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Prior, Free and Informed Consent as a Right of Indigenous Peoples and Nationalities

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To my parents who helped me day after day achieve what today became a reality;

To Erika, absent from this world, example of struggle and dedication, who inspired me to complete the present thesis;

To the indigenous peoples and nations, principal precursors so that the Prior, Free and Informed Consent becomes their recognized right.

To God, for giving me life and wisdom;
To my parents, for their unconditional support;To my USFQ family, for permitting me to achieve my goal;
To my Director, for his help;
To my professors, for their shared knowledge.

ABSTRACT

The thesis titled “Prior, Free and Informed Consent as a Right of Indigenous Peoples and Nationalities” is a study that seeks to determine whether indigenous peoples and nations can or cannot ban in their lands and territories a national interest activity or development project proposed by the State and by private companies. The research begins with the study of the right to self-determination of peoples, their entitlement to this right and the concept of people within international law. With this analysis, the present study discusses whether the Prior, Free and Informed Consent (PFIC) is or is not an expression of the recognition of the right of people to their free determination. The study continues with an analysis of what constitutes the PFIC in practice, its implications, and the compelling reasons that entitles indigenous peoples and nations to possess this power of decision vis-à-vis proposed activities and projects. Furthermore, distinct national and international instruments will be discussed that require the PFIC to be applied in the case of indigenous peoples and nations.

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ABBREVIATIONS

ACHR:	American Convention on Human Rights
BG:	Bonn Guidelines
CAN:	Andean Community of Nations
CBD:	Convention on Biological Diversity
CPCBD:	Conference of the Parties to the Convention on Biological Diversity
CPR:	Civil and Political Rights
DADRIP:	Draft American Declaration on the Rights of Indigenous Peoples
DPILCUN:	Declaration on Principles of International Law on Friendship and Cooperative Relations between Signatory States of the United Nations Charter
EIA:	Environmental Impact Assessment
EML:	Environmental Management Law
ELHO:	Substitutive Rules for Environmental Law on Hydrocarbon Operations in Ecuador
ESCR:	Economic, Social and Cultural Rights
IACHR:	Inter-American Commission on Human Rights
IACrtHR:	Inter-American Court of Human Rights
ICCPR:	International Covenant on Civil and Political Rights
ICESCR:	International Covenant on Economic, Social and Cultural Rights
ICHR:	International Covenants on Human Rights
IDB:	Inter-American Development Bank
IHRI:	International Human Rights Instruments
IL:	International Law
ILO:	International Labor Organization
NGO:	Non-Governmental organizations
OAS:	Organization of American States
OP:	Operational Policies
PFIC:	Prior, Free and Informed Consent
SD:	Stockholm Declaration
UDHR:	Universal Declaration of Human Rights
UNC:	United Nations Charter
UNCESCR:	United Nations Commission on Economic, Social and Cultural Rights
UNDRIP:	United Nations Declaration on the Rights of Indigenous Peoples
UNESCO:	United Nations Educational, Scientific and Cultural Organization
UNGA:	United Nations General Assembly
UNO:	United Nations Organization
UNPFII:	United Nations Permanent Forum on Indigenous Issues
VDPA:	Vienna Declaration and Program of Action
WB:	World Bank
WCD:	World Commission on Dams
WIPO:	World Intellectual Property Organization

INTRODUCTION

Since historic times, indigenous peoples have been subjects of discrimination and marginalization. For years, their fundamental human rights have been denied to the point that it has caused occasionally not only their cultural disappearance, but even their physical one. Unilateral decisions, imposed on them by States through policies far estranged from their cosmological vision and based on the exploitation of natural resources on grounds of economic development and national interest, has proven detrimental for indigenous peoples. This way, those peoples suffered not only from colonization, but also from discrimination and marginalization by States.

Through enacting and developing International Human Rights Instruments (henceforth IHRI), the collective rights of peoples have been recognized, especially those of the most vulnerable groups, namely the indigenous peoples, enabling them to take charge of their rights vis-à-vis the harmful consequences to human life caused by development. Those instruments guaranteed that indigenous people would become entitled to their collective rights, and more so to rights recognized individually for all persons.

Collective rights acknowledged for indigenous peoples include participation, use, usufruct, administration and conservation of renewable natural resources; be consulted on plans and programs to prospect and exploit renewable resources existent in their lands and that can affect them environmentally and culturally, participate in the benefits such programs bring, and receive compensation for socio-environmental damage caused to them; as well as to keep possession of their ancestral lands and territories; uphold property of imprescriptible, inalienable, inembargable and indivisible communitarian lands.

Ecuador is a country entirely dependent on the exploitation of renewable natural resources as a basis for the national economy. The extraction of oil for more than three decades has not left as a result the country in the best of conditions, but it has been rather a curse in the sense that more corruption can be seen, increasing poverty, social inequality, foreign debt, loss of bio-diversity, destruction of natural eco-systems and degradation of collective rights of indigenous people. The impact over the Amazon, an economically rich and environmentally and culturally susceptible region as well as homeland of millenary indigenous peoples, has been particularly ominous.

Even though several IHRI recognize the right of indigenous peoples to be consulted and to secure their consent that; noncompliance of regulated processes causes the planned activity at hand

to cease and to nullify the respective contract according to Ecuadorian and communitarian law; Ecuadorian constitution recognizes and guarantees the collective rights mentioned before, aside from the right to maintain, develop and strengthen their identity and traditions in spiritual, cultural, and economic aspects; not be displaced; and to conserve and develop traditional knowledge, the rights of indigenous peoples have been systematically and insensitively infringed through the destruction of the tropical forests, flora and fauna that constitute their natural habitat and life-sustaining means.

This way, indigenous peoples have been reduced to subjection to the unilateral decision of the State as the sovereign entity that holds absolute power. The State has disposed of those resources at will, ignoring the legitimate proprietors of lands, territories, resources and ancestral knowledge.

The Ecuadorian constitution foresees mechanisms for protecting collective rights, such as the right to be consulted. Nevertheless, this right has been regarded as a simple contractual formality to pursue extractive activities of resources in indigenous territories and a mere medium of information to the communities directly affected. In this sense, consultation has become like any other valid mechanism to achieve economic goal (of the State) and whose consistent violation of the integrity of indigenous peoples and of their fundamental rights collectively and individually. National and economic interests have superposed the interests and concerns of the indigenous peoples.

Parting from the background presented above, the following issues should be raised: Do all these consequences and elements constitute valid reasons to support the thesis that the “right to consultation” of indigenous peoples should be enshrined as the “Right to Prior, Free and Informed Consent” of indigenous peoples in the development plans and activities that affect them in such a manner that their decisions should be considered binding and constitutive of their veto rights vis-à-vis the State´s decisions as an entitlement that guarantees their fundamental rights and survival as a people? This is the problem we hope to resolve in our present research.

We sustain that the right to consultation of indigenous peoples should be equated with their right to Prior, Free and Informed Consent (henceforth PFIC). Hence we propose the following hypothesis: the right to self-determination, being of multiple and integral characters, is one that has been granted to all peoples. Thus by virtue of the right to self-determination indigenous peoples have the right to decide on and establish their own priorities regarding their economic, social, and cultural development. This way, PFIC constitutes itself as the exercise of the entitlement to self-determination of peoples as projects or extractive activities can bring about, in a world currently characterized by uncontrollable technological development, culturally and environmentally climatic

change as product of contamination, destruction of forests being the humanity´s lungs and the natural habitat of millenary indigenous peoples, as well as the illegal procurement of biological resources that has led to the deprivation of intellectual property of indigenous peoples.

Moreover, the PFIC plays a guarantor role to fully enjoy all human rights and fundamental liberties vis-à-vis the decisions of the State concerning natural resources extraction projects and activities, since the PFIC is not a right *per se* but rather a mechanism that allows other rights included there to by fully exercised. It also constitutes a medium to create an atmosphere of reciprocal relations between the proponent of the projects on one hand, and affected indigenous peoples on the other to find adequate solutions. Such circumstances force States not only to recognize the right to consultation, but also to establish the PFIC as a base to guarantee the fundamental rights of indigenous peoples, their way of life and their survival.

Together with others, the conventional instruments of human rights, State legislations and jurisprudences have consecrated PFIC of the indigenous peoples to guarantee their human rights and fundamental liberties as a group and as individuals. The contracts regarding access to genetic resources, foreseen in the Bilateral Treaties, have established the same criterion. By the same token, more and more international development organisms press for recognizing the PFIC and applying it as a condition to fulfill reimbursements for specific projects or activities to be carried out and that can affect indigenous peoples. These elements have limited the sovereign position of States and their unilateral decision favoring activities, projects and measures that involve the fundamental rights of indigenous peoples which have produced the recognition of a peer-relationship between two proprietor subjects with equal rights.

To justify our hypothesis we have divided our research in three chapters: the first has the goal of demonstrating that PFIC is an expression of the right to free determination recognized by all peoples. The second establishes the general notions of what constitutes and comprises the PFIC and the reasons to secure it; and the third aims to expound on the fact that PFIC is already enshrined in the diverse conventional national and international instruments that enforce its recognition and compliance, to demonstrate that indigenous peoples possess the binding power of decision and, consequently, the veto power in matters that affect them, as a guarantee of their fundamental rights.

CHAPTER I

PRIOR, FREE AND INFORMED CONSENT AS AN EXPRESSION OF THE RIGHT TO SELF-DETERMINATION OF PEOPLES

1.1 The Free Determination of People

1.1.1. Its Origin and Recognition

The recognition of the free determination of people has its origins in the United Nations Charter (UNC henceforth) proclaimed in 1945. It declares the free determination of peoples as an international principle that guides States in relation with other States. In 1952 the United Nations General Assembly (henceforth UNGA) recognized that the "right of peoples and nations to free determination is an indispensable condition for the possession of all human rights." The International Covenant on Civil and Political Rights (henceforth ICCPR) recognizes in Article 27 ethnic minorities and the rights that correspond to them as a whole alongside other members of their group. Later on, in 1989 the Convention 169 on Indigenous and Tribal Peoples in Independent Countries of the International Labor Organization (henceforth ILO 169 Convention) is adopted. It is a binding international instrument that obliges States to take into consideration indigenous peoples. Finally, on September 13 of 2007, the UNGA adopts the United Nations Declaration on the Rights of Indigenous Peoples (henceforth UNDRIP) of 2007. This international instrument clearly and amply takes up the right to free determination of peoples that specifically alludes to the indigenous peoples. Undoubtedly, the UNDRIP embraces the aspirations of indigenous peoples who throughout the years has been usurped and denied by the States. But even though it incorporates the exigencies of indigenous peoples, this international instrument acknowledges that these are minimal norms for the "survival, dignity and well-being of the indigenous peoples of the world."

1.1.2. Concept

The International Covenant on Civil and Political Rights (henceforth ICCPR), the International Covenant on Economic, Social and Cultural Rights (henceforth ICESCR), as well as the Declaration of Program and Action of Vienna (henceforth DPAV) ascertain that the free determination of peoples is the right that all peoples possess to create freely their political conditions and pursue their economic, social and cultural development.

Nevertheless, States have been reluctant to comply with this right considering the implications it carries. Apparently, the resistance on the question to recognize this right of indigenous peoples is based on the States' interpretation of this right within the traditional context of decolonization as developed by the UNO. States fear disintegration as a national unity. However, indigenous peoples do not approach this right from the traditional, State-oriented perspective. Parting from this perspective, indigenous peoples have understood free determination as the right that all peoples have to possess, control, administer and develop a territory judicially respected and recognized; and, from which they can develop, strengthen and project all aspects of their culture; implement their own model and development option according to their own cosmological vision of the economy and its relationship with nature, effectively controlling the resources of the soil and subsoil.

Indigenous peoples observe that the occidental concept is not the most natural form of implementing or exercising free determination, but by recognizing this right they aspire to participate in their own development and achieve recognition of other rights included in free determination. This implies direct participation in the formulation, application and evaluation of regional and national development plans carried out by the State, that is " fully participate … in the political, economic, social and cultural life of the State and in the adoption of decisions on questions that affect their right."

1.1.3. Forms of the Right to Free Determination

The resistance on part of States to recognize the right to free determination of peoples has its foundation in the consequences this right may bring. Within this uncertainty, experts have identified the existence of external and internal free determination. Internal free determination implies the capacity of peoples to decide on their political system and economic, social and cultural development. External free determination has been conceived as the faculty to establish relation directly with States, meaning to freely decide their place in the international community of States. External free determination "does not necessarily imply the faculty to secede from the State where they live and constitute sovereign entities. Such faculty can well manifest itself in diverse forms of autonomy within the State, including as individual and collective right to be different and to be considered different." A demonstration of this is the indigenous peoples' participation in political processes on themes beyond their borders, as for example in the United Nations Working Group on Indigenous Populations (henceforth UNWGIP).

It would be a big mistake to consider that exercising this right would explicitly lead to the foundation of a new independent State and would presuppose inevitably a secession as the traditional expression implies. Certainly the UNO, the UNC and their adopted Resolutions acknowledged other forms of free determination that are not contrary to the principle of territorial integration of States. These peculiarities demonstrate that the right to free determination does not go beyond the recognition of rights, values and aspirations of peoples who claim them.

The DPILCUN and the VDAP affirm that States have the duty and obligation to promote and recognize the free determination of peoples, to apply the principle of equal rights and universal respect of human rights as well as fundamental liberties. Moreover, and in the same sense, International Covenants on Human Rights (henceforth ICHR) establish the obligation of States to promote the right to free determination and its implementation, assertions that indicate that States not only have the duty of not opposing the attainment and exercise of the right to free determination, but also the obligation to sponsor the guarantees of human rights and fundamental freedoms. From this point of view, “a State that seriously breaches its fundamental obligations towards its citizens loses legitimacy to govern them,” and more so when those peoples have the right to a democratic regime that represents them all with no dissimilarity and capable of exercising the effective respect of their rights and freedoms, especially when they do not possess such rights and freedoms or are deprived of them.

The right to free determination should also be considered as the establishment of the right to secede from the State when the State and its successive governments violate human rights and fundamental liberties, deny the means to acquire a sufficient level of self-government, oppress repeatedly, exclude from decisions that affect wellbeing and security as means to restore rights and fundamental liberties and uphold the welfare of the people. In view of these considerations, and if secession does not constitute an absolute right and cannot be invoked unilaterally, it becomes so as grave violations against human rights and fundamental liberties continue to exist. Consequently, and in view of violations of their rights indigenous peoples can invoke the provision alluded to.

1.2. Holders of the Right to Free Determination

1.2.1. Notion of People

The lack of definition of the “people” in international instruments has made it difficult to specify what can be understood by it, and by extension, its corresponding rights. There is no consensus among international experts on a universal definition of the term *people*. This being the reason it

led in international practice to concede the right to free determination to the peoples of colonized territories. However, there are sufficient arguments to demonstrate that indigenous peoples are or were colonized peoples and consequently to be considered eligible to enjoy this right, aside from the rights consecrated in the IHRIs.

In spite of the lack of a definition of people, it is frequently described as a group of human beings who share characteristics such as: a common historical tradition; ethnic identity; cultural homogeneity; linguistic unity; religious or ideological affinity; territorial connection; and a common economic life, and above all the group should possess the will or consciousness of being a people and institutions to express the identity of the people.

In International Law (henceforth IL) the concept of people is referred to as an ethnic group bound by common historic events, identical habits and the similar mental and cultural disposition. As such, a people is an expression of "the awareness of a desire to live collectively and commonly on the basis of elements such as tradition and history, a culture recognized as its own, present reality and the will to continue constructing, for the future, this vital unity that feels formed by their own and differential elements." The above-mentioned concept mentions peoples as conceived by the United Nations in a specific moment. However, not all States are formed by peoples or nations, of which the majority of them do not share the same history, customs and culture even though we cannot ignore that certain elements could exist between one or another peoples.

1.2.2. The Right of People

It is affirmed that the holders of the right to free determination of peoples are the States. This conception is rooted in various Resolutions adopted by UNGA where it is established that this right is ascribed only to peoples in those territories under foreign domain and colonized territories, by which secession is neither justified nor applied to ethnic minorities in independent States. Therefore, this right in the UNO-practice was directed to help peoples subjected to colonial and foreign domination put an end to such regimes. That explains why, and for a long time, some have considered that the era of free national determination has reached its end after the period of decolonization; however, events occurring in Eastern Europe and the implications of ethnic conflicts attest to the contrary. Certainly the application of this right during the process of decolonization is a historical fact; nevertheless, this does not conclude that this right would have only existed during that period and under those conditions, but rather the right to free determination

exists, lives and should be recognized for all time, without temporal limits, because it necessarily possesses a permanent validity.

In this respect and within the UNO, the rights of indigenous peoples in connection with the right of free determination has developed in a positive way, paving the way for the endorsement of Convention 169 of the ILO and the proclamation of the UNDRIP. Therefore, knowing that the right of free determination of peoples has States as its holders, the lackluster application of this right beyond the context for which it was conceived within IL and UNO has experienced a positive evolution. The UNC, the UNGA Resolutions and the IHRIs have proclaimed that it is a right "for all peoples." This constitutes the reason why those instruments never made any distinction between one people and others, and neither do they exclude any particular people from the holder/ownership of this right. These represent the basis that have served indigenous peoples to substantiate that the right to free determination cannot be conditioned because it is a right of all peoples, consequently it cannot be denied to only indigenous peoples and it would be discriminatory if it were to be applied to all except the indigenous peoples. The only conditioning factor that could exist is the right of other peoples to self-determination.

The lack of a definition in those instruments of the holder/ownership of this right impeded major legal and political advancement in this issue. The absence of a definition caused its interpretation to be restricted and reserved for the States. As far as holder-/ownership is concerned, many peoples in the world consider they lack representation in the existing States, for which they demand the right to free determination. Their demands exacted from UNO the improvement of this right which led to the approval of the UNDRIP in 2007. In that instrument the right of the indigenous peoples to free determination is expressively recognized. The implementation of the right to free determination is not limited to the traditional concept of this right, but rather that its employment is universal, for all peoples, even more so as the UNDRIP has established that the recognition of this right from the contemporary IL point of view and according to the exigencies of indigenous peoples does not contradict the territorial integrity and political unity of States.

1.2.3. Indigenous Peoples as Holders

There is still no general agreement as to a definition of indigenous people. Even as recent UNDRIP uses this term; it does not ascertain any definition of it. However, several attempts have been made to define or describe indigenous peoples.

In a study on discrimination against indigenous peoples, the Special Rapporteur of the United Nations Sub Commission on Prevention of Discrimination and Protection of Minorities put forward a working definition in the following terms: Indigenous communities, peoples and nations are those who, having had a historical continuity with pre-colonial societies prior to the (colonial) invasion developed in their territories, are considered distinct from other sectors in the societies prevailing now in those territories or in parts of them. They constitute at present non-dominant sectors of society and have the resolve to preserve, develop and transmit to future generations their ancestral territories and ethnic identity as a base for their continued existence as a peoples, according to their own cultural patrons, social institutions and legal systems.

Moreover, the Special Rapporteur put forward other basic ideas as pertinent factors to define indigenous peoples and identify their historical continuity, such as: … indigenous peoples should be recognized according to their own perception and conception of themselves, in relation to other groups, instead of attempting to define them in a way arranged according to perceptions of others and through values of foreign societies or those of predominant sectors in them; the right to define what and who is indigenous must be recognized and left to the indigenous peoples themselves; this faculty obviously includes the correlative capacity of defining or determining who is and who is not indigenous; no State should take through legislation, regulatory or any other means measures that interfere in the ability of indigenous nations or groups to decide who are their members; in any case, artificial, whimsical or manipulated definitions should be rejected; … the special standing of indigenous populations within societies of nation-States existing nowadays is derived from their historical rights to their lands and from their right to be different and to be considered different.

Later on, Convention 169 of the ILO stated in its Article 1.1.b) that indigenous populations are those who: descend from populations that lived in the country or geographic region to which the country belonged in the era of the conquest or the colonization or during the establishment of current borders and, regardless of their judicial situation, preserve their own social, economic, cultural or political institutions or part of them. However, the ILO’s Convention 169 clearly expresses in its Article 1.3 that the term people used in the Convention has no implication whatsoever for the rights that can be derived for this term according to IL. Still, the article does not establish any limitation on the rights of indigenous peoples concerning free determination according to IL because it is only a declaration applied to this Convention in particular and that it neither supports nor refutes this right. It also does not contain an incompatible disposition with other international, legal instruments that can define or establish the free determination right of the

indigenous peoples. Furthermore, it is not within its competence to interpret the right to free determination.

Indigenous peoples are considered as such because they are holders of historical rights. They were victims of invasions, conquistas and plunder in historic times, deprived of their rights and sovereignty, and above all were sovereign nations that saw themselves subjugated and incorporated against their will into alien political entities. These assertions demonstrate that indigenous peoples satisfy the generally accepted criteria to determine the existence of a people. Furthermore, the UNDRIP took up the established criteria and recognized as such the indigenous peoples, even without defining the term *people*.

1.2.4. Indigenous/Indians

Convention 169 of the ILO establishes that "the consciousness of their indigenousness or tribal identity should be considered as the fundamental criterion to determine the groups to whom it will be applied to …." This grants them the sovereign right and power to decide who belongs to them, without any foreign interference. This illustrates to us that indigenous people and their members present not only objective attributes, but also subjective ones. Objective attributes being certain activities and practices that identify themselves by their members, while subjective attributes are those related to profound sense of belonging, beliefs and sentiments towards members of the indigenous people to which he/she is a part. Consequently, certain recognized individual rights materialize through interaction with other members, while the observance of the criteria of self-identification and acceptance through the group defines the indigenous person.

On the other hand, the recognition of indigenous/Indian peoples carries adverse connotations for the State itself, since that same recognition involve the recognition of the occupation of their native territory with its implication that favor the recognition of native rights and the characterization of State sovereignty as a form of colonialism. It thus leads to the notion of occupation of native lands. However, perhaps the lack of legal documentation brings to light the ambiguity of such affirmation in most cases because no one knows for certain who the first inhabitants of any given territory were, even though history tells us that America was inhabited by primitive humans later called Indians or natives due to the fact that they

Another important aspect involved in the indigenous concept of is the historic continuity between native populations and their descendents, being itself genetic and cultural. However, this continuity has suffered changes due to mestizaje and culturalization that often leads to sustain that

it is the result of governmental policies imposed from above and from outside. Even though such topics are complex, nothing impedes us to understand that indigenous peoples were the first inhabitants from the beginning and at height of the colonization, meaning well before the constitution of States, whose political, social, economic and cultural structures were established, which defines them in the final analysis as descendents of those native peoples who sustain differentiated characteristics from other members of society.

1.3. Collective Rights and the Exercise of the Right to Free Determination of People

Collective rights are conceived as those whose benefits are not limited only to individuals, but also to other individuals with whom he/she assimilate within a collective and in the same terms and form, in which they seek to achieve a common interest. This means that the ownership of a specific right is assigned to him/she, regardless whether this right will be exercised in individual form, in relation to a group or in a collective form. This is why it is sustained that free determination is a right of "a specific kind of human community that shares a common desire to establish a group capable of functioning to secure a mutual future."

The recognition of peoples and of their collective rights constitute the corollary to achieve shared, proposed aspirations, such as the designation of priorities and development strategies.[83] Indigenous persons have, as individuals and peoples, the same rights and fundamental rights that are acknowledged for all individuals and peoples in IL and the IHRIs. Therefore, the UNDRIP recognizes in its preamble the existence of collective human rights, vital for the existence, wellbeing, integral development of indigenous peoples, suggesting that collective rights are on the same level as individual rights. On the other hand, the existence of collective rights does not presuppose that their members' individual rights disappear or are lost. This is how it is stated in Article 1 of the UNDRIP.

For the indigenous peoples, improvements in their lives' conditions and their very destiny lie in their self-management capacity through their own institutions to decide on matters that concern their members and people. Recognition of this right will permit them to continue existing as a people with their own identity with greater control over their lives and destiny.

1.4. The Free Determination of Peoples and the Prior, Free and Informed Consent

The ICHRs establish the right of all peoples to free determination and to control their riches and natural resources for their own purposes; they also foresee that no people can be deprived of its

own means for subsistence. The UNDRIP and the ILO's Convention 169 recognize the right to maintain and develop their political, economic, social and cultural systems or institutions to decide on their own priorities regarding development, participation and consultation. The UNDRIP foresees explicitly the attainment of PFIC for indigenous peoples for matters that affect them; all this being condensed in the recognition of their rights over their lands or territories and resources, and above all the right to possess, exploit, develop and control and decide on aspects that affect them in their lives, territories and resources.

The entitlements over the land and its resources and their free management is an integral part of the right to free determination, since in virtue of this right they can unreservedly ascertain their own strategies of anticipate economic, social, political and cultural development according to their necessities, interests and aspirations; meaning they assume control and decide on their own way of life and development as a people. Such manifestation regarding recognized rights to free determination as far as it affects their way of life they are entitled to be consulted by securing the PFIC and thus decides on their development priorities. This assertion in terms of our Constitution is established within the parameters that recognize "the right to participate through their representatives in official organisms as determined by law, in the definition of public policies related to them, as well as in the design and decision making of their priorities within the State's plans and projects."

Preceding considerations illustrate that the PFIC is the exercise of the right to self determination of the peoples, derived from recognition of their entitlement to their land or territory and resources, prior authorization of programs and projects that can affect their way of life and development as a people in relation to their land or territory and resources existing there, and they have the right to exercise it.

CHAPTER II

THE RIGHT TO PRIOR, FREE AND INFORMED CONSENT

"many indigenous peoples, according to our native beliefs, learn to practice what could be called a principle of Prior, Free and Informed Consent. We ask the animals, plants, minerals, rocks, waters and spirits permission before we use a space, harvest food or medicine, dig into the earth, hunt or fish for ceremonial or alimentary ends. By the same token, the principle of PFIC can be understood as asking permission before initiating an act that may affect life and well-being of others"

2.1. General Notions

2.1.1. Nature

The PFIC is a general right to facilitate other rights of indigenous peoples; it involves all aspects related to these peoples' life. It constitutes the exercise of the fundamental right to free determination of peoples and "through treaties and rights of indigenous peoples to lands, territories and natural resources." It institutes the configuration of the rights of indigenous peoples to establish and decide on their own priorities on economic, social and cultural level in aspects that concern them, which translates as the right to determine and elaborate priorities and strategies for development or the use of their lands or territories and other resources." In this sense, it should be used to create a culture of reciprocal respect and empathy in relations between indigenous peoples, the States and the private sector in projects that may affect the lands, territories and resources of indigenous peoples and their way of life.

The PFIC means that the approval-consent of indigenous peoples, resolved in conformity with judicial regimes and custom law practices, exercising their right to self-determination. In certain

cases, indigenous peoples can express their consent through other procedures and institutions adopted by them, albeit regardless of the nature of such procedures, they have the right to deny or withhold their consent until certain conditions are met. The consent should be obtained without coercion, before activities are initiated and through a process comprehensible for indigenous peoples and involved communities.

In matters of access to genetic resources, not only the PFIC should be considered more than a mere formalism to protect genetic resources or prevent socio-environmental impact, but also a mechanism to guarantee the right to make informal decisions. From the human rights point of view, just like the ESCRs entail, it implies that communities who possess this right must be informed regarding the possible impact of any decision, and implies that they can decide whether to accept or not the utilization of genetic resources, related knowledge or linked practice. Furthermore, it involves establishing agreements on the distribution of resulting benefits from the contracts that govern genetic resources.

Based on these considerations, indigenous peoples have the right to be consulted and participate in the decision making and give their PFIC, since consent is the principal determining feature of the existence of a “social license” and a demonstration of public acceptance of the project at hand in the case of local communities, as well as an important tool to decide whether an operation should be supported.

2.2. Components

The PFIC is composed of four elements, the same that have such a significant extent in all processes set off to obtain and apply consent. These elements are: the Consent, Prior, Free, and Informed.

2.1.1. Consent

Consent is the first element of the right to PFIC. It is understood as the manifestation of a clear and convincing agreement with a structural arrangement for the decision making on part of the indigenous peoples in question, including the traditional processes of deliberation.[107] This implies that indigenous peoples have full knowledge of causes, and consequently of the implications their consent brings in its wake.[108] Therefore, there will be consent to any agreement when indigenous peoples have sufficiently understood about the proposed activities and projects.

It is taken for granted that the process to reach a decision of consent entails the process of an effective consultation and participation on part of the indigenous peoples in all aspects of the evaluation, planning, implementation, monitoring and completion of a project, with those being its fundamental components. Definitively, the observance of this element means that the entire process of the PFIC should contemplate the "consultation and participation of involved indigenous peoples, including the diffusion of all full and legally truthful information related to the proposed developments, in an accessible and comprehensible manner to them." Its negligence will comprise the negation or revoking of the consent on the implementation of a project, since consultation and participation constitute central elements of the project's entire task of attaining the PFIC. The compliance with those requirements will guarantee the rights of indigenous peoples.

With the elements prior, free and informed being components of this right, they simultaneously make up conditioning factors for obtaining consent of indigenous peoples. Hence, consent will always be given as long as these three elements are fulfilled. In other words consent must be prior, free and informed.

2.2.2. Prior

The element prior entails obtaining the consent with sufficient advance well before any authorization or initiation of activities and projects and having respected the chronological exigencies of the consultation processes with the indigenous peoples, understanding it as allocating adequate time to gather the necessary information for the process of thorough debate before commencing a project so that a decision will be taken without haste. Therefore, no project shall begin before such process having been completely concluded and the agreement on it achieved. Establishing ample time guarantees that indigenous peoples and communities understand the information received, can solicit further information or explanation, can seek advice and determine or negotiate the conditions. However, the established time frames can vary depending on the factors present in the process of achieving the PFIC.

2.2.3. Free

It is understood that free consent "implies that there is no coercion, intimidation or manipulation," which means that in the final analysis the absence of implicit threats or reprisals vis-à-vis a final decision of no, as well as monetary incentive, unless it is part of a final mutual agreement, as a

tactic to divide the community. It is constituted as a general principle of a right that rules that any consent obtained through such procedures would be invalid.

Nevertheless, legislative and administrative dispositions are never fully abided by in strict compliance with the laws. Thus, to ensure attaining free consent it is indispensable to call for certain mechanisms with verification functions that will see to it that the consent is obtained in compliance with the established requirements. This way, it will be anticipated that one of the means to guarantee the arriving at free consent is establish that whoever proposes a project is not concurrently the same entity in charge of achieving the free consent. This function should be entrusted to organisms that are recognized as constitutional, independent and directly elected by the indigenous peoples, without diminishing their capacity to exercise the judicial mechanisms to counteract ill-managed PFIC-processes. Additionally, and while putting to practice those mechanisms, diverse indigenous peoples and communities existent throughout the country as well as the traditional and custom-lay institutions should be also taken into consideration, since they will also play an important role in safeguarding recognized rights.

2.2.4. Informed

Every PFIC-process requires consultation and participation on part of indigenous peoples, where full and judicially correct dissemination of all information on the proposed project or activity in an accessible and intelligible manner to them is included. Thus, informed consent comprises the proportion of information that encompasses, at least, the following aspects: a. The nature, significance, pace, reversibility and scope of any proposed project or activity; b. The motives or objectives of the proposed project or activity; c. The duration of the project or activity; d. The locations or zones that will be affected; e. Preliminary evaluation of the probable economic, social cultural and environmental impact, including the possible risks and an equitable and just distribution of benefits in a context that respects precaution; f. The personnel that will probably intervene in the proposed project, including the indigenous peoples, private sector personnel, research institutions, governmental employees and other persons; g. Procedures that can be involved in the project.

In matters of access to genetic resources, information plays a crucial role, since it is one of the key aspects of participation in the process of informed consent because it does not only imply information related to a specific covenant or project, but also a more integrated and sustained process that involves developing capacities and access to documentation linked to covenants,

rights, instruments and relevant judicial frameworks; who have to be per se timely, transparent, intelligible and should be included in all participation processes. In this aspect, differences can be established between “background information and information for decision making; between informing to concert steps and informing for consultation; between consultation to legitimize a previously made decision and consultation and information to promote an autonomous decision making” in the PFIC-processes, those being transparent, impartial and legitimate.

The PFIC entails thus the condition that it should be staged with sufficient information given well in advance to the initiation or authorization of all activities that affect indigenous peoples or will be developed within their territories, when such activities are in the phases of the evaluation, planning, implementation, monitoring and closure of a project or activity. To achieve that, information must be precise, clear, accessible and comprehensible, meaning that is should be made available in the community’s own language. Furthermore, it should be obtained from the institution or person that were indicated or authorized by the indigenous peoples to carry it out in the name of the involved people or community, all the while respecting their decision-making processes. The strengthening of this entitlement depends on the adoption of contestation and review processes, while the omission of elements of this entitlement could lead to negation and retraction of the provided consent.

2.3. Application Spheres

By virtue of the general principle of rights of indigenous peoples, the PFIC should be handled and obtained through adequate procedures “before adopting and applying legislative and administrative measures that affect them” or projects that impinge on their lands or territories and resources. This includes the recognition of the PFIC by all projects and their stages as well as by State-official measures likely to affect the life of these peoples, because it is founded on the notion that it is the “intrinsic rights of indigenous peoples, derived from their political, economic and social structures and from their cultures, from their spiritual traditions, from their history and from their concept of life, especially their rights to land, territories and resources.”

However, it has been established that the PFIC is required in the implementation of two kinds of measures or projects: Those specifically destined for the indigenous peoples; and those that affect those peoples without being directly intended for them. This provision is tied to the presupposition that indigenous peoples have the right to exercise their recognized entitlement in all steps and projects within their territories; meaning that it engrosses the attainment of their consent

in all matters that affect them in either direct or indirect form, be they adopted or proposed projects or measures.

The general rule that warrant the attainment of the PFIC in all matters that affect directly or indirectly indigenous peoples, could encounter a limitation in the ILO 169 Convention. The only international instrument that compels its signatory the States to strictly observe its norms, in particular Article 6.1, Literal a) that they should carry out the consultation of the indigenous peoples every time legislative and administrative measures are foreseen that may directly affect them and that they should be implemented in good faith to reach an agreement or gain their consent. This norm breaks the general rule of the right to PFIC in the sense that the consultation and consequently the achievement of consent should be brought to fruition only when such measures or projects directly affect indigenous peoples. Therefore, it sets aside the explicit demand of the UNDRIP that the PFIC be required in all matters that affect these peoples.

In observance of the IHRIs, the Constitution of Ecuador ascertains that the rights and guarantees established by it and by the IHRIs are of direct and immediate application by any public, judicial or administrative servants upon request or petition by an interested party, and its norms should formally and materially be compatible with the rights foreseen in the Constitution and International Treaties and other rights necessary to guarantee human dignity and that of communities, peoples and nationalities. The latter's rights are recognized and guaranteed by human rights proclaimed in the Constitution, covenants, declarations and other international instruments.

2.4. The Principle of the Comprehensiveness of Human Rights and Prior, Free, Informed Consent

To understand the principle of comprehensiveness of human rights we should part from the standard it instituted, namely that all rights are fundamental and as such do not admit any hierarchy among them and much less assume that some are more important than others. To violate any of the rights is to assail human dignity, since they are based on the assumption that "all human beings are born free and equal in dignity and rights." Therefore, human rights, as integral parts of an all, are indivisible and interdependent. In this spirit, the UNGA has declared that "all human rights and fundamental liberties are indivisible and interdependent: the same attention and urgent consideration should be given to application, advancement and protection of the CPRs as well as the ESCRs," and by the same token, "the endorsement, the respect and gratification of certain human rights and fundamental liberties cannot justify the negation of other human rights and

fundamental liberties." Hence, the PFIC as an expression of the right to free determination is an integral part of the right of indigenous peoples, which the States, regardless of their political, economic and cultural systems, have the obligation to promote and protect, taking into account the diverse historic, cultural and religious patrimony, since they embrace other guaranteed rights of indigenous peoples.

2.4.1. The Right to Live in a Healthy Environment

According to previously expressed arguments, human rights are indivisible and interdependent, leading them to be treated as a global issue. However, the right to a healthy human environment has been categorized as part of the "third generation rights" that emphasizes the comprehensiveness of human rights and the significance of wholesome environmental values, underscored as a national and international issue for the first time ever in the Stockholm Declaration (henceforth SD) of June 1972. The SD awakened environmental consciousness worldwide and, more importantly, found its expression in the Ecuadorian constitution of 1979 and of 1998, giving nature the full judicial status of a subject of law. Yet none of the ample Ecuadorian constitutional acknowledgment of the SD and other norms and covenants relative to environmental health is of any use as long as no meaningful environmental protection is observed and practiced in Ecuador, indigenous peoples' violated environmental rights being the result.

Yet for all its professed constitutional interest for protecting the environment for all, especially the *pro natura* principle within sustainable development, and providing mechanisms for consultations on ecological projects with ecological impacts and pursue environmental transgressions, none of this is translated into effective practice. Indigenous peoples' right to PFIC and to live in environmentally and historically preserved healthy space is constitutionally recognized by the Ecuadorian State and duly supported by international norms and covenants, especially regarding economic, social, cultural and environmental effects of mining projects. They are also recognized as one of the nine principal groups and essential associates active in the pro-sustainable development action plan "Program 21."

By allowing for ecologically questionable projects to be implemented in indigenous areas, the Ecuadorian State has effectively denied them their historically proven and environmentally responsible, healthy way of life *sumak kawsay*, effectively reducing their possibilities of survival as a community. The depletion of natural resources and the ecological contamination of their habitat have drastically reduced their chances of adapting to an ever-changing climate, putting even more

in danger their survival as people. The combination of climatic changes, on-going environmental pollution and the lack of effective legal instruments to resist detrimental ecological infringement on their physical space severely impinges on the indigenous peoples' ability to adapt to new circumstances and thus survive and violates thus their human rights.

2.4.2. The Right to Health

Health is a right guaranteed by the Ecuadorian Constitution and the ICHRs that also includes the right to medical assistance and insurance, and incorporates the right to access to water, nutrition, education, work, social security, healthy environment and others that sustain well-being. For indigenous peoples, right to health includes the preservation and exercise of their traditional knowledge and medicine. The indigenous concept of health is integral, meaning that it emphasizes the connection of physical health to their right to land, territory and natural resources, to cultural identity, economic and political participation, as well as to their right to no-discrimination in medical assistance, to social development, to apply their concept of well-being and of integral medicine, to use their own indigenous language, to use and strengthen their own traditional medicine, to conserve natural resources vital for their health, to participate in the design and implementation of health policies concerning them.

Indigenous peoples' right to health is not observed in an integral fashion because it is practiced omitting the right to the numerous above mentioned and closely related rights. Of particular concern is their often denied access to the natural resources in their land and territories where they derive their knowledge and practice of traditional medicine. Even in cases where the indigenous peoples' rights to land, territory and resources are overtly respected, their actual claim to health often lags behind because the medicinal plants, practices and ancestral knowledge they so need are destroyed by their inability to exercise their right to consultation and decision making power on matters that concern these resources.

2.4.3. The Right to Life and to Personal Integrity

If not for the ESCR and CPR, the indivisibility and interdependency of human rights would be practically devoid of all significance, leaving the right to expression meaningless without the right to education. Based on this interdependence, the fundamental right to life itself comprises individual and social rights, recognized by the UDHR, Treaties against Discrimination, and by the Convention on the Rights of the Child. The Inter-American Court of Human Rights (henceforth:

IACrtHR) has asserted that the right to life does not only imply that no person should be deprived of life, but that conditions and circumstances for a dignified life should be provided for by the State, especially for persons in and groups precarious and vulnerable situation and where the right to life depends on other rights and circumstances, invoking the quality of life as a vital factor and forwarding a definition of life well beyond the merely physical.

The Inter-American Commission on Human Rights (henceforth: IACHR) confirmed that the indigenous peoples' relationship with their land and territories is protected by right to life, honor and dignity, contemplated in the American Convention. The IACrtHR ratified this ruling and underlined that this relationship must be understood as the basis of their culture, integrity, spiritual life and economic survival. This means that denying the indigenous people their access to land, territories and resources will endanger their physical existence and cultural integrity based on their knowledge and traditions.

The events of November 1986 in the village of Moiwana present a case in point regarding indigenous fears of State power and of its manifold manifestations, violent or otherwise. On that occasion, members of Suriname's armed forces killed 39 inhabitants of Moiwana and forced the rest out of their land. The still-unresolved case of Moiwana versus Suriname illustrates the vulnerability of the indigenous population's human rights in South America and fuels their concern that legal continental institutions and adhering to the right to life alone may not offer much help and protection when it comes to their ESCR, CPR and most basic human rights.

2.4.4. The Right to Culture and Cultural Identity

The right to culture guarantees that all individuals can construct and maintain their own cultural identity, decide or not on their own sense of cultural affiliation to any given community and to express themselves accordingly, to enjoy esthetic liberty, to disseminate their cultural expressions and to have access to other cultural expressions, to develop their creative capacity and to protect their own moral and patrimonial rights as well as the freedom of scientific, literary and artistic research. For indigenous peoples, this right boils down to their right to freely maintain, develop and strengthen their identity and their sense of belonging, their ancestral traditions and their forms of social organization. For indigenous peoples culture is more than accumulating handiworks and knowledge, and access to cultural goods, but it is also a way of life, whether individually or collectively, values, traditions and beliefs, and life as peoples with a different comprehensiveness.

Cultural diversity for the human race is as important as is biological diversity for living organisms. Diverse cultural patrimonies are constructed, recognized and consolidated for the benefit of present and future generations. It is thus the obligation of States and the international community to adopt policies that favor inclusion and participation of all citizens that would guarantee social cohesion, peace and the vitality of civil society. Cultural patrimony can be classified as tangible and intangible. The Universal Declaration on Cultural Diversity, elaborated by the United Nations Commission on Economic, Social and Cultural Rights (henceforth UNESCO), considers human rights as guarantors of cultural diversity and its defense is inseparable from upholding human dignity.

The recognition of this conglomerate of sentiments, achievements and expressions of indigenous cultural integrity within the cultural diversity of a national community guarantees the indigenous peoples their life and work as such. This requires the effective fulfillment and exercise of all their human rights, leading to the fulfillment of all their other rights. Enjoying their full cultural and human rights does not exclude their decision to voluntarily adapt to changes as an expression of their autonomous development.

2.5. Good Faith in Consultation

The UNC establishes cooperation, good faith and respect for human rights and fundamental freedoms as basis of processes to resolve international conflicts. Good faith is thus constituted by the UNC as *jus cogens* (compelling law) for all States in their international dealings. By the same token, the Vienna Convention on the Law of Treaties also ascertained in 1969 that principles of free consent, good faith and the *pacta sunt servanda* norm (contracts and agreements, which are not illegal and do not originate in fraud, must in all respects be observed), converting accordingly good faith as a preexisting rule of IL. The ethical and moral base of good faith prescribes sincerity and loyalty among agreement or treaty parties.

In 1998, Ecuador approved the ILO's Convention 169 that recognizes numerous rights of indigenous peoples, including the right to consultation and consent, and foresees their fulfillment with good faith and in accordance to the prevailing circumstances. Good faith means in this respect that complete, comprehensible and appropriate information should be provided by the government to the legitimate representatives of indigenous peoples on projects that may affect their well-being and way of life. Applying good faith in the consultation process means using evocative dialogs where ample information on the projects are transmitted to the indigenous peoples in timely fashion, plainly explaining their possible risks of all kinds and their benefits for the affected areas.

2.6. Ecuadorian Legislation on Participation and Elections

Ecuador's political Constitution of 1998 validated for the first time ever the indigenous peoples' right to Prior, Informed Consent, coinciding with the ratification of the ILO's Convention 169 and thus recognizing their right to participate in envisioning and implementing their own developmental model that will orient their present and future life, especially in environmental and cultural facets. The 1998 Constitution guarantees indigenous peoples' right to be consulted on mineral explorative and extractive projects in their territories, participate in their benefits and receive adequate compensations for damages, albeit not in the same spirit and extent as envisaged in the ILO's Convention 169.

On the other hand, Ecuador's Environmental Management Law (henceforth EML) was enacted in 1999 to safeguard life in healthy environment, to protect local and national environment and ecosystems, biodiversity and integrity of the genetic patrimony of the country, national protected areas and sustainable development, all foreseen in the Constitution. Beginning 2001, the Executive Decree Nr. 1215 expedited the By-Law for Environmental Law on Hydrocarbons Operations in Ecuador (henceforth ELHO) which it was foreseen that the Ministry of Energy and Mines and the Ministry of Environmental will apply procedures relating to consultation of indigenous population regarding exploration and extraction of minerals in their areas, albeit it does not specify that indigenous peoples as a whole should be consulted, but rather their directly affected individual communities, nor it obligates the government's representative powers to proceed, but rather it gives them discretionary authority to act or not to act, and it does not reflect the genuine spirit and extent of the consultation process.

Furthermore, certain provisions of the Executive Decree Nr. 1215, specifically its Article 28 on Citizen Participation and Prior Consultation, limit meaningful and effective indigenous participation, such as imposing the rule that indigenous representatives should be highly qualified technical personnel accredited by national professional guilds, a condition quite difficult to meet, as well as that certain governmental information on specific projects are of confidential nature not to be shared with unauthorized persons. Definitively, the ELHO is for all practical purposes inadequate to comply with the indigenous peoples' rights to PFIC, especially since in its practical implementation boils down to a merely informative procedure. This led to the ratification in 2008 of the By-Law for Applying Mechanisms of Social Participation as established in the EML, thus rendering Article 28 on Citizen Participation and Prior Consultation legally inoperable.

2.6.1. By-Law for Applying Mechanisms of Social Participation as Established in Law of Environmental Management

The By-Law for Applying Mechanisms of Social Participation, as part of the EML, is one of several and the last of regulatory mechanisms expedited to ensure the constitutionally desired and guaranteed rights of indigenous peoples to consultation. Yet it practically repealed the rights to and the procedures of consultation foreseen in various partial regulatory tenets, in the sense it follows their basic approach, but sets so many limitations and exceptions that it virtually hinders the full extent of exercising the indigenous peoples' right to consultation.

Provisions in the By-Law anticipate the indigenous consultation and participation in every phase of the implementation of any project, especially in the environmental impact evaluation. This suggests basically that indigenous participation is excluded in the decisional pre-evaluation and pre-implementation phase. Furthermore, article 9, stipulates that indigenous criteria will be considered for inclusion as long as their technically and economically viable, practically meaning that the project can still be carried out in spite of indigenous disapproval.

Summarizing the expediency of the By-Law for Applying Mechanisms of Social Participation, it can be concluded that it does by and large comply with its foreseen tasks and purposes of securing indigenous participation, albeit in such a general and broad manner that it often squanders its particular and adequate efficacy and thus jeopardize the rights of all indigenous population. Nevertheless, the rights of the indigenous peoples to participate in decision-making process are constitutionally guaranteed by this By-Law, even though its implementation still leaves much to be desired.

2.7. Consultation in Ecuador

Consultation in Ecuador has been largely practiced as a mere contractual formality, a requisite and an administrative procedure to be followed in order to sign a contract, whereas often pressure, harassment, intimidation and extortion have been applied. Also, consultation has been often employed directly between private companies and indigenous communities without the regulating and supervising presence of the State or bypassing the appropriate representatives, organs, channels and mechanisms, in reaching informal, voluntary, bilateral accords, often resulting in grave violations of indigenous rights and benefits. One example constitutes the refusal of the oil company OXY to honor the Rio Jivino indigenous community's petition to compensate them for damages before the company starts drilling another well in their land.

Many cases are well documented where indigenous communities had to contend with less than sufficient compensation for damages inflicted on their land and territories by Ecuadorian companies, private or State-owned, as well as transnational ones, with little or no attention from the governmental organs responsible for safeguarding indigenous rights. Transnational companies have been especially adept at securing the consent of local indigenous communities' approval for their projects by offering material incentives, trips, and offers of jobs, to their susceptible representatives. Often are faulty or non-existent environmental impact studies, misleading or outright false information about the companies' oil exploration projects and their detrimental impact on the health and culture of indigenous communities a permanent fixture of the strategy of companies, be they national or transnational, in achieving their economic goals and in dealing with the indigenous communities.

In none of the cases of mineral exploration and exploitation in Amazonian indigenous areas are the consultation procedures respected and implemented, not even by the State that sponsored them. In all activities related to extraction of mineral non-renewable resources, indigenous rights to proper and timely consultation have been breached. Also their rights to life, personal integrity, liberty, dignity, property, participate in public concerns, to no-discrimination and to adequate judicial protection, to compensation of damages to nature caused by mineral exploration and exploitation. The United Nations Commission on Economic, Social and Cultural Rights (henceforth UNCESCR) has expressed its concern over the lack of appropriate consultation and the negative impact such mining is having on the natural habitat and environment of indigenous population in Ecuador.

Irrespective of the numerous limitations Ecuadorian laws and by-laws have in matters of consultation, the State has the last word in issues regarding mineral exploration and extraction. Lacking laws to regulate the implementation of consultation procedures, an Organic Law should have been approved to take up this task, a step that was never taken by the National Congress. Instead, by-laws have been decreed to remedy the situation, albeit as we have seen, vastly insufficiently.

2.8. Consultation as Means to Achieve Prior, Free and Informed Consent

Consultation and participation are fundamental factors in obtaining the PFIC, as established by Article 6, Numeral 2 of ILO's Convention 169 as well as by the present Ecuadorian Constitution. Particularly the previously mentioned Article 6 emphasizes the obligation of all signatory States to

abide by the instituted and adequate procedures to satisfy the indigenous peoples' right to consultation in all matters that directly affect them. The consultation is an opportunity for the indigenous peoples to make their voices, opinions and suggestions heard in projects and plans that will impact their environment, health, human and all other rights as well as their ancestral culture.

The United Nations Committee on the Elimination of Racial Discrimination, formulating its thoughts on the rights of indigenous peoples, has recommended to all signatory States to observe and stand for the indigenous peoples' rights, in particular regarding consultation and their informed consent, since securing this right will help strengthen all their other rights. Aside from the Committee on the Elimination of Racial Discrimination, the ILO, and the UNCESCR have also asserted the merits of consultation to attain indigenous PFIC, this being achieved on the basis of good faith, adequate representation, timely, complete and appropriate information.

Even though the Ecuadorian State has conceived and applied consultation in practice only as means to gather information from and relay information to indigenous population in mining areas, it has voiced different criteria when faced with international judicial contentions on part of its indigenous plaintiffs. This was the case in 2005 when the Ecuadorian government claimed in the IACrtHR that it will seek indigenous opinion when it moves to sign a new contract with the oil company CGC, asserting that Ecuador's Law of hydrocarbons obligates all parties involved in oil exploration and exploitation in their territories to seek and secure indigenous consent. This underlines the Ecuadorian State's basic willingness to recognize and respect the right of indigenous population to the PFIC.

In another case, the Ecuadorian government prohibited in 2000 the oil company Arco Oriente Inc. to proceed with oil exploration in the indigenous Shuar territory after it has been proven that the company executives have improperly entered indigenous territory to negotiate the posterior access of their technicians to begin exploration operations, without having previously secured the prior and necessary consent of the Assembly of the Shuar Federation. The Ecuadorian government's laudable conduct vis-à-vis Arco Oriente Inc. serves as an example of how States should proceed to protect indigenous rights. It also illustrates the significance of good faith in initiating, maintain and strengthening relations between indigenous communities and mining enterprises, be they private or State-owned, national or transnational.

2.9. Prior, Free and Informed Consent and the Collective Rights of Indigenous Peoples

The violation of the indigenous peoples' rights and the threat to their well being and survival are persistent factors regarding in cases of mineral exploration and exploitation by either State-owned or private, national or foreign companies. Human rights, being indivisible, interdependent, evolutionary and subject in their interpretation to the *pro homine* principle, apply in special measure to indigenous population, specifically in view of their special relationship with the land, environment, historic claims to their lands, ancestral traditions and culture. Taking seriously and consequently into account their all their rights, notably the PFIC in questions of mineral exploration and exploitation in their territories, would assure their long-term collaboration in benefit of their own and national development plans and projects.

Cooperating with the local indigenous community can be valuable and of positive, long-term connotation for any mineral project to be carried out in their territory. By securing their PFIC, both the mining company and the government would be able to count on constructive local, i.e. indigenous knowledge and expertise regarding the territory in question. Assigning experts from outside the community or even the country would lead to errors in assessing the environmental and cultural damage that can ensue to the communities affected and so minimize or even eliminate the possibility of future conflicts over the use of land.

In most cases, decisions on mineral exploitation, their timing and their specific procedures has been reached and carried out by the majority of the national population, often sacrificing the rights and interests of the indigenous population and thus generating conflicts. By securing indigenous PFIC, such conflictive situations can be consequently readily avoided. As can be appreciated, the recognition of the PFIC will guarantee the collective rights of indigenous peoples to their land, territories, resources and above all to their way of life and culture as a people that can well be endangered by certain projects or decisions.

2.10. Benefits of Prior, Free, and Informed Consent

We have established that the PFIC guarantees full validity of all collective indigenous rights and thus their exercise. However, recognizing and implementing the PFIC bring multiple benefits well beyond its guarantor role and effect that can be addressed in their various spheres. The economic gains of complying in good faith with the PFIC begin with their strategic, long-term nature, as the World Bank (henceforth WB) has asserted in one of its reports on the effects of indigenous participation, even though they may manifest themselves late and are difficult to quantify.

In a similar study, the Inter-American Development Bank (henceforth IDB) concluded that consultation may take their time to accomplish, but they foresee possibly harmful future impacts and thus help minimize or even avert them altogether. Environmental impacts and the costs related to their amendments alert the involved companies to the probably drastic financial overheads of embarking on projects without proper and prior consultation, consequently not only making the project risky as such, but also jeopardizing the reputation of the company itself and as a result its financial standing i.e. shares in the stock market. It would also save all parties involved, especially the State, the costs of eventual litigation and/or public disorders resulting from confrontational situations.

The benefits assured by the PFIC, particularly in accessing genetic resources, lie in the fact that it allows the local indigenous population to decelerate or even stop altogether the often opportunistic and mindless exploitation of mineral wealth on part of external actors. The traditionally vast knowledge of local indigenous about their land can contribute significantly to reduce disinformation about its environmental aspects and potentialities, as well as to include the local indigenous population in projects that affect them directly so much.

2.11. Land, Territory and Resources

2.11.1 The Concept of Land and Territory

According to ILO Convention 169, the use of the term land includes the expression territory, defining the latter as the indigenous peoples' natural habitat and living space. Moreover, and based on the criteria voiced by representatives of indigenous organization, the Inter-American Institute of Human Rights defines indigenous territories as those geographical, natural spaces under the cultural influence, control and use by indigenous peoples, while a land is that part of a territory appropriated by individuals or judicial persons. Such a differentiated definition marks the distinction between the totality of indigenous habitats under their direct cultural control (territories) and those areas designated and carved out as units for economic production use (lands) that may correspond not only to the local indigenous population, but also to other individuals entitled to private property. Yet in indigenous terms and cultural idiosyncrasy, land is synonymous with territories, irrespective of its use or not as an economic production unit, since they constitute their natural habitat that sustains the way of life of the present as well as future generations.

2.11.2 The Indigenous Concept of Land and Territory

As noted before, the concept of land is more limited than that of territory, yet land still plays as an important role in shaping and preserving indigenous way of life as the larger concept of territory. Territory encloses the land and the natural resources in it, as well as the economic, social and cultural survival and the legacy for future generations. From this perspective, a territory may not necessarily coincide with the State borders it belongs to, leading to incongruities between a given State's plans in a specific territory and the expectations of its population that hold rights to object such projects, especially if such plans include extraction of minerals and/or ensuing toxic contamination.

An example of the overlapping of indigenous territory and States borders is the case of the Colombian Secoya tribe. They describe their ancestral territory as extending south some 32,000 square miles adjacent to the Aguarico river well into Peru. The Secoyas have for centuries been linked with the Siona people, but the Colombian-Peruvian borders forces them to sever those ancestral bonds. The comprehensiveness of the concept territory for indigenous peoples has been recognized by the IHRIs, ILO Convention 169 and the UNDRIP that all lay emphasis on their right to own lands and territories historically populated by them and use them for their subsistence. This implicitly and explicitly obligates States to consult local indigenous population on issues and projects that may directly affect them in manifold ways.

2.11.3. The Special relationship of Indigenous People with Land, Territory and Resources

Indigenous peoples have a special relationship with land, territory and resources because those constitute the basis of their existence, life, and the source of their spiritual, social and cultural identity that in turn cover so many aspects of their lives. The attachment indigenous people have with their land, territory and resources go well beyond the rights granted to them in the Constitution, reinforced by ILO's Convention 169 and the UNDRIP. However, the State's de facto refusal to recognize indigenous peoples' special relationship with their territories and their ensuing rights over the minerals in them comprises a tangible threat to their own physical and cultural survival, even thought the IACrtHR has not only emphatically asserted those intrinsic indigenous rights, but also demanded to be respected, specifically regarding their PFIC in relation to extraction of minerals.

Even though indigenous peoples may be heterogeneous in their tribal culture, organization, practices and customs, they are very much homogeneous in their cosmic vision and outlook on

land, territory and natural resources. This is recognized by the Constitution and accordingly considered in the sense that their collective rights to ancestral land and territories are recognized as inalienable, inembargable and indivisible communitarian properties. A territory for indigenous peoples is integral and indivisible that belongs to their collectivity, comprising their very own values and culture. The right to land is part of the right to property, but because communal or collective property in indigenous culture better serves and satisfies the necessities of its individuals and their relationship with territory, it supplants and surpasses the right to individual property.

2.11.4. Legal Claim to Land, Territory and Resources

The de facto refusal to recognize and act on indigenous peoples' special relationship with their land, territories and resources has contributed to the gradual deterioration of their way of life as well as physical and spiritual well-being. The prevailing economic system runs contrary to the traditional, indigenous economic system, leading to the expropriation of indigenous land and its resources. It can be affirmed with great certainty that attitudes, doctrines and policies used to justify the dispossession of indigenous peoples have been and are still based on the economic motives of the States involved. Also cultural prejudices towards indigenous culture, skewed treaties, and discriminatory use of State authority and force contribute to the dispossession of indigenous people.

To legitimize such dispossession, the *terra nullius* and the "discovery" thesis were elaborated and employed, causing the indigenous peoples to lose their native rights and consequently the development of their social, economic, political and cultural institutions. These manifestations had as a basis nothing but coercive action, cultural contempt and disavowing all property of indigenous peoples who were present long before the conquistadores and colonizers came. The legal doctrines elaborated later cannot be applied to indigenous peoples in retrospective manner, simply because those lands and territories were free and their indigenous population never needed a title over them or over their resources, based on their native entitlements and customs law, a fact that has been ratified over and over again by the IACrtH *corpus juris*-based verdicts.

Even though legitimate indigenous entitlements to land, territories and resources have been conceded by Ecuadorian legislative organs, their practical applications encounters manifold limitations. The Constitution confers on the State the right to dispose of lands and subsoil natural resources, leaving the indigenous population only with the right to being consulted on mineral exploration and exploitation projects in their territories. The State, and not the representatives of indigenous peoples, becomes thus the last and most effective national instance in deciding upon the use of indigenous land, territories and resources.

By the same token, even though the American Convention on Human Rights (henceforth ACHR) recognizes the indigenous peoples as legitimate holders of rights to their land, territory and resources, the limits it has elaborated in its Article 21 on these indigenous rights certainly favor the State as the definite decision maker on the use of these resources, yet obligating the government to demarcate indigenous territories, allow only for case-by-case, viable and necessary projects, proportional in terms of costs, extent, duration and objectives, secure indigenous PFIC, controlled impact and to be prepared to pay adequate compensations.

The Ecuadorian Constitution, ILO's Convention 169, the UNDRIP, and the IACrtHR jurisprudence that by recognizing their rights to lands that indigenous peoples traditionally occupy, the entitlement to property is not derived from the right to property itself, but rather from the fact that these lands were historically occupied by them. Therefore, participation, consultation and the PFIC become an inalienable and indispensable right of the indigenous peoples. Furthermore, the Report of the Brundtland Commission of 1987 confirms that the parting basis for a just and humane policy towards the indigenous population is the recognition and protection of their traditional rights to their land, territory and resources that permit them maintain their way of life, a definition that certainly does not coincide with ordinary judicial systems.

2.11.5. Sovereignty of Indigenous People over Natural Resources

Boarding this particular subject presupposes the recognition of the indigenous peoples' right to free determination previously discussed, this right being of multiple, complementary and interconnected political, social and cultural nature. Peoples and nations have sovereign rights over their possessions. Indigenous peoples, displaying conditions very similar to those of nations, have rights to free determination as well as sovereign rights over their land, territories and resources. The principle of permanent sovereignty over resources consists in the fact that nations need authority to control such resources, enjoy the benefits of their exploitation and of their conservation. Nations who have fought against colonialism have become States, but indigenous peoples currently subjected to States' authorities have not embarked on such liberation struggle and have thus not attained yet independent statehood.

Indigenous sovereignty rights over resources have been the subject of discussion on United Nations' and other international organs' level. The UNGA's Resolution Nr. 1803 of 1962 recognized the indigenous peoples' quasi-colonized status and thus sovereignty rights over the natural resources in their territories, converting hence this right into a relevant factor in and of IL. The same recognition is also found in Article 1 of the ICHRs, in Article 47 of the ICCPR as well as

in Article 25 of the ICESCR. Sovereignty over national resources generally in terms of IL has an authoritative, governmental connotation which makes it difficult to apply in absolute terms to indigenous peoples, these not being a governmental organ. Yet indigenous organizations can perfectly exercise a form of subordinate sovereignty to national, territorial one, within relative, local parameters.

On the other hand, State sovereignty is never absolute, neither in abstract-theoretical nor in practical terms. This explains why the IACrtHR and the IHCRs explicitly reflect this interpretation and acceptance of indigenous sovereignty. Equally important, Articles 2, 4, 5, 6, 7 and 15 of ILO's Convention 169 acknowledges this sovereignty of the indigenous peoples as a whole and specifically of their representative organizations. Article 3 of the UNDRIP also addresses the sovereignty aspect from the perspective of indigenous free determination and ownership rights of ancestral territories and corresponding resources as well as the role of participation in strengthening the indigenous political, judicial, economic and social institutions as catalysts for exercising autonomy in prioritizing their development strategies and measures.

In comparison to other legislations regarding indigenous territories and sovereignty issues, we see countries like Nicaragua conceding certain autonomy to various indigenous groups, as well as New Zealand and Australia have treaties with aborigines population with PFIC and limited autonomy. On the other hand, Article 238 of Title V "Territorial Organization of the State" of the Ecuadorian Constitution allows for Special Territorial Regimes to its indigenous groups, permitting them decentralized autonomous governmental structures and functions within those regimes, based on intercultural, multinational and indigenous collective rights. Interpreting Article 21 of the ACHR, the IACrtHR ruled that indigenous rights in their territories contain the rights to minerals and resources existing there and their property rights correspond to collective entitlement of the community, based on their customs, custom laws and values.

Even though rights, sovereignty and PFIC of indigenous peoples over their land, territory and resources are recognized by the IL, UNDRIP, ACHR, IACrtHR, IHRCs, as well as by jurisprudence of the Ecuadorian State and its practice vis-à-vis indigenous issues, their rights are by no means absolute, as established by the IACrtHR itself. Yet such limitations on indigenous sovereignty rights over resources should be exceptional since their property rights are compellingly correlated to their human rights and their *sumak kawsay* which, according to the ICCPR and the Ecuadorian Constitution, should be exempted from any limitations.

Indigenous peoples' sovereignty over their resources in their land and territories are permanent, this being a collective, inalienable human right based on free determination, empowering them to obtain and exercise their PFIC over such resources. Even though the Ecuadorian Constitution gives the States property rights over subsoil natural resources accessible in the national territory, indigenous peoples have never participated in the discussion and enactment of national constitutions elaborated under colonialist doctrines that basically ignored the native, historic and inalienable rights to their land, territories and resources.

2.12. Veto Power versus the Rights of Participation and Election of Indigenous People

As the UNDRIP specifies, indigenous human rights have come a long and promising way since its proclamation in 2007, explicitly recognizing their right to their PFIC, just as ILO's Convention 169 did in 1989. Yet States perceived PFIC and the consultation process tied to it as mere formalisms designed to inform indigenous communities about pending projects in their lands, without giving them any real participatory decision making power or even veto empowerment, hence depriving indigenous peoples of one of their basic, collective human rights.

Neither the consultation nor the PFIC are supposed to entitle indigenous people to instinctively veto State and private companies' development and mineral extraction projects in their areas that may affect them negatively, but they were rather conceived as mechanisms to explain such plans to the indigenous communities well before they begin and avoid possible conflictive situations should indigenous objections or even rejection to those projects arise. The PFIC is a process and a tool to be carried out in good faith and with the proper channels and procedures to circumvent impositions on indigenous peoples.

In countries like Ecuador, where poverty, unemployment and rising national debt leaves the majority of the population in misery, the oil boom has not helped them noticeably. Environmental contamination resulting from extraction operations has only aggravated the situation even more. Cooperation with indigenous communities where such environmental degradation takes place and obtaining their PFIC would vastly facilitate various tasks: first slow down or even stop altogether such dilapidation of natural habitat and resources, second fulfill the collective, human and sovereign rights of the indigenous population and third avoid conflicts with them over inappropriate access and exploitation of their subsoil minerals.

Over the years, pressures brought on the indigenous peoples by foreign transnational companies and missionaries as well as by the national government and its military forces

facilitating accelerated mineral extraction have weakened those communities physically and culturally and have made them vulnerable through increasing environmental pollution and decreasing habitat, without achieving any major and tangible economic gains for the country as a whole. The PFIC, carried out properly, in good faith and timely mode, can conserve the nation's mineral wealth and environment and simultaneously strengthen the indigenous peoples' human rights.

CHAPTER III
THE RIGHT TO CONSTRUE A PRIOR, FREE AND INFORMED CONSENT IN ECUADORIAN LEGISLATION, CONVENTIONAL ISNTRUMENTS AND BILATERAL DEVELOPMENT ORGANIZATIONS

3.1. Ecuadorian Legislation

3.1.1. Ecuadorian Constitution

Although the ratification of ILO's Convention 169 brought about the recognition by the Ecuadorian legislation of the right of indigenous people to consultation and PFIC and hence of their other rights, such recognition constituted in practice nothing but a mere formality and a requisite to disguise the violation of their recognized rights by feigning a legal and legitimate shroud while in effect exploiting the mineral wealth in their territories with the minimum of benefits for them. Omissions in the Constitution regarding ILO's Convention 169 and the lack of secondary laws to complement and reinforce its existing provisions add to the constitutional liabilities that weakens the indigenous PFIC.

The Constitution guarantees to maintain, protect and develop indigenous sciences, technologies and collective ancestral knowledge, innovations, their genetic resources containing biodiversity and agro-biodiversity, their medicinal practices and their knowledge on fauna and flora resources and characteristics, making the PFIC a necessary instrument to secure obtaining such knowledge before using it for other populations sectors. Article 57 of the Ecuadorian Constitution of 2008 stresses the PFIC as a collective right of the indigenous peoples, whereby the consultation and participation processes are integral, preceding ingredients of the consent. Yet the omissions previously mentioned can be compensated by Articles 417 and 425 that do emphasize the indigenous rights to the PFIC.

3.2. Conventional Instruments

3.2.1. The ILO 169 Convention

ILO's Convention 169 on indigenous peoples and tribes in independent countries comprises their rights over land, participation, education, culture and development, enshrined within the global context of safeguarding their identity and enjoying the same fundamental rights as all other, considering the special indigenous contribution to cultural diversity, social and ecological harmony

and to international cooperation. This binding Convention was approved by Ecuador in 1998 and incorporated into the 1998 and 2008 Constitutions, thus committing the country to promote and protect indigenous aspirations to control their own institutions, their way of life, development, languages, cultural and religious identity. Its Articles 2.1, 6 and 7 provide for indigenous participation and right to consultation leading to decision making on their development priorities and their PFIC, which is especially mentioned in Article 16.

ILO's Convention 169 clearly defends indigenous PFIC rights in matters related to their relocation or assigning them to other land and territories. It also accentuates the necessity of obtaining the PFIC through good faith, allowing for appropriate representation, using adequate channels and timely procedures, without converting it into a sheer informative measure, as the practice of PFIC suggests. It is also important to note in this context that the PFIC is not only designed to obtain participation in specific development projects in their land and territories, but also as a method and an instrument for their participation in the national policy making process.

3.2.2. The Convention on Biological Diversity

The Convention on Biological Diversity (henceforth CBD) of 1992 is one of the most crucial, normative and binding instrument of international reach that protects indigenous peoples' rights regarding their ancestral knowledge, practices and innovations. It underscores intrinsic value of biological diversity as a core and common interest of all humankind. It recognizes the close relationship and traditional dependency indigenous peoples have with biological resources and it acknowledges the vast benefits of using and sharing native, traditional knowledge. Yet indigenous peoples have seen their knowledge usurped and harvested without prior authorization by large pharmaceutical and bio-prospective companies.

Articles 8 and 15.5 of the CBD specify indigenous intellectual property on traditional knowledge and practices, as well as the protection of biodiversity. For some members of the Conference of the Parties to the Convention on Biological Diversity (henceforth CPCBD), the organ charged with examining the implementation of the CBD, Article 8 is equivalent with indigenous PFIC, while others refute this view. Irrespective of this ongoing debate, the CBD recognizes indigenous peoples' rights to exercise control over the biological resources in their areas. The World Intellectual Property Organization (henceforth WIPO) also addresses indigenous property and intellectual rights over those resources and their entitlement to PFIC.

Apart from CBD and WIPO, Section VI.C of the Bonn Guidelines (henceforth BG) of 2002 implicitly concedes the role of PFIC in protecting indigenous, traditional knowledge. Additionally, the Andean Community of Nations (henceforth CAN) has also acknowledged, though in reserved terms, genetic resources as property of indigenous communities. However, the CBD has been emphatic in declaring the State has sovereign rights over its own biological resources, albeit not the owner of traditional knowledge, practices and innovations of its indigenous population. Consequently, the State's authorization to third parties (companies) to have access to its nationwide biological resources does not necessarily mean authorization to use and commercialize resources and knowledge associated with indigenous peoples.

3.2.3. The United Nations Declaration on the Rights of Indigenous Peoples

Indigenous peoples have been subjected to violations throughout the years as individuals and as a people in social, cultural, economic, political and judicial terms. This undisputable historical fact has prompted the elaboration and implementation of numerous international principles, norms and guidelines regarding their human, political, economic, social and cultural rights. The UNDRIP, adopted in by the UNGA in September of 2007 with only four countries (Australia, Canada, New Zealand and the United States) voting against it, is the foremost principal legal international instrument in indigenous aspects.

The UNDRIP explicitly recognizes numerous indigenous individual and collective rights that constitute the minimum norms for survival, dignity and well-being of indigenous communities of the world. Equality, non-discrimination, life, personal integrity, freedom, national identity and access to justice are among the copious individual rights conceded, while forming self-government and autonomous institutions, safeguarding their right to free determination, to treaties and to cultural integrity through language, religion and customs as well as their rights to land, territory and resources constitute part of their collective rights.

The UNDRIP explicitly grants indigenous population their right to PFIC, especially as regards mineral exploration and exploitation of their land and territories, unambiguously obligating the States to honor this right. Although the UNDRIP lacks a binding character, it establishes the rights previously proclaimed in the IHRIs, States' obligations towards them and general principles of rights of civilized nations. Articles 57 and 93 of the Ecuadorian Constitution reflect such obligations, specifically concerning the rights of its indigenous population and their

implementation. Hemispheric organs like the IACrtHR and IACHR have used and applied UNDRIP principles even before the latter's entered into effect.

3.2.4. Draft American Declaration on the Rights of Indigenous Peoples

The Organization of American States (henceforth OAS) has approved in 1997 IACHR's proposal to endorse an American Declaration on the Rights of Indigenous Peoples. An OAS Working Group has been working ever since on the Draft American Declaration on the Rights of Indigenous Peoples (henceforth DADRIP). This Working Group's participants, both indigenous peoples and state delegations, continue to meet regularly to discuss the final draft text and submit proposals for alternative language in their efforts to reach consensus, with the latest negotiation session being completed in April of 2010.

In its various articles, the DADRIP fully recognizes the utmost relevance of the PFIC, emphasizing the all issues related to indigenous environmental and territorial aspects, health, development, cultural patrimony and ancestral knowledge. Also the PFIC's bearings on the design and implementation of policies, projects, institutions and measures directly affecting indigenous population as well as compensation for intellectual property and traditional knowledge improperly used is being discussed for their incorporation into the DADRIP, even though complete consensus on the subject has not yet been achieved.

3.3. Bilateral Development Organizations

3.3.1. The Operational Policies of the World Bank

The World Bank (henceforth WB) is one of the major multilateral development organs that lend finances where mining operations and dam construction are planned or underway and may affect the environment and the rights of peoples living there, leading the WB to adopt financing policies mindful of such circumstances. The recommendations put forward by both the World Commission on Dam (henceforth WCD) and the WB's own Extraction Review Board suggest that WB's financing policies need to take into consideration the application of indigenous PFIC. Such policies establish requisites, technical procedures, as wee as environmental, social and cultural evaluations that the WB, its borrowers and its contractors need to take into account.

The United Nations Permanent Forum on Indigenous Issues (henceforth UNPFII) has recommended the WB revise its financing policy, Operation Policy (henceforth OP) 4.20 regarding indigenous peoples. Once WB's revision was completed, its OP for Indigenous Peoples (henceforth

OPIP) 4.10 took effect as of May 2005, foreseeing both obligatory as well as consultative procedures regarding social and environmental impact of any project to be financed by the WB. OPIP 4.20 also aspires to reduce poverty and promote sustainable development, taking into account indigenous communities' human rights, their dignity, economy, culture and the close relationship between their identity and the natural resources in their habitat.

Even though WB's OPIP 4.20 does not explicitly require the indigenous PFIC, the WB would not finance those projects that are not preceded by a free, informed and prior approval on part of local population, environmental, social and cultural impact studies, carried out either by specialized, nationally accredited non-governmental organizations or foreign, WB-approved experts. The WB uses the term "wide support" to compensate for its omission of PFIC, albeit recurring to national jurisprudence and all elements in relevant IHRIs regarding indigenous rights over their way of life, social institutions and resources in their land and territories.

3.3.2. The Operational Policies of the Inter-American Development Bank

As in the case of the WB, the Inter-American Development Bank (henceforth IDB), finances important projects that frequently have serious impact over indigenous populations. IDB's initially passive attitude towards the negative impact of such projects on affected indigenous communities drew the sharp criticism of IDB's policies on part of those communities as well as the UNPFII. This prompted the IDB to change its OPs towards indigenous population in it project areas throughout South America and the Caribbean, leading to the IDB's own OPIP. The IDB recognizes thus the prohibition of forced resettlement policies and of financing projects that do not respect indigenous human rights or that cause the exclusion of indigenous areas due to ethnic discrimination.

Moreover, the IDB foresees within its financing policies, development priorities and its Indigenous Development Strategy pre-impact and post-impact environmental, economic, social and cultural studies as well as the institutionalization of good faith and proper practices in all consultation, participation and consensus processes and mechanisms relative to the indigenous right to PFIC. Furthermore, IDB's OPIP clearly admits processes and mechanisms explicitly leading up to obtaining the PFIC, respecting indigenous peoples' ESCRs, their collective rights and their natural habitat.

3.3.3. World Commission on Dams

Based on a joint initiative by the WB and the International Union for Conservation of Nature, a workshop of 39 representatives of governments, financial institutions and civil society organizations took place in Switzerland in 1998 that produced the WCD. The WCD began its work in May of 1998, aiming to study the environmental and social impacts that construction of dams brings. The WCD seeks to carry out constant follow-up studies on the efficacy of large constructed dams relative to development and to come up with internationally acceptable criteria for their design, construction, function, evaluation, inspection and dismantling, among other goals.

Two years later and based on wide participation on part of governments, representatives of private sectors, financial institutions, and non-governmental organizations and affected groups, the WCC produced its report *Dams and Development: A New Framework for Decision Making*. The report states that although dams can contribute to satisfying human necessities worldwide, they also have brought negative social and environmental problems, citing the displacement of 40 to 80 million people as one of those negative consequences. The WCD's report duly recognizes and recommends the necessity of implementing the PFIC in all policies and measures related to constructing and operating dams and to safeguarding the manifold rights of indigenous peoples.

The WCD's report stresses indigenous rights, citing ILO's Convention 1169 as well as the UNDRIP and pointing out several legitimate basis for the PFIC, even when legal corresponding mechanism in certain countries do not exist. The WCD regards indigenous peoples in many cases of controversial dams as potential victims "involuntary risks" since either proponents or opponents of specific dam projects are clearly conscious of their advantages or risks, whereas indigenous population is basically unaware of the risks and subject to their negative consequences much more than other population sectors.

3.3.4. United Nations Development Program

The United Nations Development Program (henceforth UNDP) was created to increase awareness among the UN member States regarding the necessity of upholding sustainable development and human rights. It plays an important role in providing countries with knowledge and resources to attain this goal. Its work concentrates on assisting countries to elaborate solutions to problems related to governance, democracy, health, poverty, energy and environment, among others. Specifically in regard to indigenous communities, the UNDP strives to promote indigenous

participation at all decision making levels, to safeguard their institutions and contribute to inclusive governmental policies, as well as promote the goals of sustainable development.

The UNDP explicitly supports the right of indigenous peoples to the PFIC and seeks to promote an autochthonous vision of sustainable development and protection of natural resources. Based on the UNDP's human rights oriented development and governability focal point, it also strongly endorses the recognition of indigenous peoples' rights to their land, territory and resources as well as encourages national laws that protect them. It also upholds their rights to intellectual property over traditional knowledge and natural resources related to their land and territories and their right to their PFIC to protect them from illegally obtained and commercialized use. Additionally, the UNDP urges its member States to respect indigenous PFIC in their eventual resettlement policies to avoid their forced integration into other, non-ancestral habitats.

The UNDP's commitment with indigenous peoples in Latin America and the Caribbean comprises the defense of their right to harmonious development within the parameters of the PFIC. The UNDP's guidelines and criteria lend the indigenous people a valuable support, in addition to other important legal instruments such as the Ecuadorian Constitution, the sentences of the IACrtHR and the findings and recommendations of the IACHR concerning the PFIC.

CONCLUSIONS

It is proclaimed in the vast majority of legislations that resources in the subsoil are the inalienable and imprescriptible property of the State, the latter being considered the strategic sector that directs and maintains the basis of its national economy. As such, the State has sovereign power over its resources, including the biological ones.

With respect to this conception, indigenous peoples have been made the most maligned because the vast majority of resources declared as State property are situated in the territories of these peoples, localities that are economically vital, politically marginalized and environmentally fragile.

Even though their rights have been recognized, it has served them little that their native rights to land, territories and resources have been declared as such by the State. In this sense the IHRIs have also recognized those same rights. This disownment has caused these peoples to decline physically and culturally, their natural habitat, means to subsistence as well as their institutions developed in sync with those elements increasingly threatened.

In this context, to secure the collective rights of these peoples, the right to consultation of indigenous peoples has been recognized on international and local level, on plans and programs for prospecting and exploitation of natural resources that can impinge on their lands, territories and resources, survival and in the adoption of relevant legislative and administrative measures.

Nevertheless, the right to consultation has been only a formalism to cover the apparent legitimacy needed to put into effect the process of extraction of natural resources and implementation of measures by the State. It has become a mere means of information. The norms that were adopted to guarantee this right have succumbed to the same error. Even worse, they have approved in direct violation of the Constitution.

Vis-à-vis this infringement and arbitrariness, the PFIC is considered an adequate mechanism to put into practice the rights of indigenous peoples in all broad aspects that encompass the lives of indigenous peoples, because its recognition put into operation these peoples' other rights that were historically denied.

As it has been demonstrated throughout this treatise the right to PFIC is an expression of the right to free determination or self-determination of peoples. As peoples, they are entitled to this right by complying with the parameters established by IL without limitations, except other when they infringe on other peoples' right to self-determination. The IHRIs are governed by the principle

of equality and non-discrimination. By this token and according to this entitlement, indigenous peoples have the sovereign faculty to decide on their own developmental priorities as a people with regard to land, territories and natural resources; to assume their destiny for the general interest of their members and the people as such; to exercise the decision making power on issues that affect them in the general interest of the people. This way, they would exercise the right to free determination of peoples with no discrimination whatsoever and guarantee their continued existence as distinctive peoples with their own culture.

The right of peoples to free determination is a primary right because its effective fulfillment depends on the enjoyment of other human rights and fundamental freedoms. By this measure, the ICHRs establish it in their Article 1 as a general right.

The right of indigenous peoples to free determination has its recognition beyond the colonial contexts that gave origin to this term, albeit it does have its limitations set by IL and the principle of territorial integrity of States. However, the right of peoples to free determination has an external and an internal form of instituting itself, which does not necessarily be tantamount to the exercise of the right to secession conceded to peoples under colonial domination.

The State not only has the obligation to recognize the right to self determination of peoples, but also the duty to promote and not to obstruct its exercise according to the principle of equality of rights. Furthermore, States should have governments that represent the totality of the population belonging to their territory, with no discrimination whatever. In this sense, a State that contravenes the fundamental rights of indigenous people risks seeing its territorial integrity weakened, since the problem is not so much the right to free determination, but rather disavowing its existence.

Except for the UNDRIP, the ICHRs have established an focal point for human rights protection from an individual perspective; nevertheless, some rights recognized in those covenants were not able to be exercised separately, but rather within a collective and in relation to other group members, such as the right to communication and association, among others. Seen from this perspective, the right to free determination is an entitlement of peoples to be exercised within a collective, which neither causes individual rights to disappear nor hinder their co-realization with collective rights.

On the other hand, the right to PFIC is the consent-approval between the indigenous peoples and the State, a social license and public acceptance of the proposed development’s projects. The consent is the clear and convincing agreement, achieved through the indigenous peoples’ own institutions as well as traditional deliberating institutions. But this consent should be prior, free and

informed. Its inobservance will produce the negation or the withdrawal of given consent. It is an entitlement that guarantees the exercise and validity of other rights of indigenous peoples such as the right to live in a healthy environment, right to health, right to life and personal integrity, right to own culture and cultural identity, based on the principle that human rights are indivisible and interdependent.

The right to participation and consultation constitute the necessary mechanisms in all processes leading up to the attainment of the PFIC, since they make up an essential component of gathering criteria, concerns and interests that facilitate an ample participation process to adopt a decision satisfactory to both parties involved. Omission of such process is tantamount to the annulment the contracts of a project or of a given activity.

In the processes towards obtaining the PFIC, the consultation should be carried out with good faith, meaning that culturally adequate mechanisms and procedures should be applied and have as a goal to reach an agreement. This should be achieved actively, in the sense that such positive attitude must accompany the process from the first phases of the formulation and the planning of the project or investment, and not just when the necessity arises of obtaining the approval. This is important to ensure that the consulted parties have prior knowledge of all possible risks, in order to willfully and voluntarily accept the plan of the development or investment. This entails that the consultation is not merely a mechanism of communication and information for the indigenous peoples. Ecuadorian legislation has been the first in omitting this prevision, as we have shown earlier in the corresponding chapter.

The PFIC is required to be applied in two kinds of measures or projects: those that are specifically destined for the indigenous peoples, and those that affect them without being directly meant for them. This prevision is directly tied to the entitlement of the indigenous peoples to exercise their recognized right to decide on all measures and projects that affect them directly or indirectly. This involves the attainment of their consent in all matters that concern them, since the human rights at risk are worthy and whose violation jeopardizes the very existence of the indigenous peoples.

The PFIC, instead of representing an obstacle to development, as it is frequently claimed, is a factor that safeguards the collective rights of indigenous peoples; enriches the dialog between of partakers with similar interests. It does not only bring various economic benefits, but also assures the success of the planned project, benefitting both stakeholders. Disowning the right of peoples to consultation and the disavowal of the PFIC hamper their effective exercise from the first phases of

the project or activity. From this perspective, the PFIC is an entitlement that aside from advantages both involved parties, guarantees the full implementation and validity of indigenous peoples' rights.

Land and territory constitute a basic feature for the survival of indigenous peoples. They are not objects of commercialization, considering that the indigenous social, political, judicial, economic and cultural organization rest on them and they will be passed on as their legacy to future generations to enable them to continue to exist as a people.

The territories of indigenous peoples encompass broad aspects of their life, inducing them not to permit any dismemberment of these territories by any of their members, such division being a cause for depriving them of some of the basic, relational elements of their existence as a people.

The right to lands, territories and resources enjoy the same protection as other rights regarding property. The native rights of indigenous peoples a propos lands, territories and natural resources give them the imprescriptible and inalienable right to control them. Their special bond with these elements makes it necessary to figure out particular handling when establishing the limits of the State's legal faculties over land, territory and natural resources, because restricting them would deny them the fundamental human rights such as the right to life and to their existence as a people that in terms of IHRIs do not permit any limitation whatsoever.

The principle of permanent sovereignty over natural resources is also applied to the indigenous peoples by virtue of their entitlement to free determination, since effective materialization of this right requires them to freely hold sway over their resources and to assume decision making power, whose restriction endangers fundamental rights. This conceded faculty to indigenous peoples limits the sovereign power of States.

The consultation and consent were conceived as a mere formalisms for information and participation in the State's decisions, but has developed over time and thus evolved into the right that indigenous peoples presently hold to veto projects or activities to be developed within their territories that may affect them negatively. In this sense, the State has seen limits established on its unilateral, sovereign power.

Even though all adequate and appropriate consultation procedures to reach consensus with indigenous peoples are duly observed, consent is not always taken for granted; given this and out of respect for the recognized right of indigenous peoples to free determination, the State should not advance a project that can directly impinge on an indigenous community without securing first its PFIC.

When a project or activity does not imperil basic the well-being of a community, the PFIC is not an absolute condition to carry on the project, provided that the project proceeds based on a justification derived from the interests of society in general and counts on adequate measures to mitigate its detrimental consequences on the environmental, economic, social, cultural or spiritual level and in strict observance of the requisite that such measures be necessary, proportional and have the purpose of achieving a legitimate objective worthy of a democratic society. However, indigenous peoples have the right to the PFIC and accordingly the right to veto any project because the Ecuadorian experience demonstrates that none of the procedures required by the jurisprudence and laws has been thoroughly complied with, because no adequate studies on the environmental, economic, social, cultural or spiritual impact were made, and even if such studies existed, they were elaborated deficiently in order to satisfy formalisms mandated by law, where economic interests superimpose the State's duty to protect human rights; no follow-up procedures are carried out in managing in the environmental, social and cultural aspects and the pursued goal is questionable. All this endanger the basic physical or cultural well-being of the indigenous peoples, which empowers these peoples to dissent from the proposed project, considering the eminent or potential danger that puts at risk their own existence.

In situations where the measure or project would have substantial impacts that would endanger the basic physical or cultural well-being of the indigenous peoples, they acquire hence the total veto power.

The right to the PFIC has found its legal expression in the conventional covenants on a local and international level, as well as in the operational policies of bilateral developmental organisms that finance extractive activities or projects that could well violate rights of the indigenous peoples. The covenants that recognize the PFIC and the organs created on the basis of those covenants have made the PFIC legitimate and secured its consideration as a general principle of international law, and by virtue of its jurisprudential antecedents, PFIC is obligatory.

It constitutes a valid and actionable right in the Ecuadorian legislation. Particularly, even covenants with non-binding character, such as the UNDRIP, are part of the *corpus juris* of human rights and legal instrument that echo preexisting obligations embraced by States by virtue of Human Rights Conventions and the UNC. Nevertheless, the Constitution itself and the Law give the State the last word on decide on the exploitation of natural resources, a fact that defies the collective rights, granted by the very same Constitution.

We can definitively affirm that by virtue of the special relationship that binds indigenous peoples with land, territories and resources from which they in turn derive intrinsic rights; on the basis that they have possessed traditional entitlement over these elements; for being holders of the right to free determination of peoples, among other rights foresees the deployment of their assets, exercise of autonomy and self-government as an expression of that right; the sovereign rights they possess over the resources for the effectual manifestation of the right to free determination; for being holders of recognized human rights associated with the land, territories and resources, as well as the explicit recognition of the exigencies of these peoples, as do the PFIC in the IHRIs and binding jurisprudences that obligate their compliance; indigenous peoples have the right to the PFIC and, consequently, to veto proposed activities, not only when such activities endanger the physical and cultural as a people, and when requisite, parameters, conditions anticipated were not observed, thus violating human rights, but also in recognition of the right of peoples to free determination.