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**AD HOC OPEN-ENDED WORKING GROUP ON ACCESS AND
BENEFIT-SHARING**

Ninth meeting (second resumed)
Nagoya, Japan, 16 October 2010

**DRAFT PROTOCOL: INDIGENOUS PEOPLES' OBJECTIONS TO THE CURRENT TEXT – A
CALL FOR JUSTICE AND SOLIDARITY**

Note by the Executive Secretary

1. The Executive Secretary is please to make available herewith, for the information of participants in the resumed ninth meeting of the Open-ended Working Group on Access and Benefit-sharing, an information document, at the request of the Grand Council of the Crees (Eeyou Istchee) on behalf of the signatories.
2. The document is being circulated in the form and language in which it was submitted to the Secretariat.

DRAFT PROTOCOL: INDIGENOUS PEOPLES' OBJECTIONS TO THE CURRENT TEXT – A CALL FOR JUSTICE AND SOLIDARITY

Joint Statement of Grand Council of the Crees (Eeyou Istchee); Inuit Circumpolar Council; Nunavut Tunngavik Inc.; Saami Council; Sámi Parliament in Norway; World Indigenous Peoples Network: AINU (WIN-AINU); Assembly of First Nations; Unión Nacional de Abogadas y Abogados Indígenas de Panamá (UNAAIP); Consejo Regional Otomi del Alto Lerma; Human Rights First Rwanda Association; International Indian Treaty Council (IITC); Indian Confederation of Indigenous and Tribal Peoples North East Zone (ICITP-NEZ) (India); Atlantic Policy Congress of First Nations Chiefs Secretariat; Rapa Nui Parliament; Na Koa Ikaika KaLahui Hawaii; Assembly of First Nations of Québec and Labrador/Assemblée des Premières Nations du Québec et du Labrador; Union of British Columbia Indian Chiefs (UBCIC); First Nations Summit; Lawyers' Association for Human Rights of Nepalese Indigenous Peoples (LAHURNIP); The Koani Foundation; Kus-Kura S.C.; Québec Native Women/Femmes Autochtones du Québec; International Organization of Indigenous Resource Development (IOIRD); Foundation for Aboriginal and Islander Research Action (FAIRA); United Peoples' Federation of Assam (UPFA) (India); Corporación de Abogados Indígenas de Panamá (CAIP); Centro de Asistencia Legal Popular (CEALP); Kanien'kehá:ka Onkwawén:na Raotitiohkwa Language and Cultural Center; Innu Council of Nitassinan; Asociación ANDES; Samson Cree Nation; Ermineskin Cree Nation; Montana Cree Nation; Louis Bull Cree Nation; United Confederation of Taino People (UCTP); First Peoples Human Rights Coalition; Indigenous World Association; First Nations Confederacy of Cultural Education Centres; Institut Tshakapesh; Indigenous Peoples Council on Biocolonialism; Mataatua Declaration Association; Caney de Orocovis; Maritime Aboriginal Peoples Council; National Association of Friendship Centres; Innu Takuaikan Uashat mak Mani-Utenam; Plenty Canada; Indigenous Peoples Law and Policy (IPLP) Program - University of Arizona Rogers College of Law; Natural Justice: Lawyers for Communities and the Environment; International Institute for Environment and Development (UK); Canadian Friends Service Committee (Quakers); Center for World Indigenous Studies; The North-South Institute.

Introduction

1. We welcome this opportunity to state some key concerns prior to the Resumed Ninth Meeting in Montreal in September 2010. This Joint Statement does not preclude other concerns raised by Indigenous peoples and local communities.
2. We reiterate our strong support for the central objective of both the *Convention on Biological Diversity* (CBD) and the draft Protocol,ⁱ namely, “*fair and equitable* sharing of the benefits arising out of the utilization of genetic resources”.ⁱⁱ
3. In relation to Indigenous peoples and local communities, the text of the draft Protocol resulting from the July 2010 meeting in Montreal fails to respect this essential objective. In view of global biopiracy of genetic resources and traditional knowledge, we urgently need international and domestic safeguards for our human rights. In the absence of a principled framework, we strongly object to the current text.
4. Prior to the July meeting, a Joint Statement entitled “Concerns relating to CBD Process, Revised Draft Protocol and Indigenous Peoples’ Human Rights”ⁱⁱⁱ was sent to the Contracting Parties and Co-Chairs. In good faith, we shared our concerns and proposed amendments so that significant progress could be achieved in the negotiations. Our spirit of cooperation, solidarity and mutual respect was not reciprocated.

5. Parties proceeded on essential issues with their own amendments that are not consistent with international human rights law. In key respects, the amendments are not compatible with the objective of “fair and equitable” benefit-sharing and the related framework in the CBD.

Adoption of para. (e) of article 5(2) – authority exceeded

6. Paragraph (e) of article 5(2)^{iv} of the draft Protocol was approved at the last Montreal meeting – against the wishes of the International Indigenous Forum on Biological Diversity (IIFB).^v This paragraph could undermine our rights to genetic resources and associated traditional knowledge,^{vi} as well as the need for our free, prior and informed consent in order for access to be granted.
7. A formal request was made by the IIFB to allow more time for consultations. The Co-Chair rejected this request. When no Party objected to paragraph (e), it was declared officially approved.
8. The Co-Chairs and Parties do not have the authority to approve a text that runs counter to the central objective of *fair and equitable* benefit-sharing. This latest text is not consistent with the *Convention on Biological Diversity*, the *Charter of the United Nations* and other international law.
9. The current text fails to take into account the rights of Indigenous peoples to genetic resources – even though this CBD objective requires “taking into account *all rights* over those resources”.^{vii}

Rights’ existence not dependent on State discretion

10. The Convention also refers to the “customary use of biological resources in accordance with traditional cultural practices” (art. 10(c)). This customary use in effect affirms the existence of legal rights^{viii} of Indigenous peoples to biological resources. Such resources, by definition, include genetic resources.
11. In paragraph (e), the *existence* of our rights and resulting State action could be interpreted as dependent on the discretion of States and national legislation. This approach runs directly counter to international human rights law,^{ix} which affirms that our rights relating to resources are inherent.^x
12. As affirmed in the Convention (art. 3), States have a duty to act *in accordance with the Charter of the United Nations and the principles of international law*. This requires actions “promoting and encouraging respect” for our human rights.^{xi} This also requires States to respect principles of international law, including those in the *United Nations Declaration on the Rights of Indigenous Peoples*.
13. In the CBD, the phrase “subject to its legislation” is not used to enable States to determine whether Indigenous peoples’ rights exist or to what extent. Rather, the phrase is used in the context where the Parties are obliged by the Convention to take maximum positive action. Article 8(j) requires Parties “*as far as possible*” to “respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities” and to “encourage the equitable sharing of ... benefits”.^{xii} The phrase “*as far as possible*” is also used in requiring States to “[p]rotect and encourage customary use of biological resources”.^{xiii}

UN Declaration must be fully respected

14. As concluded in the July 2010 Report of the High Commissioner for Human Rights: “The Declaration on the Rights of Indigenous Peoples has confirmed its place as the *United Nations’ key tool* in advancing the rights of indigenous peoples”.^{xiv} Special Rapporteur James Anaya adds:

This Declaration, far from affirming rights that place indigenous peoples in a privileged position, aims at repairing the ongoing consequences of the historical denial of the right to self-determination and other basic human rights.^{xv}

15. This universal human rights instrument is being used by UN treaty bodies to interpret Indigenous peoples' rights and related State obligations under international treaties. Similar use of the *Declaration* is being made by UN specialized agencies and the Human Rights Council's special procedures and mechanisms, which include special rapporteurs and independent experts.^{xvi} The *Declaration* is also being relied upon by domestic and regional courts, as well as other bodies within regional human rights systems in Africa and the Americas, including the Caribbean.
16. In light of these realities, the legal relevance of the Declaration is beyond dispute. Indigenous peoples' cultural rights are human rights. Indigenous peoples' cultural rights are human rights. As affirmed in the 2010 *Report of the independent expert in the field of cultural rights*, their existence is "a reality in international human rights law today, in particular in the United Nations Declaration on the Rights of Indigenous Peoples ... They may also be considered as *protecting access to cultural heritage and resources*".^{xvii}
17. At the July 2010 meeting, the IIFB proposed the following text for the preamble: "*Noting the significance of the United Nations Declaration on the Rights of Indigenous Peoples as regards this Protocol*". Soon after, there were proposals and counter-proposals by the Parties to limit Indigenous peoples' rights and the *UN Declaration*.^{xviii}
18. We will not accept such unilateral actions to diminish our human rights, as affirmed in the *Declaration* and by treaty bodies, courts and regional human rights systems.
19. It is contrary to the objectives of the *Convention on Biological Diversity* to undermine Indigenous peoples' rights and renege on related State obligations.^{xix}
20. The CBD states the intention is "to *enhance and complement existing international arrangements* for the conservation of biological diversity and sustainable use of its components".^{xx} Such international arrangements include the *UN Declaration*, which affirms Indigenous peoples' rights to cultural diversity and biological diversity,^{xxi} as well as environmental,^{xxii} food^{xxiii} and human security.^{xxiv}

Standard of free, prior and informed consent

21. A further concern with article 5(2)(e) of the draft Protocol is that it does not maintain the standard of "free, prior and informed consent". According to the current text, States could have discretion to "set out criteria" for either "prior, informed consent" or "approval and involvement".
22. Such approach could seriously undermine the consent of Indigenous peoples, as holders and custodians of traditional knowledge associated with genetic resources. Consent – whether freely given or withheld – must emanate from the Indigenous peoples concerned.^{xxv} This consent of Indigenous peoples must be consistent with their right of self-determination.
23. States should respect the treaty bodies and their interpretations and recommendations concerning the *Declaration* and Indigenous peoples' inherent human rights. For example, in relation to Indigenous peoples, the Committee on Economic, Social and Cultural Rights provides 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.^{xxvi}

Lawful authority and human rights prevail over consensus

24. In view of the CBD procedures favouring States, Indigenous peoples and local communities are vulnerable to abusive use of consensus by the Contracting Parties.
25. The draft Protocol does not exist in isolation. It is critical to discuss and resolve basic concerns relating to “exceeding legal authority” and “respect for human rights”. Such matters cannot be circumvented, with or without consensus of the Parties.^{xxvii}
26. It not the purpose or intent of the draft Protocol to dispossess Indigenous peoples and individuals in any way of their human rights or diminish these rights. Failure to integrate Indigenous peoples’ human rights is likely to exacerbate Indigenous poverty, discrimination and marginalization.^{xxviii}

Conclusions

27. We strongly support effective measures to safeguard the world’s biodiversity and natural environment. The draft Protocol that is currently being negotiated must fully respect the objective of “fair and equitable” benefit-sharing. This requires consistency with such core principles of international law as justice, non-discrimination, respect for human rights and good faith.
28. The text of paragraph (e) of article 5(2) fails to acknowledge that Indigenous peoples and local communities have rights to genetic resources. It does not respect the inherent rights of Indigenous peoples and the *UN Declaration on the Rights of Indigenous Peoples*. In regard to access to genetic resources, it allows States discretion as to whether users will need to obtain the free, prior and informed consent of the peoples or communities concerned.
29. **It is urgent and critical that the “approval” by the Parties of paragraph (e) be reconsidered.** An appropriate paragraph needs to be negotiated, consistent with the central objective of fair and equitable benefit-sharing and international human rights law.
30. In light of the essential role of Indigenous peoples and local communities in safeguarding biodiversity, this global objective is likely to be seriously affected.
31. The practice within the CBD process of seeking consensus solely among the Contracting Parties is prejudicial to Indigenous peoples and local communities.^{xxix} It is not consistent with the status of Indigenous peoples as subjects of international law.
32. Within the CBD negotiations, the right of Indigenous peoples and local communities to participation in the decision-making process must be ensured. This requires “meaningful” participation under international law.^{xxx}
33. International solidarity with Indigenous peoples and local communities should also be reinforced, in a manner that fully implements the *UN Declaration*. As concluded by the UN Independent expert on human rights and international solidarity:

International solidarity ... encompasses the values of social justice and equity ... and integrity of the international community ... International ... solidarity ... includes ... refraining from doing harm or posing obstacles to the greater well-being of others, including ... to our common ecological habitat, for which all are responsible. ... Special attention must be given to the human rights of vulnerable groups, including ... indigenous peoples^{xxxi}

In light of the fundamental rights and related issues at stake, this Joint Statement is also being shared with the UN Secretary-General, High Commissioner for Human Rights, treaty bodies, UN specialized agencies, special rapporteurs, UN Permanent Forum on Indigenous Issues and Expert Mechanism on the Rights of Indigenous Peoples. It is also being shared with Indigenous peoples and civil society organizations in different regions of the world.

Endnotes

ⁱ For the latest text arising from the negotiations in Montreal on 10-16 July 2010, see “Draft Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising From Their Utilization to the Convention on Biological Diversity” in Conference of the Parties to the Convention on Biological Diversity, *Report of the Second Part of the Ninth Meeting of the Ad Hoc Open-ended Working Group on Access and Benefit-Sharing*, 19-28 October 2010, Nagoya, Japan, UNEP/CBD/COP/10/5/Add.4 (28 July 2010), Annex.

ⁱⁱ *Convention on Biological Diversity*, article 1. In regard to Indigenous and local communities, there is a right to benefit-sharing – and related duties of States – that pertain to both genetic resources and “knowledge, innovations and practices”. While article 1 requires benefit-sharing from use of genetic resources concerning all rights-holders, article 8(j) refers to the “equitable sharing of the benefits arising from the utilization of ... knowledge, innovations and practices” of Indigenous and local communities.

ⁱⁱⁱ 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, *Ad Hoc Open-ended Working Group on Access and Benefit-sharing*, Resumed Ninth meeting, Montreal, Canada (10-16 July 2010).

^{iv} Solely para. (e) of article 5(2)(e) was approved in Montreal. Art. 5(2)(e) provides:

2. [Parties requiring prior informed consent,][Unless a Party waives its sovereign right through a national decision posted on the Access and Benefit-sharing Clearing-House,] Parties shall take the necessary legislative, administrative or policy measures, as appropriate, [with the aim,] to:

(e) 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;

^v In regard to article 5(2)(e), Canada, Australia and New Zealand jointly played a key role: see, *e.g.*, IISD Reporting Services, “Summary of the Resumed Ninth Meeting of the Working Group on Access and Benefit-Sharing of the Convention on Biological Diversity: 10-16 July 2010”, *Earth Negotiations Bulletin*, vol. 09, no. 527, 19 July 2010, at 7. Such joint actions that undermine Indigenous peoples’ human rights are a serious impediment to attaining the objective of fair and equitable benefit-sharing. Indigenous peoples in these countries are still struggling to overcome the inter-generational impacts of colonization, land and resource dispossession and discrimination.

See, *e.g.*, Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc. CERD/C/AUS/CO/15-17 (27 August 2010) (advance unedited version), para. 2 (history of gross violations of human rights); and 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. 4 (genocide, dispossession of lands, social and cultural disintegration, and racism).

Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Addendum: Preliminary note on the mission to New Zealand (18 to 24 July 2010)*, UN Doc. A/HRC/15/37/Add.9 (26 August 2010), para. 10: “... the Special Rapporteur cannot help but note the extreme disadvantage in the social and economic conditions of Maori people These troubling conditions undoubtedly result from the historical and ongoing denial of the human rights of Maori”.

^{vi} See, *e.g.*, *UN Declaration*, art. 31(1): “Indigenous peoples have the 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 ...” See also art. 31(2): “In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.”

^{vii} *Convention on Biological Diversity*, art. 1. An alternative formulation of para. (e) put forward by a number of representatives within the IIFB is: “(e) Provide national law to recognize and affirm the need to obtain the prior and informed consent of indigenous and local communities for access to their genetic resources and associated traditional knowledge”.

^{viii} 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 also 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).

^{ix} 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."

^x See, e.g., Committee on Economic, Social and Cultural Rights, General Comment No. 21, *Right of everyone to take part in cultural life* (art. 15, para. 1 (a), of the *International Covenant on Economic, Social and Cultural Rights*), UN Doc. E/C.12/GC/21 (21 December 2009), para. 36: "States parties must ... take measures to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources".

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."

^{xi} *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."

^{xii} The phrase "subject to national legislation" is also used in relation to "access to genetic resources" in article 15(1): "Recognizing the sovereign rights of States over their natural resources, the authority to determine access to genetic resources rests with the national governments and is subject to national legislation." However, article 15(2) qualifies such rights of States: "Each Contracting Party shall endeavour ... not to impose restrictions that run counter to the objectives of this Convention."

^{xiii} *Convention on Biological Diversity*, article 10(c): "Each Contracting Party 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 use requirements". [emphasis added] There is no inclusion here of such phrases as "subject to national legislation".

^{xiv} Human Rights Council, *Report of the United Nations High Commissioner for Human Rights on the rights of indigenous peoples*, UN Doc. A/HRC/15/34 (8 July 2010), para. 92 (Conclusions and recommendations). [emphasis added]

See also African Commission on Human and Peoples' Rights, "Communiqué on the United Nations Declaration on the Rights of Indigenous Peoples", Brazzaville, Republic of Congo, 28 November 2007: "The African Commission is confident that the Declaration will become a very valuable tool and a point of reference for the African Commission's efforts to ensure the promotion and protection of indigenous peoples' rights on the African continent."

^{xv} Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Addendum: Preliminary note on the mission to New Zealand (18 to 24 July 2010)*, UN Doc. A/HRC/15/37/Add.9 (26 August 2010), para. 4.

^{xvi} Human Rights Council, *Note by the United Nations High Commissioner for Human Rights* (report on the fifteenth meeting of special rapporteurs/representatives, independent experts and chairpersons of working groups of the special procedures of the Council, held in Geneva from 23 to 27 June 2008), UN Doc. A/HRC/10/24 (17 November 2008), para. 67: "Mandate-holders agreed that the effective implementation of the Declaration constituted a major challenge ahead, and decided to strengthen their efforts in that regard".

^{xvii} Human Rights Council, *Report of the independent expert in the field of cultural rights, Ms. Farida Shaheed, submitted pursuant to resolution 10/23 of the Human Rights Council*, UN Doc. A/HRC/14/36 (22 March 2010), paras. 10 and 9. [emphasis added]

^{xviii} "Draft Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising From Their

Utilization to the Convention on Biological Diversity”, Text submitted by the Interregional Negotiating Group, *Ad Hoc* Open-ended Working Group on Access and Benefit-Sharing, Ninth meeting (resumed), 10-16 July 2010, Montreal, UNEP/CBD/WG-ABS/9/L.2/Rev.1 (16 July 2010), preamble:

“[Taking into account] [Affirming] [any established] [the existing] rights [in national law] of [individuals,] indigenous and local communities [and countries] to genetic resources and associated traditional knowledge[, subject to national legislation where applicable [and, where appropriate, the United Nations Declaration of the Rights of Indigenous Peoples]]”.

^{xix} *UN Declaration*, art. 42: “The United Nations, its bodies ... and specialized agencies ... and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.” See also art. 38: “States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.”

^{xx} CBD, preamble. [emphasis added]

^{xxi} In regard to Indigenous peoples’ right to cultural diversity, see *UN Declaration*, 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 would also be relevant.

In relation to Indigenous peoples’ right to biological diversity, see *UN Declaration*, 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.).

^{xxii} *UN Declaration*, 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.”

^{xxiii} *Ibid.*, art. 7(2) (peace and security), read together with arts. 3 (right to self-determination); and 20 (right to own means of subsistence and 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]

^{xxiv} See generally *UN Declaration*. 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.

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

See also African Commission on Human and Peoples’ Rights, Communication No. 276/2003, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, Twenty-Seventh Activity Report, 2009, Annex 5, para. 291: “... the African Commission is of the view that any development or investment projects that would have a major impact within the Endorois territory, the State has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions.” [emphasis added]

Asian Development Bank, “Safeguard Policy Statement” (June 2009), at para. 55: “... consent of affected Indigenous Peoples

communities, through meaningful consultation, will be ascertained for the following project activities: (i) commercial development of the cultural resources and knowledge of Indigenous Peoples ...

^{xxvi} Committee on Economic, Social and Cultural Rights, General Comment No. 21, *supra* note x, para. 55(e). [emphasis added]

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. 32:

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

^{xxvii} See also Grand Council of the Crees (Eeyou Istchee) *et al.*, “Concerns relating to CBD Process”, *supra* note iii, paras. 72-78.

^{xxviii} Human Rights Council, “Opening Statement by Ms. Navanethem Pillay, United Nations High Commissioner for Human Rights”, 14th sess., Geneva (31 May 2010): “poverty, discrimination and marginalisation are both causes and effects of violations of economic, social, cultural, political and civil rights”.

See also draft Protocol, preamble: “*Acknowledging* the potential role of access and benefit-sharing to contribute to the conservation and sustainable use of biological diversity, poverty eradication and environmental sustainability”.

^{xxix} See also Grand Council of the Crees (Eeyou Istchee) *et al.*, “Indigenous Peoples’ Right to Participate in Decision-Making: International and Regional Processes”, Joint Statement of Indigenous and civil society organizations, Expert Mechanism on the Rights of Indigenous Peoples, 3rd sess., Geneva (13 July 2010), para. 77 ii): “While it can be positive for State and Indigenous parties to aspire towards consensus, such an objective should remain flexible. In no case should consensus be achieved at the expense of Indigenous peoples’ human rights. As such, it is our recommendation that the consensus based framework be re-examined and alternative negotiation frameworks be considered as needed.”

^{xxx} *Ibid.* paras. 35-38.

^{xxxi} Human Rights Council, *Report of the independent expert on human rights and international solidarity, Rudi Muhammad Rizki*, UN Doc. A/HRC/15/32 (5 July 2010), para. 58 (Conclusions). [emphasis added]
