

A Framework for Implementing the Principle of Free, Prior, and Informed Consent (FPIC) – Comity or Conflict

By Rudolph C. Rýser, PhD¹

Ms. Lannette Nickens contributed suggestions in the final sections of this article. She is a former Assistant Attorney General of the State of Alaska (USA) and is an experienced attorney and mediator. She is of Samoan heritage and a graduate of Seattle University (Seattle, WA, USA)

ABSTRACT

The central issue facing the world's first nations was historically and remains today the question of access to and use of the territory they occupy. Peoples' migrations, occupations, and colonization have continued as part of human relations for more than 60,000 years. Over this time, relations between emerging nations featured one nation being absorbed by another, some becoming associated through social mixing and independent nations remaining independent from one another. Peoples achieve these cultural processes through forced absorption, cultural exchange, or recognition of the equality of power. These changes continue today, except that the establishment of permanent boundaries around nations or combined nations has forced the need for structures and processes for mediating relations between nations that were forced inside bounded areas of states. These circumstance demands determining whether nations will remain "absorbed, associated or become independent of modern states. Nations' claims over their territories come into conflict with States' claims over the same regions—a circumstance exacerbated by the economic and business interests of transnational corporations and commercial enterprises seeking to profit from the location of nations' territories or access to undeveloped subsurface raw materials, lands, forests, surface minerals and soils supportive of agriculture.

Nations and States constitute the primary political systems of human organization required under modern state-based international law to implement the principle of free, prior, and informed consent (FPIC). However, without a formal and enforceable mechanism to carry out international and domestic pledges intended to implement nations' rights to "consent," the imbalance of power between nations and their counterparts in states and corporations leaves nations depending on their opponent's implementation is possible.

¹ Dr. Ryser is the Chairman and Executive Director and the Editor in Chief of the Fourth World Journal of the Center for World Indigenous Studies and is currently Resident Scholar at the Center and Treasurer on the Board of Directors. He is of Cree and Oneida heritage and a graduate in international relations of the Union Institute (Cincinnati, OH, USA).

This article discusses subjects of concern between nations, states, transnational corporations, and commercial businesses. Given limited FPIC details expressed in state-based laws and agreements, neither states nor nations can be assured of an acceptable and defined process for reaching mutual agreements or methods for enforcing commitments made by consenting parties. Defining the establishment and functions of intergovernmental or non-governmental monitoring mechanisms that may serve as agencies for facilitating mediation or negotiations between nations and states, I discuss these in detail.

Keywords: nation, state, corporation, colonization, consent, nation-based law, state-based law, political equals, negotiation.

When a person or a people has been recognized as “having a right,” what is occurring here? What does this mean? In law and diplomatic relations, “a right” can be a “grant of permission” where a dependent or subject is allowed to act in a prescribed manner, take possession of something or behave in some otherwise personal fashion not previously recognized. A “right” may also constitute recognition of a just, good, or proper authority either conveyed, recognized, or asserted as inborn.

When a “human right” is proclaimed, the assumption is that we should understand such a “right” as inherent or inborn and therefore “just, good and proper.” The right must be enforced as a “shared value” and implemented in good faith. Since the 1960s, the principle of free, prior, and informed consent has been declared a right. State-based international law asserts that “an indigenous nation, group or community has the right to exercise self-determination” in connection with states’ government and corporate policies,

administrative, legislative, and judicial decisions affecting the lives and property of indigenous people. Variations on this interpretation have been detailed in state-based international conventions and agreements. Notably, states governments have interpreted the FPIC principle as a process that is “free from manipulation or coercion, informed by adequate and timely information and occur(ing) sufficiently prior to a decision that indigenous rights and interests can be incorporated or address effectively”² as a product of consultations and without mention of negotiations. Non-governmental indigenous peoples’ organizations explain the principle of FPIC asserting “that communities have the right to give or withhold their consent prior to the approval by government, industry or another outside party of any project that may affect the

² Canada. (2021) “United Nations Declaration on the Rights of Indigenous Peoples Act” S.C. 2021, c. 14 Assented to 2021-06-21. Department of Justice. [Canada.ca/declaration](https://www.canada.ca/declaration).

lands, territories, and resources” the customarily own, occupy or otherwise use.³

The meaning of the “right” to free, prior, and informed consent depends on the perspective one uses. If a state, corporation, and non-governmental organization affirms the “right” to FPIC, the meaning is “permission” that is granted. If a nation asserts the “right” to FPIC, the purpose is just an expression of inherent authority. If a state or corporation states its recognition of inherent authority, it remains the case that they reserve their authority to grant the ability to exercise that authority. A nation’s perspective is that there is a difference in power between a state/corporation complex and a nation’s. The nation’s perspective proceeds from the position of asserting political equality. The principle of FPIC, therefore, constitutes the process of apportioning political power between nations and state-based on political equality—both are sovereign entities. Still, states assert that the process involves the “duty to consult” that informs a nation about an administrative, legislative, policy, or judicial decision. Resolving the difference between “granting permission” and “exercising inherent authority is the requirement at the core of FPIC. Yet, states governments and corporations hold the view that nations do not have a “veto” over government or corporate decisions, even if

those decisions may harm nations. Meanwhile, indigenous peoples’ organizations assert that “FPIC means communities have a right to decide their future, and not have their future decided for them by anyone else.”⁴ Nevertheless, other indigenous organizations, nations, and their allies hold that FPIC applied as state-based international law requires that the principle “must be applied on objective grounds, based on consideration of all the rights at stake and the importance of their protection.”⁵ The idea of an absolute right is a matter of following the law, though it is clear that the law is open to interpretation depending on your interests.

When state-based laws and commitments were made formalizing the principle of FPIC, the expressed reason was to establish a clear intergovernmental or interinstitutional framework. The framework contained objectives, functions, authorities, procedures, and mechanisms for compliance and enforcement between indigenous nations and states. This framework relies on policies and commitments to exercise the principle of free, prior, and informed consent enshrined in international instruments. The principal instruments ratified by states include Article 27 of the International Covenant on Civil and Political Rights (ICCPR) and Article 15 of the International Covenant on

³ Settle Ghana. “Indigenous People in the Driving Seat, A manual on Free, Prior and Informed Consent (FPIC). <https://settleghana.com/>

⁴ <https://settleghana.com/>

⁵ “Fact Sheet, Free, Prior and Informed Consent endorsed by Amnesty International Canada, Assembly of First Nations, Canadian Friends Service Committee (Quakers), Chiefs of Ontario, Grand Council of the Crees (Eeyou Istchee), Indigenous World Association, KAIROS: Canadian Ecumenical Justice Initiatives, Union of BC Indian Chiefs.

Economic Social and Cultural Rights (ICECSR), the ILO Convention 169 (1989),⁶ UN Draft Declaration on the Rights of Indigenous Peoples (1994)⁷ International Covenant on the Rights of Indigenous Nations (1994),⁸ United Nations Declaration on the Rights of Indigenous Peoples (2007),⁹ the Alta Declaration and Alta Outcome Document (2013),¹⁰ the UN World Conference on Indigenous Peoples Outcome Document (2014),¹¹ and the UN Expert Mechanism on the Rights of Indigenous Peoples (2018).¹²

The UN Permanent Forum on Indigenous Issues, with support from the Special Rapporteur on the Rights of Indigenous Peoples, issued guidance on the implementation of FPIC.

Notably, the UNDRIP itself offered the following broad objectives.”

- To maintain and strengthen institutions, cultures, and traditions¹³
- To promote development in accordance with aspirations and needs¹⁴
- To practice and revitalize cultural traditions and customs¹⁵
- To participate in decision-making matters affecting Indigenous rights¹⁶
- To determine and develop priorities and strategies for all forms of development¹⁷
- To not be subjected to forced assimilation or destruction of culture¹⁸

⁶ International Labour Organization (1989) Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries. Adopted on 27 June 1989 by the General Conference of the International Labour Organisation at its seventy-sixth session. Entry into force on 5 September 1991.

⁷ United Nations Working Group on Indigenous Populations (1994) “Draft Declaration on the Rights of Indigenous Peoples.” as submitted to the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

⁸ International Covenant on the Rights of Indigenous Nations (1994). Initialed by Nadir Bekir, Political, and Legal Affairs, the Crimean Tatars; A-Bagi Kabeir, Numba People of Sudan; Ron Lameman, Confederacy of Treaty Six First Nations; and Judy Sayer, Apethsaht First Nation; Viktor Kaisiepo, West Papua Peoples Front/OPM. Geneva, Switzerland. Subsequently ratified by nations located in West Asia, North Africa.

⁹ United Nations General Assembly. (2007). “Declaration on the Rights of Indigenous Peoples” drafted by the UN Working Group on Indigenous Populations 1980 – 1994, reviewed by the Sub-Commission on Prevention of Discrimination and Protection of Minorities and the UN Human Rights Council before submission to the UN General Assembly for approval. A/61/L.67 and Add. 1.

¹⁰ Global Indigenous Preparatory Conference. (2013) “Alta Outcome Document.” Conference preparatory for the United Nations High-Level Plenary Meeting of the General Assembly to be known as the World Conference on Indigenous Peoples. The Conference convened in Sami Territory in Alta, Norway, with over 400 delegates from indigenous peoples and nations from seven global geo-political regions plus a Women’s caucus and a Youth Caucus.

¹¹ UN General Assembly (2014) “Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples.” Sixty-ninth Session Agenda item 65. A/RES/69/2.

¹² UN EMRIP (2018) “Free, Prior and Informed Consent: A Human rights-based Approach. Human Rights Council. A/HRC/39/62

¹³ UN General Assembly, (2007) Declaration on the Rights of Indigenous Peoples. Preamble.

¹⁴ Ibid.

¹⁵ Ibid., Article 11

¹⁶ Ibid., Article 18

¹⁷ Ibid., Article 32

¹⁸ Ibid., Article 8

- To not be forcibly removed from lands or territories¹⁹

The principal focus of the UN Declaration on the Rights of Indigenous Peoples and other similar instruments has been to conceive of FPIC as a “safeguard” to ensure that the rights of indigenous peoples are positively fulfilled and to prevent violations of indigenous peoples’ rights. The guidance by the UN Permanent Forum on Indigenous Peoples Issues and the Special Rapporteur on the Rights of Indigenous Peoples takes a decidedly narrow perspective placing the burden on the State to fulfill indigenous peoples’ rights. The UNPFII guidance seeks to prevent violating those rights through consultations and obtaining consent in the light of State administrative, legislative, or judicial actions that affect the interests of the specific peoples. The Principle of Free, Prior, and Informed Consent is rooted in ethics and law affirming the right to engage parties to receive information, ask questions, and obtain agreeable decisions. Two or more parties seeking to obtain or exercise powers must engage in voluntary decision-making. The principle of FPIC requires a bi-directional process of decision-making. Thus, the nation and the State must benefit from the exercise of voluntary, appropriately timed sharing of information resulting in a mutual determined decision resulting from politically equal engagement.

As I wrote on the 3 June 2021 in a communication to the leaders of the Congress of

Nations and States:

... nations, states, NGOs, and academics present a wide range of opinions and policy views demonstrating there is confusion and a general misunderstanding of what are the applications of Free, Prior and Informed Consent in relations between nations and other entities. Between the policy views of Australia and the United States asserting there is no definition of “free, prior and informed consent” stating that the principle provides for consultation, but not necessarily agreement and the policy views suggested by Mohawk Nation international relations diplomat Kenneth Deer and the First Nations Assembly (Canada) where they assert the process is one of mutual benefit between nations and states and a “negotiation” as in the process of treaty making there are many who simply don’t know what it means.

Supplemental to the commitments made by Nations and States to implement FPIC, transnational corporations, and commercial enterprises sought affirmation of their intentions to comply with international human rights principles by registering their commitment to the principle. The United Nations organized the Global Compact and published a document entitled *Indigenous Peoples’ Rights and the role of Free, Prior and Informed Consent: A Good*

¹⁹ Ibid., Article 10

Practice Note, issued in 2014.²⁰ As of early 2018, some 9,704 companies across 161 countries voluntarily committed to adhering to the Global Compact's principles. The Global Compact essentially restates the broad objectives of the principle originally stated in the UN Declaration of 2007, emphasizing "safeguarding" the rights of indigenous peoples. Unfortunately, the text of the Global Compact includes numerous conflicting statements focusing primarily on obtaining consent without stating the iterative process and procedures. The compact fails to recognize the fulfillment of self-determination as an outcome but instead emphasizes consent without control over results. Therefore, the Global Compact adds to the confusion and allows industries to interpret how and with whom consent is obtained (selecting an individual or subgroup sympathetic to a business' interests could give consent without following the nation's political and cultural practices, for example).

Since 1920 when 42 states founded the League of Nations, and 1945 when 51 states founded the United Nations. These sovereign states have remained concerned about the political status of "unconsenting peoples" included inside the boundaries of an existing state—peoples under previous colonial rule or control of Imperial rule included in newly formed states

without their agreement. The political status of "unconsenting peoples" inside existing states has remained unresolved to the present date. The very existence of the state now depends on its claimed sovereignty. This claim affirms economic and political security by exercising control over territories originally claimed by nations. The unanticipated consequence of "decolonization" and maintaining existing states with unconsenting nations inside their boundaries resulted in nations and states claiming separate sovereignty over the same territories within the same political space. The presence of contention and the potential for conflict between nations and states within the boundaries of existing states demands a clear and detailed guide for resolving existing or potential disputes. In particular, those disputes arising from potential governmental decisions (either by the nation or the state) may conflict with the social, economic, political, and cultural interests of either the nation's peoples or the state. Accordingly, the Congress of Nations and States finds that international treaty norms require that contending parties enter discussions or negotiations based on free decisions, advanced knowledge, complete information, and mutual agreement. The existence of overlapping territorial and political claims between nations and states demands the formal establishment of intergovernmental mechanisms implementing

²⁰ The UN Global Compact is a strategic policy initiative for businesses that are committed to aligning their operations and strategies with ten universally accepted principles in the areas of human rights, labor, environment, and anti-corruption. In June 2006, the Global Compact Board established a Human Rights Working Group. Considering the growing recognition that labour rights are human rights and to ensure a coherent approach, the Chairs and members of the Human Rights Working Group and Labour Working Group merged to create the Human Rights and Labour Working Group in 2013. The goal of the Working Group is to provide strategic input to the Global Compact's human rights and labour work.

conflict resolution mechanisms. The principle of “free, prior, and informed consent” offers the opportunity to establish mutually beneficial and binding agreements to resolve potentially adverse consequences of administrative, legislative, or judicial governmental decisions conflicting with either a state or a nation’s interests.

The world’s original nations have organized into complex societies for more than 50,000 years. And today, the number of nations is estimated to be no fewer than 5000 distinct peoples, with a combined estimate of 1.9 billion people located on all habitable continents. In 2021 there are 207 states, with 191 having claimed sovereignty undisputed by the other states and 15 states with disputed sovereignty. The combined estimated population of states is 6 billion people located on all habitable continents. Today these nations (variously referred to as Adivasi, Indigenous, Aboriginal, or Tribal, etc.) comprise about 24% of the world’s present human population. Over the last 350 years, when the idea of the state as an organizing framework for human societies emerged in Europe, they have slowly become the dominant political agency seeking to regulate access to territories and the organization of societies. The state political system includes 76% of the world’s population.

Emphasis is placed on the requirement of parties as political equals to implement the principle of free, prior, and informed consent in support of advancing the exercise of self-determination, self-government, and peaceful relations between nations and states. That nations and states have governing authorities is not

questioned. How those governmental authorities are exercised as they affect the interests of either nations or states is a dominant theme throughout.

Nations and states are equally required under existing state-based international law to invoke the principle of free, prior, and informed consent (FPIC) when circumstances arise that an impending governmental decision or action poses a consequential or adverse effect on the interests of the other. For example, a nation may invoke the principle to require a state, or a state may invoke the principle to require a nation to enter negotiations to resolve a dispute. Similarly, FPIC should be implemented in all instances when peaceful dispute resolution between nations and states is the intended outcome. In accord with international norms invoking the principle of FPIC is required of nations and states when circumstances arise that an impending governmental decision or action poses a consequential or adverse effect on the interests of another nation or state. A state may invoke the principle or a nation may invoke the principle to require negotiations to formalize a binding agreement. By so doing, they may prevent or mitigate the adverse effects of impending adverse governmental action. States or nations applying the principle of engaging each other as political equals to honorably negotiate their commitment and affirm an agreement to peacefully resolve or mitigate disputes respectfully in the spirit of comity. Therefore, implementing the principle of free, prior, and informed consent can promote peaceful and mutually beneficial decisions between nations and states.

Controlling Principles and Commitments of Nations and States

Nations and States occupy much of the same territory and political space where governing decisions are made affecting the distinct peoples' social, economic, environmental, cultural, political, security and justice interests. When international actors contend over control of territory or political decisions it becomes necessary for the parties to undertake effective and mutually beneficial measures to directly engage and negotiate solutions—thus promote peace and mutual benefit. And where negotiations are convened or become unsuccessful provision must be made for a third-party oversight and mediation to ensure fair and balanced conciliation between the parties preserving the authorities and rights of parties.

The Nations possess the original authority to govern their territories and peoples and the States possess derived authority to govern territories and peoples. The principle of distinct peoples' right to free, prior, and informed consent ("FPIC") provides contending actors a framework for negotiating mutually beneficial outcomes in matters of dispute while affirming each party's political authority and control over the sustainability of communities, territories and the use of land, water, and air resources.

This framework to implement FPIC must provide for these elements:

- Determination that a third-party mediator or agent of compliance with agreements is to be incorporated into the negotiations between

nation parties and state parties.

- mutual recognition by parties of the self-defined decision-making and governing powers and
- processes exercised to establish agreement on the methods and free exchange of information,
- timing of exchanging information (subject, description, value assessments, etc.) in the form useful to each party, and
- mutually determined mechanism (public ceremony, negotiations, etc.) by each party for formulating and communicating consent and or approval according to the traditions and institutional systems of each party to the terms of a final agreement
- a mutually defined compliance, accountability, and enforcement agent that may be an institution, mediator, or multi-lateral organization.

When there is an imbalance of economic, military, policing and institutional supports between parties to an FPIC engagement, steps must be taken to balance the power between the parties. This may be accomplished by conducting exchanges through a mutually agreed institutional or political third party that becomes responsible for overseeing the official procedures put into action by both parties.

Terminology and Definitions

The Principle of Free Prior and Informed Consent – FPIC:

The principle of Free, Prior and Informed Consent is an international norm recognized as a framework for ensuring accountability and

mutual agreement between national or state parties for the consequences of government administrative, legislative, or judicial actions that affect the interests of national or state parties. Accordingly, the principle requires that parties respect and apply the following elements in an intergovernmental engagement conducted to formalize agreements and commitments to limit or eliminate the existing or potential adverse effects of governmental decisions that may impose social, economic, environmental, political and or cultural burdens that undermine or prevent the exercise of self-determination.

- Participation and engagement without encumbrance and intimidation.
- with notification in a timely fashion before an action is taken.
- with information provided in a form and manner useful and accessible to the recipient; and
- subject to agreement by negotiations.
- The principle of free, prior, and informed consent is linked to treaty norms, including the right to self-determination affirmed in common Article 1 of the International Human Rights Covenants. When affirming that the requirement flows from other rights, including the right to develop and maintain cultures, under article 27 of the International Covenant on Civil and Political Rights (ICCPR) and article 15 of the International Covenant on Economic Social and Cultural Rights (ICECSR), the treaty bodies have increasingly framed the requirement also considering the right to self-determination. (UN Office of the Human Rights Commissioner. 2013)

Governing Authority

The means by which a nation or state exercises its power of decision on behalf of the polity.

People

A People possesses a territory governed by inherent powers exercised by a distinct population practicing a common culture, with a shared heritage, common language, exercising customary laws, and the capacity to enforce those laws.

Nation

A people practicing a culture, with a shared heritage, common language, exercising customary laws, and the capacity to enforce those laws

Political Space

An avenue, opportunity and entry point available to parties to express their voice and influence political processes and outcomes.

Sovereignty

Absolute authority or power over governance of a territory and people.

State

A polity with fixed boundaries, a fixed population, exercising a monopoly over the use of force, imposing universal law within the boundaries and recognition by other states.

Territory

A geographic area belonging to or under the jurisdiction of a governmental authority

Territorial Space

Territorial space refers to all the waters, land surface, subsurface and space above surface under the jurisdiction of administrative units but placing more emphasis on its functional diversity than on the territory itself.

There is an apparent divergence of interpretations by diplomats and scholars on the subject of an international as opposed to domestic implementation of free, prior, and informed consent. Both, states, and nations, repeatedly call for the establishment of a mechanism or framework to implement the principle in agreements and commitments, thus suggesting recognition of limitations in existing state-based multilateral instruments. The Congress of Nations and States provides the opportunity for nations and states to prepare a new international pathway where nations located in existing states will engage states on an equal political plane to define and implement measures for conducting relations with respect and knowledge that cooperation is essential to meet global and domestic social, economic, political, and cultural challenges.

European Decisions from 1830–2014

Peoples within the boundaries of existing states and empires have been subject to “promises of freedom” by empires and states throughout history —particularly in the last 170 years. Outcomes from nineteenth century congresses (Vienna [1814-1815],²¹ Paris [1856] and Berlin [1878]) included treaty provisions for the security and rights of minority peoples who would be recognized today as “indigenous peoples.” The Concert of Europe²² failed to enforce the treaty’s commitments despite well recognized acts of oppression of such peoples by old empires and newly functioning states. The subsequent treaties in the 19th century failed as well.²³ Evidence of the early failures are reflected in the nearly thirty year process begun in the international community beginning in 1970 to internationalize and thus elevate indigenous nations as a subject demanding new rules and commitments as finally exhibited in the UN Declaration on the Rights of Indigenous Peoples (2007) and the Outcome Document of the High Level Assembly of the United Nations called the World Conference on Indigenous Peoples in 2014.

²¹ After the fall of Napoleon four European powers (Britain, Russia, Prussia and Austria) convened the Congress to reorganize the peace in Europe under the rule of the “great powers.” The European Imperial powers added France as an equal and together they set about reordering territorial and political claims in Europe. Included in this effort was a focus on “ethnic minorities” whose distinct languages and cultures set them apart from so called dominant populations. Croatians, Magyars, Czechs, Slovaks, Bohemians, Moravians, and many other nations became a subject for the great powers to address as populations requiring protection.

²² The Concert of Europe was a post-Napoleonic (1830s) consensus by European monarchies intent on preserving the territorial and political status quo contained in the Congress of Vienna, Congress of Paris and the Congress of Berlin. The Concert of Europe was viewed as necessary to reorder Europe after nearly two centuries of war and the Napoleonic dictatorship. The consensus reflected the assumption that monarchs retained responsibility and the right to intervene and impose their collective will on states threatened by internal rebellions. This early 19th Century collective consensus formed the basis of what is today referred to as the responsibility of the great powers of state to dominate international behaviors of all other states.

²³ Fink, C. (1995) *The League of Nations and the Minorities Question*. Vol.157, No. 4, Woodrow Wilson, and the League of Nations: Part One (Spring 1995), pp. 197-205.

The Political Status of Peoples Challenge

In the 20th Century, nations with a collective population of 750 million people that were remote from the states that colonized them, gained their freedom because of the 1946 United Nations General Assembly Resolution on decolonization. Nations “inside” the boundaries of existing states such as Russia, Brazil, South Africa, United States of America, Australia, México, and Canada comprised another billion people in 1946, but were exempted from decolonization.

The states with borders encompassing these nations claimed the same territory and political authority over peoples and lands as the nations. Thus, creating the present-day political challenge nations asserting sovereign authority over territory and states asserting sovereign authority over much of the same territory.

The States’ typical response to this challenge has been to

- “absorb” nations socially, politically, and culturally,
- establish an autonomous relationship with a nation based on a “free association agreement,” or
- negotiate or establish a nation as an “independent state.”

Additionally, states have set an international standard of “non-interference” for relations between states declaring that states may not interfere in the internal affairs of a state in a

manner that may violate the state’s territorial integrity or sovereign integrity. There is no international declaration or standard prohibiting nations within state borders from separating their territories politically from a state or conducting autonomous control over their territories within the boundaries or across boundaries of a state. The contest over territory and sovereignty between nations and states intervenes on a broad range of social, economic, political, and cultural matters concerning the continuity of the nation and the state.

The challenge political leaders have sought, but only partially resolved is how can a government of a ruling state and the governments of indigenous nations conduct equitable and constructive relations when the state and the nations occupy the same territorial and political space? States were established on top of indigenous nations’ territories and benefit from their resources. Indeed, the wealth of many of the world’s states is based on using resources from nations’ territories either by virtue of treaties or confiscation.

The goals of the state and the nations relating to land and natural resources and political governance do not always converge. This problem was partially addressed in the 20th century when states and nations agreed to “decolonize” non-self-governing territories that were geographically separated from the colonizing power by “blue water.” The question put before the League of Nations, and more succinctly at the United Nations thirty years later, was “what should be the political status²⁴ of non-self-governing peoples

whose colonial status is changed?” Between 1946 and 2020, more than eighty non-self-governing territories were identified and “decolonized”²⁵ and most became independent states while many decided to absorb into another nation or state. The political status of 750 million people was the subject of the UN decolonization process. Still seventeen “non-self-governing territories” did not have their political status resolved. The United Kingdom, France and the United States continue to “administer” peoples (combined population of 2 million) in mainly island territories while the question of political status remains an open question.

The political status of another 1.9 billion people in more than 5000 nations located inside the boundaries of 206 UN member states remains an unresolved matter because the UN has focused on European colonized “non-self-governing peoples” located outside the territories of existing states—mainly islands, African, Melanesian, and Asian territories. Conscious of the unresolved political status of nations

located inside the boundaries of existing states the issues political autonomy, self-government and exclusive territorial control have been policy issues introduced to the international community since 1923. The Haudenosaunee and Maori peoples, much aware of this unresolved political status question, took the initiative to carry the issue of hundreds of millions of people to the international forums of the League of Nations, United Nations and many regional multilateral state and nation forums.

Nation and State Political Structures

The political structures of nations and states may be conducive to constructive negotiations between governing bodies and the organization of political alternatives. If nations are to become or remain autonomous (governing their territory under their direct authority) then mechanisms of negotiation are necessary to effect working solutions to differences between states and nations. If nations and states agree to a free association then a negotiated agreement can form

²⁴ Three categories under state-based international law set the initial boundaries for what is meant by “political status:” 1. Independent countries, 2. internally independent countries under the protection of another country in matters of defense and foreign affairs and 3. Colonies or dependent political entities absorbed into an existing state. Beyond this definition there are nations or countries that where there is a territorial dispute or entities have declared the separation and independence as they seek diplomatic recognition from the international community as de jure sovereign states. Under existing state-based international law a state or distinct country exists by declaration if it has a defined territory, permanent population, a ruling government and the capacity to enter into relations with other states or countries. Such declarations are not dependent on recognition by other states. However, under what is referred to as “consultative theory” a state becomes a person of international law only if it is recognized as a state by other states that have attained recognition in the international community. Variations on state personality exist where a state like the Republic of Korea is not recognized by the government of North Korea, the Republic of Armenia is not recognized by Pakistan and Azerbaijan. The Republic of China (Taiwan) is not recognized by the Peoples’ Republic of China though it is recognized by fourteen states including Guatemala, Honduras, Holy See, Haiti, Paraguay, Nicaragua, Eswatini, Tuvalu, Nauru, Saint Vincent and the Grenadines, St. Kitts and Nevis, St. Lucia, Belize, Marshal Islands and Palau. Bhutan is the UN member state that has never explicitly recognized either the PR China or the Republic of China. The State of Israel is not recognized by 28 UN member state including Algeria, Bangladesh, Brunei, Comoros, Cuba, Djibouti, Indonesia, Iraq, Kuwait, Lebanon, Libya, Mali, Pakistan, Somalia and Malaysia among others.

²⁵ The UN under the Declaration on the Granting of Independence to Colonial Countries and Peoples (UN General Assembly Resolution 1541) The resolution characterized foreign rule of peoples as a violation of human rights. Colonizing powers included, United Kingdom, United States of America, Spain, France, New Zealand at the time of the Resolution.

the basis for conducting domestic and foreign affairs. Finally, if nations and states agree to join in a common political, social, economic, and cultural union then it is possible that the governing mechanisms could join into one “federated” body where political decision making is mutual determined.

Subjects of Concern Between Nations and States

There are many subjects of concern between nations and states that may be identified through conduct of Nation and State engagements employing the FPIC framework and may include but not be limited to:²⁶

- **Negotiations**

Negotiations for binding settlement (treaties, agreements, compacts) of disputes through each Nation’s representatives and each State’s representatives (1977 Int’l NGO Indg Rights, UNWCIP 2014).

- **Lands**

Land (Rights, uses, authority) – any action that has the effect of depriving a people or population of their distinct cultural or ethnic identities (1977 Int’l NGO Indg. Rights, ALTA UNDRIP, 1977 Int’l NGO Indg Rights).

- **Imposed Assimilation**

Any form of indirect or forced assimilation or integration imposed by administrative, legislative, or judicial measures (1977 Int’l

NGO Indg. Rights, ILO, UNDRIP, Alta, UNWCIP).

- **Disabilities**

Promotion and Protection of peoples’ and populations’ rights with disabilities and improve their social and economic conditions. (UNDRIP, ALTA UNWCIP 2014)

- **Propaganda**

Any form of propaganda directed through public media, education or means of organization (UNDRIP, ILO Convention 169).

- **Deprivation of People or Population**

Any actions that deprive a people or population of the ability to maintain and develop their political, economic, and social systems. (1977 Int’l NGO Indg. Rights, UNDRIP, ALTA, UNWCIP 2014).

- **Resources Development**

Natural resource development (commercial purposes), and life supporting water, soils, minerals, flora, fauna.

And the following categories included but not limited to:

- **Raw Materials Extraction**

Minerals, metals, petroleum, wildlife, forests, and lands are the subjects of state, nation, and corporate extraction for commercial purposes.

- **Ethnocide, Ecocide**

The breakdown of biodiversity, in particular flora and fauna life, colonization,

²⁶ This is by no means a comprehensive listing of subjects, but is intended to illustrate the range of subjects that may arise or already exist and may in particular circumstances be taken up within the framework of the process of Free, Prior and Informed Consent.

displacement, and removal of peoples resulting in their destruction in whole or in part.

- **Population Relocation**

Forced relocation of populations because of imposed development, commercialization of raw materials, lands, and waters

- **Preservation of the Territorial and Sovereignty Integrity**

The exercise of customary or codified jurisdiction and authority to govern over territories ensuring the life, security, and prosperity of a people.

- **Destruction of Life and Culture**

Actions that directly or indirectly result in the destruction or deterioration of ecosystems, peoples, cultures, or life supporting resources through the effects of unrestrained development

- **Government Actions and Interests of Nations or States**

Any Administrative, Legislative or Judicial action taken by the government of a Nation or a State that is determined by the parties to adversely affect the interests of either the nation or state.

Negotiation within an FPIC Framework

Negotiation is a means of dispute resolution in which the parties engage in an exchange of information that may or may not lead to mutual achievement all the parties' goals or a complete resolution of the disputed issues. Indeed, under existing international norms negotiation between nations and states is required under existing

internationally agreed treaties and conventions on matters that affect the interests of either a nation or state in advance of administrative, legislative, or judicial actions. Negotiations is a form of dispute resolution that can readily be conducted within the framework of the principle of free, prior, informed consent. The "consent" element of Free, Prior and Informed Consent ensures a "process of negotiation between parties acting as political equals." The goal is to achieve agreement based on freely exercised participation, relying on information obtained before engaging in negotiations. Mechanisms for negotiation implementing the principle of Free, Prior and Informed Consent may include:

- **Voluntary Framework** - No party is forced to participate in a negotiation. The parties are free to accept or reject the scope of the negotiations, the outcome of negotiations, and may withdraw at any point during the process. Parties may participate directly in the negotiations, or they may designate representatives.

- **Bilateral/Multilateral** - Negotiations can involve two, three or dozens of parties.

- **Non-adjudicative** - parties may engage directly in negotiations or may secure a neutral third party to facilitate the negotiations.

- **Informal** - there are no formal rules, the parties are free to adopt rules as they choose.

- **Confidential** - The parties have the option of negotiating publicly or privately. In the government context, negotiations would be subject to the criteria governing disclosure.

- **Flexible** - The scope of a negotiation depends on the choice of the parties. The parties can determine not only the topic or the topics that will be the subject of the negotiations, but also whether they will adopt a positional-based bargaining approach or an interest-based approach.

Nations engaging nations, states engaging states or nations engaging states, or nations engaging transnational corporations may enter freely defined negotiations and establish a temporary mechanism for the conduct of such engagement or a permanent framework. Of particular importance to consider the parties may mutually decide to include a mediator or third-party guarantor as an active participant in the negotiations. This approach can provide the means for enforcing the negotiated outcome.

- **Freedom of Parties** - Free, prior, informed consent means that parties must be engaged and participate free of intimidation or coercion through the implied use of force, social or economic reprisals before, during and after the engagement.

- **Advance Notice** - Free, prior, informed consent means that all parties must have ample advance notice of discussions or negotiations sufficient to the needs of the subject parties to participate in an informed and meaningful manner.

- **Information Types, Transmission and Form** - Free, prior, informed consent means that information must be provided

in a suitable format. Information may exist in digital sources, paper sources, video, person communicators and information must be conveyed in the appropriate language and narrative readily accessible to each of the parties.

- **10. Consent** - Consent is the basis for “agreement” and agreement is the intended result of negotiations where the parties engage to achieve beneficial outcomes. The six modes of negotiation early referenced are predicated on the political equality of the parties motivated by the intention to achieve comity.

Binding Agreement Methods and Mechanisms

Implementation of the principle of free, prior and informed consent in relations between nations and states preserves, or in some instances advances, the exercise of self-determination and the conduct of self-government by both parties. Stable, amicable relations are built upon the parties’ adherence to agreements and norms that exist between the parties. Binding agreements are essential to the process of attaining stable relations and a necessary early condition for engagement. A binding agreement requires that both parties have a stake in the outcome and may be reached through different mechanisms. The alternatives to negotiated relations are indigenous nations’ political resistance to occupation and exploitation of their peoples and territories; and the use of violence as a means breaking nations’ resistance by the state and or corporate

powers.²⁷ While the principle of free, prior and informed consent is defined as being focused on obtaining nations' consent to state government, administrative, legislative and judicial actions before they are brought into force, the mechanism of FPIC has broader potential benefit for stable and peaceful relations.

Nations may need to secure structured agreements with states' governments, transnational corporations, businesses, and non-governmental organizations to manage mutually beneficial social, economic, environmental, or political disputes that go beyond administrative, legislative or judicial acts. Independent mechanisms acting to facilitate negotiations are essential to operationalize the process of FPIC. To do so a spirit of comity between contending parties is an essential requirement. Furthermore, an internationally sanctioned embrace of mechanisms providing impartial monitoring of emerging disputes on a global scale must be formalized as a further elaboration of the principle of free, prior and informed consent. Toward that end we may consider one or a combination of the following mechanisms to effectuate compliance with the principle.

Mediation – Mediation is a form of dispute resolution between parties that is structured and facilitated by a neutral third party. Mediation may be bilateral or multilateral. The parties must engage in mediation through free, prior,

informed consent to the mediation, the scope of the mediation, and to be bound by any potential agreements. However, mediation may not produce any agreement that is enshrined in a mutually agreed declaration, or it may only result in partial agreement that is nevertheless memorialized in a declaration.

Arbitration – Arbitration is a form of dispute resolution in which the parties agree to submit a dispute, through argument and evidence – including testimony, documentation, expert opinion, etc. to a neutral third party (individual or panel) for resolution. Arbitration may be included as a defined mechanism for enforcement or dispute resolution in agreements and treaties or available as an option or otherwise requested on an ad hoc basis. Arbitration may be bilateral or multilateral. Outcomes may be binding or non-binding. Binding arbitration occurs when the parties agree to accept the decision of the arbitrator as the final resolution.

Monitoring – An independent “monitoring mechanism” can be an effective means of ensuring implementation of the principle of free, prior and informed consent. The independent and permanent mechanism may be established by nation(s) and state mutual agreement as a temporary or permanent organization.²⁸ Such a mechanism can independently identify potential conflicts and serve as an independent mediating

²⁷ Conflicts resulting in violent destruction of property and communities in Burma, Ethiopia, the Democratic Republic of Congo, Afghanistan, Yemen, Colombia, Somalia, Nigeria, Iraq, Syria, Turkey, South Sudan, Balochistan (Pakistan), Israel, Papua (Indonesia), Moro (the Philippines), Northern Chad are locations where nations, states, and corporate militias are engaged in armed conflicts resulting in up to 10,000 violent deaths per year. Subject of land control and access, exploitation of resources and controls over governing structures are among the reasons for these unresolved conflicts.

²⁸ Recognizing the need for an independent and permanent mechanism may be a complicated process and may require the intervention of an outside, disinterested, body that may have influence on the decisions of the governing authorities of the nations and states.

body for the conduct of negotiations. Within the domestic environment of the state or in the international environment, the monitoring mechanism also may serve as the recipient of nation or state appeals to aid in the process of establishing a forum for negotiations.

To implement the mechanism either such a body may be created and authorized by decision of nation and state governments, or a non-governmental body may establish the mechanism. Nations may “register” with the mechanism indicating their willingness to cooperate in the monitoring process (identifying existing or potential matters of dispute); and mechanism may be asked to diplomatically bring all interested parties together for the possibility of organizing talks and negotiations.

Intergovernmental Affairs Commission

An intergovernmental affairs commission provides a mechanism for the ongoing monitoring and communication of domestic and international events and actions that may affect the member nations and states. This may be accomplished with a tri-party commission consisting of one member appointed by each nation and state, and a third member selected and agreed to by both nation and state governments that may be a non-governmental personality. Members must be experienced and knowledgeable in intergovernmental affairs or relationships. The Intergovernmental Mechanism will

require a small staff that can monitor pending Administrative, Legislative or Judicial nation or state actions that may affect the interests of the parties. The Intergovernmental Commission staff may complete its review and issue a report to the decision-making body that in turn may authorize transmission of a communication to affected nations and states that they are required to enter a process to exploratory talks to assess whether the parties require a formal process of mediation and or negotiations. If there is a controversy the parties may ask the Intergovernmental Mechanism to provide the setting for mediation or negotiations or other processes. If there is no need for resolution beyond discussions, then the Intergovernmental Mechanism simply declares the matter settled. Both the state and the nation(s) must provide the financial support necessary for the intergovernmental mechanism to function independently. The shared costs may be distributed based on the ability to provide funds according to the budget of the mechanism and a proportion paid by each party.²⁹

Nongovernmental Mechanism

Nongovernmental organizations that are skilled and knowledgeable about the workings of a states’ government and or nations’ governments may be invited by nations and states within the boundaries of a state to form a “monitoring and mediation” mechanism established to inform nations and states when and if potential conflicts may arise from governmental administrative,

²⁹ By way of illustration a nation may have limited capacity to generate revenues as compared to the state so it might be required that the nation pay 2% of the Intergovernmental Mechanism budget and the state pay 98%. Since the ability to generate funds must first be determined the measure will vary but the focus of funding must be measured overall by the budget requirements of the intergovernmental mechanism.

legislative or judicial actions by either a nation(s) or the state. The significant difference between an intergovernmental monitoring mechanism and a non-governmental organization, is that the non-governmental organization will select the governing and decision-making body and designate the staff. Once again, the budget for the mechanism will determine the ratio of funding provided by nations and states to ensure the independence of the body.

Nation and State Options for Implementation

The governing authorities of nations and states function according to customary or codified practices and procedures. Since these vary from nation to nation and from state to state, mechanisms of decision must be thoroughly understood when crafting implementation measures for the principle of free, prior, and informed consent. Some of the following mechanisms may inform best approaches:

- **Administrative**

Ministerial, or bureaucratic decisions giving direction to facilitate agreed talks and exchanges can facilitate cooperation leading to constructive relations.

- **Executive Order**

The executive officer of the nation, state and or business may simply decide to engage in direct communications to identify the elements of a dispute and offer solutions.

- **Presidential Order**

The President or principal spokesperson of

the nation, state and or business may simply decide to engage in direct communications to identify the elements of a dispute and offer solutions.

- **Chairman Order**

The Chair of the nation, state and or business may simply decide to engage in direct communications to identify the elements of a dispute and offer solutions.

- **Prime Minister Order**

The Prime Minister officer or principal spokesperson of the nation, state and or business may simply decide to engage in direct communications to identify the elements of a dispute and offer solutions.

- **Chief**

The Chief or principal spokesperson of the nation, state and or business may simply decide to engage in direct communications to identify the elements of a dispute and offer solutions.

- **Head**

The Head leader of the nation, state and or business may simply decide to engage in direct communications to identify the elements of a dispute and offer solutions.

- **Legislative, Parliament, Bicameral, Unicameral, Council, Ceremonial Body, Multi-lateral Body**

Where a council, hereditary chiefs, board of directors, elected officials to representative posts decide the laws governing the nation,

state or corporation an emissary may be designated supported by a documented decision of cooperation can facilitate definition of a dispute and offer a solution.

• **Judicial**

A Council, designated judges, Sheiks, Mirs or other interpreters of nation, state, or corporate policies and laws may engage as a special commission to facilitate a mutually beneficial decision.

Nations, states, and corporate bodies organize and maintain systems for deciding acceptable policies and laws leading to outcomes resulting from controversies over the conduct of governance, social life, cultural life, economics, environment, etc. As with executive and legislative mechanisms of government, the judicial process mediating human differences varies from nation to nation and state to state.

Outcomes

A treaty or other form of intergovernmental documentation such as an intergovernmental compact, memorandum of understanding, or convention with embedded terms for compliance and enforcement must be the result of negotiations conducted implementing

FPIC. The instrument may simply declare the subject of controversy, the understood and agreed effects of the administrative, legislative, or judicial action and the remedy may be as simple an outcome. A balanced and respectful relationship between nations with states, transnational corporations and businesses, based on the principle of political equality, ensures the peace and secure environment for nations and states to conduct their historic purposes. The agreed FPIC mechanism allows the parties to decide to share their ongoing responsibility and commitment to fair and balanced relations through an intergovernmental mechanism or nongovernmental mechanism. The selected mechanism can provide advance notification to parties when and under what conditions a future policy, administrative, legislative, or judicial action or decision may affect the interest of the other party. Such a condition necessarily triggers the requirement to undertake negotiations within the framework of FPIC. The failure to seek and conduct freely determined negotiations leaves one alternative: Conflict and unresolved disputes. The principle of free prior and informed consent operationalized with a mutually agreed mechanism offers peaceful and mutually beneficial outcomes.

REFERENCES

- [1] INTERNATIONAL NGO CONFERENCE ON DISCRIMINATION Against Indigenous Populations in the Americas – September 20-23, 1977.
- [2] Draft Declaration of Principles for the Defense of the Indigenous National and Peoples of the Western Hemisphere – 1977
- [3] International Covenant on the Rights of Indigenous Nations (1994)
- [4] A Call to Action from Indigenous Peoples in Asia to the World Conference on Indigenous Peoples (Bangkok. ASIA Nov 8 - 9 2012)
- [5] Proceedings Report: Africa Preparatory Meeting for the World Conference on Indigenous Peoples (Hosted in Nairobi, Kenya by Mainyoto Pastoralist Integrated Development Organization AFRICA (2012))
- [6] Decisions and Recommendations of the North American Indigenous Peoples' Caucus (hosted by Kumeyaay Nation sponsored by Sycuan Band of the Kumeyaay Nation, the Haudenosaunee, the Viejas Band of the Kumeyaay Nation and the Lummi Nation, AMERICA, NORTH March 1,2,3 2013)
- [7] Foro Indígena de Abya Yala, Declaration of the Indigenous Forum of Abya Yala, AMERICA, SOUTH (Ix-imulew, Guatemala April 11-13, 2013)
- [8] Nuuk Arctic Declaration on the World Conference on Indigenous Peoples, ARCTIC 2014 (Adopted in Nuuk, Greenland, October 23 -24, 2012)
- [9] Discrimination against indigenous small-numbered peoples of North, Siberia and the Far East of the Russian Federation, EUROPE, EASTERN (CERD 82nd Session 11 February to 1 March 2013)
- [10] The Pacific Declaration of the Preparatory Meeting for Pacific Indigenous Peoples on the World Conference on Indigenous Peoples 2014, PACIFIC REGION (Redfern, Sydney, Australia. National Centre for Indigenous Excellence, 19-21 March 2013)
- [11] Global Indigenous Preparatory Conference for the United Nations High Level Plenary Meeting of the General Assembly to be known as the World Conference on Indigenous Peoples (Alta, Saamiland, 10-12 June 2013)
- [12] Alta Outcome Document (Alta, Saamiland 2013)
- [13] Resolution on Treaties and Implementation of the UN Declaration on the Rights of Indigenous Peoples and other International Human rights Standards. (IITC 40th Annual Conference (2014).
- [14] UN Declaration of Human Rights (1948) [adopted by 48 of 58 UN members with eight abstaining and two not voting]
- [15] Convention on the Prevention and Punishment of the Crime of Genocide (1948)
- [16] European Convention on Human rights (1953)
- [17] Convention Relating to the Status of Refugees (1954)
- [18] Convention on the Elimination of All Forms of Racial Discrimination (1969)
- [19] African Charter on Human and Peoples' Rights (1986)

-
- [20] International NGO Conference on Discrimination Against Indigenous Populations in the Americas (September 20-23, 1977)
 - [21] American Convention on Human Rights (1978)
 - [22] UN Convention Against Torture (1987)
 - [23] ILO Convention on Indigenous and Tribal Peoples (1989)
 - [24] Convention on the Rights of the Child (1990)
 - [25] Convention on Biodiversity (1992)
 - [26] UN Framework Convention on Climate Change (1992)
 - [27] Draft UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (1994)
 - [28] International Convention on the Protection of the rights of All Migrant Workers and Members of their Families (2003)
 - [29] UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (2007)
 - [30] International Convention for the Protection of All Persons from Enforced Disappearance (2010)
 - [31] United Nations Global Compact: Indigenous Peoples' Rights and the Role of Free, Prior and Informed Consent, 20 February 2014 (Prepared by Amy K. Lehr. Endorsed by the Good Practice Note endorsed by the United Nations Global Compact Human Rights and Labour Working Group.)
 - [32] WORLD CONFERENCE ON INDIGENOUS PEOPLES – Outcome Statement (2014)

This article may be cited as:

Ryser, R. (2022) A Framework for Implementing the Principle of Free, Prior, and Informed Consent (FPIC) – Comity or Conflict. *Fourth World Journal*. Vol. 21 N2 pp. 124-145.

ABOUT THE AUTHOR



Rudolph Ryser, PhD

Dr. Rudolph C. Ryser grew to maturity in the Cowlitz Indian culture on the US Pacific Northwest coast though he is of Cree/Oneida descent on his mother's side and Swiss descent on his father's. He earned his doctorate in international relations and has served as the Founding Chair of the Center for World Indigenous Studies since 1979. He is widely recognized around the world as the principle architect of theories and the practice of Fourth World Geopolitics. He is the author of the seminal book "Indigenous Nations and Modern States: The Political Emergence of Nations Challenging State Power" (2012), the Fourth World Geopolitical Reader and the currently released "Biodiversity Wars, Coexistence or Biocultural Collapse in the 21st Century" (2019). He has for more than fifty years worked in the field of Indian Affairs as a writer/ researcher/ and advisor to political leaders of Fourth World nations throughout the world.