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The Sioux's Suits: Global Law and the Dakota Access Pipeline

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THE SIOUX'S SUITS: GLOBAL LAW AND THE DAKOTA ACCESS PIPELINE

Stephen M. Young

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Stephen M. Young[*]

ABSTRACT

The Sioux Tribe's lawsuits and protests against the Dakota Access Pipelines (DAPL) received an incredible amount of international attention in ways that many Indigenous peoples' protests have not. This article argues that attention exists because the Sioux Tribe has been at the epicenter of the Indigenous peoples' rights movement in international law. Accordingly, they have invoked or claimed international human rights—particularly free, prior, and informed consent (FPIC)—to complicate, and perhaps destabilize, the DAPL's development. However, the importance of their activism is not merely in claiming human rights.

Based upon a global map of law that involves multiple and overlapping legalities, this article tracks the Sioux Tribe's activism according to the problem-solving approach. Accordingly, the Sioux Tribe is advancing a different model of legality, one that is not based on a top-down command and control authority. This article reveals a complex, global network of intercommunal Indigenous peoples and nonstate actors by tracing the historical trajectory of the Sioux Tribe, its opposition to the DAPL, its role in the Indigenous peoples' rights movement, and the novel extra-national legalities the Sioux Tribe is helping to formalize.

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I. Introduction

In mid-2016, the Sioux Tribe[1] initiated legal suits and protests to prevent the Dakota Access Pipeline (DAPL) from crossing under Lake Oahe,[2] a reservoir on the Missouri River from which the Sioux Tribe sources its drinking water.[3] The Sioux Tribe sought to protect its water source, but its protest aligns with broader goals, such as protecting lands, culture, sacred sites, the environment, and rectifying past injuries.[4] Crucially, as argued here, it also aligns with larger international and transnational movements. In opposing the DAPL, the Sioux Tribe claimed that the federal government failed to adequately consult them or obtain consent in contravention of federal law, treaties, and the international human rights of self-determination and free, prior, and informed consent (FPIC).[5]

Although federal legal procedures may ultimately provide the Sioux Tribe with a means for preventing continued operation of the DAPL,[6] which is currently functional, the Sioux Tribe's invocation of FPIC at other levels of legality has been, to some degree, successful. It has been successful in further formalizing networks of Indigenous peoples, human rights advocates, nonstate, and transnational legal actors to defund and divest from fossil fuels.[7] Undoubtedly, federal law remains a central component of Tribe-State relations.[8] However, since the

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[1] The terms "Standing Rock Sioux Tribe" and "Sioux" are not necessarily synonymous. Here, the term "Sioux Tribe" refers to those peoples of the Great Sioux Nation, including the Standing Rock, Cheyenne River, Yankton, and Crow Creek Sioux Tribes. The relation between law and tribal signifier is examined infra section II.AI.A–B.

[2] Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, (Standing Rock I), 205 F. Supp. 3d 4 (D.D.C. 2016); Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, (Standing Rock II), 239 F. Supp. 3d 77 (D.D.C. 2017); Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, (Standing Rock III), 255 F. Supp. 3d 101 (D.D.C. 2017).

[3] Standing Rock Sioux Tribe, *Background on the Dakota Access Pipeline*, at 1, https://www.standingrock.org/data/upfiles/media/Backgrounder%20DAPL%20SRST%20FINAL.pdf (webpage is no longer active) (on file with author) [hereinafter *Background on the DAPL*].

[4] *Id*. at 1 ("The Tribe opposes DAPL because we must honor our ancestors and protect our sacred sites and our precious waters.").

[5] Steve Sitting Bear & Robert Borrero, *Standing Rock Sioux Tribe and IITC File an Urgent Communication to the United Nations Citing Human Rights Violations Resulting from Pipeline Construction,* Aug. 19, 2016, http://hosted.verticalresponse.com/1383891/95e72ee8db/545546365/b5d5e1da0f/ [https://perma.cc/X427-T3GQ].

[6] *See, e.g.*, Standing Rock III, *supra* note 2.

[7] *Infra* section V.F.

[8] *Supra* note 1.

early 1980s, Indigenous peoples have been developing extra-national legal levels to pressure industry, nonstate actors, and states to adopt new ways of approaching Tribe-State interactions.[9] The Sioux Tribe was at the center of this movement,[10] and this role in advancing Indigenous peoples' rights partly explains the Tribe's ability to generate international attention. Appreciating the Sioux Tribe's role in the Indigenous peoples' rights movement in international law also assists in explaining why its opposition to the DAPL has been formative for Indigenous peoples around the world. From a legal perspective, it is important to appreciate how the Sioux Tribe, with the support of many others, has formed and relied upon extra-national and sub-national levels of legality to de-center the extant statist legal regime.[11]

This article explains the Sioux Tribe's opposition according to Patrick Cottrell and David Trubek's problem-solving approach to law in global spaces.[12] Where most law operates as "top-down control using fixed statutes, detailed rules, and judicial enforcement,"[13] Cottrell and Trubek explain that in global spaces, "law-like processes operate more as a framework for collective problem solving in complex and uncertain situations."[14] When peer pressure fails to persuade states and industry to participate in working towards resolving a common problem, those excluded from participating may engage in more destabilizing acts.[15] The Sioux Tribe sought to participate in resolving a common problem: who to consult and who has the

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[9] *Infra* section V.C–F.

[10] *Infra* section V.C. *See, e.g.*, *Int'l Indian Treaty Council,* Declaration of Continuing Independence, June 1974, http://www.iitc.org/about-iitc/the-declaration-of-continuing-independence-june-1974/.

[11] *See* BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW LEGAL COMMON SENSE 246–47 (2002) (NEW COMMON SENSE). Santos writes, "the nation-state has been the most central time-space of law for the last two hundred years, particularly in the core countries of the world system. However, its centrality only became possible because the other two time-spaces, the local and the global, were formally declared non-existent by the hegemonic liberal political theory." *Id.* at 85.

[12] *See generally* M. Patrick Cottrell & David M. Trubek, *Law as Problem Solving: Standards, Networks, Experimentation, and Deliberation in Global Space*, 21 TRANS. L. & CONT. PROB. 359 (2012).

[13] David M. Trubek & Louise G. Trubek, *New Governance & Legal Regulation: Complementarity, Rivalry, and Transformation*, 13 COLUM. J. EUR. L. 539, 543 (2006-2007).

[14] Cottrell & Trubek, *supra* note 12, at 359. They say "law-like" because in many instances, the norms they are discuss are "soft-law" norms or non-top-down, command and control style legalities.

[15] *Id.* at 374.

power to participate in permitting the construction of the DAPL on disputed territory.[16] To the extent that federal and industry actors identified problems, they were problems of permitting solvable under federal law.[17] In turning to federal law, the federal actors ignored or minimized the territorial dispute and therein disregarded the commonality of the problem by simply shifting the problem to the Sioux Tribe. As argued here, the Sioux Tribe's exclusion from participating according to its own, or a negotiated, participatory standard has led it to use alternative tools to pressure federal and industry actors.[18] The Sioux Tribe has done so by invoking international human rights law and cultivating international media attention in concert with transnational and inter-network legalities to oppose the DAPL. Its efforts may in time lead to destabilization of many fossil fuel developments.[19]

Part Two orients the dispute in a historical context. As argued here, the peoples known today as the "Sioux Tribe" have organized against the DAPL as a result of its struggle against the federal government and the resulting dispossession due to natural resource exploitation. Importantly, this short history also establishes that the land the DAPL crosses is disputed—a dispute that federal and industry actors believe is either previously solved or solvable under federal law.

Part Three then discusses state-level legality, the Sioux Tribe's litigation in the federal courts, and the DAPL protest. The Sioux Tribe's appeal to the legal system may, in time, halt further operation of the DAPL,[20] but the Sioux Tribe's use of legal procedures has limitations. According to federal law, the land is no longer disputed, so legal action cannot resolve the

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[16] Standing Rock I, *supra* note 2, at 18.
[17] *Id.* at 37 ("this Court does not lightly countenance any depredation of lands that hold significant to the Standing Rock Sioux. Aware of the indignities visited upon the Tribe over the last centuries, the Court scrutinizes the permitting process here with particular care. Having done so, the court must nonetheless conclude that the Tribe has not demonstrated that an injunction is warranted here.").
[18] Kristen A Carpenter & Angela R Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 CAL. L. REV. 173, 177 (2014) (arguing that General Assembly's endorsement of the UNDRIP is jurisgenerative moment for Indigenous peoples).
[19] *See infra* section I.F.2; Cottrell & Trubek, *supra* note 12, 374.
[20] Standing Rock III, *supra* note 2; *contra* Presidential Memorandum Regarding Construction of the Keystone XL Pipeline, Jan. 24, 2017, https://www.whitehouse.gov/the-press-office/2017/01/24/presidential-memorandum-regarding-construction-keystone-xl-pipeline [hereinafter Trump Memo].

underlying territorial dispute.[21] Further, using federal law to settle the land dispute further subjects the Sioux Tribe to the federal legal regime.[22] Despite these limitations, the Sioux Tribe must engage with the legal system to contest the DAPL development because it is the legal system under which the permits for the DAPL are issued. However, the Sioux Tribe's use of multiple extra-national levels is important for revealing how federal law is inadequate, how the Sioux Tribe engages with the federal legal system as part of a global legal challenge, and how Indigenous peoples are formalizing a different style of legality.

Part Four then introduces the concept of Indigenous peoples' FPIC, which some commentators see as a "right of Indigenous Peoples to make free and informed decisions about proposed large-scale projects on or near their land."[23] The key instrument for Indigenous peoples' rights is the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which contains several articles on FPIC.[24] Generally, if states recognize FPIC, then states will seek tribal consent before taking actions that could impact tribal livelihood and territories. As such, it appears FPIC could provide Indigenous peoples with a means for preventing projects of which they do not approve, like the DAPL.[25] Although FPIC may appear promising, settler-states, such as the United States, Canada, Australia, and New Zealand, view UNDRIP as a nonbinding, aspirational instrument, and hence they view some rights it recognizes, like FPIC, as nonbinding.[26] Another concern is that FPIC, as a

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[21] *See, e.g.*, United States v. Sioux Nation, 448 U.S. 371, 388 (1980) [Hereinafter Sioux Nation].

[22] *See infra* section III.B–III.C.

[23] Helen Szoke, Address at the Sustainable Mining Symposium at Melbourne Business School, Indigenous Peoples, Community rights and Mining: Free, Prior and Informed Consent (May 17, 2013) (on file with author).

[24] U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res 61/295, (Sept. 13, 2007) at 10, 11(2), 19, 28(1), 29(2), 32(2) (Sept. 13, 2007) [hereinafter UNDRIP]. I assume the Standing Rock Sioux self-identify as "Indigenous peoples" given their invocation of rights contained in UNDRIP. For a discussion on the term "Indigenous peoples" *see, e.g.*, KATHLEEN BIRRELL, INDIGENEITY: BEFORE AND BEYOND THE LAW 7–24 (2016); RONALD NIEZEN, THE ORIGINS OF INDIGENISM 3–5 (2003).

[25] *See infra* Part IV. There is a debate about whether FPIC provides Indigenous peoples with a veto.

[26] *See* U.N. Doc. A/61/PV.107, 15; Press Release, Robert Hagen, US advisor statement on U.S. Mission to the U. N. on the Declaration on the Rights of Indigenous Peoples Assembly (Sept. 13, 2007); President of the U.S., Remarks at the White House Tribal Nations Conference (Dec. 16, 2010); *but cf*, Sheryl Lightfoot, *Selective Endorsement without Intent to Implement: Indigenous Rights and the Anglosphere*, 16(1) INT'L J HUM.

summary process for granting or withholding consent, may be too vague to operate as a binding legal standard.[27] Where states do not embrace FPIC, international instruments that recognize FPIC lack a 'legal' means of resistance. Despite the failings of the state system and the uphill battle for broader recognition of the Indigenous peoples' rights movement in the United States, the Sioux Tribe's activism reveals how it is claiming and invoking FPIC in global legal spaces.

Part Five describes the development and use of FPIC according to a map of law in global spaces. Settler-state resistance to Indigenous rights has allowed Indigenous peoples to develop means of resistance at sites of nonstate legality. To articulate how FPIC has discursively developed throughout multiple and overlapping legal levels, this article relies on William Twining's map of global law.[28] From a state-centric, positivist perspective, the extra-national levels are often identified as 'soft law' or as legally nonbinding.[29] Even if FPIC is soft law, when FPIC is "operationalized" according to the problem-solving approach in global spaces, as the Sioux Tribe exemplify, it puts pressure on and may destabilize projects.[30] This article concludes that the Sioux Tribe, along with its intercommunal networks, is using different levels of legality in new and novel ways that are not explainable under state-based

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RTS. 100, 103, 114–15 (2012) (critical appraisal of that speech); *also*, James Anaya, Special Rapporteur on the Situation of Human Rights andFundamental Freedoms of Indigenous Peoples, Promotion & Prot. of All Human Rights, Civil, Political Economic, Social & Cultural Rights, Including the Right to Development, ¶ 41, U.N. Doc. A/HRC/12/34 (July 15, 2009) [hereinafter Promotion and Protection]; U.N. General Assembly, *Meeting Record*, U.N. GAOR, U.N. Doc. A/61/PV.107 11–14 (Sept. 13, 2007); Peter Vaughn, Statement of Peter Vaughn to the Permanent Forum on Indigenous Issues, Representative of Australia, on behalf of Australia, New Zealand and the U.S., on Free, Prior and Informed Consent (May 22, 2006); Tara Ward, *The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law*, 10(2) NW. J. INT'L HUM. RTS. 54, 59 (2011).

[27] Robert T. Coulter, *Free Prior and Informed Consent: Not the Right it is Made Out to Be*, INDIAN RES. LAW CTR. (Oct. 31, 2013), http://indianlaw.org/sites/default/files/FPIC_RTC_Oct2013.pdf.

[28] *See generally* WILLIAM TWINING, GLOBALISATION AND LEGAL THEORY 139 (2000) [hereinafter GLOBALISATION]. Tamanaha has similarly argued that there are areas of legality. Brian Z. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, 30 SYD L. REV. 375, 397 (2008). H. Patrick Glenn wrote of co-existing different legal 'traditions'. LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW 61–98 (4th ed. 2010).

[29] *Infra* section IV.B.

[30] Cottrell & Trubek, *supra* note 12.

legalities or even a combination of state and international legalities.

II. A BRIEF HISTORY OF THE SIOUX TRIBE

The Sioux Tribe's opposition to the DAPL is animated by more than water-protection and the placement of a pipeline. Those who are identifiable as "the Sioux Tribe" have been forcefully dispossessed, marginalized and made precarious by the federal government and its legal machinations. This short history also establishes that the land involved in the DAPL construction is disputed, despite how government and industry actors treat the dispute as though it is resolved.

A. *Who Are the Sioux?*

Three distinct dialects refer to themselves as the Lakota, Dakota, and Nakota, which comprise the "alliance of friends."[31] Together, they identify themselves as *Oceti Sakowin* or Seven Council Fires.[32] The *Oceti Sakowin* were originally from woodland areas in modern-day Minnesota, but were forced westward onto the plains by the Ojibwa and Cree who received guns and ammunition from French fur traders in the seventeenth century.[33] In time, the *Oceti Sakown* became known to others under the name "Sioux," which is a linguistic bastardization of the Ojibwa word *Nadouwesou* that means snakes, small adder, or enemy.[34] In the seventeenth century, French traders shortened *Nadouwesou* to "Sou," which they wrote as "Sioux."[35]

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[31] EDWARD LAZARUS, BLACK HILLS/WHITE JUSTICE: THE SIOUX NATION VERSUS THE UNITED STATES, 1775 TO THE PRESENT 4 (1991); ROBERT M. UTLEY, THE LAST DAYS OF THE SIOUX NATION 6 (1963).

[32] Oceti Sakowin Camp, *History*, http://www.ocetisakowincamp.org/history (last visited July 31, 2017) (list the Seven Council Fires as the Mdewakanton, Wahpekute, Sisitonawan/Sisseton, Wahpetonwan, Ihanktown/Lower Yanktonai, Ihanktowana/Upper Yanktoni and Tetowan); MICHAEL JOHNSON & JONATHAN SMITH, THE TRIBES OF THE SIOUX NATION 5 (2000).

[33] UTLEY, *supra* note 31, at 6 (uses the word "Chippewa" another name for the Ojibwe); LAZARUS, *supra* note 31, at 4–5; JOHNSON & SMITH, *supra* note 32, at 4-5.

[34] Standing Rock Sioux Tribe, *History*, https://www.standingrock.org/content/history (last visited July 31, 2017); LAZARUS, *supra* note 31, at 4 ("nadoueissiw"); JOHNSON & SMITH, *supra* note 32, at 4 ("nadowe-is-iw-ug").

[35] Standing Rock Sioux Tribe, *History*, https://www.standingrock.org/content/history (last visited July 31, 2017).

Between the seventeenth and mid-nineteenth centuries, the Sioux Tribe expanded its territories throughout the plains regions to the extent that Edward Lazarus saw the Sioux as an "empire."[36] During that time, each band had a chief, but the chief was not the ruler or executive power of the band, tribe, or the entire *Oceti Sakowin*. Robert Utley describes how the *Oceti Sakowin*'s internal government changed because of contact with 'whites' in the mid-nineteenth century:

> This system of tribal government operated only during the summer months, when the bands came together as a tribe to hunt and to make work. It worked well enough, but when increasing numbers of whites moved westward in the middle nineteenth century, posing a sustained menace to the Indian way of life, it proved too weak. Paradoxically, the white officials injected more authoritarianism into the system. Ignorant of the realities of Sioux political organization, they found it convenient to deal with a tribe through a single leader and persuaded each tribe to choose a head chief . . . The officials' assumption that a chief ruled absolutely over his people led to many misunderstandings between the two races.[37]

Utley explains that those known as the "Sioux" were already undergoing changes when, in 1849,[38] prospectors discovered gold in California, and American civilians began flooding the Sioux Tribe's territory.[39] To ensure that settlers would remain safe inside Indian territories, the federal government gathered representatives from potentially affected Tribes—including the Sioux, Cheyenne, and Arapaho—and offered them a yearly annuity in return for the safety of American citizens.[40] This agreement was the Fort Laramie Treaty of 1851, which recognized the "Sioux" or "Dahcotah" Nation

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[36] LAZARUS, *supra* note 31, at 7.
[37] UTLEY, *supra* note 31, at 10.
[38] LAZARUS, *supra* note 31, at 7–20.
[39] *Id.* at 15–16.
[40] Treaty of Fort Laramie, 11 Stats. 749, art. 7 (Sept. 17, 1851), [hereinafter '1851 Fort Laramie Treaty'] (provided an annuity of fifty thousand dollars for fifty years, which the United States Congress changed to ten years when ratified).

territories.[41] The tribal representatives were tribal chiefs who did not rule absolutely over the *Oceti Sakowin*, but the federal government considered them leaders of nations, rather than viewing them as part of their own complex legal arrangements.[42] That the *Oceti Sakowin* were identified as "Sioux" by mid-nineteenth century suggests that how others understood the Tribe, rather than how it understood and identified itself, was already salient.[43] The 1851 Fort Laramie Treaty continued a process of legally forming the *Oceti Sakowin* into the Sioux and the Dakota by tethering them to territory.[44]

B. *The Formation of the Great Sioux Nation and Its Fragmentation*

In the 1860s, the Civil War created a shortage of gold and silver, which renewed American interest in resource exploitation.[45] When prospectors discovered gold in what would become known as Montana, American civilians again flooded into and across the Sioux Tribe's territories. Violence between Indian Nations and American citizens in Minnesota spilled into the Sioux Tribe's territory, which led to Red Cloud's War.[46] The federal government sued for peace, which resulted in the 1868 Fort Laramie Treaty.[47] In addition to temporarily ceasing hostilities, the 1868 Treaty acknowledged lands belonging to the Great Sioux Nation, which started on the eastern bank of the Missouri River and encapsulated the entirety of western South

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[41] *Id.* at art. 5. (Article 4 guarantees safety of United States citizens. Article 2 guarantees a federal right to construct roads through the Tribal-Nation lands codified by the Treaty.); *see*, LAZARUS, *supra* note 31, at 18 (claiming the 1851 Treaty was deliberately insensitive to Sioux culture and definitions).

[42] UTLEY, *supra* note 31, at 10.

[43] 1851 Fort Laramie Treaty, *supra* note 40, at art. 5.

[44] Treaty with the Sioux, Sept. 23, 1805 (approved by the U.S. Senate on Apr. 16, 1808, never ratified); Treaty with the Sioux of the Lakes, July 19, 1815, 7 Stat., 126., Ratified Dec. 26, 1815; Treaty with the Sioux of St. Peter's River, July 19, 1815., 7 Stat., 127. Ratified Dec. 26, 1815; Treaty with the Sioux, June 1, 1816, 7 State., 143, Proclamation, Dec. 30, 1816; Treaty with the Teton, Etc., Sioux, June 22, 1825, 7 Stat., 250, Proclamation, Feb. 6, 1825; Treaty with the Sioux, Etc., Aug. 19, 1825, 7 Stat., 272, Proclamation Feb. 6, 1826. Those treaties do not signify the Sioux as a singular unity as would the 1851 Fort Laramie Treaty.

[45] LAZARUS, *supra* note 31, at 26–30.

[46] *Id.*

[47] Treaty of Fort Laramie, 15 Stat. 635, (Apr. 29, 1868) [hereinafter '1868 Fort Laramie Treaty'].

Dakota.[48] Article XII specified that "at least three-fourth of all the adult male Indians occupying or interest[ed] in the" land must consent to abrogate any article or cede territory.[49] The 1868 Treaty formed the Sioux or Dahcotah Nations into the Great Sioux Nation, as it further leashed that legal identification to a particular territory.

The cessation of hostilities generated by the 1868 Fort Laramie Treaty would not last. The United States would soon trigger violence and would never obtain the consent of three-fourths of the Great Sioux Nation's adult male population. Following rumors of gold in the Black Hills, General George Custer entered the Great Sioux Nation territory to confirm the rumors.[50] When the presence of gold was confirmed, the federal government attempted to purchase the Black Hills, which the Great Sioux Nation rejected.[51] The federal government then adopted an unofficial policy of encouraging illegal prospecting in the Black Hills.[52] Again, American settlers flooded into the Sioux Tribe's territory, this time with the intent to mine, which led to the Great Sioux War and the most infamous Native American/United States conflict, the Battle of Little Bighorn.[53] After Sitting Bull and other native leaders soundly defeated General Custer, the tides of war turned against the Great Sioux Nation. Despite the 1868 Treaty specifying that "at least three-fourths of all the adult male Indians occupying or interest[ed] in the [land]" would have to sign away land rights, in 1877 a United States Commission forced the Sioux to cede the Black Hills, obtaining signatures from only ten percent of the Sioux Nation's adult male population.[54] In 1980, the United States Supreme

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[48] *Id.* arts. II, X, XI (also guaranteed large amounts of land for hunting outside the reservation; and subsistence rations until 1872).
[49] *Id.* art. XII.
[50] Sioux Nation, 448 U.S. at 371, 376–77.
[51] *Id.* at 379.
[52] John P. LaVelle, *Rescuing Paha Sapa: Achieving Environmental Justice by Restoring the Great Grasslands and Returning the Sacred Black Hills to the Great Sioux Nation*, 5 GREAT PLAINS NAT. RES. J. 40, 45 n. 27 (2001) *citing* Exhibits in Appendix C To Reply Brief of Sioux Nation in Court of Claims No. 148–78, *reprinted in* Appendix Accompanying Brief of Respondent Sioux Nation at 59; Sioux Nation, 448 U.S. at 371 (reprinted letter from Lt. Gen. Philip H. Sheridan, commander of the Military Div. of the Missouri, to Brig. Gen. Alfred H. Terry, commander of the Dep't of Dakota, Nov. 9, 1875).
[53] The federal government re-named the Sioux "hostiles." Sioux Nation, 448 U.S. at 379; LAZARUS, *supra* note 31, at 74.
[54] Acts of Forty-Fourth Congress, Second Session, Feb. 28, 1877 Ch. 72, Art. 1, 19 Stat. 254; Sioux Nation, 448 U.S. at 381–82; LaVelle, *supra* note 52, at 51–54; LAZARUS, *supra* note 31, at 90–2.

Court would later agree with the Sioux Nation that the federal government's actions in the Black Hills contravened the 1868 Treaty.[55] However, in 1877, the Great Sioux Nation was powerless to prevent the United States from taking legal ownership.[56]

Amidst these exercises in overt violence, the federal government adopted a new tactic.[57] The federal government decided to regulate tribes and Indian Nations, including the Great Sioux Nation, by passing domestic legislation, rather than continuing to enter into treaties.[58] The following 1887 General Allotment Act, also called the "Dawes Act," sought to assimilate Native Americans into American society.[59] It partitioned territories held by tribes or bands into alienable property rights for families.[60] Where the 1851 and 1868 Laramie Treaties centralized and formalized the Great Sioux Nation, the subsequent Sioux Act of 1889 broke the Great Sioux Nation into five separate and fragmented reservations, one of which is the Standing Rock Sioux Tribe.[61] The Sioux Act of 1889 also claimed title to the land upon which the federal government would later build the Oahe dam.

C. *Twentieth-century Developments*

In 1934, the United States Congress passed the Indian Reorganization Act (IRA), also called the "Indian New Deal."[62] The IRA did not diminish the size of the Standing Rock or Cheyenne River Reservations, but it set the stage for natural

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[55] *Sioux Nation*, 448 U.S. at 423–24.
[56] LAZARUS, *supra* note 31, at 90–2.
[57] *See, e.g.*, MICHEL FOUCAULT, SOCIETY MUST BE DEFENDED 15 (Mauro Bertani & Alessandro Fontana eds., David Macey trans. (2003) ("politics is the continuation of war by other means"). Foucault's statement reverses Karl von Clausewitz's dictum that war is "the continuation of policy by other means." KARL VON CLAUSEWITZ, WAR POLITICS AND POWER 83 (1967).
[58] 25 U.S.C. § 71 (1871) (claims that "no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired.").
[59] General Allotment Act, 24 Stat. 388, Feb. 8, 1887, ch. 119, 25 U.S.C.A. 311.
[60] *Id.* §§ 5, 7.
[61] An act to divide a portion of the reservation of the Sioux Nation of Indians in Dakota into separate reservations and to secure the relinquishment of the Indian title to the remainder, and for other purposes, 25 Stat. 889 (Mar. 2, 1889).
[62] Indian Reorganization Act, Pub. L. 73-383, 48 Stat. 984 (June 18, 1934).

resource exploitation to do so.[63] After World War II, the federal government began damming its major river systems, including the Missouri River, to generate hydroelectric power.[64] The Oahe Dam's construction on the Missouri River in the late 1950s and early 1960s created Lake Oahe,[65] which forcefully displaced members of the Standing Rock and Cheyenne River Sioux Tribes.[66] Lake Oahe flooded 160,889 acres of the most densely forested and resource-rich Sioux lands, which resulted in the single largest public works destruction of Indian land.[67] Again, American desire for natural resources dispossessed the *Oceti Sakowin*.

The Sioux Tribe's members were actively resisting throughout the 1960s and 1970s[68] and won a significant Supreme Court case in 1980. Justice Blackmun and seven Justices agreed with the Sioux Nation that the federal government had illegally taken the Black Hills in contravention of the 1868 Treaty.[69] Although the Sioux Nation sought to have the Black Hills

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[63] The National Industrial Recovery Act created the Public Works Administration, which would initiate the nationwide dam infrastructure projects. MICHAEL J. LAWSON JR., DAMMED INDIANS: THE PICK-SLOAN PLAN AND THE MISSOURI RIVER SIOUX, 1944-1980 11–12 (1994).

[64] Pick-Sloan Flood Control Act of 1944, Pub. L. 78-534, Dec. 22, 1944, 58 Stat. 887. For a detailed chronicle of the planning for the dam, its effect on the Sioux and their resistance, see generally LAWSON, *supra* note 63. The 1953 House Concurrent Resolution 108 officially commenced termination, which sought to end the trustee relationship and have Indians accept American citizenship. For a general account of the Rosebud Sioux Tribe's resistance to termination see EDWARD CHARLES VALANDRA, NOT WITHOUT OUR CONSENT: LAKOTA RESISTANCE TO TERMINATION, 1950–59 (2006).

[65] An Act to designate the Oahe Reservoir on the Missouri River in the States of North Dakota and South Dakota as Lake Oahe, H.R. 2901, Mar. 21, 1968, Pub. L. 90-270 (named Lake Oahe "in honor of the Indian people who inhabited the great Missouri River Basin").

[66] LAWSON, *supra* note 63, at xx-xxi. The Standing Rock Sioux received $90,600,000 for damages for the forced resettlement, $4,660,00 for irrigation development and established a 2,380-acre irrigation area on their reservation. Reclamation Projects Authorization and Adjust Act of 1992 Title XXXV, Pub. L. 102-575.

[67] LAWSON, *supra* note 63, at 50–51.

[68] Some Sioux Tribes members of the American Indian Movement sought to remove Oglala Sioux tribal president Richard Wilson from power in 1973. He was supported by the United States Bureau of Indian Affairs and widely thought to be corrupt. Civil disobedience lead to violence and a standoff with FBI officers. Steven Curry later wrote, "[i]t would seem that the aim of these Oglala traditionalists was to assert a right to tribal self-government in contradiction to the powers of the BIA and the structures imposed by the [Indian Reorganization Act]." STEVEN CURRY, INDIGENOUS SOVEREIGNTY AND THE DEMOCRATIC PROJECT 14 (2004). The defiant 'traditionalists' would later appeal to the U.N. *Id.* at 15. Their appeal would influence the developments described infra section V.C.

[69] *Sioux Nation*, 448 U.S. at 371, 434–45 (Rehnquist dissenting).

returned to it, Blackmun ordered just compensation and interest.[70] Out of fear that accepting the money would abrogate the 1868 Treaty, the Sioux Tribe never accepted the money, leaving it to sit in a Bureau of Indian Affairs bank account.[71] The Sioux Nation maintains that the land is legally and morally theirs.[72] In 2012, the United Nations (U.N.) Special Rapporteur on the rights of Indigenous peoples James Anaya's report on Indigenous peoples in the United States highlighted the Sioux Tribe's dispossession.[73] In that report, Anaya noted the inadequately controlled development of extractive industries over Indian land,[74] and called upon the federal government to redress treaty violations and non-consensual taking by returning traditional lands to Indian control.[75] In making these points, Anaya singled out the taking of the Black Hills as a paradigm case that "serve[s] as a constant visible reminder of their loss."[76]

This all-too-brief brief history contextualizes the Standing Rock Sioux Tribe's recent opposition to the DAPL.[77] Its opposition is about an oil pipeline under Lake Oahe near Standing Rock Reservation. But it is neither a simple dispute nor solely about a pipeline. For at least 160 years, natural resource demands combined with legal machinations and no small amount of subterfuge, transformed the *Oceti Sakowin*'s empire into the Sioux or Dahcotah Nation, the Great Sioux Nation, and then the various reservation-based Sioux Tribes. According to the 1868 Treaty, the Great Sioux Nation owns the land beginning on the eastern bank of the Missouri River, which includes the lands upon which the Oahe dam was constructed and Lake Oahe now floods. The Sioux Tribe maintains that Treaty is still in full effect.[78] If it appears that the Sioux Tribe has been buffeted about

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[70] *Id.* at 423–24.

[71] James Anaya (Special Rapporteur on the rights of Indigenous peoples), *The Situation of Indigenous Peoples in the United States of America*, Addendum, U.N. Doc. A/HRC/21/47/Add.1, ¶40. [hereinafter *The situation in the US*].

[72] Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 UCLA. L. Rev. 1615, 1643 (2000).

[73] *The Situation in the US*, *supra* note 71.

[74] *Id.* at ¶ 41.

[75] *Id.* at ¶ 90.

[76] *Id.* at ¶ 40.

[77] More recent developments by the Sioux Tribe in the late twentieth century is provided *infra* Part V.

[78] Although the Supreme Court found that the United States contravened the 1868 Treaty, it also sought to indemnify the Sioux Nation for its loss of land. There is precedent that accepting the money extinguishes the land claim. *See* United States v. Dann, 470 U.S. 39, 39, 49 (1985); Julie Ann Fishel, *The Western Shoshone Struggle: Opening Doors for Indigenous*

by the whims of the federal government, that is not necessarily the case.[79] The following explains how the Tribe has continued to actively resist in ways that lawyers might overlook.

III. THE SIOUX TRIBE'S OPPOSITION TO THE DAPL

This section focuses on the struggles at the federal level of legality. In the following sections, it is argued that a full analysis of the Sioux Tribe's opposition to the DAPL should be analyzed according to a broader, nonstate-centric perspective, rather than one that focuses narrowly on the federal level of legality. The Sioux Tribe sought to participate in resolving common problems—including how to consult and who has the power to participate in permitting the DAPL over disputed territory—by requesting government-to-government consultation.[80] To the extent that federal government and industry actors saw a problem, it was a problem of permitting, which they saw as solvable according to federal law.[81] In turning to federal law, federal government and industry actors continued dealing with the Sioux Tribe according to domestic law,[82] as opposed to engaging in government-to-government relations.[83]

For Cottrell and Trubek, a state-based hierarchical approach to legality conforms to "[c]lassical theories of law [which] stress the importance of substantive norms, with procedure seen simply as a tool for ensuring compliance with these norms."[84] They explain that "[c]ollective problem solving involves a common understanding that a problem exists, consensus that it ought to be solved, and the mobilization of appropriate expertise and resource to do so."[85] Instead of "creating a framework for the construction of new knowledge"

Rights, 2 INTERCULTURAL HUM. RTS. L. REV. 41, 52 (2007). Indicative of the federal government's policy towards Tribes, the federal government accepted the money from itself on behalf of the Shoshone, thereby extinguishing the Shoshone's claim. *See also* Standing Rock III, *supra* note 1, at 131 ("Standing Rock believes that the Corps' position "misunderstands the Tribe's Treaty rights," which "embody the fundamental right of a people tied to a place since time immemorial" and thus demand a more "existential" analysis.").

[79] *See supra* notes 66, 69 and accompanying text; *also infra* Part V.

[80] Standing Rock I, *supra* note 2, at 9–10, 18–19; *see infra* sections III.B–C.

[81] Standing Rock I, *supra* note 2, at 19.

[82] Consistent with 25 U.S.C. § 71 (1871), *supra* note 58.

[83] There are various interpretations of "government-to-government". *See infra* sections III.B–C.

[84] Cottrell & Trubek, *supra* note 12, at 368.

[85] *Id.* at 367.

and "promoting participation" to "translate knowledge into norms" that would guide future behavior and compliance about how to proceed,[86] the permitting federal agency and pipeline developer federal law, which further excluded and marginalized the Sioux Tribe. In adhering to the federal legal standards, the federal government and pipeline developer simply denied the existence of a common problem to be resolved. In response, the Sioux Tribe has used "moral suasion, the potential for public embarrassment, and reputation costs" to either "retain quality participation" or generate a "penalty default and a destabilization regime."[87]

In effect, the Sioux Tribe used multiple levels of legality and effectively mobilized federal law as one legal tool to oppose the project.[88] Consider first the applicable federal law, what consultation processes were undertaken by the federal government and pipeline developer, the legal dispute, and finally, the protest. The Sioux Tribe has successfully used United States legal mechanisms to its advantage.[89] It has also used legality in global spaces, more recent developments of a different kind of legality that may mitigate the more pernicious effects of United States law on tribes.[90]

A. *The Applicable Federal Law*

Dakota Access, LLC, a subsidiary of Energy Transfer Crude Oil Company, is the entity developing the DAPL.[91] The DAPL is a 1,172-mile long pipeline that would transport crude oil from the fields near Stanley, North Dakota to Patoka, Illinois.[92] Most of the pipeline, around 99% of it, traverses private land, which does not require permitting.[93] The DAPL only requires federal permitting where it crosses federally regulated lands and waters, including Lake Oahe.[94] As such, the

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[86] *Id.* at 367.
[87] *Id.* at 374.
[88] Carpenter & Riley, *supra* note 18, at 177.
[89] *See infra* section III.C; Standing Rock III, *supra* note 2.
[90] S. James Anaya & Sergio Puig, *Mitigating State Sovereignty: The Duty to Consult with Indigenous Peoples*, ARIZ. L. STUD., Discussion Paper No. 16-42, 14 (2016); Carpenter & Riley, *supra* note 18, at 189–98.
[91] Energy Transfer Partners, *The Route*, http://landowners.daplpipelinefacts.com/ (last visited Jan. 30, 2017).
[92] *Id.*
[93] Standing Rock I, *supra* note 2, at 7.
[94] U.S. Army Corps of Eng'rs, *Frequently Asked Questions DAPL*, http://www.nwo.usace.army.mil/Media/Fact-Sheets/Fact-Sheet-Article-

agency responsible for permitting, the United States Army Corps of Engineers (Corps), only has permitting and regulatory jurisdiction over 1% of the DAPL. The thorny issue is that according to the 1868 Treaty, the land starting on the eastern bank of the Missouri River, which is now the eastern boundary of Lake Oahe, belongs to the Great Sioux Nation.[95]

Under the 1868 Treaty, the federal government cannot do anything with that land without the consent of three-quarters of the the Sioux Nation's adult male population.[96] Furthermore, under the 1851 Treaty, the DAPL cuts through the northernmost portion of the Sioux Tribe's territory. As such, the Sioux Tribe might maintain jurisdiction (from its legal perspective) over lands the federal government regulates as private property, as well as territory starting on the east bank of the Missouri River, which is now the boundary of Lake Oahe. For its part, Dakota Access, LLC, claims, "[t]he Dakota Access Pipeline Does Not Cross Land Owned by the Standing Rock Sioux."[97] While true under extant federal law, it is inaccurate according to the 1868 Treaty, the 1851 Treaty, and perhaps, the Sioux Tribe's view of land ownership.[98] Hence, Dakota Access, LLC, and the Corps claim they complied with federal law and provided the Sioux opportunities for consultation, but the Sioux were unwilling to engage in meaningful consultation.[99] Within federal court, the controversy was whether the federal government applied its own legal standards in permitting the project, not whether conflicting jurisdictional claims arose under the Treaties.[100] An overview of federal law is required to understand the ways in which the

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View/Article/749823/frequently-asked-questions-dapl/ (last visited July 31, 2017).

[95] 1868 Fort Laramie Treaty, *supra* note 47.

[96] *Id.* at art XII.

[97] Dakota Access Pipeline Facts, *The Dakota Access Pipeline Does Not Cross Land Owned by the Standing Rock Sioux*, https://daplpipelinefacts.com/dt_articles/the-dakota-access-pipeline-does-not-cross-land-belonging-to-the-standing-rock-sioux/ (last visited July 31, 2017).

[98] *See Background on the DAPL*, *supra* note 3, at 1 ("the Tribe maintains a sovereign interest in protecting its cultural resources and patrimony that remain with the land . . . The Tribe opposes DAPL because we must honor our ancestors and protect our sacred sites and our precious waters.").

[99] Decl. of William S. Scherman Supp. Mot. Summ. J., (Dec. 6, 2016), Ex. J, Tr. of Status Conference Before the Honorable James E. Boasberg (Sept. 16, 2016), at 5, Standing Rock I, *supra* note 2.

[100] The Sioux Tribe's initial legal challenge was principally on National Historic Preservation Act grounds as opposed to National Environmental Policy Act grounds. Standing Rock I, *supra* note 2, at 7; *cf.* Standing Rock III, *supra* note 2.

Corps, Dakota Access, LLC, and the Sioux Tribe adopt different approaches to legality.

The DAPL was planned to cross under Lake Oahe, a reservoir on the Missouri River. According to federal law, the Missouri River is a United States navigable waterway, and thus the Clean Water Act,[101] the Rivers and Harbors Act of 1899,[102] and the National Environmental Policy Act[103] (NEPA) apply. To comply with NEPA, an agency must complete an environmental assessment (EA); and if the EA generates a finding of no significant impact, then an environmental impact statement (EIS) does not need to be completed. The National Historic Preservation Act (NHPA) also applies because there may be Tribal historic sites on the land involved, which would require consultation with tribes in some circumstances under Section 106.[104] Lastly, National Permit 12 is a national streamlined infrastructure permitting scheme, which applies because the DAPL is regulated as infrastructure.[105] Essentially, as long as the Corps satisfies the requirements of NHPA and NEPA, then Nationwide Permit 12 enables the Corps to grant Dakota Access, LLC an easement for the DAPL's construction under Lake Oahe.

Additional complicating legal features are Executive Orders or Executive Memorandums, which influence how federal agencies operate. For example, Executive Order 13,175 directs federal agencies to "meaningfully consult" with tribes.[106]

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[101] Federal Water Pollution Control Act, Pub. L. No. 92-500, 86 Stat. 816 (1972); 33 U.S.C. §§ 1251–1367 (2000), §§ 131(a), 1342(a). The Corps of Engineers can issue individual or general permits if the project falls within a precisely defined activity. *Id.* § 1344(e)(1); Sierra Club v. U.S. Army Corps of Eng'rs, 803 F.3d 31, 38–40 (D.C. Cir. 2015).

[102] 33 U.S.C. § 403 (1970) (originally enacted, Act of 1899, ch. 425, 30 Stat. 1152). The Rivers & Harbors Act of 1899 forbids construction upon the navigable waters of the United States without permission from the Corps. *Id.* § 322.3(a). Like the Clean Water Act, the Corps may discharge its duty imposed by the Rivers and Harbors Act according to General permits, such as Nationwide Permit 12.

[103] 83 Stat. 852 (1970), 42 U.S.C. §§ 4321 *et seq*. (2012).

[104] 54 U.S.C. §§ 300101(1) *et seq*. Section 106 requires federal agencies, like the Corps, to consider their effects on tribal lands that are of cultural or religious significance.

[105] Reissuance of Nationwide Permits (NWP 12), 77 Fed Reg. 10,184 (Feb. 12, 2012). General conditions constrain the issuance of general permits, one of which requires the Corps district engineers either to verify that projects will not impact potential historic sites or to complete tribal consultations as stipulated by the NHPA. *Id.* at 10,284.

[106] Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000); Colette Routel & Jeffrey Holth, *Toward Genuine Tribal Consultation in the 21st Century*, 46 U. MICH. J.L. REFORM 417, 443–48, 453–75 (2012–13) (arguing that a more robust version of consultation would substantively

President Obama's memorandum regarding Executive Order 13,175 directs federal agencies to engage in regular and meaningful consultation and collaboration with tribes involving action taken on federal lands when that action impacts tribal interests.[107] Michael Eitner has argued that even if it appears laudatory, the standard for meeting "meaningful consultation" remains elusive and inadequate.[108] The importance of Executive Order 13,175 to the DAPL project may have been altered by President Trump's Executive Memorandum on the DAPL,[109] which sought to advance its permitting.

Although the Sioux Tribe has challenged the Corps' compliance with NHPA and NEPA, the heart of the Standing Rock Sioux Tribe's opposition to the DAPL is a failure of the federal government to consult and obtain its consent.[110] The Sioux Tribe has turned to federal law, but the dispute in federal legal space is one level in a dispute that involves legalities in global spaces, including nonstate, intercommunal, international, regional, and transnational legalities.

To satisfy the NHPA and NEPA, the Corps and Dakota Access, LLC contacted Sioux Tribe leaders and cultural heritage officers between 2014 and 2016.[111] In the Sioux Tribe's suits against the Corps and Dakota Access, LLC, United States District Court Judge Boasberg interpreted the Sioux Tribe's requests for consultation according to federal legal standards, which is of course what a United States District Court Judge must do. Reading those opinions through the lens of a United

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fulfil the federal government's trust responsibility to tribes); Michael Eitner, *Meaningful Consultation with Tribal Governments: A Uniform Standard to Guarantee that Federal Agencies Properly Consider their Concerns*, 85 U. COLO. L. REV. 867, 885–89 (2014).

[107] Barack Obama, Memorandum from President Barack Obama to the Heads of Executive Department and Agencies Regarding Tribal Consultation (Nov. 5, 2009).

[108] Eitner, *supra* note 106, at 885–94. Eitner argues it falls short of the United States' trust responsibility to tribes because the standard of "meaningful consultation" is determined by each agency and Executive Orders do not provide a substantive cause of action if the agency does not engage in meaningful consultation with a tribe. Trust responsibility stems from Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831) ("the Indians . . . may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United State resembles that of a ward to his guardian.").

[109] Trump Memo, *supra* note 20.

[110] Standing Rock I, *supra* note 2, at 7; Standing Rock III, *supra* note 2, at 111; Sitting Bear & Borrero, *supra* note 5.

[111] Standing Rock I, *supra* note 2, at 13–24.

States lawyer or judge is what Cottrell and Trubek call a "strictly legalist approach."[112] This approach "emphasize[s] command and control regulation in which courts and similar bodies that apply sanctions for noncompliance lay down and enforce relatively specific rules that define allowable behavior."[113]

Reading the DAPL dispute in that way misses that the territory in question "consists of multiple overlapping legal orders that transcend conventional state boundaries and bring many more participant actors into the regulatory arena."[114] Even if the Sioux Tribe is requesting that the courts uphold federal law in a broad manner, it is also asking to be consulted as an independent government that has unique insight and knowledge about the land (and its relationship to that land).[115] Despite the Sioux Tribe's bids to share information and work towards solving a territorial dispute, the Corps, Dakota Access, LLC, and the federal courts have strictly adhered to federal law and thus refuse to acknowledge the multiple and overlapping legal orders.

Given jurisdictional limitations, the Corps and federal courts are likely unable to consider those other legal orders. In adhering to federal law, the Corps and the courts reveal their inability to adequately treat complex historical issues, such as the Sioux Tribe's desire for consultation in this situation. The following summarizes District Court Judge Boasberg's findings about the consultation processes.

B. *The Attempt to Consult?*

Beginning in 2014 and early 2015, the Corps and Dakota Access, LLC contacted the Sioux Tribe about the planning for the DAPL regarding their initial NHPA finding of "no historic properties affected."[116] After not hearing from the Sioux Tribe, the Corps "green-lighted the work" and only then received a letter from the Sioux Tribe requesting consultation.[117] In 2015, a series of communications were traded between the Corps and various members of the Sioux Tribe's government, including the former Standing Rock Sioux Tribe Chairman Archambault.[118]

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[112] Cottrell & Trubek, *supra* note 12, at 361.
[113] *Id.*
[114] *Id.* at 362.
[115] Standing Rock I, *supra* note 2, at 19 (requesting "government-to-government" consultation).
[116] *Id.* at 15.
[117] *Id.* at 16.
[118] *Id.* at 17–20.

The Standing Rock Sioux Tribe's Tribal Historic Preservation Officer, a position designated by the NHPA, wrote that the "Tribe looked forward to participating in future consultation *prior* to any work being completed . . . [and] to playing a primary role in any and all survey work and monitoring."[119] While one could read it as a request for the Corps or Dakota Access, LLC to comply with federal law, broader contextualization reveals a request for the State and industry to consult with the Tribe and treat it as an independent government, one with a primary role in supervising the project.[120] Subsequent exchanges further reveal a divergence in legal approaches.

The Corps then requested a meeting with members of the Standing Rock Sioux Tribe. Tribe members responded, "after careful consideration . . . it is in the best interest . . . to decline participation in the site visits and walking the project corridor's [area of projected effects] at this time *until government-to-government consultation has occurred* for this project per [NHPA] Section 106 requirements as requested by the Standing Rock Sioux Tribe."[121] Judge Boasberg narrowly interpreted the Standing Rock Sioux Tribe's request as "mean[ing] that the Corps needed to first hold the previously requested meeting between Chairman Archambault and Colonel Henderson [of the Corps]."[122] In doing so, Judge Boasberg reduces "government-to-government" or sovereign-to-sovereign discussion to government-representative-authorized-to-permit-the-project-to-chairman or government-to-subject discussion. It could appear, as it did to Judge Boasberg, as though NHPA Section 106 is a direction to the Corps to gather information from potentially affected tribes. The Sioux Tribe's request for government-to-government consultation, however, suggests a broader view of Section 106, something akin to a meeting between more equal sovereign actors.

Under NHPA Section 106, Judge Boasberg found that the Corps and members of the Tribe had "no fewer than seven meetings" between January and May 2016, including meetings to increase safety standards for constructing the pipeline under Lake Oahe.[123] In early 2016, Dakota Access, LLC offered to conduct cultural surveys with several tribes, including the

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[119] *Id.* at 18 (internal citations removed, emphasis in original).
[120] *See, e.g.*, *Background on the DAPL*, *supra* note 3.
[121] Standing Rock I, *supra* note 2, at 19 (emphasis added).
[122] *Id.* at 19.
[123] *Id.* at 21.

Standing Rock Sioux Tribe, to understand the cultural significance of the area.[124] The Standing Rock Sioux Tribe declined to participate, citing the survey's limited scope, and "urged the Corps to redefine the area of potential effect to include the entire pipeline and asserted that it would send no experts to help identity cultural resources until this occurred."[125]

It might appear that the Sioux Tribe members are not willing to participate in consultation. However, given the ongoing territorial dispute, the Sioux Tribe's opposition to the survey is not a simple unwillingness to participate. It appears as an unwillingness to be further subjected to a standard dictated by federal law. Judge Boasberg found that the Corps responded and explained that it did not "regulate or oversee the construction of pipelines, and [its] regulatory control is limited to only a small portion of the land and waterways that the pipeline traverses."[126] One could read the dispute, as Judge Boasberg did, as a conflict in the interpretation of federal law, where the Corps is simply explaining that it has a minimal role to play in the DAPL permitting.[127] On the other hand, it could be that the Sioux Tribe were maintaining its jurisdiction and knowledge over the area involved while resisting the imposition of federal law.

Judge Boasberg noted that members of the Standing Rock Sioux Tribe visited Lake Oahe in March 2016 and pointed out areas of concern, which the Corps decided were outside the area of potential impact.[128] Even if the pipeline construction would not "disturb those sites," the Corps and Judge Boasberg seemed to miss that *any* use of the land the Sioux Tribe had not approved would be incommensurate with its approach and understanding of the disputed lands.

The Corps then determined that the project had "no historic properties subject to effect" under the NHPA.[129] Members of the Standing Rock Sioux Tribe objected.[130] Shortly afterwards, the NHPA Advisory Council sent letters to the Corps questioning both the "no effect" determination and why the

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[124] *Id.* at 22, 20–27 (full narrative of cultural surveys), 13–14 (process that Dakota Access, LLC undertook).
[125] *Id.* at 22.
[126] *Id.*
[127] *Id.* at 30–32.
[128] *Id.*at 22–23.
[129] *Id.* at 23.
[130] *Id.*

Corps was facing problems consulting with the Sioux Tribe.[131] In July 2016, the Corps attempted to finalize the DAPL permitting by publicly releasing a NEPA EA finding of no significant impact.[132] The Standing Rock and Cheyenne River Sioux Tribes initiated a lawsuit against the Corps and Dakota Access, LLC seeking an injunction against the granting of an easement for the DAPL.[133] Around the same time the Sioux Tribe filed the lawsuit, it began cultivating international attention for its DAPL protest. The following two subsections describe the legal dispute and then the DAPL protest.

C. *The Legal Disputes*

The Sioux Tribe has pursued several rounds of legal challenges.[134] First, when the Corps released its EA and moved towards issuing a permit for the DAPL, the Standing Rock Sioux Tribe and the Cheyenne River Sioux Tribe (collectively the Tribe) filed suit, claiming a failure to consult under Nationwide Permit 12, the Clean Water Act, the Rivers and Harbors Act, and the NHPA.[135] At that time, the Tribe only sought a preliminary injunction on NHPA grounds rather than pursuing an environmental claim under NEPA.[136] While waiting for a ruling on the injunction, Dakota Access, LLC bulldozed an area the Tribe claimed was of historical significance to its people.[137] The bulldozing inflamed the protest but had little impact on the legal claim.

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[131] *Id.* (Boasberg writes, the Advisory Council "also sent the Corps a series of letters about the adequacy of the Section 106 process around this time. After the Corps published the draft EA, the Advisory Council requested verification from the Corps of its consultation efforts and relayed concerns expressed to them by Archambault about the consultation (or lack thereof) that had occurred to date with Standing Rock.").

[132] *Id.* at 24; Dakota Access, LLC & U.S. Army Corps of Eng'rs, Omaha Dist., Envtl. Assessment: Dakota Access Pipeline Project, crossing of flowage easement & fed. lands, Mitigated Finding of No Significant Impact, Release no. 20160728-001 (July 25, 2016), Standing Rock I, *supra* note 2.

[133] Mot. Prelim. Inj. Req. Expedited Hr'g, (Aug. 4, 2016); Emergency Mot. TRO (Sept. 4, 2016), Standing Rock I, *supra* note 2.

[134] As of this time, there have been three rounds of litigation. The second maintained that the DAPL would desecrate sacred waters in contravention of the Religious Freedom Restoration Act. The intermediary challenge is not discussed here. Standing Rock II, *supra* note 2.

[135] Compl. Declaratory & Injunctive Relief (July 27, 2016), Standing Rock I, *supra* note 1.

[136] Standing Rock I, *supra* note 2, at 7–8. The NEPA claim would be advanced in February 2017 in Standing Rock III, *supra* note 2.

[137] Emergency Mot. TRO (Sept. 4, 2016), Standing Rock I, *supra* note 2.

Judge Boasberg denied the Tribe's injunction, finding that the Corps "has likely complied with the NHPA and that the Tribe has not shown it will suffer injury that would be prevented by any injunction."[138] On the same day of the decision and likely in response to the protest, the Department of Justice, Department of Army, and Department of Interior issued a joint statement that halted permitting over Indian lands until they reviewed their approaches to tribal consultation.[139]

One month after Judge Boasberg's ruling and in response to the protest, the Corps delayed granting the easement around Lake Oahe because it "determined that additional discussion and analysis [were] warranted in light of the history of the Great Sioux Nation's dispossessions of lands, the importance of Lake Oahe to the Tribe, our *government-to-government* relationship, and the statute governing easements through government property."[140]

That statement treats "government-to-government" in a way that is closer to that urged by the Sioux Tribe. It is more robustly used than Judge Boasberg's interpretation of NHPA Section 106.[141] The following day, Dakota Access, LLC filed suit against Corps, claiming that it had all permits required under federal law.[142] Dakota Access, LLC claimed, "[t]he much preferred course would have been for political interference not to have created such costly delay in the completion of a mere formality. That would have avoided the need to burden this

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[138] Standing Rock I, *supra* note 2, at 7.
[139] Press Release, Joint Statement from the Department of Justice, the Department of the Army & the Department of the Interior Regarding Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, (Sept. 8, 2016), https://www.justice.gov/opa/pr/joint-statement-department-justice-department-army-and-department-interior-regarding-standing.
[140] Moira Kelley, U.S. Army, Army will not grant easement for Dakota Access Pipeline (Dec. 4, 2016), https://www.army.mil/article/179095/army_will_not_grant_easement_for_dakota_access_pipeline_crossing (emphasis added); Jo-Ellen Darcy, Proposed Dakota Access Pipeline Crossing at Lake Oahe, North Dakota, Memorandum for Commander, U.S. Army Corps of Eng'rs, Dec. 4, 2016; *see also*, Press Release, Stand with Standing Rock, Standing Rock Sioux Tribe's Statement on United States Army Corps of Engineers Decision to Not Grant Easement, (Dec. 4, 2016), http://standwithstandingrock.net/standing-rock-sioux-tribes-statement-u-s-army-corps-engineers-decision-not-grant-easement/.
[141] Standing Rock I, *supra* note 2, 30–32.
[142] Dakota Access, LLC's Answer to Intervenor-Pl. Cheyenne River Sioux Tribe's First Am. Compl. Declaratory & Injunctive Relief, & Cross-Cl. Def. U.S. Army Corps of Eng'rs, (Nov. 15, 2016) at 49–50, Standing Rock I, *supra* note 2.

Court with a legal dispute[.]"[143] The line between political pressure and legal standard may appear obvious under what Cottrell and Trubek call a "strictly legalist approach" to federal law.[144] It is not so obvious when considering historical injustices or the "multiple overlapping legal orders that transcend conventional state boundaries."[145]

On December 4, 2016, the Corps announced it would consider the viability of alternative routes for the pipeline by engaging in an EIS under NEPA.[146] Media outlets hailed the Corps' announcement as a "major win" and a "victory" for the Standing Rock Sioux Tribe.[147] Despite the laudatory language, soon after taking office President Trump issued an Executive Memorandum directing the Corps to reconsider the effectiveness of its EA.[148] The Department of Army then terminated the EIS, and the Corps granted an easement for the pipeline in early February 2017.[149] By March, the DAPL was operational.[150] In response, the Sioux Tribe initiated a second round of legal challenges.

In the second round, the Standing Rock Sioux Tribe challenged the sufficiency of review under the NEPA with specific regard to the Sioux Tribe's 1851 Treaty rights implicating water, hunting, and fishing.[151] The Standing Rock Sioux Tribe argued that the Treaty rights should be understood as "rights which embody the fundamental rights of a people tied

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[143] Dakota Access, LLC's Answer to Intervenor-Pl. Cheyenne River Sioux Tribe's First Am. Compl. Declaratory & Injunctive Relief, & Cross-Cl. Def. U.S. Army Corps of Eng'rs, (Nov. 15, 2016) at 49, Standing Rock I, *supra* note 1.
[144] Cottrell & Trubek, *supra* note 12, at 361.
[145] *Id.* at 362.
[146] *See supra* note 140 and accompanying text.
[147] *See, e.g.*, Jack Healy & Nicholas Fandos, *Protesters Gain Victory in Fight Over Dakota Access Oil Pipeline*, N.Y. TIMES (Dec. 4, 2016), https://www.nytimes.com/2016/12/04/us/federal-officials-to-explore-different-route-for-dakota-pipeline.html.
[148] Trump memo, *supra* note 20.
[149] Press Release, U.S. Army Corps of Eng'rs, Corps grants easement to Dakota Access, LLC, (Feb. 2, 2017), http://www.nwo.usace.army.mil/Media/News-Releases/Article/1077134/corps-grants-easement-to-dakota-access-llc/ [https://perma.cc/84VY-XSN9]; Brenda S. Bowen, Dep't of Army, Notice of Termination of the Intent to Prepare an Envtl. Impact Statement in Connection with Dakota Access, LLC's Request for an Easement to Cross Lake Oahe, North Dakota, Feb. 7, 2017.
[150] Press Release, Stand with Standing Rock, Standing Rock Sioux Tribe Chairman responds to oil in DAPL (Mar. 28, 2017) http://standwithstandingrock.net/standing-rock-sioux-tribe-chairman-responds-oil-dapl/ [https://perma.cc/LU3Z-NB3X].
[151] Standing Rock III, *supra* note 2, at 130–134.

to a place since time immemorial and thus demand a more existential analysis."[152] That claim is couched in language that is familiar to the international human rights claims that Indigenous peoples have been cultivating, which is discussed below.[153] For his part, Judge Boasberg found that the Tribe "offer[ed] no case law, statutory provisions, regulations or other authority to support its position that NEPA require[d] such a sweeping analysis."[154] Even if Judge Boasberg is complying with federal law to uphold the Treaty,[155] that level of legality subjects the Treaty and the Tribe to domestic regulation, therein reinforcing the government-to-subject operation of federal law.

The court found that the Corps had sufficiently considered the Tribe's Treaty rights, but on a narrower issue, "did not adequately consider the impacts of an oil spill on fishing rights, hunting rights, or environmental justice, or the degree to which the pipeline's effects are likely to be highly controversial."[156] At that time, Judge Boasberg did not rule on whether the pipeline must cease operation or what steps the Corps must undergo to establish the sufficiency of the EA for Lake Oahe.[157] The Standing Rock Sioux Tribe argued that vacatur was the appropriate remedy, but the court acknowledged it had discretion to not vacate an EA if the Corps can substantiate its decision on remand.[158] With regard to additional consultation claims brought by the Cheyenne River Sioux Tribe, Judge Boasberg found "that the Corps complied with its statutory responsibilities,"[159] which is a holding that reduces government-to-government consultation to a government-to-subject act.

The second case could be considered another "major win" for the Sioux Tribe,[160] but it did not end the underlying

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[152] *Id.* at 131.
[153] *See infra* Parts IV–V.
[154] Standing Rock III, *supra* note 2, at 131–132 ("Absent any controlling or persuasive authority to the contrary, the Court sees no basis on which to conclude that NEPA demands the type of existential-scope analysis the Tribe advocates. Rather, it is sufficient that the agency adequately analyze impacts on the resource covered by a given treaty.").
[155] *Supra* note 58.
[156] Standing Rock III, *supra* note 2, at 111.
[157] *Id.*
[158] *Id.* at 147–148. Later, in October 2017, the Court did not grant vacatur. Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, No. 16–1534, 2017 WL 4564714 *12 (D.D.C. 2017). Judge Boasberg held that vacatur was not the appropriate remedy if the Corps could substantiate its prior NEPA conclusions.
[159] Standing Rock III, *supra* note 2, at 160.
[160] Robinson Meyer, *The Standing Rock Sioux Claim 'Victory and Vindication' in Court*, THE ATLANTIC (June 14, 2017),

political controversy, the territorial dispute. To a limited degree, the Sioux Tribe has achieved success in the federal legal system. However, in asking the court to adjudicate its claims according to the federal legal system, the Sioux Tribe subjects itself to the jurisdiction of the court. Even if Judge Boasberg treats all parties as equal before the law, he must interpret the Tribe's Treaties according to federal law rather than act as a neutral arbiter between two sovereign actors.

When the Sioux Tribe sought to participate in resolving a common problem—how to consult and who has the power to participate in permitting the DAPL over disputed territory[161]—the federal government and industry actors saw the problem as solvable according to federal law[162] because federal law regulates permitting of those sections of the DAPL. But in using federal law to solve the permitting problem, they ignored the territorial dispute and therein disregarded the commonality of the problem. To the extent the Sioux Tribe maintains that there is a common problem to resolve, the Sioux Tribe's exclusion from participating according to its own or a negotiated participatory standard has led it to use alternative tools.[163]

For these reasons, the Sioux Tribe's multiple rounds of litigation should be viewed from a larger framework of legal struggle. Accordingly, the Sioux Tribe's use of the federal legal system can be viewed as a tactical way to delay and perhaps destabilize the DAPL by raising expenses. That does not mean it is acting in bad-faith or using the legal system in an illegal manner. The protest, which was coextensive with the litigation, links the federal legal system to the multiple and overlapping levels of legality.

D. *The Protest*

Coextensive with the Sioux Tribe's lawsuit, it established protest camps named Sacred Stone Camp and Oceti Sakowin to cultivate international attention by occupying disputed territories.[164] Protesters invoked national and

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https://www.theatlantic.com/science/archive/2017/06/dakota-access-standing-rock-sioux-victory-court/530427/ [https://perma.cc/V78A-TL6K].

[161] *See supra* note 110 and accompanying text.

[162] *See, e.g.*, Standing Rock I, *supra* note 2, at 19, 37; Standing Rock III, *supra* note 2, at 131–132, 160.

[163] Carpenter & Riley, *supra* note 18, at 177.

[164] Press Release, Indigenous Env't Network, Indigenous Women Leaders of Dakota Access Pipeline Resistance to Speak Out for Protection of Earth and

international legal standards, and in doing so, whether intentionally or not, formalized networks of opposition.

In a national media opinion-editorial, Chairman Archambault explained the Tribe's opposition according to federal law:

> Although federal law requires the Corps of Engineers to consult with the tribe about its sovereign interests, permits for the project were approved and construction began without meaningful consultation. The Environmental Protection Agency, the Department of the Interior and the National Advisory Council on Historic Preservation supported more protection of the tribe's cultural heritage, but the Corps of Engineers and Energy Transfer Partners turned a blind eye to our rights.[165]

Scholars have elsewhere discussed the legal meaning of "meaningful consultation."[166] It is noteworthy that Chairman Archambault used national media to name the Corps and Energy Transfer Partners, Dakota Access, LLC's parent company, as part of the name-and-blame aspect of the protest. The Sioux Tribe's members successfully mobilized media attention as part of a tactic to destabilize the DAPL project.

At the international legal level, the Standing Rock Sioux Tribe decried a failure of the federal government and Dakota Access, LLC to consult and seek its consent, as required by the 1851 and 1868 Treaties and FPIC, and recognized in international human rights law.[167] Steve Sitting Bear and Roberto Borrero wrote,

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Water, (Sept. 28, 2016), https://www.commondreams.org/newswire/2016/09/28/indigenous-women-leaders-dakota-access-pipeline-resistance-speak-out-protection [https://perma.cc/6BHQ-7MT5].

[165] David Archambault, *Taking a Stand at Standing Rock*, N.Y. TIMES (Aug. 24, 2016), http://www.nytimes.com/2016/08/25/opinion/taking-a-stand-at-standing-rock.html?_r=0 (last visited December 05, 2017).

[166] Eitner, *supra* note 106, at 885–94; Akilah Jenga Kinnison, *Indigenous Consent: Rethinking U.S. Consultation Policies in Light of the U.N. Declaration on the Rights of Indigenous Peoples,* 53 ARIZ. L. REV. 1301, 1322 (2011).

[167] *See, e.g.*, Jeffrey Ostler & Nick Estes, *'The Supreme Law of the Land': Standing Rock and the Dakota Access Pipeline*, INDIAN COUNTRY TODAY, Jan 16, 2017, https://indiancountrymedianetwork.com/news/opinions/supreme-law-land-standing-rock-dakota-access-pipeline/ [https://perma.cc/

> [t]he Standing Rock Sioux Tribe and the International Indian Treaty Council (IITC) jointly submitted an urgent action communication to four United Nations human rights Special Rapporteurs . . . The joint urgent UN communication requests the intervention of these UN human rights mandate holders to call upon the United States to uphold its statutory, legal, Treaty and human rights obligations and impose an immediate and ongoing moratorium on all pipeline construction until Treaty and human rights of the Standing Rock Sioux Tribe, including their right to *free prior and informed consent*, can be ensured.[168]

By invoking international human rights law, the protestors drew significant support from actors in nonstate regulatory spaces, including U.N. Special Rapporteurs and the Permanent Forum on Indigenous Issues.[169] Between August and December 2016, nonstate actors (NSAs) like Cultural Survival, Amnesty International, as well as other tribes, began to draw attention to the protest through social and conventional media.[170] The Corps enumerated those factors as complicating the DAPL's development, along with factors that would not appear as legal acts, such as visits by "Hollywood A-Listers," like Jesse Jackson, and over a million Facebook "Check-In's" at the Standing Rock Sioux.[171] The Sioux Tribe's ability to cultivate

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KBP9-JDCL]; Linda Ferrer, *Standing Rock Sioux Defend Their Water, Lands, in Fight Against Dakota Access Pipeline*, CULTURAL SURVIVAL, Aug. 29, 2016, https://www.culturalsurvival.org/news/standing-rock-sioux-defend-their-water-lands-fight-against-dakota-access-pipeline [https://perma.cc/GR3D-3WG4]; Maria Ramos, *Standing with Standing Rock*, OXFAM, Nov. 1, 2016, http://politicsofpoverty.oxfamamerica.org/2016/11/standing-with-standing-rock/ [https://perma.cc/RW7W-3DFA]; Press Release, Amnesty Int'l U.S., Halting DAPL Should be Just the First Step in Full Consultation of Indigenous Voices (Dec. 4, 2016), http://www.amnestyusa.org/news/press-releases/halting-dapl-should-be-just-the-first-step-in-full-consultation-of-indigenous-voices [https://perma.cc/JA4S-ZTQU].

[168] Sitting Bear & Borrero, *supra* note 5 (emphasis added).

[169] *Infra* section V.D.

[170] *Infra* section V.C.

[171] Decl. William S. Scherman Supp. Mot. Summ. J., Ex. B, U.S. Army Corps of Eng'rs Information Package, Dakota Access Pipelines (DAPL) USACE Information Package (Nov. 7, 2016) at 9, Standing Rock I, *supra* note 2 [Hereinafter USACE Info Package].

support from NSAs and to use social media fueled significant global interest in the protest.

In December 2016, friction between protestors and police increased, resulting in violence and arrests.[172] The protestors blamed the police for unnecessary use of violence, while the police blamed the protesters for inciting violence.[173] Concerned with allegations of human rights abuses, the U.N. and Amnesty International sent human right monitors to Standing Rock.[174] In response to violence, Colonel Henderson announced the creation of "free speech zones" to move the protest site away from the pipeline construction area, ostensibly an area that would protect the protestors.[175] He claimed the move was to "protect the general public from violent confrontations between protesters and law enforcement officials that have occurred in this area, and to prevent death, illness, or serious injury to inhabitants of encampments due to the harsh North Dakota winter conditions."[176] Colonel Henderson announced that anyone remaining at the protest site on December 5, 2016, would be considered a trespasser, arrested, and prosecuted.[177]

Chairman Archambault responded that the tribe was "deeply disappointed" but provided no indication whether the Tribe would comply with Henderson's mandate.[178] On December 4, 2016, amid increasing international pressure and no sign that the Sioux Tribe or its supporters intended to comply with the mandate, the Corps announced they would engage in an

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[172] Julia Carrie Wong, *Standing Rock protest: hundreds clash with police over Dakota Access Pipeline*, THE GUARDIAN (Nov. 21, 2016), https://www.theguardian.com/us-news/2016/nov/21/standing-rock-protest-hundreds-clash-with-police-over-dakota-access-pipeline [https://perma.cc/59U8-PXDY]; Michael McLaughlin, *Dakota Access Pipeline Standoff Lapses into Violence*, HUFFINGTON POST (Oct. 28, 2016), http://www.huffingtonpost.com.au/entry/dakota-access-pipeline-protesters-removed_us_58123b0ee4b0990edc2fb009 [https://perma.cc/9ZR9-NJ9J].

[173] Wong, *supra* note 172; Mike Rothschild, *Police Escalate the Use of Force Against Standing Rock Protestors*, ATTN: (Nov. 21, 2016), http://www.attn.com/stories/12983/police-use-force-against-standing-rock-protestors [https://perma.cc/536P-7UU2].

[174] *See infra* note 285; Press Release, Amnesty Int'l U.S., *infra* note 260.

[175] Letter from John W. Henderson, Colonel, *Corps of Engineers*, to David Archambault, Chairman, *Standing Rock Sioux Tribe*, Nov. 25, 2016, https://www.unicornriot.ninja/wp-content/uploads/2016/11/Chairman_Archambault.11.25.16.pdf [https://perma.cc/8SKG-P9BT].

[176] *Id.*

[177] *Id.*

[178] Press Release, Stand with Standing Rock, Army Corps Closes Public Access to Oceti Sakowin Camp on Dec. 5th (Nov. 26, 2016), http://standwithstandingrock.net/army-corp-closes-public-access-oceti-sakowin-camp-dec-5th/ [https://perma.cc/QE5J-BV3V].

EIS under NEPA to consider the viability of alternative routes for the pipeline.[179] Although media outlets hailed the announcement as a "major win" and a "victory" for the Standing Rock Sioux Tribe.[180] The enthusiasm was short-lived as President Trump directed the Corps to review and reconsider the feasibility of the original EA and Dakota Access, LLC's original plan for the DAPL.[181]

In protesting the DAPL, the Sioux Tribe has established important precedent which cannot be found in United States courts. Instead, its United States-based legal strategy and protest worked towards formalizing networks in global spaces for operating Indigenous peoples' FPIC.[182] The next sections will consider how the Sioux Tribe invoked FPIC, which may prevent the DAPL from continuing to operate. Under this view, the Sioux Tribe's suits under national law delay and increase costs, and, as examined below, encouraged international finance institutions (IFIs) to divest from the DAPL. The delay-and-divestment strategy may, in time, destabilize plans to continue operating the DAPL by shifting investment away from fossil fuels. The Sioux Tribe's actions suggest that natural resource developers can no longer ignore Indigenous peoples and their intercommunal networks, which have created and are invoking FPIC.

IV. INTRODUCTION TO FREE, PRIOR, AND INFORMED CONSENT

The basic idea of FPIC is that states should seek Indigenous consent before taking actions that will impact them, their territories, or their livelihoods.[183] Several articles of the UNDRIP, a human rights instrument endorsed by the U.N. General Assembly and all member states, including the United States, recognize FPIC.[184] The U.N. Permanent Forum on Indigenous Issues defined FPIC as:

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[179] *See supra* note 140.
[180] Healy & Nicholas, *supra* note 147.
[181] Trump Memo, *supra* note 20.
[182] *See, e.g.*, Sitting Bear & Borrero, *supra* note 5, at 1.
[183] *See, e.g.*, Adrienne McKeehan & Theresa Buppert, *Free, Prior and Informed Consent: Empowering Communities for People-Focused Conservation*, 25(3) HARV. INT'L REV. (2014), http://hir.harvard.edu/article/?a=5677 [https://perma.cc/449M-TL3A].
[184] The General Assembly endorsed UNDRIP in 2007. UNDRIP, *supra* note 24. At that time, the United States did not endorse it, citing concerns that FPIC would provide Indigenous peoples with a "veto power" and was antidemocratic. *See supra* note 26. The United States reversed its decision

- **Free** should imply no coercion, intimidation or manipulation.
- **Prior** should imply that consent has been sought sufficiently in advance of any authorization or commencement of activities and that respect is shown for time requirements of the process.
- **Informed** should imply that information is provided that covers (at least): the nature, size, pace, reversibility and scope of any proposed project and/or activity; the reason(s) for or purpose(s) of the project and/or activity; the duration of the above; the locality of areas that will be affected; a preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks and fair and equitable benefit-sharing in a context that respects the precautionary principles; personnel likely to be involved in the execution of the proposed project (including indigenous peoples, private sector staff, research institutions, government employees, and others); and procedures that the project may entail.
- **Consent**.[185]

FPIC requires an exchange and understanding of significant information, and the Indigenous community must consent before the proposed action may commence. Nicholas Fromherz, when comparing FPIC to federal consultation laws, has argued that federal consultation provisions under NEPA fall short of meeting an FPIC standard.[186] Similarly, Akilah

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and endorsed UNDRIP in 2009. Anaya & Puig, *supra* note 90, at 14 (seeing the "veto power" as a challenge to the classical liberal framework because it is counter-majoritarian, at least as articulated in the Inter-American Court of Human Rights); *also* Promotion and Protection, *supra* note 26, ¶ 48; Lisa J. Laplante & Suzanne A. Spears, *Out of the conflict zone: the case for community consent processes in the extractive sector*, 11 YALE HUM. RTS. & DEV. L J. 69, 87–97 (2008).

[185] U.N. Econ. & Soc. Council, Permanent Forum on Indigenous Issues, *Report on the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples*, ¶ 46, U.N. Doc. E/C.19/2005/3 (17 February 2005).

[186] Nicholas A. Fromherz, *From Consultation to Consent: Community Approval as a Prerequisite to Environmentally Significant Projects* 116 W.

Kinnison points out that Executive Order 13,175's meaningful consultation standard does not guarantee that Native Americans can provide or withhold their consent.[187] As an international human rights standard, FPIC suggests that if Indigenous peoples do not consent, then the project should not go forward even if national laws allow it.[188] But, as commonly understood, FPIC has two problems.

A. *FPIC's Definition*

First, there is an ongoing debate over the meaning of FPIC.[189] The confusion results from trying to "operationalize" FPIC as a top-down style of legality. Robert T. Coulter charges that it "is so poorly defined (or not defined at all) that it is

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VA. L. REV.110, 113–14 (2013) (He does not advocate for FPIC to become the standard for all Indigenous participation in every situation, but rather argues that NEPA processes should be amended to adopt consent in some instances).

[187] Kinnison, *supra* note 166, at 1331.

[188] The notion that actions "should not go forward" without Indigenous consent has spurred debate over whether FPIC contains a veto. *See*, *e.g*., Anaya & Puig, *supra* note 90, at 2, 7, 13–14, 18–19 (analyzing the argument but concluding that it is "more than a mere right to be informed and heard but less than the right of veto"); Emma Barry-Pheby, *Examining the Priorities of the Canadian Chairmanship of the Arctic Council: Current Obstacles in Internationa Law, Policy and Governance*, 25(2) COLO. NAT. RES., ENERGY & ENVTL. L. REV. 259, 273 (2014) (equating consent with a veto-power); Catherine J. Iorns-Magallanes, *Indigenous Rights and Democratic Rights in International Law: an "Uncomfortable Fit"?*, 15 U.C.L.A. J. INT'L L. & FOREIGN AFF. 111, 133, 140, 182 (2010) (equating consent with a veto power); Kinnison, *supra* note 166, at 1304, 1326-32 (declaring a spectrum where consultation should be obtained in some situations and consent in others); Jo M. Pasqualucci, *International Indigenous Land Rights: A Critique of the Inter-American Jurisprudence of the Inter-American Court of Human Rights in Light of the United Nations Declaration on the Right of Indigenous Peoples*, 27 WIS. INT'L L. J. 51, 87-88 (2009) (assuming a right to say no is a veto); Shalanda H. Baker, *Why the IFC's Free, Prior andInformed Consent Policy does not matter (yet) to indigenous communities affected by development projects*, 30 WIS. INT'L L. J. 668, 687–88 (2012) (arguing that a broad reading could provide a needed veto, but it is unlikely to be provided); Carol Y. Verbeek, *Free, Prior, Informed Consent: the key to self-determination: an analysis of the Kichwa people of Sarayaku v Ecuador*, 37 AM. INDIAN L. REV. 263, 265, 280 (2012–13) (stating that a veto is integral to Indigenous self-determination); Martha Macintyre, *Informed Consent and Mining Projects: A View for Papua New Guinea*, 80(1) PAC. AFF. 49 (2007) (arguing that the notion of a veto ignores economic dimensions); Promotion and Protection, *supra* note 26, ¶ 48 (concluding that FPIC does not provide "veto power" but rather establishes the need to frame consultation procedures in order to make every effort to build consensus on the part of all concerned).

[189] *See, e.g.*, Coulter, *supra* note 27, at 2.

practically useless."[190] The U.N. Expert Mechanism on the Right of Indigenous Peoples (EMRIP), which completed a two-year study on Indigenous participation, demonstrates this confusion. The EMRIP study stated, "[a]lthough a relatively new concept internationally, free, prior and informed consent is one of the most important principles, as a right, that Indigenous peoples believe can further protect their right to participation."[191] EMRIP's statement belies incredible complexity and confusion from a strict legalistic perspective. For instance, one might see FPIC as a "most important principle" that guides the interpretation of a legally operable right. Or it might be "right" with correlative duties and obligations if applied as a rule of law. Or it might be a principle or a right used to protect a "further . . . right to participation,"[192] which is a confusing mixture of right and animating principle. Additionally, EMRIP's phrasing

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[190] The Philippines adopted FPIC into national legislation. An Act to Recognize, Protect and Promote the Rights of Indigenous Cultural Communities/Indigenous People, Creating a National Commission of Indigenous People, Establishing Implementing Mechanisms, Appropriating Funds Therefor, and for other purposes (Philippines) Republic Act No. 8371, The Indigenous Peoples Rights Act of 1997. There is a debate about the impact of this act. Nestor T. Castro, *Three Years of the Indigenous Peoples Rights Act: Its Impact on Indigenous Communities*, 15(2) KASARINLAW 35, 50–51 (2000); Grego Keienburg, *Blessing or Curse?—The Indigenous Peoples Rights Act of 1997 and Its Implementation*, 4(2) OBSERVER 16, 17–19 (2012); Rosa Cordillera A. Castillo & Fatima Alvarez-Castillo, *The Law is not Enough: Protecting Indigenous Peoples' Rights Against Mining Interests in the Philippines*, *in* INDIGENOUS PEOPLES, CONSENT AND BENEFIT SHARING: LESSONS FROM THE SAN HOODIA CASE 271, 272-3 (R Wynberg, D. Schoreder & R Chennells, eds., 2009); *contra* CATHAL DOYLE, INDIGENOUS PEOPLES, TITLE TO TERRITORY, RIGHTS AND RESOURCES: THE TRANSFORMATIVE ROLE OF FREE PRIOR AND INFORMED CONSENT 195, 248 (2015) (viewing it as a "high water mark[] in terms of recognition of the consent requirement in the context of extractive activities"). Doyle also upholds Australia's *Native Title Act* for affirming a right to negotiate as evidence of movement towards an FPIC standard. As evidence, he cites the 2009 Native Title Tribunal arbitration as an example of providing Aboriginal Peoples the right to "say no to development and to expect that considerable weight would be given to their view about the use of the land in the context of all the circumstances projects." *Id.* at 197, *citing Western Desert Lands Aboriginal Corporation (Jamukurnu-Yapalikunu)/Western Australia/Holocene Pty Ltd* [2009] NNTTA 49, 27 May 2009, ¶ 215. While *Holocene* did find in favor of the Aboriginal group in question, this case is only one of three to find in favor of Indigenous peoples and based the holding on weighing the economic benefit and the impact on Indigenous peoples and not on the self-determined ability to say no.

[191] U.N. Human Rights Council, *Final Report of the Study on Indigenous Peoples and the Right to Participate in Decision-Making: Report of the Expert Mechanism on the Right of Indigenous Peoples*, ¶ 63, U.N. Doc. A/HRC/18/42 (Aug. 17, 2011).

[192] *Id.*

suggests that even if "Indigenous peoples believe" in it, others may not.

From a strict legalistic approach it is not clear if FPIC is a right, a principle, or perhaps something else, such as a process that enables Indigenous peoples to give or withhold consent. If it is not clear what FPIC is, as a right to be claimed or a process the State is supposed to institute, then it is not clear how it is supposed to "operate" or be put into practice.[193] The conceptual confusion leads Coulter to conclude that FPIC is little more than "a noun with redundant intensifiers."[194] To be sure, FPIC's definitional imprecision signifies that it is soft law.[195] According to the problem-solving approach in global spaces, FPIC's soft legal status is not detrimental to its operation.

Despite the inability to precisely parse FPIC's legal definition, excitement over FPIC stems from the U.N. General Assembly's endorsement of UNDRIP, which explicitly ties FPIC to Indigenous peoples' right of self-determination.[196] EMRIP reflects this when it writes that FPIC "needs to be understood in the context of Indigenous peoples' right to self-determination because it is an integral element of that right."[197] When connected to self-determination, FPIC appears to provide Indigenous peoples with the ability to choose how non-

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[193] The language of "operating" or "operationalizing" FPIC has become somewhat commonplace but also something of a term of art. I believe the notion of "operating" or "operationalizing" was introduced in Pekka Aikio & Martin Scheinin (eds), OPERATIONALIZING THE RIGHT OF INDIGENOUS PEOPLES TO SELF-DETERMINATION (2000). To see scholarship no operating FPIC, see David Szablowski, *Operationalizing Free, Prior, and Informed Consent in the Extractive Industry Sector? Examining the Challenges of a Negotiated Model of Justice*, 30 CAN J. DEV. STUDS. 111, 112–13 (2010); Laplante & Spears, *supra* note 184, 71, 87–97.

[194] Coulter, *supra* note 27, at 1.

[195] Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54(3) INT'L ORG. 421, 424 (2000) (arguing that hard law exhibits high levels, while soft law exhibits low levels of precision, obligation and delegation).

[196] *See, e.g.*, Cathal Doyle & Jérémie Gilbert, *Indigenous Peoples and Globalization: From Development Aggression to Self-Determined Development*, 78 EUR. Y.B. MINORITY ISSUES 219, 245–48 (2009) ("UNDRIP highlights the indivisibility of the concepts of FPIC and self-determined development and the fact that they are, in many regards, two sides of the same coin."); Carpenter & Riley, *supra* note 18, at 189–91.

[197] *Final Report of the Study on Indigenous Peoples and the Right to Participate in Decision-Making: Report of the Expert Mechanism on the Right of Indigenous Peoples*, *supra* note 191, annex ¶ 20; DOYLE, *supra* note 190, at 134–35 (viewing the "free, prior and informed" elements as safeguards of consent, based upon and used to actualize rights of self-determination, culture, and territory. Under this view "free, prior and informed" seems to modify as well as identify "consent.").

Indigenous decisions will influence them, make choices about how to self-govern, develop, and otherwise exist. Oxfam's guidebook for Indigenous peoples and FPIC states that it "relates directly to the right for Indigenous Peoples to control their own future and the future of their people. It has been stated as the right to give or withhold free, prior and informed consent to actions that affect their lands, territories and natural resources."[198] If FPIC is a mechanism for Indigenous peoples to control their futures, it may be an important and transformative concept for them, sustainable development, and settler-state economies that rely on the extractive industries.[199] The question remains: even if FPIC is a mechanism for Indigenous self-determination, what obligates states to seek Indigenous consent?[200]

B. *FPIC's Obligation?*

The second problem with FPIC is that states, like the United States, view UNDRIP, arguably the most authoritative instrument containing FPIC,[201] as a nonbinding, aspirational document.[202] From a strict legalistic approach, this softer status results in an anxious search for obligatory authority.[203] There have been several attempts in international law to bypass FPIC's lack of obligation and claim that it is "required." For instance, Cathal Doyle points out that FPIC is grounded in Indigenous peoples' own legal histories and human rights so that if states recognize that Indigenous peoples have their own legality, then FPIC is required.[204] Claire Charters has argued that the multiple

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[198] CHRISTINA HILL ET AL., GUIDE TO FREE, PRIOR AND INFORMED CONSENT, OXFAM AUSTRALIA 2 (2010), http://www.culturalsurvival.org/sites/default/files/guidetofreepriorinformedconsent_0.pdf (internal citations removed).
[199] DOYLE, *supra* note 190, at 262.
[200] McKeehan & Buppert, *supra* note 183.
[201] FPIC is in other instruments, even binding instruments such as Int'l Labour Organization Convention (No. 169) Concerning Indigenous & Tribal Peoples in Independent Countries, art. 16(2), June 27, 1989 (entered into force Sept. 6, 1991) [hereinafter Convention No. 169]. The United States has not signed or ratified any treaty documents containing contemporary iterations of FPIC. The 1868 Fort Laramie Treaty art. XII, *supra* note 47, contains a consent provision, which is not technically an FPIC provision.
[202] *See supra* note 26. Abbott & Snidal, *supra* note 195, at 423 (discussing that soft law exhibits lower levels of obligation, precision, and delegation).
[203] *See, e.g.*, Megan Davis, *To Bind or Not to Bind: The United Nations* Declaration on the Rights of Indigenous Peoples *Five Years On*, 19 AUSTL. INT'L L.J. 19–20, 24, 37 (2012).
[204] DOYLE, *supra* note 190, at 6.

sources of Indigenous norms, perhaps like FPIC, generate legitimacy under international law.[205] Approaches that attempt to demonstrate FPIC's legitimacy are bids to increase the perceptions of FPIC's obligation. Increasing FPIC's obligation and definitional precision might make FPIC function as "harder" legality, but doing so is implicitly committed to a legal positivistic epistemology. If FPIC becomes treated as "hard law," then state actors may operate it according to state law, similar to how Judge Boasberg oriented the Sioux Tribe's Treaty rights within domestic law.[206]

The following largely comports with both Doyle and Charters' views that Indigenous peoples have used their influence to gain adoption of FPIC in many sources. However, here, FPIC is oriented in a discussion about legality and global spaces. If one desires to operate FPIC as a nation-state legal rule, as a "top-down control using fixed statutes, detailed rules, and judicial enforcement"[207] style of law, then a concern with FPIC's precision or obligation is well founded. However, if states adopt FPIC as a harder form of legality, then other state laws, interpretations, or memos may conflict or override it when judges treat it as domestic law.[208] A failure to consider how Indigenous peoples are operating FPIC in a global space overlooks novel, nonstate-based approaches to legal practice.

V. FPIC AND GLOBAL LAW

This section introduces William Twining's framework of global law,[209] which aids in mapping the multiple and overlapping levels of legality implicated by the Sioux Tribe's invocation of FPIC. The framework enables a mapping of FPIC

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[205] Claire Charters, *Multi-Sourced Equivalent Norms and the Legitimacy of Indigenous Peoples' Rights under International Law* in MULTI-SOURCED EQUIVALENT NORMS IN INTERNATIONAL LAW 298–99, 303–19 (Tomer Broude & Yuval Shany eds., 2011); Anaya SJ, *The Emergence of Customary International Law concerning the Right of Indigenous Peoples*, 12 L. & Anthropology 127, 127–29 (2005) ("international institutions have generated "a consensus on core principles of indigenous peoples' rights," which is not to say that it is "entirely satisfactory or that there is sufficient commitment by authoritative actors to implementing that consensus.").
[206] Standing Rock III, *supra* note 2, at 131.
[207] Trubek & Trubek, *supra* note 13, at 543.
[208] Standing Rock III, *supra* note 2, at 131.
[209] William Twining, *Normative and Legal Pluralism: A Global Perspective*, 20 DUKE J. COMP. & INT'L L. 473, 505–06 (2010) [hereinafter *Normative and Legal Pluralism*]; *see also* SANTOS, NEW COMMON SENSE, *supra* note 11 at 89–90. I generally refer to Twining's work, but Santos is owed significant credit.

at the nonstate, intercommunal, international human rights, regional, and transnational levels, which works in conjunction with but exceeds national law and the human rights discourse. So even if FPIC is soft law, the problem-solving approach allows the Sioux Tribe to operate FPIC as a softer legality in global spaces.[210] Cottrell and Trubek see law as promoting a normative ordering, allowing disparate actors to coordinate their behavior and solve common problems.[211] According to them, rather than "harder" or top-down legal enforcement that some commonly associate with national levels of legality, disparate actors operate soft law by stabilizing norms—to some degree—through common agreement, which they enforce through peer pressure.[212]

The Sioux Tribe's operation of FPIC according to the problem-solving approach avoids the need to search for precise legal definition or harder obligating force.[213] Social connections among participants and communities exert peer pressure on each other, which is observable between industry, states, NSAs, and intercommunal networks as described below.[214] However, peer pressure is not always an adequate means for solving problems. According to Cottrell and Trubek, "suasion, the potential for public embarrassment and reputation costs are not enough, there are other means to retain quality participation."[215] For Cottrell and Trubek, "other means" are "destabilizing acts."[216] The Sioux Tribe is pressuring IFIs and others to divest from the project, which is a tactic that may destabilize the DAPL and engender

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[210] *See* Cottrell & Trubek, *supra* note 12, at 367.
[211] *Id.* at 367.
[212] Nation-state legality also involves the problem-solving approach in some contexts. *See* Trubek & Trubek, *supra* note 13, at 540–41, 547–48.
[213] Cottrell & Trubek, *supra* note 12, at 374; Abbott & Snidal, *supra* note 195, at 423.
[214] Members of the Wangan and Jagalingou Family Council have travelled to the U.K. to oppose banks funding the Carmichael Coal Mine. Jennifer Rankin, *Indigenous Australians call on Standard Chartered not to fund coal mine project*, THE GUARDIAN (June 13, 2015), https://www.theguardian.com/environment/2015/jun/12/indigenous-australians-wangan-jagalingou-standard-chartered-coal-mine-meeting [http://perma.cc/8BDE-Z7DT]; similarly, the San Carlos Apache are marching and protesting the Resolution Mine. Carina Dominguez, *San Carlos Apache tribe protest future copper mine*, ARIZ. REPUBLIC (Feb. 7, 2015), http://www.azcentral.com/story/money/business/2015/02/06/san-carlos-apache-tribe-protest-future-copper-mine/22997123/ [http://perma.cc/9DRT-5LFZ].
[215] Cottrell & Trubek, *supra* note 12, at 374.
[216] *Id.*

long-term repercussions for the viability of the fossil fuel industry.

A. *The Levels of Legality*

Mapping the multiple levels of legality helps understand how legal practice is changing because of globalization.[217] Twining's goal is to describe how globalization altered legal practice so jurists can respond to the challenges they face.[218] For him, the idea of state-centric legal monism is a recent phenomenon, one that many influential global actors—like state actors—do not recognize.[219] For Boaventura de Sousa Santos, another theorist of globalization and law, globalization has allowed us to rediscover that law, which some primarily think of as state law, is interconnected and shot through with supranational and local legal forces.[220] Santos's theorization of oppositional hegemonic projects are particularly appropriate for discussing Indigenous peoples' activism involving multifaceted legal approaches.[221] Although Twining and Santos have

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[217] SANTOS, NEW COMMON SENSE, *supra* note 11, at 85–98; TWINING, GLOBALISATION, *supra* note 28, at 195; Twining, *Normative and Legal Pluralism*, *supra* note 209, at 489. This article does not discuss whether the extralegal levels of legality are law or are merely "law-like," i.e., some novel assemblage of normative ordering. *See*, Boaventura de Sousa Santos, *Law: A Map of Misreading. Toward a Postmodern Conception of Law*, 14(3) J.L. & SOC'Y 279, 281–82, 298 (1987).

[218] TWINING, GLOBALISATION, *supra* note 28, at 195.

[219] Twining, *Normative and Legal Pluralism*, *supra* note 209, at 489 ("Legal pluralism is not new. Indeed, from the perspective of world history, the near monopoly of coercive power by a centralized bureaucratic state is a modern exception, largely confined to the northern hemisphere for less than 200 years."). I am not addressing whether legal pluralism means the coexistence of multiple legal orders in the same time-space context or the recognition of different legal traditions and sources of law within a single legal system. TWINING, GLOBALISATION, *supra* note 28, at 216, 82–88.

[220] SANTOS, NEW COMMON SENSE, *supra* note 11, at 85.

[221] *Id.* at 243–45; *also* Megan Davis, *Indigenous Struggles in Standard-Setting: The United Nations Declaration on the Rights of Indigenous Peoples*, 9 MELB. J. INT'L L. 1, 17 (2008); U.N. Econ. & Soc. Council, Erica-Irene A Daes (Special Rapporteur on the Rights of Indigenous Peoples), *Final Report of the Special Rapporteur, Prevention of Discrimination & Prot. of Indigenous Peoples*, U.N. Doc. E/CN.4/sub/2/2004/30 (13 July 2004); Lillian Aponte Miranda, *The Hybrid State-Corporate Enterprise and Violations of Indigenous Land Rights: Theorizing Corporate Responsibility and Accountability Under International Law*, 11 LEWIS & CLARK L. REV. 135, 168–82 (2011); Lillian Aponte Miranda, *The Role of International Law in Intrastate Natural Resource Allocation: Sovereignty, Human Rights, and Peoples-Based Development*, 45 VAND. J. TRANS. L. 785, 830–39 (2012).

drastically different projects,[222] both of their notions of global law are akin to Cottrell and Trubek's idea, "multiple overlapping legal orders that transcend conventional state boundaries."[223] This article primarily relies upon Twining's map to articulate how FPIC has developed as more than a human rights norm, while Cottrell and Trubek's problem-solving approach helps explain how the Sioux Tribe is operating it. Twining defines some levels like this:

Twining's Levels of Legality[224]

International (in the classic sense of relations between sovereign states and more broadly relations governed, for example, by human rights or refugee law)
Regional (for example, the European Union, the European Convention on Human Rights, and the Organization of African Unity)
Transnational (for example, Islamic, Hindu, Jewish law, Gypsy law, transnational arbitration, a putative *lex mercatoria*, Internet law, and more controversially, the internal governance of multinational corporations, the Catholic Church, or institutions of organized crime)
Intercommunal (as in relations between religious communities, or Christian Churches, or different ethnic groups)
Municipal state (including the legal systems of nation states, and subnational jurisdictions, such as Florida, Greenland, Quebec, and Northern Ireland)
Nonstate (including laws of subordinated peoples, such as native North Americans, or Maoris, or gypsies or illegal legal orders such as Santos's Pasagarda law, the Southern People's Liberation Army's legal regime of Southern Sudan, and the "common law movement" of militias in the United States)[225]

[222] Twining's goal is to provide a pluralistic version to better understand the effects of legality in global society. Santos is interested in developing an oppositional or subaltern cosmopolitan legality to global capitalism. NEW COMMON SENSE, *supra* note 11, 21–84.
[223] Cottrell & Trubek, *supra* note 12, 362.
[224] TWINING, GLOBALISATION, *supra* note 28, at 139; Twining, *Normative and Legal Pluralism*, *supra* note 209, at 505–06. Twining's "global" and "sub-state" levels are not included because they are not discussed below. Twining also generates a map of Santos's levels of laws.
[225] *See* SANTOS, NEW COMMON SENSE, *supra* note 11, 237–57.

This framework presents an overview of some levels of law that exist globally. It assists in articulating how FPIC developed throughout multiple levels rather than as merely a human rights concept.[226] The following is not an exhaustive list of all extranational levels of legality, nor is it an exhaustive list of all sources of FPIC.[227] It is one way of describing the creation and dispersal of FPIC throughout multiple extranational levels, which the Sioux Tribe is operating according to the problem-solving approch to oppose the DAPL.

B. *The Nonstate Level of Legality*

The nonstate level includes the "law of subordinated peoples, such as native North Americans or Maoris."[228] Native Americans, and those commonly called Indigenous peoples have *sui generis* legal systems.[229] In the Aboriginal Australian context, Irene Watson succinctly describes this level, what she calls "Raw Law," as a "natural system of obligations and benefits, flowing from an Aboriginal ontology."[230] Other

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[226] DOYLE, *supra* note 190, at 5–6, 15; *also* CATHAL M. DOYLE & ANDREW WHITMORE, INDIGENOUS PEOPLES AND THE EXTRACTIVE SECTOR, TOWARDS A RIGHTS-RESPECTIVE ENGAGEMENT 53–57 (2014), http://www.piplinks.org/system/files/IPs-and-the-Extractive-Sector-Towards-a-Rights-Respecting-Engagement.pdf. Like Doyle, I argue that FPIC is concept found in Indigenous peoples' *sui generis* legality and that the other levels are becoming important.

[227] DOYLE, *supra* note 190, at 5 (claiming that FPIC has re-emerged in international human rights but has a foundation in precontact Indigenous society); *but cf.*, Laurel A. Firestone, *You Say Yes, I say No; Defining Community Prior Informed Consent under the Convention on Biological Diversity*, 16 GEO. INT'L ENVTL. L. REV. 171, 181–85 (2003-04) (examining the "foundations" of FPIC in the Convention on Biological Diversity); AMY K LEHR & GARE A SMITH, IMPLEMENTING A CORPORATE FREE, PRIOR AND INFORMED CONSENT POLICY, BENEFITS AND CHALLENGES 10 (2010), http://www.foleyhoag.com/publications/ebooks-and-white-papers?page=3; Sub-Comm'n on the Promotion and Prot. of Human Rights, Antoanella-Iulia Motoc & Tebtebba Foundation*, Standard-Setting: Legal Commentary on the Concept of Free, Prior Informed Consent* 6 (July 2005), www2.ohchr.org/English/issues/indigenous/docs/wgip23/WP1.doc; Anne Perrault, *Prior Informed Consent: Facilitating Prior Informed Consent in the Context of Genetic Resources and Traditional Knowledge*, 4 SUSTAINABLE DEV. L. & POL'Y 21, 21 (Summer 2004).

[228] TWINING, GLOBALISATION, *supra* note 28, at 139; Twining, *Normative and Legal Pluralism*, *supra* note 209, at 505–06. I do not endorse the view that these nonstate levels of legality are necessarily "subordinated," although they appear subordinated by States in many contexts.

[229] *See, e.g.*, *Background on the DAPL*, *supra* note 3.

[230] IRENE WATSON, ABORIGINAL PEOPLES, COLONIALISM AND INTERNATIONAL LAW: RAW LAW 5 (2015); *also* Greg Lehman, *A snake and a Seal*, *in* HEARTSICK FOR COUNTRY: STORIES OF LOVE, SPIRIT AND

Indigenous scholars from around the world similarly argue that their legal systems continue to animate their ways of living.[231] Indigenous peoples' *sui generis* legal systems are sophisticated and sometimes appear radical or contentious to people and lawyers operating under national-monist legal epistemologies.[232] However, there is little doubt that many Indigenous communities are legally responsible for territories, ancestors, and peoples.[233] When Indigenous peoples, who have responsibilities according to their legal systems, conflict with industry actors, which have countervailing legal responsibilities, one might think it is a clash of cultures.

However, when tribes use the state-based legal regimes, such as the Sioux Tribe's legal claims under NHPA and NEPA against the Corps and Dakota Access, LLC, there is a power imbalance implicit at that legal level. Historically, states sanction industry actors, like Dakota Access, LLC, while simultaneously relegating and regulating tribal law as "culture" or something even less than that. Even if tribes occasionally win when using state law, say by forcing the Corps to substantiate its position on the adequacy of a NEPA EA, using state law requires subjection to the State, which may be what they are striving to challenge.

Occasionally, the fact that Indigenous peoples have *sui generis* legal systems is obscured by the language tribal members or Indigenous peoples employ. For instance, some Indigenous peoples have articulated a right or interest in "self-determination," which has given rise to an impressive amount of interest in Indigenous self-determination.[234] The treatment of

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CREATION 135 (Sally Morgan, Tjalaminu Mia & Black Kwaymullina eds., 2008) *cited in* BIRRELL, *supra* note 24, at 47.

[231] *See, e.g.*, LEANNE SIMPSON, DANCING ON OUR TURTLE'S BACK 11–13 (2011); TAIAIAKE ALFRED, PEACE, POWER, RIGHTEOUSNESS: AN INDIGENOUS MANIFESTO 41–46 (1999).

[232] WATSON, *supra* note 230, at 5–7.

[233] *See* Int'l Indian Treaty Council, Statement Submitted to the WGIP, 2, 1st Sess., Geneva, 1982 [doCip Archives, CD 1] *cited by* Jacklyn Hartley, *Constructing a Contextual Model of Indigenous Participation in Decision-Making: A Comparative Analysis* 60 (February 2016) (unpublished PhD Dissertation, University of New South Wales) (on file with the author) ("Land, for the Indigenous, is not a commercial matter. We consider the land to be geographically, economically and culturally a collective, sacred space in which a people or nation live, not only for themselves in their own time, but for the future generations . . . The cultures and religions of the Indigenous are linked integrally with the Land, and because of this, when a group, people, or nation loses a part of their ancestral territory, it is a part of life itself that is lost.").

[234] There are many iterations and competing views of self-determination, especially as it pertains to Indigenous peoples. *See, e.g.*, Ward Churchill, *A*

Indigenous peoples' self-determination as a right/principle codified in international human rights law[235] elides the fact that many Indigenous peoples have struggled for the ability to self-rule and self-govern for hundreds of years before self-determination was codified in international law or human rights.[236]

Accordingly, it should also be acknowledged that Indigenous peoples' self-determination is not just a human right and there may be an uneasy translation from Tribal, Aboriginal, or Indigenous peoples' legal systems into rights-based analysis or vice versa. Failure to appreciate problems with translation may limit how others understand what Indigenous peoples' mean when they claim "self-determination" or any other rights for that matter.[237] It may be that self-determination or any correlative

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Travesty of a Mockery of a Sham: Colonialism as 'Self-Determination' in the UN Declaration on the Rights of Indigenous Peoples, 20(3) GRIFFITH L. REV. 526–56 (2011); James Anaya, *The Rights of Indigenous Peoples to Self-Determination in the Post-Declaration Era*, *in* MAKING THE DECLARATION WORK: THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (Claire Charters & Rodolfo Stavenhagen eds., 2009) [hereinafter MAKING THE DECLARATION WORK]; Mauro Barelli, *Shaping Indigenous Self Determination: Promising or Unsatisfactory Solutions?*, 13(4) INT'L COMMUNITY L. REV. 413 (2011); Alexandra Xanthaki, *The Right to Self-Determination: Meaning and Scope*, *in* MINORITIES, PEOPLES AND SELF-DETERMINATION 15–34 (Nazila Ghanea & Alexandra Xanthaki eds., 2005); Malcolm N. Shaw, *Self-Determination and the Use of Force*, *in* MINORITIES, PEOPLES AND SELF-DETERMINATION 35–54 (2005); Joshua Castellino, *Conceptual Difficulties and the Right to Indigenous Self-Determination*, *in* MINORITIES, PEOPLES AND SELF-DETERMINATION 55–74 (2005); R. S. Bhalla, *The Right of Self-Determination in International Law*, *in* ISSUES OF SELF-DETERMINATION 100 (William Twining ed., 1991); KAREN KNOP, DIVERSITY AND SELF-DETERMINATION IN INTERNATIONAL LAW (2002); JOSHUA CASTELLINO, INTERNATIONAL LAW AND SELF-DETERMINATION: THE INTERPLAY OF THE POLITICS OF TERRITORIAL POSSESSION WITH FORMULATIONS OF POST-COLONIAL NATIONAL IDENTITY 55 (2000).

[235] Int'l Covenant on Civil & Political Rights art. 1, *adopted* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); Int'l Covenant on Economic, Social & Cultural Rights art. 1, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

[236] DOYLE, *supra* note 190, at 14–17 (positing a natural law basis for Indigenous peoples' rights). Some Indigenous leaders have voiced concerns "about attempts to limits the concept of self-determination to the conduct of internal affairs . . . [because it] was not primarily a post-Second World War concept but had existed since time immemorial and was not dependent exclusively on international law for its understanding". Erica-Irene A Daes, *The Contribution of the Working Group on Indigenous Populations to the Genesis and Evolution of the UN Declaration on the Rights of Indigenous Peoples*, *in* MAKING THE DECLARATION WORK, *supra* note 234, at 69.

[237] KNOP, *supra* note 234, at 360–72 (discussing the interpretations given to *Sandra Lovelace v. Canada*, GAOR, 36th Sess, Supp No. 40, U.N. Doc. A/36/40 (1981)).

rights are convenient legal-linguistic phrasing used to appeal to legalistic sensibilities that represent more complex desires and struggles for self-governance, control, or power.[238]

The Sioux Tribe's opposition to the DAPL relies upon a *sui generis* level of legality.[239] When the Sioux Tribes claims Treaty rights to "demand a more existential analysis,"[240] it stands as a reminder of the Sioux Tribe's sovereign status with an independent, *sui generis* legal system.[241] Thus, the Sioux Tribe's use of the federal legal system and the invocation of international human rights to oppose the DAPL involves *sui generis* law as one of several overlapping levels of legality.

C. *The Intercommunal Level of Legality*

The intercommunal level of legality develops between "religious communities, or Christian Churches, or different ethnic groups."[242] Each tribe may have *sui generis* laws. When tribes work together, they create intercommunal legality. The most notable intercommunal legality that involves the Standing Rock Sioux Tribe is, perhaps, the International Indian Treaty Council (IITC). The IITC has recently advocated on behalf of the Standing Rock Sioux Tribe,[243] and it is not surprising considering the IITC's historical formation. In 1974, representatives from tribes scattered throughout the Americas met on Standing Rock Sioux Reservation lands—the same lands the Sioux Tribe seeks to protect by opposing the DAPL—and formed the IITC.[244] Immediately after its creation, the IITC adopted the Declaration of Continuing Independence. The Declaration may not have legal status under U.S. federal law, but under inter-Indian law, it is a Declaration that charges the United States with gross legal and moral violations, including "wrongfully taking" the Black Hills from the Great Sioux Nation.[245] It also articulated an inter-Indian commitment to a

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[238] *See* DALE TURNER, THIS IS NOT A PEACE PIPE: TOWARDS A CRITICAL INDIGENOUS PHILOSOPHY 94–121 (2006).
[239] *Background on the DAPL*, *supra* note 3.
[240] Standing Rock III, *supra* note 2, 131.
[241] There are multiple Treaties between the United States and the Sioux that predate the Marshall Trilogy. *See supra* note 44. The *Oceti Sakowin* includes bands and kinship groups whose ancestors signed those Treaties.
[242] TWINING, GLOBALISATION, *supra* note 28, at 139; Twining, *Normative and Legal Pluralism*, *supra* note 209, at 505–06
[243] Sitting Bear & Borrero, *supra* note 5.
[244] Declaration of Continuing Independence, *supra* note 10.
[245] *Id.*

unified legal and political struggle, which the IITC would help disperse through the international, regional, and transnational legal levels.

In 1977, the IITC assisted in creating the Non-Governmental Organization Conference on Discrimination against Indigenous Populations, a group comprised of Indian leaders from the Americas.[246] That NGO met at the U.N. headquarters and created the *Draft Declaration of Principles for the Defence of Indigenous Nations and Peoples of the Western Hemisphere*, which was a formal method of asking—if not demanding—the U.N. prepare a similar declaration for all Indigenous peoples.[247] In 1982, U.N. Economic and Social Council authorized the establishment of the Working Group on Indigenous Populations (WGIP).[248] In 1983, the IITC introduced the language of free, prior, and informed consent to the WGIP.[249] Shortly afterwards, the WGIP decided to draft a U.N. instrument to recognize and set standards for Indigenous peoples' rights in a formal manner.[250] Over the following twenty years, the WGIP and later the Working Group on the Draft Declaration debated the draft, which culminated in the General Assembly's

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[246] Int'l Indian Treaty Council, *International NGO Conference on Discrimination against Indigenous Populations in the Americas, Sept. 20–23 1977*, 1(7) TREATY COUNCIL NEWS 1 (1977).

[247] Robert T. Coulter, *Commentary on the UN Draft Declaration on the Rights of Indigenous Peoples*, 18 CULTURAL SURVIVAL Q. MAG., no. 1, 1994, www.culturalsurvival.org/publications/cultural-survival-quarterly/united-states/commentary-un-draft-declaration-rights-indige [https://perma.cc/E8U6-DW27].

[248] Econ. & Soc. Council Res. 1982/24, Study of the Problem of Discrimination Against Indigenous Populations, ¶ 1, U.N. Doc. E/RES/1982/34 (May 7, 1982); Asbjørn Eide, *The Indigenous Peoples, the Working Group on Indigenous Populations and the Adoption of the UN Declaration on the Rights of Indigenous Peoples*, *in* MAKING THE DECLARATION WORK, *supra* note 234, at 32; Augusto Willemsen Diaz, *How Indigenous Peoples' Rights Reached the UN*, *in* MAKING THE DECLARATION WORK, *supra* note 234, at 16, 27; Daes, *supra* note 236, at 48.

[249] Int'l Indian Treaty Council, Draft Principles for Guiding Deliberations of the Working Group 2, 4 (July 22, 1981), *reprinted in* Sub-comm'n on Prevention of Discrimination and Prot. of Minorities, Working Group on Indigenous Populations, Information Received from Non-governmental Organizations, U.N. Doc. E/CN.4/Sub.2/AC.4/1983/5/Add.2 (July 29, 1983), *cited in* Hartley, *supra* note 233, at 46.

[250] Daes, *supra* note 236, at 49 (noting that a Declaration of Principles was adopted by the World Council of Indigenous Peoples in Panama in September 1984 and a Declaration of Principles was submitted to the fourth session of the WGIP by the Indian Law Resource Center); Rep. of the Working Group on Indigenous Populations on its fourth session, Chairman/Rapporteur: Mrs. Erica-Irene A Daes, U.N. Doc. E/CN.4/Sub.2/1985/22, annex III, at 1–2 (Aug. 27, 1985).

endorsement of UNDRIP in 2007.[251] Although UNDRIP is an international human rights standard at the international level of legality that some commentators see as not creating special rights because it does not create any new rights,[252] it was influenced by *sui generis* and intercommunal level of Indigenous legality and may protect *sui generis* and intercommunal level legalities.[253]

Today, the IITC serves as "a voice and advocate for the human rights of Indigenous Peoples."[254] In that capacity, it called upon U.N. human rights institutions to attend to the DAPL's dispossession of the Sioux Tribe.[255] In doing so, the IITC cited self-determination and FPIC, international law on treaties, a lack of domestic remedies, and other alleged harms.[256] The IITC is not the only inter-Indian or inter-Indigenous legal group. There is the International Work Group for Indigenous Affairs, the World Council of Indigenous Peoples, Indian Law Resource Center, Native American Rights Fund, National Congress of American Indians, and others.[257] Intercommunal

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[251] Sub-Comm'n on Prevention of Discrimination and Prot. of Minorities Res. 1994/45, Draft U.N. Declaration on the Rights of Indigenous Peoples, U.N. Doc. E/CN.4/Sub.2/Res/1994/45 (Aug. 26, 1994); John B Henriksen, *The UN Declaration on the Rights of Indigenous Peoples: Some Key Issues and Events in the Process*, *in* MAKING THE DECLARATION WORK, *supra* note 234, at 78, 84 n.4; Luis Enrique Chávez, *The Declaration on the Rights of Indigenous Peoples Breaking the Impasse: The Middle Ground*, *in* MAKING THE DECLARATION WORK, *supra* note 234, at 96, 96–98.

[252] Stephen Allen, *The UN Declaration on the Rights of Indigenous Peoples and the Limits of the Internatianl Legal Project*, *in* REFLECTIONS ON THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (Stephen Allen & Alexandra Xanthaki eds., 2011) 236.

[253] ALEXANDRA XANTHAKI, INDIGNOUS RIGHTS AND THE UNITED NATIONS STANDARDS 4 (2007).

[254] *About IITC*, INT'L INDIAN TREATY COUNCIL, http://www.iitc.org/about-iitc/ [https://perma.cc/7V9F-EL79].

[255] Sitting Bear and Borrero, *supra* note 5.

[256] *Id.*

[257] For specific comments by some indigenous NSAs about FPIC, see, e.g., Robert T. Coulter et al., *Principles of International Law for Multilateral Development Banks*, INDIAN LAW RES. CTR. (2009), http://indianlaw.org/sites/default/files/Principles%20Memo%20FINAL%20ENG_0_0.pdf [https://perma.cc/TQM3-9GZZ]; Agnes Portalewska, *Free, Prior and Informed Consent: Protecting Indigenous Peoples' Rights to Self-determination, Participation, and Decision-Making*, CULTURAL SURVIVAL Q. MAG. (Dec. 2012), http://www.culturalsurvival.org/publications/cultural-survival-quarterly/free-prior-and-informed-consent-protecting-indigenous [https://perma.cc/56Q9-8EVY]; Marcus Colchester & Maurizio Farhan Ferrari, *Making FPIC—Free, Prior and Informed Consent—Work: Challenges and Prospects for Indigenous Peoples*, FOREST PEOPLES PROGRAMME (June 2007), http://www.forestpeoples.org/sites/fpp/files/publication/2010/08/fpicsynthesisjun07eng.pdf [https://perma.cc/H3V2-N57J].

Indigenous networks have supported the Sioux from as far away as the Philippines, Australia, and Norway.[258]

While this might initially appear to be a way of disseminating information and garnering support, it has material effects. For instance, the Sami peoples of Norway have engaged legal representation to pressure Norway's Government Pension Fund and Norway's largest financial services group, DNB, to divest from companies involved in the DAPL.[259] That is an example of how intercommunal actors use their legal system to engage with transnational actors, discussed below, to pressure divestment and destabilize the DAPL.

The Standing Rock Sioux Tribe received support from inter-Indigenous networks that work in conjunction with NSAs like Cultural Survival and Amnesty International.[260] At the request of Chairman Archambault, Amnesty International wrote a letter to the United States Department of Justice requesting an investigation into violations of national, international, and human rights law by the local police.[261] Amnesty International

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[258] Lean Deleon, *From the Philippines to Standing Rock: Water is Life, Land is Life, Fight for Self-determination*, BAYAN U.S.A. (Oct. 20, 2016), http://bayanusa.org/from-the-philippines-to-standing-rock-water-is-life-land-is-life-fight-for-self-determination/ [https://perma.cc/KS34-BBJ9]; *Joe Williams Takes the Aboriginal Flag to Standing Rock*, NITV (Nov. 14, 2016), http://www.sbs.com.au/nitv/the-point-with-stan-grant/article/2016/11/14/joe-williams-takes-aboriginal-flag-standing-rock [https://perma.cc/XB39-P8Q4]; Jenni Monet, *Standing Rock Joins the World's Indigenous Fighting for Land and Life*, YES! MAG. (Sept. 30, 2016), http://www.yesmagazine.org/people-power/standing-rock-joins-the-worlds-indigenous-fighting-for-land-and-life-20160930 [https://perma.cc/B5BV-AVBK].

[259] Letter from Brandy Toelupe, Pres., & Robin S. Martinez, Sec'y, Red Owl Legal Collective, to DNB Bank (Nov. 8, 2016), http://martinezlaw.net/wp-content/uploads/2016/11/20161108-DNB-Bank-Divestment-Letter-ROLC.pdf [https://perma.cc/U7XB-X2N7]. The ability of Indigenous peoples to choose councilin the U.S. requires the "approval" of the Commission of Indian Affairs. 25 U.S.C. § 1331 (2012). If the Commissioner does not approve a Tribe's selection within ninety days, it is automatically approved. *See* LAZARUS, *supra* note 31, at 217–50; VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 153–55 (1983).

[260] Suzanne Benally, *Cultural Survival Stands in Support of Standing Rock Sioux Tribe in Opposition to the Dakota Access Pipeline*, CULTURAL SURVIVAL (Aug. 23, 2016), https://www.culturalsurvival.org/news/cultural-survival-stands-support-standing-rock-sioux-tribe-opposition-dakota-access-pipeline [https://perma.cc/MYT7-KU88]; Press Release, Amnesty Int'l U.S., Amnesty International USA to Monitor to North Dakota Pipeline Protests (Oct. 28, 2016), http://www.amnestyusa.org/news/press-releases/amnesty-international-usa-to-monitor-to-north-dakota-pipeline-protests [https://perma.cc/5GDV-HFK7].

[261] Letter from Margaret Huang, Exec. Dir., Amnesty Int'l U.S., to Loretta Lynch, U.S. Att'y Gen. (Oct. 28, 2016), http://www.amnestyusa.org/pdfs/

also wrote letters to the local sheriff's department to express concerns over their use of force.[262] Many organizations, like Amnesty International, have used social media as a means for gathering evidence and collecting information in their effort to support the Sioux Tribe.[263]

The widespread use and effects of social media by intercommunal legal actors has influenced American lawmakers. They have influenced cities such as Sacramento, Seattle, and Los Angeles, which have passed resolutions backing the Sioux Tribe against the DAPL and leading them to divest from banks that fund the DAPL.[264] Similarly, United States Senator Bernie Sanders drew attention to the Standing Rock Sioux Tribe in a speech, which he then followed with a letter to then-sitting President Obama to halt the pipeline.[265] The Corps noted the increase in attention generated by social media as a complicating aspect of the DAPL development.[266]

Under a legal problem-solving approach, the Sioux Tribe and its intercommunal legal networks have operated FPIC to pressure Dakota Access, LLC and the federal government to seek its consent and solve this common problem or face greater destabilization. In doing so, the Sioux Tribe and its

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US_DOJ_letter_Lynch_regarding_investigtion_and_observation.pdf [https://perma.cc/823F-Q89F].

[262] Letter from Margaret Huang, Exec. Dir., Amnesty Int'l U.S., to Kyle Kirchmeier, Sheriff, Morton Cty. Sheriff's Dep't (Oct. 28, 2016), http://www.amnestyusa.org/pdfs/Letter_MortonCountySheriff.pdf [https://perma.cc/2KWJ-EEV6].

[263] Huang, *supra* note 261, at 2–3; *see* #NODAPL ARCHIVE—STANDING ROCK WATER PROTECTORS, www.nodaplarchive.com [https://perma.cc/V4EB-JHLV].

[264] Dan Bacher, *Best Thing Sacramento City Council Did in 2016: Pass Standing Rock Resolution*, ELK GROVE NEWS.NET (Dec. 27, 2016), http://www.elkgrovenews.net/2016/12/best-thing-sacramento-city-council-did.html [https://perma.cc/DPR4-TFD6]; *see infra* note 348 (Seattle has voted to divest $3B from Wells Fargo). Other Tribes have adopted similar resolutions to support the Standing Rock Sioux including the Cheyenne River Sioux Tribe, Crow Creek Tribe, Oglala Sioux Tribe, and Rosebud Sioux Tribes. *See Background on the DAPL*, *supra* note 3, at 2.

[265] Letter from Bernard Sanders, U.S. Senator, to Barack Obama, U.S. Pres. (Oct. 28, 2016), http://www.sanders.senate.gov/download/dapl-letter-10-28-16?inline=file [https://perma.cc/T8QM-BZ9E]; Press Release, Bernie Sanders, U.S. Senator, Sanders Statement on Dakota Access Pipeline Decision (Dec. 4, 2016), http://www.sanders.senate.gov/newsroom/press-releases/sanders-statement-on-dakota-access-pipeline-decision [https://perma.cc/2P34-TR4G]; Emily C. Singer, *Bernie Sanders Denounces Standing Rock Pipeline Project in Impassioned Tweetstorm*, MIC (Nov. 1, 2016), https://mic.com/articles/158256/bernie-sanders-denounces-standing-rock-pipeline-project-in-impassioned-tweetstorm#.DWN66dTba [https://perma.cc/S6DG-4NTH].

[266] USACE Info Package, *supra* note 171, at 4, 9.

intercommunal networks have invoked FPIC as international human rights law.

D. *The International Human Rights Level*

The international level of legality is "the classic sense of relations between sovereign states and more broadly relations governed, for example, by human rights or refugee law."[267] At the international legal level, the Sioux Tribe has invoked treaties as well as Indigenous peoples' rights recognized in the international human rights regime, particularly FPIC and self-determination.[268] Indigenous peoples' ability to work across communities, NSAs, inter-Indigenous networks, and international bodies have drawn attention to the Standing Rock Sioux Tribe's opposition to the DAPL. The Sioux Tribe's invocation of FPIC and self-determination as recognized in UNDRIP and supported by intercommunal legalities is evidence of the discursive construction of legality at the international level.[269] Although UNDRIP is the most important international instrument for FPIC, there are other influential instruments.

In 1989, the International Labour Organization Convention No. 169 established FPIC in a binding document for ratifying governments, which does not include the United States.[270] Convention No. 169 requires FPIC for relocation purposes and requires ratifying countries to consult with Indigenous communities regarding development that influences them and their traditional lands.[271] Other international

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[267] TWINING, GLOBALISATION, *supra* note 28, at 139; Twining, *Normative and Legal Pluralism*, *supra* note 209.

[268] Sitting Bear & Borrero, *supra* note 5.

[269] Anaya & Puig, *supra* note 90, at 11–16.

[270] *See generally* BIRGITTE FEIRING, INT'L LABOUR OFFICE, INDIGENOUS AND TRIBAL PEOPLES' RIGHTS IN PRACTICE: A GUIDE TO ILO CONVENTION NO. 169 (2009), http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@normes/documents/publication/wcms_106474.pdf [https://perma.cc/T9EW-9PU4]; LUIS RODRÍGUEZ-PIÑERO, INDIGENOUS PEOPLES, POSTCOLONIALISM, AND INTERNATIONAL LAW: THE ILO REGIME (1919–1989), at 291-331 (2005) (arguing that the ILO's adoption of Convention No. 169 was an act of bureaucratic territoriality in response to the WGIPs declaration drafting).

[271] Convention No. 169, *supra* note 201, art. 16(2). FPIC also made its way into international law through Indigenous advocacy at the 1992 Earth Summit, where several trends emerged. These years saw the emergence of the foundations for the roles of Indigenous peoples by connecting them to sustainable development, which has influenced how they invoke human rights. Indigenous peoples made a large effort to attend the Earth Summit with the intention of demanding recognition from States and NGOs alike and seeking to exchange information and expertise. *See* Erica-Irene A. Daes,

institutions and instruments have recognized Indigneous peoples' FPIC.[272] A prominent example is the Committee on the Elimination of Racial Discrimination's recommendation that states should ensure "that no decisions directly relating to [Indigenous peoples'] rights and interests are taken without their informed consent."[273] Where previous international instruments, such as the Convention No. 169, used the language of self-determination without naming it as such,[274] UNDRIP expressly ties FPIC to self-determination through its content and conceptual framework.[275] Because UNDRIP links Indigenous participation to their self-determination, some identify UNDRIP as perhaps "the most comprehensive and progressive of international instruments dealing with Indigenous peoples'

Lecture at the Castan Centre for Human Rights at Monash University: The Participation of Indigenous Peoples in the United Nations System's Political Institutions (May 27, 2004), https://www.humanrights.gov.au/news/speeches/participation-indigenous-peoples-united-nations-systems-political-institutions [https://perma.cc/7DVG-6LWE]; LEENA HEINAMAKI ET AL., ACTUALIZING SÁMI RIGHTS: INTERNATIONAL COMPARATIVE RESEARCH 227 (2017) ("[i]n 1992, the [Earth Summit] in Rio succeeded to shift the role of Indigenous peoples from the objects of protection to subjects of co-operation."). The Earth Summit saw the creation of three major agreements and guidelines aimed at altering the approaches to development, including Agenda 21, the Rio Declaration on Environment and Development and the Statement of Forest Principles. Importantly, the conference delegates agreed "not to carry out any activities on the lands of indigenous peoples that would cause environmental degradation or that would be culturally inappropriate." FRED M SHELLEY, THE WORLD'S POPULATION: AN ENCYCLOPEDIA OF CRITICAL ISSUES, CRISES, AND EVER-GROWING COUNTRIES 51 (2015). Both Agenda 21 and the Rio Declaration are not legally binding, but they conceptually bound Indigenous identity to environmental conservation. The Convention on Biological Diversity, which was opened for signatures at the Earth Summit, also contains an FPIC clause. U.N. Convention on Biological Diversity art. 8(j), Mar. 8, 1994, 1771 U.N.T.S. 430.

[272] There are many more sources of FPIC contained within the U.N. *See, e.g.*, DOYLE & WHITMORE, *supra* note 226, at 53–87; *also* American Declaration on the Rights of Indigenous Peoples, Organization of American States, AG/RES.2888 (XLVI-O/16) (June 15, 2016). Many of those instruments are not "binding" international law insturments within the United States.

[273] Rep. of the Comm. on the Elimination of Racial Discrimination, U.N. Doc. A/53/18; GAOR, 53d Sess., Supp. No. 18, ¶ 299 (Sept. 10, 1998).

[274] Claire Charters, *Indigenous Peoples and International Law and Policy*, 18 PUB. L. REV. 22, 28 (2007); S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 58, 61 (2d ed, 2004) ("The convention is further meaningful as part of a larger body of developments that can be understood as giving rise to new customary international law with the same normative thrust.").

[275] UNDRIP, *supra* note 24, arts. 10, 11, 19, 29, 30, 32; *see* Brant McGee, *The Community Referendum: Participatory Democracy and the Right to Free, Prior and Informed Consent to Development*, 27 BERKELEY J. INT'L L. 570, 577–79 (2009).

rights."[276] From a more critical perspective, Karen Engle notes that UNDRIP "contains significant compromises. Embedded in it are serious limitations to the very rights it is praised for containing."[277]

Undoubtedly there are limitations to the UNDRIP, but it is worth emphasizing the UNDRIP does not "grant" rights. It recognizes that Indigenous peoples have rights and calls upon states to recognize them. The call to "recognize" is vague, but the flexibility inherent in that vagueness allow Indigenous peoples to draw from multiple and overlapping international, intercommunal, *sui generis*, and other legalities that defy conventional "top-down control using fixed statutes, detailed rules, and judicial enforcement"[278] style of state-based legal regimes.

At the international level of legality, the U.N. has created the Permanent Forum on Indigenous Issues, the Expert Mechanisms on the Rights of Indigenous Peoples, and the Special Rapporteur on the Rights of Indigenous Peoples to facilitate recognition of Indigenous peoples' rights. All three have actively promoted FPIC[279] alongside the Committee on the Elimination of Racial Discrimination and the Committee on Economic, Social and Cultural Rights.[280] The Sioux Tribe, with the assistance of NSAs and intercommunal legal actors, such as the IITC, has appealed to the U.N. to send human rights observers to the protest site.[281]

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[276] Charters, *supra* note 274, at 33.

[277] Karen Engle, *On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights*, 22 EUR. J. INT'L L. 141, 141 (2011). For a history and discussion of Indigenous peoples' rights and development, see generally KAREN ENGLE, THE ELUSIVE PROMISE OF INDIGENOUS DEVELOPMENT: RIGHTS, CULTURE, STRATEGY (2010).

[278] Trubek & Trubek, *supra* note 13, at 543.

[279] *See, e.g.*, *Final Report of the Study on Indigenous Peoples and the Right to Participate in Decision-Making: Report of the Expert Mechanism on the Right of Indigenous Peoples*, *supra* note 191 (EMRIP); *Report on the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples*, *supra* note 185 (UNPFII); Promotion and Protection, *supra* note 26 (Special Rapporteur).

[280] Rep. of the Comm. on the Elimination of Racial Discrimination, *supra* note 273; Econ. & Soc. Council, Comm. on Econ., Soc. & and Cultural Rights, 27th Sess., Nov. 12–30, 2001, ¶ 12, U.N. Doc. E/C.12/I/Add.74; Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rights, Rep. on the Twenty-Fifth, Twenty-Sixth and Twenty-Seventh Sessions, ¶ 761, U.N. Doc. E/2002/22 (2002).

[281] Sitting Bear & Borrero, *supra* note 5; Margaret Huang, *supra* notes 261, 262; Roberto Borrero, *Human Rights Observer Report on Mission to Standing Rock Sioux Reservation*, CULTURAL SURVIVAL (Nov. 9, 2016),

The current Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz, called for a halt to the DAPL and later visited with the Standing Rock Sioux Tribe to investigate in greater detail.[282] Tauli-Corpuz wrote,

> [t]he United States should, in accordance with its commitment to implement the Declaration on the Rights [of] Indigenous Peoples, consult with the affected communities in good faith and ensure their free, and informed consent prior to the approval of a project affecting their lands, particularly in connection with extractive resource industries.[283]

Similarly, the Special Rapporteur on the Right to Freedom of Peaceful Assembly and of Association, Maina Kiai, called for a halt to pipeline construction after the protest turned violent.[284] At the invitation of Chairman Archambault, an expert member of the U.N. Permanent Forum on Indigenous Issues, Chief Edward John, spent three days at the protest site.[285] John later wrote a letter noting a host of issues and potential breaches of international human rights.[286] Several NSAs, including the IITC and Cultural Survival, supported John's visitation.[287] Following John's visit, the U.N. Secretariat of the Permanent Forum on

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https://www.culturalsurvival.org/news/human-rights-observer-report-mission-standing-rock-sioux-reservation [https://perma.cc/WA56-CNMZ].

[282] *UN Human Rights Expert Calls on US to Halt Construction of North Dakota Oil Pipeline*, U.N. NEWS CENTRE (Sept. 22, 2016), http://www.un.org/apps/news/story.asp?NewsID=55154#.WHblERt9600 [https://perma.cc/4KB9-WH9P]; Press Release, U.N. Human Rights Office of the High Comm'r, *End of Mission Statement by the U.N. Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz of Her Visit to the United State of America* (Mar. 3, 2017), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21274&LangID=E [https://perma.cc/QED6-HSWF].

[283] Press Release, U.N. Human Rights Office of the High Comm'r, *supra* note 282.

[284] Press Release, U.N. Human Rights Office of the High Comm'r, *Native Americans Facing Excessive Force in North Dakota Pipeline Protests—U.N. Expert* (Nov. 15, 2016), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20868 [https://perma.cc/J7PZ-NNEK].

[285] Report and Statement, Chief Edward John, Expert Member of the U.N. Permanent Forum on Indigenous Issues, *Firsthand Observations of Conditions Surrounding the Dakota Access Pipeline* (Nov. 1, 2016), http://www.un.org/esa/socdev/unpfii/documents/2016/Docs-updates/Report-ChiefEdwardJohn-DAPL2016.pdf [https://perma.cc/Q4NE-FEE9].

[286] *Id.*

[287] Borrero, *supra* note 281.

Indigenous Issues, Alvaro Pop Ac, released a statement reiterating concerns over the proposed pipeline route and a lack of consultation with the Sioux.[288]

None of these U.N. actor's actions can enforce the United States' compliance through force or sanctions.[289] They primarily exert pressure, which perhaps, the United States and other states shrug off. However, a Member state's poor record of human rights compliance over time may signal to industry actors that development projects, such as the DAPL, are riskier than they appear. The intercommunal actors created FPIC as partially based on and to ptorect on their *sui generis* legal systems and have pressured international legal actors to adopt it.[290] The international level has been discursively constructed and adopted FPIC in connection with the regional and transnational levels.[291]

E. *The Regional Level of Legality*

Examples of the regional level of legality are, according to Twining, the European Union, the European Convention on Human Rights, and the Organization of African Unity.[292] The regional level includes the Inter-American System of Human Rights, which has developed a jurisprudence for Indigenous rights that includes FPIC.[293] A commission and a court constitute

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[288] Statement, Alvaro Pop Ac, Chairperson, U.N. Permanent Forum on Indigenous Issues, Dr. Dalee Dorough & Chief Edward John, Expert Members, Permanent Forum on Indigenous Issues (Nov. 4, 2016), http://www.un.org/esa/socdev/unpfii/documents/2016/Docs-updates/StatementDAPL_4Nov-2016.pdf [https://perma.cc/32QL-7ZSX].

[289] Charters, *supra* note 205, 292–94.

[290] Stuart R. Butzier & Sarah M. Stevenson, *Indigenous Peoples' Rights to Sacred Sites and Traditional Cultural Properties and the Role of Consultation and Free, Prior and Informed Consent*, 32 J. ENERGY & NAT. RES. L. 297, 299 (2014).

[291] Baker, *supra* note 188, 273–78.

[292] TWINING, GLOBALISATION, *supra* note 28, at 139; Twining, *Normative and Legal Pluralism*, *supra* note 209.

[293] Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007); Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245 (June 27, 2012). Another regional body is the African Commission on Human and Peoples' Rights, which has followed the Inter-American System. Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya, No. 276/2003, Decision on Merits, Afr. Comm'n H.P.R. (Feb. 4, 2010); *see* Jérémie Gilbert, *Indigenous Peoples' Human Rights in Africa: The Pragmatic Revolution of the African Commission on Human and Peoples' Rights*, 60 INT'L & COMP. L.Q. 245, 253, 269–70 (2011) (argues the ACHR borrowed from the IACHR's jurisprudence); Gaetano Pentassuglia, *Towards a Jurisprudential*

the Inter-American System and both have articulated a requirement for governments to obtain Indigenous peoples' consent.[294] Anaya and Williams argue that these developments show how a court may interprete Indigenous peoples rights, perhaps such as FPIC, as a legal entitlement and are indicative of regional customary law.[295] In *Awas Tingni*, the Inter-American Court of Human Rights ordered the State to demarcate and title Indigenous territory to ensure that no acts on the part of the State or private parties would affect Awas Tingni enjoyment of its territories.[296] The subsequent case law *Awas Tingni* builds upon this ruling and goes so far as to describe states' duty to

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Articulation of Indigenous Land Rights, 22 EUR. J. INT'L L. 165, 188–90 (2011) (same).

[294] For a history on the development of this jurisprudence, see generally Dinah Shelton, *The Inter-American Human Rights Law of Indigenous Peoples*, 35 U. HAW. L. REV. 937 (2013).

[295] S. James Anaya & Robert A. Williams, Jr., *The Protection of Indigenous Peoples' Right over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33, 59 (2001). For readings that problematize the Court's role, see generally Alexandra Huneeus, *Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights*, 44 CORNELL INT'L L.J. 493 (2011); Alexandra Huneeus, *Rejecting the Inter-American Court: Judicialization, National Courts, and Regional Human Rights*, *in* CULTURES OF LEGALITY: JUDICIALIZATION AND POLITICAL ACTIVISM IN LATIN AMERICA 112 (Javier Couso, Alexandra Huneeus & Rachel Sieder eds., 2010); Thomas M. Antkowiak, *A Dark Side of Virtue: The Inter-American Court and Reparations for Indigenous Peoples*, 25 DUKE J. COMP. & INT'L L. 1 (2014); Thomas M. Antkowiak, *Rights, Resources, and Rhetoric: Indigenous Peoples and the Inter-American Court*, 35 U. PA. J. INT'L L. 113 (2013). The account written by Anaya and Williams has been influential. *See* Pasqualucci, *supra* note 188, at 66; Enzamaria Tramontana, *The Contribution of the Inter-American Human Rights Bodies to Evolving International Law on Indigenous Rights over Lands and Natural Resources*, 17 INT'L J. MINORITY & GROUP RTS. 241 (2010) (arguing that the IACHR is a part of a larger body of developments that can be understood as giving rise to new customary international law on Indigenous land rights); S.J. Rombouts, *The Evolution of Indigenous Peoples' Consultation Rights Under the ILO and U.N. Regimes: A Comparative Assessment of Participation, Consultation, and Consent Norms Incorporated in ILO Convention No. 169 and the U.N. Declaration on the Rights of Indigenous Peoples and Their Application by the Inter-American Court of Human Rights in the* Saramaka *and* Sarayaku *Judgments*, 53 STAN. J. INT'L L. 169, 211–24 (2017).

[296] Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 153(b) (Aug. 31, 2001). This does not mean States always comply or the orders are sufficient. *See* Antkowiak, *Dark Side*, *supra* note 295 (questioning the sufficiency of reparations and awards); Huneeus, *Rejecting the Inter-American Court*, *supra* note 295 (analyzing how national courts treat the Inter-American Court's decisions); RICHARD PRICE, RAINFOREST WARRIORS: HUMAN RIGHTS ON TRIAL 241–42 (2011) (discussing the struggles to enforce judgment in *Saramaka*).

obtain FPIC in some situations.[297] As a regional body, the Inter-American System does not exercise global jurisdiction. However, it is sufficient to note that regional bodies, like the Inter-American System, recognize FPIC as a legal right and tribes, like the Sioux Tribe, are now using it.

In December 2016, the Standing Rock Sioux, along with the Cheyenne River Sioux and Yankton Sioux Tribes, announced they had requested that the Inter-American Commission investigate Dakota Access, LLC and the federal government for failure to consult.[298] On December 9, 2016, the Standing Rock Sioux testified at the Inter-American Commission on Human Rights.[299] The jurisprudential trend of the Inter-American system suggests that the Sioux will find a friendly Commission. However, the court is unlikely to weigh in because the federal government has asserted that both the Commission and the Court lack jurisdiction over United States matters.

Mary and Carrie Dann v. United States evinces the federal government's stance toward the commission.[300] Members of the Western Shoshone complained to the commission that the federal government allowed and facilitated mining developments on their land without their consultation.[301] The Commission found the federal government violated the Danns' property rights and required United States courts to consider their individual and collective rights and informed participation.[302] In response, the federal government asserted a

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[297] *See, e.g.*, Kichiwa Indigenous People of Sarayaku v. Ecuador, *supra* note 293; Kaliña & Lokono Peoples v. Suriname, Merits, Reparations & Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 309, ¶ 202 (Nov. 25, 2015) (mentioning UNDRIP and FPIC).

[298] Letter from Standing Rock Sioux Tribe et al. to Emilio Álvarez Icaza Longoria, Exec. Sec'y, Inter-American Comm. on Human Rights (Dec. 2, 2016), https://www.dropbox.com/s/rjgt7xfprm97uza/Standing%20Rock%2C%20Cheyenne%20River%20%26%20Yankton%20Sioux%20Tribes%20-%20Request%20for%20Precautionary%20Measures%20-%20FINAL%20Dec%2002%2C%202016%20-%20with%20exhibits.pdf?dl=0 [https://perma.cc/FV29-QCUM].

[299] Comisión Interamericana de Derechos Humanos, EEUU: Indígenas e industrias extractivas, YOUTUBE (Dec. 9, 2016), https://www.youtube.com/watch?v=L_5UHH1YBhI (showing Standing Rock Sioux Tribe, Cheyenne River Sioux Tribe, Yankton Sioux Tribe testimony to the Inter-Cm. H.R.).

[300] Dann v. United States (*Dann Case*), Case 11.140, Inter-Am. Comm'n H.R., Report No. 75/02, OEA/Ser.L./V/II/117, doc. 1 rev. 1, ¶ 116 (2002).

[301] *Id.* ¶¶ 65–66.

[302] *Id.* ¶¶ 170–72.

lack of jurisdiction.[303] The Sioux Tribe will find a Commission with a jurisprudence that supports Indigenous peoples' FPIC, but the federal government will likely again adopt the stance it did toward the *Dann* case. The Commission's finding for the Sioux Tribe may, however, lend support and pressure for its struggle.

Many of the multiple and overlapping levels of legality work together to pressure Dakota Access, LLC and the federal government. But without an enforcement mechanism or some way to convert that pressure into a force that Dakota Access, LLC and the federal government care about, then all that pressure may be for naught. A surprising and unlikely place to find a degree of enforcement resides within the transnational level of legality.

F. *The Transnational Level of Legality*

The transnational level of legality includes "transnational arbitration, a putative *lex mercatoria*, Internet law, and more controversially, the internal governance of multinational corporations . . . or institutions of organized crime."[304] Although Twining views the internal governance of multinational corporations as controversial, Fleur Johns has argued that "the corporation has long been a feature of international legal practice and argument, [but] it is nonetheless one upon which public international lawyers have tended to look askance."[305] The rules corporations adopt for themselves are an unlikely place for an enforcement mechanism, but to the extent those rules shape corporate and state behaviors, they also shape international and transnational practice. The Sioux Tribe and its network's ability to publish and disperse information on corporate internal governance mechanisms attempts to hold corporations accountable to own their standards or face divestment.

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[303] *Id.* ¶¶ 168, 175 (the federal government specifically argued that the Commission lacked jurisdiction to evaluate federal laws); Fishel, *supra* note 78, at 68–69.

[304] TWINING, GLOBALISATION, *supra* note 28 at 139; Twining, *Normative and Legal Pluralism*, *supra* note 209.

[305] Fleur Johns, *Theorizing the Corporation in International Law*, *in* THE OXFORD HANDBOOK OF THE THEORY OF INTERNATIONAL LAW 635, 636, 653 (Ann Orford & Florian Hoffman eds., 2016) (remaining critical of the "new governance" approaches, like the problem-solving approach). For another view that is critical of the problem-solving approach, see Amy J. Cohen, *Negotiation, Meet New Governance: Interests, Skills, and Selves*, 33 L. & SOC. INQUIRY 503, 529 (2008).

1. The Applicable Transnational Legality

While human rights standards at the international and regional levels address the obligations and aspirations of states, which the federal government may reject as not legally obligatory, the transnational level initially appears even more unlikely to restrict action. As well noted by John Ruggie, the transnational corporate level suffers from a "gap in governance" that leaves corporations unregulated.[306] In response to the identification of the transnational governance gap, the U.N. Security-Generals appointed Ruggie as the Special Representative for Business and Human Rights. In that role, Ruggie developed the "Protect, Respect, Remedy" framework.[307] It clarifies that states are required to protect human rights through legislative action, while corporations are required to respect human rights. Certainly, "respect" generates little authority for strict legalists who consider top-down legal styles as the sole standard for legality.

However, the U.N. General Principles on Business and Human Rights (UNGPs) promulgate a standard that requires corporations and other NSAs to respect recognized human rights even where the host government does not.[308] The UNGPs do not directly reference FPIC or the UNDRIP but note that "enterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention . . . In this connection, United Nations instruments have elaborated further on the rights of indigenous peoples[.]"[309] The UNGP's direction that corporations should consider "U.N. instruments . . . on the rights of indigenous peoples," is consistent with the former Special Rapporteur on the Rights of Indigenous Peoples James Anaya's view that businesses must respect Indigenous rights contained in UNDRIP

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[306] John Ruggie, Special Representative of the Secretary General, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, ¶ 3, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008); Fleur Johns, *The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory*, 19 MELB. U. L. REV. 893, 896 (1994).
[307] U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM'R, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: IMPLEMENTING THE UNITED NATIONS "PROTECT, RESPECT AND REMEDY" FRAMEWORK, at 13, U.N. Doc. HR/Pub/11/04 (2011) [hereinafter UNGP].
[308] *Id.* at 13–14 ("Because business enterprises can have an impact on virtually the entire spectrum of internationally recognized human rights, their responsibility to respect applies to all such rights.").
[309] *Id.* at 14.

like FPIC.[310] If U.N. bodies say that states need to obtain Indigenous peoples' FPIC and corporations must respect recognized human rights, a consequence is that corporations also need to respect Indigenous peoples' FPIC. Admittedly, "respect" remains a vague legal standard. Where corporations fail to respect Indigenous FPIC, potentially injured tribes can use FPIC's definitional vagueness and its softness to generate resistance by naming, blaming and by encouraging destabilizing acts.[311]

Alongside the creation of the UNGPs, multilateral lending institutions and corporations sought to become part of the human rights discourse by articulating and adopting standards for Indigenous participation in development projects, including FPIC. A noncomprehensive list includes:

- The World Bank Environmental and Social Framework from August 2016 applies to borrowing countries;[312]
- The International Council on Mining and Minerals (ICMM) 2013 Indigenous Peoples and Mining Position Statement is a voluntary initiative for the mining industry;[313]

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[310] James Anaya (Special Rapporteur on the Rights of Indigenous Peoples), U.N. Doc. A/HRC/21/47, ¶ 59 (July 6, 2012). For the IITC commentary on the UNGP, *see* Andrea Carmen, *Proposal for the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, INT'L INDIAN TREATY COUNCIL, (Apr. 12, 2013), http://www.ohchr.org/Documents/Issues/Business/WGSubmissions/2013/International%20Indian%20Treaty%20Council.pdf [https://perma.cc/C5TQ-JPEA]; *see also* Press Release, U.N. Human Rights Office of the High Comm'r, *supra* note 282.

[311] *See, e.g.*, Archambault, *supra* note 165.

[312] WORLD BANK, ENVIRONMENTAL AND SOCIAL FRAMEWORK: SETTING ENVIRONMENTAL AND SOCIAL STANDARDS FOR INVESTMENT PROJECT FINANCING ¶ 55, § ESS7 (2016).

[313] *Indigenous Peoples and Mining Position Statement*, INT'L COUNCIL OF MINING & METALS (May 2013), https://www.icmm.com/en-gb/members/member-commitments/position-statements/indigenous-peoples-and-mining-position-statement [https://perma.cc/UB5N-CMNK]. The International Petroleum Industry Environmental Conversation Association (IPIECA) is the oil and gas equivalent of the ICMM. IPIECA, OIL & GAS INDUSTRY GUIDANCE ON VOLUNTARY SUSTAINABILITY REPORTING 97–102 (3d ed. 2015), http://www.ipieca.org/resources/good-practice/oil-and-gas-industry-guidance-on-voluntary-sustainability-reporting-3rd-edition/. It states that reporting companies should describe its approach to Indigenous peoples as including "information disclosure, consultation, informed participation and mutually acceptable solutions with consent, where appropriate." *Id.* at 100.

- The International Finance Corporation's 2012 Performance Standard 7 on Indigenous Peoples for private borrowers;[314] and
- The Equator Principles III has adopted the language for the International Finance Corporation's (IFC) Performance Standard for lenders or financiers of extractive industry projects.[315]

When corporations adopt voluntary initiatives, like the ICMM, or are required to comply with lender/financier restrictions, like the Equator Principles III (EP III), they commit to higher participatory standards for Indigenous peoples where their actions will affect Indigenous peoples. These voluntary standards are "nonlegal" in the sense that state courts cannot enforce these standards against those who sign up for them but do not comply.[316] Nevertheless, within a global space, they can be powerful.[317] Importantly, these initiatives provide Indigenous peoples with a means for partially circumventing strictly positivistic national legal systems to articulate and solve problems, which Ruggie seems to approve.[318] Despite states' hesitancy to embrace or recognize Indigenous rights as a distinct category of legal protections, corporations and IFIs are

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314 IFC, IFC PERFORMANCE STANDARDS ON ENVIRONMENTAL AND SOCIAL SUSTAINABILITY 47–52 (2012), https://www.ifc.org/wps/wcm/connect/c8f524004a73daeca09afdf998895a12/IFC_Performance_Standards.pdf?MOD=AJPERES [https://perma.cc/J3LJ-KH42]; Baker, *supra* note 188, at 673–75, 676–81, 685–705.

315 EQUATOR PRINCIPLES, THE EQUATOR PRINCIPLES: A FINANCIAL INDUSTRY BENCHMARK FOR DETERMINING, ASSESSING AND MANAGING ENVIRONMENTAL AND SOCIAL RISK IN PROJECTS 7–8 (June 2013), http://www.equator-principles.com/resources/equator_principles_III.pdf [https://perma.cc/AGK9-M2DW] (Principle 5: Stakeholder Engagement); *see* Ariel Meyerstein, *Transnational Private Financial Regulation and Sustainable Development: An Empirical Assessment of the Implementation of the Equator Principles*, 45 N.Y.U. J. Int'l L. & Pol. 487, 498 (2013) (arguing that too much focus on self-regulation "can overshadow other potentially useful ways of understanding regime effectiveness and impact.").

316 It is possible and likely that Indigenous peoples claim human rights alongside state-based legal claims. *See*, *e.g.*, Julian Aguon, *Other Arms: The Power of a Dual Rights Legal Strategy for the Chamoru People of Guam Using the Declaration on the Rights of Indigenous Peoples in U.S. Courts*, 31 U. HAW. L. REV. 113, 121–23 (2008) (arguing that human rights may be claimed alongside national legal claims for their performative effect).

317 Saskia Sassen, *Neither Global Nor National: Novel Assemblages of Territory, Authority and Rights*, 1 ETHICS & GLOBAL POL. 61, 66 (2008).

318 John Gerard Ruggie, *Global Governance and "New Governance Theory": Lessons from Business and Human Rights,* 20 GLOBAL GOVERNANCE 5, 8-12 (2014).

increasingly pressured to respect Indigenous rights as a category of human rights protections.[319] Where corporations commit themselves to higher standards for Indigenous peoples' participation but do not adhere to those standards, they may face destabilizing acts from different levels of legality.[320]

2. Destabilizing Tactics

The Sioux Tribe is combining tactics to destabilize the DAPL. First, as discussed above, they delay the project by engaging with national legal processes.[321] And, second, as evaluated here, they problematize funding by pressuring IFIs to divest from the project or face divestment from the Sioux Tribe's supporters.

Rachel Davis and Daniel Franks argue that one of the major issues facing extractive industry projects today is delays resulting from inadequate consultation and a failure to obtain a social license to operate.[322] Delay may result from various actions such as lawsuits, project modifications, lost productivity, theft, roadblocks, reputational costs, or fines.[323] They estimate that delayed extractive industry projects valued at $3–5 billion dollars lose nearly $20 million in revenue each week.[324] Energy Transfer Partners, the principal shareholder of Dakota Access, LLC, values the DAPL delay costs at $3.8 billion.[325]

In November 2016, Dakota Access, LLC requested an expedited ruling on its motion for summary judgment and, in support, claimed that it was suffering irreparable "harm alone [which] is $83.3 million per month of delay (or $2.7 million per day)."[326] In a hearing, Judge Boasberg denied Dakota Access,

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[319] *See* Stefania Errico, *The World Bank and Indigenous Peoples: The Operational Policy on Indigenous Peoples Between Indigenous Peoples (O.P. 4.10.) Between Indigenous Peoples' Rights to Traditional Lands and to Free, Prior, and Informed Consent*, 13 INT'L J. MINORITY & GROUP RTS. 367, 374 n.31 (2006); Baker, *supra* note 188, at 678–80.
[320] Cottrell & Trubek, *supra* note 12, at 374.
[321] *See supra* section III.C.
[322] *See generally* RACHEL DAVIS & DANIEL FRANKS, COSTS OF COMPANY-COMMUNITY CONFLICT IN THE EXTRACTIVE SECTOR (2014), https://sites.hks.harvard.edu/m-rcbg/CSRI/research/Costs%20of%20Conflict_Davis%20%20Franks.pdf [https://perma.cc/L3U5-8LUG].
[323] *Id.* at 15–16.
[324] *Id.* at 8.
[325] Energy Transfer Partners, *supra* note 91.
[326] Reply Supp. Mot. to Expedite (Nov. 22, 2016) at 2, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, No. 16-cv-1534, ECF No. 64.

LLC's motion.[327] Media outlets then reported that Dakota Access had lost over $450 million due to delays.[328]

The Sioux Tribe's multiple rounds of litigation successfully delayed the project. Although currently operational, the ability to temporarily increase production costs by seeking further legal review may make continued operation of the DAPL or future natural resource development projects less attractive to investors where FPIC is not obtained. When the Sioux Tribe's ability to use the United States legal system to delay is combined with its ability to use pressure to encourage divestment from the DAPL, the project, as well as future fossil fuel projects, may become fatally destabilized.

The Sioux's divestment tactics may work because many of the DAPL's IFIs have adopted lending restrictions, such as EP III,[329] which explicitly requires an FPIC standard for projects like the DAPL. Of the thirty-five IFIs that have invested in or lent to the DAPL,[330] twenty-three have adopted EP III.[331] The EP III expressly referenced Ruggie's principle of "Protect, Respect and Remedy" and mandates FPIC according to the IFC's Performance Standards.[332] As long as the twenty-three IFIs that have adopted EP III comply, the IFIs are required to take several

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[327] Miranda Compton & Daniel Press, *Dakota Access Challenges Army Corps After Easement Determination Stalled*, VAN NESS FELDMAN LLP (Dec. 13, 2016), http://www.vnf.com/dakota-access-challenges-army-corps-after-easement-determinations [https://perma.cc/B8EX-ZQAV].

[328] Christopher M. Matthews, *Judge Denies Developer's Request to Force Approval of Dakota Access Pipeline's Final Stage*, WALL ST. J. (Dec. 9, 2016), http://www.wsj.com/articles/judge-denies-developers-request-to-force-approval-of-dakota-access-pipelines-final-stage-1481319184.

[329] Many of the banks have adopted the IFC Performance Standards, but the IFC does not appear to have been involved in financing DAPL. Likewise, the World Bank's recent FPIC standard would not apply here.

[330] *Banks Funding DAPL*, DEFUND DAPL, https://www.defunddapl.org/contact-the-banks [https://perma.cc/QVV2-X5JF].

[331] *Id.*; *compare Equator Principles Ass'n Members & Reporting*, EQUATOR PRINCIPLES, http://www.equator-principles.com/index.php/members-and-reporting [https://perma.cc/STK7-PULE]. In comparing the information on the banks that have invested and those that have adopted Equator Principles III, the following banks or their parent companies have invested in DAPL and adopted the EPIII: Bank of America, HSBC, JPMorgan Chase, Citibank, Wells Fargo, BNP Paribas, DNB of Norway, Royal Bank of Scotland, Mizuho Bank, TD Securities, ABN Amro Capital, SMBC Nikko Securities, Société General, Bank of Tokyo-Mitsubishi UFJ, BBVA Securitie, Crédit Agricole, Itesa SanPaolo, IGN Bank, Natixis, Scotiabank (Bank of Nova Scotia), Scotiabank, Barclays, Credit Suisse, and Royal Bank of Canada.

[332] EQUATOR PRINCIPLES, *supra* note 315, at 7–8, 5 (referencing IFC Performance Standards).

steps. The IFIs must publicly report that the DAPL has failed to seek or achieve FPIC, establish a grievance mechanism, and engage an independent environmental and social consultant to carry out an independent review of the project.[333] These processes are costly and make lending to the DAPL developers less desirable.

There are two problems with voluntary initiatives, like EP III. First, voluntary initiatives were created for industry self-regulation.[334] Even if the Sioux Tribe and its partners are publishing information on the lenders while mobilizing public support to divest, these tactics depend on IFIs divesting or having supporters divest from those IFIs. Publishing internal governance regulations may be a means for publicly enforcing private, self-regulating voluntary initiatives to hold transnational actors accountable. It remains possible that even if there is pressure to divest, people simply do not.

Second, voluntary initiatives, like EP III, tend not to apply in the United States because it is treated as a "designated country," a country "deemed to have robust environmental and social governance, legislation system and institutional capacity designed to protect their people and the natural environment."[335] Even if the United States is a "designated country" that appears to have "robust" legal protections, the Sioux Tribe and its partners' opposition to the DAPL has successfully highlighted the deficiencies of state-level legal protections. For instance, in May 2017, ten banks that had invested in the DAPL and had signed onto the EP III wrote to the Equator Principles Association.[336] They expressed concern that "(i) local laws in relation to engagement with indigenous communities are lacking compared to best practice for FPIC . . . and (ii) banks had no leverage as there was no breach with the applicable environmental & [sic] social standards being used."[337] The letter continued, "[i]n addition to the

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[333] *Id*. at 7–10.
[334] *See* Meyerstein, *supra* note 315; Baker, *supra* note 188, at 674–75, 685–86.
[335] *Designated Countries*, EQUATOR PRINCIPLES, http://www.equator-principles.com/index.php/designated-countries [https://perma.cc/NL5T-BCER].
[336] Letter from Claire Gillig-Brouwer (ABN AMRO), Patrick Bader (BNP Paribas), Juan A. Casals Ovalle (BBVA), Eric Cochard (Credit Agricole), Emilie Goodall (FMO), Antonella Bernasconi (Intesa San Paolo), Pierre Dufaud (Natixis), Robin Willing (NIBC), Bas Rüter (Rabobank), & Sylvie Préa (Société Générale) to Chair of Equator Principles Ass'n (May 22, 2017) (on file with author). The letter did not single out the DAPL as the project at issue.
[337] *Id.* at 1.

reputation damage that this has caused to the banks involved, we believe that this is likely to damage the reputation of the Equator Principles (EPs) as a 'golden standard' and a common playing field for determining, assessing and managing environmental and social risks in projects."[338] This letter might suggest that the EPs are ineffective regulations for an unaccountable industry. On the other hand, the letter demonstrates the Sioux Tribe's effectiveness. The letter further requested EP standards to apply to projects in designated countries and create a working group to generate proposals on how to facilitate resolution where there has been a breach of the EPs.[339]

In mounting their opposition to the DAPL, the Sioux Tribe has exposed the inadequate state-level legal protections of supposed designated countries by forcing EPs and other similar voluntary initiatives into a crisis: they must take seriously Indigenous peoples' consent or admit the "golden standards" are little more than greenwashing. Either way, the Sioux Tribe and its networks will not relent. The Sioux's networks of Indigenous and environmental activists continue publicizing information on who has invested and how individuals can pressure those institutions to divest.[340]

The networks have created websites to track which banks have invested[341] and how much has been purposefully divested.[342] The Norwegian public and the Sami peoples pressured DNB of Norway to divest.[343] DNB originally engaged an independent human rights investigator to develop recommendations as to

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[338] *Id.*
[339] *Id.* at 2.
[340] *See, e.g.*, Letter from Jon R. Campbell, Head of Gov't & Cmty. Relations, Wells Fargo, to Standing Rock Sioux Tribe (Dec. 1, 2016) (on file with author); Emily Fuller, *How to Contact the 3 Dozen Banks Still Backing Dakota Access Pipeline Companies*, YES! MAG. (updated May 11, 2017), http://www.yesmagazine.org/people-power/how-to-contact-the-17-banks-funding-the-dakota-access-pipeline-20160929 [https://perma.cc/8ELD-GWXY].
[341] Jo Miles & Hugh MacMillan, *Who's Banking on the Dakota Access Pipelines?*, FOOD & WATER WATCH (Sept. 6, 2016), http://www.foodandwaterwatch.org/news/who's-banking-dakota-access-pipeline [https://perma.cc/FK2G-5GPK].
[342] #DEFUNDDAPL, https://www.defunddapl.org/ [https://perma.cc/F2QC-RY7G].
[343] Letter from Brandy Toelupe, *supra* note 259. Swedish bank Nordea has said it will publicly meet with the Sioux. Press Release, Nordea, Exclusion of Dakota Access Pipeline Companies (Feb. 8, 2017), http://www.nordea.com/en/press-and-news/news-and-press-releases/news-en/2017/%20Exclusion-of-Dakota-Access-Pipeline-companies.html [https://perma.cc/JU8X-H7P6].

whether it should divest.[344] It then sold its ownership interest in the companies that were building the DAPL.[345] Investors such as BNP Paribas, Crédit Agricole, and Société Générale have previously divested from natural resource projects that faced social resistance.[346] The Sioux Tribe and anti-DAPL networks are doing the same and have publicly called to meet with the IFIs.[347] The most dramatic implementation thus far has been the Seattle City Council's divestment of $3 billion from Wells Fargo for supporting the DAPL.[348]

If one looks at any singular event, such as the Sioux Tribe's opposition to the DAPL, it might appear as though individual tribes are continuing to lose their fights against large natural resource development. Under a broader view, the Sioux Tribe's tactics are consistent with tactics Indigenous peoples are using around the globe.[349] At a global level, the Sioux Tribe has mobilized delay and divestment tactics in a way that suggests the formalization of networks and connections between tribes,

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[344] *DNBS Kommentar Til Situasjonen I Nord-Dakota* (*DNBS Comment on the Situation in North Dakota*), DNB FEED (Nov. 6, 2016), https://dnbfeed.no/nyheter/dnbs-kommentar-til-situasjonen-i-nord-dakota/ [https://perma.cc/JCS8-JV97]. DNB hired Foley Hoag LLP, which has published a business case for adopting FPIC. *See* AMY K. LEHR & GARE A. SMITH, IMPLEMENTING A CORPORATE FREE, PRIOR, AND INFORMED CONSENT POLICY, BENEFITS AND CHALLENGES 6–9 (2010), http://solutions-network.org/site-fpic/files/2012/09/Implementing-a-Corporate-Free-Prior-Informed-Consent-Foley-Hoag.pdf [https://perma.cc/K759-XRSG].

[345] NTB, *DNB-fond selger seg ut av omstridt rorledning I USA* (*DNB Fund Sells Out of Controversial Pipeline in the U.S.*), HEGNAR.NO (Nov. 17, 2016), http://www.hegnar.no/Nyheter/Energi/2016/11/DNB-fond-selger-seg-ut-av-omstridt-roerledning-i-USA [https://perma.cc/3J8S-CZ9Z].

[346] Stephanie March, *French Banks Rule Out Funding Galilee Basin Coal Project*, ABC (Apr. 9, 2015) http://www.abc.net.au/am/content/2015/s4213055.htm [https://perma.cc/TL9Y-HGCV].

[347] Nika Knight, *Activists Around the World Take #NoDAPL Fight to the Banks*, COMMON DREAMS (Dec. 1, 2016), http://www.commondreams.org/news/2016/12/01/activists-around-world-take-nodapl-fight-banks [https://perma.cc/M7SC-FRE3].

[348] Lynda V. Mapes, *'Divestment Is Our Goal': Seattle City Council to Vote on Pulling $3 Billion from Wells Fargo over Dakota Access Pipeline*, SEATTLE TIMES (Feb. 1, 2017), http://www.seattletimes.com/seattle-news/environment/protesters-call-for-seattles-billions-to-be-pulled-from-wells-fargo-over-dakota-access-pipeline/; Bill Chappell, *2 Cities to Pull More than $3 Billion from Wells Fargo over Dakota Access Pipeline*, NPR (Feb. 8, 2017), http://www.npr.org/sections/thetwo-way/2017/02/08/514133514/two-cities-vote-to-pull-more-than-3-billion-from-wells-fargo-over-dakota-pipelin (noting Davis, California has withdrawn around $124 million from Wells Fargo).

[349] *See* Wangan Jagalingou, *The Wangan & Jagalingou Declaration to Banks*, WANGAN & JAGALINGOU FAMILY COUNCIL (May 29, 2015), http://wanganjagalingou.com.au/the-wangan-jagalingou-declaration-to-banks/ [https://perma.cc/HC92-4EY7].

environmental groups, and anti–fossil fuel activists. The ability of the Sioux Tribe and others to delay development while pushing for divestment may, in the end, stand as a significant threat to potential developments and investors—even in designated countries—where Indigenous consent and consultation is not sought. If these tactics continue, the cost of pursuing fossil fuel development may increase to the point where it is no longer economically viable.

VI. CONCLUSION

The Sioux Tribe's operation and invocation of FPIC is an important development that should be understood according to the legal problem approach in global spaces. The Sioux Tribe's activism against the DAPL is broader than a state-based legal challenge. Its invocation of FPIC and self-determination is not merely an international human rights claim. The point of contestation appears to be whether a pipeline can be built through a relatively small piece of territory. However, in opposing the DAPL crossing that territory, the Tribe has interjected alternative legal levels that are overlaid by historical and global struggles. It has invoked FPIC as a concept and begun operating it as law in a global space, one that has multiple and overlapping *sui generis*, intercommunal, international, regional, and transnational legalities.

State actors are confined by jurisdictional mandates: the Corps is constrained by what it can consider in the same way that District Court Judges are constrained by what they can consider. Industry actors often consider the state legal regime as the preeminent source of law, which in many cases has been a sound practice. That practice is becoming increasingly risky. Some human rights advocates and Indigenous peoples believe that states should recognize Indigenous peoples' FPIC. If that were to happen, state judges might treat FPIC as a feature of domestic law just as Judge Boasberg dealt with the Treaty rights the Sioux Tribe claimed.[350] Judges, as restricted by state law, may then fail to consider tribal "existential" concerns,[351] while further subjecting them to the State.

The Sioux Tribe's activism demonstrates the operation of FPIC according to the problem-solving approach. The Tribe must engage with state legality, and it can use that legality to

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[350] Standing Rock III, *supra* note 2, at 131.
[351] *Id.*

delay the project. Simultaneously, it can engage with industry actors by directly impacting development funding. In doing so, the Sioux Tribe has highlighted that Indigenous peoples have global reach and can impact designated countries just as much as developing countries. It may be that Indigenous peoples are translating their knowledge into norms that operate according to a nonstate-centric model of legality, a global practice that will guide behavior and effectively resolve disputes by taking their "existential" concerns seriously.[352]

This article has clarified how the Standing Rock Sioux Tribe is operating FPIC through multiple and overlapping levels of legality and mounting pressure upon IFIs at the transnational level. The Standing Rock Sioux and other Indigenous communities have created and begun engaging in sophisticated multilevel legal approaches that may mitigate the pernicious effects of state law. The Sioux Tribe has engaged in litigation at the state-level legal processes, but they have also become sophisticated tacticians at other legal levels, which might not be visible to attorneys who are primarily concerned with state law. The Sioux are using the multiple extranational levels to pressure both industry and the federal government. State and industry actors may continue to ignore Indigenous peoples and their unique histories, and may fail to understand how FPIC is operating throughout the extranational levels. However, the forces of law are changing and, in no small measure, it is changing because of peoples like the *Oceti Sakowin*.

[352] Cottrell & Trubek, *supra* note 12, at 367.