FREE, PRIOR INFORMED CONSENT AND EXTRACTIVE INDUSTRY: INDIGENOUS ACTION IS THE PAST, PRESENT, AND FUTURE OF GLOBAL ENVIRONMENTAL JUSTICE

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I. INTRODUCTION

The fight for control of land and what lies within the earth has shaped, and continues to shape, much of human history. As Australian historian Patrick Wolfe stated: "Land is life—or, at least, land is necessary for life. Thus, contests for land can be—indeed, often are—contests for life."[1] Often at the center of these conflicts, Indigenous peoples, though an incredibly diverse global community, share a deep-rooted relationship between cultural identity and land.[2] The "flashpoints of struggle" surrounding Indigenous peoples' land rights have become particularly tied to extractive industry and its attempts to control oil, gold, coal, and other commodities across the globe.[3]

In these conflicts, environmentalists and Indigenous peoples often have aligned goals. However, that is not always the case. In the United States ("U.S."), national parks were created in the shadow of forced removal and broken treaties.[4] Both the stealing of Paha Sápa, also known as the Black Hills, and the 18,000 acres to create the National Bison Range, are examples of how perceived

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[1] Patrick Wolfe, *Settler Colonialism & the Elimination of the Native*, 8 J. OF GENOCIDE RSCH. 387, 387 (2006).

[2] Jérémie Gilbert, *Land Rights as Human Rights*, 10 SUR INT'L. J. ON HUM. RIGHTS 115 (2013).

[3] Nick Estes, *Our History is Our Future: Standing Rock Versus the Dakota Access Pipeline, and the Long Tradition of Indigenous Resistance* 253 (2019).

[4] Jim Robbins, *How Returning Lands to Native Tribes is Helping Protect Nature*, YALE ENV'T. 360, https://e360.yale.edu/features/how-returning-lands-to-native-tribes-is-helping-protect-nature (last visited March 13, 2022).

protection of land can be in direct opposition to indigenous rights.[5] This practice is not solely located in the U.S. The forced displacement of the Endorois community from their ancestral land in the Great Rift Valley of Kenya to create a wildlife reserve resulted in over thirty years of severe poverty, disruption of religious practices, and separation from their ancestors' gravesites.[6] Ultimately, the African Commission on Human and Peoples' Rights recognized the Endorois peoples' rights over their traditionally owned land and the government's failure to provide sufficient compensation for their eviction.[7] By some estimates, ten million people have been displaced for the creation or expansion of protected areas, though not all are considered Indigenous.[8]

Environmental Justice, and specifically Indigenous Environmental Justice, requires not only the alignment of environmental goals to indigenous goals, but the acquiescence of settler colonialism holds on land. Though Indigenous peoples represent only five percent of the global population, they safeguard eighty percent of the world's remaining biodiversity.[9] It is estimated that Indigenous communities are conserving at least twenty-one percent of the world's lands, which exceeds the extent of terrestrial protected areas governed by states, which is less than fourteen percent.[10] One study found that Indigenous-managed lands in Australia, Brazil, and Canada have equal-or-higher biodiversity than

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[5] Estes, *supra* note 3, at 8-9.
[6] *Landmark Decision Rules Kenya's Removal of Indigenous People from Ancestral Land Illegal*, MINORITY RIGHTS GROUP INT'L. (Feb. 4, 2010), https://minorityrights.org/2010/02/04/landmark-decision-rules-kenyas-removal-of-indigenous-people-from-ancestral-land-illegal/.
[7] Minority Rights, *supra* note 6.
[8] Prakash Kashwan, *Inequality, Democracy, and the Env't.*, 131 ECOLOGICAL ECON. 139 (2017).
[9] *Understanding Poverty: Indigenous Peoples*, THE WORLD BANK (Mar. 19, 2021), https://www.worldbank.org/en/topic/indigenouspeoples#1.
[10] *Territories of Life*, INT'L. CONGRESS & CONVENTION ASSOC. (2021), https://report.territoriesoflife.org/wp-content/uploads/2021/09/ICCA-Territories-of-Life-2021-Report-FULL-150dpi-ENG.pdf.

protected areas in their respective countries.[11] Another study notes that wildfires and deforestation are less common on Indigenous lands, and Indigenous control seems to reduce deforestation as much as formal state protections, or even more.[12][13] Indigenous scholars are first to recognize that not all communities fit this mold and they do "not suggest that Indigenous societies possess *the* solution to climate change," but it is undeniable that Indigenous action is the past, present, and a significant part of the future in a global response to the existential crisis.[14]

II. THE FRAMEWORK OF FREE, PRIOR INFORMED CONSENT

One way to protect Indigenous rights to land in the face of extractive industry exploitation is strengthening the right to Free, Prior Informed Consent ("FPIC"), as laid out in the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP"). The United Nations ("UN") adopted UNDRIP in 2007.[15] In multiple articles of the Declaration, the term "free, prior informed consent" describes how nations should interact with Indigenous Peoples.[16] This phrase requires States obtain free, prior informed consent from Indigenous Peoples "in matters of fundamental importance for their

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[11] Richard Schuster et al., *Vertebrate Biodiversity on Indigenous-Managed Lands in Australia, Brazil, and Canada Equals that in Protected Areas*, 101 ENV'T. SCI. & POL'Y. 1 (2019).
[12] Vicky Tauli-Corpuz et al., *Cornered by PAs: Adopting Rights-Based Approaches to Enable Cost-Effective Conservation and Climate Action*, 130 WORLD DEV. 1 (2020).
[13] Benji Jones, *Indigenous People are the World's Biggest Conservationists, but They Rarely Get Credit for It*, VOX (June 11, 2021).
[14] Estes, *supra* note 3, at 22.
[15] *Declaration on the Rights of Indigenous Peoples Frequently Asked Questions,* U.N. PERMANENT FORUM ON INDIGENOUS ISSUES, https://www.un.org/esa/socdev/unpfii/documents/faq_drips_en.pdf (last visited Mar. 13, 2022).
[16] G.A. Res. 61/295 (Sep. 10, 2007).

rights, survival, dignity, and well-being."[17] Article 32 calls for States to obtain FPIC "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."[18]

This monumental declaration was the product of decades, if not centuries, of Indigenous action, advocacy, and struggle. Documents and court holdings influenced the rising campaign for international recognition of Indigenous land rights, including "Twenty Points,"[19] the "Declaration of Continuing Independence,"[20] the "Draft Declaration of Principles for the Defense of the Indigenous Nations and Peoples of the Western Hemisphere,"[21] and the 2001 Inter-American Court of Human Right's case *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*,[22] among many others. Land and resource exploitation sparked Indigenous movements and action in various countries, such as Australia, Ecuador, Nigeria, Canada, South Africa, and New Zealand, to name a few. This rising tide brought Indigenous rights to the forefront of human rights and environmental justice discussions and precipitated the UNDRIP.

Indigenous peoples fought hard for the Declaration, but its implementation has been disappointing. Some nations only recognize a right to consult, instead of the harder requirement to receive consent. Even worse, States and corporations have used forms of false consultation and consent to legitimize projects coercively or forcefully on Indigenous land.

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[17] Agnes Portalewska, *Free, Prior Informed Consent: Protecting Indigenous Peoples' Rights to Self-Determination, Participation, & Decision-Making*, CULTURAL SURVIVAL QUARTERLY MAGAZINE (December 2012).
[18] G.A. Res., *supra* note 16, at (XXXII).
[19] *Trail of Broken Treaties 20-Point Position Paper,* AMERICAN INDIAN MOVEMENT, http://www.aimovement.org/ggc/trailofbrokentreaties.html (last visited Mar. 13, 2022).
[20] Estes, *supra* note 3, at 223.
[21] *Id*. at 241.
[22] Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, (Aug. 31, 2001).

Additionally, UNDRIP is often considered soft law and non-compliance would not result in sanctions. 144 States voted for it, and four against, with eleven abstentions.[23] Notably, the United States, Canada, Australia, and New Zealand voted against the Declaration, and Nigeria and Russia abstained.[24] Proponents of FPIC argue that it is becoming part of customary international law, and is an important standard for self-determination, especially in rights to the land and resources.[25] Critics argue that the insufficient autonomy in the right to veto extractive industry's proposals makes FPIC a non-substantive right, unlike a formal right to land or self-autonomy.[26] Some argue that crafting the right in this way was intended, if not explicitly then incidentally, to avoid alarming States with "talk of actual, enforceable rights to land or resources."[27]

This paper argues that not adopting or respecting FPIC in its fullest form has resulted in Indigenous rights and environmental justice violations from extractive industry. While adopting the principle has not always resulted in substantive rights for Indigenous peoples or prevented environmental harm in every instance, it has resulted in significant improvements globally in the Indigenous struggle for sovereignty and self-determination, as well as protecting the environment. Ultimately, to fully realize Indigenous and environmental justice, FPIC must be whole-heartedly understood as a consent right, and further action must be taken by Nation States to repatriate lands back to Indigenous peoples and respect their sovereignty over that land.

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[23] G.A. Res. 61/295, *supra* note 16.

[24] *Historic Milestone for Indigenous Peoples Worldwide as UN Adopts Rights Declaration*, U.N. PERMANENT FORUM ON INDIGENOUS ISSUES, https://www.un.org/esa/socdev/unpfii/documents/Declaration_ip_pressrelease.pdf (last visited Mar. 13, 2022).

[25] Portalewska, *supra* note 17.

[26] Robert T. Coulter, *Free, Prior Informed Consent: Not the Right it is Made Out to Be*, INDIAN L. RESOURCE CENTER (October 31, 2013).

[27] Phillippe Hanna & Frank Vanclay, *Human Rights, Indigenous Peoples and the Concept of Free, Prior and Informed Consent*, 31 IMPACT ASSESSMENT & PROJECT APPRAISAL 146 (2013).

III. HOW FAILURE TO ADOPT FPIC HAS LED TO ENVIRONMENTAL HARM FROM EXTRACTIVE INDUSTRY ACTION

Indigenous protection of the environment is a powerful barrier to extractive industry exploitation of resources. However, when Indigenous peoples in a State do not have the right to FPIC to protect their land, it is difficult to prevent destruction through current legal avenues.

A. United States

It is unsurprising that the U.S. voted against the UNDRIP, given the genocide that led to and cemented the country's establishment. Dr. Nick Estes, citizen of the Lower Brule Sioux Tribe, wrote, "The perpetual threat of Indigenous nations is that they are a reminder of the settler's own precarious claims to land and belonging."[28] While there are numerous examples of extractive exploitation and Indigenous rights violations in the U.S., one controversy has been a lightning rod for more than 150 years.

Paha Sápa, Lakota for "The Black Hills,"[29] has been the subject of intense military and legal battles for more than a century. Over fifty Indigenous Nations possess similar, often overlapping relationships and claims to "the beating heart of the Lakota cosmos," including the Arikara, Osage, Shoshone, Assiniboine, Gros Ventre, Pawnee, Mandan, Hidatsa, Kiowa, Ponca, Crow, Omaha, Winnebago, Cheyenne, Arapaho, and Blackfeet, among others.[30] In 1868, the U.S. entered into the Fort Laramie Treaty with "the different bands of the Sioux Nation of Indians," establishing a thirty-two million acre "permanent reservation" and setting aside a similarly sized expanse of hunting grounds, for a total of more than seventy million acres.[31] The treaty forbade white settlers from

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[28] Estes, *supra* note 3, at 248.
[29] *Paha Sápa —The Black Hills*, BLACK HILLS VISITOR MAGAZINE (Sept. 8, 2017), https://blackhillsvisitor.com/learn/paha-sapa-the-black-hills/
[30] Estes, *supra* note 3, at 10, 71-72.
[31] *Id*. at 108.

trespassing on the land, but less than ten years after its ratification, due to the discovery of gold, Congress passed the 1877 Black Hills Act, which stole the land and opened it to white settlement, a clear violation of the treaty.[32] During the illegal annexation of the Black Hills, a federal official offered Red Cloud, an Oglala Lakota leader, and his people six million for the Black Hills.[33] Red Cloud famously responded, "The Black Hills [are] worth to me seven generations."[34]

The fight for the Black Hills hit a crescendo in the mid-1970s, rolling into the 80s. Beginning with the seventy-one-day occupation of Wounded Knee in South Dakota's Pine Ridge Reservation in 1973,[35] the growing Indian Civil Rights Movement brought wider attention to the stolen lands. Stemming from a legal battle that began in 1950, the Oceti Sakowin, known to some as the Sioux Nation, secured a judgment in the Supreme Court in 1980 that the Black Hills had been stolen, and they were owed about $106 million, accounting for inflation.[36] In response, a rallying cry emerged: "The Black Hills are Not for Sale."[37]

To this day, the Oceti Sakowin have not taken the sum, which is now estimated to be worth upwards of $1.5 billion.[38] Historian Roxanne Dunbar-Ortiz wrote, "That one of the most impoverished communities in the Americas would refuse a billion dollars demonstrates the relevance and significance of the land to the Sioux, not as an economic resource but as a relationship between people and place, a profound feature of the resilience of the Indigenous peoples of the Americas."[39]

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[32] *Id*. at 117.
[33] *Id*. at 161.
[34] Edward Lazarus, *Black Hills White Justice: The Sioux Nation Versus the United States, 1775 to Present* 121 (University of Nebraska Press 1999).
[35] *13 Images: Remembering the Occupation of Wounded Knee*, INDIAN COUNTRY TODAY (Feb. 27, 2015), https://indiancountrytoday.com/archive/13-images-remembering-the-occupation-of-wounded-knee.
[36] *U.S. v. Sioux Nation of Indians*, 448 U.S. 371 (1980).
[37] Estes, *supra* note 3, at 242.
[38] Roxanne Dunbar-Ortiz, *An Indigenous Peoples History of the U.S.,* BEACON PRESS 208 (2014).
[39] *Id*.

At the very same time the legal battle was unfolding, uranium was found in the Black Hills.[40] Within two decades, 150 uranium mines occupied the land.[41] Though mining ceased in 1973, the damage, compounded by the abandoned gold mines, was already done.[42] In 1962, uranium mill tailings washed down the Cheyenne River from a broken dam into the Pine Ridge Reservation.[43] Though the use of mercury in gold mining stopped in 1971, it is estimated fifteen kilograms of the substance made its way into the Whitewood Creek daily.[44] Arsenic and selenium concentrations found today in the watersheds of the reservation exceed U.S. Environmental Protection Agency ("EPA") toxicity limits, potentially harming fish, birds, and other species, and exceeding drinking water limits.[45] Pine Ridge has the lowest life expectancy of any U.S. county, with many Lakota believing it is a direct result of the mining activities.[46] To this day, there are at least two large, open-pit, un-reclaimed mines and a massive containment site where four million tons of radioactive tailings are buried.[47]

Despite these disastrous environmental and human impacts, a company has been fighting for over a decade to open a new uranium mine on Oglala Sioux Tribal lands.[48] Powertech Inc. is attempting to open the Dewey-Burdock Project, an in-situ leach

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[40] Delilah Friedler, *'Get the Hell Off': The Indigenous Fight to Stop a Uranium Mine in the Black Hills*, GRIST (May 10, 2020), https://grist.org/justice/get-the-hell-off-the-indigenous-fight-to-stop-a-uranium-mine-in-the-black-hills/.
[41] *Id*.
[42] *Id*.
[43] David Rich Lewis, *Native Americans & the Env't.*, 19 AMERICAN INDIAN QUARTERLY 423, 433 (1995).
[44] TW May et al., *Influence of Mining-Related Activities on Concentrations of Metals in Water & Sediment from Streams of the Black Hills, South Dakota*, 40 ARCHIVES ENV'T. CONTAMINATION & TOXICOLOGY 1 (2001).
[45] *Id*.
[46] Friedler, *supra* note 40.
[47] Seth Tupper, *Radioactive Legacy*, RAPID CITY J. (Nov. 2, 2015), https://rapidcityjournal.com/radioactive-legacy-edgemont-area-uranium-mining/collection_b13bb75f-b113-5648-99f0-a1c9bdcac615.html.
[48] Pet. Interv. & Req. Hr'g of Oglala Sioux Tribe, *In re Powertech (USA) Inc.*, No. 40-9075-MLA (2010).

uranium mine in Custer and Fall River Counties, South Dakota.[49] In 2010, the Oglala Sioux Tribe intervened in the licensing proceedings for the project.[50] The Nuclear Regulatory Commission's ("NRC") Atomic Safety and Licensing Board ruled in 2015 that, though the license can move forward based on the environmental evidence, the NRC had to properly consult with the Oglala Sioux Tribe to satisfy the requirements of the National Environmental Policy Act ("NEPA").[51] In 2018, the D.C Circuit reaffirmed the Commission's finding that the failure to discuss the cultural, historical, and religious impacts with the Oglala Sioux Tribe was a "significant deficiency" in the NEPA review and remanded the issue back to the NRC to correct the license.[52] However, the court refused to vacate the license, citing Powertech's contention that "its stock price would plummet if the license were suspended, vacated, or revoked."[53] The court believed the NRC would be able to fix the deficiencies in the license, thus highlighting the stark contrast between Indigenous peoples' right to *consultation* versus *consent*. After the permit bounced around the NRC for two years,[54] the D.C. Circuit found the NRC had finally complied with NEPA, though the Tribe continued to maintain that it had not.[55] The Tribe filed for rehearing en banc

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[49] *Id*.
[50] *Id*.
[51] *NRC Ruling Gives Victory to Mine Opponents*, INDIGENOUS ENV'T NETWORK (Apr. 30, 2015), https://www.ienearth.org/nrc-ruling-gives-victory-to-mine-opponents/.
[52] *Oglala Sioux Tribe v. U.S. Nuclear Regul. Comm'n*, 896 F.3d 520 (D.C. Cir. 2018).
[53] *Id*.
[54] *In the Matter of Powertech (Usa), Inc. (Dewey-Burdock in Situ Uranium Recovery Facility)*, 89 N.R.C. 1 (Jan. 31, 2019); *In the Matter of Powertech (Usa), Inc. (Dewey-Burdock in Situ Uranium Recovery Facility)*, 90 N.R.C. 121 (Sept. 26, 2019); *In the Matter of Powertech (Usa) Inc. (Dewey-Burdock in Situ Uranium Recovery Facility)*, 90 N.R.C. 287 (Dec. 12, 2019); *In the Matter of Powertech (Usa) Inc. (Dewey-Burdock in Situ Uranium Recovery Facility)*, 92 N.R.C. 295 (Oct. 8, 2020).
[55] *Oglala Sioux Tribe v. U.S. Nuclear Regul. Comm'n*, 45 F.4th 291, 295 (D.C. Cir. 2022).

but were denied[56] and then, understandably, declined to file a Petition for Certiorari to the U.S. Supreme Court.[57] In the U.S., as is clear through the Oglala Sioux Tribe's fight to prevent the Dewey-Burdock project from moving forward on their land, any potential for FPIC is relegated to procedure only, and void of substance.

B. Nigeria

The publication of the UN's Environmental Assessment of Ogoniland in 2011 brought to light what many Indigenous people in Ogoniland, Nigeria had known for decades— the oil disasters and pollution that plagued their land was extensive, persistent, and hazardous to the lives and livelihoods of the Ogoni.[58] The report concluded that environmental restoration could take thirty years and the average lifespan in Ogoniland was less than fifty years.[59] Now, more than ten years after the report's publication, the communities remain polluted and residents still drink from poisoned wells.[60] Ken Saro-Wiwa, an environmental activist and writer, called this the slow process of environmental genocide.[61]

In 1978, Nigeria passed the Land Use Act ("LUA"), which vested all land in Nigeria in the government.[62] The Act was passed

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[56] *Oglala Sioux Tribe v. U.S. Nuclear Regul. Comm'n*, No. 20-1489, 2022 WL 17721819 (D.C. Cir. Dec. 13, 2022).
[57] Joint Status Report, *In re Powertech (Usa) Inc*. UIC Appeal No. 20-01 (EAB Mar. 13, 2023).
[58] *Env't. Assessment of Ogoniland*, U.N. ENV'T. PROGRAMME (2011), https://postconflict.unep.ch/publications/OEA/01_fwd_es_ch01_UNEP_OEA.pdf.
[59] *Id.*
[60] Daniel Leader, *Okpabi v. Shell: The Era of Unbridled Corporate Impunity Drawing to a Close*, AFRICAN ARGUMENTS (Mar. 18, 2021), https://africanarguments.org/2021/03/okpabi-v-shell-the-era-of-unbridled-corporate-impunity-drawing-to-a-close/
[61] Curtis Kline, *The Ogoni: Indigenous Autonomy in an African Context*, INTERCONTINENTAL CRY (Aug. 18, 2013), https://intercontinentalcry.org/the-ogoni-and-indigenous-autonomy-in-the-african-context/
[62] ZO Opafunso et al., *Effects of the 1978 Land Use Act on Sustainable Mining and Petroleum Industries in Nigeria*, 6 ARTS & SOC. SCI. J. 1-5 (Jan. 2015).

in opposition to the customary land tenure system based on native law and customs of various peoples from southern Nigeria.[63] The exact scope and implementation of the Act has been the subject of controversy, especially for Indigenous peoples' rights to resources,[64] including the issue of the Nigerian government not sharing the profits derived from those resources with the people who lived on the land.[65]

1. Shell's "Dirty War" and the Tragedy of Ken Saro-Wiwa

The practices that resulted in Ogoniland's aggregated disaster have a long history, much of which involved Royal Dutch Shell. Shell has been shipping oil from Nigeria since 1958.[66] At one point, Shell Petroleum Development Company of Nigeria Limited ("Shell Nigeria"), the Shell subsidiary operating in Nigeria, owned sixty percent of the commercially viable oil-bearing land in Nigeria.[67] While Shell extracted oil, the Ogoni people protested, claiming extensive environmental issues. [68] The Nigerian government often sent the military to suppress these protests.[69]

The efforts of the Ogoni people came to a head in the 1990s when Ken Saro-Wiwa led the Movement for the Survival of the Ogoni People (MOSOP) campaign for fairer shares of the oil wealth for the people living on the land, as well as compensation for environmental damages.[70] Saro-Wiwa and other MOSOP leaders

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[63] Kaniye S.A. Ebeku, *Oil and the Niger Delta People: The Injustice of the Land Use Act*, 35 L. & POL. IN AFRICA, ASIA AND LATIN AMERICA 201 (2002).
[64] O. O. Sholanke, *The Nigerian Land Use Act—A Volcanic Eruption or a Slight Tremor?*, 36 J. OF AFRICAN L. 93 (1992).
[65] Aaron Xavier Fellmeth, Note, *Wiwa v. Royal Dutch Petroleum Co.: A New Standard for the Enforcement of International L. in U.S. Courts,* 5 YALE HUM. RTS. & DEV. L. J. 241-54 (2002).
[66] *Timeline: Shell's Operations in Nigeria*, REUTERS, Sept. 23, 2018.
[67] Fellmeth, *supra* note 65.
[68] *Id.*
[69] *Id.*
[70] Reuters, *supra* note 66.

were often arrested, intimidated, and tortured for their advocacy.[71] However, the government's actions did not quell the rising movement.[72] MOSOP created its own Bill of Rights and presented it to the government of Nigeria.[73] It called for Ogoni people's political autonomy, to ensure the Ogoni received a fair proportion of their economic resources for development, representation in Nigerian institutions, and the right to protect their environment from further degradation.[74] In 1993, MOSOP organized a protest of over 300,000 Ogoni people in opposition to Shell's practices.[75]

Tensions between Shell and MOSOP reached a peak in 1995 when Saro-Wiwa was arrested for murder, tried, and executed by the Nigerian government, along with other leaders of the movement.[76] In his trial speech, Saro-Wiwa said:

> I repeat that we all stand before history . . . The Company has, indeed, ducked this particular trial, but its day will surely come and . . . there is no doubt in my mind that the ecological war that the Company has waged in the Delta will be called to question sooner than later and the crimes of that war be duly punished. The crime of the Company's dirty wars against the Ogoni people will also be punished.[77]

Two days after the execution, Shell signed a $2.5 billion gas deal with the Nigerian military junta.[78] Saro-Wiwa's family sued Royal Dutch Petroleum, Co., Shell Transport, and Shell Nigeria in the U.S. District Court for the Southern District of New York under the Alien Tort Claims Act ("ATCA") and Racketeer Influenced and

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[71] Fellmeth, *supra* note 65.
[72] *Id.*
[73] Kline, *supra* note 61.
[74] *Id.*
[75] Reuters, *supra* note 66.
[76] Fellmeth, *supra* note 65.
[77] Earth Island Institute, *Ken Saro-Wiwa's Final Address to the Military-Appointed Tribunal*, 11 EARTH ISLAND J. 25 (1995).
[78] A. R. M. Babu, *Why Ken Saro-Wiwa Had to Hang*, 11 EARTH ISLAND J. 24 (1995).

Corrupt Organizations Act ("RICO").[79] Saro-Wiwa's family alleged Shell Nigeria recruited the Nigerian police and military to suppress the movement and that Shell Nigeria "instigated, orchestrated, planned, and facilitated" the abuses carried out by the Nigerian police and military.[80] The complaint also alleged that Royal Dutch Shell provided money, weapons, and support to the military, and helped to fabricate the murder charges against Saro-Wiwa.[81]

After partially surviving *forum non conveniens* challenges in the second circuit for twelve years, the cases were scheduled to be heard in 2009.[82] However, days before the trial was set to begin, Shell agreed to pay the plaintiffs' $15.5 million.[83] Shell called the settlement a "humanitarian gesture" and denied involvement in the execution of Saro-Wiwa.[84]

2. The 2008 Oil Spills and Foreign Court Challenges

The Niger River Delta is one of the most polluted regions in the world, with more oil spilled each year than the 2010 Deepwater Horizon disaster.[85] In 2008, the Shell-operated Trans-Niger Pipeline leaked as much as 2,000 barrels a day from September to November.[86] A month later, the same pipeline began leaking again into the swamps.[87] It was not repaired until late February, after leaking as much as 280,000 total barrels.[88] The spills devasted the

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[79] *Wiwa v. Royal Dutch Petroleum, Co.*, 226 F.3d 88 (2d Cir. 2000).
[80] *Id.*
[81] *Id.*
[82] Jad Mouawad, *Shell to Pay $15.5 Million to Settle Nigerian Case*, N.Y. TIMES (June 8, 2009).
[83] *Id.*
[84] *Id.*
[85] John Vidal, *Nigeria's Agony Dwarfs the Gulf Oil Spill. The U.S. & Europe Ignores It.*, THE GUARDIAN (May 29, 2010).
[86] John Vidal, *Shell Oil Spills in the Niger Delta: 'Nowhere & No One Has Escaped,'* THE GUARDIAN (Aug. 3, 2011).
[87] *Id.*
[88] *Id.*

community of Bodo in Ogoniland.[89]

In March 2012, 11,000 Nigerians from Bodo filed suit against Shell in the United Kingdom's ("U.K.") London High Court, seeking compensation for the spills.[90] In 2015, Shell accepted its responsibility, agreeing to pay the Bodo community £55 million, and assist in the clean-up.[91] While community members received compensation, they continue to wait for the clean-up efforts to make substantial progress.[92]

Other Ogoni communities have found success in English courts, specifically in the *Okpabi v. Royal Dutch Shell* court decision.[93] The U.K. Supreme Court reversed the preceding Court of Appeals decision and concluded the Nigerian claims were at least arguable.[94] The decision will help to pierce the corporate veil for foreign plaintiffs to bring claims against parent companies.[95] The Ogoni people have also had mixed success in Dutch court. In 2013, the Hague District Court ruled in favor of a farmer against Shell Nigeria, but dismissed the majority of the claims brought by three other farmers and fishermen, and refused to find the parent company liable.[96] Both sides appealed.[97] In 2015, the court ruled that Shell could be held accountable in Dutch Courts for its actions in Nigeria.[98] The Hague Court of Appeal, in early 2021, ordered the

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[89] Reuters, *supra* note 66.
[90] *Id.*
[91] Ishaq Khalid, *Shell in Nigeria: Polluted Communities 'Can Sue in English Courts,'* BBC NEWS (Feb. 12, 2021).
[92] Kelechukwu Iroma, *Nigeria's Silent Killer: Compensation to the Communities*, THE AFRICA REPORT (Apr. 30, 2020).
[93] Lucas Roorda & Daniel Leader, *Okpabi v. Shell & Four Nigerian Farmers v. Shell: Parent Company Liability Back in Court*, 6 Bus. & Hum. Rts. J. 368 (2021).
[94] *Id.* at 370.
[95] *Id.* at 372.
[96] David Jolly, *Mixed Decision for Shell in Nigeria Oil Spill Suits*, N.Y. TIMES (Jan. 30, 2013).
[97] Mike Corder, *Dutch Court Orders Shell Nigeria to Compensate Farmers,* ASSOC. PRESS (Jan. 29, 2021).
[98] *Id.*

Shell's Nigerian subsidiary to pay the other three plaintiffs from the 2008 suit.[99] Shell settled and was ordered to pay fifteen million euros to the communities.[100]

While it is clear Shell and the Nigerian government have exploited the Ogoni people for decades, destroying their environment, and ignoring their demands for consultation and consent, the Ogoni people have found increasing success in foreign courts to hold Shell accountable. Nigeria has not adopted UNDRIP, choosing to abstain from the vote in 2007.[101] However, the Ogoni people have taken their autonomy into their own hands. In 2011, the Ogoni people created the Ogoni Environmental Protection Agency and a year later, they held a referendum to establish an autonomous Ogoni Central Indigenous Authority.[102] Nigeria—in failing to acknowledge the rights of the Indigenous peoples within its borders and promulgating controversial legislation like LUA—has created a bloody and dirty history, with Shell's help. If Nigeria grants its vast number of Indigenous people the right to FPIC and UNDRIP, the Ogoni would experience an incredible increase of rights within Nigeria, instead of needing to seek out justice in foreign courts.

IV. ADOPTING AND INCORPORATING FPIC DOESN'T GUARANTEE THE BASIC RIGHT OF CONSENT: CANADA AND ITS PIPELINES

A complicating factor in obtaining FPIC is needing to treat Indigenous peoples as separate and distinct Nations, not as a monolith. In Canada, the Indigenous population makes up about four pervent of the general population, but over 600 First Nation communities exist, representing more than fifty Nations and fifty Indigenous languages.[103] Though the Canadian government has a

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[99] *Id.*
[100] *Shell to Pay 15 mln Euros in Settlement Over Nigerian Oil Spills*, REUTERS, Dec. 23, 2022.
[101] G.A. Res., *supra* note 16.
[102] Kline, *supra* note 61.
[103] *Indigenous Peoples and Communities*, GOVERNMENT OF CANADA, https://www.rcaanc-cirnac.gc.ca/eng/1100100013785/1529102490303 (last

long and problematic history of colonization and forced assimilation, the end of the twentieth century and onward have seen increases in rights for the Nations.[104][105] However, due to the wide diversity of Nations, implementation of such a broad and sweeping Declaration like UNDRIP has proven to be difficult.

After years of resistance, Canada finally implemented UNDRIP through the United Nations Declaration on the Rights of Indigenous Peoples Act in 2021, requiring the State to "consult . . . to obtain FPIC . . . in connection with the development, utilization, or exploitation of mineral, water or other resources."[106] While the language in the Act is promising, it leaves much to be desired; however, Indigenous groups have called its passage "essential."[107]

While the Canadian government has been arguing over UNDRIP in Ottawa for more than a decade, oil development has continued in earnest across the country, creating dissent amongst First Nations. Both the Trans Mountain Pipeline expansion project and the Coastal GasLink Pipeline have been surrounded by controversy.[108]

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visited Mar. 13, 2022).

[104] Gradual Civilization Act, S.C. 1857 (Can.), http://caid.ca/GraCivAct1857.pdf.

[105] Bill C-31, 1995 (Can.), https://web.archive.org/web/20090730192508/http://www.johnco.com/nativel/bill_c31.html.

[106] United Nations Declaration on the Rights of Indigenous Peoples Act (S.C. 2021, c. 14)**.**

[107] *Implementation of the United Nations Declaration on the Rights of Indigenous Peoples*, Assembly of First Nations, https://www.afn.ca/implementing-the-united-nations-declaration-on-the-rights-of-indigenous-peoples/ (last visited Mar. 14, 2022).

[108] Braela Kwan, *Indigenous Activists Fight British Columbia's Pipelines to the Last Mile*, CROSSCUT (Mar. 18, 2021).

A. The Trans Mountain Pipeline Turmoil

In 2016, Canadian Prime Minister Justin Trudeau approved the Trans Mountain pipeline expansion.[109] After facing legal and political backlash, the energy infrastructure company, Kinder Morgan, effectively gave up the project and sold the pipeline to Trudeau's government in 2018.[110] Trudeau stated the government would sell it back into the private sector.[111] The project has split First Nation opinions.[112] Some Nations intend to buy a controlling stake in the pipeline.[113] Forty other Indigenous groups have reached "mutual benefit agreements" with Trans Mountain.[114] However, some of the groups who signed the agreements stated they had no other financial options.[115]

Beyond ownership, the pipeline project has faced significant opposition. Before the pipeline's purchase, First Nations, including the Squamish and Tsleil-Waututh Nations, appealed the government's approval of the project. [116] Kinder Morgan sold the pipeline to the government the same day the Federal Court of Appeal ruled in favor of the Indigenous plaintiffs, citing inadequate consultation.[117] An elected councilor of the Squamish Nation called the government's efforts "note-taking," simply dictating the First

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[109] Amanda Coletta, *An Oil Pipeline Expansion is Dividing Canada's Indigenous Peoples*, THE WASHINGTON POST, (Sept. 15, 2019).
[110] *Canada Purchases Trans Mountain Pipeline from Kinder Morgan*, THE MARITIME EXECUTIVE (May 29, 2018).
[111] Rod Nickel, *Canada's Trans Mountain Pipeline Sees Fortune Shine After KXL's Demise*, REUTERS (Jan. 24, 2021).
[112] Coletta, *supra* note 109.
[113] Kyle Bakx, *Plans to Sell Trans Mountain Pipeline to Indigenous Groups Takes Another Step Forward*, CBC NEWS (Feb. 19, 2021).
[114] Jillian Kestler-D'Amours, *Nations Divided: Mapping Canada's Pipeline Battle*, AL JAZEERA (Dec. 5, 2019).
[115] *Id.*
[116] John Paul Tasker, *In a Major Victory for Trans Mountain, Federal Court Dismisses Indigenous Appeal of Project's Approval*, CBC NEWS (Feb. 3, 2020).
[117] Chantelle Bellrichard, *'More was Required of Canada': Ruling Shows Where Ottawa Fell Short with First Nations on Trans Mountain*, CBC NEWS (Aug. 31, 2018).

Nations' misgivings instead of engaging in conversation.[118]

After the government's purchase of the pipeline, the Squamish and Tsleil-Waututh Nations again challenged the adequacy of the government's consultation and brought suit over the expansion approval.[119] The Federal Court of Appeal dismissed the case in February 2020, stating the government had carried out "reasonable" and "meaningful" consultations with Indigenous peoples affected by the expansion.[120] The court ruled: "The case law is clear that although Indigenous peoples can assert their uncompromising opposition to a project, they cannot tactically use the consultation process as a means to try and veto it."[121] The court noted that 120 out of 129 communities potentially affected by the project either supported or did not oppose the expansion project.[122] The Supreme Court of Canada dismissed the appeal application in July 2020.[123]

The decision has been criticized by Chiefs and First Nation law scholars. University of British Columbia professor Gordon Christie questioned how impartial the Canadian government can be in consultation, given its ownership of the pipeline and vested interest in its completion.[124] After the February decision, Chief Leah George-Wilson said, "[i]f we're talking about reconciliation and protection of the environment, I don't think 'reasonable' [consultation] is adequate[,] I think that sets a low bar for reconciliation, and is not reconciliation the most important item on the Prime Minister's agenda?"[125] Requiring the government to obtain consent instead of simply consult with First Nations may require additional work on the part of the government to reroute the pipeline, but it would also respect the First Nations' rights to their

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[118] *Id.*
[119] Tasker, *supra* note 116.
[120] *Id.*
[121] *Id.*
[122] Bakx, *supra* note 113.
[123] *Supreme Court Dismisses First Nations' Challenge Against Trans Mountain Pipeline*, CBC NEWS (July 2, 2020).
[124] Kestler-D'Amours, *supra* note 114.
[125] Bellrichard, *supra* note 117.

ancestral land. Unfortunately, the language of the Act as it is currently written presents a barrier to reaching full consent, and instead allows Canada to continue a shallow and unequal process of "consultation."

B. Coastal GasLink Created Dissent Between Hereditary Chiefs and Elected Band Council

The Coastal GasLink pipeline, currently under construction, has been controversial from the start. TC Energy, the owner of the pipeline, began holding meetings with leadership of the Wet'suwet'en in 2012.[126] However, the dual leadership of the Wet'suwet'en people has resulted in split opinions.[127] The Hereditary Chiefs of the Wet'suwet'en represent different houses that make up the First Nation as a whole, with titles passing down through the generations.[128] They oversee the management of the Nations' ancestral lands, with their authority predating the imposed colonial law.[129] The Elected Band Councils, formed as a result of the Indian Act of 1876, was an imposed leadership structure that would resemble Canada's system of governance.[130] Some do not believe the Councils have the authority to make decisions on traditional territory.[131]

Coastal GasLink has signed agreements with all twenty Elected Councils "representing" the First Nation peoples along the route of the pipeline.[132] Victor Jim, an Elected Chief, said the pipeline representatives told him the project would go ahead, with or without his signature, so he signed.[133] He hopes the money will

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[126] Amber Bracken, *'The Nation Has Stood Up': Indigenous Clans in Canada Battle Pipeline Project*, N.Y. TIMES (Jan. 27, 2019).
[127] *Id.*
[128] Ben Cousins, *Wet'suwet'en: What's the Difference Between the Elected Band Council & Hereditary Chiefs?,* CTV NEWS (Feb. 13, 2020).
[129] *Id*.
[130] *Id*.
[131] *Id*.
[132] Bracken, *supra* note 126.
[133] *Id.*

help boost the community.[134] However, the Hereditary Chiefs oppose the pipeline.[135] Chief Madeek, one of the Hereditary Chiefs, said, "Our people never ever surrendered or ceded any portion of this territory. We are the rightful titleholders of the territory, we are the caretakers of this land and that's what we are going to do, take care of this land."[136]

Coastal GasLink filed a civil suit in 2018, seeking an injunction against the land defenders supported by the Hereditary Chiefs so the construction would not be delayed.[137] The injunction was granted in December 2019, and the Royal Canadian Mounted Police ("RCMP") began enforcement in February 2020, raiding the territory and arresting supporters.[138]

After protests erupted across Canada in response to the raid, some of the Wet'suwet'en Hereditary Chiefs, Canada, and British Columbia entered into a Memorandum of Understanding ("MOU") on May 14th, 2020.[139] The historic document recognizes that Wet'suwet'en right and title are held by the Wet'suwet'en houses under their system of governance.[140] However, the MOU sowed more dissent between the Hereditary and Elected Chiefs.[141] The Elected Chiefs claimed they were not adequately informed on the MOU proceedings.[142]

A year and a half later, the territory of the February 2020 protests was once again the location of conflict.[143] The drilling site

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[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] David Gray-Donald, *Unpacking the Coastal GasLink Injunction & its Omissions*, BRIARPATCH (Feb. 23, 2020).
[138] *Id.*
[139] *Wet'suwet'en, Canada Sign Deal to Negotiate Recognition of Title*, AL JAZEERA (May 15, 2020).
[140] *Memorandum of Understanding,* Feb. 29, 2020, http://www.wetsuweten.com/files/SIGNED_MOU_BC,_CANADA_AND_WETSUWETEN_MAY_14,_2020.pdf (last visited Mar. 13, 2022).
[141] Al Jazeera, *supra* note 139.
[142] *Id.*
[143] Geoffrey Morgan, *Flashpoint B.C.: Why the Coastal GasLink Pipeline Conflict Flared Up Again*, FIN. POST (Nov. 24, 2021).

within the territory where Coastal GasLink plans to install the pipeline below the Wedzin Kwa (Morice River), a sacred headwater, was occupied for fifty six days by protesters, who blocked the supply road to a work camp.[144] Again, RMCP, acting under court order, arrested twenty nine people.[145] The raid was described by journalists on the ground as excessive and violent.[146] The United Nations' Committee on the Elimination of Racial Discrimination and Amnesty International have joined the various voices calling for the halting of pipeline construction and suspension of its permits.[147] TC Energy expects the pipeline to be operational by the end of 2023.[148]

Even with the incorporation of UNDRIP into federal law, Indigenous peoples in Canada face challenges from the government, pipeline companies, and within their Nations. Though the Canadian government has indicated they do not believe consent is a "veto," recognizing the right as a veto power is truly the only way forward given industry's attempts to build on sacred, unceded land.

V. SUCCESS WITH FPIC

When courts acknowledge and enforce the right to FPIC in its fullest form, Indigenous peoples gain an incredibly powerful tool to protect their lands and the environment. Indigenous action is encouraged with each successive "win," and the strength communities can gain from each other has the potential to grow into a global response to extractive industry's exploitative practices.

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[144] *Id*.
[145] *Id*.
[146] Brent Patterson, *RCMP Arrest Wet'suwet'en Land Defenders Days After COP26 Summit*, CANADIAN DIMENSION (Nov. 22, 2021).
[147] *Canada: Act Now to Respect Indigenous Rights on Wet'suwet'en Territory*, AMNESTY INT'L. (Dec. 1, 2021).
[148] *Coastal GasLink,* TC ENERGY, https://www.tcenergy.com/operations/natural-gas/coastal-gaslink/ (last visited Mar. 6, 2022).

A. Ecuador

The rise of Indigenous activism in Ecuador directly parallels the oil regime struggle, which gained momentum in the 1960s and has continued well into the twenty first century.[149] In 1964, Ecuador adopted the Colonization and Agrarian Reform Act and the Law of the Tierras Baldias.[150] These laws allowed Ecuador to assume ownership over the lands, and grant titles "only to settlers who clear the rainforest for crops and pastures."[151] Ecuador rationalized these laws by assuming that the Amazonian regions were abandoned lands and mostly uninhabited.[152]

Texaco, a U.S. oil company, later bought by Chevron, discovered oil in Ecuador in 1967.[153] With strong backing from the Ecuadorian government, which aggressively promoted internal colonization of the Amazon, Texaco began shipping oil to the U.S. in 1972 via the Trans-Ecuadorian Pipeline.[154] Government officials pledged to "civilize" and "integrate" the Indigenous peoples into the national culture.[155] To the Indigenous people, this pledge was a direct attack to their survival and would result in ethnocide.[156]

In the 1980s, three regional Indigenous organizations joined together to form the Confederación de Nacionalidades Indígenas del Ecuador ("CONAIE"), which represents numerous nationalities.[157] "There are few Latin American countries that have unified Indian

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[149] Veronica Davidov, *Aguinda v. Texaco Inc: Expanding Indigenous "Expertise" Beyond Ecoprimitivism*, 1 J. OF L. ANTHROPOLOGY 147 (2010).
[150] Angelica M. Bernal, *Power, Powerlessness and Petroleum: Indigenous Env't. Claims and the Limits of Transnat'l. L.*, 33 NEW POL. SCI.143 (2011).
[151] *Id.*
[152] *Id.*
[153] Robert V. Percival, *Transnat'l Litigation: What Can We Learn from Chevron-Ecuador?*, RSCH. HANDBOOK ON TRANSNAT'L ENV'T. L. 318-339 (2020).
[154] Judith Kimerling, *Indigenous Peoples and the Oil Frontier in Amazonia: The Case of Ecuador, ChevronTexaco & Aguinda v. Texaco*, 38 INT'L L. & POL. 413 (2006).
[155] *Id*.
[156] *Id.*
[157] Davidov, *supra* note 149.

confederations, and no other Indian organization has demonstrated the power to paralyze a country again and again, as is the case with CONAIE."[158] CONAIE organized the 1990 Indian Uprising, the Indigenous March for Life in 1992 with the Canelos Kichwa Indigenous communities, and annual Marches for Life.[159] They have also been involved with *levanamientos* (uprisings) that have effectively forced out three presidents.[160] CONAIE was involved with the 2019 Quito protests over fuel subsidies and continued extraction practices on Indigenous lands.[161] Most recently, current president of CONAIE, Leonidas Iza, led the 2022 country-halting demonstrations in Ecuador over rising fuel costs, and has called for the resignation of current Ecuadorian president, Guillermo Lasso.[162]

Ecuador formally recognized Indigenous rights around 1990 when it began granting legal land titles to Indigenous groups. Though Indigenous rights expanded, the State continued to claim ownership of oil in the titled lands and mandated that the Indigenous peoples could not "impede" or "obstruct" oil development on their land.[163] On November 3rd, 1993, Indigenous groups brought suit in the famous *Aguinda v. Texaco* case in the United States.[164] The case was the first time Indigenous communities in Ecuador sought to hold a petroleum corporation legally accountable for its exploitative practices on their lands.[165] In 1998, Ecuador formally recognized a collection of Indigenous rights with the ratification of the ILO Convention 169, the International Labor Organization Convention Concerning Indigenous and Tribal Peoples in Independent

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[158] Nancy Grey Postero & Leon Zamosc,
The Struggle for Indigenous Rights in Latin America, LIVERPOOL UNIV. PRESS (2004).
[159] Davidov, *supra* note 149.
[160] Kimberley Brown, *Ecuador Unrest: What Led to the Mass Protests?*, AL JAZEERA (Oct. 10, 2019).
[161] *Id.*
[162] Alexandra Valencia, *Ecuador Indigenous Organization Ends Talks with Government, Calls for Lasso Resignation*, REUTERS (Feb. 24, 2023).
[163] Kimerling, *supra* note 154.
[164] Bernal, *supra* note 150.
[165] *Id.*

Countries.[166] Additionally, the new Ecuadorian Constitution went into effect the same year, which included chapters on the collective rights of Indigenous peoples that mirrored much of the ILO Convention.[167]

Despite the progress being made within the Ecuadorian government in recognizing and protecting Indigenous rights, oil companies often neutralized Indigenous resistance through illegal negotiations with the customary landowners, not the representative bodies of the Indigenous peoples.[168] The companies routinely used this "divide and conquer" method.[169] The Independent Federation of the Shuar Nation of Ecuador ("FIPSE") responded by challenging these actions in court with an amparo petition, using the 1998 chapters.[170] *FIPSE Shuar People v. ARCO* was brought under Chapter Eighty Four of the 1998 Constitution, claiming ARCO, an oil and gas company, did not receive the consent of the Shuar people as a whole, as ARCO only consulted with a few individuals.[171] In a victory for the FIPSE Shuar people, the judge held that ARCO could not approach any community in the FIPSE territory without prior consent from the community's Assembly.[172]

In 2007 and 2008, Ecuador expanded Indigenous rights by adopting UNDRIP and ratifying its new Constitution, including Article Fifty Seven, Section Seven which guaranteed free, prior informed consultation.[173] However, the battle between the state, corporations, and the Indigenous peoples over oil development has continued in earnest. The most recent success for Indigenous peoples came from the Constitutional Court of Ecuador, the country's highest court, which held in February 2022 that if an

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[166] Kimerling, *supra* note 154.
[167] *Id.*
[168] Davidov, *supra* note 149.
[169] *Id.*
[170] Isabela Figueroa, *Indigenous Peoples Versus Oil Companies: Constitutional Control Within Resistance*, 4 SUR INT'L J. HUM. RIGHTS 1 (2006).
[171] *Id.*
[172] *Id.*
[173] Reynard Loki, *Indigenous Peoples Go to Court to Save the Amazon from Oil Company Greed*, SALON, (Apr. 12, 2019).

Indigenous community refuses a mining, oil, or other extractive project, "under no circumstances can a project be carried out that generates excessive sacrifices to the collective rights of communities and nature."[174] The government must obtain consent, but the court left open the possibility that a project could proceed in "exceptional cases."[175] The ruling applies to all fourteen of Ecuador's recognized Indigenous groups, with their land covering over seventy percent of the Ecuadorian Amazon.[176] The global response to this decision was resounding with praise.

Despite judicial and legislative victories for Indigenous peoples, in disputes between oil companies and Indigenous rights, the Ecuadorian government has consistently backed the corporations in practice.[177] For example, the Ecuadorian government did nothing to stop Petroecuador from attempting to manufacture consent from the Cofán community, despite accepting the Cofán's proposal against the development.[178] When Argentinian Compañía General de Combustibles ("CGC") was found illegally operating on Sarayaku territory, after the provincial government issued the community a Declaration of Protection, the government used military force against the community.[179] Three years after the Sarayaku community secured a victory in *Sarayaku v. Ecuador* at the Inter-American Court of Human Rights, upholding consultation rights, the government ignored the ruling and re-entered their territory.[180] Recently, Ecuador has deployed tactics such as confusing citizens into signing wrong forms, holding hearings in

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[174] Catrin Einhorn, *Ecuador Court Gives Indigenous Groups a Boost in Mining & Drilling Disputes*, N.Y. TIMES (Feb. 4, 2022).
[175] *Id*.
[176] *Id.*
[177] Ella V. H. Carlson, *Indigenous Communities Versus Oil Companies: Identifying Trends in Tactics and Success of Indigenous-Led Anti-Petroleum Movements in the Ecuadorian Amazon*, INDEPENDENT STUDY PROJECT (ISP) COLLECTION (2020).
[178] *Id.*
[179] *Id.*
[180] *A Hard-Earned Victory for Indigenous Rights in Latin America: Sarayaku v. Ecuador*, EARTHRIGHTS INT'L. (Aug. 9, 2012).

places inaccessible to the community, and assigning judges that discriminate against Indigenous peoples to avoid FPIC requirements.[181] Indigenous activists often face inhumane treatment and harsh sentences in the justice system.[182] most recently, Leonidas Iza was detained during the 2022 protests, with some claiming it was a wrongful arrest.[183]

While the Indigenous people in Ecuador have been some of the most organized and active Indigenous populations in the world, they have faced intense backlash and obstacles when protecting their land and resource rights. Though they have succeeded using political protest, their successes in court have been marred by Ecuador's historical refusal to acknowledge those decisions. Ecuador adopted UNDRIP and ILO Convention 169, but the government and corporations continue to undermine Indigenous peoples' right to FPIC. Recent success in court has strengthened FPIC claims, and it is clear that the Indigenous groups will continue to fight to protect their land, with FPIC protections continuing to be a valuable tool in that struggle.

B. South Africa

The Indigenous communities of South Africa have recently had the fruits of decades-long labor pay off in large dividends in the High Court. In 2018, the court ruled on a dispute between Australian-owned Transworld Energy and Mineral Resources (TEM) and the UMgungundlovu community from the Wild Coast, specifically the Xolobeni area.[184] TEM's holding company was granted a mining license in 2008 on the titanium-rich lands, but the community, in the form of the Amadiba Crisis Committee (ACC),

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[181] Carlson, *supra* note 177.
[182] *Id*.
[183] Tanya Wadhwa, *CONAIE Condemns Wrongful Arrest of Indigenous Leader Leonidas Iza by Ecuadorian security forces*, PEOPLE'S DISPATCH, (June 14, 2022).
[184] *Baleni v. Minister of Mineral Resources*, 2 S. Afri. 453 (GP) (2019).

fought back.[185] The Minerals and Energy Minister Susan Shabangu revoked the license in 2011 due to lack of consultation with the community,[186] but the conflict continued and deteriorated into violence, including the murder of Sikhosiphi 'Bazooka' Rhadebe, a chairperson of ACC.[187] The community brought the issue to the court, which agreed with the community that under the Mineral Petroleum Resources Development Act they were entitled to free, prior informed consent before a mining right could be granted on their land.[188] Though this was an incredible win for the community, the successor of Minister Shabangu, Gwede Mantashe, indicated that he wished to appeal the decision, which has left the community in a holding-pattern, afraid the mining project will move forward.[189]

Despite this uncertainty, another conflict between Wild Coast communities and a foreign, extractive company relied on the 2018 ruling to find in favor of the Indigenous communities.

In November of 2021, the *Amazon Warrior*, an exploration ship owned by Royal Dutch Shell, sailed into the Wild Coasts' waters to begin seismic surveys that would use air guns to "create cannon blast-like pulse[s] of compressed air" to study the sea floor for potential oil development.[190] This was particularly concerning because the Wild Coast "hosts the entire marine orchestra from whales, dolphins, and sharks down to every order of bird and fish species."[191] The Amadiba community, along with the Dwesa-Cwebe and Port Saint Johns Indigenous communities, challenged the

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[185] *AmaDiba Win Major Battle in War Against Xolobeni Miners*, MAIL & GUARDIAN (June 7, 2011).
[186] *Id*.
[187] *Why South African Community's Win Against Mining Company Matters*, THE CONVERSATION (Dec. 13, 2018).
[188] Baleni, *supra* note 184, at 39.
[189] Daniel Steyn & Nombulelo Damba-Hendrik, *Xolobeni: Where the Discovery of Rare Minerals Has Led to Violence*, GROUNDUP (July 29, 2021).
[190] Jaco Prinsloo, *In Their Legal Victory Over Shell, South Africa's Indigenous Communities Continue to Assert Their Power*, HAKAI MAGAZINE (Feb. 7, 2022).
[191] Mike Loewe, *Saving the Wild Coast from Big Oil*, NEW INTERNATIONALIST (Dec. 14, 2021).

government's decision to let this survey proceed.[192]

On December 3rd, the Makhanda High Court dismissed the local groups' application, and the surveying began.[193] However, on December 28th, a different High Court held that Shell was under a duty to meaningfully consult with the communities who would be impacted by the seismic activity, and had failed to do so in the case of the communities who hold customary rights, such as fishing rights.[194] The survey was ordered to immediately stop.[195] In response, Shell terminated the contract of the *Amazon Warrior* and the vessel left in early January 2022.[196] Community leader Sinegugu Zukulu said, "When you are fighting for a just cause, getting tired is not an option. We are fighting to give life to our Constitution, but also to make life possible on this planet."[197] Certainly, the fight for the Wild Coast is not over, but the right to free, prior informed consent has proved a powerful tool for Indigenous communities to assert their rights to the land and customary practices.

VI. IS FPIC THE ONLY WAY FORWARD FOR INDIGENOUS AND ENVIRONMENTAL JUSTICE?

While the global tide of Environmental Justice for Indigenous peoples is rising swiftly, with much of its success made through the right to FPIC, asking Indigenous communities to wait for justice after centuries of genocide, exploitation, and oppression for any amount of time more than they already have is unconscionable. Furthermore, the climate crisis is moving at an ever-accelerating rate and is ultimately tied to the issue of Indigenous justice. When countries either do not adopt FPIC or

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[192] Prinsloo, *supra* note 190.
[193] Loewe, *supra* note 191.
[194] Ajsa Habibic, *Shell Ordered to Halt Seismic Survey Off South Africa*, OFFSHORE ENERGY (Dec. 28, 2021).
[195] *Id*.
[196] Prinsloo, *supra* note 190.
[197] *Id*.

adopt, but do not substantively enforce FPIC, the movement for Indigenous rights can be slowed to a halt, if not completely bulldozed. Even in places such as Ecuador, which has constitutionally endorsed FPIC, the damage from Chevron's exploitation is such a disaster that the land and its protectors may never be the same.

A potential avenue to speed up the shift from exploitation to true Indigenous sovereignty and environmental justice is through the Land Back movement, currently operating mostly in the United States, but which has international implications. Simply put, the Land Back movement is a demand for restoration, restitution, or repatriation of lands acquired by the U.S. outside valid treaties.[198] This is not a new, radical idea. In fact, Land Back has had decades of success in the United States, starting with the return of Blue Lake in the Sangre de Cristo Mountains to the Taos Pueblos in 1970.[199] President Nixon granted trust title of 48,000 acres to the Taos Pueblos and the exclusive use of 1640 acres surrounding the lake after a 64-year battle for title of their holy lake.[200] In recent years, President Trump signed legislation that transferred the National Bison Range to the Bureau of Indian Affairs to be held in trust for the Confederated Salish and Kootenai Tribes of the Flathead Reservation.[201] While this legislation is not complete repatriation, it does return the Range's management back to the Tribes, after President Roosevelt authorized the seizure of the 18,000 acres in 1908.[202] Land transfers are gaining traction in the U.S., with various states like Maine, California, New York, and Oregon participating.[203]

There are also many examples of private organizations or corporations simply giving land back to its ancestral stewards. For

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[198] Estes, *supra* note 3, at 206.
[199] *Id*. at 179.
[200] *Id*.
[201] *Interior Transfers National Bison Range Lands in Trust for the Confederated Salish and Kootenai Tribes*, U.S. DEP'T OF THE INTERIOR (June 23, 2021).
[202] Robbins, *supra* note 4.
[203] *Id*.

example, Save the Redwoods League purchased 523 acres in Northern California in 2020 and then transferred ownership to the Intertribal Sinkyone Wilderness Council, a group of ten Native tribes, in early 2022.[204] The League will maintain an easement, but the Council will serve as guardians of the land with the League.[205] The Nature Conservancy has also institutionalized the transfer of ecologically important land through its Indigenous Peoples and Local Communities Program, both in the U.S. and globally.[206] Notably, The Nature Conservancy worked with the Nari Nari people of the then-named Nimmie-Caira wetlands in Australia to win the right to manage the property in 2017.[207] In 2019, The Nature Conservancy transferred ownership of the 200,000 acres, now named Gayini, to the Nari Nari Tribal Council.[208]

There are often three arguments proffered against the Land Back movement. First, some argue that because Indigenous people could potentially have a claim to the entirety of a land, for example the continental U.S., transferring lands back to their original inhabitants would open the floodgates and demands for evictions would soon follow.[209] Indigenous scholar Dr. Nick Estes suggests this concern stems from the knowledge of what was done to the Indigenous peoples when colonizers came to this land, and the fear that it will happen in turn to them.[210] But there won't be a mass-scale eviction of all people that aren't Indigenous. Instead, Land Back is about the return of management and stewardship of the land to Indigenous peoples and the decolonialization of its uses.[211]

Second, environmentalism and Indigenous rights and

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[204] Isabella Grullón Paz, *Redwood Forest in California is Returned to Native Tribes,* N.Y. TIMES (Jan. 26, 2022).
[205] *Id*.
[206] Robbins, *supra* note 4.
[207] Robbins, *supra* note 4.
[208] *Places We Protect: Nari Nari Country*, THE NATURE CONSERVANCY https://www.nature.org/en-us/get-involved/how-to-help/places-we-protect/nari-nari-country/ (last visited Mar. 13, 2022).
[209] Estes, *supra* note 3, at 244.
[210] Estes, *supra* note 3, at 243-44.
[211] *Id*.

choices do not always align, and many environmentalists fear the exploitation of land for resources at the hands of Indigenous people themselves.[212] It is true that some Indigenous people have exploited their land for financial gain, but many do so in the face of abject poverty. The Mandan, Hidatsa, and Arikara ("MHA") Nation's tribal chairman adopted the mantra "sovereignty by the barrel" when he and his Nation decided to seek oil wealth to strengthen self-determination and autonomy.[213] Additionally, as stated above, the Elected Chiefs of the Wet'suwet'en support the Coastal GasLink pipeline. Though there are examples of poor land management, there are plenty more examples of excellent management, including the National Bison Range, Blue Lake, and Gayini. Furthermore, as the Director of the Western Watersheds Project, George Wuerthner, suggested, a potential avenue for these concerns could be designating the land as wilderness instead of a "cultural heritage area," which is an untested designation.[214]

Third, the separation of time between when the genocide and forced removal of Indigenous people occurred and present day allows some to argue that the actions of colonizer's ancestors do not have bearing on the current inhabitants of the land.[215] While this argument relates only to actions that are relatively long ago, the effects felt today can be far reaching. In the U.S., the Homestead Act of 1862 encouraged agricultural settlement on dry western land resulted in one and a half million white families gaining title to 246 acres of Indigenous lands.[216] Today, one in four adults in the U.S. are direct descendants of those who profited from this Act.[217] This is just one example of how past, even distant past, actions can have an impact on the present day in a significant way.

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[212] Robbins, *supra* note 4.
[213] *Id*. at 32.
[214] Robbins, *supra* note 4.
[215] Estes, *supra* note 3, at 212.
[216] Estes, *supra* note 3, at 148-49.
[217] *Id*.

VI. CONCLUSION

FPIC has been an important focal point for Indigenous rights to land and resources and has gained global legitimacy since its adoption. When States do not recognize this right, Indigenous peoples are often forced to seek out redress and autonomy in other ways, either by bringing suit in foreign courts or by physical occupation. Some Indigenous groups have been gaining increasingly more "wins," like the Ogoni people. However, the slow process of clean-up and the growing understanding that participatory rights and substantive outcomes are inextricably linked highlights how important FPIC can be to an Indigenous group and the necessity of its adoption.

Even when States adopt UNDRIP, their action or inaction can negate this right. Canada has implemented the Declaration into national law, but has failed to grant true consent power to the Wet'suwet'en and has consistently brutalized protesters. To fully realize Indigenous rights, strict adherence to FPIC must be prioritized over development.

The Land Back movement is the next logical step and an integral part of FPIC to fulfilling treaty promises, restoring and repatriating land rights, and protecting the environment from climate disaster. The movement is gaining popularity and success, and the legal community needs to recognize the vast impacts and importance Indigenous peoples have provided to the global community in the protection of the environment by supporting the movement and its leaders.