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Discussion on the six mandated areas of the Permanent Forum (economic and social development, culture, environment, education, health and human rights), with reference to the United Nations Declaration on the Rights of Indigenous Peoples and the 2030 Agenda for Sustainable Development

Implementing free, prior and informed consent in the context of Indigenous Peoples

Note by the Secretariat

Summary

At its twenty-first session, the Permanent Forum on Indigenous Issues appointed Aleksei Tsykarev, a member of the Forum, to conduct a study on implementing free, prior and informed consent in the context of Indigenous Peoples and to present the study to the Forum at its twenty-second session. The present note contains the report on the study.

* [E/C.19/2023/1](#).



Report on the study on implementing free, prior and informed consent in the context of Indigenous Peoples

I. Introduction

1. In the United Nations expert community, there is a common understanding that free, prior and informed consent is a pillar of the implementation of the right of Indigenous Peoples to determine their development priorities. While there is still some debate on categorizing free, prior and informed consent, whether as a right, a principle or a safeguard, States and Indigenous Peoples alike are deeply committed to realizing its promise for improving relationships and advancing human rights.

2. In the study of the Expert Mechanism on the Rights of Indigenous Peoples on free, prior and informed consent: a human rights-based approach,¹ free, prior and informed consent was considered as a human rights norm and a safeguard for the collective rights of Indigenous Peoples. In the report of the Special Rapporteur on the rights of Indigenous Peoples, James Anaya, on extractive industries and Indigenous Peoples,² free, prior and informed consent was referred to as a principle. Some Indigenous leaders and experts³ define free, prior and informed consent as a human right that is an integral part of the right to self-determination, while others feel that free, prior and informed consent should become another fundamental principle of international law such as territorial integrity, equality, self-determination and duty to cooperate.

3. Rather than attempting to resolve the debate, the present report includes references to free, prior and informed consent as a human rights principle and standard that embodies the right of Indigenous Peoples to their lands and to participate in decision-making.

4. While free, prior and informed consent implies a number of elements and conditions, there is no universal standard for implementing this principle. Good practices regarding free, prior and informed consent are constantly being developed by States, Indigenous Peoples and the private sector. Therefore, the practice of free, prior and informed consent currently stands as a sum of individual practices guided by an international normative framework. It is also a sum of efforts made by Indigenous Peoples, States and industrial companies. The global practice of free, prior and informed consent is evolving together with overall standard-setting with regard to the rights of Indigenous Peoples. This evolution may be transformed into a standard that should still allow for certain flexibility at the regional and national levels. The flexibility may be conditioned on the varieties of self-governing institutions of Indigenous Peoples, their decision-making models, and their historical relationships and agreements with States and the private sector.

5. The existing free, prior and informed consent framework includes articles from the United Nations Declaration on the Rights of Indigenous Peoples, the Indigenous and Tribal Peoples Convention, 1989 (No. 169) of the International Labour Organization, standards from the World Bank and the International Finance Corporation, industry standards and national laws, as well as studies by United Nations expert bodies.

¹ [A/HRC/39/62](#).

² [A/HRC/24/41](#).

³ Intervention by former Permanent Forum member Dalee Sambo Dorrough at the tenth session of the Permanent Forum on Indigenous Issues. See Rights and Resources, “UN: tenth session of the Permanent Forum on Indigenous Issues”, blog, 18 May 2011.

6. According to those standards, States are the primary duty bearers in terms of the implementation of free, prior and informed consent. Accordingly, the Expert Mechanism on the Rights of Indigenous Peoples was clear in stating that “human rights obligations cannot be delegated to a private company or other entity” and States “remain responsible for any inadequacy in the process”.⁴

7. However, it is well accepted that private entities should equally obtain the consent of and make agreements with Indigenous Peoples, as enshrined in the United Nations Declaration on the Rights of Indigenous Peoples. Both States and the private sector should be encouraged to do so and to go beyond the Declaration, employing free, prior and informed consent as a foundation for negotiations in other cases.

8. It is notable that all States have committed themselves to using free, prior and informed consent principles by unanimously agreeing on the outcome document of the World Conference on Indigenous Peoples. However, most States have not yet incorporated free, prior and informed consent into national legislation, which makes it difficult to guarantee that this principle will be widely used in practice. In such circumstances, the voluntary commitment of private companies to employing free, prior and informed consent when engaging with Indigenous Peoples can help to instill the principles in practice de facto, which will, in turn, push forward legislative reform.

9. Moreover, in many instances in which goodwill is in place, private companies have more flexibility than government actors to implement free, prior and informed consent. While States commit themselves to free, prior and informed consent in international and national laws, the private sector does it through public commitments, policies regarding Indigenous Peoples, industry standards and certifications. Such commitments are as significant for companies as they are for States themselves, in particular since any violation of the commitments would lead to both reputational damage and financial risk and loss.

10. Given that the practice of free, prior and informed consent is rapidly developing and changing, the research includes case studies and methodologies for its implementation. Therefore, the present report should be considered as complementary to the studies of the Permanent Forum on Indigenous Issues, the Expert Mechanism on the Rights of Indigenous Peoples and the Special Rapporteur on the rights of Indigenous Peoples. The present report evolves from a discussion of free, prior and informed consent and other human rights principles of due diligence that the Permanent Forum held at its Expert Group Meeting in 2021 and the recommendation of the twenty-first session of the Permanent Forum to a report on practices related to the use of free, prior and informed consent. The examples referred to in the present report include several discussed at the side event, entitled “Implementing free, prior and informed consent: building the capacity and experience of Indigenous Peoples”, held during the twenty-first session of the Permanent Forum and others in which the author participated or had the opportunity to study.

II. Integrity and uniqueness of free, prior and informed consent elements

11. The four elements of free, prior and informed consent are indivisible; none of them can be used in isolation, given their interlinkages and interconnectedness. A lack of integrity of all the elements of free, prior and informed consent-based negotiations might result in questions regarding the positive results achieved.

⁴ A/HRC/39/62, para. 56.

12. The “free” element refers to not only freedom to agree or disagree with a proposed project but also freedom to determine conditions of and justifications for the decision. Indigenous Peoples should have the option to withdraw their consent if the agreed conditions are violated. The “free” element applies to the entire process of negotiations; Indigenous Peoples should be able to freely enter into negotiations, freely withdraw from them or abstain from participating. They should have the right to freely select their representatives or bodies to participate in the process on their behalf and to elaborate on their approaches to free, prior and informed consent consultations. Less obviously, Indigenous Peoples should be able to have an internal debate or disagreement and choose methods of resolving such internal issues concerning proposed projects.

13. The free, prior and informed consent procedure must be carried out well in advance of any project, leaving sufficient time to obtain and study initial information, elect authorized representatives to participate in consultations and negotiate, engage in the consultations and make comments at all stages of the process. Companies should inform participants engaged in the procedure of all meetings, important events or changes in advance, using all available communication options.

14. The “prior” element clearly refers to a point preceding the starting point of a project affecting Indigenous Peoples. However, the issue of advance notice presents one of the most difficult questions: what should be considered as a project’s starting point? If it is agreed that gaining revenue is a material factor in any business, the most logical starting point would be investment. Once investments have been made, private companies will defend them even at the expense of the rights of Indigenous Peoples. Therefore, the process to acquire free, prior and informed consent should begin early in the conceptualization and design phases of the proposed activity, before any investment is made, providing the time necessary for Indigenous Peoples to initiate their own decision-making process. Indigenous Peoples should then be kept continuously apprised of key steps in the process, including applying for a permit or a licence, developing a project plan and engaging in geological prospecting (in the case of extractive industries).

15. Investment related to planning and due diligence procedures is crucial for the start of negotiations and for providing information on the potential risks to and impacts on the environment, culture, occupations, traditional way of life and human rights of Indigenous Peoples. Project plans and results of due diligence should be disclosed to the Indigenous Peoples concerned. In practice, however, some companies tend to keep project plans entirely private, referring to them as commercial or trade secrets. In 2021, during a virtual regional dialogue on Eastern Europe, the Russian Federation, Central Asia and Transcaucasia, the Permanent Forum was informed of such a case in the Republic of Karelia, Russian Federation, in which a private forestry company refused to disclose a felling plan, referring to the major corporate investments made for developing the plan. In further negotiations with the Veps people, however, the company agreed to show them the plan.

16. It is already well understood that Indigenous Peoples should receive complete and reliable information on a project and all its stages and proposed alternatives, including impacts on the land and resources, duration, mitigation, and financial and employment benefits. The “informed” element means that Indigenous Peoples should learn of companies’ proposals regarding the methods and rules of the free, prior and informed consent-based negotiations, grievances and follow-up measures. Indigenous Peoples should be informed of their rights and the relevant laws, international instruments and standards. All information should be communicated to Indigenous Peoples in a form that provides an opportunity to study it in advance. If necessary, the materials or a part thereof should be translated into Indigenous languages, and a qualified interpreter should be present at meetings and consultations throughout the

free, prior and informed consent procedure. Indigenous Peoples should have the opportunity to ask questions orally and in writing to comment on materials and documents provided and make their own suggestions.

17. The main objective of the “informed” element is for information to be not only accessed but also understood and analysed by representatives of Indigenous Peoples. There might be some misunderstandings related to the connotations that the terminology may have in different languages. For example, the word “informed” in legal terms in free, prior and informed consent is translated into Russian as “conscious”, which has a wider meaning than just “informed”. According to this concept, Indigenous Peoples would not only receive the necessary information but would also have the opportunity to collectively discuss it, taking into account their traditional decision-making system and internally process, and make an informed decision. That is, the information is not only received but also understood. Translations into Indigenous languages might bring an understanding of Indigenous Peoples’ own concepts and an additional understanding of how the process should be organized. In the Livvi-Karelian version of the United Nations Declaration on the Rights of Indigenous Peoples, the word “informed” is translated into the three words *sellitetty da ellendetty* (literally, “explained and understood”). However, in the kindred Finnish language, the translation, *tietoon perustuva* (“based on information”), is closer to the English. In any event, the mere provision of information without ensuring the opportunity and capacity of Indigenous Peoples to internalize it will often create misunderstanding and a failure to reach agreement.

18. Free, prior and informed consent-based consultations should include all community members. Companies should inform Indigenous communities as much as possible, identify all vulnerable groups and take their views into account. These groups may include elders, young people, women, children and persons with disabilities. In addition to identifying community members and decision-making bodies, companies should identify and inform stakeholders, such as non-governmental organizations, umbrella structures, ombudspersons, councils of authorized representatives and councils of elders.

19. The terms and conditions of consent should be stipulated in a written free, prior and informed consent agreement reached between the company and the concerned Indigenous peoples, tribe, settlement, village, community or social subgroup.

III. Development of free, prior and informed consent in practice

20. In the study of the Expert Mechanism on the Rights of Indigenous Peoples on treaties, agreements and other constructive arrangements, including peace accords and reconciliation initiatives, and their constitutional recognition,⁵ it was noted that there was a tendency in a number of sociocultural regions for Indigenous Peoples and companies to enter into direct agreements among themselves, with or without government involvement. Also noted was the need to provide capacity and resources for Indigenous Peoples to participate in the preparation and implementation of agreements and treaties.

21. As stated at the Expert Group Meeting, in Canada and the Russian Federation, some private companies engage with Indigenous Peoples on the basis of free, prior and informed consent principles. As was also noted at the meeting, “States should oversee the implementation of such agreements as part of their duty to obtain free, prior and informed consent even though they were not party to those agreements”.⁶

⁵ A/HRC/51/50.

⁶ E/C.19/2022/6, para. 35.

Such practices of the private sector form a database of success stories, typical mistakes and lessons learned that in turn develops into a theory and a practice of free, prior and informed consent. The international community should encourage the evolutionary formation of practice through extensive documentation and exchange of experience.

22. Examples of circumstances under which acquisition and documentation of free, prior and informed consent are required include investment and operations that have an impact on the traditional way of life and lands under occupation, traditional ownership or customary use, for example, industrial development of the subsurface (minerals, gases, etc.), the natural surface (water, timber, fish, reindeer, etc.) and cultural resources (artifacts, handicrafts and Indigenous traditional knowledge); land acquisition for the construction of physical infrastructure, including ancillary facilities (power substations and transmission lines, gas pipelines, shipyards, helicopter landing pads, etc.) and associated structures (road networks, ports, etc.); physical relocation of families from their settlements and villages; demolition and relocation of sacred sites (burial grounds, etc.); transportation routes, storage locations and methods, and dumping of chemicals and hazardous materials.

23. In instances in which Indigenous Peoples and companies already have a mutual agreement specifying ongoing cooperation or in which companies are responding to a direct and specific collective request by Indigenous Peoples, it may not be necessary or desirable to initiate a new free, prior and informed consent process. For example, industrial companies in Russian Taimyr invest in the construction of new houses and meat processing workshops in Indigenous villages.⁷ In Murmansk region, representatives of the Indigenous Sami people have requested that industrial companies invest in the revitalization of reindeer husbandry.⁸ In these instances, Indigenous Peoples have already outlined their objectives or negotiated entitlements.

24. In other instances, especially those in the categories of land rights and resettlement, free, prior and informed consent is strictly requested in international standards. A recent example from Taimyr⁹ provides an important case study. The village of Tukhard is a settlement that was constructed next to a gas supply plant in the 1970s on the lands of the nomadic Nenets people. Over the years, Indigenous representatives began to settle in the temporary buildings of rotational workers or constructed their own buildings from the materials at hand. Under the recently amended federal legislation, housing in an industrial area is prohibited for safety and health reasons. Even though the legislation did not require free, prior and informed consent, the Norilsk Nickel Group (the owner of the gas supplier enterprise operating in the village) decided to conduct the resettlement negotiation using the principle of free, prior and informed consent. The company hired independent experts, conducted due diligence and a broad awareness-raising campaign among the villagers and stakeholders, identified vulnerable groups, held three rounds of consultations before entering an agreement and documented the process.

25. Among the complications in the Tukhard case, several are worth mentioning: (a) the villagers did not have a decision-making body before entering into the consultations; (b) communication with the reindeer herders was limited owing to their nomadic way of life and the problematic seasonal geographical accessibility of the village; (c) past experience contributed to a lack of trust; and (d) reindeer herders live in the tundra, but have close cultural and family connections to the village. In order

⁷ Such construction is part of a five-year programme of development assistance to Indigenous small-numbered peoples of Taimyr. See Nornickel, “Nornickel builds new housing in Ust-Avam”, 13 July 2022.

⁸ Consultations between Nornickel and Indigenous Peoples of Murmansk region.

⁹ See <https://fpic.kmnsoyuz.ru/?lang=en>.

to overcome the challenges, the company proposed the following solutions: (e) an Indigenous Peoples' organization was invited to play the role of facilitator; (f) Indigenous Peoples received time and legal assistance in order to establish a free, prior and informed consent process-related decision-making body independently and according to their own procedures; (g) the company engaged with regional and federal Indigenous umbrella organizations, Indigenous parliamentarians, and the ombudsperson; (h) reindeer herders were not a target for resettlement, and their rights and needs were at the centre of the consultations; (i) the company established a grievance redress mechanism; and (j) before entering into actual consultations, the company acquired the consent of Indigenous Peoples for use of the free, prior and informed consent principle.

26. Although the legislation's requirement to establish a sanitary protection zone requires the relocation of inhabitants, in negotiations with the company, the Indigenous Peoples of Tukhard had the right to say "yes", "no" and "yes with conditions" to the proposed resettlement programme. In the case of "no", further responsibility to negotiate with the Indigenous Peoples would have rested with the local government. The government was not party to the negotiations, however; the municipal authorities and Indigenous parliamentarians from the constituency were present. The local government committed itself to monitoring and guaranteeing the lawful implementation of the agreement achieved. Consultative meetings between the Indigenous Peoples and the company were conducted according to their own rules and traditions and were chaired by an individual selected from among Indigenous representatives. All observers and other parties involved were not present during the actual decision-making process engaged in by the Indigenous Peoples.

27. The negotiation process included collective decisions by the entire community and individual decisions at the household level. Of course, no individual person can make decisions on behalf of the collective or on collective rights. Collectively, the Tukhard community decided to say "yes" to the resettlement programme, selected the relocation place and discussed conditions for the consent. Through their decision-making body, the Indigenous Peoples monitored the census to identify people eligible for new houses, reviewed the terms of reference for the architectural contest and provided advice on the construction materials and the visual characteristics of the new village. They also ensured the cultural, social and economic rights of the reindeer herders and kept other types of connections with the village. The Indigenous Peoples ensured that the new village would be constructed within the territory of traditional residence near the old village of Tukhard, within its existing boundaries, and that it would provide development opportunities to all people associated with Tukhard. While the company strived to facilitate the preservation of the community's traditional way of life, households were given the option to resettle in a city or another village. Therefore, after collective consent, households could decide individually whether to resettle to the new village or to move to another existing settlement. Since the resettlement plan is due in 2026, the consultations were held well in advance, and the "prior" element of free, prior and informed consent was ensured.

28. Interestingly, in the Tukhard case, several Indigenous representatives criticized the company for the launch of free, prior and informed consent because they believed that the company was trying to delay the actual construction of new houses or even hide non-action behind rhetoric on human rights and international standards. Since the construction of the new houses was a long-awaited project, the company had to convince Indigenous Peoples that a process based on free, prior and informed consent was important for strengthening the agreement and empowering the community.

29. Although Tukhard cannot be considered as a classic case of "free, prior and informed consent for relocation", owing to the legislative requirements to resettle the village, the case meets the criteria and offers an effective methodology for free, prior

and informed consent-based negotiations. Eventually, the application of free, prior and informed consent by the company and its acceptance by the villagers made the position of the Indigenous Peoples stronger, the agreement more reliable and its future implementation more transparent, and the company more accountable. The free, prior and informed consent acquisition process contributed to building relationships on the basis of trust and mutual respect, which were factors in the effective and just implementation of all conditions stipulated in the agreement.

30. In the Yamal-Nenets autonomous region of the Russian Federation, the Yamal liquefied natural gas project, which involved the construction of the world's largest and first Arctic plant for the production of liquefied gas, affected the traditional way of life and the reindeer husbandry of the nomadic Nenets people. A group of companies involved launched the first due diligence events in 2010, four years before obtaining a licence and seven years ahead of the beginning of the industry. The project proponents conducted ethnological, historical, cultural and archaeological research, organized an information campaign and offered a free, prior and informed consent acquisition plan. In 2013 and 2014, three rounds of negotiations between the project proponents and Indigenous Peoples led to the written free, prior and informed consent statement. As in the previous case, the Indigenous Peoples concerned created a decision-making body, a council of representatives. The free, prior and informed consent statement included a reference to the negotiated Indigenous Peoples plan (a plan of development assistance), which included impact minimization and mitigation measures, a local employment and education programme, and capacity-building efforts for the communities and households, as well as benefit-sharing mechanisms, such as construction of housing and social infrastructure, factories to process products of traditional occupations and crafts, transportation facilities, support for Indigenous-led organizations, and projects in science, sports, culture and language. The post-free, prior and informed consent engagement included consultations with Indigenous Peoples, monitoring by Indigenous Peoples of the implementation of the Indigenous Peoples plan, sociological studies, a grievance redress mechanism and restoration of ecosystems using the traditional knowledge of Indigenous Peoples.¹⁰

31. Another case from the Russian Federation that received much attention from the Permanent Forum involved the free, prior and informed consent of Indigenous Peoples of Sakhalin to a five-year Indigenous Peoples development plan, jointly implemented by the company Sakhalin Energy, the government of Sakhalin region and the regional council of the authorized representatives of the Indigenous small-numbered peoples of Sakhalin Oblast. The tripartite draft plan was discussed at consultative meetings and adopted at a conference by delegates from all seven municipalities of Sakhalin, using the principle of free, prior and informed consent. The consultation results were assessed by an independent expert. The programme is aimed at avoiding and minimizing the impacts of the project, known as Sakhalin-2, on Indigenous Peoples, improving their quality of life and supporting their sustainable development. Indigenous Peoples are directly involved in the management of the plan, including in the distribution of funds, through its governing board and the council of the sustainable development fund. The collective consent to the most recent development plan for 2021 to 2025 was given at a conference in 2021. The case suggests that, although international standards do not specifically require free, prior and informed consent for benefit-sharing mechanisms, it is applicable and contributes to the strengthening of negotiations.

32. In the absence of a legislative requirement for free, prior and informed consent in the United States of America, some companies undertake consultative processes

¹⁰ Yana Dordina, presentation at the International Forum on Public-Private Partnership in the Field of Sustainable Development of Indigenous Peoples, Murmansk, Russian Federation, 11 October 2022.

using free, prior and informed consent elements (free, prior and informed consent-like processes). A project of El Paso Corporation (now Kinder Morgan), the Ruby Pipeline in the United States supplies natural gas from a field in the Rocky Mountains Basin to the West Coast through the states of Wyoming, Utah, Nevada and Oregon. Construction of the 1,090 km-long pipeline was authorized in January 2009 and operationalized in July 2011. The consultative process required under United States law involved over 40 Indigenous Peoples' groups (Native American tribes and Nations) located near the pipeline's route or having a spiritual connection to the affected areas. The project's engagement campaign was conducted with a view to documenting and considering the concerns of Indigenous Peoples, preserving their historical and cultural heritage, and building their capacity. From the company's perspective, the approach helped to mitigate risk and limit liability, although some tribal governments and environmental groups continued to oppose the project. From the perspective of the tribes that decided to engage in the consultations, the project enhanced their capacity to deal with natural resources development companies, provided employment opportunities and enhanced information-sharing within communities on cultural practices, sacred sites and knowledge of plants.¹¹

IV. Free, prior and informed consent as a process and a dialogue

33. As was stated in the study of the Expert Mechanism on the Rights of Indigenous Peoples on free, prior and informed consent, "the process of seeking free, prior and informed consent is, at times, viewed [by the private sector] as merely procedural in nature, rather than focused on human rights. It is sometimes seen as a goodwill gesture to indigenous peoples and can lead to serving third party interests rather than protecting the rights-holders' interests".¹² However, free, prior and informed consent acquisition should still be considered as a long and inclusive process, with certain procedures that have to be agreed upon by parties.

34. Just as free, prior and informed consent has necessary elements, so does the free, prior and informed consent process: free, prior and informed consent cannot be implemented separately from due diligence, impact assessment and development of an Indigenous Peoples plan, with minimization, mitigation, compensation measures and good-faith negotiations accompanying the transition from one step to another, as well as monitoring of and follow-up to the agreements.

35. Good-faith negotiations are consultations conducted through culturally appropriate procedures with the objective of reaching agreement on just terms.¹³ Such negotiations involve, on the part of all parties: (a) willingness to engage in a process and be available to meet at reasonable times and with reasonable frequency; (b) provision of information necessary for informed negotiation; (c) exploration of key issues of importance; (d) use of mutually acceptable procedures for negotiation; (e) willingness to change initial position and modify offers, where possible; and (f) provision of sufficient time for decision-making.¹⁴ Good-faith negotiations are aimed at finding available options for resolving disagreements, focusing on

¹¹ Jennifer H. Weddle, "Navigating cultural resources consultation: collision avoidance strategies for federal agencies, project proponents, and tribes", *Proceedings of the 60th Annual Rocky Mountain Mineral Law Institute*, vols. 22–1 (2014).

¹² [A/HRC/39/62](#), para. 54.

¹³ S. James Anaya and Sergio Puig, "Mitigating state sovereignty: the duty to consult with indigenous peoples", *University of Toronto Law Journal*, vol. 67, No. 4 (fall 2017).

¹⁴ International Finance Corporation, "Guidance note 7: indigenous people", corresponding performance standard 7, 1 January 2012.

establishing a relationship of mutual respect between parties and removing any negotiating power imbalances.¹⁵

36. The involvement of an Indigenous decision-making body is needed throughout the entire process and, most important, Indigenous Peoples should be able to directly influence decision-making in the negotiation process.

37. For a private company, it may be difficult during the due diligence process to identify a legitimate negotiation partner, taking into account the possible features and variability of traditional and contemporary Indigenous self-government and decision-making institutions. There are cases in which such bodies do not exist, therefore time should be provided to allow Indigenous Peoples to establish such bodies in accordance with their own procedures and traditions. Some nomadic Indigenous Peoples in the Russian Federation, living in vast territories across thousands of kilometres and being small in number, do not have vertically integrated self-governance institutions representing the entire Peoples and all their communities. Companies that engage with many Indigenous Peoples with different livelihoods and self-governance systems should be prepared to build a multifaceted dialogue and take into account the various concepts and philosophies adopted by Indigenous counterparts. Of course, such companies need to have deeper internal expertise and a more sophisticated structure of dialogue with Indigenous Peoples. Greater effort should be made to study the variety of self-governance and decision-making institutions. An attempt to study such practices in the region of Eastern Europe, the Russian Federation, Central Asia and Transcaucasia was made by three members of the Permanent Forum, Aleksei Tsykarev, Grigory Lukyantsev and Sven-Erik Soosaar.¹⁶

38. Once the decision-making body is identified or established, the Indigenous Peoples concerned should be able to speak on their behalf in the negotiation process, both to the private company and externally to the media and the human rights community. Only the body representing the affected group or community has the legitimacy to negotiate, while all others, including human rights defenders and non-governmental organizations, should be consulted as stakeholders. For example, in the Tukhard resettlement cases, the Nenets Indigenous community concerned did not have a local decision-making body and had to establish one. The Association of Indigenous small-numbered peoples of the Taimyr of the Krasnoyarsk Krai; the federal umbrella organization, the Association of Indigenous Peoples of the North, Siberia and Far East of the Russian Federation; and other Nenets institutions played a consultative role in the negotiations, while the established Indigenous local authority took over the role of main negotiator and represented the community and the reindeer herders having registration in the village. The decision-making body established for the free, prior and informed consent process consisted of six women and one man and is already playing a larger self-organizational role beyond negotiation over resettlement.

39. Indigenous Peoples should be able to determine their own *modus operandi* in free, prior and informed consent negotiations and impact assessments. At the same time, no one should impose on them practices that have been successful in other sociocultural regions. There is no reason to force Indigenous Peoples to enter into negotiations and use the free, prior and informed consent principle if they do not consider it necessary. No one should impose on them the working methods, protocols or experience and best practices of other sociocultural regions. Indigenous Peoples, as well as their permanent or temporary decision-making bodies established as part

¹⁵ International Council on Mining and Metals, *Good Practice Guide: Indigenous Peoples and Mining*, 2nd ed. (London, 2015).

¹⁶ See [E/C.19/2021/8](#).

of the free, prior and informed consent process, should have the right to develop their own methods of work or to adapt existing experience. At the same time, no methods and protocols should be imposed on them, even with good intentions, just as participation in the free, prior and informed consent process itself cannot be imposed.

40. Signing a free, prior and informed consent agreement is not the end of the process but, rather, the beginning of a long-term relationship. During the actual implementation of a project, the constant involvement of Indigenous Peoples, a functional grievance redress mechanism and access to external remedy, as well as monitoring and evaluation facilities, are all needed.

41. Free, prior and informed consent is a constant learning process through which private companies, Indigenous Peoples and States learn from one another and the experience. Implementation of free, prior and informed consent by a leading industrial company through mutual learning and standard setting can inspire other entities to accept voluntarily or under public pressure the idea of free, prior and informed consent. On the other hand, there is a risk of an opposite effect when the bar is set too high and a large number of rights holders immediately appear to demand free, prior and informed consent in the same country. The number of requests for a procedure could grow exponentially, and such an avalanche effect could frighten both the authorities and industrial companies, which may not be ready for the rapid development of events. For example, they may lack the resources, policies for interaction with Indigenous Peoples, methodologies or experts required to engage meaningfully in free, prior and informed consent processes. A new reality may be formed in which some companies are willing to play by the rules of free, prior and informed consent while others reject or discredit the practice.

42. Therefore, it is especially important to make it clear that free, prior and informed consent is a process that can and should be learned and that precedents are needed so that States are not afraid of the principle and other companies can adopt it. The accumulation of good practices may contribute to the emergence of domestic standards for the application of free, prior and informed consent.

V. Free, prior and informed consent and the concept of justice

43. In his report on extractive industries, the Special Rapporteur on the rights of Indigenous Peoples referred to rights-centred, equitable, just agreements and partnership as a result of free, prior and informed consent-based negotiations. The definition of a just agreement needs to be clarified from the perspective of both Indigenous Peoples and industrial companies.

44. Agreements that respect free, prior and informed consent provide companies with the opportunity to develop a more sustainable business in the long run by avoiding political, social, reputational and financial risks. The free, prior and informed consent approach allows for the building of long-term relationships with Indigenous Peoples on the basis of mutual trust and respect. Likewise, free, prior and informed consent contributes to a reduction in project costs, as in the case of the Ruby Pipeline, even though it was not a classic example of free, prior and informed consent. An example of the opposite scenario is the case of the Dakota Access Pipeline, which resulted in billions of dollars of losses to the project proponents.

45. From an Indigenous perspective, the safeguards of free, prior and informed consent are essential to fostering a human rights approach to development. Free, prior and informed consent allows for a paradigm shift in which Indigenous Peoples are perceived as rights holders, as opposed to stakeholders.

46. If people agree with the notion that the signing of an agreement is not the end but only the beginning of the relationship between Indigenous Peoples and private companies, the justice of the agreement will be proven by whether it stands the test of time, how sustainable it will be and whether it will be implemented by the parties. If the conditions are not met or if each party understands them differently, the Indigenous community has the right to withdraw from the agreement and withdraw its free, prior and informed consent.

47. Financial compensation and investment, at least on their own, cannot be a measure of justice. Money is not a substitute for the rights of Indigenous Peoples, their land or their culture. For example, for the Nenets people, reindeer have a material expression, but, for a reindeer herder, they also have sacred value. It is difficult to calculate damage to culture and language. Fair agreement is not expressed in finances, but in respect for the people on whose territory a company is willing to operate.¹⁷

48. As the Chair of the Permanent Forum, Darío José Mejía Montalvo, has stated, “three key capabilities are necessary for Indigenous Peoples to preserve their identity: the ability to own their lands, the ability to think like ancestors, and, finally, the ability to make decisions independently. When we talk about free, prior and informed consent, we put these possibilities in a legal framework”.¹⁸ Together, all three represent the concept of justice from an Indigenous point of view.

49. Free, prior and informed consent practitioners and experts involved in assessing free, prior and informed consent agreements and negotiations suggest that free, prior and informed consent-based consultations are the future of the businesses and engagement of Indigenous Peoples. The firm Cross-Cultural Consulting Services, together with the Nepal Federation of Indigenous Nationalities, has developed the concept of a new paradigm in Indigenous Peoples’ project engagement.¹⁹ The concept advances from paradigms that preceded the United Nations Declaration on the Rights of Indigenous Peoples, such as “do no harm” and “broad community support”, and suggests a model according to which Indigenous Peoples are considered as co-partners and co-decision makers and have solid control over the entire process of engagement, including pre-project dialogues, negotiations on an agreement, project implementation and post-implementation relationships. This participatory paradigm involves partnership-building, rather than consulting, and taking into account the views of communities. The new paradigm is grounded in the lessons learned from specific projects, such as that of Sakhalin Energy in the Russian Federation and the Upper Trishuli-1 hydroelectric project in Nepal. The approach introduces a new set of agreements and a new cast of engagement players. A consent process agreement provides specifics on the free, prior and informed consent process, a statement of consent documents the endorsement of the project, and the Indigenous Peoples plan stipulates the conditions, measures and commitments. In the implementation agreement on the tripartite Indigenous Peoples plan, the roles, duties and entitlements of the private entity, the government and the Indigenous community are described. If necessary, an outstanding issues agreement can be signed. The process of engagement requires three rounds of consultations, raising the awareness and building the capacity

¹⁷ Antonina Gorbunova, member, Expert Mechanism on the Rights of Indigenous Peoples, presentation at the International Forum on Public-Private Partnership in the Field of Sustainable Development of Indigenous Peoples, Murmansk, Russian Federation, 11 October 2022.

¹⁸ Darío José Mejía Montalvo, Chair of the Permanent Forum, presentation at the Expert Mechanism on the Rights of Indigenous Peoples side event, “Agreements between industrial companies and Indigenous Peoples: free, prior and informed consent practices and capacity building”, 7 July 2022.

¹⁹ Greg Guldin, “Implementing free, prior and informed consent: building the capacity and experience of indigenous peoples”, presentation at Permanent Forum side event, 4 May 2022.

of the Indigenous community and project staff, and the involvement of a free, prior and informed consent facilitator organization that organizes and oversees the entire process. That may be an Indigenous-led organization not necessarily representing the affected community. The affected community is represented by an advisory council and its working groups, which co-produce free, prior and informed consent-related documents, along with the company and the government. In the post-free, prior and informed consent dialogue, the bodies established for the free, prior and informed consent process become a governing body for the implementation and assessment of the Indigenous Peoples plan. Although the new paradigm is just one of the possible ideas relating to the organization of the free, prior and informed consent process, it is nevertheless well articulated and has already been proven in practice.

VI. Free, prior and informed consent as a tool for capacity-building

50. Two of the main conditions for the success of free, prior and informed consent are the capacity and ability of Indigenous Peoples to participate in consultations with industrial companies on an equal footing. Although companies have more resources and are in a more advantageous position, practice has shown that participation in the consultation and negotiation process using the free, prior and informed consent principle allows both parties to increase their capacity and knowledge and build partnerships and relationships on the basis of mutual respect.

51. In most cases, Indigenous Peoples are in a marginalized position compared with States and industrial companies in terms of financial opportunities, legal training and availability of resources. If for officials and employees of companies such negotiations are part of the job, for Indigenous Peoples they are an additional and often very heavy burden, given the significance of their lands and possible damage to their culture and traditional way of life. In this regard, Indigenous Peoples need to create conditions for capacity-building. Those conditions may take the form of independent legal assistance, the establishment of an independent complaints mechanism, and activities to improve their knowledge in the technical areas involved in the implementation of industrial projects. Such assistance provided by companies or States should not lead to the manipulation or corruption of Indigenous leaders.

52. Industrial companies develop a variety of models for the empowerment and capacity-building of Indigenous communities engaged in free, prior and informed consent and consultative processes with them. In the Ruby Pipeline case, the project operator established a full-time Native American tribal liaison entity consisting of consultants experienced in cultural resource protection, mitigation and treatment, as well as a team of lawyers that worked directly with the tribes. The team was able to develop trust, relationships and understanding between the company and the tribes. The company contributed to the capacity-building and engagement capability of the Indigenous Peoples by investing in the training of tribal cultural resource technicians and monitors who were involved in cultural resource surveys and construction efforts. In the Tukhard case, the free, prior and informed consent agreement included legal and technical assistance and training provided by the company to allow the Indigenous Peoples to be able to monitor the implementation of the agreement and engage with the company effectively.

53. Building capacity and knowledge within industrial companies is often needed to better comply with international standards and the rights of Indigenous Peoples. Typically, a private company has very few, if any, employees with knowledge of such rights, and these employees may work in a department dedicated specifically to sustainability or investor relations. However, meaningful engagement requires a

wider understanding of the rights of Indigenous Peoples throughout all company operations.

54. In order to obtain knowledge and build capacity, companies should thoroughly document their engagement practices, organize external monitoring and evaluation, and analyse lessons learned. Private companies should be encouraged to develop institutional memory and train personnel internally or seek external training.

55. At the national level, States should play a role in the generation, sharing and advancement of free, prior and informed consent-related knowledge and expertise. Joint capacity-building programmes of States, academic institutions, private companies and Indigenous Peoples' organizations provide for a more comprehensive approach. Since 2021, the Moscow State Institute of International Relations and the Association of Indigenous Peoples of the North, Siberia and Far East of the Russian Federation have co-hosted a training programme on Indigenous small-numbered peoples, which includes free, prior and informed consent, as well as engagement practices between private companies and Indigenous Peoples.

56. At the international level, United Nations expert bodies on the rights of Indigenous Peoples contribute to building the capacity of Indigenous Peoples and industrial companies by developing recommendations and guidelines for the application of international standards. The Office of the United Nations High Commissioner for Human Rights has a fellowship programme for Indigenous Peoples, and the United Nations Institute for Training and Research offers a training programme on conflict prevention that includes consideration of free, prior and informed consent. Many United Nations agencies and international industry networks develop guidelines on free, prior and informed consent.

57. As was stated in the study of the Expert Mechanism on the Rights of Indigenous Peoples on free, prior and informed consent, "Some concerns have been raised about the many guidelines on free, prior and informed consent, including that the language used is often imprecise and sometimes introduces ambiguities, for example with respect to the point at which impact assessments are required or when consultation should begin".²⁰ However, examples of successful guidelines exist, such as *Free, Prior and Informed Consent: An Indigenous Peoples' Right and a Good Practice for Local Communities—Manual for Project Practitioners* of the Food and Agriculture Organization of the United Nations, a comprehensive and reader-friendly guideline in which free, prior and informed consent is considered as a process and a human rights norm.

VII. Findings and recommendations

58. All parties must contribute to the paradigm shift of considering Indigenous Peoples as rights holders. Companies should stop treating Indigenous Peoples as stakeholders and instead recognize their collective and individual rights.

59. The private sector should accept new approaches to long-term engagement with Indigenous Peoples on the basis of building trust and dialogue. Involving an Indigenous organization as a free, prior and informed consent facilitator and an interlocutor between the negotiating parties should be considered as good practice.

60. Free, prior and informed consent should not be separated from other due diligence and dialogue processes. The free, prior and informed consent process is meaningful if due diligence has identified the affected groups and communities and the potential impact on them, including with regard to their environment, human

²⁰ A/HRC/39/62, para. 55.

rights, culture, occupations and traditional way of life. Such a due diligence process in different countries could have different names, such as sociocultural impact assessment and ethological expertise. In addition, it is impossible to separate the Indigenous Peoples plan from the free, prior and informed consent process because it articulates measures to minimize, mitigate and compensate for the potential impact identified during the due diligence process.

61. Free, prior and informed consent can only be given by representative institutions of Indigenous Peoples, chosen by the people themselves in accordance with their own procedures. Examples of such institutions might be a duly elected Indigenous Peoples' village council or a group of elders appointed by consensus, consistent with the laws, customs and traditions of the Indigenous Peoples concerned. Compliance with this international standard can be challenging in cases in which Indigenous Peoples lack existing institutions that can serve as decision-making bodies. For example, municipal bodies in regions where Indigenous Peoples live often do not specifically or adequately represent the Indigenous population, nor do other types of organizations, such as non-profit organizations devoted to Indigenous causes. Because these bodies and organizations are well known and accessible, some companies may be tempted to negotiate with them in order to expedite matters and present the optics of a legitimate free, prior and informed consent process in the eyes of the media and shareholders. However, this course of action would fail to meet international standards, violating the self-determination of Indigenous Peoples and subjecting the company to risk and liability. To address the challenge, it could be a good practice for Indigenous Peoples to establish Indigenous decision-making bodies specifically for free, prior and informed consent-based negotiations and for companies to expect that, in some cases, the free, prior and informed consent process must include time for such bodies to form and develop the capacity to undertake free, prior and informed consent-related work.

62. In order to ensure observance of mutual interests and the rights of Indigenous Peoples, private companies should: (a) develop specific policies and strategies for engaging with Indigenous Peoples; (b) apply recognized international standards; (c) apply environment, social and governance principles; and (d) apply the policies of public commitment to, transparent reporting on and effective communication with Indigenous Peoples and businesses. Sometimes, environment, social and governance principles and industry standards, such as Forest Stewardship Council certification for the forestry industry, Initiative for Responsible Mining Assurance verification, and International Council on Mining and Metals standards for the mining industry, are better understood by staff and highlighted in the corporate policies. Since these standards are informed by the United Nations Declaration on the Rights of Indigenous Peoples and international norms, the situation does not contradict the general goal of ensuring the rights of Indigenous Peoples as part of the overall human rights agenda of companies. However, for the companies working closely with Indigenous Peoples, developing separate corporate policies and grievance redress mechanisms specifically for their engagement with Indigenous Peoples is a better practice. This is important in the light of the fact that the free, prior and informed consent requirement is specific to engagement with Indigenous Peoples, as opposed to engagement with local communities or national minorities.

63. The United Nations Institute for Training and Research, in cooperation with the United Nations Industrial Development Organization and other United Nations agencies, should be encouraged to establish a dedicated educational programme for industrial companies on engaging with Indigenous Peoples, including the free, prior and informed consent principle.

64. The United Nations Global Compact and its national networks should play a bigger role in expanding the free, prior and informed consent principle and good

practices among their member companies, sharing international standards and encouraging companies to develop their own corporate policies of engaging with Indigenous Peoples. The Global Compact should promote free, prior and informed consent as an indicator of a successful and civilized business.

65. States and the United Nations system should assist in the translation of the United Nations Declaration on the Rights of Indigenous Peoples and free, prior and informed consent guidelines into Indigenous languages, as well as promote the translations and analyse the linguistic differences in legal terminology as contained in free, prior and informed consent. The United Nations system should publish versions of free, prior and informed consent guidelines that are easily accessible to children and other social subgroups.

66. The World Bank Group and academia should invest in research into evolving free, prior and informed consent practices and develop guidelines on free, prior and informed consent for the private sector.

67. Given that free, prior and informed consent is a tool for building dialogue, States, Indigenous Peoples and the private sector should be encouraged to explore the mandate of the Expert Mechanism on the Rights of Indigenous Peoples, which allows for dialogue facilitation between States, Indigenous Peoples and the private sector.

68. States, Indigenous Peoples and private companies should jointly develop national standards for the implementation of the rights of Indigenous Peoples in commercial development and promote public-private partnership in the field of sustainable development of Indigenous Peoples. A participatory process of national standards development will allow companies, including small businesses, to associate themselves with such standards, accept free, prior and informed consent, and gradually develop their own policies.

69. In the report of the Permanent Forum on its twenty-first session,²¹ it was noted that the rights of Indigenous Peoples should be respected at all times, which fully applies to the free, prior and informed consent principle. International crises, including economic and political sanctions imposed by the United Nations or individual States on other States or private entities, should not impede the opportunity of Indigenous Peoples to utilize the principle of free, prior and informed consent. The international community should not create conditions under which certain companies and States would be limited in their capacity to engage with Indigenous Peoples under the principle of free, prior and informed consent. The Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights has repeatedly raised concerns regarding the impact of such measures on vulnerable groups. She has stressed that the financial sector's overcompliance with unilateral sanctions negatively affects human rights.²²

70. Under the turbulent conditions of international affairs, it is necessary to maintain international contacts in the field of knowledge and exchange ideas on the evolving practice of free, prior and informed consent. Exclusion from international exchange and cooperation may render the Indigenous Peoples concerned vulnerable to potential human rights violations. In the difficult international circumstances, companies should continue to engage in dialogue and build relationships under new conditions, especially in situations in which supply chains are changing.

²¹ E/2022/43-E/C.19/2022/11.

²² See Office of the United Nations High Commissioner for Human Rights, "Financial sector overcompliance with unilateral sanctions is harmful to human rights: UN expert", 28 June 2022.