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ECONOMIC, SOCIAL AND CULTURAL RIGHTS

**Written statement* submitted by the Foundation for Aboriginal and Islander Research
Action (FAIRA), a non-governmental organization in special consultative status**

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[25 February 2005]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

FAIRA notes the final report of the Special Rapporteur, Madam Daes, on Indigenous Peoples' Permanent Sovereignty over Natural Resources (E/CN.4/Sub.2/2004/30 and Add.1). The report provides a comprehensive assessment of the historical and legal foundations for recognition of Indigenous Peoples' rights over natural resources, and the conclusions and recommendations are thorough and compelling.

Para 73 of the report, which comprises one of the recommendations from the Special Rapporteur, should be given the highest priority. FAIRA supports the Sub-Commission proposals that the Commission and ECOSOC authorise an expert seminar to give further attention to the study, and that the study be published as part of the Human Rights Studies Series.

The report recognises that the continued conflicts between States and Indigenous Peoples caused by State exploitation of resources in Indigenous territories should be averted by improved understanding of the rights of Indigenous Peoples to control the use of these resources. Where shared territories exist effort must be made to improve the understanding of these rights and to pursue agreements which can be supported by both the State and Indigenous Peoples.

FAIRA recommends the findings on conflict resolution contained in the report of the Working Group on Indigenous Populations (E/CN.4/Sub.2/2004/). This report shows that root causes of conflict can be found in the processes of colonisation and assimilation, thus leading to denial of the right of self-determination. The many issues discussed at the Working Group session include recognised title to land and resources, the denial of self-determination, ineffective treaties, multinational exploitation of Indigenous Peoples, refusal to accept traditional authority, exclusion from political and economic power and discriminatory social order.

Many Indigenous participants in the session of the Working Group insisted upon capacity building for Indigenous leadership and representatives to improve the capacity to negotiate constructive arrangements with government. Some Indigenous representatives have proposed mechanisms, operating at the international level, which utilise indigenous persons in conflict resolution exercises.

FAIRA recommends the Commission communicate to the next sittings of the Working Group on Indigenous Populations and the Permanent Forum of Indigenous Peoples, as well as with Indigenous Peoples generally, about a mandate and structure for an ad hoc committee of the Commission which has the role to study, implement and promote the permanent sovereignty of Indigenous Peoples over natural resources, as proposed in Para 73 of the Special Rapporteur's report.

Madam Daes should also have the opportunity to consult widely, particularly with the States, to affirm the report is not only an accurate, factual and legal account, but also a fair, balanced and erudite document with viewpoints from the States, Indigenous Peoples and NGOs.

In Section II of the Report, 'General Considerations', especially Paragraphs 17-32, Madam Daes discusses the complexity and relevance of sovereignty of Indigenous Peoples, and the relationship between the sovereignty of Indigenous Peoples and sovereignty of States.

ABORIGINAL LAND AND RESOURCE RIGHTS IN AUSTRALIA

FAIRA considers that the Aboriginal Peoples and Torres Strait Islander Peoples of Australia continue to hold sovereign rights to their lands, territories and resources. In Australia there is no treaty, constitutional arrangement or political accord that establishes a regime between Aboriginal sovereignty and Australian sovereignty. Some Aboriginal leaders have called for the government to negotiate a treaty to restore a balance in the relationship between the government and the Indigenous Peoples.

This approach is not acceptable to the Australian Government, but the government, although convinced that the land, territories and resources of the Indigenous Peoples are duly acquired through the exercise of sovereign powers, has not provided an objective argument as to how the sovereignty over Indigenous Peoples has been acquired.

In confronting these differences in political and legal interpretations of sovereign status in Australia, FAIRA agrees with Madam Daes recommendation in Paragraph 68 of her report, that 'parties should less concern themselves with what the right should be named and more with whether the language employed fully protects the rights of indigenous peoples over their natural resources'.

The Special Rapporteur is cognizant that the Northern Territory Land Rights Act, 1976 already protects some important elements of permanent sovereignty, but it should also be remembered that the legislation has only limited application to a proportion of Australia, and is correspondingly silent on numerous, associated and important rights.

This legislation provides statutory protection for the Aboriginal Peoples to negotiate any proposal to explore or mine the traditional lands. The right to negotiate and the capacity to be effective in negotiations is protected in the structure and functions of the land councils. These organisations which are often attacked by government for being too powerful, are obliged to organise and ensure thorough consultations with traditional owners in order to gain their consent or otherwise.

Unfortunately neither the traditional owners nor the land councils have authority under the legislation to veto mining. A Minister can decide to prevent exploration or mining. This allocation of power was not consistent with expert advice provided to the government.

In 1973 the Government of Australia appointed Justice Woodward to hold a Commission of Inquiry into appropriate ways to recognise Aboriginal land rights. Justice Woodward reported that the aims of land rights were the doing of simple justice to a people who have been deprived of their land without their consent and without compensation.

He recommended that these aims could be best achieved by preserving and strengthening all Aboriginal interests in land and rights over land, and ensuring that none of these interests or rights are further whittled away without consent. He said 'I believe that to deny Aborigines the right to prevent mining on their land is to deny the reality of their land rights.'

Woodward insisted that mining and other development on Aboriginal land should proceed only with the consent of the Aboriginal landowners. Woodward considered that the right to withhold consent might be over-ridden by the government if the national interest required it, but he specifically said that such an issue 'would not be determined on a mere balance of convenience or desirability but only a matter of necessity'.

The Northern Territory Land Rights Act 1976 only applies to the Northern Territory and has no application in any of the six States of Australia. While most of these States have legislation recognizing and facilitating Aboriginal ownership of land, none allow measurable Aboriginal control over mining on traditional lands.

In 1992 the High Court of Australia ruled that the Common Law of Australia recognized Aboriginal title to land. This overdue legal recognition of Aboriginal law, opens the window to further revelations about the permanent sovereignty of Aboriginal Peoples over natural resources, however the government of Australia has used its statute-making powers to limit 'native title' rights.

Under the Native Title Act, which Australian courts are wrongfully accepting as a replacement for common law interpretation of Aboriginal rights. Aboriginal Peoples and Torres Strait Islander Peoples cannot claim ownership of natural resources, exercise the right to freely dispose of wealth and resources, nor the right to freely pursue economic, social and cultural development.

The native title laws also have different, lesser application to the Aboriginal peoples living in populated and fertile regions of Australia where assimilation of the Indigenous Peoples remains the top priority for government.

For the Aboriginal Peoples and Torres Strait Islander Peoples of Australia, the international recognition of Indigenous Peoples' permanent sovereignty over natural resources should provide a basis for any negotiations and agreements with the government of Australia.

FAIRA agrees that an international workshop provides the first important step towards resolution of the conflicts over the ownership, control and use of the natural resources of the lands and territories of Indigenous Peoples. FAIRA calls for action to promote and increase awareness and understanding of the expert report of the Special Rapporteur on Indigenous Peoples' Permanent Sovereignty Over Natural Resources.
