



High-Level Working Group
on U.S.-Ecuador Relations

Indigenous Peoples'
Rights and Trade
Relations:
A Historical
Perspective



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HIGH-LEVEL WORKING GROUP ON U.S.-ECUADOR RELATIONS

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INTRODUCTION

The United States and Ecuador have long been connected. The two countries established diplomatic relations in the 1820s, not long after both countries had won independence from Europe. In subsequent decades, the United States and Ecuador deepened relations on the basis of values enshrined in the Inter-American System, such as democracy, the rule of law, and human rights. Whether culturally or economically, the threads that bind the countries together are many.

Economic ties in particular have contributed to shared prosperity for the people of the United States and Ecuador. Today, the United States is Ecuador's principal trading partner—making Ecuador one of only three countries in South America for which trade with the United States surpasses trade with China.¹ The United States' principal exports to Ecuador include petroleum, machinery, computers, fertilizer, and cereals and grains. In return, Ecuador sends crude oil, seafood, bananas, cocoa, and flowers to the United States.²

While Ecuador and the United States sought to deepen economic ties in the early 2000s, extensive negotiations ended amid political and social upheaval in 2006. The two governments did not resume discussions over trade and investment until the administration of President Lenín Moreno (2017-2021). His successor, President Guillermo Lasso, has emphasized the need for Ecuador to deepen trade relations with the United States, with a particular focus on labor rights, intellectual property, gender equality, and environmental sustainability. Indeed, recent developments in both countries—including the elections of new presidents in both countries—offer a unique opportunity to discuss how the two countries might work together to combat the COVID-19 pandemic, spark economic growth, and pursue other priorities.

On June 4, 2021, Global Americans announced the formation of a High-Level Working Group, comprised of seasoned current and former policymakers, foreign service professionals, business leaders, and scholars. In collaboration with Global Americans staff, the Working Group has produced a series of working papers, covering a diverse range of topics central to the United States-Ecuador relationship—and in particular, central to any discussion of deepening commercial and economic relations between the two countries. The High-Level Working Group has served as a forum for nonpartisan and transregional expert analysis, resulting in a series of recommendations regarding the future of United States-Ecuador relations.

¹ *Joe Biden is Determined That China Should Not Displace America*, THE ECONOMIST (July 17, 2021), <https://www.economist.com/briefing/2021/07/17/joe-biden-is-determined-that-china-should-not-displace-america>.

² U.S. Relations with Ecuador: Bilateral Relations Fact Sheet, U.S. State Department, Bureau of Western Hemisphere Affairs (Jan 19, 2021), <https://www.state.gov/u-s-relations-with-ecuador>.

EXECUTIVE SUMMARY

The United States and Ecuador have sought to deepen their economic relationship in the past, but twenty-first century trade and investment agreements have proven elusive since negotiations first took place in the early 2000s. A major reason for the failure of past negotiations was the opposition of Indigenous Peoples in Ecuador, who felt that they were not adequately represented in decisions and that their interests were not protected. In recent years, however, the U.S. and Ecuador have relaunched discussions regarding a trade agreement, and both law and politics have evolved to better incorporate Indigenous Peoples into the process (Chapter 1).

Indigenous Peoples comprise eight percent of the population of Latin America but represent 14 percent of the poor and 17 percent of the extremely poor in the region.³ For decades, Indigenous communities have maintained a complicated relationship with trade and investment, and trade and investment have maintained a complicated relationship with Indigenous communities. During discussions on trade, Indigenous Peoples generally seek to maximize their benefits from economic integration while also carving out exceptions to protect their cultural practices.⁴ Indigenous Peoples' resistance to free trade agreements is often rooted not necessarily in trade, but in investment. Out of over 300 investment chapters of bilateral and regional trade agreements, only a few stipulate the protection of Indigenous communities, Indigenous practices, and Indigenous land.⁵ The Lago Agrio case, in which Texaco (later Chevron) and Petroecuador faced accusations of pollution in an Ecuadorean Indigenous community, remains a potent symbol for Indigenous communities of the dangers of unfettered investment (Chapter 2).⁶

In Ecuador, specifically, Indigenous communities have historically rallied against government attempts to negotiate a Free Trade Agreement (FTA) with the United States. Leading Indigenous organizations like the Confederación de Nacionalidades Indígenas del Ecuador (CONAIE) have historically opposed FTAs through mass mobilizations. In the 2021 elections, Pachakutik, an Indigenous-led political party, gained the second-largest voting bloc in Ecuador's National Assembly (Chapter 3).

³ WORLD BANK, *INDIGENOUS LATIN AM. IN THE TWENTY-FIRST CENTURY, THE FIRST DECADE* 10, 12 (2015), <https://www.worldbank.org/en/region/lac/brief/indigenous-latin-america-in-the-twenty-first-century-brief-report-page>.

⁴ Julio Lacarte Muró, *The History and Future of the World Trade Org.* by Craig Van Grastek World Trade Org. and Cambridge U. Press, 2013, 13 *WORLD TRADE REV.* 728–733 (2014) (book review).

⁵ See Hum. Rts. Council, Report of the Special Rapporteur on the rts. of Indigenous Peoples, U.N. DOC A/HRC/33/42 (2016) [hereinafter 2016 UNHRC Special Rapporteur Report], *citing*, U.N. CONF. ON TRADE AND DEV., *RECENT TRENDS IN IIAS AND ISDS*, Int'l Inv. Agreement Issues Note, UNCTAD/WEB/DIAE/PCB/2015/1 (February 2015).

⁶ Sara Randazzo, *Litigation Without End: Chevron Battles On in 28-Year-old Ecuador Lawsuit*, *WALL STREET JOURNAL* (May 2, 2021), <https://www.wsj.com/articles/litigation-without-end-chevron-battles-on-in-28-year-old-ecuador-lawsuit-11619975500>.

As Indigenous Peoples in Ecuador and elsewhere have mobilized to pursue their interests, international law has recognized more of their rights, including those that are relevant to international trade negotiations. These rights form the basis of Indigenous Peoples' participation in the process of trade negotiations, as well as the substance of the trade agreements that result from those negotiations (Chapter 4).

When Indigenous Peoples are excluded from the process of negotiations, they are more likely to resort to mass demonstrations and resist economic integration in general. Thus, the question is not whether to involve Indigenous Peoples in institutions during negotiations, but how to involve them. Consultation, required by the International Labor Organization Convention 169, is the simplest form of participation, requiring States to involve Indigenous Peoples in decisions that affect their livelihoods (Chapter 5).

A more demanding level of participation is free, prior, and informed consent (FPIC). Under the nonbinding UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and the American Declaration on the Rights of Indigenous Peoples, States are expected to conduct negotiations with the goal of obtaining consent from Indigenous Peoples on projects or legislation that may affect their wellbeing. Though scholars differ on exactly how FPIC differs from consultation (Chapter 6), Ecuador has incorporated UNDRIP into its 2008 Constitution, and the Constitutional Court has considered cases where previous consultations did not meet the bar of free, prior, and informed consent (Chapter 7).

Beyond procedural questions, recent trade agreements—specifically the Comprehensive and Progressive Trans-Pacific Partnership (CPTPP) and the U.S.-Mexico-Canada Agreement (USMCA)—have gone to great lengths to incorporate the substantive interests of Indigenous Peoples. In both the CPTPP and the USMCA, negotiators granted exceptions to Indigenous communities for provisions that would have disproportionately affected them. In the USMCA in particular, the Government of Canada led the way in maximizing the benefits that would accrue to Indigenous communities from trade integration by connecting Indigenous entrepreneurs to international markets (Chapter 8).

Chapter 9 concludes with recommendations for policymakers and stakeholders alike on how to best protect the interests and rights of Indigenous Peoples while deepening international economic relations.

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1. HISTORICAL AND CURRENT POLITICAL CONTEXT

Historically, Indigenous Peoples and their representative organizations have tended to oppose what are commonly perceived as neoliberal economic policies.⁷ Reflecting their skepticism of neoliberal economic policies, Indigenous Peoples in Latin America have often contested attempts to deepen foreign trade and investment, in part because past trade negotiations have not included Indigenous Peoples' Organizations (IPOs) as key players. While they were always stakeholders, their voices rarely achieved a level of prominence that would impact the substance of the trade debate.

Indigenous Peoples' posture towards trade is also rooted in the potential risks that economic development could pose to their communities' land and shared resources, as well as concerns that trade agreements will grant excessive protections to foreign investors at the expense of Indigenous groups.⁸

⁷ This paper will use the term Indigenous Peoples, as it is the formal term in the U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP) and other international legal instruments.

⁸ In the case of Ecuador, foreign investors are not granted excessive rights. Ecuador is among the few countries where foreign investors cannot contest the State in international tribunals. See Generally Enrique Prieto-Ríos & Daniel Rivas-Ramírez, *Neocolonialism and the Tension between Int'l Inv. Law and Indigenous Peoples: The Latin Am. Experience*, in INDIGENOUS PEOPLES AND INT'L TRADE: BUILDING EQUITABLE AND INCLUSIVE INT'L TRADE AND INV. AGREEMENTS 85–108 (John Borrows & Risa Schwartz eds., 2020); Amokura Kawharu, *The Treaty of Waitangi*

Changing Sociopolitical Context

Over the last several years, the social and political landscape has changed considerably. Indigenous communities have assumed a larger role in trade discussions. Trade agreements have become more nuanced, increasingly accounting for human rights, workers' rights, environmental protections, access to healthcare, and Indigenous Peoples' rights. As then Director-General of the World Health Organization (WHO), Pascal Lamy, stated in 2010, “[The WTO shall] ensure that trade does not impair human rights, but rather strengthens them.”⁹

The World Trade Organization (WTO) is not the only organization that has belatedly recognized the importance of Indigenous Peoples' rights. United Nations Special Rapporteurs, U.N. treaty bodies, and the Inter-American Commission on Human Rights have all made numerous recommendations urging States to adopt policies to prevent, sanction, and remedy violations of Indigenous Peoples' rights. For example, the UN Human Rights Council and the Convention on the Elimination of All Forms of Racial Discrimination have now affirmed, in one form or another, that multinational companies must be held responsible for human rights violations committed abroad.¹⁰

Exception in New Zealand's Free Trade Agreements, in INDIGENOUS PEOPLES AND INT'L TRADE: BUILDING EQUITABLE AND INCLUSIVE INT'L TRADE AND INV. AGREEMENTS 274–294 (John Borrows & Risa Schwartz eds., 2020).

⁹ See Sergio Puig, *Int'l Indigenous Econ. L.*, 52 U.C. DAVIS L.REV. 1243 (2019); Pascal Lamy, Director-General, WTO, Remarks at the Colloquium on Hum. Rts. in the Global Econ. (January 13, 2010).

¹⁰ See 2016 UNHRC Special Rapporteur Report, *supra* note 5; see also U.N. Hum. Rts. Council, Report of the Special Rapporteur on the Rts. of Indigenous Peoples: Extractive Industries and Indigenous Peoples on its Twenty-Fourth

With negotiations over trade and investment expanding to include issues of human rights, and with IPOs holding a more formal role in discussions, Indigenous rights appear likely to emerge as key issues that the United States and Ecuador must consider as they work to deepen their economic relationship.

U.S.-Ecuador Economic Integration

After the Bretton Woods Conference of 1944, nations usually sought to deepen their bilateral economic relationship via two types of legal mechanisms: a trade agreement, focused solely on liberalizing the exchange of goods and services, and a bilateral investment treaty (BIT), focused on attracting foreign direct investment. Nowadays, countries generally pursue these two goals simultaneously through a comprehensive free trade agreement (FTA), which includes an investment chapter. Countries that sign free trade agreements do so with the intention of increasing productivity and creating employment opportunities for their population.¹¹

The United States has signed FTAs with Chile (2004), Peru (2009), and Colombia (2012), leaving Ecuador as the only South American nation on the Pacific coast without a signed agreement, even though the United States is Ecuador's principal trading partner.¹²

Session, ¶ 48, U.N. DOC. A/HRC/24/41 (2013) [hereinafter 2013 UNHRC Special Rapporteur Report]; Int'l Conv. on the Elimination of All Forms of Racial Discrimination art. 5 (e) (iv), ¶ 14, Dec. 21, 1965, 660 U.N.T.S. 195, CERD/CAN/CO/19-20.

¹¹ See *Generally*, U.N. CONF. ON TRADE AND DEV., THE ROLE OF INT'L INV. AGREEMENTS IN ATTRACTING FOREIGN DIRECT INV. TO DEV. COUNTRIES, UNCTAD Series on Int'l Inv. Policies for Dev., UNCTAD/DIAE/IA/2009/5, U.N. Sales No. E.09.II.D.20 (2009).

Governments should involve Indigenous communities at the earliest stage possible in the development of a trade agreement.

Indigenous resistance to a U.S.-Ecuador Free Trade Agreement partially explains the lack of an FTA today. The United States and Ecuador previously attempted to negotiate an FTA during the presidencies of Lucio Gutiérrez (2003-2005) and Alfredo Palacio (2005-2007) in Ecuador, and George W. Bush (2001-2009) in the United States. However, at the time, strong opposition emerged from the Confederation of Indigenous Nationalities of Ecuador (CONAIE), putting pressure on the Ecuadorean government and stalling negotiations. Indigenous Peoples argued that an FTA would exclusively benefit powerful nations like the United States.¹³

Negotiations resumed during the presidency of Lenín Moreno (2017-2021) in Ecuador and Donald Trump (2017-2021) in the United States, and they continue today under President Guillermo Lasso (2021-present) in Ecuador and President Joe Biden (2021-present) in the United States.

Based on the history of economic integration between the U.S. and Ecuador, governments should involve Indigenous communities at the earliest stage possible in the development of a

¹² U.S.- Chile Free Trade Agreement (January 1, 2004); U.S.-Peru Free Trade Agreement (February 1, 2009); U.S.-Colombia Trade Promotion Agreement (May 15, 2012).

¹³ Cf. Risa Schwartz, *Developing a Trade and Indigenous Peoples Chapter for Int'l Trade Agreement*, in INDIGENOUS PEOPLES AND INT'L TRADE: BUILDING EQUITABLE AND INCLUSIVE INT'L TRADE AND INV. AGREEMENTS 248-274 (John Borrows & Risa Schwarz eds., 2020).

trade agreement to increase the agreement's perceived legitimacy.

To understand the potential benefits and drawbacks of a deeper economic relationship between the U.S. and Ecuador, the next chapter emphasizes the historical relationship that Indigenous Peoples in Ecuador have had toward trade and investment and how sociopolitical circumstances have changed since the last attempt to negotiate a U.S.-Ecuador FTA.

2. INDIGENOUS PEOPLES AND TRADE

Indigenous Peoples around the world are among the groups who face the greatest levels of marginalization and discrimination.¹⁴ While they comprise eight percent of the population of Latin America, they represent approximately 14 percent of the poor and 17 percent of the extremely poor in the region.¹⁵ Indigenous Peoples' marginalized status and their use of distinctive institutions affect their view of development, trade, and investment policies.

Defining Indigenous Peoples

Although there is no clear definition of "Indigenous Peoples" or "Indigenous communities" under international law, these groups generally share several traits. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and other international legal documents have established criteria to identify Indigenous Peoples in any given country. Among other characteristics, these communities have deep connections to their ancestral territories and usually hold a strong desire to maintain that territory and the knowledge that accompanies it.

¹⁴ See Hum. Rts. Council, Report of the Special Rapporteur on the Situation of Hum. Rts. and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen, U.N. DOC E/CN.4/2004/80 (2004); see also Hum. Rts. Council, Report of the Special Rapporteur on the Situation of Hum. Rts. and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen, U.N. DOC E/CN.4/2005/88 (2005); 2016 UNHRC Special Rapporteur Report, *supra* note 5.

¹⁵ WORLD BANK, INDIGENOUS LATIN AM., *supra* note 3 at 10, 12.

¹⁶ See 2016 UNHRC Special Rapporteur Report, *supra* note 5.

Furthermore, they have unique social, economic, and political systems that are distinct from those of mainstream society, and may be reflected in language, culture, beliefs, or customary law.¹⁶

While Indigenous Peoples comprise eight percent of the population of Latin American, they represent about 14 percent of the poor and 17 percent of the extremely poor in the region.

Additionally, the American Declaration of the Rights of Indigenous Peoples and the World Bank explain that self-determination is a fundamental criterion for identifying Indigenous Peoples.¹⁷ The World Bank goes further and provides three other characteristics beyond self-determination. By their definition, the term "Indigenous Peoples" refers exclusively to a distinct social and cultural group possessing the following characteristics:¹⁸

- Collective attachment to geographically distinct habitats, ancestral territories, or areas of seasonal use or occupation, as well as to the natural resources in these areas;

¹⁷ Org. of Am. States, AG/RES. 2888 (XLVI-O/16), Am. Decl. on the Rts. of Indigenous Peoples, art. 2 (June 15, 2016).

¹⁸ See ESS7: Indigenous Peoples/Sub-Saharan African Historically Underserved Traditional Local Communities, *in Environ. and Soc. Standards (ESS)*, WORLD BANK, <https://www.worldbank.org/en/projects-operations/environmental-and-social-framework/brief/environmental-and-social-standards>. USAID uses seven criteria to identify Indigenous Peoples.

- Customary cultural, economic, social, or political institutions that are distinct or separate from those of the mainstream society or culture; and
- A distinct language or dialect, often different from the official language or languages of the country or region in which they reside.

Development

For many Indigenous Peoples, environmental protection is a crucial concern. Indigenous economies rely heavily on natural resources, and the preservation of their traditional cultures depends upon the preservation of their natural surroundings.¹⁹ As countries approach the 2030 deadline of the Sustainable Development Goals, and with climate change regulations becoming a part of many international agreements, the preservation of Indigenous Peoples' territories is increasingly relevant.

A 2017 World Resources Institute statement noted that “many experts argue that at least half of the world’s land is held by Indigenous Peoples and other communities.”²⁰ However, many Latin American constitutions stipulate that the subsoil

and nonrenewable natural resources are property of the State to preserve and ensure their public usefulness for the benefit of the entire nation.²¹ Thus, in these Latin American countries, even when Indigenous communities legally own a given territory, they do not own the resources under that territory. The conflict between the rights of Indigenous Peoples and the rights of the State continues to provoke concerns in Indigenous communities across the Americas.

Trade

Indigenous Peoples have a similarly complex relationship with trade agreements. Due to continuous advocacy from Indigenous Peoples, there has been a proliferation of protection clauses regarding Indigenous products, lands, ancestral knowledge, and other items pertaining to Indigenous Peoples.

In recent years, the Indigenous rights movement has gathered momentum and become particularly relevant in trade negotiations. As a result, governments and international institutions have codified legal and regulatory protections for these communities, and some countries in Latin America have made significant advances in recognizing these rights.²² States have drafted and implemented policies to protect Indigenous products, remove local regulatory barriers,

¹⁹ Julio C. Tresierra, *Rts. of Indigenous Groups over Natural Resources in Tropical Forests* (Inter-Am. Dev. Bank, Environ. Div. Working Paper, 1997).

²⁰ Peter Veit & Katie Reytar, *By the Numbers: Indigenous and Community Land Rights*, WORLD RESOURCES INST. (March 20, 2017), <https://www.wri.org/blog/2017/03/numbers-indigenous-and-community-land-rights>. See also CARLA Y. DAVIS-

CASTRO, CONG. RES. SERV., R46225, INDIGENOUS PEOPLES IN LATIN AM.: STAT. INFO. UPDATED JULY 16, 2020, <https://fas.org/sgp/crs/row/R46225.pdf>.

²¹ Am. Decl. on the Rts. of Indigenous Peoples, *supra* note 17.

²² See 2016 UNHRC Special Rapporteur Report, *supra* note 5.

empower communities, and facilitate trade routes. For example, the U.S. and Australia have developed a successful Indigenous Procurement Program to stimulate Indigenous economies. Other countries, such as New Zealand and Canada, have made commitments to improve their procurement policies by establishing mandatory set-aside targets that enable Indigenous businesses to access procurement contracts.²³ Nevertheless, there is considerable room for improvement.

Indigenous Peoples are both active participants in local markets and stewards of territories and cultural practices that can be eroded by trade agreements.²⁴ Consequently, Indigenous communities have both offensive and defensive interests when it comes to trade.²⁵ On the one hand, they can seek the economic benefits derived from trade agreements as participants and stakeholders in the market.²⁶ On the other hand, when an FTA threatens to affect their cultural practices, Indigenous communities may negotiate provisions to limit harm.²⁷

²³ See e.g., Risa Schwartz & Judy Whiteduck, *A Proposal for a Joint Decl. on Trade and Indigenous Peoples*, in MODERNIZING THE WORLD TRADE ORG. 41 (Susan Bubak & Lynn Schellenberg eds. 2020).

²⁴ Cf. Patricia M. Goff, *Bringing Indigenous Goals and Concerns into the Progressive Trade Agenda*, 65 REVUE INTERVENTIONS ÉCONOMIQUES / PAPERS IN POLITICAL ECON. (2021).

²⁵ Julio Lacarte Muró, *The History and Future of the World Trade Org.* by Craig Van Grassek World Trade Org. and Cambridge U. Press, 2013, 13 WORLD TRADE REV. 728–733 (2014) (book review).

Investment

While Indigenous Peoples have engaged with trade negotiations and had success advocating for their interests, they have been less successful when it comes to investment. Out of more than 300 investment chapters of bilateral and regional trade agreements, only a few explicitly mention the protection of Indigenous communities.²⁸ Many disputes over FTAs that involve Indigenous Peoples are related to investment chapters and are not specifically related to trade itself. These are frequently investments in oil, gas, and mining that would affect Indigenous land and could harm the surrounding environment.²⁹

Many disputes over FTAs that involve Indigenous Peoples are related to investment chapters and are not specifically related to trade itself.

The Lago Agrio case is one such investment. In 1993, a group of Indigenous Peoples from the Ecuadorean Amazon sued Texaco in a federal court in New York, alleging that pollution from a Texaco-Petroecuador oil drilling project had made them sick and caused water pollution, soil

²⁶ See Goff, *supra* note 24.

²⁷ *Id.*

²⁸ See 2016 UNHRC Special Rapporteur Report, *supra* note 5, citing, U.N. CONF. ON TRADE AND DEV., RECENT TRENDS IN IIAS AND ISDS, Int'l Inv. Agreement Issues Note, UNCTAD/WEB/DIAE/PCB/2015/1 (February 2015).

²⁹ See IACHR: Demands on Indigenous Consultation to Ratify Free Trade Agreements, INT'L WORK GROUP FOR INDIGENOUS AFFAIRS (December 15, 2016), <https://www.iwgia.org/en/panama/2474-iachr-demands-on-indigenous-consultation-to-ratify>.

contamination, and deforestation. U.S. oil company Chevron acquired Texaco a few years later, but the suit has lasted 28 years, involving bribery, advocacy from international celebrities, and a ruling by the Permanent Court of Arbitration at the Hague.³⁰ Given the salience and controversy surrounding the case, Lago Agrio has emerged as a potent symbol for Indigenous communities in Ecuador.

Recognizing and addressing environmental concerns like those that arose in the Lago Agrio case will prove critical if the U.S. and Ecuador are to productively engage Indigenous communities in any comprehensive conversation about deepening economic relations. If negotiators decide that trade is a higher priority than investment in the U.S.-Ecuador economic relationship, they may consider decoupling the two topics and pursuing a trade agreement without an investment chapter to avoid the political obstacles associated with investment.

³⁰ Randazzo, *supra* note 6.

3. INDIGENOUS PEOPLES AND TRADE IN ECUADOR

Numbering more than one million, the Indigenous Peoples of Ecuador represent about seven percent of the country's total population.³¹ Moreover, about eight percent of Ecuadoreans are Afro-Ecuadorean, most of whom are located in Esmeraldas Province and the Chota Valley in Imbabura Province, with other large concentrations in Guayaquil and Ibarra. The under-served Afro-Ecuadorean population is yet another relevant group that underscores the need to address issues affecting minority groups in Ecuador.

Historically, Indigenous communities have been excluded from formal political institutions. Today, Indigenous communities are key actors in Ecuador's political arena at the local, national, and international levels. There are several reasons for this shift, including the emergence of a powerful Indigenous identity movement led by the Confederación de Nacionalidades Indígenas del Ecuador (CONAIE).

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Indigenous Political Mobilization

CONAIE was created in November 1986 when two sub-regional organizations—Ecuador Runacunapac Riccharimui (ECUARUNARI), from the Andean highlands; and Confederación de Nacionalidades Indígenas de la Amazonía Ecuatoriana (CONFENIAE), from the Amazon—united. The ECUARUNARI and CONFENIAE are the strongest and most organized Ecuadorean Indigenous organizations, controlling 45 percent and 30 percent, respectively, of the confederation's delegates. Additionally, the Confederación de Nacionalidades y Pueblos Indígenas de la Costa Ecuatoriana (CONAICE) represents the Indigenous Peoples of Ecuador's coastal regions, with around 25 percent of delegates, though it is traditionally less strong and organized than the other two branches.

Since its creation in 1986, CONAIE's principal objective has been to defend Ecuador's Indigenous nations on economic, sociocultural, and political fronts, defending their right to self-determination and promoting the conservation of Indigenous culture.³²

CONAIE is well known for organizing popular uprisings (*levantamientos populares*), including blockades against major thoroughfares and the seizure and occupation of government buildings.³³ During its first decade, CONAIE dismissed elections as a path to political change, going so far

³¹ Davis-Castro, *supra* note 20 at Y.

³² ALLEN GERLACH, INDIANS, OIL, AND POLITICS: A RECENT HISTORY OF ECUADOR (2003).

³³ See Matias Zibell, *Crisis en Ecuador: el histórico poder de los grupos indígenas (y qué buscan con la gran marcha*

de este miércoles en Quito), BBC (Oct., 9, 2019), <https://www.bbc.com/mundo/noticias-america-latina-49983047>.

as to prohibit its members from running for office. In the mid 1990s, however, recognizing that oil exploration would increase without Indigenous participation in Ecuador's political institutions, CONAIE reversed its stance and embraced a combination of direct action and electoral politics.

Turn Toward Electoral Politics

In 1995, several Indigenous Peoples' organizations and environmentalists founded the Pachakutik Plurinational Unity Movement – New County, a party to advance the interests of Indigenous Peoples in Ecuador. The party obtained 20 percent of votes in the 1996 legislative elections, and in 2002, the Pachakutik nominee, Lucio Gutiérrez, was elected president on a platform critical of globalization and free market reforms.

As president, Gutiérrez reversed his campaign positions and pursued economic integration. CONAIE mobilized against him in 2002, amid the Seventh Summit of the Free Trade Area of the Americas (FTAA), held in Quito. The Indigenous association argued that the FTAA would expand the rights granted to corporations at the expense of environmental protection and human rights. CONAIE also launched the *Ecuador Decide* campaign in October 2004, demanding the immediate suspension of U.S.-Ecuador FTA negotiations and a referendum to allow Ecuadorians to vote on a potential trade agreement.

Protests over trade, corruption allegations, and other issues reached a climax in April 2005, with the Congress of Ecuador voting to remove Gutiérrez from office.

His successor, Alfredo Palacio, participated in negotiations with the U.S., Colombia, and Peru to form an Andean trade pact. While Colombia and Peru reached trade agreements in late 2005 and early 2006, Indigenous organizations in Ecuador, particularly Ecuarrunari, led mass protests against a free trade agreement.³⁴ After a dispute between Washington and Quito over a U.S. oil company operating in Ecuador, the United States government withdrew from negotiations.³⁵

During the presidency of Rafael Correa (2007-2017), Pachakutik secured smaller percentages in presidential and legislative elections. Correa's government, broadly critical of globalization and free market economics, did not negotiate a trade agreement with the United States. Correa did, however, negotiate Ecuador's accession to the European Union's free trade agreement with Colombia and Peru in 2016.

Correa's successor, Lenín Moreno (2017-2021) resumed negotiations with the U.S. and initiated Ecuador's accession to the Pacific Alliance, a trade bloc that includes Mexico, Colombia, Peru, and Chile. He also concluded a trade agreement with the European Free Trade Area (EFTA).

³⁴ *Ecuador Police Break Up U.S. Protest*, ASSOC. PRESS (Jan. 12, 2006).

³⁵ Martin Crutsinger, *White House Says Ecuador Trade Talks Stall*, ASSOC. PRESS (May 16, 2006).

Indigenous Peoples and Trade Today

The most recent elections have shown Pachakutik to be a viable political force in Ecuador. Pachakutik nominee Yaku Pérez achieved third place in the first round of presidential elections in February 2020. Pérez encouraged his followers to cast a null vote in the second round, which disproportionately benefited conservative candidate Guillermo Lasso when Indigenous voters declined to vote for his socialist opponent, Andrés Arauz.³⁶

In the Ecuadorean legislature, Pachakutik has achieved a high level of representation. On the left, supporters of former President Rafael Correa hold 49 seats, a plurality of the 137-seat assembly. Pachakutik is the second-largest group, with 27 seats, and the newly elected President of the Assembly, Guadalupe Llori, is one of their members. Pachakutik's influence in the current government of Ecuador is unprecedented, and the party will play a major role in Ecuador's trade and investment negotiations in coming years.

Outside of electoral politics, CONAIE remains Ecuador's largest organization for Indigenous Peoples, and it continues to serve as a platform for Indigenous communities to insert themselves into national economic policy debates. Its constituent organization, ECUARUNARI, is closest to Pachakutik, with Yaku Pérez having served as president of ECUARUNARI and presidential nominee for Pachakutik. As such, ECUARUNARI provides a bridge between

CONAIE's political organizing and Pachakutik's negotiations within the Ecuadorean government.

Pachakutik's influence in the current government of Ecuador is unprecedented, and the party will play a major role in Ecuador's trade and investment negotiations in coming years.

Indigenous Peoples now play a larger role in Ecuador's politics today than they did in the early 2000s, when Ecuador's leaders previously attempted to negotiate a trade agreement with the United States. They will be a crucial stakeholder in any potential agreement today.

³⁶ See Yaku Pérez deseó éxitos a Guillermo Lasso por su Victoria en las elecciones, EL COMERCIO (April 12, 2021),

<https://www.elcomercio.com/actualidad/politica/yaku-perez-exitos-guillermo-lasso.html>.

4. INDIGENOUS RIGHTS IN INTERNATIONAL LAW: PROCESS AND SUBSTANCE

In recent years, international jurisprudence has outlined more rights for Indigenous Peoples and placed more obligations on States to protect those rights. The growing body of international law related to Indigenous Peoples is relevant to both the process and substance of U.S.-Ecuador trade negotiations.

Regarding process, international law indicates under what circumstances Indigenous Peoples must be consulted or provide consent to a potential project, a topic covered in chapters 5-7. Regarding substance, international law codifies certain rights related to Indigenous Peoples that all countries must respect. Trade agreements must recognize these rights, and they can also enshrine new protections for Indigenous Peoples, a topic covered in chapter 8. This chapter outlines the international legal instruments that inform both the process and substance of international trade negotiations involving Indigenous Peoples.

Self-Determination: A Fundamental Right for Indigenous Peoples

In an effort to empower Indigenous communities, provide them with avenues for political

participation, and pursue economic, social, and cultural development on their own terms, several international legal instruments have codified Indigenous Peoples' rights.³⁷

The principle of self-determination has played a key role in Indigenous Peoples' political organization, cultural image, and legal strategies in more recent decades. The 1948 Universal Declaration of Human Rights expresses the importance of self-determination of all peoples in Article 1.³⁸ The 1966 International Covenant on Civil and Political Rights (ICCPR) and the 1966 International Covenant on Economic, Social, and Cultural Rights (ICESCR), which elaborated on many of the rights listed in the UDHR and are legally binding, state that "all peoples have the right to self-determination," and "all peoples have the right to freely pursue their economic, social, and cultural development."³⁹

Expansion of Indigenous Rights

Following an early emphasis on self-determination, more recent legal instruments have taken a broader view of Indigenous rights.

In 1989, the International Labour Organization established the Indigenous and Tribal Peoples Convention (ILO 169).⁴⁰ The convention gained 24 ratifications around the world, with the vast majority of ratifying countries in Latin America.

³⁷ See S. James Anaya, *Indigenous Peoples' Participatory Rts. in Relation to Decisions About Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources*, 22 ARIZ. J. INTL. COMP. L. 7, 7 (2005).

³⁸ G.A. Res. 217 A(III) (Dec. 10, 1948), *Univ. Decl. of Hum. Rts.*, U.N. DOC. A/RES/217 A (III).

³⁹ Int'l Covenant on Econ., Soc. and Cultural Rts. (ICESCR), art. 12, Dec. 16, 1966, 993 U.N.T.S. 3; Int'l Covenant on Civ. and Polit. Rts. (ICCPR), Dec. 16, 1966, 999 U.N.T.S. 171.

⁴⁰ Int'l Lab. Org. (ILO), *Indigenous and Tribal Peoples Conv.*, C169, June 27, 1989, 1650 U.N.T.S. 383 (entered into force Sept. 5, 1991) [hereinafter ILO 169]

An update to an older convention on Indigenous rights from 1957, ILO 169 remains binding today, providing detailed guidance on States' obligations to consult with Indigenous communities (see Chapter 5).

The United Nations reached agreement on a non-binding Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007.⁴¹ The Organization of American States (OAS) promulgated its own non-binding legal instrument, the American Declaration on the Rights of Indigenous Peoples, in 2016.⁴² These instruments prescribe a different approach to consultation with Indigenous communities, stricter than that stipulated by ILO 169 (see Chapter 6).

When interpreting economic treaties, international judges must adhere to the 1969 Vienna Convention on the Law of Treaties (VCLT).⁴³ The Vienna Convention establishes that countries cannot sign agreements that contradict an agreement previously signed by the same country.⁴⁴ For example, Ecuador could not sign an FTA that bans consultations with Indigenous communities on projects or legislation that affects their wellbeing, since such an agreement would violate ILO 169. Moreover, a State can suspend or terminate an FTA that affects Indigenous Peoples'

rights by invoking Article 62(2) of the VCLT, which concerns a fundamental change in circumstances, such as the recognition of Indigenous Peoples within State borders.⁴⁵

Human Rights in the Inter-American System

If a State or corporation fails to uphold their obligations to Indigenous Peoples under international law, Indigenous Peoples can turn to the Inter-American system for legal recourse. Although this is rarely an effective remedy for an individual case—given the high cost and duration of a legal proceeding—decisions by international human rights bodies can force a State to improve conditions for all Indigenous Peoples, beyond the plaintiffs immediately involved. Additionally, the threat of international oversight and reputational damage can provide an incentive to States to honor Indigenous rights at the outset of a project.

In the Western Hemisphere, the 1948 American Declaration of the Rights and Duties of Man (Bogotá Declaration) provides a normative basis for human rights in the hemisphere, fulfilling a role similar to that of the UDHR. The 1969 American Convention on Human Rights (Pact of San José) establishes the Inter-American

⁴¹ G.A. Res. 61/295 (Sept. 13, 2007), *U.N. Decl. on the Rts. of Indigenous Peoples*, U.N. DOC. A/RES/61/295.

⁴² Am. Decl. on the Rts. of Indigenous Peoples, *supra* note 17.

⁴³ Vienna Conv. on the Law of Treaties, May 23, 1969, art. 31 (3) (c), 1155 U.N.T.S. 331.

⁴⁴ See Puig, *Int'l Indigenous Econ.L.*, *supra* note 9.

⁴⁵ See 2016 UNHRC Special Rapporteur Report, *supra* note 5 (“To do so, they would need to show that: (a) such recognition was not foreseen when the agreement was

entered into; (b) the change radically transforms the extent of obligations still to be performed under the treaty, as could be the case given the requirement to obtain indigenous peoples' free, prior and informed consent to investment plans; and (c) the change is not the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty, a threshold that is not met by the recognition of indigenous peoples' rights within the host State.”)

Commission on Human Rights and the Inter-American Court on Human Rights. While the Commission can investigate allegations of human rights abuses and issue recommendations for any country in the hemisphere, the Court can issue binding rulings for countries that have signed the Pact of San José.

As a signatory of the Bogotá Declaration but not the Pact of San José, the United States does not fall within the Inter-American Court's jurisdiction.⁴⁶ Therefore, individuals can sue the U.S. only in the Inter-American Commission on Human Rights, which issues nonbinding rulings.

Unlike the U.S., Ecuador has ratified both instruments. Thus, if Ecuador does not comply with a report from the Inter-American Commission on Human Rights, the case could rise to the Inter-American Court of Human Rights and result in a binding decision.

Indigenous territorial and cultural rights must be at the center of future trade negotiations.

Indigenous communities have repeatedly defended their rights in front of the Inter-American Court of Human Rights, drawing on the

Pact of San José, the American Declaration on the Rights of Indigenous Peoples, and other international instruments and national laws.⁴⁷

Process and Substance Revisited

Early human rights law emphasized self-determination, providing Indigenous Peoples with a legal foundation for future international instruments. These instruments inform the process of trade negotiations—when must negotiators consult Indigenous groups, and under what circumstances must they provide consent. They also inform the substance of negotiations—what rights do Indigenous Peoples have, and what obligations does the State or corporations owe them. If a State does not fulfill its international legal obligations, Indigenous Peoples may resort to legal remedies through the Inter-American System.

The next chapter will explain Indigenous Peoples' role in providing consultation and consent, emphasizing the role of international law in the process of trade negotiations. Chapter 8 will turn toward the substance of trade negotiations, identifying the types of rights and exceptions that recent trade agreements have provided Indigenous Peoples.

⁴⁶ See Am. Decl. of the Rts. and Duties of Man, Res. XXX, Final Act of the Ninth Int'l Conf. of Am. States (Pan Am. Union), Bogotá, Colombia, May 2, 1948, art. 1, OAS/Ser.L/V/I.4 Rev. 9; Org. of Am. States, Am. Conv. on Hum. Rts., Nov. 22, 1969, art. 4, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

⁴⁷ See, e.g., Tagaeri and Taromenane Indigenous Peoples (in Voluntary Isolation) v. Rep. of Ecuador, Submission, Inter-Am. Ct. H.R., Case No. 12,979 (Sept. 30, 2020); Indigenous

Communities Members of the Lhaka Honhat Association (Our Land) vs. Argentina, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R., Case No. 12,094 (Feb. 6, 2020); Saramaka People v. Suriname, Interpretation of the Judgement on Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R., Case No. 12,338, (ser. C) No. 185, ¶ 134 (Aug. 12, 2008); Mayagna (Sumo) Indigenous Community of Awas Tingni v. the Republic of Nicaragua, Submission, Inter-Am. Ct. H.R., Case No. 11,577 (June 4, 1998).

5. CONSULTATION VS. CONSENT: INDIGENOUS PEOPLES AS STAKEHOLDERS IN TRADE NEGOTIATIONS

As international law in general has developed to recognize rights for Indigenous Peoples, so has trade law specifically. In the past, although Indigenous Peoples participated in trade and were impacted by trade agreements, they were often excluded from trade negotiations.

Since Ecuador and the United States last attempted to forge an FTA during the government of Alfredo Palacio (2005-2007), trade law has evolved to provide opportunities for Indigenous communities to engage directly in trade negotiations. Some international agreements, constitutions, and court rulings require consultation with Indigenous Peoples when considering a trade or investment agreement that will impact them. Other legal rulings require consent, a higher bar than consultation in that it requires the approval of Indigenous Peoples, not just their input.

Participation Inside and Outside of Institutions

Indigenous Peoples can advance their interests by participating in institutions or by engaging in politics outside of institutions. Pachakutik's embrace of electoral politics (see Chapter 3) is an example of the former, while CONAIE's street mobilizations, especially their rejection of running for office prior to 1996, is an example of the latter.

CONAIE's politics—largely outside of institutions—were a major force against past efforts to negotiate a trade agreement.

If Indigenous Peoples feel that their involvement in institutions is inadequate and their input is ignored, then they are more likely to resort to mass mobilizations and street blockades.

Consultation and consent offer Indigenous Peoples an opportunity to participate in institutions. If they are prevented from participating, or if Indigenous Peoples feel that their involvement is inadequate and their input is ignored, then they are more likely to resort to mass mobilizations and street blockades. These actions often lead to a “low-trust and adversarial relationship” between the State and Indigenous Peoples, according to New Zealand's Waitangi Tribunal.⁴⁸ The policy outcomes of mobilizations are often unintended, with governments suffering in their ability to negotiate any treaty or legislation and Indigenous communities unable to shape reforms without institutional representation.⁴⁹

Indigenous participation through institutions is more predictable than the alternative. The major question for stakeholders is what level of participation is necessary during trade negotiations: consultation or consent?

⁴⁸ See WAITANGI TRIBUNAL, WAITANGI TRIBUNAL REPORT ON THE TRANS-PACIFIC PARTNERSHIP (PRE-PUBLICATION VERSION) 56 (2016),

https://forms.justice.govt.nz/search/Documents/WT/wt_DO_C_104833137/Report%20on%20the%20TPPA%20W.pdf.

⁴⁹ See 2016 UNHRC Special Rapporteur Report, *supra* note 5.

Consultation: Ecuador's Obligations under ILO 169

The only legally binding international instrument guaranteeing Indigenous Peoples' consultation in decisions that affect their wellbeing is ILO 169.

Since Ecuador ratified ILO 169 in 1998, the State must consult with Indigenous Peoples before taking any action that may affect their communities.⁵⁰ According to Article 7(1), "[I]ndigenous people shall participate in the formulation, implementation, and evaluation of plans and programs for national and regional development which may affect them directly."⁵¹

Consequently, if Ecuadorean officials do not allow Indigenous communities to participate in negotiations surrounding a possible FTA, this decision could be interpreted as a breach of ILO 169.⁵² Still, the ILO 169 is somewhat vague regarding the circumstances in which consultation and participation are mandatory, and whether this provision also grants Indigenous communities veto power over relevant dimensions of free trade negotiations.

Interpreting these provisions of ILO 169, the Committee of Experts on the Application of Conventions and Recommendations (CEACR) explains that there are two central issues:

- (i) Ensuring that appropriate consultations are held prior to

the adoption of all legislative and administrative measures which are likely to affect Indigenous and tribal peoples directly; and

- (ii) Including provisions in legislation requiring prior consultation as part of the process of determining if concessions for the exploitation and exploration of natural resources are to be granted.⁵³

The CEACR elaborated on the distinction between consultation and consent in the context of ILO 169, determining that in most cases, consultations "do not imply a right to veto, nor is their result necessarily the reaching of agreement or consent."⁵⁴ The only exception arises in cases of relocation: Article 16 of ILO 169 establishes that Indigenous communities must give their free and informed consent when presented with an agreement to resettle in a new location.⁵⁵

While Ecuador's obligations under ILO 169 do not rise to the level of consent, the government must still ensure that consultations are based in timely and comprehensive access to information.

⁵⁰ See ILO 169, *supra* note 40 at art. 7, 15, and 19.

⁵¹ *Id.* at art. 7.

⁵² See Prieto-Ríos & Rivas-Ramirez, *supra* note 8; see also ILO 169, *supra* note 40 at art. 7; U.N. Decl. on the Rts. of Indigenous Peoples, *supra* note 41.

⁵³ Comm. of Experts on the Application of Conventions and Recommendations, General Observation, Indigenous and Tribal Peoples, Int'l Lab. Conf., CEACR-2010-O-S20-GEN (2009).

⁵⁴ *Id.*

⁵⁵ Sebastiaan Rombouts, *The Evolution of Indigenous Peoples' Consultation Rts. under the ILO and UN Regimes: A Comp. Assessment of Participation, Consultation, and Consent Norms Incorporated in ILO Conv. No. 169 and the U.N. Decl. on the Rts. of Indigenous Peoples and Their Application by the Inter-Am. Ct. of Hum. Rts. in the Saramaka and Sarayaku Judgments*, 53 STANFORD J. OF INTL. L. 169 (2017).

Consent: A Higher Standard for Indigenous Peoples' Participation in Trade Agreements

Though ILO 169 requires consultation in decisions that affect Indigenous Peoples, it does not entail a requirement to obtain consent, unlike some other international instruments. As the next chapter explains in detail, the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and the American Declaration on the Rights of Indigenous Peoples recognize States' obligations to obtain free, prior, and informed consent from Indigenous Peoples when considering a project that affects them.

No matter what level of Indigenous participation a country requires, consultation and consent demand more than just a guarantee on paper. Insufficient expertise, information asymmetry, and a lack of resources can prevent Indigenous Peoples from pursuing their interests in trade negotiations. Once a trade agreement is implemented, poor access to trade networks can prevent Indigenous Peoples from fully benefiting from economic integration.⁵⁶ And if abuses do occur once a trade agreement is signed, the State must provide a legal remedy.⁵⁷ Failing this, Indigenous Peoples must have access to international human rights courts to pursue their claims.⁵⁸

⁵⁶ Cf. Schwarz, *supra* note 13; *see generally*, Prieto-Ríos & Rivas-Ramirez, *supra* note 8.

⁵⁷ *See generally*, 2013 UNHRC Special Rapporteur Report, *supra* note 10.

⁵⁸ *See generally*, Daniel M. Brinks, *Access to What? Legal Agency and Access to Justice for Indigenous Peoples in Latin Am.*, 55 J. OF DEV. STUD. 348-365 (2019), *See Hum. Rts. Council, Report of the Special Rapporteur on the Rts. of Indigenous Peoples*, U.N. DOC A/HRC/42/37 (2019).

Implementation in Colombia

Ecuador might heed neighboring Colombia's example with respect to Indigenous rights. Colombia ratified ILO 169 in 1991, and the Constitutional Court of Colombia has since established a requirement of "appropriate consultation."

In the 1997 ruling SU-039/97, a leading case in the region regarding consultation with Indigenous Peoples, the Constitutional Court stated that the government must harmonize its interest in the sustainable use of natural resources with the rights of the Indigenous communities living in the exploited areas to conserve their cultural, ethnic, economic, and social identity.⁵⁹ As a result, the court expressed the need to create participation mechanisms for communities in the decisions that affect them. The consultation should aim to mitigate the asymmetry of information between the State and Indigenous communities, by providing the latter with full knowledge of the project and its possible impact as well as any advantages and disadvantages.

In 2006, the Colombian Constitutional Court expanded this doctrine by declaring a law unconstitutional for inadequate consultation with Indigenous and Afro-Colombian communities.⁶⁰ The Constitutional Court reinforced the recognition of ethnic and cultural diversity as a constitutional principle in Colombia. This recognition entailed a "duty to create a

⁵⁹ *See* Courtis, *supra* note 59; Colombia, Const. Ct., Aug. 13, 2002, No. SU-039/97: Derechos Fundamentales de la Comunidad Indígena.

⁶⁰ *See* Courtis, *supra* note 59; Colombia, Const. Ct., Jan. 23, 2008, No. C-030/08: Convenio 169 de la Org. Internacional del Trabajo (OIT).

consultation process for Indigenous and Afro-Colombian communities.”⁶¹

The Colombian Constitutional Court’s recognition of consultation as a requirement and its emphasis on early participation, informed decisionmaking, and the need to balance the State’s interest in sustainable development with the rights of Indigenous Peoples influenced many countries’ later decision to adopt free, prior, and informed consent as a standard for Indigenous participation.

⁶¹ Curtis, *supra* note 59.

6. FREE, PRIOR, AND INFORMED CONSENT (FPIC)

International legal instruments increasingly recognize the obligation of States to obtain free, prior, and informed consent (FPIC) from Indigenous Peoples on issues that will significantly impact their wellbeing. This trend is rooted in the view that consultation is not enough, particularly when asymmetric information and resources can affect trade negotiations to the detriment of Indigenous Peoples' interests.⁶²

The major question for stakeholders is what level of participation is necessary during trade negotiations: consultation or consent?

FPIC in International Law

The United Nations led the trend toward endorsing FPIC in 2007, approving the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).⁶³ In addition to recognizing the unique identity of Indigenous communities, the UNDRIP declared that “States shall consult and cooperate in good faith with the Indigenous Peoples concerned through their own representative institutions in order to obtain their free, prior, and informed consent before adopting and implementing

legislative or administrative measures that may affect them.”⁶⁴

The Organization of American States joined the trend in favor of FPIC in 2016, passing the American Declaration on the Rights of Indigenous Peoples.⁶⁵ The OAS declaration mandated that States, with the full and effective participation of Indigenous Peoples, must adopt measures to ensure that national and international agreements and regimes provide recognition and adequate protection for the cultural heritage of Indigenous Peoples and for the intellectual property associated with that heritage. The declaration states that consultations should intend to obtain the free, prior, and informed consent of Indigenous Peoples.

Elements of FPIC

Each of the elements of free, prior, and informed consent is significant. Consent is free when Indigenous Peoples are not coerced or intimidated. Consent is prior when communities have sufficient time to consider a project and understand its implications before granting approval. And consent is informed when all stakeholders have access to clear details about a project in the local language, presenting both the positive and negative potential impacts.⁶⁶ The

⁶² SEBASTIAAN ROMBOUTS, HAVING A SAY: INDIGENOUS PEOPLES, INT’L LAW AND FREE, PRIOR AND INFORMED CONSENT 164-166 (2014), *citing* NEIL MANSON & ONORA O’NEILL, RETHINKING INFORMED CONSENT IN BIOETHICS (2007).

⁶³ U.N. FOOD AND AGRIC. ORG., FREE PRIOR AND INFORMED CONSENT – AN INDIGENOUS PEOPLES’ RT. AND A GOOD

PRACTICE FOR LOCAL COMMUNITIES (2016) [hereinafter *FAO Report on FPIC*]; G.A. Res. 61/295 (Sept. 13, 2007).

⁶⁴ *U.N. Decl. on the Rts. of Indigenous Peoples*, *supra* note 41 at art. 19.

⁶⁵ *Am. Decl. on the Rts. of Indigenous Peoples*, *supra* note 17.

⁶⁶ *FAO Report on FPIC*, *supra* note 63 at 15-16.

final element of FPIC, consent, is most contested among stakeholders.

Consent and Veto Power

International institutions, legal scholars, and Indigenous community leaders generally agree that consent is a higher bar than consultation. They diverge, however, regarding just how high a bar the FPIC requirement of the UNDRIP is.

At the lower end of the spectrum, the UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, has clarified that “the declaration doesn’t say Indigenous people have a right to withhold consent. It says States shall consult with Indigenous peoples with the objective of achieving their consent.”⁶⁷ According to this perspective, UNDRIP may be more demanding than previous requirements to consult with Indigenous communities, but only because it expects negotiators to actively try to obtain consent.

Further along the spectrum, the Expert Mechanism on the Rights of Indigenous Peoples

notes that the FPIC provision of UNDRIP includes “a right to say yes and no” to a project or proposed legislation.⁶⁸ However, none of the major international institutions supporting the application of FPIC to Indigenous Peoples (e.g. the UN General Assembly, the UN Secretary General, the Office of the High Commissioner for Human Rights, UN treaty bodies, and the Inter-American Court of Human Rights) describes FPIC as a veto.⁶⁹ Instead, these institutions treat consent as a balancing act between the rights of Indigenous Peoples and “the principles of justice, democracy, respect for human rights, non-discrimination, good governance, and good faith.”⁷⁰

Finally, some stakeholders consider consent to be equivalent to a veto. In 2007, as Canada considered whether to ratify UNDRIP, the country’s government cited concerns that FPIC may be construed as a right to veto.⁷¹ Nearly a decade later, after the country had ratified the declaration, First Nations community leader Pam Palmater told CBC radio that FPIC “is guaranteed in law and in effect that is a veto,” provoking debate in the Canadian parliament.⁷² However,

⁶⁷ *UN Envoy Accused of “Publicity Stunt” Promises “Constructive” Advice for Harper Government on Aboriginal Issues*, NAT’L POST (Jan. 25, 2015), <https://nationalpost.com/news/canada/un-envoy-accused-of-publicity-stunt-promises-constructive-advice-for-harper-government-on-aboriginal-issues>.

⁶⁸ Hum. Rts. Council, *Free, Prior and Informed Consent: A Hum. Rts.-Based Approach: Study of the Expert Mechanism on the Rts. of Indigenous Peoples*, UN Doc. A/HRC/39/62 (10 August 2018), para. 7; *see also*, U.N. Gen. Assembly, *Hum. Rts. and Transnat’l Corp. and Other Bus. Enterprises: Note by the Sec’y-Gen, Report of the Working Group on the Issue of Hum. Rts. and Transnat’l Corp. and Other Bus. Enterprises*, UN Doc. A/71/291 (4 August 2016), para. 71.

⁶⁹ PAUL JOFFE, “VETO” AND “CONSENT” – SIGNIFICANT DIFFERENCES 5 (Aug. 30, 2018),

<https://quakerservice.ca/wp-content/uploads/2018/10/Veto-and-Consent-Significant-differences-Joffe.pdf>.

⁷⁰ PAUL JOFFE, “VETO” AND “CONSENT” – SIGNIFICANT DIFFERENCES 10 (Aug. 30, 2018), <https://quakerservice.ca/wp-content/uploads/2018/10/Veto-and-Consent-Significant-differences-Joffe.pdf>; O’Neil 2013); *U.N. Decl. on the Rts. of Indigenous Peoples*, *supra* note 41 at art. 46(3).

⁷¹ Ken S. Coates & Blaine Favel, *Understanding FPIC 9* (MacDonald-Laurier Inst., Aboriginal Canada and the Natural Resource Econ. Series, April 2016).

⁷² Canada, Parliament, House of Commons Debates, 42nd Parl, 1st Sess, Vol 148, No 257 (Feb. 5, 2018) at 1105 (Hon M Strahl).

Palmater's view is supported by few legal scholars or court rulings.⁷³

Political Considerations of FPIC

UNDRIP and the American Declaration on the Rights of Indigenous Peoples are nonbinding, but governments may have moral or political reasons to favor FPIC over consultation.⁷⁴ First, the two declarations carry significant normative force: 143 countries have ratified UNDRIP, and 23 countries (of 35 in the Western Hemisphere) have ratified the American Declaration on the Rights of Indigenous Peoples.⁷⁵ Ecuador has ratified both.

Second, although consent is a higher bar than consultation, explicit support from Indigenous communities for a trade deal can also lend legitimacy to any such deal. Indigenous Peoples' support will be a major factor in favor of a potential trade agreement in Ecuador during the ratification stage given the role of Pachakutik, an Indigenous-led party, as the second largest bloc in the legislature (see Chapter 3).

The next chapter explains the role of FPIC in the Ecuadorean Constitution.

⁷³ Coates & Favel, *supra* note 71 at 7-8, 20.

⁷⁴ See Goff, *supra* note 24; see also U.N. Econ. and Soc. Council, Perm. Forum on Indigenous Issues, Fourth Session, Report of the Int'l Workshop on Methodologies Regarding Free, Prior and Informed Consent and Indigenous Peoples, 17 February 2005, U.N. Doc. E/C.19/2005/3, at ¶¶ 46-47 (providing the "[e]lements of a common understanding of

free, prior, and informed consent" and stating that "[c]onsultation and participation are crucial components of a consent process").

⁷⁵ U.N. Decl. on the Rts. of Indigenous Peoples, *supra* note 41; Am. Decl. on the Rts. of Indigenous Peoples, *supra* note 17.

7. FPIC IN THE ECUADOREAN CONSTITUTION

Ecuador has incorporated much of the international jurisprudence surrounding FPIC into its domestic law, principally through constitutional reforms in 1998 and 2008.

Consultation: 1998 Constitutional Reform

In 1998, the government of Ecuador adopted a new Constitution. Although the reforms were not exclusively related to Indigenous Peoples' demands, they fundamentally impacted the role of Indigenous Peoples in Ecuadorean society. The 1998 Constitution incorporated ILO 169 into Ecuadorean law, with Article 84 requiring prior consultation on plans to prospect and exploit non-renewable resources on Indigenous land.⁷⁶ The article also stipulates that Indigenous Peoples will receive compensation for socio-economic harms caused to them.⁷⁷

Ecuador has incorporated much of the international jurisprudence surrounding free, prior, and informed consent into its domestic law.

The Constitutional Court of Ecuador reaffirmed this provision in subsequent litigation. In the 2002 case *Arcos v. Dirección Regional de Minería*, the

Court considered a petition for relief for the Chachi Indigenous community and the Afro-descendant community from the Esmeraldas province. The Ecuadorean government granted a concession to a private mining company to prospect, explore, exploit, and market minerals in Esmeraldas. The Constitutional Court found that the government and mining company had violated the collective rights of the black and Indigenous communities by ignoring the requirement for prior consultation and by failing to conduct an environmental impact assessment.⁷⁸

In 2006, the UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples found that the Ecuadorean government had failed to uphold many of the rights enshrined in the 1998 constitution in subsequent legislation.⁷⁹

Consent: 2008 Constitutional Reform

When President Rafael Correa promulgated a new constitution in 2008, only a decade after the last set of reforms, some of the concerns of Indigenous Peoples were addressed. The 2008 Constitution, which remains in effect today, includes a chapter regarding the "Rights of Communities, Peoples, and Nationalities."⁸⁰ Article 57 includes the "right to free, prior, and informed consent" and specifically notes that "in cases where consent is not achieved from the community that was

⁷⁶ Constitución de la República de Ecuador, 1998.

⁷⁷ *Id.*

⁷⁸ See Courtis, *supra* note 59; Ecuador, Const. Ct., Aug. 13, 2002, No. 170-2002-RA: Claudio Arcos v. Mueckay Regional Bureau of Mines of Pichincha: Regional Director.

⁷⁹ See Hum. Rts. Council, Report of the Special Rapporteur on the Situation of Hum. Rts. and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen, Addendum: Mission to Ecuador, U.N. DOC A/HRC/4/32/Add.2 (2007).

⁸⁰ Constitución de la República de Ecuador, 2008, Ch. IV.

consulted, then the process would conform to the Constitution and the law.”⁸¹

Stakeholders in Ecuador continue to issue competing interpretations of the State's constitutional obligations.

Subsequent efforts to include FPIC provisions in Ecuador's hydrocarbon and mining laws have encountered resistance from CONAIE.⁸² Just as the definition of free, prior, and informed consent is contested at an international level, stakeholders in Ecuador continue to issue competing interpretations of the State's constitutional obligations and espouse differing views on how to incorporate those obligations into law.

FPIC in Practice

In 2012, the Inter-American Court of Human Rights ruled in favor of the Sarayaku people in *Sarayaku v. Ecuador*, finding that “consultations should be performed in good faith... *with the objective* of achieving agreement or consent” [emphasis added].⁸³ The State's failure to meet this standard before granting permission to an

Argentinian oil company to explore and exploit the Sarayaku people's land amounted to a violation of the right to property and cultural identity under Article 21 of the American Convention on Human Rights.⁸⁴ The government of Ecuador was therefore required to adopt legislative measures to fully acknowledge and protect Indigenous Peoples' right to FPIC. Although the government adopted some measures, they did not fully meet the requirements of the international ruling. As a result, in November 2019, representatives of the Sarayaku people filed an action of non-compliance before the Constitutional Court of Ecuador.⁸⁵ The case is still pending as of July 2021.

⁸¹ “Consentimiento libre, previo e informado,” in Spanish; Constitución de la República de Ecuador, 2008, art. 57.

⁸² Toa Maldonado Ruiz, CONSENTIMIENTO LIBRE, PREVIO E INFORMADO EN EL ECUADOR: APORTES AL MECANISMO DE EXPERTOS SOBRE LOS DERECHOS DE LOS PUEBLOS INDÍGENAS 6-10, DEFENSORÍA DEL PUEBLO DE ECUADOR (March 2018); *see generally*, Flavia Milano & Andrea Sanhueza, PUBLIC CONSULTATIONS WITH CIVIL SOCIETY: GUIDELINES FOR PUBLIC AND PRIVATE EXECUTING AGENCIES 109-133, INTER-AM. DEV. BANK (2016), <https://publications.iadb.org/publications/english/document/Public-Consultations-with-Civil-Society-Guidelines-for-Public-and-Private-Executing-Agencies.pdf>.

⁸³ Kichwa Indigenous People of Sarayaku and its Members v. Ecuador, Official Summary of the Merits and Reparations, Judgment, Inter-Am. Ct. H.R., Case No. 12,465 (ser. C) No. 245 (Jun 27, 2012), 6.

⁸⁴ Am. Conv. on Hum. Rts., *supra* note 46.

⁸⁵ *See* Kichwa Indigenous People of Sarayaku and its Members v. Ecuador, Merits and Reparations, Judgment, Inter-Am. Ct. H.R., Case No. 12,465 (ser. C) No. 245 (Jun 27, 2012); *see also* *El pueblo indígena Kichwa de Sarayaku regresa a la Corte Constitucional ecuatoriana para garantizar que se implemente el fallo de la Corte Interamericana*, CTR. FOR JUSTICE AND INT'L LAW, <https://cejil.org/en/pueblo-indigena-kichwa-sarayaku-regresa-corte-constitucional-ecuatoriana-garantizar-que-se>.

8. INDIGENOUS PROTECTIONS IN RECENT TRADE AGREEMENTS

The involvement of Indigenous Peoples in trade agreements goes beyond their consultation or consent during negotiations. Indigenous Peoples' interests are also present in the substance of agreements, especially when it comes to providing explicit protections for Indigenous rights. The history of the Trans-Pacific Partnership (TPP) and U.S.-Mexico-Canada (USMCA) agreements offer context for the types of provisions related to Indigenous Rights that modern trade agreements may include.

Trans-Pacific Partnership

In 2015, the Trans-Pacific Partnership (TPP), a proposed multilateral trade pact, was signed by 12 countries across the Americas, Asia, and Oceania. Of the signatory countries, 11 have significant Indigenous populations that have expressed their concerns over a lack of legal protections and judicial remedies.⁸⁶ These Indigenous communities have also criticized what they view as insufficient consultation during the negotiation process.

The TPP lost momentum when the United States withdrew from negotiations in 2017, but several signatories resumed talks, promising a trade agreement that would satisfy sectors that felt excluded from the first series of negotiations. The

resulting Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), signed in Santiago, Chile, in 2018, was the first regional trade agreement to recognize Indigenous Peoples' rights in its preamble⁸⁷:

The Parties to this Agreement "[...] reaffirm the importance of promoting corporate social responsibility, cultural identity and diversity, environmental protection and conservation, gender equality, Indigenous rights, labor rights, inclusive trade, sustainable development and traditional knowledge, as well as the importance of preserving their right to regulate in the public interest."⁸⁸

States party to the CPTPP included carveouts and protections for their Indigenous communities. Canada, for example, has led discussions for over a decade on carveouts and exceptions for its Indigenous Peoples (the First Nations and Métis in particular).⁸⁹ New Zealand successfully advocated for a Treaty of Waitangi exception clause, which enables preferential treatment for the Māori—the Indigenous Peoples of New Zealand—and guarantees that the substantive rights that the Māori currently enjoy under the terms of the 1840 Treaty of Waitangi will be protected under the CPTPP.⁹⁰

⁸⁶ UNCTAD, EXPLORING NEW TRADE FRONTIERS: THE POLITICAL ECON. OF THE TRANS-PACIFIC PARTNERSHIP, art. 29.6, UNCTAD/WEB/DITC/2016/3, http://unctad.org/en/PublicationsLibrary/webdite2016d3_en.pdf.

⁸⁷ See Schwartz & Whiteduck, *supra* note 23.

⁸⁸ Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Preamble.

⁸⁹ See Puig, *Int'l Indigenous Econ.L.*, *supra* note 9.

⁹⁰ Kawharu, *supra* note 8.

U.S.-Mexico-Canada Agreement

The USMCA emerged following pressure from U.S. stakeholders, including President Donald Trump, to renegotiate the North American Free Trade Agreement (NAFTA), originally signed in 1992. The 26-year gap between the ratification of NAFTA and the ratification of the USMCA provided essential time for the development of discourse and policy surrounding Indigenous Peoples' rights, and therefore allowed governments to determine how Indigenous perspectives could fit into trade negotiations with international partners.

Perry Bellegarde, National Chief of the Assembly of First Nations (Canada), has called the USMCA “the most inclusive international trade agreement for Indigenous Peoples to date.”⁹¹ For the first time in a trade agreement involving the United States, the preamble acknowledged “the importance of increased engagement by Indigenous Peoples in trade and investment.”⁹² Moreover, the USMCA is the first agreement to include a General Exception that protects the rights of Indigenous communities in all signatory countries.⁹³

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The General Exception embedded in Article 32.5 states that commitments to trade rules cannot supersede or interfere with legal obligations to Indigenous Peoples. This exception aims to protect the interests of Indigenous communities in international trade agreements by providing governments with a mechanism to adopt and maintain the measures necessary to protect the legal rights of Indigenous Peoples:⁹⁴

Provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Parties or as a disguised restriction on trade in goods, services, and investment, nothing in this Agreement shall preclude a Party from adopting or maintaining a measure it deems

⁹¹ See Jorge Barrera, *New trade agreement a 'step up' from NAFTA on Indigenous rights*, CBC (Oct. 1, 2018), <https://www.cbc.ca/news/indigenous/usmca-trade-deal-indigenous-rights-1.4846073>; see also Schwarz & Whiteduck, *supra* note 23; Schwarz, *supra* note 13.

⁹² The United States-Mexico-Canada Agreement, U.S.-Mex.-Can., art. 20, agreed to Oct. 1, 2018, [hereinafter USMCA]. See Avery Ruxer Franklin, *USMCA features new policies for the US*, RICE U., NEWS AND MEDIA RELATIONS, OFF. PUBLIC AFF. (May 22, 2020), <https://news.rice.edu/2020/05/22/usmca-features-new-policies-for-the-us-2/>; see also David A. Gantz, *The*

USMCA: Carryover Provisions from NAFTA, BAKER INST. PUB. POLICY (March 18, 2020), <https://www.bakerinstitute.org/media/files/files/ae234e02/bi-report-031820-mex-usmca-9.pdf>.

⁹³ Schwarz, *supra* note 13.

⁹⁴ Gov't of Canada, *Int'l Trade Agreements and Indigenous Peoples: The Canadian Approach* (Nov. 17, 2020), <https://www.international.gc.ca/trade-commerce/indigenous-peoples-peuples-autochtones/approach-proche.aspx?lang=eng> [hereinafter *The Canadian Approach*].

necessary to fulfill its legal obligations to Indigenous Peoples.

The clause “provided that such measures are not used as a means of arbitrary or unjustified discrimination ... or as a disguised restriction on trade” presents negotiators with a challenge. On the one hand, those seeking to maintain tariffs or other restrictions for economic benefit might cloak their motivations in a desire to protect Indigenous rights. On the other hand, corporations that face honest opposition from Indigenous communities may argue that Indigenous rights are simply a disguised restriction on trade.⁹⁵ USMCA offers no easy answers on how to adjudicate these cases.

In addition to inserting protections for Indigenous Peoples into the USMCA, Canada has sought to maximize the benefit that Indigenous Peoples can receive from economic integration. The country has pioneered mechanisms to connect Indigenous Peoples and businesses to international markets. The USMCA also includes provisions for the U.S., Canada, and Mexico to cooperate across borders to advance Indigenous Peoples’ trade-related interests and promote Indigenous-owned small- and medium-sized enterprises.⁹⁶

Lessons for U.S.-Ecuador Economic Relations

The CPTPP and USMCA demonstrate that trade agreements can include provisions to protect

Indigenous Peoples’ rights, as well as maximize their gains from trade, provided there is adequate consultation with representatives of Indigenous communities.

Negotiators on a U.S.-Ecuador trade agreement may consider dedicating a chapter specifically to Indigenous rights, increasing the productivity of Indigenous communities to complement trade liberalization, and incorporating quotas or preferential contract provisions for Indigenous benefits.

In the final chapter, we offer recommendations to policymakers based on our analysis of the relationship between Indigenous Peoples and trade.

⁹⁵ Tina Ngata, *Lessons from Aotearoa: The indigenous “exception” clause in free trade agreements*, BILATERALS.ORG (Feb. 20, 2019),

<https://www.bilaterals.org/?lessons-from-aotearoa-the&lang=es>.

⁹⁶ The Canadian Approach, *supra* note 94.

9. RECOMMENDATIONS

As the UN Special Rapporteur on the Rights of Indigenous Peoples said, “[I]t is possible to develop a system of international investment law that reduces risk to Indigenous Peoples’ rights and serves to benefit them and the State, while providing greater investment security to foreign investors.”⁹⁷ Trade is just as compatible with Indigenous Peoples’ rights, but any future trade negotiation must account for Indigenous communities in both the process of deliberations, as well as the substance of the agreement.

The analysis in chapters 1-8 provides necessary context for such a negotiation. In this section, we present recommendations to stakeholders on how to incorporate that context when deepening economic ties between the United States and Ecuador.

1. **Governments should engage local Indigenous communities as early as possible** in the development of a trade agreement. This will increase the legitimacy of the trade agreement and establish a sense of ownership for the communities involved.
2. **Indigenous territorial and cultural interests must be a principal consideration** in trade negotiations. Negotiators should be sensitive to the perception that trade agreements have historically prioritized the rights of investors and corporations over the rights of Indigenous communities.
3. **Indigenous communities must be included in negotiations** through transparent and reliable engagement processes that address their needs and aspirations. Indigenous participation in negotiations will not only prevent conflicts, but also strengthen relationships between Indigenous representatives and their counterparts, forming the basis for inclusion long after the end of trade negotiations.
4. During early stages of negotiations, parties should determine whether the main interest for Ecuador and the United States is trade or investment, or if both are equally important. **If trade is the priority, then negotiators may consider decoupling trade and investment.** This decision would allow Ecuador and the U.S. to advance a stand-alone trade agreement first, avoiding the main source of Indigenous opposition, and considering the more controversial issue of investment afterward.
5. The strong political presence of Pachakutik in Ecuador’s National Assembly will likely influence the negotiation process and the substance of a potential agreement in Ecuador.

⁹⁷ 2016 UNHRC Special Rapporteur Report, *supra* note 5. All in all, the recent advancements of Indigenous rights and the recognition that States now grant them have paved the way for a new era of trade agreements. Indigenous communities can now benefit by being a stakeholder in trade agreements, defending their interests while securing the benefits of participating in a vast global trading network unencumbered by tariffs or barriers.

Thus, **trade negotiators should consider the role of Pachakutik and other Indigenous organizations like CONAIE.**

6. **Parties should consider adding a specific chapter addressing Indigenous Peoples' rights to any agreement.**
7. **Parties involved in trade negotiations should evaluate the possibility of integrating local Indigenous products into international commerce** by assigning a predefined quota for Indigenous products or incorporating provisions offering preferential contract consideration for Indigenous enterprises.
8. Parties should implement practical and attainable public policy measures. **They should develop productive capacities to strengthen economic activity in Indigenous communities** so that they can grow into productive export entities.