

Considering Ecuador's New Water Law Through The Lens Of Indigenous Rights Under International Law

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INTRODUCTION

In August 2014, Ecuador passed a new law regarding water resources throughout the country.¹ Many aspects of this new law were not necessarily that new; they echoed many of the provisions regarding water that had been outlined in the 2008 Constitution.² Despite its lack of novelty, however, many Ecuadorians, specifically many of the country's indigenous groups, were concerned that this new Water Law did not safeguard

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¹ *Ley de Recursos Hídricos Usos y Aprovechamiento del Agua publicado en Registro Oficial*, Agua.gob.ec, <http://www.agua.gob.ec/ley-de-aguas/> (last visited Nov. 19, 2015).

² Constitution of the Republic of Ecuador, Art. 12,74, <http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html> (last visited Nov. 19, 2015), [hereinafter Constitution of Ecuador].

their interests sufficiently.³ Many indigenous groups and individuals participated in widespread demonstrations attempting to highlight what they felt to be the flaws of this new law, but to little avail. The law passed, much to the disappointment of many of the indigenous groups of Ecuador.⁴

A subsequent analysis of the text of the new Water Law reveals that the indigenous groups likely had good reason to be concerned, especially when considering this new law in the context of international human rights norms. There are provisions in this law that are sufficiently vague enough to allow for state intrusion upon indigenous rights to water and land use. Also, while there are specific provisions in the law that are designed to accommodate the interests of the indigenous groups of Ecuador, the provisions lack some of the essential elements necessary to comply with international human rights norms. Part I of this paper will analyze Ecuador's obligations under some of the international human rights instruments it has ratified. Part II will analyze the obligations that Ecuador has under its own Constitution of 2008. Part III will then transition to examining the text of the Water Law in light of the standards derived from the instruments analyzed. Part IV will suggest some possible changes to the law that might help to bring it more in harmony with international rights standards regarding indigenous peoples while still maintaining the integrity of the law. Part V will briefly conclude.

I. INDIGENOUS PEOPLES' RIGHTS UNDER INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

In order to appreciate the full context in which Ecuador's new Water Law comes into play, it is necessary to consider the framework surrounding this new law. The first

³*Water rights protest march reaches Cuenca today; Indigenous groups oppose new national legislation*, CUENCAHIGH LIFE.COM, <http://cuencahighlife.com/water-rights-protest-march-reaches-cuenca-today-indigenous-groups-oppose-new-national-legislation/> (last visited Nov. 19, 2015).

⁴*Indígenas marcharon por Quito contra la nueva Ley de Aguas*, ELCOMERCIO.COM, <http://www.elcomercio.com/actualidad/indigenas-marcha-quito-ley-aguas.html> (last visited Nov. 19, 2015); Manuela Picq, *Conflict Over Water Rights in Ecuador*, ALJAZEERA.COM, available at <http://www.aljazeera.com/indepth/opinion/2014/07/conflict-water-rights-ecuador-201471364437985380.html> (last visited Nov. 19, 2015).

aspect of the surrounding framework that will be considered is that of international law. While an exhaustive analysis of all of the obligations of Ecuador under international law will not be attempted in this article, the most salient principles from the following major international instruments will be examined: The International Labor Organization's Convention No. 169, the American Convention on Human Rights (as interpreted and applied by the Inter-American Court of Human Rights), and the United Nations' Declaration on the Rights of Indigenous Peoples.

A. The International Labor Organization Convention No. 169

The International Labor Organization (ILO), an international body that seeks to promote social justice,⁵ presented the Indigenous and Tribal Peoples Convention (No. 169) to its General Assembly for ratification in 1989.⁶ Convention 169 was groundbreaking, with "extensive provisions advancing indigenous cultural integrity, land and resource rights, and nondiscrimination in social welfare spheres."⁷ Ecuador later ratified the Convention in 1998.⁸ Thus, Ecuador is bound to abide by the provisions of Convention 169.

There are four principles contained in ILO Convention No. 169 that are relevant here. First, ratifying states are obligated to protect the environment of its indigenous peoples. Article 4 subsection 1 of the Convention reads: "Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned."⁹ While it is true that Article 4 does

⁵ *Origins and History*, ILO.ORG, <http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm> (last visited Nov. 19, 2015).

⁶ Convention Concerning Indigenous and Tribal Peoples in Independent Countries, ILO.ORG, http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314 [hereinafter ILO Convention No. 169].

⁷ S. James Anaya, *Indigenous Rights Norms in Contemporary International Law*, 8 ARIZ. J. INT'L & COMP. L. 1, 7 (1991).

⁸ *Ratifications for Ecuador*, ILO.ORG, http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102616.

⁹ C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169), Art. 4 § 1, ILO.ORG, http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C169.

not put the burden exclusively on states because it does not explicitly state who shall adopt these measures, most indigenous populations exist in a subordinate plane to the government of the states in which they reside. Thus, the responsibility naturally falls to the states to adopt adequate measures to accomplish the goals set forth in Article 4. The term “measures” is also unspecific, meaning that any legislation, regulation, policy, or other state act could potentially qualify as appropriate action as long as whatever action was undertaken could accomplish the protection goals of Article 4. And, while there are several areas that merit protection under Article 4, most notable for the purposes of this article is that the phrase “environment of the peoples concerned”¹⁰ is included along with, and at the same level, as the protection of persons and property. Despite the fact that Article 4 does not specifically delegate the duty of protection of “persons, institutions, property, labour, cultures and environment of the peoples concerned”¹¹ to specific parties, the participation of the state in these measures is still implicit. Thus, the obligation of the state to protect the environment of its resident indigenous peoples is one that states may not take lightly.

Second, when considering an action that may affect its indigenous peoples, states must consult with those that might be directly affected by such an action.¹² The provisions are set forth, in part, in Article 6, Subsection 1:

In applying the provisions of this Convention, governments shall:

- (a) Consult the peoples concerned, through appropriate procedures and in particular 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 programmes which concern them;

¹⁰ *Id.*

¹¹ *Id.*

¹² ILO Convention No. 169, *supra* note 9, at art. 6 § 1.

(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.¹³

To adequately comply with this section, states must fulfill various specific requirements. For example, states must consult with indigenous peoples when contemplating legislative or even simply administrative measures that may affect them.¹⁴ Also, they must do so through the “representative institutions” of the respective indigenous groups by means of “appropriate procedures.”¹⁵ While not specifically defined in the Article, the inclusion of “appropriate procedures” and “representative institutions” does appear to give weight to the idea that indigenous groups must be consulted with on their own terms and in a manner where the authority to represent the will of the entire group is evident. Merely taking an opinion of a portion of the group will not suffice. States may even be required to furnish the resources for the development of said institutions and also initiatives of the indigenous groups concerned.¹⁶

States are also required under Article 6 to provide means by which indigenous groups can “freely participate . . . at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them.”¹⁷ While it is left up to individual states to determine how to accomplish this goal, it is nonetheless important that indigenous groups be included in the decision-making process. It should be noted, however, that just because states are required to consult with indigenous peoples, the agreement of the indigenous people involved in the consultation is not required under Article 6 subsection 2. And, while not requiring consent may seem like a reasonable provision given the vast responsibilities of states toward their respective populations, the provision presumes that the political process will

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ ILO Convention No. 169, *supra* note 9, at art. 6 § 3.

¹⁷ *Id.* at art. 6 § 2.

sufficiently ensure that the consultations will safeguard indigenous peoples' needs, something that may not always be the case.¹⁸

Third, according to Article 7 of ILO Convention 169, states must allow indigenous groups to plan and prioritize development as they see fit and to exercise control over their own development.¹⁹ The full text of Article 7 reads:

1. 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 programmes for national and regional development which may affect them directly.

2. 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.

3. Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.

4. Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.²⁰

This provision codifies the right of self-determination for indigenous groups. By implication, it would therefore be impermissible for the state to decide what would or would not be best for its indigenous peoples. As part of this principle, states are also required to prioritize the welfare of the indigenous peoples that inhabit a particular area

¹⁸ See *infra*, Part II.B.

¹⁹ ILO Convention No. 169, *supra* note 9, at art. 7 § 1.

²⁰ *Id.*

when considering economic development for that area.²¹ Under this principle, states are also required to conduct studies on the potential “social, spiritual, cultural and environmental impact” that economic development activities may have on the indigenous peoples inhabiting the zone in question.²² But, merely conducting the studies is not sufficient. According to Article 7, the “results of these studies shall be considered as fundamental criteria for the implementation of these activities.”²³ In other words, if the results of these studies (as they pertain to the indigenous groups in question) are disregarded and not implemented as part of any economic development program, the state would not be in compliance with Article 7.

Fourth, states are obligated to protect rights of indigenous peoples to the natural resources of the lands they inhabit.²⁴ The term “lands” is understood as encompassing the “total environment” that the indigenous peoples “occupy or otherwise use.”²⁵ According to Article 15 of ILO Convention 169, the rights of indigenous peoples to the natural resources of their lands include the right to “participate in the use, management and conservation of these resources.”²⁶ While the rights of indigenous people regarding the natural resources of the lands they inhabit would obviously include the use of those resources, the inclusion of the right to participate in the “management” and “conservation” of those resources seems to set the standard much higher than just permission to use the resources. Relevant to the inquiry at hand is also the specification of Article 15 that state governments, when reserving to themselves rights to resources present on the lands of indigenous peoples, must consult with them prior to undertaking any activity with regard to those resources as to “what degree their interests would be

²¹ *Id.* at art. 7 § 2.

²² ILO Convention No. 169, *supra* note 9, at art. 7 § 3.

²³ *Id.*

²⁴ ILO Convention No. 169, *supra* note 9, at art. 15.

²⁵ *Id.* at art. 13.

²⁶ ILO Convention No. 169, *supra* note 9, at art. 15 § 1.

prejudiced.”²⁷ If such activities are undertaken, indigenous peoples are to benefit from them or be compensated in case any damages are suffered.²⁸

Thus, under ILO Convention No. 169, Ecuador is bound by the principles of adopting special measures to protect the environment of its indigenous peoples, consulting with them when they are affected, allowing them to plan and prioritize their own development, and safeguarding the benefits of the natural resources on their lands.

B. The American Convention on Human Rights

The Organizations of American States has the goal “to achieve an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence” for its member states.²⁹ Ecuador ratified the Charter of the Organization of American States in 1950 and ratified the American Convention on Human Rights in 1969.³⁰ In 1984, Ecuador also recognized the competence of the Inter-American Court of Human Rights (IACtHR) to interpret the Convention and recognized its jurisdiction as binding.³¹ Ecuador also reserved the right to withdraw its recognition, but has not done so.³²

Article 21 of the American Convention on Human Rights reads:

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.

²⁷ ILO Convention No. 169, *supra* note 9, at art. 15 § 2.

²⁸ *Id.*

²⁹ Charter of the Organization of American States art. 1, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3; *as amended by* The Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607, 721 U.N.T.S. 324; *amended by* Protocol of Cartagena de Indias, Dec. 5, 1985, 25 I.L.M. 527; *amended by* Protocol of Washington, Dec. 14, 1992, 33 I.L.M. 1005; *amended by* Protocol of Managua, June 10, 1993, 33 I.L.M. 1009 [hereinafter OAS Charter], http://www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States.htm.

³⁰ Organization of American States, American Convention on Human Rights, "Pact of San Jose", Costa Rica, Nov. 22, 1969, http://www.oas.org/dil/treaties_B-

[32_American_Convention_on_Human_Rights_sign.htm](http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm) (last visited Nov. 19, 2015).

³¹ *Id.*

³² *Id.*

2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.³³

The IACtHR has interpreted this article in several cases involving claims of indigenous peoples against states subject to its jurisdiction. The phrase “use and enjoyment” has come to have a particular meaning in this context given what has been recognized as the “spiritual relationship that indigenous peoples have with their ancestral lands.”³⁴ Because any conception of use and enjoyment of land rights must necessarily include a spiritual aspect,³⁵ the Court has taken this into account in its decisions.³⁶

But neither the Convention³⁷ nor the jurisprudence of the IACtHR requires that rights to resources on indigenous lands be completely protected from any and all infringement.³⁸ Previously, the Inter-American Commission on Human Rights had determined that consent of the community was required.³⁹ The IACtHR, however, has retreated from that requirement, finding that consent is only necessary when considering “large-scale development or investment projects that would have a major impact” on indigenous lands.⁴⁰ Most recently, the Court reiterated this standard in *Kichwa Indigenous People of Sarayaku v. Ecuador*, emphasizing that “consultations must be undertaken in good faith, using culturally-appropriate procedures and must be aimed at reaching an agreement.”⁴¹ In this case, the Court appears to have established a default

³³ Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter Convention], http://www.oas.org/en/iachr/mandate/basic_documents.asp.

³⁴ Jo M. Pasqualucci, *International Indigenous Land Rights: A Critique of the Jurisprudence of the Inter-American Court of Human Rights in Light of the United Nations Declaration on the Rights of Indigenous Peoples*, 27 WIS. INT'L L.J. 51, 56 (2009).

³⁵ *Id.*

³⁶ See, e.g., Inter-Am. Ct. H.R. (ser. C) No. 172; Inter-Am. Ct. H.R. (ser. C) No. 79.

³⁷ Convention, *supra* note 33, at art. 21 § 2.

³⁸ Pasqualucci, *supra* note 34, at 80.

³⁹ *Maya Indigenous Cmty. v. Belize*, Case 12.053, Inter-Am. Ct. H.R., Report No. 40/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1 P 142 (2004) *available at* <http://www.cidh.oas.org/annualrep/2004eng/Belize.12053eng.htm>.

⁴⁰ Inter-Am. Ct. H.R. (ser. C) No. 172.

⁴¹ Inter-Am. Ct. H.R. (ser. C) No. 245, http://corteidh.or.cr/docs/casos/articulos/seriec_245_ing.pdf. (Rule T3.6, 18.2.2).

presumption for consultation, with consent being required only in limited circumstances.⁴²

The requirements for consultation, as articulated by the IACtHR, benefit indigenous groups in many ways, but there are also gaps left by these requirements that have no obvious solution within the court's jurisprudence. Because indigenous groups must be consulted when governments or companies undertake extraction or development projects on their lands, they are better able to offer guidance as to what would be most beneficial (or least harmful) to them. Also, because the consultations must be conducted under the requirements previously mentioned, there is an increased likelihood that the voice of the indigenous peoples concerned will be considered, theoretically staving off future problems.⁴³ Yet, because the requirement emphasizes only that consultation must be done with the goal of reaching an agreement, there is no assurance that the voice of the indigenous peoples concerned will actually be taken into account. In a situation where an indigenous group were consulted but were overridden, the group would likely have to resort to litigation to protect their interests; a process that can waste valuable time.⁴⁴

But, requiring the consent of an affected indigenous group as opposed to mere consultation is no panacea either. When indigenous groups are able to exercise their right to either consent to or decline a particular development project, they are exercising their powers of self-determination; a right that has been recognized by several international instruments.⁴⁵ Requirement of indigenous peoples' consent for all projects that affect their interests results in the functional equivalent of a veto power, where one indigenous group could hold an entire country hostage. If there were a particular development or extraction project that were desperately needed and could benefit a large portion of a country's population but implicated the interests of a certain, small indigenous group that

⁴² Carol Y. Verbeek, *Note: Free, Prior, Informed Consent: the Key to Self-Determination: An Analysis of The Kichwa People of Sarayaku v. Ecuador*, 37 AM. INDIAN L. REV. 263, 278 (2012-2013) (internal citations omitted).

⁴³ Pasqualucci, *supra* note 34, at note 207.

⁴⁴ See *infra* text accompanying note 46.

⁴⁵ See, e.g., United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.

declined to consent to the project, the needs of the larger group would essentially be disregarded and subjugated by the requirement of consent.

Also troubling in the consent-or-consultation context is that the IACtHR has not further clarified what is actually encompassed in the clause “large scale developments or investment projects that would have a major impact.” Governments could conceivably exploit the ambiguity in the ruling. A state government could dispute the scale of a particular project or its effect on the environment of an indigenous group, thereby relieving itself of the duty to obtain the indigenous group’s consent as the project progresses. While the state government would still be under the obligation to consult with this indigenous group, there would be no guarantee that the opinion of the indigenous group would be taken into consideration. Their recourse would then be to litigate the issue in courts; a process costly in time and resources. It is not uncommon for litigation in the IACtHR to last several years, with some cases lasting as long as a decade.⁴⁶ An indigenous group could very well see disastrous effects to their lands during this period of time. Yet, this does beg the question of how, without the right to free prior informed consent, indigenous peoples’ right to self-determination can be fully realized.⁴⁷

Under the American Convention on Human Rights, Ecuador is bound to adhere to the standards of recognizing indigenous claims to land and their collective systems as part of those claims as determined by the IACtHR. These standards are not entirely clear, however. Ambiguity in the process by which Ecuador may be able to infringe legally upon indigenous rights remains something that could be detrimental to indigenous groups.

⁴⁶ See, e.g., Verbeek, *supra* note 42.

⁴⁷ Verbeek, *supra* note 42, at 280-81.

C. United Nations Declaration of Rights of Indigenous Peoples

The Declaration of Rights of Indigenous Peoples was presented to the UN General Assembly and adopted on September 13, 2007.⁴⁸ In a press release regarding the United Nations Declaration of Rights of Indigenous Peoples (UNDRIP) the UN stated that Declarations generally “represent the dynamic development of international legal norms and reflect the commitment of states to move in certain directions, abiding by certain principles.”⁴⁹ Despite its formal nature, however, the Declaration does not carry the binding force of law. Yet, it is instructive that Ecuador voted in favor of the Declaration⁵⁰ because it demonstrates a willingness on the part of Ecuador to embrace at least a commitment to the ideals in the Declaration, if not an intention of being legally bound by it.

Of the many principles outlined in the UNDRIP, there are three that are the most relevant to the purposes of this article. First, the UNDRIP recognizes that indigenous peoples have a spiritual connection to the lands they inhabit,⁵¹ and that they have the right to protect,⁵² conserve,⁵³ and develop⁵⁴ those lands, and should enjoy the privilege of state cooperation in these endeavors.⁵⁵ As part of this right, indigenous peoples also enjoy the right to free, prior, and informed consent when a state undertakes an activity, either legislative, administrative, or environmental, that will affect their rights.⁵⁶ Article 32 specifically sets apart activities “in connection with the development, utilization or

⁴⁸ United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Annex, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

⁴⁹ United Nations Declaration on the Rights of Indigenous Peoples, <http://www.un.org/esa/socdev/unpfii/documents/FAQsindigenousdeclaration.pdf> (last visited Nov. 19, 2015).

⁵⁰ *Declaration on the Rights of Indigenous Peoples*, United Nations Permanent Forum on Indigenous Issues <http://undesadspd.org/indigenouspeoples/declarationontherightsofindigenouspeoples.aspx> (last visited Nov. 19, 2015) [hereinafter UNDRIP].

⁵¹ UNDRIP, Article 25.

⁵² *See id.* art. 12.

⁵³ *See id.* art. 12, 29 § 1.

⁵⁴ *See id.* art. 32 § 1.

⁵⁵ *See id.* art. 29 § 1.

⁵⁶ *See id.* art. 18, 19, 32.

exploitation of mineral, water or other resources” as areas of particular concern when requiring consent of indigenous peoples.⁵⁷ Moreover, Article 19 not only guarantees indigenous peoples the right to “free, prior, and informed consent” before the state undertakes the activity, but also explicitly requires states to “consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions.”⁵⁸

Second, states have specific obligations to indigenous peoples. States must provide “effective mechanisms for prevention of, and redress for” actions that deprive them of their rights.⁵⁹ States must also provide indigenous peoples with “a fair, independent, impartial, open and transparent process” when dealing with “the recogni[tion] and adjudicat[ion] [of] the rights of indigenous peoples pertaining to their lands, territories and resources” and must allow the indigenous peoples “to participate in this process.”⁶⁰ States are also required to undertake measures to accomplish the goals of the UNDRIP and must do so in “consultation and cooperation with indigenous peoples.”⁶¹

Third, when dealing with conflicts between states or other organizations or parties regarding the infringement of the rights of indigenous peoples, Article 40 of the UNDRIP states that “[i]ndigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts. . . .”⁶² The Article continues: “Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.”⁶³ In other words, states’ claims of unavoidable procedural delays would not be a sufficient defense against claims of infringement of indigenous peoples’ rights.

⁵⁷ *See id.* art. 32 § 2.

⁵⁸ *See id.* art. 19.

⁵⁹ *See id.* art. 8 § 2.

⁶⁰ *See id.* art. 27.

⁶¹ *See id.* art. 38.

⁶² *See id.* art. 40.

⁶³ *Id.*

The Declaration, however, has qualifications on the rights it delineates. First, even though indigenous groups have the right of self-determination,⁶⁴ the rights of indigenous peoples are not absolute and may only be exercised so long as they do not infringe upon the recognized human rights of someone else.⁶⁵ The standards of the UNDRIP are, in some cases, higher than those guaranteed in other international instruments, making the rights of indigenous peoples even more powerful.⁶⁶ But, the UNDRIP does recognize that other peoples' rights should not suffer as a result of the special political situation of many indigenous peoples.⁶⁷

II. ECUADOR'S CONSTITUTION

An analysis of one of Ecuador's newest domestic laws would not be complete by merely analyzing it under the framework of international law. It is also necessary to examine the Ecuadorian Constitution as part of that framework. The rights and obligations of the various aspects of Ecuadorian society as enshrined in the Ecuadorian Constitution also affect the interpretation and implementation of the new water law.

A. Rights and Obligations of the State

Under the Constitution, the Ecuadorian state reserves several rights that impact the new water law. First, "water is the unalienable property of the State" and cannot be privatized.⁶⁸ Second, the state reserves the right to "administer, regulate, monitor and manage strategic sectors."⁶⁹ Strategic sectors are those that "due to their importance and size, exert a decisive economic, social, political or environmental impact and must be

⁶⁴ *See id.* art. 3.

⁶⁵ *See id.* art. 34 ("Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards").

⁶⁶ *See id.* art. 43 ("The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world").

⁶⁷ *See id.* art. 46.

⁶⁸ Constitution of Ecuador, art. 318.

⁶⁹ *See id.* art. 313.

aimed at ensuring the full exercise of rights and the general welfare of society.”⁷⁰ Water is one of the sectors that come under the exclusive control of the national government.⁷¹ Third, the state also reserves the right to delegate participation in the management of strategic sectors to “mixed-economy companies in which [the State] has a majority shareholding,” to private enterprise, and to “the grassroots solidarity sector of the economy.”⁷² Such exceptional cases are to be set forth by law.⁷³ While seemingly not extraordinary, the reservation of these rights will become important when considering how the government chooses to administer these rights, especially considering its obligations to indigenous peoples under international law and its own constitution..

Some of the obligations the constitution creates for the Ecuadorian state, on the other hand, truly are extraordinary. Ecuador’s constitution is among the first to recognize and guarantee the rights to nature.⁷⁴ In Article 71, the Constitution acknowledges “Nature, or Pacha Mama,⁷⁵ where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes.”⁷⁶ With regard to the state obligation, Article 71 states, “all persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature.”⁷⁷ Not only may the indigenous peoples of Ecuador claim this right, but also the entire populace may call upon the government to live up to its obligation to respect and protect nature. Article 71 also provides that the state shall create incentives for people and legal entities to “protect nature and to promote respect for all the elements comprising an ecosystem.”⁷⁸

⁷⁰ *Id.*

⁷¹ *See id.* art. 313, 318, 412.

⁷² *See id.* art. 316.

⁷³ *Id.*

⁷⁴ Andrew Diaz, *New Water Law in Ecuador: Big Business Versus Local Communities*, FOOD & WATER WATCH, (July 29, 2014), <http://www.foodandwaterwatch.org/blogs/new-water-law-in-ecuador-big-business-versus-local-communities/>.

⁷⁵ Kichwa word for Mother nature

⁷⁶ Constitution of Ecuador, art. 71.

⁷⁷ *Id.*

⁷⁸ *Id.*

Relatedly, Article 72 acknowledges the right of nature to be restored.⁷⁹ This right to restoration exists independently of the obligation of the state (and persons and legal entities) “to compensate individuals and communities that depend on affected natural systems.”⁸⁰ Thus, the Ecuadorian state must use its authority to protect its citizens and their environment.⁸¹

B. Rights and Obligations of Ecuador’s People and Communities

Ecuador’s Constitution also recognizes various rights and obligations of its citizens and communities. Among the recognized rights of the people of Ecuador is the right to live in a “healthy and ecologically balanced environment that guarantees sustainability and the good way of living (sumak kawsay). . . .”⁸² Article 14 also states that environmental concerns, such as the protection of ecosystems, are matters of public interest.⁸³ Additionally, the Constitution recognizes “[p]ersons, communities, peoples, and nations shall have the right to benefit from the environment and the natural wealth enabling them to enjoy the good way of living.”⁸⁴ Lastly, the Constitution recognizes “[t]he human right to water is essential and cannot be waived. Water constitutes a national strategic asset for use by the public and it is unalienable, not subject to a statute of limitations, immune from seizure and essential for life.”⁸⁵ Interestingly, the Constitution also notes that the state’s pursuit of promoting “environmentally clean technologies and nonpolluting and low-impact alternative sources of energy,” something the Constitution calls “energy sovereignty”, shall not affect the right to water.⁸⁶

⁷⁹ *See id.* at art. 72.

⁸⁰ *Id.*

⁸¹ *See id.* at art. 71, 72, 73, 85, 395, 396.

⁸² Constitution of Ecuador, art. 14

⁸³ *Id.*

⁸⁴ *See id.* at art. 74.

⁸⁵ *See id.* at art. 12.

⁸⁶ *See id.* at art. 15.

Similar to the obligations of the government, Ecuadorian citizens and communities have a duty to respect not only human rights, but also the rights of nature.⁸⁷ Citizens can call on the state to uphold the rights of nature and incentivize the protection of nature.⁸⁸ Implicit in this provision is the obligation of citizens, in combination with the state, to respect and protect nature.

Just as the state has an obligation to conduct itself according to the “good way of living”, people and communities also have an obligation to do so.⁸⁹ One way to accomplish this constitutional obligation is to participate in the planning process. Article 278 subsection 1 requires the aforementioned groups to “participate in all stages and spaces of public management and national and local development planning, and in the execution and control of the fulfillment of development plans at all levels.”⁹⁰ It is noteworthy that the privilege of participating in the planning process is conceptualized not as a right, but rather as a duty. This is different from the international human rights instruments that have been previously discussed.

C. Rights and Obligations of Legal Entities

While a detailed discussion of the rights and obligations of legal entities (corporations, non-profit organizations, and the like) is beyond the scope of this analysis, it is helpful to note that under the Ecuadorian Constitution, legal entities have similar rights and obligations as people and communities. Implicit in Article 71’s statement that the state shall incentivize the protection of nature is that legal entities also have the duty to protect nature.⁹¹ Article 73 says, “The State shall apply preventive and restrictive measures on activities that might lead to the extinction of species, the destruction of ecosystems and the permanent alteration of natural cycles.”⁹² This could easily apply to

⁸⁷ *See id.* at art. 71, 73, 275, 278.

⁸⁸ *See id.* at art. 100; *see supra* text accompanying notes 74-78.

⁸⁹ Constitution of Ecuador, art. 275, 278.

⁹⁰ *See id.* at art. 278.

⁹¹ *See supra* text accompanying notes 74-78.

⁹² Constitution of Ecuador, art. 73.

individuals, but it seems to apply primarily to large-scale endeavors, thus implying that legal entities (likely corporations in this context) also have a duty to protect nature.

It is interesting to note that legal entities are not included in the call for people, communities, and the state to adhere to principles of the good way of living. In its entirety, Article 275 reads:

The development structure is the organized, sustainable and dynamic group of economic, political, socio-cultural and environmental systems which underpin the achievement of the good way of living (sumak kawsay). The State shall plan the development of the country to assure the exercise of rights, the achievement of the objectives of the development structure and the principles enshrined in the Constitution. Planning shall aspire to social and territorial equity, promote cooperation, and be participatory, decentralized, deconcentrated and transparent. The good way of living shall require persons, communities, peoples and nationalities to effectively exercise their rights and fulfill their responsibilities within the framework of interculturalism, respect for their diversity, and harmonious coexistence with nature.⁹³

Given the implicit obligations that legal entities have in Articles 71 and 73, it cannot be inferred that legal entities have no environmental or social obligations whatsoever. It is worth considering why legal entities have been left out of the somewhat moralistic code of behavior in the Constitution.

D. Role of International Law in Domestic Context

It is also necessary to examine what role international law has within the context of the Ecuadorian Constitution in order to determine what kind of weight to give it. While Ecuador has ratified or signed the instruments discussed previously, Article 417 subjects all international treaties signed by Ecuador to the provisions set forth in the Constitution.⁹⁴ And although Article 424 does provide for the supremacy of the Constitution, it also provides that “the Constitution and international human rights

⁹³ See *id.* at art. 275.

⁹⁴ See *id.* at art. 417.

treaties ratified by the State that recognize rights that are more favorable than those enshrined in the Constitution shall prevail over any other legal regulatory system or action by public power.”⁹⁵ In other words, there is a special place for the standards of the international human rights instruments carved out in Ecuadorian law.

Article 425 details the order of precedence of the laws: “the Constitution; international treaties and conventions; organic laws; regular laws; regional regulations and district ordinances; decrees and regulations; ordinances; agreements and resolutions; and the other actions and decisions taken by public authorities.”⁹⁶ Similarly in Article 426, the Constitution provides that judges and other authorities shall apply the Constitutional standards first, but should international human rights standards as contained in the ratified instruments be “more favorable than that of the Constitution,” they are to apply the international standards first.⁹⁷ Thus, while the Ecuadorian Constitution may be the supreme law of the land, the rights guaranteed by international law instruments are to be given great weight.

III. LEY DE AGUAS: ECUDAOR’S WATER LAW

When Ecuador passed its most recent law regarding water and hydrological uses and management, it did so after significant work, accomplishing a landmark piece of legislation that codified access to water as a human right, nationalized water resources, and addressed the special rights of indigenous peoples with regard to water resources and access to them.⁹⁸ Despite admirable aspirations, there are sufficient ambiguities in certain sections that could lead to damaging outcomes for indigenous peoples in the future. This issue is particularly important given the Equadorian government’s obligations under international law regarding the treatment of indigenous groups. As this law is relatively new and available officially only in Spanish, a translation of the outline of the law will be provided first, with analysis of specific sections to follow.

⁹⁵ *See id.* at art. 424.

⁹⁶ *See id.* at art. 425.

⁹⁷ Constitution of Ecuador, art. 426.

⁹⁸ Ley de aguas (Ecuador), *available at* <http://www.agua.gob.ec/ley-de-aguas/> (last visited Feb. 21, 2015).

A. Outline of Water Law

Organic Law of Hydrological Resources, Uses, and Exploitation of Water⁹⁹

Preamble

- I. Title I – Preliminary “Dispositions”
 - a. Chapter 1 – About the Principles (Articles 1-9)
- II. Title II – Water resources
 - a. Chapter 1 – Definition, Infrastructure, Classification of Water Resources (Articles 10-14)
 - b. Chapter 2 – Institutionality and Management of water resources
 - i. National Strategic System and Singular Water Authority
 - ii. Water Planning
 - iii. Management and Administration of Water Resources
 - iv. Public Services
 - v. Water and Autonomous Decentralized Governments
 - vi. Community Management of water
- III. Title III – Guarantees and Obligations
 - a. Chapter 1 – Human Right to Water
 - b. Chapter 2 – Right to Equality and no discrimination
 - c. Chapter 3 – Rights of Nature
 - d. Chapter 4 – Rights of Users, Consumers, and citizenry participation
 - e. Chapter 5 – Collective Rights of communes, communities, peoples, and nationalities
 - f. Chapter 6 – Preventive Guarantees
 - i. Ecological Flow and Areas of Water Protection
 - ii. Objectives for Prevention and Control of Water Pollution
 - g. Chapter 7 – Obligations of the State for the Human Right to Water
 - i. Of Obligations and Progressivity
 - ii. On Uses of Water

⁹⁹ *Ley Organica de Recursos Hidricos, Usos, y Aprovechamiento Del Agua* [Organic Law of Hydrological Resources, Uses, and Exploitation of Water], Segundo Suplemento, Registro Oficial N°305, 6 de Augusto de 2014 (Ecuador), available at <http://www.agua.gob.ec/wp-content/uploads/2012/10/LEYD-E-RECURSOS-HIDRICOS-II-SUPLEMENTO-RO-305-6-08-204.pdf> (last visited Nov. 19, 2015). (All translations of this law are the author's).

- iii. Conditions of Authorization for Use
 - h. Chapter 8 – Servitudes
 - IV. Title VI – Water Use
 - a. Chapter 1 – On the type of productive use
 - i. Bottled Water
 - ii. Energy and Industrial Use of Water
 - iii. Agriculture
 - iv. Use of Water in Mining
 - v. Use of Water in Hydrocarbon-Related Activities
 - vi. Tourist and Thermal Use
 - b. Chapter 2 – Handling and Use of Subterranean Water and Aquifers
 - c. Chapter 3 – Procedural Norms for the Use of Water and Resolution of Conflicts
 - i. Administrative Procedure for Regulating the Handling or Use of Water
 - ii. Resolution of Conflicts
 - d. Chapter 4 – Economic Regimen
 - i. Tariffs
 - ii. Tariffs for Use
 - iii. Tariffs for Productive Use
 - V. Title V – Infractions, Sanctions, and Responsibilities
 - a. Chapter 1 – Infractions
 - b. Chapter 2 – Sanctions
- General Orders
Transitory Orders
Derogatory Orders
Final Orders

B. General Principles and Ambiguities

Ecuador has not only nationalized the resource of water under its new law, but has also taken the progressive step of codifying it as a human right. Article 3 states:

“The object of this present Law is to guarantee the human right to water as well as regulate and control the authorization, management, preservation, conservations, and restoration of hydrological resources, the handling and use of water, the integral management and its recuperation, in its distinct phases, forms, and physical states, with the purpose of guaranteeing the

sumak kawsay or good way of living and the rights of nature established in the Constitution.¹⁰⁰

Similarly, Article 4 sets out the basic principles on which the new law is founded:

Principles of the Law: This Law is founded on the following principles:

- a) The integration of all the waters, be they surface, subterranean or atmospheric, or in the hydrological cycle;
- b) Water, as a natural resource, must be conserved and protected by way of sustainable and viable management that guarantees its permanence and quality;

Water, as an asset of the public domain, is inalienable, imprescriptible, nor subject to embargo;

- c) Water is part of the national patrimony and strategic sector to the service of the necessities of the citizen and an essential element for food sovereignty; consequently, any type of private property regarding water is prohibited;

- d) The access to water is a *human right*;

- e) The State guarantees equitable access to water;

- f) The State guarantees the integral, integrated, and participatory management of water; and,

- g) Management of water is public or communitarian.¹⁰¹

The law further defines what exactly constitutes private property and initiatives in Article 6:

All forms of privatization of water are prohibited, by virtue of its transcendence for life, the economy, and the environment; as such it cannot be the subject of any agreement with commerce, government, multilateral entity or private national or foreign business.

Its management shall be exclusively public or communitarian. No form of appropriation or individual or collective possession regarding water shall be recognized, whatever state it is in.

Consequently, the following are prohibited:

- a) Any delegation of management of water to the private sector or to any of the competencies assigned constitutionally or legally to the State by means of the Singular Water Authority or to the Autonomous Decentralized Governments

¹⁰⁰ *Id.* at art. 3 (Ecuador).

¹⁰¹ *Id.* at art. 4 (Ecuador) (emphasis added).

- b) Indirect management, delegation, or externalization of the providing of public services related to the integral cycle of water by the private sector;
- c) Any commercial agreement that imposes a profit-based economic regimen for the management of water
- d) All forms of mercantilization of environmental services regarding water for profit
- e) Any form of covenant or cooperative agreement that includes clauses that undermine the conservation, the viable handling of water, biodiversity, food sovereignty, human rights and the rights of nature; and,
- f) The awarding of perpetual authorizations or of indefinite time frames for the use or exploitation of water.¹⁰²

In other words, there are very strict provisions that delineate private enterprise or control of water. Despite the explicit nature of Article 6, the text of Article 7 is vastly different. Article 7 specifies when it might be appropriate for private enterprise to engage in the management of water resources:

Activities in the strategic sector of water. The providing of the public service of water is exclusively public or communitarian. Exceptionally, private initiative and the popular and solidarity economy may participate in the following cases:

- a) Declaration of emergency adopted by the competent authority, pursuant to the legal system
- b) Development of subprocesses by the public service administration when the competent authority does not have the technical or financial conditions to do it. The maximum time frame will be ten years, subject to review.¹⁰³

The duties of the various bodies are then laid out in subsequent articles. Although the entirety of the competencies of the Singular Water Authority (SWA) contained in Article 18 will not be reproduced here, among the most salient are the following:

¹⁰² *Id.* at art. 6 (Ecuador).

¹⁰³ *Id.* at art. 7 (Ecuador).

Competencies and attributions of the Singular Water Authority. The competencies are:

- a) Direct the National Strategic System for Water;
- b) Exercise the stewardship and execute the public policies relative to the integral and integrated management of water resources; and follow its fulfillment;
- c) Coordinate the formulation of policies on water quality and control of the pollution of the waters with the national environmental authority and the national sanitation authority;
- d) Elaborate the National Plan for Water Resources and the plans for the integral and integrated management for water resources by drainage basin; and approve national water planning;

[. . .]

- l) Establish mechanisms of coordination and complementarity with the Autonomous Decentralized Governments regarding the providing of public services of irrigation and drainage, potable water, sewage, sanitation, purification of residual waters and others established by law;

[. . .]¹⁰⁴

Most of what is contained in Article 18, including the portions not cited here, seem fairly ordinary, yet the duties become more interesting when considered in conjunction with the attributions to the Intercultural and Plurinational Water Counsel (IPWC), the body that is charged with addressing the concerns of the indigenous groups of Ecuador. Article 20 reads:

The Intercultural and Plurinational Water Counsel. The attributions of the Intercultural and Plurinational Water Counsel for Water are:

1. Social control regarding the guarantee and the exercising of the human right to water and its equitable distribution;
2. Participate in the formulations, evaluation, and control of the public policies for water resources;
3. Participate in the formulation of the guidelines and follow up on the National Plan for Water Resources;
4. Generate public debates on themes relative to the integrated and integral management of water resources;

¹⁰⁴ Ley de aguas, art.18 (Ecuador), *available at* <http://www.agua.gob.ec/ley-de-aguas/> (last visited Nov. 19, 2015).

5. Participate in the promotion regarding the diffusion of ancestral knowledge on the natural properties of water;
6. Render accounts to the citizenship regarding its management;
7. Contribute and propitiate the resolution of controversies and conflicts that arise between users of water; and
8. Others determined by law¹⁰⁵

What is noteworthy about the attributions of the IPWC is that they do not have any power to affect any of the decisions of the SWA. Subsection 2 permits participation in the formation of policies¹⁰⁶ and a similar limited-scope participation exists in subsection 3.¹⁰⁷ Thus, the IPWC appears to be little more than ceremonially important in that it has no real ability to affect official determinations. It could be said that this is in accordance with the law, since consent of indigenous groups is not required when dealing with concessions that affect their lands and territories; only consultation with indigenous groups is required. But given the expanding role that indigenous rights are playing in dealings among indigenous groups, governments, and private enterprises, it is interesting to note the distinct lack of authority here.

Subsection 6 also requires that the IPWC be accountable to the public.¹⁰⁸ Nowhere in the duties of the SWA or in any of the duties of the other governing bodies created by Article 15 is a similar requirement found. This measure might be deemed appropriate, given the quasi-regulatory nature of this body. Yet, considering the requirement of transparency in government in Article 100 of the Constitution,¹⁰⁹ the need for this particular requirement of the IPWC seems unnecessary.

¹⁰⁵ *Id.* at art. 19 (Ecuador).

¹⁰⁶ *Id.* at art. 19 (2) (Ecuador).

¹⁰⁷ *Id.* at art. 19 (3) (Ecuador).

¹⁰⁸ *Id.* at art. 19 (6) (Ecuador).

¹⁰⁹ *Id.* at art. 100 (Ecuador).

Thus, the duties and obligations of the governing bodies as currently constituted in the new Water Law may not be in harmony with the principles of international law. Under ILO Convention 169, indigenous peoples should be able to exercise control over their own development.¹¹⁰ But, the structure of the water-governing bodies in the new law seems to inadequately protect indigenous peoples' rights related to environmental development. Similarly, the relative lack of authority of the IPWC calls into question its ability to be effective in the consultation-or-consent context under the rules articulated by the IACtHR¹¹¹ and under the standards for conflict resolution under the UNDRIP.¹¹²

C. Collective Rights

The Water Law specifically recognizes the rights of collectives. Article 48 reads: "Recognition of collective and traditional forms of management. Traditional and collective forms of management of water, specific to communes, communities, peoples, and nationalities are recognized and their collective rights will be respected in the terms set forth in the Constitution and the law."¹¹³ The phrase "communes, communities, peoples, and nationalities" becomes a term of art within the law, and refers to the different types of indigenous groups in Ecuadorian society.

More specifically, Article 71 details what some of those rights are, including a specific reference not only to the indigenous communities but also to the communities of descendants of Africa:

Collective rights to water. Communes, communities, peoples and indigenous nationalities, Afro-Ecuadorian people and from their own world view, enjoy the following collective rights to water:

¹¹⁰ See *supra* notes 19–23 and accompanying text.

¹¹¹ See *supra* notes 39–42 and accompanying text.

¹¹² See *supra* notes 62–63 and accompanying text.

¹¹³ Ley de aguas, art. 48 (Ecuador), available at <http://www.agua.gob.ec/ley-de-aguas/> (last visited Nov. 19, 2015).

- a) Conserve and protect the water that flows through their lands and territories in which they inhabit and carry out their collective lives;
- b) Participate in the use, usufructuary and communitarian management of water that flows through their lands and territories and which is necessary for the carrying out of their collective lives;
- c) Conserve and protect their handling and management of water in direct relation with the right to health and food;
- d) Maintain and strengthen their spiritual relation with water;
- e) Safeguard and disseminate their collective knowledge, sciences, technologies, ancestral wisdom on water;
- f) To be consulted with in a manner that is prior, free, informed and in a reasonable time frame, regarding all normative decisions or relevant state authorizations that might affect the management of water that runs through their lands and territories;
- g) Participate in the formulation of environmental impact studies on activities that affect the uses and ancestral forms of management of water in their lands and territories;
- h) Have access to true and complete hydrological information in a reasonable time frame;
- i) Participation in the social control of all public or private activities susceptible of generating an impact or affecting uses and ancestral forms of management of water in their properties and territories.

Communes, Communities, peoples, and nationalities shall exercise these rights through their representatives in terms contained in the Constitution and this law.¹¹⁴

Likewise, Article 74 recognizes traditional forms of conservation: “Conservation of water management practices. The application of traditional forms of management and handling of hydrological cycles, practiced by communes, communities, peoples, and indigenous, Afro-Ecuadorian, and Montubian nationalities is guaranteed and their particular forms, uses and customs for internal sharing and distribution of authorized quantities are respected.”¹¹⁵

¹¹⁴ *Id.* at art. 71 (Ecuador).

¹¹⁵ *Id.* at art. 74 (Ecuador).

Given the recognition of collective rights in various sections of the law, what is most interesting is the tempering of authority of these indigenous groups to participate in upholding those rights when considered in context with other sections of the law. For example, Article 72 reads:

“Participation in the conservation of water. Communes, communities, peoples and nationalities have the right that the State, through its institutions, shall articulate policies and programs for the conservation, protection, and preservation of water that flows through their lands and territories.

The exercising of this right shall not prevail nor suppose any lessening of the attributions regarding water that correspond to the State.”¹¹⁶

As noted previously, the second sentence of Article 72 seems a reasonable provision in that most states would be cautious about allowing the rights of one subgroup of its citizens to be able to trump the rights of the state. Similarly, Article 68 provides a mechanism for user organizations to participate with the Singular Water Authority:

Consultation and obligations of users. The Singular Water Authority, through the drainage basin counsels, shall consult with user organizations in a manner that is prior, free, informed, obligatory and within a reasonable time frame, in all relevant matters related to the integrated management of water resources that could affect them in conformity with this law and its regulation.

Notwithstanding the obligations of the State, users of water shall contribute economically, proportionally to the quantity of water they utilize for the preservation, conservation, and sustainable management of water resources in the drainage basin and shall be a party in the management of the same. In the case of communitarian users that are also consumers of water, they shall contribute economically or by way of communitarian works.¹¹⁷

Article 68 also appears quite reasonable in that it includes user organizations in the list of groups with whom the SWA must consult (along with indigenous groups).

¹¹⁶ *Id.* at art. 72 (Ecuador).

¹¹⁷ *Id.* at art. 68 (Ecuador).

Yet, the following examples, taken from other sections of the Water Law, show how the ability for indigenous groups to exercise their rights is undermined, often by a specific grant of authority to the SWA. For instance, in Article 53, the SWA has the ability to trump the application of a customary right against a third party:

Customary practice in relation and third parties. Before the Singular Water Authority, exceptionally, a customary practice may be invoked and applied against third parties that are not part of the commune, community, people, or nationality, notwithstanding the fact that the Singular Water Authority recognizes the relevance of the application and the third party involved expresses his consent.¹¹⁸

An interesting thing to note about this provision is that the IPWC is not involved as part of the decision-making process here. In another Article, differences between indigenous groups or other recognized collectives that cannot be resolved on their own must adhere to the decisions of the SWA:

Resolution of differences. Customary orders of communes, communities, peoples, and nationalities in relation to the use, access, usufruct, and distribution of the water that flows through their lands, constitute internal administration practices for the exercise of their collective rights in relation to hydrological cycles.

Differences that might arise between communes, communities, peoples or nationalities and persons not belonging to these, within their territorial area, with respect to the forms of access, use, usufruct, distribution, management or handling of water within the same drainage basin and that cannot be resolved by way of an agreement between those involved shall be made known to and resolved, by petition of the party, by the Singular Water Authority.¹¹⁹

Again, in a situation that is distinctly oriented toward the indigenous groups of Ecuador, no participation of the IPWC is required. Lastly, in Article 79, the objectives for the preservation and conservation of water are set forth, and no mention of the IPWC is made:

¹¹⁸ *Id.* at art. 53 (Ecuador).

¹¹⁹ *Id.* at art. 75 (Ecuador).

Objectives for the prevention and conservation of water. The Singular Water Authority, the National Environmental Authority and the Autonomous Decentralized Governments shall work in coordination with each other to fulfill the following objectives:

- a) Guarantee the human right to water for the good way of life or *sumak kawsay*, the rights recognized to nature and the preservation of all forms of life, in a sound and ecologically balanced environment free of pollution;
- b) Preserve the quantity of water and improve its quality;
- c) Control and prevent the accumulation of toxic substances, wastes, spills and other elements capable of contaminating surface or subterranean waters on the ground or underground;
- d) Control the activities that can cause the degradation of water and aquatic ecosystems and terrestrial ecosystems related to water and when these are degraded, prepare their restoration;
- e) Prohibit, prevent, control, and sanction the contamination of waters by way of spills or disposal of solid, liquid, and gaseous wastes; organic and inorganic deposits or whatever other toxic substance that could alter the quality of water or affect human health, fauna, flora or equilibrium of life;
- f) Guarantee the integral conservation and care of the demarcated sources of water and the equilibrium of the hydrological cycles; and,
- g) Avoid the degradation of the ecosystems related to hydrological cycles.¹²⁰

Even invoking the Kichwa-language concept of “*sumak kawsay*” (good life) is apparently not sufficient to trigger the involvement of the IPWC.

Especially noteworthy is the omission of the IPWC in the required inventory of sacred places. Article 92 reads:

Cultural and sacred practices. The Singular Water Authority shall guarantee the integrity and permanency of the places in which communes, communities, peoples and nationalities practice rites, cultural and sacred values of water.

The Singular Water Authority in conjunction with communes, communities, peoples, and nationalities shall carry out and maintain duly

¹²⁰ *Id.* at art. 79 (Ecuador).

current a National Inventory participatory and integral of the sacred and ritual places of water.

The administration and conservation of the sacred places in relation to water shall be carried out by the entities and organizations of peoples and nationalities in whose lands or territories they are found, with the support of programs and national projects of the public organisms and the Autonomous Decentralized Governments, in conformity with the Constitution and their own rights.¹²¹

Despite the distinct character of an inventory of places sacred to those very indigenous groups, the body that is specifically endowed with cultural knowledge is not included as part of the inventory-making process. Consequently, the true role of the IPWC is dubious. They may play a role according to some portions of the statute, but because of exclusion in other portions of the statute, its power is somewhat limited.

While the Water Law recognizes different types of collective rights, the structure of the law appears to functionally undermine the strength of those rights. Under ILO Convention 169, indigenous peoples must be allowed to participate freely in the consultation process, but there are provisions in the new law that subjugate their role in decision making.¹²² The rulings of the IACtHR¹²³ and the principles of the UNDRIP¹²⁴ also call for indigenous peoples to have a substantial role in decision-making processes, something the new law seems to weaken to a standard that is less than “substantial.”

IV. POSSIBLE ALTERNATIVES

To remedy the ambiguities in Article 7, the legislature could develop more definite criteria, than just when the technical or financial resources are lacking, for when private business would be allowed to enter into the management of water

¹²¹ *Id.* at art. 92 (Ecuador).

¹²² *See supra* notes 12–16 and accompanying text.

¹²³ *See supra* notes 34–44 and accompanying text.

¹²⁴ *See supra* notes 56–58 and accompanying text.

resources. An additional provision that might help would be to imbue any entity from the private sector with all of the responsibilities and obligations that the government has toward the indigenous peoples. It is true that a provision of this type might hinder the profitability of certain business endeavors. But, if the government were to work with the private entities to support such endeavors (as the private entities would be helping the government fulfill one of their obligations), this could be an acceptable compromise that might help private entities be willing to help in these situations of need.

Also, if the legislature were to include some of the principles contained in the World Bank's Operational Directive 4.20: Indigenous Peoples,¹²⁵ this might help to mitigate some of the concerns regarding the potential harm that could occur in indigenous territories should private enterprise be allowed to engage in water management. As one author has suggested, the principal objective of this directive is to "ensure that indigenous peoples do not suffer adverse effects during the development process, particularly from Bank-financed projects, and that they receive culturally compatible social and economic benefits."¹²⁶ If Ecuador were to include a requirement that the profits, obtained by the enterprise that has been authorized to engage in water resource management, be shared with the indigenous peoples involved in or affected by their projects, this could also mitigate the concerns of those indigenous groups. Granted, consultations would likely be necessary with these groups to determine what kind of benefits are "culturally compatible" with their ways of life, but this could also be an area in which the IPWC could help.

Lastly, to address the problems with the governing bodies, the legislature could expand the duties of the IPWC to include the consultations with indigenous groups. The legislature could also broaden the role of the IPWC as it pertains to its

¹²⁵ World Bank, *Indigenous Peoples, Operational Directive 4.20* (September 17, 1991).

¹²⁶ Peter Manus, *Sovereignty, Self-Determination, and Environment-Based Cultures: The Emerging Voice of Indigenous Peoples in International Law*, 23 WIS. INT'L L.J. 553, 597.

function as a consulting body to the SWA. This way, indigenous groups might have a better ability to assist in regulatory determinations.

V. CONCLUSION

Ecuador's new Water Law is a monumental effort to protect the national interest of water resources. Yet, the law has some troubling defects. These defects are not insurmountable, however. If the legislature were to modify the new law to include broader protections for indigenous peoples and a greater role for the IPWC, the government of Ecuador could be safeguarded against undesirable potential consequences, such as litigation in the IACtHR, potential sanctions from ILO enforcement agencies, and admonishment from UN bodies regarding the UNDRIP. These protections would also likely help to alleviate some of the concerns regarding the participation of private enterprise in the management of water resources and the relative lack of indigenous participation in decision-making processes that the indigenous groups in Ecuador have previously expressed.

