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Nagoya Protocol: Comments on Canada's Possible Signature and Draft Domestic Policy

Joint Submission of the Grand Council of the Crees (Eeyou Istchee); Assembly of First Nations; Union of British Columbia Indian Chiefs (UBCIC); Federation of Saskatchewan Indian Nations; Assembly of Manitoba Chiefs; Chiefs of Ontario; Native Women's Association of Canada; Assembly of First Nations of Québec and Labrador/Assemblée des Premières Nations du Québec et du Labrador; Atlantic Policy Congress of First Nations Chiefs Secretariat; Innu Council of Nitassinan; Yukon Aboriginal Women's Council; Maritime Aboriginal Peoples Council; Haudenosaunee of Kanehsatà:ke; Kakisiwew Treaty Nation; IKANAWTIKET Environmental Incorporated; Canadian Friends Service Committee (Quakers)

Introduction

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

2. On September 22, 2011, the government of Canada sent an email to Indigenous organizations in Canada requesting their views by October 21 on whether Canada should sign the *Nagoya Protocol*. Specifically, the email stated:

> The Government of Canada is seeking views of Aboriginal communities in Canada regarding its potential signature of the *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity*.
>
> ... Now the Government of Canada must consider w[h]ether to sign this new international treaty. The deadline for countries to sign the Protocol is February 1, 2012. Signature indicates the intent to consider ratification at a later date.

Aboriginal communities have been engaged in discussions on Access and Benefit Sharing over the last several years, to advise on both the international negotiations and on related domestic approaches.

Please find attached the following documents to assist your consideration:

- *Discussion Document* produced by Environment Canada in consultation with the federal Interdepartmental Committee on Access and Benefit Sharing;
- The official text of the *Nagoya Protocol* as adopted (for more on this see www.cbd.int/abs/);
- *Domestic Policy Guidance on Access and Benefit Sharing* for genetic resources. This document was developed collaboratively by Canada's Federal, Provincial and Territorial governments. It does not constitute official government policy and is included for reference purposes only; and,
- A comparison of the key provisions of the *Nagoya Protocol* and the *Domestic Policy Guidance*.

3. A second email was sent on September 27, indicating: "This email is to inform you that Environment Canada is also hosting a series of meetings across the country to solicit views on signature of and discuss issues of interest with regard to the Nagoya Protocol. ... The first of these meetings will take place in the Pacific Region on ... **October 4th**" in Vancouver. Aside from an opening presentation on the *Nagoya Protocol* and closing remarks, the meeting only allowed for 75 minutes for plenary discussion.

4. A similar email was sent on October 6, indicating that two-hour meetings were also scheduled for the Québec Region in Montreal (Oct. 13); Ontario Region in Toronto (Oct. 14); Atlantic Region in Dartmouth, N.S. (Oct. 17); and National Capital Region in Gatineau (Oct. 20).

5. The one-month deadline of October 21 imposed by the Canadian government did not allow adequate time to fully assess and respond to the government's three documents. This is evident, in view of the complexities of the *Nagoya Protocol* and the far-ranging issues raised in the government's three documents.

6. On October 20, the deadline was extended to October 28. This deadline is still insufficient for Indigenous organizations to carefully analyze Canada's draft documents, consult internally and collaborate with other environmental and human rights organizations. A number of Indigenous organizations have indicated that they simply do not have the funding to determine the legal and other implications involved.

7. The Canadian government has not provided funding to Indigenous peoples in Canada to effectively participate in the negotiations of the *Protocol* and in its ongoing implementation.

A few Indigenous representatives from national Aboriginal organizations were allowed to be a part of the Canadian delegation in international meetings, but they were not permitted to disclose information to other Indigenous people.

8. In contrast, a much more reasonable time-frame has been provided for consideration and involvement by federal, provincial and territorial governments. The draft *2010 Domestic Policy Guidance for Canada*[2] was developed jointly by the Federal – Provincial – Territorial Task Force since 2009. Only *after* it was approved by the Deputy Ministers FPT Committee on Biodiversity was the Canadian government willing to canvass views of Indigenous organizations on whether Canada should sign the *Nagoya Protocol*.

9. We object to such double standard and the ongoing lack of any genuine consultation. Such actions further compound the problems generated by the unilateral positions taken by the government during the negotiations on and implementation of the *Nagoya Protocol*.

10. It is unjust for the federal government to rush discussions with Indigenous organizations on the *Protocol*, as evident from the government's emails. While the deadline for countries to "sign" the *Protocol* is February 1, 2012, Canada can accede to this treaty at any later date (article 33(2)).

11. The Grand Council of the Crees (Eeyou Istchee) prepared a number of detailed joint submissions, in collaboration with many Indigenous organizations in Canada and other regions of the world.[3] The diverse concerns that have been repeatedly raised to date have been virtually ignored by the Canadian government.

12. At previous international meetings, federal officials repeatedly stated that they do not have any flexibility to alter government positions. Representatives of Indigenous organizations have expressed frustration that there is little or no genuine dialogue with the government or consultations.

13. Based on the Canadian government's ongoing conduct, there is a profound lack of confidence that implementation of the *Nagoya Protocol* will take place in good faith. Climate change constitutes a major threat to biodiversity and Indigenous peoples.[4] Yet the government continues to fall far short in terms of any reasonable and effective response.[5]

14. In the Indigenous context, the government is not respecting the rule of law in Canada or internationally. In relation to the *Protocol*, Indigenous peoples' human rights continue to be ignored and undermined by government positions. The democratic participation of Indigenous representatives has been rendered ineffective by ongoing government actions and the lack of timely information.

15. The draft Domestic Policy Guidance for implementing the *Protocol*, if adopted, would unilaterally alter the terms of this new treaty to the detriment of Indigenous peoples and the international system. The proposed policy perpetuates the discriminatory approach on genetic resource rights that the Canadian government insisted upon during the negotiations.

16. **In light of such serious shortcomings, this Submission concludes that it would not be beneficial or fair for the Canadian government to sign the *Protocol* at this time. 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.**

17. We strongly urge that the government first consult Indigenous peoples and accommodate our concerns. Such a process, if undertaken with commitment and mutual respect, could result in a domestic policy that is beneficial to Indigenous peoples and Canada as a whole.

18. The organizations endorsing this Submission are pleased to provide some preliminary comments in its present response. However, we reserve the right to raise further concerns in the future. This is especially important, since the rights, security and well-being of present and future generations of Indigenous peoples and individuals are at stake.

19. As an integral part of our current response, we are also sending by email a previous joint document entitled "Nagoya Protocol on Access and Benefit Sharing: Substantive and Procedural Injustices relating to Indigenous Peoples' Human Rights".[6] We request that the issues raised in this latter document be also fully taken into account.

20. We reiterate our strong support for the central objective of both the *Convention on Biological Diversity*[7] (CBD) and the *Nagoya Protocol*, namely, "*fair and equitable* sharing of the benefits arising out of the utilization of genetic resources".[8] However, in relation to Indigenous peoples, the text of the *Protocol* exceeds the authority established under the *Convention* insofar as this new text may serve to undermine their human rights.

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

22. Such key elements are not adequately included in the *Nagoya Protocol*. In relation to Indigenous peoples, the Canadian government has played a substantial role in lowering standards and generating uncertainty in this new treaty.

I. Failure to consult Indigenous peoples and accommodate their concerns

23. Indigenous peoples are rights holders and not simply stakeholders. The current government solicitation for opinions as to whether Canada should sign the *Nagoya Protocol* does not constitute a process for consulting and accommodating Indigenous peoples.

24. Indigenous peoples' rights are increasingly addressed in international forums, such as those relating to the *Convention on Biological Diversity* and the *Protocol*. Yet to date, the government of Canada has refused to even acknowledge or discuss its obligations to consult and accommodate Indigenous peoples under Canadian and international law.

25. Prior to and during the negotiations on the *Protocol*, the government has consistently ignored or refused to consult and accommodate Indigenous peoples. The same failure to fulfill its constitutional and international obligations is now occurring in regard to the *Protocol*'s implementation in international forums and at home. Such ongoing violations of the rule of law by Canada are unacceptable.[9]

26. In order to ensure a cooperative process, we urge the Canadian government to provide timely information on its positions. For example, it took more than three and a half months for the Canadian government to provide a copy of its own public statement made at the first Intergovernmental Committee meeting (ICNP) to implement the *Protocol* in June 2011. No such information was shared in advance. By the time our organizations received a copy, the opportunity to address Canada's position was long passed.

27. The failure to provide "all necessary information in a timely way" on Canada's positions violates its duty to consult and accommodate Indigenous peoples.[10] Such actions are incompatible with basic principles of democracy, accountability, transparency and good governance. They also undermine the rights of Indigenous peoples to full and effective participation, as required by the *UN Declaration on the Rights of Indigenous Peoples* (UNDRIP) and other international human rights law. In regard to the *Nagoya Protocol*, the Conference of the Parties has repeatedly called for the full and effective participation of Indigenous peoples.

28. As indicated by the Supreme Court of Canada, the duty to consult and accommodate Indigenous peoples is not met by having some kind of general public process. The same is true at the international level.[11] The Crown must not only provide adequate information, but also indicate what might be the potential adverse impacts on Indigenous rights and interests.

> The duty here has both informational and response components. ... The Crown was required to provide notice to the Mikisew and to engage directly with them (and not, as seems to have been the case here, as an afterthought to a general public consultation with Park users). This engagement ought to have included the provision of information about the project addressing what the Crown knew to be Mikisew interests and what the Crown anticipated might be the potential adverse impact on those interests. The Crown was required to solicit and to listen carefully to the Mikisew concerns, and to attempt to minimize adverse impacts on the Mikisew hunting, fishing and trapping rights.[12]

29. The Federal Court of Canada has referred to the above paragraph in *Mikisew* and concluded as follows:

> The Court ... held that a public forum process is not a substitute for formal consultation. That right to consultation takes priority over the rights of other users. Therefore the public comment process in January 2002 in respect of the Cooperation Plan and that of July 2004 in respect of the Regulators' Agreement, JRP Agreement and Terms of Reference is not a substitute for consultation.[13]

30. In its September 2011 "Discussion Document", the government describes its "citizen engagement processes" on the *Nagoya Protocol*:

> It is the policy of the Government of Canada to involve Canadians in the development, design, and evaluation of public policies, programs, and services through dialogue and citizen engagement processes that are transparent, accessible, accountable, supported by factual information, and that take into account the broad diversity of Canada.[14]

31. As substantiated throughout our present Submission, it is misleading and inaccurate for the government to conclude that its public processes are or have been " transparent, accessible, accountable, supported by factual information". The Crown has not fulfilled its duty to consult and accommodate Indigenous peoples.

32. The federal government states that the "draft 2010 Domestic Policy Guidance for Canada was developed jointly by the Federal – Provincial – Territorial Task Force in 2009 and 2010 and approved by the Deputy Ministers FPT Committee on Biodiversity".[15] However, provincial and territorial governments also have a duty to consult and accommodate Indigenous peoples when there is a potential to affect their rights.[16] We are not aware that any such consultations have been conducted by such governments to take into account Indigenous concerns.

33. In light of its legal responsibilities, the federal government should not initiate or be engaged in processes that exclude or marginalize Indigenous peoples and their concerns.

II. General comments on Canada's three documents

No mention of biopiracy

34. A key problem that exacerbates the impoverishment of Indigenous peoples is “biopiracy”.[17] Biopiracy has been described as “the unauthorised commercial use of genetic resources and TK without sharing the benefits with the country or community of origin, and the patenting of spurious ‘inventions’ based on such knowledge and resources”.[18]

35. Biopiracy is not specifically referred to in the *Nagoya Protocol*, since some States objected to its inclusion. However, Canada's domestic policy should not shy away from any mention of this global problem. As described below, if certain precautions are not taken to safeguard

Indigenous peoples' rights to genetic resources, the strategies that the Canadian government is using to weaken their rights may well result in dispossession and biopiracy.

No mention of "human rights"

36. The Canadian government's three documents (cited above) fail to make any specific mention of "human rights" and to integrate a human rights-based approach. The Independent Expert in the field of cultural rights has emphasized that the right to cultural heritage - which includes traditional knowledge and genetic resources - is a collective and individual human right:

> ... the right of access to and enjoyment of cultural heritage must be considered both as an individual and a collective human right. In the case of indigenous peoples, this also stems from the Declaration on the Rights of Indigenous Peoples.[19]

37. As affirmed in the *Convention on Biological Diversity*, Canada and other States have a right to exploit their own genetic resources "in accordance with the Charter of the United Nations and principles of international law".[20] These qualifications on State power unequivocally includes the duty of States to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction".[21]

38. Since its election in 2006, the government has not acknowledged that the collective rights of Indigenous peoples are human rights. During the negotiations of the *Protocol* and thereafter, the government ignored the human rights concerns raised by Indigenous organizations. As the Permanent Forum emphasized in its May 2011 Report:

> ... the Permanent Forum reiterates its long-standing position of encouraging the United Nations, its organs and specialized agencies, as well as all States, to adopt a human rights-based approach. At the international, regional and national level, the human rights of indigenous peoples are always relevant if such rights are at risk of being undermined. ... They must be respected in any context specifically concerning indigenous peoples, from environment to development, to peace and security, and many other issues.[22]

39. In environmental processes, member States still have a duty to respect their human rights obligations under the *Charter of the United Nations* and other international law. There is no blanket exception for environmental agreements.

40. Article 4(1) of the *Protocol* stipulates: "The provisions of this Protocol shall not affect the rights and obligations of any Party deriving from any existing international agreement". Such obligations would include the human rights obligations of Canada in international agreements.

No mention of UNDRIP

41. The documents also fail to refer to and incorporate the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) - even though UNDRIP is referred to in the preamble of the *Protocol*. To date, the Canadian government has not acknowledged that UNDRIP is a human rights instrument, even though it is recognized as such internationally.[23]

42. For years, the Canadian government opposed UNDRIP and sought to undermine its standards in diverse international and domestic forums, including those relating to biodiversity and climate change.[24] Since Canada's endorsement of UNDRIP in November 2010, the government's actions to lower the standards in this human rights instrument have not significantly changed.

43. Article 4(3) adds: " This Protocol shall be implemented in a mutually supportive manner with other international instruments relevant to this Protocol." The preamble of the *Protocol* recognizes "international instruments related to access and benefit-sharing should be mutually supportive with a view to achieving the objectives of the Convention".

44. Despite Canada's diverse international human obligations, the government continues to take positions that are inconsistent with UNDRIP. This is true not only in regard to the right of Indigenous peoples to full and effective participation in international forums, but also their right to cultural heritage, including genetic resources.

45. Article 31(1) of UNDRIP 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".

46. 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.[25]

No mention of interpretative provisions favouring Indigenous peoples

47. The government's three documents refer to provisions in the *Nagoya Protocol* that would affect the interpretation of State rights and obligations. However, these documents fail to underline that UNDRIP is explicitly referred to in the preamble of the *Protocol* and must be used to interpret provisions that relate to Indigenous peoples.

48. The preamble of the *Protocol* also affirms: "nothing in this Protocol shall be construed as diminishing or extinguishing the ... rights of indigenous [peoples]".[26] Yet this too has not been factored into the government's draft Domestic Policy Guidance and related analysis.

49. All of the above omissions or failures serve to create a serious imbalance in the draft domestic policy of the Canadian government. They detract from the objectives of the *Protocol* and serve to unfairly skew Canada's approach in favour of non-Indigenous users and providers of genetic resources.

Discrimination in *Protocol* simply ignored

50. A key example of discrimination is Canada's actions to restrict Indigenous peoples' rights to genetic resources in the *Nagoya Protocol*. 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.[27]

51. The term "established" might only refer to situations where a particular Indigenous people or local community can demonstrate that its right to genetic resources is affirmed by domestic legislation, agreement or judicial ruling.[28] If such rights are not so proved, they might not receive any protection under the *Nagoya Protocol* – regardless of how strong the evidence that such rights exist.[29]

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

53. Such kinds of distinctions have been held to be discriminatory by the Committee on the Elimination of Racial Discrimination.[30] In its 2011 report, the Permanent Forum on Indigenous Issues has expressed concern that the "established rights" approach in the *Protocol* is too limiting and discriminatory.[31]

54. Such approach has also been ruled to be "not honourable" by the Supreme Court of Canada.[32] At home, the Canadian government has been unsuccessful[33] in its attempts to restrict its constitutional duty to consult Indigenous peoples to situations where their rights were already "established".

55. The prohibition against racial discrimination is a peremptory norm.[34] Therefore, even if certain discriminatory provisions have been adopted by consensus among Contracting Parties, these articles have no legitimacy or validity.

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

57. Canadian government officials in Nagoya, Japan refused to disclose to Indigenous representatives what positions Canada would take in such exclusionary meetings. Subsequent to such meetings, the same officials refused to indicate what Canada intended in the provisions that solely referred to "established" rights.

58. Canada was one of the States that exploited the practice of seeking consensus among the Parties, with a view to diminishing or ignoring the rights of Indigenous peoples and applying the *lowest common denominator* among the Parties' positions.[35]

59. Such actions by Canada and other States resulted in both substantive and procedural injustices of a most fundamental nature. In relation to international environmental processes - such as the negotiations of the *Protocol* - the Expert Mechanism on the Rights of Indigenous Peoples has criticized the exploitation of consensus as follows:

> 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.[36]

60. In restricting Indigenous rights to genetic resources to "established" rights under domestic law, the Canadian government ignored the peremptory norm of discrimination, as well as the possible dispossession of Indigenous peoples.

61. The government has also chosen to disregard a number of essential factors. These include: the objective of the *Convention* and *Protocol* that requires "fair and equitable" benefit sharing, taking into account "all rights";[37] Indigenous peoples' right of self-determination, which includes resource rights;[38] right to culture, including cultural heritage;[39] State obligation in the *Convention* to "protect and encourage customary use" of genetic resources;[40] and interpretive provisions in the *Protocol* that would include UNDRIP[41] and would not affect the human rights and other obligations of States.[42]

62. In its September 2011 "Discussion Document", the government appears to deny Indigenous peoples in Canada any customary rights over genetic resources that are not "established" under domestic law.

> Article 5.2 requires that benefits arising from the utilization of genetic resources held by ILCs, <u>subject to domestic law regarding established rights</u> of the ILCs over these genetic resources, are shared in a fair and equitable way with the communities concerned, based upon MAT.[43]

63. In the same Document, it is suggested that "established" rights may only be recognized in regard to Indigenous peoples with "comprehensive land-claim and self-government agreements which provide them authority to manage their lands":

> Aboriginal communities in Canada that have completed comprehensive land-claim and self-government agreements which provide them authority to manage their lands would likely have responsibility for establishing mechanisms by which they can grant PIC for access to these genetic resources, and to establish MAT for benefit-sharing.[44]

64. In the draft Domestic Policy Guidance, the Executive Summary provides:

> In Canada, responsibility for managing genetic resources flows from the broader resource management rights and responsibilities of federal, provincial and territorial governments, and Aboriginal peoples under self-government and land claims agreements.[45]

65. The information provided by the government in its three documents is highly restrictive and insufficient. In regard to the access and benefit regime in the *Nagoya Protocol*, it would appear that the government's draft Domestic Policy may only recognize rights related to genetic resources for those Indigenous peoples that have "completed land-claim and self-government agreements".

66. For such Indigenous peoples, it is unclear what areas of land or water in their own traditional territory would be included. Contrary to the government's perspective, their inherent customary rights to genetic resources may well extend beyond the areas they "manage" or "govern".

67. The draft Domestic Policy appears to unjustly exclude all other Indigenous peoples, unless they can demonstrate "established" or proven rights to genetic resources. Those peoples facing possible dispossession of their customary rights to genetic resources may include Indigenous peoples with historic treaties or specific claims agreements or uncompleted land-claim and self-government agreements.

68. If this is an accurate description, such an arbitrary and self-serving government policy would be discriminatory.

III. Comments on "Assessment of the draft 2010 Domestic Policy Guidance for Canada (Managing Genetic Resources in the 21st Century) vis-à-vis obligations of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of the Benefits Arising from their Utilization to the Convention on Biological Diversity"[46]

Unilateral changes to treaty wording

69. On **page 1** of this comparison document, it is disclosed that the draft 2010 Domestic Policy Guidance for Canada unilaterally alters the definition of genetic resources in article 2 of the *Convention* (which is not limited to only "economic, environmental or social value"):

> Genetic resources are plant, animal, and microbial materials that contain functioning genes that have actual or potential economic, environmental or social value.

70. For example, in cases where genetic resources have spiritual value to Indigenous peoples and are customarily used in such manner, it is not clear whether such value would be excluded under the draft Domestic Policy.

71. Similarly, the definition in the draft Domestic Policy Guidance is limited to plant, animal or microbial material. However, the definition of "genetic material" in article 2 of the *Convention* extends also to "other" origins.

72. It is not an acceptable or legitimate practice for Canada to unilaterally digress from the *Protocol* or *Convention*, so as to potentially limit its scope or terms. If every State did the same, such treaties could conceivably lose all meaning and legal effect.

73. Further, the draft Domestic Policy derogates from the "objectives" in the *Nagoya Protocol* and creates a new classification called "main goals":

> The objectives of ABS policy in Canada are:
> 1) promoting the conservation and sustainable use of Canada's biodiversity;
> 2) improving Canada's competitiveness in the bio-based economy;
> 3) support ethical scientific research and development;
> 4) support Canada's foreign policy objectives;
> 5) Contribute to the improvement of the health of Canadians.
>
> The main goals of the draft Policy Guidance are to facilitate the ***sustainable access*** to genetic resources and to provide for the fair and equitable ***sharing of benefits*** arising from their use among Canadians. [underline added]

74. Although omitted from the government's comparison document, the draft Domestic Policy Guidance includes an additional "objective" - "Foster regional and Aboriginal development".[47]

75. Article 1 of the *Protocol* indicates that **the central objective is "fair and equitable sharing of the benefits arising from the utilization of genetic resources, ... taking into account all rights over those resources".**[48] Yet this key aspect is not included in the draft policy as an "objective", but as a "main goal". There is no apparent justification for removing this core aspect from Canada's objectives. Nor is there any justification for altering this objective by deleting any reference to "taking into account all rights". This latter phrase from the *Protocol* and *Convention on Biological Diversity* serves to reinforce the need for a rights-based approach.

76. In addition, there are some new objectives added to the draft Domestic Policy that are not in the *Protocol*. Additional objectives could prove useful, if they are crafted in a balanced manner consistent with the *Protocol* and *Convention*.

77. The new objective of "improving Canada's competitiveness in the bio-based economy" gives rise to some concern. For example, it could serve to reinforce third party access to and benefits from genetic resources on Indigenous lands and territories. This raises serious concerns, since there is no balancing objective to respect, protect and fulfill the rights of Indigenous peoples to genetic resources.

78. A further concern is the new objective in the draft Domestic Policy to "support Canada's foreign policy objectives". It is not clear what such foreign policy objectives would entail. For example, advancing trade at the expense of Indigenous peoples and their rights is not a "fair and equitable" objective consistent with the *Protocol* and *Convention*.

79. For the above reasons, it is not accurate to conclude on page 1 of the comparison document: "The objectives and goals of the draft Domestic Policy Guidance are consistent with the objective of the Protocol."

80. On **page 2** of the comparison document, it is indicated that the scope of the draft 2010 Domestic Policy Guidance for Canada will not include genetic resources purchased or traded as commodities (*e.g.*, trees used for lumber). This exclusion is explained as follows:

> The Protocol does not specifically exclude genetic resources acquired for personal use or consumption or genetic resources purchased or traded as commodities.
>
> However, the Protocol is restricted to access to genetic resources *for their utilization* and benefit-sharing to *benefit arising from their utilization*. In Article 2 (Use of Terms) of the Protocol, ***utilization of genetic resources*** is defined as "means to conduct research and development on the genetic and/or biochemical composition of genetic resources, including through the application of biotechnology as defined in Article 2 of the Convention".

81. The above "exclusion" and explanation requires further study of the *Protocol* and *Convention*. However we wish to emphasize that, where Indigenous peoples may have customary or other rights to these resources, federal, provincial or territorial governments in Canada have no right to trade or otherwise transfer such genetic resources to third parties. This conclusion is consistent with Canadian and international law. It is also consistent with article 3 of the *Convention on Biological Diversity* that requires States to exploit their own genetic resources "in accordance with the Charter of the United Nations and principles of international law".

82. On page 2, the scope of the draft Domestic Policy Guidance is described as follows:

> The draft Domestic Policy Guidance addresses traditional knowledge associated with genetic resources, with the exception of traditional knowledge associated with genetic resources that is in the public domain ...

83. On the same page, it is noted that:

> Contrary to the draft Domestic Policy Guidance, the Protocol does not explicitly include or exclude traditional knowledge associated with genetic resources that is in the public domain.

84. It would be critical for the draft Domestic Policy Guidance to explicitly distinguish traditional knowledge associated with genetic resources that is in the "public domain" from that which is "publicly available".[49] Any domestic policy in Canada must protect traditional knowledge that is "publicly available". Such a distinction is supported by expert opinion.[50]

Draft Domestic Policy alters relationship of *Protocol* with other instruments

85. On **pages 2-3**, the Draft Domestic Policy Guidance provides:

> **Relationship with other agreements:** The draft Domestic Policy Guidance states that access and benefit sharing policy in Canada should recognize international agreements or arrangements dealing with the subject matter that are relevant to Canada and in harmony with access and benefit sharing policy in Canada.

86. The underlined portions in the above paragraph would add qualifiers that unilaterally alter the meaning in the *Protocol*. Therefore, such changes are not acceptable. They would substantively alter articles in the *Convention* and *Protocol*, which affirm that nothing in these instruments shall affect the obligations of Contracting Parties deriving from "any existing international agreement". Such obligations would necessarily include respect and protection of human rights in a wide range of international agreements.

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

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

87. The draft Domestic Policy Guidance would unilaterally alter the obligation ("shall") to a possibly discretionary standard ("should"). It would also limit international agreements or arrangements to those "dealing with the subject matter that are relevant to Canada and in

harmony with access and benefit sharing policy in Canada". Such qualifications could be unjustly used to evade Canada's international human rights obligations.

88. At the same time, the draft Domestic Policy Guidance makes the following claims which are misleading and erroneous. It again compares the *Protocol* to the draft Policy, instead of the reverse:

> Article 4 of the Protocol does not contradict the draft Domestic Policy Guidance. However, the key difference between the draft Policy Guidance and the Protocol is that the latter is an obligation (i.e., should vs. shall).

89. The explicit intention in the *Convention on Biological Diversity* is "to *enhance and complement existing international arrangements* for the conservation of biological diversity and sustainable use of its components" (preamble). Such "international arrangements" include UNDRIP, which affirms Indigenous peoples' rights to genetic resources, traditional knowledge, cultural diversity and biological diversity,[51] as well as environmental,[52] food[53] and human security.[54] All of these aspects are relevant to the *Convention* and *Protocol*.

Undermining Indigenous peoples' "consent"

90. On **page 3**, prior informed consent (PIC) is addressed by the draft Domestic Policy Guidance as follows:

> **Prior Informed Consent (PIC)**
> The draft Domestic Policy Guidance stipulates that Canada's governments agree that the development and implementation of their measures to manage access to genetic resources and benefit-sharing should be founded on PIC. Specifically, it states that:
>
> 1.1 Access to genetic resources in Canada is provided by the entity that is legally entitled to grant access at the location where the genetic resource is found – land, water or facility such as a collection maintained *ex situ;*
>
> 1.2 Access to *in situ* genetic resources should be granted only with and after the documented prior informed consent of the party providing access;
>
> 1.3 The process for obtaining prior informed consent for access to genetic resources should depend on the mechanism established by the competent authority providing access; and
>
> 1.4 That prior informed consent involving access to genetic resources granted by an individual landowner or other private authority will be best negotiated under existing common or civil law practices (that is, property and contract law). In

> most cases involving private landowners, therefore, there will be no need to obtain prior informed consent by means of a new legal instrument.

91. On page 3 of the comparison document, it is disclosed that the draft 2010 Domestic Policy Guidance only "recommends" the use of PIC, while the *Protocol* "requires" it:

> The requirements of the Protocol addressing prior informed consent appear to be consistent with the draft Domestic Policy Guidance. The key difference between the draft Policy Guidance and the Protocol is that the Protocol obligation requires a potential user to obtain Prior Informed Consent to access genetic resources, and establishment of a Competent National Authority that grants access to genetic resources.
>
> The draft Domestic Policy Guidance recommends that prior informed should be granted by the entity that is legally entitled to grant access at the location where the genetic resources is found. This entity would be a designated Competent National Authority.

92. All Parties, including Canada, must comply with a binding international treaty, such as the *Protocol*. According to the *Vienna Convention on the Law of Treaties*, treaties must be interpreted in good faith "in light of its object and purpose":

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[55]

93. As repeatedly underlined in this Submission, it is erroneous for the draft Domestic Policy Guidance to determine whether the *Protocol* is consistent with the draft Policy rather than the other way around. Otherwise, every State could derogate from the terms and conditions of treaties and render them virtually meaningless.

94. It is also incorrect to conclude that changing the obligations relating to PIC under the *Protocol* to recommendations in the draft Domestic Policy Guidance "appear to be consistent".

95. If ongoing dispossession and biopiracy of Indigenous peoples' resources is to be eliminated and fair and equitable benefit sharing is to be achieved, then the legal right and principle of "free, prior and informed consent" (FPIC) or PIC[56] must be respected, protected and fulfilled. Such consent is a key element in international and Canadian constitutional law.

96. FPIC is the standard required or supported by the UN General Assembly,[57] international treaty bodies,[58] regional human rights bodies,[59] UN special rapporteurs[60] and specialized agencies.[61] FPIC is also the standard under UNDRIP and the *Indigenous and Tribal Peoples Convention, 1989*.[62]

97. According to Canada' highest court, "full consent" is required on "very serious issues".[63] It is clearly a serious issue, when the human rights, cultures and well-being of Indigenous peoples are at stake in the context of biodiversity, environment and resource development within the framework of the *Nagoya Protocol*.[64]

98. As described above, the government is clear about its own right to give or withhold consent under the *Protocol*. However, in regard to "prior informed consent" of Indigenous peoples, a different picture emerges. The comparison document of the government does not disclose fully its position.

99. In the *Protocol*, the Parties retained the phrase "approval and involvement" used in article 8(j) of the *Convention* with an expanded formulation. In relation to Indigenous and local communities, the new phrase used repeatedly is "*prior and informed consent or approval and involvement*".[65]

100. In regard to the new phrase, the "or" between "prior and informed consent" (PIC) and "approval" suggests that the two terms are synonymous. This interpretation is reinforced by article 6(3)(f) of the *Protocol*.[66] Thus, the "involvement" of Indigenous peoples and local communities is required in addition to such consent or approval.

101. In its September 2011 "Discussion Document", the government has unilaterally added commas around the phrase "approval and involvement" so as to separate it from "prior informed consent":

> Canada could also put in place ... measures to require evidence (documentation) that associated traditional knowledge utilized or used in research or development has been accessed with the PIC, or approval and involvement, of the Aboriginal communities that hold the associated traditional knowledge.[67]

102. The effect of the government's change is to imply that there are two different standards that could apply. One standard is "prior and informed consent"; the other is "approval and involvement". This could suggest that there would only be "involvement" in relation to situations of "approval" and not "PIC". Such an interpretation would not be coherent and would be inconsistent with international and domestic law.[68]

103. On **page 4** of the comparison document, "mutually agreed terms" (MAT) is addressed by the draft Domestic Policy Guidance as follows::

> **Mutually Agreed Terms**
>
> 2.1 Those accessing and those providing genetic resources should establish mutually agreed terms which clearly identify how the genetic resource is to be accessed and how the benefits arising from the use will be shared, or, as appropriate, should use those terms established at the international level where

> Canada has agreed to a relevant intergovernmental agreement (e.g. the *International Treaty on Plant Genetic Resources for Food and Agriculture*).

104. Once again, the same erroneous approach is taken in the draft Domestic Policy Guidance that is inconsistent with the *Protocol*. The term "should" is used in the draft Policy Guidance - even though article 5(1) provides that fair and equitable benefit sharing "shall" be upon mutually agreed terms. The draft Policy Guidance incorrectly seeks to determine whether the *Protocol* is consistent with the draft Policy rather than the other way around.

105. In regard to "mutually agreed terms", it is not accurate for the draft Policy Guidance to state that those accessing and those providing genetic resources "should use those terms established at the international level where Canada has agreed to a relevant intergovernmental agreement". Article 4(4) of the *Protocol* uses the broader term "specialized international access and benefit-sharing instrument" (which is not limited to "intergovernmental agreements"). Such instrument is said to only apply if it is "consistent with, and does not run counter to the objectives of the Convention and this Protocol". Art. 4(4) provides:

> This Protocol is the instrument for the implementation of the access and benefit-sharing provisions of the Convention. Where a specialized international access and benefit-sharing instrument applies that is consistent with, and does not run counter to the objectives of the Convention and this Protocol, this Protocol does not apply for the Party or Parties to the specialized instrument in respect of the specific genetic resource covered by and for the purpose of the specialized instrument.

106. On page 4 of the government's comparison document, it is stated that the ITPGR is expressly mentioned in the preamble of the *Protocol* and therefore has "interpretive value":

> The *International Treaty on Plant Genetic Resources for Food and Agriculture* is mentioned expressly in the Preamble. Given its interpretive value, we are of the view that the ITPGR would be a specialized instrument in the sense of Article 4.4.

107. UNDRIP also is expressly mentioned in the preamble of the *Protocol* and has "interpretive value" and other legal effects. Yet the comparison document and the draft Domestic Policy Guidance fail to mention or consider UNDRIP in relation to the *Protocol* and *Convention on Biological Diversity*. Such double standards would have far-reaching effects and do not generate confidence or trust in the government.

108. In the Indigenous context, it would not be acceptable for the government to rely upon the ITPGR or other international instruments - while ignoring the interpretive provisions in the *Protocol* that relate to UNDRIP, human rights of Indigenous peoples and related State obligations.

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

Declaration and its implementation.[69] Canada cannot avoid Indigenous peoples' human rights and related State obligations in UNDRIP, by attempting to disregard the legal significance of the *Declaration* when addressing biodiversity, climate change and other crucial international issues.

110. A further problem is that the right of Indigenous peoples to give or withhold "consent" is erroneously attributed to resource management authority under "land claim and self-government agreements". The discriminatory nature of an "established" rights approach has already been highlighted in this Submission. However, there are additional concerns that are essential to raise here relating to "consent".

111. Under Canadian constitutional and international law, the right to "consent" of Indigenous peoples is not dependent on management or legislative authority under established agreements. Such consent flows from and is inextricably linked to Indigenous peoples' right of self-determination and other human rights.

112. Yet in relation to "Aboriginal communities", the September 2011 "Discussion Document" indicates:

> Aboriginal communities in Canada that have completed comprehensive land-claim and self-government agreements which provide them authority to manage their lands would likely have responsibility for establishing mechanisms by which they can grant PIC for access to these genetic resources, and to establish MAT for benefit-sharing.[70]

113. In relation to an "individual landowner or other private authority", their consent in relation to genetic resources is not dependent on management or legislative authority. As described at pages 3-4 of the comparison document, the draft Domestic Policy affirms their right to simply negotiate the terms of their prior informed consent with prospective users:

> 1.4 That prior informed consent involving access to genetic resources granted by an individual landowner or other private authority will be best negotiated under existing common or civil law practices (that is, property and contract law). In most cases involving private landowners, therefore, there will be no need to obtain prior informed consent by means of a new legal instrument.

114. It is also incorrect for the "Discussion Document" to conclude: "Each jurisdiction in Canada would have to determine the genetic resources for which they would require PIC".[71] Should it be determined that some Indigenous peoples do not have "jurisdiction" over genetic resources, their right to prior informed consent cannot be ignored or waived by the federal, provincial or territorial government having general legislative authority.[72]

115. In regard to Indigenous peoples' consent, the Canadian government's overall approach not only derogates from the rule of law but it is also discriminatory.

Traditional knowledge and genetic resource rights undermined

116. On **p. 5** of the comparison document, access to traditional knowledge associated with genetic resources is addressed as follows:

> 3.1 Access and Benefit Sharing policy in Canada should recognize and take into account that Aboriginal peoples hold traditional knowledge associated with genetic resources. This knowledge has been gained over generations of experience and practices with the natural environment and its biological resources.
>
> 3.2 Access to traditional knowledge associated with genetic resources should require separate provisions from those for access to genetic resources.
>
> 3.3 Aboriginal peoples and communities should be entitled to determine whether and how to share the traditional knowledge that they hold, which is associated with genetic resources.

117. To restate a recurring problem, it is incorrect to use the term "should" in the draft Policy Guidance, when article 7 of the *Protocol* uses the term "shall". The draft Policy Guidance erroneously seeks to determine whether the *Protocol* is consistent with the draft Policy rather than the other way around.

118. In regard to separating traditional knowledge from genetic resources (see para. 3.2 quoted above), Canada's approach is not consistent with the *Protocol*. During the negotiations of the *Protocol*, Canada attempted to separate Indigenous peoples' rights relating to traditional knowledge from those regarding genetic resources. As described in this Submission, the Canadian government is still seeking to unjustly limit Indigenous rights to genetic resources in a manner that could lead to widespread dispossession.

119. The traditional knowledge of Indigenous peoples is linked to their customary use of genetic resources. As affirmed in the preamble, the interrelationship between genetic resources and traditional knowledge is "inseparable":[73]

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

120. On **page 5** of the comparison document, it is suggested that whether or not there exists an obligation of Parties in article 12(1) of the *Protocol* to take into

consideration customary laws, community protocols and procedures is dependent on domestic law:

> The obligation on a Party to take into consideration customary laws, community protocols and procedures is subject to domestic law and to what is applicable in the particular domestic circumstances of the Party. This provides considerable flexibility to each Party to determine whether and how to take customary laws, community protocols and procedures into account.

121. The *Convention on Biological Diversity* and *Nagoya Protocol* do not empower States to undermine the human rights of Indigenous peoples or related State obligations. Indigenous peoples' rights are inherent[74] or pre-existing rights, which urgently require protection under international and domestic law. Their existence is not dependent on domestic law.[75]

122. It would be unconscionable for the *Convention* or the *Protocol* to attempt to convert Indigenous peoples' *inherent* rights to traditional knowledge or genetic resources into rights that only exist in accordance with domestic law. Such an approach would run directly counter to international human rights law, including UNDRIP.[76]

123. In addition to courts, "States bear ultimate responsibility as the guarantors of democracy, human rights, and rule of law".[77] As affirmed by Special Rapporteur on the rights of indigenous peoples, James Anaya:

> The current global discussion about the impact of business activities on human rights has reaffirmed that the State has the ultimate international legal responsibility to respect, protect and fulfil human rights.[78]

124. In its draft Domestic Policy Guidance, the Canadian government fails to take into consideration the interpretive provision in the preamble relating to UNDRIP. The government also opts to ignore the interpretive provision affirming that "nothing in this Protocol shall be construed as diminishing or extinguishing the existing rights of indigenous and local communities".

125. Article 12(1) does not use the phrase "subject to domestic law", but rather "in accordance with domestic law". The draft Domestic Policy should not simply replace wording in the *Protocol*, without an analysis that can justify it consistent with international human rights law.

126. On its face, article 12(1) of the *Protocol* understates State obligations in the *Convention*, UNDRIP and *Indigenous and Tribal Peoples Convention, 1989*.[79] Article 12(1) requires States to "*take into consideration* ... customary laws, ... protocols and procedures" with regard to traditional knowledge associated with genetic resources:

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

> applicable, with respect to traditional knowledge associated with genetic resources.

127. **In regard to the customary use of biological resources (*Convention*, art. 10(c)), there is no such phrase as "subject to domestic law" or "in accordance with domestic law".** "Customary use" is a well-established basis for recognition of Indigenous peoples' land and resource rights in international and domestic legal systems.[80]

128. In relation to Indigenous peoples and local communities, article 10(c) of the *Convention* affirms that the **duty of the Parties to protect and encourage customary use is "in accordance with traditional cultural practices"**:

> The Contracting Parties shall *as far as possible* and as appropriate:
> ...
> (c) *Protect and encourage* customary use of biological resources *in accordance with traditional cultural practices* that are compatible with conservation or sustainable development ...[81]

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

<u>"Full and effective participation" virtually ignored</u>

130. On **page 9** of the comparison documents, the draft Domestic Policy Guidance provides for the possible establishment of a "panel of regional Aboriginal experts":

> To strengthen approaches regarding traditional knowledge associated with genetic resources, jurisdictions will consider establishing a *panel of regional Aboriginal experts*.

131. The rationale for such regional panels is stated as follows:

> Although such an initiative is not mandated by any of the provisions of the Protocol, they would likely be viewed favourably as facilitating 'effective participation' of indigenous groups as per Article 12.

132. While such panels might be useful, they are not a substitute for full and effective participation by Indigenous peoples. Article 12(2) affirms:

> Parties, with the effective participation of the indigenous and local communities concerned, shall establish mechanisms to inform potential users of traditional

> knowledge associated with genetic resources about their obligations, including measures as made available through the Access and Benefit-sharing Clearing-House for access to and fair and equitable sharing of benefits arising from the utilization of such knowledge.

133. **The "full and effective participation" of Indigenous peoples is essential in all aspects of the *Protocol* that may affect their rights and interests.** As concluded by the Expert Mechanism on the Rights of Indigenous Peoples in its study on Indigenous peoples and the right to participate in decision-making:[82]

> The right of indigenous peoples to participation is well established in international law. More recently, the indigenous-rights discourse has seen increased focus on rights not only allowing indigenous peoples to participate in decision-making processes affecting them, but to actually control the outcome of such processes. (Annex, para. 2)
>
> The participation of indigenous peoples in external decision-making is of crucial importance to good governance. One of the objectives of international standards on indigenous peoples' rights is to fill the gap between their rights on the one hand and their implementation on the other hand. (Annex, para. 14)
>
> Many indigenous peoples remain vulnerable to top-down State interventions that take little or no account of their rights and circumstances. In many instances, this is an underlying cause for land dispossession, conflict, human rights violations, displacement and the loss of sustainable livelihoods. (Annex, para. 15)

134. "Full and effective participation" and FPIC are important elements of Indigenous peoples' right of self-determination.[83] Such participation is also a crucial aspect of FPIC.[84]

135. In regard to cultural heritage, biodiversity and a wide range of other matters, the participation of Indigenous peoples in decision-making is of paramount significance in terms of both human rights and democracy.[85] In general terms, the UN Expert Mechanism on the Rights of Indigenous Peoples has emphasized:

> ... indigenous participation in decision-making on the full spectrum of matters that affect their lives *forms the fundamental basis for the enjoyment of the full range of human rights*. This principle is a corollary of a myriad of universally accepted human rights, and at its core enables indigenous peoples to be freely in control of their own destinies in conditions of equality. *Without this foundational right, the human rights of indigenous peoples, both collective and individual, cannot be fully enjoyed.*[86]

136. Yet in the draft Domestic Policy Guidance, the term "participation" is never used. Its "Principles" only highlight: " **Inclusive** – developed and implemented with the appropriate involvement of Aboriginal groups and communities".[87]

137. In its September 2011 "Discussion Document", it is stated: "Full involvement of Aboriginal communities in domestic implementation of the *Protocol* could require significant resource transfer and capacity-building from governments." This Document has no particular status and it is not clear if all its statements are endorsed by the government of Canada.

138. If the Canadian government intends to ensure "full involvement" of Indigenous peoples in all matters that may affect them under the *Protocol*, the term that should be consistently used is "full and effective participation".

139. Vague references in the draft Domestic Policy, such as "involvement" or "appropriate involvement" are not helpful or consistent with international human rights law. It exemplifies a basic, larger problem of uncertainty with the draft Domestic Policy as a whole.[88]

Attempts to achieve "certainty" increase uncertainty for Indigenous peoples

140. In the 2011 September "Discussion Document, the government emphasizes its intention to provide "certainty":

> The implementation of access and benefit sharing mechanisms under the *Protocol* is intended to provide certainty on access, including to the holders of traditional knowledge.[89]

141. However, in relation to Indigenous peoples, such terms as "involvement" or "appropriate involvement" do not provide certainty. In the context of the *Protocol*, these vague terms add to the likelihood that Indigenous peoples' right to full and effective participation will not be affirmed through Canada's domestic approach.

142. The unilateral alteration of the new treaty's obligations by the Canadian government puts into doubt the respect, protection and fulfillment of Indigenous peoples' rights. At the same time, such changes put into serious doubt the government's will to ensure full and fair compliance of Indigenous rights and related State obligations in the *Protocol*.

143. Generally, in regard to the Canadian government's three documents referred to in this Submission, there appears to be a random use of the terms "Aboriginal peoples", "Aboriginal communities" and "Aboriginal peoples and communities". This serves to raise confusion relating to the rights of Indigenous peoples and generate further uncertainty.

144. This issue is especially important, since Canada joined other States in refusing to use the internationally accepted term of "Indigenous peoples" in the *Protocol*, opting instead for "indigenous and local communities".

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

146. States that seek to restrict or deny Indigenous peoples their status as “peoples”, in order to impair or deny their rights, are violating the *International Convention on the Elimination of All Forms of Racial Discrimination*.[90]

> In this Convention, the term ‘racial discrimination’ shall mean any distinction, *exclusion, restriction* or preference based on race, colour, descent, or national or ethnic origin which has the *purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing*, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[91]

Conclusions

147. We reiterate our strong support for the central objective of both the *Convention on Biological Diversity* (CBD) and the *Nagoya Protocol*, namely, “*fair and equitable* sharing of the benefits arising out of the utilization of genetic resources, ... taking into account all rights”.

148. However, the Canadian government's proposed domestic approach fails to uphold this crucial objective in diverse and fundamental ways.

149. Canada's draft Domestic Policy, if adopted, would constitute a huge setback for Indigenous peoples. In particular, it is crucial that the government's discriminatory approach to Indigenous peoples' genetic resource rights be eliminated.[92] Dispossession and impoverishment are incompatible with the *Nagoya Protocol*'s central objective of "fair and equitable" benefit sharing.

150. In essence, the Canadian government is opting for a *permissive system* where the federal, provincial and territorial governments each have huge discretion as to whether they would recognize and safeguard the rights of Indigenous peoples. Such a system could severely impact both their rights to genetic resources[93] and traditional knowledge.[94] In order to achieve "coherence, consistency and certainty", such resource and other rights must be respected and protected in regard to *all* Indigenous peoples in Canada.[95]

151. This discretionary approach is based on narrowly interpreting specific provisions of the *Convention* and *Protocol* in isolation. Such interpretations should be made in the context of these treaties, their objectives and international law as a whole. This would necessarily include Canada's international human rights obligations.[96]

152. **Based on the serious defects in the Canadian government's draft Domestic Policy and the Canadian government's regressive perspectives, it is concluded that Canada should not rush to sign the *Protocol* prior to the deadline of February 1, 2011.** Canada can accede to this new treaty at any time in the future.

153. In its "Discussion Document", the government correctly points out:

> Signature does not bind a state to the obligations in the Protocol but indicates intent to consider ratification. In addition, signatory states under the *Vienna Convention on the Law of Treaties* must refrain from taking actions that would defeat the object and purpose of the treaty prior to ratification.[97]

154. The above statement highlights our present concerns. **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.**

155. **We strongly urge that the government first consult Indigenous peoples and accommodate our concerns. Such a process, if undertaken with commitment and mutual respect, could result in a domestic policy that is beneficial to Indigenous peoples and Canada as a whole.**

156. If Canada were to sign and ratify this new treaty at this time, there are no indications that the government is prepared to implement the *Protocol* in a manner that is fully consistent with Indigenous peoples' human rights and related State obligations. Indigenous human rights received no consideration whatsoever during the negotiations of the *Protocol* and continue to be devalued or denied in the implementation stage.

157. The *United Nations Declaration on the Rights of Indigenous Peoples* is not mentioned or incorporated in Canada's proposed implementation of the *Protocol*. In particular, the government continues to ignore the specific provisions in UNDRIP that affirm Indigenous peoples' rights to cultural heritage, traditional knowledge and genetic resources.

158. In the Indigenous context, the Canadian government continues to show disregard for the rule of law in Canada and internationally. Its duties to consult and accommodate Indigenous peoples have not been carried out and are not even open for discussion.

159. The democratic participation of Indigenous representatives has been repeatedly undermined by the lack of timely government information and unilateral positions adopted by Canada in relation to the *Protocol*'s negotiation and implementation.

160. In its draft Domestic Policy and approach, the government freely changes legal obligations in the *Protocol* into non-binding recommendations. Specific definitions and other terms are also altered in a self-serving manner. Such government actions violate this

new treaty and undermine global cooperation, human rights and the international system itself.

161. In regard to the interrelated international issues of biodiversity and climate change, the Canadian government continues to engage in in-depth consultations with corporate representatives in order to advance their positions and interests. Extensive ministerial actions, lobbying and millions of dollars continue to be spent for such purposes.[98] In contrast, government positions relating to Indigenous peoples continue to be taken without genuine dialogue and consultation with those affected.[99]

162. Such double standards by the government increase the vulnerability of Indigenous peoples and are incompatible with Canada's obligations. They are also inconsistent with UNDRIP, reconciliation and the honour of the Crown.[100] There is a profound lack of confidence that the human rights of Indigenous peoples will be respected, protected and fulfilled.

163. As the draft Domestic Policy Guidance confirms: " Globally, use of genetic resources has evolved into a multi-billion-dollar-a-year business".[101] The Canadian government's rush to expedite extraction and development of genetic resources must not be at the expense of Indigenous peoples and their human rights. As Special Rapporteur on the rights of indigenous peoples, James Anaya, concludes:

> ... natural resource extraction and other major development projects in or near indigenous territories as one of the most significant sources of abuse of the rights of indigenous peoples worldwide. In its prevailing form, the model for advancing with natural resource extraction within the territories of indigenous peoples appears to run counter to the self-determination of indigenous peoples in the political, social and economic spheres.[102]

164. We strongly urge the government of Canada *not* to contribute to ongoing abuses in regard to natural resource extraction - and instead work together with Indigenous peoples to develop a domestic policy of implementation of the *Protocol* that upholds human rights, democratic participation, good governance and the rule of law.[103]

Endnotes

[1] *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.

[2] Government of Canada, "Managing Genetic Resources in the 21st Century: Domestic Policy Guidance for Canada", Draft, 2010.

[3] See, *e.g.*, the following Joint Submissions:

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.

Grand Council of the Crees (Eeyou Istchee) *et al.*, "Draft Protocol: Indigenous Peoples' Objections to the Current Text – A Call for Justice and Solidarity", Joint Statement of Indigenous and civil society organizations, Montreal meeting 18-21 September 2010, in *Ad Hoc* Open-ended Working Group on Access and Benefit-sharing, Ninth meeting (second resumed), Nagoya, Japan, 16 October 2010, UN Doc. UNEP/CBD/WG-ABS/9/INF/22 (22 September 2010), http://www.cbd.int/doc/?meeting=ABSWG-09-3RD.

Grand Council of the Crees (Eeyou Istchee) *et al.*, "Concerns relating to CBD Process, Revised Draft Protocol and Indigenous Peoples' Human Rights", Joint Statement of Indigenous and civil society organizations, Montreal meeting 10-16 July 2010, in *Ad Hoc* Open-ended Working Group on Access and Benefit-sharing, Ninth meeting (second resumed), Nagoya, Japan, 16 October 2010, UN Doc. UNEP/CBD/WG-ABS/9/INF/21 (22 September 2010), http://www.cbd.int/doc/?meeting=ABSWG-09-3RD.

Grand Council of the Crees (Eeyou Istchee) *et al.*, "Indigenous Peoples' Right to Participate in Decision-Making: International and Regional Processes", Joint Statement of Indigenous and civil society organizations, Expert Mechanism on the Rights of Indigenous Peoples, 3nd sess., Geneva (13 July 2010).

Grand Council of the Crees (Eeyou Istchee) *et al.*, "Impacts of the CBD Revised Draft Protocol on the *UN Declaration on the Rights of Indigenous Peoples*: Human Rights Concerns", Joint Statement by Indigenous and human rights organizations from different regions of the world, Permanent Forum on Indigenous Issues, New York (20 April 2010).

[4] Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights*, UN Doc. A/HRC/10/61 (15 January 2009), para. 51:

> Climate change, together with pollution and environmental degradation, poses a serious threat to indigenous peoples, who often live in marginal lands and fragile ecosystems which are particularly sensitive to alterations in the physical environment. Climate change-related impacts have already led to the relocation of Inuit communities in polar regions and affected their traditional livelihoods.

Permanent Forum on Indigenous Issues, *Conference on Indigenous Peoples and Climate Change, Copenhagen, 21–22 February 2008, Meeting Report, Submitted by the International Work Group for Indigenous Affairs (IWGIA)*, UN Doc. E/C.19/2008/CRP. 3 (10 March 2008), para. 4:

> For indigenous peoples around the world, climate change brings different kinds of risks, brings threats to cultural survival and undermines indigenous human rights. The consequences of ecosystem changes have implications for the use, protection and management of wildlife, fisheries, and forests, affecting the customary uses of culturally and economically important species and resources.

[5] *E.g.*, Office of the Auditor General, *Report of the Commissioner of the Environment and Sustainable Development to the House of Commons – October 2011* (Ottawa: Minister of Public Works and Government Services Canada, 2011), c. 1, "Climate Change Plans Under the Kyoto Protocol Implementation Act", at 47-48, para. 1.87: " In substance, ... the 2010 plan does not contain measures with GHG emission reductions sufficient to achieve the level required to meet the obligations of the Kyoto Protocol or the *Kyoto Protocol Implementation Act*. Furthermore, expected emission reductions reported in the plans have been revised downward by more than 90 percent between 2007 and 2010. [emphasis added]

And at para. 1.88: "... despite allocations of more than $9 billion, the government has yet to establish the management systems and tools needed to achieve, measure, and report on greenhouse gas emission reductions."

[6] 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 3.

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

[8] *Convention on Biological Diversity*, article 1.

[9] *Reference re Secession of Québec*, [1998] 2 S.C.R. 217, para. 72:

> Simply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution. This Court has noted on several occasions that with the adoption of the *Charter*, the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy. The Constitution binds all governments, both federal and provincial, including the executive branch (*Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p. 455). They may not transgress its provisions: indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source. [emphasis added]

Rio Tinto Alcan Inc. v. *Carrier Sekani Tribal Council*, 2010 SCC 43, para. 44:

> Further, government action is not confined to decisions or conduct which have an immediate impact on lands and resources. A potential for adverse impact suffices. Thus the duty to consult extends to "strategic, higher level decisions" that may have an impact on Aboriginal claims and rights ... [emphasis added]

[10] *Halfway River First Nation* v. *British Columbia (Ministry of Forests)*, [1999] 178 D.L.R. (4th) 666 (B.C.C.A.), at para. 160:

> The Crown's duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action. [This paragraph was cited with approval in *Mikisew Cree First Nation*, *supra*, para. 64, emphasis added by Supreme Court of Canada]

See also *Taku River Tlingit First Nation* v. *British Columbia (Project Assessment Director*), [2004] 3 S.C.R. 550, para. 25:

> The duty to consult arises when a Crown actor has knowledge, real or constructive, of the *potential existence* of Aboriginal rights or title and *contemplates conduct that might adversely affect* them. This in turn may lead to a duty to change government plans or policy to accommodate Aboriginal concerns. Responsiveness is a key requirement of both consultation and accommodation. [emphasis added].

[11] Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, UN Doc. A/HRC/12/34 (15 July 2009), para. 42:

> Procedures for notice to and comment by the general public often appropriately reinforce representative democratic processes for State decisions. However, special, differentiated consultation procedures are called for when State decisions affect indigenous peoples' particular interests. Such special procedures are justified because of the nature of those particular interests, arising as they do from indigenous peoples' distinctive cultural patterns and histories, and because

> the normal democratic and representative processes usually do not work adequately to address the concerns that are particular to indigenous peoples ...

[12] *Mikisew Cree First Nation* v. *Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, para. 64. [emphasis added]

[13] *Dene Tha' First Nation* v. *Canada (Minister of Environment),* 2006 FC 1354, para. 104, affirmed 2008 FCA 20. [emphasis added]

[14] Government of Canada, "Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of the Benefits Arising from their Utilization to the Convention on Biological Diversity: Discussion Document", September 2011, at 24 (Appendix 1: Overview of the Current Engagement Process). [emphasis added]

[15] See *infra* note 46 and accompanying text.

[16] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, *supra* note 10, para. 58:

> The Province was aware of the claims, and contemplated a decision with the potential to affect the [Taku River Tlingit First Nation]'s asserted rights and title negatively. It follows that the honour of the Crown required it to consult and if indicated accommodate the TRTFN in making the decision whether to grant project approval to Redfern, and on what terms.

[17] See, *e.g.*, Valeria A. Gheorghiu, "Sailing The Seas of Treaties: Biopiracy in the Wake of the International Treaty on Plant Genetic Resources for Food and Agriculture", (2006) 7 Fourth World Journal 1 at 1:

> Rather than outright theft of physical property, neo-imperialists have "discovered" intellectual property, or indigenous knowledge of bioresources, such as medicinal plants or seed varieties. Instead of supporting the theft of indigenous knowledge using the doctrine of discovery to promote their view of progress as they had with indigenous lands, they use their patent systems to rationalize the theft of indigenous knowledge because of their "inventive" genetic advancements thereupon in a form of "intellectual colonization." Using their intellectual property regime, they *secure the profits of their genetic advancements based upon indigenous knowledge without compensating the original indigenous holders of that knowledge for their initial discoveries and developments*. [emphasis added]

[18] Krystyna Swiderska, *Banishing The Biopirates: A New Approach To Protecting Traditional Knowledge*, Gatekeeper Series 129, International Institute for Environment and Development (London: IIED, 2006) at 5. Biopiracy may also take place for non-commercial purposes, such as by researchers and universities, where no free, prior and informed consent has been obtained from the Indigenous peoples concerned.

[19] 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. 61.

[20] *Convention*, article 3.

[21] *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."

[22] Permanent Forum on Indigenous Issues, *Report on the tenth session (16 – 27 May 2011)*, Economic and Social Council, Official Records, Supplement No. 23, United Nations, New York, E/2011/43-E/C.19/2011/14, para. 25 [emphasis added].

[23] See, *e.g.*, the website of the Office of the UN High Commissioner for Human Rights, where UNDRIP is included in the list of international human rights instrument.

[24] See generally Paul Joffe, "*UN Declaration on the Rights of Indigenous Peoples*: Canadian Government Positions Incompatible with Genuine Reconciliation", (2010) 26 N.J.C.L. 121, http://quakerservice.ca/wp-content/uploads/2011/05/NJCLPJArticleUNDeclaration2010.pdf.

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

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

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

[26] Similarly, see UNDRIP, article 45.

[27] See *Protocol*, article 5(2):

> 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.

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

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

[29] *Haida Nation* v. *British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, para. 37: "The law is capable of differentiating between tenuous claims, claims possessing a strong prima facie case, and established claims."

[30] For example, in regard to Guyana's legislation distinguishing "titled" and "untitled" lands, the Committee "urges the State party to remove the *discriminatory distinction between titled and untitled communities* from the 2006 Amerindian Act and from any other legislation." 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.

[31] Permanent Forum on Indigenous Issues, *Report on the tenth session*, *supra* note 22, para. 27.

[32] *Haida Nation* v. *British Columbia (Minister of Forests)*, *supra* note 29, 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]

[33] *Id.*, para. 31: "The government's arguments do not withstand scrutiny. Neither the authorities nor practical considerations support the view that a duty to consult and, if appropriate, accommodate arises only upon final determination of the scope and content of the right."

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

Report of the International Law Commission, 53rd sess. (23 April-1 June and 2 July-10 August 2001) in U.N.GAOR, 56th sess., Supp. No. 10 (A/56/10), at 208, para. (5): "Those 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."

[35] 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 3, at paras. 98-100.

[36] 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.

[37] *Convention on Biological Diversity*, art. 1; *Nagoya Protocol*, art. 1.

[38] In regard to the right of self-determination, see identical art. 1 of the two international human rights Covenants. In regard to the inherent nature of Indigenous peoples' resource rights, see *International Covenant on Civil and Political Rights*, art. 47; and *International Covenant on Economic, Social and Cultural Rights*, art. 25, which include the identical provision: "Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources."

Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada*, UN Doc. CCPR/C/79/Add.105 (7 April 1999), para. 8: "... the Committee emphasizes that the right to self-determination requires, *inter alia*, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence."

[39] *International Covenant on Economic, Social and Cultural Rights*, art. 15(1)(a) (right to take part in cultural life); UNDRIP, arts. 11-13, 31; *International Covenant on Civil and Political Rights*, art. 27 (right to enjoy their cultures); and *UNESCO Universal Declaration on Cultural Diversity***,** Resolution 25 adopted by the General Conference at its 31st session, (2001), art. 4 (human rights as guarantees of cultural diversity).

[40] *Convention*, art. 10(c) .

[41] *Protocol*, preamble and art. 4(3).

[42] *Protocol*, arts. 4(1) and 4(3); *Convention*, art. 22(1).

[43] Government of Canada, "Discussion Document", *supra* note 14, at 12. "ILCs" refer to "indigenous and local communities".

[44] *Ibid*, at 22. In regard to access to genetic resources, see also p. 16, where reference is made to "self-governing Aboriginal group (as per rights over biological resources identified in Canadian legislation)".

[45] Government of Canada, Managing Genetic Resources in the 21st Century: Domestic Policy Guidance for Canada, Draft, *supra* note 2 at 2 (Executive Summary).

[46] According to Environment Canada - "*The draft 2010 Domestic Policy Guidance for Canada was developed jointly by the Federal – Provincial – Territorial Task Force in 2009 and 2010 and approved by the Deputy Ministers FPT Committee on Biodiversity . The draft Domestic Policy Guidance is used in the present document for reference purpose only. It is not and should not be considered Government of Canada policy*." [italics in original]

[47] Government of Canada, Managing Genetic Resources in the 21st Century: Domestic Policy Guidance for Canada, Draft, *supra* note 2, at 3 (Objectives).

[48] This is also one of the key objectives in the *Convention on Biological Diversity*, article 1.

[49] Otherwise, the absence of safeguards in the *Protocol* may "significantly reduce the scope for benefit-sharing as much traditional knowledge has already been documented and is freely accessible": see International Institute for Environment and Development (Krystyna Swiderska), "Equitable benefit-sharing or self-interest?", IIED Opinion, September 2010.

[50] Convention on Biological Diversity (Ad Hoc Working Group on Access and Benefit-sharing), *Report of the Meeting of the Group of Technical and Legal Experts on Traditional Knowledge associated with Genetic Resources in the Context of the International Regime on Access and Benefit-Sharing*, UN Doc. UNEP/CBD/WG-ABS/8/2 (15 July 2009), Annex (Outcome of the Meeting of the Group of Technical and Legal Experts on Traditional Knowledge associated with Genetic Resources in the Context of the International Regime on Access and Benefit-Sharing), at para. 122:

> ... experts recognized a critical distinction between traditional knowledge associated with genetic resources being in the "public domain" versus being "publically available". ... The common understanding of publicly available does not mean available for free. The common understanding of public availability could mean that there is a condition to impose *mutually agreed terms* such as paying for access. ... Within the concept of public availability, *prior informed consent* from a traditional knowledge holder that is identifiable, could still be required, as well as provisions of *benefit-sharing* made applicable ... [emphasis added]

[51] In regard to Indigenous peoples' right to cultural diversity, see UNDRIP, preambular para. 2 (right to be different) and the many provisions relating to culture, including arts. 3, 4, 8, 9, 11–16, 25, 31–34, 36, 37, 38, 40 and 41. The provisions on lands, territories and resources are also of central importance.

In relation to Indigenous peoples' right to biological diversity, see UNDRIP, arts. 29(1) (right to conservation and protection of the environment and the productive capacity of their lands or territories and resources) and 31(1) (right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, etc.).

[52] UNDRIP, art. 7(2) (right to live in peace and security, as distinct peoples), read together with arts. 29(1) (right to conservation and protection of environment and the productive capacity of their lands, territories and resources);

32(1) (right to determine and develop priorities and strategies for development or use of their lands, territories and resources); 32(2) (State duty to consult and cooperate in good faith, in order to obtain free and informed consent); and 32(3) (State duty to mitigate adverse environmental, economic, social, cultural or spiritual impacts).

See also *African Charter of Human and Peoples' Rights*, art. 23(1): "All peoples shall have the right to national and international peace and security"; and art. 24: "All peoples shall have the right to a general satisfactory environment favorable to their development."

[53] UNDRIP, art. 7(2) (peace and security), read together with arts. 3 (right to self-determination); 20 (right to own means of subsistence and development); 24 (right to health and conservation of vital medicinal plants and animals); 26 (right to lands, territories and resources); 29 (right to conservation and protection of environment); 31 (right to cultural heritage, traditional knowledge and cultural expressions including genetic resources, seeds and medicines); and 32 (right to determine priorities and strategies for development). See also identical art. 1(2) in the two international human rights Covenants: "All peoples may, for their own ends, freely dispose of their natural wealth and resources … In no case may a people be deprived of its own means of subsistence."

See also *Convention on Biological Diversity*, preamble: "*Aware* that conservation and sustainable use of biological diversity is of *critical importance for meeting the food, health and other needs* of the growing world population, for which purpose *access to and sharing of both genetic resources and technologies* are essential". [emphasis added]

[54] See generally UNDRIP. John B. Henriksen, "Implementation of the Right of Self-Determination of Indigenous Peoples Within the Framework of Human Security", in M.C. van Walt van Praag & O. Seroo, eds., *The Implementation of the Right to Self-Determination as a Contribution to Conflict Prevention* (Barcelona: Centre UNESCO de Catalunya, 1999) 226, at 226: "'indigenous peoples human security' . . . encompasses many elements, inter alia physical, spiritual, health, religious, cultural, economic, environmental, social and political aspects."

[55] *Vienna Convention on the Law of Treaties*, UN Doc. A/CONF.39/27 at 289 (1969), 1155 U.N.T.S. 331, *reprinted in* 8 I.L.M. 679 (1969), art. 31(1). See also *Libya-Chad Boundary Dispute*, ICJ Reports, 1994, 21, where the International Court of Justice affirmed that article 31 reflects the rules of customary international law on treaty interpretation. Similarly, see *LaGrand* (Germany v. USA), Merits, Judgment of 27 June 2001, ICJ Reports, 2001, 466, para. 99.

[56] It is assumed that free, prior and informed consent (FPIC) and prior informed consent (PIC) are synonymous, since no consent is genuine if it is not also freely given. FPIC has emerged as the international standard, but States in the negotiations on the *Nagoya Protocol* refused to update the wording from the 1992 *Convention on Biological Diversity*.

[57] General Assembly, *Draft Programme of Action for the Second International Decade of the World's Indigenous People: Report of the Secretary-General*, UN Doc. A/60/270 (18 August 2005) (adopted without vote by General Assembly, 16 December 2005). At para. 9, one of the five objectives of the Decade is:

> Promoting full and effective participation of indigenous peoples in decisions which directly or indirectly affect their lifestyles, traditional lands and territories, their cultural integrity as indigenous peoples with collective rights or any other aspect of their lives, considering the principle of free, prior and informed consent …

[58] See, *e.g.*, Committee on the Elimination of Racial Discrimination, *Concluding Observations on the Elimination of Racial Discrimination: Guatemala*, UN Doc. CERD/C/GTM/CO/12-13 (19 May 2010), para. 11: "In the light of its general recommendation No. 23 (para. 4 (d)), the Committee recommends that the State party consult the indigenous population groups concerned at each stage of the process and that it obtain their consent before executing projects involving the extraction of natural resources".

Comité des droits de l'homme, *Observations finales du Comité des droits de l'homme: Togo*, UN Doc. CCPR/C/TGO/CO/4 (28 March 2011) (advance unedited version), para. 21 (ensure Indigenous peoples can exercise their right to free, prior and informed consent); Human Rights Committee, *Poma v.Peru*, Case No. 1457/2006, *Report of the Human Rights Committee*, GAOR, 64th Sess., Supp. No. 40, Vol. I, UN Doc. A/64/40 (2008-09), para.

202: "Participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community."

Committee on Economic, Social and Cultural Rights, General Comment No. 21, *Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E/C.12/GC/21 (21 December 2009), para. 5, indicating that:a "core obligation applicable with immediate effect" includes the following: "States parties should obtain their free and informed prior consent when the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are at risk."

[59] See, *e.g.*, *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. 226: "In terms of consultation, the threshold is especially stringent in favour of indigenous peoples, as it also *requires that consent be accorded*. Failure to observe the obligations to consult and to seek consent – or to compensate - ultimately results in a violation of the right to property." [emphasis added]

Case of the Saramaka People v. Suriname, *(Preliminary Objections, Merits, Reparations, and Costs)*, I/A Court H.R. Series C No. 172 (Judgment) 28 November 2007, para. 134: "... the Court considers that, regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent, according to their customs and traditions."

[60] General Assembly, *Situation of human rights and fundamental freedoms of indigenous people: Note by the Secretary-General*, Interim report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, UN Doc. A/65/264 (9 August 2010), para. 27:

> ... article 32 of the Declaration, with its call for the free and informed consent of indigenous peoples prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources, provides an important template for avoiding these problems in the development context.

Human Rights Council, *Report of the Special Rapporteur on the right to food***,** *Olivier De Schutter - Crisis into opportunity: reinforcing multilateralism*, UN Doc. A/HRC/12/31 (21 July 2009), para. 21:

> These [core] principles are based on the right to food ... They also call for the respect of the right to self-determination of peoples and on the right to development. They may be summarized as follows: …
>
> (j): States shall consult and cooperate in good faith with the indigenous peoples concerned in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources …

[61] See, *e.g.*, Food and Agriculture Organization, "FAO Policy on Indigenous and Tribal Peoples" (Rome: FAO, 2010), at 5: "The principle and right of 'free, prior and informed consent' demands that states and organizations of all kinds and at all levels obtain indigenous peoples' authorization before adopting and implementing projects, programmes or legislative and administrative measures that may affect them."

IFAD (International Fund for Agricultural Development), *Engagement with Indigenous Peoples: Policy* (Rome: IFAD, November 2009), at 13 (Principles of engagement): "When appraising such projects proposed by Member States, in particular those that may affect the land and resources of indigenous peoples, the Fund shall examine whether the borrower or grant recipient consulted with the indigenous peoples to obtain their free, prior and informed consent."

Permanent Forum on Indigenous Issues, *Information received from the United Nations system and other intergovernmental organizations: United Nations Children's Fund*, UN Doc. E/C.19/2011/7 (25 February 2011), para. 52: "While the free, prior and informed consent approach is considered by UNICEF to be inherent in its human rights-based approach to programming, it is also used as a specific methodology to conduct projects and studies."

International Finance Corporation (member of the World Bank Group), "IFC Updates Environmental and Social Standards, Strengthening Commitment to Sustainability and Transparency", 12 May 2011, http://www.ifc.org/ifcext/media.nsf/content/SelectedPressRelease?OpenDocument&UNID=0ADE5C1923DC4CF48525788E0071FAAA: "For projects with potential significant adverse impacts on indigenous peoples, IFC has adopted the principle of 'Free, Prior, and Informed Consent' informed by the 2007 United Nations Declaration on the Rights of Indigenous Peoples."

[62] In regard to cultural and intellectual property, see UNDRIP, art. 11(2): "States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs."

See also Indigenous and Tribal Peoples Convention, 1989 (No. 169), art. 4:

> 1. Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.
>
> 2. Such special measures shall not be contrary to the freely-expressed wishes of the peoples concerned.

[63] *Haida Nation* v. *British Columbia (Minister of Forests)*, *supra* note 29, para. 24. See also *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010, para. 168: "Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands."

The Canadian government deals selectively with the rule of law and its constitutional obligations, at the expense of Indigenous peoples' rights. See Government of Canada, *Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult* (March 2011), where any reference to Aboriginal "consent" has been omitted.

Ensuring objectivity and non-selectivity are important principles in international law. See, *e.g.*, *Vienna Declaration and Programme of Action*, United Nations World Conference on Human Rights, adopted June 25, 1993, U.N. Doc. A/CONF.157/24 (Part I) at 20 (1993), reprinted in (1993) 32 I.L.M. 1661, Part I, para. 32:

> The World Conference on Human Rights reaffirms the importance of ensuring the universality, objectivity and non-selectivity of the consideration of human rights issues.

[64] The far-reaching significance of Indigenous peoples' genetic resources and traditional knowledge is affirmed in the preamble of the *Protocol*:

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

[65] Emphasis added. See articles 6(2), 3(f) (access to genetic resources); 7 (access to traditional knowledge associated with genetic resources); 13(1)(b) (National focal points and competent national authorities); and 16(1) (Compliance with domestic legislation or regulatory requirements on access and benefit-sharing for traditional knowledge associated with genetic resources).

[66] Where each Party requires the "prior informed consent" of Indigenous and local communities for access to genetic resources, the Party shall take the necessary measures to "set out criteria and/or processes for obtaining prior informed consent or approval" Thus, "PIC" and "approval" are synonymous. In this regard, art. 6(3)(f) of the *Protocol* provides:

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

[67] Government of Canada, "Discussion Document", *supra* note 14, at 14.

[68] Permanent Forum on Indigenous Issues, *Report on the tenth session*, *supra* note 22, para. 36, where in regard to FPIC, "the Forum affirms that the right of indigenous peoples to such consent can never be replaced by or undermined through the notion of 'consultation'."

See also *Black's Law Dictionary*, 9th ed. (St. Paul, Minn.: Thomson Reuters, 2009) at 346:

> Consent, *n.* ... Agreement, approval, or permission as to some act or purpose, esp. voluntarily by a competent person; legally effective assent.
>
> ...
>
> *informed consent*, ... A person's agreement to allow something to happen, made with full knowledge of the risks involved and the alternatives. [emphasis in original]

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

[70] Government of Canada, "Discussion Document", *supra* note 14, at 22. [emphasis added] At 11, the Document makes reference to "legislative authority":

> In Canada, the Federal, Provincial, and Territorial governments have law-making authority regarding granting of access to biological resources located on lands under their jurisdiction. Some Aboriginal communities have similar authority**.** These jurisdictions could identify Competent

> Authorities for the implementation of the *Protocol.* If they did, they would need to put in place legislative, policy or administrative measures that would require PIC for access to genetic resources, and require the establishment of MAT between the provider and the user for genetic resources identified as requiring PIC and MAT. [emphasis added]

[71] *Ibid.*, at 12.

[72] See *supra* note 63 and accompanying text.

[73] See also Convention on Biological Diversity (Ad Hoc Working Group on Access and Benefit-sharing), *Report of the Meeting of the Group of Technical and Legal Experts on Traditional Knowledge associated with Genetic Resources in the Context of the International Regime on Access and Benefit-Sharing*, UN Doc. UNEP/CBD/WG-ABS/8/2 (15 July 2009), Annex (Outcome of the Meeting of the Group of Technical and Legal Experts on Traditional Knowledge associated with Genetic Resources in the Context of the International Regime on Access and Benefit-Sharing), para. 10: "In discussing the relationship between traditional knowledge and genetic resources, the history of co-evolution (of biological and cultural systems) reinforces the inseparability of traditional knowledge and genetic resources."

[74] Louis Henkin, "Introduction" in L. Henkin, ed., *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981) 1 at 13: "International human rights are inherent". UNDRIP, preambular para. 7: "*Recognizing* the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources".

Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada*, UN Doc. CCPR/C/CAN/CO/5 (27-28 October 2005), para. 8: "The State party should re-examine its policy and practices to ensure they do not result in extinguishment of inherent aboriginal rights."

[75] United States, *Initial reports of States parties due in 1993: United States of America*, UN Doc. CCPR/C/81/Add.4 (24 August 1994) (State Party Report), para. 62: "Aboriginal Indian interest in land derives from the fact that the various tribes occupied and exercised sovereignty over lands at the time of occupation by white people. This interest does not depend upon formal recognition of the aboriginal title". In Canada, see *Calder* v. *A.G. British Columbia*, [1973] S.C.R. 313 (Supreme Court of Canada) at 390, per Hall J.: "The aboriginal Indian title does not depend on treaty, executive order or legislative enactment."

See also Permanent Forum on Indigenous Issues (Secretariat), "Presentation by Mattias Åhrén", International Expert Group Meeting, Indigenous Peoples and Forests, UN Doc. PFII/2011/EGM, New York, 12 - 14 January 2011 paras. 4.2 and 4.3, where it is described that, in the Norwegian cases of *Selbu*, Rt. 2001 side 769 and *Svartskogen*, Rt. 2001 side 1229, the Supreme Court has most recently confirmed that Saami property rights to land follows from traditional use and are not contingent upon formal recognition in national legislation. Similarly, the Swedish Supreme Court has determined in *Taxed Lapp Mountain Case*, NJA 1981 s 1, that the right to pursue reindeer husbandry follows from use since time immemorial and is not contingent on formal recognition in law.

[76] See also *Media Rights Agenda and Constitutional Rights Project v. Nigeria*, African Commission on Human and Peoples' Rights, Communications 105/93, 128/94, 130/94, 152/96, Twelfth Activity Report, 1998-1999, Annex V, 52 at 58, para. 66: "To allow national law to have precedent over the international law of the [African] Charter would defeat the purpose of the rights and freedoms enshrined in the Charter. International human rights standards must always prevail over contradictory national law."

[77] Commission on Human Rights, *Report of the second expert seminar "Democracy and the rule of law" (Geneva, 28 February-2 March 2005): Note by the secretariat*, UN Doc. E/CN.4/2005/58 (18 March 2005), para. 32 (Conclusions and Recommendations).

[78] Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Extractive industries operating within or near indigenous territories*, UN Doc. A/HRC/18/35 (11 July 2011), para. 61.

[79] See, *e.g.*, UNDRIP, arts. 31, 38 and 42; and *Indigenous and Tribal Peoples Convention, 1989*, arts. 2(2)(b) and 5.

[80] At the international and national levels, Indigenous peoples' rights are most often determined on the basis of traditional occupation or other use of their traditional lands, territories and resources. See Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Addendum: Situation of indigenous peoples in Australia*, UN Doc. A/HRC/15/37/Add.4 (1 June 2010), para. 29:

> The strengthening of legislative and administrative protections for indigenous peoples' rights over lands and natural resources should involve aligning those protections with applicable international standards, in particular those articulated in the Declaration on the Rights of Indigenous Peoples. Of note is ... the Declaration ... affirming simply that rights exist by virtue of "traditional ownership or other traditional occupation or use" (art. 26).

Case of the Mayagna (Sumo) Awas Tingni Community, I/A Court H.R., Ser. C No. 79 (Judgment) 31 August 2001, para. 151: "As a result of customary practices, possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration."

Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v *Kenya*, African Commission on Human and Peoples' Rights, Communication No. 276/2003, Twenty-Seventh Activity Report, 2009, Annex 5, para. 196: "...the State still has a duty to recognise the right to property of members of the Endorois community, within the framework of a communal property system, and establish the mechanisms necessary to give domestic legal effect to such right recognised in the [African] Charter and international law."

[81] Emphasis added. For the purposes of the *Convention on Biological Diversity*, "biological resources" includes, *inter alia*, genetic resources (art. 2).

Indigenous peoples' cultural well-being is an integral part of sustainable development: see, *e.g.*, *Declaration on the Establishment of the Arctic Council*, Ottawa, 19 September 1996, (1996) 35 I.L.M. 1387, preamble: "Affirming our commitment to sustainable development in the Arctic region, including economic and social development, improved health conditions and cultural well-being".

[82] 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).

[83] UN 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. 76 (Conclusions and recommendations):

> Participation in decision-making is a foundational right that at its core provides the basis for the enjoyment of the full range of human rights. Furthermore, a number of basic human rights principles underpin the right to participation and inform its content, including, among others, principles of self-determination, equality, cultural integrity and property.

United Nations Development Group, "United Nations Development Group Guidelines on Indigenous Peoples' Issues", February 2008, 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."

[84] United Nations Development Group, "United Nations Development Group Guidelines on Indigenous Peoples' Issues", *supra* note 83 at 28: "Consultation and participation are crucial components of a consent process." [citing the Report of the International Workshop on Methodologies Regarding Free Prior and Informed Consent, E/C.19/2005/3, endorsed by the UNPFII at its Fourth Session in 2005]

[85] Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Russian Federation*, UN Doc. CERD/C/RUS/CO/19 (20 August 2008), para. 20:

> The Committee recommends that the State party … ensure that the small indigenous peoples of the North, Siberia and the Russian Far East are represented in the legislative bodies, as well as in the executive branch and in public service, at the regional and federal levels, and ensure their effective participation in any decision-making processes affecting their rights and legitimate interests.

[86] 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. 2. [emphasis added]

See also Human Rights Council, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover*, UN Doc. A/HRC/17/25 (12 April 2011), para. 18: "The right to health framework complements current development approaches by underlining the importance of aspects such as participation, community empowerment and the need to focus on vulnerable populations."

[87] Government of Canada, Managing Genetic Resources in the 21st Century: Domestic Policy Guidance for Canada, Draft, *supra* note 2, at 3 (Principles).

[88] Such phrases as "appropriate", "where appropriate", etc. are also used excessively in the *Protocol*. However, see Committee on Economic, Social and Cultural Rights, General Comment No. 21, *Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E/C.12/GC/21 (21 December 2009), para. 16(e):

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

[89] Government of Canada, "Discussion Document", *supra* note 14 at 22.

[90] *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 U.N.T.S. 195 at 216, 5 I.L.M. 352 (entered into force 4 January 1969).

[91] *Ibid.*, art. 1. [emphasis added] See also Human Rights Committee, General Comment No. 18, *Non-discrimination*, 37th sess., (1989), at para. 7:

> ... the term "*discrimination*" as used in the Covenant should be understood to imply *any distinction, exclusion, restriction or preference which is based on any ground such as race*, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and *which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms*. [emphasis added]

[92] See *supra* notes 27 *et seq.* and accompanying text.

[93] See, *e.g.*, Government of Canada, "Discussion Document", *supra* note 14 at 10 in regard to the *Protocol*: "Article 6 ... establishes that a Party can decide not to require [prior informed consent] for access to some or all of its genetic resources".

[94] See *supra* paragraphs 116 *et seq.*

[95] Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Addendum: Situation of indigenous peoples in the Russian Federation*, UN Doc. A/HRC/15/37/Add.5 (23 June 2010), para. 83:

> It is essential that the State urgently bring coherence, consistency and certainty to the various laws that concern the rights of indigenous peoples and particularly their access to land and resources. In accordance with international standards, guarantees for indigenous land and resource rights should be legally certain; implemented fully and fairly for all indigenous communities …

[96] See *supra* notes 20 *et seq.* and accompanying text.

[97] Government of Canada, "Discussion Document", *supra* note 14 at 6. [emphasis added] See also *Vienna Convention on the Law of Treaties*, *supra* note 55, art. 18:

> A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:
>
> (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty ... [emphasis added]

[98] Terry Macalister, "Canadian government accused of 'unprecedented' tar sands lobbying", *The Guardian* (4 August 2011), http://www.guardian.co.uk/environment/2011/aug/04/canada-tar-sands-lobbying:

> The Canadian government has been accused [by Friends of the Earth Europe] of an "unprecedented" lobbying effort involving 110 meetings in less than two years in Britain and Europe in a bid to derail new fuel legislation that could hit exports from its tar sands.

See also Mike de Souza, "Three federal departments worked to put positive spin on 'dirty oil'", *The [Montreal] Gazette* (22 November 2010) at A12; and Sneh Duggal, " Feds intensify lobbying against EU fuel label", *Embassy*, Canada's Foreign Policy Newsweekly, October 26, 2011, p. 1.

[99] For example, the former Minister of Environment refused to meet with representatives of Indigenous peoples in Nagoya, Japan in October 2010 during a crucial point in the negotiations on the *Nagoya Protocol*. Instead the Minister made unilateral, prejudicial decisions relating to the rights of Indigenous peoples and UNDRIP.

[100] *Haida Nation* v. *British Columbia (Minister of Forests)*, *supra* note 29, para. 16: "The honour of the Crown is always at stake in its dealings with Aboriginal peoples …"

[101] Government of Canada, Managing Genetic Resources in the 21st Century: Domestic Policy Guidance for Canada, Draft, *supra* note 2 at 2 (Executive Summary).

See also Ad Hoc Open-Ended Inter-Sessional Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity, "Composite Report on the Status and Trends Regarding the Knowledge, Innovations and Practices of Indigenous and Local Communities – Regional report: North America: Note by the Executive Secretary", UN Doc. UNEP/CBD/WG8J/3/INF/8 (7 October 2003), at 12:

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

[102] Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Extractive industries operating within or near indigenous territories*, UN Doc. A/HRC/18/35 (11 July 2011), para. 82 (Conclusions and Recommendations). [emphasis added]

[103] It is not acceptable that, in relation to Indigenous peoples, the Canadian government fails to apply core international principles that it has affirmed in international forums. See, *e.g.*, Canada (Pamela Hay, Deputy Director, Foreign Affairs and International Trade Canada), "Inter-linkages and Cross-cutting Issues", Canada's Statement to the United Nations Commission on Sustainable Development, 18th Sess., New York (11 May 2010)**:**

> Within the context of CSD-18, Canada has identified four key inter-linkages and cross-cutting issues:
>
> 1) Good Governance:
>
> - Canada recognizes the fundamental importance of:
> - respect for human rights and gender equality;
> - respect for and enforcement of the rule of law;
> - accountable, transparent, and inclusive public institutions; and
> - a commitment to freedom and democracy.
>
> These principles form a basis for eradicating poverty, achieving sustained economic growth, and promoting sustainable development.