

# Failing Indigenous Communities: Free, Prior, and Informed Consent in Latin America

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## Abstract

Free, prior, and informed consent (FPIC) has been defined in various international agreements and declarations. In general, this requirement serves to inform local communities about projects that will happen on or near their land and represents a “social license” to operate. Indigenous peoples are some of the most vulnerable population groups, and their consent is required before any development project can be implemented. This paper looks at the level of success that FPIC has had in two Latin American gas extraction projects: the Yasuní-ITT in Ecuador and Camisea in Peru. While both countries have legislation that requires the application of a consultation for indigenous peoples to give their consent, the implementation of the process failed in both situations. This paper argues that both Peru and Ecuador implemented legislation that requires FPIC to “greenwash” their extractivist development strategies. More political commitment to the process of FPIC is required by the national governments in order for it to serve its intended purpose of protecting indigenous peoples.

## Introduction

The economic development of Latin America has always been characterized by the extraction of natural resources. In a region inhabited by large numbers of indigenous people, development through extractivism usually alters indigenous livelihoods by increasing indigenous vulnerability to various detrimental economic, social, and environmental effects. Beginning in 1989, the United Nations (UN) and the International Labour Organization (ILO) developed guidelines for a consultation process regarding projects that affect the lives of indigenous peoples in an effort to protect them from abuses by states and corporations.<sup>1</sup> Several Latin American countries such as Peru and Ecuador have also adopted the concept of free, prior, and informed consent (FPIC) as part of their national constitutions.

Theoretically, FPIC would provide a solution to ensure that the views, needs, and concerns of indigenous peoples are taken into consideration. That then leads to a more participatory decision-making process which yields more sustainable initiatives. In practice, the use of FPIC has been less than ideal. As this article will show, the Yasuní-ITT gas project in Ecuador and the Camisea gas project in Peru are two cases where consultations were carried out to varying degrees of success. The two cases have a complex network of stakeholders and interests that determined the conditions under which FPIC was applied. This paper will explore the application of FPIC in the Yasuní-ITT and Camisea cases and evaluate the outcome of each consultation process. It will also provide recommendations to help make FPIC a more effective tool for the defense of indigenous and environmental rights.

## Definition of Free, Prior, and Informed Consent

It is important to define free, prior, and informed consent in order to understand its significance in extractive activities with indigenous peoples. FPIC has been present and mentioned in various international soft and hard law documents as a fundamental right for indigenous peoples around the world. While there is no single universally accepted definition of FPIC, its key elements are defined in the International Labour Organization's Indigenous and Tribal People Convention (ILO No.169) (1989),<sup>2</sup> the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (2007),<sup>3</sup> and the United Nations Environmental Program Rio Declaration (1992).<sup>4</sup> The United Nations Permanent Forum on Indigenous Issues synthesizes these into a comprehensive definition that will be used to analyze the Ecuadorian and Peruvian cases.

The International Labour Organization, in its Indigenous and Tribal People Convention, contains two articles that grant indigenous people the right to a consultation regarding development that would affect the land they occupy.<sup>5</sup> Article 7 of this convention states that the people have "the right to decide their own priorities for the process of

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<sup>1</sup> International Labour Organization, *Indigenous and Tribal People Convention No. 169*.

<sup>2</sup> Ibid.

<sup>3</sup> United Nations Declaration on the Rights of Indigenous Peoples.

<sup>4</sup> United Nations Environmental Program, *Rio Declaration on Environment and Development*.

<sup>5</sup> International Labour Organization, *Indigenous and Tribal People Convention No. 169*.

development as it affects their lives, beliefs, institutions, and spiritual well-being and the lands they occupy or otherwise use, and to exercise control...over their own economic, social and cultural development.”<sup>6</sup> In addition, it states that governments must carry out studies to inform the local people about the environmental impact of the planned development activity, and they must protect the environment of the land inhabited by indigenous peoples.<sup>7</sup> Article 15 further specifies the right of indigenous peoples to “participate in the use, management, and conservation” of natural resources on their lands.<sup>8</sup> One of the first international treaties to discuss FPIC, ILO No.169 underlines the importance of indigenous involvement in the decision-making process and includes the requirement for information to be provided prior to consent.

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) also grants indigenous peoples the right to a consultation process. UNDRIP, which was adopted by the General Assembly in September of 2007, grants indigenous peoples the right to determine the ways in which their land and resources will be used.<sup>9</sup> It specifies that states should obtain the “free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water, or other resources.”<sup>10</sup> As this statement clearly shows, UNDRIP outlines the three requirements involved in FPIC’s use for development projects affecting indigenous land and resources.

In a more environmental focus, the United Nations Environmental Program’s Rio Declaration on Environment and Development of 1992 mentions the right of people to participate in the decision-making process of projects that will affect their lands. Principle 10 of the Rio Declaration states that individuals shall have “access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes.”<sup>11</sup> While indigenous people are not explicitly mentioned in this particular principle, the Rio Declaration states the importance of the participation of individuals whose environment is affected by a specific development project in making decisions.

Considering the mentions of FPIC in international law, the United Nations Permanent Forum on Indigenous Issues synthesizes FPIC as follows:

- People are not coerced, pressured, or intimidated in their choices of development.
- Consent is sought and freely given prior to authorization of development activities.
- People have full information about the scope and impact of the proposed development activities on their land, resources, and well-being.
- Their choice to give or withhold consent over developments affecting them is respected and upheld.<sup>12</sup>

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<sup>6</sup> Ibid., Art. 7.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid., Art. 15.

<sup>9</sup> United Nations Declaration on the Rights of Indigenous Peoples, Art. 32.

<sup>10</sup> Ibid.

<sup>11</sup> United Nations Environmental Program, *Rio Declaration on Environment and Development*, Principle 10.

<sup>12</sup> United Nations Economic and Social Council, “Report of the International Workshop,” 12.

These statements clearly explain what is meant by the concepts of “free,” “prior,” and “informed” as they relate to FPIC, and will thus be applied to the analysis of the two cases to identify problems and solutions for implementation.

### *The Importance of FPIC for Indigenous Rights*

Implementing FPIC, especially regarding development projects on indigenous lands, is important for indigenous rights as it can provide both a pathway to more democratic decision-making and a social license for operation. Natural resource extraction has been identified as one of the most important sources of abuse on the rights of indigenous peoples around the world.<sup>13</sup> According to a UN questionnaire, indigenous people most often report environmental impacts including pollution, degradation of ecosystems that affects their subsistence, and loss of land control as the main causes of concern with development projects.<sup>14</sup> Social and cultural effects are also mentioned as important concerns for indigenous people worldwide.<sup>15</sup>

In this sense, FPIC democratizes development by involving those who will be most affected by the planned activities. Widespread participation in decision-making allows more voices to be heard; therefore development can find a balance between economic, environmental, and social considerations.<sup>16</sup> As indigenous participation increases, so does their ability to influence policies that would affect their communities and environment. Indigenous interests and points of view can be negotiated with those of the national government or of other authorities and stakeholders, and that allows for more sustainable alternatives to be put into place. Since the local inhabitants of an area will be most affected by the impacts of any development project, they should be the ones who determine whether or not they want to assume these impacts. FPIC gives indigenous people the legal protections to defend their territories and communities from the risks associated with extractive activities.

Another important dimension of FPIC is that it grants the government or corporation that undertakes the development project a social license to operate. A social license is defined as the ongoing acceptance of a project by the local community in which the project is taking place.<sup>17</sup> Cases such as the Yanacocha Mine in Peru<sup>18</sup> illustrate how indigenous people have opposed and protested development projects on their land, leading to violent conflicts with the national governments and companies undertaking the projects.<sup>19</sup> A social license improves relations between stakeholders by creating an open discussion space where the social and environmental risks can be negotiated and managed. As we will see, obtaining the social license can be a long and arduous task, but having explicit approval

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<sup>13</sup> Anaya, “Report of the Special Rapporteur,” 8.

<sup>14</sup> *Ibid.*, 9.

<sup>15</sup> *Ibid.*

<sup>16</sup> Buxton and Wilson, *FPIC and the Extractive Industries*, 13.

<sup>17</sup> Boutilier and Thompson, “Modelling and Measuring the Social License to Operate,” 2.

<sup>18</sup> EcoPortal, “Enfrentamientos Violentos en Carachugo II.” The Yanacocha Mine in Peru is the world’s second largest gold mine, and it has been the epicenter of many violent confrontations for over 10 years. The indigenous people living in the area and miners periodically block the roads leading to the mine and go on strike to demand better environmental protections, job conditions, and health regulations from the owner company Newmont. The company and the state employ armed officers to confront the protesters. The use of tear gas, arrests, and shootings are common at each of these violent encounters.

<sup>19</sup> Stern, “All That Glitters is not Gold,” June 14, 2016.

from the community benefits all parties involved. This has motivated many governments to include FPIC in their national legislations and many companies to institute it as a mandatory process.

## Natural Resource Extraction and Latin American Development

The historical and economic traits of Latin America are important factors in understanding why FPIC plays such a big role in protecting the rights of the indigenous peoples residing in the area. Throughout history, Latin American development and industry have been characterized by policies of extraction of the region's natural resources, especially mining, oil, and gas extraction.<sup>20</sup> Eduardo Galeano wrote in his book, *The Open Veins of Latin America*:

Latin America is the region of open veins. Everything, from the discovery until our times, has always been transmuted into European — or later United States — capital, and as such has accumulated in distant centers of power. Everything: the soil, its fruits and its mineral-rich depths, the people and their capacity to work and to consume, natural resources and human resources.<sup>21</sup>

In the same text, Galeano mentions the indiscriminate extraction of gold and silver in the first centuries of Spanish control of Latin America, which were followed by many more years of production of food, metals, and raw materials to finance the growth of Europe and the Global North.<sup>22</sup> The extraction of commodities to be sold abroad decimated many natural environments such as the Cerro Rico in Bolivia, and caused millions of indigenous deaths in Latin America.<sup>23</sup> Even today, 40 percent of all Latin American exports come from extractive activities.<sup>24</sup> Following the historical pattern, these activities tend to yield few benefits for the people who live in the surrounding areas while causing them social and environmental harm.

The economy of resource extraction in the region has also been ridden with controversies. The so-called “resource-curse”<sup>25</sup> has been used since the middle of the 1990s to explain why a region with such an immense resource base would be performing so poorly in terms of economic growth and development.<sup>26</sup> Bebbington describes various characteristics of the extractive industry that can explain why it has not been beneficial for the countries that own the resources. These include the lack of diversity in Latin American industries which makes the states more vulnerable to price fluctuations, conflict due to social

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<sup>20</sup> Bebbington, “Extractive Industries,” 3.

<sup>21</sup> Galeano, *Open Veins of Latin America*, 15.

<sup>22</sup> *Ibid.*, 22.

<sup>23</sup> *Ibid.*, 38.

<sup>24</sup> Walter, *Extractives in Latin America and the Caribbean*, 11.

<sup>25</sup> Natural Resource Governance Institute, “The Resource Curse,” 3; The resource curse describes the failure of resource-rich countries to capitalize from their resources. Increased revenues from commodity booms cause the exchange rates in the country to appreciate, which makes non-commodities more expensive and thus non-competitive in the international market. When this happens, the economy suffers a downturn and the country is unable benefit from the export of their resources.

<sup>26</sup> Bebbington, “Extractive Industries,” 6.

opposition to extractive activities, and the lack of local benefits and multiplier effects from this activity.<sup>27</sup> One look at the chronic poverty and environmental degradation in resource-rich states like Bolivia, Peru, and Ecuador is enough to see that the dominant policy of resource extraction for development has not yielded many social, economic, or environmental benefits.

Although the problems with extractive industries in Latin America are clear, they have not deterred current governments from increasing their extractive efforts. In fact, the most recent administrations of Bolivia, Ecuador, Peru, Chile, and Brazil have all expanded the extractive activities taking place within their borders.<sup>28</sup> These governments believe that through new extractive policies they will be able to break the resource curse. Speaking in favor of continued extraction and against environmental activists, President Rafael Correa of Ecuador has said “it’s absurd to be sitting on top of hundreds of thousands of millions of dollars, and to say no to mining because of romanticisms, stories, obsessions, or who knows what.”<sup>29</sup> Correa’s plan includes investing the revenue from the export of Ecuador’s commodities into social development and poverty reduction.<sup>30</sup> In Peru and Ecuador, the expansion of extractive activities has encroached onto protected territories (both natural areas and indigenous lands), and has disrupted indigenous territorial and ownership rights in the process, which is what FPIC seeks to prevent.<sup>31</sup> In addition, the environmental impact of opening protected natural areas to resource extraction activities has also disrupted the livelihoods of the peoples living in those areas.<sup>32</sup>

## The Environmental Sustainability of Resource Extraction

Drawing upon the experience of many years of failed global development initiatives, sustainable development emerged as a concept that intended to avoid all of the pitfalls associated with traditional development. Defined in the Brundtland Report of 1987, sustainable development “meets the needs of the present without compromising the ability of future generations to meet their own needs.”<sup>33</sup> A sustainable model should do its best to balance economic, social, and environmental needs to maximize all possible benefits for the people it is targeting. In addition to the economic and social problems associated with resource extraction in Latin America, the environmental degradation caused to protected territories makes this industry one of the most unsustainable activities in the region.

Inevitably, the extraction of natural resources affects the environment in different ways. The type and severity of the effects can vary from project to project, but there are some general impacts that are important to mention, especially when discussing the effects of resource extraction on indigenous peoples. One of the first impacts is the construction of roads to access the area and transport the resources back out to the markets. The

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<sup>27</sup> Ibid., 7.

<sup>28</sup> Ibid., 10.

<sup>29</sup> Ibid., 12.

<sup>30</sup> Ibid.

<sup>31</sup> UN News Center, “Indigenous Peoples Suffer Abuses,” September 20, 2011.

<sup>32</sup> Ibid.

<sup>33</sup> World Commission on Environment and Development, *Our Common Future*, 29.

construction of these roads usually causes deforestation and can lead to biodiversity loss.<sup>34</sup> The transport activities can introduce invasive species, increase air and ground pollution, and fragment wildlife habitats.<sup>35</sup>

The resource extraction itself can also have devastating consequences. Mining, for example, can cause harmful chemicals such as mercury or radioactive compounds to be released into the environment.<sup>36</sup> As these chemicals leak into the groundwater, they contaminate large areas and cause problems to humans, fauna, and flora alike.<sup>37</sup> The problems continue throughout the various stages of mining, as the disposal process leads to sedimentation in bodies of water, acid drainage, and fluorine contamination, among other effects.<sup>38</sup> Oil and natural gas extraction have similar negative effects. Emissions of carbon monoxide, nitrogen oxides, and particulates decrease the local air quality and the amount of vegetation on which wildlife can forage.<sup>39</sup> The extraction of natural resources is in no way preserving the environment for future generations to be able to meet their needs. As we will see in the two case studies, environmental degradation is closely tied to extractivism.

## The Yasuní-ITT Project in Ecuador

Ecuador has been fully dependent on its oil extraction industry for the past 40 years.<sup>40</sup> The Yasuní-ITT area is made up of the Yasuní National Park and the Ishpingo Tambococha Tiputini block, and it represents 20 percent of the country's oil reserves.<sup>41</sup> The area is culturally diverse as it is home to the Quechua, Waorani, Taromenane, and Tagaeri indigenous groups.<sup>42</sup> The latter two groups live in voluntary isolation.<sup>43</sup> The area is also a biodiversity hub, containing 67 endangered species, 243 endemic species, and record numbers of reptile, bat, tree, and amphibian species.<sup>44</sup> The great cultural and biological diversity motivated the government to implement the Yasuní-ITT Initiative in 2007, which would have kept the oil in the ground in exchange for 3.6 billion USD from the international community for Ecuador's development.<sup>45</sup> Following the initiative's failure in 2013, the government decided to exploit the resources instead.<sup>46</sup> Although Ecuador has the legal provisions for FPIC, the decision to extract oil from Yasuní-ITT was made without any sort

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<sup>34</sup> Hill, "The Environmental Impact of Roads."

<sup>35</sup> Ibid.

<sup>36</sup> MIT, "Environmental Risks of Mining."

<sup>37</sup> Ibid.

<sup>38</sup> Ibid.

<sup>39</sup> Tribal Energy and Environmental Information, "Oil and Gas Drilling/Development Impacts."

<sup>40</sup> Rival, "Planning development futures in Ecuadorian Amazon," 153.

<sup>41</sup> Ibid.

<sup>42</sup> Warnars, "The Yasuní-ITT Initiative," 57.

<sup>43</sup> International Work Group on Indigenous Affairs, "Isolated Indigenous Peoples." Indigenous tribes that live in voluntary isolation have freely decided to avoid all contact with outsiders and prefer to live without influences from the outside world. These tribes are particularly vulnerable to diseases and changes in their ecosystem resulting from contact with outsiders.

<sup>44</sup> Ibid.

<sup>45</sup> Amazon Watch, "The Yasuní-ITT Initiative."

<sup>46</sup> Correa, "Rafael Correa declara el fin de la iniciativa," August 15, 2013.

of consultation despite opposition to the project from the indigenous groups living in the area.<sup>47</sup>



Figure 1: Map of Yasuni National Park and Location of the ITT Oil Block.  
Source: *The Guardian*, February 19, 2014.

#### Legal provisions for FPIC and Political Interests

The legal instruments for FPIC in Ecuador are very clearly delineated both in international and domestic law. Ecuador is a signatory to and has ratified the various international treaties that were previously discussed. Most importantly, it ratified the ILO Convention 169 in May of 1998.<sup>48</sup> While the ILO provisions for FPIC became part of Ecuadorian law at the same time as the push for oil extraction from Yasuni began, the first set of wells was drilled in indigenous territory without a previous consultation process.<sup>49</sup> Due to increasing pressure from the indigenous communities in the area, the government passed a law in 2002 that made FPIC a prerequisite for environmental impact assessments.<sup>50</sup> However, this law did not make consent mandatory nor did it allow for veto rights; it only made the process of a consultation mandatory.<sup>51</sup> The 2008 Constitution further guaranteed the right to FPIC within a reasonable time period of initial operations, but the decision is not binding.<sup>52</sup>

Another important legal protection for FPIC came in the form of an Inter-American Commission for Human Rights ruling against the state of Ecuador.<sup>53</sup> The Quechua community of Sarayaku (located within Yasuni) claimed that Ecuador had violated

<sup>47</sup> Lang, "Ecuador's Continued Conflict," June 3, 2014.

<sup>48</sup> International Labour Organization, *Indigenous and Tribal People Convention*, Art.7.

<sup>49</sup> Rival, "Planning Development Futures in Ecuadorian Amazon," 158.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*, 159.

<sup>52</sup> Forest Transparency, "2012 Ecuador Indicators."

<sup>53</sup> Khatri, "Indigenous Peoples' Rights," 206.

their rights by allowing an Argentinean oil company to begin operations on their land without having consulted them first.<sup>54</sup> The court ruled in favor of the indigenous community and set its FPIC standards higher than the ones mentioned in ILO 169.<sup>55</sup> With such clear provisions for FPIC, it is clear that Ecuador was in violation of both international and domestic law by failing to implement a consultation process in any and all of the stages of the Yasuní-ITT decision-making process. The country also failed to carry out a consultation before it began its oil production activities in Yasuní-ITT in September of 2016.<sup>56</sup>

By failing to consult the indigenous communities of Yasuní-ITT, the Ecuadorian state decided to purposefully act against the country's existing regulations and the public's demand for a consultation process. On one hand, the government led by President Rafael Correa was focused on poverty reduction and believed that the best way to do so was increasing the country's oil production.<sup>57</sup> Correa planned to reinvest the revenue from the oil into social programs that would directly benefit Ecuador's poorest sectors.<sup>58</sup> He spoke in terms of the inevitability of oil extraction from the Yasuní-ITT. In a national press conference on August 15, 2013, Correa stated that the world had failed Ecuador by not funding the Yasuní-ITT Initiative; therefore oil extraction from the Yasuní-ITT block was necessary to rid the country of its poverty.<sup>59</sup> Despite having advocated keeping the oil in the ground, Correa is also blamed for purposefully confusing and attacking the international community to dissuade them from funding the Initiative.<sup>60</sup> Correa's actions seem to reflect his original interest in extracting oil from the Yasuní-ITT to fulfill his promise of taking Ecuador out of poverty.

On the other hand, the indigenous people, indigenous rights activists, and Ecuador's civil society vehemently opposed the oil extraction and demanded that the state institute a consultation process before taking any action. In representation of the indigenous peoples of Yasuní, Alicia Kawiya, President of the Waorani Indigenous Federation, stated: "More than 40 years of the oil industry has not benefited us. We do not need revenues from oil, we do not need oil activity. We have everything to live on our land."<sup>61</sup> In response to Correa's decision to exploit the oil in Yasuní, *Yasunidos*, a group of young activists, began a campaign in 2014 to collect signatures to call for a national referendum.<sup>62</sup> While the group is said to have collected over 750,000 signatures, the governmental review process only found 369,000 signatures to be valid.<sup>63</sup> This number did not meet the minimum number of signatures required to call for a referendum, therefore the government refused to conduct one.<sup>64</sup> The indigenous inhabitants of Yasuní and the country's civil society were opposed to the exploitation of oil from the national park, but the government refused to listen to them. The interactions between the government, indigenous peoples, and civil society reflect the political interests that led to the failure of FPIC.

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<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

<sup>56</sup> Yasunidos, "Chronology."

<sup>57</sup> ANDES, "Ecuadorian President Declares the End."

<sup>58</sup> Correa, "Rafael Correa declara el fin de la iniciativa," August 15, 2013.

<sup>59</sup> Ibid.

<sup>60</sup> Hill, "Why Ecuador's President is Misleading," October 15, 2013.

<sup>61</sup> Hance, "Ecuador Will have Referendum," April 16, 2014.

<sup>62</sup> Yasunidos, "Chronology."

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

### *Economic, Social, and Environmental Repercussions of the Yasuní-ITT Case*

The impacts of the exploitation of oil from the ITT block are yet to be seen given that operations only began in September of 2016, but the exploitation from various other blocks of Yasuní National Park has already caused serious economic, social, and environmental impacts. Although Ecuador's economy depends mostly upon the extraction of oil, the Amazon region of the country where Yasuní-ITT is located has received very few benefits from oil revenues in the past.<sup>65</sup> The Ecuadorian government has provided various different figures regarding the amount of oil available for exploitation in the area, but estimates of the predicted revenue range from 7 billion USD to 18 billion USD.<sup>66</sup> While the state has said that the revenue from this site will be invested in projects that target poverty, historical trends point to the fact that the local communities will likely not receive the benefits from the resources extracted from their own land.

In terms of social impacts of the project, the indigenous groups living in Yasuní-ITT will be the most at risk from the impacts of the project. The health of these people will be negatively affected by contaminated water, foreign diseases, toxic waste from the extractive activities, and a decrease in wildlife they can hunt.<sup>67</sup> In addition, the influx of foreigners changes the cultural traditions of each group, and an increase in alcoholism and the dependence on cash economy have already been observed.<sup>68</sup> Alarmingly, there have also been reported murders of members of indigenous groups in voluntary isolation due to conflicts regarding colonizers encroaching on their territories.<sup>69</sup> The oil extraction does not provide any social benefits to the four tribes living in Yasuní, but rather is harmful to the continued existence of these ethnicities.

Perhaps the most important repercussions of drilling in the Yasuní-ITT are environmental. A study by Bass et al. concluded that the area is of extreme importance for global conservation efforts because it holds an immense amount of both animal and plant species and its unique likelihood to maintain wet rainforest conditions as the rest of the eastern Amazon becomes affected by drought due to the changing climate.<sup>70</sup> Unfortunately, the preliminary impact assessment reports from 2007 concluded that oil spills threaten to contaminate waterways and could decimate the populations of the endangered giant otter and the vulnerable Amazonian manatee.<sup>71</sup> In addition, colonization, deforestation, habitat fragmentation, and unsustainable fishing and hunting will also contribute to biodiversity loss.<sup>72</sup> While the government attempts to assure the people that the project's impacts will be minimal, it is obvious that the only way to minimize them would be to stop all other oil operations in the area.

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<sup>65</sup> Rival, "Planning development futures in Ecuadorian Amazon," 154.

<sup>66</sup> Yasunidos, "New and Multimillion Dollar ITT Reserves," July 16, 2016.

<sup>67</sup> SOS Yasuní, "Foreseeable impacts of oil industry activity."

<sup>68</sup> Ibid.

<sup>69</sup> Ibid.

<sup>70</sup> Bass et al., "Global Conservation Significance," 13.

<sup>71</sup> Ibid., 14-15.

<sup>72</sup> Ibid., 15.

## Peru and the Camisea Gas Project

The Camisea gas field is one of the most salient development projects that Peru has invested in during the last few decades. The gas reserves discovered by Shell in 1987 are located 20 kilometers east of the Camisea River in the jungle area of the department of Cusco.<sup>73</sup> The site overlaps with the Kugapakori Nahua Reserve, a protected indigenous territory where 10,000 Yora, Machiguenga, Kirineri, Kugapakori, and Nanti ethnicities live in conjunction with several tribes in voluntary isolation.<sup>74</sup> The Vilcabamba and Otishi National Parks also surround the drilling site.<sup>75</sup> The project's consultation process was dubious, and the environmental and social consequences to the indigenous groups in the area have been dire.



Figure 2: Location of the Camisea Gas Field

Source: *The Economist*, August 7, 2003

<sup>73</sup> Urteaga-Crovetto, "The Broker State," 114.

<sup>74</sup> Ibid.

<sup>75</sup> Ibid., 115.

### *FPIC and its Dubious Implementation*

Peru is a signatory to and has ratified several of the international law documents that were already discussed above. The state ratified the ILO Convention 169 in February of 1994 and signed it into domestic law in 1995, and it continues to be in force.<sup>76</sup> Domestically, Peru's former President Ollanta Humala passed a law in 2011 requiring the government to consult indigenous peoples before starting development projects that affect indigenous livelihoods and rights.<sup>77</sup> In addition to stating that consent should follow ILO obligations, the law establishes that the government has the final word in cases where an agreement cannot be reached, and that existing projects are not required to carry out a consultation.<sup>78</sup> The Peruvian Congress signed ILO 169 into law in 1995, meaning the final consideration of the new law stands in direct opposition to the fact that FPIC should have already been carried out in the years between 1995 and 2011.

The Camisea project was started at a time when ILO 169 was already a part of Peruvian national law. Although Shell had begun its exploration in the late 1980s, it pulled out of the project in 1998 because it was unable to reach a favorable deal with the government.<sup>79</sup> A year later, the government signed an agreement with two consortia with members from the United States, South Korea, Argentina, Algeria, and Peru.<sup>80</sup> The pipeline opened in 2004 and was already looking to expand operations to be able to export gas before it even covered the domestic need.<sup>81</sup> Since ILO 169 was already part of Peruvian national law, the companies executing the project were required to carry out a consultation process. Aware that the government would attempt to get the gas in any way possible, the indigenous Machiguengas agreed to negotiate with the companies to make the most out of the only option that was presented to them.<sup>82</sup> The companies and the government failed to inform the few indigenous communities who were consulted about all the impacts involved with the project and instead took advantage of the power inequalities and managed to get agreements that only benefitted themselves.<sup>83</sup> For example, these companies were happy to pay 400,000 USD (or less) per community so long as in return they received permission to build pipelines through indigenous lands and gas plants in the middle of indigenous communities.<sup>84</sup> The consultation is not valid under legal standards, and should not have been legally binding in allowing companies to take advantage of the indigenous people.

The state's involvement in the Camisea gas project was critical for the failure of FPIC and the ultimate exploitation of gas from this site. Pedro Pablo Kuczynski, current President of Peru and former Minister of Economy and Prime Minister, played a key role in the negotiations that led to the materialization of the Camisea project.<sup>85</sup> Between 2003 and 2004, Kuczynski worked as a financial advisor for Hunt Oil, one of the multinationals that applied for oil extraction in Camisea.<sup>86</sup> Once in his role as Prime Minister, he gave Hunt Oil

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<sup>76</sup> International Labour Organization, *Indigenous and Tribal People Convention*, Art.7.

<sup>77</sup> Maclennan, "Peru's Consultation Law," September 22, 2011.

<sup>78</sup> *Ibid.*

<sup>79</sup> Pratt, "The Camisea Gas Project," 175.

<sup>80</sup> *Ibid.*

<sup>81</sup> Urteaga-Crovetto, "The Broker State," 107.

<sup>82</sup> *Ibid.*, 116.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*, 109.

<sup>86</sup> *Ibid.*, 109-110.

one of the Camisea gas blocks to be exploited and exported.<sup>87</sup> Slowly but surely, Kuczynski continued to lobby for legal changes that would increase the oil production at Camisea.<sup>88</sup> In addition, he lobbied to change the destination of the oil production from the domestic market to the international market, where Hunt Oil could sell its oil barrels for more money.<sup>89</sup>

In his position of power, Pedro Pablo Kuczynski prioritized the interests of the gas industry and the multinationals involved in the operations (in which he also held a stake), over the interests of the indigenous people, who have much less political power in the negotiations.<sup>90</sup> Although they opposed the Camisea project, indigenous people had no say in the process as they were overpowered by stronger political interests.<sup>91</sup> The legal protection of the indigenous area was violated by the state when oil and gas concessions were granted.<sup>92</sup> The political will in this case was in opposition to the indigenous peoples' rights, and therefore FPIC was intentionally weakened to avoid having a significant effect on the gas operations that Kuczynski desired.

### *The Camisea Gas Project: Economic, Social, and Environmental Consequences*

As with most extractive development projects, the Camisea gas initiative was marketed as a great opportunity because of all of the economic benefits it would bring the country, but most of the social and environmental impacts were rarely mentioned. The Camisea gas field is estimated to hold about 8.7 trillion cubic feet of natural gas.<sup>93</sup> The government ran a successful marketing campaign starting in the 1990s making the Camisea gas project seem absolutely necessary. The focus was on the economic benefits, including the fact that it could make Peru energy-independent at the same time as bringing in state revenue from exports.<sup>94</sup> A reduction in environmental pollution, an improvement in Peru's reputation, and job creation were also mentioned as benefits. The state estimated that the project could bring in over 34 billion USD in tax revenues alone, making this an attractive investment.<sup>95</sup>

Once the project began to be implemented, the social and environmental impacts that had been previously ignored became clear. Socially, the extractive activities have changed the communal economy, making the indigenous peoples increasingly dependent on the cash economy.<sup>96</sup> Furthermore, there have been many health problems due to the influx of foreign diseases, an increase in malnutrition, and growing rates of alcoholism.<sup>97</sup> The problems have been so severe that the Yora ethnicity lost 42 percent of its population in the first few years of gas extraction.<sup>98</sup> In terms of environmental impacts, the area in which Camisea is located is a known biodiversity hub that is legally protected in the form of several

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<sup>87</sup> Otra Mirada, "Los Negocios de PPK."

<sup>88</sup> Ibid.

<sup>89</sup> Ibid.

<sup>90</sup> Ibid.

<sup>91</sup> Urteaga-Crovetto, "The Broker State," 114-115.

<sup>92</sup> Ibid., 115.

<sup>93</sup> Ibid., 107.

<sup>94</sup> Ibid.

<sup>95</sup> Ibid.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid., 117-118.

<sup>98</sup> Ibid., 114.

national parks.<sup>99</sup> Unfortunately, the protections were violated and the local ecosystems were degraded. The water in the nearby rivers was heavily polluted with toxic waste, which led to the increasing scarcity of fish and wildlife leaving the forest.<sup>100</sup> In addition, the acoustic disturbances and vibrations from drilling have affected much of the wildlife in the area.<sup>101</sup> Following the historical trend of extractive industries in Latin America, the Peruvian state prioritized the extraction of natural resources over environmental and social protection.

## Why did FPIC Fail?

Both the Peruvian and the Ecuadorian cases show the failure of FPIC, a tool intended to empower indigenous peoples in decision-making. In the Camisea gas project, a consultation process was implemented for the Machiguengas to be able to negotiate with the oil company, but it was invalid because it essentially presented an opportunity for the state and the companies to further take advantage of indigenous peoples. Although the indigenous people of the Yasuní-ITT area vehemently opposed the oil extraction project and requested an official consultation, the government ignored all of the national and international legislation and FPIC failed before it could even be implemented. So why did these cases fail? The evidence points at the fact that the adoption of legislation for FPIC in these states was done in an effort to “greenwash”<sup>102</sup> the natural resource extraction industry as a tool for development, and that it was not backed up by the political will to truly involve indigenous peoples in decision-making.

Ecuador and Peru, as well as other Latin American countries, have tried to change their discourse around indigeneity and development so as to appear friendlier to indigenous peoples and environmental protection. Since the idea of sustainable development has become so influential around the world, it is in these countries’ interest to appear as sustainable as possible in order for them to get funding and investments from industrialized countries, international organizations, and the private sector for their efforts in sustainability.<sup>103</sup> It can be argued that this was Ecuador’s motivation for changing its constitution in 2008 to add domestic legislation for FPIC and grant special protection rights for nature. The constitutional changes made Ecuador one of the most environmentally progressive countries at that time.<sup>104</sup> A year later, President Rafael Correa used these sustainability promises to petition the international community for a 3 billion USD fund to keep the oil in the ground, but Plan B was still to exploit the oil in Yasuní. His administration’s lack of involvement and actions to promote the international fund showed that the official position was to exploit the oil for revenue.<sup>105</sup> The national FPIC laws were intentionally created with contradictions and limitations that gave the government power

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<sup>99</sup> Ibid., 116.

<sup>100</sup> Ibid., 117.

<sup>101</sup> Ibid.

<sup>102</sup> Horiuchi et al., “Understanding and Preventing Greenwash,” 6. Greenwashing refers to the concept of presenting an environmentally responsible public image without committing to or implementing the “green” principles that are advertised.

<sup>103</sup> MacLennan, “Peru’s Consultation Law,” September 22, 2011.

<sup>104</sup> Vidal, “Ecuador Drills for Oil,” April 4, 2016.

<sup>105</sup> Whittemore, “The Problem of Enforcing Nature’s Rights,” 662-223.

over the final decision, but since the government claimed it was left with no other option but to drill for oil to combat poverty, it deemed a prior consultation process unnecessary.<sup>106</sup> The failure of FPIC in the Yasuní-ITT case can thus be attributed to a lack of political commitment to the promises of environmental and indigenous protection made in the 2008 Constitution.

In a similar way, the Camisea project in Peru shows that political commitment to indigenous rights was the reason why the consultation process failed. At the time that the project was started in 2004, ILO 169 had already been passed as national legislation for close to a decade. The state ignored ILO provisions and removed itself from the picture by making the oil consortium negotiate with the indigenous peoples directly. There was no state involvement in informing the indigenous people about the impacts of the project nor in ensuring that the consultation was done in “good faith.”<sup>107</sup> The FPIC law in Peru was passed by former President Ollanta Humala in 2011 as an effort to decrease the amount of conflicts that existed between indigenous communities and extractive corporations, but not to defend the indigenous peoples and their rights to their traditional territories. The push for the Camisea gas project came from Pedro Pablo Kuczynski, former Minister of Economy and Energy and Mines, and current President of Peru, indicating that political will continues to favor oil extraction in Camisea.<sup>108</sup>

Neither the Peruvian nor the Ecuadorian case show that the governments of these countries are interested in any sort of alternative methods for development other than extractive activities. The role of FPIC in sustainable development is important as it allows for an inclusive and participatory process where the indigenous people can voice their concerns and demands. Seeing as the negative social and environmental impacts of any extractive activity are almost impossible to avoid, the problem that indigenous people have with these development projects is not the specific impacts themselves. The problem is rather the development model (based on the extraction of natural resources) that undermines their environment and their livelihoods.<sup>109</sup> FPIC is not only a tool to get monetary compensation. FPIC is a tool for indigenous peoples to tell the state that they demand a fundamental change in the way development is thought of. In this sense, there need to be changes in policy to ensure that FPIC does not fail.

## Conclusion

Latin America has a complex relationship between natural resource extraction and its indigenous population. The two cases analyzed in this paper show some of the violations to which indigenous peoples are subjected if they are not consulted about projects that take place on their lands. FPIC represents a way for indigenous peoples to be able to have a voice in the decisions for projects that take place on their land and affect them directly. Its implementation in the Camisea project in Peru and the Yasuní-ITT project in Ecuador was

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<sup>106</sup> Vidal, “Ecuador Drills for Oil,” April 4, 2016.

<sup>107</sup> Urteaga-Crovetto, “The Broker State,” 109.

<sup>108</sup> *Ibid.*, 116.

<sup>109</sup> MacLennan, “Peru’s Consultation Law,” September 22, 2011.

an attempt at “greenwashing” the development model and failed due to lack of political commitment.

The biggest impediment to FPIC in the two cases discussed was a lack of political commitment to the protections represented by the consultation process. The governments who ratified international treaties or that have passed national laws regarding FPIC amend their laws to get rid of the various limitations that exist on the implementation and outcome of the consultation. Indigenous communities and groups are heterogeneous, so it is necessary to allow them enough time to carry out their traditional deliberation processes and arrive at a consensus. The legislation needs to specify that any activity affecting the lives of indigenous peoples cannot continue without the explicit consent from those affected. Additionally, it should be made clear that indigenous peoples can get the information from independent sources such as nongovernmental organizations so as to not depend solely on the state. Only by amending the laws to get rid of contradictions and limitations will FPIC gain the necessary strength to fulfill its mission even when faced with a lack of political commitment. FPIC is an important tool in defending indigenous rights and protecting the environment, so it is vital to continue to look for ways to improve its implementation.

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