

FREE, PRIOR AND INFORMED CONSENT (FPIC) IN MEXICO: ELEMENTS FOR ITS CONSTRUCTION AND CHALLENGES

JOSE ISRAEL HERRERA¹

Abstract: Free, Prior and Informed Consent (FPIC) - Consultation has become one of the most powerful tools indigenous people and minorities have to generate a dialogue and begin a negotiation in the country to face Government decisions, private companies seeking to carry out any work or when legislative measures are about to be implemented on their territories with a possibility of damaging them. In Mexico, this right is based over a group of not articulated among themselves normative foundations. This end up causing confusion and uncertainty on its application. This article presents elements to review the FPIC - Consultation foundations in Mexico for discussion and theoretical deepening in the light of human rights.

Keywords: Free, Prior, Informed Consent, Mexico, Consultation

Summary: INTRODUCTION. I. WHAT IS THE RIGHT TO PRIOR CONSENT OR FPIC - CONSULTATION? II. THE BASIC LEGAL FOUNDATIONS OF THE RIGHT TO FPIC - CONSULTATION; III. THE CASE “PEOPLE SARAMAKA VS. SURINAME OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS; IV. DECLARATION AND THE PROGRAM OF ACTION OF THE WORLD CONFERENCE ON HUMAN RIGHTS; V. THE MEXICAN SUPREME COURT OF JUSTICE; VI. THE ENERGY REFORM AND FPIC CONSULTATION; VII. THE CASE OF CHERÁN; VIII. ON WHICH IS CONSULTED; VIII. 1. The Mexican Political Constitution; VIII. 2. The ILO Convention 169; VIII. 3. The Ministry of Agrarian, Territorial and Urban Development; VIII. 4. The Declaration of the United Nations on the Rights of Indigenous Peoples; VIII. 5. The World Conference on Human Rights; IX. THE STATES RULES IN MEXICO ON FPIC; X. WHO HOLDS THE RIGHTS TO THE FPIC CONSULTATION IN MEXICO; XI. WHEN TO USE THE FPIC IN MEXICO? XII. FINAL CONCLUSIONS.

INTRODUCTION

The Free, Prior and Informed Consent or (FPIC – consultation) has become one of the most powerful tools to generate a dialogue and set up a negotiation with indigenous and tribal groups in Mexico. Its origin in the years 90's with the signature and ratification of the Convention 169 of the International Labour Organization, generated a right whose implementation has gone through several stages from being denied, to be implemented without a suitable method. It is not until the last decade, when the adoption of international decisions and regulations (case Saramaka vs. Suriname) that Mexico expelled a series of guidelines and regulations for this right.

One of the most powerful guidelines to of the FPIC in Mexico, was the 27/2016 recommendation issued by the National Commission for Humans Rights of Mexico (NCHR).

¹ Researcher at the Centre of Legal Research of the Autonomous University of Campeche, Mexico (jiherrer@uacam.mx).

This recommendation is addressed to the Federal Executive power to write a law on this right, as well as to the Congress of the Union to study, discuss and vote it, as well as secure the participation of the indigenous peoples and communities through FPIC consultations. This also recommends State Governors, the head of the Government of the city of Mexico and its local congresses, to do the same locally. The NCHR, considers it essential to clarify that prior, free and informed consultation should gradually have a binding character.²

This recommendation puts on the table a group of serious problems for the implementation of the FPIC consultation such as the existing breadth of topics to consult, the lack of definition of stakeholders for FPIC consultation, as well as media to access it. Also, the lack of harmonization among the two only states in possession of a law on prior consultation, San Luis Potosi and Durango.

This recommendation is not the only influence the Mexican legislation has found. In fact, the work the Inter-American Court of human rights (IACHR) has been doing has a great influence in Mexico among the internal pressures done by institutions such as the Supreme Court of Justice, the Chamber of Deputies and some Ministers of the federal Government through the implementation of energy policies.

At the beginning of the Decade of the 90's "Convention 169 on peoples indigenous and tribal in countries independent" was signed by Mexico. It replaced the Convention 107 from the same organization³. Mexico at this time was in a phase of great changes and structural reforms for bringing the country into the first world in a very short period. All this was done in order to improve the country's international image because the proximity of signing the "Treaty of free trade of the North American" is approved. Also, there was a main concern of the Government to silence the claims of the indigenous groups that after almost five hundred years of the first European contact, continued to be the most ignored and forgotten groups in Mexico. The 169 Convention would serve to demonstrate that the country had them in mind.

Assies mentions that: "the new ILO 169 Convention was adopted in 1989. Mexico was the first Latin American country to ratify the Convention, although it did to project itself as a progressive country on the international stage. Within the country the ratification passed almost unnoticed."⁴ De la Peña concurs, "in the year 1989 this document was signed because

² National Human Rights Commission, (2016) *General Recommendation 27/2016 On the Right to Prior Consultation of Indigenous Peoples and Communities of the Mexican Republic*. Available at: http://www.cndh.org.mx/sites/all/doc/Recomendaciones/generales/RecGral_027.pdf. Consultation date: May 11th, 2019.

³ The 107 Convention remains in force in those countries that have ratified it and that haven't signed the Convention 169.

⁴ William Assies, (2003) "Indian justice in the Andes, re-rooting or re-routing" in Ton Salman y Zoomers, Annalis, eds., *Imagining the Andes: Shifting Margins of a Marginal World*. Amsterdam, The Netherlands, Aksant Academic Publishers. pp. 167-186.

different international pressures as well as the social urgency derived from rising in arms of the Zapatista Army of National Liberation, or EZLN first day of entry into force of the free trade agreement with the United States and Canada.⁵

I. WHAT IS THE RIGHT TO PRIOR CONSENT OR FPIC - CONSULTATION?

According to the Convention 169 of the ILO, it's a right to obtain a prior consent to the implementation of a series of hypotheses established in this normativity.

It is a right that provides a path for dialogue on issues that have an impact on individual or collective life of indigenous and tribal peoples.

The FPIC consultation allows them to be heard on topics such as the implementation of a public policy, energy development which could be affecting their lands (between dozens of other possibilities). It is then a right given to indigenous groups, minorities, plural and diverse social actors, a legal tool which can express their feelings, offer an opinion or discuss the issue. This has allowed to become one of the few opportunities that these minorities into a fantastic tool of social struggle and political participation.

It's a human right that allows to set up, require and demand a dialogue with, usually minority groups against possible material or immaterial, usually before, effects that might occur or are giving, and this dialogue to generate one or more processes to consult on these possible effects, with the aim of obtaining a respect for the decisions and consensus taken.

On this the National Commission on human rights indicates that
In accordance with the provisions of the former Rapporteur special of the villages indigenous of the UN Rodolfo Stavenhagen, the approach to human rights within the framework of the development of indigenous peoples, implies the respect of certain principles, such as: their recognition as subjects of law and not as objects of public policies; participation and empowerment;

⁵ De la Peña says that in 1989 The International Labour Organization published the Convention 169. This new document abandoned the discourse of assimilation of Convention 107 in favor of being cognizant of the rights of indigenous peoples as such. Mexico ratified the convention in 1991. At the time, President Salinas was interested in gaining legitimacy for his government both within Mexico and beyond. After a highly-contested election in 1988, he needed to build domestic support for radical reform policies and solicit international approval for the admission of Mexico to the OECD. He also craved the partnership of the US and Canada in the North American Free Trade Agreement (NAFTA). The Mexican post-revolutionary model, regarded with sympathy by the US government and academia in the 1940 – 70 period (Schmidt 2001:25-7), was no longer approved by the powerful northern neighbor: its populist and protectionist legislation was a hindrance to foreign investment and free enterprise. Accordingly, President Salinas pushed legislative changes to allow for an easier flow of capital and commodities but most importantly, the reform of the Article 27 of the Mexican Political Constitution which was modified to allow privatization of peasant lands. De la Peña, *op. cit.*, 287-288.

autonomy, territorial control, non-discrimination and the application of free, prior and informed consent.⁶

But at the same time, FPIC consultation, it is identified as a human right when it stresses that “the right to prior, free and informed as being a general principle of international law, consultation is a collective human right of people and indigenous communities.”⁷

The Mexican Supreme Court of Justice of the nation (hereinafter SCJ) has held that the right of the indigenous peoples and communities in the consultation: “is a prerogative that is necessary to safeguard the self-determination of peoples, as well as other rights “cultural and heritage - ancestral - the Constitution and the international treaties recognize them.”⁸

We must consider the right to FPIC consultation, and the correlative duty to State as a human right linked with...

multiple individual and collective human rights. In addition to express the right to participate, the right to be consulted is fundamental to the effective enjoyment of the right to communal ownership of indigenous and tribal peoples over lands that has been used and occupied traditionally, and relates directly to the right to cultural identity, in so far as the culture of these peoples can be affected by State decisions that concern them.⁹

II. THE BASIC LEGAL FOUNDATIONS OF THE RIGHT TO FPIC CONSULTATION

FPIC finds one of its main legal origins in Convention 169 on indigenous and tribal peoples of the International Labour Organization (Convention 169). It is a vast document based on the of the 1957 ILO Convention 107 improvements.

The ILO Convention 169 States in the preamble that the evolution of international law since 1957 and changes occurred in the situation of indigenous and tribal peoples in all regions of the world make it advisable to adopt new international standards in this field, to drop the orientation towards the assimilation of the earlier rules, that reaffirms the special contribution of indigenous peoples to cultural diversity.

Similarly, Convention 169, is so far the main international instrument which gives indigenous peoples the right to possess and manage a territory, culture, collective rights and

⁶ National Human Rights Commission, op. cit., p. 19.

⁷ Idem

⁸ Idem

⁹ Organization of American States, (2011) *The Inter-American Court of Human Rights highlights the importance of respecting the right of indigenous peoples to the consultation*. Available at <http://www.oas.org/es/cidh/prensa/comunicados/2011/088.asp>. Consultation date: May 11th, 2019.

language among others. It's a document which binds signatory Governments to respect one's minimum standards to protect these rights implementation.

For the first time, rights such as property and possession of traditional lands and establishing the obligation to ensure the demarcation and protection of the territories are recognized. This document also identifies and gives recognition and importance of the relationship of peoples and indigenous groups with their natural resources. These resources must be protected, especially when the State declares to be the original and only owner of the subsoil.

This Convention 169 made FPIC consultation, a prerequisite for of legislative or administrative decision's adoption when they intend to take on economic development projects in the territories or areas of influence of these minorities. The right to FPIC consultation, is established in ILO Convention 169, directly in articles 6, fraction 1 and 1 a),

to carry out the provisions of this Convention, Governments shall: a) consult the peoples concerned, through proper procedures and through their representative institutions, when legislative measures or administrative susceptible of affecting them directly were taken.

Thus, Convention 169 gives responsibilities to Governments to develop (with the free participation of peoples) actions and administrative agencies that protect their rights, their institutions, their property, their work, their culture and their environment. In addition, it raises the right of indigenous peoples to decide what their interests and control the process of economic, social and cultural development. (Also, to the forms and modalities under article 6, fraction 1 b) and 1 c) indicated that:

1 b) establish the means through peoples can take part freely, at least to the same extent as other sectors of the population, and at all levels of decision-making in elective institutions and administrative bodies and other responsible for policies and programs which concern them;
(1 c) establish means for the full development of the institutions and initiatives of these peoples and provide resources necessary for this.¹⁰

Convention 169 then develops the FPIC consultation presenting cases, imposing obligations, as well as conditions for this to take place.

¹⁰ International Labour Organization, (1989) *C169 Convention concerning Indigenous and Tribal Peoples in Independent Countries*. Available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169. Consultation date: May 8th, 2019.

These items include items 7.1¹¹, 7.2¹², 7.4¹³, 15.1¹⁴, 5.2¹⁵, 17.1¹⁶, 17.2¹⁷, 17.3¹⁸ and 22.1¹⁹, and 22.2²⁰. Of these articles, it's inferred the necessity of procedure to execute the procedures and possibilities mentioned.

III. THE CASE “SARAMAKA VS. SURINAME PEOPLE” OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

The IACHR, solved in 2007 the case “People Saramaka vs. Suriname”, ruling that analyses the international responsibility of Suriname in the absence of effective measures for the recognition of the communal property of the Saramaka people, as well as the lack of resources adequate and effectively to challenge this situation. In this verdict, the IACHR indicated violations to

¹¹ The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programs for national and regional development which may affect them directly. *Idem*.

¹² The improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and co-operation, shall be a matter of priority in plans for the overall economic development of areas they inhabit. Special projects for development of the areas in question shall also be so designed as to promote such improvement. *Idem*.

¹³ Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit. *Idem*.

¹⁴ The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources. *Idem*.

¹⁵ In cases in which the State retains the ownership of mineral or sub- surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programs for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities and shall receive fair compensation for any damages which they may sustain as a result of such activities.

¹⁶ Procedures established by the peoples concerned for the transmission of land rights among members of these peoples shall be respected.

¹⁷ The peoples concerned shall be consulted whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community.

¹⁸ Persons not belonging to these peoples shall be prevented from taking advantage of their customs or of lack of understanding of the laws on the part of their members to secure the ownership, possession or use of land belonging to them.

¹⁹ Measures shall be taken to promote the voluntary participation of members of the peoples concerned in vocational training programs of general application.

²⁰ Whenever existing programs of vocational training of general application do not meet the special needs of the peoples concerned, governments shall, with the participation of these peoples, ensure the provision of special training programs and facilities.

article 2 (provisions of domestic law), article 3 (right to recognition of legal personality), article 21 (right to private property) and article 25 (judicial protection) of the American Convention, in connection with article 1.1 of that instrument. The IACHR recognized members of the Saramaka people (Suriname) as a tribal community subject to special measures that guarantee the exercise of their rights.²¹

In addition, this Court considered that the Saramaka people make up a tribal community whose social, cultural and economic characteristics are different from other sections of the national community, particularly thanks to the special relationship with their ancestral lands, and for themselves, regulate is at least in part, through its own norms, customs and traditions. Following this, the IACHR indicated FPIC must meet a series of measures to ensure its effectiveness. First to make sure the effective participation of members of the Saramaka people in plans for development or investment within its territory, the State has the duty to consult actively with the community, according to their Customs and traditions.

This duty requires the State to accept and provide information and involves constant communication between the parties. Second consultations must be made in good faith, under culturally and appropriate procedures looking an agreement at all time. Saramaka people, must be consulted in accordance with their traditions, in the early stages of any plan for development or investment, and not in the last stages, when the need to get the approval of the community arises. It's necessary to give a time to communities for their internal discussions.

The State should also make sure that members of the Saramaka have information of possible hazards (including environmental and sanitation ones), to accept the plan of development or investment with proper knowledge and will. Finally, the FPIC should consider the traditional methods of the Saramaka people to decision-making.²²

The IACHR would set up in this sentence some of the fundamentals of the consultation, such as free informed and culturally appropriate.

In addition, the Court considers that as regards development or large-scale investment plans that would have a greater impact within the Saramaka territory, the State has the obligation, not only to consult the Saramakas, but should also get the free, informed and prior consent of these, according to their customs and traditions. The Court considered that the difference between 'consultation' and 'consent' in this context requires further analysis.²³

²¹ *Idem.*

²² *Idem.*

²³ *Idem.*

IV. VIENNA DECLARATION AND PROGRAMME OF ACTION OF THE WORLD CONFERENCE OF HUMAN RIGHTS

An important precedent for the foundation of FPIC consultation became consist in the Declaration and the program of action of the World Conference on Human Rights adopted in Vienna in 1993. This

The World Conference on Human Rights recognizes the inherent dignity and the unique contribution of indigenous people to the development and plurality of society and strongly reaffirms the commitment of the international community to their economic, social and cultural well-being and their enjoyment of the fruits of sustainable development. States should ensure the full and free participation of indigenous people in all aspects of society, in matters of concern to them. Considering the importance of the promotion and protection of the rights of indigenous people, and the contribution of such promotion and protection to the political and social stability of the States in which such people live, States should, in accordance with international law, take concerted positive steps to ensure respect for all human rights and fundamental freedoms of indigenous people, on the basis of equality and non-discrimination, and recognize the value and diversity of their distinct identities, cultures and social organization...²⁴

The Vienna Conference was the start of a process that ensured the eventual adoption of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. It entered into force in May 2013, finally allowing individuals to complain of alleged violations of economic, social and cultural rights at the international level.

V. THE MEXICAN SUPREME COURT OF JUSTICE

The Saramaka vs. Suriname case has become for the legal systems in Latin America, one of the main influences for the implementation of the FPIC. IHRC established in this case which the main features of the FPIC are. The main are include the be culturally appropriate, be informed and prior and be done in good faith.

These parameters have not gone unnoticed in Mexico. In fact, the Mexican Supreme Court of Justice issued on June 24th, 2016 the Jurisprudence titled “Indigenous peoples and communities. Right to be consulted. Essential requirements for compliance” that states:

²⁴ United Nations, (2013) World Conference on Human Rights, Vienna Declaration and Programme of Action, 1993. Available at: http://www.ohchr.org/Documents/Events/OHCHR20/VDPA_booklet_Spanish.pdf, p. 3-4
Consultation date: May 11th, 2019.

In accordance with the international standards in the field of protection of the rights of indigenous communities, the specific characteristics of the consultation procedure will necessarily vary depending on the nature of the proposed measure and the (impact on indigenous groups, so judges must look at in each specific case the consultation process carried out by the authorities to comply with the standards to be: to) prior to the Act, since that should be performed during the planning phase of the project, in advance of the beginning of execution activities; (b) culturally appropriate, since you must respect their customs and traditions, because throughout the traditional methods used in making their decisions; in this regard, decisions taken by indigenous communities in accordance with the exercise of their practices and customs must be respected at all times, implying that the authorities must carry out the consultation, through media and suitable instruments for the indigenous communities, so that the lack of access to information technologies, does not mean a detriment in the exercise of this right; (c) informed, by requiring the existence of information you need about the nature and consequences of the project, and must take all necessary measures to make it understandable, so if the case requires it, must be provided in the languages or languages of the communities or peoples involved, as well as with all the elements necessary for their understanding, so that scientific technicalities do not form a barrier so that the communities can express an opinion; and (d) in good faith, then the FPIC requires the absence of any kind of intimidation by part of the State or private people acting with the authorization or acquiescence. Also, it must be made of a hostile environment that obliges communities or indigenous to a decision vitiated or precipitated.²⁵

VI. THE ENERGY REFORM AND THE FPIC CONSULTATION

In 2013, the Mexican government started a series of amendments to its Political Constitution, taxation laws, as well as allowing private companies having the possibility to invest in Mexico's state oil company (PEMEX) under a shared risk production. This was possible after more than a century of state only property of all energetics. All this movement was titled the "energy reform".²⁶

All these amendments to the legislation on fuel, electricity, land among others, included FPIC as a key part of the new infrastructure and developments would generate.

²⁵ Mexican Supreme Court of Justice, (2016) *Indigenous peoples and communities. Right to be consulted. Essential requirements for compliance*. Thesis: 2a. XXIX/2016 (10a). Book 31, Tomo II, tenth time, 2011956 registration page: 1212. Gazette of the Federation Judicial Weekly, available at <https://sjf.scjn.gob.mx/sjfsist/Paginas/DetalleGeneralV2.aspx?ID=2011956&Clase=DetalleTesisBL&Semana rio=0>. Consultation date: May 8th, 2019.

²⁶ Federal Government of Mexico, (2014) *Energy Reform*. available at: <https://embamex.sre.gob.mx/suecia/images/reforma%20energetica.pdf>. Consultation date: May 8th, 2019.

Installation of electric generators, pipelines, dams, when affecting land, sea and air, must be agreed with the local population previously the implementation of the development works.²⁷ The law modifications include articles 120 of the Law on Hydrocarbons

Article 120.- In order to consider, the interests and rights of the communities and indigenous peoples in which hydrocarbon industry projects are developed, the Ministry of Energy shall carry out prior consultation procedures, free e informed needed and any other activity necessary for safekeeping, in coordination with the Ministry of the Interior and the dependencies that correspond.

In such consultation procedures the Ministry of Energy may provide for the participation of the Agency, of the State productive enterprises and its subsidiaries and subsidiaries as well individuals, in accordance with the applicable regulations.

Consultation procedures will have as object reach agreements or, where appropriate, the consent in accordance with applicable regulations.

The Ministry of Energy, prior opinion of the Ministry of Finances and Public Credit, may provide for allocations, as well as within the terms and conditions established for tenders, the amounts or the rules for the determination of the same, as the Contractor or assignee must allocate the human and sustainable development of the communities or towns in which perform their activities, health, education, labour, inter alia, without prejudice to the obligations of the State.²⁸

and articles 117 to 120 of Law of the Electric Industry instruct:

Article 117- Infrastructure projects of the public and private sectors in the electric industry will attend the principles of sustainability and respect for the human rights of the communities and peoples in the regions where they intend to develop that infrastructure.

Article 118.- The Ministry shall inform the interested parties in the implementation of infrastructure projects in the electricity industry on the presence of social groups in situations of vulnerability in the areas in where the activities will be carried out for the execution of projects, to carry out actions necessary to safeguard their rights.

Article 119.- In order to consider the interests and rights of the communities and indigenous peoples that develop power industry projects, the Ministry should carry out the necessary consultation and any other activity necessary

²⁷ Idem.

²⁸ Congress of the Union of Mexico (2016) *Law on Hydrocarbons*. (Official Gazette) available at http://www.dof.gob.mx/nota_detalle.php?codigo=5355989&fecha=11/08/2014. Consultation date: May 7th, 2019.

for safekeeping, in coordination with the Ministry of the Interior and the dependencies that correspond. In such consultation may take part in the CRE, productive state enterprises and their subsidiaries and affiliates companies as well as people.

Article 120.- Those interested in obtaining permits or authorizations to develop projects in the electrical industry shall submit to the Ministry a study of the social impact which must contain the identification, characterization, prediction and evaluation of the social impacts that could arise from its activities, as well as proper mitigation measures.

These regulations give to the Ministry of Energy faculties in terms of FPIC consultation to consider the interests and rights of the communities and indigenous peoples in which projects in the energy sector will be develop.

VII. THE CHERÁN CASE

One of the most influential cases for the development of the FPIC in Mexico was the case of the municipality of San Francisco Cherán, Michoacán. The indigenous community of San Francisco Cherán is located in the federal State of Michoacán, Mexico. After constant violent conflicts, the community decided to take care of their own security (this because the federal state was not able to provide) by conforming communal protection committees and forcing all the local authorities to quit and abandon the community. When they were about to hold elections in the municipality, the community submitted to the electoral authority of Michoacán a document with the resolution adopted by a local general assembly of not attending the elections.

Few weeks later a second letter was sent to the authority requesting that, as indigenous community, they could nominate authorities according to own rules. The authority denied the request. As a result, the community filed a petition with the regional Electoral Court in defense of his political rights. The Court recognized the right to self-determination of the community and suspended the “official” vote. So, the community started their own election process to pick up their authorities.²⁹

This case became paradigmatic, by the extent of the resolution taken for the community and the successful story of the FPIC consultation. Until now the community has not a formal authority elected under the federal system and it's the community who is still organized and deciding in a collective general assembly.

²⁹ Almut Schilling-Vacaflor y Riccarda Flemmer, (2013) “Strengthening organizations in Latin America” *Program “Strengthening of indigenous organizations in Latin America. The right to prior consultation: Legal norms, practices and conflicts in Latin America.* Germany, Deutsche Gesellschaft für Internationale Zusammenarbeit, p. 42.

VIII. ON WHICH FPIC CONSULTATION IS USED

Different mentions on what can be consulted are found on different conventions, laws and pacts where it's possible to find a group of assumptions and general hypothesis in which a group of constants "that" are identified or about what can or should consult. In other words, we do not have a single criterion, so each case or situation of inquiry must be interpreted in a way. The following are a few basic examples of when this happens.

VIII. 1. The Mexican Political Constitution

The supreme law of Mexico, its Constitution, does a short mention to consultation when declares it is mandatory to elaborate the National Development Plan of the country one there is a new president in charge. This is done every six years.

Article 2 Paragraph B. IX. (Federal government will generate) a consultation with indigenous peoples when elaborating the National Development Plan and the ones for the Mexican States will be done... trying to incorporate on all those cases the recommendations and proposals made.³⁰

Also, article 26. A points out:

The State will organize a national democratic planning system for the development of the country to give strength, dynamism, competitiveness, durability and fairness to economy's growth for the independence and the political, social, and democratization of the nation. The purpose of the national project contained in the Constitution will determine the objectives of the planning.

The planning will be democratic and deliberative... aspirations and demands of society will be collected and added to the plan and development programs. There will be a national development plan which will be mandatory for the federal administration. The law shall entitle the Executive to establish the procedures for participation and popular consultation in the national democratic planning system, and the criteria for formulation, implementation, control and evaluation of the plan and development programs.

This means, the Mexican legal systems establish a consultation prior to the drafting of a document called the National Development Plan. However, it cannot be compared to a FPIC consultation. There is not any model, scheme, or anything to assure the right participation of the indigenous people.

³⁰ Congress of the Union, (2019) *Mexican Political Constitution*. (Official Gazette) Available at: http://www.diputados.gob.mx/LeyesBiblio/pdf/1_240217.pdf. Consultation date: May 7th, 2019.

VIII. 2. The ILO Convention 169

Over three decades, the ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169) has played a significant role in facilitating the development of laws, policies, institutions and programs aimed at promoting and securing the rights and well-being of indigenous and tribal peoples. Measures inspired by the Convention, taken by ratifying and other countries, include tools for making indigenous peoples visible in statistics based on self-identification, land rights, mechanisms for consultation and participation, measures regarding health and education, among others.³¹

The ILO 169 indicates concrete possibilities as mandatory to consult in the following cases:

Article 6 1. In applying the provisions of this Convention, governments shall:

(a) consult the peoples concerned, through appropriate procedures and through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;

(b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programs which concern them;

(c) establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.

And article 15.2 when states

In cases in which the State retains the ownership of mineral or sub- surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programs for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities and shall receive fair compensation for any damages which they may sustain as a result of such activities.

VIII. 3. The Ministry of Agrarian, Territorial and Urban Development

In 2017, the Ministry of Agrarian, Territorial and Urban Development of Mexico, enact a law titled "Agreement by which determine the assumptions of FPIC consultation of indigenous communities and peoples, by actions and/or projects performed by the Ministry

³¹ International Labour Organization, (2019) *Celebrating the 30th anniversary of the Indigenous and Tribal Peoples Convention, 1989 (No. 169): "Learning and looking ahead.* https://www.ilo.org/global/topics/indigenous-tribal/WCMS_697625/lang--en/index.htm; Consultation date: May 8th, 2019.

of Agrarian, Territorial and Urban Development”. This normativity exposes 14 possibilities to generate a FPIC.

Article 2. FPIC consultation will be requested, when an action or project, linked to indigenous peoples and communities would be proposed or adopted all this according to the requirements of the Mexican Constitution and the international standards in this area. This will be done under to the following assumptions:

- to) when a new population center or the enlargement of an old one is planned;
- (b) when the different kinds of property or possession would be regularized under the agrarian law;
- (c) when new plans or projects of urban development, control and growth of cities and metropolitan areas of the country, as well as population centers would be carried out, as well when implementing their infrastructure communications and services;
- (d) when a different authority request for assistance to carry out implementation of programs for conservation of lands and waters included in indigenous communities;
- (e) when establishing plans and actions over wastelands and national lands;
- (f) when the needs of land for urban development and housing are foreseeing, in accordance with the availability of water supply requirements determined by the Ministry of Environment and Natural Resources;
- (g) when programs to fill the needs of urban land and the establishment of provisions and reserves for the adequate development of population centers are developed, supported and implemented;
- (h) to promote the construction of infrastructure and equipment for regional and urban development;
- (i) when dealing with expropriation procedures by reason of public convenience...;
- (j) when there is an intention to acquire and transfer real estate, in order to have a range of land suitable for development, considering soil's demand and aptitude;
- (k) to carry out and execute actions and programs of regularization of the soil;
- (l) when it is intended to the deliver funds arising from expropriations, prior occupations and reimbursements;
- (m) when implementing agrarian development programs that increase the capacities of the ejido, communal, settler, possessionary and peripheral population centers; and
- (n) When files relating to projects directly affecting indigenous peoples and communities are integrated.³²

³² Ministry of Agrarian, Territorial and Urban Development, (2017) *Agreement by which determine the assumptions of FPIC consultation in indigenous communities and peoples, by actions and/or projects*

VIII. 4. The Declaration of the United Nations on the Rights of Indigenous Peoples

The United Nations Declaration on the Rights of Indigenous Peoples recognizes the right of peoples to be consulted in the following cases:

Article 10. Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11 1. Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature. 2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 30 1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned. 2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and through their representative institutions, prior to using their lands or territories for military activities.

Article 32 1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources. 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. 3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall

performed by the Ministry of Agrarian, Territorial and Urban Development. (Official Gazette) Available at: http://www.dof.gob.mx/nota_detalle.php?codigo=5477517&fecha=24/03/2018. Consultation date: May 18th, 2019.

be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.³³

VIII. 5. The World Conference on Human Rights

On 25 June 1993, it was indicated at the World Conference on Human Rights, that: “States should make sure the full and free participation of indigenous people in all aspects of society, in particular in” the issues that concern them”³⁴, that is, which is always on game interest affecting indigenous communities and peoples.

In this Conference occurs a fundamental change in human rights theory, it is accepted that human rights can be enjoyed both in public and in private and can be violated in both areas. Until that time the system was based on violations committed by States and concerned with the political and social space. For the first time, acts of people, occurring in private space, can result in state responsibility.

IX. CONSULTATION RULES IN MEXICAN STATES ON FPIC

Mexico is organized under a Federation scheme. It is integrated with 32 different states who also rule and can decide over their internal affairs. This means some states can decide over the matter’s consultation procedures can be done.

Some states have made laws where they rule which issues can be consulted. Among them are legislative measures or administrative likely to affect them directly (ruled in the States of Chiapas, Chihuahua, Colima, Durango, Guanajuato, Guerrero, Jalisco, Mexico, Morelos, Puebla, Querétaro, San Luis Potosí, Sonora, Tabasco, Veracruz, Yucatan). When proposing reforms to indigenous affair’s agencies (San Luis Potosí), when institutions and mechanisms for the preservation, protection and defense of indigenous affairs, culture, language, customs and traditions would be established (Quintana Roo). When doing the state and municipal development plans (Baja California, Durango, Hidalgo; Jalisco, Morelos, new León, Puebla, Quintana Roo, Sonora, Tabasco, San Luis Potosí). When defining and implementing public policies and programs that may affect them (such as decisions that may directly or indirect affect their daily lives, their social organization, their natural or cultural environment; objectives or development) (Guerrero, Jalisco, Morelos, Puebla, Tabasco, Chihuahua) plans for urban development that may affect indigenous territory (San Luis Potosí).

³³ United Nations, (2007) *The United Nations Declaration on the Rights of Indigenous Peoples*. Available at: http://www.un.org/esa/socdev/unpfii/documents/DRIPS_es.pdf. Consultation date: May 11th, 2019.

³⁴ United Nations, (2013) World Conference on Human Rights, Vienna Declaration and Programme of Action, 1993. Available at: http://www.ohchr.org/Documents/Events/OHCHR20/VDPA_booklet_Spanish.pdf, Consultation date: May 11th, 2019.

Also when doing works or planning projects that may impact on indigenous communities' natural resources (Baja California, Chiapas, Querétaro, Oaxaca, Chihuahua, Tlaxcala, Veracruz, Yucatan); programs, projects and actions within the lands and territories of the indigenous communities (Chihuahua, Morelos) when granting concessions and permits for the exploitation of natural and cultural resources located in their lands and territories (Chihuahua, San Luis Potosí). When expropriating lands belonging indigenous communities (Chihuahua) doing programs or projects related to practice and revitalize their traditions and customs (Chiapas) educational programs that recognize their cultural heritage (Baja California, Oaxaca, Quintana Roo, Tabasco, Tlaxcala) actions to eliminate, within the educational system and laws, adjectives that may denigrate, prejudice or discriminate indigenous people. (Morelos, Nayarit, Quintana Roo) When defining which administrative offices shall adopt and implement actions to attend, resolve or assist issues that may arise in indigenous languages (Chiapas) any type of resettlement or displacement of indigenous communities when these actions do not come from the needs and the will of them (Puebla, Querétaro).³⁵

X. HOLDERS OF THE FPIC RIGHT CONSULTATION IN MEXICO

Convention 169 of the ILO states that indigenous and tribal peoples possesses FPIC rights under certain conditions.

Article 1 This Convention applies to:

- (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
- (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.³⁶

³⁵ Center for Social Studies and Public Opinion of the Chamber of Deputies of Mexico, (2014) *Rights of indigenous peoples in Mexico in terms of consultation, participation and dialogue. Advances and challenges from the legislative sphere*. Available at: <http://www5.diputados.gob.mx/index.php/camara/Centros-de-Estudio/CESOP/Estudios-e-Investigaciones/Documentos-de-Trabajo/Num.-167.-Derechos-de-los-pueblos-indigenas-en-Mexico-en-materia-de-consulta-participacion-y-dialogo.-Avances-y-desafios-desde-el-ambito-legislativo>. Consultation date: May 7th, 2019.

³⁶ International Labour Organization. op. cit. p. 5.

Schilling-Vacaflor and Flemmers indicate that FPIC consultation is not an exclusive right for indigenous or tribal groups. They point out that the consultation may be related to other minority groups. They reflex on this issue:

Is the right to consultation is only there for indigenous peoples? Convention 169 of the ILO refers explicitly to the right to consultation of indigenous and tribal communities. In the most of States Latin American is distinguishes between the right of the population general to them hearings public and the right of them peoples indigenous to the consultation prior... in the frame of the exploitation of resources natural not must understand is as a right exclusive of those peoples indigenous... Therefore, groups not indigenous people with similar characteristics (such as the dependence of physical survival or cultural integrity of conservation and the use of a given territory) should have the right to prior consultation and FPIC.³⁷

Also, a similar approach can be found in the law proposal issued by the former representative Christian Joaquín Sánchez, when proposed “The General Law of indigenous consultation and reform the article 2nd. of the law on the National Commission for the development of indigenous peoples” in its article 7. Peoples and indigenous communities in Mexico are subjects of the right of consultation in accordance with the political Constitution of the Mexican United States, international treaties ratified by our country and of this law.

This means that owners of the FPIC’s right may be a larger number. In this consultation, there can be other groups who might be called to be part of the consultation which would allow that this was broader and therefore to include more voices and elements to make a better decision.

XI. WHEN TO USE THE FPIC IN MEXICO?

The Mexican Supreme Court of Justice states that every authority, when acting like that, should analyze whether they must initiate a FPIC. This means they must generate a process of reflection if actions or abstentions taken, cause or not an affectation. This means this is left to the will of the authorities when a FPIC should be done.

The Ministry of Energy receives a document titled “Study of Social Impact”. This is a paper done by every company, processes are started to implement a work related to energy projects. Here, the company suggests whether generate a FPIC or not.

At this point a couple of fundamental problems arise. First, it is the developer of the project who indicates if they believe or not a FPIC must be done or not, and second the authority does not necessarily will have the understanding or the political disposition to ask

³⁷ Almut Schilling-Vacaflor and Riccarda Flemmer, op. cit. p. 19.

for the consultation. This means that it goes through double analysis in which two prior approvals are needed to start the FPIC consultation, and both are not compulsory.

Also, up to this point, there is no clarification on the way the FPIC must be done, or even if one must be started, the space, time and its jurisdiction. This because of that there is not an explanation of when a FPIC consultation can start, the time to develop and especially when to conclude. An analysis of the “Protocol for the implementation of FPIC consultations with indigenous peoples and communities in accordance with the standards of the Convention 169 of the International Labour Organization on indigenous peoples and tribal in independent countries”³⁸, tells us the implementation of FPIC consultation infers a methodology³⁹ that is mandatory once the FPIC has begun. But until this point there is not an instruction to make one, there is not a definition on who will pay for it, and who can participate.

About similar problems, the former Special Rapporteur of Indigenous Affairs of UN James Anaya in his “Extractive Industries Report” pointed out that the consultations are not

“a simple if a default decision, or as a means of validating an unfavorable agreement for” the indigenous peoples affected “and that” should be mechanisms by which indigenous peoples may reach agreements favorable to its own priorities and development strategies, provide tangible benefits and, on the other hand, promote the “enjoyment of their human rights”.⁴⁰

XII. CONCLUSIONS

1. The FPIC consultation is a human right which is in the process of discovery and development in Mexico. This causes uncertainty for a fair and proper application. It is a right on which there are no entirely adequate or minimal criteria for its effective implementation, its methodology and the conceptual definitions about who can access the FPIC. This makes stakeholder’s participation might be so wide that actors either they fade or become legally possible for all who wish to participate.⁴¹

³⁸ Commission for the Development of Indigenous Peoples, (2013) *Protocol for the implementation of consultation to indigenous peoples and communities in accordance with the standards of the Convention 169 of the international of Labour Organization on indigenous tribal peoples and in independent countries*. Mexico. 2013 pp. 22. 44.

³⁹ This legal instrument sets a procedural path of five stages: 1. Integration of information and definition of basic agreements, 2. Design and programming of the consultation, 3. Implementation, 4. Feedback of results, 5. Follow-up and evaluation of implementation. Ibid. p. 6.

⁴⁰ National Commission on Human Rights. op. cit. p. 20.

⁴¹ The consultation according to this Protocol has 4 phases, in within each one has its own one, adding in total 16 to follow stages. These are: Phase I, Development of the consultation. 1. Starting Point. Phase II. FPIC design. 1. On identification of actors, 2. Delimitation of the FPIC, 3. Determination of the FPIC’S goals, 4. Determination of the procedures, 5. Design of a program of action, 6. Determination of budgets, 7. Proposition of commitments. Phase III. First agreements for the FPIC. 1. Calling the parties, 2. Accreditation of

2. This could be solved through a proper regulation to organize the way the FPIC consultation should be conducted under a uniform criterion. This can help organize and harmonize the regulations issued by all the States of Mexico without retiring them attributions to start their FPICS when needed. Also, this would help the implementation of an effective methodology for their implementation by federal, State and municipal governments.

3. It is to be noticed that when speaking of FPIC consultation, laws use a group of adjectives such as prior, in good faith or culturally adequate. The nature of these features is to give the FPIC a minimum livelihood so users can have a previously guaranteed minimum ground that allows players not to be in a position of disadvantage to start a dialogue. Therefore, these features become inherent to the FPIC and they accompany you during the entire process. If a FPIC is not done under these assumptions, then we could have a vice in. These features, therefore become an obligation that must be a right that must be respected and fulfilled.

4. Finally, the FPIC in Mexico has been confused with a normal query or a simple consultation. Laws done by Mexican states show us there is a total confusion on this subject. Unfortunately, the mere origin derives from the energy laws or their similar, are to ambiguous and the way to ask for one from the stake holders is hard, making its last and final goal being a tool for ensuring justice and peace still something far away in Mexico.

REFERENCES

- Almut Schilling-Vacaflor y Riccarda Flemmer, (2013) *Strengthening organizations in Latin America, Program "Strengthening of indigenous organizations in Latin America. The right to prior consultation: Legal norms, practices and conflicts in Latin America."* Germany, Deutsche Gesellschaft für Internationale Zusammenarbeit.
- Assies, William, (2003) "Indian justice in the Andes, re-rooting or re-routing", en Ton Salman y Zoomers, Annalis, eds., *Imagining the Andes: Shifting Margins of a Marginal World*. Amsterdam, The Netherlands, Aksant Academic Publishers, pp. 167-186.
- Center for Social Studies and Public Opinion of the Chamber of Deputies of Mexico, (2014) *Rights of indigenous peoples in Mexico in terms of consultation, participation and dialogue. Advances and challenges from the legislative sphere*. Available at: <http://www5.diputados.gob.mx/index.php/camara/Centros-de->

representatives, 3. Generating and sharing information, 4. Agreement on the schedule of the FPIC, 5. Agreements for the implementation of the consultation, 6. Time for communal deliberation, 7. Adoption and formalization of agreements. Phase IV. Implementation and follow-up: 1. Follow-through of agreements, 2. Monitoring the commitments. Ibid. pp. 3 4.

Estudio/CESOP/Estudios-e-Investigaciones/Documentos-de-Trabajo/Num.-167.-
Derechos-de-los-pueblos-indigenas-en-Mexico-en-materia-de-consulta-
participacion-y-dialogo.-Avances-y-desafios-desde-el-ambito-legislativo.
Consultation date: May 7th, 2019.

Commission for the Development of Indigenous Peoples. (2013) *Protocol for the implementation of consultation to indigenous peoples and communities in accordance with the standards of the Convention 169 of the international of Labour Organization on indigenous and tribal peoples in independent countries*. Mexico. 2013 pp. 22. 44.

Congress of the Union, (2019) *Mexican Political Constitution*. (Official Gazette) Available at: http://www.diputados.gob.mx/LeyesBiblio/pdf/1_240217.pdf. Consultation date: May 7th, 2019.

Congress of the Union, (2016) *Hydrocarbons Law*. (Official Gazette) Available at: http://www.dof.gob.mx/nota_detalle.php?codigo=5355989&fecha=11/08/2014. Consultation date: May 7th, 2019.

Congress of the Union, (2014) *Law of the Electric Industry*. (Official Gazette) Available at: http://www.dof.gob.mx/nota_detalle.php?codigo=5355986&fecha=11/08/2014. Consultation date: May 7th, 2019.

De la Peña, Rodolfo, (2006) “A New Mexican Nationalism? Indigenous Rights, Constitutional Reform and the Conflicting Meanings of Multiculturalism”, *Nations and Nationalism*, vol. 12, pp 287.

Deputy Chamber of Mexico, (2017) *Initiative of law The General Law of indigenous consultation and reform the article 2nd. of the law on the National Commission for the development of indigenous peoples of Deputy*. Christian Joaquín Sánchez. Available at: <http://gaceta.diputados.gob.mx/Gaceta/63/2017/mar/20170323-V.html>. Consultation date: May 7th, 2019.

Federal Government of Mexico, (2014) *Energy Reform*. available at: <https://embamex.sre.gob.mx/suecia/images/reforma%20energetica.pdf>. Consultation date: May 8th, 2019.

Inter-American Commission on Human Rights, (2007) *Case of the Saramaka People v. Suriname (Preliminary Objections, Merits, Reparations, and Costs)*, Available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_172_esp.pdf. Consultation date: May 7th, 2019.

International Labour Organization, (1989) *C169 Convention concerning Indigenous and Tribal Peoples in Independent Countries*. Available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169. Consultation date: May 8th, 2019.

International Labour Organization, (2019) *Celebrating the 30th anniversary of the Indigenous and Tribal Peoples Convention, 1989 (No. 169): “Learning and looking*

ahead. https://www.ilo.org/global/topics/indigenous-tribal/WCMS_697625/lang-en/index.htm; Consultation date: May 8th, 2019.

Mexican Supreme Court of Justice, (2016) *Indigenous peoples and communities. Right to be consulted. Essential requirements for compliance.* Thesis: 2a. XXIX/2016 (10a). Book 31, Tomo II, tenth time, 2011956 registration page: 1212. Official Gazette. Available at <https://sjf.scjn.gob.mx/sjfsist/Paginas/DetalleGeneralV2.aspx?ID=2011956&Clase=DetalleTesisBL&Semenario=0>. Consultation date: May 8th, 2019.

Ministry of Agrarian, Territorial and Urban Development, (2017) *Agreement by which determine the assumptions of FPIC consultation in indigenous communities and peoples, by actions and/or projects performed by the Ministry of Agrarian, Territorial and Urban Development,* (Official Gazette) Available at: http://www.dof.gob.mx/nota_detalle.php?codigo=5477517&fecha=24/03/2018. Consultation date: May 8th, 2019.

Ministry of Energy, (2014) *Manual of Procedures of the Office of Social Impact and Surface Occupation of the Ministry of Energy.* Available at: https://www.gob.mx/cms/uploads/attachment/file/176174/Direcci_n_General_de_Impacto_Social_y_Ocupaci_n_Superficial.pdf. Consultation date: May 8th, 2019

National Human Rights Commission, (2018) *General Recommendation 27/2016 On the Right to Prior Consultation of Indigenous Peoples and Communities of Mexico.* Available at: http://www.cndh.org.mx/sites/all/doc/Recomendaciones/generales/RecGral_027.pdf. Consultation date: May 11th, 2019.

Organization of American States, (2011) *The Inter-American Court of Human Rights highlights the importance of respecting the right of indigenous peoples to the consultation.* Available at <http://www.oas.org/es/cidh/prensa/comunicados/2011/088.asp>. Consultation date: May 11th, 2019.

United Nations, (2007) *The United Nations Declaration on the Rights of Indigenous Peoples.* Available at: http://www.un.org/esa/socdev/unpfii/documents/DRIPS_es.pdf. Consultation date: May 11th, 2019.

United Nations, (2013) *World Conference on Human Rights, Vienna Declaration and Programme of Action, 1993.* Available at: http://www.ohchr.org/Documents/Events/OHCHR20/VDPA_booklet_Spanish.pdf, Consultation date: May 11th, 2019.