



# Indigenous Peoples' Rights and Business: A Focus on Free, Prior, and Informed Consent (FPIC)

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# Outline

- Indigenous Peoples' rights: A historical and legal background
- The UNDRIP and the significance of Free Prior and Informed Consent (FPIC)
- The implementation of FPIC and its effect in the development of wind energy projects

# **Indigenous Peoples' rights**

## **A historical and legal background**

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Part 1

# Who are Indigenous Peoples ?

## **Cobo Definition of Indigenous Peoples**

(From José R. Martínez Cobo's UN Report, 1986)

### **1. Historical Continuity**

Indigenous peoples have a long-standing connection to their lands, dating back to pre-colonial or pre-settler times.

### **2. Distinct Identity**

They maintain distinct cultural, social, and linguistic characteristics different from the dominant society.

### **3. Marginalization**

Often face marginalization and discrimination, with a history of colonization or conquest.

### **4. Desire for Preservation**

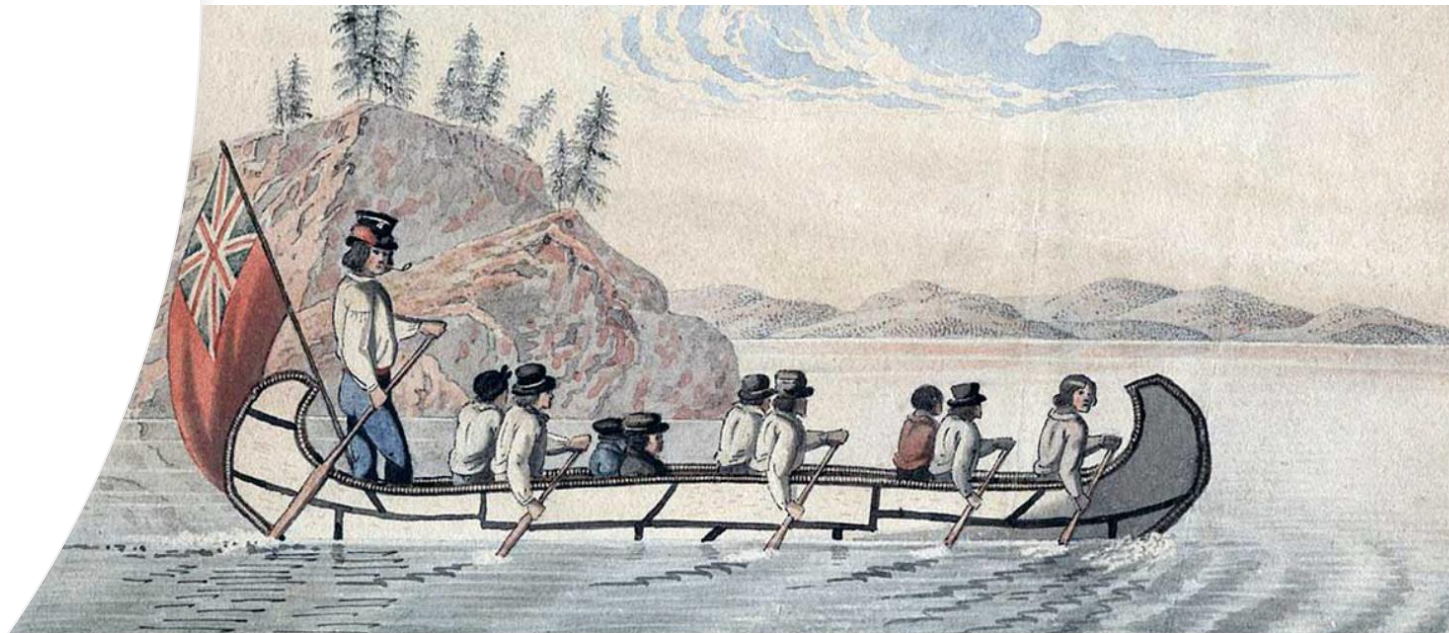
They strive to protect, preserve, and pass on their culture, land, and identity to future generations.

### **5. Self-Identification**

Indigenous peoples identify themselves as such and are recognized as Indigenous by their community.

# International law, Business & Colonisation

- British East India Company , the Dutch East India Company, the Hudson's Bay Company etc...
- The importance of international legal doctrines



Hudson's Bay Company officials cross a lake in an express canoe, Source: Wikimedia Commons



# International Law and the rights of indigenous peoples

- 1966 International Covenants on Human Rights
- 1989 ILO Indigenous and Tribal Peoples Convention, 169
- 2007 UN Declaration on the Rights of Indigenous Peoples
- 2008 UN guiding Principles for Business and Human Rights



# ICCPR

- Article 1 ICCPR : right of peoples to self-determination
- Article 27 ICCPR : rights of members of minority groups to culture
  - Recognises a duty to consult indigenous peoples in decision affecting them

# Indigenous and Tribal Peoples Convention, ILO 169

- **ILO Convention 107 (1957)**
- **ILO Convention 169 (1989)**
  - Codifies the duty to consult (Article 6) to land and natural resources ( Articles 13, 14, 15)
  - Challenges
    - Lack of legitimacy
    - Lack of ratification
    - Does not recognise the right of indigenous peoples to self-determination
    - Outdated ?

# The UNDRIP and the significance of FPIC

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Part 2



# UNDRIP: Negotiation and Adoption

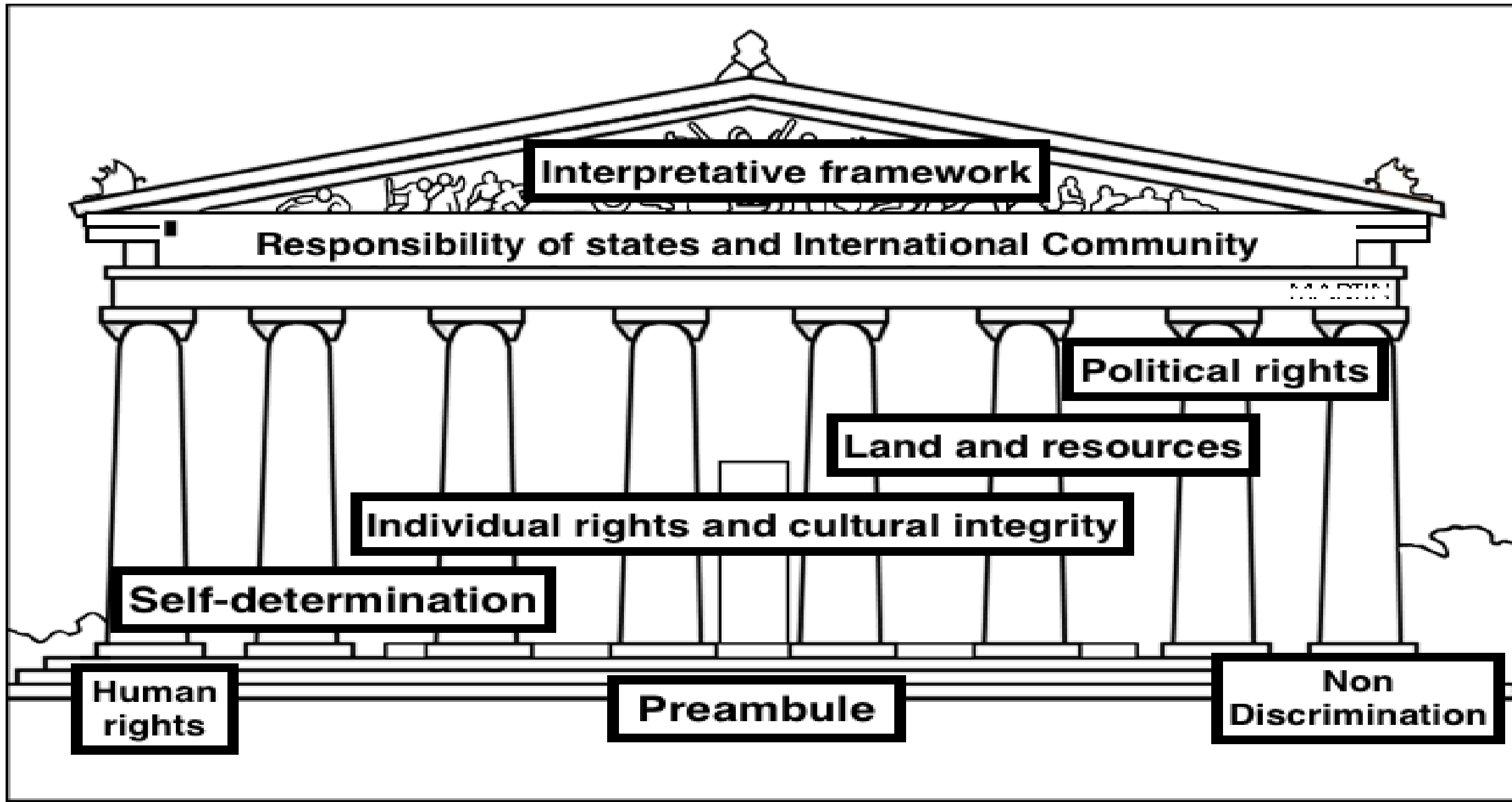
- 1971 Study of Martinez Cobo
- 1985 Establishment of the Working Group on Indigenous Population
- 1993 Adoption of the Draft Declaration
- 1995 Establishment of the Working Group to draft a Declaration
- 2006 Motion to defer the adoption of the Declaration
- 2007 Adoption of the UNDRIP : 144 votes in favor ( 4 negative votes, 11 abstentions)



# Legal status

## Is the UNDRIP soft law?

- A UN Resolution that is not binding
- A highly authoritative statement of law
  - First instruments ever drafted with the rights holders themselves
  - Adopted in broad consensus by 143 countries
  - A comprehensive instrument



**Interpretative framework**

**Responsibility of states and International Community**

**Political rights**

**Land and resources**

**Individual rights and cultural integrity**

**Self-determination**

**Human rights**

**Preamble**

**Non Discrimination**



# FPIC

- **Free** : no coercion, intimidation or manipulation
- **Prior** : before the project began and with the necessary time needed for indigenous peoples to take a decision
- **Informed** : information is objective, accurate and presented in a manner and form understandable to Indigenous Peoples
- **Consent** : veto or aspiration?



## Article 32 UNDRIP

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall **consult and cooperate** in good faith with the indigenous peoples concerned through their own representative institutions **in order to obtain their 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.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.



# CONSENT

FPIC = Contextual requirement

- Article 19 = duty to consult in order to obtain consent before adopting legislative or administrative measures
- Article 32 = duty to consult and cooperate in order to obtain consent prior to development projects affecting their lands

FPIC = Mandatory requirement = right to veto

- Article 10 : Removal from their lands
- Article 29 : Storage or disposal of hazardous materials

# Jurisprudential development

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## Regional human Rights System

- Inter-American System :  
Saramaka case 2007
- HRC: Poma Poma vs Peru 2009
- African Commission: Endorois  
2009 and Ogiek 2017/22 cases



# UNGPs

The state duty to  
**protect**

Corporate  
responsibility to  
**respect**

Access to  
**remedy**


## Business and Indigenous Peoples' rights

- 2016 World bank : Environmental and Social Standard 7 (ESS7)
- Trade Agreements
- OECD
  - 2017 OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector
  - 2022 Guide for National Contact Points on the Rights of Indigenous Peoples when Handling Specific Instances
- EU
  - 2024 Corporate Sustainability Due Diligence Directive (CSDD):
  - 2023 Regulation on Deforestation-Free Products
  - Critical Raw Materials Act (CRMA)



# Responsibility to respect indigenous peoples' rights

- Independent responsibility of business
- Responsibility to consult in order to obtain their consent
- Environmental Impact Assessment
- Benefit Sharing
- Grievance mechanisms



# The implementation of FPIC and its effects in the development of wind energy projects

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Part 3





## Landmark Projects

- Markbygden wind energy project
- Kenyan Environment and Land Court: Lake of Turkana case
- Mexican and French Courts: Gunaa Sicarú case

## Sweden Markbygden

- Up to 1101 wind turbines
- 3 main phases of constructions
- Ownership



Image: Shutterstock

# Finland Lake Turkana

- 365 wind turbines in northern Kenya
- 17% of Kenya's total power needs during the daytime
- Supported by Finnfund investment
- In violation of FPIC ?
- Corporate responsibility to respect human rights extraterritorially



# Mexico-France Gunaá Sicarú



FOTO: ProDESC

- Violation of the right to FPIC
- Corporate Duty to respect human rights: due diligence

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# Thank you !

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- Questions ?
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