The evolving duty to consult and obtain free prior and informed consent of Indigenous peoples for extractive projects in the United States and Canada

Cathal M Doyle[*]

1 Introduction

Canada and the United States (US), along with New Zealand and Australia, were the only countries to vote against the adoption of the UN Declaration on the Rights of Indigenous Peoples (henceforth UNDRIP or the Declaration) in the General Assembly in 2007.[1] One of the stated reasons for their position was the Declaration's affirmation of the duty to consult and cooperate in good faith with the Indigenous peoples through their own representative institutions in order to obtain their free and informed consent (FPIC) to measures impacting on their rights and well-being.[2] In particular, objections were expressed to Articles 19 and 32 requiring FPIC "before adopting and implementing legislative or administrative measures that may affect them" and "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".[3]

Canada and the US finally endorsed the Declaration in 2010, but in so doing restated their positions on FPIC.[4] Canada objected to the principle of FPIC "when used as a

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Cathal Doyle
Middlesex University School of Law, London, NW44BT
e-mail: c.m.doyle@mdx.ac.uk
[1] General Assembly 61st Session 2007 UN Doc. A/61/PV.107.
[2] General Assembly 61st Session 2007 UN Doc. A/61/PV.107 p11, 12, and 14; See also Explanation of vote on the Declaration on the Rights of Indigenous Peoples by Robert Hagen, U.S. Advisor, on the Declaration on the Rights of Indigenous Peoples, to the UN General Assembly, USUN Press Release #204(07) September 13, 2007.
[3] According to a joint 2006 statement of the US, New Zealand and Australia "there can be no absolute right of free, prior informed consent that is applicable uniquely to Indigenous peoples and that would apply regardless of circumstance", Statement of Peter Vaughn to the Permanent Forum on Indigenous Issues, Representative of Australia, on behalf of Australia, New Zealand and the United States of America, on Free, Prior and Informed Consent, 22 May 2006, New Zealand Ministry of Foreign Affairs and Trade available at http://unny.mission.gov.au/unny/soc_220506.html. The US also stated that "The text also could be misread to confer upon a sub-national group a power of veto over the laws of a democratic legislature by requiring indigenous peoples, free, prior and informed consent before passage of any law that "may" affect them (e.g., Article 19). We strongly support the full participation of indigenous peoples in democratic decision-making processes, but cannot accept the notion of a sub-national group having a "veto" power over the legislative process" Explanation of vote on the Declaration on the Rights of Indigenous Peoples by Robert Hagen, U.S. Advisor, on the Declaration on the Rights of Indigenous Peoples, to the UN General Assembly, USUN Press Release #204(07) September 13, 2007
[3] Canada explained its 2007 vote against the Declaration as, in part, deriving from significant concerns regarding "free, prior and informed consent when used as a veto" General Assembly 61st Session 2007 UN Doc. A/61/PV.107 p12. For an overview of the Canadian government's position at the time see Joffe (2010). See also UN Declaration on the Rights of Indigenous Peoples, Articles 19 and 32(2).
[4] 'Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples Initiatives to Promote the Government-to-Government Relationship & Improve the Lives of Indigenous Peoples' available at http://www.achp.gov/docs/US%20Support%20for%20Declaration%2012-10.pdf; 'Canada's Statement

veto", but stated that it was confident that it could now interpret it "in a manner that is consistent with its Constitution and legal framework".[5] Under the Harper government (2006-2015) Canada would not, however, clarify what it meant by "veto" and refused to discuss this with Indigenous peoples.[6] In 2017, under the Trudeau government, Canada adopted a more constructive approach and formally retracted its concerns in relation to FPIC.[7]

In its qualified statement of support for the Declaration in 2010, the US recognized the significance of its provisions on FPIC with that caveat that it understood them "to call for a process of meaningful consultation with tribal leaders, but not necessarily the agreement of those leaders, before the actions addressed in those consultations are taken."[8] It committed to continued consultation with tribes "in accordance with federal law" and "where possible, of obtaining the agreement of those tribes consistent with our democratic system and laws".[9]

The duty to consult with Indigenous peoples in the context of extractive or other development activities impacting on their rights and well-being is clearly established in Canadian and US law and policy, albeit differently in each jurisdiction.[10] In both jurisdictions, however, ambiguity remains regarding the nature of this duty to consult, including the degree to which Indigenous peoples' interests must be accommodated and the circumstances under which their consent may be required in the context of extractive industry projects. In order to fully appreciate the meaning and potential of this recent "support" for FPIC as articulated in the Declaration, it is therefore necessary to examine the legal frameworks governing Indigenous peoples' consultation and consent rights in these jurisdictions.

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of Support on the United Nations Declaration on the Rights of Indigenous Peoples' (12th November 2010) available at http://www.aadnc-aandc.gc.ca/eng/1309374239861.

[5] 'Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples' (12th November 2010) available at http://www.aadnc-aandc.gc.ca/eng/1309374239861; Canada subsequently expressed its unqualified for the UNDRIP in 2016 see Speech for the Honourable Carolyn Bennett, Minister of Indigenous and Northern Affairs at the United Nations Permanent Forum on Indigenous Issues 16th Session available at https://www.canada.ca/en/indigenous-northern-affairs/news/2017/05/speaking_notes_forthehonourablecarolynbennettministerofindigenou.html.

[6] Federal government representatives were not permitted to discuss the issue and it was therefore unclear if Canada understood "veto" to be synonymous with "consent" and "FPIC" as affirmed under IHRL, or if it regarded "veto" as an absolute right to say "no", irrespective of the facts and law in any given case.

[7] Minister of Indigenous and Northern Affairs (Carolyn Bennett), "Speech at the United Nations Permanent Forum on Indigenous Issues 16th Session: Opening Ceremony", April 26, 2017, available at https://www.canada.ca/en/indigenous-northern-affairs/news/2017/04/united_nations_permanentforumonindigenousissues16thsessionopenin.html. However, in 2016 Prime Minister Trudeau was reported as stating that indigenous peoples do not have a veto over energy projects, see Canadian Press, "Trudeau says First Nations 'don't have a veto' over energy projects," National Post, December 20, 2016, http://business.financialpost.com/news/trudeau-saysfirst-nations-dont-have-a-veto-over-energy-projects/wcm/a3b7313b-1c02-4769-84d0-96bceeba9d6a.

[8] Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples Initiatives to Promote the Government-to-Government Relationship & Improve the Lives of Indigenous Peoples available at http://www.achp.gov/docs/US%20Support%20for%20Declaration%2012-10.pdf.

[9] Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples Initiatives to Promote the Government-to-Government Relationship & Improve the Lives of Indigenous Peoples available at http://www.achp.gov/docs/US%20Support%20for%20Declaration%2012-10.pdf.

[10] McNeil (2009) p 282; Richardson (2009) p. 54; Imai (2009) p 302.

This chapter will focus on the primary areas where guidance on the duty to consult emerges in the two jurisdictions. It first addresses the US legislative, regulatory and jurisprudential context and then examines Canadian statutory requirements, the Federal Government's evolving position and the extensive body of Canadian jurisprudence on the topic. It offers a brief critique of the current situation with regard to the duty to consult in each jurisdiction and concludes by addressing their incongruities from an international human rights law (IHRL) perspective and the steps that should be taken to align these national historically based legal regimes and doctrines with contemporary IHRL standards pertaining to FPIC.

2 Basis for and content of the duty to consult in Canada and the US

The basis for the duty to consult under Canadian and US legal systems is found in treaty rights, jurisprudence addressing trust based and fiduciary responsibilities arising from colonial era international law doctrines, statutory requirements and administrative or regulatory requirements. Both Canada and the US have treaty based consultation requirements arising from the large body of treaties that were entered into with Indigenous peoples, primarily in the 18th and 19th centuries.[11] In both jurisdictions these treaties are granted constitutional protection. Indigenous peoples' rights established under historic and modern treaties are "recognized and affirmed" in the 1982 Canadian Constitution Act along with "Aboriginal rights".[12] Under the "supremacy clause" of the US Constitution treaties are classified as the "supreme law of the land", implying that they have the same force as federal laws, but leaving ambiguity as to the extent to which they are accepted as constitutional in nature.[13]

Similarly, in both Canada and the US, a trust or fiduciary duty has also been affirmed by the Courts, albeit interpreted differently in each jurisdiction, and provides an important basis for the duty to consult.[14] In Canada the fiduciary duty is embodied in Section 35 of the Constitution and arises from the sui generis nature of Aboriginal title as a property right to land, and the Crown's historic powers and responsibilities in relation to First Nations. It requires the Crown to act honourably, in the best interests of the First Nations and with "utmost loyalty".[15] The primary guidance on the content of the duty to consult flows from Canadian Supreme Court rulings addressing this fiduciary duty and the "special relationship" between the Crown and Aboriginal peoples as embodied in the principle of the "honour of the Crown".[16] The Court has taken a broad approach, not only looking at compliance with statutory consultation obligations, but also expounding on the content of the common law duty to consult and Aboriginal rights under the 1982 Constitution. Based on this jurisprudence guidelines have been developed for federal officials on how to fulfil

[11] Williams (1999); Prucha (1994).
[12] The Canadian Constitution Act, 1982, Sections 25 and 35. In negotiating s.35(3) of the Constitution Act, 1982. Indigenous peoples took care to entrench their treaty rights and not the treaties themselves, as many of these treaties include "surrender" and/or "extinguishment" clauses that are at odds with IHLR principles. The Supreme Court of Canada has occasionally referred to such treaties as constitutional instruments, but without any legal analysis on this point. Communication from Paul Joffe on file with author.
[13] The Constitution of the United States, Article VI. For a commentary on the constitutional status of Indian treaties in federal courts see Fredericks and Heibel (forthcoming 2018).
[14] *Guerin v. The Queen*, [1984] 2 S.C.R. 335.
[15] McNeil, K (2008).
[16] *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73 para 27.

the duty to consult and legislative reviews are on-going to assess its compatibility with the UNDRIP.[17]

In the US, the federal trust based relationship with Indian tribes emerges from 19th century jurisprudence,[18] when Chief Justice Marshal affirmed that the "relation [of Indian tribes] to the United States resembles that of a ward to his guardian".[19] Together with statutory provisions and executive orders, this trust relationship constitutes the foundation for the duty to consult. The primary guidance in relation to the duty emerges from a combination of these provisions, administrative orders and jurisprudence addressing their implementation. In general, US Courts have only focused on whether consultations have complied with statutory requirements, rather than delve into the nature of the duty to consult itself.

The US and Canadian contexts also differ in a number of regards. In Canada constitutional recognition was afforded to Aboriginal rights in 1982, thereby restricting the potential for the legislature to extinguish rights,[20] unlike in the US where the only reference to tribes in the Constitution is found in the commerce clause. This clause has been problematically interpreted by the US Courts as supporting Congress's plenary power over Indian tribes, effectively providing it with the power to unilaterally extinguish tribal rights. Constitutional recognition in Canada also controversially opened the door for the Supreme Court to shape the content of Aboriginal rights. As a result, the Canadian Supreme Court has taken a more active role in addressing the content of and basis for the duty to consult, accommodate and potentially obtain consent of First Nations, which flows from their historical relationship with the Crown and the associated fiduciary duty.

A second differentiator between the US and Canada is that modern day treaties addressing land claims and self-governance rights have been under negotiation in Canada since the landmark *Calder v British Columbia* (1973) ruling.[21] In the US, land claims were effectively closed in 1978 with the termination of the controversial Indian Claims Commission which provided monetary compensation for non-consensual taking of tribal lands.[22] The situation with regard to unresolved land claims continues to have implications for consultation and consent duties in both jurisdictions.[23] A third differentiator is that self-government rights are generally afforded greater recognition in the US than in Canada, unless a self-government agreement has been negotiated.[24] An explicit right to self-government was not included in the Canadian Constitution and the Courts have yet to engage fully with the issue.[25] In the US, Indian tribes are recognized as maintaining a government-to-

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[17] See discussion on Federal Government Initiatives below.

[18] The doctrine evolved from US Supreme Court jurisprudence in *Johnson v. McIntosh* (21 U.S. 8 Wheat, 543, 1823); *Cherokee Nation v. Georgia* (30 U.S. 5 Pet. 1, 1831); *Worcester v. Georgia* (31 U.S. 6 Pet. 515, 1832).

[19] *Cherokee Nation v. Georgia*, 30 U.S. 16-17 (1831). In 1941 the Supreme Court further expanded on this trust relationship clarifying that the US Federal Government had "charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealing with the Indians, should therefore be judged by the most exacting fiduciary standards." *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1941)

[20] For a commentary on rights extinguishment in Canada see McNeil (2002).

[21] *Calder v British Columbia* [1973] S.C.R. 313, [1973] 4 W.W.R. 1.

[22] Richardson (2009) p. 66-7.

[23] See discussion on the Western Shoshone case in the US, and the implications of recognition of Aboriginal title in the Canadian context, below.

[24] McNeil (1998a), Imai (2009), see also McNeil(1998b).

[25] Borrows (2015); Walters (2009) p. 49.

government relationship with the Federal government since the 19th Century Marshall Supreme Court rulings. Finally, the political context in Canada changed significantly in 2015. A Liberal government advocating indigenous rights replaced the former Conservative government that had been strongly opposed to FPIC, and launched a number of initiatives reviewing statutory processes governing consultation and their alignment with the UNDRIP. Meanwhile, in the US the executive became significantly more hostile to indigenous peoples' consultation and consent rights in 2017 when President Trump replaced President Obama, offering promises and taking steps to fast track energy and extractive industry projects significantly impacting on tribes throughout the country.[26]

Given this context, the focus of the chapter differs significantly for the two jurisdictions. Greater emphasis is placed on the implementation of particular statutes and executive orders in the US context, while in the Canadian context the predominant focus is on the Supreme Court's evolving interpretation of the common law duty to consult and how this relates to FPIC under IHRL. The initiatives of the Canadian government to review its statutes and policies are also addressed, given their potentially important implications for FPIC recognition and implementation. In so doing, the chapter does not seek to compare the two jurisdictions. Instead, it seeks to engage with the issues that are of contemporary importance and relevance in each in the context of extractive industry activities in or near indigenous peoples' territories, while also offering suggestions applicable to both jurisdictions for a reformed approach to judicial, executive and legislative engagement with indigenous peoples' rights.

3 US Context

3.1 Statutory duty to consult

In 1938, shortly after the Supreme Court recognized Indian ownership of subsoil resources in treaty and reservation lands,[27] the Indian Mineral Leasing Act (IMLA) was enacted to provide tribes with greater control over leasing processes for mining and oil and gas and to increase their revenues.[28] The Act requires consent of the tribal council and approval of the Secretary of the Interior for ten year mining leases on reservations. In 1982, the Indian Mineral Development Act (IMDA) (Melcher Act) was enacted enabling tribes to act as mineral developers on the basis that "Tribal autonomy and self-determination certainly should include the right to negotiate terms of contracts like any owner of valuable resources".[29] However, it is only in recent years that tribes have developed the legal and institutional capacity necessary to assert these rights and to negotiate fair agreements or block unwanted mining developments on tribal lands, which total some 48 million acres across the US.[30] Indeed, challenges remain for tribes to fully implement FPIC within their

[26] As evidenced by the DAPL case, the order to the Secretary of State to expedite the review process for the Keystone XL Pipeline following the January 24, 2017 executive order inviting TransCanada to resubmit its permit application and the Resolution Copper Mine in Arizona impacting on cultural significant sites of the Sioux which the Trump administration is attempt to fast track.
[27] *United States v. Shoshone Tribe*, 304 U.S. 111 (1938).
[28] This followed the Indian Reorganization Act in 1934, which attempted to halt the widespread legislatively sanctioned dispossession of Indian lands.
[29] Hook and Banks (1993) quoting Senate Select Committee on Indian Affairs report S. REP. No. 472, 97th Cong., 2d Sess. (1982)
[30] Harvard Project on American Indian Economic Development. (2014) p i.

reservations in accordance with their own customary laws and practices and their right to self-determination, with creative approaches being developed by tribes to this end.[31]

The consent requirement under the IMLA does not, however, apply to the vast traditional off-reservation territories that are now classified as Federal or public lands. The dispossession of tribes of these lands was based on "cession" in the form of land-surrender treaties entered into under duress, conquest in the context of the "Indian wars", or what effectively amounted to the application of the principle of terra nullius in the context of nomadic tribes.[32] This was compounded by the confiscation of lands and extinguishment of Indian title by Congress under the plenary powers doctrine. These lands taken without consent total over 628 million acres, almost a third of the US landmass, and contain most of the areas of historical, cultural, religious or spiritual significance for Indian tribes.[33] As discussed below, under the extant legislative, regulatory and judicial frameworks, a duty to hold meaningful consultations, without an explicit associated duty to accommodate or obtain consent, applies in relation to extractive industry projects in these lands that impact on the rights of Indian tribes.[34]

Initial steps towards recognition of tribal self-determination and the requirement for consultations were taken in the late 1960's in response to the civil rights demands and mobilization of Native Americans[35] and were reflected in President Johnson's and Nixon's Special Messages to Congress in relation Indian Affairs in 1968 and 1970.[36] This in turn led the Bureau of Indian Affairs (BIA) to issue consultation guidelines in 1972.[37] The guidelines were limited to BIA personnel issues, and focused on information provision and on "obtaining the views of tribal governing bodies".[38] In 1975, the *Indian Self-Determination and Education Assistance Act*, which enabled the transfer of control of services from the BIA to Indian tribes, became the first legislative act to require consultations between federally recognized tribal governments and the Secretaries of the Interior, Health, Education, and Welfare in relation to its implementation.[39]

From the late 1960s to the 1990's, the duty to consult with indigenous peoples was affirmed in a number of US legislative acts addressing a broad range of issues, including the governance of natural resources.[40] Primary among these, in the context of natural resource extraction activities impacting on the rights of Indian tribes, were

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[31] Fredericks (2017) pp.15-26.
[32] Williams (1990); Borrows (1997).
[33] Galanda (2011) p. 2; Kinnison (2011) p. 1305.
[34] Meaningful consultation is required under the statutes, in particular where agencies are required to consult under *Administrative Procedure Act (APA),* Pub.L. 79–404, 60 Stat. 237 (1946).
[35] Imai (2009) p. 288-9.
[36] Richard Nixon, 'Message from the President of the United States Transmitting Recommendations for Indian Policy' HR Doc No. 91-363, 91st congress (2d Sess, 1970); Lyndon B. Johnson, 'Special Message to Congress on the Problems of the American Indian: "The Forgotten American,"' 1 Pub. Papers 336 (Mar. 6, 1968).
[37] The policy is quoted in *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 717-21 (8th Cir. 1979).
[38] *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 717-21 (8th Cir. 1979).
[39] The Act was amended in 1994 and incorporated into *The Tribal Self-Governance Act of 1994,* Pub. L. No. 103-413, 108 Stat. 4250
[40] Haskew (2000) p. 21 fn 3; There are at least 10 statutes requiring consultation see Tsoise (2003) p.285.

the *Archaeological Resources Protection Act* (1979),[41] the *Energy Policy* Act (1992),[42] the *National Environmental Policy Act* ("NEPA") (1969),[43] the *National Historic Preservation Act* ("NHPA") (1966, amended in 1992 to include properties of religious or cultural significance to tribes)[44] and the *Native American Graves Protection and Repatriation Act* (1990).[45] The latter, in addition to requiring consultation, also requires the consent of the appropriate Indian tribe for planned excavation on tribal land.[46] This substantive consent requirement is exceptional in US legislative acts. Other statutes such as NEPA and NHPA are described as embodying a lesser requirement to "stop, look, and listen" with "agencies to consider how particular projects might affect the public interest" while also giving rise to "lenient standard[s] for granting a preliminary injunction".[47] They do not, however, constrain the federal agencies from prioritizing other concerns over tribal interests and do not contain a consent requirement irrespective of the extent of the impacts on tribal rights and interests.[48]

3.2 Regulation and executive orders addressing the duty to consult

These and other legislative acts therefore impose a procedural obligation to consult on the four primary agencies responsible for managing federal lands, namely the Bureau of Land Management (BLM), the Fish and Wildlife Service, the National Park Service, and the Forest Service. They are accompanied by regulatory rules and guidance pertaining to consultation requirements issued by the administrative agencies responsible for their implementation. For example, the NHPA explicitly delegates authority to the Advisory Council on Historic Preservation (ACHP), an independent agency of the US government, to promulgate regulations interpreting and implementing its section 106 addressing consultations. The Council's guidelines build on the NHPA definition of consultations 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."[49]

They clarify that "tribal consultation should commence early in the planning process" and that the agency "shall ensure that consultation provides the Indian tribe a reasonable opportunity to identify its concerns about historic properties" and to "participate in the resolution of adverse effects".[50] Consultations are to be "respectful of tribal sovereignty" and to "recognize the government-to-government relationship that exists between the Federal Government and federally recognized Indian tribes".[51] They also state that an Indian tribe "may enter into an agreement with a federal agency regarding any aspect of tribal participation in the review process…provided that no modification is made to the roles of other parties without

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[41] *Archaeological Resources Protection Act of 1979*, 16 U.S.C. §§ 470aa–470mm (2006).
[42] *Energy Policy Act*, 42 USC §§ 13201 et seq. Pub L No 102-486 (1992).
[43] *National Environmental Policy Act of 1969*, 42 U.S.C. §§ 4321–4370 (2006).
[44] *National Historic Preservation Act of 1966*, 16 U.S.C. §§ 470 to 470x-6 (2006).
[45] *Native American Graves Protection and Repatriation Act*, 25 U.S.C. §§ 3001 et seq. (2006).
[46] *Native American Graves Protection and Repatriation Act* 25 U.S.C. §§ 3001 et seq. (2006).
[47] *Apache Survival Coalition v. United States*, 21 F.3d 895, 906 (9th Cir. 1994).
[48] Kinnison (2011) p. 1311; Haskew (1999) p. 24.
[49] *National Historic Preservation Act* (36 CFR Section 800.16 (f).
[50] Advisory Council on Historic Preservation, Consultation with Indian Tribes in the Section 106 Review Process: A Handbook 25 (November 2008) p. 7.
[51] Advisory Council on Historic Preservation, Consultation with Indian Tribes in the Section 106 Review Process: A Handbook 25 (November 2008) p. 8.

their consent".[52] In 2013, the Council reportedly committed to incorporating the principle of FPIC in its programmes, policies and initiatives.[53] In 2017, responding to issues raised by tribal representatives in relation to the lack of a consent requirement in section 106, the ACHP noted that requiring FPIC in NHPA would necessitate congressional action.[54]

Similarly, the implementing regulations for NEPA require that when tribal interests may be affected by a project, Indian tribes be invited at the outset of the process to participate in the scoping exercises.[55] Orders issued by the secretariats responsible for the *Endangered Species Act of 1973* require consultations "when actions taken under authority of the Act and associated implementing regulations affect, or may affect, Indian lands, tribal trust resources, or the exercise of American Indian tribal rights".[56] In such an event, in keeping with the government-to-government relationship, the government departments are required to

> "consult with, and seek the participation of, the affected Indian tribes to the maximum extent practicable. This shall include providing affected tribes adequate opportunities to participate in data collection, consensus seeking, and associated processes".[57]

Implementation of these consultation requirements is not homogenous across statutes and agencies, and compliance with the consultation requirements of one statute, such as NEPA, will not necessarily imply compliance with the consultation requirements of another statute, such as NHPA. Differences extend to who is to be consulted, with NEPA requiring government-to-government consultation with federally recognized tribal leaders, while NHPA requires consultation with federally recognized tribal leaders, traditional cultural leaders and other pertinent knowledge holders.[58] Furthermore, under both these statutes multiple federal agencies may be mandated to consult with Indian tribes in the context of a single project, and may or may not decide to designate a single agency to coordinate consultations. A degree of inconsistency and ambiguity also appears to exist over when consultation processes have to be conducted. In the name of flexibility, NHPA's ACHP regulations require consultations before the issuance of a license or permit, before approval of federal funding, or prior to ground-disturbing activities.[59]

In addition to these legislative acts and their implementing rules addressing the duty to consult, successive US presidents have issued executive orders (EOs) and memoranda addressing the measures to be taken by government agencies in accordance with the duty. Most notable among these are EO 13007 (1996) on Indian Sacred Sites[60] and EO 13175 (2000) requiring "meaningful consultation" issued

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[52] Advisory Council on Historic Preservation, Consultation with Indian Tribes in the Section 106 Review Process: A Handbook 25 (November 2008) at 7.
[53] UN Doc. A/HRC/36/46/Add.1 (2017) para 23.
[54] 'Improving Tribal Consultation in Infrastructure Projects A report by the Advisory Council on Historic Preservation' (May 24, 2017) p4 available at http://www.achp.gov/docs/achp-infrastructure-report.pdf
[55] 40 C.F.R. § 1501.7(a)(1); see also Bureau Land Management National Environmental Policy Act Handbook H-1790-1, § 6.3.2..
[56] US Fish and Wildlife Service 'Working with Tribes | American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act' available at https://www.fws.gov/endangered/what-we-do/tribal-secretarial-order.html.
[57] US Fish and Wildlife Service 'Working with Tribes | American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act'.
[58] Stern (2009) p. 11.
[59] Stern (2009) p. 8.
[60] 61 Fed. Reg. 26771 (May 24, 1996).

under the Clinton administration together with the 2009 *Presidential Memorandum on Tribal Consultation* issued under the Obama administration which sought to give effect to EO 13175.[61] The latter executive order is significant in so far as it extends the Federal Government's consultation duty across the entire spectrum of the federal trust responsibility and resulted in the promulgation of consultation policies across the agencies of the Department of the Interior.[62] The stated objective of EO 13175 is

> "to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, to strengthen the United States government-to-government relationships with Indian tribes, and to reduce the imposition of unfunded mandates upon Indian tribes".[63]

These orders are consequently broader in scope and more ambitious in their wording than existing statutory provisions, which tend to be limited to services or activities impacting on religious or cultural sites.[64] This principled approach to encouraging "meaningful consultation" is also reflected in guidance provided by the Attorney General on working together with Federally Recognized Indian Tribes.[65] It includes commitments by the Department of Justice to honour and strive "to act in accordance with the general trust relationship between the United States and tribes" and to further the government-to-government relationship with each tribe. The Department also commits to respect and support tribes' authority to exercise their inherent sovereign powers, including powers over … their territory", to respect tribal self-determination and autonomy and to promote and pursue the objectives of the UNDRIP.[66]

The executive orders have, however, been criticized on a number of grounds. One concern is that their content was not subject to consultation, a reality at odds with their stated aim.[67] Another is the absence of clear and enforceable obligations on federal agencies as they stipulate that they do not grant or vest any right to any party, and their failure to adequately define what is meant by consultation and when the duty is triggered.[68] A related critique of the consultation processes pursuant to these executive orders and administrative regulations is that they create confusion by establishing a "non-binding"/"non-enforceable"/"non-remedial" consultation requirement, in addition to the binding/enforceable/remedial duty that flows from statutory consultation provisions.[69] As a result, the use of the single term "consultation" for two apparently distinct requirements can cause confusion and may be counterproductive to the development of good faith relationships that are necessary for meaningful and effective consultations, potentially even giving rise to "bureaucratic abuse and breach of faith".[70] This confusion is compounded by the

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[61] Executive Order 13175 'Consultation and Coordination with Indian Tribal Governments' November 6, 2000; 'Presidential Memorandum on Tribal Consultation' November 5, 2009.
[62] Haskew (1999) p. 74.
[63] Executive Order 13175 'Consultation and Coordination with Indian Tribal Governments' November 6, 2000.
[64] Routel and Holth (2013) p. 450.
[65] See Office of the Attorney General, "Attorney General Guidelines Stating Principles for Working With Federally Recognized Indian Tribes", Notice, Federal Register, Vol. 79, No. 239, at 73905-73906, December 12, 2014, Department of Justice, available at http://www.gpo.gov/fdsys/pkg/FR-2014-12-12/pdf/2014-28903.pdf.
[66] Ibid.
[67] Haskew (1999) p. 33.
[68] Haskew (1999) p. 33.
[69] Haskew (1999) p. 62; Routel and Holth (2013) p. 451.
[70] Haskew (1999) p. 41.

Courts which in some instances have deemed administrative based consultation requirements, such as those in the BIA guidelines, to be enforceable, while in other instances have affirmed the opposite in relation to the same administrative consultation requirement.[71] This ambiguity is further compounded by the ad-hoc manner in which federal agencies implement consultations under the latest executive order.[72]

While the executive orders mention the government-to-government trust relationship their silence on its implications has also been criticized. The fact that government agencies can claim to have fulfilled their obligations toward indigenous peoples by compliance with purely procedural and unenforceable processes is regarded as introducing the potential for consultations to sanction and legitimize incremental and systematic breaches of indigenous rights instead of fulfilling their trust and fiduciary responsibilities.[73]

3.3 US jurisprudence and the duty to consult

A similar critique can be levied at the US Courts which have done little to clarify the substantive obligations and protections that the fiduciary duty could give rise to (beyond those specified in statutes) in the context of consultations pertaining to activities impacting on tribal rights, such as large scale extractive and energy industry projects.[74] In the US context, the basis for the Federal Government's trust relationship with tribes emerges from three rulings of Chief Justice Marshall, known as the Marshall Trilogy, issued between 1823 and 1832.[75] In these rulings, Marshall offered his interpretation of international law (then referred to as the law of nations) and the so-called 'doctrine of discovery' and the common law trust relationship it implied.[76] As noted earlier, according to Marshall, the relationship of native peoples "to the United States resembles that of a ward to his guardian".[77] Consequently, the Federal Government had a duty to protect the Indian tribes from states and individuals seeking access to, or control over, their lands. The Court recognized the inherent sovereignty of the tribes which continued following colonialization, albeit in diminished form.[78] Subsequent Supreme Court rulings clarified that this trust relationship constitutes a fiduciary duty in relation to tribal lands and resources.[79]

The Supreme Court's perspective on the implications of this trust, or fiduciary, responsibility evolved over time.[80] In the Marshall decisions, this responsibility is the corollary of inherent sovereignty and territorial rights of native peoples that were limited by, but nevertheless continued to be recognized under, colonial doctrines. Subsequently, during the late 19th and early 20th centuries, the trust responsibility was construed as a means to deny those rights and to consequently deem consultation

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[71] *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d at 721 versus *Lower Brule Sioux Tribe v. Deer*, 911 F. Supp. 395 (D.S.D. 1995) at 400.
[72] UN doc A/HRC/36/46/Add.1 para 16
[73] Wood (1995a) p. 749.
[74] Tsoise (2003) p. 290; see also Wood (1995b) p. 132.
[75] *Johnson v. McIntosh*, 21 U.S. 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832).
[76] Anaya (2004) pp. 23-6; Williams (1999) p 132; Williams (1990).
[77] *Cherokee Nation v. Georgia* 30 U.S. 1, 17 (1831).
[78] *U.S. v. Kagama*, 118 U.S. 375 (1886).
[79] *Morton v. Ruiz*, 415 U.S. 199 (1974); *Seminole Nation v. U.S.*, 316 U.S. 286 (1942).
[80] Ezra (1989); Riley (2011) pp. 207-8; Fletcher (2012) pp. 83-4; Williams (2005) pp. 47-122.

and consent unnecessary when appropriating Indian Lands.[81] This was given legislative effect in 1871 in the Indian Appropriation Act when Congress officially halted the practice of treaty-making with Indian Nations.[82] The 1886 ruling in *U.S. v. Kagama* represented a further weakening of tribal sovereignty, classifying tribes as being in a state of pupillage and as wards of the State and extending and entrenching Congressional power over them.[83] This was compounded in 1903 by the US Supreme Court in *Lone Wolf v Hitchcock* - a case taken by Native Americans against the US government – which put an end to the notion that Indian consent was necessary prior to selling "surplus" tribal lands.[84] The rationale of the Court was that plenary power of Congress - which flowed from the dependant nature of Indian tribes and their trust relationship with the Federal Government and the Constitution's Commerce Clause,[85] - could not be limited by a treaty and that the selling of Indian trust lands was "a mere change in the form of investment".[86] Indeed, in the face of the Indian arguments that the US had never taken land from tribes without their consent, the Court went so far as to reason that requiring their consent could be detrimental to the tribes well-being, as this was something which Congress was best placed to determine.[87] The guardian-ward relationship consequently had become a basis for Congress to deem Indian consent to be irrelevant in relation to disposing of their lands and resources, in particular their timber and mineral resources.[88]

In the modern "era of self-determination", recognition of Indian tribes' right to self-determination is nevertheless closely linked with the affirmation under Marshall era jurisprudence that they retain "those aspects of sovereignty not withdrawn by treaty or statute" and exist as "distinct political [societies], separated from others, capable of managing [their] own affairs and governing [themselves]".[89] While deficient in terms of IHRL recognition of indigenous peoples' right to self-determination, it does acknowledge their potentially significant self-determination based powers over the regulation of criminal justice, tribal membership and property, provided Congress does not regulate to limit those powers.[90] It also establishes the basis for the duty to consult. Federal Courts have addressed this duty on a number of occasions since self-determination was recognized as a policy objective. They have affirmed that the duty under federal common law arises from the trust relationship between the Federal Government and Indian tribes and extents to both on and off reservation lands.[91] They also clarified that the failure comply with statutory consultation obligations

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[81] *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).
[82] Indian Appropriations Act 1871 (and as amended later) 25 U.S.C. Section 71.
[83] *U.S. v. Kagama*, 118 U.S. 375 (1886).
[84] *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).
[85] Article I, Section 8, Clause 3 the Commerce Clause addresses the role of Congress in regulating commerce with Indian tribes, The Court in Lone Wolf interpreted this clause as providing Congress with political power over tribes that is "not subject to be controlled by the judicial department of the government". *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903)
[86] *Lone Wolf v. Hitchcock*, 187 U.S. 553, 568 (1903); see also Miller (2015) p. 49; and Fletcher (2012) p. 74.
[87] *Lone Wolf v. Hitchcock* 187 U.S. 553, 564 (1903).
[88] Routel and Holth (2013) p. 429.
[89] *Cherokee Nation v. Georgia* 30 US 1, 17 (1831); Tsoise (2011) pp. 936-48; Imai (2009) 293-4.
[90] The precarious and limited nature of tribal sovereignty, and by extension the duty to consult, is evident in the Supreme Court 1987 ruling in *US v Wheeler* 435 US 313, 323 (1978) which held that tribal sovereignty "exists only at the sufferance of Congress and is subject to complete defeasance" and that "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute". It has also been argued that the trust doctrine should condition plenary power, see Skibine (2003).
[91] *Klamath Tribes*, 1996 WL 924509, (D. Or. 1996), 8.

constitutes a violation of trust duties,[92] and that the existence of a treaty implies a duty to consult under federal common law, irrespective of whether the treaty explicitly affirms this duty.[93]

In cases related to sewer construction, timber, geothermal, mining and hydroelectric projects, the US Courts have found both for and against tribes who challenged the compliance of government agencies with NHPA section 106, NEPA and other statutory consultation requirements.[94] In some cases sufficient studies demonstrating the non-existence of cultural resources were deemed to have satisfied consultation requirements,[95] while in others information provision was deemed inadequate to meet the criteria for informed consultations.[96] Courts have also held that the production of a large volume of documentation does not necessarily prove meaningful consultation occurred.[97] In cases of procedural breaches, where the "substantive duty" to consult on a government-to-government basis were not met, injunctive relief was available if irreparable harm was demonstrated and the injunction were deemed to be in the public interest.[98] Such injunctions have been issued in order to protect tribal resources such as timber.[99] In addition to issuing injunctive relief, Courts have, on at least one occasion, issued a Writ of Mandamus, ordering federal agencies to consult.[100] On the other hand, Courts have held that increased tribal control over their resources implied an increased responsibility on the tribes' part, and lessened the fiduciary responsibilities of the Federal Government in relation to information provision.[101]

Another feature of Court decisions is their finding that consultation outcomes do not necessarily have to be respected, in particular where a "substantial burden" is not placed on the tribes,[102] and that Native traditional religious considerations do not "always prevail to the exclusion of all else".[103] In one instance this was held to be the case even when an Environmental Impact Assessment had recognized the difficult–

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[92] *Muckleshoot Indian Tribe v. U.S. Forest Services* 177 F.3d 800 (1999); *Pit River Tribe v. U. S. Forest Service* 469 F.3d 768 (2006).
[93] *Confederated Tribes and Bands of the Yakama Nation v. U.S. Department of Agriculture* No. 10-3050, 2010 WL 3434091; see also Galanda (2011) p. 9.
[94] For example in *Muckleshoot Indian Tribe v. U.S. Forest Services* 177 F.3d 800 (1999) and *Pit River Tribe v. U. S. Forest Service* 469 F.3d 768 (2006) the Courts found in favour of the tribes while no breach of NEPA consultation requirements was found in *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 1207, 1215-16 (9th Cir. 2008) and *Narragansett Indian Tribe v. Warwick Sewer Auth*., 334 F.3d 161 (1st Cir. 2003).
[95] *Native Americans for Enola v. US Forest Service*, 832 F. Supp. 297 (D. Or. 1993).
[96] *Pueblo of Sandia v. United States*, 50 F.3d at 857.
[97] *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).
[98] *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d, *Klamath Tribes*, 1996 WL 924509 (D Oregon 1996), and *Confederated Tribes and Bands of the Yakama Nation v. U.S. Department of Agriculture* No. 10-3050, 2010 WL 3434091.
[99] *Klamath Tribes*, 1996 WL 924509 (D Oregon 1996); see also *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).
[100] See order in relation to the BIA in *Lower Brule Sioux Tribe v. Deer*, 911 F. Supp. 395; see also Galanda (2011) p. 6.
[101] *United States v Navajo Nation* 537 U.S. 488 (2003), see also Pevar S L (2009).
[102] *Wilson v Block* 708 F.2d 735, 745-47, cert. denied, 464 U.S. 956 (1983) quoting *Havasupai v. United States*, 752 F. Supp. 1471 (1990).
[103] *Navajo Nation v. United States Forest Service* 479 F.3d 1024, 1063 (9th Cir. 2007). For a commentary on the weakness of protections under the Act see Tsoise (2003) p. 289.

to-assess, but, nevertheless irretrievable, impact a project could have on tribal beliefs and practices.[104]

The question of the extent to which government agencies are obliged to comply with their own consultation policies and guidelines has also come before a number of Courts of Appeal, but their findings have been inconsistent. One Court held that the BIA's failure to comply with its consultation policy "violate[d] 'the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people'",[105] while another Court (at the same level, but covering different geographical districts) held that the same consultation guidelines "do not establish legal standards that can be enforced against the Bureau".[106]

3.4 Observations on duty to consult under US Indian Law

The relatively small number of cases and the limited extent to which they address the duty to consult, along with the at times inconsistent findings of the Courts, make it difficult to draw clear conclusions from the case law as to the protections afforded by statutory consultation requirements and the trust doctrine. Rulings addressing the procedural aspects of consultations indicate that failure to consult with appropriate authorities, consult prior to decision-making, conduct adequate investigations in relation to the possible impacts, or provide available information, are all grounds for deeming that the duty to consult has not been adequately fulfilled. However, the lack of clear and uniform guidance as to what constitutes "meaningful consultation" means the threshold for some of these criteria remains somewhat obscure. On the other hand, while indirectly implying that consultation outcomes may have to be respected in some contexts,[107] there is little or no guidance in relation to accommodation of tribal interests or contexts when consent may be required. In addition, the notion that increased tribal control over decision-making lessens State obligation to inform tribes about facts affecting their right to benefit from projects is problematic from the perspective of a self-determination based duty to consult in order to obtain FPIC.

Other issues arise in relation to judicial review. The only substantive grounds upon which tribes can mount a judicial challenge to final decisions reached by US federal agencies is on the basis that those decisions were arbitrary, capricious or an abuse of discretion, as established in the Administrative Procedure Act (APA).[108] This is a limited recourse for two reasons. Firstly, it only applies at the end of the consultation process when a final decision has been reached and secondly the threshold of arbitrariness, capriciousness or abuse of discretion is very high.[109] The Dakota

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[104] *Navajo Nation v. United States Forest Service* 479 F.3d 1024, 1039, 1043 1059 (9th Cir. 2007).
[105] *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d para 63, the Court was quoting from *Morton v. Ruiz*, 415 U.S. 199, 236 (1974) which in turn was quoting *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942).
[106] *Hoopa Valley Tribe v. Christie*, 812, 1099 F.2d (9th Cir. 1986); see also Haskew (1999) p. 72 fn 259.
[107] *Wilson v Block* 708 F.2d 735, 745-47, cert. denied, 464 U.S. 956 (1983) quoting *Havasupai v. United States*, 752 F. Supp. 1471 (1990) and *Navajo Nation v. United States Forest Service* 479 F.3d 1024, 1063 (9th Cir. 2007).
[108] *Administrative Procedure Act* (APA), Pub.L. 79–404, 60 Stat. 237 (1946); 5 U.S.C. §§ 551 to 599. The APA provides the necessary waiver of sovereign immunity to take a suit which other statutes do not provide.
[109] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983).

Access Pipeline (DAPL) case, discussed below, is illustrative of this.[110] This situation gives rise to the general view that judicial review is unavailable in many cases where it is needed. Another reason for this perspective is the provisions in executive orders negating judicial review and inconsistent Court rulings on their implications.[111] It also arises from failure in these orders to adequately contextualize the duty to consult within the broader framework of the Federal Government trust relationship with tribes,[112] and the prevalent judicial interpretation in the lower courts that the waiver of sovereign immunity is necessary in order for the right to consultation to be subject to judicial review unless it is tied to the violation of a specific statute.[113]

The fact that Supreme Court decisions have historically frequently been unfavourable to tribal sovereignty and are uninformed by IHRL is also relevant when considering the judicial position on the duty to consult.[114] The colonial doctrine based manner in which the Court continues to interpret and restrict tribal sovereignty does not bode well for the prospect of an empowering self-determination based duty to consult to emerge from its jurisprudence.[115] Indeed, the absence of an explicit acknowledgement that government agencies should, under certain circumstances, adhere to the wishes and decisions of tribes in relation to off-reservation measures that could significantly impact on their rights and interests is evidence of this. It is reflective of a core issue with tribal consultations in the US, namely that they are predominately procedural in nature with little emphasis placed on respecting their outcomes. This is coupled with an apparent lack of sensitivity in the judicial system and federal agencies to the importance of protecting tribal rights and cultural resources.[116] Despite these limitations, it has been argued that the 1995 US Appeal Court opinion in *Pueblo of Sandia v. United States* "indicates the federal courts should provide strong judicial review of agency actions [including consultations] under NHPA Section 106".[117] It has also been suggested that through greater proactive insistence on consultation, indigenous peoples can ensure that trust obligations are fulfilled in contexts where they would otherwise be systematically breached.[118] Another suggestion is that federal agencies establish independent mediation mechanisms where tribes withhold consent.[119] Others regard a change from current consultation processes to FPIC as posing few challenges in the US

[110] For an overview of the DAPL case see Fredericks and Heibel (forthcoming 2018).
[111] The Eight Circuit Court's rulings are an exception in relation to the BIA consultation guidelines.
[112] Routel and Holth (2013) p. 435.
[113] In general, the US government enjoys sovereign immunity from lawsuits unless it consents to waive that immunity. The government has included a limited waiver of immunity under the *Indian Tucker Act* 28 U.S.C. § 1505 (2006) provided the "claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band, or group". As Routel and Holth point out, this "should have no impact on tribal claims for declaratory or injunctive relief for breaches of the trust responsibility" as the Supreme Court has held that "no waiver of sovereign immunity is required if a plaintiff claims that a federal official has violated federal law (including federal common law) provided that the plaintiff names the federal official, rather than the agency itself, as the defendant". However, lower level courts have failed to make this distinction, thereby failing to "recognize the federal government's enforceable common law duty to consult with Indian tribes before taking actions that may impact them", see Routel and Holth (2013) p. 449.
[114] Williams (2005) pp 186-94; Richardson (2009) p. 79.
[115] Williams (2005) pp. 193-4; Richardson (2009) p. 79; Imai (2009) p 314.
[116] Wood (1995b) p. 221; Tsoise (2003) p. 289.
[117] Stern (2009) p. 12.
[118] Galanda (2011) p. 7.
[119] Kinnision (2010) p. 1332.

context.[120] However, many continue to hold that despite improvements in consultation processes in recent decades, tribes remain deeply dissatisfied as they lack an effective voice in decision-making in relation to lands and resources in close proximity to their reservations as well as off-reservation lands and resources which they have traditionally or otherwise used or with which they maintain important spiritual or cultural connections.[121] This absence of a say over if, or how, off-reservation extractive and energy projects that impact on their rights and way of life, proceed is compounded by the frequent failure to realize the standard of meaningful good faith informed consultation in such contexts. Coupled with the general absence of judicial review of consultation procedures and the need to first exhaust administrative remedies, this situation contributes to the denial of basic protections for land, cultural and self-governance rights.[122]

This view is echoed in the 2017 US country mission report of the UN Special Rapporteur on the rights of indigenous peoples (UNSRIP) which focused on the energy sector. The Rapporteur found "few examples of meaningful consultation in the context of energy projects in the United States" and highlighted the need for a shift to an approach based on consultations in order to obtain FPIC rather than consultations as an end unto themselves.[123] The Rapporteur expressed particular concern in relation to the Dakota Access Pipeline (DAPL), an emblematic case that highlights deficiencies in the US consultation law, policy and practice in the context of potential impacts of energy projects on tribes.[124] The pipeline crosses the Great Sioux Nation traditional territories and treaty lands, comes within a kilometre of one of their reservations and has generated concerns with regard to its impact on sacred areas and tribal water supply.[125] The environmental assessment prepared by the Army Corps of Engineers in accordance with NEPA failed to address all these concerns when assessing the pipeline route.[126] Large scale protests ensued, involving all bands of the Great Sioux Nation and other indigenous peoples from around the world, as well as climate change activists.[127] Private security forces and local law enforcement adopted a militarized and at time violent approach in response, arresting tribal members and protesters, some of whom remain in custody.[128]

According to the concerned tribes, the protests, which were largely non-violent, led to more constructive consultations and the promise by the Army Corps to conduct an environmental review in relation to easements.[129] The review was, however, cancelled following a directive by President Donald Trump, on 24 January 2017, enabling the pipeline to become operational, and according to the tribes, leading to the destruction of sacred areas.[130] In July 2017, the Columbia District Court found

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[120] Miller (2015) p. 38.
[121] Fishel (2007b) p. 621; Haskew (1999) p. 74; Miller (2015) p. 67; Kinnison (2011) p. 1323; Bluemel (2005) p. 529; Imai (2009) p. 302.
[122] Haskew (1999) p. 62.
[123] UN Doc. A/HRC/36/46/Add.1 para 27.
[124] UN Doc. A/HRC/36/46/Add.1 paras 63-74.
[125] UN Doc. A/HRC/36/46/Add.1 para 64.
[126] *Standing Rock Sioux Tribe, et al., v. U.S. Army Corps of Engineers, et al* Civil Action No. 16-1534 (JEB) p. 66.
[127] UN Doc. A/HRC/36/46/Add.1 para 67.
[128] UN Doc. A/HRC/36/46/Add.1 para 72.
[129] UN Doc. A/HRC/36/46/Add.1 para 69.
[130] UN Doc. A/HRC/36/46/Add.1 para 70; see also Colwell C. 'Why Sacred Sites Were Destroyed for the Dakota Access Pipeline' November 26, 2016 available at https://www.ecowatch.com/sacred-sites-standing-rock-2103468697.html.

that the Army Corps had failed to adequately address the "impacts of an oil spill on fishing rights, hunting rights, or environmental justice, or the degree to which the pipeline's effects are likely to be highly controversial."[131] At the same time, the Court found that statutory consultation processes under section 106 of NHPA had been adequately fulfilled, despite tribal claims that attempts to consult them were made after key decisions relating to the pipeline route had already been taken, and that their request to conduct their own archaeological survey went unheeded.[132] The case demonstrates the piecemeal and disjointed nature of US consultation laws, policies, procedures and practices, the failure to involve tribes in a timely and sufficient manner in assessment processes, as well as the extent to which the executive has simply disregarded indigenous perspectives and wishes. It also points to the need for timely holistic participatory impact assessments, addressing the environmental, economic, social, cultural and spiritual impacts of proposed projects, that are necessary to inform meaningful consultations and for a greater emphasis on obtaining the consent of the impacted tribes.[133]

The DAPL experience prompted a broader discussion between federal agencies and tribes in relation to infrastructure and extractive projects. Among the issues raised by tribes were the delegation of consultation and review duties by federal agencies to project applicants or private consultancies, and the inconsistency of this with the notion of government-to-government consultations, and the associated lack of accountability mechanisms to ensure federal agencies fulfilled their consultation duties.[134] Communication, funding and training issues, including the importance of recognizing that no response from a tribe does not implies tribal consent, the lack of adequate funding and resources to participate in all consultations, and the lack of understanding of trust obligation and treaty rights among agency staff were also raised.[135] A core concern of the tribes related to the need for statutory recognition of their decision-making authority over infrastructure and extractive industry projects in line with UNDRIP's provision on FPIC.[136] This included ensuring that consultations involved comprehensive reviews of proposed projects and were geared towards obtaining the consensus of the tribes; were held sufficiently in advance of decision-making thereby enabling alternative options to be considered and tribes to act as partners in the decision-making process; valuing traditional knowledge on a par with archaeology and anthropology expertise; and the need for federal agencies to make use of their existing authority (or in the case of the ACHP to be granted greater authority) to refuse authorization to projects that significantly impacted on tribes.[137]

Responding to these and other critiques in the context of NHPA, the ACHP made a series of recommendations, including that "[f]ederal agencies and Indian tribes

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[131] *Standing Rock Sioux Tribe, et al., v. U.S. Army Corps of Engineers, et al* Civil Action No. 16-1534 (JEB) p. 66.
[132] *Standing Rock Sioux Tribe, et al., v. U.S. Army Corps of Engineers, et al* Civil Action No. 16-1534 (JEB) pp. 81-90; see also UN Doc. A/HRC/36/46/Add.1 para 65.
[133] UN Doc. A/HRC/36/46/Add.1 para 88(g).
[134] 'Improving Tribal Consultation in Infrastructure Projects A report by the Advisory Council on Historic Preservation' (May 24, 2017) p4 available at http://www.achp.gov/docs/achp-infrastructure-report.pdf.
[135] 'Improving Tribal Consultation in Infrastructure Projects A report by the Advisory Council on Historic Preservation' (May 24, 2017).
[136] 'Improving Tribal Consultation in Infrastructure Projects A report by the Advisory Council on Historic Preservation' (May 24, 2017) p4, 7.
[137] 'Improving Tribal Consultation in Infrastructure Projects A report by the Advisory Council on Historic Preservation' (May 24, 2017) pp7-10.

should develop Section 106 consultation agreements or protocols that define how they will consult" and "examine existing tribal consultation policies and incorporate principles for reaching consensus with Indian tribes" in the interest of ensuring more "efficient project delivery and better accommodation of tribal cultural concerns".[138]

4 Canadian context

4.1 Statutory duty to consult and guidance of the Federal Government in Canada

In 2008, the Canadian Federal Government issued interim guidance outlining the responsibilities of federal agencies to fulfil the duty to consult as articulated in the common law and under statutory and contractual obligations, including specific consultation requirements under modern treaties.[139] The guidelines were updated in 2011 and identify a number of characteristics of meaningful consultation including that it be "carried out in a timely, efficient and responsive manner" and be "transparent and predictable; accessible, reasonable, flexible and fair".[140] Consultations are to be "founded in the principles of good faith, respect and reciprocal responsibility" and "respectful of the uniqueness of First Nation, Métis and Inuit communities" and to include "accommodation (e.g. changing of timelines, project parameters), where appropriate".[141] The guide envisages a four phase process, applicable to the issuance of authorizations or approvals for resource extraction projects.[142] Phase one is the pre-consultation analysis and planning stage.[143] Phase two is focused on implementing and documenting the consultation.[144] Phase three relates to accommodation measures,[145] and the final phase is the implementation of the final decision.[146] Critically, neither the federal nor provincial governments tend to require that these final decisions address impacts on First Nations' rights.[147] To

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[138] 'Improving Tribal Consultation in Infrastructure Projects A report by the Advisory Council on Historic Preservation' (May 24, 2017) pp 9-10, 15.

[139] 'Aboriginal Consultation and Accommodation Interim Guidelines for Federal Officials to Fulfill the Legal Duty to Consult' (Minister of the Department of Aboriginal Affairs and Northern Development Canada, 2008) available at http://caid.ca/CanConPol021508.pdf.

[140] 'Aboriginal Consultation and Accommodation - Updated Guidelines for Federal Officials to Fulfil the Duty to Consult' (Minister of the Department of Aboriginal Affairs and Northern Development Canada, 2011) available at http://www.aadnc-aandc.gc.ca/eng/1100100014664/1100100014675.

[141] Aboriginal Consultation and Accommodation - Updated Guidelines for Federal Officials to Fulfil the Duty to Consult' (Minister of the Department of Aboriginal Affairs and Northern Development Canada, 2011) p13.

[142] Aboriginal Consultation and Accommodation - Updated Guidelines for Federal Officials to Fulfil the Duty to Consult' (Minister of the Department of Aboriginal Affairs and Northern Development Canada, 2011) pp 36-58.

[143] This involves describing the planned conduct, identifying potential adverse impacts, identifying Aboriginal groups in the area and their potential or established Aboriginal or treaty rights, determining if there is a duty to consult and accommodate and the scope of that duty, designing the consultation process and maximising collaboration opportunities, such as with provincial governments, while avoiding consultation fatigue for Aboriginal groups and developing a documentation system.

[144] This involves managing issues and concerns that arise in the process, including in relation to the proposed project and adjusting the consultation and accommodation process as necessary.

[145] This consists of gathering information supporting the need for accommodation, identifying and selecting measures to realize accommodation and communicating and documenting accommodation measures.

[146] This includes accommodation measures and related communication, monitoring, follow-up and evaluation activities.

[147] 'Expert Panel Report, Building Common Ground: A New Vision for Impact Assessment in Canada' (2017) p 28.

maximize efficiency, Aboriginal consultation is integrated into "environmental assessment and regulatory approval processes" with major projects requiring a Crown consultation coordinator who integrates the activities throughout these processes.[148]

The 2008 "interim guidelines" noted that "an 'established' right or title may suggest a requirement for consent from the Aboriginal group(s)".[149] This reference to consent was removed from the 2011 updated guidelines, arguably reflective of the Harper government's aversion to the concept. Since taking office in 2015, the current Federal Government has taken a more progressive stance and committed to implementing the UNDRIP. In its own words, taking steps towards "reversing the colonial and paternalistic approaches" and "breathing life into Section 35 of Canada's Constitution", which to date "has not been lived up to".[150]

The negotiation of impact benefit agreements (IBAs) between project proponents and First Nations is common practice in the extractive sector in Canada and is sometimes misunderstood as a manifestation of FPIC. While these agreements can complement consultations and consent seeking processes they cannot replace them. There is no government involvement in the processes and they are not underpinned by a legislative requirement to consult in order to obtain consent. Instead they are based on the presumption that extractive projects will be approved. In practice they are also often finalized prior to impact assessment completion, leading to decisions that are not properly informed in relation to potential impacts.

Two of the key legislative acts regulating consultations with First Nations pertaining to extractive industries in Canada are the Canadian Environmental Assessment Act (CEAA), 2012 and the National Energy Board Act (NEBA), 1985.[151] The former is implemented by the Canadian Environmental Assessment Agency which conducts environmental impact assessments, provides support to review panels and acts as the Crown's consultation coordinator with First Nations. In the case of Energy projects, the National Energy Board (NEB) plays a central role in the discharging the Crown's duty to consult. The extent to which Aboriginal rights are protected within these regulatory processes has been the subject of considerable discussion in recent years, and in the case of the NEBA has recently been addressed by the Supreme Court following litigation by indigenous peoples, with the general consensus among indigenous people and independent experts being that they are failing to deliver on the promise of Constitutional recognition of Aboriginal rights and reconciliation and are instead increasing the potential for conflict.[152]

In 2016, the Federal Government commissioned expert review panels addressing environmental impact assessments (EIAs) and related consultations under the CEAA and the NEB's consultation procedures under the NEBA. The review panels

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[148] According to the guidelines a lead government agency is to be identified and is made accountable for "any consultation processes that may be carried out for federal government activities".

[149] 'Aboriginal Consultation and Accommodation Interim Guidelines for Federal Officials to Fulfill the Legal Duty to Consult' (Minister of the Department of Aboriginal Affairs and Northern Development Canada, 2008) p 53 available at http://caid.ca/CanConPol021508.pdf.

[150] 'Speech for the Honourable Carolyn Bennett, Minister of Indigenous and Northern Affairs at the United Nations Permanent Forum on Indigenous Issues 16th Session United Nations Headquarters, General Assembly Hall, New York' April 25, 2017 available at https://www.canada.ca/en/indigenous-northern-affairs/news/2017/05/speaking_notes_forthehonourablecarolynbennettministerofindigenou.html.

[151] National Energy Board Act (R.S.C., 1985, c. N-7).

[152] Papillon and Rodon (2017).

concluded their reports in 2017. While the CEAA review was considerably more progressive, both reports found that consultation processes needed to be overhauled and be based on the principle of securing FPIC on matters affecting indigenous peoples' rights.[153] They also stressed the need for "equal consideration of Indigenous knowledge and ways of knowing", and the goal of co-decision-making "to the greatest extent possible" in accordance with the nation-to-nation relationship, as well as greater and more appropriately structured resourcing and support for indigenous peoples and their capacity building needs, including for building the conditions necessary for FPIC.[154] The CEAA review promoted the notion of "collaborative consent" and acknowledged that "Indigenous Peoples have the right to say no", qualifying this recognition on the basis that "this right must be exercised reasonably" and be subject to review.[155] The current approach to addressing Aboriginal rights in EIAs was described as "unclear, inconsistent and insufficient",[156] and a new collaboratively developed model of impact assessments [IAs] was recommended. This requires that "[r]ecognition of and support for Indigenous laws and inherent jurisdiction … be built into IA governance and processes".[157] This position was reinforced in an Environmental and Regulatory Reviews Discussion Paper issued by the Federal Government in July 2017, in which it committed to "early and regular engagement and partnership with Indigenous peoples based on recognition of indigenous rights and interests from the outset, seeking to achieve [FPIC] through processes based on mutual respect and dialogue".[158] While weaker than the language used in the UNDRIP, and more conservative than the CEAA review recommendations, it represents a significant improvement on previous governmental positions and may provide the platform for the development of more meaningful consultation and consent seeking processes.

Canadian provinces conduct EIAs at the provincial level and are also bound by section 35 of the Constitution and the duty to consult. This adds an additional layer of complexity, as federal and provincial assessments can be required for a single project and despite the CEAA promise of "one project one assessment" this has not materialized.[159] Cooperation between federal, provincial and indigenous governments is essential for this to be realized, and as acknowledged in the CEAA review requires an approach by all parties that is premised on respect for indigenous

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[153] 'Expert Panel Report, Building Common Ground: A New Vision for Impact Assessment in Canada' (2017) and 'Forward, Together Enabling Canada's Clean, Safe, and Secure Energy Future Report of the Expert Panel on the Modernization of the National Energy Board' (2017). The NEB report used the weaker language of "seek consent", rather than "obtain consent", and its practical proposals to ensure greater indigenous involvement are significantly weaker than the CEAA report.
[154] 'Forward, Together Enabling Canada's Clean, Safe, and Secure Energy Future Report of the Expert Panel on the Modernization of the National Energy Board' (2017) p. 46; Expert Panel Report, Building Common Ground: A New Vision for Impact Assessment in Canada' (2017) p. 32.
[155] 'Expert Panel Report, Building Common Ground: A New Vision for Impact Assessment in Canada' (2017) p. 29.
[156] 'Expert Panel Report, Building Common Ground: A New Vision for Impact Assessment in Canada' (2017) p. 30.
[157] 'Expert Panel Report, Building Common Ground: A New Vision for Impact Assessment in Canada' (2017) p. 29.
[158] 'Environmental and Regulatory Reviews Discussion Paper' (Government of Canada, 2017) p. 15.
[159] See for example Taseko Mines Prosperity mine project that is strongly opposed by the Tsilhqot'in Nation, and despite having been rejected by the federal government following its EIA was approved at the provincial level EIA. For detailed documentation of the Federal government EIA process see http://www.ceaa-acee.gc.ca/050/documents-eng.cfm?evaluation=63928&type=1.

knowledge and FPIC.[160] Commitments of provinces such as Alberta's in 2015 and British Columbia's in 2017 to the implementation of the UNDRIP are therefore of particular importance.[161]

In parallel to these reviews of statutory consultation processes, the Federal Government is also adopting a number of other progressive steps and positions in relation to FPIC, with potentially significant implications for extractive industry activities. On 21 April 2016, in an effort to harmonize federal laws with the UNDRIP, a legislative proposal, known as Bill C-262 which would effectively incorporate the Declaration into Canadian law, was tabled as a private members bill in the House of Commons.[162] The Bill commenced its second reading in December 2017 and according to the Parliamentary Secretary to the Minister of Indigenous Affairs is supported by the government.[163] In 2017, the Federal Government announced that it was seeking a "complete renewal of Canada's nation-to-nation relationship with Indigenous peoples" and established a Working Group of Ministers responsible for reviewing federal laws, policies, and operational practices in relation to indigenous peoples.[164] It is tasked to

"help ensure the Crown is meeting its constitutional obligations with respect to Aboriginal and treaty rights; adhering to international human rights standards, including the [UNDRIP]; and supporting the implementation of the [2015] Truth and Reconciliation Commission's [TRC] Calls to Action."[165]

Among the calls of the TRC was that the Government develop a national action plan to achieve the goals of the UNDRIP and that all levels of government and the corporate sector fully adopt and implement the Declaration "as the framework for reconciliation", including through commitments "to meaningful consultation, building respectful relationships, and obtaining the [FPIC] of Indigenous peoples before proceeding with economic development projects".[166] This echoes the yet to be

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[160] 'Expert Panel Report, Building Common Ground: A New Vision for Impact Assessment in Canada' (2017) p. 23.

[161] The parties to the BC government are committed "as a foundational piece of their relationship…to support the adoption of UNDRIP, the Truth and Reconciliation Commission calls-to-action and the Supreme Court of Canada's Aboriginal title decision in Tsilhqot'in", see '2017 Confidence and Supply Agreement between the BC Green Caucus and the BC New Democrat Caucus' http://bcndpcaucus.ca/wp-content/uploads/sites/5/2017/05/BC-Green-BC-NDP-Agreement_vf-May-29th-2017.pdf.

[162] "United Nations Declaration on the Rights of Indigenous Peoples Act: An Act to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples" available at http://www.parl.ca/DocumentViewer/en/42-1/bill/C-262/first-reading Previous attempts to get the Bill through the second reading had failed under the Conservative government.

[163] Bill C-262 https://openparliament.ca/bills/42-1/C-262/

[164] 'Prime Minister announces Working Group of Ministers on the Review of Laws and Policies Related to Indigenous Peoples' (February 22, 2017) available at http://pm.gc.ca/eng/news/2017/02/22/prime-minister-announces-working-group-ministers-review-laws-and-policies-related; see also 'Statement by the Prime Minister of Canada on advancing reconciliation with Indigenous Peoples' (December 15, 2016) http://pm.gc.ca/eng/news/2016/12/15/statement-prime-minister-canada-advancing-reconciliation-indigenous-peoples.

[165] 'Prime Minister announces Working Group of Ministers on the Review of Laws and Policies Related to Indigenous Peoples' (February 22, 2017).

[166] The Truth and Reconciliation Commission was established as an outcome of the Indian Residential Schools Settlement Agreement, the largest class-action settlement in Canadian history, to facilitate reconciliation. It was funded to the tune of 72$M by the Canadian government between 2007 and 2015. 'Truth and Reconciliation Commission of Canada, Canada's Residential Schools: Reconciliation, Final Report of the Truth and Reconciliation Commission of Canada',

implemented recommendations of the Canadian Royal Commission on Aboriginal Peoples, which in 1996 had highlighted the need for FPIC and building a new relationship with indigenous peoples based on mutual consent.[167]

In 2017 the Federal Government also issued a set of 10 principles aimed at renewing its government-to-government relationship with First Nations. The principles specifically reference self-determination and self-government and state that "meaningful engagement with Indigenous peoples aims to secure their [FPIC] when Canada proposes to take actions which impact them and their rights, including their lands, territories and resources".[168] This is described as an acknowledgement of the "nation-to-nation…relationships that builds on and goes beyond the legal duty to consult" and is based on "the right of Indigenous peoples to participate in decision-making in matters that affect their rights".[169] Significantly, the principles also recognize that "the importance of [FPIC], as identified in the UN Declaration, *extends beyond title lands*" (emphasis added). This is particularly significant in a context where to date consent has only been considered in relation to established property rights by the Canadian Supreme Court.

4.2 Canadian Jurisprudence regarding consultation, accommodation and consent – the common law duty to consult

Since the enactment of the 1982 Constitution, the Canadian Supreme Court has issued a number of rulings affirming and elaborating on the common law duty to consult, to accommodate and in certain circumstances to obtain consent. This duty has been derived from obligations under sections 25 and 35 of the Constitution and the Crown's trust and fiduciary relationship with First Nations. In 1950, the Supreme Court held that the Indian Act embodied "the accepted view that these aborigines are … wards of the state, whose care and welfare are a political trust of the highest obligation."[170] In *Guerin v The Queen (1984)*, the Court explained that this implied a legal obligation as

> "[t]hrough the confirmation in s. 18(1) of the Indian Act of the Crown's historic responsibility to protect the interests of the Indians in transactions with third parties, Parliament has conferred upon the Crown a discretion to decide for itself where the Indians' best interests lie."[171]

Accordingly, the Court held that the Crown became a fiduciary, owning a fiduciary duty to the Band "arising from its control over the use to which reserve lands could be put".[172] In *R v Sparrow (1990)*, the first case to be addressed following Constitutional recognition of Aboriginal rights, the Court expanded on this, holding

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(Montreal/Kingston: McGill-Queen's University Press, 2015), Volume 6, p. 132 (Call to Action 92i), para 92 i.

[167] Royal Commission on Aboriginal Peoples, "Looking Forward, Looking Back", Report of the Royal Commission on Aboriginal Peoples (Ottawa: Canada Communication Group, 1996), vol. 1, pp. 481-2, 489. The Royal Commission on Aboriginal Peoples (RCAP) was established in 1991 by Order in Council and was mandated to investigate and propose solutions to the challenges affecting the relationship between Aboriginal peoples, the Canadian government and broader Canadian society.

[168] 'Principles respecting the Government of Canada's relationship with Indigenous peoples' available at http://www.justice.gc.ca/eng/csj-sjc/principles-principes.html.

[169] 'Principles respecting the Government of Canada's relationship with Indigenous peoples' available at http://www.justice.gc.ca/eng/csj-sjc/principles-principes.html.

[170] *St. Ann's Island Shooting & Fishing Club Ltd. v. R.*, [1950] S.C.R. 211; [1952] 2 D.L.R. 225, at 232.

[171] *Guerin v. The Queen (1984)* 2 SCR 335.

[172] *Guerin v. The Queen (1984)* 2 SCR 335.

that the Fiduciary duty arose from the "sui generis nature of Indian title, and the historic powers and responsibility assumed by the Crown".[173] A "trust-like" relationship therefore existed between the government and Aboriginal peoples.[174] As a consequence, the Crown faced a "heavy burden", including conducting consultations with Aboriginal peoples, when justifying infringements on their rights and interests, in this case their inherent Aboriginal fishing rights.[175] The Court established a narrow basis for legitimate limitations, stating that it found "the 'public interest' justification to be so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights", while the justification of conservation and resource management on the other hand was uncontroversial.[176] In *Sparrow*, the Court also affirmed that prior to the 1982 Constitution Act consent of First Nations was not necessary for extinguishment of Aboriginal rights, provided there had been a "clear and plain" intent of the Crown to do so.[177] This aspect of the ruling was reaffirmed in *Delgamuukw v. British Columbia (1997).*[178] As Borrows notes, at no point in either ruling was there any "critical examination" of the legality of one nation extinguishing the rights of another "without their democratic participation or consent".[179] In *Delgamuukw*, the Supreme Court held that in addition to the requirement for consultation, the fiduciary duty could also trigger a consent requirement in order to justify infringements of established Aboriginal title. The Court clarified that the "special fiduciary relationship between the Crown and the aboriginal peoples" gives rise to the requirement to involve Aboriginal peoples in decisions taken with respect to their lands and to a duty that will in most cases "be significantly deeper than mere [good faith] consultation".[180] It further added that in some cases this "may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands".[181] The nature and scope of consultations, and the potential requirement for consent, was therefore held to be contingent on the Aboriginal right in question and the extent of the infringement.

In *Haida Nation v. British Columbia* (2004), the Supreme Court addressed the duty to consult in the context of logging on lands under claim of Title.[182] It clarified that the honour of the Crown, which began "with the assertion of sovereignty", is the basis for the fiduciary duty, but in cases where rights are "insufficiently specific", such as "asserted but unproven Aboriginal rights and title", the Crown is not mandated to act as a fiduciary.[183] In these contexts, the duty to consult, which the court had classified as an "enforceable, legal and equitable duty",[184] continues to apply in relation to potential infringements on as yet unproven Aboriginal rights and

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[173] *R v. Sparrow* [1990] 1 S.C.R. 1075, 1108.
[174] *R v. Sparrow* [1990] 1 S.C.R. 1075, 1108.
[175] The charge under the Fishing Act was for "fishing with a drift net longer than that permitted by the terms of his Band's Indian food fishing licence".
[176] *R v. Sparrow* [1990] 1 S.C.R. 1075, 1113.
[177] *R v. Sparrow* [1990] 1 S.C.R. 1075, 1099; see also Borrows (2002) p. 108, 240; and *R v Badger* [1996] 1 S.C.R. 771 (S.C.C).
[178] *Delgamuukw v. British Columbia* (1997) [1997] 3 S.C.R. 1010.
[179] Borrows (2002) p. 109. This authority to extinguish Aboriginal title was vested in Parliament under Statute of Westminster, 1931, see McNeil (2002).
[180] *Delgamuukw v. British Columbia* (1997) [1997] 3 S.C.R. 1010 para 168.
[181] *Delgamuukw v. British Columbia* (1997) [1997] 3 S.C.R. 1010 para 168.
[182] *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73.
[183] *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73.
[184] *Haida Nation v. British Columbia (Ministry of Forests)* 2002 6 W.W.R. 243, para 33, at 262.

title claims. However, it is derived directly from the honour of the Crown. This reasoning was based on the fact that a) it was possible to arrive at a general idea and strength of the claimed right,[185] b) the *Sparrow* test for infringements applied to unresolved claims and to government behaviour prior to the determination of rights,[186] c) limiting reconciliation to "the post-proof sphere" was not honourable and led to it being "devoid of…meaningful content" as it could "deprive the Aboriginal claimants of some or all of the benefit of the resource",[187] and lead to "Aboriginal peoples …find[ing] their land and resources changed and denuded".[188] The Court held that the extent of the obligation to consult varied with the strength of the claim, as well as the "seriousness of the potentially adverse effect upon the right or title claimed".[189] While the legal duty to consult established in *Delgamuukw* applies "as much to unresolved claims as to intrusions on settled claims",[190] it is "distinct from the fiduciary duty that is owed in relation to particular cognizable Aboriginal interests".[191] This fiduciary duty is only triggered in cases where the Aboriginal interest is sufficiently specific. Consequently the consent requirement does not appear to arise where claims have not yet been proven.[192] In the context of "potential, but yet unproven, interests", the honour of the Crown necessitates a case by case assessment of the obligations inherent in the duty to consult.[193] Where appropriate, the reasonable accommodation of Aboriginal concerns is required.[194] Accommodation, rather than consent, is the standard to be met where there is a high "risk of non-compensable damage".[195] In such cases, accommodation includes "steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim".[196] If disagreement arises, "balance and compromise" would be necessary between societal and Aboriginal interests,[197] and potentially negotiation,[198] but there was no duty to reach agreement and "no veto over what can be done with land pending final proof of the claim".[199]

In another significant ruling, *Taku River Tlingit First Nation v. British Columbia* (2004), the Court concluded that the Tlingit First Nation had been adequately consulted and accommodated in relation to the construction of a road through their traditional territory which was necessary for a mining project but was strongly opposed by the First Nation.[200] The Court recognized that the Taku River Tlingit pending land claim "was relatively strong, supported by a prima facie case, as attested to by its acceptance into the treaty negotiation process", but nevertheless deemed that their interests had been accommodated in the decision to authorize the

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[185] *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73 para 34, 36.
[186] *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73 para 34.
[187] *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73 para 27.
[188] *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73 para 33.
[189] *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73 para 37, 39.
[190] *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73 para 24.
[191] *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73 para 54.
[192] *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73 para 18.
[193] *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73 para 27.
[194] *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73 para 10, 27.
[195] *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73 para 44.
[196] *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73 para 47.
[197] *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73 para 45.
[198] *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73 para 47.
[199] *Haida Nation v. British Columbia (Minister of Forests)* 2004 SCC 73 paras 42, 45, 48.
[200] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550 para 32.

mining road.[201] As evidence of this, it pointed to the funding they had been allocated for monitoring and their role in the committee responsible for steering the impact assessment process.[202] The decision of the First Nation not to participate in some of the consultations was not deemed to have impacted the Crown's fulfilment of its duty to consult.[203] Echoing *Haida*, the Court stated that "[w]here consultation is meaningful, there is no ultimate duty to reach agreement".[204] Instead, accommodation involved achieving a reasonable balance between the potential impact on "aboriginal concerns" and "competing societal concerns", with compromise being "inherent to the reconciliation process".[205]

In *Tsilhqot'in Nation v. British Columbia* (2014) the Supreme Court made its first declaration of Aboriginal title and in so doing effectively established a retroactive consent requirement in certain contexts.[206] The Court held that

"if the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing".[207]

While it does not establish a requirement for prior consent in relation to territories under Aboriginal title claim, it nevertheless constitutes an important step towards the presumption that prior consent should be obtained where land claims are pending resolution, as failure to do so could constitute a future unjustified infringement of Aboriginal title leading to project termination.

The ruling affirms that "[t]he right to control the land conferred by Aboriginal title means that governments and others seeking to use the land must obtain the consent of the Aboriginal title holders".[208] However, this unambiguous statement is immediately qualified by the statement that "[i]f the Aboriginal group does not consent to the use, the government's only recourse is to establish that the proposed incursion on the land is justified under s. 35 of the Constitution Act, 1982".[209] The ruling proceeds to address the basis upon which infringements of Aboriginal rights are permissible, stating that

"[t]o justify overriding the Aboriginal title-holding group's wishes on the basis of the broader public good, the government must show: (1) that it discharged its procedural duty to consult and accommodate, (2) that its actions were backed by a compelling and substantial objective; and (3) that the governmental action is consistent with the Crown's fiduciary obligation to the group".[210]

Echoing *Delgamuukw*, the Court held that extractive and energy projects constituted a legitimate objective that could potentially justify limitations on Aboriginal

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[201] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550 para 32.
[202] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550 paras 3, 6, 7, 12.
[203] This duty of the First Nations to consult was also addressed in *R. v. Douglas et al*., 2007 BCCA 265, 278 D.L.R. (4th) 653 para 45.
[204] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550 para 2.
[205] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550 para 2.
[206] *Tsilhqot'in Nation v. British Columbia* 2014 SCC 44 [2014] 2 SCR 257.
[207] *Tsilhqot'in Nation v. British Columbia* 2014 SCC 44 [2014] 2 SCR 257 para 92.
[208] *Tsilhqot'in Nation v. British Columbia* 2014 SCC 44 [2014] 2 SCR 257 para 76.
[209] *Tsilhqot'in Nation v. British Columbia* 2014 SCC 44 [2014] 2 SCR 257 para 76.
[210] *Tsilhqot'in Nation v. British Columbia* 2014 SCC 44 [2014] 2 SCR 257 para 77.

rights,[211] subject to a possible consent requirement that can flow from the fiduciary obligation. The Court shed some light on the test to determine the trigger for consent by clarifying that the "fiduciary duty infuses an obligation of proportionality into the justification process".[212] This proportionality of impact necessitates that "the benefits that may be expected to flow from that goal are not outweighed by adverse effects on the Aboriginal interest".[213] Consequently, the determination of whether consent is necessary hinges on the assessment of impacts on the rights and interests of Aboriginal peoples balanced against an assessment of the economic benefits that can be derived from a project for society as a whole. Other particularly important features of the ruling were its recognition that: "the land in question belonged to, was controlled by, or was under the exclusive stewardship of the claimant group", and by logical extension that they exercised Aboriginal self-government;[214] the "notion of occupation must also reflect the way of life of the Aboriginal people, including those who were nomadic or semi-nomadic"; and the recognition of their territorial-wide title, beyond distinct site specific parcels of land.[215] Indeed, in light of these features, while acknowledging its deficiencies in terms of perpetuating colonial doctrines in relation to Crown underlying title and assertion of sovereignty, Borrows regards the ruling as setting "a new world standard" and as representing a "large, liberal, and generous territorial view of Aboriginal rights", which helps to set "the stage for a robust recognition of Indigenous governance over Indigenous lands" and can help erase the application of terra nullius.[216]

Therefore while *Haida* and *Tsilhqot'in* do not establish consent as a requirement in relation to territories under Aboriginal title claim, neither do they preclude recognition of the important role which FPIC should play as an interim solution while pending claims are being resolved in cases involving potentially significant impacts.[217] A similar argument applies to the implementation of the fiduciary duty based prohibition of activities that could deprive "future generations of the control and benefit of the land" in contexts where land claims are pending resolution.[218]

Two rulings issued by the Supreme Court in 2017, *Clyde River v Petroleum Geo-Services Inc*. and *Chippewas of the Thames First Nation v Enbridge Pipelines Inc.,* also merit mention as they point to how, post *Tsilhqot'in*, the Supreme Court addresses the duty of regulatory tribunals to consult in contexts where Aboriginal title is not established. In *Chippewas of the Thames*, the Court upheld the National Energy Board (NEB) consultation process and its authority to authorize Enbridge to reverse the flow and increase the capacity of crude oil in a four decade old pipeline in the Anishinaabe peoples' territories, despite their objections to the NEB decision and to the form of consultation.[219] The Court also dismissed as irrelevant the fact that the community were not consulted in 1976 about the construction of the pipeline. In its view, "the duty to consult is not triggered by historical impacts" and consultation "is not the vehicle to address historical grievances".[220] The Court made no reference

[211] This approach was questioned in her dissenting opinion by McLachlin CJ in *Van der Peet*.
[212] *Tsilhqot'in Nation v. British Columbia* 2014 SCC 44 [2014] 2 SCR 257 para 87.
[213] *Tsilhqot'in Nation v. British Columbia* 2014 SCC 44 [2014] 2 SCR 257 para 87.
[214] Borrows (2015) p. 704, 714.
[215] *Tsilhqot'in Nation v. British Columbia* 2014 SCC 44 [2014] 2 SCR 257 para 38.
[216] Borrows (2015) p 704, 714.
[217] Joffe (2016) p. 8
[218] *Delgamuukw v. British Columbia* (1997) [1997] 3 S.C.R. 1010 para 117; *Tsilhqot'in Nation v. British Columbia* 2014 SCC 44 [2014] 2 SCR 257 para 15.
[219] *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc*. 2017 SCC 41 para 66.
[220] *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc*. 2017 SCC 41 para 41.

to consent, but did restate its view that the "duty to consult does not provide Indigenous groups with a 'veto' over final Crown decisions".[221]

In *Clyde River,* the Court rejected the NEB's consultation process, holding that it was "significantly flawed" "in view of the Inuit's established treaty rights [under the Nunavut Land Claims Agreement (1993)] and the risk posed by the proposed [seismic] testing to those rights".[222] The Court held that the NEB had failed to meet the duty of consultation at the "deep" end of the consultation spectrum, as required under *Haida.*[223] In addition to the NEB's failure to hold oral hearings and to answer questions regarding impacts on treaty rights, the ruling pointed to the Crown's failure to a) inform the Inuit that the NEB process was the means through which it was fulfilling its duty to consult, b) provide the First Nation with participant funding, as had been provided to the Chippewas of the Thames and the Taku River Tlingit, thereby preventing them from submitting their own scientific evidence or verifying that of the proponent, and c) enable their participation in the design of the consultation processes.[224] However, the ruling did not question the authority of the NEB to make a final decision in relation to seismic testing in Inuit lands, provided it complied with the necessary procedural steps.

Legal commentators and First Nation representatives point to the fact that the NEB is a lower level administrative agency that has essentially been empowered to decide on matters of existential importance to indigenous peoples through the conduct of a check list style consultation processes.[225] As noted by, Myeengun Henry, a chief of the Chippewas of the Thames, these rulings imply that "a decision from the NEB can effectively extinguish an Aboriginal and/or treaty right", which is not something the First Nations agreed to when sharing responsibility for land and resource management in their treaty relationships with the Crown.[226] He and others argue that, given the impacts on their lands, way of life, rights and cultural survival, these decisions need to be addressed in genuine good faith government-to-government consent based dialogues.

Finally, the cases addressed above relate to extractive and energy project specific consultation requirements, as addressed in Article 32 of the UNDRIP, but do not extend to legislative and administrative measures addressed in its Article 19. In *Courtoreille v. Canada, 2016* the Federal Court of appeal held that legislative measures do not trigger a duty to consult.[227] The controversial ruling overturned a 2014 decision of the Federal Court upholding the duty to consult in relation to Omnibus legislation (Bills C-38 and C-45) that modified the environmental assessment regime under the 2012 Canadian Environmental Assessment Act

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[221] *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc*. 2017 SCC 41 para 59.
[222] *Clyde River (Hamlet) v. Petroleum Geo-Services Inc*. 2017 SCC 40 para 52.
[223] *Clyde River (Hamlet) v. Petroleum Geo-Services Inc*. 2017 SCC 40 para 47.
[224] *Clyde River (Hamlet) v. Petroleum Geo-Services Inc*. 2017 SCC 40 paras 31, 47, 52.
[225] See for example Lindberg T. and Cameron A. 'SCC rulings suppress Indigenous peoples' rights to their land' The Globe and Mail (July 28, 2017) available at https://beta.theglobeandmail.com/opinion/scc-rulings-suppress-indigenous-peoples-rights-to-their-land/article35828687/?ref=http://www.theglobeandmail.com&; see also A. Kanji 'Supreme Court's colonial roots are showing' August 9, 2017 available at https://www.thestar.com/opinion/commentary/2017/08/09/supreme-courts-colonial-roots-are-showing-kanji.html.
[226] Henry M. 'First Nation questions relationship with Canada following court ruling' The Star August 11, 2017 available at https://www.thestar.com/opinion/commentary/2017/08/11/first-nation-questions-relationship-with-canada-following.html.
[227] *Courtoreille v. Canada*, 2016 FCA 311.

(CEAA).[228] In 2017, the Mikisew Cree, who took the original case, appealed the decision to the Supreme Court. The Supreme Court had previously stated, in *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council* (2010), that duty to consult extends "to strategic, higher level decisions" but did not clarify if this included legislative measures.[229] It therefore has an opportunity to clarify this duty in the case taken by the Mikisew Cree.

4.3 Observations on Canadian duty to consult and obtain consent

A number of themes emerge from the evolving Canadian jurisprudence with regard to the duty to consult and obtain consent in the context of extractive industry projects when contrasted with FPIC under IHRL. This first relates to the discord between the protections for claimed, but as yet unproven, rights to Aboriginal title and those for "established rights". The *Delgamuukw* ruling provided for an extremely broad range of potentially permissible infringements on Aboriginal rights, which it controversially held were consistent with the Canadian concept of reconciliation.[230] At the same time, the ruling went some way towards mitigating this Aboriginal rights limiting assertion by establishing that, where Aboriginal title has been established, full consent to these infringements may be necessary in order for the State to comply with its fiduciary duty. The *Haida* ruling exposed the weakness in this approach in cases where land claims exist but Aboriginal title has not yet been established. In such cases, accommodation, as opposed to consent, becomes the standard of protection that the Crown is obliged to guarantee, as the Court reasoned that protections under Section 35 of the Constitution do not yet apply. *Tsilhqot'in* provided additional clarity and moderated the impact of the *Haida* ruling somewhat, by noting that the requirement for consent could potentially be retroactive in nature following the establishment of title, and that the trigger for the fiduciary duty based consent requirement was the proportionality of the impact on Aboriginal title rights. It nevertheless maintained *Haida's* logic that unestablished title claims did not merit Section 35 protection.

From an IHRL perspective this aspect of the Court's reasoning is problematic. The notion that consent is only required when title is formalized is inconsistent with the recognition of Aboriginal title as an "independent right" that pre-exists the Crown assertion of sovereignty and the affirmation that the principle of terra nullius never applied in Canada. Basing the requirement to obtain consent on a fiduciary duty that only comes into force following formalization of title, as opposed to deriving it from inherent self-determination, territorial and cultural rights, renders indigenous peoples' rights subject to limitations that are inconsistent with IHRL. It essentially severs the link between the consultation and consent duties and the inherent pre-existing rights they protect.

The Canadian Court has also reasoned that "[t]he constitutional duty to consult Aboriginal peoples is rooted in the principle of the honour of the Crown, which

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[228] Abouchar, J., Birchall, C., Donihee, J., Petersen, N., Chai, V., 'Is There a Duty to Consult on Legislation? SCC May Decide' (Willms & Shier Environmental Lawyers LLP. February 22, 2017) available at http://www.willmsshier.com/docs/default-source/articles/article---is-there-a-duty-to-consult-on-legislation-scc-may-decide-docx.pdf?sfvrsn=2.

[229] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council* 2010 SCC 43 [2010] 2 SCR 650 para 44.

[230] This built on the *R v Van der Peet [1996] 2 SCR 507* and *R v Gladstone* [1996] 2 SCR 723 rulings which had significantly expanded on *R v Sparrow* narrow set of permissible infringements. See dissent of McLachlin J. in *R v. Van der Peet.*

concerns the special relationship between the Crown and Aboriginal peoples as peoples".[231] The link between the honour of the Crown, consultations and the inherent right to self-determination vested in "all peoples" under international law is implicit in this statement.[232] At the same time, the Court's reasoning is that inherent pre-existing property and self-determination rights are not entitled to full protection until they are formalized through State processes.

In effect the State is rendering it difficult and time consuming for indigenous peoples to establish title and penalizing them in the form of lesser rights protections for this situation. Restricting the requirement to obtain consent until Aboriginal title is formalized also increases pressure on indigenous peoples to conclude agreements in relation to extractive projects and weakens their negotiating position in land claim processes. Indeed, entering into such agreements has become a means of ensuring timely recognition of Aboriginal title. Under IHRL, respect for indigenous peoples' collective rights is not contingent on State issued land titles, as the very premise of international law's indigenous rights framework is that they are inherent rights, and therefore the State is duty bound to respect them, irrespective of the existence or efficiency of its titling processes.[233] Indeed, it could be argued that the requirement for indigenous peoples' FPIC takes on even greater import before lands are demarcated and titles issued, as this is precisely when their rights are most vulnerable to violation.[234] As a result, to a certain degree the Court's logic facilitates the perpetuation of the colonial parental approach that section 35 sought to replace, whereby protection of indigenous peoples' inherent rights effectively remain - as a restrictive positivist interpretation of the 1763 Proclamation would have held - subject to "the good will of the Sovereign".[235]

The potential for indigenous peoples to negotiate for their claimed rights is also negatively affected by the Court's position that infringements on claimed rights that have yet to be negotiated or recognized are a part of the reconciliation process. As Christie has pointed out, an approach based on Section 1 of the Constitution[236] justifying infringements on Section 35 rights based on the interests of society as a whole should "never have been contemplated" by the Courts.[237] Instead, at this stage "in the process of reconciliation" the Courts should have affirmed what Slattery refers to as "sure and unavoidable" rights protecting Aboriginal interests.[238] The practical effect of such an approach would have been to "bring the governments of

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[231] *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650, paras. 59-60.

[232] Common Article 1 of the *International Covenant on Civil and Political Rights* (1966) and *International Covenant on Economic, Social and Cultural Rights* (1966). See also Castellino (2000).

[233] This recognition of inherent land, territory and resource rights that are derived from possession and not from State grants is reflected in ILO Convention 107, ILO Convention 169 and the UN Declaration on the Rights of Indigenous Peoples as well as the jurisprudence of UN and regional human rights bodies. The duty to resect, protect and fulfil these inherent rights gives rise to the need for land titling. It is consequently illogical to hold that safeguards, such as FPIC, for those rights should not be required until titling processes has been completed. As Alston has noted in another context "[p]hilosophically, a right is a right, even if a government has refused to acknowledge that fact", Alston (2004) p.476.

[234] See for example Inter American Court of Human Rights *Saramaka v Suriname* (2007) para 192.

[235] *Royal Proclamation of 1763* issued October 7, 1763.

[236] *The Constitution Act, 1982* Section 1 states "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

[237] Christie (2002) p. 69.

[238] Christie (2002) pp. 69-70; Slattery (1983) pp. 251 - 53.

Canada to the negotiating table", and provide Aboriginal peoples with the power to bargain for what they regard as "fair accommodation" to remedy centuries of harm and for a "fair constitutional contract".[239] This was partially recognized in *Delgamuukw* when the Court affirmed that "best approach in these types of cases is a process of negotiation and reconciliation that properly considers the complex and competing interests at stake".[240] It was again acknowledged by the Court in *Tsilhqot'in Nation v. British Columbia (2007)*, when, in addressing Christie's arguments, the Court concluded that "[r]egrettably, the adversarial system restricts the examination of Aboriginal interests that is needed to achieve a fair and just reconciliation".[241] Unfortunately, the Court did not seem to see the contradiction between this preferred negotiated approach to reconciliation, and its affirmation - also in the name of reconciliation and ensuring the interests of others in society - of the legitimacy of non-consensual infringements on yet to be negotiated Aboriginal rights. The effect of this Court imposed conception of reconciliation is the continued subordination of pre-exiting Aboriginal legal rights and jurisdiction to the assertion of Crown sovereignty over them, something which requiring FPIC for proposed extractive industry activities while land title claims are being negotiated could have helped mitigate.

The possibility of a retroactive consent requirement as established in *Tsilhqot'in (2014)*, while welcome in terms of its potential to incentivise efforts to obtain FPIC, is also inadequate from an IHRL perspective. Stopping a project when title is established may be too late to prevent significant or irreversible harm to the enjoyment of Aboriginal rights. It also exposes Canada to potential awards in international arbitration (under standards such as legitimate expectations and indirect expropriation) or in domestic Courts.[242] The regulatory chill effect of such awards on human rights is widely recognized.[243] In Canada, mining companies have already negotiated multi-million dollar settlements where projects had to be stopped as a result of indigenous opposition following State authorizations. An example is case of the Kitchenuhmaykoosib Inninuwug (KI) First Nation, where Canada compensated two mining companies a total of 8.5 million Canadian dollars in order for them to abandon their claims following the KI's direct action preventing their projects proceeding.[244] By requiring FPIC irrespective of whether title claims have been resolved or not, the State would provide the appropriate level of rights protection and legal certainty for all parties – be they indigenous, corporate or the State and reduce the risk of irreparable violations of indigenous peoples' rights.

Another related limitation of the Canadian jurisprudence is that to date the consent requirement arising from the fiduciary duty has only been affirmed in the context of

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[239] Christie (2002) pp. 69-70.
[240] *Delgamuukw v. British Columbia* (1997) [1997] 3 S.C.R. 1010 para 207.
[241] *Tsilhqot'in Nation v. British Columbia* 2007 BCSC 1700 para 1358.
[242] By approving investments activities, such as mining, forestry or oil and gas concessions, the State establishes "legitimate expectations" of investors for which it can be held liable under contractual or international investment law. Prior warnings of the Supreme Court, such as that in *Tsilhqot'in* (2014), should be considered by investors when conducting human rights due diligence and should condition their expectations and inform investment tribunal decisions. However, under similar circumstances in other jurisdictions investors have taken governments to arbitration demanding hundreds of millions of dollars in compensation; see for example *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/2; See also UN Doc A/HRC/33/42.
[243] UN Doc A/HRC/33/42.
[244] See Kitchenuhmaykoosib Inninuwug First Nation (KI) case addressed in Doyle and Carino (2013) pp. 32-6; see also Ariss and Cutfeet (2012).

Aboriginal title, and not in relation to other Aboriginal rights and interests. The Court's reasoning in *Tsilhqot'in (2014)* may, however, signal an increased willingness to engage with self-governance and territorial rights.[245] Logically, this should lead to broader conception of when FPIC is required, as the Courts could no longer easily assume away the "underlying title and overarching governance powers that First Nations possess".[246] The introduction of the proportionality approach in *Tsilhqot'in (2014)* is also an important development, the implications of which have yet to be addressed. From an IHRL perspective, proportionality has to be considered in human rights terms and not in purely economic terms. This is expressed in Article 46 of the UNDRIP, which states that permissible limitations on indigenous peoples' rights are to be determined "in accordance with international human rights obligations, non-discriminatory…and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others…".[247] This establishes a very high threshold for the proportionality test, as what is at stake is the right of indigenous peoples to self-determination – a peremptory legal norm which may arguably, in certain contexts, constitute a non-derogable right of indigenous peoples, given that it constitutes the basis for their physical and cultural survival and is the foundation for the enjoyment of all their collective rights and interests as well as many of their individual rights.

The Supreme Court's position on "infringements" of indigenous peoples' constitutionally and internationally recognized human rights is also somewhat problematic. Consistent with IHRL, the *Canadian Charter* and *Canadian Bill of Rights* hold that human rights may only be subject to "limitations",[248] while infringements are to be protected against and remedied.[249] The Supreme Court has invoked relevant principles of international law, including IHRL, when interpreting *Charter* rights, holding that "the Charter should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified".[250] However, the Court has not yet applied international human rights standards to interpret Indigenous peoples' human rights in section 35 of the Constitution. Instead, commencing with *R.* v. *Sparrow*,[251] it established a rule that constitutionally protected Aboriginal rights may be "infringed" or "denied" – provided the Crown has satisfied justification tests set out by the Court. In so doing it appears to be discriminating against indigenous peoples' rights by applying a lower standard of protection to them than to the human rights of others.

The evolving approach to FPIC under Canadian jurisprudence therefore indicates that at present the Courts recognize that a fiduciary duty based obligation to obtain

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[245] Borrows (2015) p. 714.
[246] Borrows (2015) p. 742.
[247] UN Declaration on the Rights of Indigenous Peoples, Article 46(2).
[248] Constitution Act, 1982 (80) Canadian Charter of Rights and Freedoms (s. 1).
[249] The Charter provides that "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances." Canadian Charter S. 24. Similarly, the Canadian Bill of Rights, S.C. 1960, c. 44. affirms that "Every law of Canada shall … be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared …".
[250] *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, para. 64. In 2014, in *Tsilhqot'in Nation v. BC*, the Court described Part I (Canadian Charter) and Part II (Section 35) of the Constitution Act, 1982 as "sister provisions, both operating to limit governmental powers, whether federal or provincial."
[251] *R.* v. *Sparrow* p. 1109.

consent arises where Aboriginal title has been established and the potential impact of the proposed activity on Aboriginal title rights is disproportionate to the benefits to society as a whole. In addition "incursions on Aboriginal title… [that] would substantially deprive future generations of the benefit of the land" are prohibited where title is established.[252] Failure to obtain consent in the context of unproven claims could also lead to project cancelation once title is established. As outlined above, this represents significant progress but still falls short of IHRL standards and reasoning and leaves ample scope and need for further progressive jurisprudence.

5 General observations

The trust-relationships and related duties established at the time of European assertion of sovereignty over the Americas continue to form the foundation for the duty to consult with indigenous peoples in both the US and Canada. Conceptual tensions arise between these foundations and indigenous peoples' right to self-determination upon which FPIC is premised under IHRL.[253] Attempts to bridge these tensions have contributed to the establishment and evolution of the duty to consult in both jurisdictions. However, the results continue to fall short of international law standards, due in part to continued reliance of judicial reasoning on now discredited colonial doctrines. As IHRL addresses the issue of indigenous rights from a principled rather than jurisprudential historical basis, it escapes the constraints of those racially discriminatory legal precedents which continue to underpin interpretations of indigenous peoples' rights in many, if not most, national jurisdictions. By drawing from foundational principles of equality, non-discrimination and the indivisibility of rights, IHRL constructs a logically coherent and universally applicable framework of indigenous peoples' rights. It consequently obliges States to reconceptualise the source, content and implications of those rights. Rights to land, territories and resources cannot be considered in isolation from self-determination, self-governance and cultural rights, and by extension indigenous peoples' worldviews, legal regimes, and their perspectives on rights and duties. Nor can they be divorced from the self-determination based duty to consult in good faith with indigenous peoples through their representatives in order to obtain their FPIC to measures impacting on those rights. This duty is derived from their rights and necessary for their realization.

For decades both the US and Canada have been subject to extensive review by, and guidance from, IHRL bodies concerned with indigenous peoples' rights in the context of extractive industry projects.[254] The Committee on the Elimination of Racial Discrimination (CERD) has a particularly long history of engagement on the topic and has repeatedly called on States, including Canada and the US, to respect the requirement for FPIC.[255] Following the adoption of the UNDRIP, it has urged the US and Canada to use the Declaration as an interpretative guide in relation to the rights of indigenous peoples under national law, including in the Constitution, and highlighted the disproportionate impact of mining and energy projects on their rights

[252] *Tsilhqot'in Nation v. British Columbia* 2014 SCC 44 [2014] 2 SCR 257 para 15.
[253] Routel and Holth (2013); Richardson (2005) p. 55; Skibine (1995); Tsosie (2012).
[254] For an overview of UN jurisprudence in relation to the extractive industry since the adoption of the UNDRIP see Doyle and Whitmore (2014).
[255] CERD General Recommendation XXIII (1997).

and well-being.[256] There is a significant divergence between this approach and the position of the US and Canada that the UNDRIP can or should be interpreted in a manner consistent with their existing legal frameworks.

In the US the emblematic Western Shoshone case illustrates the gulf between national law and IHRL standards.[257] In 1978, the US Government successfully sued two Western Shoshone sisters, Carrie and Mary Dann, for trespass on their traditional lands, despite their recognition as Shoshone lands under the 1863 *Treaty of Ruby Valley*. This Governmental position was based on the non-consensual acquisition of those lands following an Indian Claims Commission ruling in 1962 which held that "gradual encroachment" had rendered them public lands by 1872. In 1979, payment for those lands, at 1872 prices, was placed in a trust fund for Shoshone who never accepted to sell or cede their lands.[258] This non-consensual land taking was sanctioned by the US Supreme Court in 1985 in *US v Dann*, when the case was dismissed on procedural grounds.[259] Faced with the prospect of large-scale mining impacting on sacred areas, the Shoshone sisters appealed to the Inter-American Commission on Human Rights (IACHR), which in 2002 held that the US had violated their rights to property, due process and equality before the law, including by failing to obtain their informed consent.[260] The IACHR called on the US to revise its laws and policies to ensure they complied with international standards in relation to indigenous peoples' rights. The US rejected the Commission's jurisdiction and the Shoshone took their case to CERD.[261] In March 2006, CERD issued a final decision under the urgent action/early warning procedure calling on the US to "freeze," "desist" and "stop" any further mining activities on Western Shoshone Territory until the land dispute was resolved in good faith. In light of the US inaction, CERD has repeatedly called on it to consult in good faith with the Shoshone and to reach a mutually acceptable solution, pending which no non-consensual mining activates should be conducted.[262] The Shoshone subsequently filed suit in the US courts claiming a breach of consultation duties under NHPA, however, in 2010, the Ninth Circuit Court of Appeals rejected their claim.[263] Other human rights treaty bodies, such as the Human Rights Committee have also recommended that the US consult in order to secure indigenous peoples' FPIC in the context of extractive industry activities impacting on their sacred areas.[264] In her 2017 US country mission report, the UNSRIP called on the US to incorporate the UNDRIP into domestic law through statutes and regulations and recommended that "[c]onsent, not consultation, should be the policy to allow for the government-to-government relationship necessary to fulfil the principles set forth in the Declaration".[265]

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[256] UN Doc. CERD/C/SR.2142 (2 March 2012), para. 39; UN Doc CERD/C/USA/CO/6 (7 Mar 2008) para 29.
[257] For an overview of the case see Fishel (2007a); Fishel (2007b); and Kinnison (2011).
[258] Fishel (2007a) p. 50.
[259] 187 U.S. 553 (1903) at 568 see also *United States v. Dann*, 470 U.S. 39, 44-45 (1985).
[260] *Mary and Carrie Dann v. United States*, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Ser.L./V/II.117, doc. 1 rev. 1, 131–32 (2002).
[261] Fishel (2007a) p. 69.
[262] UN Doc. CERD/C/USA/CO/6/Add.1 (5 February 2009) para 19; CERD Follow up letter to the United States (28 September 2009).
[263] *Te-Moak Tribe of W. Shoshone v. U.S. Dep't of the Interior*, 608 F.3d 592, 608-10 (9th Cir. 2010).
[264] UN Doc. CCPR/C/USA/CO/4.
[265] UN Doc. A/HRC/36/46/Add.1 para 87.

A similar recommendation was made by the UNSRIP to Canada in 2014, clarifying that "as a general rule resource extraction should not occur on lands subject to aboriginal claims without adequate consultations with and the free, prior and informed consent of the indigenous peoples concerned".[266] Over the past three decades Canada has also been subject to numerous reviews by human rights treaty bodies regarding its compliance with its obligations towards indigenous peoples, including under the ICCPR individual complaint mechanism in the *Ominayak (Lubicon Lake Band) v Canada* (1990) in the context of oil and gas leases.[267] In 2017, CERD provided Canada with particularly relevant guidance on FPIC, calling on it to ensure "[FPIC] for all matters concerning [indigenous peoples'] land rights", to prohibit "environmentally destructive development" in their territories and to allow them "to conduct independent environmental impact studies".[268] Addressing one of the on-going emblematic cases, the Site C dam in North-eastern British Columbia, CERD called on Canada to

> "immediately suspend all permits and approvals for [its] construction. Conduct a full review in collaboration with Indigenous Peoples of the violations of the right to [FPIC], treaty obligations and [IHRL] from the building of this dam and identify alternatives to irreversible destruction of Indigenous lands and subsistence which will be caused by this project.".[269]

Consistent with the recommendations of recent regulatory reviews, CERD urged the State to incorporate "the [FPIC] principle in the Canadian regulatory system, and amend decision making processes around the review and approval of large-scale resource development projects".[270] CERD also addressed one of the primary failings of the current consultation based approach, urging the State to "[e]nd the substitution of costly legal challenges as post facto recourse in place of obtaining meaningful [FPIC] of Indigenous Peoples".[271] Doing so would shift the burden from the indigenous party to the State in cases where consent is not forthcoming and help avoid situations where bureaucratized consultation processes, with no obligation in relation to the outcome, risk masking an incremental erosion of indigenous peoples' rights. The recommendations are timely given the Supreme Court's pending consideration of the duty to consult on legislative measures in *Courtoreille v. Canada*; the Working Group of Ministers analysis of the compatibility of existing legislation with indigenous peoples' rights; and Bill C-262 potential adoption. All of these developments have potentially profound implications for indigenous peoples' rights in the context of extractive and energy projects in and beyond Canada.

Another issue common to Canada and the US has been their equation of FPIC to an absolute veto right, rather than framing it as essentially equivalent to existing notions of consent under domestic laws but applied in a culturally appropriate manner in accordance with indigenous peoples' collective decision-making processes and rights. The Declaration and other human rights instruments recognize that human rights may need to be balanced, and do not confer an absolute and indiscriminate power to indigenous peoples. Under international law, the right to self-determination implies choice in relation to development options. It gives rise to a duty to consult in order to obtain consent whenever that right, and/or any other associated social,

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[266] UN Doc. A/HRC/27/52/Add.2 (4 July 2014), para. 98.
[267] *Lubicon Lake Band v. Canada, Communication No. 167/1984* (26 March 1990), U.N. Doc. Supp. No. 40 (A/45/40) at 1 (1990).
[268] CERD Canada 2017 UN Doc CERD/C/CAN/CO/21-23 para 20.
[269] CERD Canada 2017 UN Doc CERD/C/CAN/CO/21-23 para 20.
[270] CERD Canada 2017 UN Doc CERD/C/CAN/CO/21-23 para 20.
[271] CERD Canada 2017 UN Doc CERD/C/CAN/CO/21-23 para 20.

economic, political, cultural or territorial right, faces potentially significant limitations from the perspective of the rights holders. In such contexts indigenous peoples are not exercising a veto power through the granting or withholding of consent. Instead, by granting FPIC they may be authorizing certain activities which would otherwise be prohibited based on the State's duty to respect, protect and fulfil their rights and by withholding it they are merely demanding this duty be fulfilled.[272] A heavy burden of proof therefore falls to the State to exhaustively justify any non-consensual rights infringements in accordance with IHRL standards. A veto, on the other hand, implies a polarized position whereby most FPIC processes would result in unreasonable indigenous opposition to and rejection of proposed projects. As noted in the CEAA review, this is at odds with actual experience.[273] Instead, reviews have consistently found that FPIC was needed to foster a context in which indigenous peoples, the State and project proponents can work together on the basis of mutual respect. This implies that the option to withhold consent must remain on the table. A reductionist equation of FPIC to a veto power is unhelpful and alarmist and misses the fundamental role of FPIC in transforming historically unjust and discriminatory relationship between States and indigenous peoples.[274] It is reflective of the one-sided colonial lens through which the nation-to-nation relationship has been viewed by the State and corporations. Viewed from the perspective of Indigenous peoples, it could be argued that the pursuit of their right to self-determined development is perpetually subject to "veto" by State and corporate actors. This is because indigenous peoples' development plans and priorities cannot be formulated and implemented if they are under constant threat of non-consensual externally imposed projects with significant impacts on their right that may be inconsistent with their plans and priorities and their aspired way of life. Genuine reconciliation and development requires that indigenous peoples' worldviews, aspirations and priorities be accorded equal respect in the context of consent based nation-to-nation negotiations and relationships. Rather than reduce their self-determination based aspirations and plans to the notion of a veto on third party proposed extractive and energy projects, what a constructive State should do is facilitate meaningful choices and build relationships within which FPIC can be exercised and self-determined development pursued.

6 Conclusion

The relevance of and potential role for contemporary international law on indigenous peoples' rights is particularly clear in the US and Canadian legal contexts. Numerous commentators have pointed to the fact that the entire edifice of US Federal Indian law is premised on Chief Justice Marshall's 19th century understanding of international law.[275] In Canada, the Supreme Court has invoked Marshall's rulings on

[272] However, as noted by the Court in *Tsilhqot'in* (2014) there may be some activities that cannot be justified on the basis of obtaining FPIC.
[273] As the CEAA review noted "we did not hear strident opposition to the development of projects", see 'Expert Panel Report, Building Common Ground: A New Vision for Impact Assessment in Canada' (2017) p10.
[274] See report of the UN Special Rapporteur on the rights of indigenous peoples discussing the importance of avoiding the use of veto language when discussing FPIC, UN Doc A/HRC/12/34 (14 July 2009). For a discussion on the notion of consent as a veto power see Doyle (2015) pp. 161-8, see also Joffe (2016).
[275] Galanda (2011); Wood (1995b); Tsoise (2003); Williams (2005), Anaya (2004) and Cohen (2012).

a number of occasions[276] and has also contextualized Aboriginal rights, and the duties to which they give rise, within the framework of colonial era international law doctrines pertaining to the acquisition of sovereignty and assertion of title to territory.[277] Ironically, the Canadian and US Courts' perspectives on these historical international law principles tend to be blind to the role which indigenous sovereignty, consent and perspectives on nation-to-nation relationships played, or should have played, under legal theory legitimizing these then nascent States' title to territory and claim to sovereignty.[278] Given this legal backdrop, in essence, what US and Canadian Courts have been doing - since they first addressed the existence and legal rights of native peoples within their borders - is attempting to interpret what their responsibilities and duties towards those peoples are under international law. Rather than remaining trapped in the reasoning of discredited discriminatory, and at times misconstrued, colonial era antecedents, modern day Courts and legislatures have the opportunity to turn to contemporary international law, including the UNDRIP, for authoritative interpretative guidance. As pointed out by Williams, this can easily be justified jurisprudentially in the US by invoking the Marshall precedents in which international law formed the basis for the Supreme Court pronouncements on the rights of native peoples.[279] The Canadian Supreme Court, has in the past pointed to the persuasive interpretative role of international human rights declarations and treaties, and consequently has the option to inform its reasoning and interpretation of section 35 rights in line with the UNDRIP's FPIC requirement.[280] The option also exists in both jurisdictions for the re-alignment of legislation with IHRL pertaining to indigenous peoples, including in relation to the requirement to consult in order to obtain FPIC to legislative and administrative measures - a prospect that, despite recent judicial setbacks, remains more plausible in Canada than in the US given the current political context. As indigenous peoples in Canada have repeatedly stressed to their government, by effectively implementing the Declaration through Canadian legislation, Canada could set an important precedent that would help Indigenous peoples throughout the world.

The absence of good faith consultations in order to obtain FPIC in contexts where fundamental rights and cultural survival are in jeopardy, and serious legacy issues of extractive industry projects which remain unresolved, inevitably restricts indigenous peoples' choices to a limited range of survival based responses. Some may decide that "the only thing worth spending energy on is learning to cope with the imposition of unacceptable alternatives".[281] Others, as seen in the Western Shoshone and Dakota Access Pipeline cases in the US, and the Kitchenuhmaykoosib Inninuwug and other cases in Canada, may adopt positions of resistance and direct action in order to assert their rights. One of the proactive responses of a growing number of Indigenous peoples in Canada, the US and elsewhere[282] has been to develop their own consultation and FPIC policies, protocols and regulations, including in relation to impact assessments, that go beyond national law and are grounded on their customary laws and principles of IHRL.[283] They regard this as an exercise of their right to self-determination and insist, through the use of all available legal, political

[276] Jenkins (2001).
[277] *Tsilhqot'in Nation v. British Columbia* 2014 SCC 44 [2014] 2 SCR 257 para 69.
[278] Doyle (2015) pp. 1-70.
[279] Williams (2005) pp 161-195.
[280] *Reference re Public Service Employee Relations Act (Alberta),* [1987] 1 S.C.R. 313 para 57.
[281] Haskew (1999) p. 28.
[282] These include the Chippewas of the Thames First Nation. See Doyle and Carino (2013) pp. 29-40.
[283] Doyle and Carino (2013) pp. 29-40; Fredericks (2016).

and physical means, on compliance with them from government and corporate actors. Increasingly, indigenous peoples are also coming together to proactively assert their positions with respect to certain development projects and principles.[284] They have been active internationally in the promotion of sustainable development and pushing states to recognize the need to protect their rights as integral to the Sustainable Development Agenda.[285] Commitments made to reach the nations and peoples who are the furthest behind first, and to protect their human rights and the planets natural resources, are of vital importance to indigenous peoples in Canada and the US. Canada's recognition in the Commission on Sustainable Development of the importance of the UNDRIP "in the context of global, regional, national and subnational implementation of sustainable development strategies" is important in this regard.[286] The *American Declaration on the Rights of Indigenous Peoples*, which contains similar FPIC provisions to the UNDRIP, also addresses the right of indigenous peoples to ensure that resources in their territories are conserved and protected in a sustainable way and affirms indigenous peoples' right to a "healthy, safe and sustainable environment".[287] These initiatives and achievements highlight the importance of FPIC as an enabler for indigenous peoples' realization of their chosen form of sustainable self-determined development.

Indigenous peoples' lobbying has also resulted in international financial institutions such as the influential International Finance Corporation (IFC) in 2012, the World Bank's private sector arm, incorporating FPIC into their policies (having previously adopted the lesser standard of free prior and informed consultation), and by extension into the policies of all major private financial institutions that are party to the Equator Principles (EPs) on environmental and social risk management which apply to indigenous peoples in developing countries.[288] This in turn has prompted a number of mining companies and the International Council for Mining and Metals (ICMM), which comprises of 23 major mining companies, to commit to "work to obtain FPIC", and multi-stake holder initiatives in the sector to require FPIC for certification purposes.[289] These are particularly important developments in light of the tendency of governments to (inappropriately from an IHRL and common law perspective) delegate consultation duties to companies. They provide another platform for indigenous rights advocacy in light of the independent responsibility of corporations to respect human rights affirmed in the UN Guiding Principles on Business and Human Rights.[290] In this regard, an interesting outcome of the protests in relation to the DAPL in the US is that some of the EP Banks funding the project

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[284] For example the signing of an accord by over 150 nations and tribes opposing the Tar Sands Pipeline 'Indigenous Peoples Don't Consent To Pipelines. It's Time We Listened' 08/09/2017 available at http://www.huffingtonpost.ca/mike-hudema/indigenous-peoples-dont-consent-to-pipelines-its-time-we-list_a_23071485/.

[285] General Assembly, Transforming Our World: The 2030 Agenda for Sustainable Development, UN Doc. A/RES/70/1 (25 September 2015) (adopted without a vote)

[286] Rio+20 United Nations Commission on Sustainable Development, The future we want, Rio de Janeiro, Brazil, 20-22 June 2012, UN Doc. A/CONF.216/L.1 (19 June 2012), para. 49. Endorsed by General Assembly, UN Doc. A/RES/66/288 (27 July 2012) (adopted without vote)

[287] Res. AG/doc.5537, adopted without vote by Organization of American States, General Assembly, 46th sess., Santo Domingo, Dominican Republic, 15 June 2016, Article XIX

[288] IFC Performance Standard 7 on Indigenous Peoples (2012) available at https://www.ifc.org; Equator Principles on Environmental and Social Management available at http://www.equator-principles.com/.

[289] ICMM Indigenous Peoples and Mining Position Statement (2013). See also FPIC requirements of the Initiative for Responsible Mining Assurance (IRMA) and the Aluminium Stewardship Initiative (ASI) available at http://www.responsiblemining.net/ and https://aluminium-stewardship.org/.

[290] UN Guiding Principles on Business and Human Rights UN Doc A/HRC/17/31 (2011).

became concerned about potential reputational damage. They consequently called on all EP members to apply FPIC policies uniformly across projects impacting on indigenous peoples in developed and developing countries.[291]. This would be particularly relevant in the Canadian context as junior companies make up a large proportion of the mining sector and are highly dependent on access to investment finance.

While these private sector policies have yet to translate into practice, and accountability mechanisms remain inadequate,[292] the contemporary reality in Canada and the US is that where potentially affected indigenous peoples are opposed to projects on reasonable grounds, governments can no longer claim to have a moral or clear legal authority to proceed with those projects.[293] Even where national law, grounded on discriminatory colonial doctrines, may provide the basis for the government to proceed with a project, it is becoming increasingly politically and potentially financially infeasible to do so due to indigenous peoples' sustained opposition and the proactive steps they are taking to assert their rights, including their right to give or withhold their FPIC, as recognized under international law.[294] Translating this de-facto exercise of self-determination into legal duties to consult in order to obtain FPIC would represent an important step towards genuine reconciliation and respect for inherent territorial, cultural and self-determination rights. This would breathe new life into relationships between Indigenous peoples and the contemporary nation states that now exist in their traditional territories.

[291] Torrance M 'Banks look to apply free prior and informed consent in North America Why global banks may start to apply the concept of :free prior and informed consent: to North America' (Canadian Mining Journal, September 13, 2017) available at http://www.canadianminingjournal.com/features/banks-look-apply-free-prior-informed-consent-north-america/; see also BankTrack 'Ten Equator banks demand decisive action on Indigenous peoples following DAPL debacle Banks from the Netherlands, France, Spain and Italy press Equator Principles Association for change' Jun 16 2017 available at https://www.banktrack.org/news/ten_equator_banks_demand_decisive_action_on_indigenous_peoples_following_dapl_debacle.

[292] Coumans (2010).

[293] Hoberg G and Taylor S (2011) 'Between Consent and Accommodation' What is the Government Duty to Accommodate First Nations Concerns with Resource Development Projects?' http://greenpolicyprof.org.

[294] Hoberg G (2015) 'What is the Role of First Nations in Decision-Making on Crown Government Resource Development Projects?' http://greenpolicyprof.org/wordpress/?p=996.