

# THE RIGHT TO CONSULTATION AND FREE, PRIOR AND INFORMED CONSENT IN LATIN AMERICA: THE GOVERNMENTALITY OF THE EXTRACTION OF NATURAL RESOURCES

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Résumé de l'article

Dans les dernières décennies, les peuples autochtones en Amérique latine ont adopté l'approche des droits de la personne revendiquant la ratification de la Convention 169 de l'Organisation internationale du travail qui a été ratifiée par la plupart des pays du continent. La plupart des publications concernant la gouvernance de l'extraction des ressources naturelles s'est focalisé sur les divers régimes utilisés ou sur la politique écologique. Cependant, il est nécessaire d'analyser la place spécifique du droit de consultation et de « consentement préalable, libre et éclairé » (CPLE) dans cette gouvernance. En utilisant le cadre théorique de la gouvernamentalité, cet article vise à analyser les continuités et les ruptures, les tensions et les avancements dans cette gouvernance en se concentrant sur les rationalités, les pratiques, les technologies de gouvernement et les relations de pouvoir concernés à la ratification de la C169 et à la mise en oeuvre du droit de CPLE. La conclusion est que les peuples autochtones sont en train de gagner plus de participation et d'influence sur la gouvernance des projets extractifs, alors que les gouvernements colonisent le droit de CPLE afin de le subordonner à leurs projets néolibéraux et post-néolibéraux à travers une rationalité basée sur le développement et l'intérêt national, l'utilisation de la biopolitique, de l'onto-politique et de la discipline comme types de pouvoir, à travers des réformes institutionnelles et légales comme technologies de gouvernement, avec peu d'implémentation substantive par rapport à une majeure implémentation normative. La gouvernamentalité de la plupart de ces pays de l'Amérique latine correspond à la gouvernamentalité autoritaire.

# THE RIGHT TO CONSULTATION AND FREE, PRIOR AND INFORMED CONSENT IN LATIN AMERICA: THE GOVERNMENTALITY OF THE EXTRACTION OF NATURAL RESOURCES

*Gonzalo Bustamante\**

Over the last few decades, indigenous peoples in Latin America have adopted a human rights approach which demands the ratification of the International Labour Organization Convention 169 (C169), a convention that has been successfully ratified by most of Latin American countries. Most of the literature on the governance of natural resource extraction has focused on different governmental administrations and ecological policies. However, there is still a need to analyse the role of the right to consultation and ‘free, prior and informed consent’ (FPIC) within this governance structure. Using the theoretical framework of governmentality, this article aims to analyze the continuities and ruptures, as well as the tensions and advances of this form of governance by focusing on the rationalities, practices and technologies of government and power relations at play in the ratification of C169 and the implementation of FPIC in several Latin America countries. The main conclusion is that, while indigenous peoples are gaining more participation in and influence on the governance of extractive projects, national governments have colonized the right to FPIC, rendering it subordinate to their neoliberal and post-neoliberal projects. This has occurred through a rationality based on development and national interest, the use of biopolitics, ontopolitics and disciplinary power, as well as institutional and legal reforms as technologies of government – all of this having yielded little substantive implementation in comparison to a more established normative implementation. Consequently, the governmentality of most of these Latin-American countries corresponds to authoritarian governmentality.

Dans les dernières décennies, les peuples autochtones en Amérique latine ont adopté l’approche des droits de la personne revendiquant la ratification de la Convention 169 de l’Organisation internationale du travail qui a été ratifiée par la plupart des pays du continent. La plupart des publications concernant la gouvernance de l’extraction des ressources naturelles s’est focalisé sur les divers régimes utilisés ou sur la politique écologique. Cependant, il est nécessaire d’analyser la place spécifique du droit de consultation et de « consentement préalable, libre et éclairé » (CPLÉ) dans cette gouvernance. En utilisant le cadre théorique de la gouvernementalité, cet article vise à analyser les continuités et les ruptures, les tensions et les avancements dans cette gouvernance en se concentrant sur les rationalités, les pratiques, les technologies de gouvernement et les relations de pouvoir concernés à la ratification de la C169 et à la mise en œuvre du droit de CPLÉ. La conclusion est que les peuples autochtones sont en train de gagner plus de participation et d’influence sur la gouvernance des projets extractifs, alors que les gouvernements colonisent le droit de CPLÉ afin de le subordonner à leurs projets néolibéraux et post-néolibéraux à travers une rationalité basée sur le développement et l’intérêt national, l’utilisation de la biopolitique, de l’onto-politique et de la discipline comme types de pouvoir, à travers de réformes institutionnelles et légales comme technologies de gouvernement, avec peu d’implémentation substantive par rapport à une majeure implémentation normative. La gouvernementalité de la plupart de ces pays de l’Amérique latine correspond à la gouvernementalité autoritaire.

Durante las últimas décadas, los pueblos indígenas de Latinoamérica adoptaron un enfoque basado en los derechos humanos, reivindicando la ratificación del Convenio 169 de la Organización Internacional del Trabajo, que ha sido ratificado por la mayoría de los países. La mayoría de las publicaciones sobre la gobernanza de la extracción de recursos naturales se ha enfocado en los diversos regímenes utilizados o en la política ecológica. Sin embargo, es necesario analizar el rol específico del derecho a la consulta y del “consentimiento previo, libre e informado” (CPLI) en esta gobernanza. Este artículo, mediante un marco

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teórico de la gobernanza, tiene como objetivo analizar las continuidades y las rupturas, así como las tensiones y los avances de este tipo de gobernanza enfocándose en las racionalidades, las prácticas, las tecnologías de los gobiernos y las relaciones de poder con respecto a la ratificación del Convenio 169 y la aplicación del derecho al CPLI en algunos países latinoamericanos. La conclusión principal es que, mientras que los pueblos indígenas están ganando más participación e influencia sobre la gobernanza de los proyectos extractivos, los gobiernos nacionales están colonizando el derecho al CPLI para subordinarlo a sus proyectos neoliberales y post-neoliberales a través de una racionalidad basada en el desarrollo y el interés nacional, el uso del poder biopolítico, onto-político y disciplinario, así como las reformas institucionales y legales como tecnologías gubernamentales, todo esto ha cedido a una mínima implementación substantiva comparada a una mayor implementación normativa. En consecuencia, la gobernanza de la mayoría de estos países de Latinoamérica corresponde a la gobernanza autoritaria.

Indigenous peoples from Latin America have been active participants in the emergence of new institutions and human rights instruments focused on indigenous issues.<sup>1</sup> With the support of international NGOs and other indigenous peoples, they have been carrying out multifaceted strategies from the local to the international.

Since the beginning of the 1990s, indigenous peoples in Latin America have articulated their demands through a human rights discourse, focusing on the ratification of the *Indigenous and Tribal Peoples Convention, 1989 (C169)*—a convention stipulating the collective recognition, participation, development, education, health, and other specific rights of indigenous peoples. The convention is also significant because it becomes a binding international instrument from the moment it is ratified by a state; as such a government's actions are made accountable before international institutions in which indigenous peoples can challenge them. Oftentimes, this is not possible with national legislation. *C169* remained in place as the main international instrument on the rights of indigenous peoples until the adoption of the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*<sup>2</sup> by the General Assembly of United Nations in 2007.

The main purpose of this article is to analyze—from the perspective of Foucault's concept of governmentality—the continuities, ruptures, tensions, rationalities, practices and power relations produced during the implementation of the right of indigenous peoples to consultation and free, prior and informed consent (FPIC)—one of the main indigenous rights issues with respect to extractive projects. The following are some preliminary conclusions of a larger doctoral research project examining the 'governmentality' of the implementation of the right to consultation on extractive projects in indigenous territories. Latin America is providing interesting examples and debates from indigenous peoples, scholars and decision-makers on these issues, and is also developing internationally relevant jurisprudence on the interpretation and application of consultation and FPIC.

In this article, I analyse the cases of Venezuela, Colombia, Ecuador, Peru, Bolivia and Chile as they have already ratified *C169*. They provide information on the ratification process, the legal and institutional arrangements used to implement the *Convention*, the subsequent *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)* and, in many cases, information on the steps leading to new constitutions. They also provide information on the studies supporting technologies of government and the rationalities underpinning them.

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<sup>1</sup> Suzana Sawyer & Edmund Terence Gómez, "Transnational Governmentality in the Context of Resource Extraction" in Suzana Sawyer & Edmund Terence Gómez, eds, *The politics of Resource Extraction: Indigenous Peoples, Multinational Corporations, and the State* (New York: Palgrave MacMillan, 2012) 1 [Sawyer & Gómez, *Transnational Governmentality*]; Asbjorn Eide, "The Indigenous Peoples, the Working Group on Indigenous Populations and the Adoption of the UN Declaration on the Rights of Indigenous Peoples" in Claire Charters & Rodolfo Stavenhagen, eds, *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Copenhagen: International Work Group on Indigenous Affairs (IWGIA), 2009) 32.

<sup>2</sup> United Nations Declaration on the Rights of Indigenous Peoples, GA Res 295, UNGAOR, 61st Sess, UN Doc A/RES/61/295, (2007).

## I. Governmentality, Indigenous Rights and Extractive Projects

Formulated by Michel Foucault during his lectures at the Collège de France during the 1970s, governmentality is a concept that refers to the shift to governmental rationality from the sixteenth century onwards in Europe. He argues that Europe progressively transitioned from sovereign power based on the principle of “let live and make die” to a different type of power based on a new rationality aiming to govern populations as well as the biological dimensions of populations (the new type of power which he calls ‘biopower’) which is based on the principle of “make live and let die”.<sup>3</sup>

This new governmental theory, dubbed ‘governmentality,’ is also based on the principle of the ‘reason of the state’ (that is, the state as the standard of rationality in the art of government), which uses new technologies of government in order to give predominance to government itself as a type of power.<sup>4</sup> These new technologies of government have consisted of alliances between states in order to preserve the balance of power within Europe, the organization of armies and the use of different means of promoting growth within the state (means he later defines as the ‘police’).<sup>5</sup>

In reference to the way power is exercised under liberalism, Foucault argues that the art of government has its own specific type of governmentality. Thus, if during the governmentalization of the state starting in the sixteenth century the reason of the state was a core principle of governmental reason (‘to govern by the state’), then what liberalism has done is to transform this rationality with the aim of diminishing the state. Consequently, in neoliberal regimes, in which the market assumes a central role, the state uses technologies of government that have objectives related to the self-regulation of individuals, and populations in general, so that their needs, desires and subjectivity fit with those of the state.<sup>6</sup>

Based on Foucault’s analysis and reflections on the rationalities underlying the art of government, governmentality also emerges as a way to analyse power in modern society, or what Dean calls the ‘analytics of government.’<sup>7</sup> According to Castro-Gómez and Dean, with governmentality Foucault moves from an approach to power as a form of domination—in which the governed can either resist or allow themselves to be dominated—to an approach where he identifies three types of power relations: power as strategic games between liberties, power as domination and power

<sup>3</sup> Michel Foucault, *Security, Territory and Population: Lectures at the Collège de France 1977-1978* (New York: Picador USA, 2007) [Foucault, *Security, Territory and Population*]; Michel Foucault, *Il faut défendre la société: Cours au Collège de France, 1976* (France: Éditions de Gallimard and Éditions du Seuil, 1997), [Foucault, *Défendre la société*]; Santiago Castro-Gómez, *Historia de la gubernamentalidad: Razón de Estado, liberalismo y neoliberalismo en Michel Foucault* (Bogotá: Siglo del Hombre Editores, 2012) [Castro-Gómez].

<sup>4</sup> Foucault, *Security, Territory and Population*, *supra* note 3; Foucault, *Défendre la société*, *supra* note 3; Castro-Gómez, *supra* note 3; Mitchell Dean, *Governmentality: Power and Rule in Modern Society* (London: SAGE Publications Ltd, 2010) [Dean].

<sup>5</sup> Foucault, *Security, Territory and Population*, *supra* note 3.

<sup>6</sup> Foucault, *Security, Territory and Population*, *supra* note 3; Castro-Gómez, *supra* note 3.

<sup>7</sup> Dean, *supra* note 4.

as government.<sup>8</sup> Moreover, he moves from an approach focusing on the link between power and knowledge to one that also includes subjectivity. Thus, power affects subjects or the governed, who are conceived as free and self-regulated. Within this notion of subjectivity the resistance or dissent of actors is possible in terms of ‘counter-conducts’ or “struggles against the processes implemented for conducting others”—counter-conducts that participate in shaping the exercise of power and eventually in formulating new governmental rationalities.<sup>9</sup>

Through the lens of governmentality, indigenous rights can be seen in two complementary ways. On the one hand, Foucault sees laws within a state as the inner regulation of governmental rationality needed in order for the state accomplish its duties.<sup>10</sup> Thus, the incorporation of an international law (much like the one analyzed herein) into national legislation serves to regulate and limit the power of those who govern and create the conditions in which the governed can self-regulate, allowing the market to function properly. On the other hand, human rights are seen specifically as an element within international governmentality aiming to limit the power exerted by the state on individuals.<sup>11</sup> In that sense, consultation and other forms of citizen participation in governmental decisions can be seen as “technologies of citizenship”.<sup>12</sup>

Empirical studies on indigenous rights show its dual effect of empowering indigenous peoples by facilitating resistance or dissent,<sup>13</sup> but also disempowering them<sup>14</sup> by framing their claims under governmental rule.<sup>15</sup>

In previous studies on the subject of extractive industries and indigenous peoples in which this concept was used, Sawyer & Gómez conclude that natural resource extraction on indigenous land is regimented by a transnational governmentality in which power is exerted at a transnational level by transnational companies and international institutions.<sup>16</sup> Ulloa arrives at a similar conclusion by analyzing the governance of protected areas of biodiversity on indigenous land in Colombia, in which she coined the term “transnational eco-governmentality” in reference to the predominance of decision making at a transnational level and due to the fact that these protected areas respond more to transnational interests than to the

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<sup>8</sup> Castro-Gómez, *supra* note 3; Dean, *supra* note 4.

<sup>9</sup> Foucault, *Security, Territory and Population*, *supra* note 3 at 201.

<sup>10</sup> *Ibid.*

<sup>11</sup> Dean, *supra* note 4; Elsa Stamatopoulou, "Indigenous Peoples and the United Nations: Human Rights as a developing dynamic" (1994) 16:1 Hum Rts Q 58.

<sup>12</sup> Dean, *supra* note 4.

<sup>13</sup> Aliénor Bertrand, "Une archéologie philosophique des normes environnementales: biopolitique et droits des peuples autochtones" (2013) 43 RGD 223 ; Louiza Odysseos, "Governing Dissent in Central Kalahari Game Reserve: "Development," Governmentality, and Subjectification among Botswana's Bushmen" (2011) 8:4 Globalizations 439 [Odysseos]; Suzana Sawyer & Edmund Terence Gómez, "On Indigenous Identity and a Language of Rights" in Suzana Sawyer & Edmund Terence Gómez, eds, *The politics of Resource Extraction: Indigenous Peoples, Multinational Corporations, and the State* (New York: Palgrave MacMillan, 2012) 9 [Sawyer & Gómez, *Indigenous Identity*].

<sup>14</sup> Sawyer & Gómez, *Indigenous Identity*, *supra* note 13.

<sup>15</sup> Odysseos, *supra* note 13.

<sup>16</sup> Sawyer & Gómez, *Transnational Governmentality*, *supra* note 1.

claims of local indigenous communities.<sup>17</sup>

## II. The Rationale Underlying the Ratification of *ILO Convention 169* in Latin America

Since *C169* was adopted in 1989, most of Latin-American countries have ratified it: Mexico in 1990, Colombia in 1991, Bolivia in 1991, Costa Rica in 1993, Paraguay in 1993, Peru in 1994, Honduras in 1995, Guatemala in 1996, Ecuador in 1998, Argentina in 2000, Venezuela in 2002, Brazil in 2002, Chile in 2008 and Nicaragua in 2010.

I argue that these ratifications were carried out under very different rationalities regarding indigenous peoples and the state, which resulted in the same technology of citizenship (i.e. indigenous rights). On the one hand, for indigenous peoples the demand to ratify *ILO Convention 169* had been a part of their struggle to redefine their relationship with the state after a long history of colonialism. In demanding the recognition of these human rights, indigenous peoples aimed to carve out a more favourable position within the state by actively participating in shaping it. For instance, in Bolivia *C169* was promptly ratified due to the mobilizations of the indigenous peasant Katarista movement during the 1970s, the indigenous territorial organization Consejo Nacional de Ayllus y Markas de Qullasuyu as well as the Asamblea del Pueblo Guaraní during the 1980s.<sup>18</sup> These organizations demanded the recognition of the rights of indigenous peoples, especially land rights, which during the 1990s turned into a demand for the redefinition of the relationship between indigenous peoples and the state, leading the government of Jaime Paz Zamora to ratify *C169* and to reconsider the territorial administration of the entire country in order to address these claims. In Ecuador, it was the organization CONAIE (Confederation of Indigenous Nationalities of Ecuador) that proved strong enough to provoke the fall of the Abdúlá Bucaram and Jamil Mahuad governments (in 1997 and 2000 respectively), becoming one of the main political actors in the country. In the wake of the demand for the recognition of indigenous rights at a constitutional level and the ratification of *C169*, the Ecuadoran national congress ratified the *Convention* and introduced articles recognizing collective rights for indigenous peoples into the final draft of the new constitution. Similarly, in the case of Chile, since the beginning of the 1990s, the ratification of the *Convention* was one of indigenous peoples' main demands. However, the complexity of a political scene characterized by a right-wing-driven transition to democracy and a deeply entrenched neoliberal project, made it highly difficult to move forward with these demands. As a result, the Indigenous Act of 1994 fell considerably short of indigenous peoples' requests. Moreover, from the late 1990s on, conflict between indigenous communities (especially those of the

<sup>17</sup> Astrid Ulloa, "The Politics of Autonomy of Indigenous Peoples of the Sierra Nevada de Santa Marta, Colombia: A Process of Relational Indigenous Autonomy" (2011) 6:1 *Latin American and Caribbean Ethnic Studies* 79[Ulloa].

<sup>18</sup> Laurent Lacroix, "Territorialité autochtone et agenda politique en Bolivie (1970-2010)" (2012) 17:1 *Quaderns-e* (Institut Català d'Antropologia) 60.

Mapuche people) and development projects deepened the distance between indigenous peoples and politicians. During the first half of the 2000s, this conflict eventually prompted different international actors (e.g., the United Nations Special Rapporteur on the Rights of Indigenous Peoples) to recommend that the government respect international indigenous rights. During the presidency of Michelle Bachelet, along with a newly composed congress more favourable to the *Convention*, Chile finally ratified *C169*.

The case of indigenous peoples in Guatemala, Colombia and Peru share a common history of civil war and armed conflict in which their demands to change their relationship with the state took place. In Colombia, as a result of violence between guerrilla movements and the government, and the ensuing call for a new constitution by the Supreme Court, indigenous peoples played a central role in obtaining the recognition of special rights during the discussions of the General Assembly charged with formulating the new constitution. These discussions led to the ratification of *C169*.<sup>19</sup> In Peru, although indigenous peoples were often described as weak actors within the country<sup>20</sup> and were among the communities most affected by the political violence stemming from the Sendero luminoso (or 'Shining Path') guerrillas, they acquired considerable visibility in the new constitution formulated under the government of Alberto Fujimori, which later ratified *C169*. In the case of Guatemala, the ratification of the Convention was part and parcel of the Peace Accords between the government and the Unidad Revolucionaria Nacional Guatemalteca (URNG). The Accords were negotiated in the context of the Permanent Mission of Guatemala to the United Nations' effort to put an end to the 40-year civil war and stop human rights violations. During the Civil War, indigenous peoples were disproportionately subject to human rights violations; they therefore had an especially relevant role during the peace talks.<sup>21</sup> One outcome of the talks was the ratification of *C169*, which the government did in 1996.

In the case of Venezuela, it was the direct participation of indigenous peoples in the formulation of the new Bolivarian Constitution in 1999 which later led to the ratification of *C169* in 2002.

I suggest that, in their demands, indigenous peoples have used the ratification of *C169* as one of their primary objectives for three main reasons. First of all, until the adoption of the *UNDRIP* by the General Assembly in 2007, *C169* was the main instrument of indigenous rights in international law and introduced fundamental rights for indigenous peoples not recognized in prior instruments. Another reason is that the *Convention* is a legally binding instrument forcing its implementation in countries that have ratified it, to which they can later be held accountable within the ILO's formal

<sup>19</sup> Al Gedicks, "Resource wars against Native Peoples in Colombia" (2003) 14:2 Capitalism Nature Socialism 85 [Gedicks].

<sup>20</sup> Shane Greene, "Getting over the Andes: The Geo-Eco-Politics of Indigenous Movements in Peru's Twenty-First Century Inca Empire" (2006) 38:2 Journal of Latin American Studies 327.

<sup>21</sup> John Peeler, "Citizenship and Difference: Indigenous Politics in Guatemala and the Central Andes" (Paper prepared for presentation at the 2000 Meeting of the Latin American Studies Association, Miami, March 16<sup>th</sup> and 17<sup>th</sup> 2000).

institutions and procedures. And finally, due to a history of civil wars and dictatorships leading up to the 1990s, the political struggles of indigenous peoples and other organizations in Latin American civil society were deeply rooted in a human rights approach.

The question remains: what were the rationalities of governments in the ratification of *C169*? I suggest that their rationalities were very different than those of indigenous peoples. For governments, the ratification of the *Convention* has been a part of a larger project which aims towards the modernization and neoliberalization of the state and of society. For example, in Bolivia the ratification of *C169* was a part of a neoliberal project, especially under Gonzalo Sánchez de Lozada's government – the main goal was the complete reorganization of the state's territory and administration. The indigenous demand for the creation of *Territorios Comunitarios de Origen* (or "Communal Territories of Origin") was considered part of the reorganization of the nation's territory by the government. In Peru, the ratification of *C169* took place during the authoritarian government of Alberto Fujimori and its attempts at neoliberalizing the economy. In Ecuador, the ratification occurred under the neoliberal administration, prior to the government of Rafael Correa – a neoliberal project that was highly contested by indigenous peoples. In Chile, the ratification transpired during Michelle Bachelet's left-wing government's administering of the neoliberal regime imposed by the dictatorship of Augusto Pinochet during the 1980s.

The case of Venezuela, however, was an exception in that the *C169* was ratified following the Bolivarian Constitution of the Hugo Chávez government. In this case, *C169* was likely seen as means to legitimate the structural transformations of the state taking place under Bolivarian regime.

In that sense, governments' ratification of *C169* can be seen as a particular technology of government converging with the neoliberal projects in place throughout the 1980s and the 90s under the so-called Washington Consensus. This technology of government also has a transnational dimension, not only because the ILO is an international institution, but also because of the intervention of other international institutions such as the World Bank (in the special case of Guatemala of the Permanent Mission of Guatemala of the United Nations) and the Inter-American Court of Human Rights.<sup>22</sup>

It is also important to note that there was a mutual influence between the ratification of the *Convention* and the drafting of new constitutions in many of these countries. In each aforementioned case, with the exception of Chile, the ratification deeply influenced the recognition of indigenous peoples within their new constitutions. The recognition of indigenous peoples led to the definition of the state as pluricultural or pluriethnic (the terms differ from country to country) as well as the integration of *C169* within the constitution. In the case of Bolivia, Colombia, Ecuador and Peru, *C169* influenced the way in which new constitutions defined the role of

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<sup>22</sup> International Labour Organization, "La aplicación del Convenio 169 por tribunales nacionales e internacionales en América Latina: una compilación de casos" (Nepal: International Labour Organization, 2009).

indigenous peoples within the state and, therefore, created a new relationship between indigenous peoples and the state. In the case of Venezuela, *C169* had a direct influence on the way in which the new Bolivarian Constitution defined the state's relationship with indigenous peoples, but it was actually the new constitution that finally led to *C169*'s ratification. Finally, in the case of Guatemala, *C169* influenced the introduction of constitutional reforms recognizing indigenous peoples and, in the case of Chile, no constitutional reform has yet come to pass but, as *C169* has constitutional implications, it is at the highest level of national legislation. By the time *UNDRIP* was adopted in 2007, most of these countries had already ratified *C169* and were thus accountable to ILO governance structures. That being said, the influence of *UNDRIP* on Latin-American countries is clear in the case of Bolivia, as its 2009 constitution, when referring to indigenous issues, was inspired by *UNDRIP* and *C169*.

### III. Rationalities and Practices in the Legal and Institutional Reforms Needed to Apply FPIC

As the reports of the Special Rapporteur and of the *Mecanismo de Expertos en Derechos de los Pueblos Indígenas* (Expert Mechanism on the Rights of Indigenous Peoples) show, over the last few decades, conflict with extractive industries has been one of the main concerns of indigenous peoples all over the world.<sup>23</sup> In order to confront extractive industries, the primary right claimed by indigenous peoples has become the right to FPIC. Under the international, institutional, procedural and legal framework of *C169*, the international system on indigenous rights (including the UN Special Rapporteur on the Rights of Indigenous Peoples, the Permanent Forum on Indigenous Issues and the Expert Mechanism on Indigenous Rights) and the Inter-American Court of Human Rights, there is an ongoing debate about how to define and apply FPIC: whether it should be applied as a veto right where the duty of the state is to obtain “consent,” a mere “prior consultation” (thus, not necessitating consent) or as a “consultation in order to obtain FPIC.”

Upon analyzing the latest reports of the Special Rapporteur and of the *Mecanismo de Expertos*—which are saturated with both in national (e.g., the Constitutional Court of Colombia has progressively defined many aspects of FPIC) and international jurisprudence (especially that of the Inter-American Court of Human Rights)—it is clear that the current formulation of the right to FPIC is composed of the following dimensions: a) it is the duty of the state - only procedural issues can be delegated to third parties (i.e. extractive industries); b) consultation must be held before any administrative or legislative decisions concerning indigenous peoples are

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<sup>23</sup> Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: *Extractive Industries and Indigenous Peoples*, UNGAOR, 24th Sess, UN Doc A/HRC/24/41, (2013) [Anaya, 2013]; Expert Mechanism on the Rights of Indigenous Peoples, *Follow-up report on indigenous peoples and the right to participate in decision-making, with a focus on extractive industries*, UNGAOR, 15th Sess, UN Doc A/HRC/EMRIP/2012/2 [Expert Mechanism].

taken by government agencies; c) the objective of consultation is to obtaining FPIC from indigenous peoples or communities; d) consultation must be carried out in “good faith,” via indigenous peoples’ own representatives, decision-making, institutions and procedures; e) consent is obligatory when the initiative in question entails the relocation, storage or disposal of hazardous materials and/or when the indigenous community considers that the project may have a significant impact on their land; and f) when consent is needed, it shall be given before the final decision is taken, without any form of coercion and with all the information necessary to fully understand the initiative.<sup>24</sup>

In essence, a more accurate formulation of the current interpretation of the right to FPIC would be that it is a “right to consultation in order to obtain the free, prior and informed consent of indigenous communities” in addition to which consent is obligatory at least three of the aforementioned cases. In a broader sense, FPIC should be seen as technology of government – namely of indigenous citizenship – by which indigenous peoples can fully and meaningfully participate in the decision-making related to their land and resources and can have a voice that substantially influences the final decision.

In order to understand the complexities of several of the institutional and legal arrangements that have taken shape in each country over the last few years, I will now describe the arrangements that specifically aim to govern natural resource extraction as well as the place FPIC occupies within them.

In Bolivia oil extraction has become the main source of wealth.<sup>25</sup> Although the government ratified *C169* and was introducing new laws to allow more participation of indigenous communities (such as the Popular Consultation Act), it was simultaneously and systematically restructuring the governance of hydrocarbon extraction under the neoliberal doctrine promoted by the Washington Consensus. According to Perreault, in 1996, President Gonzalo Sánchez de Lozada defined a national policy based on a new hydrocarbon law, the capitalization of the state hydrocarbon company and the construction of a pipeline to Brazil.<sup>26</sup> Five years after the ratification of the *Convention*, the Hydrocarbons Act of 1996 and the Mining Code of 1997 stipulated that extractive industries had to respect *C169*, but shifted the responsibility of consultation to companies. Thus, under this law neither consultation nor consent was adequately enforced. In addition to the lack of the political will to regulate consultation his led, this led to further conflict, especially between the

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<sup>24</sup> *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, James Anaya*, UNGAOR, 15th Sess, UN Doc A/HRC/15/37 (2010); *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Extractive Industries operating within or near indigenous territories*, UNGAOR, 18th Sess, UN Doc A /HRC/18/35 (2011); *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya*, UNGAOR, 21th Sess, UN Doc A/HRC/21/47 (2012); Anaya, 2013, *supra* note 23; Expert Mechanism, *supra* note 23.

<sup>25</sup> Thomas Perreault, “Extracting Justice: Natural Gas, Indigenous Mobilization, and the Bolivian State” in Suzana Sawyer & Edmund Terence Gómez, eds, *The Politics of Resource Extraction: Indigenous Peoples, Multinational Corporations, and the State* (New York: Palgrave MacMillan, 2012) 75 [Perreault].

<sup>26</sup> *Ibid.*

Guarani people (on whose land most of the oil and gas reserves are located) and industry. In 2005, the same year that Evo Morales assumed the presidency of the nation, his government adopted a new hydrocarbons law (Act 3058). This law specified how hydrocarbon projects should be carried out on indigenous lands so as to respect *C169*. The law was then complemented with the Presidential Decree 29033 on "Consultation and participation of indigenous peoples and peasant communities in hydrocarbon activities," both of which constitute the current legal framework for the implementation of FPIC in Bolivia. In this juridical context, FPIC is defined in terms of "the right to consultation in order to obtain FPIC, but where obtaining FPIC is not mandatory."

In the case of Colombia, the implementation of FPIC has followed the progressive rulings of the Constitutional Court, which have taken a different direction than that of the government's development policies. In fact, extractive projects have significantly increased since the 1980s and are frequently concomitant with indigenous territories and human rights violations.<sup>27</sup> After ratifying *C169*, following the assessment of the World Bank and the Canadian International Development Agency, the government enacted a new Mining Code in 1992, which in practice aimed to neoliberalize the economy and erode indigenous rights.<sup>28</sup> This new mining code only recognized the indigenous territories that were permanently occupied and eliminated the obligation to hold consultation with indigenous peoples.<sup>29</sup> More recently, new legal reforms and development policies have further perpetuated the contradictions with FPIC. In 2008, the Constitutional Court declared the new Forestry Act, the National Development Plan and the 2011 reform of the Mining Code inapplicable, basing its decisions on the fact that the government did not consult with indigenous communities. This demonstrates one of the particularities that characterizes the Colombian case: while the implementation of FPIC stems from the rulings of the Constitutional Court, the government's neoliberal policies and reforms directly undermine FPIC. Another particularity of the Colombian case is that other specific actors participate in the power relations underpinning the governance of natural resource extraction on indigenous land as well as in the substantive implementation of FPIC: the guerrillas, paramilitaries and drug organizations.<sup>30</sup>

In the case of Peru, during the ratification of *C169*, Fujimori's government began to adopt a series of neoliberal reforms with the support of the World Bank. According to Laforce, in order to implement the structural reforms needed for the neoliberalization of the economy, the government set out to enact a new mining law in 1992, adopt new regulations on environmental issues relative to mining in 1993 and create a new Environmental Council.<sup>31</sup> However, it was not until 2001 that a

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<sup>27</sup> Gedicks, *supra* note 19.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

<sup>30</sup> Thad Dunning & Leslie Wirpsa, "Oil and the political economy of conflict in Colombia and beyond: a linkages approach" (2004) 9:1 *Geopolitics* 81.

<sup>31</sup> Myriam Laforce, "Processus de dialogue et ententes négociés : réponses durables aux conflits? L'expérience du projet minier de Tintaya au Pérou" in Myriam Laforce, Bonnie Campbell & Bruno

*Guide to Community Relations*<sup>32</sup> from the Ministry of Energy and Mines was finally published. In spite of the ratification of the Convention in 1994, the guide only considers consultation to be a transfer of information from the government to communities and a procedure to obtain the opinion of communities – an opinion that “might” be considered in the final project design. The guide also puts forth a voluntary approach; it does not constitute a real enforcement of the right to FPIC.<sup>33</sup> At the beginning of the 2000s, this was the basic legal framework for FPIC, leading to several conflicts around mining, oil and forestry projects in different regions of the country. However, in 2009, when the ‘Bagua massacre’ left 33 people (from indigenous communities opposing forestry in the Amazon and the police force) dead during police repression, the government began negotiations with indigenous organizations in order to create a specific law on FPIC. After heated negotiations that even included the participation of the Special Rapporteur, in 2010 the Peruvian congress finally enacted the Prior Consultation Law. To date, this is the only law in Latin America that has directly addressed FPIC. It defines FPIC as the right to consultation in order to obtain FPIC, in which obtaining consent is not mandatory, but if obtained totally or partially is binding for the parties. This law requires that the government create a public database with all the communities subject to this law, but because the government has yet to deliver this database, the Prior Consultation Act is not yet applicable.

In Guatemala there are ongoing conflicts between indigenous communities and mining companies. Communities demand that their right to FPIC be respected, but from 1997 to 2011, the Ministry of Energy and Mines granted 398 exploration and exploitation mining leases without any consultation of those affected. In response to this lack of consultation, communities began to implement their own ‘*consultas comunitarias*’ (or ‘community consultations’), which the government does not consider to be binding. From 2004 to 2012, 67 community consultations regarding mining and hydroelectric projects in different municipalities were carried out. However, the violence is still ongoing.

In Ecuador, at the time when *C169* was ratified, the Mining Act of 1991–later reformed in 1999 by the Environmental Regulations for Mining Activities (which was proposed by the Ministry of the Environment in 1997) – was in force. However, these reforms created two problems: 1) at that time, indigenous rights did not have constitutional legitimacy and FPIC was not included in these new rules; and 2) the law stipulated that the Ministry of the Environment only had a secondary role, as the main responsibilities fell under the Ministry of Energy and Mines, which granted concessions for exploration and exploitation while it was charged with following up on environmental issues affecting the same projects that it had already accepted. Thus, over the course of ten years, FPIC was not respected and conflicts

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Sarrasin, eds, *Pouvoir et régulation dans le secteur minier: Leçons à partir de l'expérience canadienne* (Québec: Les Presses de l'Université du Québec, 2012) 191 [Laforce].

<sup>32</sup> República del Perú, Ministerio de Energía y Minas, *Guía de relaciones comunitarias* (Lima: Dirección General de Asuntos Ambientales, Ministerio de Energía y Minas, República del Perú, 2001).

<sup>33</sup> Laforce, *supra* note 31.

between extractive industries and indigenous communities increased. In 2006, Rafael Correa was elected president of the country, marking a turn towards a post-neoliberal era. According to Moore and Velásquez, in 2008, during discussions on the drafting of a new constitution, the National Constituent Assembly ordered a ‘Mining Mandate’ which suspended all major mining projects, and was going to cancel most of the new mining permits throughout the country and nationalize 4000 mining concessions.<sup>34</sup> However, the strong lobbying effort exerted by the Embassy of Canada and mining companies, as well as the contradictions within the government, undermined the Mining Mandate. Both the government (which was in favour of mining activities) and social movements that opposed the exploitation argued the need to exert national sovereignty over natural resources. Following the new constitution of 2008, a new Mining Act was passed in 2009, which gave the state a more active role than the previous law, but subdued the expectations raised under the Mining Mandate. Also, it failed to recognize the right to FPIC and, instead, established a right to “prior non-binding consultation”.<sup>35</sup>

In the case of Venezuela, before ratifying *C169*, indigenous peoples succeeded in actively participating in the discussions leading up to the new constitution of 2009, which recognized the rights of indigenous peoples as laid out in *C169*. Regarding extractive projects, the *Organic Act on Indigenous Peoples and Communities* of 2005 already recognized the “full right to free, prior and informed consent”.<sup>36</sup> However, in its reports to the Committee of *C169*, the Venezuelan government did not provide information on how these high standards were being upheld.

Finally, in the case of Chile, following the ratification of *C169*, the government issued Decree 124 in 2009 to regulate the implementation of the *Convention*, which was then replaced by Decree 66 in 2013. However, both decrees were highly contested by indigenous peoples and Human Rights NGOs due to the fact that indigenous peoples were not consulted prior to its adoption. Moreover, in 2010 the government interpreted that mandatory consultations could be channelled through the indigenous council of CONADI (the government agency for indigenous issues). As a response, International agencies, such as the Special Rapporteur and the Expert Mechanism on the Rights of Indigenous Peoples, asked to be informed on the implementation of the *Convention* and recommended that the duty to consult be respected. Moreover, a government agency (the National Institute of Human Rights) officially concluded that same year that Decree 124 did not respect the *Convention*, and in 2011 the Congressional Human Rights Commission requested that this decree be repealed. Nevertheless, Decree 66 does not attenuate the criticisms stemming from

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<sup>34</sup> Jennifer Moore & Teresa Velásquez, “Sovereignty negotiated : Anti-mining movements, the state and multinational mining companies under Correa’s ‘21st Century Socialism’” in Anthony Bebbington, ed, *Social Conflict, Economic Development and Extractive Industry: Evidence from South America* (New York: Routledge, 2012) 112 [Moore & Velásquez].

<sup>35</sup> *Ibid.*

<sup>36</sup> Asamblea Nacional de la República Bolivariana de Venezuela, *Ley Orgánica de Pueblos y Comunidades Indígenas*. Caracas: Asamblea Nacional, 2005.

different national and international actors. Meanwhile, several court decisions<sup>37</sup> started sanctioning extractive projects because they did not respect the right to consultation established in *C169*. The most important court ruling on this issue was the ‘El Morro Mine’ decision<sup>38</sup>, in which the Supreme Court ordered mining activities to cease because the company did not consult with the indigenous community. Thus, in Chile FPIC can be thought of as the “right of communities, as defined by the state, to be consulted in order for consent to be obtained.”

These institutional and legal reforms demonstrate that the implementation of FPIC in Latin America is still highly fluid; there is no one single, but several, regimes of practice and underlying rationalities. Similarly, tensions between the rationalities and practices (which can be seen as counter-conducts) of indigenous peoples aiming to obtain full and meaningful participation in the decisions regarding natural resource extraction on their lands and tendencies to “colonize” FPIC by neoliberal as well as post-neoliberal governments seem to be commonplace. I use the term “colonize” to highlight two sides of a larger process: 1) the different strategies and technologies of government that have been used in order to shape and frame FPIC within their own neoliberal or post-neoliberal projects in such a way that they undermine objectives of indigenous self-determination; and 2) to date, the governmental regimes of natural resource extraction have not seemed to change the colonial basis of indigenous peoples’ relationship to the state.

However, at the same time, the implementation of FPIC has been broadening the conditions in which indigenous peoples can participate in decisions that affect their role in society and the state, at least in terms of their land. These new conditions benefit indigenous peoples, who are now crucial actors in the political scene in each country. In this sense, although the relationship is still colonial, FPIC has brought better conditions for new relationships to be built.

In general, the implementation of FPIC in these countries transpired in the context of increasing extractive projects on indigenous lands, in which governments prioritized the extraction as a source of wealth. Thus, the different technologies of government employed, by the way of institutional and legal arrangements, have been crucial in shaping how FPIC will later be applied concretely.

The way in which the different countries in question have developed institutional and legal reforms of the governance of natural resource extraction shows that there is no one single type of power underlying these technologies of government, but rather several. First and foremost, biopolitics is one of these types of power, insofar as it is a ‘conduct of conducts’ regarding the way natural resource extraction affects the conditions of living of the population (health, well-being, environment, etc.) as well as natural resources. In addition to biopolitics, there is

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<sup>37</sup> For example, *Machi Francisca Linconao v/s Forestal Palermo*, Resolución 41913-2009, Corte Suprema (Chile) and *Comunidad Mapuche Huilliche Pepiukelen v/s Empresa Pesquera Los Fiordos Ltda*, Causa Rol 36-2010, Corte de Apelaciones de Puerto Montt (Chile).

<sup>38</sup> *Caso Proyecto minero El Morro Goldcorp. Comunidad Huascoalinos - Comisión Evaluación III Región*, Fallo Rol 2211-2012, Corte Suprema (Chile).

another type of power I would call ‘ontopolitics;’ instead of governing the conditions of living of the population (as Foucault’s concept of ‘bio-politics’ indicates), what is governed is the very “being” (or ontology) of indigenous communities, for example, by way of defining who are the communities’ subjects (e.g. the Prior Consultation Law in Peru) and what criteria lead to the recognition of an indigenous community (e.g. the case of Chile). This use of ‘ontopolitical’ technologies aims to control the very identity of indigenous peoples so as to limit who can demand the right to FPIC by technical means that define what indigenous land and communities are.

Another type of power employed is discipline, especially in highly controversial extractive projects where the government criminalizes or militarizes indigenous peoples’ protests, acting to punish the bodies of community members opposed to the government’s actions, as has been the case in Guatemala, Peru, Chile, Colombia, Mexico as well as during the neoliberal period in Bolivia and Ecuador.

Another technology of government used to different degrees by all neoliberal governments is what several authors have called “the selective absence of the state”, “the institutional capture” or “the broker state”.<sup>39</sup> With this technology the government actively allows transnational companies and international agencies (e.g. the World Bank) to govern in its place. Because the institutional and legal reforms are weak, they let the extractive industries carry out their projects and define consultation with their own criteria.

In this approach, the knowledge that justifies and shapes the exercise of government is at the core of the type of governmentality in question. Likewise, in terms of the role of knowledge in power relations, indigenous rationalities are faced with government rationalities of “development” and “national interest” both of which are present within neoliberal and post-neoliberal regimes. Regarding the latter, this analysis concurs with Bebbington and Gudynas who conclude that no major differences exist between neoliberal (e.g. Chile, Peru and Colombia) and post-neoliberal governments (e.g. Venezuela, Ecuador and Bolivia), or what Gudynas has dubbed “neoliberal extractivism” and “progressive neoextractivism”, in reference to the governance of natural resource extraction.<sup>40</sup> In Ecuador and Bolivia, the government and indigenous communities have both claimed that their strategies aim to bolster ‘national sovereignty,’ but that they also coincide with the indigenous concept of ‘Buen vivir’ (or ‘good living’). In that sense, these two countries illustrate the ongoing struggle around the rational analysis of the goals and means with which to govern while implementing FPIC.

<sup>39</sup> Laforce, *supra* note 31; Sawyer & Gómez, *supra* note 1; Patricia Urteaga-Crovetto, “The Broker State and the ‘Inevitability’ of Progress: The Camisea Project and Indigenous Peoples in Peru” in Suzana Sawyer & Edmund Terence Gómez, eds, *The Politics of Resource Extraction: Indigenous Peoples, Multinational Corporations, and the State* (New York: Palgrave MacMillan, 2012) 103 [Urteaga-Crovetto].

<sup>40</sup> Anthony Bebbington, “Extractive Industries, Socio-environmental Conflicts and Political Economic Transformations in Andean America” in Anthony Bebbington, ed, *Social Conflict, Economic Development and Extractive Industry: Evidence from South America* (Abingdon: Routledge, 2012) 3 [Bebbington]; Eduardo Gudynas, “Estado compensador y nuevos extractivismos: las ambivalencias del extractivismo sudamericano” (2012) 237 *Revista Nueva Sociedad* 128.

#### IV. The Practice of FPIC: ‘Normative’ and ‘Substantive’ Implementation

With regards to the implementation of FPIC in Latin America, I have identified two main types: a ‘normative implementation,’ which is when local, national or international courts impose sanctions on a state for not respecting FPIC; and a ‘substantive implementation,’ which is when this right is implemented from the first phases of an extractive project.

The normative implementation of FPIC is related to the jurisprudence carried out by national and international courts, which in turn has helped to develop the current definition of FPIC used by international institutions. In particular, at a national level, some of the most noteworthy and well-documented decisions specifically regarding FPIC are that of the Constitutional Court of Colombia and the Supreme Court of Chile.

In Colombia, the progressive rulings of the Constitutional Court have been crucial, considering that there are no specific rules defining how FPIC should be carried out within the country derived from legislation. According to the Ministerio de Interior y de Justicia, the decisions of the Constitutional Court relative to FPIC are: the *U'wa* case (SU-039, 1997), the *Urrá* case (T-652, 1998), the *Regulation of article 176 of the Political Constitution of Colombia Act* case (C-169, 2001), the *Mining Code* case (C-891, 2002), the *Illegal Plantation* case (SU-383, 2003), the *Motilón Barí* case (T-880, 2006), the *Forestry Act* case (C-030, 2008), the *National Plan of Development Act* case (C-461, 2008), the *Ranchería River* case (T-154, 2009), the *Rural Statute Act* case (C-175, 2009) and the *Wayuu Basic Plan* case (C-615, 2009).<sup>41</sup>

In these rulings the Constitutional Court of Colombia has defined the following guidelines with respect to FPIC: the right to FPIC is constitutional issue, it applies to strategic decisions (national plans, laws and programmes) and particular projects (mining, oil, hydroelectric, etc.), it must be carried out via indigenous peoples’ own representatives and decision-making processes, consultation must be carried out in a meaningful way, not by merely giving information to the community, indigenous communities that consider that FPIC has not been respected must take legal actions within a reasonable timeframe, and projects that generate considerable negative impacts must be consented to by the community.

In Chile, following the ratification of *ILO Convention 169*, the Court of Appeals began to render decisions applying the *Convention* in favour of indigenous communities faced with fishing, forestry, and non-extractive development projects. Said rulings are the following: the *Palguin Alto v. COREMA* case (1705, 2009), the *Pepiwkelen Community v. Los Fiordos* case (16, 2010), the *Machi Francisca Linconao v. Forestal Palermo* case, and the *Lanco Community v. CONAMA* case (243, 2010). With regards to the Chilean Supreme Court, the decision favouring the

<sup>41</sup> Colombia, Ministerio del Interior y de Justicia, *La consulta previa a grupos étnicos en Colombia: compendio de legislación, jurisprudencia y documentos de Estado* (Bogotá: Ministerio del Interior y de Justicia, 2009).

indigenous community of Huascoatinos in its case against the EL Morro Mine is crucial, as it was based on the lack of consultation with the community.

One of the consequences of these court decisions is that they have effectively enforced a shift in the governance of natural resource extraction. This shift has given rise to uncertainty in governments by diminishing their ability to make decisions on their own, while extractive industries continue to want certainty for their investments. This uncertainty has pressured governments to improve FPIC regulation.

In a more theoretical sense, this also confirms the governmentality approach's assumption: the state is not a homogeneous set of institutions, but rather a set of heterogeneous institutions with different rationalities, strategies and power relations. Some examples of this theorization can be found in the contradictions between the government and the courts in Chile and Colombia, the Ombudsman in Peru (acting in favour of indigenous communities) and the government (which saw them as extremists and retrograde sectors of society that should be modernized), and also between the courts, the government and the governmental agency on human rights in Chile, interceding in favour of indigenous peoples against the government's decisions.

The differences between national courts and certain governmental agencies on the one hand, and governmental agencies in charge of natural resource extraction on the other, have been used by indigenous communities as part of their strategy to oppose extractive projects. Moreover, these differences show another dimension of governmentality at work within the implementation of FPIC: the excess of government.<sup>42</sup> How can one understand the paradox of an excess of government, while at the same time recognizing a form of governance characterized by a state that is mostly absent leaving, in its stead, extractive industries or other international agents? This paradox is precisely one of the key aspects of the neoliberal art of government; it is not that the government shirks its duty to govern, but instead rules by allowing other agents, notably the market, to govern in its place. Moreover, I argue that this is one of the characteristics of the governance of natural resource extraction in the Latin American countries analysed herein.

With regards to the substantive implementation of FPIC, there have been very few documented cases found in Latin America. Conflicts in mining, oil, forestry and hydroelectric projects are in general better documented, for example Bebbington provides several instances from Ecuador, Peru and Bolivia, much like Perreault in the case of Bolivia and Urteaga-Croveto in that of Peru.<sup>43</sup> However, "best practices" seem to be sparsely, or not yet, documented. Only a few documented cases from Bolivia, in which consultation has been applied, can be found. One even stated that consent was obtained by applying *ILO Convention 169*. This means that what the description of the practical implementation of FPIC or consent in Latin America cannot be clearly ascertained.

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<sup>42</sup> Foucault, *Security, Territory and Population*, *supra* note 3.

<sup>43</sup> Bebbington, *supra* note 40; Perreault, *supra* note 25; Urteaga-Croveto, *supra* note 39.

In the only Latin American case in which FPIC was fully applied, de la Riva Miranda<sup>44</sup> describes how the process of carrying out a proper consultation and obtaining consent for the Bolivian project *Bloque San Isidro* was fraught with conflict.<sup>45</sup> What seems to have helped keep these negotiations going, in spite of the tension, was the political will of the government to obtain the consent of the surrounding communities, the strong organization and clarity of the demands of the Guarani communities' that stood to be affected by the project, and the overall quality and process through which the information was given to the communities (even if, in this case, it was not totally adequate).

Considering the other cases from Bolivia<sup>46</sup> Peru<sup>47</sup> and Ecuador<sup>48</sup> in which different consultation processes were analyzed or described, I posit that consultation in the governance of natural resource extraction in Latin America is still a highly contested issue. Neoliberal and post-neoliberal governments have adopted several strategies in order to undermine its meaning, subjects, goals, and procedures. Consequently, there have been no major changes in the governance of natural resource extraction in indigenous territories.

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This article examined the governmentality at work in the implementation of indigenous rights on consultation and FPIC in Latin America. With the ratification of *C169* and the later adoption of *UNDRIP*, indigenous peoples have gained more participation and influence in the governance of natural resource extraction, by influencing the formulation of new constitutions within most of these countries and by means of the legal and institutional reforms aiming to implement FPIC. However, indigenous resistance and demands have taken the form of counter-conducts in opposition to a prevailing governmentality, the characteristics and technologies of government of which are: a rationality based on the notions of development and national interest, in which extractive projects are crucial to neoliberal (Colombia, Peru, Chile and Guatemala) and post-neoliberal governments (Venezuela, Ecuador and Bolivia) alike; a governmentality that uses biopolitics, ontopolitics and discipline as its main forms of power; and legal and institutional reforms that result in tension between the normative (legal) and substantive (practical) implementation of FPIC. These characteristics can be considered as what Dean has deemed "authoritarian governmentality," which "link[s] the exercise of sovereignty and its instruments of

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<sup>44</sup> Polo De la Riva Miranda, "Proceso de consulta y participación proyecto exploración sísmica 2D campos Tacobo y Tajibo, Bloque San Isidro" in Iván Bascopé Sanjinés, ed, *Lecciones aprendidas sobre consulta previa* (La Paz: Centro de Estudios Jurídicos e Investigación Social [CEJIS], 2010) 43.

<sup>45</sup> *Ibid* at 157.

<sup>46</sup> *Ibid*; Perreault, *supra* note 25.

<sup>47</sup> Bebbington, *supra* note 40; Laforce, *supra* note 31; Urteaga-Crovetto, *supra* note 39.

<sup>48</sup> Moore & Velásquez, *supra* note 34.

death with a power over life exercised at the level of populations and races”.<sup>49</sup> Bolivia has shown some aspects of this authoritarian governmentality, while simultaneously providing the only documented cases of FPIC ever being applied (although more information is needed in the case of Venezuela to see if it can compare).

Sawyer and Gómez and Ulloa highlight the transnational level at which this governmentality takes shape, but the present article also points out its manifestations at the national level.<sup>50</sup> At the local level, substantive implementation has yet to be carried out, which can be seen as another technology of government with the effect of making FPIC part of authoritarian governmentality.

Finally, while indigenous peoples are gaining more participation in and influence on the governance of extractive projects in their territories, government practices have been moving toward a “colonization” of FPIC in order to counteract its decolonial momentum and subordinate it to an extractivist order.

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<sup>49</sup> Dean, *supra* note 4 at 173.

<sup>50</sup> Sawyer & Gómez, *Transnational Governmentality*, *supra* note 1; Ulloa, *supra* note 17.