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Investment projects and the protection of indigenous peoples and territories in Colombia

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Abstract

This article addresses the protection of indigenous peoples and their natural habitats in Colombia when investment projects are planned or implemented. Special attention is paid to the mechanisms of prior informed consultation; and free, prior, and informed consent. The Colombian case is relevant because it is at the vanguard of protecting the rights of indigenous peoples and their territories, and it is home to tough policy choices, balancing indigenous rights, the environment (as a megadiverse country), and the economy (highly dependent on mining exports). From a law and sustainable development perspective, this article analyzes a novel combination of various statistical data sets and case law and includes tests of the outcomes of prior informed consultation processes and their interaction with environmental licensing based on regression analyses. The conclusions point to the scale of the use of the protection mechanisms, the patterns in the behavior of indigenous peoples and in the outcomes of the mechanisms, the need to reinterpret transaction costs, and the crucial role of the constitutional court.

KEYWORDS

benefit sharing, Colombia, environment, indigenous peoples, investment, prior consultation, sustainable development

INTRODUCTION

The protection of indigenous peoples' (IP) rights depends on the constitutional model, and the protection of the lands of ethnic minorities is increasingly interconnected with environmental protection. Ecosystem preservation and conservation depend on how inhabitants use or exploit

them. From a development perspective, governments struggle between adopting sustainable economic measures to eradicate poverty and exploiting natural resources without crossing the safe space to operate (Rockström et al., 2023). These governance challenges and constitutional provisions reflect the value attributed to ecosystems and whether the value IP attribute to them is recognized, in other words, whether ecosystems have mainly an economic value, an intrinsic value, or something in between (social, cultural, or "existential" value for those who live in it) (Davidson, 2013, p. 173). In Latin America, many constitutions recognize the right to a healthy environment but also the sovereignty of states to exploit natural resources. Some constitutions also recognize the "existence value" of ecosystems that IP attribute to nature (Davidson, 2013; Krutilla, 1967); Ecuador's constitution gives an intrinsic value to mother Earth. Latin American countries move between constitutions that seek a balanced model of natural resource exploitation in a sustainable manner (anthropocentric model), constitutions that protect IP lands and culture, and one constitution that incorporates an ecocentric model (Imhof et al., 2016).

Colombia combines three elements of relevance for IP; first, its constitution is generous in terms of the protection of human rights, IP, and the environment (Gómez-Betancur et al., 2022; Macpherson et al., 2020; Sanabria-Rangel, 2020; Wesche, 2021). Second, in terms of sustainability, Colombia is the second-most biodiverse country in the world after Brazil (World Population Review, 2023). Third, in terms of the economic model, the Colombian economy is very dependent on the exploitation of nonrenewable natural resources. Oil, coal, and other mining products accounted for approximately 56% of exports in 2022 (DANE, 2022) and are an important source of government income.

In terms of institutional design, Colombia has moved between the three main models of sustainable development (Lizarazo-Rodríguez, 2021a), depending on the government in power and on the branch of power. First, the anthropocentric model, which seeks a sustainable exploitation of natural resources even in IP territories, has been implemented by governments over the last decades, aligning with a neoliberal economy. Second, some courts (Shapiro & McNeish, 2021; Wesche, 2021) have backed the biocultural or biocentric model, which promotes a development model receptive to the culture of IP (Chen & Gilmore, 2015; Macpherson et al., 2020); this model seems to align with the government agenda since 2022. Third, the ecocentric model seeks to preserve ecosystems by declaring protected areas; phasing out activities that are considered as harmful, particularly mining and hydrocarbons; and recognizing the rights of nature (Borràs, 2017; Rodríguez-Garavito, 2020; Shapiro & McNeish, 2021; Viaene, 2022); some international agencies and some courts and actors (often promoting de-growth) back this model, claiming that these options are the only possibility to address the climate crisis and the loss of biodiversity (Buch-Hansen & Carstensen, 2021; Escobar, 2015; Garver, 2013; Hickel, 2020; Muniz & Cruz, 2015; Perkins, 2019; Sandberg et al., 2019). These three development models are contradictory in many respects, including from an economic theory perspective, which renders the institutional design a complex endeavor.

Progressive approaches to the protection of IP in Colombia are grounded in several international treaties.[1] Still, this progressive approach toward IP rights has not been absolute. In 2016, Colombia, the United States, Canada, and Brazil made statements addressing different aspects of the American Declaration on the Rights of IP (OAS, 2017). Colombia commented on various articles (XX, XXIII, XXX) on the participation of IP in administrative and legislative measures that affect them, consultation, and the prohibition of military activities in indigenous territories. The comments mainly sought to clarify that the prior informed consultation (PIC) should not be interpreted as a veto right of the IP.

The 1989 Indigenous and Tribal Peoples Convention (ILO, 1989) (ILO 169) is the core convention that protects IP rights and lands. It sought to reconcile contradictory interests—indigenous rights and environmental conservation, and investment promotion in their

territories. Although it follows biocultural or ecocentric approaches, ILO 169 falls short in protecting IP; state agencies in charge of mining, energy, hydrocarbons, and infrastructure, as well as some investors have contested the recognition of IP rights and lands. Some national courts and the Inter-American Court of Human Rights (IACtHR, CIDH in Spanish), have upheld the IP rights when economic activities were planned in their territories. This tension among actors defending different development models reveals how IP lands and rights have been intrinsically connected to investment policies and why IP struggle for the free use (or non-use) of their lands and their natural resources (Kröger & Lalander, 2016; Robledo Silva & Rivas-Ramírez, 2020; Rodríguez-Garavito, 2011; Zárate-Toledo et al., 2019; Zaremberg & Wong, 2018).

The global relevance of the Colombian (and Latin American) perspective lies in the fact that ILO 169 is the only international treaty that recognizes IP rights over their territories, and only 24 states have ratified it. Of these, 14 state parties are Latin American[2]; one, Caribbean[3]; five, European[4]; two, from the Asia-Pacific region[5]; and only one, African.[6] Furthermore, the Colombian case has influenced the Inter-American system of human rights by enlarging ILO 169 protection to Afro-descendant communities. In Europe, the European Parliament (2018) recommended that European Union member states and their partners uphold the rights of IP and peasants[7] and ensure that their trade and investment policies and agreements respect them. So far, no new ratifications or adherence have occurred in this region.

A deeper analysis of the Colombian case reveals the potential to integrate indigenous priorities into investment projects for the exploitation of natural resources, which is crucial to keep global economies within a safe space operating (Rockström et al., 2023). The focus is on the mechanisms of PIC and free, prior, and informed consent (FPIC), used more in Colombia than in other Latin American countries (Urteaga-Crovetto, 2018; Zaremberg & Wong, 2018). Although some literature points to the positive outcomes of these mechanisms for reaching sustainable development aligned with indigenous interests, other authors consider them to be ineffective (Guevara Gil & Cabanillas Linares, 2020; Hougaard, 2022; Schilling-Vacaflor, 2019; Wesche, 2021). The present analysis is, to our understanding, the first that combines a law and sustainable development perspective with quantitative evidence.

The article is organized as follows. Section 2 reviews the literature, Section 3 introduces the Colombian case, Section 4 presents the methodology and data, Section 5 discusses the results, and Section 6 offers some conclusions.

LITERATURE REVIEW

The evolution of the three development models (anthropocentric, biocultural, and ecocentric) and their implications for the recognition of IP rights in their territories reflect the economic policies followed by the states. From a mainstream economics perspective, contributions on the nature–economy nexus, in other words, how economic activities based on the exploitation of natural resources could undermine future growth (Naveed et al., 2022), have not been linked to the protection of IP rights and lands. The policies have mainly sought to tackle the link between environmental degradation and economic growth via the environmental Kuznets curve (EKC) (Faure, 2020; Naveed et al., 2022). Environmental economics have supported environmental regulations that consider the environment as a scarce resource, the cost of environmental degradation, and the economics of regulation. This model, highly contested, is progressively moving toward sustainable economic development that promotes sustainable economic growth, by reducing pollution, its repercussions, or both, with emphasis on energy transitions and reduction of fossil fuel consumption (Ayres, 2008). This literature is mainly known as green growth approaches (Rockström et al., 2009, 2023; Steffen et al., 2015) that in the policy arena materialized in the Sustainable Development Goals or the Green Deal

(Adamowicz, 2022; Barral, 2012; Bartels, 2013; Bosselmann, 2017; Lizarazo-Rodríguez, 2021a; Ossewaarde & Ossewaarde-Lowtoo, 2020).

Meanwhile, the current ecological crises described by the planetary boundaries framework (Rockström et al., 2009, 2023; Steffen et al., 2015) have given more visibility to approaches such as ecological economics (Garver, 2013; Hornborg & Martinez-Alier, 2016; Kronenberg, 2010; Martinez-Alier, 2018) that focus on how to reduce material and energy consumption and how to implement theories of degrowth (Akbulut et al., 2019). This approach has frequently raised concerns about the approval of projects on indigenous lands, particularly if they are connected to fossil fuel industries (Garver, 2013; Perkins, 2019). A systematic literature review carried out on the use of the EKC over time shows how the economic analysis of sustainability has mostly shifted to ecological economics and development economics (Kronenberg, 2010; Naveed et al., 2022; Stern, 2004). This analysis is corroborated by a review of law and economics journals, where the protection of IP and their territories has received little attention. In fact, only one article reviews the case of indigenous lands in Brazil, but it relies mainly on descriptive statistics and qualitative comparative analysis (Monteiro et al., 2019).

A broader look at the law and sustainable development literature—with connections to institutional economics, political economy, law and policy, or governance—reveals additional insight. States with racial and cultural diversity seek an efficient institutional design that reflects the cultural diversity and addresses the economic challenges. Alongside producing "red lines" in the form of (natural) reserves, the adoption of mechanisms for (local) participation in development projects and policies has been put forward to balance between protecting IP lands and promoting investment projects seeking to exploit natural resources in IP territories (Allard & Curran, 2023; Bravo, 1997; De Sa, 2019; Petavratzi et al., 2022; Stetson, 2012).

There is no one-size-fits-all governance model; the way constitutions shape relations between the state, the economy, and IP should be context-sensitive (Broderstad, 2011; Rodríguez, 2021; Urteaga-Crovetto, 2018). In a context of indigenous communities, cultural differences and conceptions of territoriality and land use (change) add complexity and fuel tensions in the design of policies geared toward indigenous communities (Bauer, 2016). Such is the case even if indigenous territorial conceptions are incorporated in contemporary policy frameworks (Burke et al., 2023; Chen & Gilmore, 2015; Figuereido & McDonald, 2019; Hanspach et al., 2020; Macpherson et al., 2020; Sajeva, 2015), such as the agency of IP when designing the mechanism for reducing emissions from deforestation and forest degradation (REDD) (Schroeder & González, 2019; Schroeder, 2010). Mixed results of such participatory mechanisms have been reported worldwide. In Norway, the Sámi peoples have sought to influence mining projects, but their effects vary significantly from one project to another because the relative importance of the indigenous population in the total population of a municipality emerges as a crucial variable (Nygaard, 2016). Based on the Sámi case, Valkonen et al. (2017, p. 541) conclude further that "indigeneity is not an ethno-cultural, objectively existing fact, but an act of framing and a political demand. The possible rights associated with the category of indigeneity have increased its appeal among the local people of Northern Finland and made it a more attractive idea for them to belong to the official indigenous people in Finland, the Sámi." Economic incentives can explain people's behavior, including in indigenous contexts.

In Latin America, conflicts between indigenous lands and energy-related activities are frequent. Some empirical studies find that PIC is not effective in preventing the expansion of extractive projects in indigenous territories (Urteaga-Crovetto, 2018; Zaremberg & Wong, 2018). Yet, based on a typology of possible or desired outcomes of PIC (such as preventing industrialized resource extraction on indigenous territories, redistributing economic benefits of resource extraction, and diminishing state repression associated with extractive investment projects), these outcomes are often partially achieved (Zaremberg & Wong, 2018).

The extraction of transition minerals such as lithium are is controversial because many are developed in indigenous territories (Finn & Stanton, 2022; Marchegiani et al., 2020; Owen, Kemp, Harris, et al., 2022; Owen, Kemp, Lechner, et al., 2022; Petavratzi et al., 2022).

In the Arctic region, benefit sharing of indigenous communities in the context of extractive industries has also been addressed (Britcyna, 2019; Wilson, 2019), and its effectiveness for the protection of indigenous interests has been questioned, but these conflicts are not exclusive of extractive industries. Energy transition investment projects are also a source of conflict. Some disputes emerge because PICs are considered transaction costs for these projects; IP may also feel that PICs are not conducted in due manner or there may be a lack of access to benefit sharing in monetary or affordable energy terms (Murgas et al., 2021; Ramirez, 2021; Zárate-Toledo et al., 2019).

Regarding institutional design, some studies find that constitutional or legislative protection of ethno-territorial rights from the possible effects of extractive industries shows positive outcomes (Allard & Curran, 2023; Kröger & Lalander, 2016; Wilson, 2019). This de jure protection does not guarantee de facto protection, but it can provide communities and social actors with more effective means to defend their interests. These frameworks seem to be relatively more effective when private companies develop the extractive project, compared to cases where the state is the principal economic stakeholder (Kröger & Lalander, 2016). The Swedish case also illustrates the importance of the institutional design (here, the non-ratification of ILO 169) for the protection of indigenous (Sámi) rights (Tarras-Wahlberg & Southalan, 2022). In Brazil, policy implementation has been questioned in conflicts related to infrastructure works in the Amazon. It seems crucial to define which (directly affected) areas should be considered, which communities should be consulted (Fearnside, 2015; Ferrante et al., 2020), and how to make participation the most effective.

In Canada, although it has not signed ILO 169, the involvement of IP when their territories are affected by investment projects has been widely discussed. First, IP being given veto rights, as in the case of FPIC, has generated some resistance (Leydet, 2019). Second, an analysis of Canada's infrastructure corridor projects concluded that the recognition of IP rights, particularly FPIC, constitutes a transaction (economic) cost for investment projects, caused by the mistrust of governments that obstruct a comprehensive participation of IP where they share environmental jurisdiction. The increasing recognition of IP rights, including lands and jurisdiction by courts, governments, and industry, has also been considered as a factor that increases the transaction costs for the energy and resource infrastructure corridor (Le Dressay et al., 2022). Still, the incorporation of the Declaration on the Rights of Indigenous Peoples (UNDRIP) into legislation in British Columbia has been cited as a good example for countries that have not adhered to ILO 169, such as Sweden (Allard & Curran, 2023).

In Canada, transactional arrangements have emerged that explicitly recognize cultural identity and relations with ecosystems (Mason et al., 2012). The adoption of impact and benefit agreements (IBA) between companies and IP are frequent (Odumosu & Newman, 2021) and are not free of objections (Cascadden et al., 2021). This contractual model has been assessed as an option for the (paternalistic) model of ILO 169, particularly regarding benefit sharing. An assessment for Chile concluded that this contractual model is not a better option than the PIC model of ILO 169 because it excludes support from the state and would leave IP in a more disadvantaged position (Carmona Caldera, 2022).

Literature on indigenous entrepreneurship challenges the view that the "game" that is played between a (potential) investor and a local community is necessarily one between two players with incompatible preferences and strictly opposite interests, and where the interests of IP are always to keep their lands and ecosystems untouched. Indigenous entrepreneurship claims that it goes further than the passive benefit-sharing arrangements. Indigenous entrepreneurship refers to indigenous persons or communities who experiment with forms of organization to participate in the market economy by producing goods or services and improve their livelihoods while respecting essential cultural parameters of their communities (Hindle & Moroz, 2010; Mason et al., 2012; Peredo et al., 2004). Indigenous entrepreneurship was also

considered compatible with the World Bank's policy on indigenous people's (World Bank, 2005) and ILO 169. Overall, there is enough evidence that globally there is a wide variation in the willingness, capacity, modalities for indigenous entrepreneurship, and participation in investment projects proposed by third parties (Anderson et al., 2006; Mason et al., 2012; Peredo et al., 2004). Different readings of these new forms of economic participation are obviously possible. Critical analysts have described, for example, how elite-driven new political technologies have dealt with local community opposition to extractivist projects by setting up mixed public–private social corporations in Chile (Leiva, 2019).

Despite the variety of situations regarding the willingness of IP to adhere to or oppose investment projects, the regulation of PIC and FPIC shows a growing juridification of ethnic difference over the last 30 years, as a way to manage globally the culture–ethnicity–economy nexus (Larsen & Gilbert, 2020; Rodríguez-Garavito, 2011, 2019). These modalities vary in different national contexts and cover different realities as to how participation of concerned communities plays out in practice (Lawrence & Moritz, 2019; Rodríguez-Garavito, 2011). In a Colombian and Latin American context, the overall results have been qualified as ambiguous or mixed. While PIC does not fundamentally alter power relations, it does not mean that substantive disputes are completely transformed into procedural dynamics or disputes (Rodríguez-Garavito, 2011), and limitations to indigenous participation should not be underestimated (Flemmer & Schilling-Vacaflor, 2016; Guevara Gil & Cabanillas Linares, 2020; Hougaard, 2022; Schilling-Vacaflor, 2019; Shapiro & McNeish, 2021; Wesche, 2021). Another study on mining and hydrocarbon production in Colombia concludes that PIC has served to represent IP interests and that the Constitutional Court has played an important role by upholding such procedures (Jaskoski, 2020).

At least six building blocks can be identified from this literature review for an analysis of the interaction between IP rights and development policies seeking to exploit resources located in their lands.

- The cost–benefit calculus of investment projects for investors, IP and territories, and society, including methods to establish the extension of the affected areas, the economic cost of blocked or delayed investment projects, and the need to incorporate costs and benefits that cannot easily be quantified or monetized, such as the intrinsic or existential value attributed to ecosystems by IPs.
- The effectiveness of participatory processes, meaning the relationship between design features and incentive structures on the hand and outcomes on the other.
- The contractual approach to the state–indigenous community nexus, which means access to benefit sharing and the stability of agreements. Information and power asymmetries are signaled as co-determining the (skewed) distribution of the benefits of investment projects.
- The regulatory approach to investor–state relations, meaning design options for the incorporation of FPIC in negotiations (see Szoke-Burke & Cordes, 2021).
- The (economic) behavior of IP, which covers the specificities of traditional indigenous economic activity (e.g., small-scale), the self-identification of IP driven by economic incentives (explained by either behavioral approaches or rent-seeking logics (see Leeson, 2019), and indigenous entrepreneurship and participation in investment projects.
- The behavior of courts, and more specifically how economic variables influence (or not) judgments related to the protection of IP and territories.

THE COLOMBIAN CASE

Constitutional design and legal framework

The Colombian Constitution (1991, art.7, 329 and 330) stipulates that IP territories are their collective and nontransferable property; therefore, IP need to be involved in projects on natural

resources located in their territories or in the subsoil. Furthermore, ILO 169 is part of the "constitutional block" (Colombian Constitution, 1991, art. 93), this is, it constitutes an integral part of the Constitution and has primacy over national laws and treaties ratified on issues other than human rights. ILO 169 (ILO, 1989, art. 15) requires states to safeguard IP rights connected to natural resources located on their lands and to guarantee their participation in their use, management, and conservation. The Colombian constitution also adopted the option given by the ILO 169 that allowed states to *retain the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands*, under the condition that before undertaking any activity in IP territories, the state organizes a PIC to enable IP to assess whether and how their interests would be affected. In turn, IP have the right to explore whether they can participate in the benefits of such activities and receive fair compensation for harm resulting from these activities. Yet, the information asymmetries in these events need a careful assessment that integrates the recognition that IP give to their lands and ecosystems (Arsenault et al., 2019). ILO 169 furthermore requires that states avoid undertaking the exploitation of natural resources on IP lands when these activities may cause resettlement or serious environmental degradation (Rodríguez, 2017). This model leaves no room for contractual arrangements between investors and IP outside the regulatory framework of the PIC where the state necessarily intervenes.

Prior informed consultation and free, prior and informed consent: Veto rights for investment projects?

In Colombia, PIC and FPIC are considered as fundamental rights of IP and other ethnic groups whenever a decision is to be made that may affect them directly or when projects are intended to be carried out within their territories and may affect them directly (CCC, 1997). PIC materializes the IP right to set their priorities within the development programs and projects that may affect them (Rodríguez, 2021) or their values linked to the ecosystems at stake.

FPIC integrates within the cost–benefit analysis (from an economic perspective) or proportionality test (from a legal perspective) the various values attributed to ecosystems so that the consent of IPs must be obtained when their essential values related to their lands and ecosystems may be affected by investment projects; however, this measure is of exceptional application. FPIC is a more stringent protection, restricted to projects that may have a possible "intense direct impact," in other words, "when a measure threatens the subsistence of the traditional community" (see CCC, 2018; Ministerio del Interior, 2020; Rodríguez, 2021). FPIC is considered effective if it has a verifiable result on the decisions to be made, which must be reflected in the action plans and measures implemented by the authorities (see CCC, 1997, 2018). It is a stricter protection because unlike with PIC, the projects cannot be implemented without obtaining the FPIC (CCC, 2018). This study captures mainly cases of consultation, which are the majority and which do not grant IP veto rights, skewing the balance in favor of the economic value attributed to their lands and ecosystems over the existential value that IP may attribute them.

Procedures for PIC and FPIC

Although the regulation of both PIC and FPIC requires a special (statutory) law (see CCC, 2011) which, as of today, has not been enacted, the government has regulated PIC procedures following the case law from the Colombian Constitutional Court (CCC) (Función Pública, 2020a) (see Figure 1). First, the government (Ministry of Internal Affairs [MIA])[8] must verify whether there is a direct effect on the social, economic, environmental, and cultural

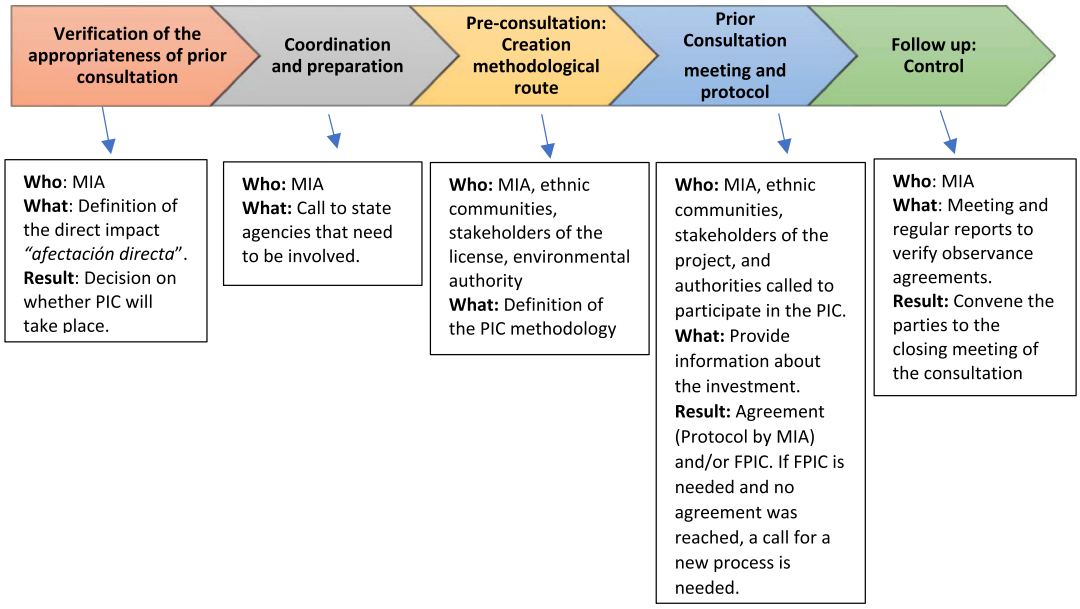

FIGURE 1 Administrative procedures of prior informed consultation (PIC) and free, prior, and informed consent (FPIC). MIA, Ministry of Internal Affairs. *Source*: Author's elaboration, with data from Ministerio del Interior (2020).

conditions of IP and, if so, it must organize a PIC (CCC, 2018; Presidencia de la República, 2020).[9] The implementation of PIC is more stringent since 2019 (see CCC, 2018; Función Pública, 2019), since before, MIA only verified the presence of ethnic communities in the area of influence of the project, and then it issued a certificate. Now, MIA may issue this certificate ordering the PIC procedure in a period between 30 or 60 days, depending on whether the project requires a verification visit to its area of influence that can be extended for the same term when there are external factors that affect the process (see Función Pública, 2015, art. 14; 2011, art. 14). Second, the pre-consultation stage involves a prior dialog with the representatives of the ethnic communities to define what the PIC methodology will be and how the cultural specifications of each community will be considered. Third, the PIC takes place among representatives of the state, the investors, and the ethnic communities, and MIA must guarantee that their ethnic and cultural identity is safeguarded. If no agreement is reached in the pre-consultation or consultation phases, when the representative authorities did not attend the meeting, or when a conflict of representativeness in the ethnic community persists, the government has 3 months to apply the proportionality test and define management measures. The proportionality test seeks to determine appropriate measures to prevent, correct, or mitigate the direct outcomes, grounded in the positions expressed by all the parties involved. Fourth, MIA must follow up on compliance with the measures agreed to or established by MIA in application of the proportionality test. If environmental issues are involved, the follow up is the responsibility of the state agency for environmental permits (ANLA).

PIC and FPIC and public participation in environmental matters

Besides ethnic communities' rights to PIC and FPIC, the Constitution (1991) also guarantees all citizens the right to enjoy a healthy environment and to participate in decisions that may

individually affect them or communities (art. 79, 80, and 332). Like the PIC and FPIC, public participation in environmental matters is also a fundamental right of all citizens, not only IP. It aligns with the Rio Declaration on the Environment and Development (United Nations, 1992) (see CCC, 2017a), reinforced by the ratification of the Escazú Agreement (2018). When investment projects may cause serious deterioration to renewable natural resources or the environment, or introduce considerable or notorious modifications to the landscape, investors must obtain a license. These two procedures for civic engagement (PIC and access to information) seek to rectify information asymmetries but often overlap, with no possibility of being merged. Since 2020, the measures to guarantee PIC within a license permit procedure are more stringent since previously the license could be requested with the certificate of applicability of the PIC, regardless of whether the PIC had been completed. Now, when both a PIC and an environmental license are required, the latter cannot be requested if the PIC or FPIC process has not been completed (the PIC has been carried out, and the outcome has been registered). The procedure to decide on the environmental permit can be suspended when the ANLA requires MIA's certificate regarding the applicability of the PIC to be updated (see Función Pública, 2020b). The fact that investment projects cannot obtain the environmental license without a PIC or a FPIC when IP lands are at stake has been a serious concern for governments and investors who see them as a veto right or at least an additional transaction cost for projects. Colombia is progressively reinforcing the mechanisms to guarantee the effective participation of IP in projects to be developed on their lands, especially if they may have high environmental impact and are attributed certain values. See Figure 1.

The role of the courts

The judiciary branch, particularly the CCC, has rendered progressive judgments, enforcing the right to public participation in environmental matters in general, and the fundamental right to PIC and FPIC of IP when their territories are affected by investment projects, so that their ethnic, social, economic, and cultural integrity and subsistence are guaranteed (CCC, 2018). While the CCC case law has shaped the adoption of the more stringent procedures (supra), it also requires the government to balance between IP interests and the economic interests of the government and investors. In other words, in cases of disagreement, the government must apply the proportionality test to deblock the process and register the results of the PIC.[10] Still, where a FPIC is required, the project can only be implemented after one is obtained. In exceptional cases, MIA can allow the project to be executed if the fundamental rights and survival (physical and cultural) of the ethnic communities can be guaranteed.

The CCC approach seems to align with ecological economics perspectives, following biocultural and ecocentric models of environmental and IP protection (Macpherson et al., 2020; Rodríguez-Garavito, 2020; Shapiro & McNeish, 2021; Viaene, 2022; Wesche, 2021). The CCC has also recognized rights to ecosystems, seeking to preserve them beyond the individual claims of affected communities (Lizarazo-Rodriguez, 2021b; Rodríguez-Garavito, 2019, 2020; Shapiro & McNeish, 2021; Wesche, 2021). Governments have criticized these judgments, following an anthropocentric development model, as have investors who considered these decisions as judicial obstacles to development policies, investment (see CCC, 2018, 2019), and economic growth because they strengthened the veto power of racial minorities who, together, represent 14% of the total Colombian population yet have the potential to decide on the carrying out of investment projects that could be considered of general interest for the country.

The CCC has also influenced the case law of the IACtHR.[11] Both courts recognize three situations where a FPIC is required before a project can be implemented on indigenous lands. These situations are considered as intense direct effects *(afectación directa intensa*) and include serious risk of forced resettlement; storage or disposal of hazardous or toxic materials on

indigenous lands; or projects that involve high social, cultural, and environmental outcomes that put their subsistence at risk (CCC, 2009, 2011; IACtHR, 2007). The concept of direct effects on IP adopts a biocultural perspective, going beyond the formal notion of territory to include the economic, social, and spiritual dimensions the community needs to preserve its identity (CCC, 2016). The right to territory has been considered a dynamic concept that covers "all space that is currently essential for indigenous people to get access to natural resources in line with their culture and their economic and social organization" (see CCC, 2014, 2015a). This biocultural approach has been enforced in cases involving hydrocarbon industries (see CCC, 2018).[12] Meanwhile, the IACtHR has held that PIC is not required when the activities only aim at maintaining or improving works, in other words, the magnitude of the repercussion requires an individualized assessment (see IACtHR, 2020).

The courts have also enlarged the scope of international law (ILO 169), first, by extending the fundamental right to PIC and FPIC to Black, Afro-Colombian, Raizal or Palenquera (NARP) communities, and second, by referring explicitly to the right of ethnic communities to share the benefits obtained from projects performed in their territory, which is optional in the ILO 169 (see CCC, 2013). The IACtHR held that when these projects involve natural resource exploitation in IP lands, the Inter-American Standards apply—PIC, environmental and social impacts, and the reasonable distribution of the benefits derived from the project (see IACtHR, 2015b).

RESEARCH QUESTIONS, DATA, AND METHODS

The analytical building blocks extracted from the literature review in Section 2 provide the framework for our analysis, while Section 3 provides the institutional context in Colombia. The following research questions emerge, (1) what is the scale of utilization of PIC and FIPC in Colombia for the protection of IP territories in the presence of investment projects, and how does it evolve over time?; (2) which patterns can be detected in the implementation of PIC (by ethnicity, region, industry) since its implementation in 1995?; (3) are there visible societal and economic costs and benefits of these mechanisms depending on their outcomes and duration?; and (4) to what extent have courts contributed to the enforcement of IP values that align with biocultural approaches to development, supported by approaches such as ecological economics rather than anthropocentric economic development models that would privilege contractual forms of indigenous entrepreneurship?

Existing analyses have been limited to case studies (see literature review), particularly in ecological economics, development studies and socio-legal and doctrinal approaches. This article is novel as it unveils how the protection of IP and territories can be approached from an empirical and law and sustainable development perspective, and by addressing unexplored aspects of this phenomenon. The descriptive statistics aim to shed new light on the PIC mechanism despite the statistical data limitations in terms of quality, availability, and compatibility between data sources.

Several data sets are combined, including—but not limited to—those held by the MIA (*Dirección de la Autoridad Nacional de Consulta Previa*, DANCP),[13] the National Department of Statistics (DANE, 2023a), and the Colombian Constitutional Court (CCC) (Corte Constitucional de Colombia, 2023). Some of the underlying mechanisms were explored using regression analysis. It was tested whether the outcomes of the PIC processes (leading to an agreement or not, their duration) can be explained in terms of the region, ethnicities involved, or industry. Interaction effects between the consultation and environmental licensing processes were also tested.

A review of the role of courts was conducted because the judiciary branch can shape state economic decisions, particularly when there are tensions between constitutional values that on

the one hand seek to preserve ecosystems and racial minorities and on the other hand protect the rights of investors and promote economic development. Although judicial ideology has been assessed, the lack of objective criteria to identify it has been noted (Cross & Lindquist, 2006, p. 16; Volokh, 2008, p. 56). The CCC and the IACtHR have upheld constitutional values, which is considered to be "remedial activism" because they seek to apply fair laws and address noncompliance by governments that have not enforced them (Gargarella et al., 2016; Rodríguez-Garavito, 2017; Santos Botelho, 2017) The complementary quantitative analysis of case law shows how courts have tilted the balance in favor of IP interests and biocultural values, and how Colombian case law influenced the case law of the IACtHR. This study is relevant for Latin America because the IACtHR has a leverage effect over other countries under its jurisdiction, where the PIC has been used in lesser proportions and where it does not have the same institutional guarantees. For the case law selection of the CCC, two methods were followed; for the quantitative analysis, a review was made of all CCC judgments on PIC since their implementation in 1995; for the content and legal analysis, only "tutela"[14] judgments were selected.

RESULTS AND DISCUSSION

Analyzing government data

Between 1995 and 2022, 6183 PICs have been initiated. The first consultations started in 1995, but in 2009, the numbers increased considerably (see Figure 2). There seemed to be a peak in 2015–2017, after which the numbers appear to slow again. The pandemic-related economic slowdown might have affected the numbers in 2020 and 2021. Another explanation could be the more stringent requirements to declare the applicability of a PIC. The numbers for 2022 are preliminary partial data.

The number of consultations does not coincide with the number of investment projects as more than one consultation can be initiated per project. It could be explained by the size, timing, and ethnic communities involved, among other factors. Based on MIA data, 1703 different investment projects were identified for the same period. Remarkably, only 10

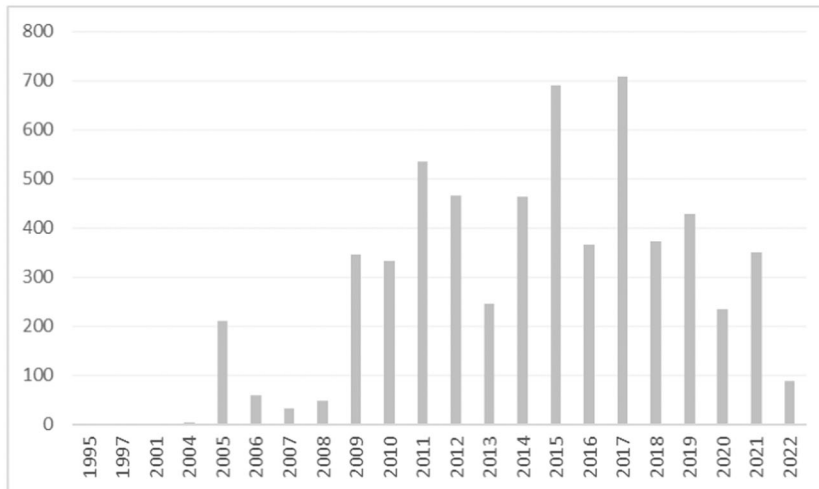

FIGURE 2 Number of prior consultations by year of initiation, 1995–2022. *Source*: Authors' elaboration, with data from Ministerio del Interior (2023a).

projects account for 1440 PICs, or 23% of all registered PICs, and in each of them, several ethnic groups participated (see Table 1). Moreover, 7 of the 10 projects with the most PIC are in 3 of the 30 departments (La Guajira, Choco, and Córdoba). Most required an environmental license and were related to projects of environmental management or hydrocarbon industries.

When looking at the distribution of the PICs by region, approximately half of the PICs are in the coastal regions (Caribbean, followed by Pacific), the two regions with the largest indigenous and afro-descendent populations (see Table 2). Of a total of 110 registered ethnicities, one ethnicity (Wayuu) is responsible for one-third of all PCs. This figure correlates with the overrepresentation of PICs per project (see Table 1).

The 6183 PICs are spread over 4132 communities. The number of PICs per community ranges between 41 (for the indigenous community of the Sierra Nevada of Santa Marta) and one. The category of communities with only one PIC includes 2867 communities. Table 1 shows that only 10 projects account for one-quarter of all PICs conducted since 1991, 8 in the Caribbean region (Guajira and Cordoba) and 2 in the Pacific region (Choco).

TABLE 1 Projects with the most PICs, by industry and location.

Project	PIC	Type of project	Industry	Project owner	Department
P-00540	177	Development Plan	Administration	State	Choco
P-00528	176	Freshwater management	Environmental	State	Guajira
P-00932	164	Freshwater management	Environmental	State	Cordoba
P-01747	157	Infrastructure	Energy	Private investors	Guajira
P-00250	148	Infrastructure	Hydrocarbon	SOC	Guajira
P-01440	145	EIA	Hydrocarbon	SOC	Guajira
P-01345	137	Infrastructure	Energy	Private investors	Guajira
P-00229	123	Infrastructure	Hydrocarbon	SOC	Guajira
P-00270	119	Infrastructure	hydrocarbon	SOC	Guajira
P-00196	94	Infrastructure	Telecommunications	Private investors	Choco

Abbreviations: PIC, prior informed consultation; SOC, state-owned company.
Source: Authors' calculations, based on Ministerio del Interior (2023).

TABLE 2 Number of prior consultations by region.

Region	PIC number	Indigenous population	NARP population	Rom population
Caribbean	3090	818.630	974.098	496
Pacific	1169	614.169	1.463.646	352
Amazonian	823	168.572	19.574	51
Andean	583	225.654	472.429	1.701
Orinoquía	506	78.572	25.604	49
Insular	12	0	0	0
Total	6183	1.905.617	2.982.224	2.649

Abbreviations: PIC, prior informed consultation; NARP, Black, Afro-Colombian, Raizal, and Palenquera populations.
Source: Authors' calculations, based on Ministerio del Interior (2023); DANE (2023a).

TABLE 3 Number of prior consultations by ethnicities, 1995–2022.

Ethnicity	PIC number	% of total
Wayuu	2056	33
NARP	1018	16
Zenu	582	9
Sikuani	191	3
Pijao	167	3
Guahibo	113	2
Awa	97	2
Embera Chami	92	1
Linga	85	1
Embera	59	1
Other	1495	29
Total	**6183**	**100**

Abbreviation: PIC, prior informed consultations.

Source: Authors' calculations based on Ministerio del Interior (2023).

Putting these figures into context, the percentage of ethnic minorities with PIC rights in Colombia also matters (see DANE, 2023a). In 2018, people who self-identified as indigenous amounted to 1,905,617, 4.4% of the total Colombian population (48,258,494). These figures show a 36.8% increase between 2005 and 2018, explained by a better statistical coverage of indigenous territories and a significant rise in the self-identification of IP.[15] The largest number of self-recognized IP is mainly concentrated in coastal regions. In addition, people self-recognized as NARP amounted to 4,671,160 in 2018, which is 9.34% of the total Colombian population. Meanwhile, self-recognized NARP declined by 30.8% between 2005 and 2018.[16] Although the NARP represent 9% of the total population, and IP only 4.4%, PICs are mainly triggered in indigenous lands (see Table 3). The increase of more than 30% in self-recognition as IP between 2005 and 2018, particularly in coastal regions, may be connected to the options to get access to PIC. The decrease in self-recognition by a similar percentage in the same period among the NARP cannot be explained with these figures.

Together, hydrocarbon extractive activities and electric energy represent 45% of all PICs (see Table 4). These numbers correlate with the figures in Table 1 because of the 10 projects that account for almost one-quarter of PICs, 6 concern hydrocarbons and energy projects, all located in Guajira (Caribbean region). This point seems to confirm that extractive and energy industries are the most contested when it comes to exploiting natural resources in IP lands. For electricity projects, the environmental argument may be different as sometimes energy transition projects involve abundant PICs, not necessarily free of conflict.

If hydrocarbon exploration and exploitation projects located in IP lands are delayed by PICs, which are in turn a condition to obtain the environmental license, PICs have a clear effect on the transaction costs of the projects, for both the state and investors. There is a significant economic repercussion in Colombia because 55% of Colombian exports rely on hydrocarbons and other mining products. Still, the projects with the highest number of PICs are very localized, which deserves an in-depth analysis of the situation of the IP in la Guajira. The current government sought to adopt exceptional measures, but the CCC struck down the declaration of economic emergency.[17] Remarkably, these conflicts are in coastal areas and not

TABLE 4 Prior consultations by industry, 1995–2022.

Industry	PIC number
Hydrocarbon	1587
Electrical	1269
Environmental	1143
Administrative measure	720
Infrastructural	713
Telecommunications	332
Judicial order	258
Mining	146
Research	15
Total	**6183**

Abbreviation: PIC, prior informed consultation.

Source: Authors' calculations, based on Ministerio del Interior (2023).

TABLE 5 Number of prior consultations by outcome, 1995–2020.

Outcome	Number of prior consultations
With agreement	5875
Without agreement	308
Total	**6183**

Source: Authors' calculations, based on Ministerio del Interior (2023).

in the Amazon, which represents one-third of the Colombian territory and has been the most controversial region for hydrocarbon exploitation in indigenous lands in other Amazonian countries such as Peru and Ecuador.[18]

Regarding the outcome and potential impact of PICs, they do not seem to be a serious structural obstacle, given that 95% of them end with an agreement (see Table 5). This outcome could represent an indication of effectiveness because these projects can be developed in a concerted manner with the indigenous communities, but the duration of the processes can have economic repercussions.

In the period addressed (1995–2022), half of the projects in IP territories had potentially a high environmental impact and required an environmental license (see Table 6). This number indicates that 50% of these projects obtained the license to operate only after having concluded and registered the result of the PIC process. The percentage shows how IP rights play a central role in investment projects but also that these investments have a high environmental impact on IP lands and ecosystems.

Regarding the duration of PICs, the data recorded by MIA do not allow for strong conclusions. Only in 2016 were the deadlines established by the legislation to carry out the PIC met. Since 2019, there seems to be a downward trend, which cannot only be explained by the pandemic (see Figure 3). The stringent institutional design for PICs could also play a role in this trend. In terms of transaction costs for the state and investors, although PICs mostly end in an agreement, this point is not formalized within the legally established timeframe. In most of the observed years (27) the legal timeframe (which can constitute a legitimate expectation for

TABLE 6 Prior Consultations and environmental permits, 1995–2022.

Projects	Number of prior consultations
Projects subject to PIC and environmental permit	3261
Projects subject to PIC but not to environmental permit	2922
Total	**6183**

Abbreviation: PIC, prior informed consultation.

Source: Authors' calculations, based on Ministerio del Interior (2023).

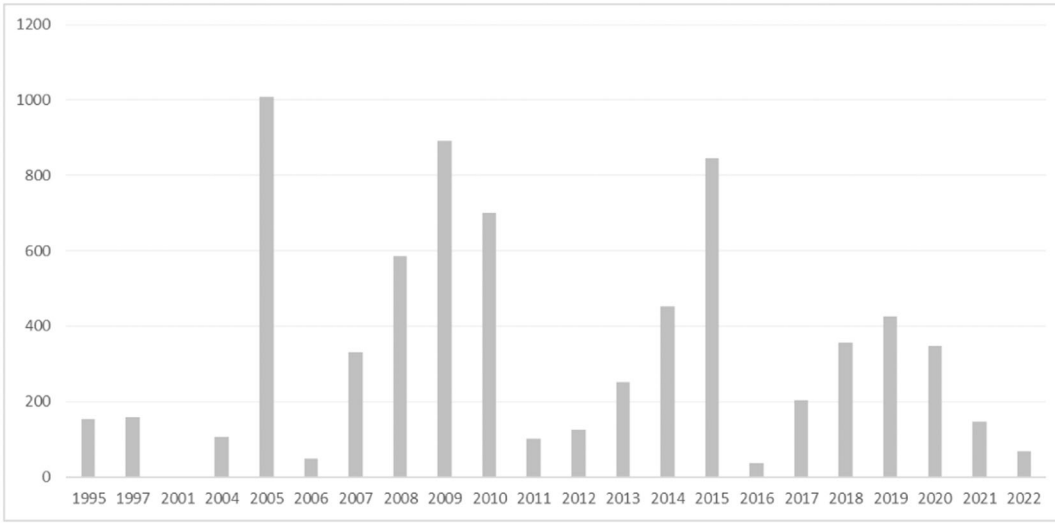

FIGURE 3 Average duration of prior consultations by year of initiation (in days), 1995–2022. *Source:* Authors' calculations, based on Ministerio del Interior (2023).

investors) was exceeded. Another reading of the figures after 2015, showing lower average durations, might in turn point to a learning effect and more efficient procedures.

The correlation between PIC outcomes and duration on the one hand and structural variables on the other was assessed to explore the dynamics of the PIC processes in Colombia. The aim was to detect patterns, such as whether the outcomes vary by involved region, industry, or ethnicity; whether the duration of the consultations varies by region, industry, or ethnicity; or whether the outcomes are dependent on environmental licensing. Outcomes of PIC (with or without agreement) and duration (in days) were regressed against a series of categorical variables (region, industry, ethnicity), while outcomes were also regressed against the existence of an environmental license process for the same investment project (see Appendix A).

Several findings are relevant. First, there are significant differences between industries as to the probability of achieving successful outcomes and the duration of PIC. Compared to the benchmark industry (environmental), the electricity and telecommunications industries show a significantly higher likeliness to reach agreements and involve significantly shorter processes. The hydrocarbon industry also shows shorter processes, while infrastructural projects typically lead to longer consultation processes. Second, compared to the benchmark region (Amazon), the Pacific region systematically shows longer processes, while Orinoquía shows significantly shorter processes. Third, when looking at the influence of ethnicities, and comparing with the

NARP benchmark, if statistically significant differences are found, they tend to be in lower probabilities of achieving a negotiated agreement, longer consultation process durations, or both.[19] The Wayuu, who are most involved in PIC, show a positive coefficient (pointing to higher probabilities to achieve agreements) although not significant. Regarding the duration of the PIC, they are significantly longer for specific indigenous ethnicities.[20] Still, only two of these ethnicities are in both groups—Guahibo, located in the Orinoquía region; and the Katio, located in the intersection between the Pacific, Caribbean, and Andean regions. This outcome also deserves an in-depth analysis because the Guahibo seem to behave differently from the pattern in the Orinoquía region. In contrast, the likeliness of reaching an agreement does not seem to be related to the requirement of obtaining an environmental license.

Analyzing constitutional court data

The complementary analysis of CCC case law was motivated by the fact that IP and NARP have frequently activated constitutional actions to claim the organization of a PIC, or to challenge PICs carried out by the government without fulfilling the legal and jurisprudential conditions. The quantitative analysis of CCC case law reviewed systematically all the action of protection (*tutela*) judgments referring to PIC from 1995 to 2022, which resulted in 161 decisions (see Table 7). The results seem to confirm that the CCC has mostly upheld the protection of IP rights and enhanced biocultural or ecocentric approaches to their protection. Further in-depth analysis could inquire whether CCC intervention could be considered as activist (Gargarella et al., 2016; Rodríguez-Garavito, 2017; Santos Botelho, 2017) or represent an effort to fill the regulatory void related to the noncompliance with the constitution of governments and investors (Voigt, 2021).

These data were filtered, based on a content and legal analysis of the judgments. Of the cases that reached the CCC, only a minority also involved environmental licenses. Of the 161 *tutela* judgments, 80% were favorable to the plaintiffs, where IP filed the most tutela lawsuits (96, as compared to 48 lodged by NARP). Regarding the most contentious sectors, a majority of cases were filed against state projects, which are not necessarily linked to specific economic sectors since some of them related to public services. The most contentious industries were infrastructure and hydrocarbons. Further analysis could explain how the CCC grants protection to IP in specific industries, and whether the results may be influenced by ethnicity.

CONCLUSIONS

Tensions between IP rights and investment projects that seek to exploit natural resources in their territories, particularly hydrocarbons, are frequent in many countries, notwithstanding their development levels and model. ILO 169 has thereby been a game changer in the recognition of IP rights worldwide, although it aligns with anthropocentric models. Still, only Latin American countries have been largely receptive to the implementation of this convention. Countries that traditionally host the headquarters of multinational companies that control the mining and hydrocarbon markets, as well as the energy transition, have been reluctant to ratify ILO 169. This situation has led to disagreement over the desired development models at the global level that balance the distinct values attributed to ecosystems, although this scenario may change as the extractive and hydrocarbon industries are seen as the main culprits of global warming.

Few studies have looked at the protection of IP and territories and the interconnection with sustainable development policies. From a literature review, we identified 6 building blocks that could be used for this purpose, mainly related to the cost–benefit calculus of investment

TABLE 7 CCC Tutela judgments related to PIC and licenses, 1995–2022—Outcomes.

Mechanism	Total	Decision					Ethnicity			Sector						
		Granted	Inadmissible	Denied	Nullified	Mix	Indigenous	NARP	Citizen	Environment	Energy	Infrastructure	Administration	Mining	Hydrocarbon	Other
Env. License	10	8	2	0			1	4	5	3	2	3	1	1		
PIC	148	109	15	24	1	1	95	44	12	9	6	23	74	13	21	5
PIC/ License	3	2	0	0						1		1				

Note: Search keywords used: Consulta previa, comunidades indígenas, Actividad, Obra o Proyecto (AOP) sentencia de tutela, sentencia unificada.

Abbreviations: Env. License, Environmental License; NARP, Black, Afro-Colombian, Raizal, and Palenquera populations; PIC, prior informed consultation.

Source: Authors' compilation of CCC case laws, based on Corte Constitucional de Colombia (2023).

projects that needs to balance the transaction costs of IP rights and the value they attribute to their territories; the effectiveness of participatory processes depending on their design features; the state–IP contractual arrangements and their consequences; the regulatory approach to investor–state relations; the (economic) behavior of IP (including the specificities of traditional indigenous economic activity; the self-identification of IP driven by incentives, as well as indigenous entrepreneurship, and how courts behave vis-à-vis the protection of IP rights when the government promotes investment in their lands). Empirical analysis along these lines requires appropriate data, which are not always easily available, especially if large *n* types of analyses are pursued.

The data collected shed some light on certain facets of the underlying research questions. First, regarding the scale of use of PIC and FIPC in Colombia for the protection of IP territories when investment projects are planned, the empirical and case law analyses reveal that Colombia is a landmark case because it is where the ILO 169 PIC has been used the most. It is also the country where the courts have ruled on the most cases that seek to protect IP rights. Since the implementation of PIC, more than 6000 PICs have been started, multiplying the number of implicated investment projects roughly by four (mainly due to the number of ethnic communities involved per project). PIC procedures generally (in 95% of the cases) conclude with an agreement between the interested parties, which would seem to be positive. From the government and investors' perspectives, the duration seems to exceed the legal terms exponentially, which increases the transaction costs of these investment projects. In addition, in some 50% of the cases, PICs were required to obtain environmental licensing procedures. From the IP perspective, the literature suggests that getting a positive outcome in the PIC processes does not always translate into recognition of the values attributed to their territories. Solid conclusions can be drawn only by conducting in-depth studies.

Second, the number of environmental licenses that required PIC or FPIC shows the important effects these projects might cause on IP lands. For the investors, the fact that environmental licenses can only be requested once a PIC process has been registered adds length to project implementation. Yet, avoiding these processes would constitute a denial of IP land rights and prevent any assessment of the convenience of these projects beyond the economic value of ecosystems, which is precisely the main criticism of the anthropocentric approaches mentioned as responsible for the present global ecological crisis.

Third, significant patterns in the outcome of the PICs (with or without agreement, duration) can be detected in terms of region, ethnicity, or industry involved, or a combination of these factors. More analysis is needed, however, to pinpoint the exact reasons for these patterns. There is also evidence that the PIC framework provides material incentives to self-identify as IP.

Finally, the role of the CCC has been crucial in enforcing ILO 169 and has even extended its scope of application to the NARP, communities that may be more marginalized than IP. Several aspects show how the CCC aligns with ecological economics approaches that advocate for more biocultural or ecocentric perspectives as a response to the anthropocentric models. First, the CCC has required the government to adopt stringent PIC procedures while allowing for balancing between IP interests and economic development. Second, the CCC has protected IP when PIC were not respected, thus filling institutional gaps that affect IP rights. Third, the CCC has upheld the biocultural (and sometimes ecocentric) models by balancing values of the constitution and ILO 169 that align with these models with values that pursue economic prosperity. Further analysis could assess whether the CCC has a leverage effect, in other words, whether the significant increase in self-identification as "indigenous" is the result of the increasing importance of PIC in investment projects in IP territories and the systematic support of the CCC for IP. Meanwhile, it is unclear why NARP populations do not achieve the same level of leverage and why, even though the CCC and the IACtHR expanded the protection of ILO 169 to cover them, their self-recognition as NARP has diminished. At the regional level,

the influence of the CCC on the IACtHR's jurisprudence is significant, which means there is a multiplier effect on IP protection policies at the regional level.

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CONFLICT OF INTEREST STATEMENT

The authors declare no conflict of interest.

DATA AVAILABILITY STATEMENT

The data that support the findings of this study are available in the public domain: Ministry of Internal Affairs, *Autoridad Nacional de Consulta Previa*, https://www.mininterior.gov.co/direccion-de-autoridad-nacional-y-consulta-previa/datos-abiertos-dancp/ and https://www.mininterior.gov.co/transparencia-y-acceso-a-la-informacion-publica/; National Department of Statistics (DANE), https://www.dane.gov.co/index.php/estadisticas-por-tema/demografia-y-poblacion/grupos-etnicos/informacion-tecnica accessed on 25.1.2023 Colombian Constitutional Court, https://www.corteconstitucional.gov.co/secretaria/.

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ENDNOTES

[1] The American Convention on Human Rights, 1969 (Pact of San Jose) and the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights (San Salvador Protocol), the International Labor Organization (ILO) Indigenous and Tribal Peoples Convention, 1989 (ILO 169), The Convention on Biological Diversity (CBD) 1992 and their Protocols, and recently the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, 2018 (Escazú Agreement, 2018).

[2] Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru, and Venezuela.

[3] Dominica.

[4] Denmark, Germany, Luxembourg, Netherlands, Norway, and Spain.

[5] Fiji and Nepal.

[6] Central African Republic.

[7] See United Nations (2018).

[8] It is conducted by the National Authority for Prior Consultation (DANCP) of the Ministry. In this article, we refer to the Ministry of Internal Affairs (MIA) for the sake of simplicity.

[9] Other institutes that intervened were the Agustín Codazzi Geographic Institute, the National Land Agency, and the National Institute of Anthropology and History, among others.

[10] The proportionality test seeks whether the project is not arbitrary and grounded in criteria of reasonableness, proportionality, and objectivity. See CCC (2018).

[11] See IACtHR (2012, 2015a).

[12] See also CCC (1997, 2003, 2012, 2015a, 2015b).

[13] See Ministerio del Interior (2023b).

[14] Constitutional action of protection of fundamental rights.

[15] The DANE (2023b) identified 115 indigenous peoples living in Colombia. The most numerous (Wayuu, 380,460; Zenú, 307,091; Nasa, 243,176; and Pastos, 163,873) represent 58.1% of the country's indigenous population. The Jurumi, Passe, and Yuri indigenous peoples were not counted, respecting their voluntary isolation.

[16] NARP populations disagreed with this census and lodged a complaint. See CCC (2022).

[17] For example, CCC (2023), which was unexpected because CCC (2017b) declared unconstitutional the situation in La Guajira, particularly regarding the Wayuu ethnicity.

[18] See analyses of the Inter-American Commission of Human Rights regarding the human rights of indigenous and tribal peoples in Panamazonia (CIDH, 2019, 2021).

[19] Significantly lower probabilities for an agreement are found for Arhuaco, Chimila, Embera Dobio & Embera Yabida, Embera Eyabida, Guahibo, Katio, Misak, Muruy, and Yukpa.

[20] Amarua, Cofan, Cubeo, Curripacos, Guahibo, Inga, Jiw, Katio, Makaguan Cusay, Nukak, Piapoco, Piapoco-Achagua, Pijaos, Puinave, Saliba, Sikuani, Uitoto, Uwa, and Zenu.

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APPENDIX A

Table A1

TABLE A1 OLS regression output.

	(1) With agreement	(1) Duration
1.	NombreSe~d 0	NombreSe~d 0
	(.)	(.)
2.	NombreSe~d 0.0339**	NombreSe~d −1961.9***
	(0.003)	(0.000)
3.	NombreSe~d 0.0189	NombreSe~d −1461.2***
	(0.075)	(0.000)
4.	NombreSe~d 0.0102	NombreSe~d 1950.7***
	(0.422)	(0.000)
5.	NombreSe~d −0.0497	NombreSe~d 4969.0*
	(0.443)	(0.018)
6.	NombreSe~d −0.0827***	NombreSe~d −1567.8**
	(0.000)	(0.003)
7.	NombreSe~d −0.0409	NombreSe~d −519.0
	(0.053)	(0.449)
8.	NombreSe~d −0.00297	NombreSe~d −1893.0***
	(0.842)	(0.000)
9.	NombreSe~d 0.0414*	NombreSe~d −1662.9**
	(0.028)	(0.007)
1.	Region_ad 0	Region_ad 0
	(.)	(.)
2.	Region_ad 0.0362	Region_ad 6232.0*
	(0.632)	(0.011)
3.	Region_ad −0.0655	Region_ad 1950.5
	(0.084)	(0.112)
4.	Region_ad −0.0180	Region_ad 6938.2
	(0.938)	(0.354)
5.	Region_ad 0.0237	Region_ad −8214.3***
	(0.608)	(0.000)
6.	Region_ad −0.0621	Region_ad 6110.5***
	(0.135)	(0.000)
1.	Etnia_ad 0	Etnia_ad 0
	(.)	(.)
2.	Etnia_ad −0.0417	Etnia_ad 15167.5*
	(0.856)	(0.042)
3.	Etnia_ad 0.0682	Etnia_ad 14175.7***
	(0.465)	(0.000)
4.	Etnia_ad 0.0710	Etnia_ad 2810.1
	(0.761)	(0.711)
5.	Etnia_ad −0.112	Etnia_ad −811.2
	(0.255)	(0.799)
6.	Etnia_ad 0.162	Etnia_ad −1546.7
	(0.482)	(0.836)
7.	Etnia_ad −0.137**	Etnia_ad −317.2
	(0.002)	(0.825)
8.	Etnia_ad 0.0638*	Etnia_ad −37.26
	(0.044)	(0.971)
9.	Etnia_ad 0.134	Etnia_ad −348.3
	(0.559)	(0.963)
10.	Etnia_ad 0.259	Etnia_ad 7567.4
	(0.233)	(0.283)

(Continues)

11. Etnia_ad 0.157
(0.491)
12. Etnia_ad 0.0465
(0.839)
13. Etnia_ad −0.441**
(0.009)
14. Etnia_ad −0.0260
(0.875)
15. Etnia_ad −0.135
(0.130)
16. Etnia_ad 0.0549
(0.428)
17. Etnia_ad 0.00588
(0.980)
18. Etnia_ad −0.0635
(0.175)
19. Etnia_ad 0.166
(0.164)
20. Etnia_ad 0.177
(0.443)
21. Etnia_ad 0.100
(0.551)
22. Etnia_ad 0.127
(0.579)
23. Etnia_ad 0.0681
(0.674)
24. Etnia_ad 0.0762
(0.287)
25. Etnia_ad 0.158
(0.491)
26. Etnia_ad 0.0208
(0.523)
27. Etnia_ad −0.0451
(0.122)
28. Etnia_ad −0.971***
(0.000)
29. Etnia_ad −0.620***
(0.000)
30. Etnia_ad −0.0442
(0.204)
31. Etnia_ad 0.0428
(0.303)
32. Etnia_ad 0.0868
(0.704)
33. Etnia_ad 0.0464
(0.731)
34. Etnia_ad −0.123***
(0.001)
35. Etnia_ad 0.0485
(0.772)
36. Etnia_ad 0.0463
(0.758)
37. Etnia_ad −0.00821
(0.934)
38. Etnia_ad 0.0329
(0.291)
39. Etnia_ad 0.208
(0.363)
40. Etnia_ad −0.192*
(0.017)

11. Etnia_ad −4881.0
(0.510)
12. Etnia_ad 572.8
(0.939)
13. Etnia_ad −969.6
(0.859)
14. Etnia_ad 4123.3
(0.442)
15. Etnia_ad 9900.1***
(0.001)
16. Etnia_ad 3557.8
(0.113)
17. Etnia_ad 8941.0
(0.234)
18. Etnia_ad 8672.8***
(0.000)
19. Etnia_ad 12859.5***
(0.001)
20. Etnia_ad 16436.0*
(0.028)
21. Etnia_ad 8195.1
(0.133)
22. Etnia_ad 4155.5
(0.576)
23. Etnia_ad 393.9
(0.940)
24. Etnia_ad 11069.1***
(0.000)
25. Etnia_ad 4257.3
(0.568)
26. Etnia_ad −1622.0
(0.125)
27. Etnia_ad 388.6
(0.681)
28. Etnia_ad −4075.5
(0.581)
29. Etnia_ad 1223.7
(0.744)
30. Etnia_ad −189.0
(0.867)
31. Etnia_ad −2809.3*
(0.037)
32. Etnia_ad −2069.3
(0.780)
33. Etnia_ad 15670.0***
(0.000)
34. Etnia_ad 13986.7***
(0.000)
35. Etnia_ad 9894.9
(0.069)
36. Etnia_ad 10376.2*
(0.033)
37. Etnia_ad 3998.2
(0.213)
38. Etnia_ad 4853.9***
(0.000)
39. Etnia_ad −2375.3
(0.749)
40. Etnia_ad 12479.6***
(0.000)

41. Etnia_ad 0.250	41. Etnia_ad −1274.1
(0.063)	(0.770)
42. Etnia_ad 0.208	42. Etnia_ad −4022.3
(0.363)	(0.588)
43. Etnia_ad 0.0913	43. Etnia_ad −1315.3
(0.574)	(0.803)
44. Etnia_ad 0.112	44. Etnia_ad 1127.2
(0.630)	(0.882)
45. Etnia_ad −0.888***	45. Etnia_ad 48978.2***
(0.000)	(0.000)
46. Etnia_ad −0.170	46. Etnia_ad 5453.7
(0.075)	(0.079)
47. Etnia_ad −0.117	47. Etnia_ad 578.9
(0.271)	(0.866)
48. Etnia_ad −0.0291	48. Etnia_ad −3640.8
(0.863)	(0.504)
49. Etnia_ad 0.0804	49. Etnia_ad −1528.1
(0.726)	(0.837)
50. Etnia_ad 0.0990	50. Etnia_ad −2170.0
(0.339)	(0.518)
51. Etnia_ad 0.195	51. Etnia_ad 2734.0
(0.252)	(0.620)
52. Etnia_ad 0.0682	52. Etnia_ad 3863.3
(0.357)	(0.108)
53. Etnia_ad 0.158	53. Etnia_ad 4868.3
(0.491)	(0.514)
54. Etnia_ad 0.0715	54. Etnia_ad 5826.8**
(0.223)	(0.002)
55. Etnia_ad 0.158	55. Etnia_ad 6677.3
(0.491)	(0.370)
56. Etnia_ad −0.0417	56. Etnia_ad 16525.5*
(0.856)	(0.027)
57. Etnia_ad −0.954***	57. Etnia_ad 14987.0*
(0.000)	(0.044)
58. Etnia_ad −0.0795	58. Etnia_ad 258.5
(0.480)	(0.943)
59. Etnia_ad 0.259	59. Etnia_ad 7611.4
(0.338)	(0.385)
60. Etnia_ad −0.149	60. Etnia_ad 6587.1
(0.582)	(0.454)
61. Etnia_ad −0.418***	61. Etnia_ad 1814.6
(0.000)	(0.630)
62. Etnia_ad 0.0731	62. Etnia_ad −1352.6
(0.050)	(0.264)
63. Etnia_ad 0.0275	63. Etnia_ad 15913.3*
(0.905)	(0.033)
64. Etnia_ad 0.117	64. Etnia_ad 10343.7**
(0.284)	(0.003)
65. Etnia_ad 0.127	65. Etnia_ad 17578.4***
(0.200)	(0.000)
66. Etnia_ad −0.277*	66. Etnia_ad 941.8
(0.037)	(0.826)
67. Etnia_ad −0.0879	67. Etnia_ad −245.1
(0.183)	(0.909)
68. Etnia_ad −0.0246	68. Etnia_ad −19.44
(0.544)	(0.988)
69. Etnia_ad 0.0612	69. Etnia_ad 21120.8***
(0.403)	(0.000)
70. Etnia_ad 0.0439	70. Etnia_ad 46624.3***
(0.710)	(0.000)

(Continues)

71. Etnia_ad −0.0929
(0.176)
72. Etnia_ad 0.0589
(0.674)
73. Etnia_ad −0.0984
(0.207)
74. Etnia_ad 0.203*
(0.045)
75. Etnia_ad 0.0468
(0.844)
76. Etnia_ad 0.0387
(0.866)
77. Etnia_ad 0.0460
(0.523)
78. Etnia_ad −0.00625
(0.979)
79. Etnia_ad 0.392
(0.314)
80. Etnia_ad 0.110
(0.255)
81. Etnia_ad −0.00921
(0.773)
82. Etnia_ad 0.0494
(0.830)
83. Etnia_ad 0.158
(0.491)
84. Etnia_ad 0.0567*
(0.011)
85. Etnia_ad 0.00762
(0.926)
86. Etnia_ad −0.439*
(0.013)
87. Etnia_ad 0.0410
(0.864)
88. Etnia_ad 0.0440
(0.854)
89. Etnia_ad −0.113
(0.068)
90. Etnia_ad −0.0242
(0.696)
91. Etnia_ad −0.0209
(0.862)
92. Etnia_ad −0.0209
(0.815)
93. Etnia_ad −0.0209
(0.747)
94. Etnia_ad 0.109
(0.367)
95. Etnia_ad 0.00416
(0.980)
96. Etnia_ad 0.102
(0.459)
97. Etnia_ad 0.122
(0.593)
98. Etnia_ad −0.0588
(0.448)
99. Etnia_ad 0.0203
(0.929)
100. Etnia_ad 0.00855

71. Etnia_ad 2190.5
(0.326)
72. Etnia_ad 2257.8
(0.618)
73. Etnia_ad 28822.9***
(0.000)
74. Etnia_ad 15383.0***
(0.000)
75. Etnia_ad 10492.7
(0.175)
76. Etnia_ad −4012.9
(0.589)
77. Etnia_ad −778.6
(0.739)
78. Etnia_ad 630.8
(0.934)
79. Etnia_ad 6614.0
(0.600)
80. Etnia_ad 13468.7***
(0.000)
81. Etnia_ad 16678.2***
(0.000)
82. Etnia_ad 16009.0*
(0.032)
83. Etnia_ad 3981.3
(0.593)
84. Etnia_ad 14558.4***
(0.000)
85. Etnia_ad −1653.1
(0.536)
86. Etnia_ad −1370.3
(0.811)
87. Etnia_ad −1355.8
(0.861)
88. Etnia_ad 678.1
(0.930)
89. Etnia_ad 4715.8*
(0.019)
90. Etnia_ad 3844.3
(0.055)
91. Etnia_ad 4443.2
(0.254)
92. Etnia_ad 4444.2
(0.125)
93. Etnia_ad 4481.3*
(0.033)
94. Etnia_ad 9507.3*
(0.016)
95. Etnia_ad 9646.3
(0.077)
96. Etnia_ad 9474.8*
(0.034)
97. Etnia_ad −1328.0
(0.858)
98. Etnia_ad 7994.6**
(0.001)
99. Etnia_ad −1217.6
(0.869)
100. Etnia_ad 8717.8***

(0.893)	(0.000)
101. Etnia_ad 0.249	101. Etnia_ad 13497.5
(0.307)	(0.088)
102. Etnia_ad 0.0181	102. Etnia_ad −1170.6
(0.763)	(0.547)
103. Etnia_ad 0.0255	103. Etnia_ad 1508.0
(0.371)	(0.102)
104. Etnia_ad 0.0543	104. Etnia_ad 3365.0
(0.591)	(0.304)
105. Etnia_ad 0.0758	105. Etnia_ad 2458.5
(0.742)	(0.742)
106. Etnia_ad 0.00952	106. Etnia_ad −1061.3
(0.830)	(0.461)
107. Etnia_ad 0.128*	107. Etnia_ad −2708.9
(0.049)	(0.198)
108. Etnia_ad 0.0723	108. Etnia_ad −1356.9
(0.569)	(0.742)
109. Etnia_ad −0.285***	109. Etnia_ad 2116.7
(0.000)	(0.410)
110. Etnia_ad 0.130	110. Etnia_ad 8836.9
(0.575)	(0.239)
111. Etnia_ad −0.0271	111. Etnia_ad 6034.0***
(0.261)	(0.000)
1. Departam~d 0	1. Departam~d 0
(.)	(.)
2. Departam~d −0.125	2. Departam~d −1764.7
(0.071)	(0.432)
3. Departam~d −0.120**	3. Departam~d 10299.0***
(0.002)	(0.000)
4. Departam~d 0.0390	4. Departam~d 3791.5
(0.687)	(0.226)
5. Departam~d −0.366	5. Departam~d −6888.1
(0.256)	(0.510)
6. Departam~d −0.0126	6. Departam~d 2709.3**
(0.665)	(0.004)
7. Departam~d −0.0672	7. Departam~d −4943.7
(0.523)	(0.147)
8. Departam~d −0.129	8. Departam~d −2444.8
(0.091)	(0.322)
9. Departam~d −0.133*	9. Departam~d 3387.0
(0.029)	(0.087)
10. Departa~d −0.211*	10. Departa~d 740.8
(0.017)	(0.796)
11. Departa~d −0.0869***	11. Departa~d 2093.9*
(0.001)	(0.011)
12. Departa~d −0.0766	12. Departa~d 5050.4***
(0.064)	(0.000)
13. Departa~d 0.00196	13. Departa~d 1328.5
(0.932)	(0.074)
14. Departa~d −0.0644**	14. Departa~d −2535.5***
(0.002)	(0.000)
15. Departa~d 0.113	15. Departa~d −6436.5
(0.658)	(0.437)
16. Departa~d −0.240***	16. Departa~d −9632.9***
(0.000)	(0.000)
17. Departa~d −0.0648	17. Departa~d −4175.5
(0.400)	(0.094)
18. Departa~d −0.0982	18. Departa~d 303.0
(0.292)	(0.920)

(Continues)

19. Departa~d −0.0358	19. Departa~d 4098.8***
(0.347)	(0.001)
20. Departa~d 0.0686	20. Departa~d 5115.6**
(0.217)	(0.005)
21. Departa~d −0.0911**	21. Departa~d −1290.5
(0.002)	(0.169)
22. Departa~d −0.00772	22. Departa~d −561.1
(0.819)	(0.609)
23. Departa~d −0.316*	23. Departa~d −8893.2
(0.048)	(0.087)
24. Departa~d −0.188***	24. Departa~d 7585.4***
(0.000)	(0.000)
25. Departa~d −0.0167	25. Departa~d −2206.3
(0.879)	(0.534)
26. Departa~d −0.0422	26. Departa~d 7284.7**
(0.559)	(0.002)
27. Departa~d 0	27. Departa~d 0
(.)	(.)
28. Departa~d −0.0602	28. Departa~d 3637.6
(0.550)	(0.265)
29. Departa~d 0	29. Departa~d 0
(.)	(.)
30. Departa~d 0	30. Departa~d 0
(.)	(.)
31. Departa~d 0	31. Departa~d 0
(.)	(.)
32. Departa~d −0.0682	32. Departa~d −2798.9
(0.136)	(0.059)
33. Departa~d 0	33. Departa~d 0
(.)	(.)
_cons 1.021***	_cons −4422.2***
(0.000)	(0.000)
---	---
N 5768	N 5768
R-sq 0.081	R-sq 0.219
adj. R-sq 0.056	adj. R-sq 0.198
---	---
p Values in parentheses	*p* Values in parentheses
* $p < .05$, ** $p < .01$, *** $p < .001$	* $p < .05$, ** $p < .01$, *** $p < .001$

Acuerdo

Licencia0.00233
(0.723)
_cons 1.046***
(0.000)

N 5768
R-sq 0.070
adj. R-sq 0.046
---
p Values in parentheses
* $p < .05$, ** $p < .01$, *** $p < .001$

Source: Authors' elaboration.

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