

**Permanent Forum on Indigenous Issues  
Tenth session  
New York, 16-27 May 2011**

**Agenda Item 4(b): Dialogue with the Special Rapporteur  
on the rights of indigenous peoples**

**Speaker: Ghislain Picard, Assembly of First Nations of Quebec and Labrador**

**Joint Statement of: Assembly of First Nations, First Nations Summit, Grand Council of the Crees (Eeyou Istchee), Haudenosaunee of Kanehsà:ke, International Alliance of Indigenous and Tribal Peoples of Tropical Forests/Alianza Internacional de los Pueblos Indígenas y Tribales de los Bosques Tropicales, International Organization of Indigenous Resource Development (IOIRD), Inuit Tapiriit Kanatami, Louis Bull Cree Nation, Montana Cree Nation, Na Koa Ikaika KaLahui Hawaii, National Association of Friendship Centres, Native Women's Association of Canada Samson Cree Nation, Union of BC Indian Chiefs, First Peoples Human Rights Coalition, Amnesty International, Amnistie Internationale Canada, Canadian Friends Service Committee (Quakers), Hawai'i Institute for Human Rights, KAIROS: Canadian Ecumenical Justice Initiatives**

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

A new treaty - the *Nagoya Protocol* on access and benefit sharing arising from the use of genetic resources – was adopted in October 2010. This Statement will highlight some key points in the detailed Joint Submission on the *Protocol* that has been submitted by over 60 organizations to this 10<sup>th</sup> session of the Permanent Forum.

The Joint Submission emphasizes 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 in accordance with 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*, however, 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.

The 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.

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”.

**We recommend the following measures to the Permanent Forum on Indigenous Issues (PFII) for fair and equitable implementation of the *Protocol*, as well as possible revisions to its text. These recommendations include that the PFII:**

1. Urge Parties to the *Convention on Biological Diversity* and the *Nagoya Protocol* that, in relation to Indigenous peoples, positive actions are required on *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 the *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; and exclusion of representatives of Indigenous peoples from negotiation meetings where their rights may be undermined;
- 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” (*Convention*, art. 22(1); and *Protocol*, art. 4(1)), 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 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*.

2. Urge the Conference of the Parties (COP) to revise those decisions made in October 2010, where it altered the terms of the *Protocol* to the detriment of Indigenous peoples. Such actions exceed the authority of COP.