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AQ FEATURE

Contradiction in International Law

BY Angela Bunch

International law and practice offer contradictory answers for what happens when communities say "no."

Indigenous peoples' control over natural resources continues to be one of the most controversial issues in international law.[1] Numerous international human rights treaties recognize Indigenous communities' right to be consulted over the use of resources on or beneath their communal lands. But international law tends to consider third parties' exploitation of natural resources on Indigenous land to be legal—as long as Indigenous rights to consultation, participation and redress, among other rights, are met.[2]

But there are disputing interpretations of whether Indigenous communities have the right to free, prior and informed consent (FPIC)—the right not only to be consulted about, but to reject activities that adversely affect them.

This is evident in the two main international human rights instruments that apply specifically to Indigenous peoples: the legally binding ILO 169 (1989), and the non-binding United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007.[3] While ILO 169 does not clearly recognize Indigenous and tribal peoples' right to veto measures or investment projects that they oppose, UNDRIP does.

The ILO Committee of Experts on the Application of Conventions and Recommendations[4] has declared that under ILO 169, Indigenous peoples' ownership and possession rights can be subordinate to the interests of states, if states retain ownership of subsoil resources and comply with the following:

- Consult with Indigenous communities before natural resources on their lands are explored or exploited;
- Ascertain the impact of resource extraction;
- Provide Indigenous communities a fair share of the benefits accruing from any natural resource extraction; and
- Provide fair compensation for any damages caused by natural resource exploration and exploitation.[5]

ILO 169 also declares that "relocation of these peoples [...] shall take place only with their free and informed consent." If consent is not granted, states must follow procedures established under national law to allow for the "effective representation" of the communities involved before relocating them.[6]

While ILO 169 sets the standards that should be met under any consultation (including a "genuine dialogue" between governments and Indigenous peoples and an "objective of reaching agreement or consent"), it does not state explicitly whether Indigenous peoples have the right to veto.[7]

UNDRIP, on the other hand, establishes that "Indigenous peoples shall not be forcibly removed from their lands or territories," and that states need to obtain Indigenous peoples' free and informed consent before the approval of any project or legislative or administrative measure that may affect them.[8] This is a major step in the advancement of Indigenous peoples' right to veto.

In light of these differing interpretations, what should happen when consultations do not take place, go sour, or when Indigenous peoples do not consent? In the Americas, Indigenous peoples' territorial rights have been interpreted primarily through cases that have come before the Inter-American Human Rights System (Commission and Court). In 2002, the Court declared that Indigenous peoples' "right to property over natural resources may not be legally extinguished or altered by State authorities," unless they obtain the peoples' full and informed consent, and comply with other legal requirements.[9]

But in later judgments and opinions, the Court has suggested that FPIC is not required, as long as a consultation process has been carried out in line with the recommendations of the ILO Committee of Experts—"undertaken in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures"[10]—except in cases where development projects involve displacement, deprive communities of the use of their lands, or involve the storage or disposal of hazardous waste.[11]

Recently, the Court endorsed a qualified FPIC that differentiated between small and large-scale

development projects.[12] The judges ruled that for large-scale projects, states must not only consult with Indigenous peoples, but also obtain their free, prior and informed consent; but small-scale projects require only consultation.[13]

Exactly what constitutes a small- and a large-scale project was not set and appears to have been left up to judicial interpretation.

This approach attempts to reconcile the rights of Indigenous people with those of states and investors. But does it adequately protect Indigenous rights? The answer remains unclear.

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