



# **Compendium of Developments**

## **in Indigenous Peoples–Related Jurisprudence in the Context of the Just Transition**



**Indigenous Peoples  
Rights International**

Championing Indigenous Peoples Rights

**2025  
EDITION**



# **Compendium of Developments in Indigenous Peoples–Related Jurisprudence in the Context of the Just Transition**



**The Indigenous Peoples Rights International (IPRI)** is a global Indigenous Peoples' organization established in 2019 in response to the grave situation of Indigenous Peoples who are increasingly being criminalized, killed, disappeared, and subjected to the worst forms of violence.

We are leading the Global Initiative to Address and Prevent Criminalization, Violence, and Impunity Against Indigenous Peoples—an Indigenous-led global effort to strengthen coordination, solidarity, and actions to prevent, respond to, and reduce acts of criminalization, violence, and impunity against Indigenous Peoples; and to provide better protection and access to justice for victims not only as individuals but as collectives or communities.

No. 7, Ground Floor  
Calvary Street  
Easter Hills  
Subdivision, Central Guisad,  
Baguio City 2600  
Philippines

#### Contact us

 [ipri@iprights.org](mailto:ipri@iprights.org)  
 <https://www.iprights.org>

#### Find us on social media

 [Indigenous Peoples Rights International](#)  
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# Contents

<b>INTRODUCTION</b>	5
Executive Summary	5
Purpose of the Compendium	6
How to use the Compendium	6
Renewable Energy Value Chain & Human Rights Relevance	7
<b>KEY REFERENCE DECISIONS</b>	10
<b>EXTRACTION PHASE</b>	12
Global	12
Regional	19
National	33
<b>DEPLOYMENT PHASE</b>	48
Wind Energy	48
Hydroelectric Projects	60
National	60
<b>RECOMMENDATIONS (&amp; Key Takeaways for a Just Transition)</b>	79
<b>Appendix A. Glossary</b>	82
<b>Appendix B. Directory of Relevant Organizations &amp; Contacts</b>	85



# INTRODUCTION

## Executive Summary

Over the past decade, the language of climate ambition has grown louder, yet for many Indigenous Peoples the soundtrack of the “green” economy still feels like the old extractive anthem: minerals leave ancestral territories, turbines rise on sacred hillsides, and the promised benefits arrive—if they arrive at all—only after land, water, and culture have been compromised. A just transition must break that pattern. As Joan Carling, Executive Director of IPRI, said,

**The global energy transition poses both opportunities and risks for Indigenous Peoples, as our lands and resources are key targets for this shift. Respecting and protecting our rights is non-negotiable. Indigenous Peoples are leading the fight against the climate crisis and must be recognized as invaluable and equal partners in the transition to renewable energy, with our rights and perspectives fully respected.<sup>1</sup>**

Recent momentum is encouraging. The October 2024 resolution of the UN Human Rights Council on the Rights of Indigenous Peoples recognizes that “failing to consider the rights of Indigenous Peoples in the context of the just transition to sustainable energy systems could lead to further injustices, marginalization and discrimination, as well as the loss of their lands or territories and natural resources.”<sup>2</sup> Investors are starting to follow suit, steering capital toward projects that demonstrate Free, Prior, and Informed Consent (FPIC) and away from those that do not. The Business & Human Rights Resource Centre’s Transition Minerals Tracker logged more company policy commitments in 2023 than in any previous year—even as it recorded 630 allegations of abuse across the value chain.<sup>3</sup> In principle, breaches of FPIC have shifted from being perceived as unethical to “very bad business”.<sup>4</sup>

But commentators remind us that a Just Transition for Indigenous Peoples is not limited to the questions of compensation but is a question of “survival, of rights, of relationships.” Far from being described in economic terms only, “there is no price tag on the bond between people and land, no metric that can measure a spiritual relationship with water, or a duty passed down through generations to protect biodiversity.”<sup>5</sup>

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<sup>1</sup> “Urgent need for renewable energy sector to embrace fair and equitable partnerships with Indigenous Peoples”, Business & Human Rights Resource Centre, October 15, 2024, available at <https://www.business-humanrights.org/en/from-us/media-centre/urgent-need-for-renewable-energy-sector-to-embrace-fair-and-equitable-partnerships-with-indigenous-peoples/>

<sup>2</sup> *Human rights and Indigenous Peoples*, Human Rights Council, Resolution 57/15, October 11, 2024, U.N. Doc. A/HRC/RES/57/15, available at <https://docs.un.org/en/A/HRC/RES/57/15>

<sup>3</sup> “Transition Minerals Tracker: 2024 Analysis”, Business & Human Rights Resource Centre, May 21, 2024, available at [https://media.business-humanrights.org/media/documents/2024\\_Transition\\_Minerals\\_Tracker\\_EN.pdf](https://media.business-humanrights.org/media/documents/2024_Transition_Minerals_Tracker_EN.pdf)

<sup>4</sup> Zbona, Ana, and Morales Garro, Alancay, “Why Indigenous Peoples’ rights must be at the heart of the transition to renewables”, *Reuters*, December 18, 2024, available at <https://www.reuters.com/sustainability/society-equity/comment-why-indigenous-peoples-need-help-power-transition-renewables-2024-12-18/>

<sup>5</sup> Angarova, Galina, and Escobar, Roman. “What does a just transition look like for Indigenous Peoples?”, *Debates Indígenas*, June 1, 2025, available at <https://debatesindigenas.org/en/2025/06/01/what-does-a-just-transition-look-like-for-indigenous-peoples>

For these reasons, a Just Transition must re-center the rights to self-determination, collective land and water tenure,<sup>6</sup> and FPIC enshrined in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and reaffirmed in jurisprudence, from the various UN treaty bodies interpreting universal human rights treaties to the rulings of regional human-rights systems.

## Purpose of the Compendium

It is in this fraught yet hopeful moment that IPRI offers this Compendium of Developments in Indigenous Peoples–Related Jurisprudence in the context of the Just Transition. Like the earlier *Digest* that mapped a rising tide of UNDRIP-aligned decisions, the Compendium gathers selected judgments, treaty-body views, and Compliance Advisor Ombudsman (CAO) findings from 2015-2025 into one practical reference.

Its purpose is three-fold: to highlight precedents (on the international, regional, and domestic level), furnish advocates with ready citations, and share lessons that can transform courtroom victories into lasting, on-the-ground change.

## How to use the Compendium

This Compendium is designed as a practical advocacy tool rather than an academic archive. It opens with an introduction to the renewable energy value chain, mapping its major phases and identifying the pressure points that have given rise to community grievances and disputes. Thematic case profiles follow, illustrating real-world experiences with transition minerals, wind and solar energy deployment, and conflicts over land and water. A dedicated section revisits landmark rulings on FPIC, Indigenous self-determination, and connected rights. The final section distills key recommendations for Indigenous leaders, policymakers, financiers, and companies operating in the sector.

Each case entry presents a summary of the central issues, an overview of the relevant sources of law, and a concise summary of the case itself. All entries are grounded in primary sources, including court decisions, expert observations, and findings from accountability mechanisms such as the CAO, the body that monitors projects supported by the private sector arms of the World Bank Group.

In some instances, sections of judicial decisions are presented as they appeared in the original ruling. These are included not only for context and precision but also because certain portions of the legal reasoning raise significant international rights arguments—particularly under instruments such as the International Covenant on Civil and Political Rights (ICCPR) and the UNDRIP. Given that these instruments have been ratified or endorsed by many countries, the underlying principles they contain are widely applicable and may inform advocacy strategies and legal arguments far beyond the jurisdiction of the original case.

All source materials in the Compendium were originally written in a range of languages. They have been translated into English, and where no official translation existed, the editorial team has provided one to ensure accessibility and coherence across cases.

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<sup>6</sup> *Poma Poma vs. Peru*, Communication Number 1457/2006, U.N. Doc. CCPR/C/95/D/1457/2006 (HRC 2009) [https://www.worldcourts.com/hrc/eng/decisions/2009.03.27\\_Poma\\_Poma\\_v\\_Peru.htm](https://www.worldcourts.com/hrc/eng/decisions/2009.03.27_Poma_Poma_v_Peru.htm)



The Compendium will be periodically updated on the Indigenous Peoples Rights International website, where users can search by mineral, region, or finance mechanism, and upload new cases as they emerge. All materials are freely accessible and can be downloaded for community use.

## Renewable Energy Value Chain & Human Rights Relevance

Renewable energy technologies—from lithium-ion batteries and solar panels to wind turbines and electric vehicles—rely heavily on minerals such as lithium, cobalt, copper, nickel, and rare earths, with over half of these essential deposits located on or near Indigenous Peoples' territories.<sup>7</sup>

**The extraction process** itself can be profoundly destructive. Lithium mining in places like Chile's Atacama Desert consumes vast amounts of water in already arid regions, depleting water tables, contaminating scarce freshwater sources, and threatening fragile ecosystems and livelihoods. Communities living near mining sites frequently report forced displacement, loss of grazing lands and agricultural areas, and violations of FPIC, as guaranteed under universal human rights treaties and international instruments like UNDRIP. Additionally, weak regulatory oversight and gaps in corporate accountability mean that toxic byproducts, such as tailings and chemical effluents, are often poorly managed, leading to long-term soil and water pollution.<sup>8</sup> Nearly 70% of mining projects linked to renewable energy span Indigenous territories and are situated within climate-sensitive biodiversity zones, often accompanied by weak environmental, social, and governance safeguards.<sup>9</sup>

At **the deployment stage** of the energy transition, large-scale infrastructure projects—including wind farms, solar farms, hydropower plants, geothermal plants, and hydrogen facilities—are frequently sited on ancestral lands because of ideal natural resources such as sun, wind, and rivers. In Colombia's La Guajira region, for example, the Wayuu community is resisting wind and solar developments near sacred cemeteries, arguing that their spiritual and cultural heritage is being disregarded amid project planning and lacking prior consultation.<sup>10</sup> Similar patterns emerge elsewhere—agreements between developers and Swedish Sámi reindeer herders have often led to land dispossession, disrupted migration routes, pasture degradation, and cultural erosion, despite offering financial incentives.<sup>11</sup>

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<sup>7</sup> Owen, J.R., Kemp, D., Lechner, A.M. et al. „Energy transition minerals and their intersection with land-connected peoples.” *Nat Sustain* 6, 203–211 (2023). <https://doi.org/10.1038/s41893-022-00994-6>

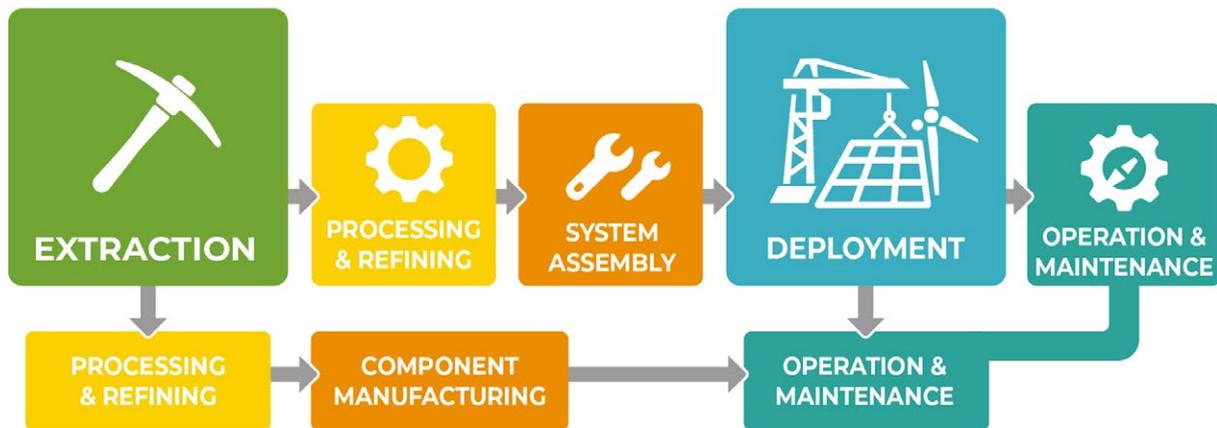
<sup>8</sup> Heikkinen, A. “Mining companies are pumping seawater into the driest place on Earth. But has the damage been done?”, in *The Guardian*, July 17, 2025. Retrieved from <https://www.theguardian.com/global-development/2025/jul/17/green-transition-water-chile-atacama-desalination-plants-lithium-copper-mining>

<sup>9</sup> Gayme, Damien. “Finance for transition mineral mining is driving destruction and abuse, says report”, in *The Guardian*, September 03, 2025. <https://www.theguardian.com/environment/2025/sep/03/finance-for-transition-mineral-mining-is-driving-destruction-and-abuse-says-repor>

<sup>10</sup> Grattan, S. “Renewable energy ambitions in northern Colombia collide with Indigenous worries”, in *AP News*, February 20, 2025. Retrieved from <https://www.apnews.com/article/wind-energy-colombia-wayuu-indigenous-resistance-clash-cemetery-renewable-e55077418352f19349dc27b09f1eee18>

<sup>11</sup> Neslen, A. “Agreements between Sámi reindeer herders and developers do more harm than good”, in *The Guardian*, March 14, 2024. Retrieved from <https://www.theguardian.com/world/2024/mar/14/agreements-between-sami-reindeer-herders-and-developers-do-more-harm-than-good>

## RENEWABLE ENERGY VALUE CHAIN



**Human Rights Challenges.** These patterns reveal systemic human rights risks: communities are seldom fully consulted (resulting in violations of their right to FPIC), land and water rights are frequently compromised, and cultural sites and livelihoods are threatened. Studies show that in a significant portion of cases, Indigenous Peoples are asserting their rights through litigation and advocacy—highlighting both the scale of harm and the increasing resistance across the globe.

As documented by the Business & Human Rights Resource Centre (BHRRC), most of these legal actions – nearly 95 cases since 2009, with a dramatic surge since 2018 – are a direct response by Indigenous Peoples, frontline communities, and workers confronting harms associated with the renewable energy value chain. These challenges reflect a deeper structural problem: while energy transition efforts aim to address the climate crisis, they often replicate extractivist practices that marginalize or bypass the very communities most affected by climate impacts.

The data reveals that 71% of the lawsuits are linked to transition mineral mining—the foundation of battery and renewable tech—while 29% target wind, solar, and hydropower projects. A common thread across 65% of these cases is the demand to halt projects due to failures in consultation, environmental degradation, or disregard for land tenure rights. Particularly striking is that almost half of all cases were initiated by Indigenous Peoples, with a third citing explicit violations of FPIC. The lawsuits also highlight recurring infringements on land rights (27%), water (56%), cultural and sacred sites (40%), and livelihood (48%).

These figures reveal not only widespread procedural failures—such as inadequate participation in over half of the cases—but also a more profound legitimacy crisis in how energy transition projects are conceptualized and implemented. Without centering the rights of Indigenous Peoples whose lands and resources are increasingly targeted, the transition risks entrenching new forms of injustice under a green banner. These legal cases thus serve as both a tool of resistance and a warning: unless the renewable energy sector embeds human rights protections, including FPIC, equitable benefit-sharing, and environmental safeguards, it may reproduce patterns of harm that have long characterized fossil-fuel economies.<sup>12</sup>

<sup>12</sup> “Rising human rights lawsuits raises concerns about how energy transition is being delivered”. Business & Human Rights Resource Centre, July 1, 2025. Retrieved from <https://www.business-humanrights.org/en/from-us/media-centre/rising-human-rights-lawsuits-raises-concerns-about-how-energy-transition-is-being-delivered>



**Positive Developments.** There is growing recognition of Indigenous rights in this sphere. Courts and human rights bodies have set precedents (detailed in later sections) asserting that projects lacking FPIC or causing significant cultural/environmental harm are illegal. Some governments and companies are beginning to adopt policies on FPIC and benefit-sharing. For instance, Indigenous communities in Brazil's Xingu region won a Supreme Court ruling to receive royalties from a hydro dam (Belo Monte) that harmed their livelihoods. In Norway, Sámi reindeer herders won a case affirming that wind farms built without safeguarding their grazing lands violated their rights. These victories, along with emerging corporate due diligence laws, signal that respecting Indigenous rights is not only a legal duty but also essential for sustainable outcomes. Investors are warned that ignoring such rights risks project delays, legal setbacks, and reputational damage.

In the following sections, we present case studies divided into two phases: Transition Minerals (Extraction) and Renewable Energy Projects (Deployment). Each case (2015-present) illustrates Indigenous Peoples' realities – their struggles, violations endured, and victories achieved. They also highlight legal/policy frameworks (FPIC, Treaty rights, business and human rights standards, IFC Performance Standards) invoked in these contexts.

**For too long, Indigenous voices have been marginalized. From the Amazon to the Arctic, protecting our environment has always been intertwined with protecting our people. We are the stewards of the world's most vital ecosystems, from rainforests to grasslands, and we are the first to suffer when these ecosystems are threatened. The world must understand that there can be no climate justice without Indigenous justice. There can be no green transition without the full participation of Indigenous Peoples. Protecting the Earth means protecting the people who have always protected it. This is our responsibility, and it is also our right. Without Indigenous knowledge, the quest for a green future is a journey without a map. And without Indigenous voices, even the greenest economy will run dry.<sup>13</sup>**

**RODION SULYANDZIGA (UDEGE)  
CHAIR OF THE SUMMIT'S GLOBAL COORDINATING COMMITTEE**



<sup>13</sup> SIRGE Coalition. "Indigenous Peoples Define the Just Transition and Provide Principles and Protocols to Eliminate Harm from Renewable Energy and 'Green' Development", in *Cultural Survival Quarterly*, December 17, 2024, <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/indigenous-peoples-define-just-transition-and-provide>.

# KEY REFERENCE DECISIONS

To inform and strengthen current advocacy, it's important to recall landmark decisions and frameworks (beyond 2015) that set precedents for Indigenous rights in context of land, resources, and development:

- ***Awás Tingni v. Nicaragua (Inter-American Court, 2001)*<sup>14</sup>**: the InterAmerican Court of Human Rights broke new ground by affirming that the Mayagna (Sumo) community's right to its ancestral lands arises from traditional, customary use—even in the absence of formal title. Despite repeated pleas from the community, Nicaragua had failed to demarcate or title their territory. It authorized a logging concession on it, without obtaining their consent or offering any meaningful remedy. The Court held that this violated their rights to property (Article 21), judicial protection (Article 25), and the broader obligation to uphold rights under the American Convention. The remedy was concrete and profound: Nicaragua was ordered to establish a legal procedure that would lead to the expeditious demarcation, titling, and recognition of Awás Tingni's lands, and to refrain from granting further resource concessions until that was done—an outcome that acknowledged customary tenure as deserving of legal protection as formal ownership.
- ***Saramaka People v. Suriname (Inter-American Court, 2007)*<sup>15</sup>**: The tribal Saramaka people challenged logging and mining concessions on their lands. The Court affirmed that tribal and Indigenous Peoples have a right to property and resources on their traditional lands under international law. Notably, it held that for large-scale projects that could have major impacts, the State must not only consult but also obtain their Free, Prior, and Informed Consent. It found Suriname in violation of the Saramaka's rights to property (Article 21), judicial protection (Article 25), and juridical personality (Article 3), for failing to consult or obtain consent before granting mining and logging concessions. The Court emphasized that for large-scale development projects affecting communal lands, states must secure FPIC from of the community. It directed Suriname to implement benefit-sharing mechanisms, including a communal development fund, and to recognize and safeguard the Saramakas' customary land rights
- ***Ángela Poma Poma v. Peru (Human Rights Committee, 2009)*<sup>16</sup>**: the UN Human Rights Committee applied Article 27 of the International Covenant on Civil and Political Rights in an Indigenous context. Ángela Poma Poma, an Aymara Indigenous woman, challenged Peru's diversion of water resources for commercial agriculture, arguing it had devastated communal wetlands and the livelihood of her community. The Committee found that neither she nor her community had effectively participated in decision-making, and that this lack of engagement violated their right to enjoy their culture under the Covenant. The decision emphasized that traditional resource

<sup>14</sup> Inter-American Court of Human Rights, *Mayagna (Sumo) Awás Tingni Community v. Nicaragua*, Merits, Reparations and Costs, Judgment of August 31, 2001, Series C No. 79.

<sup>15</sup> Inter-American Court of Human Rights, *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations and Costs, Series C No. 172.

<sup>16</sup> Human Rights Committee, *Poma Poma v. Peru*, Communication 1457/2006, March 27, 2009. U.N. Doc. CCPR/C/95/D/1457/2006 [https://www.worldcourts.com/hrc/eng/decisions/2009.03.27\\_Poma\\_Poma\\_v\\_Peru.htm](https://www.worldcourts.com/hrc/eng/decisions/2009.03.27_Poma_Poma_v_Peru.htm)



use is integral to cultural identity and must be considered and guaranteed in state decision-making. The Committee decided that

participation in the decision-making process must be effective, which requires not mere consultation but the Free, Prior, and Informed Consent of the members of the community. In addition, the measures must respect the principle of proportionality so as not to endanger the very survival of the community and its members.<sup>17</sup>

- **Endorois Welfare Council v. Kenya decision (African Commission on Human and Peoples' Rights, 2009)<sup>18</sup>**: the African Commission on Human and Peoples' Rights held that the Kenyan government violated multiple provisions of the African Charter when it forcibly removed the Endorois community from their ancestral lands around Lake Bogoria to create a wildlife reserve. The Commission found breaches of the rights to property (Article 14), culture (Article 17), religion (Article 8), natural resources (Article 21), and development (Article 22), emphasizing that Indigenous Peoples possess customary land rights enforceable under international law, even in the absence of formal title. It ruled that any development or conservation project must involve the effective participation of affected Indigenous Peoples, thereby recognizing a standard akin to FPIC. The decision ordered restitution or adequate compensation, recognition of collective ownership, and equitable benefit-sharing from tourism revenues and other resource exploitation, setting a powerful precedent for Indigenous land rights jurisprudence in Africa.
- **Maya K'iche', Ixil and Kaqchikel peoples v. Guatemala (UN Human Rights Committee, March 17, 2025)<sup>19</sup>**: the UN Human Rights Committee held Guatemala responsible for multiple International Covenant on Civil and Political Rights (ICCPR) violations in a consolidated case (CCPR/C/143/D/4023/2021–4032/2021) brought by 269 Maya K'iche', Ixil, and Kaqchikel people displaced during the 1978–1996 conflict, finding that Guatemala's failure to implement agreed reparations—especially promised housing with basic services on titled plots—means the forced displacement is ongoing, violating Article 12 alone and with Arts. 7, 17, 23, 24, and 27. Crucially, the Committee recognized intergenerational harm: the displacement's effects cascade across generations, so children born during displacement are direct victims, with compounded losses in education, health, identity, and Indigenous cultural transmission, engaging both collective and individual rights. It also found violations of effective remedy and fair hearing (Art. 2(3)(c) read with Art. 14(1)) due to non-execution of domestic decisions and the paralysis of the National Reparations Programme. Ordered measures include adequate compensation, construction of the agreed housing, economic reparations for compensation claimants, medical and psychological care, search and dignified return of remains for culturally appropriate ceremonies, scholarships, a public acknowledgment of responsibility, and steps to restore the Reparations Programme's functioning. Guatemala must publish the Views in Spanish and Maya languages and report on implementation within 180 days.

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<sup>17</sup> Id. para. 7.6.

<sup>18</sup> African Commission on Human and Peoples' Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International (on behalf of the Endorois Welfare Council) v. Kenya*, Comm. No. 276/2003 (2009)

<sup>19</sup> Human Rights Committee, *Maya K'iche', Ixil and Kaqchikel peoples v. Guatemala*, Communication 4023/2021–4032/2021, U.N. Doc. CCPR/C/143/D/4023/2021–4032/2021, March 17, 2025 [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?Lang=en&symbolno=CCPR%2FC%2F143%2FD%2F4023-2021%2F4032%2F2021](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?Lang=en&symbolno=CCPR%2FC%2F143%2FD%2F4023-2021%2F4032%2F2021)

# EXTRACTION PHASE

## GLOBAL

### **T. M. E. V., S. E. V. and B. I. V. v. Finland** [CRC Communication No. 172/2022]

**Country:** Finland | **Body:** UN Committee on the Rights of the Child

**Date:** September 13, 2024 (publicized October 2024)

- **Issues:** Indigenous children's rights, land use, reindeer herding, Free, Prior and Informed Consent (FPIC), environmental impact
- **CRC Arts.** 2(1), 8, 12, 27, 30; **UNDRIP Arts.** 19, 26, 32

**Summary:** Three Sámi sisters, aged 13–16 at the time of submission, challenged Finland's decision to grant a mineral exploration permit on their traditional reindeer herding lands without an adequate impact assessment or the Free, Prior and Informed Consent (FPIC) of their community. They alleged that the exploration project, which permitted deep drilling in winter pastures, threatened the sustainability of Sámi reindeer herding and, by extension, their culture, language, identity, and way of life, in violation of their rights under the Convention on the Rights of the Child (CRC), particularly Articles 8 (identity), 27 (standard of living), and 30 (cultural rights), read in conjunction with non-discrimination (Article 2.1) and child participation (Article 12).

While domestic courts upheld the permit, the Committee found that Finland had failed to meet international standards. Specifically, it did not ensure effective participation of the affected Sámi children or carry out a culturally appropriate impact assessment before authorizing the project. The process lacked genuine consultation aimed at consensus and failed to include the children's voices as required under article 12 of the CRC. The Committee emphasized that the right to culture (Art. 30) must be understood in connection with the intergenerational transmission of identity and traditional livelihoods, including reindeer herding and language. It also recognized that denying Indigenous children meaningful participation in decisions affecting their land and way of life can amount to systemic discrimination.'

**First**, the Committee considered the authors' claim that Finland violated Articles 8, 27, and 30 of the CRC by authorizing a mineral exploration project in critical winter reindeer herding areas, without environmental or social impact assessment or obtaining the Free, Prior and Informed Consent (FPIC) of the Sámi community (para. 9.2). The authors argued that this disrupted reindeer herding and posed irreparable harm to their ability to receive the intergenerational transmission of Sámi culture, identity, language, and livelihood (para. 9.2). The State contested this, asserting the project was small-scale and temporary and would not compromise reindeer herding (para. 9.3). The Committee recognized that both parties agreed Sámi reindeer herding is essential to the children's cultural identity and traditional way of life (paras. 9.7–9.9) and recognized that the central dispute was whether the exploratory drilling of deep holes over 390 hectares would cause merely temporary or long-lasting effects on the herd and thus on the children's rights (para. 9.10).



**Second**, the Committee affirmed that Article 30 CRC must be read in light of “evolutionary interpretation of Indigenous Peoples’ rights”, including the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) (paras. 9.11–9.12). Drawing from the Human Rights Committee and Committee on the Elimination of Racial Discrimination (CERD) jurisprudence, it emphasized that cultural survival is inseparable from Indigenous Peoples’ traditional territories, and that their relationships with land are material and spiritual. The Committee cited HRC case law (CCPR/C/137/D/3585/2019, para. 8.3) stating that denial of land rights can result in the extinction of a people, and that any measures affecting culturally significant Indigenous territories must be preceded by FPIC, “so as not to endanger the very survival of the community and its members to avoid threatening the community’s survival” (para. 9.13). It further stated that cultural rights are intergenerational, forming a basis for identity and continuity, and that Sámi children must be protected from the erosion of their right to learn and live their culture (para. 9.14). Language, the “principal mode of transmission of traditional knowledge,” was also deemed essential (para. 9.15). The Committee concluded that, in this context, article 30 “enshrines the right of Indigenous children to enjoy their traditional territories and that any decision affecting them should be taken with their effective participation” (para. 9.17).

**Third**, the Committee reviewed the process by which the exploration permit was granted. It found that Finland had relied on a general administrative procedure: a bulletin board notice and consultations directed at legally recognized landowners, with no binding obligation to conduct culturally appropriate participation or FPIC (para. 9.18). Referring to Article 32(2) of UNDRIP, the Committee recalled that States must consult Indigenous Peoples through their own representative institutions with a view to obtaining free and informed consent prior to approving extractive projects (para. 9.19). It found that consultation must be continuous, interactive, and start from the earliest stages, based on impact assessments conducted by independent entities (paras. 9.20–9.21). Indigenous children must be at the center of such processes, and States must ensure their right to be heard under Article 12 CRC (paras. 9.22–9.23). The Committee found that Finland had not met these standards as it failed to demonstrate that the permit process for exploration activities on the authors’ traditional territory adequately respected the participation rights of Indigenous children or assessed the cultural impacts (para. 9.23). The Committee also found that the State’s failure to require FPIC or recognize Indigenous land use rights constituted discrimination, as it impaired the enjoyment of their rights on an equal footing, especially in light of the distinct relationship between Sámi culture and land (para. 9.24).

**Fourth**, the Committee concluded that the granting of the exploration permit, without effective participation of the authors in a prior impact assessment and without FPIC, violated Articles 8 (identity), 27 (standard of living), and 30 (cultural rights), read in conjunction with Articles 2.1 (non-discrimination) and 12 (right to be heard) of the Convention (paras. 9.25–9.26).

**Fifth**, in terms of remedies, the Committee recommended that Finland revise the mineral exploration project after conducting a child rights-oriented impact assessment, as a necessary first step before a genuine FPIC process involving the children’s *siida* (community) (para. 10). It also called for legislative reforms to enshrine FPIC and child participation in line with international standards, and for the Views to be published in Northern Sámi and disseminated widely (para. 11).

## 2. J.T. et al. v. Finland [Communications Nos. 251/2022 and 289/2022]

**Country:** Finland | **Body:** UN Committee on Economic, Social and Cultural Rights

**Date:** September 27, 2024

- **Issues:** Sámi Indigenous rights, mining, land access, climate change, cultural rights, non-discrimination, self-determination
- **ICESCR,** Arts. 1, 2(2), 11, 15(1)(a)

**Summary:** Sámi reindeer herders challenged the State's authorization of (1) a mineral exploration permit (251/2022) and (2) a large area reservation for future mineral exploration (289/2022) on their ancestral lands without their Free, Prior, and Informed Consent (FPIC). The authors alleged that these actions, taken without proper impact assessments and amid severe climate change stress, threatened the sustainability of Sámi reindeer herding and the intergenerational transmission of their culture.

The CESCR found that both actions violated the authors' rights under Article 15(1)(a) (cultural participation), read in conjunction with Article 1 (self-determination), Article 2(2) (non-discrimination), and Article 11 (adequate standard of living) of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The Committee emphasized that the State party had failed to engage in meaningful consultation or obtain the FPIC of the Sámi, as required under international law. While some consultations were held in relation to the exploration permit, they were deemed insufficient—lacking genuine dialogue, no independent impact assessment, and proceeding despite formal opposition from the Sámi Parliament and herders' cooperative. In the area reservation case, the Sámi were not consulted at all, and Finnish law denied them standing to appeal.

The Committee reaffirmed that the rights of Indigenous Peoples to culture and livelihood are inseparable from their rights to land, and that land is central to Indigenous self-determination. The failure to protect these rights in both cases constituted discrimination, particularly as the State—which declared itself landowner—receives compensation under the Mining Act, while Sámi communities receive none, despite the impact on their traditional practices and livelihoods.

**First**, the Committee reviewed the State party's argument that both communications were inadmissible. Finland claimed that the Sámi lacked victim status, that domestic remedies had not been exhausted—particularly regarding the area reservation—and that the communications were manifestly ill-founded (paras. 4.1–4.10). Specifically, Finland contended that the mineral exploration activities had not yet commenced, that the area reservation created no legal effects on the ground, and that both measures applied equally to Sámi and non-Sámi individuals (paras. 4.3–4.4, 4.8–4.9). The Committee rejected these objections, affirming that the authors had standing (para. 10.3), that relevant domestic remedies had been exhausted or were unavailable (paras. 10.5–10.6), and that the communications were sufficiently substantiated in light of the harm alleged and of “the State party's failure to ensure a process of Free, Prior and Informed Consent in the granting of the mineral reservation permit and the area reservation has violated their rights to enjoy their own culture (Article 15(1)(a)), read alone and in conjunction with their rights to an adequate standard of living through their traditional means of livelihood, i.e. reindeer herding (Article 11), to non-discrimination (Article 2.2) and to self-determination (Article 1), particularly with regard to the economic and cultural dimensions of the right of Indigenous Peoples to self-determination.” (para 10.8)



**Second**, turning to the merits, the Committee reaffirmed that Article 15(1)(a) of the Covenant protects Indigenous Peoples' rights to engage in cultural life, which includes traditional economic activities such as reindeer herding (para. 14.1). It emphasized that "Indigenous Peoples' cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected," as such lands are "indispensable to their existence, well-being and full development" (para. 14.2, citing General Comment No. 21). The Committee reaffirmed that Article 15(1)(a), read in conjunction with Articles 1 and 11, "entails the right to the lands, territories and resources which [Indigenous Peoples] have traditionally owned, occupied or otherwise used or acquired" (para. 14.5), and that States must ensure "effective participation... based on the principle of their Free, Prior and Informed Consent, so as not to endanger the very survival of the community and its members" (ibid.). The Committee reiterated that "Free, Prior and Informed Consent" is not merely a consultation, but "an interactive and continuous dialogue through Indigenous Peoples' own representative institutions" and must be based on "environmental, social and cultural impact studies... conducted by independent and technically competent entities" (para. 14.6).

**Third**, applying these principles to the exploration permit, the Committee found that the State party had not conducted an adequate FPIC process. While the Sámi Parliament and Reindeer Herders' Cooperative were invited to submit comments and attend two meetings, both institutions opposed the permit, and their opposition was disregarded (para. 12.3). The Committee rejected the State party's argument that providing an opportunity to be heard was sufficient. It held that "the procedure provided in this case does not meet the standard of effective participation in accordance with the principle of Free, Prior and Informed Consent" (para. 14.6). It concluded that the State party had failed to ensure that the Sámi "had a de facto opportunity to influence the outcome of decision-making processes affecting them" (ibid.).

**Fourth**, regarding the area reservation in "Ruossakero," the Committee noted that the authors were not informed or consulted before the decision was adopted (para. 12.4), and "the Sámi do not have legal standing to appeal against the granting of a reservation area" under Finnish law (para. 12.4, 14.7). The Committee found that this process "takes no account of the rights of Sámi living on the affected area to control and use their land and transmit their traditional livelihoods from generation to generation" (para. 14.7). It cited a 2022 government-commissioned report acknowledging that even a reservation "creates uncertainty regarding the future opportunities to use and manage the area subject to the reservation" and "can also be considered to affect the Sámi people's views on conditions for practicing traditional economic activities" (para. 14.7).

**Fifth**, the Committee turned to the question of discrimination. It found that the State party's treatment of Sámi land as public land, managed by the State Forest Agency, and its failure to legally recognize Sámi ownership, amounted to structural discrimination. The Committee observed that "the Sámi are not entitled to compensation when their traditional lands are subject to the mineral exploration... and they are not recognized as the interested party in the granting of the area reservation" (para. 14.11). It noted that "failure to address the distinct status and vulnerabilities of Indigenous Peoples amounts to discrimination in effect" (para. 14.10), and that "equal treatment does not mean identical treatment" (ibid.). The Committee concluded that "the processes of granting the permit and the reservation area under the Mining Act" did not "adequately take into account the authors' rights" under Article 15(1)(a), in conjunction with Article 2(2) (para. 14.11).

**Sixth**, the Committee issued both individual and general recommendations. It called on Finland to provide the authors “with effective reparation... including through an effective review of the decisions concerning the mineral exploration project and the area reservation, based on an adequate process of Free, Prior and Informed Consent, accompanied by an independent assessment of the impact on the rights of the authors” (para. 16). It also urged the State to “amend its legislation and administrative procedures to enshrine the international standard of Free, Prior and Informed Consent” and to “initiate the process of legal recognition of the rights of Indigenous Peoples to their traditional lands, including through collective ownership” (para. 17).

In a concurring opinion, Committee member Ludovic Hennebel emphasized the need to treat self-determination as an autonomous, justiciable right. He stated that “the violation of the Sámi’s right to self-determination stems directly from the State party’s failure to implement a meaningful process of free, prior, and informed consent” (Annex, para. 3). He argued that the control over land “is not only an economic matter but a core component of self-determination” (ibid.) and concluded that “the State party’s failure to respect this right... constitutes a direct and autonomous violation of Article 1” (Annex, para. 7).

### 3. Lars-Anders Ågren et al. v. Sweden [CERD Communication No. 54/2013; CERD/C/102/D/54/2013]

**Country:** Sweden | **Body:** UN Committee on the Elimination of Racial Discrimination  
**Date:** November 18, 2020

- **Issues:** Sámi Indigenous rights, mining concessions on traditional territory, property rights, equality before tribunals and organs of justice, effective protection and remedies, victim status/admissibility
- **ICERD Arts.** 5(a), 5(d)(v), 6

**Summary:** Filed on September 16, 2013, by members of the Vapsten Sámi reindeer-herding community, this case contests Sweden’s grant of three exploitation concessions for open-pit mines in the Rönnebäcken isthmus, an area key to seasonal pastures and migration routes, without prior consultation or consent. The petitioners alleged violations of Article 5(d)(v) International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (right to own property), Article 5(a) (equality before tribunals and organs administering justice), and Article 6 (effective protection and remedies). They underlined the importance of reindeer herding to Sámi cultural identity and the cumulative nature of industrial projects threatening their livelihood. The Committee requested interim measures in 2013 and 2015, and declared the case admissible in 2017, establishing that the mere issuance of concessions, absent consultation, already affected the rights enshrined in the ICERD.

On the merits, the Committee based its analysis in general recommendation No. 23 and UNDRIP Article 26, affirming that indigenous land rights arise from traditional use and that effective consultation aimed at obtaining Free, Prior and Informed Consent is required before authorizing extractive activities on traditional territories. With note of Swedish case law acknowledging Sámi property rights by immemorial prescription, the Committee found Sweden failed to discharge its duty by delegating consultation to the mining company, separating concession decisions from environmental permitting, and proceeding without independent, prior environmental and social impact studies, thereby impairing land rights and risking the community’s cultural survival. It concluded that



Articles 5(d)(v) and 6 were violated; the Article 5(a) claim was not sufficiently substantiated. As remedies, Sweden must effectively revise the concessions following a process consistent with FPIC, amend legislation to reflect the Sámi's status and to enshrine FPIC, disseminate and translate the opinion, and report within 90 days on implementation.

**First**, the Committee addressed the admissibility of the communication. It found that the petitioners had victim status, since the mere granting of exploitation concessions without prior consultation and consent affected their rights under the Convention, regardless of whether mining would eventually occur. The Committee also determined that the petitioners' claims raised substantive issues under Article 5(d)(v), as well as Articles 5(a) and 6 of the Convention. Accordingly, it declared the communication admissible and requested the parties' submissions on the merits (para. 1.5).

**Second**, turning to the merits under Article 5(d)(v), the Committee reaffirmed that indigenous peoples have a right to own, use, develop, and control their lands, territories, and resources, as recognized in General Recommendation No. 23 and Article 26 of the UN Declaration on the Rights of Indigenous Peoples. The Committee emphasized that Indigenous Peoples' relationship to land is not just economic but also cultural and spiritual, and that securing their land rights is often a prerequisite for their survival as a people. It reiterated that disregarding indigenous land rights or failing to ensure Free, Prior and Informed Consent for activities affecting traditional territories constitutes a form of racial discrimination, as it impairs the equal enjoyment of rights (paras. 6.5–6.7).

**Third**, applying these principles, the Committee found that the State party had not effectively consulted the Vapsten Sami reindeer herding community or obtained its Free, Prior and Informed Consent before granting the mining concessions. While the State argued that national law requires only consultation and that landowners (including the Sami) are treated equally, the Committee found this reasoning insufficient. The Committee stressed that States must ensure that limitations on indigenous land rights are proportional and do not threaten the community's survival. The Committee concluded that the State had failed to protect the Vapsten Sami's rights by not providing for an effective consultation process or giving due consideration to their traditional livelihood and cultural identity (paras. 6.8–6.13).

**Fourth**, the Committee addressed the State party's claim that mining concessions do not constitute racial discrimination since the Sami are treated like other property owners. The Committee rejected this argument, noting that "equal treatment" does not mean identical treatment, and that failing to recognize the Sami's distinct status as an Indigenous People, with unique rights and vulnerabilities, amounts to structural discrimination. The Committee observed that land rights associated with reindeer herding are collective, permanent, and rooted in immemorial usage, and must be recognized and protected accordingly. The lack of meaningful consultation and disregard for Sami land rights thus constituted racial discrimination in effect (paras. 6.14–6.16).

**Fifth**, the Committee found that the State had improperly delegated its duty to consult to the mining company, which had a commercial interest in the project. The Committee reaffirmed that the State bears the ultimate responsibility to organize consultations in good faith, ensuring effective participation and genuinely seeking consensus. Delegation of this responsibility to private entities is not compatible with international human rights standards, particularly where the interests of indigenous peoples are at stake (para. 6.17). The Committee highlighted the necessity of environmental and social impact assessments, to be carried out by independent and competent bodies, as a prerequisite to any development project on indigenous lands. (para 6.18).

**Sixth**, the Committee determined that the State had failed to strike an actual balance between public interest in mineral extraction and the protection of Sami land rights. It reiterated that the development of natural resources, even as a legitimate public interest, does not absolve the State of its obligation to secure the Free, Prior and Informed Consent of Indigenous Peoples and to protect them from discrimination.

**Seventh**, with respect to Article 5(a) of the Convention (equality before tribunals), the Committee noted the petitioners' claim that treating Sami as private landowners, rather than an Indigenous community, denied them equal treatment. However, the Committee found the claim was not sufficiently substantiated and thus did not find a violation (paras. 6.23–6.24).

**Finally**, regarding Article 6 (effective protection and remedies), the Committee found the petitioners had no effective legal remedy to challenge the taking of their traditional territory, since the domestic courts could only apply national mining laws and could not review the fundamental property rights at issue. The Committee noted the State had not provided evidence of remedies offering adequate reparation or satisfaction for the damage suffered, nor did the judicial review process address the sustainability of reindeer husbandry. The Committee recalled that, where return of lands is impossible, compensation must be just, fair, and, as far as possible, in the form of lands and territories. The Committee concluded that the petitioners' rights under Article 6 had been violated (paras. 6.25–6.28).

#### 4. Mandates of the Special Rapporteur on environment, climate change, human rights defenders, and Indigenous Peoples [Communication AL COL 3/2025]

**Country:** Colombia | **Body:** United Nations Special Procedures (Multiple Mandates)<sup>20</sup>  
**Date:** March 21, 2025

- **Issues:** Environmental degradation (deforestation, water contamination, biodiversity loss), land rights, impacts on Afro-descendant and Indigenous communities, threats and stigmatization against human rights/environmental defenders (CINEP/PPP), partial compliance with court rulings (Atrato River, land restitution)
- **UNDRIP:** Arts. 1, 2, 8, 18, 25–29, 32

**Summary:** On 21 March 2025, four UN Special Rapporteurs sent a letter to the authorities of Colombia, underlining urgent concern regarding significant environmental degradation in the Bajo Atrato region of Chocó, including extensive deforestation, water pollution, mining, agro-industrial monocultures, and water buffalo ranching. The experts underlined that these actions could jeopardize the human rights, including food security, health, and cultural survival, of Afro-descendant and Indigenous communities.

The letter expressed concerns over the slow advancement in land restitution efforts and partial compliance with key court rulings by the authorities. It condemned the threats and stigmatization by the Gaitanist Self-Defense Forces (Clan del Golfo) directed against the NGO CINEP/PPP subsequent to the release of their environmental conflict study, resulting in the cessation of its field operations. The Rapporteurs request the authorities to provide more information on governmental data regarding environmental impacts, protective measures, inquiries into purported environmental offenses, and assurances for the safety of communities and defenders.

<sup>20</sup> Refer to Annex for information on the Special Procedures



## REGIONAL

### 1. Maya Q'eqchi' Indigenous Community of Agua Caliente v. Guatemala Series C No. 488

**Country:** Guatemala | **Body:** Inter-American Court of Human Rights<sup>21</sup>

**Date:** May 16, 2023 (publicized December 2023)

- **Issues:** Land rights, mining, harassment and violence against community leaders
- **UNDRIP:** Arts. 1, 2, 19, 25-32

**Summary:** This case was first submitted to the Inter-American Commission on Human Rights (IACHR) in 2011 on behalf of Agua Calientes Lot 9, a Q'eqchi' Maya community ("the Community"). It was declared admissible in 2017 and the IACHR adopted a merits report in May 2020. It was submitted to the Inter-American Court of Human Rights (IACrHR) in August 2020 after Guatemala failed to comply with the IACHR's remedial recommendations. Broadly speaking, it concerns Guatemala's failure to adequately and promptly delimit, demarcate and title the Community's collective lands, lack of participation in decision-making and encroachment on those lands by a large-scale nickel mine, harassment and attacks against Community leaders and members, and the denial of effective judicial remedies (noting that Guatemala's Constitutional Court had ruled in favour of the Community, even suspending the mining operation, and that the State and company has not adequately complied with this decision). The IACrHR found violations of multiple rights, including property, participation, the right to information, and the right to legal personality.

**First**, the IACrHR was required to assess a claim that another group represented the Community that was brought to its attention by the State and at the last minute (the Community's representatives who had filed the case alleged that the State was engaged in divide and rule tactics and the persons seeking to intervene were not affected by the mining operations) (para. 30-44). The IACrHR began by stating that its review of this question "does not entail, in any way, a position on the part of the Court with respect to the form of organization of the Agua Caliente Community, its representative bodies, or its authorities or community leaders" (33). As it has done in other cases, it noted that, while there may be different entities or leadership within communities who hold different views, "within the framework of their right to self-determination, indigenous peoples and communities have the power to adopt decisions in relation to the defense of their rights, through their own forms of organization and decision-making, in accordance with their cultural patterns" (36). It is, the IACrHR said, "up to the Community itself, and not to this Court or state authorities, to resolve what is appropriate with respect to its forms of organization, leadership and representation" (40). It restated this with respect to reparations, explaining that "it is not for the Court, nor for the State, to settle controversies that may arise within the Community, nor to rule on its forms of organization, leadership, and representation.... All this corresponds to the Community itself, in the exercise of its rights of self-determination and autonomy" (343). It also highlighted that Guatemala had refused to allow the IACrHR to visit the Community, during which time it could have verified the Community's choices about

<sup>21</sup> See also *Garifuna Community of San Juan v. Honduras*, Ser C No. 496 (Aug. 2023), concerning the State's lack of due diligence in titling ancestral territory and violations of property and other rights in relation to land acquisition by third parties and for tourism projects, lack of consultation, and ineffective remedies; and "IACHR presented to the Inter-American Court a case against Ecuador for violations of the right to property of the indigenous community of Salango", IACHR Press Release, October 30, 2023, [https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media\\_center/preleases/2023/254.asp](https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/media_center/preleases/2023/254.asp)

representation (41, 277). The IACrHR reiterated some of these points in its analysis of the merits as it relates to participation rights. It highlighted that “the effective participation of the legitimate representatives of the peoples or communities, who derive from their own forms of organization and decision-making, without State interference, such as traditional chiefs, specialized councils and autonomous governments or parliaments, must be guaranteed” (275).

**Second**, the IACrHR confirmed that it has used and will continue to use UNDRIP “to interpret conventional provisions” (47, 200). It also referenced UNDRIP, Art. 19 as part of its analysis of the right to participation (276).

**Third**, recalling that there is no mechanism to recognize collective Indigenous land rights in national law, the IACrHR reviewed its jurisprudence (197-205) and concluded that States are obligated to “adapt their domestic law to ensure that mechanisms relating to collective property exist, are adequate and effective: they must provide a real possibility for peoples or communities to defend their rights and exercise effective control over their territory without any external interference” (204). Moreover, as it has ruled previously, it highlighted that effective guarantees for collective property rights “does not imply only its nominal recognition but also entails the observance and respect of the autonomy and self-determination of indigenous communities over their lands” (205, 222). States must also “adapt their domestic law ... so as to recognize indigenous communities’ legal personality, so that they can exercise the relevant rights, including land ownership, in accordance with their traditions and modes of organization” (id.), including “the right to adopt autonomous decisions about the use of their lands...” (362). Noting that Guatemala’s Constitutional Court had reached the same conclusions in 2019, as had various international authorities (216-18), the IACrHR ruled that Guatemala had failed to comply with these obligations and, therefore, had violated various rights protected by the American Convention on Human Rights (224).

**Fourth**, turning to the mining project and the alleged lack of participation in decision-making, the IACrHR reiterated in prior jurisprudence (245-55), including its view that “the right to consultation of indigenous and tribal peoples, in addition to constituting a treaty norm, is also a general principle of international law...” (248), and “consultation must be carried out in advance, in good faith, in order to reach an adequate, accessible, and informed agreement” (250). Additionally, “in order to safeguard the right to collective property, [the State] must guarantee the right to consultation and participation in any project or measure that may affect the territory of an indigenous community, or other rights essential to its survival as a people” (id.). In the case at hand, it found that Guatemala had granted a 25 year-long mining permit in 2006, that this was within the Community’s lands, and it had had negative impacts on the Community (260 et seq). A few meetings were held with the Community in 2006, yet the mining began despite protests about the lack of adequate participation, facts that were also verified by Guatemala’s Constitutional Court in a 2020 judgment (261-2). The IACrHR, therefore, found that Guatemala has failed to comply with its international obligations, among other things, because consultations were not “prior,” that they failed to respect “the customs and forms of organization of the communities in the designation of authorities or representatives for the purpose of the consultation and information was not provided in a way that was accessible to the affected population, which implied an act of discrimination” (266, 269). This continued even after the Constitutional Court had suspended the mining project and ordered an effective consultation process with the Community, in part, the IACrHR decided, because the State failed to consult with the entire Community (270-85).



**Fifth**, the IACrHR then turned to the allegations of harassment, threats, violence and evictions that affect some members of the Community, including those who had taken on leadership roles opposing the mining operations and seeking protection for the Community's rights. It had raised this also in the context of participation rights, observing that threats and violence may result in "alterations in the modes of organization of an indigenous community, in its leadership, and in its representative authorities," and the "State must take these circumstances into account in order to comply in good faith with its obligation to consult" (273). It decided to address these issues in terms of "whether, in the context of the violations of collective rights already declared, that are centrally linked to the right to property, there has also been an affectation of the right to personal integrity" (321, 323).

The IACrHR recalled that threats and harassment "can generate a situation of fear and tension that threatens personal integrity, and this, in particular, can have an impact on indigenous leaders and members of indigenous peoples acting in defense of their territories and human rights" (322). It highlighted the impact on the Community of the prolonged delays in seeking recognition of its property rights, negative interactions with State officials and the mining company, including forcible evictions and "threats and direct attacks on a community leader and others by a large contingent of the company's private security personnel, who sought to prevent a community meeting" (324-6). Taken together, this has had a severe impact on "community life, in which personnel not only from the State, but also from the mining company, have been involved, and that this context responds to a territorial conflict" for which the State has been found liable (327). This rose the level of violating Article 5 of the American Convention (the right to humane treatment), which also protects the right to mental and moral integrity (328).

**Finally**, the IACrHR ordered a series of reparations (345 et seq). It noted that reparations "must recognize the strengthening of the cultural identity of indigenous and tribal peoples, guaranteeing them control over their own institutions, cultures, traditions, and territories, in order to contribute to their development in accordance with their life projects, and present and future needs" (333). Additionally, "the reparation measures granted must provide effective mechanisms, based on their own ethnic perspective, that allow.

## 2. Kaliña and Lokono Peoples v. Suriname

**Country:** Suriname | **Body:** Inter-American Court of Human Rights

**Date:** November 25, 2015

- **Issues:** Indigenous Peoples' legal personality, territorial rights, participation, environmental harm, protected areas, FPIC, discrimination, restitution, conservation compatibility
- **American Convention:** Arts. 1(1), 2, 3, 8, 11, 21, 23, 25
- **UNDRIP:** Arts. 18, 19, 26, 27, 28, 32 |
- **Convention on Biological Diversity:** Arts. 8(j), 10(c)

**Summary:** In *Kaliña and Lokono Peoples v. Suriname* (Judgment of January 28, 2016), the Inter-American Court of Human Rights found Suriname responsible for multiple violations of the American Convention on Human Rights due to its failure to recognize the legal personality and territorial rights of the Kaliña and Lokono peoples, and for actively violating these rights through unconsented bauxite mining (by Alcoa and BHP Billiton subsidiaries), granting land titles to non-Indigenous persons, and imposing restrictions within nature reserves.

The Court ordered delimitation, demarcation, and titling of Indigenous territories within 3 years, rehabilitation of environmental harm, and legal reforms ensuring the rights of all Indigenous Peoples in Suriname.

It affirmed that Indigenous rights and environmental conservation are compatible, emphasizing that effective participation, access to traditional lands, and benefit-sharing are essential for lawful conservation measures. The Court cited the UN Declaration on the Rights of Indigenous Peoples and Articles 8(j) and 10(c) of the Convention on Biological Diversity, integrating these into its interpretation of human rights obligations.

This judgment sets a jurisprudential precedent by establishing that environmental policies must comply with Indigenous rights and international human rights standards.

## DECISION

### **Right to recognition of juridical personality (Article 3) in relation to Articles 1(1), 2, 21 and 25 of the American Convention on Human Rights**

**114.** In conclusion, since the domestic laws of Suriname do not recognize the collective exercise of the juridical personality of the indigenous and tribal peoples, this Court finds that the State has violated Article 3 of the American Convention, to the detriment of the Kaliña and Lokono peoples, in relation to Article 2 of this instrument. In addition, for the effects of the instant case, the failure to recognize the juridical personality of the Kaliña and Lokono peoples has an impact on the violation of other rights recognized in Articles 1(1), 21 and 25 of the Convention, as will be examined below.<sup>22</sup>

### **Right to collective property (Article 21) and political rights (Article 23) in relation to Articles 1(1) and 2 of the American Convention**

**122.** As established by this Court in 2007 in the case of the *Saramaka People v. Suriname*, the domestic laws of Suriname do not recognize the right to communal property of the members of its tribal peoples and it has not ratified ILO Convention No. 169.<sup>23</sup> However, Suriname has ratified both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>24</sup> and voted in favor of the United Nations Declaration on the Rights of Indigenous Peoples. The Committee on Economic, Social and Cultural Rights, which is the body of independent experts that monitors the implementation of the ICESCR by the States Parties, has interpreted Article 1 common to both Covenants as applicable to Indigenous Peoples.<sup>25</sup> In this regard, based on the right to self-determination of the Indigenous Peoples pursuant to the said Article 1, such peoples may “freely pursue their economic, social and cultural development” and may “freely dispose of their natural wealth and resources” to ensure that they are

<sup>22</sup> Referring to the Case of the *Saramaka People v. Suriname*. Monitoring compliance with judgment. Order of the Inter-American Court of Human Rights of November 23, 2011, operative paragraph 3.b)

<sup>23</sup> Cf. International Labour Organization (ILO), Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, adopted on June 27, 1989, and in force since September 5, 1991. Available at: [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_INSTRUMENT\\_ID:312314](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312314)

<sup>24</sup> Suriname ratified both instruments on December 28, 1976. International Covenant on Civil and Political Rights, December 19, 1966, 99 U.N.T.S. 171, Can T.S. 1976 No. 47, 6 I.L.M. 368 (entry into force March 23, 1976), and International Covenant on Economic, Social and Cultural Rights (entry into force January 3, 1976).

<sup>25</sup> Cf. UN, Committee on Economic, Social and Cultural Rights, Consideration of reports submitted by States Parties under Articles 16 and 17 of the Covenant. Concluding observations on the Russian Federation (thirty-first session). UN Doc. E/C.12/1/Add.94, December 12, 2003, para. 11, in which the Committee expressed concern “about the precarious situation of indigenous communities in the State party, affecting their right to self-determination under Article 1 of the Covenant.”



not “deprived of [their] own means of subsistence.”<sup>26</sup> According to Article 29(b) of the American Convention, this Court is unable to interpret the provisions of Article 21 of this instrument in a sense that would limit the enjoyment and exercise of the rights recognized by Suriname in these covenants.

- 123.** Furthermore, the Human Rights Committee has examined the obligations of the States Parties to the ICCPR, including Suriname, under Article 27 of that instrument, and noted that “persons belonging to these minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, [which] may consist in a way of life which is closely associated with territory and use of its resources. This may particularly be true of members of indigenous communities constituting a minority.”
- 124.** The preceding analysis supports an interpretation of Article 21 of the American Convention that requires recognition of the right of the members of Indigenous and Tribal peoples to freely determine and enjoy their own social, cultural and economic development, which includes the right to enjoy their particular spiritual relationship with the territory they have traditionally used and occupied. Consequently, in this case, the right to property protected by Article 21 of the American Convention, and interpreted in light of the rights recognized in Article 1 common to the two Covenants, and Article 27 of the ICCPR which cannot be restricted when interpreting the American Convention in this case, confer on the members of the Kaliña and Lokono peoples the right to the enjoyment of their property in keeping with their community-based tradition.
- 125.** Applying this criteria to the present case, the Court concludes that, as Indigenous Peoples, the Kaliña and Lokono peoples are protected by international human rights law which guarantees the right to the collective territory they have used and occupied traditionally, derived from the use and occupation of the land and of the resources necessary for their physical and cultural survival and, also, that the State has the obligation to adopt special measures to recognize, respect, protect and guarantee to their members the right to communal ownership of this territory.
- 127.** Based on the above, in light of the arguments of the parties, the Court finds that the violations that have been alleged relate to four main disputes: (a) the failure to recognize the right to collective property and the absence of delimitation, demarcation and land-titling of the ancestral lands of the Kaliña and Lokono Indigenous Peoples; (b) the granting of land titles and leases to non-indigenous persons within the territory claimed by the Kaliña and Lokono peoples; (c) the adverse effects on use and enjoyment of the parts of the nature reserves that fall within the alleged traditional territories, and (d) the absence of effective participation, by means of a consultation process, with regard to the mining concessions within one of the nature reserves in the ancestral territory.
- 129.** The Court recalls its case law in this regard in the sense that Article 21 of the American Convention protects the close relationship that the Indigenous Peoples have with their lands, as well as with the natural resources within those lands, and the incorporeal elements that are derived from them. “Among the indigenous peoples there is a communal tradition as regards the collective ownership of the land, in the sense that the ownership is not centered on an individual, but rather on the group and its community. This notion of ownership and possession

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<sup>26</sup> Article 1(1), common to the ICCPR and the ICESCR, establishes that “[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

of land does not necessarily conform to the classic concept of property, but the Court has established that it deserves equal protection under Article 21 of the American Convention. Disregard for specific versions of the use and enjoyment of property arising from the culture, uses, customs and beliefs of each people, would be tantamount to holding that there is only one way of using and disposing of property, which, in turn, would render protection under that provision illusory for these communities.”

**130.** The Court has considered that, owing to their very existence, the Indigenous Peoples have a right to live freely in their territories. In addition, the close relationship that the Indigenous Peoples have with the land should be recognized and understood as the essential basis of their culture, spiritual life, integrity and economic system. “For the indigenous communities, the relationship with the land is not merely a question of possession and production, but rather a material and spiritual element that they should be able to enjoy fully, including to preserve their cultural legacy and transmit it to the future generations.” The culture of the members of the indigenous communities corresponds to a particular way of being, seeing and acting in the world, based on their close relationship with their traditional lands and natural resources, not only because these are their main means of subsistence, but also because they are a component of their world vision, their religious beliefs and, consequently, their cultural identity, so that the protection and guarantee of the right to use and enjoyment of their territory is necessary in order to safeguard not only the survival of these communities, but also their development and evolution as a people.<sup>27</sup>

### **Obligation to delimit, demarcate and grant title**

**133.** The Court has established that, based on the principle of legal certainty, the land rights of the Indigenous Peoples must be formalized by the adoption of the administrative and legislative measures required to create an effective mechanism for delimitation, demarcation and the granting of titles that recognizes these rights in the practice. This is because the recognition of the right to indigenous communal property should be ensured by granting a formal property title, or other similar form of State recognition, that provides legal certainty concerning the indigenous ownership of land in the face of actions of third parties or of agents of the State itself, and that the “mere abstract or legal recognition of indigenous lands, territories or resources has almost no meaning if the property is not physically [delimited and demarcated].”<sup>28</sup>

**138.** The Court has established that the territorial rights of the Indigenous Peoples “encompass a different and broader concept that is related to their collective right to survival as an organized people with control of their habitat as an essential condition for the reproduction of their culture, for their very survival, and to implement their life projects. [...] Ownership of the land ensures that the members of indigenous communities conserve their cultural heritage.”<sup>29</sup>

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<sup>27</sup> Cf. Case of the *Yakye Axa Indigenous Community*, supra, paras. 124, 135 and 137, and Case of the *Garifuna Community of Punta Piedra and its members*, supra, para. 166.

<sup>28</sup> Case of the *Yakye Axa Indigenous Community*, supra, para. 143, and Case of the *Garifuna Community of Punta Piedra and its members*, supra, para. 169.

<sup>29</sup> Case of the *Yakye Axa Indigenous Community*, supra, para. 146, and Case of the *Kuna Indigenous Community of Madungandí and the Emberá Indigenous Community of Bayano and their members*, supra, para. 143.



- 139.** It should be clarified that, in order to delimit, demarcate and grant title to the traditional territory in this case, the Court finds that the right to property of the Indigenous and Tribal Peoples includes full guarantees over the territories they have traditionally owned, occupied and used in order to ensure their particular way of life, and their subsistence, traditions, culture, and development as peoples.<sup>30</sup> Nevertheless, there may be other complementary or additional traditional areas to which they have had access for their traditional or subsistence activities (which may have other purposes), regarding which they should be ensured, at least, the necessary access and use.
- 141.** Notwithstanding the above, since it is the State's obligation to delimit the traditional territories,<sup>31</sup> the State must, following a consultation process and using the necessary administrative and legal measures in keeping with the relevant international standards, first delimit the territories that correspond to the Kaliña and Lokono peoples, in accordance with paragraph 139 of this Judgment, and then proceed to demarcate and title them, guaranteeing their use and enjoyment. To this end, the State must also respect the rights of the tribal peoples or their members in the area. Thus, the State must, in agreement with the indigenous and Maroon communities, draw up rules for peaceful and harmonious coexistence in the territory in question.<sup>32</sup>
- 142.** Based on the above, the State's failure to delimit, demarcate and grant title to the territories of the Kaliña and Lokono peoples has violated the right to collective property, recognized in Article 21 of the American Convention, and the obligation to adopt domestic legal provisions established in Article 2 of this instrument, to the detriment of these peoples.
- The right to request the restitution of the territory, because individual titles have been granted to non-indigenous and non-tribal third parties.
- 149.** In this regard, the Court's consistent case law has established that Indigenous and Tribal Peoples who have lost their traditional lands involuntarily have the right to request restitution, or to obtain other lands of the same size and quality, when those lands have been transferred legally to innocent third parties.<sup>33</sup>
- 151.** To determine the existence of the relationship of the Indigenous Peoples with their traditional land, the Court has established that: (i) this may be expressed in different ways, according to the Indigenous People in question and their specific circumstances, and (ii) the relationship with the land must be possible. The ways in which this relationship is expressed could include traditional use or presence by spiritual or ceremonial ties; sporadic settlements or crops; seasonal or nomadic hunting, fishing or gathering; use of natural resources connected to their customs,

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<sup>30</sup> Similarly, Article 26 of the United Nations Declaration on the Rights of Indigenous Peoples recognizes the right to lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired, as well as the right to own, use, develop and control these lands; thus, States must give legal recognition and protection to these lands, respecting the customs, traditions and land tenure systems of the Indigenous Peoples concerned. UN, United Nations Declaration on the Rights of Indigenous Peoples, supra

<sup>31</sup> Cf. Case of the *Mayagna (Sumo) Awás Tingni Community*, supra, para. 153, and Case of the *Kuna Indigenous Community of Madungandí and the Emberá Indigenous Community of Bayano and their members*, supra, para. 119.

<sup>32</sup> Cf. Case of the *Garífuna Community of Punta Piedra and its members*, supra, para. 326

<sup>33</sup> Cf. Case of the *Sawhoyamaxa Indigenous Community*, supra, para. 128, Case of the *Garífuna Community of Punta Piedra and its members*, supra, para. 173. Case of the *Moiwana Community*, supra, para. 131 and 133; Case of the *Yakye Axa Indigenous Community*, supra, paras. 131, 135, 137 and 154; Case of the *Sawhoyamaxa Indigenous Community*, supra, paras. 127, 130 and 131, and Case of the *Xákmok Kásek Indigenous Community*, supra, para. 112.

and any other element characteristic of their culture.<sup>34</sup> The second element means that the members of the Indigenous Peoples are not prevented, for reasons beyond their control, from carrying out those activities that reveal the persistence of the relationship with their traditional territories.<sup>35</sup>

- 155.** However, the Court reiterates its case law that both the property of private individuals and the collective property of the members of the indigenous communities are protected by Article 21 of the American Convention. In this regard, the Court has indicated that, when there is a conflict of interests in relation to indigenous claims, or a real or apparent conflict between the right to indigenous communal property and the property of private individuals, the legality, necessity, proportionality and attainment of a legitimate objective in a democratic society (public utility and social interest) must be assessed on a case-by-case basis, in order to restrict the right to property, on the one hand, or the right to traditional lands, on the other, without the restriction of the latter preventing the survival of the members of the indigenous communities as a people. The Court has defined the content of each of these parameters in its case law (case of the *Yakye Axa Indigenous Community* and subsequent cases).
- 157.** Furthermore, the Court considers that the fact that the lands claimed are in the hands of private individuals does not constitute, per se, a sufficient reason to deny prima facie the indigenous claims. This would place the Indigenous Peoples in a vulnerable situation where the rights to individual property can prevail over the rights to communal property, owing merely to the existence of titles in favor of the former, to the detriment of the latter, as in cases such as *Tjang A Sjin v. Zaalman and Celientje Martina Joeroeja-Koewie and Others v. Suriname & Suriname Stone & Industries N.V.* (supra paras. 62 to 64).
- 158.** The foregoing does not mean that whenever there is a conflict between the territorial interests of the State or of private individuals and the territorial interests of the members of the indigenous communities, the latter prevail over the former. Thus if, for objective, specific and justified reasons, the State is unable to take measures to return the traditional territory and the communal resources to the Kaliña and Lokono peoples - after the possibility of expropriating the property of third parties has been adequately assessed as indicated in this Judgment - the State may offer alternative lands of the same or greater size and quality or payment of fair compensation, or both, by mutual agreement with the peoples concerned (infra para. 281).

### **Nature reserves in the traditional territory**

- 164.** The Court has established that the relationship with the land and the natural resources that the Indigenous and Tribal Peoples have used traditionally, and which are necessary for their physical and cultural survival, as well as for the development and continuation of their world vision, must be protected under Article 21 of the Convention. The purpose of this protection is to ensure that the Indigenous and Tribal Peoples may continue to enjoy their traditional way of life and that their cultural identity, social structure, economic system, customs, beliefs

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<sup>34</sup> Cf. Case of the *Yakye Axa Indigenous Community*, supra, para. 154, and Case of the *Sarayaku Indigenous People*, supra, para. 148.

<sup>35</sup> Cf. Case of the *Sawhoyamaya Indigenous Community*, supra, para. 132, and Case of the *Sarayaku Indigenous People*, supra, para. 148



and distinctive traditions are respected, guaranteed and protected by the States.<sup>36</sup> Hence, the Indigenous Peoples are entitled to the natural resources that they have traditionally used within their territory because, without them, their economic, social and cultural survival are at risk.<sup>37</sup>

### **Compatibility of the rights of the Indigenous Peoples and the protection of the environment**

**171.** Regarding environmental protection as a justification for public interest, in the Salvador Chiriboga case, the Court established that, in a democratic society, the protection of the environment by the creation of a metropolitan park was a legitimate reason to restrict the right to property established in Article 21 of the Convention.<sup>38</sup>

**173.** The Court considers it important to refer to the need to ensure the compatibility of the safeguard of protected areas with the adequate use and enjoyment of the traditional territories of Indigenous Peoples. In this regard, the Court finds that a protected area consists not only of its biological dimension, but also of its socio-cultural dimension and that, therefore, it requires an interdisciplinary, participatory approach. Thus, in general, the Indigenous Peoples may play an important role in nature conservation, since certain traditional uses entail sustainable practices and are considered essential for the effectiveness of conservation strategies. Consequently, respect for the rights of the Indigenous Peoples may have a positive impact on environmental conservation. Hence, the rights of the Indigenous Peoples and international environmental laws should be understood as complementary, rather than exclusionary, rights.

**174.** In this regard, in her expert opinion, the UN Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz, indicated to the Court that:

International environmental law and international human rights law should not be considered separate, but rather interrelated and complementary, bodies of law. Indeed, the States Parties to the Convention on Biological Diversity (CBD) have incorporated respect for the related international rights and obligations into their decision on protected areas in relation to indigenous peoples. [...] The CBD, and its authorized interpretation by the Conference of the Parties, defends fully the rights of the indigenous peoples in relation to the protected areas and requires that these are established and managed in full compliance with the State's international obligations. This permits the application of the whole range of the State's human rights obligations as defined by the American Convention on Human Rights and established in the UN Declaration. It is also the consensus reflected in the main international policy norms and best practice. [...] The [UN] Rapporteur has adhered to these same basic principles affirmed by the Human Rights Committee and the Committee for the Elimination of Racial Discrimination. [...].

**181.** Based on the above, the Court reiterates that, in principle, the protection of natural areas and the right of the Indigenous and Tribal Peoples to the protection of the natural resources in their territories are compatible, and it emphasizes that, owing

<sup>36</sup> Cf. Case of the *Yakye Axa Indigenous Community*, supra, paras. 124, 135 and 137, and Case of the *Garífuna Community of Punta Piedra and its members*, supra, para. 167.

<sup>37</sup> Cf. Case of the *Yakye Axa Indigenous Community*, supra, paras. 135 and 137, and Case of the *Garífuna Community of Punta Piedra and its members*, supra, paras. 165 to 167 and 172.

<sup>38</sup> Cf. Case of *Salvador Chiriboga v. Ecuador*. Preliminary Objection and Merits. Judgment of May 6, 2008. Series C No. 179, para. 76

to their interrelationship with nature and their ways of life, the Indigenous and Tribal Peoples can make an important contribution to such conservation. Thus, the criteria of a) effective participation, b) access and use of their traditional territories, and c) the possibility of receiving benefits from conservation— all of the foregoing provided that they are compatible with protection and sustainable use (supra para. 177) – are essential elements to achieve this compatibility which should be evaluated by the State. Consequently, the State must have adequate mechanisms to implement these criteria as a means of guaranteeing the right to a dignified life and to cultural identity to the Indigenous and Tribal Peoples in relation to the protection of the natural resources that are in their traditional territories.

**192. [Monitoring and management of the nature reserves]...** the State should have endeavored to ensure compatibility between the protection of the environment and the collective rights of the indigenous peoples, in order to: (a) ensure access to and use of their ancestral territories for their traditional ways of life in the nature reserves, and (b) provide the means for them to participate effectively in the objectives of the reserves; mainly in their care and conservation, and (c) to participate in the benefits derived from conservation.

**198. [Conclusion on the restrictions in the nature reserves]** In sum, the Court finds that the State has violated the victims' rights to collective property, cultural identity and participation in public matters, mainly by preventing their effective participation, and the access to part of their traditional territory and natural resources, in the Galibi and Wane Kreek nature reserves, as well as by failing to guarantee, effectively, the traditional territory of the communities that has been affected by the environmental degradation within the Wane Kreek Nature Reserve (infra paras. 217 to 222), which constitutes a violation of Articles 21, 2 and 23 of the American Convention, in relation to Article 1(1) thereof, to the detriment of the Kaliña and Lokono peoples and their members.

### **The right to collective property in relation to the mining concession within the Wane Kreek Nature Reserve**

**201.** In this regard, the Court has already established in the case of *the Saramaka People v. Suriname* that, under Article 1(1) of the Convention, in order to ensure that the restrictions imposed on the right to property of the Indigenous and Tribal Peoples owing to the issue of concessions within their territory do not entail a denial of their survival, the State must comply with the following three guarantees: “first, it must ensure the effective participation of the members of the [Indigenous and Tribal Peoples], in accordance with their customs and traditions, with regard to any development, investment, exploration or extraction plans (hereinafter “development or investment plan”) implemented within [their territory]. Second, the State must ensure that the members of the [Indigenous and Tribal Peoples] receive a reasonable benefit from the plan implemented within their territory. Third, the State must ensure that no concession will be granted within their territory until independent and technically-qualified entities, under the State’s supervision, have conducted a prior social and environmental impact assessment. These safeguards are intended to preserve, protect and ensure the special relationship that the members of the [Indigenous and Tribal Peoples] have with their territory, which, in turn, ensures their survival [as an indigenous people].”<sup>39</sup> In the instant case, the

<sup>39</sup> Case of the *Saramaka People*, supra, para. 129, and Case of the *Garífuna Community of Punta Piedra and its members*, supra, para. 215.



Court will analyze the State's alleged failure to comply with these safeguards in relation to the start-up of bauxite extraction operations in 1997.

- 202.** Furthermore, the Court reiterates that Article 23 of the American Convention establishes that: “[e]very citizen shall enjoy the following rights and opportunities: (a) to take part in the conduct of public affairs [...]” Similarly, Article 18 of the United Nations Declaration on the Rights of Indigenous Peoples establishes that “[i]ndigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives [...],” and the pertinent part of Article 32 stipulates that “States shall consult and cooperate in good faith [...] prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the [...] utilization or exploitation of mineral [...] resources.”<sup>40</sup>
- 203.** Consequently, in order to ensure the use and enjoyment of the right to indigenous collective property recognized in Articles 1(1) and 21 of the Convention, in relation to the utilization or exploitation of natural resources in their traditional territory, the State must, for the effects of this case, put in place mechanisms for the effective participation of the indigenous peoples using procedures that are culturally adapted to the decision-making of such peoples. This is not only a matter of public interest but also forms part of the exercise of their right to take part in any decision-making on matters that affect their interests, in accordance with their own procedures and institutions, in relation to Article 23 of the American Convention (*supra* para. 196).

### **Effective participation by means of a consultation process**

- 206.** In this regard, the Court has already established that the State must ensure the effective participation “with regard to any development, investment, exploration or extraction plan.” In particular, the Court referred to development and investment plans as “any activity that may affect the integrity of the lands and natural resources [...] in particular, any proposal related to logging or mining concessions.”<sup>41</sup>
- 207.** In this regard, the Court considers that the State's duty in relation to this guarantee must be complied with prior to the execution of activities that may have a significant impact on the interests of the Indigenous and Tribal Peoples, such as the exploration, and the exploitation or extraction stages. [...] The guarantee of effective participation should have been put in practice before the start of the mining extraction or exploitation operations, which did not happen in this case.
- 212.** In conclusion, from the body of evidence, the Court has verified that the State failed to ensure the effective participation, by means of a consultation process, of the Kaliña and Lokono peoples before undertaking or authorizing the exploitation of the bauxite mine within their traditional territory.

### **Prior social and environmental impact assessment**

- 214.** In this regard, the Court has established that the State must guarantee that no concession will be granted within the territory of an indigenous community unless and until independent and technically-qualified entities, under the State's supervision, have made a prior assessment of the social and environmental impact.<sup>42</sup>

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<sup>40</sup> Cf. Article 29 of the United Nations Declaration on the Rights of Indigenous Peoples, *supra*; Article 6 of the InterAmerican Democratic Charter stipulates that: It is the right and responsibility of all citizens to participate in decisions relating to their own development [...].”

<sup>41</sup> Case of the *Saramaka People*, *supra*, para. 129

<sup>42</sup> Cf. Case of the *Saramaka People*, *supra*, para. 129, and Case of the *Kichwa Indigenous People of Sarayaku*, *supra*, para. 205.

The Court has also determined that environmental impact assessments “help to evaluate the possible damage or impact that a development or investment project may have on the property and community in question. The purpose of [such studies] is not [merely] to have an objective measurement of the possible impact on land and persons, but also [...] to ensure that the members of the peoples [...] are aware of possible risks, including environmental and health risks,” so that they can weigh up whether to accept the proposed development or investment plan, “voluntarily and with full knowledge.”<sup>43</sup> The permitted level of impact cannot negate the very survival of the members of the Indigenous and Tribal Peoples.

- 215.** In addition, the Court has established that environmental impact assessments must respect the traditions and culture of the Indigenous Peoples and that one of the purposes of requiring such assessments is to ensure the right of the Indigenous People to be informed of all proposed projects on their territory.<sup>44</sup> Therefore, the State’s obligation to supervise such assessments interrelates with its duty to ensure the effective participation of the Indigenous People.<sup>45</sup>
- 221.** In this regard, the State has the obligation to protect the areas of both the nature reserve and the traditional territories in order to prevent damage to the indigenous lands, even damage caused by third parties, with appropriate supervision and monitoring mechanisms<sup>46</sup> that guarantee human rights; in particular by supervising and monitoring environmental impact assessments. The Court also notes that Article 32 of the United Nations Declaration on the Rights of Indigenous Peoples stipulates that “States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, [...] impact.”
- 226.** Based on the above, the Court finds that, because the State did not ensure that an independent social and environmental impact assessment was made prior to the start-up of bauxite mining, and did not supervise the assessment that was made subsequently, it failed to comply with this safeguard; in particular, considering that the activities would be carried out in a protected nature reserve and within the traditional territories of several peoples.

### Shared benefits

- 227.** When considering development plans within the territories of Indigenous and Tribal Peoples, the State should, within reason, share the benefits of the project in question, as appropriate. This concept is inherent in the right to compensation recognized in Article 21(2) of the Convention, which refers not only to total deprivation of a property title by means of expropriation by the State, but also includes the deprivation of the normal use and enjoyment of that property.<sup>47</sup>

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<sup>43</sup> Cf. Case of the *Saramaka People*, supra, para. 133, and Case of the *Saramaka People v. Suriname*. Interpretation of the judgment on Preliminary Objections, Merits, Reparations and Costs. Judgment of August 12, 2008. Series C No. 185, paras. 40 and 41, and Case of the *Kichwa Indigenous People of Sarayaku*, supra, para. 205.

<sup>44</sup> Cf. Case of the *Saramaka People*. Interpretation of the Judgment, supra, para. 41, and Case of the *Kichwa Indigenous People of Sarayaku*, supra, para. 206.

<sup>45</sup> Cf. Case of the *Saramaka People*. Interpretation of the Judgment, supra, para. 41, and Case of the *Kichwa Indigenous People of Sarayaku*, supra, para. 206.

<sup>46</sup> Cf. Case of *Suárez Peralta v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of May 21, 2013. Series C No. 261, para. 133, and Case of *Gonzales Lluy et al. v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 1, 2015. Series C No. 298, para. 184.

<sup>47</sup> Cf. Case of the *Saramaka People*, supra, paras. 138 and 139



- 228.** In this case, the victims' representatives asserted that there is no evidence in the case file before the Court that the Kaliña and Lokono peoples benefited from the mining concession granted by the State; rather, to the contrary, this caused severe damage to the environment in the area, thereby prejudicing these peoples. However, the State argued that the minimum damage was caused and that, in any case, the Kaliña and Lokono peoples had been compensated by the fact that they could use and enjoy the highway built in order to transport their timber.
- 229** In this regard, the Court finds that, according to the evidence in the file, the domestic laws of Suriname do not recognize this safeguard. Also, even though there is no dispute that the indigenous peoples use the highway, this access cannot be considered to provide a direct, mutually-agreed benefit for the peoples in light of the above-mentioned standards; above all, bearing in mind that the highway was part of the exploitation project that had an adverse impact on the natural resources of their territory. Hence, this requirement was not met either.
- 230.** Based on the foregoing, the Court concludes that the State of Suriname failed to ensure the effective participation of the Kaliña and Lokono peoples by means of a consultation process. The Court also concludes that a social and environmental impact assessment was not made, and that the benefits of the said mining project were not shared. Furthermore, Suriname has not adopted mechanisms in order to guarantee these safeguards. Consequently, the State has violated Articles 21 and 23 of the Convention, in relation to Articles 1(1) and 2 of this instrument, to the detriment of the Kaliña and Lokono peoples and their members.

### 3. Southeast Alaska Indigenous Transboundary Commission v. Canada [Petition 3004-18, Report No. 179/23]

**Country:** Canada | **Body:** Inter-American Commission on Human Rights  
**Date:** August 25, 2023

- **Issues:** Transboundary environmental harm, Indigenous subsistence and cultural rights, right to health, property, FPIC and consultation, large-scale hard-rock mining, environmental impact assessment, prevention and precaution, access to justice
- **American Declaration:** Arts. I, XI, XIII, XXIII. **UNDRIP:** Arts. 10, 19, 25, 26, 29.
- **ICCPR:** Art. 27. **ICESCR** Arts. 12, 15

**Summary:** In a petition filed in 2018 before the Inter-American Commission on Human Rights, the Southeast Alaska Indigenous Transboundary Commission (representing fifteen Alaska tribal communities) alleged that six large hard-rock mines in British Columbia—some operating, others permitted or proposed—pose a foreseeable, imminent, and ongoing threat of polluting the Taku, Stikine, and Unuk river watersheds, which flow from Canada into Alaska. These rivers are central to the petitioners' subsistence, culture, health, and property rights, particularly because they provide salmon and eulachon vital to their diets and traditions.

The petitioners argue that Canada and British Columbia have failed to prevent environmental harm, to assess transboundary impacts adequately, or to consult Indigenous communities outside Canada, violating rights under the American Declaration of the Rights and Duties of Man. Canada counters that the projects underwent environmental assessments that found no likely significant adverse effects, that it had no legal duty to consult foreign Indigenous groups, and that the petitioners

failed to exhaust domestic remedies by seeking judicial review. The IACHR found that domestic remedies need not be exhausted in this case, that the petition was timely, and that—if proven—the allegations could constitute violations of rights to life, health, culture, and property. The Commission declared the petition admissible and will proceed to examine the merits.

## **DECISION**

### **Exhaustion of Domestic Remedies and Timeliness of the Petition**

- 58.** On this basis, the Commission recalls that a State, whenever alleges the lack of exhaustion of internal resources, not only has the burden of identifying which would be the non-exhausted resources, but that it must also demonstrate that these are adequate to repair the alleged violation, that is, that the role of these remedies within the system of internal law is appropriate to protect the legal situation infringed. This, since, as a rule, the only resources that must be exhausted are those whose functions, within the legal system, are adequate and effective to provide protection tending to remedy an infringement of a certain legal right.
- 59.** Based on this, in the present case, the Commission emphasizes that the State of Canada has not provided such information, because although it maintains that the alleged victims should have sought judicial review of the decisions of the of federal and provincial authorities relating to approval of the B.C. mines, it does not specify which are the concrete resources that they should have used, nor does it justify why these would be adequate analyze claims referred to the protection of the rights to the environment, to prior consultation and to culture. Instead, based on the information on the record, the State's legal framework does not extend to the protection of the rights of the petitioners, particularly given that they are based outside of Canada. Accordingly, the Commission considers that in accordance with Article 31 (2) (a) of the Commission's Rules of Procedure, the petitioners qualify for an exemption to the requirement to exhaust domestic remedies.

### **Colorable Claim**

- 63.** Thereby, in the present petition, the Commission recalls that in addressing complaints of violations of the American Declaration it is necessary to consider those complaints in the context of the evolving rules and principles of human rights law in the Americas and in the international community more broadly, as reflected in treaties, custom and other sources of international law. On this basis, regarding the obligations of States with respect to business activities, like the Inter-American Court of Human Rights the Commission highlights that the Human Rights Council has adopted the "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework" (hereinafter "Guiding Principles"), which detail that the States have a duty to prevent human rights violations by private companies, and therefore must adopt legislative and other measures to prevent such violations, and to investigate, punish and provide reparation when they occur. In the Commission's opinion, such document evidences the evolutionary interpretation that exists in relation to the obligations that States have with respect to business activities under their jurisdiction.

### **Transboundary Environmental Damage**

- 65.** Finally, the Commission reiterates that, under certain circumstances, the exercise of its competence over acts occurring outside the territory of the State being



denounced is not only consistent with but required by the norms which pertain. On this basis, in opinion of the Commission, in the case of transboundary environmental damages, it must be examined whether the State adopted measures to prevent the activities under its jurisdiction from causing human rights violations in zones outside of its territory. Therefore, the Commission considers that the contexts of businesses' transnational operations and activities relating to human rights violations may activate the exercise of the jurisdiction of the State that oversees these activities and their corresponding international human rights obligations according to the applicable rules and facts of each case, considering the international human rights law and the standards on the duty to respect and guarantee.

66. Considering these considerations and after examining the factual and legal elements presented by the parties, the Commission considers that the petitioners' allegations are not manifestly unfounded and require a substantive study of the alleged facts. The Commission considers, prima facie, that the risk of pollution from the B.C. mines, if proven, could threaten the petitioners' means of subsistence, health, culture, and well-being. Notwithstanding the foregoing, the Commission will examine in more detail, at the merits stage, the arguments presented by the State, regarding the scope of the advisory opinions of the InterAmerican Court and its questions regarding the obligations of the States with respect to indigenous communities.
67. There, the Commission considers that the allegations if proven, could characterize violations of the rights protected in Articles I (life and personal security) and XI (preservation of health and well-being), XIII (benefits of culture) and XXIII (property) of the American Declaration. The Commission believes that any mining activities (or other activities that impact the environment) must be accompanied by appropriate and effective measures to ensure that they do not proceed at the expense of the fundamental rights of persons who may be negatively affected, including indigenous communities located outside of the State where such activities are being conducted.

## NATIONAL

### 1. Asociación Indígena Agrícola San Isidro de Quipisca (AIASIQ) v. Servicio de Evaluación Ambiental (SEA) [Rol R-39-3030]

**Country:** Chile | **Body:** First Environmental Tribunal (Antofagasta)

**Date:** July 12, 2021

- **Issues:** Indigenous consultation (ILO 169), environmental impact assessment sufficiency, particulate matter (MPS) and health risk, cumulative impacts, baseline information (anthropological), alleged project segmentation/elusion (rejected) in a mining context.
- **ILO Convention 169:** Arts. 6, 15. **Law 19.300:** Art. 11, 11 bis. **RSEIA/DS 40:** Art. 85. **DS 66:** Arts. 7–10.

**Summary:** The San Isidro Quipisca Indigenous Agricultural Association (AIASIQ) challenged RCA No. 11/2019, which approved modifications to the CMCC mine's waste-rock dumps, internal roads, and camp in Tarapacá. The association argued the project had been unlawfully split to dodge a complete review under Chile's Environmental Impact Assessment System (SEIA). The court said sanctions for "project splitting" fall to

the environmental superintendency (SMA), though the SEA still has a preventive role. Even so, it found no solid evidence of splitting: the filing was treated as a modification of an already evaluated project, so that allegation failed.

With regards to requirements of consultation and drawing on ILO Convention 169, the Court agreed that the project could directly affect AIASIQ—farms in Sabaya, a zone which sit about 4.5 km from a waste-rock dump, affecting irrigation, herding routes, and spiritual sites. It held the SEA accountable for brushing aside that “susceptibility of impact,” underlined the precautionary approach and that “significance” must be read through the community’s own cultural lens. While it found no illegality by CONADI (National Indigenous Development Agency) or the regional evaluation commission, the court concluded the environmental review had substantial errors for skipping consultation and declared RCA No. 11/2019 (and a related resolution) illegal, upholding the claim on that ground.

## DECISION

### The duty of Indigenous Consultation under ILO Convention 169

- 103.** According to the plaintiff, based on Annex I of the project DIA, concerning “Human Environment Characterization,” the town of Quipisca—home of the claimant Indigenous association—is located 7 km west of the CMCC mine area and had an estimated population of 16 in 2017, carrying out traditional agricultural activities such as fruit tree cultivation. Thus, in the plaintiff’s view, the association lies within the project’s area of influence, and its effects could impact them. The DIA itself included Quipisca, Mamiña, Parca, and Iquiuca in the human environment area of influence, making special reference to AIASIQ.
- 104.** The SEA, however, argues that there is no “direct susceptibility of impact” as required under ILO Convention 169 to trigger Indigenous Consultation.
- 105.** To address this dispute, it is necessary to clarify the content and scope of Indigenous Consultation in environmental matters, particularly under ILO Convention 169, which requires governments to:
- (Art. 6.1a) Consult Indigenous Peoples through appropriate procedures and representative institutions whenever legislative or administrative measures may directly affect them.
  - (Art. 6.2) Carry out such consultations in good faith, aiming to reach agreement or consent.
  - (Art. 15.2) Consult before undertaking or authorizing exploration or exploitation of subsurface resources on Indigenous lands, ensuring participation in benefits and fair compensation for damages.
- 169.** Chilean regulations (DS 66/2014 and DS 40/2013) specify that environmental qualification resolutions (RCAs) are “administrative measures” that may trigger consultation if they could cause significant and specific impacts on Indigenous Peoples’ traditions, customs, or lands. DS 40 (Art. 85) explicitly requires consultation if SEIA projects may directly affect Indigenous communities, in line with Law 19.300 (Art. 11, particularly literals c, d, f).
- 122.** Jurisprudence from Chile’s Supreme Court has held that Indigenous impact occurs when their lives, beliefs, institutions, well-being, lands, or ability to control development are affected. Doctrine agrees consultation is required when measures may impact Indigenous Peoples’ cultural integrity, survival, or autonomy.



**114-116.** From judicial and administrative records and the Tribunal’s on-site inspection, it is clear that in Sabaya—where AIASIQ operates—communities carry out subsistence farming, cultural practices, and maintain ancestral ties to land. Evidence shows:

- AIASIQ’s mission is to improve product quality while respecting ancestral tradition and Pachamama.
- They cultivate flowers, fruit trees (quinces, pomegranates, guavas, mangoes, oranges), and vegetables (tomatoes, peppers, chili, onions).
- Members collectively own or are legalizing about 60% of Quipisca Valley farmland.
- 26 families sustain themselves mainly from farming and sell produce in Iquique.

The Tribunal found clear evidence of direct interaction between project activities (e.g., waste rock dumps) and AIASIQ farmlands, including impacts from particulate matter (MPS), irrigation waters, and transhumance routes, all of which threaten their way of life.

**117-120.**

- The Tribunal rejected SEA’s dismissal of indigenous consultation, concluding that susceptibility of impact was evident.
- It emphasized the precautionary principle: even potential impacts require consultation.
- “Significance” of impact cannot be measured solely by external criteria; it must respect Indigenous cultural self-determination.
- DS 40 and Convention 169 require flexibility, considering Indigenous decision-making, customs, and traditions.
- Ultimately, the Tribunal determined there was irrefutable evidence of direct susceptibility of impact on AIASIQ, meaning indigenous consultation should have been carried out. The claim on this point was therefore upheld.

## 2. Bayprã Indigenous Association et al. v. State of Pará (re Onça Puma/Vale S.A.) – [SL 1226 AgR/PA]

**Country:** Brazil | **Body:** Supreme Federal Court

**Date:** Virtual session Aug 28– Sep 04, 2020 (published Oct. 2020)

- **Issues:** Environmental licensing compliance; Indigenous rights (Xikrin/Kayapó); mining; ethno-environmental impacts; interim relief vs. public interest; compensation payments
- **UNDRIP:** Arts. 2, 18–19, 25–29, 32

**Summary:** Vale’s Onça Puma nickel mine sits beside Xikrin and near Kayapó Indigenous lands in southeastern Pará. When the project was licensed, the state required “Condition 16”: concrete plans to prevent, mitigate, and compensate impacts on those communities. Years later, the Federal Prosecution Service said Vale hadn’t delivered. The regional federal court (TRF-1) responded by ordering the mine to halt until those measures were in place and set monthly compensation to the villages. The State of Pará went to the Supreme Court asking to suspend that shutdown.

As Court president, Justice Dias Toffoli granted a counter-injunction: operations could continue, and the payments to the Indigenous communities were restored. Xikrin associations appealed, arguing the Constitution’s environmental protections should prevail while the company complied with licensing terms. Justice Edson Fachin agreed

with them in a separate opinion, saying the Court shouldn't reweigh evidence in this kind of proceeding and that the real "grave harm" was ignoring environmental conditions.

The full Court, however, rejected the appeal in a virtual session held Aug. 28–Sept. 4, 2020. Toffoli's decision stood; Justices Fachin and Cármen Lúcia dissented, Justice Celso de Mello didn't participate (medical leave), and Justice Gilmar Mendes was recused.

## DECISION

[...]The appellants argue, in summary, that the decision of this Court's Presidency that granted counter-injunctive relief "reinstated payments intended for the Indigenous communities, emphasizing the subsistence nature of the funds, but, unfortunately, contrary to the socio-environmental principles upheld by the Constitution, allowed the Onça Puma project to operate" (e-doc no. 114), which they contend is highly harmful to the environment.

They submitted a monitoring report of the Xikrin do Cateté Indigenous Land, which would corroborate the grounds pointing to the need to suspend the mining activities, inasmuch as environmental impacts caused by the project were evidenced.

They argued that the grant of counter-injunctive relief ended up favoring economic interests to the detriment of environmental principles and that, by allowing the Onça Puma project to operate, it also entails a risk of serious harm to the health, order, safety, and economy of the Indigenous communities in the region. They further stressed that "with each day that passes while the irregular implementation of the project remains in full effect, the harm to the affected Indigenous communities only increases, exponentially and irreversibly worsening the health, safety, well-being, and subsistence of the members of those communities." Finally, they requested that the appeal be granted to reinstate the judgment rendered in AI no. 0042106-84.2015.4.01.0000/PA, insofar as it ordered the shutdown of the mining activities of the MOP project (e-doc no. 114, p. 61). [...]

In this context, the present request to stay the injunction was filed by the State of Pará, arguing that maintaining the effects of the judgment in AI no. 0042106-84.2015.4.01.0000 and the subsequent decisions which, in AI no. 1004428-76.2019.4.01.0000, ordered full compliance with that ruling, would cause grave harm to administrative order, health, safety, and the economy, both locally and statewide. It alleged a risk of: (i) the loss of 1,200 direct jobs and 6,000 indirect jobs; (ii) losses of R\$ 20,000,000.00 (twenty million reais) from service contracts for transportation, industrial maintenance, and cleaning that would be terminated; (iii) non-collection of taxes which, in September 2017, totaled about R\$ 17,000,000.00 (seventeen million reais). As to shutting down the electric furnace required for processing, the applicant emphasized that "the company will incur an estimated cost of USD 200 million to rebuild it, due to irreversible damage to the equipment." The request, as noted, was partially granted by the Hon. Presiding Justice in a single-judge decision, against which the present internal appeal was filed.

The Hon. Reporting Justice proposes denying the appeal brought by the Associations, on the grounds that the appellants did not present reasons to undermine the foundations of the challenged decision; therefore, the grounds showing a risk of harm to public order and the economy remain intact. [...]

The crux of the present debate lies in the need for Vale S.A., Mineração Onça Puma Ltda., the State of Pará, and Funai to comply with the compensatory measures set out in Condition no. 16, imposed in the project's environmental licensing process. As seen, the preventive, mitigating, and compensatory measures must benefit the Xikrin



Indigenous communities (Cateté, Djudjekô, and Ô-odjã villages) and the Kayapó (Aukre, Pykararankre, Kendjam, and Kikretum villages) and are the subject of a public civil action brought by the Federal Prosecution Service in 2011. The factual controversy dates back to 2005.

Of course, the economic and social losses resulting from the shutdown of Mineração Onça Puma's activities are not ignored. However, economic development cannot be used as a justification for non-compliance with environmental conditions that were required in the project's licensing process.

Moreover, disregarding environmental issues in order to elevate public order and the public economy as absolute values does not seem compatible with the constitutional principles applicable to the subject. The constitutional text says nothing different; under Article 225—which cannot be disregarded under any circumstances—it is plainly evident that the effects of the project may irreversibly affect the way of life of the Indigenous communities living nearby. [...]

The economic interests of those engaged in mining are fair and legitimate and are protected by the legal order. They must not, however, be exercised without respect for Article 225 of the Constitution, nor do they authorize the use of counter-injunctive relief, which is legally intended to protect the public interest, under the already-cited Article 4, caput, of Law No. 8,437/92.

Thus, in light of all these considerations, the argument that, in this case, there are serious harms to public order and the public economy does not accord with the protection mandated by Article 225 of the Constitution of the Republic.

This Court, in the judgment of Petition No. 3388, has already rejected the possibility of setting economic development against the proper protection of Indigenous intangible heritage:

“Popular action. Demarcation of the Raposa Serra do Sol Indigenous Land. Absence of defects in the administrative demarcation process. Observance of Articles 231 and 232 of the Federal Constitution, as well as Law No. 6,001/73 and its regulatory decrees. Constitutionality and legality of Ministry of Justice Order No. 534/2005, as well as of the presidential decree of homologation. Recognition that the demarcated area is Indigenous in its entirety. [...]

*10. The false antagonism between the Indigenous issue and development. It falls to the public administration at all levels of the federation not to underestimate, much less be hostile to, Brazilian Indigenous communities, but to draw on them to diversify the economic-cultural potential of their territories (of the federative entities). Development carried out without or against Indigenous Peoples, wherever they are traditionally settled as of the date of the 1988 Constitution, disrespects the fundamental objective in Article 3, item II, of the Federal Constitution, which secures a type of ‘national development’ that is as ecologically balanced as it is humanized and culturally diverse, thereby incorporating the Indigenous reality. (Pet 3388, Reporting Justice Carlos Britto, Full Court, judgment of 03/19/2009).” (emphasis added)*

Thus, with due respect to decisions to the contrary, I do not find the requirements of Article 4 of Law No. 8,437/1992 present to a degree sufficient to suspend the preliminary injunction issued by the competent court.

### 3. Apache Stronghold v. United States

**Country:** United States | **Body:** United States Court of Appeals for the Ninth Circuit  
**Date:** March 5, 2021

- **Issues:** Indigenous religious rights, federal land transfer, sacred sites, preliminary injunction, irreparable harm, religious freedom, environmental impact
- **U.S. Constitution (First Amendment), Religious Freedom Restoration Act (RFRA)**

**Summary:** The Ninth Circuit affirmed the denial of a preliminary injunction sought by Apache Stronghold, a nonprofit representing members of the San Carlos Apache Tribe, to prevent the federal government from transferring Oak Flat—a site sacred to the Western Apache—to a private mining company, Resolution Copper. Apache Stronghold argued that the transfer violated their rights under the Free Exercise Clause, the Religious Freedom Restoration Act (RFRA), and an 1852 treaty with the Apaches. The court acknowledged the profound spiritual significance of Oak Flat for the Apache people but found that, under the Supreme Court’s decision in *Lyng v. Northwest Indian Cemetery Protective Ass’n*, government actions disposing of public land do not constitute a “substantial burden” on religious exercise unless they coerce individuals to act against their beliefs, discriminate, or penalize them. The court further found that Congress had expressly abrogated any contrary treaty rights through the statutory mandate for the land transfer.

Although a majority of the court recognized a broader definition of “substantial burden” under RFRA than previously applied, a separate majority concluded that the limits established in *Lyng* still controlled the outcome, and thus Apache Stronghold’s claims failed. Dissenting judges argued that the utter destruction of Oak Flat would be a substantial burden on Apache religious practice, requiring strict scrutiny under RFRA, but the majority did not adopt this view. Ultimately, the court held that Apache Stronghold had not demonstrated a likelihood of success on the merits, and therefore the government’s land transfer could proceed.

After the Ninth Circuit’s decision, the Supreme Court declined to hear the case in 2025, letting the land transfer proceed despite strong dissent from some justices who argued it would do lasting harm to Native American religious freedom.

## DECISION

### Decision in *Lyng v. Northwestern Indian Cemetery Protective Association*<sup>48</sup>

The Supreme Court reversed. In addressing the Free Exercise Clause issue, which was a necessary component of the relief granted by the district court, the Court began by acknowledging that “[i]t is undisputed that the Indian [plaintiffs’] beliefs are sincere and that the Government’s proposed actions will have severe adverse effects on the practice of their religion.” *Lyng*, 485 U.S. at 447. As the Court explained, it was undisputed that the “projects at issue in this case could have devastating effects on traditional Indian religious practices,” and the Court therefore accepted the premise that “the G-O road will virtually destroy the Indians’ ability to practice their religion.” *Id.* at 451 (simplified); see *also id.* (acknowledging that the threat to the Indian plaintiffs’ «religious practices is extremely grave»). Despite these acknowledged severe impacts, the Court nonetheless held that the Government was *not* required to demonstrate a «compelling need” or

<sup>48</sup> *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 108 S. Ct. 1319, 99 L. Ed. 2d 534 (1988).



otherwise to satisfy strict scrutiny. *Id.* at 447. That was true, the Court held, because the plaintiffs would not «be coerced by the Government's action into violating their religious beliefs,» nor would that action «penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens.» *Id.* at 449.

The *Lyng* Court acknowledged that "[i]t is true that this Court has repeatedly held that *indirect* coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment." 485 U.S. at 450 (emphasis added). Such indirect coercion or penalties would include a denial of program benefits "based solely" on the claimant's religious beliefs and practices, as well as any other denial of "an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Id.* at 449-50. But the Court held that the Free Exercise Clause's protection against government conduct "prohibiting" the free exercise of religion, see U.S. Const. amend. I, does not protect against the "incidental effects of government programs, which may make it more difficult to practice certain religions, but which have no tendency to coerce individuals into acting contrary to their religious beliefs." *Id.* at 450; see also *id.* at 451 (noting that the "crucial word in the constitutional text is «prohibit"). [...] According to the Court, the Indian plaintiffs sought, not "an equal share of the rights, benefits, and privileges enjoyed by other citizens," but rather a "religious servitude" that would «divest the Government of its right to use what is, after all, *its* land." *Id.* at 449, 452-53.

The project challenged here is indistinguishable from that in *Lyng*. Here, just as in *Lyng*, the Government's actions with respect to "publicly owned land" would "interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs", but it would have "no tendency to coerce" them "into acting contrary to their religious beliefs." 485 U.S. at 449-50. And just as with the land use decisions at issue in *Lyng*, the challenged transfer of Oak Flat for mining operations does not "discriminate" against Apache Stronghold's members, "penalize" them, or deny them "an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Id.* at 449, 453. Under *Lyng*, Apache Stronghold\_ seeks, not freedom from governmental action "prohibiting the free exercise" of religion, see U.S. Const. amend. I, but rather a «religious servitude» that would uniquely confer on tribal members "*de facto* beneficial ownership of [a] rather spacious tract [] of public property." *Lyng*, 485 U.S. at 452-53. Under *Lyng*, Apache Stronghold's Free Exercise Clause claim must be rejected.

### **On a Violation of the Religious Freedom Restoration Act (RFRA)**

Apache Stronghold also contends that the sale of Oak Flat to Resolution Copper would violate its members' rights under RFRA. Congress enacted RFRA in 1993 "in direct response" to Smith's narrow construction of the Free Exercise Clause, see *City of Boerne v. Flores*, 521 U.S. 507, 512, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997), and Congress did so precisely "in order to provide greater protection for religious exercise than is available" under the Free Exercise Clause as construed in *Smith*, see *Holt v. Hobbs*, 574 U.S. 352, 357, 135 S. Ct. 853, 190 L. Ed. 2d 747 (2015). The question here is whether the broader protection afforded by RFRA has the practical effect of displacing, by statute, the pre-Smith decision in *Lyng*. The answer to that question is no.

A sharply divided Court held that there was no violation of the Free Exercise Clause. Justice Scalia's majority opinion for five Justices acknowledged what it described as "the balancing test set forth in *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963)," under which "governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest." *Smith*, 494 U.S. at

883. The Court noted that it had applied the *Sherbert* test in three cases to “invalidate [] state unemployment compensation rules that conditioned the availability of benefits upon an applicant’s willingness to work under conditions forbidden by his religion.” *Id.* The Court also observed that, in several other decisions, the Court “purported to apply the *Sherbert* test in contexts [\*1057] other than that,” but that it had “always found the test satisfied.” *Id.* Citing specifically to (among other decisions) *Roy and Lyng*, the Court further noted [\*\*46] that, “[i]n recent years [the Court] ha[s] abstained from applying the *Sherbert* test (outside the unemployment compensation field) at all.” *Id.* The Court then held that, “[e]ven if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law.” *Id.* at 884 (emphasis added). Reviewing its caselaw more broadly, the Court held that its decisions had “consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).” *Id.* at 879 (citation omitted). Citing *Lyng*, the Court held that “[t]he government’s ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, cannot depend on measuring the effects of a governmental action on a religious objector’s spiritual development.” *Id.* at 885 (quoting *Lyng*, 485 U.S. at 451).

The Court’s holding that the *Sherbert* test does not apply to neutral and generally applicable prohibitions drew the sharp [\*\*47] disagreement of four Justices, in a separate opinion written by Justice O’Connor. According to Justice O’Connor, the Court’s caselaw has “respected both the First Amendment’s express textual mandate and the governmental interest in regulation of conduct by requiring the government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest.” *Smith*, 494 U.S. at 894 (O’Connor, J., concurring in the judgment). Citing the unemployment compensation case of *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707, 101 S. Ct. 1425, 67 L. Ed. 2d 624 (1981), Justice O’Connor elaborated on her understanding of what it meant for government to impose a substantial burden on religious exercise:

[T]he essence of a free exercise claim is relief from a burden imposed by government on religious practices or beliefs, whether the burden is imposed directly through laws that prohibit or compel specific religious practices, or indirectly through laws that, in effect, make abandonment of one’s own religion or conformity to the religious beliefs of others the price of an equal place in the civil community. As [the Court] explained in *Thomas*:

“Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or [\*\*48] where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists.” 450 U.S., at 717-718. *Smith*, 494 U.S. at 897 (O’Connor, J., concurring in the judgment). Thus, Justice O’Connor concluded, “[t]he [\*1058] *Sherbert* compelling interest test applies” to both “cases in which a State conditions receipt of a benefit on conduct prohibited by religious beliefs and cases in which a State affirmatively prohibits such conduct.” *Id.* at 898. In either type of case, Justice O’Connor concluded, it did not matter whether the law was a “neutral” or “generally applicable” one. *Id.* at 898-900. The Court’s precedents, she explained, reflected a “consistent application of free exercise doctrine to cases involving generally applicable regulations that burden religious conduct.” *Id.* at 892.



Congress promptly sought to supersede, by statute, Smith’s holding that “neutral, generally applicable laws that incidentally burden the exercise of religion usually do not violate the Free Exercise Clause.” Holt, 574 U.S. at 356-57. As stated expressly in § 2 of RFRA, Congress’s primary purpose in enacting the Act was to “restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963) and Wisconsin v. Yoder, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972) and to [\*\*49] guarantee its application in all cases where free exercise of religion is substantially burdened.” 42 U.S.C. § 2000bb(b)(1). That stated purpose was based on RFRA’s express finding that “laws ‘neutral’ toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise.” Id. § 2000bb(a)(1).

### ***On a Violation of the 1852 Treaty***

“Congress has the power to abrogate Indians’ treaty rights,” but Congress generally must “clearly express its intent to do so.” South Dakota v. Bourland, 508 U.S. 679, 687, 113 S. Ct. 2309, 124 L. Ed. 2d 606 (1993). To the extent that Apache Stronghold is correct in contending that the Government has a treaty-based trust obligation to retain Oak Flat for the benefit of the tribe and its members, 3003 clearly and manifestly abrogates any such obligation. HN17 Section 3003 was passed to accomplish a single goal: to “authorize, direct, facilitate, and expedite the exchange of land between Resolution Copper and the United States.” 16 U.S.C. § 539p(a). [\*\*65] The entirety of the statute is built around that ultimate objective. There are various preparatory requirements, like consultations and report generation, e.g., id. § 539p(c)(3), (c)(4), (c)(6)(A), (c)(9), and post-transfer rules about land disposition and management, id. § 539p(d)(2), (e), (g), (h), but they all lead up to the transfer of Oak Flat. Indeed, § 3003 unambiguously states that, upon completion of the preparatory steps, “if Resolution Copper offers [\*1065] to convey to the United States all right, title, and interest of Resolution Copper in and to the non-Federal land, the Secretary is authorized and directed to convey to Resolution Copper, all right, title, and interest of the United States in and to the Federal land.” Id. § 539p(c)(1) (emphasis added). Section 3003’s clear direction that, after consultation with the tribe, the transfer shall occur simply cannot co-exist with Apache Stronghold’s claim that the treaty requires that it shall not occur. Section 3003 plainly abrogates any tribal treaty rights that would otherwise preclude the transfer. See Bourland, 508 U.S. at 687.

## **4. Guitian, Román E. and Atacameños del Altiplano Community v. National Executive Power and Province of Catamarca [Corte N° 054/2022]**

**Country:** Argentina | **Body:** Tribunal (San Fernando del Valle de Catamarca)  
**Date:** 13 March 2024

- **Issues:** Indigenous rights, environmental protection, amparo action, community representation, state responsibility
- **ILO Convention 169; Escazú Agreement**

**Summary:** Román Elías Guitian, acting in representation of the Atacameños Indigenous Community of the Altiplano, initiated amparo proceedings against the National Executive Power and the Province of Catamarca, challenging the legality of lithium mining projects authorized within the Salar del Hombre Muerto sub-basin. He claimed that the projects were approved in the absence of a comprehensive, inter-jurisdictional, and cumulative environmental impact assessment (EIA), contrary to both national and international legal provisions protecting Indigenous rights and the environment.

The plaintiff contends that the administrative processes leading to the approval of the “Fenix” and “Sal de Vida” projects, operated by Livent and Galaxi Lithium SA respectively, disregarded the obligation to secure Free, Prior, and Informed Consent (FPIC) from the affected Indigenous community. Additionally, the complaint underscores the lack of an adequate hydrological model to evaluate the long-term effects of lithium extraction on local water resources, with particular reference to the Río Los Patos. The plaintiff asserts that ongoing extractive activities jeopardize the delicate hydrogeological balance of the Salar del Hombre Muerto, thereby threatening the community’s ancestral subsistence, cultural integrity, and access to vital resources such as water.

The Court of Justice of Catamarca examined its jurisdiction and the procedural admissibility of the amparo action. With reference to the relevant provisions of the National Constitution, the General Environmental Law (LGA), and international instruments including ILO Convention 169, the Court affirmed its competence to adjudicate the matter. The Court acknowledged the risk of irreversible environmental harm and the potential infringement of fundamental rights, thus warranting urgent judicial intervention to safeguard collective and diffuse interests.

In its analysis of the precautionary relief sought by the plaintiff, the Court recognized the exceptional character of suspending administrative acts presumed to be valid. Nevertheless, it underscored the necessity of reconciling economic development with the imperatives of environmental protection and respect for Indigenous rights. Citing jurisprudence of the Supreme Court of Argentina and international human rights bodies, the Court invoked the precautionary principle, which precludes scientific uncertainty from serving as grounds to defer effective measures aimed at averting serious environmental harm.

The Court of Justice of Catamarca partially upheld the precautionary measure requested. While refraining from suspending extant permits and authorizations, the Court ordered the Ministry of Mining of the Province of Catamarca to undertake a comprehensive, cumulative EIA of all lithium mining projects impacting the Salar del Hombre Muerto sub-basin. Furthermore, the Court enjoined the Ministry from granting any new permits or authorizations within the affected area until such cumulative EIA is completed. This decision seeks to ensure transparency, Indigenous participation, and an integrated assessment of environmental risks, while also taking account of the economic relevance of lithium mining activities.

## DECISION

**IV.** I must also take into account that the Atacameños Indigenous Community of the Altiplano is a party to this amparo action and is entitled to differentiated protection. ILO Convention 169, adopted by Law 24.071 in March 1992, in its Preamble, establishes: “It is fundamentally reaffirmed that the right to land and territory of Indigenous Peoples is a human right due to its intrinsic relationship with nature.” (Dino L. Bellorio Clabot, “Derecho Ambiental Innovativo,” Ad-Hoc, Buenos Aires, 2017, p. 169).

Within the Inter-American human rights system, the right to a healthy environment is expressly enshrined in Article 11 of the Protocol of San Salvador and is also included among the economic and social rights protected by Article 26 of the American Convention.

In Advisory Opinion OC-23/17 on Environment and Human Rights, dated November 15, 2017, the Inter-American Court of Human Rights responded to Colombia’s request for clarification regarding State obligations in relation to the environment, in the context of protecting and guaranteeing the rights to life and personal integrity enshrined in Articles 4 and 5 of the American Convention, in connection with Articles 1.1 and 2 of the same treaty.



“The human right to a healthy environment has both individual and collective dimensions. In its collective dimension, it constitutes a universal interest owed to both present and future generations. Its violation may have direct or indirect repercussions on individuals, given its individual aspect and its interconnectedness with other rights, such as the rights to health, personal integrity, or life, among others. Environmental degradation can cause irreparable harm to human beings; therefore, a healthy environment is a fundamental right for the existence of humanity.”

The statements of the Inter-American Commission on Human Rights (IACHR) regarding groups in situations of vulnerability are particularly noteworthy and are applicable to the Atacameños Indigenous Community of the Altiplano. The IACHR maintains that violations of these rights are aggravated or of greater intensity, given that such groups depend economically, or even for their very survival, fundamentally on environmental resources, in addition to their ancestral connection to the land. Consequently, States are legally obligated to address these vulnerabilities (paragraph 67). The IACHR thus elaborates on the State’s duty to supervise and oversee (paragraph 152), as well as the obligation to require and approve environmental impact assessments for activities carried out in Indigenous territories. “In this regard, it has been established that the conduct of environmental impact assessments constitutes one of the safeguards to ensure that restrictions imposed on Indigenous or Tribal communities regarding their property rights over their lands—due to the granting of concessions within their territory—do not result in a denial of their survival as a people. The purpose of such assessments is not merely to provide an objective measure of possible impacts on the land and its people, but also to ensure that members of the community are aware of the potential risks, including environmental and health risks...” (paragraph 156).

Furthermore, reference must be made to the case *Indigenous Communities Members of the Association Lhaka Honhat (Our Land) v. Argentina*, in which, on February 6, 2020, the Inter-American Court of Human Rights condemned Argentina for the violation of various rights of 132 Indigenous communities (Province of Salta).

In that decision, the Inter-American Court determined that the State had violated the rights to communal property, cultural identity, a healthy environment, adequate food, and water, due to the lack of effective State measures to prevent activities that harmed those rights.

Particularly noteworthy is the Court’s analysis regarding the right to a healthy environment in relation to the Indigenous community: “The Court examined the rights to a healthy environment, adequate food, water, and cultural identity independently on the basis of Article 26 of the American Convention. The Tribunal deemed it appropriate to analyze these four rights in their interdependence and according to their specific characteristics concerning Indigenous Peoples. The Court found that illegal logging, as well as activities carried out by non-Indigenous populations within the territory—specifically, livestock farming and the installation of fencing—affected environmental assets, impacting the Indigenous communities’ traditional means of subsistence and their access to water. This, in turn, altered the Indigenous way of life and harmed their cultural identity, which, while evolutionary and dynamic, was disrupted in this case without consented interference. The State was aware of these harmful activities and undertook various actions, which proved ineffective in halting them. This ineffectiveness further reflects Argentina’s failure to guarantee Indigenous communities the possibility to determine the activities carried out on their lands. Consequently, the State violated Article 26 of the American Convention in relation to Article 1.1 thereof.”

Dr. Juan Carlos Hitters, commenting on this judgment, stated: “(...) it sets highly progressive jurisprudence regarding Indigenous and tribal peoples, as although the Inter-American Court had previously addressed these issues, this decision establishes a series of important standards, particularly for these 132 extremely poor and neglected communities that have inhabited these lands since the seventeenth century.”; “In the judgment under discussion, the majority implicitly distinguished between ‘land’ and ‘territory’ and granted differentiated protection based on Article 26 of the American Convention, encompassing for the first time in a contentious case all rights in favor of Indigenous Peoples (...)” “All this because the Court found the State incurred in the autonomous violation, by action or omission, of the rights to a healthy environment, food, water, and participation in cultural life, as well as violations of judicial guarantees arising from Articles 8 and 25 of the American Convention.” “The Condemnation of the Argentine Government and the Case of the Indigenous Communities Members of the Association Lhaka Honhat”.

Additionally, the Inter-American Commission on Human Rights, in Resolution No. 1/2020, operative paragraph No. 57, with respect to Indigenous Peoples, ordered States: “To refrain from promoting legislative initiatives and/or advancing the implementation of productive and/or extractive projects in Indigenous territories during the duration of the pandemic, due to the impossibility of carrying out prior informed and free consent processes (due to the recommendation of the WHO’s that social distancing measures be adopted) as mandated by ILO Convention 169 and other relevant international and national instruments.” This must be borne in mind given the dates on which some of the administrative acts in question were issued.

Furthermore, although this resolution was not in force at the time the conflicts began, the Escazú Agreement—approved by Law 27.566 (published in the Official Gazette on October 19, 2020)—is also applicable to this matter. The Escazú Agreement is of great significance, as its objective is to guarantee the full and effective implementation, in Latin America and the Caribbean, of the rights of access to environmental information, public participation in environmental decision-making processes, and access to justice in environmental matters. The Agreement also provides for the creation and strengthening of capacities and cooperation, thereby contributing to the protection of the right of every person, and of present and future generations, to live in a healthy environment and to sustainable development.

## 5. Comunidad Aborígen de Santuario de Tres Pozos y otras v. Province of Jujuy, Province of Salta, and the National State

**Country:** Argentina | **Body:** Supreme Court of Argentina | **Date:** March 28, 2023

- **Keywords:** Indigenous rights, environmental justice, lithium, borate, water, prior consultation, Salinas Grandes, impact assessment, hydrological basins
- **ILO Convention 169**

**Background:** Indigenous communities of the Santuario de Tres Pozos area and others, along with Fundación Ambiente y Recursos Naturales (FARN), filed an environmental amparo action against the Provinces of Jujuy and Salta, and the National State. They sought: (a) suspension of all administrative acts authorizing lithium and borate exploration and extraction in the Salinas Grandes basin; (b) implementation of integrated management of the basin; (c) baseline environmental studies and cumulative environmental impact assessments; and (d) a halt to all ongoing mining permits until a



definitive court ruling. They also requested the formation of an independent committee of experts, including Indigenous representatives, to study the hydrology, biodiversity, and sociocultural aspects of the Salinas Grandes-Guayatayoc basin.

The plaintiffs argued that the current authorizations for lithium mining lacked proper environmental assessment, baseline data, and consideration of cumulative impacts, threatening the rights to a healthy environment, water, life, and Indigenous self-determination. They highlighted the international and constitutional obligations for environmental protection and Indigenous consultation. They also pointed out the shared hydrological nature of the basin between the two provinces, requiring coordinated management.

The Supreme Court did not yet decide on the merits but required the national and provincial authorities to submit detailed information on all mining permits and environmental authorizations for lithium and borate in the region. The Court emphasized the constitutional and international standards of environmental protection, the need for eco-systemic and basin-wide approaches, and the obligation to prioritize environmental and water protection when in doubt (*in dubio pro natura, in dubio pro aqua*).<sup>49</sup>

The Court also reaffirmed its role in guaranteeing effective protection of fundamental rights and ordered urgent measures to gather all necessary information.



**We know very well the wealth we have; we do not want their so-called progress. That is why we are organizing to preserve our territory from mining companies.**



MILAGROS ROMERO, FROM THE TORO YACO COMMUNITY

## 6. CAO Dispute - Oyu Tolgoi 01 & 02 / Southern Gobi (Mongolia)

**Country:** Mongolia | **Body:** Office of the Compliance Advisor Ombudsman (CAO) for IFC & MIGA, World Bank Group | **Date:** May 2020

- **Issues:** Water scarcity & Undai River diversion; pastureland impacts; 2004 resettlement & 2011 economic displacement compensation; transparency of compensation; participatory monitoring; joint fact-finding; multi-party governance (Tripartite Council); scholarship/livelihood programs; monitoring & case closure.
- **UNDRIP (relevant):** Arts. 18, 19 (participation/consultation); 25, 26, 29 (lands, resources, environment); 32 (development & consent), among others.

**Summary:** This report concludes CAO’s multi-year dispute resolution process concerning two complaints about the IFC/MIGA-supported Oyu Tolgoi copper-gold project in Mongolia’s Southern Gobi (IFC #29007; MIGA #7041). The project (total investment ~US\$12 billion) is operated by Oyu Tolgoi LLC, owned 66% by Turquoise Hill Resources and 34% by Erdenes Oyu Tolgoi (Gov. of Mongolia), with Rio Tinto as TRQ’s

<sup>49</sup> “8) That judges must consider the principle *in dubio pro natura*, which establishes that in case of doubt, all proceedings before courts, administrative bodies, and other decision-makers must be resolved in a way that favors the protection and conservation of the environment, giving preference to the least harmful alternatives, and actions shall not be undertaken when their potential adverse effects are disproportionate or excessive in relation to the benefits derived from them (Fallos: 342:1203). Especially the principle *in dubio pro aqua*, consistent with the principle *in dubio pro natura*, which in case of uncertainty, establishes...” (UICN. Eighth World Water Forum. Brasilia, Declaration of Judges on Water Justice. Brasilia, March 21, 2018).

largest shareholder. As part of a US\$4.4 billion debt package, IFC committed an A-loan of up to US\$400 million and a B-loan of up to US\$820.625 million; MIGA provided up to US\$1 billion in guarantees.

Two complaints were filed by herder households near the site: in October 2012, 37 herders alleged that land and water use affected their nomadic livelihoods and that the 2004 resettlement and 2011 economic-displacement compensation were inadequate; in February 2013, seven herders challenged the Undai River diversion, fearing loss of springs, degraded pasture, reduced forest water supply, and cultural impacts on a sacred river. CAO deemed both complaints eligible and, after assessments in late-2012/early-2013, all parties agreed to voluntary CAO-facilitated mediation. Herders elected an Elected Herders Team (EHT) to represent them; CAO provided negotiation and communication training to both sides.

**Process & governance.** Early talks produced information sharing, site access, and a commitment to Joint Fact-Finding (JFF) via an Independent Expert Panel on water sources and knock-on effects (pasture, access, quality). In June 2015, the parties formed a formal Tripartite Council (TPC) with equal representation from herders, the company, and the Khanbogd Soum Government to exchange information, recommend actions, and oversee implementation. A second JFF (July 2015–Jan 2017)—by a multi-disciplinary team (JSL Consulting, University of Oxford, and Mongolian Academy of Sciences)—assessed pasture/water access and quality, household livelihoods, and the adequacy of the 2004/2011 compensation processes; final recommendations were accepted, and an implementation plan was developed.

**Agreements (May 2017) & headline outcomes.** The parties reached two final agreements addressing the Undai River diversion and resettlement/compensation concerns. Over 60 action items followed, including:

- Acknowledgment by the company of inadequacies in the 2004 resettlement, with a commitment to resolve outstanding household issues through the TPC.
- Establishment of a Compensation Claims Committee (within the TPC) using agreed criteria to review claims from the 2004 and 2011 processes.
- Cancellation of confidentiality clauses in the 2004/2011 compensation agreements, enabling claimants to disclose information if they choose.
- Collective compensation and community programs (sustainable livelihood projects; SME capacity-building; school tuition coverage for herders' children; health services).
- Opportunities for Undai-adjacent herders (scholarships, vocational training, paid monitoring jobs).
- Structural measures on pastureland & water (a Soum-wide pasture management plan, new deep wells per geophysical studies, and improved participatory monitoring jointly undertaken by herders and the company).

**Implementation & monitoring.** After the May 2017 agreements, CAO set 12 months of monitoring. The TPC met regularly; after the first year, members reported >70% of actions completed or underway. By December 2018, results included: 20 university scholarships for herder households (MNT 79,583,485 ≈ US\$32,187); 10 wells fitted with solar pumps (MNT 150 million ≈ US\$60,668); 174 claims reviewed, with 114 eligible and MNT 2,363,600,000 ≈ US\$955,000 paid; and seven livelihood projects in development (e.g., herder market/supply chain for livestock raw materials, fodder planting, a permanent slaughter line, well and livestock-shelter maintenance teams). A local NGO—“Munkh Nagoon Galba” (Eternal Green Galba)—was created to carry out environmental monitoring.



**Evaluation & disclosure.** In October 2017, independent experts were contracted to evaluate the outcomes of the 2011 economic-displacement programs relative to livelihood restoration; findings were discussed in the TPC and publicly reflected in OT's September 2018 Community Resettlement Plan. The TPC agreed to quarterly internal monitoring and at least annual independent evaluations of outcomes. Parties highlighted that the TPC had evolved into a trusted, rules-based forum for open, constructive dialogue.

**Case closure.** In March 2019, CAO and the TPC held a formal case-closure meeting in Khanbogd and a knowledge-sharing event in Ulaanbaatar; the TPC also released a public video about the mediation experience. The report distills insights: the value of local mediators (including capacity-building of a Mongolian mediator), the effectiveness of JFF to resolve factual disputes, the critical role of local government (via the TPC), and good practice on participatory environmental monitoring in arid, variable ecosystems. IFC notes complementary lessons (e.g., ex-post livelihood-restoration audits, proactive stakeholder meetings, and integrated social-biodiversity-water approaches such as an ecosystem services working group).

CAO closed its involvement after monitoring to the parties' satisfaction. The TPC continues implementing multi-year, community-driven commitments (e.g., herders' market and supply chain; slaughter line; health services; youth and life-skills programs; well repair teams; communications infrastructure; artificial lakes/ponds; comprehensive pasture-and-water studies leading to a Soum-level management plan; livestock health and value-added processing). IFC and MIGA committed to continue supervising outstanding items through their regular project oversight.

# DEPLOYMENT PHASE

## WIND ENERGY

### 1. Roan and Storheia Wind Turbines [HR-2021-1975-S]

**Country:** Norway | **Body:** Supreme Court of Norway

**Date:** October 11, 2021 (publicized November 2021)

- **Issues:** Indigenous cultural rights, renewable energy development, reindeer grazing, Free, Prior and Informed Consent (FPIC), environmental impact
- **ICCPR:** Art. 27 **UNDRIP:** Arts. 19, 26, 32

**Summary:** The Court held that government-issued licenses for two wind farms on the Fosen peninsula, including the 80-turbine Storheia project, violated the Sámi people's right to enjoy their culture under ICCPR art. 27. The wind parks made traditional reindeer herding in the affected areas impossible, rendering the concessions invalid. The Court rejected monetary compensation as insufficient to remedy the violation, emphasizing that Sámi reindeer husbandry is integral to cultural survival. The ruling sets a precedent that similar concessions may be void if they encroach on Sámi grazing lands, and leaves open the possibility of decommissioning the wind farms.

## DECISION

### On a potential violation of Article 27 ICCPR

- (98) Article 27 of the UN Convention on Civil and Political Rights (ICCPR) reads: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."
- (99) Article 27 ICCPR must be viewed in context with Article 108 of the Constitution, which imposes a duty on the state authorities "to create conditions enabling the Sami people to preserve and develop its language, culture and way of life". The provision is based on Article 27 ICCPR and may constitute an independent legal basis where other sources of law give no answer, see HR-2018-872-A paragraph 39.
- (100) Pursuant to section 2 (3) of the Human Rights Act, ICCPR applies as Norwegian law and thus sets limits on administrative discretion. In the event of a conflict, provisions in the Convention take precedence over any other legislative provisions, see section 3. This implies that the licence is void if Article 27 ICCPR is violated.
- (101) It is clear that the Sami people is a minority within the meaning of Article 27, and that reindeer husbandry is a form of protected cultural practice.
- (102) When interpreting Article 27, statements from the UN Human Rights Committee will carry significant weight, see the Supreme Court's grand chamber judgment in Rt-2008-1764 paragraph 81.



### **Individual or collective protection – who may assert a violation?**

- (103) The State has principally contended that Article 27 ICCPR only protects individuals, not legal entities or groups of individuals. On this basis, the State has advocated that the protection cannot be invoked by the siidas. Two issues rise in this regard, and I will first take a closer look at who is protected under the provision.
- (104) According to Article 27, the protection applies to “persons belonging to such minorities”. This wording in the first part of the provision indicates that the protection is enjoyed by the individuals in a minority group. However, the provision further states that the individuals have the right to enjoy their own culture, etc. “in community with the other members of their group”. This element was added to clarify the collective nature of the provision, see Nowak’s ICCPR Commentary, 3rd edition, 2019 page 799–800.
- (105) In line with this, the Supreme Court assumes in HR-2017-2428-A *Reindeer cull I* paragraph 55 that Article 27 protects the individual but adds that the protection has “certain collective features”. Furthermore, the UN Human Rights Committee does not always distinguish clearly between the protection of individuals in a minority and the group as such. Relevant here is *Lubicon Lake Band vs. Canada* (March 26, 1990, ICCPR-1984-167). The author is initially partially presented as “Chief Bernard Ominayak and the Lubicon Lake Band” and partially as “*Chief Bernard Ominayak of the Lubicon Lake Band*” (italics added). In paragraph 33, the Committee found that the interference threatened “the way of life and culture of the Lubicon Lake Band”.
- (106) Against this background, I find that Article 27 at the outset protects individuals in a minority. However, the minorities’ culture is practiced in community, which gives the protection a collective nature. When it comes to reindeer husbandry, this is expressed by the fact that the Sami pasture rights are collective and conferred on each individual siida, see HR-2019-2395- A *Reindeer cull II* paragraph 51 with further reference to Rt-2000-1578 *Seiland*. A siida is a group of people practicing reindeer husbandry jointly in specific districts, see section 51 of the *Reindeer Husbandry Act*. Against this background, it is difficult to draw a sharp distinction between the individuals and the group.

### **The term “denied” – what is the threshold for violation?**

- (111) Although Article 27 ICCPR contains the term “denied”, it is clear that also interference that does not constitute a total denial may violate the right to cultural enjoyment. Already in the Human Rights Committee’s general comment No. 23 (1994) paragraph 6.1, it was specified that a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. [...]
- (113) There are four rulings from the Human Rights Committee that clarify in particular what it takes before the right to cultural enjoyment under Article 27 is violated – *Ilmari Länsman and Others v. Finland* (October 26, 1994, ICCPR-1992-511), *Jouni Länsman and Others v. Finland I* (October 30, 1996, ICCPR-1995-671), *Jouni Länsman and Others v. Finland II* (March 17, 2005, ICCPR-2001-1023) and *Ángela Poma Poma v. Peru* (March 27, 2009, ICCPR2006-1457). In HR-2017-2247-A *Reinøya*, these rulings are accounted for in more detail. This judgment concerned, among other things, the question whether a road construction on Reinøya north of Tromsø was a violation of Article 27 ICCPR because of the consequences for Sami reindeer husbandry. Justice Kallerud states the following regarding the four rulings in paragraph 124 of the judgment:

(124) In the case *Ilmari Länsman and others v. Finland* from [26 October] 1994, the Committee established that “... measures whose impact amount to a denial of the right” would not be compatible with the Covenant. However, measures that had “... a certain limited impact on the way of life of persons belonging to a minority ... [would not] necessarily amount to a denial of the right under Article 27”, see paragraph 9.4. Then, in paragraph 9.5, the Committee expressed that the question was whether the relevant quarry had such an impact in the area “... that it [did] effectively deny to the authors the right to enjoy their cultural rights in that region”. It is then established that no measures, either implemented or planned, were of such a character that Article 27 had been violated.

(125) The case *Jouni E. Länsman and others v. Finland* from [October 30] 1996 confirms the line that was drawn in paragraph 9.4 in the case from 1994, see paragraph 10.3. The question there was whether the logging of trees that had already taken place, together with the logging that was planned was, “... of such proportions as to deny the authors the right to enjoy their culture in that area”, see paragraph 10.4. In the individual assessment in paragraph 10.6, the Committee established that the logging in the area resulted in “... additional work and extra expenses ....” for the Sami, but that it “... does not appear to threaten the survival of reindeer husbandry”.

(126) In *Jouni Länsman and others v. Finland* from [March 17] 2005, the subject was once again the consequences of logging of trees in Sami areas. The Committee stressed in paragraph 10.2 that one had to consider “... the effects of past, present and planned future logging...”. As in the earlier rulings, the Committee pointed at the fact that the low profitability of reindeer husbandry was due to other circumstances than the measure, see paragraph 10.3. Finally, the Committee concluded in this paragraph that the consequences of the logging “... have not been shown to be serious enough as to amount to a denial of the authors’ right to enjoy their own culture in community with other members of their group under article 27 of the Covenant”.

(127) In a ruling from [March 27] 2009 – *Ángela Poma Poma v. Peru* – the Committee formulated the core issue as follows in paragraph 7.5: “... the question is whether the consequences ... are such as to have a substantive negative impact on the author’s enjoyment of her right to enjoy the cultural life of the community to which she belongs”. The Committee concluded that Article 27 had been violated. It was held among other things that because of the measure, thousands of head of livestock were dead and that the complainant had been forced to abandon her land.”

(114) Against this background, Justice Kallerud concludes as follows in paragraph 128 in the *Reinøya* judgment: “Overall, the case law of the Human Rights Committee shows that it takes a lot for a measure to become so serious that it constitutes a violation of Article 27.”

(118) The statement in *Ángela Poma Poma v. Peru* (ICCPR-2006-1457) paragraph 7.5, that the question is whether the measure has “a substantive negative impact” on the author’s enjoyment of her culture, has been particularly important in the case at hand. This is the most recent statement regarding the threshold and therefore, in my view, essential to the interpretation. The term “substantive” in this context means “considerable” or “significant”, which suggests that the threshold is high.

(119) Against this background, my conclusion is that there will be a violation of the rights in Article 27 ICCPR if the interference has a substantive, negative impact on the possibility of cultural enjoyment. The measure in itself may be so intrusive that



it amounts to a violation. However, the effect does not need to be as serious as in *Ángela Poma Poma v. Peru*, where thousands of livestock animals were dead as a result of the measure, and the author had been forced to leave her area. The measure must also be seen in context with other measures, both previous and planned. It is the different activities taken together that may constitute a violation, see *Jouni Länsman and Others v. Finland I* (ICCPR-1995-671) paragraph 10.7.

### **The significance of consultation**

- (120) Although the consequences of the measure largely dictate whether the rights in Article 27 have been violated, it is also essential whether the minority has been consulted in the process. This is set out in several decisions from the UN Human Rights Committee. Both in *Ilmari Länsman and Others v. Finland* (ICCPR-1992-511) paragraph 9.6 and *Jouni Länsman and Others v. Finland I* (ICCPR-1995-671) paragraph 10.5, this aspect is considered in the individual assessment. The Committee has a more general approach in *Ángela Poma Poma v. Peru* (ICCPR-2006-1457) paragraph 7.6. Here, it is set out that the question of violation “depends on whether the members of the community in question have had the opportunity to participate in the decision-making process in relation to these measures...”. The Supreme Court has stressed the importance of consultation in HR-2017-2247-A *Reinøya* paragraph 121 and in HR-2017-2428-A *Reindeer cull I* paragraph 72.
- (121) It appears from the Human Rights Committee’s decisions and the mentioned Supreme Court judgments that whether and to which extent the minority has been consulted cannot be decisive. This is rather an aspect to be included in the assessment of whether the right to cultural enjoyment has been violated, see NOU 2008: 5 *The right to fishing in the sea off Finnmark* page 272. If the consequences of the interference are sufficiently serious, consultation does not prevent violation. On the other hand, it is not an absolute requirement under the Convention that the minority’s participation has contributed to the decision, although that, too, may be essential in the overall assessment.

### **Margin of appreciation and proportionality assessment**

- (124) At the outset, the wording of Article 27 does not allow the States to strike a balance between the rights of Indigenous Peoples and other legitimate purposes. The rights appear to be absolute, however so that they can be derogated from in time of public emergency, see Article 4. On this point, Article 27 differs from a number of other rights provisions in ICCPR, including Article 12 on the right to freedom of movement, Article 18 on freedom of thought and religion, Article 19 on freedom of expression and Article 22 on the freedom of association. These provisions expressly allow the States to limit the application on certain conditions, and a proportionality assessment is recommended. Nor is there anything in the wording of Article 27 that suggests that the States have a margin of appreciation.
- (125) The Human Rights Committee established in *Ilmari Länsman and Others v. Finland* (ICCPR1992-511) that the States do not have a margin of appreciation in their application of Article 27. The Committee states the following in paragraph 9.4: “A State may understandably wish to encourage development or allow economic activity by enterprises. The scope of its freedom to do so is not to be assessed by reference to a margin of appreciation, but by reference to the obligations it has undertaken in article 27.”

- (126) Furthermore, in *Ángela Poma Poma v. Peru* (ICCPR-2006-1457) paragraph 7.4, the Committee specifies that economic development may not undermine the rights protected by Article 27.
- (128) The Committee follows this up in the summary of the state of the law on page 210, emphasizing that the rights conferred by Article 27 appear “absolute”. [...]
- (129) Against this background, the clear starting point must be that no margin of appreciation is granted under Article 27, and that it does not allow for a proportionality assessment balancing other interests of society against the minority interests. This is a natural consequence of the reason for the provision, as the protection of the minority population would be ineffective, if the majority population were to be able to limit it based on its legitimate needs.
- (130) However, in situations where the rights in Article 27 conflict with other rights in the Convention, the at the outset conflicting rights must be balanced against each other and harmonized. A possible outcome of this is that Article 27 must be interpreted strictly, see also Norwegian Official Report 2007: 13 A The new Sami law, page 195. The Human Rights Committee further allows for a balancing in cases where the interests of an individual in a minority group stand against the interests of the group of as a whole, see *Ivan Kitok v. Sweden* (27 July 1988, ICCPR-1985-197) paragraph 9.8.
- (131) As I see it, the same balancing of interests may be necessary if the rights in Article 27 conflict with other basic rights. In a given case, the right to a good and healthy environment may, in my view, be such a conflicting basic right. In other words, the consideration for “the green shift” may be relevant. However, as I will return to, the status of this case suggests that further elaboration on this is not needed.

### **The significance of continued profitability**

- (132) In some decisions, the Human Rights Committee has emphasized that the members of the minority must still be able to operate with a profit. In *Ilmari Länsman and Others v. Finland* (ICCPR-1992-511) paragraph 9.8, the Committee states that other economic activities in the area must be exercised so that the appellants “continue to benefit from reindeer husbandry”. Correspondingly, the Committee stresses in *Ángela Poma Poma v. Peru* (ICCPR-2006-1457) paragraph 7.6 that the admissibility of measures depends on whether the members of the community in question “will continue to benefit from their traditional economy”. Against this background, the siidas contend that it amounts to a violation if the interference prevents the minority from benefiting from its traditional trade.
- (134) In my view, the starting point must be that Article 27 aims at protecting the right to cultural enjoyment. As mentioned, reindeer husbandry is a form of protected cultural practice while at the same time a way of making a living. The economy of the trade is therefore relevant in a discussion of a possible violation. The relevance must be assessed specifically in each individual case and must depend, among other things, on how the economy affects the cultural practice. In my view, the rights in Article 27 are in any case violated if a reduction of the pasture deprives the herders of the possibility to carry on a practice that may naturally be characterized as a trade.



## **The individual assessment of whether the rights in Article 27 ICCPR have been violated**

- (135) The question whether the reindeer herders' rights under Article 27 have been violated, depends on the Court of Appeal's findings of fact and the interpretation of the provision I have now presented. I will first consider whether Storheia and Roan windfarms have a substantive negative impact on the Sami people's possibility to enjoy their own culture.
- (136) As mentioned, the two windfarms are part of the largest onshore wind power project in Europe. Both were Norway's largest upon completion, and the planning areas cover a total of well above 60 square kilometres. The development has changed the character of the area completely. I line with the Court of Appeal's findings of fact; I take it that the effect of the measures is that the siidas' winter pastures are lost in important areas connected to reindeer husbandry – and thus to the reindeer herders' culture – in late winter. The development will ultimately eradicate the grazing resources to such an extent that it cannot be fully compensated by the use of alternative pastures. As a result, the reindeer numbers will most likely have to be dramatically reduced.
- (137) The reindeer herders on Fosen are already operating with small margins. I have previously quoted from the Court of Appeal's assessment of the development's consequences for the trade's economy. The Court of Appeal assumes that a dramatic reduction of the reindeer numbers will entail that the herders may no longer benefit from the trade, or at least that the profit will no longer be proportionate to the efforts. The Supreme Court has been presented with comparative figures in the reindeer herders' trading statements supporting the Court of Appeal's assessments on this point. Against this background, the interference will ultimately constitute a serious threat against the trade and thus against the cultural enjoyment.
- (141) It is also a factor in the assessment that the South-Sami culture is particularly vulnerable. Traditional reindeer husbandry is what carries this culture and the South-Sami language. The interference does not imply a total denial of the reindeer herders' right to enjoy their own culture on Fosen. My view is nonetheless after an overall assessment that the wind power development will have a substantive negative effect on their possibility to enjoy this culture.
- (142) The wind power development is a result of thorough investigations and assessments. Along the process, there has been a close dialogue with the herders, and certain adaptations and remedy measures have been implemented in accordance with their input. These factors have been important in the overall assessment, but they cannot in themselves be decisive.
- (143) I do agree with Fosen Vind that "the green shift" and increased production of renewable energy are crucial considerations. But as mentioned, Article 27 ICCPR does not allow for a balancing of interests. As also mentioned, this may be different in the event of conflict between different basic rights. The right to a good and healthy environment may be relevant in such a context. However, no collision between basic rights has been demonstrated in the case at hand. I point in particular to the fact that the Norwegian Water Resources and Energy Directorate considered a number of wind power projects on Fosen and in Namdal in 2009. Despite the constant highlighting of the negative consequences for reindeer husbandry, the choice fell on Roan and Storheia, among others. Fosen Vind has not disputed that the progress of the planning of each windfarm was a key factor in the selection. As the case has been presented to the Supreme Court, I must assume that "the green

shift” could also have been taken into account by choosing other – and for the reindeer herders less intrusive – development alternatives. Then, the consideration of the environment cannot be significant when assessing whether Article 27 has been violated in this case.

(144) Against this background, I find that the wind power development will have a substantive negative effect on the reindeer herders’ possibility to enjoy their own culture on Fosen. Without satisfactory remedy measures, the interference will amount to a violation of Article 27 ICCPR, which will render the license decision invalid. I will now turn to assessing whether the decision nonetheless may be upheld if compensation is awarded for the winter feeding of the reindeer, as the Court of Appeal has done.

### **Compensation for winter feeding – remedy measures and duty to adapt**

(147) To this, I note that remedy measures by the authorities or the expropriator to minimize the disadvantages of an interference, must as a starting point be taken into account when assessing whether Article 27 has been violated. Depending on the circumstances, such measures may keep the interference below the threshold for violation.

(148) Furthermore, the reindeer herders have a duty under general expropriation-law principles to adjust their operation, provided that the very trade base remains intact, see the Supreme Court ruling in Rt-2000-1578 Seiland page 1585. To which extent the possibility of adaptation is also relevant in the assessment of whether Article 27 has been violated, has not been addressed. However, I will leave that question here, as I cannot at any rate see how the license decision may be upheld with the reasoning provided by the Court of Appeal.

(149) Here, I point out first that winter feeding according to the Court of Appeal’s model deviates considerably from traditional, nomadic reindeer husbandry. According to information provided, such feeding, where half the herd for around 90 days each winter must stay within a relatively small fenced-in area, has never been tried out in Norway. Nor has information been provided on the effect of such a model, or on animal welfare, based on experience from other countries. Also, the information provided to the Supreme Court demonstrates uncertainty as to whether such a system is compatible with reindeer herders’ right to enjoy their own culture under Article 27 ICCPR. This issue has not been given a broad and thorough assessment, and general reindeer husbandry interests have not been heard.

(151) Against this background, the Court of Appeal’s solution with compensation for winter feeding is burdened with so much uncertainty that it cannot determine whether or not Article 27 ICCPR has been violated, even if a duty to adapt should be relevant also under Article 27 ICCPR. My conclusion is therefore that the licence decision violates the reindeer herders’ rights under the provision.

**They put wind farms in the middle of nowhere, [where they claim] ‘there is nothing’, but there is reindeer husbandry. It is the workplace of people.**

**JOVNA NIELSEN EIRA, SAMI**

## 2. Mohamud Iltarakwa Kochale & Others v. Lake Turkana Wind Power Ltd & Others

Meru Environment and Land Court, ELC No. 163 of 2014

**Country:** Kenya | **Body:** Environment and Land Court (ELC), High Court of Kenya

**Date:** April 25, 2018

- **Issues:** Indigenous land rights, ancestral and cultural land, large-scale energy project, FPIC, public participation, procedural fairness, displacement
- **Constitution of Kenya:** Arts. 40, 63, 69, 71. **Trust Land Act.** **UNDRIP:** Arts. 10, 19, 25, 26. **ICCPR:** Art. 27. **ICESCR:** Art. 15 **ILO Convention 169.** **IFC Performance Standards**

**Summary:** This case concerned a representative suit filed by six members of Indigenous pastoralist communities (Rendille, Samburu, El Molo, and Turkana) residing in Laisamis Constituency and Karare Ward in Marsabit County. The plaintiffs challenged the acquisition and use of approximately 150,000 acres of land (known as LR Nos. 28031/1 and 28031/2) by Lake Turkana Wind Power Ltd (LTWP) for a large-scale wind energy project. They alleged that the land is their ancestral territory and is essential to their pastoralist livelihoods, cultural identity, and access to Lake Turkana. They sought the revocation of the title, nullification of the project, and declarations that their constitutional and international rights had been violated.

The plaintiffs argued that the land was set apart in violation of the former Constitution and the Trust Land Act, specifically pointing to the absence of a divisional land board, lack of notices, failure to carry out proper public participation, and the absence of compensation. They asserted that their Free, Prior, and Informed Consent had not been obtained, in breach of both Kenyan law and international standards such as ILO Convention No. 169 and the IFC Performance Standards.

Lake Turkana Wind Power Ltd denied the plaintiffs' claims and asserted that the plaintiffs were not residents of the affected area. The company maintained that it had lawfully acquired a 33-year lease through a legitimate process involving various governmental bodies, and that the land remained accessible to communities. The project was framed as a strategic development, supplying 17% of Kenya's national electricity needs, with wide socioeconomic benefits.

The Marsabit County Government and national authorities also defended the land alienation process, arguing that it complied with applicable laws and procedures, and that public participation had occurred. Interested parties from within the project area expressed strong support for the project and denied that the land was of cultural or ancestral significance to the plaintiffs.

The plaintiffs presented testimony and evidence to demonstrate that the project interfered with key grazing routes, access to cultural sites (including the Galgulame ceremonies), and threatened their nomadic way of life. They contended that privatization of communal land without their consent created risks of exclusion and future trespass claims.

While the full written judgment is lengthy, the Court ultimately found that there were serious procedural irregularities in how the land was set apart and leased to the company. It held that statutory procedures under the Trust Land Act—particularly those relating to public consultation and the role of the divisional land board—had not been properly followed. The Court emphasized that “the benefits of a project, no matter how significant, cannot override constitutional and statutory requirements.”

Accordingly, the Court declared the title held by LTWP invalid and ordered it to be revoked. It held that the land acquisition process had failed to comply with both domestic legal requirements and the constitutional rights of the communities, especially those related to ancestral land, cultural practices, and participation in decision-making.

**First**, the Environment and Land Court held that the Plaintiffs had sufficient locus standi to bring the suit, both individually and in a representative capacity on behalf of the communities residing in Marsabit County. The Court cited Article 258 of the Constitution of Kenya, which grants standing to individuals acting in their own interest, on behalf of others, or in the public interest, and reaffirmed that ancestral and customary land rights are protected under Articles 40 and 63 of the Constitution, as well as Section 12 of the Trust Land Act (paras. 96–101). It found that the Plaintiffs, as members of the Rendille and other pastoralist communities, had shown sufficient historical, cultural, and geographical connection to the suit land—including occupation, cultural use, and grazing practices—to claim rights under customary law. The Court rejected the defendants’ objections that the Plaintiffs came from outside the immediate project area, noting that nomadic communities often span wide territories and that trust land rights may be asserted individually or collectively. It concluded: “It mattered not if a Rendille residing in Serima or Loiyangalani or any of the far-flung corners of the County filed suit to advocate for the ancestral rights and interests in the suit land” (paras. 104–105) and held that the Plaintiffs met the threshold for locus standi under the Constitution (para. 106).

**Second**, the Environment and Land Court held that the setting apart of the 150,000-acre suit land was unlawful, finding substantial violations of the constitutional and statutory procedures. The Court emphasized that the legally mandated process—including notice to and engagement of the Divisional Land Board, public hearings, and gazettelement—was not followed (paras. 107–109). While acknowledging that public consultations had occurred, the Court distinguished these from the structured public participation before a Divisional Board required by law (paras. 116–117). Although the project had socioeconomic benefits, the Court also concluded that no public interest justification could excuse the violation of due process and reiterated that legal compliance is both necessary and achievable alongside development goals (paras. 120–122). Therefore, it determined that the setting apart process was procedurally and legally invalid.

**Third**, the Court ruled on a potential violation of the plaintiffs’ environmental or cultural rights. As the Plaintiffs neither challenged the validity of the NEMA license nor established concrete harm, the Court found that “nothing was placed before the court by the Plaintiffs to challenge the said license and or demonstrate the nature and/or extent of the violation” (para. 126). On cultural rights, the Court acknowledged the constitutional status of culture under Article 11(1) and heard evidence that the Gulgalame ceremony, held every 14 years, was central to the Rendille community. However, it found that “other than the apprehension by the Plaintiffs... no evidence was placed before the court to support real or threatened violation” (para. 128). Citing expert testimony from the National Museums of Kenya, the Court further noted that the project avoided cultural and archaeological sites, concluding that any impact was minimal. The Court emphasized that even where rights are asserted under the Constitution, generalized fears are insufficient, and the burden lies on the claimant to prove actual or threatened infringement (para. 130).

**Fourth**, with regards to compensation, the Court found no evidence that compensation was ever paid, noting that relocation of residents to avoid dust and noise pollution “does not constitute compensation for setting apart of a large portion of trust land” (para. 131). However, the Court declined to award compensation, reasoning that



it was neither specifically pleaded nor supported by valuation or expert evidence, and would thus be premature and procedurally improper, particularly as the matter could still be handled by competent organs tasked with compensation under law (para. 134).

**Fifth,** The Court concluded that the titles issued to the 1st Defendant were illegal and must be cancelled, as the process of setting apart the trust land was fatally flawed on multiple legal grounds, including the absence of the Divisional Board, non-compliance with Section 13 of the Trust Land Act, and failure to assess or pay compensation (para. 135). While acknowledging the project's public utility and scale, the Court stressed that "compliance with the law is the highest expression of public interest" and that allowing legal shortcuts in such large-scale land conversions "would have adverse effects on the rule of law and investor confidence in Kenya" (para. 147). Thus, it answered the issue affirmatively and ordered the cancellation of the titles (para. 148).

### Unión Hidalgo v. EDF (Gunaa Sicarú Wind Park)

**Countries:** Mexico/France | **Body:** French Civil Courts (lawsuit under the French Duty of Vigilance Law)

**Date:** Lawsuit filed October 2020, ongoing as of November 2020

- **Issues:** Indigenous land rights, Free, Prior and Informed Consent (FPIC), Corporate human rights due diligence, Environmental impacts of renewable energy projects, Threats and violence against human rights defenders
- **French Duty of Vigilance Law** (Loi de vigilance, 2017). **ILO Convention 169:** right to consultation/FPIC. **UN Guiding Principles on Business and Human Rights (UNGPs).** **OECD Guidelines for Multinational Enterprises.** **Mexican Constitution** and communal land law. **UN Declaration on the Rights of Indigenous Peoples (UNDRIP)**

**Summary:** This case concerns the rights of the Indigenous Zapotec community of Unión Hidalgo in Oaxaca, Mexico, regarding the construction of the Gunaa Sicarú wind park by Électricité de France (EDF) and its Mexican subsidiaries. The principal legal issues raised are the violation of the community's right to Free, Prior and Informed Consent (FPIC) under international and domestic law, the adequacy of EDF's human rights due diligence as required by the 2017 French Duty of Vigilance Law (Loi de vigilance), and the resulting harms including internal community division and violence against land and human rights defenders.

Following Mexico's 2013 energy sector reforms, EDF began planning the Gunaa Sicarú wind park in 2015, its fourth such project in the Isthmus of Tehuantepec region. From the outset, EDF's local subsidiaries entered negotiations and contracts with a small number of self-identified "landholders" rather than with the communal assemblies which, under Mexican law, hold legal authority over communal lands. The project proceeded without meaningful consultation or the collective approval of the Zapotec community, contravening both Mexican law and the standards of international human rights instruments, including ILO Convention 169.

In October 2020, representatives of Unión Hidalgo, supported by ProDESC and the European Center for Constitutional and Human Rights (ECCHR), initiated civil proceedings in France. The claimants allege that EDF violated its legal obligations under the French Duty of Vigilance Law by failing to establish and implement adequate vigilance measures to prevent human rights abuses and adverse environmental impacts associated with the wind park project. The plaintiffs further assert that EDF's vigilance plan was non-specific, fragmented, and failed to identify or mitigate foreseeable risks of

harm, particularly with respect to the community's right to effective consultation and the escalation of social conflict.

The claimants invoke the French Duty of Vigilance Law, which requires large French corporations to identify, prevent, and mitigate severe risks to human rights and the environment, not only in their direct operations but also across subsidiaries and supply chains. The lawsuit alleges that EDF's conduct resulted in a violation of the Indigenous community's right to FPIC, leading to social division, intimidation, and violence against defenders. It is further argued that EDF's failures cannot be excused by reference to compliance with Mexican law or by deferring responsibility to local authorities, as the duty of vigilance imposes an independent, proactive obligation upon French parent companies.

The plaintiffs first sought recourse in Mexican courts and with the French National Contact Point for the OECD Guidelines, before bringing their claim to French civil courts. In November 2021, the Paris Civil Court rejected a request for interim suspension of the wind park project on procedural grounds, while confirming its jurisdiction over claims arising under the Duty of Vigilance Law. In 2022, the claimants appealed this procedural denial. In June 2024, the Paris Court of Appeal ruled that the legal action against EDF is admissible, thereby affirming the competence of French civil courts to hear claims under the duty of vigilance framework.

The claimants argue that EDF's direct negotiations with select individuals, rather than with the duly constituted community assembly, violated communal property rights and the essential requirements of FPIC. The plaintiffs allege that EDF's vigilance plan failed to provide for meaningful risk identification and mitigation, and that the company's actions fostered internal conflict, stigmatization, and violence. The plaintiffs seek an order compelling EDF to comply with its duty of vigilance by suspending the project until full FPIC has been secured, and for compensation for harms already suffered.

EDF, in response, contends that it has complied with all applicable Mexican laws, that its 2018 vigilance plan satisfies the requirements of the French statute, and that it has collaborated fully with relevant Mexican authorities. EDF further asserts that it maintains a relationship of trust with local communities and has taken steps to disclose and mitigate risks.

In June 2024, the Paris Court of Appeal affirmed the admissibility of the lawsuit under the duty of vigilance law, and the case remains pending before the French civil courts.

**United States v. Osage Wind, LLC, 2024 U.S. Dist. LEXIS 228482**

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**Country:** United States of America | **Body:** United States District Court for the Northern District of Oklahoma

**Date:** December 18, 2024

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- **Issues:** Indigenous mineral rights, renewable energy development, unauthorized mining, trespass, continuing trespass, injunctive relief, federal trust responsibility.

**Summary:** In 2014, the United States, acting on behalf of the Osage Nation, filed suit against Osage Wind, LLC, Enel Kansas, LLC, and Enel Green Power North America, Inc., over the construction of the Osage Wind Farm in Osage County, Oklahoma. The defendants had obtained surface leases covering approximately 8,400 acres and constructed 84 wind turbines. During that process, they engaged in extensive excavation, blasting, crushing, and reuse of limestone, shale, and clay from the Osage Mineral Estate without securing a federally approved mining lease as required under 25 C.F.R. Part 214.



The plaintiffs alleged conversion, trespass, and continuing trespass, asserting that the unauthorized removal and commercial use of minerals deprived the Osage Nation of its exclusive right to control and profit from the estate, while the turbine foundations obstructed lawful oil and gas development. After the district court initially dismissed the claims, the Tenth Circuit reversed, holding that defendants' activities constituted "mining" under federal regulations, and remanded for further proceedings; the Supreme Court denied certiorari.

Following a bench trial on damages and remedies, the court credited plaintiff expert testimony on the volume and value of minerals removed, rejecting defense attempts to narrow the scope of compensable excavation. The court awarded \$242,652.28 for conversion, \$66,780 for trespass, and more than \$3.88 million in combined attorney's fees and costs but denied pre-judgment interest and treble damages. Crucially, the court also ordered injunctive relief requiring removal of all wind towers and related infrastructure by December 1, 2025, at an estimated cost of \$259 million, to abate the continuing trespass.

## DECISION

Defendants maintain the position that they "'honestly believed' that construction of the Osage Wind project did not require a mining lease or permit in reliance on the advice of counsel. [...]

[63] Defendants and their predecessors in the wind farm project were told by officials of the United States and Osage Nation governments on multiple occasions of the need to secure permits and leases, and the governments issued cease-and-desist requests until such authorization was obtained. As early as October 2013, the Osage Minerals Council solicited information from Wind Capital Group and Tradewind "to determine the federal permitting, leasing and other regulatory requirement that could apply to the Osage Wind Project." Defs.' Ex. 18 at 4. The October 2013 letter referenced that "[i]n addition to oil and gas, the Osage Mineral Estate consists of solid materials, including limestone, dolomite, sandstone, sand, gravel, clay, and shale," and that activities within the mineral estate "may be subject to a range of federal regulatory requirements, including the need to secure a federal permit or lease to undertake such activities, pursuant to 25 C.F.R. §§ 411 and 414." *Id.*

[64] Defendants disregarded these governmental mandates and continued with construction. It is apparent that this decision was the product of a desire to maximize financial gains by Defendants' representatives, while recklessly disregarding the risks of infringing upon the mineral rights of the Osage Nation. When asked to explain the decision to disregard the Bureau of Indian Affairs' cease-and-desist instruction, multiple representatives for Defendants indicated that they simply believed that the Bureau of Indian Affairs and Osage Minerals Council, the organizations responsible for administering the Osage Mineral Estate, were wrong to require a permit and needed to be better educated on the topic.

[75] As an initial matter, Defendants argued for the first time that the Court should alter its prior ruling and require only the removal and replacement of the backfill used for support of the wind towers. Defs.' Br. Resp. Feb. 8, 2024 Order at 2-3, 7-10 [Doc. 396]. Defendants argue that removal of the backfill and replacement with substitute materials would be a more narrowly tailored remedy than total removal of the wind towers. *Id.* at 2-3 (citing *Garrison v. Baker Hughes Oilfield Operations, Inc.*, 287 F.3d 955, 962 (10th Cir. 2002)). The Court disagrees. As explained in *Osage*

Wind II, the harm resulting from Defendants' continuing trespass is not only the continued use of the wrongfully obtained backfill, but also the interference with the Osage Nation's sovereignty.<sup>50</sup>

## HYDROELECTRIC PROJECTS

### NATIONAL

#### Ação Direta de Inconstitucionalidade (ADI) 3239 (Belo Monte Dam)

**Country:** Brazil | **Body:** Supreme Federal Court (Supremo Tribunal Federal – STF)

**Date:** August 30, 2023 (Judgment finalized 5 September 2023)

- **Issues:** Indigenous participation, environmental licensing, hydroelectric development, right to consultation, legislative interpretation, constitutional protections
- **ICCPR:** Art. 27. **UNDRIP:** Arts. 19, 32. **ILO Convention 169:** Art. 6. **Brazilian Constitution:** Art. 231

**Summary:** In *ADI 3239*, the Supreme Federal Court of Brazil reviewed the constitutionality of Law No. 9.427/1996, which established procedures for hydroelectric energy concessions without requiring Indigenous consultation. The case centered on whether the absence of such a requirement violated Article 231 of the Brazilian Constitution, which guarantees Indigenous Peoples the right to participate in decisions affecting their traditionally occupied lands. The judgment affirmed that prior consultation of Indigenous Peoples is a constitutional requirement in the context of energy infrastructure projects—regardless of whether the physical installations are located within Indigenous territories. What matters, the Court held, is whether the impacts—territorial, environmental, or cultural—are significant for Indigenous communities.

The ruling emphasized that free, prior and informed consent is not merely good practice, but a binding legal duty under both domestic constitutional law and Brazil's international obligations, including ILO Convention 169. Minister Dino highlighted the dangers of allowing hydroelectric and other large-scale projects to proceed without Indigenous input, likening it to a new form of territorial usurpation. He made clear that interpreting federal energy legislation in isolation from constitutional rights would amount to enabling “a new modality of dispossession.” The Court's decision reinforces the principle that development cannot override Indigenous rights, and it sets a significant precedent for future infrastructure licensing across Brazil.

On March 12, 2025, Supreme Court Justice Flávio Dino ruled that Indigenous communities affected by the Belo Monte hydroelectric dam on the Xingu River in Pará must receive a direct share of the royalties (CFURH) generated by the plant. While the total royalties paid by the concessionaire, Norte Energia S/A, remain unchanged, 10

<sup>50</sup> Citing to *Osage Wind II*, 710 F. Supp. at 1041-42. “Defendants were advised by the Bureau of Indian Affairs and the Osage Mineral Council on multiple occasions that the wind farm project required a lease related to the mineral estate. Pl.'s Br. at Ex. 20 (“BIA Letter of Oct. 9, 2014”); Pl.'s Br. at Ex. 21 (“OMC Letter”); Pl.'s Br. at Ex. 22 (“BIA Letter of Jul. 19, 2012”). Defendants failed to obtain the required lease. The Tenth Circuit Court of Appeals held in 2017 that a lease was required. [\*\*49] *Osage Wind*, 871 F.3d at 1087-93. Even following the appellate court's ruling, Defendants have taken no steps to obtain a lease during [\*104] the years following the appellate court's opinion. On the record before the Court, it is clear that Defendants are actively avoiding the leasing requirement. Permitting such behavior would create the prospect for future interference with the Osage Mineral Council's authority by Defendants or others wishing to develop the mineral estate. The Court concludes that Defendants' past and continued refusal to obtain a lease constitutes interference with the sovereignty of the Osage Nation and is sufficient to constitute irreparable injury. <https://cloud.iprights.org/s/gMAKcrmH7rq6exr>, 1041-1042



percent that previously went to the federal government will now be redirected to the local Indigenous Peoples. Justice Dino emphasized that Indigenous populations have a constitutional right to benefit from hydropower or mineral projects that directly impact their territories, citing the social, health, and environmental disruptions they have faced since the dam's construction. The decision gives Brazil's Congress 24 months to create comprehensive legislation governing how hydropower and mining projects on Indigenous lands are licensed and how benefits are shared, establishing a precedent intended to apply to future projects as well. Norte Energia's executives, viewing the ruling as largely favorable, said they would comment after the full court issues its final floor vote.<sup>51</sup>

## DECISION

### General Considerations

3. The rights of Indigenous Peoples over their traditional territories, the duty to protect those rights, and the establishment of mechanisms to repair damage arising from the exploitation of resources found on lands traditionally occupied by Indigenous Peoples stem from a body of national and international norms that must be interpreted so as to ensure dignity and the highest level of preservation of the environmental resources necessary for their well-being and physical and cultural reproduction, according to their uses, customs, and traditions. Applicability of ILO Convention No. 169 and Article 32 of the United Nations Declaration on the Rights of Indigenous Peoples.
7. The resources must be employed for the benefit of Indigenous Peoples, considered collectively, with transparency in decision-making processes and in accountability.
8. This Court's filling of the gap does not, in itself, constitute authorization to exploit energy potential on Indigenous lands. Authorization always lies with the Union, through the competent authority, and must be preceded by authorization from the National Congress, with the participation of Indigenous Peoples, as set forth in ILO Convention No. 169. However, a benefit-sharing regime with Indigenous Peoples is established for cases already existing or that may arise.

### Parties' claims

3. They argue that Indigenous communities, since the construction and operation of the Belo Monte Hydroelectric Plant (UHBM/UHE Belo Monte), have undergone significant changes in their way of life, in addition to the emergence of social, public-health, and environmental problems, [...]
4. As for public-health and social problems, they emphasize, among others, the communities' exposure to sexual exploitation, increased incidence of diseases, impairment of water for consumption, increased risk of accidents on the Xingu River, difficulty in transporting goods to market, and insecurity.
5. Regarding the Xikrin communities of the Trincheira Bacajá TI, they assert that these "depend on the Bacajá River for their physical and cultural reproduction, it being originally the main access route and channel of communication among the villages, as well as the main fishing site for the subsistence of the Indigenous people." They add that said river "was extremely impacted by the operation of the

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<sup>51</sup> Perón, Isadora; Bitancourt, Rafael. "Brazil: Supreme Court orders Indigenous communities to receive Belo Monte royalties", *Agência Brasil*, in BHRRC, March 12, 2025. <https://www.business-humanrights.org/my/%E1%80%9E%E1%80%90%E1%80%84/brazil-supreme-court-orders-indigenous-communities-to-receive-belo-monte-royalties/>

Belo Monte Hydroelectric Plant due to the reduction of existing floodplains, with potential effects on water quality, riparian vegetation, and the ichthyofauna, among others” (e-doc. 01, p. 8, emphasis added).

6. In the petitioners’ view, the reports and studies concerning the impacts of the hydropower project in question were not robust enough to “support actions that would effectively mitigate and compensate for the socio-environmental impacts experienced by the Xikrin people” (e-doc. 01, p. 8).

### **III - Traditionally Occupied Indigenous Lands**

33. The Federal Constitution (Art. 231) recognizes the original rights of Indigenous Peoples over the lands they traditionally occupy, over which they have permanent possession and the exclusive usufruct of the riches of the soil, the rivers, and the lakes therein.
34. The concept of “lands traditionally occupied by Indigenous Peoples” includes those they permanently inhabit, those used for their productive activities, those indispensable to preserving the environmental resources necessary for their well-being, and those necessary for their physical and cultural reproduction, according to their uses, customs, and traditions.
37. Because these lands are public property of the Union and are subject to the exclusive possession and usufruct of Indigenous Peoples, no rights of occupation, ownership, possession, or even exploitation of the natural riches of the soil, rivers, and lakes therein may be asserted in relation to them (Art. 231, § 6, CF).
39. Therefore, private titles incident upon Indigenous lands are invalid. Such exclusive usufruct may only be relativized in cases of relevant public interest of the Union, as provided by complementary law, and the nullity of the title does not give rise to a right to compensation or actions against the Union, except, as provided by law, with respect to improvements resulting from occupation in good faith.
40. On the other hand, the use of water resources and energy potentials, as well as the prospecting and mining of mineral resources, which are legally permitted under art. 231, § 3, CF, depend on compliance with the specific conditions established by law when they occur on Indigenous lands (art. 176, caput and § 1, CF).
42. The distinction stems from the fact that the utilization of water resources, including energy potentials, and the prospecting and mining of mineral resources are activities that are not barred by the Indigenous exclusive usufruct, provided that the affected communities are heard and there is authorization from the National Congress (Art. 231, § 3, CF). In these cases, the Constitution also ensures participation in the results of the mining (Art. 231, § 3).

### **IV - Indigenous Participation in the Results**

44. The central issue in these proceedings, especially at the preliminary-injunction stage, is whether the petitioners are entitled to a share in the results of the Belo Monte hydroelectric project.
46. I emphasize that International Labour Organization Convention No. 169, an international norm in force in Brazil, establishes in its Article 15 that the rights of Indigenous Peoples must be especially protected, ensuring, whenever possible, participation in the benefits arising from the exploitation of resources on their lands and fair compensation for any damage they may suffer as a result of such activities, verbatim:



### **Article 15.**

1. *The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.*
2. *In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.*

**47.** In the same vein, Article 32 of the United Nations Declaration on the Rights of Indigenous Peoples addresses the need to guarantee Indigenous Peoples the opportunity to express their views on the utilization/exploitation of water and mineral resources on their lands, as well as to ensure effective mechanisms for just and equitable reparation for the resulting damages.

**48.** The rights of Indigenous Peoples over their traditional territories, the duty to protect those rights, and the establishment of mechanisms for reparation of damages arising from the exploitation of resources present on lands traditionally occupied by Indigenous Peoples stem from a set of national and international norms that must be interpreted so as to guarantee dignity and the highest level of preservation of the environmental resources necessary for their well-being and for their physical and cultural reproduction, according to their uses, customs, and traditions. In the same sense is the case law of the Inter-American Court of Human Rights:

**116.** This Court's jurisprudence has repeatedly recognized the property right of Indigenous Peoples over their traditional territories and the duty of protection deriving from Article 21 of the American Convention, in light of the norms of ILO Convention No. 169 and the United Nations Declaration on the Rights of Indigenous Peoples, as well as the rights recognized by States in their domestic laws or in other instruments and international decisions, thus constituting a corpus juris that defines the obligations of the States Parties to the American Convention in relation to the protection of Indigenous property rights. Therefore, in analyzing the content and scope of Article 21 of the Convention in the present case, the Court will take into account, in light of the general rules of interpretation established in its Article 29(b), and as it has done previously, the aforementioned special interrelationship of collective land ownership for Indigenous Peoples, as well as the actions allegedly undertaken by the State to make these rights fully effective. (I/A Court H.R., 2022, p. 125, emphasis added)

**51. In view of the legal norms cited—the Federal Constitution and international legislation—and all that has already been decided by the STF in RE 1379751, there is no doubt that Indigenous Peoples hold the right to participate in the results of the exploitation of water resources and the mining of minerals that occur on, or directly affect, their lands.**

## VII - Gap-Filling by the Judiciary

**68.** According to the Economic Commission for Latin America and the Caribbean (ECLAC), conflicts over land and the exploitation of natural resources have been common in Latin America. As a result, it emphasizes that it is necessary to strengthen legal frameworks that recognize the territorial rights of Indigenous Peoples, *verbatim*:

Legislation on land tenure, mining and the extraction of renewable and non-renewable resources, as well as forestry and environmental legislation, cannot promote measures contrary to the territorial rights of Indigenous Peoples, nor be prioritized in the name of the so-called general interest. It is essential to harmonize the different national regulatory frameworks as soon as possible, respecting the territorial rights of Indigenous Peoples and prioritizing application of the *pro homine* principle of international law. (...)

It is necessary to establish reasonable mechanisms for sharing benefits in favor of peoples affected by extractive and development projects, to conduct impact studies, and to establish mitigation and compensation measures with the full and effective participation of Indigenous Peoples.

- Dialogue and negotiation tables between Indigenous Peoples and States must be promoted until they are institutionalized as a regular mechanism and become a permanent practice.
  - Systematic work is needed to document, map, and monitor existing consultation processes and conflicts, especially around extractive projects. This work must include the collection and analysis of good practices by institutions and bodies that have legitimacy and are considered objective in the region, but also by governmental actors with direct responsibility for the protection and promotion of the rights of Indigenous Peoples. (...)
- (...) States must promote sustainable models of economic development and territorial management within the framework of *buen vivir*. (ECLAC, 2014, pp. 54–63, emphasis added)
- 71.** In view of the need to guarantee dignity to Indigenous Peoples and the necessary and effective recognition of these peoples as part of the Nation and as relevant subjects in our history, I understand that the context authorizes the granting of a preliminary injunction to set out the specific conditions of art. 176, §1, of the Constitution and the manner of Indigenous participation in the results of the exploitation of energy potentials by the Belo Monte hydroelectric project, as outlined below.
- 72.** Article 176, §1, of the Constitution provides that the utilization of hydraulic potentials and the prospecting and mining of mineral resources may only be carried out by authorization or concession of the Union, in the national interest, and that the law shall establish specific conditions when these activities take place in the border zone or on Indigenous lands.
- 73.** The Judiciary's filling of such a gap does not, by itself, constitute authorization to exploit hydraulic potentials or to mine on Indigenous lands. Authorization always lies with the Union, through the competent authority, and must be preceded by authorization from the National Congress, with the full participation of Indigenous Peoples.
- 74.** Thus, while the legislative omission concerning the regulation of art. 176, §1, of the Constitution remains pending, I deem it necessary to observe the requirements set forth below:



- a) Any intervention in an indigenous area, or that has repercussions on the indigenous way of life—especially on the natural goods they use—must be preceded by studies of the impacts on their productive activities, well-being, food security, physical and cultural reproduction, uses, customs, and traditions, so that it is possible to assess the pertinence or extent of any authorization to be granted by the National Congress;
- b) The impacts caused by the exploitation of the energy potentials of water resources must be justly compensated;
- c) No economic enterprise may result in markedly unequal access to natural resources to the detriment of Indigenous Peoples. Markedly unequal access shall be understood as that which:
  - c.1) compromises the life and integrity of Indigenous Peoples;
  - c.2) makes Indigenous customs, way of life, and physical and cultural reproduction unviable, leading to their cultural or physical extermination.
- d) The Federal Executive Branch must restrict the areas to be subject to prospecting, mining, and utilization of energy potentials in light of the degree of isolation of Indigenous communities, “recent contact,” and regional and cultural particularities;
- e) The precautionary and polluter-pays principles must be applied, and environmental restoration must be provided for.

#### **A) National and International Parameters for Filling the Gaps**

- 84.** It is well known that establishing a calculation methodology for Indigenous participation in the results of the exploitation/utilization of energy potentials generally depends on analysis of social and economic criteria, technical specificities of the electric-power sector, and the impacts of the projects on the environment, on the lands, and on the Indigenous way of life.
- 85.** That broad gathering of information and analysis of its ramifications falls primarily to the Executive and Legislative Branches, which plan/formulate public policies by virtue of their typical functions.
- 86.** However, in the face of legislative omission that, since the promulgation of the Federal Constitution, has rendered unviable the exercise of fundamental Indigenous rights and interferes with their traditional possession, it is for the Judiciary—when prompted—to intervene, by the constituent legislator’s choice in creating the writ of injunction (*mandado de injunção*).
- 87.** In addition to the legal parameters mentioned above, it is pertinent to summarize certain international experiences to inform judicial assessment.
- 88.** In Australia, compensation for damage caused to Indigenous lands or to Indigenous People due to mineral exploitation on their lands has its conditions set in agreements entered into between applicant companies and Indigenous Peoples, taking into account, in particular, the value of the mineral involved, the deprivation of land use, and the deprivation of the use of improvements on the land (free translation of Section 44A of the Aboriginal Land Rights (Northern Territory) Act 1976).
- 89.** In Canada, the *Indian Act* likewise establishes regulations on the territorial and political framework. With respect to the territorial framework, the law provides that reserves are made available to “Indians,” without ceasing to be federal territory. Thus, “the government is free to decide when and how to dispose of natural resources and the subsoil” (Víteni, 2017), as can be gathered from arts. 53, 57, and

58 of that statute. In return, it is ensured that a share of the revenues obtained from the exploitation of natural resources is allocated to Indigenous Peoples, as a kind of profit-sharing (*distribution of proceeds*).

- 90.** In New Zealand, mining on Māori lands is the subject of agreement between the license holder and the Māori, and must cover, among other aspects, compensation for losses or damage suffered, reimbursement of all reasonable costs and expenses of the owner due to the negotiations, as well as compensation for loss of income, privacy, and amenities (Crown Minerals Act 1991, sections 76 and 80).
- 91.** These considerations are important to show that there is no ready-made formula that can be imported into the national context regarding the best way to repair—with justice—Indigenous Peoples for the impacts suffered due to the exploitation of natural resources present on their lands and those necessary to the maintenance of their way of life.

## VII – Gap-Filling by the Judiciary

- 92.** Establishing a calculation methodology for Indigenous participation in the results of the exploitation/utilization of hydraulic potential necessarily involves: (a) analyzing social and economic criteria and technical specificities of Brazil's electric-power sector; (b) measuring the projects' impacts on the environment, on the lands, and on the Indigenous way of life, with those peoples being heard, in accordance with ILO Convention No. 169; and (c) observing the legal protections granted to these peoples by national and international norms.
- 107** d) I establish *erga omnes* effect. Projects aimed at utilizing the energy potential of water resources on Indigenous lands generate impacts wherever they are installed. This is not a situation restricted to UHBM, to the river in question, or to the Indigenous Peoples represented by the petitioners. Thus, while the regulation addressed herein is pending, the specific conditions for any new utilization of the energy potential of water resources on Indigenous lands and the manner of paying Indigenous Peoples' share in the results of such activity must observe items 74 and 103 of this decision;
- 108.** I again emphasize that this decision does not order new exploitation of energy potential on Indigenous lands. Should such exploitation occur, it will depend on compliance with all constitutional and legal requirements, notably ILO Convention No. 169. The scope of this judicial decision is limited to filling gaps and omissions in relation to the Federal Constitution, setting the conditions for Indigenous Peoples' participation in activities affecting their lands, so that they cease to be only victims and become beneficiaries. I stress that it is not for the STF to replace the will of Indigenous Peoples, who can and must be protected in all their choices—including choosing to refuse participation in the results of the activities listed in the Federal Constitution.

**My father wanted to take me to his land, the village of Kubênkrankej, so he took me to meet my relatives there. Then my father's brother went to help establish the village of A'ukre, and he took me there. It was in that village that I had my first child. But the land where I was born is the Xingu — that is my motherland. That's why I get angry when people are destroying the Xingu. I want my land to be preserved forever.**

TUÍRE KAYAPÓ: INDIGENOUS LEADER

## Pueblo Kichwa de Santa Clara (PONAKICSC) et al. v. Ministry of Energy, ARCONEL, Ministry of Environment (MAE), SENAGUA & GENEFRAN S.A. (Piatúa River) (Spanish only)

**Country:** Ecuador | **Body:** Provincial Court of Pastaza (Sala Multicompetente), Second Instance (acción de protección appeal) **Date:** September 5, 2019

- **Issues:** Rights of Nature; ecological flow and water allocation; environmental licensing defects; Prior, Free, and Informed Consultation (FPIC) and community participation; Indigenous collective rights and cultural identity; precautionary principle; hydropower siting (Piatúa HPP); archaeological heritage; remedies (annulment of water concession and environmental license; suspension of works; environmental audit; institutional training; public apologies).

**Summary:** A coalition led by the President of the Pueblo Originario Kichwa de Santa Clara (PONAKICSC), joined by the provincial delegate of the national ombudsman (Defensoría del Pueblo), human-rights specialists, NGOs (Fundación Pachamama, Centro de Derechos Humanos PUCE, Fundación Río Napo), leaders from CONFENIAE, and others, brought an acción de protección against the Ministry of Energy and Non-Renewable Natural Resources, ARCONEL, the Ministry of Environment (MAE), SENAGUA (and its Napo sub-secretariat), and the private concessionaire GENEFRAN S.A., over the 30 MW Piatúa hydroelectric project in Pastaza/Napo. They alleged violations of rights of nature, the right to water and to a healthy environment, collective rights of the Kichwa people (territory/participation), cultural identity, prior consultation, health and food sovereignty. While a first-instance judge denied the action on July 25, 2019; the Pastaza Provincial Court (Sala Multicompetente) partially granted the appeal and reversed.

On the merits, the Court found multiple unlawful State actions/omissions in the issuance of the environmental license and held the State accountable for failing to conduct proper consultation/participation with the Kichwa of Santa Clara. With regards to the remedies, the Court voided SENAGUA's water-use authorization and the MAE's environmental license. The Court also ordered the project halted until lawful permitting and urged the State to train officials on proper constitutional/application standards, investigate and sanction responsible personnel, and GENEFRAN and the agencies must issue a public acknowledgment/apology.

## DECISION

### Violation of Constitutional Rights

**2.3.1.1- Violation of constitutional rights:** The first basic requirement of admissibility for an action for protection is that there be a violation of a constitutional right. "This means that for the action for protection to proceed, the violation of the right must necessarily affect the constitutional content of the right and not other dimensions of the right affected by the action or omission of the authority or the private party" [11]. In the case under review, the petitioners affirm that the State's authorization for the development of the project has violated constitutional rights, specifically: the rights of nature regarding the integral respect for its existence and the maintenance and regeneration of its life cycles, structure, and evolutionary processes (Article 71 of the Constitution); the right to communal property and territory (Article 57, *ibid.*); the right to prior, free and informed consultation and environmental consultation (Article 57.7, *ibid.*); the right to cultural identity (Article 66.28 CRE); the right to work (Articles 33, 319 CRE); the rights to health, water, and food sovereignty (Article 15 CRE); the right to live in a healthy and ecologically balanced environment (Article 66.27 CRE). We proceed

to analyze each of the stated rights alongside the factual circumstances of the case to determine whether the rights mentioned above have been violated:

**2.3.1.1.1- Rights of nature regarding the integral respect for its existence and the maintenance and regeneration of its life cycles, structure, and evolutionary processes (Article 71 of the Constitution):** Nature is a subject of rights, a recognition that has prevailed in our country since the Constitution came into force, which in Article 10 speaks of rights-holders, including nature as one of them. For its safeguarding, guarantees of conservation, protection, regeneration, and improvement were established, aimed at strengthening sustainable, lasting, and harmonious development between people and nature, being a legal entity susceptible to constitutional protection developed in Articles 71, 72, 83.6, and 277.1, *ibid*.

The Inter-American human rights system has enshrined in the Protocol of San Salvador, in Article 11.2, the obligation of States Parties to promote the protection, preservation, and improvement of the environment, “understood as a right with both individual and collective connotations. In its collective dimension, the right to a healthy environment constitutes a universal interest owing to both present and future generations,” and “an individual dimension, insofar as its violation can have direct or indirect repercussions on persons due to its connection with other rights”, since environmental degradation would result in irreparable harm to the planet and therefore to the beings who inhabit it, constituting a fundamental right for the existence of humanity.

This human right takes shape in regulating human activities in order to protect nature, considering as the core of protection “nature for the value it has in itself”, that is, it has an “autonomous character,” and “its interdependence and indivisibility with other rights entails a series of environmental obligations for States”, protecting ecosystems in their components such as forests, rivers, seas, etc., as legal interests in themselves, “even in the absence of certainty or evidence about risk to individuals”. That is, they protect nature not only for its usefulness to human beings, whose violation would entail the violation of other rights, but also highlight its importance for the other living organisms with whom we share the planet, who must be protected in judicial decisions and in constitutional orders.

In other words, this right has evolved from an initial stage that “indirectly protected the environment, whose principal purpose was to safeguard people’s health; a second stage, where the environment is recognized as a legal good to be protected in itself; and a third stage characterized by sustainable development”, characterized by a “double dimension: the first called objective or ecologist, whose legal interest attends to the defense and restoration of nature and its resources regardless of its repercussions on human beings; and the subjective or anthropocentric, where the protection of the right constitutes a guarantee for the realization and effectiveness of other rights recognized in favor of the person”.

**2.3.1.1.1.1- Impact on the habitat of endemic fauna in the area of influence of the project:** The petitioners assert that construction of this project will affect the habitat of several plants and endemic animals in the area due to the reduction of river flow and the project’s construction; and that in the area there is wildlife included in the Red Lists of both the Ministry of the Environment and the International Union for Conservation of Nature (IUCN), and in CITES Appendix II [24]; and that the National Environmental Authority did not take this into account in the environmental license granted, and that the EIA and management plan submitted “does not consider or minimizes irreversible impacts” on nature, violating the right to live in a healthy and ecologically balanced



environment (Articles 14 and 66.27 of the Constitution of the Republic). [...] In quantifying in the EIA, they did not evidence in the management plan the mitigation or specific measures for each species that is on the Red List and deserves special protection by the State, affecting their life cycle since they are considered threatened and at high risk of population decline; nor do we find an analysis of **resilience capacity** to achieve ecological balance and avoid extinction.

In this sense the management plan fails to comply with the condition established in Article 28 of Agreement No. 061 (Reform of Book VI of the Unified Secondary Legislation), special edition of Official Register No. 316, May 4, 2015, since although potential impacts were identified and a baseline was structured with the EIA, “the most effective measures to prevent, control, mitigate, and compensate negative environmental impacts” were not determined in the management plan, because there are no differentiated measures to mitigate negative impacts on those species.

[...] Concomitant with the **precautionary principle** (Article 396, paragraph 2; and 73, *ibid.*), “in case of doubt about the environmental impact of any action or omission, even if there is no scientific evidence of harm, the State shall adopt effective and timely protective measures,” under which, before the project’s development, the national environmental authority should have determined whether there were risks to the environment and the measures to apply under the regulations to avoid environmental damage. The omission of precaution concerning environmental harm violates the right to live in a healthy and ecologically balanced environment set out in Articles 14 and 66.27 of the Constitution of the Republic, since if species that the State itself has declared at risk of existence become extinct due to the project’s execution, it would be a loss for humanity in general and not only for the inhabitants of the project’s area of influence. The recognition of the right to live in a healthy environment obliges human beings to coexist and be part of the ecosystems that nature itself forms, without jeopardizing environmental sustainability. This right deepens solidarity and collective responsibility over individual interests. [...] These omissions by both the State and the company fail to meet the conditions that the Constitutional Court has established so that natural resources may be used for society’s benefit and that the constitutional rule in Article 74 speaks of, requiring urgent State measures to fully restore the affected ecosystem, which has not been evidenced in this proceeding.

**2.3.1.1.2- Impact on the flow of the Piatúa River:** The petitioners argue that the resolution granted by SENAGUA to exploit an initial flow from the Piatúa River of 12.60 m<sup>3</sup>/s, later corrected to 10.5 m<sup>3</sup>/s, for the project’s hydroelectric generation, as well as the environmental license granted by the MAE which establishes an ecological flow of 10% of the multiannual monthly mean flow of the river’s natural regime, determined based on at least 10 years of hydrological data, violate the right to the integral respect of nature. They assert that it is the duty of the State and citizens to abstain from acts that threaten existence, life cycles, structure, functions, and evolutionary processes (Article 71 of the Constitution of the Republic). [...]

Among the rights of *Buen Vivir* we find the right to water (Article 12 of the Constitution) and a mandate to the single water authority for the management of water resources, where the ecological flow must be maintained [42], placing responsibility on the State for the conservation, recovery, and comprehensive management of ecological flows (Articles 318 and 411, *ibid.*), considering as a right of nature “the conservation of waters with their properties as an essential support for all forms of life” [43], stating that maintenance of the ecological flow is the “guarantee of the preservation of ecosystems and biodiversity,” and further requiring that it be intangible. By legal rule the ecological flow must be maintained at 10% of the river’s mean flow. [...]

According to international standards, most people require a minimum of 7.5 liters per person per day to meet a set of basic needs, including food and hygiene. In addition, under international standards, water must be of a quality that represents a tolerable level of risk. Under these standards, the State has not shown that it is providing sufficient water to ensure supply for the minimum requirements” [50], violating the rights of *Buen Vivir*, which recognize the human right to water—fundamental and inalienable—since it “constitutes a strategic asset for public use, inalienable, imprescriptible, unseizable, and essential for life” (Article 12 of the Constitution).

**2.3.1.1.2.- Collective rights (Article 57 of the Constitution) of the Kichwa People of Santa Clara regarding their fluvial connections and natural environment, communal properties, territory; the Piatúa River is considered sacred because its stones and waters have healing powers, and it sustains the community life of those settled along the river's banks, claiming a violation of their right to cultural identity.** The petitioners argue that Article 57 of the Constitution of the Republic establishes the collective rights of indigenous nationalities, and that the Kichwa People of Santa Clara (PONAKICSE) live in the project's area of influence; and, regarding fluvial connections and the natural environment, on communal properties that make up their territory, which GENEFRAN S.A. has denied by asserting it is private property. They further argue that it has not been taken into account that the Piatúa River is considered sacred for its inhabitants and that its stones and waters possess healing powers, and that it sustains the coexistence of the communities settled along the banks of the Piatúa, claiming that their right to cultural identity is being violated.

**2.3.1.1.2.1.- Collective rights (Article 57 of the Constitution) of the Kichwa People of Santa Clara who live in the project's area of influence regarding their fluvial connections and natural environment, communal properties, territory, and the company's denial by claiming it is private property.** Article 57.5 of the Constitution of the Republic recognizes and guarantees to indigenous nationalities the right to “maintain possession of their ancestral lands and territories and to obtain their free adjudication.” The Organic Law on Rural Lands and Ancestral Territories defines “ancestral possession and property,” that is, “land and territory in ancestral possession and property—the physical space over which a community, commune, people, or nationality of ancestral origin has historically generated an identity based on social, cultural, and spiritual construction, developing economic activities and its own forms of production in a current and uninterrupted manner”, guaranteeing “the right to participate in the use, usufruct, administration, and conservation of their lands and territories”. The property of these communal lands and territories of ancestral possession is imprescriptible, inalienable, unseizable, and indivisible.

At the supranational level, the concept of territories, according to ILO Convention 169 (Article 13.2) on Indigenous and Tribal Peoples, considers territory as “covering the totality of the habitat of the regions which the peoples concerned occupy or otherwise use.” The Inter-American Court of Human Rights has stated that: “among indigenous people there is a community tradition regarding a communal form of collective property of the land, in the sense that ownership thereof is not centered on an individual but on the group and its community. Indigenous people, by virtue of their very existence, have the right to live freely in their own territories; the close relationship that indigenous people maintain with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, the relationship with the land is not merely a matter of possession and production but a material and spiritual element that they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations”.



[...]

This omission of State responsibilities violated the Kichwa People of Santa Clara's collective right set out in Article 57.6 of the Constitution of the Republic, since they were not consulted and could not "participate in the use, usufruct, administration, and conservation of the renewable natural resources found on their lands," in line with Articles 21, 2, and 23 of the American Convention, in relation to Article 1.1 of that instrument, and Article 57.5 of the Constitution regarding recognition of their ancestral territory. Although the project's infrastructure will not be built there, the environmental impacts and consequences due to the loss of flow in the Piatúa River downstream of the intake—until other tributaries converge—will affect the communities of the Kichwa People of Santa Clara who are settled along the riverbank, as was evident in the company's EIA, but the State did not take these peoples into account, even though they expressed opposition before the water-use authorization was granted, thereby violating their constitutional rights.

**2.3.1.1.2.- The Piatúa River is considered sacred by its inhabitants because its stones and waters have healing powers, and it sustains the communal life of the communities settled along its banks, who assert that their right to cultural identity is being violated.** Based on Article 57, numerals 8, 12 and 18 of the Constitution of the Republic, and Article 277.6, *ibid.*, consistent with Article 15 of Convention 169 of the International Labour Organization (ILO) concerning Indigenous and Tribal Peoples in Independent Countries, the Constitutional Court has highlighted the importance of the ancestral knowledge of Indigenous Peoples and nationalities, indicating that "traditional or ancestral knowledge constitutes the body of specialized know-how developed in an ancestral context by an indigenous people or local community and transmitted across generations", which values and respects the harmonious coexistence of its members with nature, as well as the importance "given to knowledge and ancestral practices related to the care and use of natural heritage".

The Inter-American Court of Human Rights has stated in this regard that "the spiritual and material foundation of the identity of Indigenous Peoples is primarily based on their unique relationship with their traditional lands. As long as that relationship exists, the right to claim remains in force; otherwise, it will be extinguished. That relationship may be expressed in different ways, depending on the Indigenous People concerned and their specific circumstances, and may include traditional use or presence, whether through spiritual or ceremonial ties; sporadic settlements or cultivation; seasonal or nomadic hunting, fishing or gathering; the use of natural resources linked to their customs; and any other characteristic element of their culture...". [...]

**2.3.1.1.3.- Right to prior, free and informed consultation and to environmental consultation.** The petitioners state that what is described in Article 57.7 of the Constitution was not complied with, since there was no prior, free and informed consultation or environmental consultation in accordance with the parameters established by the Inter-American Court of Human Rights, because it was carried out by persons linked to the company and not by the State (there was a facilitator accredited by the MAE). They add that the Ministry of the Environment (MAE) treated as a post-license activity the delivery of the 72 invitations that had not been sent during the stage of social participation (environmental consultation), giving a period of three months—thus approving the activity without having completed all citizen participation, which had been conducted by the company itself.

Access rights to information, public participation, and access to justice are fundamental in environmental matters and for the exercise of the rights recognized in

the Constitution—namely, the right to a healthy environment, the human right to water, rights of nature, and the collective rights of communities, peoples and nationalities, which are established in the Constitution of the Republic. [...]

The Inter-American Court of Human Rights has stated that “with regard to the obligation to carry out environmental impact studies, Article 7.3 of ILO Convention No. 169 provides that ‘[g]overnments shall ensure that, whenever appropriate, studies are carried out, in cooperation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities’” [...]

The national environmental authority is obliged, on behalf of the State, to carry out this environmental consultation. In this case it delegated the work to facilitators accredited by that institution (hereinafter, environmental facilitator), but their work should have incorporated both positive and negative observations about the project in order to take the corresponding measures and avoid social conflict. The process shows that, although the People’s organization of the Kichwa People of Santa Clara was notified of the process, the observations generated by them—which are important to the life of an Indigenous People, since we are speaking of their cosmovision and life in the territory—were not incorporated, thereby violating their right to community consultation regarding environmental impacts described in Article 398 of the Constitution of the Republic.

The Inter-American Court of Human Rights “has established that Environmental Impact Studies must be conducted in accordance with international standards and best practices in this regard; respect the traditions and culture of Indigenous Peoples; and be concluded prior to the granting of the concession, since one of the objectives of requiring such studies is to guarantee the right of the indigenous people to be informed about all projects proposed in their territory. Therefore, the State’s obligation to oversee Environmental Impact Studies coincides with its duty to guarantee the effective participation of the indigenous people in the concession-granting process. In addition, the Court added that one of the points to be addressed by the social and environmental impact study is the cumulative impact generated by existing projects and to be generated by proposed projects”.

By not incorporating the observations of the Kichwa People of Santa Clara—by the environmental facilitator—regarding the spiritual and healing significance of the Piatúa River to its indigenous inhabitants, the State should have relied on specialists (anthropologists, sociologists) to verify the people’s cosmovision given the complexity of its meaning. The State thus violated Article 398 of the Constitution of the Republic, since it is the Ministry of the Environment’s responsibility to carry out this participation process, and the observations of PONAKISC were not included. Consequently, no plan has been devised to address that impact on the life plan of the families belonging to the Kichwa People of Santa Clara, and the environmental license granted for the project does not comply with citizen-participation regulations regarding social participation.



**They are killing us; our river is contaminated with mercury, cyanide and fuel.**



KICHWA COMMUNITIES.<sup>52</sup>

<sup>52</sup> Ortiz-T., Pablo. “Empty Territories and Violated Rights: The Forced Displacement of Indigenous Communities in Ecuador”, in *Debates Indígenas*, August 1<sup>st</sup>, 2025. <https://debatesindigenas.org/en/2025/08/01/empty-territories-and-violated-rights-the-forced-displacement-of-indigenous-communities-in-ecuador/>

### 3. Compliance Investigation of IFC's Environmental and Social Performance: Advisory Services to Empresa de Transmisión Eléctrica, S.A. (<https://bit.ly/3B0z4Yt>)

**Country:** Panama | **Body:** Office of the Compliance Advisor Ombudsman for the International Finance Corporation and the Multilateral Investment Guarantee Agency (World Bank Group)

**Date:** February 28, 2022

- **Issues:** FPIC
- **UNDRIP:** Arts. 18, 32, among others

**Summary:** This decision was adopted by the Compliance Advisor Ombudsman (“CAO”) for the International Finance Corporation (“IFC”) and the Multilateral Investment Guarantee Agency,<sup>53</sup> the latter being private sector-related agencies within the World Bank Group.<sup>54</sup> It was adopted in response to a complaint filed in June 2018 about the negative environmental and social impacts of the Panama Transmission Line IV project (“PTIV project”). The PTIV project is a major new powerline project supported by the IFC, which would connect the capital city with the province of Bocas del Toro. It was submitted by members of Ngöbe and Buglé Indigenous Peoples living in the project-affected area. The PTIV project affects three different groups of Indigenous Peoples. One group has legally regularized property rights (the Comarca Ngöbe-Buglé); one group is adjacent to the Comarca and is recognized in law but is not yet demarcated; and the third has no legal recognition (the CAO decision only addressed the first two groups, although it also explained that the same rationale would apply to the third).

IFC support for the PTIV project, which was internally classified as an ‘Advisory Services project,’ required that IFC advice be consistent with its 2012 environmental and social safeguards, known as ‘Performance Standards’ (PS). One of these focuses on Indigenous Peoples (PS7).<sup>55</sup> Among other things, PS7 sets out various requirements for conducting consultations and for obtaining Free, Prior, and Informed Consent (FPIC) in certain situations, e.g., where projects impact land or natural resources under traditional ownership of or customary use by Indigenous Peoples.

There was no dispute that this project triggered that requirement, at least with respect to the Comarca. The complainants asserted that the project failed to obtain FPIC from the impacted Indigenous Peoples, excluded some entirely and, otherwise, that the consultation processes were defective. With respect to the latter and in the Comarca, they highlighted that they had not been provided with adequate information (e.g., the exact route of the powerline, no documents); that only Spanish, not the Indigenous languages, was used and presentations were not culturally appropriate; that women were not adequately included; and that consultations were only with government-recognized authorities, which, they said, did not properly represent the communities. Those outside the Comarca asserted that they were not consulted at all.

<sup>53</sup> Office of the Compliance Advisor Ombudsman (CAO), <https://www.cao-ombudsman.org/>

<sup>54</sup> See also *Compliance Appraisal of a Complaint Regarding IFC's Exposure to the Dairi Prima Mineral Mine in Indonesia Through an Investment in Postal Savings Bank of China* (IFC Project: #35461), 6 July 2022, p. 21: “There are preliminary indications of potential harm associated with the lack of recognition of potentially impacted communities as Indigenous Peoples and the resulting possibility that the need for Free, Prior, and Informed Consent from Indigenous communities may have been overlooked”; and p. 22: “Based on information from the complainants and other NGO sources, most villagers living around the mine appear to self-identify as Indigenous. Indonesia’s leading Indigenous Peoples organization likewise recognizes these communities as Indigenous”, [https://www.cao-ombudsman.org/sites/default/files/downloads/CAO\\_Compliance\\_Appraisal%20Report\\_PSBC\\_Indonesia\\_July\\_2022\\_EN.pdf](https://www.cao-ombudsman.org/sites/default/files/downloads/CAO_Compliance_Appraisal%20Report_PSBC_Indonesia_July_2022_EN.pdf)

<sup>55</sup> International Finance Corporation, “Stakeholder Engagement: A Good Practice Handbook for Companies Doing Business in Emerging Markets”, April 30, 2007, <https://www.ifc.org/stakeholderengagement>

The company involved in the project maintained that it was consulting the Indigenous representatives who had been appointed to two commissions by the Comarca authorities. These commissions were intended to be the mechanisms to obtain FPIC via two separate processes. First, in a “preliminary FPIC process related to conducting an impact assessment and project studies (but which in practice also involved an agreement on developing the power lines). Second, in “a primary FPIC process,” which would have related to the actual construction of the power lines. According to the CAO decision, “FPIC is a principle that pertains specifically to Indigenous Peoples and allows them to give or withhold consent to a project that may affect them or their territories. Where a project involves FPIC, the process of engagement with Indigenous Peoples requires detailed stakeholder mapping, information disclosure, consultation, and negotiation of benefit-sharing arrangements, with a view to achieving consent” (p. 6).

**First**, the CAO found that the IFC’s role in the project had both positive and negative effects in terms of compliance with the IFC’s PS. The positive measures were listed as supporting compliance with some of the requirements in the PS, one of which was that the IFC encouraged the company “to commence the FPIC process early in the project development process.”

However, IFC advice was inconsistent with PS1 (on impact assessment) and PS7 regarding certain aspects of both the preliminary and primary FPIC processes. On the first, the defects included the failure to develop a stakeholder engagement plan and associated stakeholder analysis to prepare for the preliminary FPIC process. This resulted in the exclusion of the Indigenous communities outside of the Comarca. Their participation was required, the CAO concluded, even though they do not have legally recognized and regularized lands, because the project would have impacts on lands traditionally owned or under customary use. The exclusion of traditional authorities in favor of the government-recognized authorities was also identified as was the limited involvement of Indigenous women. Lack of culturally appropriate modes of consulting and the failure to employ Indigenous languages completed the list. These same deficiencies were repeated and identified by the CAO in relation to the primary FPIC process. This resulted in verified harm to the complainants that the CAO also deemed to be inconsistent with the requirements in the PS, leading the IFC to conclude that “Absent action to address the shortcomings in IFC’s advice to date, there is significant risk that the project will not achieve FPIC of the affected Indigenous communities as required by the [PS]. This may heighten the risk of negative project impacts on the cultural, economic, and territorial (including customary) rights and interests of those Indigenous communities” (3).

**Second**, the CAO identified several underlying causes of the IFC’s failure to adequately advise on compliance by the company with the PS. Of particular note is the (common) “shortcoming” of relying on assurances by the company that FPIC would proceed in accordance with national law without any serious analysis of the differences between that law and the PS. “This led to the exclusion of the Indigenous groups outside the government-recognized territory of the Comarca from the FPIC process, and the focus, within the Comarca, on consultations with government-recognized representatives” (10).

## Compliance Investigation of IFC's Environmental and Social Performance: Latin Renewables Infrastructure Fund (Hidroeléctrica Santa Rita, Guatemala)

**Country:** Guatemala | **Body:** Office of the Compliance Advisor Ombudsman (CAO) for IFC & MIGA, World Bank Group

**Date:** August 21, 2017

- **Issues:** FPIC; consultation and disclosure (PS1/PS7); Indigenous Peoples; environmental flows and river use (PS4/PS6); dam safety (PS4); social impact and economic displacement; supervision of high-risk FI investments/ESMS
- UNDRIP:** Arts. 18, 19, 32 (FPIC & participation)

**Summary:** This compliance investigation examines IFC's role in its 2012 equity investment in the Latin Renewables Infrastructure Fund (LRIF)—a financial intermediary (FI) that acquired a controlling stake in the Hidroeléctrica Santa Rita (HSR) project in Alta Verapaz, Guatemala. The Santa Rita project was a 23-MW run-of-river hydropower development on the Río Icbolay, featuring a 17.5-meter dam, a 33-hectare reservoir, and a 15-km transmission line in an area inhabited by Indigenous Peoples. Construction began in early 2013 but quickly halted amid escalating conflict; it had not resumed by the time of the report, and the Fund later indicated it no longer planned to develop the project.

**The complaint (filed October 2014 by nearby community members) alleged:** failure to meet IFC's consultation and FPIC requirements, inadequate assessment of impacts on water sources and river use, risks to livelihoods (e.g., fishing, agriculture, transport), and a broader pattern of violence, repression, and criminalization of opponents. CAO's investigation focuses on IFC's pre-investment review and supervision of the Fund and whether IFC assured itself that the Fund was applying the IFC Performance Standards (2012) to Santa Rita.

**Pre-investment review (FI setup & risk mitigation).** IFC correctly categorized the Fund as high risk and required application of the Performance Standards with a strengthened Environmental & Social Management System (ESMS). IFC also negotiated the right to review the Fund's E&S due diligence (ESDD) for its first three investments. However, CAO finds IFC's pre-investment review not commensurate to the risks: IFC did not sufficiently analyze contextual risks (including existing opposition and social conflict around the project area) or the practical challenges a start-up fund with limited E&S capacity would face in applying the (then newly updated) PS7/FPIC requirements in Indigenous territories. The review framework that IFC negotiated limited the time and information available to IFC E&S specialists, constraining their ability to determine whether the Fund's ESMS and project ESDD were robust.

**Supervision and review of the Fund's ESDD for Santa Rita (2012–2014).** In August 2012, IFC reviewed the Fund's Santa Rita ESDD and noted some gaps but overlooked central weaknesses vis-à-vis the Performance Standards and good international industry practice. CAO highlights that IFC failed to assure itself that the Fund had:

- Up-to-date, adequate environmental and social assessment: the materials relied on studies for an earlier, significantly smaller project configuration and lacked a social impact assessment proportionate to the risks.
- Analyzed key technical/safety and environmental issues: insufficient consideration of dam safety against World Bank standards and water/river-flow impacts (with implications for drinking water, fisheries, river transport, and livelihoods), as well as biodiversity, land use, and cultural heritage.

- Met consultation, disclosure, and Indigenous rights requirements: IFC’s review was not sufficient to ensure proper application of PS7, including the requirement to obtain FPIC where land and natural resources under traditional ownership or customary use would be affected.
- Considered potential economic displacement (PS5) connected to altered access to and uses of the river and surrounding resources.

**Contextual risk & conflict.** CAO underscores that community sentiment was divided and that conflict predated IFC’s investment. Protests were publicly reported in 2010–2012 (including after dredging began), and as construction started in 2013, tensions spiked: July 2013 saw equipment damage and a roadblock at Monte Olivo; in August 2013, two children and a former HSR worker were killed in a nearby incident (circumstances disputed). In August 2014, police briefly cleared the roadblock; broader allegations of violence and criminalization continued. CAO finds IFC did not give due consideration to these contextual risks in its review and supervision—despite their clear relevance to FPIC feasibility, community safety, and social stability.

**Overall findings.** CAO makes several non-compliance findings regarding IFC’s:

- Pre-investment review of a high-risk FI without adequate assurance that the Fund could apply PS1/PS7 in Indigenous territories or manage contextual conflict.
- Supervision of the Fund, including a review framework that constrained IFC’s ability to verify ESMS implementation and detect material ESDD gaps on Santa Rita.
- Failure to ensure that the Fund properly assessed dam safety, river-flow and livelihood impacts, consultation and disclosure requirements, Indigenous Peoples/FPIC, and economic displacement.

Given these shortcomings, CAO concludes that IFC did not sufficiently assure itself that the Fund was correctly applying the Performance Standards to Santa Rita and that, absent corrective action, the project would likely not achieve FPIC as required, heightening risks to the cultural, economic, and territorial rights and interests of affected Indigenous communities. CAO kept the case open for monitoring until IFC addressed the findings through corrective measures (e.g., strengthening FI oversight, ensuring robust PS-aligned impact assessment—including dam safety and environmental flows—and establishing consultation processes capable of achieving FPIC).

## Compliance Investigation of IFC’s Environmental and Social Performance: IFC Investment in CIFI— Guatemala: CIFI-01/ Hidro Santa Cruz

**Country:** Guatemala | **Body:** Office of the Compliance Advisor Ombudsman (CAO) for IFC & MIGA, World Bank Group

**Date:** December 19, 2018

- **Issues:** Consultation/FPIC (per 2006 PS7: free, prior, informed consent); disclosure and impact assessment (PS1); community health, safety and security/use of security forces (PS4); potential economic displacement (PS5); FI supervision and ESMS adequacy; incident response; residual impacts at project closure; policy compliance and disclosure
- **UNDRIP:** Arts. 18, 19, 32 (participation, consultation/consent for projects affecting lands/resources), among others.



**Summary:** This CAO investigation reviews International Finance Corporation (IFC)'s environmental and social (E&S) performance in relation to its 2008 equity and loan investment in Corporación Interamericana para el Financiamiento de Infraestructura, S.A. (CIFI), a financial intermediary (FI). CIFI financed the Canbalam I run-of-river hydropower project (~4.96 MW) near Santa Cruz Barillas (Huehuetenango, Guatemala), developed by Hidro Santa Cruz, S.A. (HSC), owned by Ecoener and Desarrollo Hidroeléctrico Centroamericano. Construction began January 2012, was suspended in March 2012 after protests, CIFI terminated the loan in Nov. 2015, HSC abandoned the project in Dec. 2016, and state registration was cancelled in March 2017. The complaint to CAO was filed by community representatives in July 2015.

**Allegations & context.** Complainants—Indigenous Peoples in a majority-Indigenous municipality—alleged failures to meet IFC requirements on consultation/FPIC, disclosure, and assessment of social/environmental impacts (including cumulative impacts given a proposed Canbalam II), plus economic displacement risks and violence/persecution of opponents. A pivotal incident on May 1st, 2012, led to the death of one community member and injuries to two others; complainants assert involvement of a guard from the project's security contractor. Criminal proceedings were complex and evolving; one accused was later convicted of causing serious injury, while murder acquittals were reportedly appealed. The incident was followed by a state of siege lasting nearly three weeks. Complainants also described 17 detentions (nine jailed ~9 months) and ongoing restricted access to land and natural resources due to the perimeter fence.

**IFC's exposure & FI structure.** IFC invested US\$10m equity (15% in 2008; later reduced) and US\$20m loan (plus a US\$48.5m syndicated facility) into CIFI, whose mandate is small/medium infrastructure across LAC. CIFI and Norfund approved up to US\$10.6m for Canbalam I in Dec. 2011, disbursing US\$3.5m before suspending further disbursements after the May 2012 violence. As an FI investment, IFC's responsibility was to ensure CIFI's ESMS was adequate and that IFC Performance Standards (2006) were applied to higher-risk sub-projects.

#### **Key CAO findings — Pre-investment review (2007–2008).**

Categorization & requirements: IFC correctly treated the operation as FI and required application of IFC PS to CIFI's portfolio.

Not commensurate to risk: IFC's E&S due diligence did not adequately assess CIFI's track record implementing its ESMS, capacity constraints (no full-time E&S officer; investment staff doubling as E&S reviewers), or how CIFI would apply PS to higher-risk deals where it lacked leverage or documentation (e.g., non-arranger roles). No actionable ESMS enhancement plan was secured despite ESRP requirements.

**Key CAO findings — Supervision (2008 onward).** Insufficient supervision against IFC policy (para. 26): IFC did not ensure that CIFI's ESMS operated "as envisaged at appraisal" or that PS were applied to sub-projects. Repeated AEPRs flagged persistent gaps (categorization inconsistencies; limited leverage/information in some deals; need for a full-time E&S specialist; weak documentation), yet IFC did not secure timely corrective actions and took insufficient steps to bring the client into compliance.

After the May 2012 fatality, CIFI suspended disbursements and its consultant produced a Social Monitoring Report (Oct. 2012) indicating potential non-compliance with PS1/PS7 consultation & FPIC (2006 framework term "free, prior and informed consultation") and PS4 on security forces. IFC did not engage as required by its procedures to ensure root-cause analysis, mitigation, and prevention measures—nor to assure investigation of security-force allegations under PS4, expert assessment of social impacts (including Indigenous Peoples under PS7), or risk controls for security use.

Despite awareness of ongoing adverse impacts (conflict, injuries/death, detentions, access restrictions from fencing), IFC did not ensure the client addressed assessment, mitigation, or compensation obligations through closure, contrary to the Sustainability Policy and PS1.

**Project-level deficiencies linked to Performance Standards.**

- PS1 (Assessment & management): Absence of an adequate social impact assessment and socio-economic baseline, weak organizational capacity review for a first-time developer, and deficient documentation to support conclusions of PS alignment.
- PS4 (Community health, safety & security): No project security risk assessment, no documented investigation of allegations regarding security personnel, and missing measures to manage risks associated with security use during a period of escalating conflict.
- PS5 (Land acquisition/economic displacement): Potential impacts tied to restricted access to land and river resources were not meaningfully assessed/managed.
- PS7 (Indigenous Peoples): Under the 2006 framework, the requirement is free, prior, and informed consultation (FPIC-as-consultation) leading to broad community support. Documentation and practice were insufficient to demonstrate PS7-consistent consultation or to address Indigenous Peoples' impacts; later evidence suggested potential non-compliance.

**Conclusions & monitoring.** CAO concludes that IFC's pre-investment review was not commensurate to risk, its supervision of the FI and response to a serious incident were non-compliant with IFC policy and procedures, and that IFC did not work with the client to ensure assessment, mitigation, or compensation of residual harms, including at project closure. Given these findings, CAO keeps the case open to monitor IFC's response and corrective actions (e.g., strengthening FI oversight, ensuring PS-aligned assessments, incident response protocols, and measures addressing ongoing community impacts).

# RECOMMENDATIONS

## & key takeaways for a just transition

Drawing from documented cases and legal precedents, here are strategic recommendations to ensure that the transition to renewable energy and mineral extraction respects Indigenous rights and promotes accountability.

- 1. Free, Prior, and Informed Consent as a Standard, Not an Afterthought:** Governments and companies must obtain FPIC from Indigenous Peoples for any project on their lands or affecting their resources, as required by international law and increasingly by national courts. This means early engagement *before* concessions or permits are issued. Consent is not a one-time form – it should be an ongoing process, with Indigenous communities having a say at each stage (planning, construction, operation, closure). Where consent is withheld, that decision must be respected – alternative project siting or design must be pursued. No project should be forced through via coercion or by ignoring dissent. As one legal victory put it, without consent, projects risk being illegal and will face contestation. Embracing FPIC leads to better outcomes and avoids costly disputes. Find a guide on FPIC [here](#) and a Due Diligence Questionnaire [here](#).
- 2. Culturally Appropriate and Inclusive Consultation:** In all cases, consultation should be conducted in Indigenous Peoples' own languages, with respect for their decision-making structures and sufficient time for deliberation. Information about projects must be provided in an **accessible and transparent** manner (e.g., environmental impact summaries understandable to non-specialists). Special care should be taken to include **women, youth, and elders** in consultation, as they may have distinct perspectives. Cases like Oaxaca's wind projects show that rushed or top-down consultations breed mistrust – instead, a dialogue approach that treats Indigenous communities as partners is needed. *Good practice:* set up joint committees with community representatives and project proponents to continually discuss and address concerns, not just in one-off meetings.
- 3. Benefit-Sharing and Co-Management:** Indigenous communities should *directly benefit* from any resource extraction or renewable energy project on their land. This can include royalty-sharing (as now mandated in Brazil after Belo Monte), equity stakes in projects, preferential employment and training, and community development funds. Beyond monetary benefits, co-management of environmental monitoring or even project operations can be offered—for example, involving Indigenous rangers in managing protected catchment areas around a dam, or having community-appointed observers at mine sites. Such models turn affected people into stakeholders with agency. **Benefit agreements** must be negotiated in good faith and be legally enforceable. As seen in the Fosen settlement (Norway), granting veto rights over future project expansion and additional land for livelihoods can compensate for impacts and restore balance. Companies and governments should consider creative arrangements such as community-owned renewable installations or discounted electricity guarantees as part of benefit-sharing.
- 4. Environmental and Cultural Impact Safeguards:** A just transition requires minimizing and mitigating harm. Projects should undergo rigorous **environmental**

**impact assessments (EIAs)** that specifically evaluate impacts on Indigenous rights and culture. If a project threatens critical water sources, fisheries, sacred sites, or endangered species essential to Indigenous livelihoods, it should be redesigned or not pursued. **Cumulative impacts** must be assessed (as the Zaldívar case showed, segmenting projects can hide actual impacts). Mitigation plans must be made with community input – e.g., creating alternative water supplies, fish passages for dams, and grazing corridors around solar farms. Where sacred areas are involved, avoidance is the best policy – some places should be no-go zones. The concept of a “Green Access Restriction” (from conservation) should be avoided – renewable projects must not cut off Indigenous Peoples from their lands. If relocation of Indigenous communities is absolutely unavoidable (a scenario best prevented), it must only occur with consent and provide lands and support *better* than what was lost, as per international standards.

- 5. Legal Empowerment and Access to Remedy:** Indigenous communities should have access to legal remedies if their rights are violated. States should strengthen legal frameworks to recognize Indigenous land rights (through titling, demarcation, etc., as seen in the Awás Tingni case) and to require FPIC in national law. Independent judiciary and grievance bodies (like the IFC’s CAO or national human rights commissions) are vital. Where violations occur, Indigenous Peoples must be able to seek justice without fear of reprisals. This includes the ability to file lawsuits to halt projects or seek compensation (as many cases here illustrate). To this end, donors and advocacy groups can support legal aid and technical advice for Indigenous communities – e.g., hydrologists to measure mine pollution, or lawyers to navigate courts. Companies and financiers should establish grievance mechanisms to allow issues to be raised early at the project level. A key recommendation to investors is to ensure their investee companies have such mechanisms and respect the outcomes.
- 6. Protection of Indigenous Human Rights Defenders:** The compendium cases reveal that those who speak out often face lethal danger. Governments must ensure protection for Indigenous activists opposing projects: effective witness protection programs, responsive policing that prosecutes attacks against defenders (rather than criminalizing the defenders themselves), and *zero tolerance* for violence or threats by private security or others. Companies should publicly commit to not tolerating any reprisals against critics. They should engage constructively with community representatives and refrain from SLAPP lawsuits (legal harassment). International observers (UN Special Rapporteurs, NGOs) should continue to monitor and shine light on hotspots. Ensuring that Indigenous leaders can raise concerns safely will lead to better, more inclusive decisions and prevent conflicts from escalating.
- 7. Revise Project Planning to Integrate Indigenous Knowledge:** Often Indigenous communities have deep environmental knowledge and sustainable practices (e.g., the Lickanantay “sowing water” methods). Project developers should consult Indigenous knowledge holders on how to design projects in harmony with local ecosystems – this could mean adjusting the siting of wind turbines to avoid bird migration routes and sacred hills or altering mine waste disposal plans based on community insights into downstream effects. Some renewable projects could even be *community-led* —for instance, supporting Indigenous-owned solar or wind microgrid projects that both provide clean energy and respect the land. A just transition can be an opportunity to empower Indigenous innovation rather than just extract resources.
- 8. Corporate and Investor Accountability:** Companies in the renewable energy and mining sectors should adopt clear policies on Indigenous rights – including



commitment to FPIC, benefit-sharing, and no land grabs. They must carry out human rights due diligence for all projects (as emerging laws in the EU and elsewhere will mandate), identifying risks to Indigenous Peoples and addressing them. If a company cannot obtain a “social license” from an Indigenous community, it should rethink the project. Investors and banks financing the green transition have leverage: they should require clients to implement the IFC Performance Standards or equivalent and decline funding if Indigenous rights are not upheld. They should also support benefit-sharing frameworks—for example, green bonds could include covenants requiring some proceeds to be directed to local communities. In short, financial actors must make respect for Indigenous rights a condition of doing business.

- 9. Government Policy Coherence – Climate Action with Justice:** Governments developing climate policies and allocating lands for renewables or mining should integrate Indigenous rights from the start. This includes recognizing Indigenous land titles, supporting community mapping of lands, and establishing legal mechanisms for Indigenous community consent on any proposed project. National energy plans should identify areas suitable for renewables that avoid critical Indigenous territories (with Indigenous input in zoning). When projects are conducted on Indigenous lands, governments can serve as mediators to ensure fair agreements. Promptly implementing court decisions (like Belo Monte’s royalty-sharing) is essential to build trust. A Just Transition Commission including Indigenous representatives can help guide policies. Ultimately, a shift in narrative is needed: Indigenous Peoples aren’t anti-development hurdles – they are rights-holders and vital leaders in achieving sustainable development. When their rights are protected, environmental stewardship often improves, benefiting wider society.
- 10. Knowledge Sharing and Solidarity:** Indigenous communities worldwide are networking to share experiences and strategies (for example, the International Indigenous Forum on Climate Change or networks formed through UN mechanisms and NGOs). These exchanges should be supported, as they spread “best practices” for resistance and negotiation. Advocates can gather and share accessible guides (similar to this compendium) on legal precedents and how communities achieved victories. Solidarity from civil society and the public—through campaigns, consumer pressure (for example, calling on EV companies to source minerals responsibly), and media coverage—can amplify Indigenous voices. We saw this in the Sami protests in Norway and the global outrage after Berta’s murder; public support pushes authorities and companies to change their course. Therefore, continuing to build broad alliances for an Indigenous-inclusive climate movement is essential. As one commentary noted, a truly just transition must “recognize Indigenous Peoples’ rights, sovereignty, and authority over ancestral lands”—this is not only a legal issue but a moral one for humanity’s shared future.

In conclusion, the path to a green economy can either repeat injustices or help remedy them – it depends on the choices we make now. The cases and recommendations above unequivocally show that when Indigenous Peoples’ rights are respected, everyone stands to gain: projects become more sustainable, conflicts are prevented, and Indigenous knowledge enhances environmental solutions. Achieving climate goals and protecting Indigenous rights are mutually reinforcing objectives. As the world speeds up renewable energy deployment, let’s make sure Indigenous communities are front and center of decision-making – as equal partners whose consent guides development, whose cultures are honored, and who share in the benefits of the transition they have done so little to necessitate yet are so vital in leading. Only then can we call the transition truly just.

# Appendix A

## Glossary

This glossary defines technical, legal, environmental, and Indigenous terms used throughout the Compendium. These definitions aim to promote shared understanding among practitioners, policymakers, Indigenous communities, and other stakeholders.

### LEGAL AND HUMAN RIGHTS TERMS

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<b>Free, Prior and Informed Consent (FPIC):</b>	A collective right of Indigenous Peoples to give or withhold consent to impacts that may affect their lands, territories, resources, or rights. It must be given freely, in advance of project authorization, and based on complete, accessible, and culturally appropriate information.
<b>Self-Determination:</b>	The right of peoples, including Indigenous Peoples, to freely determine their political status, to freely pursue their economic, social, and cultural development, to freely dispose of their natural wealth and resources, and to be secure in their means of subsistence.
<b>Collective Land Tenure:</b>	Legal recognition of land held and managed by a community collectively rather than individually, ensuring protection of traditional territories and resources.
<b>Customary Law:</b>	Indigenous Peoples' traditional laws and practices, often unwritten, that govern social, cultural, and territorial matters within their communities.
<b>ILO Convention 169:</b>	The International Labour Organization's binding convention on Indigenous and Tribal Peoples' rights, focusing on consultation, land rights, and cultural protections.
<b>UNDRIP:</b>	The United Nations Declaration on the Rights of Indigenous Peoples (2007), a landmark international instrument affirming the collective and individual rights of Indigenous Peoples.
<b>UN Special Procedures:</b>	Independent human rights experts appointed by the United Nations Human Rights Council to monitor, report, and advise on specific human rights issues or country situations. These experts—who may be individuals (Special Rapporteurs, Independent Experts) or working groups—serve voluntarily and are not UN staff. Their work includes country visits, engaging with governments and civil society, and issuing reports and recommendations to promote accountability and strengthen human rights protection. Special Rapporteurs also send <b>formal communications</b> —such as urgent appeals or allegation letters—to governments and other actors to raise concerns about potential or ongoing human rights violations and request corrective action.

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<b>Inter-American Court of Human Rights (IACrtHR):</b>	A regional court that issues binding judgments on human rights cases in the Americas, including Indigenous rights and land protection.
<b>Inter-American Commission on Human Rights (IACHR):</b>	A regional human rights body that receives complaints, conducts investigations, and issues recommendations regarding human rights violations.
<b>Compliance Advisor Ombudsman (CAO):</b>	An independent accountability mechanism of the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA) that addresses concerns related to social and environmental impact.
<b>Environmental Impact Assessment (EIA):</b>	A systematic process for evaluating potential environmental and social impacts of a proposed project before approval or implementation.
<b>Escazú Agreement:</b>	A 2018 regional treaty for Latin America and the Caribbean that guarantees access to environmental information, public participation in decision-making, justice in environmental matters, and protection for environmental human rights defenders.

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## ENVIRONMENTAL AND RESOURCE TERMS

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<b>Transition Minerals:</b>	Critical minerals essential for renewable energy technologies, including lithium, cobalt, nickel, copper, and rare earth elements.
<b>Just Transition:</b>	A process of shifting from fossil fuels to sustainable energy systems in a way that is equitable, inclusive, and rights-based, prioritizing vulnerable and historically marginalized communities.
<b>Carbon Credits:</b>	Tradable certificates representing the reduction of one ton of carbon dioxide or equivalent greenhouse gas emissions.
<b>Ecosystem Services:</b>	The benefits humans derive from ecosystems, such as clean water, biodiversity, pollination, and climate regulation.
<b>Biodiversity Offsets:</b>	Conservation activities intended to compensate for biodiversity loss caused by development projects.

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# INDIGENOUS GOVERNANCE AND ADVOCACY TERMS

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**Indigenous Governance:** Systems and structures of leadership and decision-making developed by Indigenous Peoples according to their cultural norms and traditions.

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**Cultural Heritage:** Tangible and intangible assets of Indigenous Peoples, including sacred sites, languages, traditional practices, and ancestral knowledge.

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**Benefit Sharing:** Mechanisms to ensure that communities affected by resource extraction projects receive fair economic, social, and environmental benefits.

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**Traditional Ecological Knowledge (TEK):** Indigenous Peoples' cumulative knowledge and practices regarding local ecosystems, built over generations and central to sustainable resource management.

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**Frontline Defenders:** Individuals and communities directly protecting human rights and natural resources, often at personal risk.

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## Appendix B

# Directory of Relevant Organizations & Contacts

The following organizations play a key role in Indigenous rights, environmental protection, renewable energy governance, and accountability processes.

ORGANIZATION	WEBSITE	CONTACT / FOCAL POINT
<b>Indigenous Peoples Rights International (IPRI)</b>	<a href="https://www.iprights.org">https://www.iprights.org</a>	ipri@iprights.org
<b>Due Process of Law Foundation (DPLF)</b>	<a href="https://www.dplf.org">https://www.dplf.org</a>	info@dplf.org
<b>Center for Justice and International Law (CEJIL)</b>	<a href="https://cejil.org">https://cejil.org</a>	contacto@cejil.org
<b>Business &amp; Human Rights Resource Centre</b>	<a href="https://www.business-humanrights.org">https://www.business-humanrights.org</a>	transitionminerals@business-humanrights.org
<b>Compliance Advisor Ombudsman (CAO)</b>	<a href="https://www.cao-ombudsman.org">https://www.cao-ombudsman.org</a>	cao-compliance@ifc.org
<b>UN Special Rapporteur on the Rights of Indigenous Peoples</b>	<a href="https://www.ohchr.org">https://www.ohchr.org</a>	srindigenous@ohchr.org
<b>Inter-American Commission on Human Rights (IACHR)</b>	<a href="https://www.oas.org/en/iachr">https://www.oas.org/en/iachr</a>	cidhoea@oas.org
<b>Inter-American Court of Human Rights</b>	<a href="https://www.corteidh.or.cr">https://www.corteidh.or.cr</a>	corteidh@corteidh.or.cr
<b>International Work Group for Indigenous Affairs (IWGIA)</b>	<a href="https://www.iwgia.org">https://www.iwgia.org</a>	iwgia@iwgia.org
<b>Earth Rights International</b>	<a href="https://www.earthrights.org">https://www.earthrights.org</a>	info@earthrights.org

<b>ORGANIZATION</b>	<b>WEBSITE</b>	<b>CONTACT / FOCAL POINT</b>
<b>Human Rights Watch – Indigenous Rights Division</b>	<a href="https://www.hrw.org">https://www.hrw.org</a>	indigenous@hrw.org
<b>Amnesty International – Indigenous Rights Program</b>	<a href="https://www.amnesty.org">https://www.amnesty.org</a>	contact@amnesty.org
<b>World Resources Institute (WRI)</b>	<a href="https://www.wri.org">https://www.wri.org</a>	info@wri.org
<b>International Finance Corporation (IFC)</b>	<a href="https://www.ifc.org">https://www.ifc.org</a>	inquiries@ifc.org
<b>United Nations Environment Programme (UNEP)</b>	<a href="https://www.unep.org">https://www.unep.org</a>	unepinfo@un.org
<b>Global Witness</b>	<a href="https://www.globalwitness.org">https://www.globalwitness.org</a>	info@globalwitness.org
<b>Front Line Defenders</b>	<a href="https://www.frontlinedefenders.org">https://www.frontlinedefenders.org</a>	info@frontlinedefenders.org
<b>World Bank – Environmental and Social Standards Advisory Team</b>	<a href="https://www.worldbank.org">https://www.worldbank.org</a>	safeguards@worldbank.org
<b>International Institute for Environment and Development (IIED)</b>	<a href="https://www.iied.org">https://www.iied.org</a>	info@iied.org
<b>Equitable Origin</b>	<a href="https://www.equitableorigin.org">https://www.equitableorigin.org</a>	info@equitableorigin.org
<b>Natural Justice</b>	<a href="https://www.naturaljustice.org">https://www.naturaljustice.org</a>	info@naturaljustice.org



**Indigenous Peoples  
Rights International**

Championing Indigenous Peoples Rights

