SYMPOSIUM ON THE IMPLEMENTATION OF THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

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"Indigenous Peoples, Treaties and the Right to Free, Prior and Informed Consent"

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I. THE RIGHT TO FREE, PRIOR AND INFORMED CONSENT: AN OVERVIEW

For Indigenous Peoples, the Right of Free, Prior and Informed Consent (FPIC) is a requirement, prerequisite and manifestation of the exercise of their fundamental right to Self-determination as defined in international law.

Free, Prior and Informed Consent is a fundamental underpinning of Indigenous Peoples' ability to conclude and implement valid Treaties and Agreements with other parties, to exert sovereignty over their lands and natural resources, to develop and participate in processes that redress and correct violations, to accept any results that emerge from these processes, and to establish the terms and criteria for negotiations with States over any and all matters affecting them.

Experts at the **1st United Nations Seminar on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Peoples** which met in Geneva from December 15th to 17th, 2003 underscored the vital importance of consent in paragraph 2 of their final conclusions and recommendations. They affirmed that "that treaties, agreements and other constructive arrangements constitute a means for the promotion of harmonious, just and more positive relations between States and indigenous peoples because of their *consensual basis* and because they provide mutual benefit to indigenous and non-indigenous peoples" (E/CN.4/2004/111, paragraph 3, emphasis added).

These conclusions underscore the consensual basis of Treaties and Agreements as an essential component upon which their original validity and ongoing viability is based. The failure of State parties to respect the right to Free Prior and Informed Consent of Indigenous Nations is a principle cause of Treaty violations and abrogations, and results in a wide range of pervasive human rights violations. It must be underscored again that Treaties by definition can be concluded only between two equally sovereign Nations. Their continuing validity under both national and international law reaffirms the ongoing nature and quality of this relationship between Treaty Parties, based on equal standing and rights, mutual recognition and respect, and the fundamental principle of Consent.

Free, Prior and Informed Consent as a right of Indigenous Peoples, and as an essential principle upon which a range of other rights depends, has been acknowledged on many occasions in international human rights instruments and by a range of UN experts, Human Rights mechanisms and Treaty monitoring bodies.

For example, one of the 5 key objectives of the **UN General Assembly Plan of Action for the 2nd International Decade of the World's Indigenous Peoples** (January 2005) 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".

The adoption of the **United Nations Declaration on the Rights of Indigenous Peoples** by the UN General Assembly on September 13th 2007 represented a "watershed" moment and an historic step forward for Indigenous Peoples. The Declaration repeatedly affirms and underscores the Right to Free, Prior and Informed Consent for Indigenous Peoples. Its adoption demonstrates broad recognition by the international community that States are obligated to take an active role in ensuring that this right is upheld in a variety of contexts. These include redress, restitution,

settlement and dispute resolution affecting lands and resources, as well as in development activities, judicial and legislative processes which may impact Indigenous Peoples.

Now, more than ever, FPIC can be asserted as the operative human rights framework for concluding new Nation to Nation Treaties, as well as for negotiations between Indigenous Peoples and States pertaining to new Agreements and Constructive Arrangements. FPIC is also affirmed as the operative principle though which the parties establish, in equal and full partnership, the terms, processes, mechanisms and criteria for settling disputes arising from the failure to implement and respect existing Treaties.

The Land Claims Commission in the United States was an example of a failed process which violated this principle. It established a unilateral decision making process by which the same party which had violated Treaty Rights was also the sole arbitrator of the resulting claims. This had disastrous impacts for Indigenous Treaty Nations, whose rights were doubly violated by this process.

The desire of States and private interests to access Indigenous Peoples' lands for mineral development has been a primary force behind the illegal acquisition and appropriation of many of the Treaty Lands in the United States. One of many examples was the US response to the discovery of gold in the sacred Black Hills only 6 years after they were recognized by the 1868 Fort Laramie Treaty between the US and Sioux Nation as belonging to the Lakota (Sioux) in perpetuity. In 1980, the United States Supreme Court stated, referring to the resulting illegal confiscation of the Treaty Lands in the Black Hills of South Dakota that "... a more ripe and rank case of dishonorable dealing will never, in all probability, be found in the history of our nation" and considered that "... [U.S.] President Ulysses S. Grant was guilty of duplicity in breaching the Government's treaty obligations with the Sioux relative to ... the Nation's 1868 Fort Laramie Treaty commitments to the Sioux". The Court also concluded that the United States Government was guilty of "... a pattern of duress ... in starving the Sioux to get them to agree to the sale of the Black Hills."

However, despite this clear acknowledgement of wrongdoing by the US Supreme Court nearly 30 years ago, to this day none of these illegally-confiscated Treaty Lands have been returned, and gold mining continues in the Black Hills to this day.

Similar experiences have also been the norm in other countries with Nation to Nation Treaties concluded with Indigenous Peoples, including, notably, Canada and New Zealand. In these countries, the State Treaty Parties and/or their successor States have continued to assert that they have sole jurisdiction to determine, decide and control the process for redress of Treaty violations. They unilaterally establish the procedures and timelines for claims, decide if any violations have occurred and set the terms and parameters (called "caps" in New Zealand) for compensation when and if Treaty violations are recognized by the violating party. The Right to Free, Prior and Informed Consent of the concerned Indigenous Treaty Party is usually not a factor in these procedures.

Given the content of the Declaration's relevant provisions, and its assertion that it is now the minimum standard, combined with the wide range of compelling, in many cases legally-binding, recognitions under international norms of the right to FPIC for Indigenous Peoples, this situation can no longer be considered an acceptable "status quo". The call upon States and Indigenous Peoples to work together to change the terms, nature and structure of such processes so that they conform to current International Human Rights standards is clear and compelling.

II. INDIGENOUS PEOPLES' UNDERSTANDING OF THE RIGHT TO FREE, PRIOR AND INFORMED CONSENT

The Right to Free, Prior and Informed Consent is a broad and comprehensive right that is clearly distinct from the commonly used term "Consultation" which implies an exchange of views devoid of any decision making role. It is a far cry from the prevailing historic experience of Indigenous Peoples, who have been informed of someone's else's decision about what will be done with their lands and resources once it has been made, in spite of any relevant existing Treaty Rights. In many cases they have simply been moved off their lands, out of the way of so-called "progress".

FPIC may be understood according to the following definitions. These were previously presented to the **UN Expert Seminar on Indigenous Peoples' Permanent Sovereignty over Natural Resources and their Relationship to Land** in Geneva (January 2006); the **2nd United Nations Expert Seminar on Treaties, Agreements and Constructive Arrangements between States and Indigenous Peoples** in Samson Cree Nation, Alberta Canada (November 2006); and most recently the **Mining and Indigenous Peoples Issues Roundtable** (Sydney Australia, January 2008) Organized by the World Conservation Union (IUCN) and the International Council on Mining and Metals (ICMM).

1) ***Free*** is defined as the absence of coercion and outside pressure, including monetary inducements (unless they are mutually agreed on as part of a settlement process), and "divide and conquer" tactics. It must also include the absence of any threats or retaliation if it results in the decisions to say "no".

2) ***Prior*** is defined as a process taking place with sufficient lead time to allow the information-gathering and sharing process to take place, including translations into traditional languages and verbal dissemination as needed, according to the decision-making processes decided by the Indigenous Peoples in question. It must also take place without time pressure or time constraints. A plan or project must not begin before this process is fully completed and an agreement is reached.

3) ***Informed*** is defined as having all relevant information reflecting all views and positions. This includes the input of traditional elders, spiritual leaders, traditional subsistence practitioners and traditional knowledge holders, with adequate time and resources to find and consider information that is impartial and balanced as to potential risks and benefits, based on the **"precautionary principle"** regarding potential threats to health, environment or traditional means of subsistence.

4) ***Consent*** can be defined as the demonstration of clear and compelling agreement, using a mechanism to reach agreement which is in itself agreed to under the principle of FPIC, in keeping with the decision-making structures and criteria of the Indigenous Peoples in question, including traditional consensus procedures. Agreements must be reached with the full and effective participation of the authorized leaders, representatives or decision-making institutions as decided by the Indigenous Peoples themselves.

A process or activity which does not meet these or other criteria put forth by the affected Indigenous peoples as requirements for obtaining their FPIC is subject to immediate cease and desist.

This principle is essential in assessing the legal and moral validity of a Treaty or Agreement from the perspective of Indigenous Peoples. Free, Prior and Informed Consent requires that valid

Treaties, Agreements and Arrangements, whether concluded in the past or the present, must be decided free of any coercion, i.e. not under threat or in the face of starvation, small pox epidemics, cuts or elimination of basic human services, forced removals or annihilation under the gun.

Under FPIC, any new Agreements as well as redress and settlement processes cannot be carried out or concluded under an implied threat or with the stated denial of other options, i.e. *"This is your only choice, you better take it or you'll be left with nothing at all"* or *"we're going to do this on your land whether you like it or not, so you better agree so you can at least get a share of the jobs/cut of the profits/a little piece of your land back", etc. etc."*.

Certainly, these terms also apply to any consensual changes in the terms, interpretations or implementation of the original Treaty provisions, as they were understood by the Indigenous Peoples when they were agreed to in the first place.

Many Indigenous Peoples, in keeping with our original instructions, are also taught to apply what could be called the principle of Free, Prior and Informed Consent, to ask for permission from the animals, plants, minerals, and the spirits living in places that we have traditionally used.

The Traditional Peoples of our Indigenous Nations still practice this when they harvest plants to eat, bring water to drink, cut trees for building or making fires, hunt animals, catch fish, gather medicines for healing or rocks for ceremonies, or before they dig into the earth for any reason.

We are taught to do this, to ask for and get permission, when we are contemplating any activity that might disrupt the equilibrium of a place where any of our Natural World relations are living, including when we make agreements with outside parties about plans for "development" that may affect our lives as well as the lives and survival of other living things. We have been instructed to defend them and be responsible for them, not just as "resources" that we use but as living beings who themselves have rights to survive and prosper, and to give their consent.

We continue to do this so that we can carry out our original instructions and remain who we are, even while dealing with the complex demands and relationships that are part of this so called "modern" world.

III. THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES AND THE RIGHT TO FREE, PRIOR AND INFORMED CONSENT

The **United Nations Declaration on the Rights of Indigenous People**s, as adopted by the Human Rights Council on June 29th, 2006, and by the UN General Assembly on September 13th 2007 is the primary international instrument recognizing and upholding the rights of Indigenous Peoples. The Declaration explicitly affirms the right to Free, Prior and Informed Consent and upholds State obligations in this regard in many of its provisions. This issue was a pivotal point of debate throughout the many years at the UN Intersessional Working Group on the Draft Declaration. Some States, including Canada, the United States, New Zealand and Australia (under its former administration) consistently proposed wording to diminish this principle to a State obligation to merely "consult with Indigenous Peoples" or to "seek" but not necessarily obtain their Free, Prior and Informed Consent.

Canada continually cited Articles 19 and 32 as the most objectionable. They have maintained this position even though Canadian First Nations representatives reminded them on many occasions that

their legally binding Treaties with Indigenous First Nations including Treaty No. 6 clearly mandate Canada's compliance with this principle.

Indigenous Peoples as a whole made it clear that we could accept no less that the full recognition of this right in the Declaration. In the end we prevailed, with the broad support of most States and the international community. This formulation is contained in a number of provisions of the Declaration addressing various matters of critical concern to Indigenous Peoples.

Many of the relevant provisions of the Declaration directly refer to, imply or underscore the Right of Free, Prior and Informed Consent in relation to rights affirmed in Treaties, Agreements and other Constructive Arrangements between States and Indigenous Peoples as well as other rights. They are quoted in their entirety in Appendix I of this paper.

Articles 19, addressing the adoption of legislative and administrative measures and Article 32, which addresses development activities affecting Indigenous Peoples Lands and Natural Resources, do contain some of the broadest affirmations in Declaration of the right to FPIC for Indigenous Peoples. The provisions spelling out the terms and criteria for restitution, redress and compensation in cases of land and resource rights violations are equally relevant. Article 10, which affirms that Indigenous Peoples shall not be forcibly removed or relocated from their lands or territories without their Free, Prior and Informed Consent, is also of direct relevance to Land as the central issue in most Treaty rights violations being carried out around the world.

These provisions, as well as others in the Declaration, affirm specific rights as well as the fundamental nature of the relationship between State and Indigenous parties enshrined and recognized in Treaties. They also highlight some of the most critical ways in which Treaty Rights as well as the related right to FPIC are systematically violated, not only historically but in the present day.

Although the Declaration is by nature aspirational and is not legally binding in the same way as a Convention, the significance of its full and unqualified recognition of Indigenous Peoples as Peoples for the first time in an international standard has far-reaching implications. This leaves no room for any doubt that the range of other instruments which <u>are</u> legally binding upon State parties and contain rights which accrue to all Peoples, also apply to Indigenous Peoples. Primary among those is the Right to Self Determination as stated in the three paragraphs which constitute Article 1 in Common of the International Human Rights Covenants, as well as the recommendations of the CERD Committee, in particular General Recommendation XXIII pertaining to the Right to FPIC for Indigenous Peoples.

The impacts of these provisions and the rights and obligations for States which they affirm, cannot be minimized. They provide a clear basis for the next steps forward.

IV. THE UN DECLARATION AS A FRAMEWORK FOR A "NEW JURISDICTION" FOR REDRESS OF TREATY VIOLATIONS

In his Final Report, the **UN Rapporteur on Treaties, Agreements and Constructive Arrangements between States and Indigenous Populations** [E/CN.4/Sub.2/1999/20] Dr. Miguel Alfonso Martinez presented a number of Conclusions and Recommendations under the heading "Looking Ahead". One of the most important, and least developed to date, was his recommendation

that, due to the failures and injustices of existing mechanisms to resolve conflicts arising from Treaty violations, an “entirely new, special jurisdiction” should be established within States (supported by public funds) to deal exclusively with “Indigenous Issues”.

The Rapporteur affirmed that this “new jurisdiction” or mechanism for conflict resolution must be “independent of existing governmental…structures".

In paragraphs 306 – 308 of his Final Report, the Rapporteur presented some of the criteria and components he saw as necessary for this “new jurisdiction” to be a successful and viable tool for the resolution of disputes sand redress of violations, including “those related to treaty implementation”. A key component of this "new jurisdiction" would be a “body to draft, **through negotiations with the indigenous peoples concerned new juridical, bilateral, consensual, legal instruments with the indigenous Peoples interested**”, as well as legislation “to create a new institutionalized legal order applicable to all indigenous issues and that accords with the needs of indigenous peoples;” **(para. 308 (ii))**

The Rapporteur stressed that to effectively replace the current outmoded, oppressive and ineffective unilateral processes and structures, the full participation of Indigenous Peoples would be essential.

Last year, the IITC, Confederacy of Treaty 6 First Nations and Aotearoa Indigenous Rights Trust co-sponsored a side event during the 6th session of the UN Permanent Forum on Indigenous Issues focusing on Treaty Rights and International Standards. Treaty Nation representatives from the US, Canada, Hawaii, Aotearoa (New Zealand), Nicaragua, Chile and Kenya participated.

A primary focus of the discussion, and a strong consensus which emerged, was that there is an urgent unmet need to address and further develop the recommendation in the Final Treaty Study report calling for the establishment of this “new jurisdiction”. The participants discussed what this effective and just new legal framework might look like, from the point of view of Indigenous Peoples.

With its adoption by the UN General Assembly, the Declaration on the Rights of Indigenous Peoples and the framework it provides as a “minimum standard” can be used as the basis for discussions to transform the Rapporteur’s recommendation into a practical reality. We have an historic opportunity to bring the practices and procedures for redressing Treaty violations into line with currently accepted International Human Rights standards, based on the provisions of the Declaration which has now been accepted and adopted by the vast majority of UN member States around the world.

I have recently had the great privilege to be in Aotearoa (New Zealand) at the invitation of our Maori affiliates for the annual commemoration of the signing of the Tiriti o Waitangi. While I was there, I heard first-hand from many Maori about the shortcomings and injustices of the process established by the New Zealand Government for redressing and "settling" violations of the 1840 Treaty of Waitangi, called the Treaty of Waitangi settlements process. They reported that it has resulted in various “settlements” which have included the return of not more than 3% of the lands (or more frequently, of their monetary value) to the Maori tribes from whom it was appropriated in violation of the Treaty.

The urgent need to establish a just and fair process in which both Treaty parties have an equal role and decision making-authority based on FPIC was underscored to me during this visit and in

discussions I had with Maori throughout the country. The idea of Indigenous Treaty Peoples coming together from various regions to develop a general international framework which could then be applied and adjusted to various situations, countries and areas, is of great interest to them, to me, and I hope, to all of us.

Some of the key elements of this "new jurisdiction model" as a bi-lateral mechanism for Treaty-related redress/restitution/conflict resolution/land rights adjudication and recognition, based on relevant provisions contained in the UN Declaration on the Rights of Indigenous Peoples would include:

1) The process be fair independent, impartial, open and transparent (Article 27)
2) It be established and implemented in conjunction with the indigenous peoples concerned (Article 27)
3) It gives due recognition to indigenous peoples' laws, traditions, customs and land tenure systems (Article 27); and/or gives due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights (article 40)
4) It provides redress for Indigenous Peoples' lands, territories and resources, including those which were traditionally owned or otherwise occupied or used and which were confiscated, taken, occupied, used or damaged without their free, prior and informed consent (article 27 and 28).
5) Indigenous peoples shall have the right to participate in this process (Article 27)
6) Redress can include restitution of their traditionally owned or otherwise occupied or used lands and resources unless this is not possible (Article 28)
7) Compensation shall be just, fair and equitable (Article 28)
8) If return of original lands (as per #6 above) is "not possible", compensation shall take the form of lands, territories and resources equal in quality, size and legal status, unless otherwise freely agreed to by the peoples concerned (Article 28)
9) Monetary compensation or other appropriate redress can also be provided according to the above criteria, but only with the free agreement of the affected Peoples (Article 28)
10) Indigenous peoples have the right to have access to the process (Article 40)
11) The process provides for prompt decisions (Article 40)
12) It provides just and fair procedures to Indigenous Peoples for the resolution of conflicts and disputes with States or other parties (Article 40)
13) The process shall provide effective remedies for all infringements of their individual and collective rights (Article 40)

The basis for these processes and decisions in which Treaties and Treaty rights are involved or affected must be Article 37 of the Declaration. This article affirms Indigenous Peoples'' unequivocal rights to the recognition, observance and enforcement of the Treaties, Agreements and Other Constructive Arrangements concluded with States or their successors, as well as the obligation of States to honour and respect such Treaties, Agreements and other Constructive Arrangements.

V. CONCLUSIONS AND CLOSING THOUGHTS

Brothers and Sisters, as you all know, we successfully asserted over many years that the UN Declaration constitutes the minimum standard required for the survival, dignity and well being of Indigenous Peoples. Now that is it is adopted, Indigenous Peoples cannot be expected to accept negotiation processes with States to redress Treaty, land and other rights violations under terms that fall below the very basic, and minimal, provisions contained in the Declaration.

We now have a clear and compelling mandate, represented by the vote of 144 countries from all regions of the world. We have an historic opportunity, if we assert it, to step away from the failures and injustices of the past and undertake a new way forward.

I am presenting these thoughts and ideas to you as a basis for further discussion with all of your inputs. This will include an international roundtable or seminar specifically to continue to develop proposals for this framework or "new jurisdiction" for dispute resolution and redress of Treaty violations. We anticipate that it will take place in Aotearoa (New Zealand) sometime in the next year. It will be (provisionally at this time pending further consultations) hosted by Ngapuhi Tribal Nation at Te Tiriti o Waitangi Marae and will be (also provisionally) co-sponsored by the International Indian Treaty Council.

I thank you for this opportunity to share these thoughts. I also thank our hosts and the organizers of this event, the First Nations Leadership Council and the Assembly of First Nations. I will look forward to hearing all your ideas as we talk further.

For all our relations, Cheoque Utesia (Thank you very much).

APPENDIX I: EXCERPTS FROM THE UN DECLARAION ON THE RIGHTS OF INDIGENOUS PEOPLES

Below are relevant provisions of the Declaration which either directly refer to, imply or underscore the Right of Free, Prior and Informed Consent in relation to rights affirmed in Treaties, Agreements and other Constructive Arrangements between States and Indigenous Peoples, as well as other rights in the Declaration including processes for redress.

Preamble:

…*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,

Further recognizing the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States,

…*Convinced* that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

…*Recognizing also* that indigenous peoples have the right freely to determine their relationships with States in a spirit of coexistence, mutual benefit and full respect,

Considering that the rights affirmed in treaties, agreements and constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character,

Also considering that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States,

Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights affirm the fundamental importance of the right of self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development.

Bearing in mind that nothing in this Declaration may be used to deny any peoples their right of self-determination, exercised in conformity with international law,

Encouraging States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned…

Article 3

Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11

1. Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature.

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.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 20

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

2. Indigenous peoples deprived of their means of subsistence and development is entitled to just and fair redress.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 28

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, of a just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 29

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions 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.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 37

1. Indigenous peoples have the right to the recognition, observance and enforcement of Treaties, Agreements and Other Constructive Arrangements concluded with States or their successors and to have States honour and respect such Treaties, Agreements and other Constructive Arrangements.

2. Nothing in this Declaration may be interpreted as to diminish or eliminate the rights of Indigenous Peoples contained in Treaties, Agreements and Constructive Arrangements.

Article 40

Indigenous peoples have the right to have access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

Article 45

Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

APPENDIX II: THE RIGHT TO FREE, PRIOR AND INFORMED CONSENT AS RECOGNIZED IN OTHER INTERNATIONAL NORMS, INSTRUMENTS, MECHANISMS AND BODIES

1. As early as 1984, the **Inter-American Commission on Human Rights** stated that the 'preponderant doctrine' holds that *the principle of consent is of general application to cases involving relocation of indigenous peoples*." (OEA/Ser.L/V/II.62, doc.26., 1984, 120 emphasis added). In three recent cases addressing Indigenous Peoples in Nicaragua, Belize and the United States, Inter-American human rights bodies reaffirmed that States must obtain the prior consent of the Indigenous Peoples regarding actions affecting their land rights based on traditional occupancy as well as their own land tenure laws and systems.

In its report in the *Mary and Carrie Dann vs. United States case (2002)* the Inter-American Commission on Human Rights Commission stated that it "considers that general international legal principles applicable in the context of indigenous human rights to include:…the right of indigenous peoples to legal recognition of their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property; the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied; and where property and user rights of indigenous peoples arise from rights existing prior to the creation of a state, recognition by that state of the permanent and inalienable title of indigenous peoples relative thereto and to have *such title changed only by mutual consent between the state and respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property*." (Report No. 75/02, Inter-Am. C.H.R., paragraph 130, emphasis added)**.** The Commission further stated that international law requires "special measures to ensure recognition of the particular and collective interest that indigenous people have in the occupation and use of their traditional lands and resources and their right not to be deprived of this interest except *with fully informed consent*." (Ibid, paragraph 131).

2. The **International Labour Organization "Indigenous and Tribal Peoples Convention No. 169** (1989) refers to the principle of free and informed consent in the context of relocation of Indigenous Peoples from their land (article 16). It also recognizes Indigenous Peoples' "right to decide their own priorities for the process of development" (Article 7). In Articles 2, 6 and 15, the Convention mandates States to fully consult with Indigenous Peoples and to ensure their informed participation in matters pertaining to development, national institutions and programmes, lands and resources.

ILO Convention 169 Art. 4 further states that "*Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned*", and that "*such special measures shall not be contrary to the freely-expressed wishes of the peoples concerned" (Article 4, para. 1 and 2).*

Article 6 also requires that consultation be undertaken in good faith, in a form appropriate to the circumstances and with the objective of achieving consent.

3. The principle of mutual consent is also codified in the **Vienna Convention on the Law of Treaties,** which stipulates that termination of or withdrawal from a treaty requires the consent of all the parties (art. 54).

4. The **Special Rapporteur on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Peoples** also highlighted the importance of reciprocity and mutuality in treaty relations and observed that the unilateral termination of a treaty, or non-fulfillment of the obligations contained therein "has been and continues to be unacceptable behavior according to both the Law of Nations and more modern international law" (E/CN.4/Sub.2/1999/20, paragraph 279).

5. Experts at the **1st United Nations Seminar on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Peoples** which met in Geneva December 15th -17th, 2003 also underscored the vital importance of consent in paragraph 2 of their final conclusions and recommendations. They affirmed that "that treaties, agreements and other constructive arrangements constitute a means for the promotion of harmonious, just and more positive relations between States and indigenous peoples because of their *consensual basis* and because they provide mutual benefit to indigenous and non-indigenous peoples" (E/CN.4/2004/111, paragraph 3, emphasis added).

6. The 1990 **UN Global Consultation on the Right to Development** stated that "the most destructive and prevalent abuses of Indigenous Rights are the direct consequences of development strategies that fail to respect their fundamental right to self-determination."

7. Special Rapporteur Mrs. Erica-Irene A. Daes, in her landmark studies on **indigenous land rights** (E/CN.4/Sub.2/2001/21), **indigenous peoples' intellectual and cultural heritage** (E/CN.4/Sub.2/1993/28), and **Indigenous peoples' permanent sovereignty over natural resources** (E/CN.4/Sub.2/2004/30 and Add.1) recognized the historic and current violations of Indigenous Peoples' rights as result of the appropriations of their lands and resources without their Free Prior and Informed consent, and the failure of States to insure that these rights are protected. Madame Daes also emphasized the need to respect Free, Prior and Informed consent in any effective redress and resolution as well as in legislative measures to redress violations or correct current policies. For example, in her final recommendations in the Land Rights study Madame Daes called upon States to implement "measures to recognize demarcate and protect the lands, territories and resources of indigenous peoples" E/CN.4/Sub.2/2001/21 paragraph 145 …. But she also stressed that such legislation "must recognize indigenous peoples' traditional practices and law of land tenure, and *it must be developed only with the participation and free consent of the indigenous peoples concerned*." (ibid, paragraph146, emphasis added)

8. **The UN Expert Seminar on Indigenous Peoples' Permanent Sovereignty over Natural Resources and their Relationship to Land**, which met in Geneva in January of this year, endorsed the recommendations in Madame Daes' studies on Land Rights and Permanent Sovereignty over Natural Resources, and further "*underlined that free, prior and informed consent was an important treaty principle and an essential element of a legitimate constitutional order which should be applied to all agreements between indigenous peoples, States and third parties.* The principle should, however, always be based on the recognition of indigenous peoples' group rights and be linked to their equal access to justice in case of violations of the principle. (E/CN.4/Sub.2/AC.4/2006/3, paragraph 27, emphasis added).

In their final recommendations, the experts at this Seminar "*encouraged States to recognize the vital importance of implementing national legislation and procedures that protected the rights of*

indigenous peoples to free, prior and informed consent as the basis and framework for development. They also "*encouraged States to recognize the vital importance of implementing national legislation and procedures that protected the rights of indigenous peoples to free, prior and informed consent as the basis and framework for development.* States were also called upon to establish, in consultation with indigenous peoples and taking into account their legal systems and decision-making processes, effective measures to ensure that this fundamental right was respected, including by third parties such as private industry" (Ibid, paragraph 40, emphasis added).

9. Likewise, the 2005 Working paper "**Legal Commentary on the Concept of Free, Prior and Informed Consent"** submitted by Antoanella-Iulia Motoc and the Tebtebba Foundation to the UN Working Group on Indigenous Populations underscores that "*good faith adherence to treaty obligations and the consent-based relationship that underpins performance of those obligations must transcend formalistic and legalistic views of relations between the parties and be seen as an essential element of conflict avoidance*" (E/CN.4/Sub.2/AC.4/2005/WP.1, paragraph 51, emphasis added.)

10. In recent years various UN bodies and processes which focus on issues of environment, development and food security have affirmed the links between these concerns and human rights, including the right to Free, Prior and Informed Consent. For example, the **Millennium Development Goals (MDG'**s) were adopted by 189 nations and signed by 147 heads of State and governments during the **UN Millennium Summit** in September 2000. The MDG's and the Millennium Declaration acknowledge that development rests on the inter-related foundations of democratic governance, justice, the rule of law, respect for human rights, environmental sustainability and respect for nature, shared responsibility, peace and security.

Likewise Indigenous experts from North America, Latin America, Africa, Asia, Pacific and the Arctic and representatives of the UN Food and Agricultural Organization (FAO), United Nations Permanent Forum on Indigenous Issues, United Nations Educational, Scientific and Cultural Organization (UNESCO), United Nations Development Fund for Women (UNIFEM) and the United Nations Development Programme (UNPD) participated in the **2nd Global Consultation on the Right to Food, Food Security and Food Sovereignty for Indigenous Peoples**, **in Bilwi Nicaragua in September 2006. They affirmed a rights-based approach in the development of *"Cultural Indicators for Food Security, Food Sovereignty and Sustainable Development"*** which are currently being disseminated in many communities, organizations and UN agencies. Indicator area 8 provides benchmarks for "Effective consultations for planning, implementation and evaluation applying the principles of Free, Prior Informed Consent and full participation by community members when development programs are implemented by States, outside agencies or other entities and the extent to which cultural concerns are considered and addressed."

11. The far-reaching significance of the emphasis placed on FPIC as one of the 5 major themes of the **Plan of Action as set forth by the UN General Assembly for Second International Decade of the Worlds Indigenous Peoples,** which commenced on January 1, 2005, can not be overstated. The Draft Programme of Action for the Decade as submitted by the Secretary General (A.60/270) proposed one of its five goals as "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".*

Mr. José Antonio Ocampo, Under-Secretary-General for Economic and Social Affairs and Coordinator of the Second International Decade of the World's Indigenous People, in his statement to the Fifth Session of the United Nations Permanent Forum on Indigenous Issues New York, 15 May 2006, affirmed the first two goals of the Decade as: " First, to promote non-discrimination and inclusion of indigenous peoples in all phases of the policy process, from design through implementation and evaluation; Second, *to promote full and effective participation of indigenous peoples in the decisions that affect their lives, based on the principle of free, prior and informed consent;"*

12. UN Treaty Monitoring bodies have also made various references to the principle of Free, Prior and Informed consent in their jurisprudence. It should be noted that these Conventions or International Treaties are legally binding on the State parties, and the recommendations of these bodies to State Parties to improve their compliance carry a significant weight and can not be lightly ignored. In the report of its 27th session (2001) the UN **Committee on Economic, Social and Cultural Rights** also highlighted the need to obtain indigenous peoples' consent in relation to resource exploitation impacting the Indigenous Peoples of Columbia. The Committee observed "with regret that the traditional lands of indigenous peoples have been reduced or occupied, without their consent, by timber, mining and oil companies, at the expense of the exercise of their culture and the equilibrium of the ecosystem" (E/C.12/1/Add.74, paragraph 12). It recommended that the State party ensure the participation of indigenous peoples in decisions affecting their lives and particularly urged it "to consult and seek the consent of the indigenous peoples concerned prior to the implementation of timber, soil or subsoil mining projects and on any public policy affecting them, in accordance with ILO Convention No. 169" (ibid., paragraph 33). Likewise, in 2004 the Committee stated that it was "deeply concerned that natural extracting concessions have been granted to international companies *without the full consent of the concerned communities*". (E/C.12/1/Add.100, paragraph 12, emphasis added).

13. Of particular importance are the outcomes of the **Committee on the Elimination of Racial Discrimination (CERD)** in the past 10 years. For example, in its General Recommendation XXIII on the Rights of Indigenous Peoples (1997), the **CERD** called upon States to "ensure that members of indigenous peoples have rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent" (paragraph 4 (d)). In the CERD's concluding observations addressing the United States of America (CERD/C/59/Misc.17/Rev.3, 2001), it notes with concern that in the US, treaties made with Indigenous Peoples "can be abrogated unilaterally," and "the land they [indigenous peoples] possess or use can be taken without compensation by a decision of the Government". The Committee called upon that State to "ensure effective participation by indigenous communities in decisions affecting them, including those on their land rights, as required under article 5 (c) of the Convention", drawing particular attention to *"the importance of securing the 'informed consent' of indigenous communities"* (emphasis added).

The Seventieth Session of the CERD met from February 19 – March 9, 2006 in Geneva, and issues an historic opinion responding to the government of Canada's report. The CERD expressed its concerns that trans-national mining companies registered in Canada were negatively impacting the rights of Indigenous Peoples outside of Canada. This conclusion was based on a submission by IITC containing statements and resolutions from Indigenous Peoples from Canada, Montana, Nevada, Alaska and Guatemala reporting human rights violations

resulting from activities of Canadian Mining companies, including the denials of their rights to Free, Prior and Informed Consent.

The **CERD's "Concluding Observations**" with respect to Canada stated:

"The Committee notes with concern the reports of *adverse effects of economic activities* connected with the exploitation of natural resources in countries *outside Canada by transnational corporations* registered in Canada on the right to land, health, living environment and the way of life of indigenous peoples living in these regions …

… the Committee encourages the State party to take appropriate legislative or administrative measures to prevent acts of transnational corporations registered in Canada which negatively impact on the enjoyment of *rights of indigenous peoples* in territories outside Canada. In particular, the Committee recommends to the State party that it explore ways to *hold transnational corporations registered in Canada accountable*. (CERD/C/CAN/CO/18 para. 17}

This was the first time in history that a State was told by a UN Treaty Monitory Body for a legally-binding Convention that it was responsible to monitor the actions of corporations regarding compliance with internationally recognized human rights. It sheds a new light on State obligations to Indigenous Peoples and the International Community in this regard.