, reflects the efforts by the Co-Chairs to elaborate the elements of a draft Protocol, and is without prejudice to the rights of the Parties to make further amendments and additions to the text.” Therefore, there is still some possibility to make changes.

² *Convention on Biological Diversity*, concluded at Rio de Janeiro 5 June 1992, entered into force 29 December 1993.

³ *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.”

⁴ For the purposes of the *Convention on Biological Diversity*, “biological resources” includes, *inter alia*, genetic resources (art. 2).

⁵ GA Res. 61/295 (Annex), UN GAOR, 61st Sess., Supp. No. 49, Vol. III, UN Doc. A/61/49 (2008) 15.

⁶ 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. 40: “The Declaration does not affirm or create special rights separate from the fundamental human rights that are deemed of universal application, but rather elaborates upon these fundamental rights in the specific cultural, historical, social and economic circumstances of indigenous peoples.”

⁷ *UN Declaration*, seventh preambular para.: “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”.

⁸ 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) at para. 85 (Conclusions).

⁹ 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 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 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.

¹⁰ 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.

¹¹ Inter-Agency Support Group on Indigenous Issues, Statement on the United Nations Declaration on the Rights of Indigenous Peoples, adopted at its Annual Meeting in September 2007.

¹² *Ad Hoc* Open-Ended Working Group on Access and Benefit-Sharing, *Study on Compliance in Relation to the Customary Law of Indigenous and Local Communities, National Law, Across Jurisdictions, and International Law: Note by the Executive Secretary*, [Study co-authored by Merle Alexander, Preston Hardison and Mattias Ahren], UNEP/CBD/WG-ABS/7/INF/5 (6 March 2009), at 12-17. At its ninth meeting, the Conference of the Parties, in paragraph 13 (e) of decision IX/12, on access and benefit-sharing, requested the Executive Secretary to commission this study.

¹³ *UN Declaration*, 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.”

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 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]

¹⁴ In regard to Indigenous cultural rights and related obligations, see *UN Declaration*, 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.”

¹⁵ UNESCO, “Message from Mr. Koïchiro Matsuura, Director-General of UNESCO, on the occasion of the International Day of the World’s Indigenous People 9 August 2008”, online: <http://www.un.org/esa/socdev/unpfii/en/news_internationalday2008.html>. UNESCO adds: “Each of these [instruments] recognizes the pivotal role of indigenous peoples as custodians of cultural diversity and biodiversity. Yet, in seeking to promote and protect indigenous cultures, these standard setting instruments also recognize the vulnerability of many of those cultures, the material, environmental and spiritual conditions of indigenous peoples, their worldviews and their intimate relationship with the land and natural resources in our rapidly changing world.”

¹⁶ *Ibid.*

¹⁷ Adopted at the General Conference of UNESCO, 32nd sess., Paris, 17 October 2003, *entered into force* on 20 April 2006.

¹⁸ Adopted at the General Conference of UNESCO, 33rd sess., Paris, 20 October 2005.

¹⁹ Organization of American States (Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples), *Report of the Chair on the Meetings for Reflection on the Meetings of Negotiations in the Quest for Points of Consensus (Washington, D.C., United States – November 26-28, 2007)*, OEA/Ser.K/XVI, GT/DADIN/doc.321/08 (14 January 2008), at 3:

The majority of States and all of the indigenous representatives supported the use of the UN Declaration as the baseline for negotiations and indicated that this represented a minimum standard for the OAS Declaration. Accordingly, the provisions of the OAS Declaration ha[ve] to be consistent with those set forth in the United Nations Declaration.

²⁰ 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), para. 58 [emphasis added]. Adopted without vote by General Assembly, 16 December 2005.

²¹ Resolution 25 adopted by the General Conference at its 31st session, (2001).

²² Permanent Forum on Indigenous Issues, *Information received from the United Nations system, Note by the Secretariat, Addendum: United Nations Educational, Scientific and Cultural Organization*, UN Doc. E/C.19/2005/4/Add.10 (14 March 2005), para. 19:

All over the world, sacred natural sites and cultural landscapes are expressions of traditional beliefs and land management systems of local and indigenous communities, and understanding the links between nature and culture is important for safeguarding both biological diversity and cultural integrity.

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, where reference is made to the “inextricable link between cultural and biological diversity“. Töpfer adds: “The very origins of environmental conservation lie buried in ancient cultures found throughout the world. ... Learning and respecting the ways of today’s indigenous and traditional peoples, and integrating them into environmental and developmental considerations, will prove indispensable for the survival of diversity.”

²³ Human 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. 41: “The right of self-determination is a foundational right, without which indigenous peoples’ human rights, both collective and individual, cannot be fully enjoyed.”

UN treaty-monitoring bodies have consistently applied the right of self-determination in identical article 1 of the two international human rights Covenants. 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.

²⁴ General Assembly, Report of Special Rapporteur Anaya, *supra* note 14, at para. 64: “Notably, indigenous peoples are called upon to exercise responsibilities for the preservation, exercise and development of their cultural heritage and expressions.” Notably, indigenous peoples are called upon to exercise responsibilities for the preservation, exercise and development of their cultural heritage and expressions. The Declaration further acknowledges indigenous peoples’ intergenerational responsibilities, including environmental stewardship, with regard to their traditional lands, territories and resources (articles 25 and 29).”

²⁵ New Zealand indicated to Indigenous representatives that it would table the proposal, but only if the word “significance” were deleted.

²⁶ Only three States remain opposed to the *Declaration* – Canada, New Zealand and United States – and each of them claims to be reviewing its position.

²⁷ African Commission on Human and Peoples' Rights, Communication No. 276/2003, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (2009) (not yet reported), para. 204.

²⁸ See Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: United States of America*, UN Doc. CERD/C/USA/CO/6 (8 May 2008), para. 29: “While noting the position of the State party with regard to the United Nations Declaration on the Rights of Indigenous Peoples ..., the Committee ... recommends that the declaration be used as a guide to interpret the State party’s obligations under the Convention relating to indigenous peoples.”

²⁹ *UN Declaration*, art. 45: “Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.”

³⁰ See, e.g., *Indigenous and Tribal Peoples Convention, 1989* (No. 169), art. 35; *Convention on the Rights of Persons with Disabilities*, art. 4(4); *Convention on the Elimination of All Forms of Discrimination against Women*, art. 23; *International Covenant on Civil and Political Rights*, arts. 5, 46 and 47; *International Covenant on Economic, Social and Cultural Rights*, arts. 5, 24 and 25; *Universal Declaration of Human Rights*, arts. 29 and 30; *Convention on the Rights of the Child*, art. 41; and *Protocol to the African Charter of Human and Peoples’ Rights on the Rights of African Women*, art. 31.

³¹ Revised Draft Protocol, 2nd to last preambular paragraph. See also article 5(2)(e) (access to genetic resources).

³² Similarly, see art. 5*bis* of the Revised Draft Protocol: “Parties shall take legislative, administrative, or policy measures, as appropriate, with the aim of ensuring that traditional knowledge associated with genetic resources held by indigenous and local communities is accessed with the prior and informed consent/approval and involvement of indigenous and local communities, and is based on mutually agreed terms.” [emphasis added]

³³ The representative of the African Group raised concern over Canada’s amendment, indicating that this would be like giving with one hand and taking away with the other.

³⁴ For use of the term “guarantee”, see, e.g., *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, art. 2(1); *UNESCO Universal Declaration on Cultural Diversity*, art. 4; *Indigenous and Tribal Peoples Convention, 1989* (No. 169), art. 2(1); *International Covenant on Civil and Political Rights*, arts. 2(2) and 26; *International Covenant on Economic, Social and Cultural Rights*, art. 2(2); *International Convention on the Elimination of All Forms of Racial Discrimination*, Art. 5; *Convention on the Rights of the Child*, art. 18(2); *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, 2000, preamble; *Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women*, art. 13; *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, Annex, 1998, art. 2; World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, *Programme of Action*, adopted in Durban, South Africa (8 September 2001), para. 15(a) (Indigenous peoples’ human rights);

Universal Declaration of Human Rights, art. 11(1); *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, preamble; and *Inter-American Democratic Charter*, 2001, art. 24.

³⁵ See also *International Covenant on Civil and Political Rights*, art. 47; and *International Covenant on Economic, Social and Cultural Rights*, art. 25, which include the identical provision: “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.”

³⁶ 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.” See also Human Rights Committee, *Concluding observations of the Human Rights Committee: Norway*, UN Doc. CCPR/C/79/Add.112 (5 November 1999) at para. 17: “... the Committee expects Norway to report on the Sami people's right to self-determination under Article 1 of the Covenant, including paragraph 2 of that article.”

³⁷ 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.”

³⁸ *UN Declaration*, art. 38: “States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.”

³⁹ United Nations World Conference on Human Rights, *Vienna Declaration and Programme of Action*, adopted June 25, 1993, U.N. Doc. A/CONF.157/24 (Part I) at 20 (1993), (1993) 32 I.L.M. 1661, para. 5:

All human rights are universal, indivisible, interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. ... [I]t is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and freedoms.

⁴⁰ See, e.g., *UN Declaration*, art. 11(2): “States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.”

⁴¹ 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:

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,

⁴² This same issue arises in art. 5*bis* of the Revised Draft Protocol.

⁴³ 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.

⁴⁴ WGIP refers to the Commission's Working Group of Experts on Indigenous Populations /Communities.

⁴⁵ African Commission on Human and Peoples' Rights, Communication No. 276/2003, *Centre for Minority Rights Development (Kenya)*, *supra* note 27, para. 159.

⁴⁶ *Advisory Opinion of the African Commission on Human and Peoples' Rights on the UN Declaration on the Rights of Indigenous Peoples*, 2007, paras. 10 and 11.

⁴⁷ *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.

⁴⁸ See also Permanent Forum on Indigenous Issues, "Results of the Copenhagen meeting of the Conference of the Parties to the United Nations Framework Convention on Climate Change; implications for indigenous peoples' local adaptation and mitigation measures", report compiled by Special Rapporteurs Victoria Tauli-Corpuz and Lars-Anders Baer, UN Doc. E/C.19/2010/18 (4 March 2010) at paras. 25 and 26, where the term "Indigenous peoples and communities" is used.

⁴⁹ See *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):

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. [emphasis added]

⁵⁰ 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]

⁵¹ "Consensus", as understood within the United Nations, refers to acceptance of a proposal where no objection is formally raised.

⁵² 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].

⁵³ 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.

⁵⁴ See Australia (Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs), "Statement on the United Nations Declaration on the Rights of Indigenous Peoples", Parliament House, Canberra (3 April 2009). See also Hon. Dr. Pita Sharples, Minister of Maori Affairs, New Zealand Permanent Mission to the

United Nations, Te Māngai o Aotearoa, “New Zealand Statement”, Ninth session of the United Nations Permanent Forum on Indigenous Issues, 19-30 April 2010 (19 April 2010).

⁵⁵ See Canada (Governor General), *A Stronger Canada. A Stronger Economy. Now and for the Future*. Speech from the Throne, 3 March 2010 at 19: “A growing number of states have given qualified recognition to the United Nations Declaration on the Rights of Indigenous Peoples. Our Government will take steps to endorse this aspirational document in a manner fully consistent with Canada’s Constitution and laws.”

See also the response to the Canadian government’s announcement in the Speech from the Throne in “Canada’s endorsement of the *UN Declaration* must be consistent with human rights”, joint statement by Indigenous peoples and human rights and faith-based organizations in Canada, 18 March 2010:

... human rights standards cannot merely condone or sustain the current practices and preferences of states, whether or not those practices and preferences are expressed in domestic law. To limit UN declarations in this way would defeat the purpose of having international standards, which are meant to inspire and guide improved protection for human rights, not simply reinforce the status quo.

⁵⁶ “Remarks by Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, at the UN Permanent Forum on Indigenous Issues”, USUN Press Release #064, April 20, 2010: “...the United States has decided to review our position regarding the U.N. Declaration on the Rights of Indigenous Peoples.”

⁵⁷ “Secretary-General, in Forum Remarks, Says Significant Steps Taken at United Nations on Indigenous Issues, but ‘We Cannot Even Begin to Be Content with Our Progress’”, Department of Public Information, New York, online: <http://www.un.org/News/Press/docs/2010/sgsm12848.doc.htm>.