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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)**

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## Executive Summary

In its October 2011 Decision, the WIPO General Assembly invited the Intergovernmental Committee (IGC)<sup>1</sup> 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.

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<sup>1</sup> The IGC is WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore.

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WIPO Intergovernmental Committee on Intellectual Property and Genetic  
Resources, Traditional Knowledge and Folklore**

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**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.<sup>1</sup>

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.<sup>2</sup>

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.<sup>3</sup>

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*.<sup>4</sup> In order to attain its "objective" to "promote the protection of intellectual property throughout the world"<sup>5</sup>, 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 ...<sup>6</sup>

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<sup>7</sup> - consistent with the rights, customs, practices and worldviews of such peoples and communities.<sup>8</sup>

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*<sup>9</sup> on access and benefit sharing, such phrases continue to be used to undermine Indigenous peoples' human rights and their inherent nature.<sup>10</sup>
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*"].<sup>11</sup> 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".<sup>12</sup> This Joint Submission is intended to be 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.<sup>13</sup>

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.<sup>14</sup> Such participation is also a crucial aspect of FPIC.<sup>15</sup>
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.<sup>16</sup>

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.<sup>17</sup>
17. Proposals by Indigenous peoples and local communities should be accepted without conditions for inclusion in draft texts.<sup>18</sup> At any stage of the negotiations, consensus should not be a requirement.<sup>19</sup> 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.<sup>20</sup>

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.<sup>21</sup>

19. The UN Permanent Forum on Indigenous Issues urges WIPO and other international bodies and forums to facilitate Indigenous peoples' participation<sup>22</sup> 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.<sup>23</sup>

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.<sup>24</sup>

21. The international community is widely supportive of this right and principle, including the General Assembly,<sup>25</sup> specialized agencies,<sup>26</sup> national human rights institutions<sup>27</sup> and Indigenous peoples.<sup>28</sup> 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.<sup>29</sup>

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.<sup>30</sup> 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 ...<sup>31</sup>

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.<sup>32</sup>

### 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.<sup>33</sup>
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.<sup>34</sup>

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.<sup>35</sup>



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".<sup>36</sup> 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 ...<sup>37</sup>

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".<sup>38</sup>

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*<sup>39</sup> 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.<sup>40</sup>

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

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.<sup>42</sup>

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.<sup>43</sup>

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."<sup>44</sup> 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.<sup>45</sup> 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.<sup>46</sup>

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.<sup>47</sup>

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*.<sup>48</sup> 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".<sup>49</sup>

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".<sup>50</sup>
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.<sup>51</sup> 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.<sup>52</sup> 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.<sup>53</sup> 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.<sup>54</sup>

44. The prohibition against racial discrimination is a peremptory norm.<sup>55</sup> 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<sup>56</sup> 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.<sup>57</sup>

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".<sup>58</sup> The Commission has applied UNDRIP to specialized agencies<sup>59</sup> and African States.<sup>60</sup>
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.<sup>61</sup>
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.<sup>62</sup> 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".<sup>63</sup> 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.<sup>64</sup>

51. Indigenous peoples' cultural rights are human rights.<sup>65</sup> 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."<sup>66</sup> 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.<sup>67</sup>

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.<sup>68</sup>
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.<sup>69</sup> 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”.<sup>70</sup>
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 ...<sup>71</sup>
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.<sup>72</sup>

## 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*.<sup>73</sup> 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”.<sup>74</sup> States are required to exploit their own genetic resources “in accordance with the Charter of the United Nations and the principles of international law”.<sup>75</sup>
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.<sup>76</sup>
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.<sup>77</sup> Such kinds of distinctions have been held to be discriminatory by the Committee on the Elimination of Racial Discrimination,<sup>78</sup> as underlined by the Permanent Forum on Indigenous Issues.<sup>79</sup>
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.<sup>80</sup> This would be a gross distortion of the original intent.<sup>81</sup> Massive dispossessions could result globally from such an arbitrary approach inconsistent with the *Convention*.<sup>82</sup>
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".<sup>83</sup>

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".<sup>84</sup> 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.<sup>85</sup>

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;<sup>86</sup>
- 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";<sup>87</sup>
- 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;<sup>88</sup>
- 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;<sup>89</sup>
- "prior and informed consent" of Indigenous peoples was included in the *Protocol*, but regrettably questionable and ambiguous terms were added that some States are likely to use to circumvent the obligation of consent.<sup>90</sup>

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;<sup>91</sup>
  - 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;<sup>92</sup>
  - 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;<sup>93</sup> 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.<sup>94</sup>
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".<sup>95</sup>
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<sup>96</sup> 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;<sup>97</sup>
  - iii) concise disclosure of intent when making specific proposals;
  - iv) consistent use of the term "indigenous peoples" (*e.g.* "indigenous peoples and local communities");<sup>98</sup>
  - v) consistent use of the term "free, prior and informed consent"; and
  - vi) use of terms or phrases to avoid compliance not acceptable.<sup>99</sup>
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<sup>100</sup> in order to implement the following **draft recommendations**:
1. In accordance with the Decision of the WIPO General Assembly (October 2011),<sup>101</sup> 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

<sup>1</sup> 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]

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

<sup>3</sup> *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]

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

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<sup>5</sup> *Ibid.*, article 3.

<sup>6</sup> *Ibid.*, article 4. [emphasis added]

<sup>7</sup> 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.

<sup>8</sup> 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.

<sup>9</sup> *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.

<sup>10</sup> 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.

<sup>11</sup> 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](http://www.wipo.int/export/sites/www/tk/en/documents/pdf/note_igc_participation.pdf).

<sup>12</sup> 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>.

<sup>13</sup> 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]

<sup>14</sup> United Nations Development Group (UNDG), “United Nations Development Group Guidelines on Indigenous Peoples’ Issues”, February 2008, [www2.ohchr.org/english/issues/indigenous/docs/guidelines.pdf](http://www2.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.

<sup>15</sup> *Ibid.* at 28: “Consultation and participation are crucial components of a consent process.”

<sup>16</sup> 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]

<sup>17</sup> 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.

<sup>18</sup> *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.

<sup>19</sup> 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](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.”

<sup>20</sup> 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]

<sup>21</sup> 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.

<sup>22</sup> 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.

<sup>23</sup> *Ibid.* [emphasis added]

<sup>24</sup> 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.

<sup>25</sup> 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]

<sup>26</sup> 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.”

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

<sup>28</sup> 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]

<sup>29</sup> 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.

<sup>30</sup> 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):

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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.

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

<sup>32</sup> 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.

<sup>33</sup> 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.

<sup>34</sup> 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]

<sup>35</sup> 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)*, 35<sup>th</sup> sess., UN Doc. E/C.12/GC/17 (12 January 2006), para. 2.

<sup>36</sup> 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].

<sup>37</sup> *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".

<sup>38</sup> *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)



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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.

<sup>39</sup> *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).

<sup>40</sup> 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]

<sup>41</sup> 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]

<sup>42</sup> *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]

<sup>43</sup> 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]

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

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<sup>45</sup> 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.

<sup>46</sup> *Ibid.* [Oguamanam], at 81.

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

<sup>48</sup> 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."

<sup>49</sup> *Ibid.*

<sup>50</sup> 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."

<sup>51</sup> 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.

<sup>52</sup> 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.

<sup>53</sup> 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).

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

<sup>55</sup> Ian Brownlie, *Principles of Public International Law*, 5<sup>th</sup> 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".

<sup>56</sup> 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 universal framework of minimum standards for the survival, dignity, well-being and rights of the world's indigenous peoples. ... It outlaws discrimination against indigenous peoples and promotes their full and effective participation in all matters that concern them. [emphasis added]

<sup>57</sup> 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.

<sup>58</sup> 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.

<sup>59</sup> *Ibid.*, para. 2.

<sup>60</sup> *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.”

<sup>61</sup> 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.

<sup>62</sup> 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.

<sup>63</sup> 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,

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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.”

<sup>64</sup> *Ibid.*, para. 87 (Conclusions). [emphasis added]

<sup>65</sup> 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]

<sup>66</sup> 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.

<sup>67</sup> *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.

<sup>68</sup> 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, 15<sup>th</sup> Activity Report 2001-02, 31 at para. 44:

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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]

<sup>69</sup> 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."

<sup>70</sup> 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]

<sup>71</sup> 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]

<sup>72</sup> 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, 15<sup>th</sup> 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,

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

<sup>73</sup> *Convention on Biological Diversity*, concluded at Rio de Janeiro 5 June 1992, entered into force 29 December 1993.

<sup>74</sup> *Ibid.*, article 1.

<sup>75</sup> *Ibid.*, article 3.

<sup>76</sup> 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.

<sup>77</sup> *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](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.

<sup>78</sup> 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]

<sup>79</sup> 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.

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<sup>80</sup> 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. 41 that, 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]

<sup>81</sup> 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*.

<sup>82</sup> 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]

<sup>83</sup> 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), <http://quakerservice.ca/wp-content/uploads/2011/12/Nagoya-Protocol-GCCEI-Joint-Submission-on-Canadas-possible-signature-Oct-28-11.pdf>, paras. 50-68.

<sup>84</sup> *Ibid.*, para. 15.

<sup>85</sup> *Ibid.*, para. 154.

<sup>86</sup> 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.

<sup>87</sup> *Ibid.*, paras. 26-31.

<sup>88</sup> *Ibid.* paras. 37-56.

<sup>89</sup> *Ibid.*, paras. 112-120.

<sup>90</sup> *Ibid.*, paras. 126-136.

<sup>91</sup> *Ibid.*, paras. 149-153 and 155-171.

<sup>92</sup> *Ibid.*, paras. 5, 39, 166, 186, 199, 205-206, 210 and 228(x).

<sup>93</sup> *Ibid.*, paras. 78-79 and 99.



<sup>94</sup> *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]

<sup>95</sup> 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.

<sup>96</sup> 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."

<sup>97</sup> 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)

<sup>98</sup> 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.

<sup>99</sup> 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."

<sup>100</sup> 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.

<sup>101</sup> 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.