

**Statement by Expert Member Dr. Wilton Littlechild, I.P.C.,
Twelfth Session of the UN Permanent Forum on Indigenous Issues, 20-31 May 2013
Agenda Item 8: Consolidated report on extractive industries and their impact on
indigenous peoples (E/C.19/2013/16)
30 May 2013**

Good morning, Chairperson, Permanent Forum Members and all delegations. I welcome the Permanent Forum's Consolidated report on extractive industries and their impact on Indigenous peoples. In the past two years, the three Indigenous-specific mechanisms have all examined this important area of human rights – the impact of extractive industries on Indigenous peoples. I would like to highlight some of the key findings of the Expert Mechanism's Follow-up report on Indigenous peoples and the right to participate in decision-making, with a focus on extractive industries (UN Doc. No. A/HRC/EMRIP/2012/2) as well as the companion Comment on the Human Rights Council's Guiding Principles on Business and Human Rights as related to Indigenous Peoples and the Right to Participate in Decision-Making with a Focus on Extractive Industries (A/HRC/EMRIP/2012/CRP1).

In our follow-up report, we examined the Ruggie Guiding Principles on Business and Human Rights as they relate to indigenous peoples and the right to participate in decision-making, with a focus on extractive industries¹ and made several comments on the three pillars.

In explaining the importance of self-determination, the report states:

"11. While only paragraph 1 of common article 1 of the Covenants appears in article 3 of the United Nations Declaration on the Rights of Indigenous Peoples, the content of paragraphs 2 and 3 of common article 1 are found in articles 23 and 32 of the Declaration. Further, article 3 needs to be read together with a cluster of articles (10, 11, 12, 20 and 25- 31) in the Declaration, which generally relate to lands, territories and resources. Article 3 must also be read in the light of the articles specific to extractive industries, which include article 26, article 28 and, of particular importance, article 32. The latter article provides protection analogous to that provided under common article 1, paragraphs 2 and 3, ensuring that the free, prior and informed consent of indigenous peoples is obtained prior to approval of the use by private industries of indigenous peoples' lands, territories and resources.

12. Furthermore, treaties and treaty principles must be considered in the development of extractive industries, consistent with both the Declaration on the Right to Development and preambular paragraphs 7, 8, 14, 15 and articles 3, 32 and 37 of the United Nations Declaration on the Rights of Indigenous Peoples, as stated by the Permanent Forum on Indigenous Issues in its report on its ninth session (E/2010/43-E/C.19/2010/15, para. 7)."

It further states:

¹ A/HRC/EMRIP/2012/2. Footnote references have been omitted – please see report for full citations.

“44. The right of indigenous peoples to participate in decision-making in the area of extractive industries is dependent upon the recognition of their rights to self-determination and to permanent sovereignty over their lands, territories and resources (...)”

I refer all delegations to Advice No. 4 (2012): Indigenous peoples and the right to participate in decision-making, with a focus on extractive industries which sets out the relevant law and policy related to, *inter alia*, the permanent sovereignty of Indigenous peoples over natural resources, sustainable development and environmental responsibilities and rights, as well as an analysis of the Ruggie Guiding Principles. This Advice addresses the duties of states, including in relation to the obligation to seek to obtain the free, prior and informed consent of Indigenous peoples in relation to development of lands, territories and resources, consistent with articles 10, 29(2), 37, preambular paragraphs 14 and 24 of the UN *Declaration*. The Advice also provides practice advice for states, extractive industries and Indigenous peoples in this area.

I appreciate the opportunity to present some of the Expert Mechanism’s key findings on the human rights of Indigenous peoples in the context of extractive industries. As mentioned in my earlier intervention, it is of critical importance that the Expert Mechanism, the Permanent Forum and the Special Rapporteur on the Rights of Indigenous Peoples continue to collaborate in this area. I look forward to working with my colleagues as we prepare for the World Conference on Indigenous Peoples, where this area will no doubt receive much attention. It will be incumbent upon us to fully discuss and articulate the applicable legal standards, norms and laws to Indigenous peoples that must be followed by states, corporations and others in the area of extractive industries. As we all know, the right to development and control over lands, territories and resources represents a cornerstone set of rights of Indigenous peoples, as recognized by, *inter alia*, the UN *Declaration* and the *International Labour Organization Convention No. 169*.

I would like to thank Saul Vicente Vazquez for doing the Consolidated Report.

HaiHai. Thank you.

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In our follow-up report, we examined the Ruggie Guiding Principles on Business and Human Rights as they relate to indigenous peoples and the right to participate in decision-making, with a focus on extractive industries¹ and made the following comments:

“21. ...In its resolution 17/4, the Human Rights Council unanimously endorsed the Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy Framework” (A/HRC/17/31, annex). This endorsement effectively established the Guiding Principles as the authoritative global standard for addressing business-related human rights challenges.

22. The Framework rests on three main pillars: (a) the State's duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation and adjudication; (b) the corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved; and (c) the need for greater access to remedy, both judicial and non-judicial, for victims of business-related human rights abuse (A/HRC/17/31, para. 6)...

24. It is important for all States and all business enterprises to apply all of the Guiding Principles specifically to indigenous peoples “in a non-discriminatory manner” (A/HRC/17/31, annex, p. 6)...

26. As regards the first pillar of the Guiding Principles, the State duty to protect against human rights abuse by third parties, the following key points may be especially relevant to business activities that affect indigenous peoples:

¹ A/HRC/EMRIP/2012/2. Footnote references have been omitted – please see report for full citations.

(a) States may be in breach of their international human rights obligations where human rights abuse by private actors can be attributed to them, or where they fail to take appropriate steps to prevent, investigate, punish and redress private actors' abuse. In fulfilling the duty to protect with regard to business activity having potential or actual impacts on the situation of indigenous peoples, measures taken by States should conform to relevant international laws, norms and standards relating to indigenous peoples, such as the United Nations *Declaration on the Rights of Indigenous Peoples* and *International Labour Organization (ILO) Convention No. 169 (1989) concerning Indigenous and Tribal Peoples in Independent Countries*;

(b) The State duty to protect the human rights of indigenous peoples in the context of business activities also applies when granting development licences and permits relating to indigenous peoples' lands, territories and resources. As provided by relevant standards on the specific rights of indigenous peoples, the State should take into account the full participation of indigenous peoples at all stages of decision-making in such processes;

(c) Meeting the State duty to protect implies that the State should enforce laws that are aimed at requiring business to respect human rights and ensure that other business- focused laws and policies do not constrain but enable business respect for human rights, including in the context of indigenous peoples. It also requires that the State provide effective guidance for business enterprises, including State-owned enterprises, on how to respect human rights throughout their operations, particularly in conflict-affected areas;

(d) Under their international human rights obligations, States have a duty to establish legal and policy frameworks that effectively monitor and enforce relevant international laws, norms and standards, including the right to free, prior and informed consent. Departments specifically mandated to address indigenous affairs should provide mandatory information, training and support.

27. In relation to the second pillar of the Guiding Principles, the corporate responsibility to respect human rights, the following key points may be relevant in the context of business operations that affect indigenous peoples:

(a) The responsibility to respect human rights requires that business enterprises avoid causing or contributing to adverse impacts through their own activities, and address such impacts when they occur; and that they prevent or mitigate adverse human rights impacts with which they would be or are involved through their business relationships;

(b) ...regardless of their size, sector, operational context, ownership and structure;

(c) [making reference to]...ILO Convention No. 169 and the United Nations *Declaration on the Rights of Indigenous Peoples*;

(d) In order to meet their responsibility to respect human rights, business

enterprises must have in place appropriate and effective policies and processes. This includes a policy commitment to respect human rights; due diligence processes to identify, prevent, mitigate and account for how they address their adverse human rights impacts; and processes to enable remediation of any adverse human rights impacts that they cause or contribute to. When operating in the context of indigenous peoples' lands, territories and resources, due diligence processes must pay particular attention to the risks faced by indigenous peoples, including the different risks that may be faced by women and men. Due diligence processes should also be undertaken in a manner that enables meaningful engagement with indigenous peoples when their human rights may be affected. This includes taking into account language and other potential barriers to effective engagement. A company with a footprint in indigenous areas should develop a policy to address how it engages with indigenous peoples. Any company that utilizes the cultural heritage of indigenous peoples should do the same. Due diligence processes should take into account the right of free, prior and informed consent of indigenous peoples;

(e) In order to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally, particularly when concerns are raised by or on behalf of indigenous peoples. If there are risks of human rights impacts, the business enterprises should report formally on how they address them. In addition to considering whether to include relevant information in formal reporting, business enterprises should also take into account the situation of affected stakeholders, and communication could also take the form of in-person meetings and consultations with those affected;

(f) Where business enterprises identify that they have caused or contributed to adverse impacts on indigenous peoples, they should provide for or cooperate in the remediation of those impacts through legitimate processes. Criteria for grievance mechanisms at the operational or site level have been developed, some of which are particularly relevant in the context of impacts on indigenous peoples, such as ensuring accessibility, by providing adequate assistance for those who may face particular barriers to access, and equitability, by ensuring that aggrieved parties have access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms. Processes involving the business enterprise to enable remediation for adverse impacts on indigenous peoples should also be informed by relevant international standards, particularly articles 1, 27, 28, 32 and 40 of the United Nations Declaration on the Rights of Indigenous Peoples and articles 3, 5, 8, 9, paragraph 2, 10, paragraph 1, 11, 12, 13, and 15 of ILO Convention No. 169.

28. In relation to the third pillar of the Guiding Principles, access to remedy, the following points may be of particular relevance to indigenous peoples:

(a) ...States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur, those affected, including indigenous peoples, have access to remedy;

(b) ...[making] reference should be made to articles 27, 28, 32 and 40 of the United Nations Declaration on the Rights of Indigenous Peoples;

(c) A critical barrier to access to remedy for indigenous peoples is their exclusion from access to effective judicial mechanisms. To overcome this, particular attention should be paid to the rights and needs of indigenous peoples at each stage of the remedial process: access, procedures and outcome;

(d) Grievance mechanisms may be mediation based and should be culturally appropriate and rights based. In the establishment of grievance mechanisms, traditional indigenous mechanisms, such as justice circles and restorative justice models involving elders and other traditional knowledge keepers, should be taken into account where so sought by the indigenous peoples in question;

(e) Special measures should be implemented in relation to indigenous peoples to overcome barriers to access, including those relating to a lack of awareness of the grievance mechanism, language, literacy, costs, physical location and fears of reprisal.

In explaining the importance of self-determination, the reports:

“11. While only paragraph 1 of common article 1 of the Covenants appears in article 3 of the United Nations Declaration on the Rights of Indigenous Peoples, the content of paragraphs 2 and 3 of common article 1 are found in articles 23 and 32 of the Declaration. Further, article 3 needs to be read together with a cluster of articles (10, 11, 12, 20 and 25- 31) in the Declaration, which generally relate to lands, territories and resources. Article 3 must also be read in the light of the articles specific to extractive industries, which include article 26, article 28 and, of particular importance, article 32. The latter article provides protection analogous to that provided under common article 1, paragraphs 2 and 3, ensuring that the free, prior and informed consent of indigenous peoples is obtained prior to approval of the use by private industries of indigenous peoples’ lands, territories and resources.

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It further states:

“44. The right of indigenous peoples to participate in decision-making in the area of extractive industries is dependent upon the recognition of their rights to self-determination and to permanent sovereignty over their lands, territories and resources. The guarantee of these rights, in turn, will be of benefit for all in terms of promoting sustainable development and environmental protection, as noted by the Special Rapporteur on indigenous peoples’ permanent sovereignty over natural

resources:

Indeed, increased extractive activities on indigenous peoples' traditional lands, territories, and resources without guarantees for their rights often create public disorder, health concerns, political and social instability, and legal uncertainty.

The analysis of relevant international law shows that there have been substantial developments in international law and State practice with respect to the rights of indigenous peoples to own, use, control, and manage their lands, territories, and resources... In most instances, these developments reflect greater recognition of indigenous peoples' rights to authority over their lands, territories, and resources and to their own decision-making power regarding their use and development.

45. The result is increased recognition of the right of indigenous peoples to give or withhold their free, prior and informed consent."

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May 29/13