

**United Nations Permanent Forum on Indigenous Issues
Twelfth Session – New York
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Agenda Item 7.b: Dialogue with Special Rapporteur: Extractive Industries

Joint Intervention Delivered by Brian Wyatt on behalf of the Indigenous Peoples Organisation (IPO) Network of Australia on behalf of:
The National Indigenous Higher Education Network (NIHEN)
National Native Title Council (NNTC)

Thank you Mr Chairperson

The Indigenous Peoples Organisations Network of Australia would like to make the following recommendations on the Dialogue with the Special Rapporteur: Extractive Industries:

Recommendations:

1. Encourage member States to utilise the UN Special Mechanisms to enhance the work they are doing on progressing the rights of Indigenous peoples;
2. Encourage member States to report through the Universal Periodic Review on their progress with promoting free, prior and informed consent for the extractive industry;
3. Include the principle of ecologically sustainable development in the international standard to ensure the necessity of free, prior and informed consent in extractive activities and other large scale developments; and
4. Encourage member States and Indigenous peoples to provide case studies to the Special Rapporteur on successful partnerships between indigenous and non-indigenous groups in land development.
5. Furthermore in presenting this paper we propose the following questions to the Special Rapporteur on the Rights of Indigenous Peoples:
 - a) Should any proposed models of consultation or partnership between the affected indigenous peoples and developers adhere to a number of internationally recognized principles, including the Declaration on the Rights of Indigenous peoples, the Convention on Civil and Political Rights or ecologically sustainable development under the Convention on Biological Diversity?
 - b) What kind of measures could exist to encourage private corporate developers to negotiate with indigenous peoples and obtain their free, prior and informed consent to develop on their land?
 - c) What merit would there be in the establishment of mediation or conciliation forum either within the state or the global region to hear any disputes between indigenous peoples and developers for resolution?

The Indigenous Peoples Organisations (IPO) Network of Australia is pleased to present this intervention on our dialogue with the Special Rapporteur on the rights of Indigenous peoples (the Special Rapporteur). The Special Rapporteur has tabled a number of reports on the rights of Indigenous peoples relating to extractive industries

operating within or near Indigenous territories. Reports have been tabled at the 18th Session of the Human Rights Council in 2011 and the 21st Session of the Human Rights Council in 2012. The Expert Mechanism on the Rights of Indigenous Peoples also received a follow-up report on indigenous peoples and the right to participate in decision-making, with a focus on extractive industries at the 21st Session of the Human Rights Council in 2012.

In his Report to the 21st Session of the Human Rights Council, the Special Rapporteur noted that there was a fundamental problem with the model of natural resource extraction in which plans are developed with little or no involvement of the affected indigenous community or peoples concerned. In addition, the Special Rapporteur noted that such involvement of Indigenous Peoples is essential for their survival as distinct peoples. Consent would therefore be a presumptive requirement for those aspects of development that would affect customary lands and resources (A/HRC/21/47, para. 65). This involvement should take place, not just during the negotiations with the mining company to extract, but involvement should also take place within the plans to explore (A/HRC/21/47, para. 74 and 75).

In his report the Special Rapporteur also stated his intention to devote special attention to the issue of extractive industries during the remainder of his mandate with a view towards possibly developing guidelines on the subject (A/HRC/21/47, para. 42). The Expert Mechanism subsequently proposed to jointly develop the guidelines with the Special Rapporteur.

The report also noted that a "significant barrier to the effective protection of indigenous peoples' rights in the context of natural resource extraction and development affecting them is the existence of conflicting points of view about the practical implications of international standards affirming the rights of these peoples, and about the kind of measures required to fulfill the responsibilities of States, corporate actors and indigenous peoples themselves" (A/HRC/21/47, para. 45).

Article 32 of the Declaration on the Rights of Indigenous Peoples provides for the right of Indigenous peoples to determine their own priorities for the development or use of their lands as well as the right to free, prior and informed consent for any project affecting their lands or territories. 60% of mining activity neighbours Indigenous communities and the extractive industry has become one of the biggest employers of Indigenous peoples outside the Government sector.

Economic sustainability of Indigenous communities is critical to the future of their communities and it is critical for health and well-being. At the same time and just as critical is Indigenous cultural sustainability. For Indigenous peoples this relates to how they can maintain their cultural identity.

Like self-determination, free, prior and informed consent reinforces all of the rights contained within the Declaration. According to the Human Rights Council, free, prior and informed consent has been identified as a 'requirement, prerequisite and manifestation of the exercise of our right to self-determination'. This ensures our rights to our lands and resources within our customary laws and practices, which we require to ensure its continued practice. Further, this right allows us to ensure that our lands are protected for the purposes of intergenerational equity.

Mr Chairman, States are yet to fully recognise the full rights of Indigenous peoples as set out under the UN Declaration of the Rights of Indigenous Peoples through statutory means such as including principles contained in the Declaration in relevant legislation.

In some States, free, prior and informed consent has formed a significant platform for fair and reasonable decision making, particularly in relation to the negotiation of comprehensive agreements with the extractive industry. Negotiating agreements are becoming common practice and Indigenous peoples are gaining confidence in determining their own beneficial outcomes.

International treaty obligations demand special measures to ensure it addresses the principles under ILO Convention 169 as well as those principles of the Special Representative of the UN Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises that promotes the protection of human rights amongst business enterprises. That mandate includes, amongst other things, to provide recommendations on ways to strengthen the fulfillment of the duty of the State to protect all human rights from abuses by or involving transnational corporations and other business enterprises, including through international cooperation.

Being a party to these conventions allows States to take positive action to address the disadvantage Indigenous Peoples face today. It is essential that States work toward developing forums that will allow for intelligent debate on the issues surrounding land tenure and the rights of Indigenous peoples to their lands, territories and natural resources.

The Economic and Social Council resolved to undertake a study on the impact of the mining boom on Indigenous communities in Australia, the results of which will be presented under Item 8 of this session of the Permanent Forum. The study focuses on various aspects of the mining boom that impact on indigenous communities, including economic development through agreement making, community development and employment, suggesting that agreements between mining companies and Indigenous communities cover not only distribution of revenue but also poverty, education, training, health and culture (E/C.19/2013/20, para 6). The study concluded that "the redistribution of the wealth from the mining boom to indigenous communities is inequitable" (E/C.19/2013/20, para 23) and more work should be done to assist in alleviating the inequity from the consequences of the mining boom and providing capacity building and leadership programs.

However, the report noted that the social impact of the mining boom has had detrimental effects, with the negotiation of agreements doing little to improve the socioeconomic conditions for Aboriginal people in some cases. For example, the mining boom in Australia has led to housing shortages and increased rent, with the strain of housing and homelessness leading to family disruption and breakdown and other abuses, including violence and alcohol (E/C.19/2013/20, paras 19 and 20).

Agreements negotiated between mining companies and indigenous communities are increasingly important in terms of formalising the conditions upon which mining can take place on indigenous lands, as well as the compensation and benefit sharing arrangements that flow from mining. However Indigenous peoples are not able to

fully experience the benefits of free, prior and informed consent. Indigenous peoples do not have genuine decision-making authority and power over their lives and futures. That power and authority continues to rest in the hands of governments.

Despite the recognition outlined in the Expert Mechanisms Report on the right to participate in decision-making with a focus on extractive industries that 'international law has developed a clear principle of the right of indigenous peoples to permanent sovereignty over natural resources', the Convention on Biological Diversity recognises the sovereign rights of States over their natural resources in areas within their jurisdiction. States also have the obligation to take appropriate measures with the aim of sharing the benefits derived from their use in a fair and equitable manner.

Mr Chairman, it is time for Indigenous Peoples to be fully afforded the benefits from their traditional lands. As well as the right to free, prior and informed consent for access to traditional lands, Indigenous peoples need to be afforded the recognition of rights under other international mechanisms, such as the UN Convention on Civil and Political Rights, the Convention on cultural diversity and the Convention on Biological diversity, including the Ngoya protocol.

States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that the rights of Indigenous peoples are fully recognised.

We thank the Special Rapporteur for his continued support for Indigenous Peoples of Australia and look forward to continuing our positive working relationship.