

MEMORANDUM

DATE: May 24, 2023

MATTER: Free, Prior and Informed Consent in Ecuador

Below is a memorandum assessing and commenting on free, prior and informed consent and its applicability in Ecuador, given the current legislative environment, as of 24 May 2023. Interpretations and understanding of legal and social documents and events may and will differ among judges, lawyers, legislators, and other members of the political body. The following memorandum on the combined and intertwined meaning of these documents and events is solely intended to address these questions regarding Free, Prior and Informed Consent in Ecuador at this point in time to provide a starting point for the comparative understanding of the situation in the country. This is not a legal opinion. Anyone seeking a legal opinion should contact the attorney of their choice for legal advice in the country in which the activities they seek to understand are, were or will be occurring. This memorandum should not be used for business, political or social purposes.

MEMORANDUM

Free, Prior and Informed Consent in Ecuador

I. INTRODUCTION

[1] In order to understand the importance of free, prior and informed consent (hereinafter FPIC) in Ecuador, it is necessary to highlight that Ecuador is a plurinational and multicultural State. In Ecuador there are 13 Indigenous nationalities that maintain their own language and culture, as well as peoples without voluntary contact, such as the Tagaeri, the Taromenane and the Oñamenane.

[2] This reality generates a permanent conflict based on distinctive visions of “development”. Likewise, there are different notions of the meaning of “territory” and how it is related to belonging. In this sense, FPIC is a right that could mediate conflict.

[3] However, despite the fact that the Constitution of the Republic of Ecuador (hereinafter, CRE) explicitly recognizes the right to FPIC and is a pioneer in the recognition of the rights of nature, the proper application of FPIC continues to be a pending debt from the State.

[4] FPIC remains close to being a mere formality because it has not been duly materialized into the form of a law, and it lacks adequate state institutionality to protect these rights of Indigenous communities, peoples and nationalities.

II. LEGISLATION

[5] For Ecuador, FPIC is presently woven together from the Constitution of the Republic of Ecuador; the International Labor Organization Convention 169 (hereinafter, ILO Convention 169); the United Nations Declaration on the Rights of Indigenous Peoples (hereinafter, UNDRIP); the Ecuadorian Organic Law on Citizen Participation (hereinafter, LOPC); the landmark FPIC Ruling 273-19-JP/22 of the Constitutional Court of Ecuador (hereinafter, CCE); the Inter-American Court of Human Rights’ holding that determined the basic FPIC parameters in the case of Pueblo Sarayaku vs Ecuador; the Instructions for the Application of Pre-legislative Consultation of the National Assembly; and, the Instructions for the Application of Pre-legislative Consultation for the Issuance of Normative Acts of the Executive Function.

[6] We will discuss these sources in the following paragraphs.

2.1. INTERNATIONAL LAW

[7] In Ecuador, the covenants, conventions, declarations, and other international human rights instruments are part of the underpinnings of constitutionality and are therefore a parameter of control of infra-constitutional norms.

[8] In this regard, Article 57 CRE recognizes and guarantees a series of collective rights of Indigenous communes, communities, peoples and nationalities, including FPIC, **“in accordance with the Constitution and *the covenants, conventions, declarations and other international human rights instruments*”**.

[9] Therefore, ILO Convention 169 and the UNDRIP are of fundamental relevance for monitoring compliance within the minimum parameters of FPIC.

ILO Convention 169

[10] Ecuador ratified, and made binding, ILO Convention 169 through Executive Decree No. 1387 published in Official Gazette 311 of May 6th, 1998.

[11] Given Ecuador's self-recognition as a plurinational and intercultural State, FPIC is the cornerstone of ILO Convention 169 for Ecuador. Thus, compliance with ILO Convention 169 cannot be complete without the correct application of FPIC.

United Nations Declaration on the Rights of Indigenous Peoples

[12] Although according to the general principles of public international law the UNDRIP is part of *soft law*, Ecuador ratified it through Executive Decree 800 of June 18, 2019.

[13] In this sense, the UNDRIP is, in theory, within the block of constitutional enforceability, based on articles 11, paragraphs 3 and 417 CRE.

2.2. NATIONAL

[14] In Ecuador, the main norms that protect the right to FPIC are found in the CRE, the Organic Law on Citizen Participation, the Instructions for the Application of Pre-legislative Consultation of the National Assembly, and the Instructions for the Application of Pre-legislative Consultation for the Issuance of Normative Acts of the Executive Function.

Constitution of the Republic of Ecuador

[15] We begin by noting that the CRE defines three different types of consultation. Article 398 of the CRE established that, before a decision or permit is granted by the state on environmental matters, all affected communities must be consulted. And although both consultations defined by article 57, paragraph 7 and 17 must be carried out with the Indigenous, Afro-Ecuadorian and Montubio communities, peoples and nationalities of Ecuador, the two have different scopes.

[16] The consultation established in article 57 paragraph 17 is related to the adoption of legislative measures that may affect any collective right and is commonly referred to as the pre-legislative consultation.

[17] On the other hand, the scope of the consultation established in paragraph 7 of the same article applies to plans and programs for prospecting, exploitation, and commercialization of non-renewable resources located in the lands of Indigenous communities, peoples, and nationalities, and that may generate environmental or cultural impact on them. Also, the Constitution spells out that this consultation must be free, prior and informed, among other criteria¹. Hence, this last consultation, defined by article 57, paragraph 7, will be referred to hereinafter as FPIC.

[18] In this regard, the CRE has stated that the pre-legislative consultation, established in article 57 paragraph 17 of the CRE, and the consultation on environmental matters, established in article 398, are not the same as FPIC of article 57 paragraph 7 of the CRE.

[19] Being a right guaranteed in the Constitution, FPIC should be regulated through the promulgation of an Ecuadorian law. As no such Ecuadorian law has been promulgated; and due to the principle of the reservation of law, the regulation of FPIC by secondary legislation, as is currently the case, is broadly considered against the law.

[20] Thus, an FPIC Law remains aspirational for communities, peoples and nationalities.

Organic Law on Citizen Participation (LOPC)

[21] The LOPC includes FPIC and environmental consultation among the mechanisms for citizen participation.

[22] Although article 81 of LOPC refers to FPIC by reiterating the text of article 57, paragraph 7 of the CRE, yet it does not develop this right.

[23] On the other hand, article 82 of LOPC develops environmental consultation. This is important to mention because article 83 LOPC generates confusion, by

¹ “To free prior informed consultation, within a reasonable period of time, on the plans and programs for prospecting, producing and marketing nonrenewable resources located on their lands and which could have an environmental or cultural impact on them; to participate in the profits earned from these projects and to receive compensation for social, cultural and environmental damages caused to them. The consultation that must be conducted by the competent authorities shall be mandatory and in due time. If consent of the consulted community is not obtained, steps provided for by the Constitution and the law shall be taken.” Translation of article 57, paragraph 7 provided by the Political Database of the Americas, available at <https://pdba.georgetown.edu/Constitutions/Ecuador/english08.html>.

apparently referring to the two types of consultation, giving them the same effect but by also providing that the pronouncements of the communities, peoples and nationalities are not binding.

[24] For this reason, a separate organic law to regulate the application of FPIC would clear up the present confusion and lack of application of Constitutional FPIC.

Instructions for the Application of Pre-legislative Consultation

[25] As explained above about the regulation of FPIC, the pre-legislative consultation should also be developed and regulated in an organic law, by virtue of the principle of reserve of law. At this moment, the instructions for the application of the pre-legislative consultation are still only regulated in an ordinance (In Spanish, “instructivo”), which falls within the legal hierarchical category of a mere legislative resolution.

[26] Notwithstanding the above situation, the ordinance establishes the basic principles of this consultation, which are: the principle of opportunity, the principle of reasonable time, the principle of good faith, the principle of interculturality and plurinationality, the principle of truthful and sufficient information and the principle of autonomy.

[27] Different social organizations have rejected the ordinance because, in their opinion, it did not undergo a process of public consultation, is not binding, violates the principle of legal reserve and does not comply with the standards established in the CRE and international human rights instruments. Hence, there is a present demand for the creation of a binding FPIC Law, to be carried out through representative institutions.

Instructions for the Application of Pre-legislative Consultation for the Issuance of Normative Acts of the Executive Function.

[28] Recently, the President of the Republic of Ecuador issued an ordinance for the Instructions for the Application of Pre-legislative Consultation for the Issuance of Normative Acts of the Executive Function. With respect to this secondary regulation, it should be noted that it clarifies that the consultation is not binding and that its purpose is simply to seek agreements and receive criteria and feedback from the communes, communities, peoples and nationalities, with respect to the normative act or acts to be issued by the executive function.

[29] The principles governing the consultation are timeliness, reasonable time, good faith, interculturality and plurinationality, information, voluntariness, and administrative efficiency.

III. INDIGENOUS / CUSTOMARY LAWS

[30] In accordance with article 171 of the CRE, the authorities of Indigenous communities, peoples and nationalities may exercise jurisdictional functions based on ancestral traditions and their own law within their territorial scope.

[31] In this regard, it is the state's responsibility to ensure that the decisions of the Indigenous jurisdiction are respected by State institutions and authorities. Accordingly, FPIC should have a binding character.

[32] Nonetheless, the resistance on the part of the same authorities has led to the filing of "Extraordinary Protection Actions" questioning the legality of what has been resolved by the Indigenous jurisdiction. Hence, it is evident that the support to the Indigenous jurisdiction and the commitment to make FPIC binding are insufficient.

IV. CASE LAW / JURISPRUDENCIA

4.1. INTERNATIONAL

[33] At the international level, the main ruling regarding Ecuador is the Inter-American Court of Human Rights case of **People of Sarayaku vs. Ecuador** decided in 2012, which establishes the basic parameters for free, prior and informed consent.

[34] In this ruling, the Inter-American Court of Human Rights "established that in order to ensure the effective participation of the members of an Indigenous community or people in development or investment plans within their territory, the State has the obligation to consult the said community in an active and informed manner, in accordance with its customs and traditions, within the framework of continuing communication between the parties."²

[35] The court then listed some of the essential elements of the right to consultation, which are the prior nature of the consultation, good faith and the aim of reaching an agreement, appropriate and accessible consultation, the environmental impact assessment, and informed consultation. Thus, the consultation must:

² Paragraph 177 of the decision, available at https://corteidh.or.cr/docs/casos/articulos/seriec_245_ing.pdf.

- Be prior
- Be made in good faith and to tend to agreements
- Be appropriate and accessible
- Be informed

[36] At last, the Inter-American Court of Human Rights determined that Ecuador must adopt domestic legislation to implement FPIC in the country within a reasonable time. As per the sections above, it is clear that Ecuador has not fulfilled that obligation yet.

4.2. NATIONAL

[37] At the national level, ruling 273-19-JP/22 is the most important and recent case on FPIC decided by the Constitutional Court of Ecuador. In this landmark FPIC decision, Justice Karla Andrade Quevedo noted that from article 57, paragraph 7 of the CRE, “it is evident that prior consultation, according to the constitutional mandate, must have the following parameters:

1. Characteristics: ‘Free, prior and informed,’ ‘mandatory and timely;’
2. Timing: ‘Within a reasonable time;’
3. Aspect to consult: ‘Plans and programs for prospecting, exploitation and commercialization of non-renewable resources that are found on their lands and that may affect them environmentally or culturally;’
4. Obligated subjects: The ‘competent authorities;’
5. It must also be guaranteed that they can ‘Participate in the benefits that those projects report and receive compensation for social, cultural and environmental factors caused to them;’
6. Effects: “If the consent of the consulted community is not obtained, the procedure will be in accordance with the Constitution and the law’.”³

[38] After affirming that the Constitutional Court had previously recognized the right to prior consultation as a state obligation in rulings 001-10-SIN-CC and 20-12-IN/20, Justice Karla Andrade Quevedo asserts that the state must:

- (i) “ensure that the communities that will be affected participate in the benefits that the activity or program brings and receive fair

³ Free translation from paragraph 85 of judgment 273-19-JP/22, with Spanish version available at http://esacc.corteconstitucional.gob.ec/storage/api/v1/10_DWL_FL/e2NhcnBldGE6J3RyYW1pdGUUnL CB1dWikOidjOWE4ODAyZC03Y2E1LTQ4NDItOWIzNS01ZDZjMzZiM2I3ZGMucGRmJ30=.

- compensation for any damage they may suffer as a result of these activities;
- (ii) maintain channels of communication and effective participation with the Indigenous peoples or communities affected by the execution of the project;
 - (iii) include parameters that minimize the impact on communities and ecosystems, as well as provide methods for mitigation, compensation, and repair of all damages that may be caused to the community; and,
 - (iv) if possible and accepted by the community involved, employ the members of the community in the respective projects under conditions that guarantee human dignity.”⁴

At last, the CCE confirmed the previous decisions that mandated reparation measures and that recognized the violation of the right to FPIC and other rights. The decision then ordered the translation of the decision to the Cofán language.

V. TRENDS / FUTURE

[39] In 2022, the government faced a national strike that ended with a commitment to discuss several issues at dialogue tables with the Indigenous movements, including the issuance of a law on FPIC. This is ongoing.

[40] At the time of this writing, Ecuador is in a moment of political social movement uncertainty, during which no FPIC bill has been drafted.

VI. CONCLUSION

[41] In Ecuador, the legal framework for FPIC includes the constitutional package, made up of the CRE, ILO Convention 169, the UNDRIP, the landmark FPIC Ruling 273-19-JP/22 of the CCE, and the Inter-American Court of Human Rights ruling on the Sarayaku people; in addition to infra-constitutional norms such as the LOPC, the Instructions for the Application of the Pre-legislative Consultation of the national Assembly and the Instructions for the Application of the Pre-legislative Consultation for the Issuance of Normative Acts of the Executive Function.

[42] In this regard, the CRE recognizes three types of consultations. The first, found in article 398 of the CRE, is the consultation on environmental matters which is not restricted to Indigenous communities.

⁴ Paragraph 124 Ibid.

[43] The second, found in article 57, paragraph 17 of the CRE, refers to consultation on the adoption of legislative measures that may affect collective rights.

[44] The third, found in article 57, paragraph 7 of the CRE, refers to plans and programs for prospecting, exploitation and commercialization of non-renewable resources found in the lands of communities, peoples and nationalities that may have an environmental or cultural impact on them.

[45] Although the Ecuadorian legislation is not clear about the parameters for FPIC in the country, the 2022 decision of the CCE defined clear rules for FPIC. According to the jurisprudence, FPIC must be 'free, prior and informed,' 'mandatory and timely;' 'within a reasonable time;' and applicable to 'plans and programs for prospecting, exploitation and commercialization of non-renewable resources that are found on their lands and that may affect them environmentally or culturally.' The CCE also defined that the 'competent authorities' must seek FPIC, guarantee that the consulted communities 'participate in the benefits that those projects report and receive compensation for social, cultural and environmental factors caused to them,' and, if consent is not obtained, the competent authority must follow a procedure 'in accordance with the Constitution and the law'.

[46] Notwithstanding that the CRE and the CCE recognize and guarantee the right to FPIC and that the Inter-American Court of Human Rights has determined that Ecuador must adopt domestic legislation to implement FPIC in the country within a reasonable time, the adoption of a law regulating the application of the aforementioned constitutional articles is still pending. This situation is a source of conflict in the country, the demand for which is present in every mobilization of communities, peoples, and nationalities.