

United Nations Expert Mechanism on the Rights of Indigenous Peoples
Fifth Session, 9-13 July 2012
Agenda Item 4: Follow-up to thematic studies and advice

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Our organizations welcome the Expert Mechanism's consideration of the *Follow up report on indigenous peoples and the right to participate in decision making, with a focus on extractives*. This is an important opportunity for the United Nations human rights system to more deeply engage with one of the most pressing concerns facing Indigenous peoples around the world.

There is an urgent need for effective implementation of international standards for the protection of Indigenous peoples' rights, in the face of mounting pressures over resource development. Although repeatedly affirmed by the international human rights system, the strong standards for Indigenous peoples' control of their lands, territories and resources are too often ignored in practice.

While some Indigenous peoples have been able to work collaboratively with extractive industries to ensure that they benefit from development on their lands, states have failed to establish and maintain effective legal frameworks necessary to ensure Indigenous peoples' rights are recognized and protected in every instance. The reliance on voluntary compliance by corporate interests fails to address the power imbalance that typically exists between Indigenous peoples and the proponents of extractive development. This also denies Indigenous peoples' means of effective redress when their rights are violated.

Many states are promoting the expansion of resource extraction activity both domestically and abroad through various forms of support to extractive industries, including loans, subsidies, political support and the negotiation of trade agreements. Such measures are taken without adequate assessment of the potential impact on the human rights of Indigenous peoples or legal safeguards against the violation of these rights.

We strongly concur with the *Follow up Report's* emphasis on the central importance of the right of free prior and informed consent (FPIC). We support the *Report's* analysis that FPIC is an integral component of Indigenous peoples' right to self-determination and their rights to lands, territories and resources. FPIC is also an essential safeguard for other rights indispensable for Indigenous peoples' survival, dignity and well-being.

The protection of Indigenous rights must be an urgent state priority, particularly given the continued systemic marginalization and extreme impoverishment faced by so many

Indigenous peoples around the world. This situation is exacerbated by the unresolved legacy of widespread historic violations of their rights and the continued threats to their peace, security and survival.

Accordingly, our organizations respectfully submit the following points for the consideration of the Expert Mechanism.

FPIC is generally the standard required in respect to extractive activities

As affirmed in EMRIP's advice No. 2 (2011), the "duties to consult with indigenous peoples and to obtain their free, prior and informed consent are crucial elements of the right to self-determination". Indigenous peoples' right to give or withhold FPIC is further reinforced by their right to determine their own priorities and strategies for exercising their right to development. It is also reinforced by Indigenous peoples' relationship with their lands, territories and resources and their responsibility to future generations in this regard.

In relation to proposed projects affecting Indigenous peoples' lands, territories and resources, article 32 of the *UN Declaration* affirms: "States shall consult and cooperate in good faith with the indigenous peoples concerned ... in order to obtain their [FPIC]". In diverse circumstances, this would require Indigenous peoples' FPIC consistent with their right of self-determination.

Should factual situations arise where FPIC may not apply, the duty of states still goes beyond "consultation" and requires "cooperation". States are required to negotiate with Indigenous peoples in good faith in order to obtain their consent. This goes beyond a duty to "seek" consent.

As Special Rapporteur James Anaya describes in his July 2009 Human Rights Council report: "The somewhat different language of the Declaration suggests a heightened emphasis on the need for consultations that are in the nature of negotiations towards mutually acceptable arrangements, prior to the decisions on proposed measures".

Indigenous peoples' right to redress for failure to obtain FPIC

Article 28 of the *UN Declaration* is unambiguous in its affirmation that the confiscation, taking, occupation, use or damaging of Indigenous lands, resources and territories of Indigenous peoples without FPIC is a violation of Indigenous peoples' human rights that requires state redress. International standards of justice require, where possible, the restoration of the victims of human rights violations to the circumstances enjoyed prior to the violation. The *Declaration* defines such restitution as returning lands or, when this not possible, providing "lands territories and resources equal in quality, size and legal

status.” Redress also requires guarantee of non-repetition of the violation, which in this instance would require state measures to ensure ongoing protection of the right to FPIC.

FPIC and the balancing of rights

Situations could arise where in Indigenous peoples’ right to FPIC may need to be balanced with overlapping and competing rights claims, including the rights of other Indigenous peoples. Such a balancing of rights would need to be carried out on a case-by-case basis, in accordance with international standards. In particular, article 27 of the *Declaration* calls on states to establish, in conjunction with Indigenous peoples, “a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples’ laws, traditions, customs and land tenure systems.”

Scale of impact or project not the only consideration

It is insufficient to rely on scale of impact as a primary consideration in the balancing of rights. This follow up study, and the prior EMRIP study, rightly conclude that the potential impact of a proposed activity must be assessed in relation to “the cumulative effects of previous encroachments or activities and historical inequities faced by the indigenous peoples concerned.” It should also be noted that certain activities, such as uranium mining, pose inherent risks to Indigenous peoples’ use of the land regardless of the scale of proposed activity. Furthermore, the legal circumstances of Indigenous peoples, such as a persistent state failure to recognize and demarcate their land title, may mean that any state authorization of extractive activities without Indigenous consent would further entrench an unjust and unacceptable status quo.

Claims of “national” or “public” interest cannot trump the rights of Indigenous peoples

There is a disturbing tendency of states to assert vague and ill-defined “national” and “public” interests as a justification for ignoring the rights of Indigenous peoples in respect to their lands, territories and resources. “National” or “public” interest cannot simply exclude or override human rights. Respect, protection, fulfilment and promotion of human rights constitute state obligations under international law, including the *Charter of the United Nations*. In virtually all states, human rights are a national commitment.

Consultation processes are not an alternative to FPIC

The well-established state obligation to consult with Indigenous peoples whenever contemplating measures that might affect Indigenous peoples’ rights can be an appropriate means to identify and accommodate such rights. Consultation processes,

however, must not be defined as alternative to obtaining free, prior and informed consent. The exclusion of FPIC from national consultation processes serves to predetermine the outcome and lacks validity. This violates the principles of objectivity and non-selectivity in upholding human rights. No consultation process can be meaningful or in good faith if there is a predetermined outcome.

Indigenous participation in decision-making requires timely and adequate information

The right and principle of "informed" consent requires, *inter alia*, full and understandable information relating to the proposed project or activity. Failure by states, including its public bodies, to provide such information would violate the right of Indigenous peoples and individuals to freedom of expression.

Access to information is essential for full, democratic and effective participation by Indigenous peoples and is consistent with state accountability, transparency and good governance. Exceptions to the right to information should be narrowly construed.

Refusal by the state to obtain or disclose significant science-based information can serve to preclude Indigenous peoples' "informed" consent. Such conduct may also be a violation of Indigenous peoples' right to freedom of expression.

Participation should include all members of Indigenous communities, including equitable participation of Indigenous women and youth.

State-imposed time limitations preclude fair assessments

In regard to environmental, social and cultural impact assessments, States must not impose pre-determined time limits to complete such processes. There may be a host of legitimate factors that could arise in specific situations and that justify more rigorous assessment. Pre-determined time limits may preclude the achievement of fair and impartial assessment processes.

RECOMMENDATIONS TO EMRIP

Our organizations recommend the following additional points be added to Advice No. 4 to clarify the guidance provided to states and corporations and ensure consistency with international human rights standards.

1. FPIC is generally the standard required in respect to extractive resource activities in or affecting Indigenous lands, territories and resources. National consultation processes that omit or exclude FPIC lack legitimacy or validity. Indigenous peoples' right to give or withhold FPIC is further reinforced by their right to determine their own priorities and strategies for exercising their right to development. It is also reinforced by Indigenous

peoples' relationship with their lands, territories and resources and their responsibility to future generations in this regard.

2. Should factual situations arise where FPIC may not apply, the duty of states still goes beyond "consultation" and requires "cooperation". States are required to negotiate with Indigenous peoples in good faith in order to obtain their consent. This goes beyond a duty to "seek" consent.

3. Article 28 of the *UN Declaration on the Rights of Indigenous Peoples* affirms a state obligation to provide redress for the confiscation, taking, occupation, use or damaging of Indigenous lands, resources and territories of Indigenous peoples without free, prior and informed consent. Such redress requires restitution of lands and protection against further violations. States have a duty, in conjunction with Indigenous peoples, to establish effective, fair and transparent mechanisms for these purposes.

4. Any determination of whether FPIC is required to achieve an appropriate balancing of rights must only be undertaken on a case-specific basis after a fair, independent, impartial, open and transparent process. This must be carried out in conjunction with Indigenous peoples and with due recognition to their laws, traditions, customs and land tenure systems.

5. States engaged in the promotion of extractive activities in or affecting the lands and territories of Indigenous peoples in other countries have an obligation to ensure that these activities fully conform to international human rights norms, including FPIC. Such obligation applies when states negotiate trade agreements or provide financial assistance and other support to nationally registered corporations. In the negotiation of trade agreements, timely and thorough disclosure of state positions is critical so that mutually acceptable arrangements may be achieved with the Indigenous peoples affected.