



## **Submission of the Assembly of First Nations (AFN) on Free Prior and Informed Consent (FPIC) for the Expert Mechanism on the Rights of Indigenous Peoples**

### **1. Introduction**

The Assembly of First Nations (AFN) welcomes this opportunity to provide input into the Expert Mechanism's study on free, prior and informed consent (FPIC). FPIC lies at the heart of the *UN Declaration of the Rights of Indigenous Peoples* and is essential to protecting and upholding the diverse range of rights affirmed in the *Declaration* and in the wider body of international human rights law as a whole. It is an aspect of our rights, as peoples, to the right to self-determination.

The repeated affirmation of FPIC in the *UN Declaration* and the work of UN Treaty bodies and Special Mechanisms respond to the urgent necessity of respecting the right of Indigenous peoples, as peoples and nations, to make our own decisions about our lives and our futures, through our governments and representative institutions. For First Nations, consent means, quite simply, the ability to say no, to say yes, or to say yes but with conditions. It means having the decisions of our governments (and the will of our peoples), respected by other governments, institutions and private interests on any matter affecting our political, economic, cultural and social development.

The terms 'free,' 'prior' and 'informed' define the essential preconditions for States such as Canada to meet their obligations under international law. These preconditions happen to be consistent with Canada's Constitution respecting relations with First Nations. This includes protection from duress and coercion; disclosure of all necessary information; honesty and fair dealing on the part of government and other proponents; as well as capacity to deploy our own knowledge and values through the application of our own laws and to conduct, for example, assessments of the potential impacts; and assurance no actions will be taken until First Nations have had time and opportunity to come to a decision according to our own processes and traditions.

FPIC is more than a principle. FPIC is a well-established, widely accepted and essential expression of a wide range of international human rights, including the right of self-determination, and therefore must be respected, protected and upheld as a standard in international law. FPIC serves as a procedural safeguard for other human rights and therefore should also be applied as a precautionary human rights standard.

More than 10 years have now passed since the global adoption of the *UN Declaration* as a body of minimum standards for the realization of the human rights of Indigenous peoples. This decade has seen significant developments in the exercise of FPIC by Indigenous peoples and in the acceptance of FPIC by states and the private sector. There are increasing examples of processes of mutual agreement conducive to the realization of FPIC.

In Canada, First Nations have long struggled against the suppression of our right of self-determination. The essence of FPIC, of forging ties based on mutual respect and agreement, is a critical aspect of the nation-to-nation relationship that First Nations and Canada are committed to restore. Work must continue to realize and implement this essential aspect of relations between First Nations and Canada.

However, we have observed that FPIC can be misunderstood or misrepresented – by those less familiar with international human rights law, and the role international law plays in understanding the rights of First Nations affirmed by the Canadian Constitution. This lack of capacity is evident in government, academia and other institutions, and constitutes a barrier to the full enjoyment of the rights affirmed by the *UN Declaration*. Considerable work lies ahead to establish the required mechanisms in law and policy to ensure that FPIC is upheld.

The AFN commends the Expert Mechanism for undertaking its study of FPIC at such a crucial moment. Indigenous peoples, states and civil society will all benefit from a study of the meaning and importance of FPIC - one firmly grounded in an accurate understanding of the *UN Declaration* and the wider body of international law.

At the same time, the AFN has concerns respecting some aspects of how FPIC appears to have been framed in the Expert Mechanism's Concept Note for this study and the implicit assumptions that this framing may reflect. These concerns are of such importance that we want to present them from the outset of our submission.

First, the concept note appears to excessively focus on the specific language of a few provisions of the *UN Declaration* rather than on the wider framework of law, within and beyond the *Declaration*, on which interpretation of these provisions must be based. As the members of the Expert Mechanism are aware, individual provisions of the *Declaration* cannot be accurately understood in isolation. Each must be read in relation to each other and to the wider body of international law. This is a standard of interpretation applicable to all international instruments, but it is particularly important in respect to the provisions of the *UN Declaration* because the agreed working method of its drafting was to consolidate existing international standards, and not elaborate ‘new rights’ or adopt standards that fell below existing norms and state obligations. Accordingly, in Section 3 below our submission engages in some detail with understanding the foundations of FPIC in international law before further elaborating on the interpretation of FPIC in the *UN Declaration*.

Second, we want to raise concerns about a possibly unintended implication of the third part of the concept note, which focuses on the question of whether or not FPIC is required in respect to specific rights. Our interpretation of FPIC in the *UN Declaration* and the wider body of international law identifies numerous situations where free, prior and informed consent is either mandatory in all instances or where it is reasonable to presume that FPIC is likely required. However, we strongly reject the notion that there are corresponding situations where it can be assumed from the outset that FPIC is not required. We submit that in every instance, there must be careful examination of the situation of the Indigenous peoples concerned and the potential implications of the decision in question, including the nature of the rights at stake, the heightened risk of harm that may have been created by previous unaddressed violations of their rights, and how the affected peoples themselves understand and assess the risks involved. There is no answer to the question ‘when is FPIC not required’ outside of such a specific analysis.

Finally, we are concerned that the EMRIP study must clearly delineate consultation and free, prior and informed consent. We agree that the objective of obtaining mutual agreement is one of the defining characteristics of meaningful consultation. We also suggest there are a number of other characteristics necessary for consultation processes to comply with the standards of “consultation and cooperation” repeatedly called for the *UN Declaration*. In those instances where it can be determined that FPIC is not required, Indigenous peoples’ rights under international law nonetheless always require both meaningful consultation

and cooperation as the minimum standard of rights protection. “Cooperation” necessarily includes a consensual element. As indicated in article 38 of the *UN Declaration*, the minimum standard is “consultation and cooperation” – not mere consultation. Critically, where FPIC is required, consultation processes, no matter how robust, cannot be a substitute for consent.

As we set out below, interpretations of FPIC as requiring nothing more than consultation are demonstrably inaccurate and do not serve the purpose of upholding Indigenous rights or promoting harmonious relations between Indigenous peoples and States. States should be counselled against efforts to deny Indigenous peoples the full and non-discriminatory observance of their rights by undermining application of FPIC.

## **1.1 The Assembly of First Nations**

The AFN is the national, political organization of First Nation governments and their citizens, including those living on and off reserve in Canada. The role and function of the AFN is to serve as a nationally delegated forum for determining and harmonizing effective, collective and cooperative measures on any subject matter that the First Nations delegate for review, study, response or action, and to advance the rights, positions and aspirations of First Nations.

The AFN National Executive is made up of National Chief Perry Bellegarde, ten Regional Chiefs, and the chairs of the Elders, Women’s and Youth Councils of the AFN. The role of the National Chief and the AFN is to advocate on behalf of First Nations as directed by Chiefs-in-Assembly.

The AFN convenes at least two national meetings per year, with an open invitation to all Chiefs and delegates from 634 First Nations, representing more than 900,000 Indigenous Peoples across Canada. At these meetings, resolutions of the Chiefs-in-Assembly are passed which provide direction, guidance, positioning and planning of the AFN for the coming years.

Chiefs-in-Assembly have passed many resolutions to support all First Nations in their work to ensure the full and meaningful implementation of the *United Nations Declaration on the Rights of Indigenous Peoples*. A few examples of these include:

- Support for *Bill C-262: An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration* (Resolution no. 97/2017)

- United Nations Declaration on the Rights of Indigenous Peoples 10 Year Anniversary (Resolution no. 28/2016)
- UN Declaration Legislative Framework and Interpretation of Canadian Laws (Resolution no. 128/2016)
- Support for the Full Implementation of the Truth and Reconciliation Commission of Canada's Call to Action (Resolution no. 01/2015)
- Canada's Obligation to Develop with Indigenous Peoples a National Action Plan for Implementation of the UN Declaration on the Rights of Indigenous Peoples (Resolution no. 38/2015)

The AFN has consultative status with ECOSOC and has long participated in international and regional standard setting processes in respect to the human rights of Indigenous peoples. This has included active participation in the development of the *UN Declaration* itself and in meetings of both the Expert Mechanism and the UN Permanent Forum on Indigenous Issues. The AFN has also regularly participated in Treaty body reviews of Canada and has engaged extensively with the UN Special rapporteur on the rights of Indigenous peoples and with other mechanisms and procedures of the UN and Inter-American human rights system.

The Assembly of First Nations also has been a co-signator to a number of joint statements to EMRIP.

## **2. An established norm but an contested reality: free, prior and informed consent in the Canadian context**

Within the UN system, the specific terminology of free, prior and informed consent has been used in respect to the rights of Indigenous peoples for more than two decades in international law, dating back at least to General Recommendation 23 adopted by the UN Committee on the Elimination of Racial Discrimination in 1997. As a matter of international law, the negotiation of mutual agreements among First Nations and other peoples has a much longer history.

Consent processes in the form of Treaty-making were part of the earliest relationships between peoples on Turtle Island ("North America"). First Nations entered into Treaties with each other both as an enduring covenant and a relationship to be continually renewed. When European came to our lands, our protocols were an integral part of the legal process establishing these Treaty relationships.

Canada has widely breached the Treaties entered into by the Crown and these issues are major unfinished business between the Crown and First Nations in Canada. Given recent commitments by Canada to correct its policy approach respecting First Nations to one of rights recognition and implementation, Canada now has the opportunity to align its actions to reflect Treaty as a central pillar of the relationship between the Crown and First Nations. Contrary to the spirit and letter of Treaty and the fundamental rights of First Nations, there has been a long history of discriminatory and oppressive laws and policies imposed on Indigenous peoples. These include the imposition of the Indian Residential Schools and the Natural Resources Transfer Act as a few examples. The breach of Treaty has been the source of profound harm and suffering for First Nations and have stood as barriers to the full exercise of our right to self-determination, and the individual human rights of the citizens of First Nations, The continuing multi-generational impacts of rights violations has been well documented.<sup>1</sup>

Today, First Nations continue to enter into a wide range of agreements that are predicated on our right to grant or withhold consent. These include so-called “Comprehensive land claims agreements”. These typically can only be amended through the consent of First Nations and, as part of their terms, set out areas where future decisions will either be made by First Nations governments and institutions or where the consent of First Nations is required.<sup>2</sup>

It should also be noted that the policy frameworks for the negotiation of these agreements have long been argued by First Nations to not reflect the requirements and protections of the Canadian Constitution, decisions of the Supreme Court of Canada and international human rights law. Canada recently has acknowledged its policy framework and many operational practices negatively impact our rights and has undertaken to work with us to carry out a substantive overhaul to move federal policies from rights denial to rights recognition.

Canada has committed to a new policy approach founded in rights recognition and implementation, to reflect the full nature and scope of our inherent rights under the Canadian Constitution and international human rights law. The Prime Minister has made several statements affirming his government’s commitment to fully

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<sup>1</sup> See for example, Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, 2015; and Canada., Erasmus, G., & Dussault, R. (1996). *Report of the Royal Commission on Aboriginal Peoples*. Ottawa: The Commission.

<sup>2</sup> For example, Tla’amin Nation, The Queen in Right of Canada, the Queen in Right of British Columbia, *Tla’amin Final Agreement*, April 5, 2015. See also Land Claims Agreements Coalition, “What is a Modern Treaty,” <http://landclaimscoalition.ca/modern-treaty/>

implement its obligations under the *UN Declaration*. (These are more fully discussed below.)

Despite resistance by some governments in Canada to recognizing and formally implementing FPIC, there are growing numbers of instances in which First Nations have been successful in asserting the right to make our own decisions about which projects should proceed on our territories and under what conditions. In these instances, the right to free, prior and informed consent can be tacitly upheld by government decisions to reject projects that do not have consent or by corporations that decide not to proceed because consent has not been granted.

In addition, agreements between First Nations and private industry are widespread. As will be explored below, many sectors of private industry clearly recognize that operating on the basis of consent is conducive to their own interests. Endorsement of FPIC in the policies of corporations and industry associations in Canada and internationally further strengthen the norm and add further fuel to demands for government to work with Indigenous peoples to establish clear formal policies.

All of this demonstrates that FPIC already has considerable legal effect and normative value in the Canadian context as well as demonstrable practicability and benefit. Advancing this trend will promote peace and mutual benefit.

More remains to be done – in particular, the adoption of FPIC into federal, provincial and territorial regulatory frameworks in resource decision-making impacting First Nations territories. Governments also need to consistently carry out their responsibility to assess potential negative impacts on the rights of Indigenous peoples, including human rights impacts. This should be done in partnership and in a transparent way to promote dialogue to resolve disputes respecting resource decision-making.

## **2.1 The Treaty relationship**

The First Peoples of Turtle Island have a long history of Treaty-making among our Nations. First Nations also have entered into Treaty with the Crown as nations with sovereignty and inherent rights as peoples. When the British asserted an “assumed” sovereignty over much of what was to become Canada, the Crown explicitly recognized First Nations’ continued possession of our traditional

territories and implicitly endorsed the process of Crown Treaty-making the basis of continued relations.<sup>3</sup>

As Andrea Carmen of the International Indian Treaty Council has written, “‘consent’ and ‘good faith’ of all parties are the two most essential elements in treaty-making.”<sup>4</sup> The mutual nature of the Treaty relationship was symbolized by the parallel rows – distinct but equal – of the Haudenosaunee Two-Row Wampum Belt, first used to embody one of the first treaties between Europeans and First Nations in North America, a 1613 Treaty with Dutch settlers in what is now New York state. The mutual relationship was also symbolized by the medallions that commemorate the Numbered Treaties in Canada from 1871 to 1921. The medallions depict an Indigenous person and a European person, both standing and clasping each other’s hands. The mutual nature of the Treaties has been confirmed by Canadian Courts which have held that these Treaties must be interpreted to reflect how the First Nations understood the spirit and intent at the time of signing. Furthermore, any ambiguities in the Treaty must be resolved in favour of the Indigenous peoples and that any restrictions on rights must be narrowly construed.<sup>5</sup> This is a critical part of recognizing that First Nations’ legal traditions are part of Canada’s legal framework.

The Canadian government suspended Treaty-making in the early 20<sup>th</sup> Century, at the height of its efforts to forcibly assimilate First Nations. After a political showdown with First Nations forced the government to abandon the restatement of assimilation as a formal policy objective in its 1969 “White Paper”. The federal government subsequently launched what it called “the modern Treaty process” as its preferred means to negotiate Indigenous peoples’ land title issues. Dozens of such agreements have been concluded since 1973.

While there are serious deficiencies in the existing policy frameworks imposed unilaterally for land title and self-government negotiations, all the agreements required an expression of consent by Indigenous peoples for their adoption and require consent for any amendment. Furthermore, these newer agreements contain

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<sup>3</sup> The Royal Proclamation of 1763 states in part, “whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds.” *The Royal Proclamation*, October 7, 1763.

<sup>4</sup> Andrea Carmen, “The Right to Free, Prior and Informed Consent: A Framework for Harmonious Relations and New Processes for Redress,” in Jackie Hartley, Paul Joffe and Jennifer Preston, eds. *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope and Action*, Purich Publishing Ltd., 2010.

<sup>5</sup> *R. v. Badger*, [1996] 1 S.C.R. 771, para. 52.



provisions setting out areas in which Indigenous peoples' governments and other institutions exercise exclusive decision-making authority or where decisions by the federal, provincial or territorial government require an Indigenous Nation's consent.

The significance of the Treaty relationship, and with it, consent requirements, are a foundation of Canadian law.

### **Canadian jurisprudence on FPIC**

Canadian courts have recognized two other broad areas where legal consent requirements exist. The first is where Indigenous peoples have formally established title or ownership rights over their lands, territories and resources and therefore exercise ongoing decision-making authority. The second can be characterized as a precautionary measure to avoid erosion of rights that are subject to unresolved issues respecting First Nations' land rights and inherent jurisdiction. The two modalities are discussed below.

In 2014, the Supreme Court of Canada recognized that the Tsilhqot'in Nation hold ownership rights and title over a large part of their traditional territory in central British Columbia. In a unanimous decision, the Supreme Court explicitly stated that Indigenous land title "means that governments and others seeking to use the land **must obtain the consent** of the Aboriginal title holders [emphasis added]." <sup>6</sup>

While Canadian courts had previously confirmed aboriginal title as a legal concept in Canadian law, the *Tsilhqot'in Nation* decision marked the first time that a Canadian court took the step of affirming or recognizing such title over a specific tract of land. The fact that the *Tsilhqot'in Nation* case was before the courts for more than two decades demonstrates the considerable barriers First Nations face in having our rights recognized and respected in the Canadian legal system, and especially embedded barriers flowing from the implicit and explicit influence of the doctrine of discovery. As Professor John Burrows notes the doctrines of discovery and terra nullius continue to permeate Canadian law and works to undermine Indigenous peoples' rights, "Thus, it is apparent that the doctrine of terra nullius has not been entirely or even largely expunged from Canadian law, despite the Supreme Court of Canada's protestations to the contrary.

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<sup>6</sup> *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 S.C.R. 256, para. 76.

Aboriginal title is still a "burden on the underlying title asserted by the Crown at sovereignty." The doctrine of discovery is alive and well in Canada."<sup>7</sup>

The *Delgamuukw* decision and later *Haida Nation* set out a spectrum of obligations arising from the duty to consult that will vary based both on the strength of the rights assertion and the risk of harm.<sup>8</sup> Here the Court explicitly restates the findings set out in *Delgamuukw* that the spectrum includes the obligation to obtain consent:

The Court's seminal decision in *Delgamuukw*, in the context of a claim for title to land and resources, confirmed and expanded on the duty to consult, suggesting the content of the duty varied with the circumstances: from a minimum "duty to discuss important decisions" where the "breach is less serious or relatively minor"; through the "significantly deeper than mere consultation" that is required in "most cases"; to "full consent of [the] aboriginal nation" on very serious issues. **These words apply as much to unresolved claims as to intrusions on settled claims** [emphasis added].<sup>9</sup>

So far, jurisprudence has yet to elaborate on the inclusion of consent as part of the spectrum of potential requirements of the duty to consult. No government decisions or actions have yet been overturned on the basis of the failure to obtain such consent on "very serious issues." Nonetheless, the *Delgamuukw* and *Haida Nation* decisions together clearly locate consent within the spectrum of protective or precautionary measures required by Canada's constitution.

Uninformed and misleading opinion has inaccurately pointed to the *Haida Nation* decision as evidence of a possible conflict between domestic jurisprudence and FPIC in international law. This is done by citing -- out of context -- one passage in the decision where the Court stated that the duty to consult in the context of so called "claims" that are not yet established. In this context the Court said the duty to consult "does not give Aboriginal groups a veto over what can be done with land pending final proof of the claim."<sup>10</sup>

The Court did not define what it meant by the term "veto". In the absence of clarification within the decision itself, we can assume a plain language meaning

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<sup>7</sup> John Borrows, "TITLE: The Durability of Terra Nullius: Tsilhqot'in Nation v British Columbia" University of British Columbia Law Review, (2015) 48 UBC L Rev 701 – 742 at para 35.

<sup>8</sup> *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, para. 88.

<sup>9</sup> *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73, para. 24.

<sup>10</sup> *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73, para. 48.

of “veto” as describing an action that is arbitrary rather than based on specific facts and law; unilateral or without consideration for contending rights and interests; and absolute, without limit or possibility of recourse or appeal.<sup>11</sup> Such a reading is consistent with the rest of the passage in *Haida Nation* that goes on to state,

...what is required is a process of balancing interests, of give and take.... Balance and compromise are inherent in the notion of reconciliation. Where accommodation is required in making decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests.<sup>12</sup>

Indigenous peoples’ right to grant or withhold consent is not arbitrary, or any different in character than decisions made every day by other governments in Canada. It is not accurate or useful to describe the requirement of consent set out in *Delgamuukw*, *Haida Nation* and now *Tsilhqot’in* as a “veto”. Instead, in the context of widespread Crown denial of the rights of Indigenous peoples, and the well documented resulting harms, consent processes are an effective and necessary means to achieve the reasonable balance called for the Court –ongoing dialogue between the Crown and First Nation governments. There is nothing in the Supreme Court’s reference to “veto” in the *Haida Nation* decision that in any way diminishes the consent obligations as part of Canadian jurisprudence.

In addition, no government in Canada has a “veto” in relation to other governments in the valid exercise of jurisdiction. When differences arise between governments, the norm of inter-governmental relations is to pursue dialogue until mutual consent or cooperation is achieved. In the absence of agreement, the judicial system is relied on to resolve disputes. In the *Reference re Securities Act*, case the Supreme Court of Canada acknowledged that cooperation is the animating force for resolving complex governance problems and that “The federalism principle upon which Canada’s constitutional framework rests demands nothing less.”<sup>13</sup>

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<sup>11</sup> Paul Joffe, “Veto” and “Consent” – Significant Differences, March 26, 2016. Available online <http://quakerservice.ca/wp-content/uploads/2016/03/Veto-and-Consent-Significant-differences-Joffe.pdf>

<sup>12</sup> *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73, paras. 48, 50.

<sup>13</sup> *Reference re Securities Act*, [2011] 3 S.C.R. 837, para. 133.

### 2.3 Canada's public commitments to FPIC

Under Prime Minister Justin Trudeau, the Government of Canada has made numerous public commitments to recognize and uphold the rights of First Nations. Speaking to the UN General Assembly in September 2017, Prime Minister Trudeau acknowledged Canada's shortcomings in meeting its obligations to Indigenous peoples while re-stating Canada's commitment to the implementation of the *UN Declaration*. The Prime Minister acknowledged the *Declaration* is not merely an aspirational document. He said, "In the words of Canada's Truth and Reconciliation Commission, the *Declaration* provides 'the necessary principles, norms, and standards for reconciliation to flourish in twenty-first-century Canada.'" He also stated, "We know that the world expects Canada to strictly adhere to international human rights standards – including the *United Nations Declaration on the Rights of Indigenous Peoples* – and that is what we expect of ourselves, too."<sup>14</sup> At the UN Permanent Forum, in April 2017, Canada's Minister of Indigenous and Northern Affairs, Dr. Carolyn Bennett formally retracted Canada's previous concerns respecting the commitment to implement FPIC in the World Conference of Indigenous Peoples outcome document, saying that FPIC provisions are the "heart of the *Declaration*".<sup>15</sup> In a speech in the House of Commons on February 14, 2018, the Prime Minister said: "We endorsed the *United Nations Declaration on the Rights of Indigenous Peoples* without qualification and committed to its full implementation"<sup>16</sup>.

Canada's repeated public commitments to the *UN Declaration* require Canada to respect the FPIC standard. The work to close the gap between rights recognition and the respect and implementation of our rights lies ahead. A key focus of that work is translating the recent significant policy statements described above into instructions and guidance for civil servants and government decision-makers to change the way government works in practice. The success of this work will determine Canada's capacity to meet the minimum standards of the UN Declaration including FPIC.

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<sup>14</sup> Prime Minister Justin Trudeau's Address to the 72<sup>th</sup> Session of the United Nations General Assembly, 21 September 2017. <https://pm.gc.ca/eng/news/2017/09/21/prime-minister-justin-trudeaus-address-72th-session-united-nations-general-assembly>

<sup>15</sup> Speech for the Honourable Carolyn Bennett, Minister of Indigenous and Northern Affairs at the United Nations Permanent Forum on Indigenous Issues 16<sup>th</sup> Session: Opening Ceremony. [https://www.canada.ca/en/indigenous-northern-affairs/news/2017/04/united\\_nations\\_permanentforumonindigenousissues16thsessionopenin.html](https://www.canada.ca/en/indigenous-northern-affairs/news/2017/04/united_nations_permanentforumonindigenousissues16thsessionopenin.html)

<sup>16</sup> Parliament of Canada, House of Commons, 1<sup>st</sup> Session, 42<sup>nd</sup> Parliament, 148(262), at p.17217.

### **2.3 Exercise of FPIC within Canada’s current resource regulation system**

Despite formal commitments to respect and implement the *UN Declaration*, federal, provincial and territorial governments in Canada continue to authorize or issue permits to large-scale resource development projects over the objections of First Nations concerned about the potential for severe harm to the enjoyment of our human rights.

The Site C dam, a massive hydro-electric project now under construction in northeast British Columbia is one such example. It was approved by the federal government and the province of British Columbia in 2014.

There are far too such many instances across Canada where the refusal of government and project proponents to listen to First Nations has led to legal battles and further damaged the relationship between First Nations and the state.

First Nations do not take our resource development decisions lightly. The decisions we make are based on the wisdom of elders, knowledge-keepers, hunters, fishers and others who have intimate knowledge and experience of our lands and the cycles of nature. In many of our nations, we are developing formal assessment regimes of our own, which are based on our traditional knowledge and values and which far exceed state-mandated assessments in depth and scope.<sup>17</sup> When the federal, provincial and territorial governments ignore First Nations decisions about what projects should or should not go ahead, or which require significant modification to protect our lands and territories, the state jeopardizes the common interest in a health, sustainable environment.

It is important to note, however, that such costly and detrimental conflicts are not necessarily the norm. There are also numerous counter-examples where resource developments are proceeding on the basis of mutual agreements between First Nations and other governments or between First Nations and the private sector. In many instances, First Nations are both decision-makers and active partners in the design and operation of the project.

In British Columbia, Carrier Sekani First Nations have entered into agreements with the provincial government establishing a cooperative role for both

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<sup>17</sup> Scott A. Smith, Paul Seaman, Mark Youden. “Occupying the Field: from being consulted to actively making decisions about energy and natural resource projects in your territories.”

governments in the oversight of major resource developments projects in the extensive traditional territory of the Carrier Sekani. Provisions include a commitment to develop consensus recommendations for how projects will be assessed and decided on, to seek consensus on approval or rejection of proposed projects, and to use dispute resolution mechanisms to help resolve any differences.<sup>18</sup>

In this example, First Nations were able to reach agreement with the provincial governments to establish a decision-making approach that goes well beyond the existing regulatory regime in ensuring a direct role for First Nations, in establishing collaboration and consensus as the objective, and committing to use of formal mechanism to resolve disputes. This agreement covers territories that are subject to Carrier Sekani assertion of title that has never been formally recognized by Canada.

It is increasingly common for public corporations and private industry to offer to negotiate agreements with First Nations, prior to making significant investments in a planned project. The federal department of Natural Resources, which has actively encouraged such agreements, has determined that between 1975 and 2015, First Nations entered into formal “Impact Benefit Agreements” in respect to 198 mining projects in Canada with the frequency of such agreements increasing over this period.<sup>19</sup> First Nations may negotiate a range of benefits through such agreements, including preferential hiring of First Nations employees and contractors, direct partnership in subsidiary enterprises, and agreement over mitigation and post-project remediation. The agreements provide greater certainty for government and industry through the commitment by First Nations not to contest the project in court or in other ways. Critically, however, within the current Canadian regulatory regime the negotiation of Impact Benefit Agreements is not predicated on any enforceable obligation for the project proponent to abandon the proposal if agreement cannot be reached. In fact, First Nations may enter into such agreements as a way to make the best of a bad situation by securing some benefit from an unwanted project that they do not feel able to prevent.

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<sup>18</sup> Scott A. Smith, Paul Seaman, Mark Youden. “Occupying the Field: from being consulted to actively making decisions about energy and natural resource projects in your territories.”

<sup>19</sup> Norah Kieland, *Supporting Aboriginal Participation in Resource Development: The Role of Impact and Benefit Agreements* (In Brief). Library of Parliament, May 5, 2015. Publication No. 2015-29-E.

For this reason, Impact Benefit Agreements can not necessarily be assumed to represent free, prior and informed consent. What the prevalence of such agreements does indicate about First Nations and project proponents is a preference, where possible, to reach such mutual agreements and capacity on to engage in the negotiation of often complex legal agreements. This preference and capacity for reaching mutual agreements could provide a foundation for the implementation of an FPIC regime consistent with international law.

We point out that too often, the question of actually listening to First Nations if they say no to proposal is often the sticking point for government and industry. Nevertheless, there are examples where, even within existing regulatory regimes, Indigenous peoples in Canada have exercised their right to reject extractive activities deemed harmful and unacceptable through their own decision-making processes and have had those decisions upheld by the state or respected by industry. The examples that follow, illustrate the fact that despite lingering resistance and controversy surrounding FPIC, First Nations exercise of FPIC is already being explicitly or tacitly accommodated with the Canadian legal structure.

As previously noted, agreements negotiated through the comprehensive land claims or ‘modern Treaty’ process set out areas where First Nations now exercise exclusive jurisdiction or participate in decision making through co-management and joint decision-making structures. For the most part, these processes have supported proposed resource development activities brought before them, albeit with conditions, and final approvals have subsequently been issued by the federal, provincial and territorial governments. However, there are also examples where decisions through these mechanisms to reject proposals for resource development activities within the governed territories have subsequently been upheld.

For example, the Mackenzie Valley Environmental Impact Review Board is a co-management structure established the settlement of comprehensive claims in the Northwest Territories. Half of its members are nominated by the Nations that have entered into these agreements. The Board has generally supported most development proposals that it has reviewed.<sup>20</sup> However, in 2006, after hearing serious concerns by traditional knowledge holders, the board concluded that a

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<sup>20</sup> Scott A. Smith, Paul Seaman, Mark Youden. “Occupying the Field: from being consulted to actively making decisions about energy and natural resource projects in your territories.”

proposed diamond explorations project should not proceed. The Federal government denied the permit on the advice of the board.<sup>21</sup>

The federal government, the Nunavut territorial government and the Inuit party to the Nunavut settlement each nominate three of the nine members of the Nunavut Impact Review Board. In 2015, the Board rejected a proposed uranium mine. The proposal had been brought forward without a clear start date or schedule which the Board concluded made it too difficult to assess its potential environmental and social impacts. In July 2016, the federal government upheld the Board's decision.<sup>22</sup>

It is also important to note that First Nations assertion of FPIC has in some instances had a significant impact within the general regulatory system in which reviews are conducted by state appointed panels. The federal government has twice rejected a proposed mine that would, among other impacts, destroyed a land of cultural importance to the Tsilhqot'in Nation. The Tsilhqot'in National Government has repeatedly stated that although it is interested to pursue agreements to promote mining in other parts of their territory, the proposed "Prosperity" or "New Prosperity" mine is the "wrong mine in the wrong place." In the second review, the federally-appointed panel devoted considerable attention to understanding FPIC as an international standard that should contribute to the interpretation of the Canadian Environmental Assessment Act. In its report, the panel said that the absence of FPIC was one of the significant factors contributing to its findings that the harm caused by the mine should be considered severe and high magnitude. The panel commented, "The Panel is convinced that the Tsilhqot'in cultural attachment to Fish Lake (Teztan Biny) and the Nabas areas is so profound that they cannot reasonably be expected to accept the conversion of that area into the proposed New Prosperity mine."<sup>23</sup>

First Nations have also been able to successfully exercise FPIC even where federal, provincial and territorial governments have remained committed to pursuing resource extraction activities opposed by First Nations. Grassy Narrows First Nation (Asubpeeschoseewagong Netum Anishinabek) has experienced profound harm to its culture and economy and to the health of the community due

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<sup>21</sup> Scott A. Smith, Paul Seaman, Mark Youden. "Occupying the Field: from being consulted to actively making decisions about energy and natural resource projects in your territories."

<sup>22</sup> Sima Sahar Zerehi, "Feds say no to Kiggavik uranium mine, back Nunavut Impact Review Board." CBC News, July 26, 2016.

<sup>23</sup> Canadian Environmental Assessment Agency, Report of the Federal Review Panel – New Prosperity Gold-Copper Mine Project, October 31, 2013, CEAA Reference Number 63928, p. 197.



to the lingering, unaddressed consequences of massive releases of mercury into their river system a half-century ago. In January 2007, after a blockade against clearcut logging was launched by youth in the community, the Chief and Council and other institutions including the Clan Mothers of the community, the Elders Council, Trappers Council, and the Youth Council, declared a moratorium on further industrial development in their territory “until such time as the Governments of Canada and Ontario restore their honour and obtain the consent of our community in these decisions that will forever alter the future of our people.”<sup>24</sup> When the provincial government continued to issue licenses for large-scale clearcut logging in the territory, Grassy Narrows approached and put pressure on the companies holding the licenses as well as those selling products made from this wood.

In 2008, the US paper company Boise agreed that it would stop purchasing paper fiber sourced from Grassy Narrows. In doing so, Boise noted that although it was confident in the due diligence it had conducted to comply with the certification standards it had adopted, it agreed after consideration of the specific circumstances of Grassy Narrows that it was appropriate to take additional voluntary action until consent was granted or the dispute between Grassy Narrows and the province resolved.<sup>25</sup> Boise’s decision was quickly followed by companies responsible for logging at Grassy Narrows giving up their licenses. The moratorium declared by Grassy Narrows has now held for almost a decade, despite the fact that resumption of logging is still part of the province’s plans.<sup>26</sup>

The last example clearly a concrete example of Indigenous peoples’ exercise of FPIC. First Nations do exercise our right to self-determination in very practical and real ways.

## **2.4 FPIC and private sector standards**

Many of the examples in the preceding section demonstrate the frequency with which private industry currently seek to enter into agreements with First Nations, and in some instances, may be willing to go beyond the federal, provincial and territorial governments in the application of FPIC. In 2010, in response to a shareholder motion, then Canadian-owned resource company Talisman Energy

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<sup>24</sup> Grassy Narrows Chief and Council, Environmental Committee, Blockaders, Trappers, Clan Mothers, Elders, Youth, “Open Letter Re: Moratorium on industry in our Traditional Territory, and opposition to MNR tender process.” January 17 2007.

<sup>25</sup> Stephen Earley, Letter from Region Woodlands Manager, Boise, February 27, 2008.

<sup>26</sup> Craig Benjamin, “Free, prior and informed consent: Defending Indigenous rights global rush for resources,” in Joyce Green, ed. *Indivisible: Indigenous Human Rights*, Fernwood Books, 2004.

contracted an independent study of the business case of adopting a formal FPIC policy. The Foley-Hoag report set out a number of economic advantages of proceeding on the basis of formal consent, including reduced risk of disruption from protest or legal action and greater insulation from public criticism. Although noting that obtaining consent has a cost for corporations, both in the time and effort required to achieve and maintain consent, as well as conditions that may be imposed on operations as a result, the overall conclusion was to suggest that benefits outweigh the cost. The report also noted that acceptance of FPIC “is rapidly gaining momentum.”<sup>27</sup> As support for the FPIC continues to grow, the report noted there is increasing risk that a company that proceeds without FPIC could face substantial loss if Indigenous peoples are able to enforce FPIC through government, court or consumer action.<sup>28</sup>

There have been numerous similar statements of the business case for FPIC.<sup>29</sup> In 2012, the Boreal Leadership Council issued a report that stated, “responsible development of natural resources within Canada’s boreal region needs to integrate the principle of free, prior, and informed consent (FPIC) of Aboriginal peoples who inhabit the region.” The report noted that the failure to provide formal assurance that Indigenous peoples’ voices will be heard in the decision-making process forces Indigenous peoples to defend their rights and interests through other “bargaining tactics” that are disruptive and costly to industry. The report concluded that over the long term failure to integrate FPIC is “untenable” for all concerned.<sup>30</sup>

In a regular survey of the extractive industry, Oxfam reported that it was able to identify three times more companies with formal policy commitments to FPIC in 2015 than in 2012. While Oxfam concludes that “extractive industry companies are increasingly seeing the relevance of FPIC to their operations”, their report also notes that few companies with policy commitments to FPIC have corresponding operational procedures to ensure that FPIC is upheld in practice. The Oxfam

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<sup>27</sup> Amy K. Lehr and Gare A. Smith, *Implementing a Corporate Free, Prior, and Informed Consent Policy: Benefits and Challenges*. Foley Hoag Ltd, 2010. P. 6.

<sup>28</sup> Amy K. Lehr and Gare A. Smith, *Implementing a Corporate Free, Prior, and Informed Consent Policy: Benefits and Challenges*. Foley Hoag Ltd, 2010.

<sup>29</sup> Cf., First Peoples Worldwide, *Investors and Indigenous Peoples: Trends in Sustainable and Responsible Investment and Free, Prior, and Informed Consent*, undated. Antonio G. M. La Viña, Jonathan Sohn, and Steve Herz, *Development without Conflict: The Business Case for Community Consent*, World Resources Institute, 2007.

<sup>30</sup> Boreal Leadership Council, *Free, Prior, and Informed Consent in Canada: A summary of key issues, lessons and case studies towards practical guidance for developers and Aboriginal communities*, September 2012.

report also notes that many companies with FPIC policies stop short of explicitly committing to proceed only if consent is granted and instead “use vague and hedging language.”

A good example is the policy adopted by Talisman energy in response to the Foley Hoag report. While acknowledging the importance of FPIC, the policy commits only “to seek to obtain and maintain the support and agreement of communities for its activities.” IPIECA, an international oil and gas industry association, similarly characterizes FPIC as “emerging good practice” but calls only for “good faith negotiation and decision-making with the objective of achieving agreements, seeking consent or broad community support.”<sup>31</sup> The International Council on Mining and Metals (ICMM), which represents both national industry associations and individual companies, commits its members to “work to obtain the consent of Indigenous communities for new projects (and changes to existing projects) that are located on lands traditionally owned by or under customary use of Indigenous Peoples and are likely to have significant adverse impacts.”<sup>32</sup>

In May 2016, in response to formal endorsements of the *UN Declaration* by both the federal government and the province of Alberta, the Canadian Association of Petroleum Producers (CAPP) issued a discussion paper on the *UN Declaration* that including the following as part of a statement on FPIC:

CAPP understands FPIC as an important set of principles to ensure protection of the rights of Indigenous Peoples through the process of meaningful engagement and consultation... In practice, CAPP member companies regularly seek to and achieve FPIC with Indigenous communities as discussed above, through meaningful discussions that can lead to the mitigation of project-related impacts.<sup>33</sup>

These policy statements while failing to properly articulate the FPIC standard at least demonstrate a growing acceptance by the private sector of the desirability of consent agreements as an aspect of business. It is considerably harder therefore for either private interests or states to argue that consent processes are too onerous to be realistic.

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<sup>31</sup> IPIECA, *Indigenous Peoples and the oil and gas industry: Context, issues and emerging good practice*, 2012, p. 17.

<sup>32</sup> International Council on Mining and Metals. *Indigenous Peoples and Mining Position Statement*. May 2013, Commitment 4.

<sup>33</sup> Canadian Association of Petroleum Producers, “Discussion Paper on Implementing the UN Declaration on the Rights of Indigenous Peoples in Canada,” May 2016.

It is important to emphasize that merely agreeing to seek consent is not the same as respecting FPIC. Otherwise, as Oxfam states, one risks, “abusing a concept that has been defined clearly by international bodies and law.”<sup>34</sup>

In contrast to the corporate policies and statements noted above, the obligation to proceed only on the basis of FPIC is clearly and explicitly set out in the Performance Standard adopted by the International Finance Corporation in 2012 as conditions for this multilateral agency’s funding to the private sector. The standard requires project proponents to document that consent has been granted under processes acceptable to Indigenous peoples.<sup>35</sup> This requirement applies to a range of circumstances including if Indigenous peoples would be relocated from their lands or where the project would result in “significant” and “unavoidable” impacts on “critical cultural heritage.”<sup>36</sup> Accordingly, corporations that want to participate in projects funding through the IFC may already be held to higher standards than most have voluntarily adopted.

The UN Global Compact, which is self-described as the largest corporate responsibility initiative in the world with over 9,500 companies in over 160 countries is similarly explicit about the nature of FPIC. A guide for businesses published by the Global Compact states, “Consent can be understood as a formal, documented social license to operate. Indigenous peoples have the right to give or withhold consent, and in some circumstances, may revoke consent previously given.”<sup>37</sup> The right to both give and withhold consent is further underlined when the guide states, “International human rights standards require States to obtain the FPIC of indigenous peoples prior to authorization of business activity on indigenous lands, including the issuance of concessions, licenses or adoption of administrative measures facilitating these activities.”<sup>38</sup>

### **3 FPIC as a right and standard in international law**

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<sup>34</sup> Emily Greenspan, Michelle Katz, Julie Kim, Serena Lillywhite, and Chris Madden, *Community Consent Index 2015: Oil, gas, and mining company public positions on Free, Prior, and Informed Consent*, Oxfam, July 23, 2015. P. 3.

<sup>35</sup> International Finance Corporation, “Performance Standards on Environmental and Social Sustainability,” January 1, 2012, para. 12

<sup>36</sup> International Finance Corporation, “Performance Standards on Environmental and Social Sustainability,” January 1, 2012, paras. 15, 16

<sup>37</sup> UN Global Compact, *The Business Reference Guide to the UN Declaration on the Rights of Indigenous Peoples*. United Nations Global Compact Office, 2013. P. 28.

<sup>38</sup> UN Global Compact, *The Business Reference Guide to the UN Declaration on the Rights of Indigenous Peoples*. United Nations Global Compact Office, 2013. P. 29.

The lengthy process of deliberation leading to the finalization of the text of the *UN Declaration*, the direct role of rights holders in the elaboration of this text, and the state consensus that has now been repeatedly affirmed in UN General Assembly, all serve to underline the authoritative nature of the *Declaration*.<sup>39</sup> The *Declaration* serves as a consolidation, and global affirmation of decades of progressive development of international human rights law that preceded the *Declaration* and on which it was based. As the former UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, has stated, *the Declaration*

represents an authoritative common understanding, at the global level, of the minimum content of the rights of indigenous peoples, upon a foundation of various sources of international human rights law ... the *Declaration* reflects and builds upon human rights norms of general applicability, as interpreted and applied by United Nations and regional treaty bodies.<sup>40</sup>

To understand FPIC in international law, it necessary to look both at the text of the *UN Declaration* itself and at the wider body of interpretation referred to by the Special Rapporteur.

General recommendation 23, adopted by the UN Committee on the Elimination of Racial Discrimination in 1997 – a full ten years before the adoption of the UN Declaration – is particularly helpful as a starting point for such interpretation. In setting out state obligations under the *Convention on the Elimination of Racial Discrimination*, the Committee called on state parties to “[e]nsure that members of indigenous peoples have equal rights in respect of effective participation in public life and that **no decisions directly relating to their rights and interests are taken without their informed consent.** [emphasis added]”<sup>41</sup>

It is clear from this statement that the Committee is calling on states to do more than engage with Indigenous peoples with the objective of obtaining their consent. As stated by the Committee, states are obligated to take measures to ensure that decisions relating to the rights and interests of Indigenous peoples are made only

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<sup>39</sup> Claire Charters, “*The Legitimacy of the UN Declaration on the Rights of Indigenous Peoples.*” in Claire Charters and Rodolfo Stavenhagen, eds. *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples.* IWGIA Document No. 127, 2009.

<sup>40</sup> UN Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, S. James Anaya.* UN Doc. A/HRC/9/9, August 11, 2008, paras. 85-6.

<sup>41</sup> UN Committee on the Elimination of Racial Discrimination, *General Recommendation 23: Indigenous Peoples*, Fifty-first session, 1997, 18/08/97. Para 5 (e).

with Indigenous peoples free, prior and informed consent. As a consequence, decisions made without FPIC would violate the rights of Indigenous peoples and state obligations under the Convention.

It is also notable that the Committee did not limit the FPIC requirement to only certain rights or impacts on those rights. Instead, the requirement covers all decisions directly relating to Indigenous peoples' rights and interests. This is consistent with the wider framework set out by the Committee. General Recommendation 23 begins with the statement that "all appropriate means must be taken to combat and eliminate" discrimination against Indigenous peoples.<sup>42</sup> The Committee goes on to express concern

"that in many regions of the world indigenous peoples have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to colonists, commercial companies and State enterprises. Consequently, the preservation of their culture and their historical identity has been and still is jeopardized."<sup>43</sup>

The measures set out in the General Recommendation, FPIC among them, are intended to address the impacts of the discrimination and harm that have already been inflicted on Indigenous peoples and to prevent discrimination in future decisions and actions. It is this context of discrimination and continued jeopardy that makes FPIC relevant and necessary to every decision where the rights and interests of Indigenous peoples are at issue.

Since CERD General Recommendation 23, international and regional human rights bodies have repeatedly affirmed FPIC as a state obligation. The exact language of the findings and recommendations has varied in relation to the specific mandates of these bodies, and in response to the context of the specific complaints or concerns to which they are responding. However, it is clear that the overall approach first set out in General Recommendation 23, of an obligation potentially applicable to all decisions affecting the rights and interests of Indigenous peoples, has been repeatedly reaffirmed both before and after the adoption of the *UN Declaration*. To take one example, in a 2009 General Comment on the right to take part in cultural life, the UN Committee on Economic Social and Cultural Rights stated, "States parties should respect the

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<sup>42</sup> UN Committee on the Elimination of Racial Discrimination, *General Recommendation 23: Indigenous Peoples*, Fifty-first session, 1997, 18/08/97. Para 1.

<sup>43</sup> UN Committee on the Elimination of Racial Discrimination, *General Recommendation 23: Indigenous Peoples*, Fifty-first session, 1997, 18/08/97. Para 3.

principle of free, prior and informed consent of indigenous peoples **in all matters covered by their specific rights** [emphasis added].”<sup>44</sup>

In sections that follow, this paper looks first at the sources of FPIC in international law and then examines the FPIC provisions of the *Declaration* itself, before turning to the question of reasonable limitations on FPIC. Consistent with the recommendations from the two Treaty Bodies cited above, FPIC necessarily applies to the full range of Indigenous peoples’ human rights. Furthermore, the sources of FPIC international law point for the need for rigorous protection of FPIC both as an essential aspect of well-established rights such as the right of self-determination and as a safeguard for other rights. Such rigorous protection in most instances necessitates an obligation, as originally set out in UNCERD General Recommendation 23, for decisions to be made only on the basis of FPIC.

### 3.1 Legal sources of FPIC

The legal sources of FPIC are many and diverse. FPIC can be grounded in the continued exercise of Indigenous peoples’ own legal orders (section 3.1.1 below). The repudiation of doctrines of superiority in international law calls into question the legitimacy of state actions that undermine or ignore the decisions made by Indigenous peoples according to their own traditions and institutions (section 3.1.2). Where Indigenous peoples have entered into Treaties and other agreements that recognize their exercise of specific decision-making powers, international law protects the right of Indigenous peoples to have these Treaties, arrangements respect and upheld (section 3.1.3). FPIC is also an integral aspect of a number of rights recognized in international law, including the right of self-determination (3.1.4), the right to land (3.1.5), and the right to participate in political and cultural life (3.1.6). An examination of FPIC in respect to the right to culture (3.1.7) illustrates the breadth of issues where FPIC may be required as an indivisible aspect of Indigenous peoples’ rights in international law. The legal sources of FPIC also point to a procedural role of FPIC as a human rights safeguard. FPIC is a means to meet state obligations to provide redress (3.1.7) and the obligation of states and private actors to exercise due diligence (3.1.8).

The following account is not meant to be exhaustive. Rather it is intended to illustrate a number of important points in respect to EMRIP’s study.

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<sup>44</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment no. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights)*, 21 December 2009, E/C.12/GC/21, para. 37.

First, the opportunity for Indigenous peoples to make our own decisions, and to have those decisions respected and upheld, is an integral dimension of many rights in international law. The close, indivisible relationship between FPIC and various rights such as the right to self-determination and rights in respect to lands, territories and resources argues for recognizing FPIC as a right<sup>45</sup>. As a consequence, the duty of all actors in society to avoid violating human rights (duty to respect), and the duty of the state to prevent and prosecute violations by others (duty to protect) and the responsibility to help establish conditions necessary for the exercise of the right (duty to fulfil) would necessarily apply to FPIC.

Second, FPIC has also been widely recognized as an essential condition to safeguard a broad range of other rights. In this way FPIC is also a precautionary standard. Even where a case cannot be established for the exercise of FPIC as an aspect of other rights, the duty to avoid harm, especially in the context of the widespread and severe harms already experienced by Indigenous peoples, may necessitate that decisions be made only on the basis of FPIC.

Third, the range of matters where FPIC may be required is potentially very broad, so much so that it would be prudent as a general principle of public policy to assume that FPIC is required wherever the rights of Indigenous peoples are at stake.

### **3.1.1 Indigenous laws and decision-making procedures**

All Indigenous peoples have their own distinct practices, institutions and legal systems through which we make decisions and enter in relations with other nations. Since time immemorial, these Indigenous legal orders have been part of what has defined our societies, guided the stewardship of our lands, and structured our relations with our neighbours.

Living in independent communities and nations across the land, [Indigenous peoples]... developed norms and practices to govern their societal relations, manage territories, regulate trade, resolve disputes and government the relationships between different nations. Over time the diverse norms and practices progressed into highly developed legal

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<sup>45</sup> This is comparable, for example, to rights, such as the right to water or the right to housing, that have been articulated as essential components of broader rights recognized in international law.



traditions that guided these people for centuries in the governance of community, the environment and relations between people.<sup>46</sup>

The *UN Declaration* recognizes the right of Indigenous peoples to “maintain and strengthen their distinct political, legal, economic, social and cultural institutions...” (Art. 5) and prohibits any State action “which has the aim or effect of depriving them of the integrity as distinct peoples, or of their cultural values or ethnic identities” (Art. 8.2a). Article 18 states,

Indigenous people have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own Indigenous decision-making institutions.

In Article 27, on mechanisms to fair adjudicate disputes concerning Indigenous lands, the Declaration calls for “due recognition to indigenous peoples’ laws, traditions, customs and land tenure system.”

The affirmation of the right of Indigenous peoples to make decisions according to our own customs and procedures, cannot be meaningfully realized unless States are prepared to recognize and respect the decisions that Indigenous peoples make.

### **3.1.2 Repudiation of racist, colonial doctrines**

The fourth preambular paragraph of the *UN Declaration* affirms “that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust.”

In repudiating the various racist and colonial doctrines through which nation states have sought to legitimize their assertion of control over the lives of Indigenous peoples, international human rights law places considerable onus on States to demonstrate the legitimacy of any measure or policy that would restrict the ability to practice our own laws and traditions of decision-making.

The Inter-American Court of Human Rights has further concluded that the failure to recognize and provide protection for customary land tenure systems -- the systems by which Indigenous peoples determine who has the right to access, use,

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<sup>46</sup> Sarah Morales, “Braiding the Incommensurable: Indigenous Legal Traditions and the Duty to Consult,” in Centre for International Governance Innovation, *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws*, Special Report, 2017, P. 75.

benefit from and make decisions about lands, territories and resources according to Indigenous laws and traditions -- is a form of racial discrimination.<sup>47</sup>

### **3.1.3 The right to have Treaties, agreements and other constructive arrangements honoured and respected**

As noted earlier in this paper, many Treaties and other agreements between Indigenous peoples and nation states include explicit or implicit consent provisions. Treaties and other agreements may set out areas, including amendment of the Treaty itself, where consent of Indigenous governments and institutions will be required. Treaties and other agreements may also define areas of jurisdiction where states recognize Indigenous peoples' ongoing decision-making authority, whether such authority is exercised exclusively by Indigenous peoples or in partnership with the state.

The UN Declaration states that Indigenous peoples have “the right to the recognition, observance and enforcement” of such Treaties, agreements and other constructive arrangements [Article 37.1].

### **3.1.4 Affirmation of self-determination as a universal right of all peoples**

The right of self-determination necessarily encompasses the right to make our own decisions, and accordingly the right to say yes or no to the proposals brought forward by others. Former UN Special rapporteur on the rights of Indigenous peoples, James Anaya, has written, “If self-determination means anything... it means the right to choose.”<sup>48</sup> The Expert Mechanism has previously called FPIC “an integral element” of the right of self-determination.<sup>49</sup>

Article 3 of the UN Declaration states:

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

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<sup>47</sup> IACtHR. *Case of the Mayagna (Sumo) Awas Tingni community v. Nicaragua, Merits, Reparations and Costs*, Judgment of August 31, 2001, Series C No. 79, Para 140(b).

<sup>48</sup> Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya*, UN Doc. A/HRC/21/47 (6 July 2012), para. 76.

<sup>49</sup> Human Rights Council, *Final report of the study on indigenous peoples and the right to participate in decision-making - Report of the Expert Mechanism on the Rights of Indigenous Peoples*, Annex “Expert Mechanism advice No. 2 (2011): Indigenous peoples and the right to participate in decision making”, August 17, 2011 A/HRC/18/42, Para. 20.

The inclusion of language that directly mirrors the self-determination provisions common to the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) makes it clear that Indigenous peoples enjoy the same right of self-determination as all other peoples, and not – as some states tried unsuccessfully to inject into the *Declaration* – a lesser, circumscribed right. This interpretation is underlined in the preamble to the *Declaration* which cites both Covenants and affirms “the fundamental importance of the right to self-determination of all peoples.”

James Anaya has described self-determination as a “foundational right, without which indigenous peoples’ other human rights, both collective and individual, cannot be fully enjoyed.”<sup>50</sup> The *Declaration*’s affirmation of Indigenous peoples’ right to self-determination should always be borne in mind in interpreting other right of Indigenous peoples as set out in the *Declaration* and the wider body of international law, including FPIC.

### **3.1.5 Indigenous peoples’ rights in respect to lands, territories and resources**

The *ICCPR* and *ICESCR* both define the right of self-determination as including the right of all peoples to “freely dispose of their natural wealth and resources” and the protection that “[i]n no case may a people be deprived of its own means of subsistence.”<sup>51</sup> This dimension of the right of self-determination is sometimes named as permanent sovereignty over lands and resources.

The central importance of Indigenous peoples’ relationships to the land, the necessity of protecting these relationships, and the right of Indigenous peoples to make their own decisions about how their lands will be used and developed have been repeatedly affirmed by international and regional human rights bodies. Erica-Irene A. Daes, who chaired the UN Working Group on Indigenous Populations during the original drafting of the UN Declaration, and was subsequently named UN Special Rapporteur on Indigenous peoples’ permanent sovereignty over natural resources, wrote “because the indigenous ownership of the resources is associated with the most important and fundamental of human rights: the rights to life, food, and shelter, the right to self-determination, and the right to exist as a people,” therefore “few if any limitations on indigenous

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<sup>50</sup> James Anaya, *Report of the Special Rapporteur on indigenous people, James Anaya, Addendum “Report on the Situation of Human Rights of Indigenous Peoples in Brazil”* UN Doc A/HRC/12/34/Add.2 (26 August 2009). Para. 22.

<sup>51</sup> Article 1.2, ICCPR, ICESCR.

resource rights are appropriate.”<sup>52</sup> The Inter-American Commission on Human Rights has concluded that the duty to protect, respect and fulfil Indigenous peoples’ lands rights is a “norm of customary international law”<sup>53</sup> – a human rights standard so widely and consistently accepted that it can be considered a binding obligation on all states.

The power to make decisions over how lands, resources and territories are to be used or developed, and to say yes or no in respect to any proposals affecting the land, are indivisible aspects of Indigenous peoples’ rights in respect to lands, territories and resources. The FPIC provision in Article 32.2 of the UN Declaration is part of the same article as the provision stating, “Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories or other resources” (Art. 31.1). FPIC helps give effect to the right to determine and develop priorities and strategies for the use of lands, territories and resources.

### **3.1.6 The right to participate in decision-making**

UNCERD General Recommendation 23, cited above, introduced the obligation to obtain FPIC in the context of a call on State parties to “ensure that members of indigenous peoples have equal rights in respect of effective participation in public life.”

The UN Committee on Economic, Social and Cultural Rights has defined the right to effective participation in public life as a “core obligation” under that Covenant that is “applicable with immediate effect”<sup>54</sup> The Expert Mechanism has previously noted that while the right to participate has conventionally been understood as a civil and political right of the individual, it has in the context of Indigenous right taken on “a collective aspect, implying a right of the group as a people to exercise decision-making authority.”<sup>55</sup>

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<sup>52</sup> UN Commission on Human Rights. Special Rapporteur Erica-Irene A. Daes, *Final Report on Indigenous peoples’ permanent sovereignty over natural resources*, UN Doc. E/CN.4/Sub.2/2004/30, 13 July 2004.

<sup>53</sup> IACtHR. *Case of the Mayagna (Sumo) Awas Tingni community v. Nicaragua, Merits, Reparations and Costs*, Judgment of August 31, 2001, Series C No. 79, Para. 140(d).

<sup>54</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment no. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights)*, 21 December 2009, E/C.12/GC/21, para. 5.

<sup>55</sup> Human Rights Council, *Final report of the study on indigenous peoples and the right to participate in decision-making -Report of the Expert Mechanism on the Rights of Indigenous Peoples*, Annex “Expert Mechanism advice No. 2 (2011): Indigenous peoples and the right to participate in decision making”, August 17, 2011 A/HRC/18/42, Para. 5.

Like CERD, other UN Treaty bodies have tied effective participation of Indigenous peoples to a right to grant or withhold consent. Acknowledging the gulf that may exist between, on the one hand, the cultural groups that may have dominant influence in the life of the state, and on the other, Indigenous peoples and marginalized ethnic minorities, the UN Human Rights Committee has called for “measures to ensure the effective participation of members of minority communities in decisions which affect them.”<sup>56</sup> In respect to decisions that may “substantially compromise or interfere with the culturally significant economic activities of a minority or indigenous community,” the Committee has defined “effective participation” as requiring “not mere consultation” but free, prior and informed consent.<sup>57</sup>

### 3.1.7 The right to culture

International and regional human rights bodies and special mechanisms have called for FPIC in relation to a wide range of human rights, including the right to property,<sup>58</sup> the right to development,<sup>59</sup> and the right to food.<sup>60</sup> Commentary on FPIC and the right to culture is particularly instructive because of the expansive way that the international system has interpreted the right to culture, especially in respect to Indigenous peoples.

The UN Committee on Economic, Social and Cultural Rights has stated,

...culture is a broad, inclusive concept encompassing all manifestations of human existence. The expression “cultural life” is an explicit reference to culture as a living process, historical, dynamic and evolving, with a past, a present and a future. (Para 11.)

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<sup>56</sup> Human Rights Committee, *General Comment No. 23: The Rights of Minorities* (Art. 27). 1994. CCPR/C/21/Rev.1/Add.5, Para. 7 (1994).

<sup>57</sup> *Ángela Poma Poma v. Peru*, CCPR 1457/2006, 24 April 2009, para. 7.6.

<sup>58</sup> IACHR. Report No. 40/04, Case 12.053, *Maya Indigenous Communities of the Toledo District (Belize)*, October 12, 2004. Para. 194.

<sup>59</sup> African Court for Human and Peoples’ Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*. 276 /2003, 2010.

<sup>60</sup>For example, a 2012 report on small-scale fisheries, the UN Special rapporteur on the right to food noted that “the right to food requires that States respect existing access to adequate food and abstain from taking measures that result in reducing such access.” Therefore, “[t]o fully discharge this obligation, States should refrain from adopting any policy that affects the territories and activities of small-scale, artisanal and indigenous fishers unless their free, prior and informed consent is obtained.” UN Special Rapporteur on the right to food, *Interim Report*. UN General Assembly 8 August 2012. UN Doc. A/67/268. Para. 39.

In respect to Indigenous peoples, the Committee has said that culture includes rights “to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.” The Committee also recognized that Indigenous peoples’ right to culture additionally encompasses “cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literature, designs, sports and traditional games, and visual and performing arts.”

This broad and holistic interpretation of culture and cultural rights is especially significant in light of the Committee’s conclusion, cited above that “States parties should respect the principle of free, prior and informed consent of indigenous peoples in all matters covered by their specific rights.”<sup>61</sup>

### **3.1.8 The right to redress**

Under international law, any individual or group whose rights have been violated have the right to redress. Redress includes reparations “proportional to the gravity of the violations and the harm suffered” and effective protection against any repetition of this harm.<sup>62</sup> The objective is to enable the victims of rights violations to fully enjoy the rights of which they have been deprived and ensure that they are secure in the enjoyment of these rights.

James Anaya has said that the rights protections set out in the *Declaration* “share an essentially remedial character, seeking to redress the systemic obstacles and discrimination that indigenous peoples have faced in their enjoyment of basic human rights.”<sup>63</sup> In this light, it can be argued that FPIC represents both a measure to help restore Indigenous peoples to full enjoyment of their rights, and as will be discussed in the final point below, a means to safeguard against further harm.

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<sup>61</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment no. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights)*, 21 December 2009, E/C.12/GC/21, para. 37.

<sup>62</sup> UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, resolution 60/147, December 16, 2005.

<sup>63</sup> UN General Assembly, *Second International Decade of the World’s Indigenous People: Note by the Secretary-General, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, James Anaya, A/64/338, September 4 2009, para. 69 (Conclusions and recommendations).

The remedial character of the *Declaration* as a whole, and of the FPIC standard in particular, underlines the need to carefully consider the situation of the Indigenous peoples who might be affected, including the prior experience of abuses that have occurred as a consequence of decisions imposed without their consent.

### **3.1.9 The requirement of due diligence**

In the examples above, FPIC can be identified as an indivisible part of the expression and fulfillment of rights established in various international human rights instruments. The jurisprudence and commentaries of international and regional human rights bodies and special procedures also describe FPIC as a procedural safeguard to ensure the protection of other rights. Often FPIC is considered as both a right and a safeguard.

James Anaya has described free, prior and informed consent as one among many “expressions of a precautionary approach that should guide decision-making about any measure that may affect rights over lands and resources and other rights that are instrumental to the survival of indigenous peoples.” The Inter-American Commission has called the requirement of consent “as a heightened safeguard” for the rights of Indigenous Peoples.<sup>64</sup>

The application of FPIC as a safeguard or precautionary standard is consistent with the key concept of due diligence in international law. The concept of due diligence refers to the obligation to take reasonable precautions to avoid causing harm to the rights of others. This is a core component of the duty to respect human rights.

Due diligence requires consideration of the nature of the rights at stake, the significance of those rights in lives of those potentially affected, the risks inherent to planned course of action, and how the specific circumstances of those affected can compound or amplify the harm that is done. The AFN strongly agrees with and endorses the previous conclusion by EMRIP that relevant factors in the determination of whether FPIC is required in any specific instance include “the perspective and priorities of the indigenous peoples concerned,” “the nature of the matter or proposed activity and its potential impact,” “the cumulative effects of

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<sup>64</sup> IACHR. *Indigenous and Tribal Peoples’ Rights Over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*. OEA/Ser.L/V/II. Doc. 59/06. 2010. Para. 333.

previous encroachments or activities” and “the historical inequities faced by the indigenous peoples concerned.”<sup>65</sup>

The AFN emphasizes the importance of Indigenous peoples’ own perspectives on what constitutes a significant or acceptable risk of harm. Indigenous peoples have knowledge of our lands and territories that others do not, as well as considerable experience of how decisions made outside of our control can have far-reaching, unintended and unpredicted consequences on our lives. The first UN Special rapporteur on Indigenous issues, Rodolfo Stavenhagen, noted that when large-scale economic activities are carried out on the lands of Indigenous peoples, “it is likely that their communities will undergo profound social and economic changes **that are frequently not well understood, much less foreseen**, by the authorities in charge of promoting them [emphasis added].”<sup>66</sup>

The AFN also agrees with James Anaya that the inherent potential for serious impacts from certain activities such as large-scale extraction, combined with the central importance of the land to the rights of Indigenous peoples, enables the presumption that such activities will always or almost always require FPIC.<sup>67</sup> At the same time, we know from experience that there are a wide range of other decisions and action, not only resource extraction activities, with the potential for serious harm. The potential need for FPIC should not be ruled out in any instance without careful consideration of the rights at stake and the potential for harm under those specific circumstances.

It is also important to note that the standard of due diligence in international law applies to state as well as non-state actions, including private corporations. The corporate responsibility to respect human rights exists independently of the obligations of states. Thus the failure of States to recognize or require protections for the rights of Indigenous peoples would not excuse corporate failure to respect those rights. On this point, James Anaya has also written, “Businesses must carry out due diligence to ensure that their activities do not infringe or contribute to the infringement of the rights of indigenous peoples that are internationally

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<sup>65</sup> Human Rights Council, *Final report of the study on indigenous peoples and the right to participate in decision-making -Report of the Expert Mechanism on the Rights of Indigenous Peoples*, Annex “Expert Mechanism advice No. 2 (2011): Indigenous peoples and the right to participate in decision making”, August 17, 2011 A/HRC/18/42, Para. 22.

<sup>66</sup> UN Economic and Social Council. Human rights and indigenous issues: Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2001/65. E/CN.4/2003/90. 21 January 2003

<sup>67</sup> UN Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Extractive industries and indigenous peoples*. A/HRC/24/41, July 1, 2013, para 65.



recognized, regardless of the reach of domestic laws.”<sup>68</sup> In this way the due diligence standard may require private corporations to adhere to FPIC standards even when nation states do not.

### 3.2 FPIC in the provisions of the UN Declaration

Free, prior and informed consent is repeatedly affirmed throughout the Declaration, although the language varies from article to article. The broadest affirmation of FPIC is in Article 19 which states:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent **before adopting and implementing legislative or administrative measures that may affect them** [emphasis added].

Article 32.2 on lands, territories and resources also has far reaching application:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent **prior to the approval of any project affecting their lands or territories and other resources**, particularly in connection with the development, utilization or exploitation of mineral, water or other resources [emphasis added].

Other articles in the *UN Declaration* set out an FPIC requirement in relation to the specific contexts of the removal of Indigenous peoples from their lands and territories [Article 10], storage or disposal of hazardous materials [Article 29] and military activities on the lands of Indigenous peoples [Article 30].

The right of FPIC is also explicitly invoked in two other articles that require redress for actions taken without the consent of Indigenous peoples. Article 11.2 requires redress whenever “the cultural, intellectual, religious and spiritual property of Indigenous peoples is “taken without their free, prior and informed consent or in violation of their laws, traditions and customs.” Article 28 requires redress for lands, territories and resources that have confiscated, occupied, used or damaged without FPIC.

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<sup>68</sup> Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya*, UN Doc. A/HRC/21/47 (6 July 2012), para. 83.

There are numerous other provisions in the Declaration where FPIC is implicit or necessary to give effect to provisions affirming the decision-making powers and authority of Indigenous peoples. This includes Article 4 (“autonomy or self-government in matters related to their internal and local affairs”), 12.1 (“control of their ceremonial objects”), Article 14 (“establish and control their educational systems institutions”), Article 15 (“establish their own media’), Article 23 (“determine and develop priorities and strategies for exercising their right to development...and, as far as possible, to administer such programmes through their own institutions”), Article 26.2 (“the right to own, use, develop and control” their lands, territories and resources); Article 31.1 (“the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expression as well as the manifestations of their sciences, technologies and cultures...and... their intellectual property over such cultural heritage, traditional knowledge and traditional cultural expressions,”) Article 31.1 (“the right to determine and develop priorities and strategies for the development or use of their lands or territories or other resources”), Article 33.1 (“the right to determine their own identity or membership”), Article 33.2 (“the right to determine the structures and to select the membership of their institutions”), and Article 35 (“the right to determine the responsibilities of individuals to their communities”).

According to some interpretations, the requirements of FPIC in the *Declaration* are narrow and limited. Such restrictive interpretations point to the fact that only Articles 10, 29 and 30, which deal with specific, potentially severe intrusions on Indigenous peoples’ use of their lands (forced removal, storage of hazardous materials and military activities) explicitly state that no actions or decisions will take place without free, prior and informed consent. By this interpretation, Articles 19 and 32.2, which have much broader application, and which call on states to “consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent,” require only consultation and would permit states to act on their own judgement if FPIC is withheld.

Such a conclusion is not correct. To limit the FPIC requirement to only those instances set out in Articles 10, 19 and 30 would put the *Declaration* at odds with the wider body of human rights law on which it was founded. Indigenous peoples’ own laws, the obligation to uphold Treaties, and the right of self-determination have potential application to a wide range of rights and relationships. As indicated in the section above, international and regional human rights bodies have already affirmed FPIC in a wide range of circumstances, including the sweeping scope of rights subsumed under the right to culture. In particular, FPIC has been repeatedly

applied as the appropriate and necessary of human rights protection in respect to a wide range of corporate and state actions affecting the land rights of Indigenous peoples.

Furthermore, Treaty body rulings since 2007, have not adopted the interpretation that FPIC is required in only those limited instances where the *Declaration* explicitly states that decisions cannot proceed without FPIC. To the contrary, since the adoption of the *Declaration*, the frequency with which Treaty bodies have called on states to guarantee the right of FPIC has only increased.<sup>69</sup>

Interpretations of Articles 19 and 32.2 as requiring nothing more than consultation is also inconsistent with the technical language of these Articles and with their context within the *Declaration*. To begin with, these provisions call on States to engage in “consultation and cooperation,” a more robust requirement than consultation alone and one that clearly establishes a requirement of Indigenous peoples’ active participation. In the process of elaboration of the *Declaration*, the efforts of some states to word these provisions as a requirement only to “seek” consent were rejected. The phrase that was used instead, “in order to obtain” is more strongly prescriptive in international law.<sup>70</sup> Finally, both Article 19 and Article 32.2 need to be read in the context of other articles cited above that explicitly affirm the right of Indigenous peoples to “control” or “determine” a wide range of decisions essential to their rights and exercise of self-government.

In particular, Article 32.2 follows the provision in 32.1 that “Indigenous peoples have the right to determine and develop priorities and strategies for the development and use of their lands or territories and other resources.” Article 31.2 is in turn followed by the provision that “States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.” In this way, Article 32 as whole situates the prescriptive requirement of states to consult and cooperate in good faith in order to obtain FPIC in an immediate context that both affirms the right of First Nations to make our own decisions and an explicit statement that decisions in respect to their lands, territories and resources made without FPIC are a violation of Indigenous peoples’ rights for which there is a duty of redress.

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<sup>69</sup> Cathal M. Doyle, *Indigenous Peoples, Title to Territory, Rights and Resources: The transformative role of free, prior and informed consent*, Routledge, 2015, p. 131.

<sup>70</sup> Cathal M. Doyle, *Indigenous Peoples, Title to Territory, Rights and Resources: The transformative role of free, prior and informed consent*, Routledge, 2015, p. 144.

### 3.2 Reasonable limitations on FPIC in the *UN Declaration*

In considering Canadian court judgements in Section 2.2 above, it is not helpful or accurate to characterize consent as an arbitrary, unilateral or absolute “veto.” We note that the word veto does not appear in the *UN Declaration* itself or in any of the sources in international law reviewed in this section. Few rights in international law are absolute. The text of the *Declaration* itself makes it clear that the application of FPIC may be subject to careful balancing with the rights of others as well as the context of the decision at stake and its impact on First Nations’ rights.

Article 46.2 states that the exercise of rights affirmed in the *Declaration* “shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations.” The Article further requires that “any such limitations” be a) non-discriminatory, b) “strictly necessary” and c) “solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.” Interpretation of these requirements is set within the context of the sentence that begins Article 46.2 that “[i]n the exercise of the rights enunciated in the present *Declaration*, human rights and fundamental freedoms of all shall be respected.” Additional interpretative guidance is provided in Article 46.2 which states, “The provisions set forth in this *Declaration* shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.”

In the context of the well-established critical importance of protecting the right of First Nations to make our own decisions in matters affecting the governance of our societies, the stewardship of our lands and the preservation of our unique cultures – along with the widespread discrimination faced by First Nations and the harm that has resulted – it can be argued that efforts to limit or deny FPIC would rarely pass the tests set out in Articles 46.2 and 46.3. Harmonious relations between States and Indigenous peoples would be best achieved by assuming that FPIC is in fact required in any decisions potentially affecting the integrity of our lands and cultures or the exercise of our rights of self-determination and self-government.

It should also be noted that a conclusion of whether FPIC is required in specific instances cannot be unilaterally determined by States. This would be contrary to the standard of active participation of Indigenous peoples affirmed throughout the *Declaration* and the specific calls on States to “consult and cooperate” with

Indigenous peoples in respect to FPIC. Furthermore, where there are irresolvable differences between States and Indigenous peoples on whether FPIC is applicable, the *Declaration's* call for “fair, independent, impartial, open and transparent” adjudication of disputes should come into play.

#### **4. Consultation and Cooperation**

While consultation is not a substitution for consent, consultation processes can be important tools to determine the potential for First Nations and other governments in Canada to reach mutual agreement. In the context of striving to reach such agreement, consultation processes must also be free from coercion or duress, take place well prior to any decision-making deadlines so that Indigenous peoples can engage according to their own customs and traditions, and ensure that all necessary information is transparent and accessible.

Critically, as noted above, the *UN Declaration*, which defines the minimum global standards for upholding the rights of Indigenous peoples, repeatedly calls not for consultation alone, but for “consultation and cooperation.” In those instances where FPIC is not required by international law, the minimum requirement is therefore not consultation but consultation and cooperation.

Consultation and cooperation implies a more active role for Indigenous peoples in the decision-making process consistent with their rights to determine, decide and control fundamental aspects of their lives and cultures, as set out in the *Declaration*. Consultation and cooperation requires a role for Indigenous peoples in deciding how consultation should be conducted to be consistent with their own laws and protocols. Consistent with Article 39 of the *Declaration*, which states that Indigenous peoples have the right to financial and technical assistance to achieve the ends of the Declaration, consultation and cooperation implies a state obligation to ensure Indigenous peoples have sufficient capacity and resources to freely participate in such processes.

Critically, while consultation processes are often triggered by plans and proposals developed by external interests, a meaningful process of consultation and cooperation requires due consideration of Indigenous peoples’ own plans and priorities. Part of the objective of consultation and cooperation must be to determine whether the proposal in question is in conflict with Indigenous peoples’ own plans and priorities and whether this conflict can be mitigated to Indigenous peoples’ satisfaction.

Meaningful processes of consultation and cooperation are procedural in nature but must ultimately be driven by the objective of respecting, protecting and fulfilling

the underlying substantive rights of First Nations.