

International Forum on Indigenous Peoples Legal Aid 【Session II - Consult and Consent】

**Panelist: Legal Center of Indigenous
Peoples**

Lawyer Hui-Hsin Luo

2024.9.4



Agenda

I. The Right of Consult and Consent in Taiwan's Law

II. Dispute over the Right of Consult and Consent in Taiwan's Law

III. Conclusion



財團法人法律扶助基金會

原住民族法律服務中心

Legal Center of Indigenous Peoples, Legal Aid Foundation

THE RIGHT OF CONSULT AND CONSENT IN TAIWAN'S LAW



財團法人法律扶助基金會
原住民族法律服務中心
Legal Center of Indigenous Peoples, Legal Aid Foundation

Why do the indigenous peoples in Taiwan have the right of consult and consent?

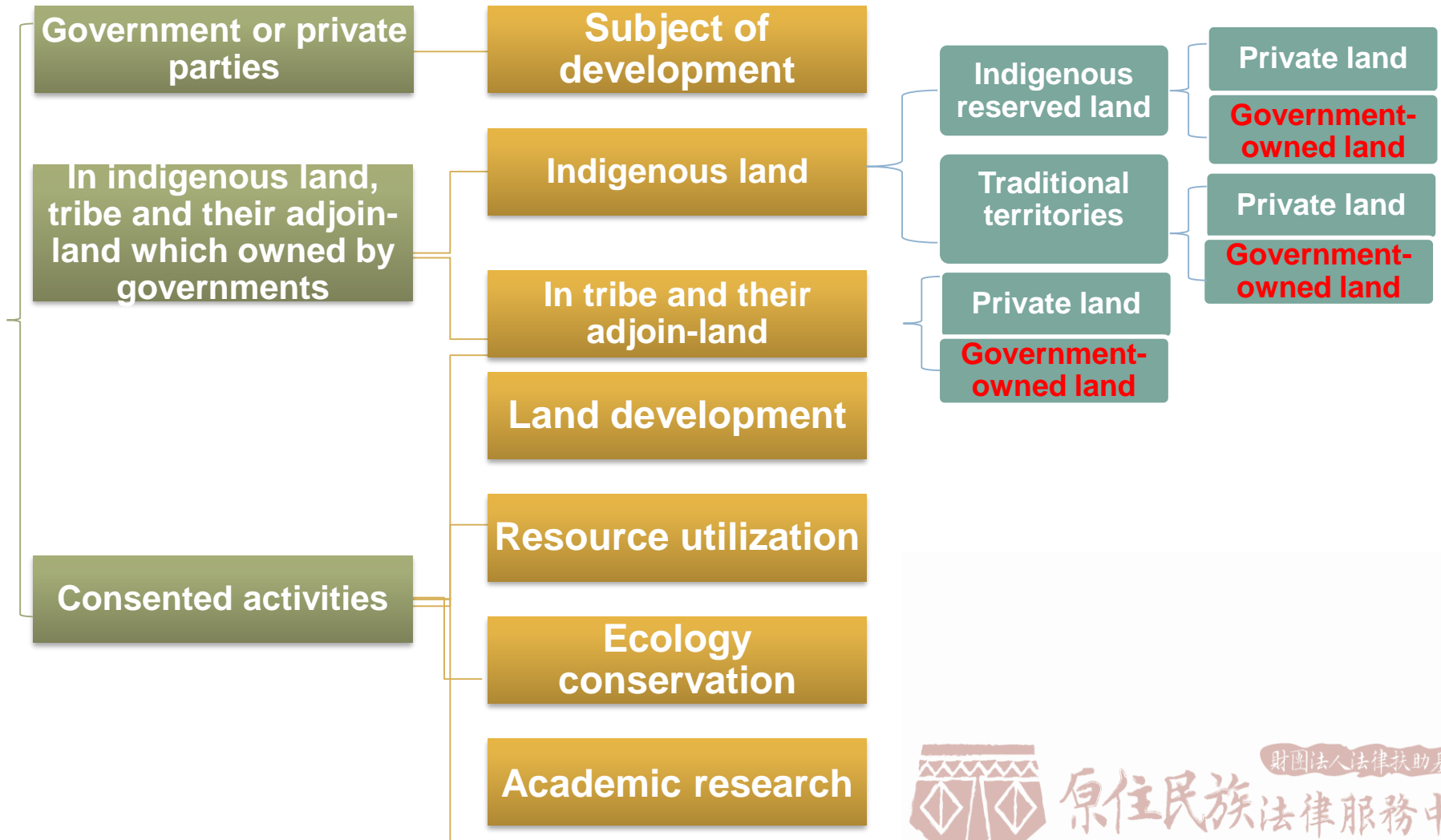
Supreme Administrative Court 2019 Shang No. 894 Ruling (Truku People v. Asia Cement):

- The subsistence, spirits, and cultural activities of the indigenous peoples **heavily rely on** the land they live upon.
- The indigenous peoples **understand to the most extent and are the most sensitive to** the impact of development on the subsistence and traditional culture of the indigenous land.
- In order to reduce **the implications on the subsistence and cultural rights of the indigenous peoples** of land development, the indigenous peoples' right of Consult and Consent is acknowledged.
- The indigenous tribes (**collective**) and peoples (**individuals**) have the right of Consult and Consent.



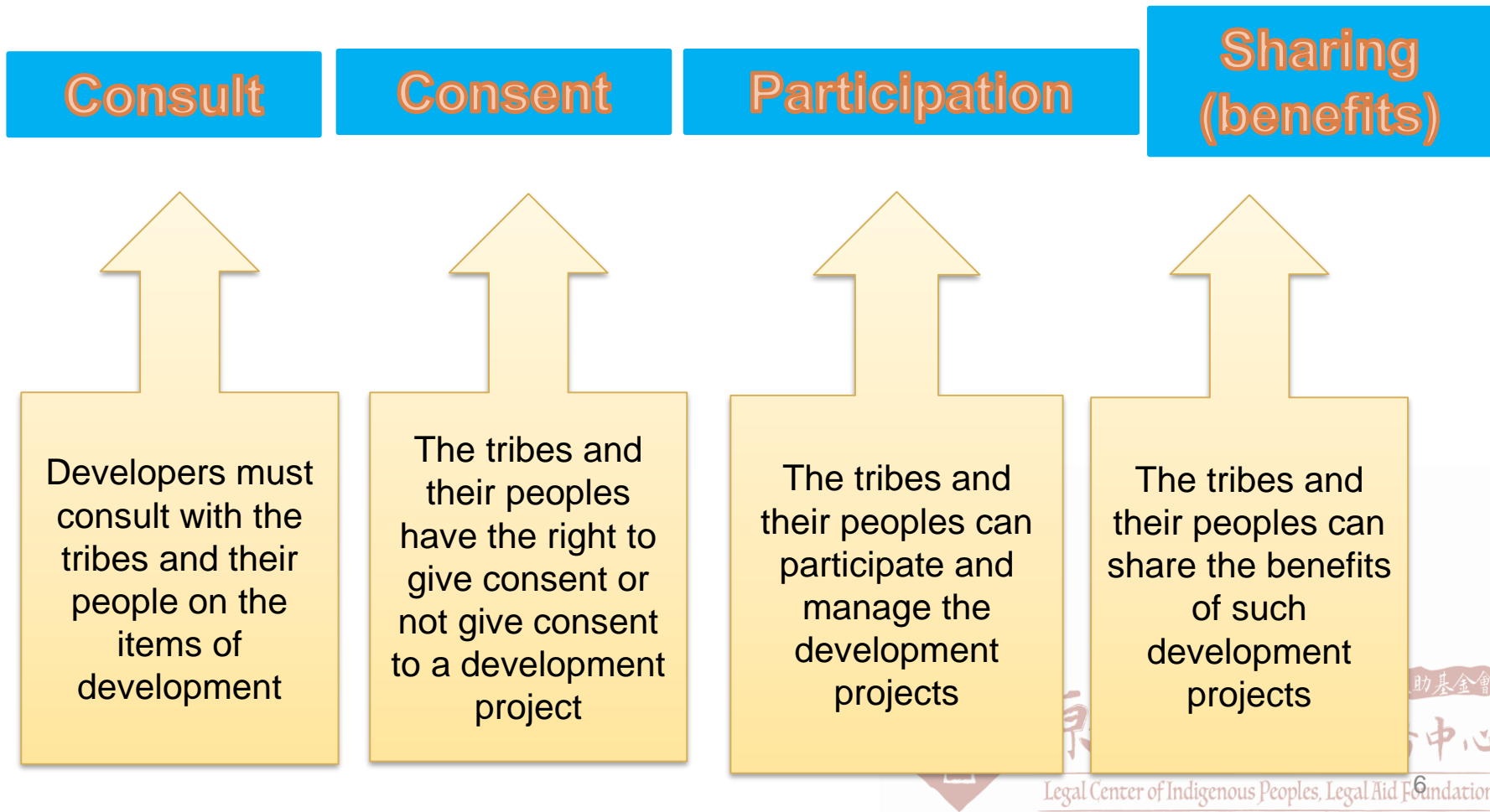
The Indigenous Peoples Basic Law

Constituent Elements of Article 21



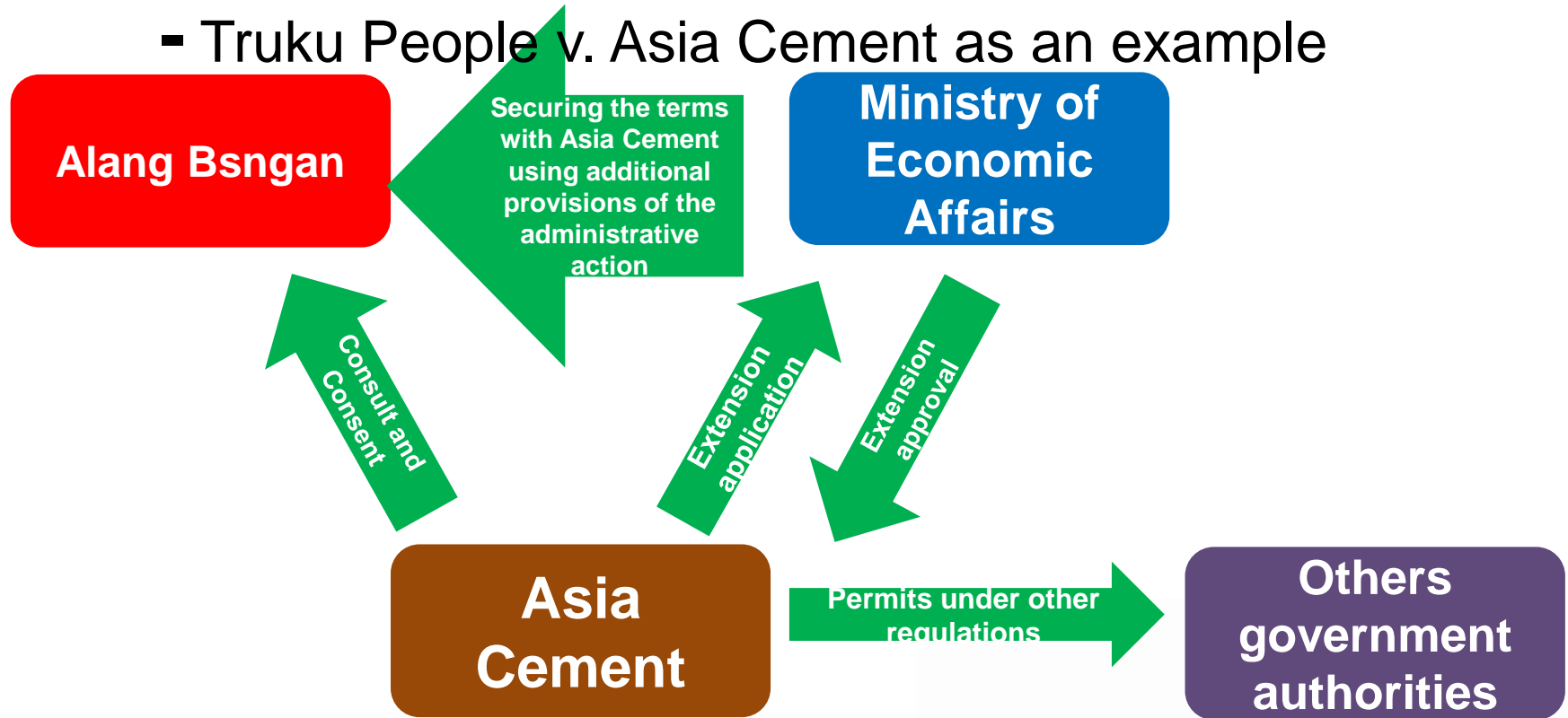
Article 21 of the Indigenous Peoples Basic Law

The rights that the indigenous tribes and peoples have:



The legal effects of the right of Consult and Consent

- Truku People v. Asia Cement as an example



DISPUTE OVER THE RIGHT OF CONSULT AND CONSENT IN TAIWAN'S LAW



財團法人法律扶助基金會
原住民族法律服務中心
Legal Center of Indigenous Peoples, Legal Aid Foundation

DISPUTE I. DOES THE SCOPE OF CONSULT AND CONSENT CONTAIN PRIVATE LAND?



財團法人法律扶助基金會
原住民族法律服務中心

Legal Center of Indigenous Peoples, Legal Aid Foundation



How does Article 21 interpret the dispute?

- Item 1 of Article 21 of the Indigenous Peoples Basic Law stipulates:

When governments or private parties engage in land development, resource utilization, ecology conservation and academic research **in indigenous land, tribe and their adjoin-land which owned by governments**, they shall consult and obtain consent by indigenous peoples or tribes, even their participation, and share benefits with indigenous people.



How to interpret:

Version I: “Indigenous land,” “tribe,” and “their adjoin-land which owned by governments” → include **private land** and **government-owned land**.

Version II: “Indigenous land, tribe, and their adjoin-land which owned by governments” → limited to **government-owned land**.

Let's review the journey of amending Article 21 of the Indigenous Peoples Basic Law

Before amendment	When governments or private parties engage in land development, resource utilization, ecology conservation and academic research in indigenous land , they shall consult and obtain consent by indigenous peoples or tribes, even their participation, and share benefits with indigenous people.
After amendment	When governments or private parties engage in land development, resource utilization, ecology conservation and academic research in indigenous land, tribe and their adjoin-land which owned by governments , they shall consult and obtain consent by indigenous peoples or tribes, even their participation, and share benefits with indigenous people.



Is it true that Consult and Consent is not required for private land?

財團法人法律扶助基金會
原住民族法律服務中心
Legal Center of Indigenous Peoples, Legal Aid Foundation

遭花蓮紅葉部落控告偽文 地熱業者否認：私有地開發免諮商同意



地熱開發商瑞興倍達羅得公司6月下旬起，在萬榮鄉紅葉段912-1地號引發居民反彈。(記者花孟璟攝)

黃金海渡假村5度審環現差 台東3原民部落持續反對

#渡假村 #部落 #專案小組 #黃金海 #蘭路



反畜牧場公聽會 2部落：繼續蓋剝



巴壠、馬佛部落昨天舉辦反畜牧場「公聽會」，要求縣府1週內發公文讓業者停工，否則要封路不讓養牛場工程車進入。(記者花孟璟攝)

Photo credit: Liberty Times,
United Daily News, Taiwan
Public Television Service



原住民族法律服務中心
Legal Center of Indigenous Peoples, Legal Aid Foundation

DISPUTE II. HOW TO DETERMINE THE RELEVANT TRIBES HAVING THE RIGHT OF CONSULT AND CONSENT?

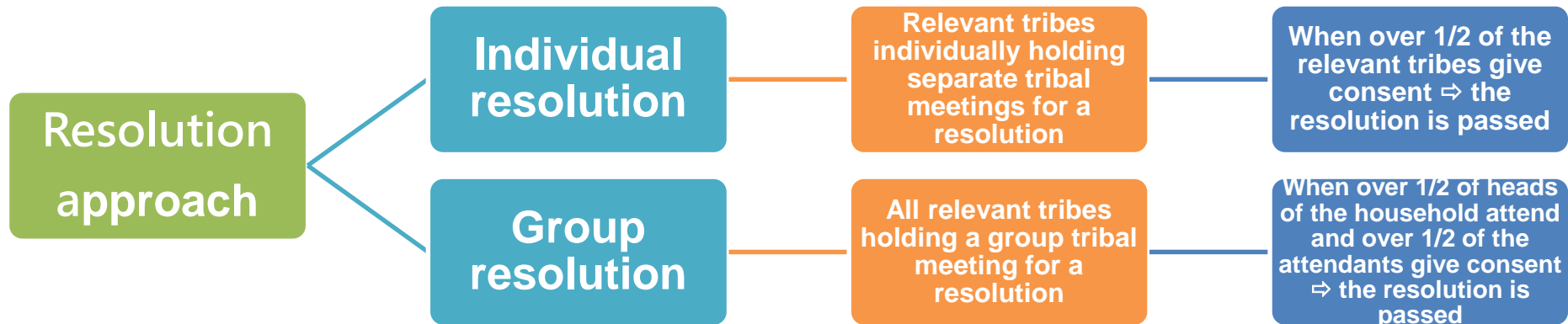


How to determine the relevant tribes?

- Relevant tribes: Tribes whose rights to indigenous land or natural resources are impacted by the activities requiring consent to (Article 2 of Regulations for Consulting Indigenous Peoples or Tribes to Obtain Their Consent and Participation, hereafter "Regulations on Consult and Consent".)
- "Relevant tribes" are recognized according to the following principles (§14 Item 1):
 - The **location or area** of the activities requiring consent is within the tribe's area.
 - The **implication** of the activities requiring consent is within the tribe's area.
- Competent authority of recognition: Township (City) offices, in principle; when it is difficult to determine, the Council of Indigenous Peoples determines the relevant tribes (§14 Item 2).



How do multiple tribes come up with a resolution?



Shih Feng Power's hydropower plant as an example



Shih Feng Power's hydropower plant as an example

Name of Tribe	Population	Resolution
Tavila	381	No consent
Tausa	536	Consent
Valau	258	Consent
Nakahila	218	Consent
Bgurah Branaw	103	Consent
Swasal	499	Consent

Five tribes out of the six tribes gave consent; with majority of the tribes giving consent, the development thus is allowed. Under the circumstances, the Tavila tribe is facing development while voting no. Does this resolution respect the Tavila tribe's autonomy?



Issues with “relevant tribes”

- There is no clear process for the township/ city offices to determine relevant tribes, and they almost solely rely on materials provided by the developer.
- The township/ city offices lack the ability and resources to compare the traditional territories to the areas in the development projects and further assess the development’s impact on the tribes’ land and natural resources.
- Green-lighting a development project with over half of the relevant tribes giving consent sacrifices the autonomy of the tribes that did not give consent.
- All relevant tribes have equal-weighted votes regardless of the extent of potential impact.



**DISPUTE III. ARE THE HEADS OF
THE HOUSEHOLD THE ONLY
ONES ELIGIBLE TO VOTE IN THE
RESOLUTION?**



INTRODUCTION OF THE KATRATRIPULR SOLAR FARM CASE





The land in question - Kanaluvang (in Beinan language) is a traditional territory for the Katratripulr tribe, which is now known as the Zhiben wetlands.



The Katratripulr solar farm case

- Katratripulr is one of the four largest traditional tribes of the Beinan people in Taitung. The name indicates solidarity, togetherness in Beinan.
- The tribe consists of three major families, each has a high priest - “rahan” in Beinan, serving as traditional leaders in the tribe.
- In 2018, Taitung County government invited companies to tender a solar farm in Zhiben wetlands. The tender ultimately went to a Singaporean company, and the project is expected to be the largest EV plant in Asia.
- The Singaporean company followed Article 21 of the Indigenous Peoples Basic Law and the Regulations on Consult and Consent, requesting the Katratripulr tribe to hold a tribal meeting to vote on the development project.





The three “rahans”



What are the tribe members protesting against?

The tribe's claims

The tribe is still discussing the pros and cons of the development project, but the city office said that they are holding the tribal meeting on our behalf because our discussion has lasted more than two months!

This is the traditional territory of the Katratipulr tribe, why are people from other ethnic groups eligible to vote? Why are Beinan people from other tribes eligible to vote?

Affairs at the Katratipulr tribe are determined by rahans. Why are the heads of the household qualified to vote on the resolution?

Legal disputes

Regulations on Consult and Consent stipulate that the township/ city office can help organize the tribal meeting if the tribe has not hosted a tribal meeting two months upon receiving the developer application.

Regulations on Consult and Consent stipulate that individuals with an indigenous status and a household registration at the location of the development project are all eligible to vote, regardless of their ethnic groups tribes.

Regulations on Consult and Consent stipulate that only the heads of the household can vote on the resolution.

The Katratripulr tribe would choose their own path

- The court ultimately ruled that the Regulations on Consult and Consent were unconstitutional and violated the Indigenous Peoples Basic Law, with the Ministry of Economic Affairs and the Singaporean company losing the case.
- After the proceedings ended in court, the Katratripulr tribe decided not to apply the Regulations on Consult and Consent and establish their own rules on Consult and Consent.

目前的諮商同意辦法完全不是卡大地布部落認定族人的標準！因此，今年（111年）7月，部落會議通過

卡大地布部落章程
修正草案

卡大地布部落成員
辦法草案

我們決定走自己的路，用部落自己的標準來認定族人，而不是讓中華民國的法律來替部落決定誰是部落的成員。

所以到底要做什麼？

簡言之
就是一類「人口普查」啦！

只有經登錄的部落成員，才享有部落成員的權利：包含部落會議提案權、表決權，分享部落利益。

當然也同時須履行義務：遵守部落章程、相關法規、部落會議決議及部落幹部會議決定等，並積極參與部落事

**DISPUTE IV. CAN DEVELOPERS NOT
CLARIFY THE SPECIFICS OF THE
DEVELOPMENT PROJECT AS LONG AS
THEY CONTINUE TO PROVIDE ECONOMIC
BENEFITS FOR THE TRIBE MEMBERS?**

玻士岸部落會議 函

機關地址：972 花蓮縣秀林鄉富世村 10 鄰富世 188-2 號

聯絡人：李文章

電話：0987-899092・0939-060013

電子信箱：puppy270701@gmail.com

受文者：本部落家戶代表(戶長)

發文日期：民國 111 年 1 月 20 日

發文字號：花秀玻字 1110000001 號

速別：普件

附件：如文

主旨：召開本部落會議投票表決亞洲水泥股份有限公司申請部落諮商同意事項案，詳如說明，請查照辦理。

說明：

一、依據「諮商取得原住民族部落同意參與辦法」第 17、18 條之規定暨秀林鄉公所民國 110 年 12 月 29 日秀鄉民字第 1100032954A 號函與亞洲水泥股份有限公司民國 110 年 12 月 21 日亞(110)總花字第 1281 號函暨第三屆玻士岸部落會議 111 年 1 月 4 日第 2 次幹部聯繫會議記錄詳附件辦理。

二、茲將本部落會議投票表決亞洲水泥股份有限公司申請部落諮商同意事項之相關事宜通知如下：

1、部落名稱：花蓮縣秀林鄉玻士岸部落會議。

2、同意事項：亞洲水泥股份有限公司於新城山礦場目前已核定礦業用地之公有原住民保留地(玻士岸段 778 地號等 373 筆土地，面積合計約 183 公頃)繼續從事土地開發暨資源利用行為。

3、會議時間：民國 111 年 2 月 12 日(星期六)下午 2 時 00 分至 5 時 10 分(中午 12 時 00 分至下午 2 時 00 分為報到時間)。

4、會議地點：花蓮縣秀林鄉富世村多功能集會所(富世村 6 鄰 97 號)。

5、會議召集人：玻士岸部落會議主席張文盛。

6、本部落原住民家戶共計 555 戶。

In the example here, there are 373 pieces of land within the scope of the development project, while the developer only provided one land registration number with no clear information on the land registration numbers, exact locations, or the right owners.

How can the tribe members determine the impact of the development project under such circumstances?



Can the developers simply provide economic benefits for the tribe members?

- Is the developer allowed to transport tribe members with a shuttle bus on the day of the vote?
- Is the developer allowed to give away lunch boxes prior to the vote and gifts afterwards?
- Is the developer allowed to gift the township office a bus under the company's name before the vote?

→ There are no clear regulations or penalties prohibiting such activities. Nevertheless, can such activities affect the free will of the tribe members? Is a vote under such circumstances fair?



Photo credit: Mirror Media

Conclusion

- Taiwan's discussion on the right of Consult and Consent should move beyond whether there is such a right or not; instead, we should discuss how to adhere to the principle of free, prior, and informed consent.
- Regulations on Consult and Consent did not focus on the needs of the tribe but the benefits of the developer and the ease of administrative processes.
- As the process of Consult and Consent remains complex, and the tribes lack the ability or resources to negotiate with the developers, the right of Consult and Consent has now been reduced to a competition for the highest compensation. If this is the case, is the consent of the tribe still authentic?



Thank you for listening

