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Thomas Rudolf Eimer & Tom Bartels

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From consent to consultation: Indigenous rights and the new environmental constitutionalism

Thomas Rudolf Eimer and Tom Bartels

Institute for Management Research, Department of Political Science, Radboud University, Nijmegen, The Netherlands

ABSTRACT

International biodiversity politics is traced from the Brundtland Report (1987) to the Paris climate agreement of 2015. While continuously expanding in scope, international biodiversity regulations are gradually losing substance and tend to relinquish the self-determination rights of indigenous peoples with regard to natural resources. The simultaneity of expansion and erosion is surprising in view of the increased participation of indigenous spokespersons at international meetings. These dynamics are explained by the introduction of intellectual property rights for biological resources. The commodification of life forms has triggered an ongoing dynamic by which governments from industrialized and developing countries, transnational corporations, and some NGOs push for the legal codification of neoliberal environmentalism. These findings suggest the emergence of a new environmental constitutionalism, which subdues all spheres of life to economic imperatives and simultaneously co-opts dissenting voices to increase the stability of inherently exploitative structures.

KEYWORDS Biodiversity; traditional knowledge; intellectual property; indigenous rights; new constitutionalism; regime complexes

Introduction

This article is about a dying star. While continuously expanding in scope, international biodiversity regulations are gradually losing substance and tend to relinquish the protection of indigenous rights. The first comprehensive international treaty on genetic resources and traditional knowledge (GR & TK), the Convention on Biodiversity (CBD), attempted to reconcile environmental, economic and indigenous rights goals in an all-encompassing agreement (Redowell 1992). Over the years, the CBD has become the focal point of an increasingly dense network of international agreements that deal with GR & TK in a variety of specific contexts, including pharmaceutical inventions, cosmetics, agricultural products, and climate protection measures (Raustiala and Victor 2004, Wallbott 2014). At
the same time, however, the self-determination rights of indigenous peoples have been significantly watered down. More recent agreements replace the wording of ‘prior informed consent’ by the weaker formulation ‘indigenous consultation’. This semantic shift appears quite surprising, because indigenous representatives frequently participate at international negotiations (Reimerson 2013, Suiseeya 2014, Witter et al. 2015). Moreover, the change in wording is highly problematic from a human rights perspective, because it legitimizes the expropriation of indigenous groups in the name of scientific progress and environmental protection (Drahos 2014).

Existing literature lacks the conceptual tools to explain the move from consent to consultation. Previous writings have interpreted the international institutionalization of GR & TK policies as an emerging ‘regime complex’, ‘an array of partially overlapping and nonhierarchical institutions governing a particular issue-area’ (Raustiala and Victor 2004, p. 279–280, see also Morin and Orsini 2014, Oberthür and Pożarowska 2013). Within this framework, international biodiversity regulations are understood as the outcome of negotiation dynamics between states, environmental NGOs, and international organizations.

However, this perspective fails to acknowledge that the space of negotiable policies is pre-structured by the idea of commodifying natural assets, which is at odds, or at least not entirely compatible, with the lifeworld experiences of most indigenous actors. Taking their perspective into account, Stephen Gill’s concept of a ‘new constitutionalism’ (Gill and Cutler 2014) offers a more comprehensive interpretive framework; not only does it help to understand why non-market approaches are marginalized, but it also explains why indigenous viewpoints are swept aside despite their participation at international negotiations.

Our empirical analysis is based on process-tracing. We draw on legislative documents, minutes of international meetings, media publications, stakeholder statements, and policy briefs. All sources are analyzed with regard to the role of indigenous actors during the course of international negotiations. Additionally, we make use of 137 semi-structured interviews conducted during the course of several interrelated research projects between 2007 and 2018. We were able to talk with indigenous spokespeople, public officials, diplomats, and representatives from research institutions, corporations, and environmental NGOs in Berlin, Brasília, Brussels, Geneva, Manaus, New Delhi, Ranchi, and Washington DC. While some interviewees are directly quoted, most interviews are used as background information for the documentation of our case. Given the sensitivity of indigenous politics, we ensure the confidentiality of our interview partners by not revealing their names or any other information that may endanger their anonymity.
In the next section, we explain why we consider the prevailing biodiversity regime complex literature to be insufficient and why it needs to be amended by insights from writings on the new constitutionalism. We then explain the underlying tensions between indigenous perspectives on GR & TK and the commodification of their resources preferred by external actors. This lays the groundwork for our reconstruction of the history of international biodiversity negotiations from a low angle shot, i.e. with a focus on the non-fulfilment of indigenous demands. In the final section, we present our case as an example of the new environmental constitutionalism. We conclude with an outlook on possible future developments and some propositions for further research.

Overcoming the blind spots in the regime complex literature

Over the last twenty years, international biodiversity politics have enjoyed considerable academic attention. Moreover, empirical analyses have inspired the development of new conceptual tools to understand international environmental politics. Referring to Stephen Krasner’s notion of regimes ‘as principles, norms, rules and decision-making procedures around which actor expectations converge in a given issue-area’ (Krasner 1983 [1982], p. 1), Raustiala and Victor drew on international biodiversity politics to show that environmental policy coordination is simultaneously taking place in various negotiation forums. Moreover, they hinted at the idea that the outcome of international negotiations is not only shaped by states’ interests but also influenced by the institutional setting of the negotiations (Raustiala and Victor 2004).

Referring to the same empirical example, other authors spelled out the motivations, tactics, and interactions of international organizations’ secretariats, which were increasingly perceived as actors in their own right (Gehring and Oberthür 2009, Oberthür and Pożarowska 2013). They demonstrated that the multiplication of negotiation forums in regime complexes does not outweigh but at least relativizes the impact of powerful states’ interests and strategies, because it creates a pull factor for cooperation (Morin and Orsini 2011, 2014). Moreover, they showed that the interlinkage of various negotiation platforms creates a deliberative space in which other non-state actors such as environmental NGOs and experts can make their voices heard (Orsini et al. 2013, Kuypers 2014). In the more recent literature, the question of horizontal coherence between various international organizations’ biodiversity regulations is increasingly linked to the question of vertical coherence, i.e. the congruence between internationally agreed rule-making and domestic preference formation and policy implementation patterns.
It would do injustice to the biodiversity regime complexity literature to claim that its authors are uncritical of the results of internationally institutionalized coordination. At least in some articles, the underrepresentation of economically and politically weaker actors is problematized, and many authors are well aware of a potentially loose coupling between international agreements and domestic policies (Oberthür/Rabitz 2014, Rabitz 2018). However, the coordinating function of international agreements remains the main vantage point in this literature. Its authors tend to downplay those claims that have remained unrecognized or have not even been brought to the table. Moreover, scholars seem to equate marginalized actors’ enlarged opportunities to participate at international negotiations with the chance to have a substantial influence on their outcomes (Morin et al. 2017). Especially in view of the last point, we think that the regime complexity literature cannot fully explain the paradox of our research question.

We therefore suggest that to understand the biodiversity regime complex requires a critical political economy perspective. In our view, Stephen Gill’s concept of new constitutionalism may serve as an alternative interpretive framework, which should not replace but amend the existing literature. Like the regime complexity literature, Gill starts from the observation of a densification of international rule-making, which can be associated with cooperation within and among various international organizations (Gill 1998). Gill and other critical scholars understand the ongoing process of legal codification as an attempt of powerful corporate actors and states to cement a neoliberal world order by internationally binding treaties (Gill 1995, Cutler 2014). Secure property rights play an important role in this process, because they make resources tradeable and facilitate the investments of financially strong actors.

At the same time, de-commodifying (e.g. welfare) policies are dismantled, and all citizens are increasingly subjected to the pressures of market forces. Any resistance against the move towards ‘disciplinary capitalism’ is weakened by the individualization and denial of collective (group or class-based) interests (Gill 2002; Cerny 2010). Potentially critical actors are allowed to formally participate at discussion rounds, but their influence is limited to technical improvements of the pre-defined policy course (Gill 1995). While their co-optation is used to legitimate decision-making processes, any substantial resistance is supressed by authoritarian means if needed (Wigger and Buch-Hansen 2014). However, the new constitutionalism remains open for contestation because of its inherent contradictions (Gill and Cutler 2014).

As of yet, the literature on the new constitutionalism has only occasionally been applied to environmental politics. Gill himself remains rather superficial in this regard, simply stating that capitalism is unable to cope with natural crises (Gill 2012). We nevertheless think that his basic
framework can be applied to our case, if it is amended by the idea that environmental policies do not necessarily exclude but rather go hand in hand with market-based ideologies and instruments (Zelli et al. 2013). To make our argument comprehensible, however, we first have to explain the tension between indigenous actors’ preferences and the commodification of their resources.

**Little words that count**

Indigenous communities throughout the world have acquired an intimate knowledge of local flora and fauna. Plants and animals are used for nutritional and medicinal purposes, but they are also at the roots of indigenous mythologies, cultural practices, and belief systems (Dutfield 2014). Usually, GR & TK are subject to specific customary laws (Francis 2009). Many healers in Tamil Nadu (India), for example, believe that any commercial exploitation of their knowledge will corrupt the pharmacological effects of the used substances, and the Terena people (Brazil) consider the whole community as the owner of GR & TK, even if the knowledge is exclusively held by their shamans (Interview 187). While many authors assume that customary rules ensure the sustainable use of natural resources (e.g. Nagendra and Ostrom 2012), indigenous communities themselves perceive these rules as a cornerstone of their cultural identity (Tobin and Swiderska 2001). That does not necessarily mean that they would deny the access to GR & TK, but they insist on their right to decide by themselves and by their own rules if, and under which conditions, they share their knowledge with outsiders (Drahos 2014).

In international law, indigenous self-determination is generally subsumed under the concept of (free) prior informed consent (PIC). Graham Dutfield, one of the leading ethnologists in this field, defines PIC as follows:

> Prior informed consent is consent to an activity that is given after receiving full disclosure for the activity, the specific procedures the activity would entail, the potential risks involved, and the full implications that can realistically be foreseen. Prior informed consent implies the right to stop the activity from proceeding and for it to be halted if it is already underway. (Dutfield 2009, p. 60).

Most scholars agree that PIC not only affects the substance of a decision, but also refers to a procedural dimension (Buxton 2010). It implies bottom-up procedures, by which customary decision-making processes must not be disturbed by external threats or coercion (Dutfield 2014). But self-determination rights for indigenous peoples also impinge on the principle of state sovereignty, which is particularly emphasized by governments in the postcolonial world. Although PIC does not entail the right to secession,
it reduces governmental prerogatives to regulate property rights. Such restrictions are anything but unique. It has been argued that any self-commitment vis-à-vis foreign states, transnational firms, and international organizations can be interpreted as an expression of a state’s ‘external sovereignty’, by which governments voluntarily relinquish some of their competencies for the sake of economic advantages (Krasner 2001). However, PIC stipulates ‘legal pluralism’ on the domestic level, because it obliges governments to incorporate the customary rules of indigenous citizens within the law of the state (Teubner and Korth 2009). In the words of David Lake (2003), it restrains ‘internal state sovereignty’.

At the same time, PIC significantly enhances the bargaining position of indigenous communities vis-à-vis other non-governmental actors. Although not explicitly stated, it grants them a collective property title over their community’s resources, whose distribution is internally defined (Buxton 2010). Once again, this is hardly a unique institution. Intellectual property law, for example, allows companies to claim property rights for the inventions of their employees (May and Sell 2006). If collective ownership titles are applied to indigenous communities, however, they compel external actors to accept a denial of disclosure. It is against this background that many external actors (e.g. scientists, environmentalists) are concerned about the unpredictable consequences for negotiations unfolding under the PIC principle.

In international negotiations, many actors prefer weaker formulations such as ‘prior informed consultation’ or even ‘approval and involvement’ (CBD, art. 8j). These terms are hardly defined. The U.N. REDD (Reducing Emissions from Deforestation and forest Degradation) program operationalizes ‘consultation’ as a ‘two-way flow of information and the exchange of views. This involves sharing information, garnering feedback and reactions and, in more formal consultation processes, responding to stakeholders how their recommendations were addressed (including if they were not, why not)’ (UN-REDD 2013, p. 41). While this formulation also envisages the participation of indigenous groups, it does not compel external actors ‘to listen and to accept “no” as an answer’ (Hanna and Vanclay 2013, p. 154).

In the language of game theory, the difference between consent and consultation is similar to the distinction between voluntary and compulsory negotiation systems (Scharpf 1993), at least from the perspective of indigenous peoples. The principle of consent endows them with the same veto power as external actors, who may always decide to withdraw from a project. Mere consultation rights, on the other hand, lead to a highly asymmetric game, in which only external actors are vested with exit (veto) powers, whereas indigenous communities are eventually compelled to accept an agreement. Referring to Adam Smith’s famous metaphor of the market mechanism, this ultimately leads to a situation in which the baker may still try to negotiate an
acceptable price but is ultimately forced to sell his pastries. Apart from this economistic interpretation, many authors claim that the veto power of indigenous actors motivates external actors to engage in more in-depth discussion with indigenous groups, in which bargaining tactics may be replaced by ‘discursive democracy’ (Buxton 2010).

Admittedly, both ‘prior informed consent’ and ‘consultation’ are only vaguely defined terms that do not qualify as an *erga omnes* (universally applicable) obligation in international law. Moreover, participatory procedures inevitably raise many technical issues that cannot easily be resolved (Dutfield 2009). However, consent and consultation represent two clearly distinguishable ‘regulatory principles’ (Braithwaite and Drahos 2000, p. 18–19), which imply different patterns of interaction between indigenous communities and external actors (Haugen 2016). As we will show, negotiators from all sides are very well aware of these subtle but important differences and attempt to craft wording in line with their own interests.

**Expansion and erosion: the evolution of international biodiversity politics**

Here, we trace international negotiations on TK & GR over the last 30 years with a focus on indigenous rights. We start with an analysis of the dynamics of the early 1990s, which led to the adoption of the Convention on Biodiversity and the subsequent application of its basic concepts in other international agreements. We then describe the consolidation of international regulations in the 2000s, which entailed an at least facultative recognition of indigenous rights. Finally, we show that the international legal framework as well as its interplay with regional and national regulations are currently rapidly expanding, but tend to weaken indigenous self-determination rights.

**Defining the stakes: biodiversity regulations in the 1980s and 1990s**

Already in the colonial era, European natural scientists were fascinated by the abundance of biodiversity in the newly conquered territories. With the voluntary or forced help of indigenous communities, they ‘discovered’ numerous species in the New World and established scientifically renowned collections in their motherlands (Lowenhaupt Tsing 2005). After the second world war, their moral and legal impunity was confirmed by the ‘common heritage of mankind’ doctrine, which pictured GR & TK as a public good free to be accessed without further obligations (Shiva 2001, p. 49–50).

This perspective was challenged in the 1980s when the U.S. Supreme Court ruled that genetically engineered micro-organisms would be eligible for patent protection (Diamond v. Chakrabarty, 447 U.S. 303). Governments in developing countries first sought to prevent the application
of intellectual property rights to their resources. During the negotiations of the Undertaking on Plant Genetic Resources, they defended the common heritage doctrine (Fowler 1994). Increasingly, however, they realized the economic potential of biodiversity and demanded financial compensation for the use of the ‘green gold’ of their hinterlands (Raustiala and Victor 2004, p. 289).

At the beginning of the 1990s, the alliance of countries from the global South gained the support of transnational environmental groups and international organizations (Görg 2003). The secretariat of the U.N. Commission on Environment and Development pressed strongly for a globally binding agreement (Bernstein 2000). It enjoyed the technical, personal, and financial support of the Business Council for Sustainable Development, which was intensively involved with pre-negotiations for the 1992 Earth Summit in Rio de Janeiro (Doran 1993). Indigenous communities, on the other hand, were not admitted to participate directly at either the preparatory meetings or the concluding summit (Wold 1993).

Eventually, industrialized countries conceded that the exchange of GR & TK should be subject to an international agreement, although in a rather narrow and unspecific sense. In the Convention on Biodiversity (CBD), provider and user states agreed on the principle that biological resources fall under the sovereign rights of the states of origin (Götting 2004). Any extraction becomes subject to ‘fair and equitable access and benefit sharing’ and grants indigenous communities the right of ‘approval and involvement’ (CBD, Art. 8j). However, the convention only refers to ‘consent’ with regard to the competences of national authorities (CBD, Art. 15.5).

Within academic debates, the CBD was quickly described as an innovative international regime (Spector et al. 1994). Spurred by the activities of environmental groups and the ‘biodiplomacy’ of developing countries, its principles spilled over to negotiations within adjacent fields (Dutfield 2001). Most notably, negotiations on seed varieties gained new momentum (Rosendal 2006). After protracted negotiations in the Food and Agriculture Organization (FAO), the International Treaty on Plant Genetic Resources for Food and Agriculture explicitly subjected biological materials to the sovereignty of states (Cooper 2002). Indigenous customary rights, however, are only indirectly addressed in the ITPGRFA (see Art. 9.2c), and the wording avoids any intertextual interference with their rights as described in the CBD.

The lengthy negotiation phase for the ITPGRFA from the late 1980s until the early 2000s already indicated industrialized countries’ reluctance to subscribe to potentially costly commitments. The U.S., for example, signed both the CBD and the ITPGRFA but has never become a party to either treaty. This reflects the concerns of major U.S. biotechnology firms, which were afraid of additional costs for their bio-explorations in the
Global South (Carr 2008). At the same time, the corporate sector fought for stricter protection of its own innovations. Lobbied by a broad range of industries, the U.S. Trade Representative pushed for the global adoption of rigorous intellectual property standards to prevent ‘piracy’ in the developing world. U.S. companies convinced their European counterparts to support this (Drahos and Braithwaite 2002, p. 121–126).

Together, the U.S. and the European Union bypassed the World Intellectual Property Organization (WIPO), which had been traditionally concerned with the negotiations on protective measures for intangible goods (Sell 2010). Instead, the largest trade powers of the 1990s added intellectual property issues to the negotiation package of the GATT Uruguay round, which ultimately led to the foundation of the World Trade Organization (WTO) in 1994. When the U.S. and the EU promised facilitated access to their agricultural and textile markets (Cottier and Panizzon 2004), developing countries ultimately subscribed to the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in 1994. The agreement significantly limits their possibilities for reproducing inventions from industrialized countries. TRIPS does not explicitly refer to GR & TK. Industrial inventions which make use of indigenous knowledge are eligible for patentability, but GR & TK as such do not enjoy any intellectual property protection at all. Indigenous rights such as PIC are not even mentioned.

By the same logic, the amendment of the Union for the Protection of New Varieties of Plants (UPOV) in 1991 strengthens the rights of plant breeders to protect newly developed plant varieties, but excludes incremental seed improvements by small farmers (Dutfield 2004). While developing countries formally remained free not to ratify the UPOV amendment, they were strongly pressured to do so (Chauhan et al. 1997, p. 59–61). But even without direct coercion, many leading agronomists in the global South assumed that the introduction of property rights would be necessary to preserve their countries’ biodiversity (Swaminathan 1997). This interpretation, however, went against the claims of indigenous peoples. Their representatives addressed the U.N. Subcommission on the Prevention of Discrimination and Protection of Minorities to demand more self-determination rights with regard to their resources (Engle 2010, p. 67–68).

**Balancing property and Indigenous rights in the 2000s**

Since its commencement, governments in developing countries criticized the perceived unfairness of the TRIPS agreement. Their complaints were echoed by prominent activists such as Vandana Shiva, who contrasted the TRIPS obligations to refrain from any imitation of industrialized countries’ ‘inventions’ to the allegedly rampant theft of GR & TK (‘biopiracy’) in
developing countries (Shiva 2001). Many civil society groups, e.g. the Rural Advancement Foundation International, supported this criticism. While their protests strengthened the claims of developing countries’ governments, it appears questionable whether they really met the demands of the affected indigenous communities. At least implicitly, the framing of biopiracy as ‘theft’ helped to proliferate the view that GR & TK should be perceived as tradable commodities.

Nevertheless, the global discourse on GR&TK stimulated substantial reforms on the regional level. The African Union, for example, adopted the African Model Law (2000) on the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources. The African Model Law attempts to reconcile ‘the prior informed consent of the State and the concerned local communities’ (Part I, section c). While this formulation seems to give more rights to indigenous knowledge holders than the CBD, the subsequent objectives only speak about their ‘effective participation’ (Part I, section e) and explicitly ‘promote the conservation, evaluation and sustainable utilisation of biological resources’ (Part I, section h). When defining PIC (Part II), the African Model Law appears less state-centred than the CBD, but still connects the consent of indigenous groups and state authorities without anticipating conflicting views.

Meanwhile, the WIPO perceived the debates on biodiversity as an opportunity to put itself back into play. It initiated several fact-finding missions in cooperation with the CBD secretariat (Straus and Klunker 2007). The activities of the WIPO secretariat coincided with increased attention by developing and emerging countries to the potential role of this forum. Led by Brazil, a broad alliance of provider states strongly advocated amendment of the TRIPS agreement (May 2006), claiming that the use of GR & TK should be documented in patent applications. Even some leading trade economists argued that a ‘disclosure requirement’ would make it possible to trace the use of these resources by the life science industry in industrialized countries and thereby serve as an enforcement mechanism for the access and benefit sharing provisions of the CBD (Cottier and Panizzon 2004).

Since 2002, the disclosure requirement also enjoyed the official support of the CBD, which explicitly referred to it in the ‘Bonn Guidelines’ (Helfer 2004). Some industrialized countries such as Switzerland showed their willingness to accept a TRIPS amendment, because they expected that this position would help to promote their corporations’ position in developing countries (Hufty et al. 2014). However, the majority of OECD countries, spearheaded by the U.S., passionately rejected any legal change. They even denied the CBD observer status in the WTO in order to forestall any substantial debate (Interview 044).
In view of the political stalemate, the WIPO decided to focus on technical questions. It initiated a reform of the international patent classification system, which made it possible for patent offices to recognize documented GR & TK during the examination of patent applications (Dutfield 2001, p. 268–269). Provider countries such as India actively supported this reform, because it facilitated the economic exploitation of indigenous resources. But even industrialized countries felt pressurized to contribute, because they were aware that a reputation as ‘bio-pirate’ would endanger the position of their corporations in the provider states of GR & TK (Carr 2008). Most notably, the U.S. concluded an agreement with Indian authorities to consider the Indian Traditional Knowledge Digital Library (TKDL) as a source for patent examinations (Narula 2014).

At least for a while, WIPO officials tried to directly involve indigenous actors (Interview 111). In 2005, they proactively supported and co-financed the establishment of a voluntary fund to make it possible for indigenous representatives to participate in the deliberations of the Intergovernmental Committee on Intellectual Property and Genetic Resources (IP Watch 2013). The reactions of governments from developing countries, however, remained lukewarm at best. Indian diplomats, in particular, made it clear that separate representation of indigenous interests would only detract from the overarching purpose to secure property rights for GR & TK (Interview 115). WIPO diplomats began to regret the facilitation of indigenous representatives, because they realized that their demands for self-determination provoked fierce resistance from industrialized and developing countries’ governments alike (Interviews 115). For this reason, the organization even tried to prevent the publication of one of its own reports (Tobin 2014, p. 167).

But indigenous spokespersons also quickly recognized that their participation at the WIPO discussion rounds obscured the lack of meaningful involvement (Interview 202). Due to this, they drew on their comparably stronger position within the U.N. human rights system (Helfer 2003). Towards the end of the ‘International Decade of the World’s Indigenous People’ (1995–2004), they had succeeded in getting a relatively strong voice in the international human rights arena (Feiring 2013, p. 27–30). After passionate disputes, the final version of the Declaration on the Rights of Indigenous Peoples explicitly mentions the concept of (free) prior informed consent and confers on indigenous communities ‘the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions’ (Art. 31.1).

While the U.N. declaration is not legally binding, it served as a major point of reference during debates in the CBD during the late 2000s. Increasingly, indigenous actors were able to participate at the side events of the conferences of parties of the CBD (Teran 2016). Diplomats from
developing countries had mixed feelings about their interventions (Interview 187). On the one hand, they understood the participation of indigenous as an opportunity to increase pressure on industrialized countries and life science industries (Interview 185). On the other hand, indigenous demands for the international adoption of indigenous PIC were perceived as a threat to sovereign prerogatives. It is against this background that Brazilian diplomats explicitly supported the participation of indigenous representatives but made clear that they were not entitled to speak on behalf of the Brazilian government (De Chastonay 2018: 104–125).

Finally, the donor countries of GR & TK succeeded in convincing industrialized countries that the CBD must be amended. In the Nagoya Protocol, the latter promised to establish checkpoints in order to ensure that companies and public research institutes comply with access and benefit-sharing mechanisms of the donor countries (Rosendal and Andresen 2014, Oberthür and Pożarowska 2013, p. 108–109). With regard to indigenous rights, however, the Nagoya Protocol remains quite ambivalent. On the one hand, it strengthens the legal position of indigenous and local communities by directly referring to the U.N. Declaration on the Rights of Indigenous Peoples (Suiseeya 2014, p. 103), explicitly addressing their importance as ‘knowledge holders’ and stipulating that any access to their resources shall be subjected to their PIC. On the other hand, the corresponding regulations remain subject to national law (Nagoya Protocol, Art. 6.3f), which eventually gives governments the right to determine the extent of indigenous self-determination.

From consent to consultation: biodiversity regulations since the 2010s

With some notable exceptions (U.S.A., Brazil), the Nagoya Protocol was quickly ratified by many industrialized and developing countries. Indigenous commentators became aware that their situation was dramatically changing. Ana María Guacho, a spokesperson of Ecuadorian indigenous groups, summarized her interpretation as follows:

Since ancestral times, Mother Earth has been cared for, protected, and respected by Indigenous Peoples as a living being and life giver. (...) We never put a price on a plant. (...) This contemporary world is going against the natural laws that our ancestors transmitted to us orally from one generation to the next. I do believe that the Nagoya Protocol is going to change our life. We will be forced to think and act in a new way. (A. M. Guacho, quoted in Teran 2016, p. 14–15).

Not only indigenous actors made up their mind. The EU quickly adopted the Nagoya Protocol, but avoided any connection with intellectual property laws. Although a resolution of the European Parliament initially suggested
the adoption of developing countries’ demands for a disclosure requirement [2012/2135(INI)], the proposed linkage between safeguards for indigenous PIC and European intellectual property law was denied by the Council and the European Commission. Neither institution was willing to endanger the interests of the European pharmaceutical industry, which claimed that the disclosure requirement would create legal uncertainty and lower their competitiveness vis-à-vis multinational corporations from the U.S.A. (Interview 420).

The lack of an internationally viable enforcement mechanism for indigenous rights also puts the provider states of GR & TK under competitive pressure. If they implement PIC provisions in their domestic legislation, they can reasonably expect that transnational life science industries will relocate their research to other countries in which bio-explorations are not complicated by the protection of indigenous rights (Interview 433). Against this background, emerging countries such as Brazil have initiated reforms to replace the formerly mandatory consent of indigenous communities by sweeping consultation rights (Eimer and Donadelli 2016), while other countries (e.g. India) rigorously promote the interests of their own life science industries and even make it impossible for indigenous (Adivasi) activists to protest on the international level (wiretapping, denial of passports). For similar reasons, the already vague recognition of indigenous self-determination in the African Model Law suffers from a lack of implementation and is hardly applied in practice.

At the same time, biodiversity regulations are rapidly spilling over to other issue-areas. GR & TK have become increasingly important in the context of Reducing Emissions from Deforestation and Forest Degradation (REDD) initiatives (Thompson et al. 2011). In essence, REDD+ initiatives are based on the sustainable use of natural resources in the Global South in exchange for financial compensation from carbon dioxide emitting companies. The exploration of GR & TK is needed to define appropriate reforestation plans (Feldt 2009). Quite often, however, local project developers ignore indigenous customary rules (Ciplet 2014) and even approve enforced displacement of indigenous groups as soon as they have transmitted the necessary background knowledge for REDD+ projects (Interview 450).

On the international level, indigenous representatives keep protesting against the negative consequences of internationally hailed climate protection policies. Initially, they focused on the World Bank, one of the largest financiers of REDD+ initiatives. At the time, the World Bank appeared very committed to taking indigenous voices into account (Interview 453). Due to fierce objections from many national governments (World Bank 2016), however, the organization stepped back and explicitly stated that it considered the consent of indigenous communities to be given ‘even if some individuals or groups object’ (World Bank 2017, p. 80). Reacting to the new
guidelines, indigenous actors complained about the ‘direct affront to the hundreds of indigenous representatives who travelled to their capital cities, to regional consultations and to Washington DC to share experiences and provide recommendations’ (Forest Peoples Program 2016).

Similar dynamics can be observed in the context of the negotiations of the UNFCCC (U.N. Framework Convention on Climate Change). Here again, REDD+ initiatives enjoy the broad support of the involved international organizations, environmental NGOs, transnational companies and governments, despite all REDD+’s well-known shortcomings. Indigenous representatives are regularly invited to participate at the talks, but they are only listened to if they subscribe to the prevailing discourse (Enns et al. 2014, Wallbott 2014).

The dilemmas and pitfalls of indigenous participation also became visible during the negotiations of the Paris climate agreement. Once again, indigenous groups perceived the summit as an occasion to bring in their perspectives. They considered their participation to be particularly relevant because of their special vulnerability to the consequences of climate change. In fact, 51 indigenous representatives were formally invited to participate in order to show the urgency of an international agreement (UNFCCC 2014). In view of their own demands, however, indigenous participation was hardly successful. The Paris agreement explicitly mentions traditional knowledge as an important factor to combat climate change, but the vast majority of the diplomats both from industrialized and developing countries rejected any direct reference to indigenous rights (Hansen 2015, Komai 2015, Kumar-Rao 2016). Instead of prior informed consent, the Paris agreement merely stipulates that indigenous concerns should be ‘taken into consideration’ (Paris agreement, Art. 7.5).

In an official statement, the U.N. Special Rapporteur on Indigenous Rights officially criticized the weak human rights language of the Paris agreement (Survival International 2015). To express their deep disappointment, indigenous representatives made use of the official announcement of the conclusion of the Paris agreement to claim that the world’s most ambitious attempt to combat climate change would entail genocidal consequences (Friends of the Earth 2015). Their sharp criticism, however, remained largely ignored by the broader public audience, which hailed the agreement as a milestone for international climate protection. For the moment, it seems that international climate policies will further weaken indigenous rights in the biodiversity regime complex. However, the ongoing revolts of indigenous groups against enforced reforestation projects (Nel 2017) also make clear that the contestations are far from over.
Conclusion: indigenous rights and the new environmental constitutionalism

Here, we have explained the evolution of a dying star – why international biodiversity regulations are expanding in scope while losing their indigenous rights substance. Empirically, our analysis shows that the simultaneity of expansion and erosion can be explained by the introduction of intellectual property rights for biological resources. The commodification of life forms has triggered an ongoing dynamic by which governments from both industrialized and developing countries, corporate actors, and even some environmental NGOs push for an expansion of market logic to ever new fields. To legitimize their ambitions, dominant actors instrumentalize the participation of indigenous representatives at international negotiations but deny or even repress their demands for self-determination as soon as this might endanger the fragile compromise between environmental goals and economic interests.

In our reconstruction, we have deliberately focused on the rights of indigenous peoples. The low angle view admittedly eclipses those achievements which are usually highlighted by the biodiversity regime complex literature. We agree that the institutionalization of international biodiversity politics has helped to reconcile environmental and economic priorities while also providing a compromise between the financial interests of GR & TK user and provider countries. In our view, the regime complexity literature provides a framework very well-suited to understand the negotiation dynamics related above. However, we also warn that the emphasis on property rights in the expanding biodiversity regime complex tends to sacrifice internationally recognized indigenous rights on the altar of the new environmental constitutionalism. As long as indigenous actors’ criticisms of market mechanisms are not taken seriously, their participation will not increase, but will eventually undermine the legitimacy of international rule-making.

Yet the current state of affairs is not the ‘end of history’ (Fukuyama 1989). It is still possible that industrialized countries will give up their resistance to the disclosure requirement in intellectual property law and that stakeholders from both the Global North and South will acknowledge their shared responsibility for recognition of indigenous rights in reforestation projects. To use the vocabulary of regime complexity authors, this would not only strengthen horizontal coherence (between intellectual property, environmental, and human rights agreements) but also reduce competitive pressures among the donor countries of GR & TK and thereby facilitate the vertical coherence of the biodiversity regime complex.

To be clear, such a decision might reduce the profitability of industrialized countries’ life science industries, impede some reforestation projects, and
challenge developing countries’ ambitions to strengthen their internal sovereignty vis-à-vis indigenous actors. However, it would help to (re-)connect the environmental and economic goals of the biodiversity regime complex with its human rights dimension. For better or worse, the dying star of international biodiversity regulations might open the space for a new galaxy.

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Disclosure statement

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List of Interviews

Interview 111. WIPO official, September 15, 2010, Geneva.
Interview 187. Brazilian Ministry of foreign affairs official, August 4, 2011, Skype Interview.
Interview 202. Brazilian indigenous spokesperson, August 17, 2011, Brasília
Interview 304: Indian Adivasi healer, February 19, 2010, village in Jharkhand (India)
Interview 408: Brazilian indigenous spokesperson, August 30, 2012, São Paulo
Interview 431: Representative of a Brazilian NGO, July 23, 2015, Brasília
Interview 433. Representative of a Brazilian pharmaceutical company, July 28, 2015, Brasília
Interview 434: Brazilian prosecutor, July 28, 2015, Brasília
Interview 450. Spokesperson of the Brazilian rubber tappers’ movement, August 12, 2015, Manaus
Interview 453. Representative of a German indigenous rights NGO, July 10, 2017, Cologne
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