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Legal Recognition of Indigenous Community Rights in Resource Exploitation: Advancing Environmental Justice through Free, Prior, and Informed Consent (FPIC)

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ABSTRACT

The issues of both environmental justice and indigenous peoples' rights arise today more than ever. Global exploitation of resources through approaches such as mining, oil extraction, cutting of trees including logging, and development of hydroelectric power is encroaching into the territory of indigenous peoples. This action threatens to compromise the cultural integrity, biodiversity, and sustainable means of living of indigenous peoples. The Free, Prior, and Informed Consent (FPIC) principle, in the form established by the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), 2007, and the International Labour Organization (ILO) Convention 169 (1989), establishes an important framework within which the meaningful participation of Indigenous communities must take place regarding decisions affecting their land and resources. The various international instruments, however, have been interpreted differently by the state(s) producing different results in their respective implementation of FPIC. Some states have reduced FPIC to a consultative or locating process with little or no substance; additional challenges to FPIC include the pressures exerted on indigenous communities by corporations and continued power imbalances that prevent resolution of environmental degradation and violations of human rights. This paper will examine the various forms of legal recognition of the rights of indigenous communities in

resource exploitation, including international instruments and case law at the national level; and will analyze these issues using case studies from Latin America, Asia, and North America for the period 2007-2025. Overall, the author argues that elevating FPIC to a more substantive, veto-like right for the equitable governance of resources, protection of the environment, and reconciliation with indigenous peoples will provide a needed path forward. This study stresses the need to reinforce free, prior, and informed consent (FPIC) in light of increasing demands on natural resources and climate change, as well as the role of Indigenous Peoples' stewardship in supporting global environmental strategies.

KEYWORDS

Environmental Justice, Indigenous Rights, Free, Prior, And Informed Consent (FPIC), United Nations Declaration on The Rights of Indigenous Peoples (UNDRIP), International Labour Organisation (ILO) Convention 169, Resource Exploitation, Extractive Industries, Legal Recognition.

INTRODUCTION

The goal of environmental justice is to ensure that people who live on the margins of society (including Indigenous peoples) have equal opportunities to obtain permits, organize protests or activities against those who are abusing their rights (like big companies) and receive compensation when their rights have been violated. On a global basis, Indigenous peoples occupy about 22% of Earth's land mass; however, they control 80% of Earth's biodiversity - which serves as a carbon sink and a buffer against climate change). The exploitation of resources (due to global population growth and the need for metals, fossil fuels and hydropower) has led to deforestation; polluted water; displaced communities; loss of culture; and increased vulnerability of all 476 million Indigenous peoples worldwide to climate change. The recognition in law of rights of Indigenous communities, specifically through FPIC, serves as an essential tool for rectifying the injustices of this period. FPIC requires that before projects that impact Indigenous territory are developed, Indigenous Peoples be consulted, and have free, prior, and informed consent; that means they have access to all information, provided freely, and not under duress. While FPIC derives from the right to self-determination, it also represents a significant shift in power perspectives — moving from top-down imposition to participatory governance. It allows Indigenous communities to either veto or

negotiate the terms of any proposed project that threatens their survival.

However, as a result of increased extraction of natural resources due to the expansion of global capitalism, international law now operates under a "dual existence". Whereas human rights (e.g., UNDRIP) provide robust protection of Indigenous Peoples' rights, investment treaties provide corporate entities with an incentive for States to Favor development over the rights of Indigenous Peoples. The inequity is clearly seen in the Amazonian region, where more than 31 million hectares are overlapped by oil and gas concession's resulting in disputes and damage to the environment. In places such as Asia, specifically in the Philippines, the exploitation of ancestral domains happens in the name of national development while reducing Free Prior and Informed Consent (FPIC) to a process that legitimizes the forced removal from their land. In Canada, disputes over pipelines illustrate that the constitutionally mandated duty to consult with Indigenous Peoples can conflict with Indigenous Peoples' assertion of veto power over their land through reference to consent. This research supports its assertions with legal precedent and data in order to avoid asserting things that cannot be backed up, even if these things are controversial or politically charged (e.g., using a veto power could conceivably create economic dislocation although it is also required for the administration of justice). This analysis refers to a variety of disciplines (including reviews from legal journals, public documents produced by various UN agencies, and judicial decisions from various regional courts) to create a road map for improved legal enforcement.

INTERNATIONAL LEGAL FRAMEWORKS

The legal framework for Indigenous rights in relation to natural resource extraction evolves from policies with the aim of assimilating indigenous people to now supporting them in their right to self-determination. The ILO Convention 169 (1989), which requires consultation with Indigenous peoples to gain consent for any project that may affect them and to recognize their unique social, cultural and economic circumstances, marks a major change in policy. This Convention has been ratified by 24 countries, most of those being in Latin America. It specifies that Indigenous peoples are those who self-identify as Indigenous and requires that States act in accordance with Indigenous customary law when determining how to respond to Indigenous peoples' requests. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP described as "non-binding", contains many provisions regarding the need for Free, Prior and Informed

Consent (FPIC"), including Article 19¹ which requires good faith consultation on legislative processes; Article 32 which requires FPIC for resource development; and Articles 10, 28 and 29 which require FPIC for removing indigenous peoples from their land, providing restitution and/or undertaking any activities that may create an environmental hazard. In addition to FPIC, UNDRIP provides a number of rights concerning the use of historic and cultural land (Articles 25 – 26), the enjoyment of cultural rights and the right to self-determination. While initially opposed by many indigenous nations, including Canada and the US, UNDRIP is now considered to be a standard and an important part of customary international law. Many regional frameworks reinforce these norms. For example, the Inter-American Court of Human Rights (IACHR) has said that the FPIC is the right of Indigenous Peoples to be involved in decision-making, including regarding environmental assessments/impact statements and benefit-sharing, with respect to extractive-related projects and activities. The African Commission on Human and Peoples Rights also holds that not consulting Indigenous Peoples or obtaining prior and informed consent before extraction likely violates Indigenous Peoples' human rights. Several treaty bodies (e.g., Committee on the Elimination of Racial Discrimination [CERD] and Committee on Economic, Social and Cultural Rights [CESCR]) have stated that FPIC is related to non-discrimination and cultural rights, and therefore, individuals/communities must receive restitution for loss of their lands without prior consent from them.

CHALLENGES IN EXECUTION

Ambiguity, power imbalances (or disparate levels of influence among those making decisions), and inadequate enforcement of free, prior, and informed consent (FPIC) will continue to undermine its effectiveness, though robust frameworks exist to support its implementation. In particular, many governments interpret FPIC to be limited to the consultation process, without granting Indigenous peoples a right of veto or refusal in the decision-making process. This creates a finality to the decision process contrary to the expectation of Indigenous peoples that FPIC is foundational to their self-determination as Indigenous peoples. As a result, the consultation process is reduced to the existence of procedural formalities wherein the consultation process is conducted in a manner that prevents dissenters from participating; that use inaccessible language or that occurs after a 'Final' Decision has been made. Corporations also exacerbate the issues. UNDRIP² (the United Nations Declaration on the

¹ <https://www.un-redd.org/sites/default/files/2021-10/FPIC%20Guidelines-1.EN.pdf>

² <https://www.un.org/development/desa/Indigenouspeoples/wp->

Rights of Indigenous Peoples) binds state governments to respect the principles in UNDRIP, but not to corporations. As a result, many corporations rely on voluntary standards such as those established by the International Council of Mining and Metals (ICMM) to guide their business practices and social responsibilities, which allow for the creation of mining projects without the consensus of Indigenous peoples. Power imbalances exist between corporations and Indigenous peoples, resulting in coercion, financial rewards, and divisions within communities, as demonstrated by examples of corporations going directly to the local level to circumvent Federations; or the use of military presence to intimidate local Indigenous peoples; or through the exclusion of youth and women from the decision-making process. Other internal challenges include overlapping territories that complicate consensus within an existing community and the reluctance of Indigenous peoples belonging to isolated communities to signal non-consent to an action.

UNDRIP's non-binding nature and varying levels of incorporation into different jurisdictions creates gaps around governance as does the lack of clear consensus (e.g., veto power) required to elevate the Declaration into customary international law through broad state practice and opinion juris. Furthermore, investment treaties incentivize states to disregard FPIC in order to avoid potential arbitration claims from investors; consequently, this creates double standards for the treatment of Indigenous Peoples. Finally, violence against defenders of Indigenous Peoples' rights is highlighted by the 164 recorded assassinations of human rights activists in Latin America during 2018 and the tendency of governments to classify them as “extremists.” In developing settings, the framing of resource development and extraction as critical to national development (or “debt”) and the logging and oil extraction industries prioritizing national economic gain over the rights of indigenous peoples also reflect the pervasive logics of extractivism. Specific examples include the labeling of protesters in Peru and the legitimization of the plunder of extractive resources in the Philippines through the country’s outdated Mining Act and by providing a flawed and inadequate process for obtaining FPIC. Solutions to these problems must include establishment of binding mechanisms, capacity-building and incorporation of FPIC into the investment regime.

In the *Saramaka People v. Suriname case* (2007; IACHR) the tribunal held that states have an obligation to obtain FPIC pursuant to Article 32 of UNDRIP, including the elements of good faith consultations, participatory assessments and ongoing communications. Suriname's failure to demarcate the lands after

content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf

the ruling illustrates issues with enforcing the ruling.

In *the Kichwa Indigenous People of Sarayaku case* (2012; IACHR)³, the issue of consultation was affirmed, as well as the requirement for consent prior to granting large-scale project authorizations. The IACHR also stated that Ecuador did not follow the spirit of the ruling with respect to how the ruling would be implemented until the present-day as violations have continued. The Constitutional Court of Ecuador affirmed A'i Cofán rights in 2022 by annulling mining concessions, and the IACHR ordered in 2025 that oil in Yasuní would not be produced.

Illegal Gold Mining in Peru and the Amazon: Illegal gold mining continues to invade the land around San José de Karene and will cause additional deforestation. Talisman Energy's activities in Block 64 were at risk of contamination; Chevron's operations in Ecuador caused a public health crisis and indigenous community disruption; The Pakitsapango Dam will endanger Ashaninka spirituality. The government grants land and resources to companies without consulting the indigenous community in advance of the granting; the granting of this land is based on coercion.

Philippines: The Indigenous Peoples Rights Act (IPRA) makes Free, Prior, and Informed Consent (FPIC) a requirement; Dole Asia sub-leased land in Bukidnon without consulting with the indigenous community, through bribery, intimidation and coercion. The Mining Act gives priority to resource extraction and displacing communities.

Guatemala (Ixquisis): The San Andrés and Pojom II dams polluted rivers without consultation and led to the eviction and murder of members of the Ixquisis community, in violation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Based on comparative analysis, companies in Canada, Guatemala and Peru have all experienced difficulties achieving good faith engagement with indigenous peoples using FPIC as a rights obligation as opposed to risk mitigation.

ENVIRONMENTAL JUSTICE IMPLICATIONS

The effective enforcement of the Free, Prior, and Informed Consent (FPIC) through the acknowledgement of indigenous community rights provides an opportunity to foster the advancement of environmental justice as a transformative tool. The broad movement for environmental justice seeks to correct the disproportionate burden and distribution of environmental goods

³ https://corteidh.or.cr/docs/casos/articulos/seriec_245_ing.pdf

and services that disproportionately affect historically marginalised and disadvantaged communities. Indigenous people occupy roughly 22–25% of the globe's surface area and are responsible for maintaining 80% of the world's terrestrial biodiversity, thus giving them a unique position as ecosystem stewards with regard to the regulation of global climate. Where FPIC has been recognised as substantive rather than procedural, indigenous peoples are provided with the ability to control, change, or reject resource development projects that could negatively impact their traditional territories, their livelihoods, and their cultural survival. This empowerment directly results in better environmental outcomes. In general terms, weak or superficial implementation of Free, Prior and Informed Consent (FPIC) creates "sacrifice zones." These are places where heavy industry, especially extractive industries, has a concentrated negative impact on ecology and culture. It negatively impacts many of the groups who are already marginalized for the benefit of the overall economy. Extractive industries target Indigenous territories to generate profits by converting biodiversity into sacrificed land – heavily polluted with mining, oil drilling, nickel extraction and hydropower projects. There are many examples in countries such as Indonesia, Ecuador, Mexico, and Brazil of weak FPIC processes that allow for pollutants to be introduced into soil, air, and rivers, leading to displacements, illnesses, and loss of traditional livelihoods. All of these zones violate two important tenets of environmental justice – non-discrimination and equitable sharing of burdens – since Indigenous peoples, who are already suffering from historical marginalization, are disproportionately affected by toxin and ecological harm and receive little or no benefit. There is no legitimate consent for these processes creating an environment of justice that reinforces colonial relations that have treated Indigenous lands as resources rather than as sovereign lands. By advocating for Free, Prior, and Informed Consent (FPIC) as part of climate finance and the implementation of REDD + Projects, (Reducing Emission through Deforestation and Degradation) to achieve energy transition (e.g., building large-scale renewable energy projects on Indigenous lands without permission), will help prevent Green Extractivism, but also provide equitable benefit sharing.

By promoting Indigenous leadership in policy development, we aim to address injustice for past dispossession while also creating a framework that draws on diverse knowledge systems to develop globally relevant and effective climate change strategies.

CONCLUSIONS

While strong international standards regarding the recognition of Indigenous Peoples' land rights exist (i.e., UNDRIP and ILO

Convention 169), actual practices in many parts of the world still show a significant disparity in its recognition. Many multinational corporations and governments prioritize economic development and resource extraction activities over respectfully seeking meaningful consent from Indigenous Peoples, often using FPIC as a consultation technique instead of a legally enforceable requirement. These long-standing inequities contribute to ongoing environmental injustices such as sacrifice zones, cultural loss, forced relocations and rapidly degrading ecosystems within Indigenous Peoples' territories. These outcomes violate both fundamental principles of self-determination/non-discrimination and also undermine international efforts to address climate change, given the extent to which Indigenous Peoples manage forests that sequester carbon and contribute to biodiversity. In order to improve the implementation of international law protecting Indigenous Peoples' rights, there are four key actions that must be taken:

- 1) UNDRIP and ILO C169 must be incorporated into domestic laws through constitutional amendments, specific legislation, or judicial interpretation clearly stating that Free, Prior and Informed Consent (FPIC) is a requirement for receiving FPIC. This will eliminate loopholes that allow for a shallow process;
- 2) International trade and investment agreements must be reformed to include obligations for FPIC, provide a mechanism for Indigenous Peoples to pursue disputes concerning their rights through the legal system, and require investors to comply with Indigenous Peoples' standards in order to enjoy protections under legitimate law;
- 3) Governments, international institutions and civil society must support capacity building initiatives (including legal education, participatory mapping, community environmental assessments and negotiation support) to enable Indigenous Governments to exercise their governance and rights effectively; and finally,
- 4) Indigenous protocols - Customary processes or agreements between Indigenous Peoples and others which document the process of providing consent, identify cultural protections and outline the preferred model of development to take place on their property - should have legal status and be incorporated into national legal systems so that authorities respect Indigenous Peoples' world view and relational ethics in their decision-making.

To conclude this research paper, end with this powerful and timeless indigenous wisdom:

"We do not inherit the Earth from our ancestors; we borrow it from our children."

In order to achieve true environmental justice, we must behave as responsible borrowing entities, respecting the views of those who have always taken care of the earth, so that future generations receive an earth that is alive and healthy instead of an earth that is dead and depleted.