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Robert J. Miller

CONSULTATION OR CONSENT: THE UNITED STATES' DUTY TO CONFER WITH AMERICAN INDIAN GOVERNMENTS

ROBERT J. MILLER*

ABSTRACT

This article explores the current international law movement to require nations/states to consult with Indigenous peoples before undertaking actions that impact Indigenous nations and communities. The United Nations took a significant step in this area of law in September 2007 when the General Assembly adopted the Declaration on the Rights of Indigenous Peoples. The Declaration contains many provisions requiring states to confer and consult with Indigenous peoples, and in many instances, to obtain their "free, prior, and informed consent." This article undertakes an original and detailed investigation into how the free, prior, and informed consent standard emerged in the drafting of the Declaration.

But this article also points out that consultations and obtaining the consent of Indigenous peoples is nothing new in the political and diplomatic relations between American Indian nations and the United States. From the very founding of the United States, it has maintained a government-to-government relationship with Indian tribes. This is expressly recognized in the U.S. Constitution and is reflected in hundreds of U.S./Indian treaties and in the history of the interactions between these governments. A nearly constant stream of formal and informal consultations and diplomatic dealings has marked this relationship.

In recent decades, though, the international community has begun focusing on consultations with Indigenous peoples and has increased the international law obligation on states to consult. The international regime is also moving far beyond mere consultations and is requiring states to obtain the free, prior, and informed consent of Indigenous peoples. On the surface, requiring the United States to obtain the informed consent of Indian

* Professor, Sandra Day O'Connor College of Law, Arizona State University; Faculty Director, Rosette LLP American Indian Economic Development Program; Justice, Court of Appeals of the Grand Ronde Tribe; Citizen, Eastern Shawnee Tribe. The author is currently working on a tribal consultation project for the U.S. Air Force. The author thanks Nolan Shutler and Ammon Orr for their research assistance; and profound thanks go to Dr. Rosalee Gonzalez and Benigno Delgado for their very valuable assistance.

nations and peoples, before undertaking actions that affect them, might be more onerous than just consulting with tribal governments.

This article examines the history and modern-day processes for United States consultations with Indian nations and the emerging international law standard of free, prior, and informed consent. The article argues that the United States should continue and even enhance the consent paradigm that has always been the goal of federal/tribal relations. And, the article also argues that the United States should have little trouble adapting to the new international law consent movement.

I. INTRODUCTION

The political existence of the American Indian nations and their government-to-government relationship with the United States is expressly recognized in the U.S. Constitution.[1] The long history of the interactions between these governments is marked by diplomatic efforts to resolve disputes and address common interests.[2] A nearly constant stream of formal and informal consultations and diplomatic dealings has marked this relationship. Tribal governments and Indian peoples are very interested in seeing this mutually respectful relationship continue and even be enhanced and improved in the future.

In recent decades, the international community has demonstrated one-way consultations between the federal government and tribal governments could be changed and perhaps improved. The international law regime is moving beyond mere consultations with indigenous peoples to what is known as "free, prior and informed consent."[3] On the surface, requiring the United States to obtain the informed consent of Indian nations and peoples, before undertaking actions that affect Indians, is far more complicated, and perhaps onerous, than just consulting with tribal governments and Indians. In lieu of those potential difficulties, the United States to date has only seen fit to attempt to improve its consultation processes and has mostly ignored the emerging free, prior, and informed consent paradigm.

This article examines the history and modern-day processes for United States consultations with Indian nations and the emerging international law standard of free, prior, and informed consent ("FPIC"). This article argues that the United States should continue and even enhance the consent requirement that has been the goal of federal/tribal relations since the birth of the United States. Overall, the United States should have little trouble absorbing and adapting to the new international consent legal movement. Mere consultation with American Indian nations, without obtaining consent, does not fulfill the United States' legal duties to Indian nations, nor does it honor the history of the United States' diplomatic relationship with tribal governments or the emerging FPIC standard.

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1. U.S. CONST. art I, § 8, cl. 3; *see also id.* art. I, § 2, cl. 3; art. VI, cl. 2; amend. 14, § 2.

2. *See infra* Part II.

3. *See, e.g.*, G.A. Res. 61/295, art. 19 (Sept. 13, 20007) ("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.").

Part II lays out the history of consultation and consent between American Indian governments and the United States and the modern-day legal basis for a federal duty to consult. Part III then dissects the current efforts by the United States to implement and improve its consultation processes with Indian nations. Part IV examines the recent development in international law of the standard of FPIC, which moves significantly beyond mere consultations. This Part undertakes an original and detailed investigation into how FPIC emerged into international law through the process of drafting the U.N. Declaration on the Rights of Indigenous Peoples. Finally, Part V concludes with the author's opinions on the future of U.S./Indian consultation policies and how they should conform to the FPIC standard.

II. THE HISTORY AND LAW OF FEDERAL CONSULTATIONS WITH TRIBAL NATIONS

Long before Europeans began colonizing North America, indigenous peoples and Indian nations governed themselves through various governmental entities. These entitles ranged from informal structures for quasi-family bands of nomadic hunter/gatherers to very complex and even hierarchical and authoritarian governments for large and settled populations. For example, Indian nations in the Mississippi Valley, the Adena and Hopewell cultures from 1000 BCE to 500 CE in what is now modern-day Ohio, and the Ancestral Puebloans in the American Southwest governed themselves through political entities that possessed the power to mobilize labor and manufacture, to build roads and cities that included urban areas and populations, to build enormous residential and ceremonial structures, and to practice elaborate burials of elite leaders.[4] The city of Cahokia, near modern day St. Louis,[5] existed from 900–1400 CE and had an estimated population at its highpoint of 15,000–38,000.[6] The earthen

4. ROBERT J. MILLER, RESERVATION "CAPITALISM": ECONOMIC DEVELOPMENT IN INDIAN COUNTRY 13, 19-20 (2012) [hereinafter MILLER, RESERVATION "CAPITALISM"] (citing 2,000 year old irrigation canal systems near modern-day Phoenix); CHARLES C. MANN, 1491: NEW REVELATIONS OF THE AMERICAS BEFORE COLUMBUS 41-42, 288-90 (2005); Neal Salisbury, *The Indians' Old World: Native Americans and the Coming of Europeans*, *in* AMERICAN ENCOUNTERS: NATIVES AND NEWCOMERS FROM EUROPEAN CONTACT TO INDIAN REMOVAL 1500-1850, at 5, 7-10 (Peter C. Mancall & James H. Merrell eds., 2000); MICHELE STRUTIN, CHACO: A CULTURAL LEGACY 34-35, 50-51 (1994); LYNDA NORENE SHAFFER, NATIVE AMERICANS BEFORE 1492: THE MOUNDBUILDING CENTERS OF THE EASTERN WOODLANDS 3, 20-28, 33-38, 40-45 (Kevin Reilly ed., 1992); Stephen H. Lekson, *The Chaco Canyon Community*, SCI. AM., July 1988, at 108; FOOD, FIBER, AND THE ARID LANDS 58 (William G. McGinnies et al eds., 1971).

5. SHAFFER, *supra* note 4, at 51.

6. THE OTHER SIDE OF THE FRONTIER: ECONOMIC EXPLORATIONS INTO NATIVE AMERICAN HISTORY 87 (Linda Barrington ed., 1999); SHAFFER, *supra* note 4, at 53.

ceremonial mound that the Cahokians built is the world's largest earthwork.[7] Moreover, French accounts of the Natchez culture in the lower Mississippi region demonstrate it was ruled by a royal lineage and leading citizens were carried in litters.[8] Some tribal governments also taxed their citizens and held public monies and crops in public treasuries.[9]

Most Indian nations interacted politically with other tribes and many created tribal confederations for mutual protection and other benefits.[10] For example, the Hadenosaunee or Iroquois Confederacy was a federalist governing system devised by the Five, and later Six, Nations (Oneida, Onondaga, Seneca, Mohawk, Cayuga, and Tuscarora) in what is now upstate New York to control their intra-tribal and international relations.[11] They met in an annual congress to decide internal and international legal and political issues.[12] Many other Indian governments also developed sophisticated regimes, including democratic and governance principles, such as the separation of powers between branches of government and

7. SHAFFER, *supra* note 4, at 51.

8. *Id.* at 62-67.

9. 15 HANDBOOK OF NORTH AMERICAN INDIANS (NORTHEAST) 384 (William C. Sturtevant et al. eds., 1978) [hereinafter 15 HANDBOOK OF NORTH AMERICAN INDIANS] (explaining that some clans and villages established a "public treasury" to which everyone contributed and was administered by a chief for public purposes); ANGIE DEBO, A HISTORY OF THE INDIANS OF THE UNITED STATES 13-14 (1970) (noting public storehouses controlled by town chiefs in the Creek and Cherokee Tribes were for public needs).

10. *See generally* DUANE CHAMPAGNE, SOCIAL ORDER AND POLITICAL CHANGE: CONSTITUTIONAL GOVERNMENTS AMONG THE CHEROKEE, THE CHOCTAW, THE CHICKASAW, AND THE CREEK (1992); COLIN G. CALLOWAY, CROWN AND CALUMET: BRITISH-INDIAN RELATIONS, 1783-1815, at 14, 32, 45, 55 (1987) (mentioning Creek, Chickasaw, Choctaw, Cherokee, Miami, Shawnee, and Delaware created powerful, multi-tribal confederacies); VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 85-86 (1983); DOROTHY V. JONES, LICENSE FOR EMPIRE: COLONIALISM BY TREATY IN EARLY AMERICA 34-35 (1982).

11. BRUCE E. JOHANSEN, FORGOTTEN FOUNDERS: HOW THE AMERICAN INDIAN HELPED SHAPE DEMOCRACY 8-10 (1982); 15 HANDBOOK OF NORTH AMERICAN INDIANS, *supra* note 9, at 314-17, 418-33; DONALD A. GRINDE, JR., THE IROQUOIS AND THE FOUNDING OF THE AMERICAN NATION 62-80 (1977); Frank Gouldsmith Speck, THE IROQUOIS: A STUDY IN CULTURAL EVOLUTION 23 (1st ed. 1945); JONES, *supra* note 10, at 21; OLIVER MORTON DICKERSON, AMERICAN COLONIAL GOVERNMENT 1696-1765, at 336 (1912) (the confederacy held the balance of power for several centuries in North America); *see generally* LEWIS H. MORGAN, ANCIENT SOCIETY (1877). The Confederacy dates from at least the fifteenth century and was fully developed when the French encountered it in 1630. JONES, *supra* note 10, at 23; FRANCIS JENNINGS, THE AMBIGUOUS IROQUOIS EMPIRE: THE COVENANT CHAIN CONFEDERATION OF INDIAN TRIBES WITH ENGLISH COLONIES FROM ITS BEGINNINGS TO THE LANCASTER TREATY OF 1744, at 39 (1984) (Iroquois League was formed between 1400–1600 CE); 15 HANDBOOK OF NORTH AMERICAN INDIANS, *supra* note 9, at 418. Others argue it was fully formed by the twelfth century. BENJAMIN FRANKLIN, PENNSYLVANIA, AND THE FIRST NATIONS: THE TREATIES OF 1736–62, at 6 (Susan Kalter ed., 2006).

12. 15 HANDBOOK OF NORTH AMERICAN INDIANS, *supra* note 9, at 420, 433.

between civil and military powers.[13] In many of these tribal governing systems, female leaders exercised important powers.[14] Tribal governments often engaged in negotiations with other Indian nations regarding diplomatic affairs and trade, and many entered into agreements like treaties.[15]

Negotiating, entering agreements, and engaging in diplomacy with other governments was a regular practice of American Indian nations. It is not surprising, then, that all of the European countries that attempted colonization in North America dealt with the Indigenous nations as political entities that possessed sovereign governing powers.[16] England and the English colonies, for example, signed scores of treaties with tribes on the east coast of North America, engaged in extensive diplomatic relations with Indians, and in England, the Crown even received diplomatic visits from North American tribal representatives.[17] Spain signed up to twenty treaties with Indian nations, across what are now the southeast and southwest areas of the United States.[18] France and Holland also engaged in diplomatic relations with Indigenous peoples and entered treaties with Indian nations to buy land, to engage in trade, and to ensure peace.[19] These arrangements

13. *Id.* at 156, 216, 261, 314-17, 418-41, 610, 627, 640, 684, 782; Robert J. Miller, *American Indian Influence on the United States Constitution and Its Framers*, 18 AM. INDIAN L. REV. 133, 143-46 (1993) [hereinafter Miller, *American Indian Influence*]; RENNARD STRICKLAND, FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT 24 (1975); ANGIE DEBO, THE ROAD TO DISAPPEARANCE: A HISTORY OF THE CREEK INDIANS 6 (1941).

14. Miller, *American Indian Influence*, *supra* note 13, at 144-45; Renee Jacobs, Note, *Iroquois Great Law of Peace and the United States Constitution: How the Founding Fathers Ignored the Clan Mothers,* 16 AM. INDIAN L. REV. 497 (1991); 15 HANDBOOK OF AMERICAN INDIANS, *supra* note 9, at 216, 261, 617-18, 627, 684, 782.

15. *See, e.g.*, 1 VINE DELORIA, JR. & RAYMOND J. DEMALLIE, DOCUMENTS OF AMERICAN INDIAN DIPLOMACY: TREATIES, AGREEMENTS, AND CONVENTIONS, 1775-1979, at 6-8, 681-744 (1999).

16. JONES, *supra* note 10, at 84-85 ("Long before 1765, observers were recording well-defined territorial limits for the various Indian groups north of the Ohio and east of the Mississippi. Associated with these limits were clear and commonly accepted ideas of trespass, as well as of permissive use by outsiders.").

17. JEFFREY GLOVER, PAPER SOVEREIGNS: ANGLO-NATIVE TREATIES AND THE LAW OF NATIONS, 1604-1664, at 15, 29, 59, 91, 99, 133, 188 (2014); FRANKLIN, *supra* note 11, at 11-14, 35, 160, 185, 226, 308, 358, 369; 4 HANDBOOK OF NORTH AMERICAN INDIANS (HISTORY OF INDIAN-WHITE RELATIONS) 128-43, 185-94, 211-29 (Wilcomb E. Washburn ed., 1988); CALLOWAY, *supra* note 10, at 66; JENNINGS, *supra* note 11, at 156, 236, 241, 259; *see generally* HENRY F. DE PUY, A BIBLIOGRAPHY OF THE ENGLISH COLONIAL TREATIES WITH THE AMERICAN INDIANS: INCLUDING A SYNOPSIS OF EACH TREATY (Martino Pub. 1999) (1917).

18. FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY 59 (1994) [hereinafter PRUCHA, AMERICAN INDIAN TREATIES]; 1 DELORIA & DEMALLIE, *supra* note 15, at 6, 103, 106-07.

19. 1 DELORIA & DEMALLIE, *supra* note 15, at 6; ROBERT J. MILLER, NATIVE AMERICA, DISCOVERED AND CONQUERED: THOMAS JEFFERSON, LEWIS & CLARK, AND MANIFEST DESTINY 22 (2006) [hereinafter MILLER, NATIVE AMERICA] (noting the Dutch colonies entered treaties and transacted with the Indian Nations); JENNINGS, *supra* note 11, at 53-54 (Dutch treaty with the Mohawks in 1643).

were based, needless to say, on extensive and prior consultations and consent by both parties before the agreements were considered binding.[20]

The English colonies that developed on the east coast of the present-day United States signed dozens, if not hundreds, of treaties with Indian tribes regarding land, trade, jurisdiction, and peace.[21] In addition, most of the colonies were involved in nearly continuous diplomatic interactions and negotiations with Indian nations.[22] The records of the diplomatic sessions and treaties that Benjamin Franklin published regarding just the colony of Pennsylvania, and only for the years 1736–1762, exemplify the broad extent of these colonial diplomatic activities with Indian nations.[23] Obviously, the treaty agreements that resulted from these efforts were preceded by lengthy consultation sessions and were based on the mutual consent of the parties.

A. THE UNITED STATES AND INDIAN NATIONS CONSENSUAL TREATY RELATIONS 1774–1871

In September 1774, the thirteen English/American colonies created their first national government, the loosely organized Continental Congress. It is not surprising that this government continued the English, European, and colonial practice of dealing with Indian nations as sovereign governments via diplomatic, political, and treaty-making processes.[24] From its very beginning, the United States government realized it had to deal with the tribal nations to ensure its survival and success.[25] Thus, the United States took a very conciliatory and respectful position vis-à-vis Indian tribes. For example, in the Revolutionary War, the Continental Congress continually pleaded with tribal governments to stay neutral or to join the

20. *See, e.g.*, JONES, *supra* note 10, at 3.

21. *See generally* EARLY AMERICAN INDIAN DOCUMENTS: TREATIES AND LAWS, 1607-1789 (Alden T. Vaughan ed., 1979–2003) (consisting of 20 volumes); PRUCHA, AMERICAN INDIAN TREATIES, *supra* note 18, at 21; DE PUY, *supra* note 17; JONES, *supra* note 10, at 14, 26-30, 53, 70, 75, 89.

22. *See, e.g.*, Miller, *American Indian Influence*, *supra* note 13, at 135-36; JONES, *supra* note 10, at 89; *see generally* FRANKLIN, *supra* note 11.

23. *See generally* FRANKLIN, *supra* note 11; JONES, *supra* note 10, at 58-59.

24. PRUCHA, AMERICAN INDIAN TREATIES, *supra* note 18, at 21, 23.

25. Dickerson, *supra* note 11, at 336; XVIII EARLY AMERICAN INDIAN DOCUMENTS: TREATIES AND LAW, *supra* note 21, at 1-3, 39, 43, 59-60, 63-65, 68-71, 84-85, 98-114, 124; Miller, *American Indian Influence*, *supra* note 13, at 137-39; THE PAPERS OF GEORGE WASHINGTON: COLONIAL SERIES VOL. 4, NOVEMBER 1756–OCTOBER 1757, 192-94 (W.W. Abbot ed., 1988); JOHANSEN, *supra* note 11, at 65 (quoting Benjamin Franklin); FRANCIS JENNINGS, EMPIRE OF FORTUNE: CROWNS, COLONIES, AND TRIBES IN THE SEVEN YEARS WAR IN AMERICA 88 (1988); PAGE SMITH, JAMES WILSON: FOUNDING FATHER, 1742-1798, at 67-68 (1956); Worcester v. Georgia, 31 U.S. 515, 549 (1832); Cherokee Nation v. Georgia, 30 U.S. 1, 34 (1831) (Baldwin, J., concurring).

U.S. side.[26] In addition, in 1778 this Congress requested permission before crossing Delaware Nation territory to attack the British. This treaty with the Delaware even offered them the opportunity to join the Union as a state.[27]

The thirteen American states then convened a new Congress in 1781 under a written constitution called the Articles of Confederation. This Congress was granted "the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians."[28] This Congress took steps to exclude the states from Indian affairs and continued the colonial and Continental Congress practice of negotiating with tribal governments over trade, peace, and land purchases, and it ultimately entered at least eight treaties with Indian nations from 1784–1789.[29]

In 1789, the United States began operating under our current Constitution. Article I grants Congress the sole authority to deal with Indian tribes.[30] This Constitution also includes a treaty clause, which ratified the previous nine treaties the Continental and Articles of Confederation Congresses had entered with tribal nations, authorized future federal/tribal treaty making, and made treaties "the supreme Law of the Land."[31]

Indian tribes were very important to the existence and development of the nascent United States.[32] Indian nations were powerful, numerous, and

26. XVIII EARLY AMERICAN INDIAN DOCUMENTS: TREATIES AND LAW, *supra* note 21, at 1-2; GRINDE, *supra* note 11, at 62-80; PRUCHA, AMERICAN INDIAN TREATIES, *supra* note 18, at 23; FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 35-36, 39-42 (1995 ed.) [hereinafter PRUCHA, GREAT FATHER].

27. Treaty with the Delawares, Sept. 17, 1778, 7 Stat. 13 art. 6, *reprinted in* 2 INDIAN AFFAIRS: LAWS AND TREATIES 3-5 (Charles J. Kappler ed., 1904) [hereinafter INDIAN AFFAIRS].

28. ARTICLES OF CONFEDERATION of 1781, art. IX (1781); *but see* Miller, *American Indian Influence*, *supra* note 13, at 151-52 ("[T]he Articles of Confederation proved inadequate in maintaining uniformity among the states and creating a federal Indian policy.")

29. Treaty with the Six Nations, Oct. 22, 1784, 7 Stat. 15, *reprinted in* 2 INDIAN AFFAIRS, *supra* note 27, at 5-6; Treaty with the Wyandot, Etc., Jan. 21, 1785, 7 Stat. 16, *reprinted in id.* at 6-8; Treaty with the Cherokee, Nov. 28, 1785, 7 Stat. 18, *reprinted in id.* at 8-11; Treaty with the Choctaw, Jan. 3, 1786, 7 Stat. 21, *reprinted in id.* at 11-14; Treaty with the Chickasaw, Jan. 10, 1786, 7 Stat. 24, *reprinted in id.* at 14-16; Treaty with the Shawnee, Jan. 31, 1786, 7 Stat. 26, *reprinted in id.* at 16-18; Treaty with the Wyandot, Etc., Jan. 9, 1789, 7 Stat. 28, *reprinted in id.* at 18-23; Treaty with the Six Nations, Jan. 9, 1789, 7 Stat. 33, *reprinted in id.* at 23-25; c*f.* 1 DELORIA & DEMALLIE, *supra* note 15, at 15 (arguing that the Confederation Congress entered into at least eleven treaties with tribes from 1783–1789); *see also* MILLER, NATIVE AMERICA, *supra* note 19, at 39-43.

30. U.S. CONST. art I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .").

31. U.S. CONST. art. VI, cl. 2; Robert J. Miller, *American Indians and the United States Constitution* (2000), at 5, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1573144 (last visited August 5, 2015); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW ¯277 (Nell Jessup Newton et al eds., 2012 ed.) [hereinafter COHEN'S].

32. "Most American history has been written as if history were a function solely of white culture - in spite of the fact that till well into the nineteenth century the Indians were one of the principal determinants of historical events." A. Irving Hallowell, *The Backwash of the Frontier:*

located within, and on, the borders of the United States. The United States was heavily involved in Indian affairs, diplomacy, and treaty making in its early decades.[33] And President George Washington quickly established many of the Indian treaty procedures that came into practice. He showed great respect for Indian treaties and handled them in the same fashion as he did international treaties.[34]

Ultimately, the United States entered 366 (or more) treaties with Indian nations from 1789–1871.[35] These treaties were entered after extensive negotiations and consultations and only with the consent of the tribal governments. The Senate would sometimes reject treaties agreed to by tribes and the Executive Branch, and vice versa, tribal nations rejected treaties proposed by federal officials; occasionally, the Senate referred treaties back to a tribal government to consider changes the Senate insisted upon.[36] Some of the treaties contained provisions that any future amendments required the consent of the tribe; often the requirement was that three-quarters of the adult males of the tribe had to consent.[37] Obviously, these treaties required intelligent negotiation and mutual consent by both parties.[38] Moreover, the United States Supreme Court has analogized Indian treaties to international treaties and called them "contracts between nations."[39]

The Impact of the Indian on American Culture, in THE FRONTIER IN PERSPECTIVE 230 (Walker D. Wyman & Clifton B. Kroeber eds., 1957) (quoting Bernard DeVoto).

33. PRUCHA, AMERICAN INDIAN TREATIES, *supra* note 18, at 2-4 (stating that from the beginning, the U.S. recognized the autonomy of Indian tribes and that treaties rested on the concept of Indian sovereignty).

34. *Id.* at 67, 72-73.

35. KAPPLER REVISITED: AN INDEX AND BIBLIOGRAPHIC GUIDE TO AMERICAN INDIAN TREATIES 7 (Charles D. Bernholz ed., 2003); PRUCHA, AMERICAN INDIAN TREATIES, *supra* note 18, at 446-502. *See also* 1 DELORIA & DEMALLIE, *supra* note 15, at 3-5 (arguing that hundreds of other agreements qualify as Indian treaties).

36. *See, e.g.*, 2 DELORIA & DEMALLIE, *supra* note 15, at 745-1083. *Cf.* 2 INDIAN AFFAIRS, *supra* note 27, at 145, 162 (Treaty with the Wyandot, Etc., 1817, art. 6, 7 Stat. 160 and Treaty with the Wyandot, Etc., 1818, art. 1, 7 Stat. 178).

37. *See, e.g.*, VINE DELORIA, JR. & DAVID E. WILKINS, TRIBES, TREATIES, AND CONSTITUTIONAL TRIBULATIONS 69 (1999); United States v. Sioux Nation, 448 U.S. 371 (1980); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

38. Indian treaties involved real negotiations and consent situations: "[T]he stereotype of Indian leaders at treaty talks as being passive and overmatched intellectually is wrong. . . . The calculus was about power, and the tribes could make the calculations as well as the white people. The tribal negotiators were sophisticated and they used every technique and device available to them." Charles F. Wilkinson, *Indian Tribal Rights and the National Forests: The Case of the Aboriginal Lands of the Nez Perce Tribe*, 34 IDAHO L. REV. 435, 438 (1998).

39. Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 675 (1979).

B. UNITED STATES AND INDIAN CONSENSUAL RELATIONS POST-TREATY MAKING

In 1871, Congress ended treaty making with tribes.[40] This occurred not due to any change in the status of tribal nations but because of congressional infighting: the House of Representatives demanded a greater role in Indian affairs.[41] Even though the treaty era ended, political, diplomatic, and consensual relations between the entities continued unabated.[42] In fact, U.S./Indian agreements after 1871 were still often called treaties by many, and they continued to be negotiated by the Executive Branch and ratified by Congress.[43] The only difference after 1871 was that both houses of Congress had to approve the agreements as statutes before they became binding. This procedure and these agreements are called treaty substitutes by scholars.[44]

Congress continued to spend enormous amounts of time and money sending commissioners to tribal governments, negotiating with tribes on various issues, formulating Indian policies, and enacting legislation regarding the tribal nations.[45] Tribes continued to consult with and petition Congress regarding important issues.[46]

In addition, in more modern times, 1982–2010 in particular, federal, state, and tribal governments have been involved in decades of negotiations regarding water rights and have often reached agreements that Congress later enacted into laws.[47] These arrangements look remarkably like treaties. A bit earlier, the Executive Branch and tribal and state governments were also involved in extensive negotiations over native claims to lands and rights in Alaska and in the eastern United States, and Congress also enacted

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40. Act of March 3, 1871, § 1, 16 Stat. 544 (codified at 25 U.S.C. § 71). This act expressly did not "invalidate or impair the obligation of any treaty heretofore lawfully made . . . ." *Id.*

41. PRUCHA, GREAT FATHER, *supra* note 26, at 530-32; COHEN's, *supra* note 31, at 69-70; Antoine v. Washington, 420 U.S. 194, 201-02 (1975).

42. PRUCHA, GREAT FATHER, *supra* note 26, at 532, 676; *see also* Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe, 473 U.S. 753 (1985) (noting the Klamath Tribe and the United States negotiated a 1901 agreement to modify the boundaries of the reservation that had been established in 1864 treaty; Congress ratified the agreement).

43. 1 DELORIA & DEMALLIE, *supra* note 15, at 287; PRUCHA, GREAT FATHER, *supra* note 26, at 532, 676.

44. 1 DELORIA & DEMALLIE, *supra* note 15, at 1; PRUCHA, AMERICAN INDIAN TREATIES, *supra* note 18, at 312.

45. *See, e.g.*, Indian Department Appropriations, Pub. L. No. 125, 32 Stat. 245-77 (May 27, 1902); PRUCHA, GREAT FATHER, *supra* note 26, at 687-1208 (covering the history and political interactions between the United States and Indian tribes 1871 to 1994).

46. *See, e.g.*, PRUCHA, GREAT FATHER, *supra* note 26, at 759-896, 917-92, 1017-23, 1087-1190; United States v. Sioux Nation, 448 U.S. 371, 384 (1980).

47. *See generally* DANIEL MCCOOL, NATIVE WATERS: CONTEMPORARY INDIAN WATER SETTLEMENTS AND THE SECOND TREATY ERA (2002); Peter W. Sly & Cheryl A. Maier, *Indian Water Settlements and EPA*, NAT. RESOURCES & ENV'T, Spring 1991, at 23, 24.

those agreements into law.[48] Consequently, "treaty making" and the historical, consensual, diplomatic relationship between Indian nations and the United States have continued beyond the official end of treaty making in 1871.

C. FEDERAL LAWS, REGULATIONS, AND THE CONSENSUAL U.S./INDIAN RELATIONSHIP 1774–2015

In addition to the Executive Branch and Senate exercising the treaty power to reach agreements with tribal nations, and the federal/tribal conduct post-1871, Congress has also enacted numerous laws requiring consultation and consent in Indian affairs. For example, in furtherance of the paradigm of diplomatic relations with Indian nations, in 1787 the Articles of Confederation Congress enacted the Northwest Ordinance to provide for the future incorporation of the lands in the Northwest Territory into the United States.[49] This law expressly continued the consensual relationship the United States had maintained with Indian governments; the Act promises that the United States will always negotiate with Indian nations to obtain their consent for purchases of tribal lands: "The utmost good faith shall always be observed towards the Indians, their lands and property shall never be taken from them *without their consent* . . . ."[50] In 1848, Congress applied this Act, and this consensual relationship, to the Indian nations in the Oregon country.[51]

Even in federal policies that ultimately had negative effects on Indian country, Congress regularly required the Executive Branch to engage in prior consultations with tribes and to obtain consent. In the Removal Act of 1830, Congress instituted a policy attempting to remove all eastern tribes west of the Mississippi River.[52] Congress, however, predicated removals on consultation, negotiation, and the consent of the tribes: "the President . . . [may] cause so much of any territory belonging to the United States, west

48. Maine Indian Claims Settlement Act, Pub. L. No. 96-420, 94 Stat. 1785 (1980); Rhode Island Indian Claims Settlement Act, Pub. L. No. 95-395, 92 Stat. 813 (1978); COHEN'S, *supra* note 31, at 326-30 (discussing Alaska native settlement act); PRUCHA, GREAT FATHER, *supra* note 26, at 1172-74 (discussing tribal land claims settlement acts for the Narragansetts in Rhode Island and the Passamaquoddies and Penobscots in Maine).

49. PETER S. ONUF, STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE xiii, 3, 15, 25, 46 (Indiana University Press 1992). The Northwest Territory is now the modern day states of Ohio, Illinois, Indiana, Wisconsin, and Minnesota.

50. DOCUMENTS OF UNITED STATES INDIAN POLICY 9 (Francis Paul Prucha ed., 3d ed. 2000) (emphasis added). *See also* Mitchel v. United States, 34 U.S. 711, 746 (1835) ("[P]ossession could not be taken without [Indian] consent.").

51. *See* Organic Act, § 14, 9 Stat. 323 (1848).

52. *See* Removal Act, ch. 148, 4 Stat. 411 (1830), *reprinted in* 3 THE AMERICAN INDIAN AND THE UNITED STATES: A DOCUMENTARY HISTORY 2169-71 (Wilcomb E. Washburn ed., 1973).

of the river Mississippi . . . to be divided . . . for the reception of such tribes or nations of Indians as *may choose* to exchange the lands where they now reside, and remove there; . . ."[53] And, several decades later, under the Allotment Act of 1887, Congress required tribal consultations and consent before reservations could be allotted and before land on reservations could be purchased by the United States.[54] As part of the allotment process, the Secretary of the Interior negotiated with tribes over the individual allotment plans for each specific reservation.[55] Congress continued to believe that allotting reservations required a tribe's consent until the United States Supreme Court, in essence, held otherwise in 1903.[56]

In 1899, 1901, and 1904 Congress began authorizing rights-of-way through Indian reservations.[57] Later, Congress and various agency regulations began requiring the consent of tribes before a grant or renewal of rights-of-way.[58] In the 1934 Indian Reorganization Act ("IRA"), Congress repeated its policy of favoring tribal consultation and consent.[59] Congress invited tribal governments through the IRA to consider drafting constitutions and organizing their governments under those documents.[60] Consultation and consent took the form of tribal communities debating whether to enter this process[61] and then holding at least two elections before a written tribal constitution could become operative. First, the community had to vote whether to agree to organize under the IRA; second, the

53. *Id. See also* PRUCHA, GREAT FATHER, *supra* note 26, at 179-213; COHEN'S, *supra* note 31, at 41-51.

54. *See* Allotment Act of 1887, 25 U.S.C. § 348 (2012) ("[I]t shall be lawful for the Secretary of the Interior to negotiate . . . for the purchase . . . of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell . . . ."); DELORIA & WILKINS, *supra* note 37, at 60-61 (noting the Allotment Act required the Executive Branch to obtain tribal consent and to negotiate to purchase Indians' remaining lands).

55. PRUCHA, GREAT FATHER, *supra* note 26, at 668, 867.

56. Solem v. Bartlett, 465 U.S. 463, 467 (1984). Congress enacted allotment acts reservation by reservation "with each surplus land act employing its own statutory language, the product of a unique set of tribal negotiation and legislative compromise." *Id.* But after *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), Congress enacted allotment acts without consultation or consent. PRUCHA, GREAT FATHER, *supra* note 26, at 867-69.

57. Act of Mar. 2, 1899, 30 Stat. 990 (codified as amended at 25 U.S.C. § 312) (2012)); 25 U.S.C. § 311 (2012). *See also* PRUCHA, GREAT FATHER, *supra* note 26, at 344-45, 401, 869 n.14; COHEN'S, *supra* note 31, at 319, 1062-65.

58. 25 U.S.C. § 324 (2012); 25 C.F.R. § 169.3(a) (2015). *See also* 25 U.S.C. §§ 323-328 (2012); 25 C.F.R. pt. 169 (2015).

59. Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-479 (2012)). The senator who introduced the bill stated that it would give Indians and tribes control over their own affairs. 78 Cong. Rec. 11,125 (1934).

60. Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-479 (2012)).

61. *See* ELMER R. RUSCO, A FATEFUL TIME: THE BACKGROUND AND LEGISLATIVE HISTORY OF THE INDIAN REORGANIZATION ACT 258-59 (2000); *Tribal Self-Government and the Indian Reorganization Act of 1934*, 70 MICH. L. REV. 955, 964-65 (1972).

community had to draft a constitution and then consult with the Secretary of Interior to gain approval of their constitution as drafted; and third, the community had to hold a second election whether or not to adopt the constitution after it had been approved by the Secretary.[62]

In the current era of federal Indian policy, called the Self-Determination Era, President Richard Nixon reemphasized consultation and consent as the federal model for working with Indian nations. Nixon stated that the federal government should ask Indian nations what the federal government should do for them, and with them, instead of the United States dictating policies and programs:

> It is long past time that the Indian policies of the Federal government began to recognize and build upon the capacities and insights of the Indian people. . . . [W]e must begin to act on the basis of what the Indians themselves have long been telling us. The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.[63]

In response, the Bureau of Indian Affairs ("BIA") began immediately drafting procedures for consulting with Indian nations and finalized its policy in 1972.[64] Congress also accepted President Nixon's call when it enacted the Indian Self-Determination and Education Assistance Act ("ISDA") in 1975 and allowed tribes to negotiate with the United States to assume the operation of federal Indian programs.[65] Congress also required the Secretaries of the Interior and of Health, Education, and Welfare to consult with Indian organizations while drafting the ISDA regulations.[66] And in 1978, Congress required that Indian tribes be "actively consulted" in

62. *See* 25 U.S.C. §§ 476(b), 503 (2012); Robert J. Miller, *American Indian Constitutions and Their Influence on the United States Constitution*, 159 PROCEEDINGS OF THE AM. PHIL. SOC'Y 32, 45-46 (Mar. 2015); THEODORE H. HAAS, TEN YEARS OF TRIBAL GOVERNMENT UNDER I.R.A. 2, 30 (1947).

63. Richard Nixon, *Special Message to the Congress on Indian Affairs*, *in* DOCUMENTS OF UNITED STATES INDIAN POLICY 256, 257 (Francis Paul Prucha ed., 3d ed. 2000); FRANCIS PAUL PRUCHA, THE INDIANS IN AMERICAN SOCIETY: FROM THE REVOLUTIONARY WAR TO THE PRESENT 72-73 (1985) ("The new watchword was 'Indian participation.'").

64. Oglala Sioux Tribe of Indians v. Andrus, 603 F.2d 707, 717-21 (8th Cir. 1979).

65. Pub. L. No. 93-638, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. §§ 450-458ddd-2 (2012)). In 1994, Congress enacted the Tribal Self-Governance Act as an amendment to the ISDA and expanded the reach of federal programs tribes could agree to operate in lieu of federal agencies. Indian Self-Determination Act Amendments of 1994, Pub. L. No. 103-413, § 102(18), 108 Stat. 4250, 4259, 4270 (1994); Tadd M. Johnson & James Hamilton, *Self-Governance for Indian Tribes: From Paternalism to Empowerment*, 27 CONN. L. REV. 1251, 1262-66 (1995).

66. Pub. L. No. 93-638, § 107(b), 88 Stat. 2203, 2212 (1975) (codified as amended at 25 U.S.C. §§ 450-458ddd-2 (2012)).

planning and developing educational programs for Indians and any related activities.[67]

One of the major goals of the ISDA was to end the "Federal domination of Indian service programs."[68] As part of that objective, the ISDA allows tribal governments to agree to contracts and compacts with the United States to take over and operate various federal Indian programs.[69] Furthermore, Congress has also granted tribes far more power over economic decision making in Indian country. For example, once tribes have consulted with the Secretary of the Interior and received approval of their regulatory schemes, tribes can make certain economic decisions without further federal involvement.[70]

Congress has continued to support the long standing policy of consultation with Indian nations. It is unnecessary, and perhaps even impossible as the White House admits,[71] to set out the entire laundry list of congressional acts and administrative rules that require consultations with tribes and sometimes tribal consent before various actions can be undertaken.[72] This article will thus only highlight some of the most significant examples.

Congress has enacted many statutes that require consultation with tribes for actions that might impact Indian historic, cultural, and religious

67. Pub. L. No. 95-561, §§ 1101(c), 1121-1122, 1130, 92 Stat. 2143, 2314, 2316-18, 2321 (1978) (codified as amended at 25 U.S.C. § 2011(a) (2012)). *See also* John E. Silverman, *The Miner's Canary: Tribal Control of American Indian Education and the First Amendment*, 19 FORDHAM URB. L.J. 1019, 1025 (1992).

68. 25 U.S.C. § 450(a) (2012).

69. 25 U.S.C. § 450 (2012); 25 C.F.R. § 273 (2015).

70. *See, e.g.*, The Hearth Act, 25 U.S.C. § 415 (2012); Elizabeth Ann Kronk Warner, *Tribal Renewable Energy Development Under the HEARTH Act: An Independently Rational, but Collectively Deficient, Option*, 55 ARIZ. L. REV. 1031 (2013); Judith V. Royster, *Practical Sovereignty, Political Sovereignty, and the Indian Tribal Energy Development and Self-Determination Act*, 12 LEWIS & CLARK L. REV. 1065 (2008).

71. The White House tribal consultation list of January 2009 includes this caveat: "[This list] does not purport to be comprehensive or all encompassing." *List of Federal Tribal Consultation Statutes, Orders, Regulations, Rules, Policies, Manuals, Protocols and Guidance* [hereinafter *List of Federal Tribal Consultation Statutes*], http://www ncai.org/attachments/Consultation_hJYORXOnCSfagkpaeFLgYFNCffnFTxSpQNdqyejdardbxFCdFUz1%20fed%20consultation%20authorities%202-09%20ACHP%20version6-9pdf.

72. For an exhaustive listing of federal statutes and regulations that require tribal consultations, *see* Derek C. Haskew, *Federal Consultation with Indian Tribes: The Foundation of Enlightened Policy Decisions, or Another Badge of Shame*?, 24 AM. INDIAN L. REV. 21, 21 n.3 (2000). *See also* 25 U.S.C. § 2719(b)(1)(A) (2012) (noting the Indian Gaming Regulatory Act requires consultations between the Secretary of Interior, tribes, and states in certain circumstances); 25 U.S.C. § 1326 (2012) (amending a 1968 statutory provision, which allowed states to assume criminal jurisdiction over Indian reservations, to require tribal consent to any future state assumptions).

issues: the Archeological Resources Protection Act of 1979,[73] the Native American Graves Protection and Repatriation Act of 1990,[74] and the 1992 amendments to the National Historic Preservation Act.[75] And very recently, Congress has provided for tribal governments to consult and to consent on whether to opt in to new initiatives expanding their criminal jurisdiction. Tribal governments that consent to exercise expanded powers over domestic violence and other crimes on reservations have to consult with federal agencies and officials, adopt various provisions, and obtain federal approvals before exercising this expanded jurisdiction.[76]

The regulations enacted pursuant to the Native American Graves Protection and Repatriation Act require the United States to organize and work with a committee composed of tribal leaders and religious leaders, to consult, and whenever possible, to reach agreements on how to handle the sensitive issues related to religious objects and graves.[77] The Advisory Council on Historic Preservation drafted the regulations for the 1992 amendments to the National Historic Preservation Act, and the relevant provisions require federal officials to consult with tribes on historic and cultural property issues, to negotiate and reach mutual consent on agreements regarding these issues, and to allow tribal governments to participate in the resolution of any adverse effects.[78]

Administrative agencies have also promulgated numerous regulations requiring tribal consultation and, in some situations, consent. For example,

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73. Pub. L. No. 96-95, 93 Stat. 721, 727 (1979) (codified at 16 U.S.C. § 470ii (2012)) (promulgation of regulations allowed only after tribal consultations). Also, before issuing excavation permits under this Act which might result in harm to religiously or culturally significant sites, federal officials must notify and consult with affected tribes. 16 U.S.C. § 470cc(c) (2012); 43 C.F.R. § 7.7(a) (2015).

74. Pub. L. No. 101-601, § 5, 104 Stat. 3048, 3052 (1990) (codified at 25 U.S.C. § 3001-3013 (2012)). The Act requires the drafting of regulations and several other decisions to be conducted only after consultations with Indian tribes and traditional religious leaders. 25 U.S.C. §§ 3002(b), 3002(c)(2), 3002(d), 3003(b)(1)(A), 3004(b)(1)(B), 3005(a)(3), 3006(b)(1)(A) (2012) (agencies to draft regulations only after consulting with the Nagpra committee comprised mostly of tribal representatives); *see also* 43 C.F.R. § 10.3 (2014).

75. Pub. L. No. 102-575, § 4006(a), 106 Stat. 4600, 4757 (1992) (codified as amended at 16 U.S.C. §§ 470x-6 (2012)) (repealed by Pub. L. 113-287, §7, Dec. 19, 2014, 128 Stat. 3272). *See also* 16 U.S.C. § 470a(d)(6)(B) (requiring government-to-government consultations with tribes) (repealed by Pub. L. 113-287, §7, Dec. 19, 2014, 128 Stat. 3272).

76. Violence Against Women Reauthorization Act, Pub. L. No. 113-4, § 903, 127 Stat. 54, 120 (2013) (codified at 42 U.S.C.A. § 14045 (2015)); Tribal Law and Order Act, Pub. L. No. 111-211, 124 Stat. 2261 (2010).

77. 43 C.F.R. §§ 10.1(b), 10.5(b)(3), 10.5(f), 10.8(d), 10.9(b) (2014).

78. 36 C.F.R. §§ 800.2(c)(2), 800.2(c)(2)(ii)(A) (2014). Federal agencies are to engage in consultation and consent situations in a sensitive manner; agencies should always be aware of the federal trust responsibility to tribes and the government-to-government relationship and can enter any agreements regarding these issues. 36 C.F.R. § 800.2(c)(2)(ii)(B)-(C), (E). Agencies should consult with any concerned tribe, 36 C.F.R. § 800.5(a), and work cooperatively to resolve adverse effects. 36 C.F.R. § 800.6.

regulations under the National Environmental Policy Act require federal agencies to invite affected tribes to participate in planning efforts and require agencies to consult with Indian tribes early in their planning processes.[79] The Departments of the Interior and Health and Human Services have also promulgated rules that require them to consult and reach certain agreements with tribal governments.[80] Other federal agencies have also promulgated regulations that require them to plan various actions in consultation and cooperation with tribes.[81] In conclusion, it is clear that consultation with Indian nations is a legal requirement for the federal government in many fields of endeavor, and often tribal consent must also be obtained.

D. CONSULTATION CASE LAW

Indian nations have filed a significant number of lawsuits regarding what they perceive as insufficient federal consultations. Tribal governments have prevailed in many of these cases[82] and lost many others.[83] In

79. 40 C.F.R. §§ 1501.2(d)(2), 1501.7(a)(1) (2014).

80. *See generally* 25 C.F.R. Part 900 (2015) (negotiating ISDA contracts); 25 C.F.R. Part 1000 (2015) (negotiating Tribal Self Governance Act compacts). *See also* 25 C.F.R. § 900.119 (2014) (federal officials must consult with tribal officials); 25 C.F.R. § 1000.161 (2014) (federal officials must negotiate compacts with tribal officials); 25 C.F.R. § 1000.182 (2014) (tribes must consent to assume federal programs).

81. *See, e.g.*, 36 C.F.R. § 219.4(a)(1) (2014) (National Forest System); 36 C.F.R. § 219.4(a)(1)(3), (b) (2014) (noting the responsible official should consult on a government-to-government basis, keep in mind the federal trust responsibility, seek native knowledge, and coordinate with tribes); 36 C.F.R. § 219.12 (2014) (stating the responsible office should collaborate and cooperatively develop goals); 36 C.F.R. § 219.12(c)(3)(iii) (2014) (monitoring of forest plans to be conducted jointly with federal, state, local, and tribal governments); 30 C.F.R. § 750.6(d) (2014) (directing the BIA to consult with tribes regarding Interior's Office of Surface Mining activities on Indian lands); 25 C.F.R. § 262.3(b)(1) (2015) (stating federal land managers must notify tribes before issuing archaeological research permits on Indian lands); 25 C.F.R. § 900.119 (2015) (noting BIA and Indian Health Services must consult with tribes before spending any planning or design funding on ISDA construction projects).

82. *See, e.g.*, Pit River Tribe v. U. S. Forest Serv., 469 F.3d 768 (9th Cir. 2006) (holding that federal agencies violated National Historic Preservation Act ("NHPA") consultation requirements by not consulting with tribe over historic sites before extending geothermal leases); Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800 (9th Cir. 1999) (enjoining Forest Service from exchanging lands with a timber company because of violating National Environmental Policy Act and NHPA consultation duties); Confederated Tribes and Bands of the Yakama Nation v. U.S. Dep't of Agric., 2010 WL 3434091 (E.D. Wash. 2010) (holding that Department of Agriculture failed to consult with the nation before siting a landfill that would interfere with treaty hunting and fishing rights); N. Cheyenne Tribe v. U.S. Bureau of Land Mgmt., 32 Indian L. Rptr. 3270, 3274-75 (D. Mont. June 6, 2005) (unpublished opinion) (holding that BLM violated NHPA consultation duties and breached the agency's trust responsibility to consult); Klamath Tribes v. United States, 1996 WL 924509 (D. Or. Oct. 2, 1996) (holding Forest Service failed to consult regarding timber sales on tribal lands in violation of trust duty to avoid adversely affecting treaty resources).

83. *See, e.g.*, Te-Moak Tribe of W. Shoshone v. U.S. Dep't of the Interior, 608 F.3d 592, 608-10 (9th Cir. 2010); Snoqualmie Indian Tribe v. Fed. Energy Regulatory Comm'n., 545 F.3d

2010, the U.S. District Court for the Southern District of California issued an opinion that was a bit surprising. In light of what looked like an extensive record of federal consultations with the Quechan Tribe ("Tribe"), the court held that the putative consultations did not comply with the legal requirements.[84]

In this case, the federal government was trying to fast-track a large solar energy development in California on 6500 acres of land managed by the Bureau of Land Management ("BLM").[85] Under the American Recovery and Reinvestment Act of 2009, the project had to break ground by December 31, 2010, to qualify for federal stimulus funding.[86] Consequently, it appeared that BLM was actively pushing the project ahead.[87] The relevant lands, however, were known to contain an estimated 459 cultural resources (historic trails, burials, and archaeological sites) that were important to the Tribe and of historic significance, thus deserving of NHPA procedures.[88] After becoming dissatisfied with federal consultation efforts, which the Tribe viewed as inadequate, lacking meaning, and coming after BLM had already approved the project, the Tribe filed suit for a preliminary injunction which the court granted on December 15, 2010.[89]

The Tribe's complaint alleged that BLM had reached a decision to approve the project prior to evaluating the historic and cultural resources under NHPA and before engaging in consultation with the Tribe as required by the Act.[90] The BLM, however, presented the court with a lengthy list of what it claimed were consultations and attempts to consult with the Tribe.[91] The court then engaged in a detailed analysis (more than eight pages of the opinion) examining item by item each piece of evidence presented by the BLM to decide whether the legally required consultations had occurred.[92] Despite dozens of claimed incidents of consultation with tribes in general and with Tribe employees and hosting many public meetings on the project,

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1207, 1215-16 (9th Cir. 2008); Narragansett Indian Tribe v. Warwick Sewer Auth., 334 F.3d 161 (1st Cir. 2003).

84. Quechan Tribe of the Fort Yuma Reservation v. U.S. Dep't of the Interior, 755 F. Supp. 2d 1104, 1118-19, 1122 (S.D. Cal. 2010).

85. *Id.* at 1106-07.

86. *Id.* at 1119.

87. *Id.*

88. *Id.* at 1107.

89. *Id.* at 1108, 1122.

90. *Id.* at 1106-08.

91. *Id.* at 1111.

92. *Id.* at 1111-20. Compare *id.* with *Ke-Kin-is-Uqs v. British Columbia (Minister of Forests)*, 2008 BCSC 1505, paras. 42, 50 (Can. B.C.), where the British Columbia Supreme Court considered a 1663 page "consultation record" supplied by government lawyers and decided that much of it was just draft meeting notes and not minutes of actual consultations, and much of it was specialized terminology not understandable to outsiders; the record did not "speak for itself."

the court held the evidence demonstrated that "the Tribe [was] likely to prevail at least on its claim that it was not adequately consulted as required under NHPA before the project was approved."[93] The court then issued a preliminary injunction notwithstanding the "balance of the equities" and the "public interest" elements that it had to weigh before enjoining the construction of this important, alternative energy project.[94]

It is possible that this case will be seen as an outlier because of the strict requirements and close scrutiny the court imposed on the BLM. Moreover, the district judge seemed irked by the impression created by BLM that it was "padding the record," when it provided the court with irrelevant string citations without explanations, blurred the crucial chronology of the consultation process, and grouped all tribes together as one entity instead of just discussing its actual consultations with the Quechan Tribe.[95]

Another case worth highlighting is a 1995 Tenth Circuit decision that held the U.S. Forest Service violated section 106 of the NHPA because it failed to properly consult with the Sandia Pueblo and to make good faith and reasonable efforts to identify historic resources.[96] In fact, one hopes that this situation is an outlier because the Forest Service did not take the NHPA "very seriously," ignored relevant evidence it received, seemed to not really want to find information that tribal sources might provide, and withheld very relevant information from the state historic preservation officer.[97] Not surprisingly, the Tenth Circuit found a violation of the NHPA consultation requirements and ruled against the Forest Service.[98]

In sum, the duty of federal consultation and consent with Indian nations is a very well-established legal principle in the history, statutes, administrative regulations, and caselaw of the United States. This fact leads to important questions about how consultation and consent is playing out in modern-day U.S./Indian affairs and how the United States actions compare

93. Quechan Tribe of the Fort Yuma Reservation v. U.S. Dep't of the Interior, 755 F. Supp. 2d 1104, 1119 (S.D. Cal. 2010).

94. *Id.* at 1120-22.

95. *Id.* at 1111-12. In comparison, in 2013 the Quechan Tribe lost a separate case about consultation with the BLM regarding the Ocotillo Wind Energy Facility Project. Quechan Tribe of the Fort Yuma Indian Reservation v. U. S. Dep't of the Interior, 927 F. Supp. 2d 921 (S.D. Cal. 2013). The judge in the 2013 case distinguished the 2010 case on the facts concerning BLM's consultations with the Tribe. *Id.* at 932-33. In total, these two cases are valuable comparisons that can educate agencies on a range of methods and types of consultation efforts that do and do not meet legal requirements.

96. Pueblo of Sandia v. United States, 50 F.3d 856, 861-63 (10th Cir. 1995).

97. *Id.* at 858-62.

98. *Id.* at 863.

to international norms of consultation and consent in dealing with Indigenous peoples.

III. CURRENT UNITED STATES CONSULTATION PROCEDURES: FREE, PRIOR, AND INFORMED CONSENT?

The procedures and efforts the United States currently utilizes to consult with Indian nations began coalescing in 1993. In that year, President Bill Clinton issued Executive Order 12,875 entitled "Enhancing the Intergovernmental Partnership."[99] This Order requires executive agencies to "develop an effective process" that establishes "regular and meaningful consultation and collaboration with State, local, and tribal governments on Federal matters that significantly or uniquely affect their communities."[100] Clinton followed that Order in 1994 with a presidential memorandum entitled "Government-to-Government Relations with Native American Tribal Governments."[101] This memo strengthened the 1993 Order, now requiring executive branch agencies to "consult, to the greatest extent practicable and to the extent permitted by law, with tribal governments prior to taking actions that affect federally recognized tribal governments."[102] The head of each executive department and agency was charged with ensuring that the Order was communicated to and complied with by their respective departments.[103] The Order and memorandum were binding, of course, on all executive branch agencies and officials.

In 1996, Clinton continued ordering federal consultations. In Executive Order 13,007, he directed federal agencies to accommodate native and tribal access to sacred sites, to create procedures to notify tribes if federal actions might restrict access to or adversely affect sacred sites, and to undertake their actions relative to sacred sites in compliance with the consultation procedures of his 1994 memorandum.[104] The President also now sought to monitor agency compliance with his directives by requiring reports on their implementation of this Order.[105]

In 1998 and 2000, President Clinton issued even stronger orders regarding tribal consultations. In 1998, he required agencies "to establish regular and meaningful consultation and collaboration with Indian tribal

99. Exec. Order No. 12,875, 58 Fed. Reg. 58,093 (Oct. 26, 1993).

100. *Id.* at 58,903.

101. 59 Fed. Reg. 22,951 (April 29, 1994). The President also required consultations with tribes on issues concerning environmental justice. Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994).

102. 59 Fed. Reg. at 22,951.

103. *Id.* at 22,953.

104. Exec. Order No. 13,007, 61 Fed. Reg. 26,771, 26,771 (May 24, 1996).

105. *Id.*

governments in the development of regulatory practices on Federal matters that significantly or uniquely affect their communities."[106] Even in formulating federal policies, agencies were to be guided by principles of Indian self-government and sovereignty, treaty rights, and the unique legal relationship between tribal governments and the United States.[107] Each agency was ordered to develop consultation procedures for tribes "to provide meaningful and timely input in the development of regulatory policies" and to avoid promulgating regulations that affect tribal governments unless certain conditions were met.[108] When agency issues relate to tribal self-government, tribal trust resources, or treaty and other rights, agencies should "where appropriate, use *consensual mechanisms* for developing regulations."[109]

In 2000, Clinton replaced the 1998 Order with Executive Order 13,175, "Consultation and Cooperation with Indian Tribal Governments."[110] Order 13,175 is still in effect today. It includes almost all of the provisions that were in the 1998 Order and greatly expands on them.

The 2000 Order was also issued "to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies."[111] It reaches far beyond just formal agency rulemaking, however, and includes tribal consultations to develop "regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes."[112] For example, agencies proposing new regulations that have tribal implications are required to consult with tribal officials "early in the process," and they must describe in the Federal Register the extent of the agency's prior consultation with tribal officials.[113]

The 2000 Order also expressly directs that agencies develop "an accountable process," and for the first time, imposes deadlines on the development of agency consultation procedures.[114] In fact, agencies were given only thirty days after the Order became effective to designate an official with primary responsibility for implementing the Order, and then

106. Exec. Order No. 13,084, 63 Fed. Reg. 27,655 (May 14, 1998).
107. *Id.* at 27,655.
108. *Id.*
109. *Id.* at 27,656 (emphasis added).
110. Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000).
111. *Id.* at 67,249.
112. *Id. See also id.* at 67,250.
113. *Id.* at 67,250.
114. *Id.*

that official had only sixty days after the effective date of the Order to submit a description of the agency's consultation process to the Office of Management and Budget ("OMB").[115] Also noteworthy, and like the 1998 Order, the 2000 Order requires agencies, when "issues relat[e] to tribal self-government, tribal trust resources, or Indian tribal treaty and other rights" to "explore and, where appropriate, use *consensual mechanisms* for developing regulations."[116] The 2000 Order increases the obligations on agencies in these situations by including the admonition that they should consider using "negotiated rulemaking" (i.e., rules developed in conjunction with tribal governments) to develop their regulations.[117]

President George W. Bush expressly stated his support for Executive Order 13,175 in his 2004 presidential memorandum entitled "Government-to-Government Relationship with Tribal Governments."[118] In 2009, President Barack Obama also expressly reaffirmed Executive Order 13,175 in a presidential memorandum.[119] Moreover, President Obama imposed new duties and deadlines on agencies. Each agency head was granted ninety days to submit a "detailed plan" to OMB on the actions the agency would take to implement Order 13,175.[120] The plans themselves had to "be developed after consultation by the agency with Indian tribes and tribal officials."[121] Agency heads were also required to file progress reports with OMB within 270 days, and annually thereafter, on the status of each action included in their consultation plans.[122] The President also ordered OMB to

115. *Id.*

116. *Id.* at 67,251 (emphasis added).

117. *Id. See also* Negotiated Rulemaking Act of 1990, 5 U.S.C. §§ 561 *et seq.*; WILLIAM F. FUNK, SIDNEY A. SHAPIRO & RUSSELL L. WEAVER, ADMINISTRATIVE PROCEDURE AND PRACTICE: PROBLEMS AND CASES 134-35 (5th ed. 2014) (describing the negotiated rulemaking process); Robert J. Miller & Dean Suagee, *The New Indian Housing Act and Some of Its Environmental Implications*, 13-19 (AMERICAN BAR ASS'N CONFERENCE 1997), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1247853 (explaining the author's experience with the Department of Housing and Urban Development negotiated rulemaking committee which included forty-eight tribal representatives).

118. Memorandum on Government-to-Government Relationship with Tribal Governments, 2 PUB. PAPERS 2177 (Sept. 23, 2004) [hereinafter Bush Memorandum], http://www2.epa.gov/sites/production/files/2013-08/documents/president-bush-2004.pdf.

119. Memorandum for the Heads of Executive Departments and Agencies: Tribal Consultation, (Nov. 9, 2009) [hereinafter Obama Memorandum], http://www2.epa.gov/sites/production/files/2013-08/documents/tribal-consultation-memorandum-09.pdf.

120. *Id.*

121. *Id.*

122. *Id. See also* U.S. Department of the Treasury, *Department of the Treasury Progress Report to OMB on Tribal Consultation*, http://www.treasury.gov/resource-center/economic-policy/tribal-policy/Documents/2014%20Consultation%20Report.pdf; U.S. Department of Agriculture, *Action Plan for Tribal Consultation and Collaboration: Plan Submitted Pursuant to President Memorandum Dated November 5, 2009*, http://www.usda.gov/documents/Consultation Plan.pdf.

compile a report on the implementation of Order 13,175 across the entire executive branch and to make recommendations, if any, for improving agency consultation plans and improving the tribal consultation process.[123]

After all these presidential orders and memoranda, and the federal laws and regulations discussed in Part II.C, it is no surprise that there has been an enormous amount of activity in the federal government regarding tribal consultations and the drafting of agency consultation policies and procedures. But our focus here is not to examine these myriad agency policies one by one but instead to determine the procedures for consultation that have developed from all these laws, Executive Orders, and policies. From these determinations, we hope to understand what is effective and beneficial for tribal governments and communities and if they approach the emerging international law regime of free, prior, and informed consent.

A. FEDERAL CONSULTATION PROCEDURES

A very active federal process for consulting with Indian nations has developed from the laws, regulations, Executive Orders, and memoranda already discussed. Executive branch agencies and many independent federal agencies have drafted consultation policies, engaged in extensive consultation trainings, and subsequently engaged in myriad consultations with tribal governments.[124] In addition, after the 2000 Clinton Executive Order, the OMB Director issued a memorandum directing each Executive Branch department to designate a specific employee to serve as a tribal coordinator and to be the contact point for agency compliance with the Order.[125] In reaction, many agencies have created tribal liaison positions,[126]

123. Obama Memorandum, *supra* note 119.

124. The author has conducted numerous tribal consultation training sessions over the past fifteen years with federal agencies, including the U.S. Fish & Wildlife Service, BLM, U.S. Forest Service, and the Bonneville Power Administration.

125. Jacob J. Lew, Guidance for Implementing E.O. 13175, *Consultation and Coordination with Indian Tribal Governments* (Jan. 11, 2001), https://www.whitehouse.gov/sites/default/files/omb/memoranda/m01-07.pdf. In 2010, the OMB Director issued similar guidance. Peter R. Orszag, Guidance for Implementing E.O. 13175, *Consultation and Coordination with Indian Tribal Governments* (July 30, 2010), https://www.whitehouse.gov/sites/default/files/omb/memoranda/2010/m10-33.pdf.

126. National Congress of American Indians, *Consultation with Tribal Nations: An Update on Implementation of Executive Order 13175*, at 6-9 (Jan. 2012), http://www ncai.org/attachments/Consultation_hxjBLgmqyYDiGehEwgXDsRIUKvwZZKjJOjwUnKjSQeoVaGOMvfl_Consultation_Report_-_Jan_2012_Update.pdf. In 2013, President Obama created the White House Council on Native American Affairs. Exec. Order No. 13,647, 78 Fed. Reg. 39,539 (June 26, 2013).

and all of this activity in the past two decades has led to greatly increased agency attention to tribal issues and thousands of tribal consultations.[127]

There is no mandated federal process for how to conduct tribal consultations, but fairly standardized principles are being followed by most of the Executive Branch agencies, and best practices are well-known. For example, the independent federal agency, the Advisory Council on Historic Preservation, was tasked with drafting the regulations for the 1992 amendments to the NHPA, which added American Indian issues to historic preservation matters. These regulations define consultations with tribal nations regarding historically significant properties as "the process of seeking, discussing, and considering the views of other participants, and, where feasible, *seeking agreement* with them regarding matters arising in the section 106 process."[128] The regulations require that consultations be "appropriate to the scale of the undertaking,"[129] "commence early in the planning process,"[130] and "provide[ ] the Indian tribe . . . a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties . . . and *participate in the resolution* of adverse effects."[131] Obviously, these rules provide an active and important role for tribes in historic preservation matters.[132] Other agencies also drafted similar rules and policies.

We can divine a pretty clear process for tribal consultations from the NHPA regulations: (1) identify when agency actions might impact tribal interests, (2) confer with the relevant tribal nation early in the agency's planning process, (3) provide tribes reasonable opportunities to identify their concerns about potential agency actions and to identify and evaluate

127. *See, e.g.*, National Congress of American Indians*, supra* note 126, at 14, 16, 20-21, 24-25, 28-31; *List of Federal Tribal Consultation Statutes*, *supra* note 71 (providing a twelve page list of executive branch and military branch policies on tribal consultations); Colette Routel & Jeffrey Holth, *Toward Genuine Tribal Consultation in the 21st Century*, 46 U. MICH. J.L. REFORM 417, 436-48, 463 (2013).

128. 36 C.F.R. § 800.16(f) (2014) (emphasis added).

129. *Id.* at § 800.2(a)(4).

130. *Id.* at § 800.2(c)(2)(ii)(A).

131. *Id.* (emphasis added).

132. Agencies can enter agreements with tribes on how consultations will be carried out. 36 C.F.R. § 800.2c(2)(ii)(E); Advisory Council on Historic Preservation, *Consultation with Indian Tribes in the Section 106 Review Process: A Handbook* 25 (November 2008), http://www.achp.gov/regs-tribes2008.pdf. Under the heading "Tips for Successful Consultations," the Handbook advises agencies to engage in respectful communications, to consult early and often, and to conduct effective meetings. *Id.* at 27-29. A 2010 OMB directive even ordered agencies to encourage tribes to develop their own policies to achieve program objectives; where possible to defer to tribes to establish standards; and in determining whether to establish federal standards, to consult with tribal officials as to the need for federal standards or to otherwise preserve the prerogatives and authority of Indian tribes. Orszag, *supra* note 125.

tribal interests, and (4) allow tribes to participate in the resolution of potential adverse effects.[133]

The NHPA rules are not the only set of regulations that suggest specific federal procedures.[134] Attorney General Eric Holder, for example, approved the Justice Department's policy statement on tribal consultations in 2013.[135] The Department identified four crucial procedures for consultations: (1) timely and adequate notice to the appropriate parties, (2) accessibility and convenience to tribal participants, (3) a meaningful process, and (4) transparency and accountability throughout the process.[136]

In 1998, the Secretary of the Interior defined consultations regarding historic properties that would be held with any appropriate party, including tribes, in this fashion:

> Consultation means the process of seeking, discussing, and considering the view of others, and, where feasible, *seeking agreement* with them on how historic properties should be identified, considered, and managed. Consultation is built upon the exchange of ideas, not simply providing information.[137]

The U.S. Forest Service ("Service") issues an interim directive on tribal consultations as part of the Forest Service Handbook.[138] Forest Service line officers can only conduct government-to-government consultations with tribal leaders who have been authorized to consult on behalf of their tribe.[139] The Service sets some time deadlines, and Service officials are encouraged to facilitate consultations by providing funding in some circumstances to tribes or tribal representatives.[140] The agency defines its step-by-step process as: (1) contact the tribal government, preferably prior

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133. *See* Advisory Council on Historic Preservation, *supra* note 132, at 3, 5-8, 11, 14-16.

134. The U.S. Department of Agriculture defines tribal consultation as "the timely, meaningful, and substantive dialogue between USDA officials who have delegated authority to consult and the official leadership of Federally recognized tribes, or their designated representative, pertaining to USDA policies that may have Tribal implications." Office of Tribal Relations, United States Department of Agriculture, *Who We Are*, http://www.usda.gov/wps/portal/usda/usdahome?navid=otr (last updated Feb. 26, 2013).

135. Attorney General Eric Holder, *Department of Justice Policy Statement on Tribal Consultation* (August 29, 2013), http://www.justice.gov/sites/default/files/otj/docs/doj-memorandum-tribal-consultation.pdf.

136. *Id.* at 5.

137. National Park Service & Advisory Council on Historic Preservation, *The Secretary of the Interior's Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to the National Historic Preservation Act* 30 (1998) [hereinafter *Interior's Standards*] (emphasis omitted and added), http://gpmuellerdesign.com/portfolio/multimedia/itam_cd/documents/Cultural%20Resource%20Documents/Standards%20and%20Guidelines.pdf.

138. U.S. Forest Service, *American Indian and Alaska Native Relations Handbook* (April 1, 2014), http://www fs fed.us/im/directives/fsh/1509.13/ (last visited June 19, 2015).

139. *Id.* at 7.

140. *Id.* at 8-9.

to scoping and public involvement, to advise the tribe of a proposed policy, plan, or project that may affect tribal rights; (2) allow tribes to respond; (3) tribes may request federal technical experts to meet with the tribes' technical representatives or with the tribe; (4) issues are discussed so the agency understands tribal concerns; (5) consultation steps are defined and an agreement may be reached on the consultation process; and (6) the agency makes a decision in consultation with the tribe.[141] These examples demonstrate the general outline of federal consultation procedures.

B. BEST PRACTICES

Much has been written about tribal/federal consultations and many reports and studies have been conducted on the subject. In addition to the federal procedures that have developed, there are generally accepted best practices that should be part of any effective consultation. Interestingly, having the outcome, the agency decision, be what a specific tribe desired is not necessarily indicative of whether a tribal nation thinks the consultation process was worthwhile and effective. Just as in court proceedings, being fairly heard, being allowed to adequately present your argument, and having the decision maker seriously consider your views is an important best practice for successful consultations, notwithstanding the final decision.[142]

This article will now briefly highlight some of the generally accepted best practices.[143] It must be noted that many federal agencies have already incorporated some of these practices.

- Conduct consultations on a true government-to-government, equal-footing basis.[144]

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141. *Id.* at 8.

142. National Association of Tribal Historic Preservation Officers, *Tribal Consultation: Best Practices in Historic Preservation*, 35, 39 (May 2005) [hereinafter NATHPO], http://www.nathpo.org/PDF/ Tribal Consultation.pdf.

143. In 2006, the National Congress of American Indians ("NCAI") proposed a very detailed description of best practices for the federal government to use when consulting with tribal nations. *Proposed Minimum Requirements of a Valid Consultation Prior to Taking Federal Action*, http://www ncai.org/attachments/ConsultationqikBfAquyWllLGSqdNYagbaMeCHbArgkPhBppxNXdDcYhNXMPCu2%20NCAITestimony-HR5608.pdf. NCAI repeated many of these suggestions in a 2009 letter to the Department of Agriculture Secretary. Letter from National Congress of American Indians to Department of Agriculture Secretary Tom Vilsack, (Dec. 14, 2009), Background and Recommendations at 1-4 [hereinafter NCAI Letter], http://www ncai.org/attachments/ConsultationustVpCDczCqwJLHCixLQIraeUjlUzDypiZusMhFQGeuEMPMMjRAUSDA.pdf.

144. NATHPO, *supra* note 142, at 39; National Cooperative Highway Research Program, *Successful Practices for Effective Tribal Consultation*, 124 (Sept. 2013) [hereinafter NCHRP], http://onlinepubs.trb.org/onlinepubs/nchrp/docs/NCHRP25-25%2879%29_FR.pdf; DARBY C. STAPP & MICHAEL S. BURNEY, TRIBAL CULTURAL RESOURCE MANAGEMENT: THE FULL CIRCLE TO STEWARDSHIP 122 (2002).

- Show respect, and listen and consider tribal comments carefully.[145]
- Consult as early as possible in the planning process and provide frequent communications and multiple consultations.[146]
- Provide full and candid project information and ample notice of consultation meetings.[147]
- Conduct meetings at both agency and tribal locations, and conduct effective meetings to save everyone time and to accomplish the objectives.[148]
- Provide funding for tribes to consult if at all possible.[149]
- Note that confidentiality of tribal and Indian communications is legally allowed in certain circumstances.[150]

This partial list of best practices,[151] and the actual federal procedures discussed above, leads naturally to the question of what do Indian nations think of federal consultations.

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145. *See* NCHRP, *supra* note 144, at 124; Advisory Council on Historic Preservation, *supra* note 132, at 27; STAPP & BURNEY, *supra* note 144, at 122; Patricia L. Parker & Thomas F. King, National Park Service, NATIONAL REGISTER BULLETIN 38, *Guidelines for Evaluating and Documenting Traditional Cultural Properties* 7-8 (1998), http://www.nps.gov/history/nr/publications/bulletins/pdfs/nrb38.pdf.

146. *Interior's Standards*, *supra* note 137, at 30; NATHPO, *supra* note 142, at 39; Advisory Council on Historic Preservation, *supra* note 132, at 27-29; NCHRP, *supra* note 144, at 124. *Cf.* Parker & King, *supra* note 145, at 7-8; STAPP & BURNEY, *supra* note 144, at 122-23.

147. *Interior's Standards*, *supra* note 137, at 31; Advisory Council on Historic Preservation, *supra* note 132, at 29-30; NATHPO, *supra* note 142, at 39.

148. Advisory Council on Historic Preservation, *supra* note 132, at 29; NATHPO, *supra* note 142, at 39.

149. NCHRP, *supra* note 144, at 125; STAPP & BURNEY, *supra* note 144, at 121 (stating that most tribes lack discretionary funds and cannot consult on an equal footing without funding).

150. *Interior's Standards*, *supra* note 137, at 31; Advisory Council on Historic Preservation, *supra* note 132, at 19; 36 C.F.R. § 800.11(c)(1); *see* Parker & King, *supra* note 145, at 8.

151. *See also* Saramaka People v. Suriname, Inter-American Court of Human Rights, Series C 172 (Nov. 28, 2007), para. 133 (suggesting steps for Suriname to effectively consult with the Saramaka: consult early in the development process and pursuant to Indigenous customs and traditions, accept and disseminate full information with constant communications, and conduct the consultation in good faith and with the objective of reaching an agreement); Jeremie Gilbert & Cathal Doyle, *A New Dawn Over the Land: Shedding Light on Collective Ownership and Consent*, *in* REFLECTIONS ON THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 315 (Stephen Allen & Alexandra Xanthaki eds., 2011) [hereinafter REFLECTIONS] (listing best practices as good faith; free from all external manipulations or coercion or intimidation; consult early in the process before approving any project activities; full disclosures of all information; Indigenous peoples have the right to approve or reject a project based on their community consensus and traditional decision making procedures; might require multiple consents spanning the entire project life cycle; and effective grievance mechanisms).

C. THE TRIBAL RESPONSE—TOO MUCH AND TOO LITTLE

Tribal governments and communities are pleased when the United States respects their rights, interests, and sovereignty, and when they are able to participate in making decisions about projects and actions that might impact their interests.[152] But tribal governments have many concerns about current federal consultation efforts and would no doubt argue that best practices are rarely used in federal consultations. Ironically, federal efforts to date might be both "too much" and "too little."

The consultations might be "too much" because there are myriad federal agencies that are all clamoring for tribal governments to consult with on every subject under the sun. Tribal governments have been inundated with consultation requests in recent decades.[153] The presidential executive orders and memoranda have created a cottage industry in tribal consultations. But most Indian governments do not have sufficient numbers of employees, government officials, and/or the funding to effectively study, plan, travel, and fully engage in all of these requested consultations.[154] Consequently, the National Congress of American Indians, the preeminent national tribal organization, suggested in 2006 that the federal government should distinguish between major federal actions of national importance that require substantial and prolonged consultations versus actions of minor importance.[155]

More importantly, the federal consultations are also "too little" in that many tribes and Indians see them as almost meaningless and that tribal input produces so few and such minor, concrete results as to not be worth the time, effort, and money tribes and individual Indians are expending.[156] The lack of a consent requirement—actual consent by a tribe before federal agencies can proceed—is one of the main sticking points. In addition, the United Nations Declaration and the newly adopted standard of free, prior, and informed consent have raised the bar and the expectations for Indian nations about consulting with the federal government.

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152. *See* NCAI Letter, *supra* note 143, Background and Recommendations at 1.

153. Testimony of National Congress of American Indians 4 (April 9, 2008) [hereinafter Testimony] (stating that tribal leaders are being "consulted to death" and noting over thirty consultations in the past year alone), http://www ncai.org/attachments/ConsultationqikBfAquy WllLGSqdNYagbaMeCHbArgk PhBppxNXdDcYhNXMPCu2%20NCAITestimony-HR5608.pdf; NCAI Letter, *supra* note 143.

154. Testimony, *supra* note 153, at 4.

155. National Congress of American Indians, Resolution #SAC 06-026, 1-2, Adopted 63d Annual Session, Sacramento, CA (Oct. 1-6, 2006), http://www ncai.org/attachments/ ConsultationqikBfAquyWllLGSqdNYagbaMeCHbArgkPhBppxNXdDcYhNXMPCu2%20NCAI Testimony-HR5608.pdf.

156. *See* Testimony, *supra* note 153, at 1, 4; Haskew, *supra* note 72, at 28 (stating that consultations that are not enforceable "are ultimately worthless.").

1. *Meaningful Consultations*

Many tribal leaders do not believe they have much input regarding the actual decisions being made by federal agencies.[157] Often agencies have already made a decision and/or committed funding to a project before consulting with tribes, and the consultation is really more an example of "decide and defend" or procedural hoop jumping.[158] A real consultation is supposed to enable one party to provide input about its concerns and expectations to another before a decision is made and to see the information given and opinions expressed integrated into the decision-making process. Tribes complain that this rarely happens in the United States. For example, a Navajo Nation president described the consultations that occur at the Bureau of Indian Affairs Tribal Budget Advisory Council in this way:

> [T]ribal leaders come in to ask the BIA for help to protect our resources, our culture, our existence. . . . While the tribal leaders pour out their hearts talking about the needs of their people, BIA bureaucrats impassively listening. All the while, the BIA officials know that the budgetary decisions have already been made, and that "consultation" is nothing more than a pretense to being able to say that we listened and took notes . . . . Consultation in my mind is more than sitting there and listening; consultation is acting on the information.[159]

The National Congress of American Indians also states that agencies vary in their interpretations of what constitutes meaningful consultations,[160] and that federal consultation policies are still "uneven in their application or adoption across entire departments."[161]

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157. *See* NCAI Letter, *supra* note 143, Background and Recommendations at 1; Testimony, *supra* note 153, at 1-2; STAPP & BURNEY, *supra* note 144, at 122 (arguing that if tribal recommendations and comments are not listened to and seriously considered, then the process is meaningless and a waste of the tribe's time).

158. *See* NCAI Letter, *supra* note 143, Background and Recommendations at 3; Testimony, *supra* note 153, at 2 (agency already made decision); STAPP & BURNEY, *supra* note 144, at 119-20 (asking does an agency truly want to know something or is it just checking the box "Have you consulted?"); Haskew, *supra* note 72, at 25.

159. *Hearing on H.R. 3490, H.R. 3522, H.R. 5608, H.R. 5680, and S. 2457 Before the H. Comm. on Natural Resources,* 110th Cong. 4 (2008) (statement of Dr. Joe Shirley, Jr., President of the Navajo Nation) [hereinafter *Hearing*], http://naturalresources. house.gov/uploadedfiles/Shirley testimony04.09.08.pdf.

160. *See generally* National Congress of American Indians*, supra* note 126.

161. Testimony, *supra* note 153, at 6. *Accord* NCAI Letter, *supra* note 143, Background and Recommendations at 1-2; *Hearing*, *supra* note 159, at 1, 3-4 (statement of Dr. Joe Shirley, Jr., President of the Navajo Nation).

Tribal leaders also often complain that they are not allowed to consult with the real decision makers.[162] Tribes often request to meet with senior agency officials but that rarely occurs.[163] In fact, in 2013 ten tribes walked out of an alleged consultation on the Keystone pipeline because President Obama was not in attendance.[164] Also, in 2001 over 200 tribal representatives walked out of a Department of Housing and Urban Development meeting, which was ironically about the HUD consultation process, because they did not believe the consultation respected tribal sovereignty or was a true government-to-government consultation.[165]

2. *Enforceable Consultations*

The Executive Orders and memoranda expressly state that they are not legally enforceable and do not create any rights, benefits, or new trust responsibilities for Indian tribes.[166] Furthermore, they can be withdrawn by later presidents or less vigorously enforced by later administrations.[167] Thus, some tribal leaders have advocated for a concrete method to hold the federal government accountable for failing to consult or for ignoring tribal views. Without a means of enforceability, the only remedy available to tribes is to complain to the president that an executive branch agency is failing to consult.[168] For this very reason, in 2008 H.R. 5608 was introduced "to establish regular and meaningful consultation and

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162. Testimony, *supra* note 153, at 4. *See also* Routel & Holth, *supra* note 127, at 458 (noting the federal government usually sends low-ranking employees to consultation sessions).

163. *See* Quechan Tribe of the Fort Yuma Reservation v. U.S. Dep't of the Interior, 755 F. Supp. 2d 1104, 1111 (S.D. Cal. 2010).

164. Jacob Devaney, *Sovereign Nations Walk Out of Meeting With U.S. State Department Unanimously Rejecting Keystone XL Pipeline*, HUFFINGTON POST, May 17, 2013, http://www huffingtonpost.com/jacob-devaney/sovereign-nations-walk-ou_b_3289501 html; *Chiefs Declare Keystone XL Consultation Meeting Invalid*, INDIAN COUNTRY TODAY, May 17, 2013, http://indiancountrytodaymedianetwork.com/2013/05/17/chiefs-declare-keystone-xl-consultation-meeting-invalid-walk-out-state-department.

165. Brian Stockes, *Tribes Reject HUD Consultation Policy*, INDIAN COUNTRY TODAY, Aug. 1, 2001, http://indiancountrytodaymedianetwork.com/2001/08/01/tribes-reject-hud-consultation-policy-85005.

166. Exec. Order No. 13,175, *supra* note 110, at 67,252; Bush Memorandum, *supra* note 118; Obama Memorandum, *supra* note 119, at 57,882 (Nov. 9, 2009). One commentator states that "consultation rights" that "create no substantive duty on the part of the agency" shows that "'consultation' is the latest federal codeword for lip service." Haskew, *supra* note 72, at 73.

167. *See Hearing*, *supra* note 159, at 3 (statement of Dr. Joe Shirley, Jr., President of the Navajo Nation).

168. *See* NCAI Letter, *supra* note 143, Background and Recommendations at 2-3; Testimony, *supra* note 153, at 4; *Hearing*, *supra* note 159, at 3 (statement of Dr. Joe Shirley, Jr., President of the Navajo Nation) ("Executive Orders and memorandums do not carry the full force of law. Presidents for decades have paid lip service to the idea of tribal sovereignty and self-determination with little practical effect.").

collaboration with tribal officials in the development of Federal policies."[169] The bill defined an "accountable consultation process" and would have created a legal right to consultations that tribes could enforce in court.[170] The bill was referred to the House Committee on Natural Resources and a hearing was held, but the bill never passed the committee stage.[171]

3. *No Consent*

Many Indian governments are less than excited about consultations that do not have a tribal consent requirement. What is the purpose of taking the time and effort to study an issue, develop a position, and then have the federal government give it only modest consideration, if even that?[172] Administration officials often realize they do not have to obtain tribal consent and even have downplayed President Clinton's 2000 Executive Order.[173]

In conclusion, it is probably correct to state that most tribal governments are not satisfied with the current federal consultation process, no matter how much it has been emphasized and possibly improved in recent decades. Indian nations do not believe the federal government is fulfilling its trust duties towards tribes,[174] nor is it giving tribes a real voice in decisions that vitally affect them and their lands and resources.[175] Is there perhaps a better system for the United States to consult and work with American Indian nations?

IV. THE INTERNATIONAL LAW PRINCIPLE OF FREE, PRIOR, AND INFORMED CONSENT

Indigenous nations and advocates from around the world achieved a great accomplishment when the United Nations General Assembly adopted the Declaration on the Rights of Indigenous Peoples ("DRIP" or "Declaration") in September 2007.[176] While the effort took nearly thirty

169. *Consultation and Coordination with Indian Tribal Governments Act,* H.R. 5608, 110th Cong. (2008).

170. Testimony, *supra* note 153, at 5.

171. *Id.*

172. Haskew, *supra* note 72, at 28 ("[C]onsultations are ultimately worthless.").

173. *See, e.g.*, *Hearing*, *supra* note 159, at 3-4 (statement of Dr. Joe Shirley, Jr., President of the Navajo Nation)

174. Routel & Holth, *supra* note 127, at 429-35, 474-75; Haskew, *supra* note 72, at 29-31. For a succinct discussion of the trust duty, *see* COHEN'S, *supra* note 31, at 412-16.

175. *See generally* NCAI Letter, *supra* note 143.

176. Julian Burger, *The UN Declaration on the Rights of Indigenous Peoples: From Advocacy to Implementation*, *in* REFLECTIONS, *supra* note 151, at 42; JAMES (SA'KE'J) YOUNGBLOOD HENDERSON, INDIGENOUS DIPLOMACY AND THE RIGHTS OF PEOPLE: ACHIEVING

years, it still seems almost miraculous that Indigenous nations, Indigenous peoples and organizations, and their supporters were able to push their way to the U.N. table, which is after all a nation/state organization, and gain nearly unanimous support for the DRIP.[177]

Among its many provisions, the DRIP significantly strengthened the emerging international law principle that states must consult with Indigenous nations and peoples in many circumstances and must often even acquire their informed consent before undertaking state actions that might impact Indigenous peoples and their rights.[178] In this section we undertake a detailed and original examination of the evolution of FPIC and its adoption in the DRIP and whether states really must obtain the consent of Indigenous peoples in certain situations.

A. CREATING THE DECLARATION

In 1972, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities (part of the U.N. Commission on Human Rights) appointed a Special Rapporteur to study discrimination against Indigenous peoples.[179] Subsequently, a significant U.N. conference for Indigenous peoples was held in 1977 during which the delegates created a declaration of principles to defend the rights of Indigenous nations.[180] In addition, in 1982 the report that had been ordered in 1972 for the Sub-Commission was finished.[181] In response to the report and the 1977 conference, the Sub-Commission created a Working Group on Indigenous Populations ("WGIP") and assigned it two tasks: (1) to review the promotion and

UN RECOGNITION 10-12, 24 (2008); ALEXANDRA XANTHAKI, INDIGENOUS RIGHTS AND UNITED NATIONS STANDARDS: SELF-DETERMINATION, CULTURE AND LAND 102-05 (2007).

177. Erica-Irene A. Daes, *The Contribution of the Working Group on Indigenous Populations to the Genesis and Evolution of the UN Declaration on the Rights of Indigenous Peoples*, *in* MAKING THE DECLARATION WORK: THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 74 (Claire Charters & Rodolfo Stavenhagen eds., 2009), http://www.internationalfunders.org/documents/MakingtheDeclarationWork.pdf (the WGIP made every effort to include Indigenous peoples' primary aspirations in the Declaration; no other U.N. human rights instrument has had such direct involvement of the intended beneficiaries); Luis-Enrique Chávez, *The Declaration on the Rights of Indigenous Peoples Breaking the Impasse: The Middle Ground*, *in id.* at 97-98; Luis Alfonso de Alba, *The Human Rights Council's Adoption of the United Nations Declaration on the Rights of Indigenous Peoples*, *in id.* at 111.

178. Inter-American Commission on Human Rights, *Indigenous and Tribal Peoples' Rightsover Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, 35 AM. INDIAN L. REV. 263, 452, 454, 456, 461 (2010-2011); XANTHAKI, *supra* note 176, at 255, 284.

179. HENDERSON, *supra* note 176, at 34; Augusto Willemsen Diaz, *How Indigenous Peoples' Rights Reached the UN*, *in* MAKING THE DECLARATION WORK, *supra* note 177, at 23.

180. HENDERSON, *supra* note 176, at 34; Diaz, *supra* note 179, at 21-22. Another significant meeting of Non-Governmental Organizations occurred in 1981 as well as various other meetings. *See id.*

181. HENDERSON, *supra* note 176, at 34.

protection of human rights and fundamental freedoms for Indigenous peoples, and (2) to file a report.[182] Five human rights experts from around the world were selected to be the WGIP.[183] The WGIP, however, allowed Indigenous peoples and organizations to participate fully in its annual meetings and up to 1000 people attended these meetings, along with many senior government officials.[184]

In 1993, after eleven years of annual working sessions, the WGIP experts and the Indigenous participants reached consensus on a Draft Declaration on the Rights of Indigenous Peoples.[185] In 1994, the U.N. Sub-Commission approved the text without a vote.[186] Many nations/states, however, were unhappy with the Draft, thus the Sub-Commission requested a review by the U.N. Secretariat to ensure it was consistent with U.N. human rights standards.[187] The Sub-Commission ultimately adopted the Draft and sent it to the Commission on Human Rights, although many states still resisted the Draft and lobbied the Commission not to adopt it.[188]

Due to the state opposition, in 1995 the Commission took the cautious route and created an open-ended working group of fifty-three state representatives, called the Working Group on the Draft Declaration ("WGDD"), to review the Draft.[189] Commentators claim that most states wanted to rewrite the entire Draft but that Indigenous peoples insisted on no changes at all.[190] Commentators also allege that some states devoted significant work to revising the Draft and presented elaborate counter-proposals to the WGDD each year.[191]

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182. *Id.* at 41-42, n.110; Diaz, *supra* note 179, at 22, 26. The WGIP, however, was located at the lowest level of the UN hierarchy. HENDERSON, *supra* note 176, at 41.

183. HENDERSON, *supra* note 176, at 42.

184. Diaz, *supra* note 179, at 27; HENDERSON, *supra* note 176, at 47-48 (stating that at the first WGIP meeting fourteen Indigenous organizations attended but that by the ninth working session more than seventy attended with more than 2500 delegates a year attempting to participate).

185. HENDERSON, *supra* note 176, at 51; Diaz, *supra* note 179, at 28.

186. Diaz, *supra* note 179, at 28.

187. HENDERSON, *supra* note 176, at 67.

188. *Id.* Indigenous representatives insisted on a policy of "no change" to the Draft. de Alba, *supra* note 177, at 111.

189. Mauro Barelli, *Shaping Indigenous Self-Determination: Promising or Unsatisfactory Solutions?*, 13 INT'L COMM. L. REV. 413, 420 (2011) [hereinafter Barelli, *Shaping Indigenous Self-Determination*], http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1991756 (last visited July 4, 2014).

190. HENDERSON, *supra* note 176, at 67, 69; Asbjorn Eide, *The Indigenous Peoples, The Working Group on Indigenous Populations and the Adoption of the UN Declaration on the Rights of Indigenous Peoples'*, *in* MAKING THE DECLARATION WORK, *supra* note 177, at 38; XANTHAKI, *supra* note 176, at 104; John B. Henriksen, *The UN Declaration on the Rights of Indigenous Peoples: Some Key Issues and Events in the Process*, *in* MAKING THE DECLARATION WORK, *supra* note 177, at 79.

191. HENDERSON, *supra* note 176, at 70.

By the end of the U.N. Decade of Indigenous Peoples in 2004, consensus had been reached on only two of the forty-five articles in the Draft Declaration![192] As the idea of a second Decade of Indigenous Peoples was being floated in 2004, the U.N. General Assembly and the Secretary-General put pressure on the Commission to finish the Draft.[193] The WGDD, the state representatives, and the Indigenous representatives did not reach consensus on a Draft Declaration.[194] Instead, in March 2006 the Chairman of the WGDD submitted his final revised proposal for a Declaration to the U.N. Human Rights Council, which had replaced the now-defunct Commission on Human Rights. The new Human Rights Council ("HRC") adopted the Chairman's proposal without making any substantive changes in June 2006 by a vote of thirty states yes, to two states no (Canada and the Russian Federation), with twelve states abstaining or absent.[195]

The HRC Draft Declaration was then expected to be voted on and ratified by the General Assembly in fall of 2006, but the African Group of States (allegedly encouraged by Australia, Canada, New Zealand, and the United States[196]) delayed the process.[197] After further negotiations and the addition of nine amendments, the General Assembly adopted the Declaration on September 13, 2007, by a vote of 143-4 with 11 abstentions.[198] All four countries that voted no in 2007 have since stated their official support for the DRIP.[199]

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192. *Id.* at 71; Henriksen, *supra* note 190, at 82.

193. de Alba, *supra* note 177, at 109-10; HENDERSON, *supra* note 176, at 72.

194. HENDERSON, *supra* note 176, at 74; Diaz, *supra* note 179, at 28.

195. Diaz, *supra* note 179, at 28; Eide, *supra* note 190, at 39 (stating that the United States, New Zealand, and Australia officially protested the adoption even though they were not on the HRC).

196. Barelli, *Shaping Indigenous Self-Determination*, *supra* note 189, at 423; de Alba, *supra* note 177, at 123, 128; Eide, *supra* note 190, at 38.

197. Diaz, *supra* note 179, at 28; Eide, *supra* note 190, at 38.

198. *See* Press Release, General Assembly, General Assembly Adopts Declaration on Rights of Indigenous Peoples; 'Major Step Forward' Towards Human Rights for All, Says President, U.N. Press Release GA/10612 (Sept. 13, 2007), http://www.un.org/press/en/2007/ga106 12.doc htm (last visited July 5, 2015); Diaz, *supra* note 179, at 28 (Australia, Canada, New Zealand and the United States voted no).

199. *Australia's Support of the Declaration of the Rights of Indigenous Peoples*, AUSTRALIAN HUMAN RIGHTS COMM'N, https://www humanrights.gov.au/publications/australias-support-declaration-rights-indigenous-peoples (last visited July 5, 2015) [hereinafter *Australia's Support*]; *Declaration on the Rights of Indigenous Peoples*, NEW ZEALAND MINISTRY OF FOREIGN AFFAIRS & TRADE, http://www mfat.govt nz/Foreign-Relations/1-Global-Issues/Human-Rights/Indigenous-Peoples/draftdec-jun07.php (last visited July 5, 2015) [hereinafter NEW ZEALAND]; *Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples*, ABORIGINAL AFFAIRS AND N. DEV. CANADA (Nov. 12, 2010), http://www.aadnc-aandc.gc.ca/eng/1309374239861/1309374546142 [hereinafter *Canada's Statement of Support*]; *Announcement of U.S. Support for the United Nations Declaration on the*

B. LEGISLATIVE HISTORY OF FPIC

The exact phrase "free, prior and informed consent" appeared in the Draft Declaration for the first time after the eleventh working session of the WGDD in 2005–2006 in the chairman's March 2006 revised proposal for the Draft.[200] But the idea that Indigenous peoples have the right to consent, or not, prior to the commencement of state projects and programs that might affect is not new. This idea seems to have appeared in international law circles in 1977 when Indigenous peoples, governments, and organizations became involved in international efforts to protect their rights.

In 1977, the U.N. Economic and Social Council's Sub-Committee on Racism, Racial Discrimination, Apartheid, and Decolonization held a conference in Geneva on discrimination against Indigenous populations.[201] The sixty or so Non-Governmental Organizations ("NGO"), and up to 400 people in attendance, split into groups to study specific issues and to file reports and recommendations.

The Social and Cultural Commission for this conference concluded that Indigenous peoples in the Americas have the right to participate in the political lives of the countries where they live, and it protested, among other things, that sterilization operations were conducted on Indigenous peoples in the "absence of free and informed consent."[202] Moreover, the Economic Commission for this conference addressed the taking of Indigenous lands and the exploitation and damage caused to these lands from development projects that were conducted "without native consultation."[203] And the Final Resolution adopted by the conference delegates recommended that the lands of Indigenous peoples "should not be taken, and their land rights should not be terminated or extinguished without their full and informed

Rights of Indigenous Peoples, U.S. DEP'T OF STATE (Dec. 16, 2010), http://www.state.gov/r/pa/prs/ps/2010/12/153027 htm [hereinafter *Announcement of U.S. Support*].

200. Comm'n on Human Rights, Rep. of the Working Group Established in Accordance with Comm'n on Human Rights Resolution 1995/32 of 3 March 1995 on Its Eleventh Session, U.N. Doc. E/CN.4/2006/79, at 30, 39, 46, 55-56, 61 (Mar. 22, 2006). The Draft Declaration produced by the WGIP contained language very similar to FPIC. *See, e.g.*, *id.* at art. 20 ("States shall obtain the free and informed consent of the peoples concerned before adopting and implementing such measures."). An Indigenous representative used the FPIC phrase during the seventh work session of the WGDD. Comm'n on Human Rights, Rep. of the Working Group Established in Accordance with Comm'n on Human Rights Resolution 1995/32, U.N. Doc. E/CN.4/2002/98, at 9 (Mar. 6, 2002).

201. International Indian Treaty Council, *The Geneva Conference* (Oct. 1977) (doCip CD Rom) (on file with author); *cf. A Documentary History of the Origin and Development of Indigenous Peoples Day*, INDIGENOUS PEOPLES DAY, http://ipdpowwow.org/Archives1 html (last visited Aug. 12, 2015).

202. International Indian Treaty Council, *supra* note 201, at 18.

203. *Id.* at 14-15.

consent" and that all governments should engage in "meaningful negotiations" with Indigenous peoples relative to their lands.[204]

The delegates also developed a Declaration of Principles, which included consent provisions. The Principles stated that Indigenous treaties and agreements should not be subject to unilateral abrogation, no state should assert a claim over an Indigenous nation except pursuant to agreements "freely made," and disputes should be settled by procedures "mutually acceptable to the parties."[205]

1. *The Working Group on Indigenous Populations and the Draft Declaration 1982–1994*

As already noted, in 1982 the U.N. Economic and Social Council authorized the Sub-Commission on Prevention of Discrimination and Protection of Minorities to establish a Working Group on Indigenous Populations ("WGIP").[206] Five independent human rights experts were appointed to be the WGIP. This group was directed to review current developments on the rights of Indigenous peoples and to draft standards to promote and protect these rights.[207]

The WGIP held annual sessions from 1982 to 1993. In 1982, several comments were received from WGIP members and Indigenous representatives that international and national standards concerning Indigenous peoples should be drafted only after consultations, that policies on the national recognition of Indigenous peoples' rights should not be formulated without consultations, and that Indigenous peoples needed to be consulted on their rights to participate in national development decisions.[208] Interestingly, many Indigenous and NGO representatives stated that any modification of Indigenous peoples' land rights and development projects

204. *Id.* at 22-23.

205. *Id.* at 25-26. In 1981, the same U.N. Sub-Committee organized another conference on Indigenous peoples. World Federation of Democratic Youth, *International NGO Conference on Indigenous Peoples and the Land* (1981). The report of this conference reaffirmed many points from the 1977 conference, *id.* at 16, when it stated that the lands of Indigenous peoples "should not be terminated or extinguished without their full and informed consent." *Id.* Some delegates argued that states that did not have constitutional provisions addressing Indigenous peoples should enact them, and Indigenous nations and peoples should determine for themselves "in negotiations with the governments concerned, the scope and language of the constitutional amendments." *Id.* at 15-16.

206. The idea to form a working group was suggested in the Final Resolution of the 1977 Geneva Indigenous conference on discrimination against Indigenous peoples. *See* International Indian Treaty Council, *supra* note 201, at 24.

207. Daes, *supra* note 177, at 48. Ms. Daes was the Chair of the WGIP during the times relevant to our discussion.

208. Comm'n on Human Rights, Rep. of the Working Group on Indigenous Populations on Its First Session, U.N. Doc. E/CN.4/Sub.2/1982/33, at 15-16 (Aug. 25, 1982).

to be operated within those lands "should be made only with the consent of the indigenous group concerned and only after a thorough and public discussion involving those populations had been held."[209] In the 1983 session, several observers repeated that Indigenous peoples should be able to participate by consultation and consent in all decisions regarding development projects in their territories or that would have an impact on them.[210]

Significantly, in September 1984 the WGIP chairperson, Erica-Irene Daes from Greece, represented the WGIP at a World Council of Indigenous Peoples meeting in Panama.[211] At this World Council, hundreds of Indigenous attendees demanded that the U.N. formally recognize and protect their basic rights and insisted that the U.N. adopt a declaration or a treaty/convention to accomplish this purpose.[212] Ms. Daes participated in extensive consultations at this 1984 conference, and these efforts led to the drafting of seventeen principles that she states became the basis for the Draft Declaration on the Rights of Indigenous Peoples.[213] The following principles relevant to FPIC were developed by consensus at the Panama conference:

- Indigenous peoples are entitled to participate in the political life of the state;
- Indigenous peoples have exclusive rights to their traditional lands and resources, and if these have been taken without "their free and informed consent" they must be returned;
- no actions may be undertaken which directly or indirectly result in the destruction of the land, air, water, sea ice, and other resources of Indigenous peoples "without the free and informed consent of the indigenous peoples affected"; and
- Indigenous peoples have the right to be "previously consulted and to authorize" technological and scientific investigations conducted within their territories.[214]

In addition, Ms. Daes reports that another "important drafting text"[215] was submitted by six Indigenous NGOs at the WGIP fourth working

209. *Id.* at 20.

210. Comm'n on Human Rights, Rep. of the Working Group on Indigenous Populations on Its Second Session, U.N. Doc. E/CN.4/Sub.2/1983/22, at 11 (Aug. 23, 1983).

211. Daes, *supra* note 177, at 49.

212. *Id.* at 49, 59.

213. *Id.* at 49.

214. *Id.*; Comm'n on Human Rights, Rep. of the Working Group on Indigenous Populations on Its Fourth Session, U.N. Doc. E/CN.4/Sub.2/1985/22, annex III (Aug. 27, 1985).

215. Daes, *supra* note 177, at 51.

session in 1985.[216] The Declaration of Principles presented by these NGOs states, in relevant part:

- Rights to share and use lands owned by Indigenous nations or peoples "may be granted by their free and informed consent, as evidenced in a valid treaty or agreement";
- No state shall deny the right of Indigenous nations, communities, or peoples to participate in the life of the state;
- No technological, scientific, or social investigations shall take place in relation to Indigenous peoples or their lands "without their prior authorization"; and
- Jurisdictional disputes regarding the territories and institutions of Indigenous peoples "must be resolved by mutual agreement or valid treaty."[217]

In her opening statement in 1985 to the fourth session of the WGIP, Ms. Daes expressly stated that these two sets of principles should constitute the basis for drafting a declaration.[218]

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216. The Indian Law Resource Center, the Four Directions Council, the National Aboriginal and Islander Legal Service, the National Indian Youth Council, the Inuit Circumpolar Conference, and the International Indian Treaty Council. Comm'n on Human Rights, Rep. of the Working Group on Indigenous Populations on Its Fourth Session, U.N. Doc. E/CN.4/Sub.2/1985/22, annex IV (Aug. 27, 1985).

217. Daes, *supra* note 177, at 51-52.

218. *Id.* at 53, 59; Comm'n on Human Rights, Rep. of the Working Group on Indigenous Populations on Its Fourth Session, U.N. Doc. E/CN.4/Sub.2/1985/22, at 17 (Aug. 27, 1985). Other international efforts regarding Indigenous rights occurred somewhat parallel to the WGIP. The International Labour Organization ("ILO") was in the process of replacing its 1957 treaty regarding Indigenous peoples in the mid-to-late 1980s and concluded that process in 1989. But ILO convention 169 only requires states to consult with Indigenous peoples; there is no consent requirement. *No. 169 of 1989 Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, INTERNATIONAL LABOUR ORGANIZATION, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312314 (last visited July 4, 2015). And, it has only been ratified by 20 countries. *Monitoring Indigenous and Tribal Peoples' Rights Through ILO Conventions*, INTERNATIONAL LABOUR ORGANIZATION, http://www.ilo.org/wcmsp5/groups/public/—-ednorm/—normes/documents/publication/wcms 126028.pdf. ILO 169 was mentioned during the WGIP work sessions but was generally dismissed by Indigenous representatives because it did not contain consent requirements. *E.g.*, Comm'n on Human Rights, Rep. of the Working Group on Indigenous Populations on Its Fourth Session, U.N. Doc. E/CN.4/Sub.2/1985/22, at 16 (Aug. 27, 1985); Comm'n on Human Rights, Rep. of the Working Group on Indigenous Populations on Its Sixth Session, U.N. Doc. E/CN.4/Sub.2/1988/24, at 25 (Aug. 24, 1988); Comm'n on Human Rights, Rep. of the Working Group on Indigenous Populations on Its Eighth Session, U.N. Doc. E/CN.4/Sub.2/1990/42, at 12, 26 (Aug. 27, 1990).

In 1987–1991, the World Bank revised its policies regarding Indigenous peoples, but it only requires consultation with Indigenous peoples and not consent. Mauro Barelli, *Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges Ahead*, 16 INT'L J. OF HUMAN RIGHTS 1, 7-9 (2012) [hereinafter Barelli, *Free, Prior and Informed Consent*], http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1991731. But in 2011, the International Finance Corporation, an arm of the World Bank, adopted a performance standard that requires obtaining FPIC from affected Indigenous peoples regarding environmental and social sustainability issues. *Overview of Performance Standards on*

The principles of consultation and consent were strengthened in the WGIP fifth session in 1987.[219] NGO observers and Indigenous organizations continued to press for mechanisms to require Indigenous consent for government actions that affected them and for a declaration that "free and informed consent" in many areas of Indigenous life was an essential element of their self-determination.[220] One NGO proposed that the WGIP adopt this principle concerning Indigenous participation: "The right to be informed of any proposed actions which may affect the well being of any indigenous peoples or communities and to participate in all related decision-making processes."[221] The WGIP and the Indigenous participants agreed to draft a declaration, and Daes was assigned the task of compiling a first draft in line with the comments from the working sessions held to date and the principles presented by the Indigenous peoples.[222]

In 1988, Daes presented the first full draft of a declaration at the WGIP's sixth session.[223] The draft, not surprisingly, included several provisions on FPIC. For example, the preamble endorsed a call for Indigenous "participation in and consultation about" development efforts; article 12 stated that "lands may only be taken away from [Indigenous peoples] with their free and informed consent as witnessed by a treaty or agreement."[224] Other articles proclaimed: (1) the Indigenous peoples' right

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Environmental and Social Sustainability, INTERNATIONAL FINANCE CORPORATION 3 (Jan. 1, 2012), http://www.ifc.org/wps/wcm/connect/1ee7038049a79139b845faa8c6a8312a/PS7English2012.pdf?MOD=AJPERES. *See also* Shalanda H. Baker, *Why the IFC's Free, Prior and Informed Consent Policy Does Not Matter (Yet) to Indigenous Communities Affected by Development Projects*, 30 WIS. INT'L L.J. 668 (2012).

Furthermore, an Indigenous representative brought to the attention of the Working Group on the Draft Declaration an interpretation by the U.N. Committee on the Elimination of Racism and Discrimination of its standards. This interpretation required states to obtain consent before making "decisions that directly impact [Indigenous peoples'] rights and interests." Comm'n on Human Rights, Rep. of the Working Group Established in Accordance with Comm'n on Human Rights Resolution 1995/32, U.N. Doc. E/CN.4/1998/106, at 7 (Dec. 15, 1997).

219. A 1987 study commissioned by the U.N. Sub-Committee also stated that Indigenous peoples should be consulted and give "explicit consent" before mining and multinational corporation activities occur within their territories. José R. Martínez Cobo (Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities), *Study of the Problem of Discrimination Against Indigenous Populations*, *Volume 5*, U.N. Doc E/CN.4/sub.2/1986/7/Add.4, at 41 (1987).

220. Comm'n on Human Rights, Rep. of the Working Group on Indigenous Populations on Its Fifth Session, U.N. Doc. E/CN.4/Sub.2/1987/22, at 9, 14 (1987).

221. *Id.* at 17.

222. *Id.* at 17; Daes, *supra* note 177, at 59-60, 63.

223. *Daes*, *supra* note 177, at 63; Comm'n on Human Rights, Rep. of the Working Group on Indigenous Populations on Its Sixth Session, U.N. Doc. E/CN.4/Sub.2/1988/24, annex II at 32-36 (Aug. 24, 1988).

224. Comm'n on Human Rights, Rep. of the Working Group on Indigenous Populations on Its Sixth Session, U.N. Doc. E/CN.4/Sub.2/1988/24, annex II at 32-36 (Aug. 24, 1988); *see also* Daes, *supra* note 177, at 63*;*

to reclaim lands and resources "taken away from them without consent"; (2) a right to protection from pollution of their land, air, water, sea ice, and other resources caused "without free and informed consent"; (3) that states have a duty "to seek and obtain their consent" before exploiting mineral resources in Indigenous territories; (4) a right to consent to state measures to assist them with social and economic conditions; and (5) a right to participate fully in the political life of the state and "in decision-making about and implementation of all national and international matters that may affect their life and destiny."[225]

Throughout the working sessions on the draft declaration, the WGIP repeatedly requested comments from Indigenous peoples and organizations and state governments.[226] The WGIP also continued to amend and expand the first draft at its seventh, eighth, ninth, and tenth sessions in response to comments, including many on consultation, both pro and con, from governments, Indigenous peoples, organizations, and informal drafting committees.[227] After these four years of work sessions, comments on the first draft, and the drafting of amendments, the WGIP presented what was expected to be the final draft at its eleventh session in 1993.[228] After further long discussions, including many comments by state observers,[229] the WGIP accepted this document by consensus and submitted it as the proposed Draft Declaration to the U.N. Sub-Commission.[230] In 1994, the Sub-Commission approved it without a vote and sent it to the U.N. Commission on Human Rights.[231]

This Draft Declaration contained several provisions regarding free, prior, and informed consent. There were at least five provisions that expressly required the "free and informed consent" of Indigenous peoples

225. Comm'n on Human Rights, Rep. of the Working Group on Indigenous Populations on Its Sixth Session, U.N. Doc. E/CN.4/Sub.2/1988/24, annex II at 32-36 (Aug. 24, 1988).

226. Daes, *supra* note 177, at 64.

227. The WGIP received many comments from governments and Indigenous peoples on consultation and consent. *See, e.g.*, Comm'n on Human Rights, Rep. of the Working Group on Indigenous Populations on Its Seventh Session, U.N. Doc. E/CN.4/Sub.2/1989/36, at 13, 20, 23-24, 31-33 (1989); Comm'n on Human Rights, Rep. of the Working Group on Indigenous Populations on Its Eighth Session, U.N. Doc. E/CN.4/Sub.2/1990/42, at 8, 14, 19, 24, 26 (1990); Comm'n on Human Rights, Rep. of the Working Group on Indigenous Populations on Its Ninth Session, U.N. Doc. E/CN.4/Sub.2/1991/40, at 10, 13, 33-34, 36 (1991); Comm'n on Human Rights, Rep. of the Working Group on Indigenous Populations on Its Tenth Session, U.N. Doc. E/CN.4/Sub.2/1992/33, at 14, 24, 28, 49 (1992).

228. Comm'n on Human Rights, Rep. of the Working Group on Indigenous Populations on Its Eleventh Session, U.N. Doc. E/CN.4/Sub.2/1993/29, at 12 (1993); Daes, *supra* note 177, at 64.

229. Daes, *supra* note 177, at 66-72.

230. *Id.* at 72; Diaz, *supra* note 179, at 28.

231. Daes, *supra* note 177, at 73; Diaz, *supra* note 179, at 28.

before states could undertake various actions,[232] three other articles required consultations before various state actions could be commenced,[233] and at least two provisions required agreements with Indigenous peoples.[234] Once the Draft moved to the U.N. Commission on Human Rights, many states began to fight it in earnest, and FPIC was one of the most controversial and primary targets.[235]

In sum, this Draft Declaration was written by the WGIP with extensive input from Indigenous peoples and organizations, and, in fact, the WGIP actively worked to incorporate the desires and goals of Indigenous peoples into the document.[236] States were not as actively involved in the WGIP

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232. Draft United Nations Declaration on the Rights of Indigenous Peoples, *reprinted in* HENDERSON, *supra* note 176, at 164, art. 10 (allowing no forced removals of Indigenous peoples without their free and informed consent); *id.* at art. 12 (stating Indigenous peoples have the right to restitution of cultural, intellectual, religious and spiritual properties taken "without their free and informed consent"); *id.* at 166 art. 20 ("States shall obtain the free and informed consent of the [indigenous] peoples" before adopting legislative or administrative measures that may affect them.); *id.* at 167 art. 27 ("Indigenous peoples have the right to the restitution of the[ir] lands . . . which have been confiscated, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation."); *id.* at 168 art. 30 (noting Indigenous peoples have "the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources.").

233. *Id.* at 164 art. 13 (noting states shall work "in conjunction with the indigenous peoples" to protect cultural places); *id.* at 165 art. 16 (declaring states shall "in consultation with indigenous peoples" eliminate discrimination); *id.* at 169 art. 37 (noting states shall, "in consultation with the indigenous peoples," adopt national legislation to give effect to the Declaration).

234. *Id.* at 167 art. 28 (stating military activities cannot take place on indigenous lands "unless otherwise freely agreed upon"); *id.* at 169 art. 39 ("Indigenous peoples have the right to have access to and prompt decision through mutually acceptable and fair procedures for the resolution of conflicts . . . .").

235. S.J. ROMBOUTS, HAVING A SAY: INDIGENOUS PEOPLES, INTERNATIONAL LAW AND FREE, PRIOR AND INFORMED CONSENT 15 (2014); Barelli, *Free, Prior and Informed Consent*, *supra* note 218, at 21; Henriksen, *supra* note 190, at 79 (stating that only three governments were willing to accept the Draft Declaration without changes); Luis Rodríguez-Pinero, *The Inter-American System and the UN Declaration on the Rights of Indigenous Peoples: Mutual Reinforcement*, *in* REFLECTIONS, *supra* note 151, at 472 ("FPIC was one of the most controversial issues in the drafting process at the UN, and some of the States that abstained or voted against the Declaration actually voiced concern at the affirmation of FPIC understood as a 'right to veto.'"). *See also* Comm'n on Human Rights, Consideration of a Draft United Nations Declaration on the Rights of Indigenous Peoples, U.N. Doc. E/CN.4/1995/WG.15/2, at para. 14 (Oct. 10, 1995) (stating Argentina objected to article 20 because "the obligation to obtain the consent of the [indigenous] peoples" would be incompatible with the democratic principles of the Argentine constitution); Comm'n on Human Rights, Consideration of a Draft United Nations Declaration on the Rights of Indigenous Peoples, U.N. Doc. E/CN.4/1995/WG.15/2/Add.1, at 5, 7-8 (Nov. 13, 1995) (noting Mexico stated article 30 requiring states to obtain the consent of indigenous peoples before approving projects affecting their lands could violate the Mexican constitution; the United States said article 20 would have to be narrowed because indigenous communities could not have "the unqualified right to veto legislative or administrative measures affecting them.").

236. Comm'n on Human Rights, Rep. of the Working Group on Indigenous Populations on Its Twelfth Session, U.N. Doc. E/CN.4/Sub.2/1994/30, at 28 (Aug. 17, 1994); Erica-Irene Daes, *The UN Declaration on the Rights of Indigenous Peoples: Background and Appraisal*, *in* REFLECTIONS, *supra* note 151, at 38 ("The members of the WGIP and I made every effort to incorporate primary indigenous peoples' aspirations, and also took into account several

process, but they still offered many comments throughout the long process and objected to numerous provisions.[237] But state resistance to the Draft became far more vigorous in front of the Commission on Human Rights after 1994, as the process of creating a declaration to go to a vote in the U.N. General Assembly took thirteen more years.

2. *The Working Group on the Draft Declaration 1995–2006*

State opposition to the WGIP Draft Declaration led the U.N. Commission on Human Rights in 1995 to create an open-ended working group of states, entitled the Working Group on the Draft Declaration ("WGDD"), to review the Draft.[238] Indigenous peoples had no right to participate in the WGDD process, although they were fully included anyway.[239] As already mentioned, many states wanted to completely rewrite the WGIP Draft, but Indigenous peoples and organizations insisted on no changes being made.[240]

The eleven year WGDD process resembled a slow motion negotiation and an attempt by state governments to amend the Draft when the Indigenous peoples and organizations adamantly refused any changes whatsoever. Yet, Indigenous peoples and organizations also demanded to participate fully in informal state-to-state consultations and in the WGDD plenary debates regarding potential changes.[241] The Chairman of the WGDD expressly recognized the difficulty of the situation, and the WGDD

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substantive comments and amendments proposed by various States."); Barelli, *Shaping Indigenous Self-Determination*, *supra* note 189, at 418, 420; Diaz, *supra* note 179, at 28 (declaring that Indigenous peoples were full participants and drafters); Julian Burger, *The United Nations Draft Declaration on the Rights of Indigenous Peoples*, 9 ST. THOMAS L. REV. 209, 210 (1996) (asserting that essentially it is the outcome of a "partnership between experts and indigenous peoples.").

237. *See, e.g.*, Comm'n on Human Rights, Rep. of the Working Group on Indigenous Populations on Its Eighth Session, U.N. Doc. E/CN.4/Sub.2/1990/42, at 25 (Aug. 27, 1990); Barelli, *Free, Prior and Informed Consent*, *supra* note 218, at 19; XANTHAKI, *supra* note 176, at 102 ("States gradually withdrew from the drafting process, attending in small numbers and often reluctant to engage in a dialogue on the provisions.").

238. Barelli, *Shaping Indigenous Self-Determination*, *supra* note 189, at 418, 420 (claiming that states chose not to actively participate in the WGIP so most of the work was performed by the five experts and Indigenous peoples).

239. Diaz, *supra* note 179, at 28.

240. HENDERSON, *supra* note 176, at 67, 69; Chávez, *supra* note 177, at 97, 99-101. In 2000, the Russian representative stated: "the current text of the draft declaration was not acceptable to most Governments." Comm'n on Human Rights, Rep. of the Working Group Established in Accordance with Comm'n on Human Rights Resolution 1995/32, U.N. Doc. E/CN.4/2001/85, at 8 (Feb. 6, 2001).

241. *See, e.g.*, Comm'n on Human Rights, Rep. of the Working Group Established in Accordance with Comm'n on Human Rights Resolution 1995/32, U.N. Doc. E/CN.4/2000/84, at 4 (Dec. 6, 1999); Chávez, *supra* note 177, at 101.

seems to have slowly massaged the annual meetings and pressured the states and Indigenous peoples to accept some changes.[242]

Throughout the eleven years of the WGDD process, states also resisted the consent provisions in the Draft. In fact, starting at the very first work session in 1995, several governments stated they could not accept the FPIC provisions because they created a separate political, legal, and social system for Indigenous peoples that would discriminate against others, and some governments objected to the very term "consent."[243] In the second work session in 1996, many governments began suggesting changes that would have dramatically limited FPIC. Brazil, for example, suggested that the FPIC provision in article 20 should be amended to state that "Indigenous people have the right to participate fully, if they so choose . . . . [and their] informed opinion shall be expressed freely."[244] Brazil also suggested changes to articles 27, 28, and 30; although Indigenous peoples should be active and informed participants in political affairs, Brazil felt states should only have to "take account of their free and informed *opinion* in the approval of any project affecting their lands and their resources."[245]

France also opposed these articles because they impacted state sovereignty and "gave indigenous peoples a right of veto."[246] Other countries also thought that the FPIC in proposed article 20 gave "indigenous peoples a right of veto."[247] Even as late as the seventh work session, the WGDD Chairman summed up the debate on proposed article 10 (forced removals) and said that questions about the meaning of "consent" remained, and states continued to suggest alternative words such as "consultation" or "agreement."[248]

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242. *See, e.g.*, Comm'n on Human Rights, Rep. of the Working Group Established in Accordance with Comm'n on Human Rights Resolution 1995/32 of 3 March 1995 on Its Eleventh Session, U.N. Doc. E/CN.4/2006/79, at 4-5 (Mar. 22, 2006).

243. Comm'n on Human Rights, Rep. of the Working Group Established in Accordance with Comm'n on Human Rights Resolution 1995/32 of 3 March 1995, U.N. Doc. E/CN.4/1996/84, at 15 (Jan. 4, 1996).

244. Comm'n on Human Rights, Rep. of the Working Group Established in Accordance with Comm'n on Human Rights Resolution 1995/32, U.N. Doc. E/CN.4/1997/102, at 37 (Dec. 10, 1996). *Accord id.* at 34-36, 46 (stating Canada suggested, and Japan agreed, that articles 19 and 20 be merged and only reflect the principle that Indigenous peoples have "the right to participate fully in public affairs"; Malaysia also wanted to limit article 20).

245. *Id.* at 48 (emphasis added).

246. *Id.* at 36.

247. *Id.* at 39; *See also* Comm'n on Human Rights, Rep. of the Working Group Established in Accordance with Comm'n on Human Rights Resolution 1995/32, U.N. Doc. E/CN.4/2000/84, at para. 93 (Dec. 6, 1999) (noting the New Zealand representative recognized Indigenous peoples rights but said they must be balanced by the need of governments to own or regulate resources for all citizens).

248. Comm'n on Human Rights, Rep. of the Working Group Established in Accordance with Comm'n on Human Rights Resolution 1995/32, U.N. Doc. E/CN.4/2002/98, at para. 82, annex I

Several of the FPIC provisions, however, were far less controversial and many states agreed, for example, that hazardous materials should not be stored on Indigenous lands and that Indigenous lands should only be taken "with the free and informed consent of indigenous peoples."[249] And many states expressed support for FPIC at different times in somewhat limited fashions.[250]

Very little progress towards agreement on the exact language of the Draft was reached in these work sessions, and mostly informal debates and side consultations occurred. In fact, by the ninth session in 2004, only two of the forty-five articles in the Draft had been accepted by consensus.[251] Consequently, France called on WGDD Chairman Luis-Enrique Chávez to compile language for the Draft that might be approved by consensus.[252] This was itself very controversial because Indigenous representatives were demanding that no changes be made to the WGIP Draft.[253]

Mr. Chávez then created what appears to be his first summary of the proposals suggested to amend and to add new language to the Draft. He circulated this summary as an annex to his report on the ninth session.[254] Pursuant to the proposed changes, he added one new provision of free and informed consent that was not in the WGIP Draft.[255] He of course also reported the objections of most governments to many of the "free and informed consent" provisions and their proposals for amendments.[256] He even suggested alternative language to FPIC in regards to forced removals of Indigenous peoples.[257] And for article 20 (now 19 in the DRIP), he reported a proposal to merge Draft articles 19 and 20, which also removed

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at 24 (Mar. 6, 2002). *See also* Comm'n on Human Rights, Rep. of the Working Group Established in Accordance with Comm'n on Human Rights Resolution 1995/32, U.N. Doc. E/CN.4/2003/92, annex at 21-22 (Jan. 6, 2003) (noting that Australia suggested amending article 30 to delete consent entirely and only require state consultations).

249. Comm'n on Human Rights, Rep. of the Working Group Established in Accordance with Comm'n on Human Rights Resolution 1995/32, U.N. Doc. E/CN.4/2003/92, at para. 37, annex at 23-25 (Jan. 6, 2003) (quoting New Zealand representatives).

250. *See id.* at paras. 44-46 (showing that in discussing article 30, Canada's representative said that "prior informed consent might not be required in all cases").

251. Henriksen, *supra* note 190, at 82; HENDERSON, *supra* note 176, at 71.

252. Comm'n on Human Rights, Rep. of the Working Group Established in Accordance with Comm'n on Human Rights Resolution 1995/32, U.N. Doc. E/CN.4/2004/81, at para. 19 (Jan. 7, 2004).

253. MAKING THE DECLARATION WORK, *supra* note 177, at 97, 99, 101.

254. Comm'n on Human Rights, Rep. of the Working Group Established in Accordance with Comm'n on Human Rights Resolution 1995/32, U.N. Doc. E/CN.4/2004/81, annex at 20 (Jan. 7, 2004).

255. *Id.* annex at 25.

256. *See, e.g.*, *id.* annex at 24.

257. *Id.* annex at 22.

the FPIC provision.[258] In addition, he reported a proposal to change the language in article 30 of the Draft from states having a duty to *obtain* free and informed consent prior to approving development projects affecting Indigenous lands to a duty that states only had to "*seek* their free and informed consent prior to the approval" of any such project.[259] He also summarized a proposal that would have significantly limited the duty of states having to obtain consent by merging articles 25–28 and 30 of the WGIP Draft that addressed several different issues regarding Indigenous lands and rights, such as the exploitation of minerals and the military use of their lands.[260] These state suggestions would have eviscerated the application of FPIC.

Before the start of the tenth session, several states demonstrated their support for limiting FPIC. Denmark, New Zealand, Norway, Switzerland, Finland, Iceland, and Sweden filed their edited version of the WGIP Draft.[261] They left in many of the free and informed consent provisions, but they changed the verb "obtain" into "seek" in articles 20 and 30 (now 19 and 32(2) in the DRIP).[262] In another document, submitted on the same date, these states explained in regards to FPIC that they were trying to affirm the principle of consent "as far as possible."[263]

The tenth session was a split session, and the first part was held September 13–24, 2004.[264] During the break between sessions, on October 14, 2004, the Chairperson filed his second summary of proposals.[265] He again accurately reported the state suggestions to use the word "seek" instead of "obtain" regarding Indigenous consent in articles 20 and 30, and to possibly remove FPIC from article 10 on forced removals.[266] Also during the session break, the Indigenous peoples of Scandinavia, the Saamis, put forward their written proposal for the Draft in which they

258. *Id.* annex at 24.

259. *Id.* annex at 26 (emphasis added).

260. *Id.* annex at 26-27.

261. Comm'n on Human Rights, Working Group Established in Accordance with Comm'n on Human Rights Resolution 1995/32, *Information Provided by States*, U.N. Doc. E/CN.4/2004/WG.15/CRP.1 (Sept. 6, 2004).

262. *Id.* at 9, 11.

263. Comm'n on Human Rights, Working Group Established in Accordance with Comm'n on Human Rights Resolution 1995/32, *Information Provided by States,* U.N. Doc. E/CN.4/2004/WG.15/CRP.2, at 6-7 (Sept. 6, 2004).

264. Comm'n on Human Rights, Rep. of the Working Group Established in Accordance with Comm'n on Human Rights Resolution 1995/32 of 3 March 1995 on Its Tenth Session, U.N. Doc. E/CN.4/2005/89, at 5-6 (Feb. 28, 2005).

265. Comm'n on Human Rights, Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32, *Chairperson's Summary of Proposals,* U.N. Doc. E/CN.4/2004/WG.15/CRP.4, at 1 (Oct. 14, 2004).

266. *Id.* at 17, 28-29, 37-38.

accepted the use of "seek" over "obtain" in article 20 but rejected "seek" in article 30 (article 32(2) of the Declaration) because they argued that states must get FPIC before taking or using the lands and territories of Indigenous peoples.[267]

The tenth session was then completed from November 29 to December 3, 2004.[268] The Indigenous representatives objected vociferously to the Chairman's summary of proposals including the changes suggested to FPIC and the use of "seek" instead of "obtain" in article 30.[269] Indigenous peoples insisted on the return of FPIC language and some even staged a hunger strike and engaged in other protest efforts because of the proposed changes.[270] In a list of the most important issues compiled by Indigenous peoples regarding the Chairman's summary, they stated: "The principles of prior informed consent and full collaboration with affected indigenous peoples must be applied for the effective implementation by States of the provisions throughout the declaration."[271] Obviously no consensus could be reached on the proposed changes to the WGIP Draft after lessening state consent obligations.[272] Throughout the tenth work session, a facilitator was used to conduct discussions. The facilitator strongly suggested that the Chairman delete "seek" from articles 20 and 30 and return to "the verb obtain."[273]

Also during the tenth session, the Chair stated that for the first time he would submit a Chairman's proposal for the entire Draft Declaration, not

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267. Comm'n on Human Rights, Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32, *Information Provided by the Saami Council and the Tebtebba Foundation, Endorsed by the Saami Parliamentarian Council*, U.N. Doc. E/CN.4/2004/WG.15/CRP.5, at 12, 15 (Oct. 28, 2004).

268. Comm'n on Human Rights, Working Group Established in Accordance with Comm'n on Human Rights Resolution 1995/32, *Chairperson's Summary of Proposals,* U.N. Doc. E/CN.4/2004/WG.15/CRP.4, at 1 (Oct. 14, 2004).

269. Comm'n on Human Rights, Rep. of the Working Group Established in Accordance with Comm'n on Human Rights Resolution 1995/32 of 3 March 1995 on Its Tenth Session, U.N. Doc. E/CN.4/2005/89, at para. 35 (Feb. 28, 2005).

270. Comm'n on Human Rights, Rep. of the Working Group Established in Accordance with Comm'n on Human Rights Resolution 199/32 of 3 March 1995, U.N. Doc. E/CN.4/2005/89/Add.1, at 4-5, 8 (Feb. 24, 2005) (displaying written comments submitted by Indigenous organizations after end of the tenth session). *See also* Adelfo Regino Montes & Gustavo Torres Cisneros, *The United Nations Declaration on the Rights of Indigenous Peoples: The Foundation of a New Relationship Between Indigenous Peoples, States and Societies*, in MAKING THE DECLARATION WORK, *supra* note 177, at 143.

271. Comm'n on Human Rights, Rep. of the Working Group Established in Accordance with Comm'n on Human Rights Resolution 199/32 of 3 March 1995, U.N. Doc. E/CN.4/2005/89/Add.1, at 8 (Feb. 24, 2005).

272. Comm. on Human Rights, Rep. of the Working Group Established in Accordance with Comm'n on Human Rights Resolution 1995/32 on Its Tenth Session, U.N. Doc. E/CN.4/2005/89, at 7 (Feb. 28, 2005).

273. *Id.* at 7.

just a summary of the proposals of the states and Indigenous representatives.[274] Chairman Chávez released his proposal on April 1, 2005.[275] In the two most controversial FPIC articles, he used the verb "obtain" regarding consent in article 30, but for article 20, which concerned states obtaining FPIC before enacting legislative and administrative measures that may affect Indigenous peoples, he only required states to "seek" their consent and did not require states to "obtain" consent.[276]

During this ten year process from 1995–2005, the United Nations Decade of Indigenous Peoples had come to an end and the continued existence of the WGDD was in question.[277] In fact, the WGDD was ultimately authorized to work only one more year on the Draft Declaration.[278] Thus, the WGDD met for its final time in its eleventh session from December 5–16, 2005, and January 30 to February 3, 2006, to discuss the Chairman's April 2005 proposal for the Draft.[279]

From the very opening of the session, Chairman Chávez put pressure on the state and Indigenous representatives.[280] He emphasized that this was the last meeting of the WGDD and thus the participants had to be flexible and conciliatory because they had to make clear progress towards creating a text that could be adopted by consensus.[281] He also wanted the text to be as close as possible to the WGIP Draft, but it also had to include the proposed amendments that seemed necessary.[282] Not surprisingly, at the end of the eleventh session, consensus was not reached on the Draft.[283] Consequently, the Chair stated he would revise the proposals he presented after the tenth session, include all the language provided by the eleventh session facilitators, and make his own proposals regarding the articles still pending based on the session discussions.[284]

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274. *Id.*

275. Comm'n on Human Rights, Rep. of the Working Group Established in Accordance with Comm'n on Human Rights Resolution 1995/32 of 3 March 1995 on Its Tenth Session, U.N. Doc. E/CN.4/2005/89/Add.2, at 1 (Apr. 1, 2005).

276. *Id.* at 28, 41. *See also id.* at 17 (noting the Chair proposed that FPIC was required in article 10 for forced removals).

277. *See* Comm'n on Human Rights, Rep. of the Working Group Established in Accordance with Comm'n on Human Rights Resolution 1995/32 of 3 March 1995 on Its Eleventh Session, U.N. Doc. E/CN.4/2006/79, at 4 (Mar. 22, 2006).

278. Montes & Cisneros, *supra* note 270, at 143.

279. Comm'n on Human Rights, Rep. of the Working Group Established in Accordance with Comm'n on Human Rights Resolution 1995/32 of 3 March 1995 on Its Eleventh Session, U.N. Doc. E/CN.4/2006/79, at 4 (Mar. 22, 2006).

280. *Id.* at 4.

281. *Id.* at 4-5.

282. *See id.* at 5.

283. *Id.* at 7.

284. *Id.*

Both Indigenous and state representatives were very concerned about the lack of consensus on many articles.[285] The Chair responded that he would present the "revised Chairman's proposals" to the U.N. Commission on Human Rights "with the hope that it would be considered as a final compromise text."[286] He completed his revised proposal quickly and submitted it on March 22, 2006, along with his final report on the eleventh session.[287] The Chair's proposal was adopted without any substantive changes by the U.N. Human Rights Council in June 2006.[288]

Since the Chair's revised proposal was adopted as the HRC Draft Declaration, it is especially useful in regards to FPIC to compare his proposal with the Draft of the WGIP. First, the Chairman retained most if not all of the FPIC provisions from the WGIP Draft, and in fact he even added two new FPIC requirements and numerous other provisions requiring states to consult, cooperate, enter agreements, or act in conjunction with Indigenous peoples.[289] He also used in his proposal, apparently for the first time used by anyone in written form, the exact phrase "free, prior and informed consent."[290]

Second, he also retained FPIC in the most controversial articles, 20 and 30 (now 19 and 32(2) of the Declaration).[291] He ignored the state proposals to use the conditional word "seek" instead of the mandatory word to "obtain" FPIC.[292] However, the Chair did make some unilateral and very significant changes to these two articles that perhaps served state interests.[293] In articles 20 and 30, which require states to "obtain" the free and informed consent of Indigenous peoples before enacting legislative or administrative measures that may affect them, and before approving development projects affecting their lands and territories, the Chair added

285. *Id.*

286. *Id.*; Chávez, *supra* note 177, at 102. The Chair's hopes were realized because his proposal was accepted without any substantive changes as the Draft Declaration by the Human Rights Council, which had replaced the Commission on Human Rights.

287. Comm'n on Human Rights, Rep. of the Working Group Established in Accordance with Comm'n on Human Rights Resolution 1995/32 of 3 March 1995 on Its Eleventh Session, U.N. Doc. E/CN.4/2006/79, at 8-77 (Mar. 22, 2006).

288. *See* Chávez, *supra* note 177, at 105.

289. *See, e.g.*, Comm'n on Human Rights, Rep. of the Working Group Established in Accordance with Comm'n on Human Rights Resolution 1995/32 of 3 March 1995 on Its Eleventh Session, U.N. Doc. E/CN.4/2006/79, at 39 (Mar. 22, 2006) (article 12); *id.* at 42 (article 15 in which the Chair added "in conjunction with"); *id.* at 43 (article 16 in which the Chair added "consultation and cooperation"); *id.* at 48-49 (article 22); *id.* at 53 (article 26); *id.* at 56 (article 28 in which the Chair added FPIC); *see also id.* at 40, 59, 67, 70.

290. *See, e.g.*, *id.* at 30 (article 10); *id.* at 46 (article 20); *id.* at 61 (article 30).

291. *Id.* at 40, 61.

292. *Id.* at 46.

293. *See* discussion *infra* Part IV.C.

this identical wording in both articles: "States shall consult and cooperate in good faith with the indigenous peoples . . . in order to obtain their" FPIC.[294] Chairman Chávez interprets this language as only requiring states to use a mandatory procedure—consultation and cooperation in an attempt to obtain consent— but not as a requirement to actually obtain consent.[295]

3. *The Draft Declaration in the Human Rights Council and General Assembly 2006–07*

In 2006, the Commission on Human Rights was abolished and a new entity, the U.N. Human Rights Council, was created.[296] During its very first session, on June 29, 2006, the Council adopted without any substantive changes Chairman Chávez's March 22, 2006, revised proposal as the Draft Declaration on the Rights of Indigenous Peoples.[297] The HRC Draft was not adopted by consensus, but the state representatives on the HRC voted for Mr. Chávez's proposal thirty yes, two no (Canada and the Russian Federation), with twelve abstentions.[298]

With this vote, it appeared a foregone conclusion that the U.N. General Assembly would also adopt the Draft in fall of 2006. However, the few states actively opposing the Draft continued to fight, and apparently they enlisted the African Group of nations to help put a stop to a General Assembly vote in 2006.[299] Primarily led by Namibia, the African Group had seven objections to the Draft, including that FPIC might give Indigenous peoples a veto power over state actions.[300] The African nations ultimately offered more than thirty-five amendments to the HRC Draft

294. Comm'n on Human Rights, Rep. of the Working Group Established in Accordance with Comm'n on Human Rights Resolution 1995/32 of 3 March 1995 on Its Eleventh Session, U.N. Doc. E/CN.4/2006/79, at 46 (Mar. 22, 2006) (article 20); *id* at 61 (article 30).

295. *See infra* text accompanying notes 331-37.

296. de Alba, *supra* note 177, at 108, 117. The creation of the Council elevated human rights issues in the United Nations hierarchy because the HRC reports directly to the General Assembly. *Id.* at 108, 117.

297. de Alba, *supra* note 177, at 108-09, 121-124. *See also* Human Rights Council Resolution 2006/2, (June 29, 2006), http://www.ohchr.org/EN/Issues/IPeoples/Pages/Declaration.aspx.

298. de Alba, *supra* note 177, at 108. The HRC has a limited number of representatives that serve set terms. Of the states with representatives on the Council in 2006, only Canada and the Russian Federation voted no. *Id.* Canada filed a statement explaining its no vote and cited the FPIC provisions in particular. Ambassador Paul Meyer, Statement to the First Session of the Human Rights Council (June 29, 2006), http://www.docip.org/greenstone/collect/cendocdo/index/assoc/HASH1009/f057ac98.dir/5.Canada.

299. *See* de Alba, *supra* note 177, at 122-23, 125. As already mentioned, many scholars report that the United States, Australia, Canada, and New Zealand actively encouraged African nations to object. *Id.* at 122-23; *see also supra* note 196 and accompanying text.

300. Albert K. Barume, *Responding to the Concerns of the African States*, in MAKING THE DECLARATION WORK, *supra* note 177, at 170-72; s*ee* de Alba, *supra* note 177, at 126-27.

between April and May of 2007, but these changes were refused by Indigenous peoples and organizations and by the states that supported the HRC Draft.[301] Also, Australia, New Zealand, and the United States filed joint objections that the Draft process had been deeply flawed, was finalized without agreement or consensus, provided for possible secession by Indigenous peoples and nations, and created different categories of citizens due to the FPIC provisions.[302] These arguments were identical to those being made by the African Group of nations.[303]

Thereafter, the President of the U.N. General Assembly appointed the Philippine U.N. representative to negotiate this impasse, and after intense negotiations and lobbying, the African objectors, the state sponsors of the HRC Draft, and Indigenous representatives accepted nine amendments to the Draft, none of which concerned the FPIC provisions.[304] The U.N. General Assembly then voted to adopt the HRC Draft as the U.N. Declaration on the Rights of Indigenous Peoples on September 13, 2007, the last day of the United Nation's 61st session.[305] The only four countries to vote no, Australia, Canada, New Zealand, and the United States, explained their reasons, which included the FPIC provision in article 19 (article 20 in the Draft).[306] As already mentioned, however, all four of these countries have since officially endorsed the Declaration.[307]

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301. Barume, *supra* note 300, at 172; de Alba, *supra* note 177, at 127-29.

302. de Alba, *supra* note 177, at 129 n.37. As late as August 13, 2007, Canada, Colombia, New Zealand, and the Russian Federation sent the U.N. General Assembly President thirty-four proposed amendments, including to some of the FPIC provisions. *Id.* at 131.

303. de Alba, *supra* note 177, at 129 n.37.

304. Barume, *supra* note 300, at 178-79; Montes & Cisneros, *supra* note 270, at 150-51; de Alba, *supra* note 177, at 108, 129-32.

305. Montes & Cisneros, *supra* note 270, at 151. *See also* de Alba, *supra* note 177, at 108, 132 (noting that the DRIP was adopted by a vote of the U.N. General Assembly, 143 – 4, with 11 abstentions).

306. United States Press Release # 204, September 13, 2007 (the U.S. objected that the HRC Draft had not been before the WGDD but was prepared and submitted after the last working session concluded, states had had no opportunity to discuss it, the HRC allegedly did not respond to U.S. calls to work on a consensus text, and because of the splintered vote (30-2)). The following four documents are available at http://www.docip.org/Online-Documentation.32.0.html (last visited July 27, 2015): Observations of the U.S. with Respect to the Declaration, at 2 (naming specifically Article 19 as possibly conferring a veto power over domestic laws to a sub-national group); Explanation of Vote by the Hon. Robert Hill Ambassador and Permanent Representative of Australia, at 3 ("Australia has concerns that the Declaration expands any right to free, prior and informed consent too far."); Statement by Ambassador John McNee Permanent Representative of Canada, at 3 (stating that the FPIC provisions "are unduly restrictive" and Article 19 might prevent states from enacting legislative or administrative matters); Explanation of Vote by New Zealand Permanent Representative H E Ms. Rosemary Banks, at 2 ("[F]our provisions in the Declaration are fundamentally incompatible with New Zealand's constitutional and legal arrangements . . . articles 19 and 32 on a right of veto over the State."). *Accord* U.N. GAOR, 61st Sess., 107th plen. mtg. at 11, U.N. Doc. A/61/PV.107 (Sept. 13 2007) (Australia voted no because of FPIC and an Indigenous veto); *id.* at 12-13 (Canada voted no because of FPIC, Article 19, and

C. WHEN DOES THE DECLARATION REALLY REQUIRE PRIOR CONSENT?

The U.N. Declaration contains many provisions that require states in certain situations to enter agreements with Indigenous peoples,[308] to engage in consultations and to cooperate with Indigenous peoples,[309] to work in conjunction and cooperation with Indigenous peoples,[310] and to obtain the free, prior, and informed consent of Indigenous peoples.[311] Most of these provisions are not controversial, at least not in the United States where Indian nations have government-to-government political relationships with the United States, the U.S. owes them a fiduciary trust duty, and tribes and Indians own their lands and other property rights as recognized in treaties,

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an Indigenous veto); *id.* at 14 (New Zealand voted no because of FPIC, Article 19, and an Indigenous veto).

307. *Australia's Support*, *supra* note 199; NEW ZEALAND, *supra* note 199; *Canada's Statement of Support*, *supra* note 199; *Announcement of U.S. Support*, *supra* note 199. *See also* DWIGHT G. NEWMAN, REVISITING THE DUTY TO CONSULT ABORIGINAL PEOPLES 150 (2014) (stating that each endorsement came with an interpretive statement to limit the legal effects of the endorsement; Canada, for example, said that the DRIP is only aspirational, not legally binding, and does not reflect customary international law).

308. HENDERSON, *supra* note 176, at 154 art. 18 ("Indigenous peoples have the right to participate in decision-making in matters which would affect their rights . . . ."); *id.* at 155 art. 23 ("Indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them . . . ."); *id.* at 156 art. 30(1) (stating no military activities can occur in Indigenous peoples' lands or territories unless freely agreed upon).

309. *Id.* at 154 art. 17(2) ("States shall in consultation and co-operation with indigenous peoples take specific measures to protect indigenous children from economic exploitation . . . ."); id at 156 art. 30(2) (noting states shall consult with Indigenous peoples "prior to using their lands or territories for military activities"); *id.* at 157 art. 36(2) ("States, in consultation and co-operation with indigenous peoples, shall take effective measures to facilitate the exercise and implementation of" Indigenous peoples' rights to maintaining contact and activities across international borders.); *id.* at 158 art. 38 ("States, in consultation and co-operation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.").

310. *Id.* at 153 art. 12 (declaring that states shall develop effective mechanisms in conjunction with Indigenous peoples for their access to, and repatriation of, ceremonial objects and human remains); *id.* at art. 14(3) ("States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children . . . to have access, when possible, to an education in their own culture and provided in their own language."); *id.* at art. 15(2) ("States shall take effective measures, in consultation and co-operation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination . . . ."); *id.* at 155 art. 22(2) ("States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination."); *id.* at 156 art. 27 ("States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process . . . to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories, and resources . . . ."); i*d.* at 157 art. 31(2) ("In conjunction with indigenous peoples, States shall take effective measures to recognize and protect" Indigenous peoples' cultural heritage, traditional knowledge, sciences, technology, and cultures.).

311. *Id.* at 152-54, 156-57 arts. 10, 11(2), 19, 28(1), 29(2), 32(2).

federal statutes, and/or court orders.[312] During the WGDD process, many states noted that when Indigenous peoples own land and property rights, they often should have the right to consent, or not, to state actions that might harm or affect those rights.[313] In this section, we will focus on the six FPIC provisions that purport to require states to secure the free, prior, and informed consent of Indigenous peoples in certain situations.

As a preliminary matter, however, we must note that the DRIP is not yet considered binding international law. The United States, Canada, New Zealand, and Australia all made that point abundantly clear when they issued their statements of support for the Declaration after initially voting against it in 2007.[314] The DRIP is a U.N. General Assembly resolution and is not the equivalent of treaties and U.N. conventions that states ratify and agree to abide by.[315] Thus, the Declaration is not a legally binding document but, as some say, it is only aspirational.[316] But another way to view the DRIP is that it represents what was already accepted international law regarding Indigenous nations and peoples. The fact that the U.N. voted 143-4 in favor of the DRIP is some evidence, maybe even persuasive evidence, that nation/states viewed the Indigenous rights and state duties explicated in the Declaration to already be established international law.

That possibility is very significant under what can be called the common law of international law, *opinio juris*. Under *opinio juris*, when states act in a certain fashion because they think it is required of them under international law, they are in effect creating and solidifying international law because they are acting according to standards that they think are

312. *See, e.g.*, COHEN's, *supra* note 31, at 412-16, 993-1318; Babbitt v. Youpee, 519 U.S. 234, 242-43 (1997) (holding the federal government cannot take individual Indians' property without paying compensation); United States v. Mitchell, 463 U.S. 206, 236-37 (1983) (holding that an individual Indian can sue the U.S. for money damages for breach of trust in managing her timber); Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 707 (1979) (declaring signatory tribes own treaty-recognized property rights in salmon); Arizona v. California, 373 U.S. 546, 644-45 (1963) (holding that five tribes own an enormous quantity of Colorado River water); Menominee Tribe of Indians v. United States, 391 U.S. 404, 406 (1968) (noting the tribe retained property rights for hunting based in treaty, even though terminated from federal recognition); Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942) (U.S. trust responsibility).

313. *See, e.g.*, Comm'n on Human Rights, Rep. of the Working Group Established in Accordance with Comm'n on Human Rights Resolution, U.N. Doc. E/CN.4/2003/92, at 10-11, 23-25, (Jan. 6, 2003) (citing the New Zealand, Canadian, and Norwegian representatives).

314. *See supra* notes 199, 307, and accompanying text.

315. NEWMAN, *supra* note 307, at 149 (General Assembly resolutions do not have inherent legal force).

316. *Id.* at 150; Tara Ward, *The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights Within International Law*, 10 NW. J. INT'L HUM. RTS 54, para. 12 (2011).

legally required of them.[317] Some commentators argue that in 2007 the DRIP represented established international law requirements,[318] including the U.N. Special Rapporteur James Anaya,[319] and thus perhaps it is itself binding international law pursuant to *opinio juris*. With those thoughts in mind, let us turn to the six FPIC provisions.

First, article 10 forbids the forcible relocation of Indigenous peoples from their lands or territories without their consent and mandates that removals can only occur after agreements are reached on fair compensation.[320] There seems to be nothing controversial about that point although there were proposals in the WGDD to drop the FPIC provision in regards to removals.[321] But in 2007, forced removals of peoples were already considered illegal under international law and might even be defined as genocide under a 1948 United Nations convention.[322] Moreover,

317. *See, e.g.*, NEWMAN, *supra* note 307, at 144-45, 153 (noting "the obligation to consult . . . is also a general principle of international law" and Canada now has a duty to consult with Indigenous peoples as part of developing international law). A U.N. General Assembly resolution can describe customary international law. *Id.* at 149. *But see* Ward, *supra* note 316, at para. 86 (noting FPIC is not customary international law yet, but a customary minimal norm of consultation with Indigenous peoples has crystallized).

318. *See, e.g.*, Montes & Cisneros, *supra* note 270, at 155 (arguing that the DRIP did not necessarily create new rights, but instead just repeated and re-affirmed already existing rights, which had already become recognized in international law); ROMBOUTS, *supra* note 235, at 88 (arguing that the U.N. had already approved FPIC in 2005 when it stated its objectives for a second decade of the world's Indigenous peoples: "To promote the full and effective participation of indigenous peoples in decisions which directly or indirectly affect their lifestyles, traditional lands and territories, their cultural integrity as indigenous peoples with collective rights, or any other aspects of their lives, considering the principle of free, prior and informed consent." (quoting U.N. GA, *Draft Programme of Action for the Second International Decade of the World's Indigenous People*, U.N. Doc. A/60/270, at 4 (Aug. 18, 2005)); Stefania Errico, *The Controversial Issue of Natural Resources: Balancing States' Sovereignty with Indigenous Peoples' Rights*, *in* REFLECTIONS, *supra* note 151, at 357-58 (quoting the World Bank's legal department as saying that consultation with, and the participation of, Indigenous peoples in decisions affecting them is an "emerging principles of international law" (citing *Legal Note on Indigenous Peoples*, para. 28 Apr. 8, 2005, www.worldbank.org/indigenous (last visited July 7, 2015))).

319. James Anaya (Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People), *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, U.N. Doc. A/HRC/12/34, at 12 (July 15, 2009) ("[T]he duty of States to consult with indigenous peoples . . . is firmly rooted in international human rights law.").

320. G.A. Res. 61/295 (X) (Sept. 13, 2007).

321. *See supra* notes 248, 257, 266, and accompanying text.

322. *See Convention on the Prevention and Punishment of the Crime of Genocide* 3 (1948), https://treaties.un.org/doc/Publication/UNTS/Volume%2078/volume-78-I-1021-English.pdf; Office of the UN Special Adviser on the Prevention of Genocide 1, http://www.un.org/en/prevent genocide/adviser/pdf/osapganalysisframework.pdf. One group says that removals can meet the U.N. definition of genocide if a removal imposes conditions of life on an ethnic or racial group with the intent to destroy them in whole or in part. *The Legal Definition of Genocide*, PREVENT GENOCIDE INTERNATIONAL, http://www.preventgenocide.org/genocide/officialtext-printerfriendly htm (last visited August 10, 2015).

this same idea has been reflected in United States law since colonial times and was expressly stated in the Removal Act of 1830.[323] Furthermore, article 28(1) provides a right of redress for Indigenous peoples, which can include restitution of lands or monetary relief, for any of their lands, territories, or resources that are taken, occupied, or damaged without their free, prior and informed consent.[324] And, unless Indigenous peoples "freely agree[]" otherwise, compensation must include providing other lands of comparable value.[325] This provision also seems to match United States law regarding American Indian nations.[326]

In addition, article 11(2) requires states to provide redress through mechanisms developed "in conjunction" with Indigenous peoples regarding any of their cultural, intellectual, religious, or spiritual property rights that have been taken without FPIC. United States law already protects many of these same issues for American Indians and tribes.[327]

Furthermore, article 29(2) prohibits the storage or disposal of hazardous waste on the lands or territories of Indigenous peoples without their free, prior, and informed consent.[328] This provision does not seem surprising if Indigenous peoples own the lands at issue. In the United States, however, despite this seemingly obvious tenet, and despite U.S. obligations to Indian nations, the federal government has been fairly accused of using Indian lands as "national sacrifice areas" over the past two centuries to the extreme detriment of tribes and Indian communities.[329]

The controlling factor under these four FPIC provisions seems to be that if Indigenous nations or peoples own specific lands, rights, or

323. *See* Removal Act, ch. 148, 4 Stat. 411 (1830); *see supra* text accompanying note 52. Removals of American Indians were mostly performed pursuant to alleged consent demonstrated in subsequent treaties. *Cf.* 2 INDIAN AFFAIRS, *supra* note 27, at 145, 162 (Treaty with the Wyandot, Etc., 1817, art. 6, 7 Stat. 160 and Treaty with the Wyandot, Etc., 1818, art. 1, 7 Stat. 178).

324. G.A. Res. 61/295, Art. 28(1) (Sept. 13, 2007).

325. *Id.*

326. *See, e.g.*, *supra* note 312; PRUCHA, GREAT FATHER, *supra* note 26, at 1017-23 (describing the Indian Claims Commission process created by Congress to compensate tribes for lands illegally taken); United States v. Sioux Nation, 448 U.S. 371, 423-24 (1980).

327. *See, e.g.*, Robert J. Miller, *American Indian and Tribal Intellectual Property Rights*, 13 TUL. J. TECH. & INTELL. PROP. 179, 179 (2010); PRUCHA, GREAT FATHER, *supra* note 26, at 932-34, 973-76 (discussing the Indian Arts and Crafts Act of 1934); *see* Exec. Order No. 13,007, *supra* note 104 (sacred sites); 25 U.S.C. §§ 3001 *et seq*. (Native American Graves Protection and Repatriation Act of 1990); 42 U.S.C. § 1996 (American Indian Religious Freedom Act); 25 U.S.C. § 2901 (Native American Language Act); 42 U.S.C. § 1996a (protecting Indian religious use of peyote); COHEN's, *supra* note 31, at 1265-318 (discussing a wide range of Indian rights).

328. G.A. Res. 61/295 Art. 29(2) (Sept. 13, 2007).

329. MILLER, RESERVATION "CAPITALISM", *supra* note 4, at 55; Jana L. Walker, Jennifer L. Bradley & Timothy J. Humphrey, Sr., *A Closer Look at Environmental Injustice in Indian Country*, 1 SEATTLE J. FOR SOC. JUST. 379, 386-91 (2002).

resources, then states cannot take or adversely affect those property rights without prior consent.[330] That seems to be a perfectly reasonable legal requirement. Consequently, states, and the United States, must obtain the FPIC of Indigenous peoples and Indian nations before engaging in the activities or creating the situations defined in articles 10, 11(2), 28(1), and 29(2). And it seems imminently reasonable that American Indian nations and Indigenous peoples have the FPIC option to say "no" in these circumstances.

In sharp contrast, however, two of the FPIC provisions were far more controversial during the Declaration drafting process; article 19 is especially so. Article 19 states: "States shall *consult and co-operate 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."[331] And article 32(2) states:

> States shall *consult and co-operate 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.[332]

The Chairperson of the WGDD from 1999–2006, Luis-Enrique Chávez, added the italicized language to articles 20 and 30 (articles 19 and 32(2) in the DRIP) in his March 2006 Chairman's revised proposal for the WGDD Draft. As mentioned, the HRC adopted his revised proposal in June 2006 as the HRC Draft Declaration without making any substantive changes. And the U.N. General Assembly adopted it as the Declaration

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330. The role of eminent domain and the United States' sovereign power to take private property for "public use" on reservations, to unilaterally abrogate Indian treaty rights, and the plenary power of Congress over Indian affairs are beyond the scope of this article. *See* U.S. CONST. amend V; COHEN'S, *supra* note 31, at 1050, 1053, 1057-58; United States v. Dion, 476 U.S. 734, 746 (1986); Lone Wolf v. Hitchcock, 187 U.S. 553, 568 (1903); United States v. Kagama, 118 U.S. 375, 384-85 (1886).

331. G.A. Res. 61/295 (XIX) (Sept. 13, 2007) (emphases added), *as reprinted in* HENDERSON, *supra* note 176, at 154. Article 19 of the Declaration was article 20 in the WGIP Draft Declaration and throughout the WGDD and HRC processes. Article 20 stated in relevant part: "States shall obtain the free and informed consent . . . ." *Id.* at 166.

332. *Id.* at 157 (emphases added). This article of the Declaration was article 30 in the WGIP Draft and as used throughout the WGDD and HRC processes. Article 30 stated in relevant part: "Indigenous people have the right . . . to require that States obtain their free and informed consent prior to the approval of any project affecting their lands . . . ." *Id.* at 168.

without making any changes to the FPIC provisions. Thus, he literally had the last word on the drafting of those two provisions.

Mr. Chávez has expressly stated that he drafted these provisions as he did to avoid creating an Indigenous veto power. In a 2009 book chapter, he wrote that one of the most sensitive, hot button issues in the entire WGDD process was FPIC because "it was a question of establishing whether the declaration could recognise a right of veto in relation to state action or not."[333] In his opinion, "the WGDD could not accept this."[334] He felt that states could not renounce their powers or responsibilities to make decisions on issues of public order and that the Declaration could never recognize greater rights for Indigenous peoples than for other members of society.[335] Thus, he amended these articles to defeat any idea of an FPIC veto right.

He also stated: "The Chairman's proposals therefore established only an obligation regarding the means (consultation and cooperation in good faith with a view to obtaining consent) but not, in any way, an obligation regarding the result, which would mean having to obtain that consent."[336] Consequently, he dispensed with the idea of a state obligation from the WGIP Draft to "obtain" the consent of Indigenous peoples in articles 20 and 30, and created only a mandatory process "in order to [attempt to] obtain their" consent in what became articles 19 and 32(2) of the DRIP.[337]

Mr. Chávez must have accomplished his goal because it seems that no commentator reads FPIC, at least in article 19, to have created an Indigenous veto power over state actions.[338] Even James Anaya, who was the U.N. Special Rapporteur on the Rights of Indigenous Peoples in 2009–2014, stated in an official U.N. report that article 19 "should not be

333. Chávez, *supra* note 177, at 103.

334. *Id.*

335. *Id.*

336. *Id.* at 103-04.

337. *Id.*

338. Barelli, *Free, Prior and Informed Consent*, *supra* note 218, at 3 (noting that article 19 "should be intended as a process of which consultation and participation represent the central pillars"); *id.* at 16 (stating that human rights treaty bodies have dealt with FPIC "[t]o different degrees, [but] they have all accepted that FPIC cannot be understood in strict terms."); NEWMAN, *supra* note 307, at 64, 172 (noting article 19 cannot be read strictly because "one effect would be to alter democratic institutions in ways that may generate further democratic deficits" and "courts and policy-makers [have to] continue to ensure that the duty to consult fulfills its purposes as a procedure but does not become an effective veto power, which it is not meant to be"); ROMBOUTS, *supra* note 235, at 87 ("FPIC should not be seen as a veto power but that the concept's general aim is to fully integrate indigenous peoples into decision-making processes that affect them."). It does seem obvious for article 19 that no democratic society could function under an Indigenous veto power over the enactment of legislative and administrative measures. The DRIP itself states pretty clearly that it cannot be read as a veto power: "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." G.A. Res. 61/295 (XLVI) (Sept. 13, 2007).

regarded as according indigenous peoples a general 'veto power' over decisions that may affect them, but rather as establishing consent as the objective of consultations."[339] At least one commentator has noted that Mr. Anaya retreated in this statement from positions he had taken in his earlier writings.[340]

It is extremely interesting, though, that the DRIP article 19 was apparently read, in sharp contrast to Mr. Chávez' comments, as recognizing an Indigenous veto power by the four countries that voted against the Declaration in the U.N. General Assembly. Australia, Canada, New Zealand, and the United States all specifically cited article 19 and its veto power for Indigenous peoples as one of the four reasons they voted against the DRIP.[341] (Perhaps this claim was just a "democratic" smoke screen to cover other reasons these countries really voted against the DRIP?). Moreover, throughout the WGIP, WGDD, HRC Draft, and U.N. General Assembly processes, many states vehemently objected to these articles because they allegedly created a veto power for Indigenous peoples over the legislative and administrative powers of states, and over the approval of development projects in Indigenous lands. States made countless suggestions to amend those articles.

Notwithstanding Chairman Chávez's 2009 statements, and the interpretation almost everyone gives articles 19 and 32(2), is it possible that the articles require states to consult with Indigenous peoples, "so as to" or "in order to" obtain their consent? What does "in order to" really mean in those articles? Is it possible that the phrase means that states shall use the defined process—consulting and cooperating with Indigenous peoples—and that states "shall" obtain FPIC?

In sum, it appears fairly certain that the FPIC provisions in articles 10, 11(1), 28(1), and 29 are not controversial because they entail property and human rights that Indigenous peoples own and possess. In addition, it is clear these articles mandate States, including the United States, to obtain

339. James Anaya (Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People), *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, U.N. Doc. A/HRC/12/34, at para. 46 (July 15, 2009).

340. Dwight G. Newman, *Norms of Consultation with Indigenous Peoples: Decentralization of International Law Formation or Reinforcement of States' Role?*, *in* INTERNATIONAL LAW IN THE NEW AGE OF GLOBALIZATION 272 (Andrew Byrnes et al. eds., 2013) (claiming that Anaya argued in his scholarly work for a broader application of FPIC than in this new analysis as the Special Rapporteur; Anaya "opts for the more limited conception of consultation envisioned by one side within the ongoing scholarly debate on this issue and thus somewhat moves back from his own past position."). *See also* ROMBOUTS, *supra* note 235, at 171 (noting that in his 2009 report, Anaya argued that article 19 should not be regarded as a veto right).

341. *See supra* note 306.

Indigenous peoples' consent before undertaking the actions defined in those articles. For some reason, though, article 32(2) was controversial even though it also concerns lands or resources owned by Indigenous peoples. States were no doubt very leery of Indigenous peoples stalling economic development activities on and off lands they actually own. And it must be remembered that worldwide many Indigenous peoples' lands are not yet demarcated, and their rights are not well-defined under domestic laws. Thus, states must have been worried about exactly what lands and rights might be protected in 32(2).

But based on the WGDD Chairman's explanation of the changes he made to that article from the WGIP Draft Declaration, and the opinion of almost all commentators, article 32(2) does not require states to obtain consent but only to engage in a mandatory consultation and cooperation procedure "in order to" obtain consent. Finally, there also seems to be no controversy, according to Chávez and all the commentators, that article 19 does not require states to obtain consent from Indigenous peoples before enacting administrative and legislative measures that might impact them. Once again, states are only required to engage in mandatory good faith consultations and cooperation "in order to" obtain the consent of Indigenous peoples.

V. CONCLUSION

The principle that Indigenous peoples have the right to free, prior, and informed consent, or not to consent, to matters that affect their property rights and lands will continue to be a serious, ongoing, and evolving issue in the international arena.[342] In fact, a wide array of international conventions, organizations, and courts now require at least meaningful consultations with Indigenous peoples and often require their prior consent.[343] A few countries have codified consultation and consent requirements in their constitutions and laws.[344] And even private interests are voluntarily or involuntarily getting involved in FPIC issues.[345] In

342. NEWMAN, *supra* note 307, at 13, 164 (stating FPIC is the future direction of aboriginal law and relations).

343. *See, e.g.*, ROMBOUTS, *supra* note 235, at 190-215; Aurelio Cal, et al. v. Attorney General of Belize, Supreme Court of Belize (Claims No. 171 and 172) (Oct. 18, 2007), paras. 119, 123, 126, 130-32 (holding that Belize, as part of the international community and a subscriber to some international humanitarian treaties, had a duty to recognize Mayan customary land tenure rights and to abstain from affecting the property at issue, occupied and used by the Maya people, unless pursuant to their informed consent).

344. NEWMAN, *supra* note 307, at 159-61 (citing Bolivia, Ecuador, and Peru).

345. *See generally, e.g.*, *We Want to Talk: Resolution Copper Breaks Silence Over Land Swap*, INDIAN COUNTRY TODAY, June 17, 2015, http://indiancountrytodaymedianetwork.com/2015/06/17/we-want-talk-resolution-copper-breaks-silence-over-land-swap-160750 (last visited

addition, in 2011 the International Finance Corporation, which is a part of the World Bank, adopted a performance standard that requires entities that are using its funding to obtain FPIC from the Indigenous peoples regarding environmental and social sustainability issues raised by their projects.[346] The United States will of course also be faced with decisions on how to respond to this evolving issue.

I view the FPIC issue in the United States from five different viewpoints: (1) through the lens of the United States fairly consistent practice of dealing with Indian nations via consensual, diplomatic, and political means; (2) with the understanding that American Indian nations and Indian peoples own lands and various property rights that properly raise FPIC issues; (3) with the backdrop that the United States has a fiduciary trust responsibility for Indian nations and Indian peoples; (4) from a practical angle, it appears easier and less expensive for the United States to deal with Indian nations in this modern-day on an FPIC basis; and (5) that article 19 of the Declaration should never be read as an Indigenous veto over democratic principles. I conclude that viewed from these vantage points, FPIC is not such a new or alarming idea for the United States, and it is not that much of a change in the context of Indian nations and the U.S.

First, as discussed in Parts II and III, the history and the generally accepted practice in the United States has been to deal with tribal nations on a consensual treaty, diplomatic, and political basis. I am well aware that Indian nations and Indian peoples suffered greatly under federal policies and laws and American "Manifest Destiny."[347] I am not holding the United States up as some kind of utopian model for its dealings with Indigenous peoples. In fact, many commentators and historians have accurately argued that the United States pursued genocidal policies against Indian peoples.[348] But the practices and laws that the United States *claimed* to utilize vis-à-vis Indian nations for the past two hundred plus years does not appear to differ that much from what is required under FPIC principles. The modern-day

June 29, 2015) (company seeking to consult with San Carlos Apache Tribe); Fergus MacKay, *Indigenous Peoples' Right to Free, Prior and Informed Consent and the World Bank's Extractive Industries Review*, 4 SUSTAINABLE DEV. L. & POL'Y 43 (2004); STAPP & BURNEY, *supra* note 144, at 133, 136-37 (stating Cemex, Inc. engaged in extensive cultural resource consultations with thirteen tribes); Dean B. Suagee, *Consulting with Tribes for Off-Reservation Projects*, 25 NAT. RESOURCES & ENV'T 54 (Summer 2010); Michael P. O'Connell, *Indian Tribes and Project Development Outside Indians Reservations*, 21 NAT. RESOURCES & ENV'T 54, 55 (2007).

346. *Performance Standard 7 Indigenous Peoples*, INTERNATIONAL FINANCE CORPORATION 3, http://www.ifc.org/wps/wcm/connect/1ee7038049a79139b845faa8c6a8312a/PS7English2012.pdf?MOD =AJPERES.

347. MILLER, NATIVE AMERICA, *supra* note 19, at 78-94, 115-172

348. *See generally* FRANCIS JENNINGS, THE INVASION OF AMERICA: INDIANS, COLONIALISM AND THE CANT OF CONQUEST (1975); DEE BROWN, BURY MY HEART AT WOUNDED KNEE: AN INDIAN HISTORY OF THE AMERICAN WEST (1971).

federal policies and laws discussed above, and the attempts to improve federal consultations with Indian nations, shows that federal officials and policy makers are moving closer and closer to most of the FPIC provisions explicated in the U.N. Declaration.

Second, and most significant to me, is that all but one of the six FPIC provisions concern lands, assets, property rights, and human rights owned and possessed by Indigenous peoples. In the context of United States Indian law and policies, it is not surprising that Indian nations have well-recognized property rights and sovereign powers to consent, or not, to proposals that use, take, or significantly impact their rights.[349] Even article 32(2) of the DRIP, which was so controversial in the WGDD drafting process, and which WGDD Chairman Chávez unilaterally amended to avoid an "Indigenous veto,"[350] is solely about lands and resources owned by Indigenous peoples. Consequently, the United States ought to support and enforce this FPIC provision as well as the four other non-controversial FPIC provisions.

A third reason for the United States to support at least five of the FPIC provisions is the federal trust responsibility. This article has barely mentioned this important topic, but it is very relevant when defining the duties the United States owes Indian nations and peoples, which should include consulting and acquiring their consent before taking or seriously impacting their rights.[351] According to the United States Supreme Court, the United States,

> [u]nder a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, [ ] has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.[352]

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349. *See* S. James Anaya, *Indigenous Peoples' Participatory Rights in Relation to Decisions About Natural Resource Extraction*, 22 ARIZ. J INT'L & COMP. L. 17, 17 (2005) ("[W]here property rights are affected . . . the international norm is developing to also require actual consent by the indigenous peoples concerned.").

350. *See supra* notes 331-37 and accompanying text. One reason article 32(2) was so controversial, and why I argue it should be far less so in the United States, is that most of the lands and resources claimed by Indigenous peoples worldwide are not as well identified as are Indian and tribally owned lands in the United States. Many Indigenous communities have not yet had their lands demarcated, thus there is tremendous concern in many countries about possible claims to immense and, as of today, unknown lands and resources under article 32(2).

351. *See, e.g.*, Routel & Holth, *supra* note 127, at 429-35; Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471; COHEN'S, *supra* note 31, at 412-36.

352. Seminole Nation v. United States, 316 U.S. 286, 296-97 (1942) (footnote omitted).

The Congress and Executive Branch are well aware of their legal responsibilities to tribal nations under this fiduciary duty and regularly reference the trust responsibility in federal laws and regulations.[353] It seems obvious that the United States would be violating its trust duties if it unilaterally takes the property and human rights of Indian nations and peoples without consulting them first and without obtaining their consent. Five of the six FPIC provisions seem to be implicated in the trust obligations the United States possesses in regards American Indians and the Indian nations.

Fourth, I see very practical reasons for the United States to deal with Indian nations in this modern-day on an FPIC basis. It is far easier and less expensive for the Congress and Executive Branch to fully and fairly consult with tribal nations and to secure their consent before taking steps that impact Indian rights. Tribal governments are more powerful and capable today, and some are very well-funded now. In addition, they are very effective at lobbying Congress and the public, and in hiring lobbyists and attorneys to fight for their rights. Thus, perhaps even "selfish" pecuniary and political interests—solid practical reasons—mandate that the United States is better served by working with tribes on an FPIC basis and not by unilateral actions.[354]

Finally, the sixth FPIC provision, article 19, seems to be another matter. Article 20 of the WGIP Draft clearly recognized an Indigenous veto power over states enacting legislative or administrative measures that impacted Indigenous peoples. As detailed above, states vigorously fought that idea, and the WGDD Chairman amended the provision that became article 19 in the DRIP to negate any idea of an Indigenous veto in this situation. The commentators uniformly agree that article 19 does not create a veto power. They agree, though, that states must still consult with Indigenous peoples and attempt to obtain consent on these matters. In a democratic society, I believe that article 19 has to be read in that fashion. In fact, no matter how article 19 might have ultimately been worded, the DRIP itself states that all its provisions must be interpreted "in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith."[355] Pursuant to an

353. *See, e.g.*, *id.* at 296-97; COHEN'S, *supra* note 31, at 414.

354. President Fawn Sharp of the Quinault Nation stated: "good policy is so much more than consultation . . . [the United States should embrace] free, prior and informed consent . . . [because it] no longer has permission or power to make unilateral decisions about Indigenous resources and lands." Peter D'Errico, *Opportunity Knocks in Senate: Experts Tiptoe, Native Leaders Respond*, INDIAN COUNTRY TODAY, July 10 2011, http://indiancountrytodaymedianetwork.com/2011/07/10/opportunity-knocks-us-senate-experts-tiptoe-native-leaders-respond.

355. G.A. Res. 61/295 (XLVI) (Sept. 13, 2007).

interpretation that article 19 only guarantees Indigenous peoples the right to participate in the democratic process, over the past six decades, American Indian nations have become heavily involved and effective in the political process of the United States; they are effective in working to ensure that their rights and opinions are considered seriously and taken into account in any legislative or administrative measures that might impact them.

In conclusion, the United States seems to have little reason to fear the Declaration and seems to have had little legitimate reason to vote no in 2007. In line with its official statement of support for the Declaration in 2010, its trust responsibility, and its efforts of the past few decades in regards to tribal consultations, the United States should improve its consultation processes with Indian nations by not undertaking actions that impact the property, human rights, and sovereign powers of Indian nations and Indian peoples without their consent. The federal process of working with Indian nations and peoples should not be a question of consultation *or* consent, but should be a relationship based on consultation *and* consent.